

SOUTH AFRICA / JUDGMENT

Thobejane v Vermeulen N.O and Others (CIV APP MB02/2021) [2021] ZANWHC 75 (4 November 2021) [2021] ZANWHC 75

COURT

North West High Court, Mafikeng

BEFORE

Mtembu, Hendricks

CASE / FILE NUMBER

CIV APP MB02/2021

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IN THE HIGH
COURT OF SOUTH AFRICA
NORTH WEST
PROVINCIAL DIVISION, MAHIKENG
Case
No.: CIV APP MB02/2021

Reportable: NO
Circulate
to Judges: NO
Circulate
to Magistrates: NO
Circulate
to Regional Magistrates: NO
In

the matter between:

ENVA
THOBEJANE
Appellant
And
N.
J VERMEULEN N.O
First Respondent
M
VERMEULEN N.O
Second Respondent
C
VERMEULEN
Third Respondent

Heard:

10 SEPTEMBER 2021
This
judgment was handed down electronically by circulation to the
parties' representatives by email. The date for hand-down is
deemed
to be 04 November 2021.
ORDER
WHEREFORE,

the following order is
made:

i.
The appeal succeeds with costs.
ii.
The order of the court a quo is set aside and replaced with
the
following order: 'The Respondents' actions are dismissed with costs'.

JUDGMENT

MTEMBU AJ

INTRODUCTION

[1] This appeal lies against the judgment and order of the Magistrate Court for the District of Naledi sitting in Vryburg. The Magistrate made an order that the appellant is liable to pay rental in the amount of R35,000 and R75,000 for the leased premises. Two different actions were instituted under case numbers 1085/18 and 1086/18. These

two actions were consolidated by agreement between the parties before the trial court. The appellant made an application for leave to appeal to this court, which was dully granted by the court a quo.

THE FACTS

- [2] The genesis of this appeal stems from the contractual dispute regarding lease agreements. The parties entered into a lease agreement in March 2017 for a period of five (5) years. The parties also entered into another lease agreement in December 2016. In terms of these lease agreements, the appellant leased both the front and the back of a property known as Nolla's Pub & Grill situated at shop No.2, Highway Centre, 34 Moffat street in the town of Vryburg.

This shop is divided into two sections. The front section is mainly used for selling of food, whereas the rear portion is used for selling alcohol. That was the primary purpose for the use of these leased premises. The rental for the front portion was R8000,00 per month payable on the first day of the month, whereas on the other section, the rental was R25,000,00 per month.

- [3] The liquor licence for this restaurant was suspended on 28 March 2018. The suspension of the liquor licence was as a result of non-compliance with sections 38, 39, 55 and 57 of the repealed Liquor Act 27 of 1989[1] which was applicable.
- [4] Christian Vermeulen, the third respondent, is the holder of the liquor licence. It is common cause that the third respondent failed to comply with the provisions of sections 38 and 39 of the Act. The

third respondent accepted that it was his responsibility to comply with the provisions of sections 38 and 39 of the Act. However, the respondents contended that the liquor licence was suspended due the appellant's failure to comply with the licence regulations in that he operated the business beyond the permitted hours and contravened the provisions of sections 55 and 57 of the Act.

- [5] It is common cause that the appellant could not conduct a business after the suspension of the liquor licence. Consequently, the appellant did not pay the rental after the suspension of the liquor licence.
- [6] As a result, the first and second respondents issued summons claiming the rental due in the amount of R32,000,00 for the months of April, May, June and July 2018. The third respondent claimed the rental in the amount of R75,000,00 for the same months as stated above, less the deposit of R25,000.00. The appellant acknowledged the two separate lease agreements but contended that for reasons unknown to him, on 28 March 2018, the trading liquor licence in respect of Nolla's Pub & Grill was suspended, As a result, he was unable to trade and was ordered to vacate.
- [7] The parties were unable to converge at the consensus, as a result, the matter was tried before the Magistrate.

- [8] During examination in chief, the following evidence emerged:

Counsel for the respondents: "Was the liquor licence suspended as a result of your doing? After hours operating it was the lessee, selling liquor after the licence was suspended, it was because of the lessee, yes. So, it was not because of your actions? Vermeulen: There was the first reason for the suspension, it was because of me and Enva the forms was not completed". (Sic).

Counsel: "Mr Du Tait, have you ever personally seen the defendant and or plaintiff contravening the liquor licence? Yes, Your worship. How? In the Liquor Act, there is section 39 and that says when the person rents the place that person should be appointed by the Liquor Board to sell liquor in that premises. I found the defendant there where he was selling without being appointed."

[9] In this appeal, the appellant contends that the two properties were leased for purposes of operating a pub and restaurant. The third respondent as the lessor, had a duty to ensure that the liquor licence was always compliant with the Act. The court a quo ought to have found that due the third respondent's non-compliance with his own obligations to submit an application form contemplated

in sections 38 and 39 of the Act, the appellant was unable to fully use and enjoy the leased premises as per the lease agreement.

LEGAL POSITION

[10] The essence of a contract of lease is that there must be a certain enjoyment or a certain use of a thing which the lessor undertakes to cause the lessee to have during the period agreed upon and it is actually that which constitutes the subject and substance of the contract and not the leased property itself. The lessor is under a duty to deliver the property in a condition reasonably fit for the purpose for which it was let. See: *Bahadur v Phillipson* 1956 (4) SA 638 (FS). See also: *Gateway Properties (Pty) Ltd v Bright Idea Projects* 249 CC and Another (AR353/13) [2014] ZAKZPHC 41; [2014] 3 All SA 577 (KZP) (1 July

2014) at para [24]

[11] This salutary approach was enunciated in *Thompson v Scholtz* [1998] ZASCA 87; 1999

(1) SA 232 (SCA) in which the Supreme Court of Appeal (SCA) had regard to the following:

"Where a lessee is deprived of or disturbed in the use or enjoyment of leased property to which he is entitled in terms of the lease, either in whole or in part, he can in appropriate circumstances be relieved of the obligation to pay rental, either in whole or in part; the Court may abate the rental due by him pro rata to his own reduced enjoyment of the merx. This is true not only where the interference with the lessee's enjoyment of the leased property is the result of vis major or casus fortuitus but also where it is due to the lessor's breach of contract, eg because the leased property is not fit for the purpose for which it was leased or, as in this case, because the performance rendered by the lessor is incomplete or partial. (See the cases cited by Piek and Klein (supra at 380 footnote 112).) The lessee would be entirely absolved from the obligation to pay rental if he were deprived of or did not receive any usage whatsoever. That would simply be a manifestation of the exceptio, more particularly of the first proposition in *BK Tooling* (cf *Fourie NO en 'n Ander v Potgietersrusse Stadsraad* 1987 (2) SA 921 (A))." [My Emphasis]

[12] Yekiso J in TH Restaurants (Pty) Ltd (Formerly TH Restaurants CC) v Rana Pazza (Pty) Ltd t/a Karoo Cattle & Land Eden on the Bay and Others (3321/12) [2012] ZAWCHC 70; 2012 (5) SA 378 (WCC) (8 June 2012) stated that:

"[29] In authorities such as Thompson v Scholtz [1998] ZASCA 87; 1999 (1) SA 232 (SCA) at 238 C-D, the defence of exception non adimpleti contractus is stated as a defence that is available to a party where the principle of reciprocity arises. It entitles the one party (the party from whom performance is demanded) to withhold such performance until the other party (the party demanding performance) has either rendered or tendered its own performance. It arises in circumstances where the performance and counter performance are so closely linked that the one was undertaken in return for the other. (See BK Tooling (Edms) Bpk v Scope Precision Engineering (Edm) Bpk 1971 (1) SA 391 (A) at 418)."

[13] The exceptio is available as a defence to a party ("the defendant") from whom performance is demanded by the other contracting party ("the plaintiff") whose own reciprocal performance has not been rendered precisely or in full; the exceptio accordingly applies even if the defect in the plaintiffs performance (short of being de minimis) is not so serious as to justify its rejection or the cancellation of the contract by the defendant. See: Thompson v Scholtz[2].

[14] The exceptio defence can only apply where the plaintiffs performance has to precede that of the defendant or where both parties have to perform simultaneously. A lessor of property must usually perform before rental may be demanded. See: BW Bright Water Way Props (Pty) Ltd v Eastern Cape Development Corporation

[2019] 4 All SA 27 (ECL) at [14]

ANALYSIS OF THE FACTS AND THE LAW

[15] As the respondents claiming specific performance in terms of the contract, they have to allege and prove the terms of the contract as well as compliance with any antecedent or reciprocal obligation to tender to perform it fully.[3]

[16] It is common cause that the liquor licence was suspended based on the following four reasons:

(i) failure to comply with provisions of section 38 of the Act by the third respondent; (ii) failure to comply with the provisions of section 39 of the Act by the third respondent; (iii) failure to comply with section 55 by the appellant; and (iv) failure to comply with the section 57 of the Act by the appellant.

[17] It is glaring that the third respondent had an obligation to comply with his own obligation but failed. In order to ensure that the appellant as a lessee was not deprived of or disturbed in the use or enjoyment of the leased property to which he was entitled in terms of the lease, either in whole or in part, the third respondent was required to ensure, in terms section 38 of the Act, as the holder of a licence that the appellant was permitted to procure a

controlling interest in the business to which the licence relates. In terms of this section, 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 chairman has, on application by the holder, granted consent that such a person may procure such an interest in that business.

[18] The third respondent was also required to ensure, in terms of section 39 of the Act, as the licence holder, that the appellant was appointed in the prescribed manner to manage and be responsible for the business. In terms of the provisions of section 39, a person other than a natural person shall not conduct any business under a licence unless a natural person who is not disqualified in terms of section 25 to hold a licence, is appointed by the licence holder. Quite correctly, the third respondent admitted that the suspension was as a result of his conduct in that he did not comply with the provisions of sections 38 and 39 of the Act. During examination in chief, the evidence is recorded as follows: "So, it was not because of your actions? Vermeulen: There was the first reason for the suspension. it was because of me and Enva the forms was not completed".(sic) [My Emphasis]

[19] The material evidence also reveals that the main reason for suspension was due to the fact that the appellant was not authorised to conduct a business in terms of section 39 of the Act. The Police Officer, Mr Du Toit, testified as follows: Counsel: "Mr Du Tait, have you ever personally seen the defendant and or plaintiff contravening the liquor licence? Yes, Your worship. How? In the Liquor Act, there is section 39 and that says when the person rents the place that person should be appointed by the Liquor Board to sell liquor in that premises. I found the defendant there where he was selling without being appointed".

This portion of evidence demonstrably confirms that the main reason for suspension was due to non-compliance with the Act by the

third respondent.

[20] In my view, non-compliance with the provisions of sections 38 and 39 would appear to be the main contributory factors for suspension of the liquor licence. As a matter of fact, the appellant was not even allowed to commence operating the business without compliance with the provisions of sections 38 and 39 of the Act. Hence, even the non-compliance with the provisions of sections 55 and 57 are still attributed to the licence holder. The contention that seeks to suggest that the main reason for suspension was due to the appellant's conduct in that he operated the business beyond permitted hours is without merit. In my view, whether the appellant operated the restaurant beyond permitted hours or not, such does not absolve the respondents from performing their obligations. It is conspicuously clear that compliance with the provisions of sections 38 and 39 by the respondent was peremptory and non-compliance thereof would lead to the suspension of the liquor licence, irrespective of compliance with the licence regulations by the appellant. In *BW Bright Water Way Props (Pty) Ltd v Eastern Cape Development Corporation*[4], the Court stated that the exceptio defence can only apply where the plaintiffs performance has to precede that of the defendant or where both parties have to perform simultaneously. A lessor of property must

usually perform before rental may be demanded.

[21] It is common cause that the third respondent failed to comply with his own obligations in terms of the Act. It is also common cause that the third respondent's obligations precede those of the appellant. Therefore, whether the appellant complied with his own obligations is neither here nor there under these circumstances. In fact, as already

stated above, he was not even permitted in terms of the provisions of sections 38 and 39 of the Act to commence operating the business.

This therefore means that at the time when he was operating the business, the leased property was not fit for the purpose for which

it was leased or the performance rendered by the lessor was incomplete or partial. The appellant would therefore be entitled to

withhold his performance until the respondents (the parties demanding performance) have either rendered or tendered their own performance.

In TH Restaurants (Pty) Ltd (Formerly TH Restaurants CC), supra, confirming the principle enunciated in *Thompson v Scholtz*, it was held that the defence of exception non adempti contractus is stated as a defence that is available to a party where the principle of reciprocity arises. It entitles the one party (the party from whom performance is demanded) to withhold such performance until the other party (the party demanding performance) has either rendered or tendered its own performance.

[22] Reduction of rental in this matter does not apply in my view. The respondents have not claimed it either. As a result of the suspension of liquor licence, the appellant was unable to use or enjoy the leased properties to which he was entitled in terms of the lease, either in whole or in part.

[23] I therefore find that the parties' obligations arising from the lease agreements concluded between the appellant and the respondents, based on the interpretation of the lease agreements, are reciprocal; that the appellant, in these proceedings, is entitled to invoke the defence of exceptio non adempti contractus. The court a quo erred when stating that the appellant never invoked it. The appellant's defence has always been clear in that he refused to pay rental on the basis that he was unable to use or enjoy the leased property to which he was entitled in terms of the lease agreements. For the reasons stated above, the learned Magistrate also erred in finding that there is no evidence that the respondents did not perform in terms of the agreement or prevented the appellant in any way of the use and to enjoy the premises for the purposes that it was leased for.

[24] What remains is the question of costs. The general rule is that costs must follow the result. Nothing emerges from this warranting a deviation from this principle.

[25] WHEREFORE, the following order is made:

- i. The appeal succeeds with costs.
- ii. The order of the court a quo is set aside and replaced with the following order: 'The Respondents' actions are dismissed with costs'.

A.M. MTEMBU

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

I agree

R.D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

10 SEPTEMBER 2021

DATE OF JUDGMENT

04 NOVEMBER 2021

COUNSEL FOR THE APPLICANT ADV O K CHWARO

INSTRUCTED BY.

MOTHABI & ASSOCIATES ATTORNEYS

FOR THE RESPONDENTS

DU PLESSIS-VIVIERS INC

[1]

38. (1) 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 chairman has, on application by the holder, granted consent that such a person may procure such an interest in that business. 39.

- (1) A person other than a natural person shall not conduct any business under a licence unless a natural person who is not

disqualified in terms of section 25 to hold a licence, is appointed by it in the prescribed manner to manage and be responsible for its business. (2) A natural person who is the holder of a licence may in the prescribed manner appoint another natural person who is not disqualified in terms of section 25 to hold a licence, to manage and be responsible for the business to which the first-mentioned licence

relates. (4)

- (a) A person managing and responsible for a business to which a licence relates, shall be subject to the same obligations and liabilities as the holder of the licence concerned. (b) Paragraph (a) shall not release the holder of a licence from any obligation or liability to which he is subject in law. 55. The holder of a restaurant liquor licence shall at all times maintain on the licensed premises a bona fide restaurant at which

meals are regularly supplied to guests. 57. The holder of a restaurant liquor licence may, notwithstanding any law to the contrary, sell his or her liquor between 10:00 on any day and 02:00 on the following day irrespective of whether any one of the days is a closed day or not, but may on a closed day only sell it to a person taking an ordinary meal purchased on the licensed premises and consuming the liquor at or immediately before or after the meal.

[1]

38. (1) 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 chairman has, on application by the holder, granted consent that such a person may procure such an interest in that business.

39.

- (1) A person other than a natural person shall not conduct any business under a licence unless a natural person who is not

disqualified in terms of section 25 to hold a licence, is appointed by it in the prescribed manner to manage and be responsible for its business.

- (2) A natural person who is the holder of a licence may in the prescribed manner appoint another natural person who is not disqualified in terms of section 25 to hold a licence, to manage and be responsible for the business to which the first-mentioned licence

relates.

(4)

- (a) A person managing and responsible for a business to which a licence relates, shall be subject to the same obligations and liabilities as the holder of the licence concerned. (b) Paragraph (a) shall not release the holder of a licence from any obligation or liability to which he is subject in law.

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[2] 1999 (1) SA 232 (SCA)

[3] Nkengana and another v Schnetler and another [2011] 1 All SA 272 (SCA); see also BW Bright Water Way Props (Pty) Ltd v Eastern Cape Development Corporation [2019] 4 All SA 27 (ECL) at para 9

[4] [2019] 4 ALL SA 27 (ECL) at 14

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