

SOUTH AFRICA / JUDGMENT

Coad v Malan (16423/08) [2013]

ZAWCHC 32 (28 February 2013)

[2013] ZAWCHC 32

COURT

Western Cape High Court, Cape Town

BEFORE

Traverso

CASE / FILE NUMBER

16423/08

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN THE HIGH COURT OF
SOUTH AFRICA
(WESTERN CAPE HIGH COURT,
CAPE TOWN)

Case

No: 16423/08

In

the matter between:

BRUCE
STUART COADPlaintiff
and
JACOBUS
PETRUS MALAN
.....Defendant

JUDGMENT

: 28 FEBRUARY 2013

TRAVERSO.AJP

- [1] This matter has as its origin the sale by plaintiff to the defendant of his 100% members interest in Vision Direct 120 CC ("Vision Direct), which was at the time trading as Savannah Cafe in Tyger Valley Centre. The terms of the Agreement were contained in a written document which was attached to the summons ("the Agreement).
- [2] The plaintiff is claiming R553 756,00, being the balance of the purchase price in respect of the said members interest. It is common cause the defendant has not paid the full balance.

[3] The defendant maintains that he is not liable to pay the amount claimed, because there was non-compliance with the provisions of section 38 of the Liquor Act, No. 27 of 1989 (“the Act”), and accordingly the Agreement was void.

[4] In terms of paragraph 7(c) of the Agreement:

“The Seiler warrants that there is an existing liquor license and that the Seiler undertakes to sign all documentation for the transfer of such license.”

This liquor licence was registered in the name of the plaintiff personally and not in the name of the dosed corporation, Vision Direct.

[5] Section 38(1) of the Act provides:

“The holder of a licence shall not permit any other person to procure a controlling interest in the business to which the licence relates, unless the chairperson has, on application by the holder, granted consent that such a person may procure such an interest in that business(My emphasis)

With section 38 must be read section 148 of the Act which provides:

“Unless this Act specifically or by necessary implication permits such a provision, a contract which contains a provision whereby a person purports to relinquish or forgo a right, privilege, obligation or liability in terms of this Act, shall be void

irrespective of whether the contract was concluded before or after the commencement of this Act. ”

[6] Against this background Mr. van Riet for the plaintiff, conceded that a failure to comply with section 38 of the Act will result in the Agreement being void ab initio. This concession is made in view of the decision in Klokow

v. Sullivan, 2006 (1) SA 259 (SCA) at 264 A - B:

“The concession was made because it was common cause that no consent had been obtained for the plaintiff to acquire a controlling interest in the business as required by s 38(1). This rendered the agreement illegal. Section 148, which had been overlooked, disposed of the second question (whether the agreement was void). Section 148 provides that 'a contract which contains a provision whereby a person purports to relinquish or forgo a right, privilege, obligation or liability in terms of this Act, shall be void'. The agreement was thus illegal and void.”

[7] Mr. Van Riet argued that section 38 has no application to the Agreement in question and that, in law, regard must be had to section 113 of the Act because at all material times the

plaintiff personally was the owner of the licence, and that therefore, by necessary implication there had to be a transfer of the licence from the plaintiff to Vision Direct as contemplated in section 113. Whereas the plaintiff sold his members interest in

Vision Direct to the defendant the licence in respect of the business Savannah was transferred from the plaintiff personally to Vision Direct.

[8] Section 113 of the Act provides: “Consideration of applications

The holder of a licence (excluding a temporary liquor licence and occasional licence) may at any time make application for the transfer thereof to another person (hereinafter called the prospective holder). (Emphasis supplied)

[9] Against this background I will analyse the evidence.

[10] The plaintiff presented only the evidence of a certain Mr. Windvogel who is a director of what was previously known as the Liquor Board. He took the Court through the relevant documentation, His evidence was not challenged. What these documents demonstrate is that the liquor licence that was operative in respect of the Savannah Cafe was registered in the name of the plaintiff personally. It further shows that DLL

Consultants were authorised by both parties to represent them in making application for the transfer of the licence as provided for in section 113 of the Act. He testified that the information reflected in this application (that is, the application for the transfer of the liquor licence from the plaintiff to Vision Direct) is the type of information required in terms of the Act. This information relates to the character of the prospective holder.¹ Accordingly the Board will not grant an application unless the prospective holder is of good character or is otherwise fit to be a holder of the licence.

[11] It is not disputed that the liquor licence was transferred

from the plaintiff to Vision Direct. The documents further show that the defendant, when he moved from the premises in Tyger Valley Centre to the Durbanville premises, applied for the transfer of the licence from his old premises to the new premises.

[12] The defendant testified that he took possession of the Savannah Cafe, Tyger Valley Centre, during April 2008. The members interest was only transferred to him on 13 August 2008.

[13] Shortly thereafter, and on 19 September 2008, the defendant received notice from the landlord to vacate the premises because he had fallen into arrears with the payment of rental.

[14] The defendant conceded that he was experiencing financial problems at the time, and that he was unable to pay the arrear rental, and also that he did not have sufficient funds with which to pay the balance of the purchase price due to plaintiff. Notwithstanding his acknowledgement that he was experiencing financial problems he refused to vacate the premises and the landlord thereafter brought an application in this Court to evict him. He defended this application, but ultimately the parties settled the matter, and the defendant vacated the premises and relocated to Durbanville. When he left he took all the furniture that was part of the business Savannah Cafe with him to the new premises, and traded there

under the name “Savannah” He did this, he testified, because he wanted his existing clients to follow him.

[15] The defendant relied heavily on the fact that the business

at the Durbanville premises was a restaurant rather than a coffee shop, in support of his contention that he no longer regarded himself bound by the Agreement. But this does not assist the defendant. It is common cause that the defendant

sold liquor at the Durbanville premises under the licence which he obtained from the plaintiff. It is also common cause that he used the name Savannah and therefore the goodwill in respect of his new business in Durbanville. The defendant also moved all the furniture, which was in the Savannah Cafe when he bought it, to the Durbanville premises. Although the defendant initially testified that the business in Durbanville was conducted through Eldante Functions & Events CC (“Eldante”), he was constrained to concede during cross-examination that he had not transferred the licence to Eldante; that he had no books of account for Eldante; and that his First National Bank account was in the name of “JP Malan trading as Savannah”. Although he had an account at Standard Bank in the name of Eldante, it appears that not a single transaction in this account related to the business of Savannah.

[16] Sadly, the new business also failed and was closed down.

[17] As stated above, the nub of the defendant’s case is that he is not obliged to pay the plaintiff as the agreement of sale is void ab initio due to the alleged non-compliance with section 38 of the Act. In addition, the defendant filed a counterclaim in terms whereof he reclaims all amounts paid by him to the plaintiff.

DOES SECTION 38 OF THE ACT APPLY?

[18] As stated above section 38 must be read with section 148 of the Act. In this case it is common cause that no consent had been obtained for the defendant to acquire a controlling interest (100% members interest) as required in section 38(1) of the Act. It is also common cause that the licence was in plaintiff’s personal name and not in the name of Vision Direct.

[19] The mischief which the legislature sought to avoid in section 38 is that the holder of a controlling interest in a corporate entity would transfer that interest in that entity to someone who may not be worthy of consideration for the granting of a licence, under the guise that the corporate entity is still the licence holder. Therefore although the actual holder of the licence is the corporate entity, the legislature, in respect of a liquor licence, in a manner of speaking, pierced the corporate veil. Inasmuch therefore, as this case does not involve the transfer of a majority interest in a corporate entity, section 38 of the Act does not apply.

[20] The plaintiff, in his plea to the defendant’s counterclaim, admitted that by virtue of the non-compliance with section 38 of the Act the sale agreement was void.

[21] Mr. Srnit, on behalf of the defendant, argued that the plaintiff was bound by this admission, and would therefore be

barred from arguing that the Agreement is not subject to the provisions of section 38. I disagree. The admission by the plaintiff is an admission based on a legal conclusion - namely that because of the non-compliance with section 38 of the Act, the Agreement was void. In matters of law the Court "must apply the law and not the parties' perception thereof (Metedad

v. National Employers' General Insurance Co. Ltd, 1992 (1) SA 494 (W).) See too Rosenbach & Co. (Pty) Ltd v. Dalmonte, 1964 (2) SA 195 (NPD) at 200 - 201 where Caney, J summarised the legal position as follows:

"In my judgment a Court cannot be held to be bound to a mistake of law on the part of one of the parties. Cf. Van Rensburg v. Van Rensburg en Andere, 1963 (1) S.A. 505 (A.D.). Particularly is this so when the Court is being invited to make a declaration of rights; it cannot be hampered by an incorrect admission of law made either deliberately or incautiously by one of the parties."

[22] It is, in my view, self-evident that a Court cannot be bound by an interpretation of a section by the legal adviser of a party, if such interpretation is based on an incorrect legal premise.

[23] Accordingly the principles enunciated in the Klokow case (supra) do not apply to this case.

[24] As stated above, on the facts of this matter, the Agreement is governed by the provisions of section 113 of the

Act.

[25] There is no provision in this section which prohibits a person from entering into an agreement in anticipation of the transfer of an existing licence. In most cases this will be the only practical way in which the sale of the licensed business can take place.

[26] In this case the Liquor Board and its chairperson

subsequently approved of the transfer of the licence to Vision

Direct, and that is the end of the enquiry.

[27] But even if I am wrong in finding that the Agreement was

not void for want of prior approval by the Liquor Board, I am of the view that a tacit relocation of the Agreement occurred. In this regard see Golden Fried Chicken (Pty) Ltd v. Sirad Fast

Foods CC & Others. 2002 (1) SA 822 (SCA) at 825 D-F:

“After the termination of the initial agreement and prior to this letter the parties (in the light of the facts recited) conducted themselves in a manner that gave rise to the inescapable inference that both desired the revival of their former contractual relationship on the same terms as existed before. Taken together, those facts establish a tacit relocation of a franchise agreement (comparable to a tacit relocation of a lease) between the appellant and Sirad (Shell South Africa (Pty) Ltd v. Bezuidenhout and Others 1978

- (3) SA 981 (N) at 984B-E). A tacit relocation of an agreement is a new agreement and not a continuation of the old agreement (Fiat SA v. Kolbe Motors 1975
- (2) SA 129 (O) at 139D-E; Shell at 985B-C. The fact that the appellant had forgotten that the agreement had lapsed is beside the point because in determining whether a tacit contract was concluded a court has regard to the external manifestations and not the subjective workings of minds (Fiat SA at 138H- 139D).”

[28] In my view this dictum applies equally to the fact presently under consideration. The defendant at all times acted as if the Agreement was of full force

and effect. I need not rehash the facts that show this.

[29] In all the circumstances I find that the Agreement remained valid and enforceable.

[30] It remains for me to deal with the counterclaim. The defendant filed a counterclaim in terms whereof he claims repayment of all amounts paid by him to plaintiff. It is however common cause that the defendant is in no position to tender the return of what he received in terms of the Agreement. His tender in the pleadings is therefore meaningless.

[31] I therefore make the following order:

31.1. The Claim:

- (a) The plaintiff's claim succeeds;
- (b) The defendant is ordered to pay the plaintiff the sum of R574 625,24;
- (c) Interest on the aforesaid amount is to be paid at the rate of 15.5% per annum from 10 July 2008 to date of payment;
- (d) The defendant is ordered to pay the costs.

31.2. The Counterclaim:

The counterclaim is dismissed with costs.

TRAVERSO, AJP

1Section 114 of the Act: Consideration of applications (1) ... (2) The Board shall not grant such an application -

- (a) unless the prospective holder concerned - (i) ... (ii) is of good character and is otherwise fit to be the holder of the licence;

1Section 114 of the Act: Consideration of applications (1) ... (2) The Board shall not grant such an application -

- (a) unless the prospective holder concerned - (i) ... (ii) is of good character and is otherwise fit to be the holder of the licence;
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAWCHC/2013/32.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/coad-v-malan-unknown-topic-awchc-2013--6a3ea5193b1caa91298100f6>

Prepared on 10 October 2026 · Esheria