



IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

APPEAL No.: **A63/2022**

In the matter between:

WALSUN MOTORDIENSTE CC

Appellant

and

JOHANNES ANDRIES COMBRINK N.O.

1st Respondent

JOHANNES JOCHEMUS COMBRINK N.O.

2nd Respondent

JAN LODEWYK VOSLOO N.O.

3rd

Respondent

CORAM: REINDERS J, DANISO J *et* VAN RHYN J

HEARD ON: 28 NOVEMBER 2022

DELIVERED ON: 14 APRIL 2023

JUDGMENT BY: REINDERS, J.

[1] It is common cause that the Joe Combrink Family Trust (the “Trust”) as represented by its trustees (the plaintiffs in the action and respondents in this

appeal, to which reference will be made interchangeably), and the defendant (appellant in this appeal, Walsun Motordienste CC as represented by Mr P du Preez with similar interchangeable reference) during August 2014 concluded a written agreement. In terms thereof the defendant leased the commercial premises of the Trust for the purposes of conducting a fuel filling station from the said premises. This agreement commenced on 1 September 2014 and contained an option at the choice of the defendant to renew the agreement for a further five years.

- [2] During March 2020 the plaintiff issued a summons in this court under civil case number 1375/2020 wherein it sought orders cancelling the agreement alternatively confirmation of cancellation of the agreement of lease, an order ejecting defendant from the property and further ordering defendant to pay the costs of suit.
- [3] The matter was defended and ultimately came before a single judge of this Division (Mhlambi J) who on 11 November 2021 granted orders of cancellation and ejectment of the defendant and further directing defendant to pay the costs of suit. On application by defendant, Mhlambi J granted leave to appeal to the full bench of this court against the whole of the judgment and order.
- [4] The plaintiff in the summons averred that in terms of the agreement, defendant was to obtain a license in respect of the business to be conducted on the property, and in the event any licences in respect of the business were to be cancelled or refused, the agreement could be cancelled. As the business is a retail business as contemplated in the Petroleum Products Act 120 of 1977 (the "Act"), a person may not retail prescribed petroleum products without an applicable retail license. Such a license is not transferrable. Defendant failed to obtain a retail license, thereby repudiating the agreement and entitling plaintiff to cancel the agreement.

- [5] In the amended plea filed on behalf of defendant no issue was taken with the terms alleged by the plaintiff as contained in the written agreement.
- [6] The defendant however averred that, at the time of contracting with the Trust, a retail license did exist for the sale of petroleum products ostensibly issued in the name of the Trust and accordingly it was not necessary for defendant to apply for a retail license. Defendant further averred that the mentioned license had to be cancelled first before a retail license could be issued on behalf of defendant, however first and second plaintiffs, in their capacities as the holder of the retail license (being Shakina Trading 5 CC (“Shakina Trading”)) prevented the defendant from obtaining the license. The defendant lastly averred that clause 11.2¹ of the agreement granted the right to defendant only to cancel the agreement, and not the plaintiff.
- [7] The appellant’s grounds of appeal can be summarised as follows;
- That the court *a quo* erred:
- by granting judgment against the appellant for cancellation of the lease agreement, the ejectment of the appellant from the premises and costs of suit;
 - by failing to consider that, in terms of section 2B(4) of the Petroleum Products Act² (the “Act”) the Credit Controller of Petroleum Products (the “Controller”) may only issue one retail licence per site;
 - by not finding that it was an implied term of the agreement between the appellant and the Trust and/or that there was a legal duty upon the Trust, as envisaged in section 2B (4) of the Act, to ensure that the cancelation of the existing retail licence for the site is effected to enable the appellant to obtain a retail licence;
 - by failing to consider the failure of the Trust to cancel the existing retail licence and that same constitutes a breach of an implied term of the

¹ Clause 11.2 reads: “Ten spyte van enigiets wat hierin vervat is, as die lisensies wat vereis word vir die uitvoering van die besighede op die perseel op enige stadium gekanselleer of geweier word as gevolg van omstandighede buite die beheer van die huurder, sal die huurder geregtig wees om hierdie huurkontrak te kanselleer sonder benadeling van enige eis om skadevergoeding.”

² 120 of 1977.

agreement between the parties and/or that it was wrongful and made it impossible for the appellant to obtain a retail licence for the site;

- by failing to take into consideration that the appellant endeavoured to obtain a retail licence for the site, that the appellant is still able to obtain same and that the Trust was entitled to cancel the agreement.

[8] When the appeal was heard the arguments were confined to the defence that the first respondent and/or the second respondent (and/or Mrs Van Zyl who had, prior to the conclusion of the agreement, resigned as a member of Shakina Trading according to her testimony) in their capacities as holders of the retail licence in the name of Shakina Trading in respect of the premises, prevented the appellant from obtaining the requisite retail licence by refusing to cause the surrender of the existing licence.

[9] Mr Groenewald, counsel on behalf of the appellant, argued that there are three broad categories within the ambit of which a debtor can rely on a creditor's wrongful conduct as an excuse for the debtor's failure to perform exist. These categories are where:

- wrongful conduct of the creditor makes performance impossible;
- the creditor's wrongful conduct can be ascribed to a deliberate intention on his/her part to prevent performance by the debtor;
- the creditor's conduct complained of by the debtor in itself constituted a breach of an express or implied term of the agreement.³

[10] On behalf of the appellant submissions were made to the following effect: It was an implied term of the agreement that there existed a legal duty upon the respondents to ensure that the cancellation of the existing retail licence is effected so as to enable the appellant to obtain a retail licence as envisaged in section 2B(4) of the Act. The expression 'implied term' of a contract is used to describe an unexpressed provision of a contract which the law imports therein, generally as a matter of course, without reference to the actual intention of the parties. It simply represents a legal duty (giving rise to a correlative right)

³ Academy of Learning (Pty) Ltd and Others v Hancock and Others 2001 (1) SA 941 (C) at 952F-953D.

imposed by law, unless excluded by the parties.⁴ An implied term of a contract therefore does not originate from the contractual *consensus* of the parties. Mr Groenewald contended that the court *a quo* erred by not finding that the failure of the Trust to effect the cancelation of the existing retail licence, constituted a breach of an implied term of the agreement between the parties and/or was wrongful and made it impossible for the appellant to obtain a retail licence for the filling station as provided for in terms of the provisions of the Act.

[11] Counsel on behalf of the Trust, Mr Hefer SC, argued that apart from the provisions of the lease agreement, Mr Du Preez was informed of the obligation to apply for a retail licence on 15 March 2018 and responded through his attorney that the agreement between the parties was that Mr Du Preez would utilise the existing retail licence obtained by Shakina Trading. In the event of the Trust insisting on the appellant obtaining the necessary retail licence, such application will be made by Mr Du Preez.

[12] The respondents contended that it is evident from the record that Mr Du Preez dragged his feet and only subsequent to the issue of summons during 2018, made two insufficient attempts to request the assistance of Mrs Van Zyl and the first respondent to obtain the requisite retail licence. The appellant did not adhere to the provisions of the lease agreement by failing to diligently apply for and take the necessary steps in order to obtain the said licence. The appellant bears the onus to establish impossibility to comply with the provisions of the lease agreement and has failed to discharge such onus of proof.

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[13] The trial court was not convinced of any of the relied upon defences. The trial judge on the evidence found that the defendant failed to take any steps to compel the plaintiff to make it possible for defendant to obtain a valid retail license. I agree. It is common cause that the appellant, at no stage since September 2014 applied for an order compelling Mrs Van Zyl and/or the first defendant to cooperate in this regard. In his judgment Mhlambi J questioned this inaction of Mr Du Preez to take the necessary steps to apply for a retail

⁴ A. McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) at 531D-F.

licence notwithstanding such demand and the subsequent legal action in the Magistrate's Court for cancellation of the agreement (which was subsequently withdrew due to the incorrect citing of the defendant). In referring to the action in the Magistrate's Court Mhlambi J pointed out defendant's failure to institute or mention in a counter-claim anything in respect of plaintiff's duty to assist in obtaining the license. On the contrary, in the Magistrate's Court the defendant rather relied on the non-variation clause contained in clause 17 of the written agreement.⁵ I agree with the trial judge in this regard. No counterclaim was instituted, neither in the Magistrate's Court nor in the court *a quo*.

- [14] During the trial in 2020 Mr du Preez proffered another explanation for his failure to apply for a valid license namely an oral agreement between him and the first defendant in respect of the Shakina Trading license. Clause 17 of the agreement makes it clear that, loosely translated, the agreement is the complete agreement between the parties and that no amendment of the agreement would be valid or of any effect except if it had been reduced in writing and signed by the parties. Put differently, none of the allegations by the defendant could hold any water save if it had been put in writing and signed by both parties. This did not happen. Apart therefrom the Section 2 of the Act (read with Section 2A) makes it clear that a person and/or an entity may not retail prescribed petroleum products without an applicable license issued by the controller. Such a license is legally not transferrable. In his evaluation of the evidence presented by Mr Du Preez, Mhlambi J found that Mr Du Preez admitted that he had to obtain a retail licence to conduct the business of retailing fuel. He failed to do. As a person who manages three filling stations his concession is telling and nullifies the effect of all the defences raised on his behalf.

⁵ Clause 17 reads: “

- 17.1 Die huurkontrak vorm die totale ooreenkoms tussen die partye.
- 17.2 Geen party in hierdie ooreenkoms sal berus op enige waarborge, voor stellings, openbaarmakings, uitdrukkings van mening wat nie omvat word in hierdie ooreenkoms as waarborge of ondernemings nie.
- 17.3 Geen wysigings of ooreengekome kansellasië van hierdie ooreenkoms sal van enige krag of effek wees tensy dit op skrif gestel end deur beide partye onderteken is nie.”

[16] The plaintiff, based on the absence of such a license, decided to cancel the agreement, and rightly so in my view. Not only have the parties agreed that defendant would obtain the necessary license, but the Act compels the defendant to do so. At the time of the hearing of this appeal defendant was still in default in respect of this particular obligation and was still in occupancy of the premises, presumably retailing fuel in contravention of the provisions of the Act. In the absence of an obtained license, defendant may not conduct business on the premises. The court may not be a party to transgressing the Act. This is exactly what the defendant asks from court, namely to keep the agreement in place. For the same reasons I cannot find that defendant had extended the lease agreement as per clause 11.2. The lease agreement in any event lapsed by effluxion of time on 31 August 2019.

[17] In my mind there is no doubt that the trial court came to the correct conclusion in finding that the plaintiff had made out a proper case for the cancellation of the agreement and the ejectment of the defendant from the premises, as well as the consequent order of costs to be paid by the defendant. The appeal cannot succeed.

[18] In the result I make the following order:

The appeal is dismissed with costs.

REINDERS J

I concur.

DANISO J

I concur.

VAN RHYN J

On behalf of the appellant:

Instructed by:

ATTORNEYS

Adv W Groenewald

SYMINGTON & DE KOK

BLOEMFONTEIN

On behalf of the respondents:

Instructed by:

Adv J J F Hefer SC

ETIENNE VISSER ATTORNEY

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