IN THE HIGH COURT OF LESOTHO
(Commercial Court Division)

HELD AT MASERU **CCA/0092/2021**

In the matter between:

PUMA ENERGY LS (Pty) Ltd **1ST APPLICANT**

TOTAL LESOTHO (Pty) Ltd **2ND APPLICANT**

And

MOTHIBELI THOMAS SEHLABO **1ST RESPONDENT**

BONGA (PTY) LTD **2ND RESPONDENT**

COMMISSIONER OF POLICE **3RD RESPONDENT**

OFFICER COMMANDING FLIGHT 1 POLICE STATION **4TH RESPONDENT**

ATTORNEY GENERAL **5TH RESPONDENT**

Neutral Citation: **PUMA ENERGY LS (Pty) Ltd** v **MOTHIBELI THOMAS & 4 Others SEHLABO** [2022] LSHC 144 Com (15 June 2022)

JUDGMENT

CORAM: MATHABA J

HEARD ON: 12th May 2022

DELIVERED ON: 15th June 2022

Summary

Civil application – Applicants alleging existence of oral agency agreement between the parties – Respondents denying existence of agency agreement but alleging another arrangement – The terms of the arrangement fitting the description of the oral agency agreement and the Respondents conducting themselves in terms of the alleged agency agreement – Consensus inferred from the conduct of the Respondents that there was agency agreement between the parties.

ANNOTATIONS

BOOKS

A.J Kerr, Principles of the Law of Contract, 1998, 5th ed

F.R. Mechem Outlines of Agency 1901, 4th ed

F.M.M Reynolds, The Law of Agency 1985, 15th ed

Herbestein and Van Winsen, Civil Practice of the High Court of South Africa 5th ed Vol 2

Havenga et al, General Principles of Commercial Law 2004, 5th ed

Smith and Keenan's Advanced Business Law, 1991, 8th ed

CASES

LESOTHO

Afzal Abubaker v Magistrate Quthing [2016] LSCA 5

Hanyane v Total (Pty) Ltd (CIV/APN/412/97) [1999] LSHC 6

Khabo v Khabo (C of A (CIV) 72/18) [2019] LSCA 56

Mamahloli Makhetha v Sekonyela and Others (CIV) 44 (C of A 2017) [2018] LSCA 16

The Commissioner of Customs and Excise v Hippo Transport (C of A CIV) 35 of 2016 [2016] LSCA 28

Smally Trading Company v Lekhotla Matsaba and 10 Others (C of A (CIV) 17 of 2016 [2016] LSCA 22

Woolwagon v LNIG (CIV/APN/489/2001) [2002] LSCA 63

SOUTH AFRICA

Andre Malan v Law Society of the Northern Provinces ZASCA [2008] 90

Associated South African Bakeries v Oryx and Vereinigte Backerein (Pty) Ltd [1982] ZASCA 1

Bothma v Chalma Beef (Pty) Ltd N0 2145/2017 [2018] ZAFSHC 132

Candid Electronics Pty Ltd v Merchandise Buying Syndicate (Pty) Ltd 1992 (2) SA 459

Cresto Machines BPK v Die Afdeling Speuriffisier South African Polisie Noord Transvaal 1970 (4) SA 350

Da Mata v Otto No 1972 (3) SA 858 (AD)

Erasmus v Afrikander Proprietary Mines Ltd 1976 (1) SA 950

Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co Ltd 1961 (2) SA 518

Goldbratt v Freemantle 1920 AD 123

Hotz v UCT (730/2016) [2016] ZASCA 159

Makate v Vodacom (Pty) Ltd [2016] ZACC 13

Minister of Law and Order Bophuthatswana v Committee of the Church Summit 1994(3) SA 89

National Director of Public Prosecutions v Zuma (2009) ZASCA 1

Nel v Waterberg Land Ko-operative Vereeneging (1949) AD 597

Nestor and Others v Minister of Police and Others 1984 (4) SA 230

Plascon –Evans Paints Ltd v Van Riebecck Paints (Pty) Ltd 1984 (3) SA 623

Petersen v Cuthbert & Co Ltd 1945 AD 420

Rikhoto v East Rand Administration Board and Another 1983 (4) SA 278

RoomHire (Pty) Ltd v Jeppe Street Mansion (Pty) Ltd 1949 (3) SA 1155

Sea Lake (Pty) Ltd v Church Hwa Trading (Pty) Ltd and Others (CIV/APN492/98) [2000] 46

Setlogelo v Setlogelo 1914 AD 221

Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234

Stern and Ruskin NO v Appleson 19519£) SA 800

Soffiatini v Mould 1956(4) SA 150

Transvaal Property and Investment Co Ltd and Reinhold and Co v South African Townships Mining and Finance Corporation Ltd and Administrator 1938 TPD 512

Van Ryn Wine and Spirit Co. v Chandos Bar 1928 TPD 417

ENGLAND

Smith v Hughes (1871) LR 6 QB 597

INTRODUCTION:

[1] This is an application in which the applicants pray for restoration of possession of a retail services station business conducted at Plot No. 14314-014 Mazenod Maseru and for other related relief. The application is opposed by the first and second respondents *("the respondents").*

[2] The matter was lodged on an urgent basis on the 11th November 2021. The parties appeared before me on the 18th November 2021 where I

issued an interim court order by consent of the parties effectively re-opening the filling station that had been closed from the 5th November 2021.

THE FACTS:

[3] Puma Energy Mauritius Ltd, a company registered under the laws of Mauritius and a peregrine of Lesotho is a holding entity of both Puma Energy Ls (Pty) Ltd *("Puma Lesotho")* and Total Lesotho (Pty) Ltd *("Total Lesotho").* Though Puma Lesotho and Total Lesotho *("the companies")* are still recognised as separate juristic persons since they have not yet legally merged, all service stations of Total Lesotho have been rebranded into Puma Lesotho colours and logos.

[4] The companies are petroleum wholesalers in the petroleum product market in Lesotho. They have exclusive rights and access to Plot No. 14314-014 as a consequence of a Notarial Deed of Sub – Lease entered into by Total Lesotho with the landlord, Mapetla Holdings (Proprietary) Limited. Plot No. 14314-014 is the premises on which the business of Masianokeng Filling

Station is being conducted: it formerly being a Total Lesotho service station business now falling within the retail dealer network of Puma Lesotho.

[5] The first respondent, Mr. *Mothibeli Sehlabo ("Mr. Sehlabo")* and Bonga (Pty) Ltd *("Bonga")* represented by Mr. *Sehlabo* conduct the business of Masianokeng Filling Station on the Premises at Plot No: 14314-014 based on the arrangement between the companies and Mr. *Sehlabo*. The nature of the arrangement is a subject of dispute in this application.

[6] The companies conduct their business using two business models, independent retail dealer model, alternatively agency model. Under independent retail dealer model, the companies, through Puma Lesotho would sub – let its premises and that of Total Lesotho to various retail dealers for the conduct of their business of sale of retail petroleum products, lubricant products, convenience stores products and ancillary sales operations *("retail service station business").*

[7] On the other hand, under the agency model, an agent would be appointed on the premises to facilitate exclusive sale of various petroleum and related products of Puma Lesotho through the retail service station business in

circumstances where the agent would act as a consequence of an agency agreement and the agent would receive a fixed monthly agency income from the companies with its expenses, including staff being paid by Puma Lesotho.

[8] The way the two business models work and their description, is not in dispute. It is equally not in dispute that during the period October 2015 to October 2018, Total Lesotho and Mr. *Sehlabo* had entered into independent retail dealer arrangement, with respect to retail service station at Masianokeng Filling Station. This arrangement was not renewed when it expired in 2018.

[9] Mr. *Sehlabo* participated in another retail service station business, Total Success at Khubetsoana, forming part of Puma Lesotho dealership network. The business owed Puma Lesotho around M3 million as at the 1st January 2019. According to the companies, it was then agreed that Mr. *Sehlabo* will settle this debt with profits generated from Bonga. On the other hand, Mr. *Sehlabo* contends that he ran Total Success at Khubetsoana with Mr. *Mokoena* and that he had orally agreed with the then Puma Lesotho country manager that he was going to pay part of his liability, M1.5 million.

[10] The liability was one of the considerations when the parties had to renew their independent retail dealer agreement in 2018 in respect of Masianokeng Filling Station. The agreement was eventually not entered into between the parties because the companies wanted to enter into the agreement with Mr. *Sehlabo*. On the other hand, Mr. *Sehlabo* wanted the companies to enter into agreement with Bonga and not with him as a person.

[11] The parties entered into oral arrangement on how the business of Masianokeng Filling Station was going to be conducted from the 1st July 2019. It is not particularly clear from the papers what arrangement obtained from the time the independent retail dealer agreement expired until the 1st July 2019.

APPLICANTS' CASE:

[12] The companies contend that the arrangement between the companies and Mr. *Sehlabo* and *Bonga* is that of oral agency agreement. They assert that though Mr. *Sehlabo* and *Bonga* did not sign the agency agreement, which has been filed of record, the parties acted in terms thereof during 2020 and 2021, thus creating oral agency agreement.

[13] According to the companies, the agency agreement was entered into in order to assist Mr. *Sehlabo* and *Bonga* in that they were struggling to run

Masianokeng Filling Station as well as to assist *Mr. Sehlabo* to pay his debt with regards to Total Success. In terms of the agency arrangement, Puma Lesotho was going to put its own consignment stock on the premises and in its underground storage tanks for resale by Mr. *Sehlabo*. Mr. *Sehlabo* was going to earn his money without having the normal risk associated with a retail service station business.

[14] Borrowing liberally from the founding affidavit, some of the terms of the agency agreement were as follows according to the companies:

14.1 Puma Lesotho would make the premises at Masianokeng Filling Station available to *Bonga* as its agents.

14.2 Puma Lesotho would provide petroleum products and lubricants to Masianokeng Filling Station for resale by *Bonga* as the agent and its staff at the premises.

14.3 Puma Lesotho would pay *Bonga* M60,0000.00 every month to cover financial and administrative costs of *Bonga*.

14.4 Puma Lesotho would have a right through its employees or contractors at any time to enter Masianokeng Filling Station for purposes of inspection or for doing work thereat or for accounting and stock control purposes.

14.5 The agency agreement was to commence on 1st July 2019 and would terminate on the 28th June 2023.

[15] To demonstrate that the parties acted in terms of the oral agency agreement, the companies have, to the founding affidavit, annexed invoices for selected months from *Bonga* in respect of the M60,000.00, the latest being that of the 20th October 2021. They have also annexed proof of payment of same for selected months with the latest still being that of the 21st October 2021. There is also a statement of account for the 21st October 2021 for payment of wages and salaries to Bonga staff.

[16] The companies further assert that in line with the oral agency agreement, Puma Lesotho appointed its own Manager at Masianokeng Filling Station and one Manager was appointed by Bonga to co-manage the service. This process and procedure in conducting the business continued until 5th November 2021. It is the events of the 5th November 2021 that prompted this application which will be explained later in this judgment.

[17] The companies narrate the events of the 5th November 2021 which led to the closure of Masianokeng Filling Station by the police as follows:

17.1 Prior to the arrival of Mr. *Sehlabo*, the Manager of *Bonga*, Mr. *Moruti*, arrived at the premises and instructed security, including *Kotsokoane Mabote* and *Lebohang Janefeke* not to get involved in the affairs that might take placed during the course of that day.

17.2 Mr. *Sehlabo* arrived at Filling Station where he had staff meeting after which he escorted two supervisors, Miss *Fumane* and Mr. *Tumisang* off the premises. He also ordered Mr. *Tsitso* from Puma Lesotho to leave the premises. At that time, Mr. *Sehlabo* was brandishing a firearm, pointing it at the Puma Lesotho representatives causing them to fear for their safety and lives.

17.3 Later on Miss *Mpho* and Mr *Tsitso* arrived at the premises. They wanted access to the office to ensure that all the petroleum product and other product sales were properly accounted and banked within a specified safe on the premises. They were denied access to the office and it was found that Mr. *Sehlabo* was depositing the product sales in a different safe under his exclusive control contrary to the arrangement between the parties.

17.4 In order to prevent Mr. *Sehlabo* from selling the petroleum product and other products belonging to Puma Lesotho, "Mrs *Mpho* expressed the view that she was going to activate the emergency stop system to the premises". This got Mr. *Sehlabo* even more aggressive and he started pushing Mrs. Mpho around and to the ground onto which she fell.

17.5 At that time, Mr. *Sehlabo* was "pointing a firearm at both Mrs. *Mpho* and Mr. *Tsitso* and instructed them aggressively and with force to leave, which they did under threat of violence and risk to their lives."

17.6 Mrs. *Mpho* and Mr. *Tsitso* thereafter opened a criminal case at the Flight One Police Station. The police closed down the premises preventing the conduct of the retail service station business since the 5th November 2021. They took the keys to the premises and have declined a request to have the business re-open unless there was an Order of Court directing them.

[18] The companies assert that their employees and representatives were in the peaceful and undisturbed possession of the premises which was

violently and with force interfered with as set out in the preceding paragraph. Consequently, so argues the companies, the actions and conduct of Mr. *Sehlabo* and *Bonga* were unlawful, violent and uncalled for in dispossessing Puma Lesotho and its employees and representatives, including Mr. *Tsitso* the premises from which lawful, continuing and income – producing business activities were conducted.

RESPONDENTS' CASE:

[19] The respondents dispute that the parties are under agency arrangement. Mr. *Sehlabo* explains that when the parties could not agree on the renewal of the independent retail dealer arrangement, they got into discussions regarding the liability which he accrued from Total Success. The discussions resulted into an arrangement of how the parties were to operate Masianokeng Filling Station for 12 months. He does not ascribe any name to the arrangement, which according to him, started in July 2019 and has been obtaining between the parties until the 5th November 2021. The terms of the arrangement are as follows:

"40.1 Puma would take over the filing station to run it and recoup its money (the loan account) from Masianokeng filling station profits.

40.2 Puma would bring its representative employees on site to co-management with management of Bonga and proceed to operate also co-managing the staff of Bonga.

40.3 The trading license would remain in the names of Bonga.

40.4 The fuel on site would remain in the name of Bonga.

40.5 The stock in the shop would remain in the name of Bonga.

40.6 Puma would take profits of Bonga at Masianokeng to pay the debt.

40.7 Puma would supply fuel consignment stock to the site.

40.8 The operator would still be Bonga.

40.9 When the debt is fully paid, Puma would hand back the full dealership rights to Bonga.

40.10 The arrangement would subsist for 12 months.

40.11 During this arrangement Puma would pay the founder of Bonga, being me [Mr. Sehlabo] a living wage of sixty thousand Maloti (M60,000.00) per month.

40.12 Puma shall also pay all the overheads costs.

40.13 Puma will be relieved of these obligations once its debt is settled and the dealership arrangement will be back in operation."

[20] Mr. *Sehlabo* alleges that though the arrangement was for 12 months ending on the last day of 2020, wherein Masianokeng Filling Station would be handed back to *Bonga*, this did not happen.

[21] Puma Lesotho contended that the debt in respect of Total Success had not been paid in full, but later changed to say that Bonga also had outstanding debt, so explains Mr. *Sehlabo*. Mr.*Sehlabo* disputed and is disputing the liability on the ground that *Bonga* was not buying on credit from Puma Lesotho. The disputed debt covers the period prior to the 1st July 2019.

[22] In the result, the arrangement between the parties continued on the basis that the account was not settled though Puma Lesotho was not giving him monthly statements reflecting how much money it was taking and at what pace the debt was being reduced. On the 28th May 2021, Mr. *Sehlabo* followed up again with Puma Lesotho to find out how far the debt had been settled. He was given a statement showing a balance of M493,884.04 relevant to the debt of Total Success and M539,116.74 relevant to the debt of Bonga which he disputed.

[23] With respect to the events of the 5th November 2021, Mr. *Sehlabo* denies that he caused a commotion on the site. He avers that "while these issues were being discussed" he had the occasion to appear at the Masianokeng Filling Station. He recognises that it is the events of his being at the filling station that prompted this litigation.

[24] Mr. *Sehlabo 's* account of the events is that once he was at the filling station, he explained to staff that he was back at the operations because the issues which were being resolved with Puma Lesotho had come to a successful conclusion. He also informed the employees that going forward, they will see him more often and he asked two members of staff appointed by Puma Lesotho to consider taking leave for a week or two to normalise how the operations shall proceed from then going forward.

[25] According to Mr. *Sehlabo's* version, Mr. *Tsitso Tsoaeli* reported to the police that he was violently taking over the site. The police arrived at the business, but he explained how he was related to the business and showed them its license after which they left. Thereafter Mr. *Tsitso* reported the matter to the security but did not get any assistance.

[26] Mr. *Sehlabo* explains further that Mr. *Tsitso Tsoaeli* came back with Ms. *Mpho Senatsi* and that as they got near him, the latter uttered the words which according to Mr. *Sehlabo*, loosely translates to "I hear you have turned into unruly bull and was ordering people around", which he disputed. Ms. *Senatsi* said that the stock in the premises belong to Puma Lesotho and she was told that though oil belongs to Puma Lesotho, but on site, it was answerable to Mr. *Sehlabo* and money shall be forwarded to Puma.

[27] At some point Ms. *Senatsi* and Mr. *Tsoaeli* shouted to staff to open for them and when staff refused, Ms. *Senatsi* demanded iron rod to force open the door. When she could not succeed, she went to the main switch and tried to pull it. Mr. *Sehlabo* prevented her from doing so. She tripped on the cone whereupon she ordered security guards to cock their guns on the basis that there was eminent threat. Mr. *Sehlabo* explains that it was at this stage that he pulled his gun which remained pointed down as he assessed the situation and his safety.

[28] After Ms. *Senatsi* had left, Mr. *Sehlabo* got a call which invited him to the police station whereat he was told that there was assault case opened against him in which Ms. *Senatsi* alleges she was physically assaulted and pointed with a gun. The police halted the operations of the business until the

matter had been discussed. Mr. *Sehlabo* denies assaulting Puma Lesotho staff or committing any unlawful acts at Masianokeng Filling Station on the 5th November 2021.

THE ISSUES:

[29] I am therefore called upon to determine whether the parties entered into agency agreement from the 1st July 2019 in relation to the conduct of the business of Masianokeng Filling Station and whether the events of the 5th November 2021 warrant confirmation of the interdict.

LEGAL PRINCIPLES:

[30] A point of departure is that a contract can be described as an agreement which is concluded between two or more persons with the intention of creating legally enforceable obligations which meets the requirements set by the law for the formation of a valid contract. *See*: Peter Havenga et al, General Principles of Commercial Law 2004 5th ed at 46. In this regard it is imperative to note that there are no special rules peculiar to an agency agreement. The rules or principles governing the law of contract will *mutandis mutandis* apply for the determination of the validity of an agency agreement.

[31] An agreement may either be express or implied, it may also be written or oral. In all these instances an agreement will be considered to be valid if it meets all the requirements of a valid contract. Exposition of those requirements is not necessary for purposes of this Judgment. An agreement will not be declared invalid on the mere ground that it was not written nor express.

[32] In **Goldbratt v Freemantle** 1920 AD 123 **Innes J** opined that:

> "subject *to certain exceptions mostly statutory, any contract maybe verbally entered into, writing is not essential to contractual validity and if during negotiations mention is made of written document the court will assume that the object was merely to afford facility of proof of the verbal agreement unless it is clear that the parties intended that writing should embody the contract."*

[33] **Goldbratt v Freemantle**, *supra*, was followed in this jurisdiction in **Sea Lake (Pty) Ltd v Church Hwa Trading (Pty) ltd & Others** (Civ/APN/492/98) [2000] 46 (10 July 2000). It is axiomatic therefore that an oral agreement has a binding effect just as a written one does. The obligation to do what one has promised to do is sufficient justification for enforcing a contractual obligation.

[34] Where one party denies the existence of a contract as alleged by the other party, a doctrine of quasi mutual assent is invoked. The principle of quasi mutual assent is not concerned with what the party sought to be bound knew but with whether he conducted himself in such a way that a reasonable man would believe that he was assenting to the terms proposed by the other party.

[35] In **Smith v Hughes** (1871) LR 6 QB 597 at 607 **Blackburne J** said the following:

> *"If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."*

[36] Again, **Greenberg J** observed as follows in **Van Ryn Wine and Spirit Co. v Chandos Bar** 1928 TPD 417 at 423-424 in relation to the doctrine of "quasi-mutual assent":

"It is for the Court in each case to have regard to all the circumstances and to decide whether the person sought to be bound has rendered himself liable by his unreasonable conduct. And I think that in order to hold him liable on the contract, the inference that he was assenting to the terms proposed by the other party must not only be reasonable, but must also be a necessary inference. If there are a number of reasonable inferences which may be drawn, including one of assent, then the hypothetical reasonable man is not entitled to select the inference of assent and to disregard the others."

[37] This matter involves disputed agency agreement. The discourse will be incomplete without commenting on an agency agreement. The question whether an agency agreement has been concluded should be ascertained by applying ordinary principles of construction of contracts including any proper implication from the express words used or the course of business between the parties. At this juncture it is imperative to define the agency agreement.

[38] **Musi AJP** in **C A. Bothma v Chalma Beef (Pty) Ltd** Case No. 2145/2017, at 5 para 17 viewed agency as follows:

"Agency is the phenomena of representation where one person, duly authorised to do so, performs a juristic act on behalf of another, which act then confers rights and duties directly on the person on whose behalf it is

done. The agent's actual authority to act on behalf of and bind his or her principal can be express or implied". (Footnotes excluded)

[39] In short, an agent is a person who is authorised to act on behalf of another, being his principal. The concept of agency is based on the common law principle "*qui facit per alium, facit per se"* which translates to mean that, "*he who acts through another, acts personally"*. Agency may be conveyed through actual authority and ostensible or apparent authority. *See*: **Makate v Vodacom (Pty) Ltd** [2016] ZACC 13 para 46 to 48.

[40] Consent of an agent in an agency agreement is very crucial. In general consent is certainly relevant to the relationship between principal and agent. Only mutual assent will give rise to a contract and duties arising in non-contractual agency would normally only do so if there was consent to the relationship. Thus, when the principal confers authority on the agent and the agent purports to act on the principal's behalf, he is not permitted to deny that it was on the principal's behalf that he acted. *See:* F.M.B Reynolds, Bowstead on Agency 15th ed 1985 at 44.

APPLICATION OF THE LEGAL PRINCIPLES - THE ARRANGEMENT BETWEEN THE PARTIES:

[41] It is common cause that in July 2019, the parties entered into an arrangement regarding the conduct of the business of Masianokeng Filling Station. The companies assert that the arrangement was that of oral agency agreement. On the other hand, the respondents deny the existence of agency agreement. The respondents contend that the draft agency agreement was only provided in 2020 and they refused to sign it. Mr. *Molise* on behalf of the respondents, persisted in his heads of argument that "the parties have a temporary arrangement pending signing of dealership agreement and nothing else."

[42] Mr. *Molise* forcefully argued that there is stark dispute of facts regarding the nature of the arrangement that was obtaining between the parties as a result of which I have to prefer the version of the respondents based on *Plascon Evans* rule. In my view, Mr. *Molise* is oversimplifying the application of the rule.

[43] This is what **Corbett JA** said in **Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 635 – 636 in

demystifying the general rule as stated in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E – G:

> *"It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification.* ***It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order****. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation.* ***In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact*** *(see in this regard Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163 - 5; Da Mata v Otto NO 1972 (3) SA 858 (A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (cf Petersen v Cuthbert & Co Ltd 1945 AD 420 at 428; Room Hire case supra at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg Rikhoto v East Rand Administration Board and Another 1983 (4) SA 278 (W) at 283E - H).* ***Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are***

so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers *(see the remarks of BOTHA AJA in the Associated South African Bakeries case, supra at 924A).*

[44] The *Plascon Evans* has been applied in countless cases in this jurisdiction and is now part of our law. *See:* **Afzal Abubaker v Magistrate Quthing** [2016] LSCA 5 (28 April 2016**); The Commissioner of Customs & Excise v Hippo Transport** (C of A (CIV) 35 of 2016) [2016] LSCA 28 (28 October 2016); **Khabo v Khabo** (C of A (CIV) 72/18) [2019] LSCA 56 (01 November 2019).

[45] The Court is also entitled to reject respondent's averments if they "consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on papers. *See*: **National Director of Public Prosecutions v Zuma** (2009) ZASCA 1 at para 26.

[46] Therefore in resolving this matter, what I am required to do is to look into facts averred by the companies in their affidavits which have been admitted by the respondents together with the facts alleged by the latter.

[47] As I embark on this exercise it is apposite to bear in mind the following profound remarks by **Price J.P** in **Soffiantini v Mould** 1956 (4) S.A 150 (E) at 154 which **Ramolibeli J**, as he then was, found attractive in **Hanyane v Total Pty Ltd** (Civ/APN/412/97) [1999] LSHC 6 (01 January 1999) at 5:

> *"It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits."*

[48] I now turn to the averments of the companies with respect to the arrangement they entered into with the respondents from the July 2019. First, the companies state at paragraphs 34 of their founding papers that they conduct their business through two business models, independent retailer dealer model or agency model.

[49] The respondents do not dispute the existence of the two business models. It is common cause that whatever arrangement the parties had during the period under consideration, it was definitely not independent retail dealer model. The agreement for independent retail dealer model had not been

renewed when it expired in 2018. Tellingly, the companies have provided the description of each model at paragraph 35 of their founding affidavit and this is not disputed as well.

[50] Significantly, most of the material terms stipulated at paragraph 40 of the answering affidavit of what the respondents classify as a temporary arrangement between the parties fit the description of the agency model which the companies allege existed between the parties during the period under review.

[51] For instance, under agency agreement, the companies pay an agent agency fee, provide petroleum products to be sold as well as shouldering all the expenses of the agent including staff related costs. This is exactly what happened in *casu*. Mr. *Sehlabo's* denial that the M60,000.00 monthly payments were agency or administration fee is preposterous. The respondents' own invoices classify the M60,000.00 as agent fee. Again, the parties are in agreement that the profits generated from Masianokeng Filling Station were remitted to Puma Lesotho.

[52] Moreover, although Mr. *Louw* for the companies could not readily assist me when I inquired during arguments as to whom petroleum products belong once they are delivered to Masianokeng Filling Station, there lies the

answer in clause 1.9 and 5.5 of the unsigned agency agreement, annexure PE to the founding affidavit. The products belong to Puma Lesotho. Even if I were to ignore the unsigned agency agreement, this fact also comes out clear from paragraphs 60 and 61 of the founding affidavit as well as paragraph 66.11 of the answering affidavit.

[53] I am aware that Mr. *Sehlabo* is blowing hot and cold on this issue. He admits at paragraph 66.11 of his answering affidavit that the products belong to Puma Lesotho and that he has to forward the proceeds to Puma Lesotho. His only contention in this paragraph is that the products were answerable to him once they were at the Filling Station.

[54] Conversely, at paragraph 113 of the same answering affidavit, Mr. *Sehlabo* says that the products belong to *Bonga* as the dealer according to the dealership agreement and that what belongs to Puma Lesotho is the invoice amount for the products sent to the filling station. This does not advance the respondents' case because it is common cause that the arrangement between the parties was not governed by dealership agreement during the period under review.

[55] I also could not get assistance from Counsel when I asked whether the respondents paid rentals to the companies during the period under review.

Be that as it may, at paragraph 132 of the answering affidavit it is alleged that Puma Lesotho stopped giving Bonga statement for rentals from 1st July 2019. The explanation for this is found at paragraph 29.2 of the replying affidavit where the deponent thereof states that the statement of account would not reflect rental payment because Puma Lesotho was shouldering the operating expenses of Bonga as the parties were operating under agency agreement. Again, the deponent to the replying affidavit goes further to observe that "It further appears *Bonga* admits that since at least July 2019 it was not paying monthly rental obligations."

[56] In my view, there is no real dispute of facts in this matter. "A real dispute of fact arises when the respondent denies material allegations made by deponents for the applicant and produces positive evidence to the contrary". *See:* **Makhetha v Estate Late Elizabeth 'Mabolase Sekoyela** (C of A (CIV) 44 of 2017) [2018] LSCA 16 (07 December 2018) para 24.

[57] Again, in determining whether agency or dealership agreement exist, the distinction normally revolves around whether the person concerned acts for himself to make profit as he can or is remunerated by pre-arranged commission. *See*: F.M.B Reynolds, The Law of Agency, 1985 15th ed, Sweet and Maxwell at 21. Another important question to be asked is whether he takes

the profit on the resales which will make him a seller or a commission in which case he is likely to be an agent. F.M.B Reynolds The, Law of Agency, *ibid.*

[58] The above questions are answered in the affirmative in this case. I have already found that respondents were paid agency fee which is not necessarily different from a commission. Neither is it disputed that the profits generated from the filling station were remitted to Puma Lesotho. The fact that the arrangement as styled by the respondent was never signed is neither here nor there considering the element of consensus in forming contracts.

[59] The respondents have in this instance conducted themselves in a manner in which a reasonable man would infer that they were assenting to the agreement as proposed by the companies. Despites Mr. *Sehlabo's* argument that there was no agency agreement, both parties performed obligations in terms of the proposed agreement and the respondents acquiesced themselves to the arrangement proposed by the companies *moreso* because they also issued invoices to Puma Lesotho bearing heading "Agent Fee" as depicted in Annexure PE8 of the founding affidavit.

[60] Consequently, an obligation to do what one has promised to do is sufficient justification for enforcing an agreement. In the circumstances, the

court is inclined to conclude that an agency agreement as pleaded by the companies has been proved. The respondents and the companies conducted themselves in accordance with the terms contained in the agency agreement and therefore consensus can be inferred from their conduct and this supports the conclusion that they both intended to be bound by the terms of the agency agreement proposed by the applicants.

INTERDICT:

[61] The decision of the Appellate Division in **Setlogelo v Setlogelo 1914** AD 221 is a hallmark case in which the requirements for the granting of an interdict are elaborated and refined. In order to succeed in obtaining a final interdict whether it be prohibitory or mandatory an applicant must establish;

a) *Clear right*

b) *Injury*

c) *No other adequate remedy*

Clear right

[62] The onus rests on the applicant applying for a final interdict to establish on a balance of probabilities the facts and evidence which prove a clear and definite right. The right which the applicant must prove is also a right which can be protected, that is, the right which forms the subject matter of the claim for an interdict must thus be a legal right. **Minister of Law and order Bophuthatswana v Committee of the Church Summit** 1994 (3) SA 89 (B) at 98 D-F.

Injury

[63] The word injury must be understood in the wide sense to include any prejudice suffered by the applicant as a result of the infringement of his rights. *See*: **Minister of Law and Order Bophuthatswana v Committee of the Church Summit** *supra.* In an application for interdict, the applicant is not required to establish that on a balance of probabilities flowing from the undisputed facts injury will follow; he is only required to demonstrate that there are reasonable grounds to apprehend that injury would follow. See: C.B Prest, The Law of Practice of Interdicts 1996, Juta and Co at 44. *See:* **Erasmus v Afrikander Proprietary Mines Ltd** 1976 (1) SA 950 at 965.

[64] A reasonable apprehension of injury is one which a reasonable man might entertain on being faced with the same facts. *See:* **Free state Gold Areas Ltd v Merriespruit (orange Free State) Gold Mining Co Ltd** 1961 (2) SA 505 at 518; **Nestor and Others v Minister of Police and Others** 1984 (4) SA 230 (SWA) at 244

[65] In claims for vindicatory or quasi – vindicatory, the applicant is not required to prove for instance actual or well-grounded apprehension of irreparable loss as long as he demonstrates clear right. *See*: **Stern and Ruskin, NO v Appleson**1951 (3) SA 800 at 813. Again, in **Setlogelo v Setlogelo,** *supra*, at 227 the Court said that –

> *"The argument as to irreparable injury being a condition precedent to the grant of an interdict is derived probably from a loose reading in the well – known passage in Van der Linden's Institutes where he enumerates the essentials for such an application. The first, he says, is a clear right; the second is injury. But he does not say that where the right is clear the injury feared must be irreparable. That element is only introduced by him in cases where the right asserted by the applicant, though prima facie established, is open to some doubt."*

No other adequate remedy

[66] An applicant for an interdict must establish that there is no other alternative remedy. The alternative remedy postulated in this context must be adequate in the circumstances, be ordinary and reasonable, be a legal remedy and grant similar protection. *See;* **Transvaal Property and Investment Co Ltd and Reinhold and Co v South African Townships Mining and Finance Corporation Ltd and Administrator** 1938 TPD 512 at 521.

[67] The Court will not generally grant final interdict where applicant can obtain adequate redress in some other form of ordinary relief. *See*: **Woolwagon v LNIG** [2002] LSCA 63 at 8; **Cresto Machines Bpk v Die Afdeling Speuriffisier South African Polisie Noord Transvaal** 1970 (4) SA 350 at 367. Where an award of damages can be proved to be an adequate remedy for the applicant, then an interdict will not be granted. *See*: **Transvaal property and Investments**, *supra,* at 521; **Smally Trading Company v Lekhotla Mats'aba & 10 Others** (C of A (CIV) 17 of 2016 [2016] LSCA 22 (25 May 2016) at para 7 to 8. The grant and refusal of an interdict is a matter within the discretion of the court hearing the application and depends on the facts peculiar to each individual case and the right the applicant is seeking to enforce or protect. *See:* **Candid Electronics Pty Ltd v Merchandise Buying Syndicate (Pty) Ltd** 1992(2) SA 459 at 464.

[68] The existence of another remedy will only preclude the grant of an interdict if the proposed alternative will afford the injured party a remedy that gives it similar protection to an interdict against the injury that is occurring or is apprehended. *See*: **Hotz v UCT** (730/2016) 2016 ZASCA 159 (20 October 2016) at para 36.

APPLICANTION OF LEGAL PRINCIPLES:

[69] Having laid down the foundational basis of an application for interdict, it becomes imperative to ascertain whether the companies in the present case have established all the requirements of an interdict. It is common cause that the companies have vested rights in the premises by virtue of notarial deed of lease as well as notarial deed of servitude entered into between Total Lesotho and Mapetla Holdings (Pty) Ltd.

[70] The petroleum products at the filling station belong to Puma Lesotho and are delivered there for sale by Bonga. In fact, the respondents have acknowledged in their heads of argument that Puma Lesotho is the supplier of the petroleum products and it owns intellectual property to the filling station. As a result, the companies had a clear right to the filling station as well as the products thereat.

[71] Again, it is common cause that from the 1st July 2019 until the events of the 5th July 2021, the filling station was being co-managed by Puma Lesotho and the respondents. From Mr. *Sehlabo*'s own version, Puma Lesotho had taken "over the filling station to run it and recoup its money (the loan account) from Masianokeng filling station profits". Mr. *Sehlabo* explained that this arrangement was to last for 12 months, but it continued as Puma Lesotho insisted that he still had outstanding debt. As a result, the running of the filling station never reverted to the respondents under dealership arrangement.

[72] It is clear from paragraph 65 of Mr. *Sehlabo's* answering affidavit that when he went to the filling station on the 5th November 2021, serious disagreements were obtaining between the companies and the respondents. On the one hand, Mr. *Sehlabo* was contending that the respondents had finished paying their debt and the filling station must revert to them under dealership agreement, on the other hand, the companies were arguing that there was outstanding liability.

[73] It has not been issuably denied that on the 5th November 2021, *Bonga* Manager, Mr. *Moruti,* had arrived at the filling station in the early hours of the morning where he instructed security personnel on the premises including Messrs. Mabote and Janefeke not to get involved in the affairs that might take place during the course of that day. In the context of this case, especially taking into account the events that unfolded later in the day, this was clearly a forewarning.

[74] Mr. *Molise* made a vain attempt to convince me that when Mr. *Sehlabo* went to the filling station on the 5th November 2021, it was in the normal course of events and that he had no ill intentions. This submission is not only disingenuous, but it is inconsistent with Mr. *Sehlabo's* conduct as gleaned from his own answering affidavit. Again, Mr. *Sehlabo* tells this Court that he told staff during the meeting that the issues between him and the companies had been successfully concluded. He knew he was not telling the staff the truth. According to his version where he introduced the events of the 5th November 2021, he went to the filling "while these issues [the issues between him and the companies] were being discussed".

[75] On the evidence before me, Mr. *Sehlabo* had had enough of the companies and when he went to the filling station on the 5th November 2021, it

was with one intention, to take over the operations of the filling station. This is borne out by his own evidence under oath at paragraph 66 of the answering affidavit that when he arrived at the filling station, he told staff he was "back at the operations because issues which were being resolved with Puma have come to a successful conclusion". He told staff they would from then going forward see his presence more often and asked two members of staff appointed by Puma to "consider taking a leave for a week or two to normalise how operations shall proceed from then going forward."

[76] Though Mr. *Sehlabo* is putting what he actually said or did to Puma Lesotho staff moderately, his version in this regard is not far from that of the companies as it appears at paragraph 58 of the founding affidavit. According to the companies, "after the meeting, he [Mr. *Sehlabo*] came out with two Supervisors, Miss *Fumane* and Mr. *Tumisang* and escorted them off the premises…"

[77] It is common cause that Puma Lesotho employees were denied access to the office, hence according to Mr. *Sehlabo*, Ms. *Senatsi* demanded an iron rod to force open the door. It is also common cause that at some stage, Ms. *Senatsi* fell to the ground. How this happened is a subject of controversy. The companies allege that she was pushed to the ground by Mr. *Sehlabo*. On the

other hand, Mr. *Sehlabo's* version is that she tripped on the cone as she was prevented from pulling the main switch. Interestingly, Mr. *Sehlabo* does not explain as to who prevented Ms. *Senatsi* from pulling the main switch.

[78] Be that as it may, it is also common cause that at some stage during the fracas, Mr. *Sehlabo* pulled his gun. He says he had to pull his gun when Ms. *Senatsi* ordered security guards to cock theirs. The companies have a different version. According to them, he brandished the firearm to threated Puma Lesotho staff.

79] The totality of evidence before me is that Mr. *Sehlabo* unilaterally and forcefully took over Masianokeng Filling Station on the 5th November 2021 and that the takeover generated a fracas between himself and Puma Lesotho employees. As a consequence, the business of the filling station was closed and opened following the granting of the interim court order. If Mr. *Sehlabo* had been at the premises under normal circumstances, then the question would be why would he convene a meeting and tell staff that he was back at the operations and that they will see him more often? Why would he ask Puma Lesotho staff to take leave so as to normalise the operations going forward? The answer is simple, Mr. *Sehlabo* was introducing a new order.

[80] The companies assert that as a result of the closure of the business of filling station they were incurring losses and suffering actual damages while on the other hand they were continuing to foot the monthly rental obligation. It is beyond disputation that before the takeover, the companies were in peaceful and undisturbed possession of the filling station as they assert.

[81] It was argued on behalf of the respondents that the versions of the parties are diametrically opposed regarding the events of the 5th November 2021. In my view, whatever disputes or discrepancies are there, they are either not genuine dispute of fact or germane to the resolution of the dispute. I have already extensively referred to the relevant parts of the affidavits in this regard and I need not repeat the exercise.

[82] It may be that respondents were aggrieved and felt the companies were frustrating their desire to take over the filling station under the dealership arrangement. That did not entitle them to resort to self-help as they did. In my considered view, the companies have established the three requirements for an interdict. It is not disputed that they have a clear right to the premises as well as the filling station. The assertion by the companies at paragraph 11 of the

founding affidavit that they have exclusive rights and access to the premises as a consequence of a notarial deed of sub – lease entered into with the landlord Mapetla Holdings (Proprietary) Limited has not been denied. Again, it is common cause that the companies were in possession of the premises as well.

[83] It is further not disputed that as a result of the closure of the business of the filling station, the companies were suffering continuous harm or damages. In **Hanyane v Total Pty Ltd,** *surpa,* at 10 where the respondent had closed down the filling station on the ground that the applicant was not selling the products at the prescribed rates, **Ramodibeli** J said the following:

> *"Regarding the requirement of the absence of similar protection by any ordinary remedy I consider that the Respondent's wrongful act of self help as fully set out above is so repugnant to the rule of law that it must be nipped in the bud. Damages alone would in my view therefore not be sufficient to drive the point home."*

I respectively agree. It will be repugnant to justice not to grant the companies an interdict in circumstances where there is a continuing harm.

CONCLUSION:

[84] In the circumstance of this case, I find that the arrangement between the parties from the 1st July 2019 until when the operations of the business of the filling station were interrupted by Mr. *Sehlabo* was that of oral agency agreement. The terms of the arrangement that existed as gleaned from the founding affidavit Mr. *Sehlabo's* answering affidavit, fits the undisputed description of agency arrangement provided by the companies in their founding affidavit.

[85] Though I have found that the arrangement between the parties during the period under review was that of oral agency agreement, I had expressed reservations during argument regarding the manner in which Prayer 1 (g) in the notice of motion is framed, "Directing the oral Agreement of Agency between the Applicants and the Second Respondent be enforced to govern the relationship between the Applicant and the First and Second Respondent". I am not asked to make a declaratory order or direct the respondents to perform any of specific obligations under the agreement which they are not fulfilling.

[86] I also find that the companies were dispossessed of the filling station through an act of self – help by Mr. *Sehlabo* on the 5th November 2021. Had Mr. *Sehlabo* not interfered with the business of the filling station as he did it would not have been shut down by the police. Clearly the take-over was

characterised by threats from Mr. *Sehlabo* hence Puma Lesotho had to report to the police.

[87] The respondents, without substantive application or counter – application asked this Court to order the first applicant to comply with dealership agreement. They are basing this request on the alleged collateral challenge. This Court can surely not issue such an order in circumstances where it is common cause that since the last dealership agreement which expired in 2018, the parties never entered into dealership agreement.

COSTS:

[88] The companies have asked for costs at attorney and client scale against the first to fourth respondents. A Court can grant costs at attorney and client scale by reasons of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party. *See:* **Nel v Waterberg Landbouwers Ko-operative Vereeniging** (1949) A.D 597 at 607**.**

[89] Looking at the circumstances which gave rise to this case where the first and second respondents clearly resorted to self -help, an order of costs

at the attorney and client scale is justifiable against them. However, I am reluctant to impose an order of costs against the third to the fourth respondents. They were invited to intervene twice on the same day. I am certain they did what they could to preserve peace. Faced with parties with competing claims over the business, perhaps police thought they were doing the right thing by closing the place until they got a direction from this Court. I do not want to give an order that may discourage the police to preserve peace next time for fear that they will be slapped with an order for costs.

COURT ORDER:

[90] In the result, the application is granted, and I confirm the order as follows –

90.1 The Applicants be granted access to and possession of Plot No.14314-014 Mazenod Maseru situated at the corner Main South 1 and A5 Roads Masianokeng, Mazenod Maseru, Lesotho, ("the Premises").

90.2 The Applicants be granted access to, and possession of the retail service station business situated at the Premises.

90.3 The Third and Fourth Respondents deliver and hand to and make available the keys and each and every item taken and or removed from the retail service station business on the Premises to the First Applicant upon service of this order on the Third and Fourth Respondents.

90.4 The First to Fourth Respondents shall not interfere with or obstruct the conduct of the business of a retail service station business on the Premises unless it is by due process of the law.

90.5 The First Respondent shall not threaten or assault the employees of the First and Second Applicants.

90.6 The First Respondent shall not interfere with the business of the First Applicant and the Second Respondent conducted on the Premises unless it is by due process of the law.

90.7 The proceeds of the sale of petroleum products and related petroleum products and all proceeds of the sale of the consignment stock of the First Applicant be banked by the manager of the First Applicant, *Ts'itso*

T'soaeli or any individual designated by him or the Territory Manager of the First Applicant.

90.8 The First and Second Respondents pay costs of this application at attorney and client scale.

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A.R. MATHABA J
Judge of the High Court

For the Applicant: Adv. *H. Louw* with Adv. *M. Khatleli*
For First and Second Respondents: Adv. *A. Molise*