



THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 683/08

B P SOUTHERN AFRICA (PTY) LIMITED

Appellant

and

MAHMOOD INVESTMENTS (PTY) LIMITED

Respondent

Neutral citation: (683/2008) BP Southern Africa v Mahmood Investments
(683/08) [2009] ZASCA 153 (27 November 2009)

Coram: HARMS DP, LEWIS, MLAMBO AND MAYA JJA, AND HURT
AJA

Heard: 17 November 2009

Delivered: 27 November 2009

Summary : Petrol filling station owner obliged in terms of contracts of sale of property and supply of products to conduct business of filling station: refusal to comply amounts to a repudiation of both contracts warranting eviction and retransfer of property to seller/supplier.

ORDER

On appeal from: High Court, Pietermaritzburg (Msimang and Jappie JJ and Mokgohloa AJ sitting as a full court).

1 The appeal is upheld with costs, including those of two counsel.

2 The order of the court below is altered to read:

‘The appeal is dismissed with costs.’

JUDGMENT

LEWIS JA (HARMS DP, MLAMBO AND MAYA JJA AND HURT AJA concurring)

[1] On 3 June 1999 the appellant, BP Southern Africa (Pty) Ltd (BP), entered into three contracts in respect of a petrol filling station in Umgeni Road, Durban with Mr Abdul Malek: a sale of property on which the petrol filling station had been erected by BP, a supply agreement for petrol and related products and an equipment loan agreement. Malek in each case was acting for an entity yet to be formed. The respondent, Mahmood Investments (Pty) Ltd (Mahmood Investments), succeeded to Malek. The dispute between the parties arises from their different understandings of their rights and obligations under the three contracts. Before turning to the contracts themselves a brief summary of the facts is necessary.

[2] Possession of the filling station was given to Mahmood Investments shortly after 3 June 1999. It is not clear from the papers precisely when that was but it is common cause that it commenced running the filling station before it took

transfer of the property and before the supply agreement actually became operative. Transfer of the property to Mahmood Investments took place on 28 September 1999. But before then, it had let the property to Argyle Umgeni Service Station CC (Argyle). The lease commenced on 1 September 1999 and was for an initial period of three years. The lease was conditional on a supply agreement being concluded between BP and Argyle. That was done – though more about that agreement (the Argyle supply agreement), and an agreement to suspend the supply agreement with Mahmood Investments, later.

[3] BP supplied Argyle with petrol and other products for some three years. But it then discovered, during the course of 2003, that Argyle was selling the products of other suppliers in contravention of the Argyle supply agreement. BP demanded that Mahmood Investments terminate its lease with Argyle and resume the operation of the filling station itself. BP removed its dispensing equipment from the premises and called upon Mahmood Investments to comply with its obligations under the supply agreement, tendering return of the equipment. Mahmood Investments indicated that it did not want the pumps reinstalled and would not operate a filling station from the premises. (I shall discuss the correspondence between the parties and its legal consequences later.)

[4] BP accordingly applied to the Durban High Court for an order declaring that the sale agreement had been cancelled, and evicting Mahmood Investments from the property. The latter opposed the application and counter applied for the cancellation of the servitudes that had been registered over the property pursuant to the agreement of sale. The high court (K Pillay J) granted the orders sought by BP and dismissed the counter application. Mahmood Investments appealed with the leave of the high court to a full court (Msimang J, Jappie J and Mokgohloa AJ concurring) which upheld the appeal and ordered that the servitudes over the property be cancelled. It is against this order that the appeal lies, with the special leave of this court.

[5] The issues before us are, first, the meaning to be given to certain provisions in the agreement of sale, read with the supply agreement and the equipment loan agreement, and, second, whether there was a breach of the supply agreement by either of the parties. The court of first instance based its decision on the meaning to be attributed to the sale agreement, whereas the full court, on appeal, did not consider it necessary to interpret the provisions in issue, finding that BP had repudiated the supply agreement, entitling Mahmood Investments to cancel it, and to have the servitudes over the property reinforcing the supply agreement cancelled too.

The provisions of the sale agreement in issue

[6] Clause 9, headed 'suspensive conditions', provided that:¹

'This agreement is subject to the fulfilment of the conditions detailed below within the time limits as indicated, failing which within a reasonable time.

9.1 signature by both parties of the supply agreement detailed in 11 below at the time of signing of this agreement.

9.2 registration against the title of the property of the servitude detailed in 10 hereof. . . .

The parties hereto undertake to use their best endeavours to expedite fulfilment of the conditions detailed above within a reasonable time from date of signature hereof. It is recorded that the conditions detailed above have been imposed solely for the benefit of the seller and that the seller shall accordingly be entitled at its sole election to waive compliance with any one or more of these conditions and/or to extend the period considered as reasonable for fulfilment thereof.'

[7] Clause 10, headed 'Servitude', and which is at the heart of the dispute, reads:

'It is a condition of the sale of the property that:

10.1 The said property *shall not be used for any purpose other than for the purpose of conducting thereon the business of a garage, filling and/or service station'* (my

¹ The capital letters and emphasis used by the parties are omitted in this clause as well as others quoted.

emphasis). (I shall refer to the business as a filling station, but that encompasses all the other functions set out in the provision.)

'10.2 No petroleum fuels, products and/or lubricants other than those manufactured and supplied by the seller and/or any other manufacturer/distributor approved by the seller in writing shall be stored, handled, sold or distributed or dealt with in any manner whatsoever on or from the said property save with the prior written consent of the Transferor.

10.3 The purchaser shall not be entitled to alienate, lease, mortgage or encumber the property in any manner whatsoever without first obtaining the written consent of the seller, which shall not be unreasonably withheld, as will more fully appear from the provisions of clause 16.2 of the supply agreement to be entered into between the parties as provided for in clause 11 below.

10.4 The abovementioned conditions shall be binding on the purchaser and his successors in title and shall remain in force until the termination of all supply ties between the parties as provided for in the supply agreement referred to in paragraph 11 below. In the event of a breach of the above-mentioned agreement by the purchaser or any other dispute leading to the termination of supply ties as embodied in the above mentioned agreement then the conditions imposed in 10.1 and 10.2 above shall continue to be of binding force and effect notwithstanding the breach or dispute leading to such termination for the duration of the time period provided for in the supply agreement had the termination not taken place.

10.5 It is agreed that the conditions contained in this clause shall be registered against the title deed of the property as conditions of title simultaneously with the transfer of the property into the name of the purchaser. The purchaser undertakes to sign all documents necessary to give effect to the foregoing.

10.6 The purchaser shall, immediately on termination of all supply ties between the parties, as provided for in 10.4 above, be entitled to make the necessary application to note the lapse of the servitude, or to remove the servitude. The seller hereby warrants and undertakes to sign immediately on request by the purchaser all documents necessary to effect the noting of the lapse or the removal of the servitude. Should the seller fail to sign the necessary documents the parties agree that the seller hereby authorises as the purchaser to act as its agent to sign all such documents on his behalf.'

(The parties are agreed that the word 'condition' in clause 10 means term: there is nothing conditional about it.)

[8] The next provision of note is clause 17 which deals with breach. This provides that

'[S]hould the purchaser fail to fulfil any of his obligations as herein provided and remain in default for a period of 14 (fourteen) days subsequent to written notice requiring him to remedy such breach, the seller shall have the right either:

- (a) to cancel this sale forthwith without further notice to the purchaser and to re-take possession of the property should possession have been given to the purchaser in which event all payment(s) made by the purchaser on account of the purchase price shall be for the seller's account and retained by him as liquidated damages. . .; or
- (b) to hold the purchaser bound by any purchase and to claim the payment of the full amount then owing in respect of the purchase price and interest due, and the fulfilment of all the terms and conditions hereof.'

[9] The conditions referred to in clause 9 were fulfilled: the supply agreement was signed by the parties on 3 June 1999, and servitudes were registered against the title deeds when the property was transferred to Mahmood Investments on 28 September 1999. At issue, however, is whether clause 10.1 imposes an obligation on Mahmood Investments to operate a filling station on the property, or whether it is obliged only to refrain from operating any other business there. If there is a positive obligation to operate a filling station (at least for the duration of the supply agreement) then plainly Mahmood Investments would be in breach of contract if it failed or refused to do so. The court of first instance found that there was such an obligation. The full court made no finding in this regard. In my view the construction of the provision is crucial to the determination of the dispute.

[10] BP contends that although the language used is in the negative (the property 'shall *not* be used for any purpose *other than* for the purpose of a garage . . .') the only sensible construction to be given to it is one that obliges Mahmood Investments to operate a filling station. It makes no commercial sense, it argues, to construe the provision as merely an undertaking to do nothing at all with the property if it does not operate a filling station.

[11] It is settled law that a contractual provision must be interpreted in its context, having regard to the relevant circumstances known to the parties at the time of entering into the contract: *KPMG Chartered Accountants (SA) v Securefin Ltd.*² It is also clear that a provision must be given a commercially sensible meaning. In this regard see *Bekker NO v Total South Africa (Pty) Ltd*³ and *Ekurhuleni Municipality v Germiston Municipal Pension Fund*.⁴ The context, particularly the fact that the three agreements were concluded on the same day, is not in dispute.

[12] BP argues that the construction of the provision as imposing a positive obligation on Mahmood Investments is consonant with the business efficacy of the agreement. That is to be viewed in the light of all the circumstances relevant to the sale of the property. These include the fact that BP had developed the property by constructing a garage and petrol filling station on it. It sold this to Mahmood Investments on the basis that a supply agreement would be entered into: indeed the sale was conditional (in the true sense) on the supply agreement being concluded. This would have made no sense had it been intended that after the agreement was concluded, and the property transferred to Mahmood Investments, the latter would be entitled to hold the property and not to operate a filling station on it. The contract of sale would not have made commercial sense but for the conclusion of the supply agreement and the operation of the filling station.

[13] The supply agreement, as I shall show, could well have endured for 10 years, in which time BP's investment in the filling station would be recovered not only through the payment of the purchase price but also through the income generated for BP. Indeed the heading of clause 2 of the supply agreement reads '*Fundamental underlying basis of this agreement*' (my emphasis). Clause 2.1

² [2009] ZASCA 7 (13 March 2009); 2009 (4) SA 399 (SCA) para 39.

³ 1990 (3) SA 159 (T) at 170G-H.

⁴ [2009] ZASCA 154 (27 November 2009)

records that the dealer (Mahmood Investments) is about to become the owner of the premises. Clause 2.2 records that BP has invested a substantial amount of capital for the purpose of optimising the operational and marketing structure of the premises including the buildings, the forecourt, the dispensing and service station equipment and the visual standards. These provisions clearly signify that the underlying basis of the sale agreement is an obligation to operate a filling station on the premises sold.

[14] Moreover the sale agreement required that servitudes be registered against the title deed of the property, apparently for the purpose of ensuring that any successor in title to Mahmood Investments would also operate a filling station for the duration of the supply agreement. Clause 10.6, set out above, provided for the procedure to cancel the servitudes on the termination of supply ties.

[15] The third contract concluded by the parties on 3 June 1999 regulated the loan of equipment by BP to Mahmood Investments. BP undertook to lend storage and dispensing equipment, free of charge, to Mahmood Investments for the purpose of selling the products supplied by BP. Clause 6 provided that BP would have rights of access to the property to inspect and maintain the equipment. It also purported to give BP the right to remove the equipment from the property on termination of the supply agreement. This provision would of course be unenforceable: it permits spoliation. But it too shows that the sale was dependent on Mahmood Investments operating the filling station.

Breach of the supply agreement

[16] Each party complains of a breach of the supply agreement by the other. BP alleges that, by refusing to operate a filling station on the property, Mahmood Investments was in breach of clause 8 which sets out the obligation of the dealer to run the filling station, and to stock and supply only BP products. And of course it alleges as well that this conduct is a breach of the sale agreement such that BP

was entitled to cancel it. Mahmood Investments, on the other hand, alleges that BP repudiated the supply agreement when it removed the pumps and the dispensing equipment. The correspondence between the parties' attorneys in this regard, and the affidavits in the application, are bedevilled by confusion. The confusion arose, it appears, because agreements entered into after the property was let to Argyle were drafted but not signed. It is necessary to clarify the issues, as well as the duration of the supply agreement, before dealing with the respective arguments on breach.

[17] The 'supply period' is defined in the supply agreement as an initial period of three years commencing on the date of transfer (28 September 1999), and terminating on the 'expiry date' (defined as the last day in a period of 36 months), provided that BP had an option to extend the agreement for a further period of three years, and then a further period of four years. The options would be 'deemed to have been automatically exercised' unless BP informed Mahmood Investments in writing to the contrary, at least 90 days before the expiry of any of the periods. The supply agreement would thus, in the ordinary course, have run until 27 September 2009.

[18] Mahmood Investments let the property to Argyle from 1 September 1999. The lease provided that it was 'entirely conditional upon the lessee entering into a supply agreement with [BP]' which had a servitude registered over the property 'entrenching their rights to the supply of their branded fuel and related products to any service station operator leasing the premises' (clause 4). Clause 5 provided that the premises could be used 'only for the purposes of conducting the business of a BP service station in terms of the supply agreement'.

[19] It was thus anticipated that Argyle would enter into a supply agreement with BP. And indeed one was drafted, together with an equipment loan agreement between BP and Argyle. But, as I have said, the drafts were not signed by the parties. They nonetheless acted on the basis that there were

contracts in place and BP supplied products to Argyle from September 1999 until November 2003.

[20] The supply agreement between BP and Mahmood Investments was suspended in terms of a 'suspension of supply agreement' between BP, Mahmood Investments and Argyle, also not signed by any of the parties. This agreement recorded the fact that the Argyle supply agreement was to be concluded, and provided that the supply agreement between BP and Mahmood Investments 'shall be suspended during the currency of the [Argyle] supply agreement, with effect from the 28 September 1999'. The suspension agreement also provided that the owner (Mahmood Investments) 'undertakes, save with the written consent of BP, to use the premises for the purpose of a garage petrol filling and service station only'.

[21] BP discovered during 2003 that Argyle was stocking and selling products of other suppliers. On 6 November 2003 BP's attorney, Mr S Langa, wrote to Mahmood Investments advising that Argyle was selling products that BP had not supplied. He said that BP required Mahmood Investments to 'remove the current operator' from the premises and 'to take over the operation of the service station in terms of the supply agreement with yourselves'. If Mahmood Investments failed to do so within 14 days, the letter stated, BP would have no option but to terminate the supply agreement with it.

[22] Langa, and no doubt BP, were under the impression that because there was no signed supply agreement with Argyle, the supply agreement between BP and Mahmood Investments was still in operation. The parties accept now, however, that BP had performed in terms of the contracts drafted but not signed and that those contracts were binding. That includes the suspension agreement.

[23] In fact, therefore, it was the Argyle supply agreement that had been breached by Argyle. Mahmood Investments' attorney, Mr A Martin, pointed this

out in a letter dated 12 November 2003. He claimed, however, that the supply agreement had been superseded by the Argyle supply agreement. This is a misconstruction of the suspension agreement which provided not that it would be replaced by the Argyle supply agreement but that the supply agreement with Mahmood Investments would be suspended for the duration of the Argyle supply agreement. I shall revert to this issue.

[24] Martin wrote to Langa on 5 January 2004 saying that Mahmood Investments could do nothing to prevent Argyle from supplying other products, and that BP, which had been threatening to remove its pumps, should put an end to the problem by doing that: 'it is probably best that it do so'.

[25] By 15 April 2004 BP had indeed removed the pumps. Martin wrote directly to BP, stating that as a result of the removal Argyle was in breach of its lease which had thus terminated. Martin stated further that Mahmood Investments wished to redevelop the property and could not do so until the underground tanks were removed by BP. He demanded that BP remove them by 30 April. Martin also informed BP that the servitudes had lapsed and that he was preparing documents for their cancellation which he would send for signature.

[26] To this Langa replied on 21 April, stating that although the pumps had been removed, the supply agreement had not been terminated, and the servitudes had not lapsed. Martin's response to that, on 17 May 2004, was that the supply agreement had not been suspended but had terminated and that Mahmood Investments did not intend to operate a filling station itself. Martin asserted that BP's conduct in removing the pumps constituted a repudiation of the supply agreement (despite his previous assertion that the supply agreement no longer existed) which Mahmood Investments had 'accepted'.⁵

⁵ See *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) on the principles governing repudiation, and the terminology.

[27] Langa's response, on 29 July 2004, was that Mahmood Investments was itself in breach of the sale and supply agreements which required it to conduct a filling station and supply BP products. He pointed out that BP was entitled to remove the pumps in terms of the supply agreement (in fact the equipment loan agreement). He did not add that it had been asked to do so by Martin himself. The letter gave notice to Mahmood Investments in terms of clauses 17 and 18 of the sale and supply agreements to remedy its breach. Return of the pumps was tendered should Mahmood Investments give a written undertaking that it would comply with the notice.

[28] Martin responded on 6 August 2004. It was never the intention of Mahmood Investments, he said, to run a filling station itself. The supply agreement had lapsed when the property was let to Argyle. BP had destroyed the business by removing the pumps. 'The site and consequently the business is hopeless. Your client is well aware of this fact.' He repeated that the removal of the pumps constituted a repudiation by BP. The tender by BP to reinstall the pumps was 'absurd'. He enclosed the documents purporting to cancel the servitude and demanded removal of the storage tanks.

[29] BP, through Langa, wrote to Mahmood Investments on 29 October 2004 cancelling the sale and supply agreements with immediate effect. It advised also that it would apply for an eviction order and transfer to it of the property. And so it did.

[30] The high court granted the application and dismissed Mahmood's counter application for the cancellation of the servitudes. As I have said, the court of first instance found that clause 10.1 of the sale imposed an obligation on Mahmood Investments to operate a filling station, but the full court on appeal dismissed BP's application and ordered that the servitude be cancelled. The basis for that decision was that even if Mahmood Investments had been obliged to operate a filling station by the sale agreement (making no finding in this regard), when BP

gave notice to remedy the breach the supply agreement had been terminated because it was impossible to operate the filling station once BP had removed the equipment.

[31] In my view, the court below misconstrued the terms of the supply agreement and failed to take into account the suspension agreement. It did not consider what the consequences of the breach by Argyle had been agreed by the parties to be: that the lease of the property to Argyle and the Argyle supply agreement would terminate, and the supply agreement between the parties would come back into operation. It is true that when notice was given the pumps had been removed – but the parties had agreed that BP was entitled to do so in certain circumstances, and Mahmood Investments had not just consented to their removal: through Martin it had requested that they be removed.

[32] It was not BP that repudiated the sale and supply agreements. Mahmood Investments repudiated both contracts in refusing to perform its obligation to operate a filling station on the property. It evinced a clear intention no longer to be bound by the contracts, demanding removal of the pumps and the tanks, and stating that it had no intention of running a filling station.

[33] Counsel for Mahmood Investments argued before us that at the time of the notice to remedy the breach, and of the cancellation itself, the supply agreement had terminated. Some five years had elapsed since the agreement had commenced. The argument fails to take into account that the first three-year period had been suspended, and began running again only when the Argyle supply agreement terminated. The supply agreement was thus current when notice was given in July 2004, and would have been automatically renewed had BP not terminated it.

[34] Counsel also argued that BP did not rely on repudiation in its founding papers. It is true that the word ‘repudiation’ is not used. But BP does rely on

breach. And the breach it alleges is a refusal to operate a filling station. That is a repudiation. The absence of the label is irrelevant.

[35] Accordingly Mahmood Investments repudiated both the sale and the supply agreements. It communicated its refusal to comply with the provisions through its attorney on several occasions, as outlined. BP elected to cancel both agreements, as it had the right to do. It is thus entitled to claim eviction of Mahmood Investments from the property and transfer of the property to it, as the court of first instance correctly found.

Order

[36]

1 The appeal is upheld with costs, including those of two counsel.

2 The order of the court below is altered to read:

‘The appeal is dismissed with costs.’

C H Lewis
Judge of Appeal

Appearances

For Appellant:

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