IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 211/14

In the matter between:

MIGHTY SOLUTIONS CC t/a ORLANDO SERVICE STATION Applicant

and

ENGEN PETROLEUM LTD First respondent

CONTROLLER OF PETROLEUM PRODUCTS Second respondent

APPLICANT'S HEADS OF ARGUMENT

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INTRODUCTION

[1] In these heads of argument, we intend to focus our submissions on two issues:

a. First, that the first respondent lacks *locus standi* and does not have the right to evict the applicant.

b. Secondly, that the applicant has an enrichment lien over the retail business and the premises.

[2] We respectfully submit that the Court *a quo* erred in finding that the first respondent has *locus standi*. Although a superficial inquiry of our case law would seem to support such a finding, a deeper analysis applied to the facts *in casu* shows that the first respondent indeed lacks *locus standi*.

[3] Regarding the second issue, we respectfully submit that based on the facts of this matter the applicant has an enrichment lien – a real right – over the premises.

BACKGROUND

General

[4] The applicant is a small business, fully owned by Mr Mighty Mwale, a historically disadvantaged South African citizen.

[5] The applicant conducts business as a petroleum products retailer at the corner Highway and Mooki Streets, Orlando East, Soweto (the 'premises').[1]

[6] In 2005, the applicant purchased the petroleum products retail business at the premises as a going concern with goodwill for a purchase price of R1,5 million.[2]

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1 Founding affidavit *a quo* [6] p7 (The page numbers in these footnotes are in terms of the current index filed by the applicant).

2 Affidavit of JM Kotze [3.4] pp86–87. The first respondent states that Mr Zeenat sold the 'service station business to the [applicant] for R150 000' – founding affidavit *a quo* [25] p14.

[7] At that stage, the applicant and the first respondent – a petroleum products wholesaler[3] – entered into a contract ('the contract') that commenced on 1 September 2005[4] and that entailed the following main components:

a. *Sub-lease* of the premises by the first respondent (sub-lessor) to the applicant (sub-lessee)

b. *Licensing* of the use of the first respondent's brand to the applicant

c. *Loan* by the first respondent of its equipment on the premises to the applicant

[8] The applicant holds a petroleum products retail license in respect of the premises,[5] and is accordingly the only person currently entitled to trade in petroleum products from the premises.

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3 Founding affidavit *a quo* [5] p7.

4 Schedule 1 of the contract, p82.

5 Retail licence certificate, p110.

Dispute between the parties

[9] The first respondent sued for *inter alia* the eviction of the applicant from the premises.[6] The first respondent sued for such eviction of the applicant on the grounds that the contract (which included a sub-lease agreement) between the applicant and the first respondent had been cancelled and/or had come to an end.[7]

[10] However, on the first respondent's own version it had leased the premises from the owner of the premises,[8] and its tenure in terms of this head-lease (between the owner and the first respondent) came to an end in 2011.[9]

[11] This is also reflected in the contract, which explicitly states that the head-lease terminates in August 2011.[10]

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6 Notice of motion *a quo* [1] p1.

7 Founding affidavit *a quo* [10] p9.

8 *Ibid* [25] p14.

9 Affidavit of Thulani Edwin Mcicwa [23] p85: 'Applicant [first respondent on appeal] is the lessee of the premises and its tenure shall end in 2011'.

10 Schedule 1 of the contract, p83.

[12] The owner of the premises is the estate of the late Mr Ndlovu.[11]

[13] Despite demand, in terms of a notice in terms of rule 35(12),[12] the first respondent failed and refused to provide a copy of an alleged head-lease agreement.[13]

[14] At the time of the eviction application:

a. The first respondent did not have any lease rights from the owner of the land;[14] and

b. the first respondent did not have any antecedent rights to be holding or dispensing occupational rights to anyone, including the applicant.[15]

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11 Answering affidavit *a quo* [8] p42; Schedule 1 of the contract, p83.

12 Notice in terms of rule 35(12), pp114–117.

13 Affidavit of JM Kotze [3.4.2] p87.

14 Answering affidavit *a quo* [11.4.1] pp46–47.

15 *Ibid* [8.2] p43.

[15] The applicant tendered return of any equipment that belongs to the first respondent; the applicant also tendered return of any trademarks and signage belonging to the first respondent.[16]

[16] The applicant is duly licensed by the Republic of South Africa represented by the Controller of Petroleum Products in terms of and in accordance with the Petroleum Products Act, 120 of 1977:[17]

a. As the only person – to the exclusion entirely of any other person in the Republic – who may conduct retail activity in the sale of petroleum products at the premises.

b. There are certain rights that vest in the applicant in accordance with said retail license. The said retail licence is extant, has not been and will not be surrendered by the applicant, and has not been cancelled by the Controller of Petroleum Products.

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16 Answering affidavit *a quo* [10] pp44–45, [14] p48.

17 *Ibid* [6] pp41–42.

c. The applicant does not need the first respondent's consent or approval in order to conduct retail activity in the sale of petroleum products from the premises. This will transpire without the signage or trademarks of the first respondent.

Goodwill generated by the applicant

[17] Goodwill is a valuable asset and *qua* intellectual property falls within the ambit of section 25(1) of the Constitution.[18] While goodwill can attach to a trademark,[19] goodwill can also – independent of any trademark – attach to a particular business at a particular location.[20]

[18] The applicant invested in his petroleum products retail business both financial and human capital to generate the goodwill of the business.[21] It should be noted, with respect, that the human capital that goes into running

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18 *Phumelela Gaming and Leisure Limited v Gründlingh and Others* (CCT31/05) [2006] ZACC 6; 2006 (8) BCLR 883 (CC) [35]–[38].

19 See for instance: *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC).

20 See: Andries van der Merwe. (2013) Infringement of the right to goodwill; the basic legal principles in relation to South African case law. *De Jure* 1039–1055.

21 Affidavit of JM Kotze [13.6] p97.

and building a petroleum products retail business is irreplaceable,[22] and that the risks involved in retailing petroleum are high, and rest on the shoulders of the retailer.[23]

[19] The standard formula for valuing the goodwill of the business of a petroleum products retailer is 36 times the average monthly gross profit for the last year of trade.[24] The applicant valued the goodwill of his business at the premises at R2 million, being the amount the retailers in the application under CCT 134/13 believe that such business would fetch on the open market and what they might pay for such a business.[25]

Conclusion

[20] It is against the above background that we now proceed to make submissions regarding the two core issues of the case.

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22 Affidavit of JM Kotze [9] p95.

23 *Ibid* [8] p95.

24 *Ibid* [26] p109.

25 *Ibid* [3.14.4] p90.

ISSUE 1: *LOCUS STANDI*

[21] At first glance, it would seem as if the authorities support the conclusion reached by the Court *a quo*, namely that the applicant (*qua* sub-lessee) has no right in law to question the right of the first respondent (*qua* sub-lessor) to occupy a property. The position is stated by the Appeals Court in *Boompret Investments* as follows:[26]

> It is also clear that when sued for ejectment at the termination of the lease it does not avail the lessee to show that the lessor has no right to occupy the property.

[22] However, it is important to investigate the *ratio* for this general contractual principle. In this regard, the Appeals Court stated as follows in the *Hillock* case:[27]

> It seems to me that the rule [that the lessee cannot dispute the lessor's title] may be based upon one or other of two very simple grounds. The first is, that the lessor having performed his part of the contract, and having placed the lessee in

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[26] *Boompret Investments (Pty) Ltd & Another v Paardekraal Concession Store (Pty) Ltd* 1990 (1) SA 347 (A) 351.

[27] *Hillock & Another v Hilsage Investments (Pty) Ltd* 1975 (1) SA 508 (A) at 516E.

> undisturbed possession of the property is entitled to claim that the lessee should also perform his part of the contract and should pay him the rent which he agreed to pay for the use and enjoyment of the premises. The second ground is, that the lessee having had the undisturbed enjoyment of the premises under the lease, and having thus had all for which he contracted, it would be against good faith for him to set up the case that the lessor had no right to let him the property.

[23] *In casu*, this rationale for the general contractual principle is simply not applicable, as the parties ***explicitly agreed*** in their written agreement that the first respondent's head lease with the owner of the Premises – and hence the first respondent's possessory rights regarding the Premises – would expire in August 2011.

[24] Furthermore, no new head lease has been entered into by the first respondent and the owner of the Premises.

[25] Accordingly, with reference to the *Hillock* ratio, it is not *contra* good faith for the applicant to challenge the first respondent's possessory rights after August 2011, as the parties from the outset explicitly agreed that the first respondent's possessory rights regarding the Premises would expire in August 2011.

[26] Given the particular facts *in casu*, the *ratio* for application of the general contractual principle falls away, and accordingly it cannot find application.

[27] We submit that the Court should engage with the actual facts of this matter – in particular that the parties from the outset explicitly agreed that the first respondent's possessory rights regarding the Premises would expire in August 2011.

[28] Accordingly, the first respondent has no *locus standi* or right to evict the applicant.

ISSUE 2: THE APPLICANT'S ENRICHMENT LIEN

[29] As mentioned in the Introduction *supra*, we submit that the applicant has a real right in the premises in the form of an enrichment lien. In the following, we first analyse the relevant legislative framework for the petroleum industry. We then move our focus to the contract and submit that a specific clause that excludes the applicant from claiming compensation for loss of his business due to cancellation of the contract is contrary to the legislation and hence invalid. This opens the door to the third stage of our analysis, which deals with unjust enrichment.

Petroleum Products Amendment Act

[30] The Petroleum Products Amendment Act, Act 58 of 2003 ('the Act'), which came into operation on 17 March 2006, states that it aims to, *inter alia*, promote the transformation of the South African petroleum and liquid fuels industry. The relevant provisions of the Act reads as follows:

> **2A** (1) A person may not—
>
> […]
>
> (b) wholesale prescribed petroleum products without an applicable wholesale licence;
>
> […]
>
> (d) retail prescribed petroleum products without an applicable retail licence,
>
> issued by the Controller of Petroleum Products.
>
> […]
>
> (4) Any person who has to apply for a licence in terms of subsection (1) must—
>
> […]

(c) in the case of retail or wholesale licences be the owner of the business concerned;[28]

[…]

(5) No person may make use of a business practice, method of trading, agreement, arrangement, scheme or understanding which is aimed at or would result in—

(a) a licensed wholesaler holding a retail licence except for training purposes as prescribed, but excludes wholesalers and retailers of liquefied petroleum gas and paraffin.

[…]

2B (2) In considering the issuing of any licences in terms of this Act, the Controller of Petroleum Products shall give effect to the provisions of section 2C and the following objectives:

[…]

(c) the creation of employment opportunities and the development of small businesses in the petroleum sector;

[…]

2C (1) In considering licence applications in terms of this Act, the Controller of Petroleum Products shall—

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[28] It is relevant to note that section 2A(4)(c) was amended by the Petroleum Products Amendment Act, Act 2 of 2005, which deleted the word 'entity' after 'business', making it clear that the petroleum products retail business need not be moulded in the form of a legal entity.

(a) promote the advancement of historically disadvantaged South Africans; and

(b) give effect to the Charter.

[31] The Act draws a sharp line between wholesalers and retailers of petroleum products. It is further clear in its intention to exclude wholesalers from acting in the retail space.[29]

[32] We submit that the legislature's intention to create a 'wall of separation' between wholesalers and retailers of petroleum products is determinative of this (and similar) cases. However, the way in which the Act is determinative is *not* located in a purported change to the common law, but in that contracts between wholesalers (that effectively act as franchisors[30]) and retailers must conform to the letter and spirit of the Act – and that any contractual clause that is contrary to the Act must be declared unlawful and invalid.

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29 s2A(5)(a).

30 See: *Engen Petroleum Limited v Rasebotsa t/a Everon Filling Station* (24051/2014) [2015] ZAGPPHC 284 (6 May 2015) [26]. The Court describes the retailer as a 'franchisee' of the wholesaler.

The contract

An unlawful contractual provision is invalid

[33] Clause 41 of Schedule 2 of the contract reads as follows:

> 41.1 Where the Dealer's tenure is prematurely terminated by the Company in terms of this Agreement, for whatever reason, the Dealer shall not have the right to any compensation in respect of his loss of the Business. The Company shall have the right to appoint a new dealer, and the Dealer shall be entitled to negotiate with such new-dealer the terms or any take-over of stock and/or equipment belonging to the Dealer on the Premises; alternatively the Dealer shall have the right to remove such stock or equipment owned by itself. [Our emphasis.]
>
> 41.2 Should the Company advise the Dealer that it does not intend offering it a new lease in terms of sub-clause 2.2 of the First Part, the Dealer shall be entitled to attempt to sell the Business during the remaining period of the lease, and the Company shall not unreasonably withhold its consent to such sale. Should the Dealer not have sold the Business prior to the expiry of the lease, the provisions of sub-clause 41.1 of this Schedule 2 shall apply.

[34] The effect of this clause is that, if any of the conditions in the two sub-clauses are met (premature termination by the wholesaler, or inability of the

retailer to sell the business prior to the expiry of the lease) the retail business and all the goodwill in it that was generated by the retailer are transferred to the wholesaler *qua* sub-lessor/licensor/lender without any compensation to the retailer *qua* sub-lessee/licensee/borrower.

[35] This creates a situation where a retailer holds a retail licence not (only) for his or her own benefit, but *effectively holds the licence on behalf of the wholesaler*. This situation is clearly *contra* the letter and spirit of the Act.

[36] Accordingly, to the extent that clause 41 of Schedule 2 of the contract excludes the right of retailers to compensation for the loss of the retail business, clause 41 is unlawful and hence invalid.

An additional ground: Contra proferentem

[37] We submit that the same outcome is reached by simply applying the *contra proferentem* rule.

[38] The contract is based on a standard contractual template of the first respondent. Accordingly, should there be any ambiguity in the contract, the

preferred meaning should be the one that benefits the interests of the applicant.

[39] We submit that there is indeed ambiguity in the contract: Clause 39 of Schedule 2 of the contract reads as follows:

> Without limiting the scope of, and subject to the provisions of, sub-clause 35.2 of this Schedule 2, nothing contained in clauses 34 to 41 (both inclusive) of this Schedule 2 shall detract from any right of either of the parties to claim damages from the other as a result of any breach of this Agreement, or to exercise any other right or remedy it may have in terms of this Agreement, or in law, or otherwise. [Our emphasis.]

[40] While clause 41 provides that the applicant shall not have the right to any compensation in respect of his loss of the retail business, clause 39 effectively nullifies this limitation on the rights of the applicant by providing that *nothing* contained in clause 41 (*inter alia*) *shall detract* from the applicant's right to exercise any right or remedy it may have in law, etc.

[41] To the degree that there is a conflict between clauses 41 and 39, the interpretation that is most beneficial to the applicant should be followed, namely that the applicant does indeed have the right to compensation for the loss of his or her retail business.

Unjustified enrichment

[42] As submitted *supra*, the applicant has contributed to the goodwill of the retail business.[31]

[43] Upon cancellation of the contact, the retail business contractually transfers to the first respondent. Although the first respondent may not legally operate the retail business itself, it can in principle enter into an agreement with a third party (a new retailer) to operate the retail business – an agreement from which the first respondent will earn an income in the form of, *inter alia*, an upfront 'licence fee',[32] exclusive supply (sale) of automotive fuel to the retailer,[33] a fixed-amount rental plus a turnover-determined rental,[34] etc.

[44] The legal question is therefore whether the goodwill that the applicant contributed to the retail business constitutes unjustified enrichment. In the following, we analyse each of the criteria for unjustified enrichment.

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31 [17]–[19] *supra.*

32 Schedule 2 of the contract, clause 2.

33 *Ibid*, clauses 4–5.

34 Schedule 3 of the contract.

Enrichment

[45] Goodwill is an intellectual property asset, and contributes to the value of a business. As already submitted,[35] the applicant valued the goodwill of his business at the premises at R2 million. This is the amount that the retailers in the application under CCT 134/13 believe that the applicant's business would fetch on the open market and what they might pay for such a business.

[46] Accordingly, should the first respondent appoint a new retailer, the first respondent would be able to ask R2 million for the goodwill of the business, whether as part of a sale of the business, an up-front licence fee, amortised over a number of months as part of a fixed lease tariff, or structured in any other way.

[47] Accordingly, the first respondent has been enriched to the value of R2 million.

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[35] [19] *supra*.

Impoverishment

[48] Goodwill results from the complex interaction and synergetic effect of a number of entrepreneurial components that are involved in the functioning of a business.[36] We therefore submit that a traditional approach of attempting to place a monetary value on out-of-pocket 'expenses' that contributed towards goodwill is accordingly not applicable.

[49] Furthermore, we submit that goodwill *qua* subject-matter of enrichment does not lend itself to the traditional rigid classification as either 'necessary' or 'useful'. Goodwill is to a business as the rule of law is to the Court – it is *essential*. However, an entrepreneur would typically always strive to perpetually *increase* – and not merely preserve – goodwill. We submit that the traditional classifications in our common law ('necessary' or 'useful') was developed as tools to assist the Courts to reach equitable results; however, when dealing with the novel concept of goodwill as subject-matter of enrichment, these common law tools offer little assistance and can only lead to an exercise in artificial classification. Instead, we submit that the Court be guided by the general principle of equity that underlies all enrichment law.

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[36] See: Van der Merwe *op cit* note 20 *supra*.

[50] Applied *in casu*, we submit as follows: Had the applicant been afforded the opportunity, it – rather than the first respondent – could have sold the retail business on the open market, with the goodwill component of the business fetching R2 million. This is the only reasonable and realistic way to value the entrepreneurial activity that resulted in the goodwill.

[51] Accordingly, the applicant has been impoverished to the value of R2 million.

Enrichment at the expense of the applicant

[52] The enrichment of the first respondent is clearly at the expense of the applicant.

Sine causa

[53] There is no valid *causa* for the enrichment.

[54] The contract is completely silent on the issue of goodwill and does not mention it once.

[55] Clause 7.1 of the First Part of the contract deals with alterations to the premises and reads as follows:

> 7.1. The Dealer shall not make any alteration or addition to the Premises, whether structural or otherwise, without the prior written consent of the Company. Should the Company grant such consent, the Dealer shall not be entitled to any compensation whatsoever for any such alteration or addition, regardless of the reason therefore, and shall, if so required by the Company upon termination of this Agreement, forthwith remove such alterations or addition and reinstate the Premises to their previous condition, at the Dealer's own cost.

[56] We submit that this clause clearly only contemplates *tangible* alterations to the premises, and not intangible improvements such as the generation of goodwill. To illustrate: goodwill that accrues to the retail business and indirectly to the premises cannot simply be 'removed' from the premises upon request by the first respondent. Moreover, it would be absurd to require the applicant to first obtain the first respondent's written permission before starting to generate goodwill. The generation of goodwill is inherent to any

entrepreneurial business activity,[37] including the running of a petroleum products retail business.

Conclusion on unjustified enrichment; retention right

[57] All the general requirements for enrichment liability being present, unjustified enrichment is established.[38]

[58] Accordingly, the applicant is entitled to exercise an enrichment lien over the retail business and the premises (to which the retail business is inextricably linked).

[59] An enrichment lien is a real right and enforceable against the whole world.[39]

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37 See: Van der Merwe *op cit* note 20 *supra*.

38 *McCarthy Retail Ltd v Shortdistance Carriers CC* [2001] 3 All SA 236 (A) [25].

39 *Goudini Chrome (Pty) Ltd v MCC Contract (Pty) Ltd* 1993 (1) SA 77 (A) 85.

Postscript on unjustified enrichment

[60] The Court is respectfully referred to the recent judgement of the Court of Appeal of British Columbia in *Haigh v Kent*.[40] In this case, Mr Haigh over a period of twenty years contributed to a resort business that was operated from the Kents' land. During this time, Mr Haigh lived on the land for free, and was not fully paid for his services. The trial judge held that Mr Haigh contributed to the business in various ways, *inter alia* by generating *goodwill*.[41] The trial judge further held that the business and the land on which it was operated are intertwined as a matter of objective fact.[42] Finally, the trial judge held that Mr Haigh unjustly enriched the Kents and that a 25% constructive trust in the land, rather than a monetary award, was appropriate.[43] Both cross-appeals against the judgement *a quo* were dismissed.[44] We submit that the principles underlying this judgement can find fruitful application *in casu*.

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40 *Haigh v Kent* 2013 BCCA 380.

41 *Ibid* [23].

42 *Ibid* [40].

43 *Ibid* [1]–[8].

44 *Ibid* [69].

LEAVE TO APPEAL

[61] Regarding the applicants' application for leave to appeal, the following considerations are relevant: First, given our submissions on the merits of the case above, we submit that the appeal has a strong chance of success. Secondly, the proper interpretation of the Act – in particular with regard to the degree to which wholesalers (such as the first respondent) can be involved in the business of retailers (such as the applicant) – has been the subject of litigation in the lower courts.[45] As such, we submit that the authoritative interpretation by this Court would enhance legal certainty in this regard, which is in the public interest.

[62] While the Act aims to promote transformation through, *inter alia*, prohibiting wholesalers from entering into schemes that would have the effect of the wholesaler *de facto* being a holder of a retail licence, we submit that the first respondent (*qua* wholesaler) is engaging in exactly such a scheme through the non-compensation provision of clause 41 of Schedule 2 of the contract. We

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[45] For instance: *Engen Petroleum and Gundu Services Station* (16333/2012) ZAGPJHC; *Shell South Africa Marketing (Pty) Ltd v Exclusive Access Trading 431 (Pty) Ltd* (5434/2014) ZAGPJHC.

respectfully refer the Court to our analysis of this offending clause.[46] Such non-compensation provisions in wholesaler–retailer agreements in the petroleum industry are matters of law that are of general public interest.

CONDONATION FOR LATE FILING OF THE STATEMENT OF FACTS

[63] The applicant respectfully requests the Court to condone the late filing of the documents[47] in terms of Direction 2(a) of the Directions of the Court dated 25 March 2015.[48] The applicant was required to file the documents by Friday, 29 May 2015, but only served said documents on Monday, 1 June 2015.

[64] We respectfully refer the Court to the reasons for the late delivery, as set out in detail in the applicant's condonation application.

[65] We submit that the first respondent is not prejudiced by the applicant's late filing. The first respondent has in fact filed its statement of facts, and there

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46 [30]–[36] *supra.*

47 Such documents are the statement of facts, the index and the portions of the record relevant to the impugned findings (the 'documents').

48 Condonation application, notice of motion, pp1–3.

can be no allegation that the late delivery of the documents by the applicant prejudiced or delayed the first respondent at all.

[66] Accordingly, we submit that the applicant has made out a proper case for the condonation sought, and respectfully request the court to condone the late filing of the documents as sought by the applicant.

CONCLUSION

[67] In these heads of argument, we make two main submissions:

a. First, that the first respondent lacks *locus standi* and does not have the right to evict the applicant.

b. Secondly, that the applicant has an enrichment lien over the retail business and the premises.

[68] In our analysis of the relevant legislation, we point out that the legislature clearly intended to protect petroleum product retailers – who are supposed to be small businesses and/or historically disadvantaged South Africans – from *de facto* control by petroleum product wholesalers; the intention of the legislature is that retailers should *not* be mere agents or

employees of the wholesalers. However, these legislative intentions are critically undermined when wholesalers act as lessors/licensors/lenders vis-à-vis retailers as lessees/licensees/borrowers that can be deprived of their retail businesses by the wholesalers *without compensation*. This effectively renders retailers nothing more than agents or employees of the wholesaler. We respectfully request the Court to set a precedent that such non-compensation clauses are not legally tenable in the petroleum industry.

[69] Our submission that goodwill can be the subject-matter of enrichment is novel in the South African context, but solidly grounded in case law that recognises it as a valuable asset and as intellectual property that falls within the ambit of section 25(1) of the Constitution. The application to the law of enrichment is therefore a logical next step that is supported by relevant foreign case law.

[70] In the premises, we respectfully submit that a proper case has been made for the relief sought in the applicant's notice of motion.

[71] Lastly, a note regarding costs. Clause 28.2 of Schedule 2 of the contract provides as follows:

28.2 Should any award of costs be made by any court against either party with respect to any matter arising out of or in connection with this Agreement, subject to any contrary direction which such court shall give, such costs shall be taxed and paid on the scale as between attorney and own client.

[72] We submit that this clause is applicable, given that the first respondent's application to evict the applicant clearly arises out of the contract. Accordingly, we respectfully request the cost order in this Court to include the cost of two counsel on a scale of attorney and client.

Christopher Woodrow Donrich Jordaan

Co-counsel for the applicant

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3 *Engen Petroleum Limited v Rasebotsa t/a Everon Filling Station* (24051/2014) [2015] ZAGPPHC 284 (6 May 2015)

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