

SOUTH AFRICA / JUDGMENT

Aludar 233 CC v Unlocked Properties 28 (Pty) Ltd (A3148/2021) [2023] ZAGPJHC 1297 (14 November 2023) [2023] ZAGPJHC 1297

COURT

South Gauteng High Court, Johannesburg

BEFORE

S D J Wilson, A Crutchfield

CASE / FILE NUMBER

A3148/2021

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IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION,
JOHANNESBURG)

Case

No. A3148/2021

NOT REPORTABLE

NOT OF INTEREST TO OTHER

JUDGES

14/11/23

In the matter between:

ALUDAR
233 CC
Appellant
And
UNLOCKED
PROPERTIES 28 (PTY) LTD
Respondent

JUDGMENT

WILSON J:

1 The appellant, Aludar 233 CC (“Aludar”), rented premises from the respondent, Unlocked Properties 28 (Pty) Ltd (“Unlocked Properties”). The lease between the parties provided that the property was to be used as a nightclub, and only for that purpose. The lease was to run between 1 September 2019 and 30 August 2020.

2 On 18 March 2020, the government declared a National State of Disaster in terms of section 27 of the Disaster Management Act 57 of

2002. The purpose of the declaration was to enable the state to take measures to curb the transmission of the Covid-19 virus. Those measures were introduced by regulation, and they transformed most South Africans’ daily lives for the weeks and months that

followed. At the core of the regulations were measures to curtail social gatherings except between members of the same household.

Restaurants and bars were closed for an extended period, the sale of alcohol was banned, and the operation of a nightclub was clearly

placed off-limits.

3 Faced with the extinction of any possibility of operating a nightclub at the property, Aludar took the view that the lease had been terminated by supervening impossibility of performance. It stopped paying rent from March 2020, and quit the property. In its particulars of claim in the court below, Unlocked Properties alleges that Aludar vacated the property on 10 September 2020. In its plea, Aludar does not specifically admit that it left the property on that date. It instead avers that the lease agreement was deemed to have

been cancelled on or about 18 April 2023. Aludar also pleads that it would be contrary to public policy to hold it to the terms of the lease in circumstances where it had unforeseeably become impossible to use the property as both parties had agreed it must be used.

4 Unlocked Properties took the view that, notwithstanding the impossibility of Aludar using the premises for the sole and exclusive

purpose for which it had been let, Aludar was still liable for the rent that fell due under the lease between March and August

2020. It sued in the court below for payment of that rent, in the sum of R141 460.51, plus interest and costs.

5 The Magistrate in the court below granted summary judgment for that amount. He did so on the basis that the parties had contracted

out of the ordinary common law rule that a tenant can claim a remission of rent if they are deprived of beneficial occupation of a property by vis major (superior force) or causus fortuitous (an unexpected mishap).

6 Aludar now appeals to us against this order. Summary judgment is a drastic remedy to be resorted to only where there is no good faith defence raised on the defendant's plea. To put it another way, a court that grants summary judgment must do so only where the plea raises no triable issue, or where the plaintiff has an "unanswerable case" (see *First National Bank of South Africa Ltd v Myburgh* 2002 (4) SA 176 (C), paragraph 9).

7 I think that Unlocked Properties' application for summary judgment fell far short of that standard. It is true that clause G15.1.1 of the lease, on its face, excludes Aludar's claims "arising out of vis major or causus fortuitous", but I do not think that completely answers the claim that the whole contract was voided because it could no longer be performed by either party. The effect of the regulations was not just that Aludar could not operate a nightclub. It was that Unlocked Properties could not rent the property for that purpose. Given that this was the only purpose for which the parties agreed the property could be used, the effect of the regulations may well have been to void the whole contract. If that is so, the exclusion clause upon which Unlocked Properties relied was voided too.

8 It is not as if it was open to Aludar to simply change the use to which it intended to put the property. That would have been impossible without Unlocked Properties' consent. In other words, Unlocked Properties did not let the property to Aludar to be used for a broad range of beneficial purposes. It stipulated that the property was to be used solely and exclusively for a purpose that was unforeseeably declared illegal about halfway through the initial period of the lease.

9 Mr. Paige-Green, who appeared for Unlocked Properties, referred us to the decision of the Supreme Court of Appeal in *Butcher Shop and Grill CC v Trustees for the time being of Bymyam Trust* 2023 (5) SA 68 (SCA), but I do not think that decision helps us. The main issue before the court in that case was whether a remission of rent could be claimed by a tenant where their sub-tenant had suffered loss because they could not run a restaurant during the period for which the regulations applied. The situation in this case is different. Aludar's case is pressed on its own behalf, and the case in its plea is not that it is entitled to a remission of rent. It is that the entire contract was voided by the fact that the regulations made it impossible for either party to perform their obligations under it.

10 In this respect, I think the situation that confronts us here has more to do with the facts in *World Leisure Holidays (Pty) Ltd v Georges* 2002 (5) SA 531 (W), in which a full court of this Division explored the extent to which temporary impossibility of performance entitles a party to treat a contract as having been cancelled. In that case, the court held that it could, but only "where the foundation of the contract has been destroyed"; where "all performance is already, or would inevitably become, impossible"; or where "part of the performance has become, or would inevitably be, impossible" and the party is not bound to accept the remaining performance

(paragraph 8). In this case, whether any of these situations applied was plainly a factual issue that should have been referred to trial.

11 Even if I am wrong in this respect, I think that there are colourable public policy claims to be raised at trial by Aludar. In my view, evidence has to be led to explore whether, on the facts of this case, it can be consistent with public policy to allow a party to enforce the terms of a lease during a period in which everyone accepts that the underlying purpose of the contract has been rendered wholly unlawful.

12 In these circumstances, Unlocked Properties' case was far from "unanswerable". I would make the following order –

12.1 The appeal succeeds with costs.

12.2 The order of the court below is set aside and substituted with an order dismissing the application for summary judgment, and granting Aludar leave to defend, with costs to be costs in the trial.

S D J WILSON

Judge of the High Court

13 I agree, and it is so ordered.

A CRUTCHFIELD

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 14 November 2023.

HEARD ON: 19 October 2023

DECIDED ON: 14 November 2023

For the Appellant: HP van Nieuwenhuizen

Instructed by Kavier Guinness Inc

For the Respondent: T Paige-Green

Instructed by Schindler's Attorneys

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