CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 05/07

THE CROWN RESTAURANT CC Applicant

versus

GOLD REEF CITY THEME PARK (PTY) LTD Respondent

Decided on : 6 March 2007

JUDGMENT

THE COURT:

[1] This is an application for leave to appeal which is dealt with in terms of Constitutional Court rule 19(6)(b). In terms of a written lease agreement, the applicant, a close corporation, leased premises from Gold Reef City Theme Park (Pty) Ltd (the company) and fell into rental arrears. At one stage the amount owing was at least R 71 000, 00. The company cancelled the lease and applied to the Johannesburg High Court for an ejectment order and for payment of an amount of R 8 743, 82. The applicant opposed the application on the basis that the company had verbally agreed to grant it an indulgence and allow it time within which to make proposals for settling the rental arrears. It was contended that it was implicit that the company had waived its rights to cancel the lease agreement.

[2] The company denied the verbal agreement and contended that in any event, it was entitled to rely on a non-variation clause in the lease agreement which provided that no agreement varying, adding to, deleting from or cancelling the lease agreement would be effective unless reduced to writing and signed by the parties. The company also relied on another clause in the lease agreement which provided that any indulgence granted did not preclude either party from enforcing any of its rights. The High Court, per Msimeki AJ, agreed that the company was entitled to rely on both clauses and granted the relief sought.

[3] The applicant applied unsuccessfully to the Supreme Court of Appeal for leave to appeal the judgment of the High Court. Hence, the present application in which, for the first time, the applicant seeks to have the *exceptio doli generalis* reintroduced as a defence, contending that this equitable remedy is in line with constitutional values.[1] It was contended that because of the verbal agreement referred to in paragraph 1, it was unconscionable for the company to rely on the clauses. The applicant also tentatively suggested that the cancellation of the lease constituted an arbitrary deprivation of property and suggested, in a manner not entirely intelligible, that the termination of the contract in the circumstances of the case was disrespectful of the applicant and affected its dignity.

[1] In Roman law the *exceptio doli generalis* was an equitable remedy. Before *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* 1988 (3) SA 580 (A), it was generally assumed that the *exceptio doli generalis* provided a remedy against the enforcement of an unfair contract and against the unfair enforcement of contracts. In *Bank of Lisbon*, the Appellate Division decided that the *exceptio doli generalis* was not part of our law and "bur[ied]" it (at 607B). See also Christie The *Law of Contract* 4 ed (Butterworths, Durban 2001) at 14-15. In April 1998 the Law Commission presented a report in respect of the unfair making of contracts and on unfair terms and unfair enforcements of contracts. The report has as yet not resulted in legislation.

[4] Msimeki AJ was called upon to deal *only* with the waiver defence and did so. He was not invited to develop the common law of contract to promote the spirit, purport and objects of the Bill of Rights, nor to address any of the other constitutional issues now raised by the applicant. On the limited basis on which the case was presented to him, the learned judge arrived at the correct conclusion.

[5] This Court has stated repeatedly that it is generally undesirable for it to sit as a court of first and last instance.[2] In *Fleecytex*, this Court stated the following:

> "Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment."[3]

[6] In respect of the development of the common law of contract, the High Court and the Supreme Court of Appeal have a vital role to play. There are no compelling reasons for us to deal with the issues raised by the applicant as a court of first and last instance. Besides, the further exploration that was necessary to enable the proper adjudication of the issues now raised by the applicant was understandably not undertaken by Msimeki AJ. Furthermore, disputes unrelated to the narrow question before him did not require resolution. Litigants are once again reminded that care

[2] *Satchwell v President of the Republic of South Africa and Another* 2003 (4) SA 266 (CC); 2004 (1) BCLR 1 (CC) at para 6; *Phenithi v Minister of Education and Others* 2003 (11) BCLR 1217 (CC) at para 5; *Dormehl v Minister of Justice and Others* 2000 (2) SA 987 (CC); 2000 (5) BCLR 471 (CC) at para 5; *Christian Education South Africa v Minister of Education* 1999 (2) SA 83 (CC); 1998 (12) BCLR 1449 (CC) at para 12; *Bruce and Another v Fleecytex Johannesburg CC and Others 1998* (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 8.

[3] *Fleecytex* above n 2 at para 8.

should be taken to identify properly at the time of the institution of proceedings which constitutional issue they wish to have addressed so that they, the courts and practitioners can ensure that all the necessary material is available to enable proper adjudication of cases at all levels of the judicial system.[4]

[7] For all the reasons mentioned, it is not in the interests of justice that the application be granted. The application for leave to appeal is dismissed.

Moseneke DCJ, Madala J, Mokgoro J, Navsa AJ, Ngcobo J, Nkabinde J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J.

[4] *Prophet v National Director of Public Prosecutions* 2007 (2) BCLR 140 (CC); 2006 (2) SACR 525 (CC); at paras 49-53; *Shaik v Minister of Justice and Constitutional Development* 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC) at para 40; *Prince v President, Cape Law Society* 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) at para 22.