



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 311/16

In the matter between:

**C W A SNYDERS N.O. AS TRUSTEE OF:
THE LOUIS SNYDERS FAMILIE TRUST**

Applicant

and

LOUISTEF (PTY) LTD

First Respondent

THE CONTROLLER OF PETROLEUM PRODUCTS

Second Respondent

Neutral citation: *C W A Snyders NO as Trustee of the Louis Snyders Familie Trust v Louistef (Pty) Ltd and Another* [2017] ZACC 28

Coram: Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojaelo AJ, Pretorius AJ and Zondo J

Judgment: The Court

Decided on: 3 August 2017

Summary: Petroleum Products Amendment Act 58 of 2003 — legal nature of site licences under section 2D — licence is asset, but subject to constraint

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the Gauteng Division of the High Court of South Africa, Pretoria from Nieuwenhuizen J):

The following order is made:

1. The application for leave to appeal is dismissed with costs.

JUDGMENT

THE COURT (Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J):

Background

[1] This is an application for leave to appeal against the decision by the Supreme Court of Appeal to reverse the order by the High Court¹ declaring null and void the sale of a site licence issued under the Petroleum Products Amendment Act² (PPA). The Supreme Court of Appeal upheld the appeal, holding that the sale was valid and ordered the applicant to pay the respondent the purchase price of R1 000 000 plus R140 000 VAT against delivery of a valid tax invoice.³

[2] The applicant (Trust) is the owner of immovable property in Brits, which had been let to the first respondent (lessee) since 1991. The lessee conducted a motor dealership and a fuel filling station on the property. With the introduction of the PPA in 2003 the lessee acquired a “site licence” for the property as well as a “retail licence” in terms of its transitional provisions. The two are interlinked: petroleum products may be retailed or sold from a particular property only if the property is licensed as premises

¹ *Snyders NO v Louistef (Pty) Ltd* 2016 (1) SA 123 (GP).

² 58 of 2003.

³ *Louistef (Pty) Ltd v Snyders* [2016] ZASCA 182; 2016 JDR 2225 (SCA).

from which it can be done, and the retailing may be done only by someone with a retail licence to do so.

[3] The PPA created a new dispensation which envisages that only owners of property (or in the case of public land, those holding the land with permission) may acquire and hold site licences, but the link with retail licences remains to the extent that the one cannot be acquired without the other, even though the retail licence may be acquired by someone other than the owner of the property.

[4] The PPA also contains a section dealing with “transitional licensing provisions”:

“(1) For the purposes of this section—

‘hold’ means to own or lease land, or to possess an option to purchase or lease land, that has been zoned and approved by appropriate authorities for use as a site; and

‘process of developing’ means the construction of, or the completion of the infrastructure necessary to use such land as a site within a period of 12 months from the date of commencement of the Petroleum Products Amendment Act, 2003.

(2) Any person who, at the time of commencement of the Petroleum Products Amendment Act, 2003—

(a) holds and is in the process of developing a site; or

(b) manufactures or wholesales petroleum products, or retails prescribed petroleum products;

shall, subject to subsection (3), be deemed to be the holder of a licence for that activity.”⁴

[5] The lessee acquired the site and retail licences in terms of these transitional provisions. The lease agreement was to terminate at the end of April 2014, but it appears that it was extended to 31 May 2014. The Trust wished to continue the filling station business and on 26 March 2014 the parties agreed to a sale of the site licence, held by the lessee, to the owner, the Trust, in order to acquire a retail licence for running the

⁴ Section 2D of the PPA.

filling station. The price was R1 000 000. This was done on the advice of the Trust's then-attorneys that the sale was necessary for it to obtain the site licence. The site licence was in due course issued to the Trust.

[6] On 26 June 2015 the Trust's current attorneys asserted that the sale agreement was invalid and instituted proceedings for it to be declared so. The lessee countered with a counter-application seeking confirmation of the validity and payment of the R1 000 000. As stated above, the High Court found in favour of the Trust, but the Supreme Court of Appeal reversed that, ordering the Trust to pay the R1 000 000.

[7] The regulations under the Act allow for transfers of site licences,⁵ but not for retail licences.⁶ Regulation 12 reads in relevant part:

“(2) In the case of a licence issued to a person in respect of whom section 2D of the Act is applicable, the site licence issued to—

- (a) a land owner, must be transferred to the new owner of that land; or
- (b) a lessee, must be transferred to the new lessee or to the new owner of that land.

(3) The site licence transfer contemplated in subregulation (2) must be subject to—

- (a) the lodging of an application therefor within six months of change of ownership or lease;
- (b) the payment of the relevant site licence fee determined in Annexure B into the relevant regional bank account; and
- (c) the provision of a certified copy of the title deed or of the deed of transfer or of the lease agreement, to the Controller.”

[8] It appears that a site licence issued to a lessee may be transferred only to a new lessee or a new owner. The High Court held that this was a *casus omissus* (omitted eventuality) that entitled the Court to fill the gap, which it did, concluding that in view of this the lessee had a statutory obligation to transfer the site licence without

⁵ Regulations regarding petroleum products site and retail licences GN 286 GG 28665, 27 March 2006. See especially regulation 12, which provides for transfers of site licences.

⁶ Id. See especially regulation 22(7), which prohibits transfers of retail licences.

any payment to the Trust. The implication of this was that the lessee had nothing to sell to the Trust and hence the sale was null and void.

[9] The Supreme Court of Appeal disagreed. It held that the site licence had a commercial value and that the parties did not labour under any mistake at the time of the conclusion of the agreement. The sale was thus valid and the Trust was ordered to pay the R1 000 000 plus R140 000 VAT against delivery of a valid tax invoice.⁷

[10] This Court issued directions for written argument, and both the Applicant and First Respondent filed submissions. The matter was not set down for oral hearing.⁸

[11] The parties advance directly opposing viewpoints about the legal nature of the site licence. The Trust argues that it attaches to the land as part of the content of ownership of the land, whilst the lessee contends the opposite, namely that it forms part of its assets, with value, and is thus capable of being sold.

[12] The new dispensation under the PPA appears to be based on site licences being issued only to owners of property. The transitional provisions, however, allowed lessees who were operating as site licence holders to continue doing so and, in addition, to transfer these site licences to new lessees and new owners during the existence of the lease in terms of which it held the site licence. This exceptional entitlement is in line with the overall eventual scheme that site licences should be issued only to owners. When the lease of a new lessee expires, the site licence can then be acquired only by an owner. There is no *casus omissus*. Existing owners may, in the absence of a lessee holding the site licence under the transitional provisions, in their own right apply for site licences.

⁷ *Louistef* above n 3 at para 22.

⁸ See Rule 19(6) of the Rules of this Court.

[13] The lessee's entitlement to transfer the site licence is indeed an asset with commercial value, but it is subject to two constraints: (i) it is transferable only to new lessees or new owners and (ii) it cannot survive the termination of the lease period. Accordingly the High Court erred in "filling the gap" of a *casus omissus* that did not exist, as well as finding that the transfer provisions in regulation 12(2) did not allow for a transfer by sale. The Supreme Court of Appeal was correct that the site licence had a commercial value, but it may have failed to appreciate that it existed only for a limited time, and then maybe only against new lessees and new owners.

[14] The Trust's point, though it ultimately fails, is reasonably arguable. Reasonable prospects of success thus exist, but that is not in itself sufficient to grant leave. The ultimate determinant is the interests of justice.⁹ Here, there are a number of factors counting against a finding that it is in the interests of justice to grant leave. On an acceptance of the legal position set out in the previous paragraph, no deprivation of property is involved in the application of the PPA. The constitutional angle that the Trust rather belatedly sought to attach to the application is without merit.

[15] Nor does it support the Trust's further contention that the site licence somehow adhered to its property and was transferred to it without any further application of its own for a site licence in terms of the PPA, with its attendant costs. The Trust has had the benefit of the transfer to it of the site licence and apparently continues to have a right to operate on the premises in terms of it. It appears to want to have its cake and to eat it. It is not in the interests of justice, in the particular and exceptional circumstances of this case to grant leave.

Order

[16] The application for leave to appeal is dismissed with costs.

⁹ Sections 172(b) and 173 of the Constitution.

For the Applicant:

B Savvas instructed by Venn & Muller
Attorneys

For the First Respondent:

I Hattingh of Langenhoven Pistorius and
Partners Inc