



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**

Date: **08 JUNE 2022** Signature: 

Case Number: A3/2021

In the matter between:

SHELL DOWNSTREAM SOUTH AFRICA (PTY) LTD

Appellant

and

VUYISILE ZAMINDLELA NONDABULA
(trading as uMzimkhulu Garage)

Respondent

JUDGMENT

NYATHI J

Background

- [1] The Appellant is before the full bench with leave of the Supreme Court of Appeal, leave having been previously refused by the court *a quo*. The Appellant appeals against the whole of the Judgment and Order delivered by the Honourable Madam Justice Khumalo in this Division under Case No. 63998/2018 on 15 July 2020.
- [2] The Appellant claims occupation of the property in terms of the notarial deed of lease.

The Parties

- [3] The Appellant is Mr Nondabula, who trades as UMzimkhulu Garage (“the Property”, and is the registered owner of the property.
- [4] The Respondent is Shell, the holder of a notarial deed of lease registered over the property.

Issues

- [5] The questions for determination before this court is whether the court *a quo* erred in finding that the appellant is legally entitled to evict the Respondent and take over possession and occupation of the immovable property,

known as the Remainder of Erf 233, a portion of Erf 18, UMzimkhulu Municipality, district of UMzimkhulu, Eastern Cape Province, and whether the Respondent validly cancelled the notarial lease and servitude.

The proceedings in the court *a quo*

- [6] The proceedings in the court *a quo* were initiated by the Respondent who had launched an urgent application seeking an order that the Appellant be directed to deliver fuel and related petroleum products to the Respondent's Property. In addition, the Respondent sought an order, seeking a statement and debatement of account.
- [7] The Appellant opposed the relief sought by the Respondent. In opposing the relief claimed, the Appellant launched a counter-application. In the counter-application, the Appellant seeks an eviction order in terms whereof the Respondent — including all persons in occupation of the property through or under him - be directed to return possession and occupation of the property to the Appellant.
- [8] It is common cause that a dispute arose between the Respondent as franchisee and the Appellant as franchisor regarding the supply and payment for petrol, lubricants and related products sold in a filling station. The finer details of how this disagreement came into being was quite elaborately detailed by **Khumalo J** in her judgment. I will not retrace those in this judgment but will instead confine myself to the applicable legal principles and provisions.
- [9] The crux of the court *a quo*'s decision is that once the dispute became intractable and the Respondent's business was crippled by Appellant's refusal to supply it with the requisite fuel whilst retaining moneys that he

had paid up front, the Respondent retaliated and cancelled the notarial lease and servitude over his land. The amounts owed by Respondent to the Appellant due to the latter having supplied fuel without invoicing the former properly for about six months remain unpaid. This is before another court, involving a different process and some mediation process.

- [10] The Respondent has remained adamant in his refusal to sign a new franchise agreement.

Proceedings before this court

Appellant's arguments

- [11] It is the Respondent's contention that none of the Notarial Deeds obliges it to deliver fuel and related products to the Respondent.
- [12] Counsel for the Appellant submitted that the Notarial Deed of lease envisages that a franchise agreement will be entered into between the Appellant and the Respondent. Once concluded and for as long as the franchise agreement remains in place, fuel and related products will be sold and supplied by Appellant to the Respondent.
- [13] The Appellant also contended that when the franchise agreement that was originally entered into had run its course, the Respondent refused to renew or sign a new franchise agreement. Therefore, the Respondent's erstwhile contractual right to demand delivery of fuel and related products also terminated.
- [14] For the same reason the Respondent's right to occupy the property - which is registered in his name but leased to the Appellant for a period of 30 years (by way of the notarial lease) — is dependent on a sub-lease being entered

into between the Appellant and the Respondent. The sub-lease, the parties agreed, would form part of the franchise agreement.

- [15] Accordingly, the Appellant argued that as there is no franchise agreement in existence, the Respondent also has no right to be or remain in possession of occupation of the property.

Respondent's case

- [16] The Notarial contracts relied on by Appellant were repudiated by Appellant and that the Respondent validly cancelled these contracts.
- [17] Accordingly the Appellant has no case for the eviction of the Respondent. The basis for this is that the Respondent validly cancelled the Notarial Lease and Servitude.
- [18] The Appellant claims that in terms of a Notarial Lease the Respondent cannot have the sub lease right provided for in the Notarial lease unless there is a signed franchise agreement in place.

Analysis

- [19] The Appellant states in its heads of argument that “...*Shell was prepared to finance and carry the costs incidental to the upgrading of the property, provided that Shell would be able to recover and amortise these expenses. Accordingly, and before Shell incurred any expenses in relation to improvements on the property, Shell required that a notarial deed of servitude, a notarial deed of lease, and mortgage bond be registered against the title deed of the property. The trio of notarial deeds were deemed necessary in order to protect the rights of Shell, particular regard*

being had to the major capital outlay which Shell had to incur, when upgrading the property. A notarial deed of lease and notarial servitude were duly executed and registered, in favour of Shell, against the title deed of the property. Apart from the aforestated two deeds, a mortgage bond was also registered against the title deed. The property was thereupon upgraded by Shell to accord with other Shell branded fuel stations...”

- [20] The above accordingly sets out the Appellant’s purpose in insisting on the execution of the notarial deed of lease whilst the Respondent’s objectives are set out in the next paragraph.
- [21] Clause 10.1 of the notarial deed of lease provides as follows: “...*Shell agrees to let the premises to the Lessor for purposes of the Lessor operating the garage, filling and/or service station and convenience store on the premises on infer alia the following terms and conditions: ...*”
- [22] At the point where the Appellant unilaterally ceased to supply the Respondent with fuel fully knowing that he is precluded from sourcing same from alternate sources, it completely stymied is business endeavours.
- [23] It is not as if the Appellant had run out of options in resolving the dispute that had arisen between it and the Respondent. The Appellant chose the easier and more beneficial route which all things being equal, amounted to self-help.
- [24] The Respondent then regarded the Appellant’s actions as a repudiation of the deed of lease and the associated mortgage bond over the property and cancelled same.

Legal provisions applicable

[25] It is settled law that a court of appeal does not lightly interfere with the findings of a court *a quo*, and that it does so only in instances where the latter court had misdirected itself materially on the facts. In *Makate v. Vodacom (Pty) Ltd*¹ Jafta J held that:

“...If it emerges from the record that the trial court misdirected itself on the facts or that it came to a wrong conclusion, the appellate court is duty-bound to overrule factual findings of the trial court so as to do justice to the case.” (own emphasis)

[26] In *S v Naidoo & Others*² the Supreme court of Appeal stated that:

“a court of appeal does not overturn a trial court's findings of fact unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong” (own emphasis).

[27] In this matter the court *a quo* analysed the evidence and submissions in totality and came to the conclusion that the Appellant's unilateral decision to stop fulfilling its obligations to supply fuel absent a franchise agreement was improper.

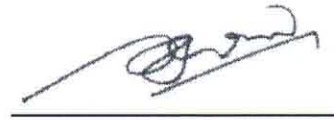
Conclusion

[28] I am not persuaded that there are cogent reasons to interfere with the findings of the court *a quo*. I accordingly propose the following order:

¹ 2016 (4) SA 121 (CC).

² 2003 (1) SACR 347 (SCA).

The appeal is dismissed with costs.



J.S. NYATHI

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

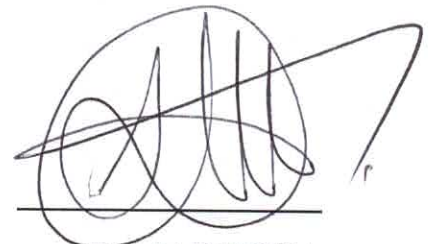
I agree.



M.R. PHOOKO

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

I agree, and it is so ordered.



D. MAKHOB

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their

legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 08 June 2022.

APPEARANCES:

FOR THE APPELLANT: ADV. R Stockwell SC

INSTRUCTED BY: HERBERT SMITH FREEHILLS SOUTH AFRICA LLP

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FOR THE RESPONDENT: ADV. BG Savvas

INSTRUCTED BY: MKA ATTORNEYS

(Murray Kotzé & Associates)

DATE OF JUDGMENT: 08 JUNE 2022