THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1060/2015

In the matter between:

LOUISTEF (PTY) LTD **APPELLANT**

and

CWA SNYDERS NO AS TRUSTEE OF:

LOUIS SNYDERS FAMILIE TRUST **FIRST RESPONDENT**

THE CONTROLLER OF PETROLEUM PRODUCTS **SECOND RESPONDENT**

MACROBERT INCORPORATED **THIRD RESPONDENT**

Neutral citation: *Louistef v Snyders NO* [2016] ZASCA 182 (29 November 2016)

Coram: Lewis, Pillay, Zondi and Mocumie JJA and Fourie AJA

Heard: 14 November 2016

Delivered: 29 November 2016

Summary: Petroleum Products Act 120 of 1977: sale of site licence issued in terms of s 2D of the Act: whether site licence constituted a merchantable merx: held to be a valid agreement of sale.

ORDER

On appeal from: Gauteng Division of the High Court of South Africa, Pretoria (Janse van Nieuwenhuizen J sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and the following substituted therefor:

'(a) The application is dismissed with costs.

(b) The counter-application succeeds with costs.

(c) It is declared that the agreement of 26 March 2014 was legally and validly concluded between the applicant and the first respondent and is not null and void.

(d) The applicant is ordered to pay the first respondent the amount of R1 million plus R140 000 VAT against delivery of a valid tax invoice.'

JUDGMENT

Fourie AJA (Lewis, Pillay, Zondi and Mocumie JJA concurring):

[1] This appeal concerns the validity of a written agreement of sale (the agreement) in terms of which the appellant, Louistef (Pty) Ltd (Louistef), sold a site licence issued to it in terms of the provisions of the Petroleum Products Act 120 of 1977 (the Act), to the respondent, the Louis Snyders Familie Trust (the trust), for a purchase consideration of R1 million.

[2] The trust subsequently took the view that the agreement was invalid and unenforceable and launched application proceedings in the Gauteng Division of the High Court, Pretoria, seeking a declaratory order to that effect. Louistef, on the other hand, maintained that the agreement was valid and binding and as it had complied with all its obligations thereunder, it opposed the application and sought, by means of a counter-application, payment of the purchase price of R1 million.

[3] In the event, the matter was heard by Janse van Nieuwenhuizen J, who upheld the trust's application with costs and granted the declaratory order. The counter-application was dismissed with costs. Louistef now appeals the whole of the judgment and orders of the court a quo, which appeal is with the leave of that court. The second respondent, the Controller of Petroleum Products contemplated in s 3(1) of the Act (the Controller), and the third respondent, MacRobert Incorporated, the former attorneys of the trust, were cited as parties, but they abided the decision of the court a quo and have not participated in this appeal.

[4] The background facts giving rise to the litigation are largely common cause: The trust is the registered owner of certain immovable property situated at Brits, North West Province (the site), which Louistef had hired from the trust since 1991. Louistef conducted a Toyota motor vehicle dealership at the site which included, inter alia, a fuel filling station. The lease had been renewed from time to time, finally until 31 May 2014. With effect from 17 March 2006, the Petroleum Products Amendment Act 58 of 2003 (the Amendment Act) introduced a new dispensation regarding the licencing of retail activities concerning petroleum products. The relevant statutory provisions will be discussed in more detail hereunder, but for present purposes it would suffice to record that on 9 October 2008, a 'site licence' and a 'retail licence' were issued to Louistef in terms of the Act, as amended, authorising it to retail prescribed petroleum products at the site. Louistef continued to conduct the business of a filling station at the site under the new dispensation until 15 May 2014.

[5] During November 2013, MacRobert Incorporated, on behalf of the trust, commenced negotiations with Louistef with a view to obtaining the transfer of the site licence held by Louistef, to enable the trust to apply for a retail licence authorising it to conduct the business of a filling station at the site. These negotiations culminated in the conclusion of the agreement on 26 March 2014, which provided for the sale of Louistef's site licence to the trust for a purchase price of R1 million. Louistef took the necessary steps to effect the transfer of the site licence, with the result that, on 14 May 2014, the Controller issued a site licence in the name of the trust. When Louistef ceased to conduct the business of a filling station at the site on 15 May 2014, the trust set in motion the process to acquire a retail licence to enable it or its

nominee to retail petroleum products at the site. However, on 26 June 2014, the trust's present attorneys addressed a letter to Louistef stating that the agreement was 'invalid and unlawful'. The letter recorded that the trust objected to the payment of the agreed purchase price which had by then been deposited into the trust account of MacRobert Incorporated.

[6] It is rather difficult to discern the trust's cause of action from the affidavits filed and the submissions made on its behalf. Shorn of unnecessary verbiage, it appears that its case was based on common mistake, namely that both of the parties mistakenly believed that the res vendita, ie the site licence, constituted a merchantable merx, whilst this was not the case. This mistake rendered the agreement impossible of performance, with the result that it was void ab initio.

[7] In adjudicating upon the validity of the agreement, it is necessary to first have regard to the relevant provisions of the Act, as amended. The Act initially did not, apart from price regulation, prescribe any method of control over the retailing of petroleum products in South Africa. However, the amended Act now provides for, inter alia, the issuing of licences by the Controller to persons involved in the manufacturing and sale of certain prescribed petroleum products. 'Regulations Regarding Petroleum Products Site and Retail Licences, GN R286, *GG* 28665, 27 March 2006' (the regulations) were simultaneously promulgated under the Act, prescribing, inter alia, the procedures to be followed for the obtaining of licences. Of particular importance in this appeal are the newly created categories of a 'site licence' and a 'retail licence'.

[8] Section 1 of the Act defines a 'site' as 'premises on land zoned and approved by a competent authority for the retailing of prescribed petroleum products'. A 'site licence' is not defined in the Act, but the regulations define it as 'a licence issued to a person who holds land or has permission from the owner of the land to develop a site for the purpose of retailing petroleum products'. A retail licence in terms of the Act is defined as a licence to conduct the business of a retailer, namely, the sale of petroleum products to an end-consumer at a site. It is important to note that a site licence and a retail licence are interlinked – a site licence application may only be accepted by the Controller where a corresponding valid retail licence application has

been lodged for that site (regulations 5(1) and 15(4)), and a site licence remains valid for so long as there is a corresponding valid retail licence and the licenced activity (a filling station in this instance) remains a going concern (s 2B(3)*(b)* and *(c)* of the Act, read with regulation 30(1)*(c)*).

[9] Any person who wishes to apply for a site licence has to do so in terms of s 2A(4) of the Act, read with regulation 13(1). Such a person has to be the owner of the relevant land or someone who has the written permission of the owner of the land. A person who wishes to apply for a retail licence, in terms of s 2A of the Act, read with regulation 15, has to be the owner of the business concerned.

[10] Section 2D of the Act, however, contains transitional licencing provisions which provide that any person who, at the time of the commencement of the Amendment Act holds and is in the process of developing a site or retails prescribed petroleum products, shall be deemed to be the holder of a licence for that activity, on condition that an application is made within six months for a site or retail licence, as the case may be. Section 2D(1) provides that, for purposes of this section, 'hold' means to own or lease land. As recorded above, Louistef as the lessee who had been conducting the business of a filling station at the site, made application for the necessary site and retail licences in terms of s 2D of the Act and both licences were issued to it on 9 October 2008. Therefore, at the time of the conclusion of the agreement, Louistef was the lawful holder of a site licence in respect of the site, as well as a retail licence entitling it to conduct the business of a filling station at the site.

[11] There is a significant difference between the requirements that an applicant has to meet when applying for a site licence in terms of s 2A of the Act, and those that govern the application for a site licence in terms of the transitional provisions of s 2D of the Act. In the case of the former, more onerous requirements are prescribed by the regulations, including, inter alia, the following:

(a) The submission of an environmental management plan and proof that financial provision has been made for the rehabilitation of the site upon cessation of the retailing activities (regulations 14*(b)*(i) and (ii)).

(b) The obtaining of a record of decision of the environmental authorities permitting retailing operations on the site (regulation 13(1)*(d)*(ii)).
(c) Proof that proper notice by way of publication was given for public participation purposes (regulation 4).
(d) Proof that there is a need for the site and that the site will promote the licensing objectives stipulated in s 2B(2) of the Act. These include objectives such as promoting an efficient petroleum industry, facilitating an environment conducive to efficient and commercially justifiable investment, creating employment opportunities, ensuring countrywide availability of petroleum products at competitive prices and promoting access to affordable petroleum products by low-income consumers.

[12] On the other hand, the requirements for a site licence under the transitional licencing provisions of s 2D of the Act, are substantially less. The mere production of formal documentation such as the relevant lease agreement and documents of identification, as well as declarations regarding the retailing operations conducted on the site, are required (regulation 13(2)).

[13] The regulations also deal with the transfer of licences. Regulation 22(7) states that a retail licence is not transferable. A site licence, however, is freely transferable and regulation 12 deals, inter alia, with the transfer of a site licence which had been issued in terms of s 2D of the Act. As recorded above, this is the section of the Act in terms of which the site licence was issued to Louistef on 9 October 2008. Regulation 12(3)*(a)* requires the lodging of an application for transfer of a s 2D site licence within six months 'of change of ownership or lease'. In such event the site licence has to be transferred to the new owner or new lessee, as the case may be.

[14] What is envisaged by regulation 12, read with regulation 15(4), is the continuation of the licenced retail activity at the site pending the transfer of the site licence within six months of the new owner or lessee taking ownership or possession of the site. For the site licence to be transferred it obviously has to be extant. Had the agreement providing for the transfer of Louistef's site licence to the trust not been concluded, the site licence would have expired upon the termination of Louistef's lease or any earlier termination of the filling station business. In such event the trust would have been obliged to apply de novo for a site licence in terms of s 2A of the

Act. The trust would then have been obliged to comply with the more onerous requirements referred to in para 11 above. As pointed out by Louistef, this would not only have been the more onerous route to take, but the trust would then also run the risk of its application being refused.

[15] Counsel for the trust submitted that the site licence did not constitute a merchantable merx as it only creates legal rights in favour of a land owner. Therefore, the submission continued, a site licence is inseparable from the land and as the trust was at all relevant times the owner of the site, Louistef derived no legal rights from its site licence. In view of this, the site licence could not have constituted a valid res vendita for purposes of the agreement of sale, thereby rendering the agreement void ab initio.

[16] There is no merit in this submission. It is clear from the above provisions of the Act that the site licence confers a personal right upon the holder thereof which entitles the holder to enter the site and to prepare it for the purpose of retailing petroleum products at the site, upon the granting of a retail licence. There is certainly no room for the conclusion that the site licence confers rights upon the land owner only and not the holder of the licence. The granting of a site licence constitutes a *delectus personae* whereby the applicant for the licence is personally granted the right to exploit the site for the purpose of retailing petroleum products upon the granting of a retail licence.

[17] A site licence bears a close similarity to a liquor licence as to which this court said in *Aquatur (Pty) Ltd v Sacks & others* 1989 (1) SA 56 (A) at 64H-I:

‘A liquor licence, it has been stated in decisions of this court, is a purely personal statutory privilege granted to a particular person under the liquor laws to sell liquor at particular premises. Its grant involves the exercise by the licencing authorities of a delectus personae so that the licensee cannot transfer or otherwise deal with the licence unless authorised thereto in terms of the Act, which provides for the strict supervision of the grant, transfer and removal of licences.’

[18] Louistef as the licensee was the person to whom the privileges attaching to the site licence had been granted. The site licence had a commercial value, not only

to Louistef, but also to the trust, particularly as the transfer thereof resulted in the trust not having to follow the more onerous and risky route of an application for a site licence in terms of s 2A of the Act. Therefore the site licence constituted a merchantable merx, which is described in G Glover *Kerr's Law of Sale and Lease* 4 ed (2014) at 36 as:

'The thing [merx] may be movable or immovable, corporeal or incorporeal. It must be capable of being the subject matter of a private legal transaction (in other words, it must not be a *res extra commercium*).'

[19] It follows, in my view, that the site licence was an asset of Louistef, which it could sell and transfer with the consent of the Controller. In this regard too it is apposite to compare it with a liquor licence, of which the following remarks of Van Zyl JP (Jones J concurring) in *Solomon v Registrar of Deeds* 1944 CPD 319 at 325, were approved by this court in *Slims (Pty) Ltd & another v Morris NO* 1988 (1) SA 715 (A) at 724J-725A and 737E-G:

'[A] liquor licence is not merely a privilege but is a right which has a potential commercial value which may sometimes be very considerable. And it is a right which is alienable and can be sold.'

[20] In *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape & others* [2015] ZACC 23; 2015 (6) SA 125 (CC), the main judgment of the court held that a grocer's wine licence is 'property' for purposes of s 25(1) of the Constitution. Madlanga J (albeit in a judgment dissenting on a different issue) put it as follows (para 143):

'By comparison, the grocer's wine licence is something in hand: it grants the holder an entitlement to sell wine under certain specified circumstances . . . also, a grocer's wine licence holds objective commercial value: its very raison d'être is to trade in accordance with its conditions. The licence is transferable, albeit subject to that being sanctioned by the authorities. As an item with objective economic value, the transfer may even be for a valuable consideration . . . All these point to the grocer's wine licence being property for purposes of s 25(1).'

In my view, the same holds true mutatis mutandis for a site licence issued under the Act.

[21] For all the above reasons, and particularly in view of the finding that the site licence constituted a merchantable merx, it follows that the parties did not labour under any mistake at the time of the conclusion of the agreement. The agreement is accordingly valid and enforceable. Therefore, the appeal should succeed.

[22] In the result, the following order is made:

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and the following substituted therefor:

‘(a) The application is dismissed with costs.

(b) The counter-application succeeds with costs.

(c) It is declared that the agreement of 26 March 2014 was legally and validly concluded between the applicant and the first respondent and is not null and void.

(d) The applicant is ordered to pay the first respondent the amount of R1 million plus R140 000 VAT against delivery of a valid tax invoice.’

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P B Fourie

Acting Judge of Appeal

APPEARANCES:

Counsel for Appellant:	J H Dreyer SC
	Instructed by:
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