



SUPREME COURT OF APPEAL SOUTH AFRICA

MEDIA SUMMARY - JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 1 December 2017

STATUS Immediate

Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd (183/17) [2017] ZASCA 176

Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Today, the Supreme Court of Appeal upheld an appeal brought by the appellant, Mohamed's Leisure Holdings (Pty) Ltd, against the judgment of the Gauteng Local Division, Johannesburg (Van Oosten J) (court a quo). The issue at the centre of the appeal concerned the question whether the common law maxim *pacta sunt servanda* should be developed to infuse the law of contract with the Constitutional values of ubuntu, fairness and good faith.

The appeal stemmed from the following factual background. On or about 1 November 2001, the appellant concluded a written lease agreement with the respondent, Southern Sun Hotel Interests (Pty) Ltd, as the lessee in respect of immovable property known as Remaining Extent of Erf 13164. In terms of the lease agreement, the respondent shall make monthly provisional rent payments to the appellant by not later than the 7th day of each month. During the period of the lease, the respondent maintained regular and prompt payment of the rental in terms of the agreement. However, in June 2014 the respondent failed to make payment on the 7th, as stipulated in the agreement. On 20 June 2014 when payment was not forthcoming, the appellant wrote a letter to the respondent and afforded it a period of five days within which to remedy the breach. In that letter the appellant pertinently warned the respondent that should it fail to pay rent on due date in the future, no notice to remedy the breach would be given and the agreement will be cancelled forthwith and the respondent will be required to vacate the premises with immediate effect. Thereafter, the breach was remedied by the respondent.

During the month of October, the rental was debited from the respondent's account on 6 October 2014. However, on 7 October 2014, the respondent's bank omitted to transfer the rental amount due to the appellant. As a result of this breach, the appellant's attorneys addressed a notice of cancellation of the lease agreement to the respondent on 20 October 2014 and afforded it until 31

October 2014 to vacate the premises. As a result, the appellant approached the court a quo seeking an eviction order on the basis that the respondent was in breach of the lease agreement by failing to make rental payment on due date.

In the court a quo, it was held that the appellant was entitled to cancel the lease agreement on the ground of non-payment of the October rental on due date and that in itself triggered the right to be restored into possession of the leased property. However, it declined to grant an order for eviction. It reasoned that the implementation of the cancellation clause would be manifestly unreasonable, unfair and offend public policy. In doing so it concluded that the common law principle, *pacta servanda sunt*, should be developed by importing or infusing the principles of ubuntu and fairness in the law of contract.

On appeal, the SCA held that the fact that a term in a contract is unfair or may operate harshly does not by itself lead to the conclusion that it offends the values of the Constitution or is against public policy. In some instances the constitutional values of equality and dignity may prove to be decisive where the issue of the party's relative power is an issue. There is no evidence that the respondent's constitutional rights to dignity and equality were infringed. It was therefore impermissible for the court a quo to develop the common law of contract by infusing the spirit of ubuntu and good faith so as to invalidate the term or clause in question. It further reasoned that it would be untenable to relax the maxim *pacta sunt servanda* in this case because that would be tantamount to the court then making the agreement for the parties.

As a result, the appeal was upheld with costs.