IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2020/16410

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
15 SEPTEMBER 2021

In the matter between:

MARY MAGDELAN ANN DA CONCEICAO	Applicant
and	
ALIPIO AFONSO MILHEIRO N.O.	First Respondent
VANDA MARIA CAQUEIRO ASSUNCAO N.O.	Second Respondent

JUDGMENT

This judgment is handed down electronically by circulation to the parties or their legal representatives via email and by uploading same onto CaseLines. The handing down of this judgment is deemed to be 15 September 2021.

KHAN AJ:

INTRODUCTION

[1] On the 4 November 2019, the Applicant entered into an Agreement for the sale of the business known as A & A Café and Tavern ("the Business"), with the V.M Investment Trust, who were represented herein by the First and Second Respondents, ("the Respondents"), both of whom are Trustees of the V.M Investment Trust.

[2] The Applicant seeks return of the Business, alleging that the Respondents have breached the Agreement of Sale ("The Agreement") by the failure to pay the balance of the purchase consideration of R250 000.00. The Applicant alleges that she has cancelled the agreement as a result of the Respondents breach, alternatively cancels the agreement, further alternatively that the Respondent has repudiated the agreement, which repudiation is accepted.

[3] The Respondents argue as follows, firstly, that the Applicant did not cancel the Agreement, can accordingly not claim return of the business or an entitlement to retain the R500,000 deposit, secondly the Respondents allege that they cancelled the agreement on the 17 August 2020 as a result of the Applicant's breach of the warranty clause contained in paragraph 16.3 of the Agreement and lastly the Respondents contend that there are substantial and real disputes of fact not capable of being resolved in motion proceedings. The Applicants claim should accordingly be dismissed with costs and the Court should grant the Respondents' the relief claimed in their counter application.

[4] At this point I pause to mention that the Respondent has a counterclaim in the amount of R618 520,532, together with interest and a claim for rental paid from the 1 September 2020, until the termination of the lease concluded with Hentiq 1096 (Pty) Ltd.

[5] The general rule when dealing with disputes of fact in motion proceedings is as set out in **PLASCON EVANS PAINTS LTD V VAN RIEBEECK PAINTS (PTY) LTD**

1984 (3) SA 623 (A), where the court referred to *Stellenbosch Farmers' Winery Ltd (Pty) Ltd v Stellenvale Winery (Pty) Ltd*, 1957 (4) SA 234 (C) at 235 E-G, held as follows:

> '… *Where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondent together with the admitted facts in the applicant's affidavits justify such an order…In certain instances the denial by the Respondent of a fact alleged by the Applicant may not be such as to raise a real, genuine or bona fide dispute of fact (Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at pp 1163-5). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross examination under rule 6 (5)(g) of the uniform rules of court and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact amongst those upon which it determines whether the applicant is entitled to the final relief which it seeks…. Morever, there may be exceptions to this general rule, as for example where the allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers."*

[6] Our courts are required to robustly approach disputes of fact. In ***SOFFIANTINI V MOULD*** **1956 (4) SA 150 (E),** the court outlined this approach and stated as follows:

> "*In the case of Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*, 1949 (3) SA 1155 T at 1165 *Murray, then AJP, said,* '*A bare denial of the applicant's material averments cannot be regarded as sufficient to defeat the applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondent to enable the Court to conduct a preliminary examination… and to ascertain whether denials are not fictitious intended merely to delay the hearing. Soffiantini v Mould,* at 154 E-H.

[7] ***THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS V ZUMA*** **2009 (2) SA 277 (SCA)** Harms, JP recorded at (26) and (27) that:

> *"the court may not impose an onus on the respondent to prove a negative….In motion proceedings the question of onus does not arise and the approach set out in the Plascon Evans-matter governs irrespective of where the legal or evidential onus lies. The more serious the allegation or its consequences, the stronger must be the evidence before a court before it will find the allegation established. A person claiming relief acts at his peril in proceeding by motion action, he cannot by electing to proceed by motion deprive his opponent of a number of procedural advantages. The flip side is that the respondent may not sabotage the proceedings that is established law for expeditious and cost-efficient resolve of civil cases."*

[8] **MOUTON V PARK 2000 DEVELOPMENT 11 (PTY) LTD 2019 (6) SA 105 (WCC)** at 85:

> "At the same time, it is equally well established that where a dispute of fact is not a 'real, genuine or *bona fide*' one the Court will be justified in ignoring it and may proceed to find on the applicant's version thereof. So too, where the respondent's version is clearly or palpably far-fetched or untenable, the Court may take a robust approach and decide the matter on the basis of the applicant's version. As always, in evaluating the contents of the affidavits the Court must have due regard for the treatment which the respondent has given to the averments under reply. In this respect a respondent has a duty to engage with the facts which are put up by the applicant, and to deal with them fully and comprehensively. Any 'skimpiness' and improbabilities in his version may thus count against him."

[9] Having regard to the affidavits filed herein, I do not believe that this court is precluded from dealing with this matter. There is no dispute regarding the terms of the agreement and the parties' duties in terms thereof, the Agreement is relied on by both parties. The dispute effectively turns on which party cancelled the agreement and the warranty clause at paragraph 16.3. I proceed to deal with each issue accordingly.

THE APPLICANT'S CANCELLATION

[10] The Respondents argue that the Applicant has not complied with the notice requirements that are peremptory in terms of the Agreement, prior to cancellation. That in order to prove that the Agreement was legitimately cancelled, it is incumbent upon the Applicant to prove that she gave notice in writing, by prepaid registered post or hand delivered a notice, to the Respondents', at their chosen *domicilia*, wherein she called upon them to remedy the breach within 10 days.

[11] The first issue the court has to consider is whether or not the Applicant has cancelled the Agreement. The Applicant relies on the following breaches of the Agreement:-

> 11.1 The first breach pertaining to the early closure of the business, which was communicated to the Respondent on the 9th of December 2019. The Respondents undertook on the 11 December 2019 to rectify the breach and keep the premises open, no more need be said about this.
>
> 11.2 The second breach in respect of the Respondents' failure to make payment of the installment due on the 1 January 2020, communicated to the Respondents' on the 2 January 2020. The Respondents were requested to rectify the breach and make payment into the designated account, this the Respondents failed to do. On the 9 January 2020, the Respondents' Attorney addressed an email to the Applicant recording that the Respondents' had been unable to obtain a trade license, as the business is zoned industrial 1, that the

Respondents are unable to lawfully carry on business and that the installments would not be paid until the Respondents are able to do so.

11.3 On the 29 January 2020, the Applicant advised the Respondents' that the trade license is valid and has not been revoked, that the Respondents were in breach of the agreement, by failing to make payment of the installment of R20 000,00 on the 1 January 2020, despite receiving proper notice and despite the lapsing of 10 days from the date of such notice. That in terms of clause 15.2 the Applicant is entitled to claim specific performance and demand payment of the balance of the purchase price in the sum of R250 000.00, on or before the 5 February 2020, failing which the Respondent is advised of the Applicant's election to cancel the contract and retake possession of the business.

11.4 On the 7 February 2020, the Respondent again claimed payment of the balance of the purchase price on or before the 10 February 2020, failing which the agreement would be formally cancelled and the Applicant would launch proceedings to retake the business.

[12] The Applicant alleges that the letters of the 29 January 2020 and 7 February 2020, evidence a clear intention to cancel the contract, if the balance of the purchase price was not paid. The Respondents' disputes this and argues that the Applicant made an election to claim the balance of the purchase price, thus to claim specific performance and not cancellation. The specific paragraphs in the letters aforesaid reveal the following:

12.1 29 January 2020,- "As a direct result of your clients beach, our client is entitled, in terms of clause 15.2 of the agreement to claim specific performance from your client and demand payment of the balance of the purchase price in the sum of R250 000, alternatively cancel the agreement. (my emphasis). *In the event the agreement is cancelled as aforesaid, our client will retake possession of the business."*

12.2 7 February 2020,- *"consequently we repeat our clients demand for payment of the balance of the purchase price on or before close of business on Monday, 10 February 2020, failing which <u>we will formally cancel the agreement and launch proceedings to retake possession of the business</u>."*(my emphasis).

[13] The relevant clauses in the Agreement dealing with Default, are paragraphs 15.1 to 15.3 which reads as follows:-

"15.1 Should the purchaser fail to comply with any of his obligations in terms of this agreement, the seller shall, without prejudice to any other rights he may have, give the purchaser notice in writing by prepaid registered post or hand-delivered to the purchaser, calling upon the purchaser to remedy such breach within 10 (ten) days of posting of such notice.

15.2 In the event of the purchaser failing to remedy such breach, the seller shall be entitled to cancel this agreement, to reclaim and to retake possession of the business and the assets sold in terms thereof and to retain all monies paid to him by the purchaser in respect of the purchase price as a genuine pre-estimate of damages which he may have sustained by reason of such cancellation. Alternatively, the seller shall be entitled to demand payment of the full balance of the purchase price.

15.3 It is specifically recorded that in the event of the seller having given the purchaser notice on two occasions as contemplated in clause 15.1 above within the period of any calendar year, then, and in the event of any subsequent breach by the purchaser of the terms and conditions of this agreement, the seller shall have the rights as set out in clause 15.2 above without the necessity of giving the purchaser any further notice whatsoever."

[14] I do not read the letters of the 29 January 2002 and 7 February 2020 as an election to claim specific performance and nothing else. Clause 15 affords the Applicant the option to cancel the contract in the event of a breach, alternatively to claim payment

of the full balance of the purchase price. The Applicant called upon the Respondent to make payment of the instalment of R20 000.00 on the 2 January 2020, on the 29 January 2020, the Applicant called for payment of the balance of the purchase price, failing which the Applicant recorded its intention to cancel the contract, this demand was made again on the 7 February 2020.

[15] The Respondents' were given 3 Notices in the 2020 calendar year to remedy the breach. The Respondents did not effect payment and the Respondents' letter of the 9 January 2020 made it clear that payment would not be effected. The Applicant views this as a repudiation of the contract.

[16] I now turn to the complaint that the breach notices that were sent by the Applicant did not comply with clause 15.1, in that, there is no demand that the beach be remedied within 10 days, no evidence that there has been compliance with service on the Respondents' *domicilia*, and these notices are not in the same calendar year.

[17] The Domicilium and Notices Clause in the Agreement record as follows:-

> "20. *The parties choose as their respective domicilium citandi et executandi for all purposes under this contract, whether in respect of payments, court processes, notices or other documents or communications of whatsoever nature the following address:-*
>
> *20.1 The Seller, [….] F[....] Street, Hazel Park Germiston,*
> *Tel 084 583 2863,*
> *e-mail: anndaconceica063@gmail.com.*
>
> *20.2 The Purchaser: At the business, Tel: 0732835181*
> *email: vassuncao@gmail.com."*

[18] Clauses 20.5 and 20.5.1 to 20.5.3, provide that service by telefax and email is competent and that, *"Notwithstanding anything to the contrary, a written notice or communication actually received by a party shall be an adequate written notice or communication to it, notwithstanding that it was not sent to or delivered at its chosen domicilium citandi et executandi".*

[19] Having regard to the aforesaid, I am not persuaded that it was necessary for the notice to be sent by prepaid registered post or hand delivered to the Respondents' at their chosen *domicilia*, which, as is apparent from the aforesaid, includes the parties email addresses. The Respondents', in addition, have never alleged that the letters of demand were not received and have in fact responded thereto.

[20] The ten (10) day period from the 2 January 2020, would have elapsed by the time the second demand was made on the 29 January 2020, I am satisfied that this constitutes a second notice, in the same calendar year. In terms of clause 15.3 of the Agreement, no further notice to the Respondent would be required. Despite this the Applicant made a third demand for payment on the 7 February 2020 and then proceeded to institute action for the return of the business.

[21] On the 7 February 2020, the Respondents indicated that the instalments for January 2020 and February 2020 were paid into the Trust account of its Attorneys. Attempts by the Applicant's Attorney to ascertain if any additional payments were made subsequent to February 2020 failed to elicit a response. These payments were never paid over to the Applicant and there is no indication that additional payments were made by the Respondents to their Attorneys after February 2020.

[22] The Agreement does not make provision for payment to any other party except the Applicant, the payments by the Respondents into the Trust account of its Attorneys, in the absence of the Applicants agreement does not constitute compliance with the Agreement. **BOUWER NO v SAAMBOU BANK BPK 1993 (4) SA 492 (T), "***It can be safely accepted that payment to a person other than the creditor does not discharge the*

debt or obligation, even though payment is made to the creditor of the creditor, unless he has consented thereto."

[23] I am not persuaded that the Applicant has not complied with the provisions set out in clause 15 or that this is a matter where the Applicant has adopted a method of communication other than that provided for in the agreement. The Applicant made it clear that if payment was not effected, the Agreement would be cancelled. The Applicant then instituted motion proceedings, the Notice of Motion is dated the 25 June 2020 and was served on the Respondents' on the 22 July 2020.

[24] Even if the argument that the agreement was not cancelled before the institution of motion proceedings could be sustained, the service of the Notice of Motion puts this argument to rest, **THELMA COURT FLATS (PTY)LTD V MC SWIGIN 1954 (3) SA 457 (C) 462C-D**:

> "*There is ample authority for the proposition that the issue and service of a summons in cases of this nature is a formal intimation to the lessee of the lessor's contention that the contract has been broken and of the fact that he has elected to treat the lease as cancelled…. (see Noble v Laubscher, 1905 T.S. 125, and the other cases referred to in Alpha Properties (Pty.) Ltd v Export Import Union (Pty.) Ltd ., 1946 W.L.D. 518…….. there is no substance in this distinction…between a summons and a notice of motion. … I am fortified in my view that the filing and service of a notice of motion by a lessor claiming the ejectment of a lessee from the leased premises is a sufficient notice of the intention of the lessor to cancel the lease, by the decision in the Alpha Properties case, supra, which decision was approved of by the Full Bench of the Transvaal Provincial Division in van Achterberg v Walters, 1950 (3) SA 734 (T).*

[25] I accordingly find that on a reasonable reading of the emails sent by the Applicant and her Attorneys, the Notice of Motion and Founding affidavit, that the

Applicant has cancelled the Agreement by reason of the Respondent's failure to pay the balance of the purchase price. I am accordingly satisfied that the Applicant cancelled the Agreement before the Respondent did on the 17 August 2020.

THE RESPONDENTS' DEFENCE

[26] The Respondents main defence turns on the breach of the warranty clause at paragraph 16.3, of the Agreement and forms the basis of the Respondents' opposition as well as their counterclaim, Clause 16.3 reads as follows:

> "*The Seller hereby warrants that, up to the effective date, all licenses, permits and authorities of and relating to the business will remain in full force and effect and the seller has not done anything or matter which could affect or prejudice the validity and existence of such licenses permits and authorities*."

[27] The Respondents letter of the 9 January 2020 records that they had applied for a trade licence and were advised that same cannot be issued as the property upon which the business is situated is zoned as Industrial 1. That they find themselves in a position where it has purchased a business, but is unable to run it despite being given a warranty by the Applicant that all licenses, permits and authorities of and relating to the business were correctly in place as at 1 November 2019. That they will not be paying the instalments referred to in paragraph 3.3.2 until such time as it can lawfully carry on the business in terms of the agreement.

[28] In a letter dated the 5 February 2020, the Respondents' Attorneys advised the Applicant that it did not wish to cancel the Agreement and proposed that the Applicant attends to the rezoning of the property by the 15 March 2020, failing which the Respondents reserved their rights to cancel the agreement and claim restitution. It is then submitted that the Applicant failed to rezone the property and after attempts at settling the dispute the Respondents cancelled the sale of business on the 17 August 2020.

[29] The Respondents' allege that the Applicant breached clause 16.3, as the trade license was unlawful and thus not in full force and effect as at the effective date of the sale or before then, the license has accordingly always been unlawful. In explanation, the Respondents indicate that the second page of the Applicant's trade license is specifically granted on the condition, "*that all the requirements in terms of the provisions of any other legislation must be complied with."*

[30] The Respondents do not identify what legislature must be complied with in their affidavit save to state that the Applicant took no steps to attend to the rezoning of the property.

[31] The Applicant's trade license was granted on the 23 October 2001. The Respondents argue that when this trade license was granted in 2001, the Applicant was already in breach of the Germiston Town Planning Scheme of 1985. Reliance is placed on a letter dated the 3 October 2000, (the year before the license is issued to the Applicant) addressed to the owner of the business premises, recording that the existing use of shops on the property was in conflict with the zoning requirements and thus illegal. It is alleged that the Applicant knew of this when she was provided with her trade license in 2001 and despite this took no steps to ensure that the owner of the property attended to the rezoning of the property in order to ensure that her trading license was lawful and valid.

[32] On the 13 March 2020, 19 years after the Applicant's license was issued, the Respondents are advised that the property is zoned Industrial 1 by the City of Ekurhuleni, City Planning Department, Germiston and that the shops and pub being operated on the Erf does not comply with the zoning. That the department cannot consent to the issuing of a trading license for the pub until such time as a rezoning application has been positively considered by the appropriate delegated authority.

[33] It is necessary to note that the letter dated the 3 October 2000, is addressed to the owner, Hentiq 1096, by the South Germiston Planning and Development Directorate, and records that the property is zoned Industrial 2, that in terms of the Germiston Town Planning Scheme of 1985, the Existing use Right expired on the 25 September 2000. The owner, must apply for suitable rezoning or an application for an extension of time to legalise the existing use and that if suitable arrangements are not made by the 25 October 2000, the existing lease will lapse and render *the owner* (my emphasis) liable for prosecution.

[34] There is no evidence before this court that the Applicant was aware of the breach of the Town Planning Scheme (as evidenced by the letter of the 3 October 2000) or aware of the letter of the 3 October 2000, when the Applicant applied for her trading license in 2001, in fact the Applicant specifically disputes this in her Replying Affidavit.

[35] The Applicant argues that the trading license was valid and legal as at the effective date and remains valid until revoked. That clause 16.3 does not warrant the validity of previously issued licences, permits and authorities, what is warranted is that all such licenses will remain in full force and effect and the seller has not done anything or matter which could affect or prejudice the validity and existence of such licenses, permits and authorities.

[36] That the Applicant is not the owner of the business premises and it is only the owner of the land who can apply for the rezoning of the property. The Applicant argues that the Respondent conflates the obligations of the landlord/owner of the property with that of the tenant and business owner selling the business. Further that the Respondents have a perfectly competent claim to force the landlord to procure the necessary rezoning to allow for the permitted use of the premises. That the correct interpretation of clause 16.3 warranted the license, permits and authorities relating to the business sale agreement and not the zoning of the landlords' premises.

[37] There is no disagreement between the parties that the Respondent would have had to obtain a trade license in its name. I do not read clause 16.3 as warranting to the Respondents that they would obtain a trade license, simply that whatever license, permits and authorities of and relating to the business that were in place at the effective date would remain so.

[38] We know that the Applicant provided its liquor license and trading license to the Respondent and that the Respondent is currently trading on those licenses. From the Respondents supplementary affidavit, we know that the Respondent continued to trade up the 2 November 2020 and that at the date of the hearing this was still the case, no information was provided to the contrary. We further know that the zoning of the property is something that only the owner of the property can attend to.

[39] From the affidavits and heads of arguments of both parties it appears that the Germiston Town Planning Scheme of 1985, was replaced by the Ekurhuleni Town Planning Scheme of 2014. It further appears that between the 3 October 2000 and the 13 March 2020, the zoning on the property changed from Industrial 2 to Industrial 1, no explanation is provided for this.

[40] Both parties rely on the Town Planning and Township Ordinance, 15 of 1986, but for different reasons. The Applicant to indicate that the license was valid and will continue to remain so and the Respondent to indicate that the landlord had not taken steps to rezone the property.

[41] The Respondent asserts that it is a known fact that the property was not rezoned and no steps were taken to legalise the use of the property to permit a business to trade therefrom because of the letter dated 13 March 2020. The Respondents do not provide any evidence to support this assertion and base this conclusion on the letter written by the South Germiston Planning and Development Directorate on the 3 October 2000. Nothing is known of what transpired in the 19 years since the letter was written, neither

has an explanation been offered as to how the Applicant would be issued with a trade license on the 23 October 2001, in the absence of the property being rezoned.

[42] What we do know is that the Applicant was issued with a trade license in 2001. We also know, based on the letter sent to the Respondent on the 13 March 2020, that if there was a problem with the zoning at the time, the trade license would not have been issued in 2001.

[43] The Respondent has entered into a lease agreement with Hentiq 1096, the owner of the property, it would seem a relatively simple task to obtain confirmation from the owner as to what transpired in those 19 years, the Respondent has not opted to do this. What the Respondent does is use the objection raised in 2000 to the property as justification for why a license is refused in 2020, 19 years later, ignoring that a license was issued in 2001.

[44] The Respondents indicate in their Answering Affidavit that the Applicant is in breach of the Germiston Town Planning Scheme, in that she failed to comply with the condition attached to the trade license that required all relevant legislature to be complied with.

[45] A closer inspection of the license is warranted:-

45.1 On the first page, the following appears,
"this license is issued subject to the following conditions, namely P.T.O. (which presumably means "Please Turn Over").

45.2 On the following page the following words appear:-

SALES OR SUPPLY OF MEALS OR PERISHABLE FOODSTUFFS:
Restricted to the sale or supply of any foodstuff in the form of meals for consumption on or off the premises.

NB:

All requirements in terms of the provisions of any other legislation must be complied with. (NB is a Latin phrase, meaning, note well).

[46] In the Respondents heads of argument, counsel for the Respondents, for the first time refers to the Business Act, No 71 of 1991 ("Business Act") and makes the submission that the Applicants trade license is a license issued in terms of section 6(b)(i) of such Act. That a license may be issued subject to a condition therein specified in terms of which the license holder shall in connection with the business comply with a specific requirement contemplated in subsection 4(a) or aA (there is no 4(aA) in the Act) as the case may be.

[47] Subsection (4a) *provides that a licensing authority shall, subject to the provisions of subsection (6), issue a license which is properly applied for unless, "in the case of a business referred to in item 1(1) or 2 of schedule 1, the business premises do not comply with a requirement relating to town planning or the safety or health of the public of any law which applies to those premises.*

[48] "*Argument by counsel, does not constitute evidence on oath and is merely a persuasive comment made by the parties or legal representatives with regard to questions of fact or law.* **MABOHO AND OTHERS V MINISTER OF HOME AFFAIRS (833/2007 (2011) ZALMPHC 4 (28 NOVEMBER 2011)."** The reference to the Business Act, however, makes it clear that a licensing authority must issue a license, which has been properly applied for **unless, the business premises do not** (my emphasis) comply with a requirement relating to town planning or the safety and health of the public. Subsection 6(a), provides that "*a licensing authority may grant the application on condition that the business premises shall,* ***before the license*** (my emphasis) *is issued comply with a requirement referred to in subsection 4(a)."*

[49] The Business Act thus makes it clear that 2 things must happen before a license will be issued:

49.1 The business premises must comply with a requirement relating to town planning or the safety and health of the public in terms of subsection 4(a);

49.2 The license will be only be issued after compliance with a requirement relating to town planning or the safety and health of the public in terms of subsection 6(a).

[50] The Applicant was granted a trade license, the Business Act makes it clear that this would only occur after the necessary requirements were complied with.

[51] Section 6(b) of the Business Act, makes it possible for a license to be issued subject to a condition:

> "a licensing authority may *issue the license subject to any condition therein specified, in terms of which the license holder shall in connection with the business premises-*
>
> *i. comply with a specific requirement contemplated in subsection 4(a)*
> *or*
> *ii. within a specific period comply with such requirement."*

[52] I do not believe that the licensing authority would impose a condition to the effect that, "*All requirements in terms of the provisions of any other legislation must be complied with*", when section 6(b) refers to compliance with a specific requirement, within a specific time. I am further not convinced that such condition would be prefixed by the words "Note well". I even question whether this is the condition that the license is subject to and whether the condition is not in fact, the words "***SALES OR SUPPLY OF MEALS OR PERISHABLE FOODSTUFFS:*** *Restricted to the sale or supply of any foodstuff in the form of meals for consumption on or off the premises*." The parties have however not raised this and I will leave it there.

[53] The Respondents, apart from making a statement to the effect that the Applicant has not complied with any other legislation, has failed to provide proof that the Applicants trade license is invalid. The Respondents have not tendered an explanation as to why the license was not revoked if it is invalid, or an explanation as to how it is that the Respondents continue to operate the Business despite this invalidity. I am not persuaded that the Applicant's trade licence is invalid or that the warranty clause has been breached. I accordingly find that the Respondents, by their failure to pay the balance of the purchase consideration of R250 000.00 have breached the Agreement.

EFFECT OF THE APPLICANT'S CANCELLATION

[54] The effect of the cancellation imposes a duty on both parties to restore what they have received in terms of the agreement, **CASH CONVERTERS SOUTHERN AFRICA (PTY) LTD V ROSEBUD WESTERN PROVINCE FRANCHISE (PTY) LTD 2002 (1) SA 708 (C), "***it is incumbent on both contracting parties to restore each to the other what has respectively been received thereunder. De Wet and Van Wyk Kontraktereg en Handelsreg 5th ed at 220 - 1; Joubert (ed) The Law of South Africa vol 5 1st re-issue para 256. The rule applies equally to contracts cancelled by reason, for example, of misrepresentation and to contracts cancelled by reason of breach of their contractual provisions. The duty applies to both the 'innocent' party and the 'guilty' party.* ***TWEEDIE AND ANOTHER v PARK TRAVEL AGENCY (PTY) LTD t/a PARK TOURS 1998 (4) SA 802 (W), "****So far as the refund of the tour price is concerned, a claim for restitution of performance upon cancellation of a contract for breach is a distinct contractual remedy: Baker v Probert 1985 (3) SA 429 (A) at 438I--439B."*

[55] By reason of the Applicant's cancellation, the Applicant is entitled to return of the Business. The Respondents would be entitled to return of the R500 000,00 deposit paid in respect thereof, however clause 15.2 of the Agreement stipulates that in the event of the Respondents breach, the Applicant is entitled to cancel the agreement, to reclaim

and take possession of the business sold and to retain all monies paid by the Respondents.

[56] There is some debate between the parties as to whether Clause 15.2 is a rouwkoop provision or a penalty clause and whether the Conventional Penalties Act, No 15 of 1962 should apply. Whichever it is, it does not detract from the fact that the parties agreed, in the event of the Respondents' breach, that the Respondent would return the business and forfeit the deposit paid. There is a long standing principle in our jurisprudence, which stresses the importance of the principle of *pacta sunt servanda* (agreements, freely and voluntarily concluded, must be honoured) and the need for certainty in the law of contract. **BEADICA 231 CC AND OTHERS V TRUSTEES FOR THE TIME BEING OF THE OREGON TRUST AND OTHERS 2020 ZACC 13; 2020 (5) SA 247 (CC).**

> "If there is one thing that more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract."

THE RESPONDENTS COUNTERCLAIM

[57] The Respondents have filed a counterclaim, in terms of which they claim that they cancelled the contract on the 17 August 2020 and demand payment of various amounts from the Applicant:-

57.1 R500,000, in respect of the deposit paid to the Respondent for the purchase of the business;

57.2 R840.50 in respect of pest control services rendered at the property;

57.3 R91,430.02 in respect of essential plumbing and renovating repairs to the property;

57.4 R26,215.00 in respect of administering the liquor license;

57.5 Interest on the aforesaid amounts *a tempore morae*;

57.6 Directing the Applicant to reimburse the Respondents' the monthly rental amount paid to Hentiq 1096 (Pty) Ltd for the rental of the property with effect from 1 September 2020.

[58] The Respondents counter application is conditional upon the court not dismissing the main application and is premised on the fact that if the court entertains the main application then it does on the basis of a finding that there are no real disputes of fact. The Applicants claim pertains to the sale of a business, breach of contract and damages flowing from such breach.

[59] The part of the Respondents counterclaim that pertains to the Agreement is the return of the R500 000,00 deposit paid and the costs of the liquor license, which the agreement does not make provision for. The amounts claimed for improvements and renovations to the property and the rental, do not form the basis of the sale agreement. The Agreement was subject to a suspensive condition at Clause 10 thereof and provides that, "*the sale recorded herein shall be subject to the suspensive condition that the purchaser becoming entitled to occupy the premises in terms of a lease granted to him by the owner thereof…….".* In the event that the Respondents were unable to secure a lease agreement with the owner, the agreement would have dissolved and the parties would have been restored to the pre-agreement position.

[60] No evidence has been tendered, as to what basis the improvements, pest control and renovations were undertaken, presumably based on discussions with the Landlord/

owner and with his consent. It is the Landlord who warranted in terms of paragraph 6 of schedule A to the lease agreement, '*that the permitted use of the premises is commercial purposes only, i.e. for food and beverages'*, at paragraph 8.2, *"that he does not warrant that the leased premises are fit for the purpose for which they are let or that the lessee be granted a license in respect of the leased premises, for the conduct of the business of the lessee or that any license will be renewed. There shall be no liability on the Lessor to do any work on make any alterations or repairs to the leased premises to comply with the requirements of any licensing authority."*

[61] The work done on the property pertains to the lease agreement and does not arise from the sale of business, the Respondents' recourse would be to the owner of the property and not the Applicant. I accordingly do not find in favour of the Respondents in respect of the counterclaim.

[62] In the circumstances, I make an order in the following terms:

1. The Respondents are to return the business trading under the name and style of A & A Café and Tavern at the Business premises of 102 Refinery Road, Refinery Complex, Germiston Industries West, to the Applicant within 7 (seven) days from date of this Order;

2. The Applicant will retain the amount of R500 000,00 paid by the Respondents;

3. The Respondents to pay the costs of this application.

J.L. KHAN
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

Heard:	24 May 2021
Judgment:	15 September 2021
Applicant’s Counsel:	Adv. J.C. Viljoen
Instructed by:	Stupel & Berman Inc.
Respondent’s Counsel:	Adv. P. Cirone
Instructed by:	Kokkoris Attorney