IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE	**Civil Appeal Case No.31/2016**
In the matter between:	
ENGEN PETROLEUM LIMITED	**First Appellant**
ENGEN PETROLEUM SWAZILAND (PTY) LTD	**Second Appellant**
And	
CUSTOM MOTORS (PTY) LTD	**Respondent**
In re:	
	CASE NUMBER: 319/2016
CUSTOM MOTORS (PTY) LTD	**Applicant**
And	
ENGEN PETROLEUM LIMITED	**First Respondent**
ENGEN PETROLEUM SWAZILAND (PTY) LTD	**Second Respondent**

Neutral citation: *Engen Petroleum Limited and others vs. Custom Motors (Pty) Ltd. vs. Quality Catering Services (Pty) Ltd. (31/2016) [2016] SZSC 61 (30 June 2016)*

CORAM: **S.P. DLAMINI, JA**

Z. MAGAGULA, AJA

M.J. MANZINI, AJA

Head: 27rd May 2016

Delivered: 30th June 2016

Summary: *Civil Procedure; - requirements for an interdict pendente lite and interim relief - jurisdiction- where a litigant is an incola or pereginus- interlocutory order and final judgments- application of Sections 14 (1) (a) and 14 (1) (b)- appeal specific performance- appeal dismissed with costs including certified costs of Counsel*

JUDGMENT

S. P. DLAMINI, JA

[1] This is an Appeal against judgment of the High Court delivered on 10th March 2016.

[2] Respondent filed a notice of motion on an urgent basis and set it down for hearing on Friday, 19 February 2016. The matter was for some reasons heard on the 3rd March 2016.

[3] The relief sought in the notice of motion is found in pages 5 and 6 of the record of appeal and it states that;

"**1. The application be regarded as urgent and that the non- compliance with the Rules of Court relating to service and time periods be and is hereby condoned.**

2. **That pending the final determination of the action instituted by Applicant (as plaintiff) against ENGEN PETROLEUM LIMITED and Respondent as respectively first and second Defendants) in case number 152/15**:

2.1 **First Respondent be prohibited from and interdicted from evicting Applicant from the premises situated at Site number 44 (7WDQ), generally known and referred to as Bypass Road, Mbabane, Swaziland (the "premises")**

2.2 First Respondent be ordered to, as from 20 February 2016, give and allow Applicant free and unfettered access to and occupation of the premises on the same terms and conditions as those contained in the Lease Agreement entered into by and between Applicant and First Respondent on 15 May 2008 (the "Lease Agreement")

2.3 Second Respondent be ordered to, as from 19 February 2016, as First Respondent's nominated representative and as a registered fuel supplier in terms of the "Fuel Levy Act", continue to supply and deliver automotive fuel and all other automotive products to

Applicant as it has done before and on the same terms and conditions as those that existed in accordance with the terms and conditions contained in the Lease Agreement.

3. **That First and Second Respondents, jointly and severally, the one to pay, the other to be absolved, pay the costs of this application.**

4. **That such further and/or alternative relief be granted as this Honourable Court may deem fit."**

[4] Respondent relied on the founding affidavit of Mr. Luis Filipe Ferreira De Matos Valentim. It is noted that the said Filipe Ferreira De Matos Valentim describes himself as businessman but does not state the capacity in which he deposed to the founding affidavit.

[5] On 16th February 2016 Appellants filed a notice to oppose the Notice of Application and further filed an answering affidavit. The answering affidavit was deposed to by one Lefika Morobe who describes himself as an employee of first Appellant in the capacity of a legal advisor and that he acts for and on behalf of first and second Appellants herein.

[6] On the 10th march the Court *a quo* delivered the judgment in the matter. At paragraphs [52] and [53] of the judgment found at page 27 of the record the Learned Judge states the following;

> **"(52) It is this Court's considered view that applicant has established that he has no other satisfactory remedy available to him should the interim order be refused by this court.**

(53) In the light of all what has said above, this court makes the following order:

1. Prayers 1, 2, 2.2 and 2.3 of the Notice of Motion are hereby granted.

2. The first and second respondent jointly and severalty, the one to pay, the other to be absolved, to pay costs of this application, including those of counsel in terms of Rule 68 of the Rules of this Court.''

[7] Appellants thereafter appealed against the judgment of the Court *a quo*. Although the notice of appeal has not been filed in the record before this court, it is attached to the filing sheet of first and second Appellants dated 12th April 2016 and it is reproduced herein;

"Notice of Appeal from final decision of the High Court in its original jurisdiction in terms of Section 14 (1) (a) of the court of appeal Act (74 of 1954)

TAKE NOTICE THAT the Appellants who were the Respondents in the High Court of Swaziland, being dissatisfied with the judgment of the said court contained in the order dated the 10th day of March 2016, hereby appeal to the Supreme Court on the following grounds:

1. **It failed to make a ruling on prayer 2.1 of the notice of motion and it ought to have dismissed this prayer with costs as no legal basis exist to justify the relief claimed therein.**

<u>RE: LEAVE GRANTED AS AGAINST THE FIRST APPELLANT (PRAYERS 2 READ WITH 2.2 OF THE NOTICE OT MOTION)</u>

2. **The Court erred (on the facts) in finding that there existed a disturbance or a threat to the Respondent's occupation and access to the leased property;**

3. **The Court erred in rejecting the first Appellant's contention that prayer 2.2 of the notice of motion is to be construed as a prayer merely to establish free and unfettered access to, and occupation of the premises and that such relief is moot given the fact that the Respondent undeniably enjoyed free and unfettered access to and occupation of the premises;**

4. **The court erred in granting a mandatory interdict against the first Appellant (by ordering in terms of prayers 2 read with prayer 2.2 of the notice of the motion) in that:**

   4.1. It had no jurisdiction to grant such an order over the first Appellant the latter being a *peregrinus;*

   4.2. The mandatory interdict granted comprises an order for specific performance and the Respondent provided no evidentiary basis for the exercise of a discretion in granting specific performance as against the first Appellant; and

   4.3. An alternative remedy existed in that the Respondent may proceed against either Appellant for damages.

5. **Regarding the finding that the High Court had jurisdiction, it ought to have found and consequently erred in not having found that:**

5.1 ***Peregrini*** **may not be pursued in a local court unless the plaintiff/application has taken the necessary steps to found or confirm jurisdiction by means of an attachment;**

5.2 **The first's Appellant's performance of its obligations arising from the Agreement of Lease and Operation of Service Station between it and Respondent cannot be enforced in Swaziland;**

5.3 **The prayers for relief contained in clause 2 read with 2.2 of the notice of the motion, and in so far as such prayers can be interpreted to comprise a mandatory interdict, relate to action and performance of the first Appellant as a legal entity and not the leased premises;**

5.4. **The leased premises in question are not relevant to the purported obligations of the first Appellant arising from the Agreement of Lease and Operation of Service Station; and**

5.5. **Consequently, an attachment is a legal pre-requisite to confirm jurisdiction and necessary to give effect to, and to enforce, any judgment pursuant to which the first Appellant has to comply with obligations arising from the said agreement.**

6. In summary the High Court ought to have dismissed prayers 2 read with 2.2 of the notice of motion with costs in that:

6.1. **No threat justifying possessionary relief is disclosed in the papers; and**

6.2. No jurisdiction exists to justify the enforcement of the agreement of Lease and Operation of Service Station.

<u>AS AGAINST THE SECOND APPELLANT</u>

7. The Learned Judge erred in that he ought to have found that no source of legal obligation exists justifying the relief claimed in prayer 2.3 of the Notice of Motion and in particular he erred in finding that:

7.1. Facts existed which justified the application of the doctrine of *"piercing the corporate veil"*, and/ or

7.2. Such piercing results in the two separate legal entities becoming basically one entity;

7.3. The factors listed in sub- paragraph (1) to (6) of paragraph [43] of the judgment substantiate the doctrine of *"piercing the veil"*,

7.4. An intimate working relationship between the first and second Appellants establishes a legal obligation on the second Appellant; or that

7.5. The factors listed in sub- paragraph (1) to (5) paragraph [45] of the judgment substantiate *"piercing of the veil"*.

8. The Court ought to have found that:

8.1 The second Appellant acted as the agent of the first Appellant and as such does not incur any obligations arising from any legal relationship between the first Appellant and the Respondent; and

8.2. The factors listed in paragraphs 7.3 to 7.5 above are entirely consistent with the second Appellant being the agent of the first Appellant and as such the second Appellant cannot legally be held liable for the contractual obligations of the first Appellant (if any).

9. The Court erred in finding that the facts of the case undermine the concept of legal personality resulting in the second Appellant attracting liability for the obligations of the first Appellant.

10. As such the court ought to have found that the relief as claimed against the second Appellant is not legally justifiable as no legally recognized source of obligation is disclosed that would lead to an enforceable obligation as prayed for in prayer 2.3 of the notice of motion.

A PRIMA FACIE RIGHT

11. The Court erred in finding that a prima facie right existed as against the first Appellant in that no right to possessionary relief is disclosed in that the common cause facts do not justify the inference that the first Appellant intended to take any unlawful actions to dispossess the Respondent of its possession and/or access to and/or access to and of the premises.

12. Regarding a mandatory interdict, no prima facie right can be established as against the first Appellant as the High Court had no jurisdiction to entertain such an interdict.

13. As against the second Appellant, no prima facie right was established as the papers of record failed to disclose any legally recognized source of obligation resulting in the second Appellant being subject to the interdict granted against it.

AN ALTERNATIVE REMEDY

14. The Respondent is in a position to proceed against either Appellant for damages and consequently the court erred in exercising discretion to grant specific performance/mandatory interdictory relief as against the Appellants.''

[8] The Appellants and Respondent have filed comprehensive Heads of argument together with the bundles of authorities in support of the respective arguments. In addition both the Appellants filed applications for Condonation for the late filing of the Heads of argument. At the hearing of the matter and by consent of the parties, Condonation was granted in respect to each of the applications.

[9] The facts of the matter are contained in the judgment of the Court a quo and are reinforced in the papers filed in the court a quo and before this court. Briefly, they are as follows;

(a) The first Respondent is a South African company with its registered address in Cape Town and its main business in Johannesburg;

(b) The second Respondent is a company incorporated in terms of the Company Laws of the kingdom of Swaziland and its business within Swaziland;

(c) Respondent is a company incorporated in terms of the company Laws of the Kingdom of Swaziland with its registered address at Bypass Road, Mbabane Swaziland;

(d) The Respondent and first Appellant entered to an Agreement of Lease and Operation of Service Station (The Agreement). The said agreement was entered into at Matsapha, Swaziland , on the 15th May 2008.Essentially, the

agreement , inter alia , deals with the terms and conditions for the leasing of certain premises to wit site number 44 and the use of equipment, the use of trademarks and emblems , the operation of a fuel service station, a retail outlet and many other provisions in relation thereto;

(e) The agreement is voluminous and it is attached as annexure “A” and found at pages 35 to 119 of the record. The salient terms and conditions of the agreement are that the rights of the parties; in so far as they inter alia, relate to:

- maintenance of the premises, the obligations of parties in relation to the possession of the premises;

- the operation of the business at the premises such as signage, pumps, the exterior of buildings, the roofing of the building, forecourt surfaces, equipment and wear and tear and maintenance;

- rentals;

- dispute resolution mechanism;

- growth of the business;

- exclusive purchase by Respondent from first Applicant of automotive products via the latter’s nominated or approved supplier;

- the termination date of the agreement was 31st March 2015, subject to procedures relating to renewal, There is a dispute between the parties regarding this Respondent argues the agreement was renewed but the Appellants argue that it was not renewed hence the proceedings before the Court *a quo*; and
- In Article 28 of the Agreement, it is stated that “either party shall be entitled to institute action against the others, in respect of any matter

arising out of the agreement, in any Court in South Africa having territorial jurisdiction; and to the extent that consent of the other party may be required in respect of the monetary jurisdiction of such court, the parties hereby irrevocably grant such consent."

[10] When the hearing of the matter commenced before this Court, the parties, by consent, agreed to the granting of Condonation in respect of the respective applications for Condonation for the late delivery of the Heads of argument by the parties.

[11] Therefore, the Court accordingly proceeded to deal with the matters raised in the appeal. Respondents raised various points in *limine* in the Heads of argument namely that;

(a) The order granting the interim interdict is not final in effect and is therefore, not appealable. The Respondent prayed that the appeal by first and second Appellants be dismissed with costs as Appellants were not entitled to appeal against an interlocutory order that was granted by the Court *a quo*. However, Appellants argued that the order of the court a quo was a final order. In paragraph 4 at page 2 of the filing sheet, Appellant's Head of arguments it is stated that;

> **"4. It is submitted that the relief claimed is in effect an order for specific performance. Such performance is not an issue in the action pending which the interdict was granted. In determining whether an order is final, it is important to bear in mind that not merely the form of the order must be considered but also, and predominantly, its effect. The order that fuel be delivered as well as the other obligations to be implemented by the Appellants,**

were intended to have immediate effect, they will not be reconsidered at the trial and will not be reconsidered on the same facts by the Court *a quo*. For this reason, they are in effect final orders. As such it is submitted that the present appeal procedure is appropriate."

[12] Respondent, in advancing its argument that an appeal on an interlocutory order cannot be sustained at law relied on the following authorities**;- Atkin v Bots 2011 (6) SA 231 (SCA), Cronshaw and Another V Coin Security group (Pty) Ltd 1996 (3) SA 686 (A) Knox Darcly Ltd and Others V Jamieson and Others 1996 (4) SA 348 (AD); [1996} 2 All SA 669); and Prentice V Smith (1889) 3 SAR 28.** In the cited case the court sought to deal with the interpretation of interlocutory orders that are final and those that are not final. In the **Prentice V Smith** case, the court held that an interim interdict is susceptible for an amelioration or the setting aside thereof and such an interim interdict is not final and therefore there can be no appeal. Respondent presented various scenarios to demonstrate that the order of the Court *a quo* is not final in accordance with the test from the cited authorities. In addition to the above authorities, Respondent further relied on the cases of **Metlika Trading Ltd and Others V Commissioner, South African Revenue Service 2005 (3) SA(1) (SCA): [2004] 4 all SA 410; South African Motor Industry Employers Association V South African Bank of Athens Ltd 1980 (3) SA (A) at 96 H ; Nova Property Group Holdings V Cobbett (20815/2014) [2016] ZA SCA 63; and Zweni V Minister of Law and Order 1993 (1) SA 523 at 652 J – 533 A.**

[13] In the **Nova property Group Holdings V Cobbett** case in paragraph [8] it is stated that;

“[8] *the test articulated by this Court in Zweni v Minister of Law and Order, the dismissal of an application to compel discovery, such as by the court a quo, is not appealable as it is (a) not final in effect and is open to alteration by the court below; (b) not definitive of the rights of the parties; and (c) does not have the effect of disposing of a substantial portion of the relief claimed. ……….’’*

[14] This Court is persuaded by Respondent’s argument that the order granted by the Court *a quo* is not final as per the test referred to in the cited authorities and specifically the **Zweni V Minister of Law and Order case**. Accordingly, the Court a quo did not misdirect itself on this issue. Applicant’s argument that the Order amounted to an Order for specific performance is, therefore, rejected and on that basis alone the Appeal must fail. However, with respect to the first appellant there is the issue of the jurisdiction of the Court *a quo* which is dealt with in the latter part of judgment.

[15] Secondly, Respondent argued in *limine* that the Appellants followed the incorrect appeal procedure in light of the provisions of Section 14 (1) (a) and 14 (1) (b) of the Court of Appeal Act No 74 of 1954. Respondent’s argument is that Appellants ought to have sought leave of this Court to appeal the interlocutory order of the court *a quo* following from the previous argument. Further, Respondent argued that since Appellants did not seek or obtain the requisite leave, the appeal ought not to be entertained and be consequently be dismissed with costs.

[16] Section 14 (1) of the Court of Appeal Act No. 70 of 54 states;

“ 14. (1) An appeal shall lie to the Court of Appeal-

(a) From all final judgments of the High Court; and

(b) by leave of the Court of Appeal from an interlocutory order, an order made *ex parte* or an order as to costs only."

[17] Upon hearing the parties on the points in *limine* , this Court is satisfied that with respect to second Appellant, a case has been established that the order of the Court is interlocutory and not final in terms of the test in the Zweni v Minister of Law and other authorities provided in support of Respondent's argument. Furthermore, the Court agrees with the learned Counsel for Respondent that Section 14 (1) and 14 (1) (b) is applicable.

Therefore, leave to appeal ought to have been sought with respect to the appeal on behalf of second Appellant. Since no leave was sought and granted, the appeal is dismissed with the respect to second Appellant.

[18] First Appellant's appeal is on a slightly different footing compared to second Appellant. In addition to the grounds of appeal common to the parties, first Appellant advanced an additional ground of appeal namely that the Court a quo lacked the necessary jurisdiction to order performance of the terms of the Agreement since it is a peregrinus.

[19] To the extent of the common grounds of appeal between first and second Appellants, the common grounds of appeal are rejected for the same reasons on which they were rejected with respect to second Appellant. Therefore, this leaves only the issue of jurisdiction.

[20] First Appellant's Argument is that it is "registered in the Republic of South Africa and has no commercial presence and/ or owns no property in Swaziland" (See foot noto 48 of Appellant's Heads of Argument). First Appellant submits that in view of this, the High Court of Swaziland lacked the necessary jurisdiction to hear the matter and grant the orders it did with respect to it. First Appellant relied on various authorities, including the case of **Hugo V Wessels 1987 (3) SA 837 (A),** to support this argument. First appellant specifically, relies for its argument on the dictum in **Hugo v Wessells whereby Woester JA** said (according to Afrikaans to English transition by Counsel);

"… the question as to whether a court in any given suit is legally competent to adjudicate the dispute involves a twofold enquiry. First the court has to determine whether it is even entitled to take cognizance of the matter before it; the answer to this leg of the enquiry will depend on the existence of one or more of the acknowledged grounds of jurisdiction (rationes jurisdictionis). The second leg of the enquiry refers to whether the defendant is subjected to the power of the court; the answer to that question is sought with reference to the so called doctrine of effectiveness….''

[21] Therefore, according to first Appellant, Respondent, if it desired to proceed against it, ought to sue it at the High Court in Cape Town in the Republic of South Africa, alternatively Respondent ought to have effected an attachment in order to confirm jurisdiction.

First Appellant makes this argument in paragraphs 120 to 127 of the Heads of Argument wherein it is stated that;

"120. In paragraphs [33] to [35] of the judgment, the Learned Judge substantiates the conclusion that:

"The court is inclined to agree with the applicant that this court has jurisdiction to hear and determine this application"

121. This reference is clearly a reference to the ordinary *ratio* jurisdictionis and based on the ratio that the contract was entered into in Swaziland.

122. The proposition respectfully submitted to be uncontroversial and correct.

123. However, the question is not whether an ordinary ratio jurisdictionis exists, but whether it ought to have been *confirmed* by means of an attachment.

124. Without expressly expressly referring to this requirement the court summarized the position in paragraph 41 and as follows:

"… this court is inclined to agree with the applicant that this court has jurisdiction to hear the present application by virtue of the fact that;

(1) The contract was entered into Swaziland;

(2) The performance of the contract was wholly implemented in Swaziland by second respondent who is the supplier of the first respondent's products in this country;

(3) The immovable property that is the subject of the dispute that is situated within the jurisdiction of this court; and

(4) The cause of action arose within the jurisdiction of this court"

125. It is respectfully submitted that this enumerated list of factors fails to establish jurisdiction.

126.1 The following submissions are made:

> **126.1 First, it is true that the contract was entered into Swaziland but this only provides an ordinary ratio jurisdictionis. An attachment in cofirmandam jurisdictionis remains an essential (and outstanding) requirement;**

126.2 Secondly, although the contract was indeed implemented in Swaziland, from the judgment itself it is clear that this implementation was achieved by the second respondent and not the first respondent. In fact, it is quite clear that any actions by the first respondent relating to the operating agreement would have to be taken against its head office in cape Town and / or another external subsidiary office. All instructions, actions, finance and alike originate in South Africa from whence it is transferred to Swaziland. The first respondent never physically operated in Swaziland, has no assets in Swaziland and has no commercial operation in Swaziland;

126.3. Third, it is true that the immovable property is situated within the jurisdiction of the court. However, it is crucial to distinguish rights arising from the immovable property itself with rights arising from the operating agreement. Prayer 2.2 of the notice of motion does not seek to enforce any rights arising from immovable property itself. It expressly seeks to enforce rights arising from the immovable property itself. It expressly seeks to enforce rights arising from the operating agreement. The fact

that a lease agreement may give a rise to a quasi real right is irrelevant. No such real right is sought to be enforced. The doctrine of effectiveness makes it quite clear that the rights relating to immovable property which could conceivably be enforced without the necessity of attachment or arrest, are those rights which can be enforced within the territorial area of jurisdiction of the given court. These rights include title; transfer of title (because the court has the power to instruct the Registrar of Deeds to effect such a transfer) declarations regarding real rights in immovable and possession of immovable, partition, rescission of a contract for the transfer of of immovables; and declaration that the immovable property is executable; application for leave to sell or mortgage the property and appointment of a curator *bonis* respect of immovable property. It is clear from all the reported cases involving rights associated with immovable property, that the guiding factor was the principle of effectiveness. A court could thus assume jurisdiction over a peregrine only where two requirements are met and both need to be fulfilled. First, the property must be situated within the territorial area of jurisdiction of the court. Second – the Registrar of Deeds (or another state official) of that territory needs to be capable of taking steps to give effect to any contemplated judgment.

126.4 Fourth, it is true that in casu the cause of action arose within the area of jurisdiction of the court. This cause of action is simply the ordinary ratio *jurisdictionis* referred to above. It is aimed at enforcing rights in personam arising from the alleged operating agreement. Clearly the rights the applicant seeks to enforce are

not a real right but only a personal right to obtain possession which he may enforce against the landlord."

126.5 The real right arising from the "huur gaat voor koop" rule "… is to be distinguished from the personal right in existence between the lessor and lessee in respect of the property. In such instances the personal rights of the lessee are against the lessor only, who may not necessarily be the owner of the property."

126.6. It is furthermore clear that a failure by the first respondent to comply with the contractual obligations stipulated in prayer 2.2 of the notice of motion cannot effectively be enforced by means of contempt of court proceedings either. The effective enforcement of personal rights as against a peregrine requires such rights to be enforceable by means of court proceedings.

127 It is respectfully submitted that the factors enumerated by the court *a quo* in support of its finding that it had jurisdiction to hear the matter *are* thus inapplicable."

[22] Respondent, on the other hand, argues that the Court _a quo_ has the necessary jurisdiction over the matter. Respondent relies on **Herbstein and Van Winsen - The Civil practice of the Supreme Court in South Africa, 5th Edition, Eilon v Eilon** (1) SA 703 and other authorities on support of its argument.

[23] In paragraphs 35 and 36 of the Heads of argument of respondent's it is stated that;

"35.4 **The learned authors confirmed that difference of opinion exists as to whether it is necessary to attach the subject matter of a**

claim against a *peregrinus* relating to immovable property situated within the area of jurisdiction of the court and stated the following in this regard:

" it would however, seem to follow from the decision in Palm v Simpson, which applied the test of effectiveness, that in South African Law, attachment in such a case is unnecessary, for the judgment can be rendered effective against a peregrine defendant without attachment. Thus, it has been held the court has jurisdiction wherever the defendant may be, without attachment".

35.5 The learned authors are of the view that an attachment of property is not appropriate for an order in the nature of an interdict and further stated the following:

> *" where an interdict is claimed against a peregrinus, the court will have jurisdiction if, in the case of a mandatory interdict, the act is to be carried out in its area, or in the case of a prohibitory interdict, the act against which the interdict is claimed is about to be done in its area".*

and

> *"Where a court does have jurisdiction to grant an interdict against a peregrine defendant, no attachment or submission is necessary".*

36.

36.1 It is submitted that Respondent has comprehensively and sufficiently set out in its papers that it seeks interim relief for the preservation of its prima facie right of free and unfettered access to and occupation of the premises including the continued

supply and delivery of automotive fuel and products within the area of jurisdiction of the High Court.

36.2 In any event, it would seem that the Appellants confuse the issue. They themselves, in a multitude of correspondence, draw no distinction between themselves as to which entity has which rights or as to who the lawful lessor or to whom is entitled to cancel or renew the contract.

36.3 In fact, First Appellant cited itself as the Lessor (or then the "Company", and then the South African company registration number) in concluding the lease, and then, to add insult to injury, in respect of Second Appellant's immovable property situated in Swaziland. Only to then, in a lame effort to explain this, state that it was a "mere agent".

36.4 It is respectfully submitted that Appellant wants to rule through the chaos and uncertainty it created, and then benefit from it."

[24] Further, it is argued on behalf of Respondent that first and second Appellants are actually "one and the same". At paragraphs 40 and 41 of respondent's Head of argument it is stated that;

"Appellant's (dubious) submissions in this regard can be reduced to merely the following statements:

40.1 Second Appellant was not a party to the lease agreement;

40.2 Second Appellant merely acted as an "agent" for First Appellant and therefore no rights and obligations arising from the contract can be attributed to Second Appellant; and

40.3 Second Appellant does not physically have the means to deliver any fuel without the first Appellant's authority, consent and financial support.

41.

It is respectfully submitted that the Appellants dismally failed to adequately explain or address (in their Answering Affidavits):

41.1 the numerous anomalies pertaining to the identities of the Appellants appearing on their misleading correspondence,

41.2 the invoices clearly reflecting that Respondent made all payments (in respect of rental as well as fuel products) into the bank account of the Second Appellant;

41.3 the fact that it is factually and legally Second Appellant which owns the premises and not First Appellant whereas the lease agreement was concluded with First Appellant;

41.4 that the performance and implementation of the lease agreement is the responsibility of second Appellant;

41.5 both the answering affidavits of Appellants were deposed to by only one person and that is Mr Lefika Morobe who did so on behalf of both Appellants.

[25] The court notes that Appellants did not challenge jurisdiction on the basis of the ouster clause in terms of Article 28 of the Agreement. Therefore, nothing much turns on it. First Appellant cannot dislocate itself in the interlinked and interdependent relationship that obviously exists between it and second Appellant. On the other hand Respondent has advanced cogent arguments that show that first Appellant by its conduct relating to second Appellant clearly falls within the jurisdiction of the Court *a quo* . Accordingly, the Court rejects the claim by first Appellant that the Court *a quo* lacked jurisdiction to hear the matter. This close relationship between appellants is sufficiently demonstrated at paragraphs [43], [44] and [45] of the judgment of the Court *a quo*.

In view of the aforegoing, the appeal by first and second Appellants is dismissed with costs.

[26] **Order**

In the premise, the court orders that;

(a) The appeal by first and second Appellants be and is hereby dismissed with costs including the certified costs of counsel in terms of Rule 68; and

(b) The orders of the Court *a quo* are hereby confirmed

____

S.P DLAMINI

JUSTICE OF THE APPEAL

I agree ____________________________

Z. MAGAGULA

ACT. JUSTICE OF APPEAL

I agree ____________________________

M.J. MANZINI

ACT. JUSTICE OF APPEAL

FOR THE APPELLANTS: ADVOCATE C. VANDERSPY

Instructed by Robinson Bertram

FOR THE RESPONDENT: ADVOCATE P. FLYNN

Instructed by Henwood and Company