



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Slabbert N O & 3 Others v Ma-Afrika Hotels t/a Rivierbos Guest House (772/2021) [2022] ZASCA 152 (04 November 2022)

Today the Supreme Court of Appeal (SCA) handed down a judgment upholding, with costs, an appeal against the decision of the Western Cape Division of the High Court, Cape Town (the high court).

The issue before the SCA concerned a dispute of failure by Ma-Afrika Hotels (Pty) Ltd t/a Rivierbos Guest House (the respondent), to pay rental and related charges allegedly owing to the respondent, the Trustees of the Venezia Trust (the Trust), in terms of a lease agreement.

On 8 October 2018, the parties concluded a sale and leaseback agreement where the Trust purchased a certain erf in Stellenbosch (the property). The property was leased back to the respondent to enable it to conduct a business of a guesthouse. In addition to the leased premises, the respondent also traded in the hospitality industry from other premises. The lease agreement, which was envisaged in clause 18 of the Deed of Sale, was concluded on 12 February 2019. It was agreed that the lease would terminate ten years from the date of its commencement. In terms of the agreement, the permitted use of the property was as a guesthouse.

Following the Covid-19 pandemic, the President announced a national 'lockdown' which commenced on 26 March 2020 at 23h59. For that period, every person was confined to his or her place of residence except those performing an essential service, obtaining an essential good or service, collecting a social grant or seeking emergency, life-saving or chronic medical attention. Moreover, regulation 11B(1)(b) stipulated that all 'businesses and other entities shall cease operations during the lockdown, save for any business or entity involved in the manufacturing, supply, or provision of an essential good or service'.

Covid-19 regulations were amended from time to time and the Minister declared various 'alert' levels to manage the Covid-19 pandemic. On 22 February 2021, the Trust launched an urgent application against the respondent in the high court. Accordingly, the Trust essentially sought an order of ejection in terms of which the respondent would be evicted from the premises in which the guesthouse was conducted, coupled with an order of costs; as well as arrear rental, interest thereon and costs. The high court dismissed the application for eviction. As a result of this, it was placed before this Court as to whether the high court erred in dismissing the application for eviction.

The SCA held that it was trite that where the performance of an obligation by a party to an agreement became impossible after the conclusion of the agreement, through no fault of its own, that party was discharged from liability if it was prevented from performing its obligation by *vis major*. Moreover, the SCA held that the catastrophic effect of the Covid-19 pandemic on lives and livelihoods worldwide was indisputable, as this was attested to by various speeches made by the World Health Organisation. Hence, the SCA was not oblivious to that impact.

Relying on *Thompson v Scholtz*, the SCA agreed with the contention that where a lessee was deprived of or disturbed in the use or enjoyment of leased property to which he was 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.

In addition, the SCA held that it was of the view that the facts of this matter did not necessitate this Court to decide whether the Covid-19 regulations being applicable during the period 26 March 2020 to 20 September 2020 constituted a supervening impossibility that discharged the respondent from liability to pay the full amount of rental.

Moreover, the SCA held that applying the *Hansen* principle, it was evident that the period after 20 September 2020 was on a different footing, as there was no government-imposed bar to trading at that stage. Accordingly, it stood to reason that even if it were to be accepted in the respondent's favour that the Covid-19 regulations which prevented or restricted trade were behind the respondent's default in the payment of rental, there was no justification for such default beyond 20 September 2020 despite the diminished commercial ability that may have resulted from the Covid 19 pandemic. As the SCA saw it, the doctrine of impossibility of performance could not conceivably have been triggered beyond 20 September 2020.

Furthermore, the SCA held that it was unable to find any indication that the respondent's obligation to pay the rental was reciprocal to the obligation of the Trust to provide beneficial occupation of the entire premises. The SCA further held that this Court must also consider that the lease agreement was a triple net lease for commercial purposes, from which a business was conducted. Moreover, the considerations of fairness and good faith dictate that the hardships that the Trust had to endure due to non-payment of rent be taken into account.

Accordingly, sight could not be lost of the fact that due to the respondent defaulting on the regular payment of the rental, the Trust ended up having to service the repayments of the mortgage bond from a loan to avert foreclosure. Hence, the circumstances of this matter obliged this Court to apply the same principle applied in *Mohamed Leisure*. Against that background, the SCA held that a proper interpretation of the parties' lease agreement led to the ineluctable conclusion that the lease agreement was validly cancelled. More so, it followed that the Trust was entitled to evict the respondent from the leased premises. On that basis alone, the SCA held that the appeal ought to succeed.

In relation to the appeal, the SCA held that the ascertainment of the amount of remission of rental, if any, and its bearing on the amount of rent claimed are aspects that the high court will determine under Part B. The SCA agreed that the cross-appeal must succeed. In the SCA's view, the issues raised in the cross-appeal are not complex and therefore did not warrant the engagement of two counsel.

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