PREMISES LEASED FOR PURPOSES OUTSIDE ZONING ALLOWANCE: IS THE AGREEMENT VOID?

Swart v Bergh N.O and Others (A79/2020) [2022] ZAFSHC 64 (25 March 2022)

The answer to the above was in the affirmative, in this judgment, and the landlord was precluded from claiming arrear rental and municipal costs from the tenant based on the lease agreement. However, as the court was at pains to point out, it is not in all instances that invalidity follows when conduct contravenes a law and will depend on the provisions involved: Was it the intention to trigger a penalty or was it the intention that the conduct and agreement be considered void? Generally, a lease agreement for use of premises contrary to zoning allowances will be void. Don't risk this consequence and consult STBB when detailing your lease provisions.

The Judgment can be viewed here.

FACTS

The Chanwill Trust ('the Trust') leased premises in Bloemfontein to Ms Swart to be used as a coffee shop, home industry and restaurant. The Trust had been leasing property for commercial purposes for a while and was aware, at the time, that the premises were zoned Residential 2.

The tenant, Ms Swart, leased the premises on the Trust's assurance that she could run the business from there. She had no knowledge at the time that the zoning provisions prohibited such business activities at the premises. Three years into the lease period, which commenced on 2011, she applied for a liquor licence and it was then that she learned of the position regarding the zoning. Shortly after a letter from the municipality to that effect, received in June 2014, she terminated the lease.

A dispute regarding arrears arose and the Trust issued summons for payment of both arrear rental and municipal charges.

The Court *a quo* (the court that made the first finding herein and which finding is being appealed) held nonetheless, as it was common cause that the rental premises were rented out to be used as a coffee shop, home industry and restaurant contrary to the zoning provisions (which indicated that the property may only be used for dwelling purposes as it was zoned "Single Residential 2"), that: (i) rental could not be claimed as the agreement was illegal and unenforceable, as it provided for use of the premises contrary to the purpose for which it was zoned; (ii) that Ms Smit may be held liable for municipal charges for the time she enjoyed occupation of the property; and (iii) that rental for the period after she became aware of the fact that her use of the property was against zoning provisions until she vacated was due to the landlord.

In an appeal to the judgment, the landlord (the Trust) argued that the Court *a quo* was incorrect and that rental was due to them. Ms Swart pleaded that it was illegal and contrary to the Bloemfontein Town Planning Scheme, 1 of 1954, the Town Planning Ordinance 9 of 1969 as well as the Spatial Planning Land Use Management Act 16 of 2013 ('SPLUMA') for the Trust to rent out the premises to her in order to conduct a business. She furthermore pleaded that use of the premises for business purposes was illegal in accordance with the Ordinance. Consequently, she pleaded that the rental agreement was illegal and void.

HELD

Zoning generally

- Zoning schemes not only restrict the rights of owners in an area, but also confer rights on owners because

they are entitled to require that neighbouring owners comply with the applicable zoning scheme. Where an owner seeks to depart from the scheme, the rights of neighbouring owners are affected and they are entitled to be heard on the departure.

Was the lease agreement rendered unlawful?

- To answer this question, it is necessary to consider what the various pieces of legislation intend should follow on non-compliance. These were, amongst others:
    - The Town Planning Scheme: It is common cause that the premises rented out to Ms Smit is zoned "Single Residential 2" and may only be used for the purpose of a dwelling house in terms of the Bloemfontein Town Planning Scheme. Contravention hereof constituted an offence and rendered the offender liable, on conviction, to a fine or to imprisonment.
    - It is accepted in the preamble of SPLUMA that municipal planning is primarily the executive function of a local sphere of government. Section 26 of SPLUMA deals with the legal effect of a land use scheme, as follows:

      "Legal effect of land use scheme

      26. (1) An adopted and approved land use scheme-

      (a) has the force of law, and all land owners and users of land, including a municipality, a state-owned enterprise and organs of state within the municipal area are bound by the provisions of such a land use scheme;

      (b) replaces all existing schemes within the municipal area to which the land use scheme applies; and

      (c) provides for land use and development rights.

      (2) Land may be used only for the purposes permitted-

      (a) by a land use scheme;

      (b) by a town planning scheme, until such scheme is replaced by a land use scheme; or

      (c) …." (emphasis added)
    - Section 58(1)(b) of SPLUMA stipulates that a person is guilty of an offence if that person uses land contrary to a permitted land use as contemplated in s 26(2). A person convicted of an offence in terms of s(1) may be sentenced to a term of imprisonment for a period not exceeding 20 years or to a fine.
- While there are statutes which expressly provide that certain contracts are void, there are many statutes which contain no such express statements, despite providing for penalties. In the latter case, when the validity of the underlying agreement is considered, one has to consider what the intention of the legislature was.
- Generally speaking, where certain conduct is penalised, the implication is that the conduct is void even if no declaration of invalidity is attached to the statute.

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- Our courts have confirmed however that despite the general rule being that a contract impliedly prohibited by statute is void and unenforceable, the rule is not inflexible:

    - For example, in *Metro Western Cape (Pty) Ltd v Ross*, the particular section of an ordinance prohibited a general dealer from carrying on business by entering into particular contracts on or from fixed premises without the required certificate of registration and licence. The Court held that the purpose of the ordinance was to provide a system of control and it was not the object of the ordinance of treating all contracts entered into by such unregistered or unlicenced businesses as void. Consequently, the Court held that the purpose of the legislature was sufficiently served by the penalties prescribed for illegal trading and not intended to render contracts entered into between the trader and his customers void. In arriving at this conclusion the Court held that if contracts concluded between a trader and his customers, being innocent members of the public, were held to be void, it would cause grave inconvenience and injustice to such innocent members without furthering the object of the ordinance.

    - Another example is *Wierda Road West Properties (Pty) Ltd v Sizwe Ntsaluba Gobodo Inc*, where the respondent and former lessee of business premises alleged that the lease agreement entered into with the landlord was void and that it was precluded from enforcing its rights. (All the shareholders in Gobodo (the lessee) were shareholders of Wierda, and five of them, were appointed as its directors.) All the shareholders were aware of the absence of the occupancy certificate, as well as the City Council, as their inspectors conducted an assessment of the property and there was no objection to the occupation. In June 2014, Sizwe vacated the premises without notice to Wierda. Later, after Sizwe vacated the property, Sizwe sent a letter to Wierda stating that the reason for vacating the property was due to the absence of the occupancy certificate, and therefore the lease agreement was invalid. The High Court found that the lease agreement was valid but unenforceable, as a result of the contravention of section 4(1) of the National Building Act ('the Act') (lack of approved building plans for the leased property) and section 14(1) of the Act (the lack of the occupancy certificate for the leased property). Wierda appealed the decision and the SCA held as follows: (i) Non-compliance with section 4(1) and 14(1) of the Act does not render the parties' lease agreement void and unenforceable as there is no basis to justify reading an implied meaning into section 4(1) that the use or occupancy of a building which has no approved plans is prohibited; (ii) Sizwe was fully aware of the lack of the occupancy certificate and had consented to the use and occupation under the circumstances. Therefore, Sizwe had received exactly what it had bargained for, which was office accommodation refurbished to its needs, in a building with an outstanding occupancy certificate which, to its knowledge, the owner (Wierda) was in the process of obtaining. Sizwe never complained of this alleged unfitness for letting, and only did so after it had vacated the property and to avoid the consequences of being held to a contract it had freely entered into. The appeal was upheld with costs and the cross-appeal was dismissed with costs.

Application to present facts

- On an evaluation of the present facts, it was established that the Trust expressly represented to Ms Swart that the permitted use of the premises allowed for a coffee shop, home industry and restaurant, despite the Trust's failure to obtain permission from the municipality to use the premises for the purposes for which it was rented out to Ms Swart. The fact that the particular suburb, inclusive of the relevant premises, had been earmarked for restricted business purposes is irrelevant. The Bloemfontein Town Planning Scheme was still not amended by the time that the court *a quo* dealt with the case.

- It could not be expected of Ms Swart to establish from the authorities, before entering into lease agreement, whether the premises could be used for a coffee shop, home industry and restaurant. Her landlord gave her such rights and there was no reason to question its competency, bearing in mind that similar businesses are

conducted in close proximity. When Ms Swart started looking for an ideal spot to conduct her business, she noted the premises and the fact that several other restaurants were being run in the same street. She believed that the premises had a business licence.

- The Trust advised that it knew that the premises were not zoned for the purpose that it was rented out, and that an application for rezoning was made in 2006/2007 by the previous owners, but that rezoning was never approved.

- Whilst previous decisions (*Wierda Road*) found that the underlying agreement should not be declared invalid, such a judgment was distinguishable from the facts in the present matter. Unlike the facts in *Wierda Road*, Ms Swart was lured into the lease agreement on the express understanding that she may conduct the businesses as represented in writing. When she became aware of the absence of a right to conduct business from the premises in June 2014, she could not pack up immediately and vacate. It is important to note that the letter of the municipality referred to above pertinently stated that the premises may only be used as a dwelling house. One should understand that she had to discuss the matter, obtain legal advice and then decide what to do, bearing in mind that she had established a business during the previous three years and that she would suffer a severe future loss of income. Correspondence ensued between the attorneys as is evident from the record. It was pointed out by Ms Swart's attorneys on 8 October 2014 that the landlord had rented out the premises in contravention of the municipal by-laws.

- Also, the Trust is in the property industry and knew "the lay of the land". It was not, as in the *Wierda* case, an innocent lessor. It was also not necessary here to protect the Trust as lessor as an innocent member of the public caught in legalities. Also, unlike in *Wierda Road*, Ms Swart was totally unaware of the fact that the premises were not zoned for business purposes when the lease agreement was concluded and for three years thereafter.

- The facts here are also distinguishable from those in *Wierda Road* insofar as, in that case, the municipal officers attended to the premises and had no objection to occupation. Furthermore, the lessee in *Wierda Road* was well aware from the signing of the lease agreement that no occupancy certificate had been issued, unlike the knowledge of Ms Swart in the present matter.

CONCLUSION

- The Court *a quo* correctly held that the lease agreement was illegal and unenforceable and therefore concluded that the claim for rental could not succeed.

- However, because Ms Swart utilised the property, she was held liable for municipal charges until 30 June 2014. The Court *a quo* made the point that the parties never specified the amount to be paid in respect of Ms Swart's residency and refused to grant a monetary amount for this period. This was incorrect; it was wrong to grant an order in respect of the payment of municipal charges for this period insofar as it had found the lease agreement to be illegal. This part of the order had to be set aside.

- Having correctly found the lease agreement to be illegal, void and enforceable, the Court *a quo* should have dismissed the claims with costs.

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