**IN THE HIGH COURT OF SOUTH AFRICA,**

**FREE STATE DIVISION, BLOEMFONTEIN**

| | |
|---|---|
| **Reportable:** | **YES/NO** |
| **Of Interest to other Judges:** | **YES/NO** |
| **Circulate to Magistrates:** | **YES/NO** |

Case number: 1375/2020

In the matter between:

**JOHANNES ANDRIES COMBRINK N.O.** 1st Plaintiff

**JOHANNES JOCHEMUS COMBRINK N.O.** 2nd Plaintiff

**JAN LODEWYK VOSLOO N.O.** 3rd Plaintiff

and

**WALSUN MOTORDIENSTE CC** Defendant

---

**JUDGMENT BY:** MHLAMBI J,

---

**HEARD ON:** 24 August 2021, 27 September 2021

---

**DELIEVERED ON:** 11 NOVEMBER 2021

---

**MHLAMBI, J**

Introduction

[1] The plaintiffs are the representatives and the trustees of the Joe Combrink Trust which entered into a written lease agreement with the defendant in terms

of which the defendant leased the trust property, a filling and service station situated at the corner of 3rd Street, Koppies for a period of five years commencing on 1 September 2014. The third party to the agreement was the E10 Petroleum Africa CC, a supplier of petroleum products whose task was to supply the parties with an accurate monthly reconciliation of the total litres of fuel sold which determined the rent payable. The initial rent was payable at the end of October 2014 and was fixed at 30 cents per litre of the monthly sales.

[2] It was a term of the agreement that the defendant would obtain and maintain a retail licence in respect of the business on the property while the trust was responsible for the site licence.

[3] It is this agreement that the plaintiffs seek to cancel and an order for the ejectment of the defendant from the premises on the basis that the defendant repudiated the agreement by failing to obtain a retail licence issued in its name. The plaintiffs alleged to have cancelled the agreement on or about 14 October 2019, alternatively cancelled it with the issue of the summons.

[4] The defendant acknowledged and admitted the lease agreement but raised four defences in resistance of the claims. It was pleaded in the first defence that, as at the time of contracting, the first plaintiff informed Mr Pierre du Preez, the sole member of the defendant, that it was not necessary for him to apply for a retail licence as he could use the retail licence issued to Shakira Trading 5 CC and was provided with a copy thereof. The said licence was issued on 12 December 2008 to the said close corporation and related to the premises. The defendant proceeded to retail petroleum products in terms of the said licence. The first plaintiff and the defendant conspired to circumvent the provisions of the Petroleum Products Act 120 of 1977. The trust, as represented by the first plaintiff, was therefore in *in par delictum* and barred from cancelling the lease agreement as a result of the defendant's failure to obtain a retail licence in terms of the relevant Act. Given these circumstances, the second defence was

that the first plaintiff could not rely on a breach of the agreement based on the failure by the defendant to obtain a retail licence as required by the agreement.

[5] The third defence was that the licence issued to Shakira Trading 5 CC was controlled by the first plaintiff's sister who refused to consent to the cancellation of the said retail licence to enable the authorities to issue a fresh licence as two licences could not be issued for the same premises. It was concluded that the first plaintiff prevented the defendant from obtaining a retail licence as he insisted that his sister did not consent to the cancellation of the current licence over the premises.

[6] The last defence was that the defendant did not cancel the lease agreement as such right was reserved in his favour as the trust was not entitled to cancel the lease agreement should the defendant fail to obtain such retail licence.

[7] Retail in terms of the Act[1] means the sale of petroleum products to an end-consumer at a site and a retailer shall be interpreted accordingly. A retail licence means a licence to conduct the business of a retailer. A site means premises on land zoned and approved by a competent authority for the retailing of prescribed petroleum products. Section 2 of the same Act provides that a person may not retail prescribed petroleum products without an applicable retail licence issued by the controller of petroleum products. In terms of the regulations to the Petroleum Products Act, a retail licence issued in terms of the Act, is not transferrable.[2]

[1] S1 of the Petroleum Products Act 120/1977.
[2] Regulations to the Act.

[8] The defendant in its denial that the agreement has been terminated, pleaded that it renewed the lease agreement for the five-year period starting on 1 October 2019 and that it had the right to occupy the premises. The plaintiffs did not have any right or basis upon which they could cancel the agreement.

[9] In his oral testimony, Mr Pierre du Preez stated that he did not go through the whole agreement but certain parts of it. The plaintiffs gave him their licence and told him to trade with it. The first plaintiff never told him to get his own retail licence or that the defendant should never trade on the plaintiffs' retail licence. He was, however, aware of the clause in the lease agreement that he should obtain his own retail licence. On being pressed under cross-examination why, despite his knowledge of this particular clause, did he sign the lease agreement, his reply was that he did not have an answer.

[10] During March 2018, he received a letter from the plaintiffs' attorneys in which he was required to furnish the plaintiffs with a copy of his retail licence within three days. On his instructions, his attorneys responded to the letter and advised that he did not object to apply for his own licence and was willing to do so. The only problem was that the plaintiffs would have to apply for a fresh licence when the lease agreement came to an end. Mr Du Preez testified that he did not know why he did not take further

steps to obtain the retail licence. He rented a third filling station and knew that in terms of the contract and the law, he should have followed the same process with Jostas filling station, the business conducted on the plaintiffs' property.

[11] On 31 October 2019, the plaintiffs' attorneys addressed a letter to the defendant cancelling the lease agreement signed during 2014 on the basis that the defendant failed to obtain the retail licence to conduct the retail business on the premises. Consequently, the plaintiffs rejected the defendant's renewal notice of the lease and regarded the lease agreement as cancelled. The defendant was given fourteen within which to vacate the premises. In response, the defendant made known through its attorneys that the defendant relied on the agreement that allowed him to use the plaintiffs' licence. Should legal steps be taken against it, an application would be made for the rectification of the lease agreement. Besides, the first applicant made the defendant's attempts at obtaining the requisite licence difficult by influencing his sister to refuse to consent to the cancellation of her agreement.

[12] In the heads of argument, it was submitted that the behaviour of the plaintiffs with regard to the defendant's failure to obtain the retail licence, is clearly indicative of the plaintiffs' election not to cancel. The plaintiffs' continued acceptance of the rental for a period of three years and their

failure to take action for the defendant's alleged breach was a definite indication of a failure to cancel the agreement. A party cannot reprobate and approbate. Once the election to abide by the contract has been made, the plaintiffs can neither insist on the cancellation of the agreement nor the eviction of the defendant. This behaviour by the plaintiffs, it was submitted, supported the defendant's defence of the existence of a verbal agreement relating to the use of the Shakira licence.

[13] Relying on *Burger v Central South African Railways*[3] the applicant submitted in its heads of argument that it is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature. It was clear from the written agreement between the parties that Defendant was to obtain the necessary retail licence to enable it to conduct business as such at Jostas Filling Station. What was important was that on the evidence of Mr Du Preez himself, the defendant has up to date failed to comply with its obligations as far as the obtaining of a retail licence in his name is concerned. In terms of Section 2A of the Petroleum Products Act 120 of 1977, a person may not retail prescribed petroleum products without an applicable retail licence. Section 2A(4) provides further that any person who has to apply for a licence in terms of subsection (1) must, in the case of retail and wholesale licences be the owner of the business concerned.

[3] 1903 TS 571.

[14] The defence of impossibility, it was submitted, should fail as the defendant attempted for the first time to take steps to obtain a retail licence only three months after the action was instituted in the Koppies Magistrates Court after the alleged refusal by the First Plaintiff and/or Second Plaintiff and/or Ms Van Zyl to co-operate in obtaining such licence. There was no correspondence from either the Defendant itself nor its attorney acting on its behalf to compel Plaintiffs to co-operate in this regard.

[15] It was submitted further that Mr Du Preez could not provide any plausible explanation why, since the conclusion of the agreement and more in particular after the first action was instituted in the Koppies Magistrates Court, no steps were taken to compel the Trust to make it possible for the Defendant to obtain a retail licence. It is in this regard also significant that not in the Magistrates Court action nor in the present action, a counterclaim was instituted to compel the Trust as represented by its trustees in the action, to take such steps. I agree with these submissions.

[16] In his own oral testimony, Mr Du Preez stated that he knew that he had to obtain a retail licence to conduct the business on the premises. He failed to do so and did not know why he did not take steps to obtain such retail licence. As a person who manages three fuel filling stations, this concession is telling and nullifies the effect of all the defences he raised. It also militates against the allegation of a conspiracy to circumvent the provisions of the Act. He cannot say that he did not know why he did not take steps to obtain the retail licence

when his case was that the first plaintiff informed him that it was not necessary for the defendant to apply for such a retail licence and could use the Shakira retail licence.

[17] To add fuel to the fire, his attorneys addressed a letter to the plaintiffs' attorneys dated 20 April 2017, in which it was stated that he relied on the non-variation clause contained in paragraph 17 of the lease agreement. In this letter, he denied the existence of any oral and implied terms and maintained that the written lease agreement was the only contract between the parties. The question that arises is why did he not at this stage, when he endorsed the non-variation clause, obtain the retail licence. Instead, he chose to remain inactive until a demand was made on 17 March 2018 to produce the retail licence. Notwithstanding such demand and the subsequent legal action in the Magistrate's court for cancellation of the agreement, he still failed to take the necessary steps to apply for the licence.

[18] The defendant maintained that the agreement was not cancelled and that it has been lawfully renewed. Paragraph 14 grants the defendant the option to renew as at 1 October 2019. However, clause 14.3 stipulates that "*Al die voorwaardes van hierdie huurkontrak sal steeds van toepassing wees gedurende hernuwing."* As at the time of the alleged renewal, the defendant did not have a retail licence contrary to the provisions of the lease agreement. The question is: Can the defendant rely on the par delictum rule to enforce the agreement or insist on its continued occupation of the filling station on the basis of the

alleged renewal of the lease agreement? I think not. Secondly, his reliance on the defence of impossibility of performance is totally misplaced.

[19] His testimony has shown that he failed to obtain the requisite licence. Both his testimony and papers are a classical example of reprobation and approbation. First plaintiff's sister testified that she had no interest in the closed corporation and that her shares or membership interest had long been alienated to the first plaintiff. Were she required to sign documents relating to the business, she would have done so. Ms Nel's testimony was that the first plaintiff, apart from refusing to sign the licence application forms, never gave her his sister's telephone number as alleged. The issue of the first plaintiff's sister's refusal to consent to the cancellation of the retail licence only came to the fore in the defendant's attorneys' letter of 7 November 2019[4] which was in reaction to the plaintiffs' notice of cancellation dated 31 October 2019[5].

[20] In *Klokow v Sullivan*,[6] It was stated that as a general rule, a plaintiff who was found to be in *pari delicto*, was hence unable to recover any money paid or property handed over to a defendant pursuant to it; and if a plaintiff based his case on such a contract in formulating his pleading, he would fail on this basis alone. In this case, the defendant pleaded that the plaintiffs are precluded from cancelling the agreement and bound to accept its renewal of the lease agreement as both the parties are in *pari delicto*. The real issue is whether the

[4] Page 52 of Exhibit "A".
[5] Page 40 of Exhibit "A".
[6] 2006(1) SA 259 (SCA) para 17.

non-compliance with the provisions of the Petroleum Products Act[7] renders the renewal of the lease agreement illegal and whether the plaintiffs have made out a case for cancellation. The lease agreement is on the face of it not illegal and imposes a burden on the defendant to obtain the necessary retail licence in order to conduct the business of a filling station. The evidence shows that he failed to do so over a period of time despite demand. The defendant is therefore solely to blame as the Act[8] and the agreement placed a burden on him to secure the retail licence. The *par delictum rule*, upon which the defendant relies to defeat the plaintiffs' claims, did not arise.[9] The facts also demonstrate that the plaintiffs have a clear cause of action and should therefore succeed in their claims.

[21] It is trite that the costs should follow the event.

[22] In the result, I make the following orders:

**ORDER:**

1. Cancellation of the lease agreement between the parties;

2. Ejectment of the defendant from the property;

3. Costs of suit.

[7] 120/1977.
[8] 120/1977.
[9] Klokow, supra.

**JJ MHLAMBI, J**

| | |
|---|---|
| Counsel for the Plaintiff: | Adv. JJF Hefer SC |
| Instructed by: | Etienne Visser Attorneys<br>15 Barnes Street<br>Westdene<br>Bloemfontein |
| Counsel for the Defendant: | Adv. BC Van Rooyen |
| Instructed by: | Symington & De Kok<br>169B Nelson Mandela Drive<br>Bloemfontein |