



IN THE HIGH COURT OF SOUTH AFRICA

[NORTHERN CAPE HIGH COURT, KIMBERLEY]

JUDGMENT ON LEAVE TO APPEAL

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

CASE NR : 1322/2012

PETRUS FRANCOIS PIETERSE

FIRST APPLICANT

PETRUS JOHANNES AND JACOBA ADRIANA

JANSE VAN RENSBURG

SECOND APPLICANT

AND

HARTSWATER HOTELS (PTY) LTD

FIRST RESPONDENT

REGISTRAR OF DEEDS: NORTH WEST PROVINCE

SECOND RESPONDENT

Date of the hearing: 24 October 2013

Date Delivered: 13 December 2013

PHATSHOANE J.

1. Mr Petrus Francois Pieterse, the first applicant and Mr Petrus Johannes and Ms Jacoba Adriana Janse Van Rensburg (the Van Rensburgs), the second applicants, brought an application for leave to appeal to the full-bench of this division against the whole of my judgment and order dated 31 May 2013 in terms of which the application for the confirmation of the cancellation of the notarial long-term lease agreement was dismissed with costs; Hartswater Hotels (Pty) Ltd, the first respondent, was ordered to file an application for the removal of the restrictive conditions as appearing at clause B(a), B(b), B(f)(1), B(f)(3) and B(f)(5) of the title deed T154/1996 with the appropriate authority within 30 days from the date of the order; the counter-application pertaining to the rectification of the notarial long-term lease was postponed pending the

determination of the application for the removal of the restrictive conditions mentioned.

2. The applicants filed a prolix document totalling 40 pages headed the application for leave to appeal. The grounds set out therein are repetitious, longwinded and largely in a form of argument. Condensed and without curtailing them, they come down to the following.

- 2.1 The Court erred in dismissing the main application with costs in which the applicants sought, *inter alia*, the confirmation of the Van Rensburgs' cancellation of the lease agreement on the basis that Hartswater Hotels had breached the terms thereof and had failed to cure the defect within the time period provided for in the agreement. In particular, it was contended:

- 2.1.1 That the Judge erred in finding that the lease agreement authorised the use of the property contrary to any uses to which the property might lawfully be used in terms of its zoning and restrictive conditions registered against the title, in other words, for residential purpose. It was further contended that the state of affairs that are prohibited by law in the public interest cannot be perpetuated by reliance upon the doctrine of estoppel. That there was an obligation on Hartswater Hotels to procure the removal of all legal impediments to its proposed use of the property but it has failed to do so in 13 years of its occupation of the property. That the registration of the lease agreement cannot legalise the current unlawful use of the property or alter conditions registered against the title.

- 2.1.2 That the applicants' attorneys directed correspondence to Hartswater Hotels in which it was notified that it was in breach of clause 9.3 of the notarial agreement in that it was utilising the premises in a manner repugnant to the title deed conditions. Further it was informed that if it did not desist from its illegal use, the notarial agreement would be cancelled. The applicants contend that they properly notified

Hartswater Hotels of the breach and were entitled to cancel the contract based on the terms of the agreement. This is what the Court was called upon to consider and it ought to have confirmed the cancellation of the agreement.

2.1.3 That the following view expressed at para 34 of the Judgment is indefensible:

“On the evidence it can hardly be said that Hartswater Hotels consciously trampled the conditions registered against the title. The sanctity of the freedom to contract is one of the basic foundations of our law of contract. In *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) at 707 para 57 the following dictum appears:

“[57]The first question involves the weighing-up of two considerations. On the one hand, public policy, as informed by the Constitution, requires, in general, that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim pacta sunt servanda which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one’s own affairs, even to one’s own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress. These considerations express the constitutional values which must now inform all laws, including the common-law principles of contract.

It was contended that this is because there is no element of *mens rea* to an act in contravention of a statutory provision. It was argued that the test is objective, namely, whether or not the act in question is repugnant to the title deed restrictions.

2.2 That the Court erred in ordering Hartswater Hotels to file an application for the removal of the restrictive title conditions which prohibits the use of the

applicants' property. It is contended that there is no provision in the Removal of Restrictions Act, 84 of 1967, authorising anyone, other than the owner of the property concerned, to apply for the removal of restrictive conditions registered against the title. The Van Rensburgs will not give consent to the application for the removal of restrictions while the *bona fide* possessor, Pieterse, will object to such a removal. Therefore, the administrator would be hard pressed to approve the application. In any event, it was contended, the removal of restriction will be for the entire property and not only for "*the first 5 metres measured from the street boundary of the Erf, 5 metres into the property in respect of the entire width of the Erf,*" the subject of the lease. This would prejudice the applicants.

2.3 That the Court erred in not having dismissed the counter application for rectification of the notarial lease and in having pended same until the application for the removal of the restrictions had been determined. It was argued that there was no *bona fide* mutual mistake between the parties which would warrant rectification. Therefore, the notarial lease agreement is void or voidable and incapable of rectification.

3. The test to determine whether leave to appeal ought to be granted was authoritatively laid down by the Supreme Court of Appeal in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 531B – E as follows:

"The jurisdictional requirements for a civil appeal emanating from a Provincial or Local Division sitting as a Court of first instance are twofold:

(1) the decision appealed against must be a "judgment or order" within the meaning of those words in the context of s 20(1) of the [Supreme Court] Act; and

(2) the necessary leave to appeal must have been granted, either by the Court of first instance, or, where leave was refused by it, by this Court. Leave is granted if there are reasonable prospects of success. So much is trite. But, if the judgment or order sought to be appealed against does not dispose of the issues between the parties the balance of convenience must, in addition, favour a piecemeal consideration of the case. In

other words, the test is then "whether the appeal - if leave were given - would lead to a just and reasonably prompt resolution of the real issue between the parties."

4. The grounds of appeal enumerated by the applicants are a regurgitation of the argument which they advanced during the hearing of the application on the merits. I propose not to burden this judgment with the analysis thereof because I have dealt with the same adequately in the main judgment.
5. Mr Pienaar, for the applicants, contended that insofar as Hartswater Hotels breached the conditions registered against the title the Van Rensburgs were entitled to terminate the lease agreement. He contended that the alleged waiver cannot avail Hartswater Hotels because it was not pleaded. He further argued that there is a presumption against waiver and that the onus to prove waiver is on the party asserting it; such onus must be discharged on the balance of probabilities. Counsel contended that in its opposing affidavit Hartswater Hotel did not discharge the onus.
6. One of the principal averments raised in the opposing papers by Hartswater Hotels is that since its use of the property, in a period of 13 years, the Van Rensburgs did not notify it that it was acting in breach of the terms of the notarial lease or called upon it to remedy the breach. The respondent took this further in argument and contended that the Van Rensburgs waived their rights to cancel the agreement and should be estopped as this will lead to an injustice.
7. In RH Christie, *The Law of Contract in South Africa*, 5th Edition at 445 the learned author states:

"The question is whether, without estoppel, waiver can be created by mere delay in enforcing a right conferred by the terms of a contract. In principle there seems to be no reason why it should not."
8. The argument on rectification of the notarial lease is not relevant for the present purposes because that application is still pending. I have set out in the judgment that the determination of the question whether the agreement is amenable to rectification is premature as the current use of the property is

clearly inimical to the conditions registered against the title. I have also pointed out that upon finalization of the application for the removal of restrictions any of the parties may approach this Court on the same papers suitably supplemented for the determination of the question of the rectification of the lease agreement.

9. Section 2 Removal of Restrictions Act, 84 of 1967, provides in part:

“Alteration, suspension or removal of restrictions or obligations in respect of land by the Administrator:

(1) Whenever the Administrator of a province in which the land in question is situate, is satisfied-

(a) that it is desirable to do so in the interest of the establishment or development of any township or in the interest of any area, whether it is situate in an urban area or not, or in the public interest; or...

he may, subject to the provisions of this Act, of his own accord or **on application of any person** in terms of section 3, by notice in the Provincial Gazette of the province alter, suspend or remove, either permanently or for a period specified in such notice and either unconditionally or subject to any condition so specified, any restriction or obligation which is binding on the owner of the land by virtue of-

- (aa) a restrictive condition or servitude registered against the title deed of the land; or
- (bb) a provision of a law relating to the establishment of townships or to town planning; or
- (cc) a provision of a by-law or of a regulation or of a townplanning scheme; or
- (dd) a provision of a townplanning scheme and a restrictive condition or servitude registered against the title deed of the land; or
- (ee) a provision of a townplanning scheme and a provision of a law relating to the establishment of townships or to town planning, and which relates to-
 - (aaa) the subdivision of the land; or
 - (bbb) the purpose for which the land may be used; or
 - (ccc) the requirements to be complied with or to be observed in connection with the erection of buildings or the use of the land.”

10. I am of the view that, properly construed, s 2 above read with s 3 of the Removal of Restrictions Act, permits any person to make an application for the removal of restrictive conditions registered against the title deed. Hartswater Hotels has a real right to the property by virtue of the registered long term lease. I therefore fail to comprehend how it could be unable to bring the application for the removal of the restrictions.

11. On the whole I am satisfied that there are no reasonable prospects of a successful appeal. The application for leave to appeal must fail.

12. In the premise, the following order is made:

ORDER

1. The application for leave to appeal is dismissed with costs.

MV PHATSHOANE

JUDGE

NORTHERN CAPE HIGH COURT

<i>Appearance for the applicant : Adv C.D. Pienaar Instructed by Duncan & Rothman</i>
<i>Appearance for the respondent: Adv.J.C. Coetzer Instructed by Elliott Maris Wilmans & Hay</i>