

Case No 254/87  
/MC

IN THE SUPREME COURT OF  
(APPELLATE DIVISION)

In the matter between

AQUATAUR (PROPRIETARY) LIM

pellant

- and -

<u>MAUREEN SACK</u>	.....	First Respondent
<u>WILMA NORMA SHEIN</u>	.....	Second Respondent
<u>LEONARD PHILIP SEIMON</u>	.....	Third Respondent
<u>HOUSE OF BACCHUS (PROPRIETARY) LIMITED</u>	...	Fourth Respondent

Coram: CORBETT, HOEXTER, VIVIER, STEYN JJA  
et NICHOLAS AJA.

Heard: 23 May 1988.

Delivered: 1 September 1988.

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J U D G M E N T

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VIVIER JA.

VIVIER JA:

The first, second and third respondents are the joint owners of Erf 1234, Krugersdorp Township, situated at the corner of Commissioner and Kruger Streets, Krugersdorp where for many years a hotel business known as the Majestic Hotel has been conducted under a hotel liquor licence. In terms of a duly registered Notarial Deed of Lease dated 22 July 1965 their predecessor in title, Solly Seimon, let the premises to one Kotze for a period of 10 years with effect from 1 January 1966 with the right to renew the lease for two further periods of 5 years each, terminating on 31 December 1985. I shall refer to this lease as the main lease. Kotze was followed by a series of tenants to whom the rights and obligations of the tenant

under / ...

under the lease were ceded and assigned from time to time.

On 24 June 1975 the fourth respondent, then known as Benpret (Pty) Ltd, became the tenant, and duly exercised the first right of renewal by extending the main lease until 31 December 1980. On 13 April 1976 Seimon and the fourth respondent concluded a written agreement amending the main lease by extending it to 31 March 1986 with no further right of renewal. On 12 January 1981 the fourth respondent, who was then the owner of the hotel business, sold the business to the appellant in terms of a written agreement of sale and under a further written agreement dated 13 May 1981 the fourth respondent sublet the premises to the appellant.

There has at all relevant times been a hotel liquor

licence / ...

licence in existence in respect of the said property.

The licence was transferred to each successive tenant and

is at present held by the appellant. When the main

lease was concluded on 22 July 1965 authority to sell

liquor for off-consumption, which is one of the special

privileges which may be granted in respect of hotel liquor

licences, and could then have been applied for under sec

71 bis (7)(c)(i) of Act 30 of 1928 (now sec 87(1)(a) of the

present Liquor Act 87 of 1977 ("the Act")), had not been

applied for. Such authority was subsequently, but prior

to the sale to the appellant, duly granted and the off-

sales business established at premises at the corner of Market

and Pretorius Streets, Krugersdorp. The deed of sale

concluded between the fourth respondent and the appellant

recorded that the seller intended moving the off-sales business to premises at 20 Percy Stewart Street, Krugersdorp, and that such removal was a condition of the sale. The off-sales business was duly moved to 20 Percy Stewart Street and from there to Nedbank Centre, Kruger Street and finally to IGI Building, Von Brandis Street, Krugersdorp, where it is still being conducted by the appellant.

Clause 4 of the agreement of sub-lease concluded between the appellant and the fourth respondent provided that certain clauses of the main lease would be deemed to be incorporated, mutatis mutandis, in the sub-lease as if the fourth respondent were the landlord and the appellant the tenant. One of these clauses of the main lease was clause 11, which provided inter alia as

follows / ...

follows :-

"The tenant acknowledges that the Hotel Liquor Licence held by the tenant in respect of the premises attaches to the premises, is the property of the landlord and is held by the tenant solely for the purpose of enabling him to carry on in the premises the business of an Hotel keeper.

The tenant shall take all necessary steps to procure the said Licence to be renewed from time to time and shall not remove the said Licence or cause or apply for the removal thereof from the premises and shall upon the expiry or earlier determination of this Lease cause the then current Hotel Liquor Licence to be transferred into the name of the landlord or his nominee ....."

Similar provisions were contained in the agreement of sale of the hotel business concluded between the fourth respondent and the appellant. Clause 7 thereof provided that the hotel liquor licence would remain the property of

Seimon, that it would be transferred to the appellant solely for the purpose of enabling it to carry on the hotel business and that the appellant would permit the hotel liquor licence neither to be transferred nor removed without the prior written consent of Seimon and, as long as any part of the total purchase price remained unpaid, of the fourth respondent.

During the time that the off-sales business was conducted at 20 Percy Stewart Street, the appellant applied, in terms of sec 34(1)(b) of the Act, for cancellation of the authority to sell liquor for consumption off the hotel premises and for the grant of a liquor store licence in its place. The application was granted and a liquor store licence issued in respect of the premises. Sec 34(1)(b) had

been / ....

been introduced into the Act by sec 5 of Act 31 of 1985 and now made it possible, for the first time, to convert an authority to sell liquor for consumption off the premises into a liquor store licence. The application was made without notice to any of the respondents and before sec 34 (1 A), which requires notice of such an application to be given to the owner of the premises and to any person who has a financial interest in the business, was introduced into the Act by sec 1(1)(b) of Act 50 of 1987.

Both the main lease and the sub-lease terminated on 31 March 1986. The appellant then refused to take any steps to transfer either the hotel liquor licence or the liquor store licence to the respondents or their nominee. This led to an application by the respondents in the



Witwatersrand Local Division for an order that both the hotel liquor licence and the liquor store licence be transferred to the first three respondents or their nominee. They contended that the appellant was expressly bound to take steps to transfer the hotel liquor licence to the fourth respondent, and that it was a tacit term of the lease agreement that the liquor store licence should likewise be transferred to the fourth respondent. As the latter was, in turn, contractually bound to transfer the licences to the first, second and third respondents, and had nominated them to receive transfer of the licences, they sought an order that the appellant procure the transfer of both licences directly to the first three respondents or their nominee. The application was resisted by the appellant on the grounds, firstly, that it was not contractually bound

to transfer either licence to the respondents; secondly, that any such contractual obligation was in any event void in terms of sec 191(a) of the Act; and thirdly, with regard to the liquor store licence, that each time the off-sales business was moved to new premises an application for a new off-sales authority was required, which meant that the off-sales privilege was abandoned and a new off-sales privilege granted before appellant applied under sec 34(1)(b) of the Act for the liquor store licence.

The application was heard by VERMOOTEN AJ who upheld the respondents' contentions in regard to the appellant's contractual obligations and dismissed the defences raised by the appellant. He granted an order directing the appellant within a month to take all

steps within its power and to sign all documents necessary to procure transfer to the first, second and third respondents or their nominee of the hotel liquor licence as well as the liquor store licence. Appellant was ordered to pay the costs of the application.

With the leave of the Court a quo the appellant appeals to this Court against the order for the transfer of the liquor store licence to the first three respondents or their nominee. There is no appeal against the order for the transfer of the hotel liquor licence.

At the hearing of the appeal Mr Bertelsmann, on behalf of the appellant, raised as a preliminary point the question of the non-joinder in the application of the lessor of the premises on which the appellant carries on the

off-sales business. The principles applicable to joinder are well established and appear from decisions such as Amalgamated Engineering Union v Minister of Labour 1949(3) SA 637(A); Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 (2) SA 151(O) at 167 C-F, 169 in fine; Kock and Schmidt v Alma Modehuis (Edms) Bpk 1959(3) SA 308(A) at 318 D-H; United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another 1972(4) SA 409(C) and Wistyn Enterprises (Pty) Ltd v Levi Strauss & Co and Another 1986(4) SA 796(T) at 801 B-G. For present purposes it is sufficient to refer to the following summary of these principles by CORBETT J in the United Watch and Diamond Co case, supra, at 415 E-H :-

"It / ...

"It is settled law that the right of a defendant to demand the joinder of another party and the duty of the Court to order such joinder or to ensure that there is waiver of the right to be joined (and this right and this duty appear to be co-extensive) are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved and the order which the Court might make ..... In Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953(2) SA 151(O), HORWITZ AJP (with whom VAN BLERK J concurred) analysed the concept of such a 'direct and substantial interest' and after an exhaustive review of the authorities came to the conclusion that it connoted (see p 169) -

'..... an interest in the right which is the subject-matter of the litigation and  
..... not merely a financial interest which is only an indirect interest in such litigation'.

This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions .... and it is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the Court ....."

Applying these principles to the position of the appellant's landlord in the present case, it is clear, in my view, that he need not be joined. He has no legal interest in the application for the transfer of the bottle store licence but merely a financial or commercial interest which may be prejudicially affected by the judgment of the Court. The preliminary point cannot, therefore, succeed.

Mr Bertelsmann next submitted that any construction of appellant's contractual obligations whereby appellant would be obliged to procure the transfer of the liquor store licence to the fourth respondent, would amount to a purported relinquishment of its right under the Act to transfer the licence to any other person, with the result that such contractual obligation would be void in terms of sec 191(a) of

the Act. This provision reads as follows :-

"191 Subject to express provisions to the contrary in this Act contained -

(a) any provision in any contract whereby any person purports to relinquish any right or forego any obligation under this Act shall be null and void; "

A similar contention to the one advanced by Mr Bertelsmann was rejected by COLMAN J in Bank Station Hotel (Pty) Ltd v Thomas and Others 1970(4) SA 411(T). The question for decision in that matter was whether a lessee of premises in respect of which he held a bottle store licence was entitled, as against the lessor, who was also the owner of the premises and from whom he had obtained transfer of the licence, to apply for the removal of the licence to other premises after the termination of the

lease. / ...

lease. Clause 7 of the lease provided that "although the said licence shall be taken out by the said lessee in his own name, upon the termination of this agreement the lessee shall have no power to apply for the removal or transfer of the said licence to any other premises, and the same shall be and remain the property of the said lessor". Clause 8 was similar to clause 11 of the main lease in the present case and provided that "upon the termination of this lease, whether by effluxion of time or otherwise, the lessee undertakes to do all such things and to sign all such documents as may be necessary for the purpose of transferring such licence to the said lessor or his nominee or nominees".

On behalf of the lessee it was contended that these provisions were void by virtue of sec 172(a) of the 1928 Liquor Act,

which / ...



which was the precursor of sec 191(a) of the present Act and was in terms substantially similar to the present sub-section. In his judgment COLMAN J said (at 414 D-G) that there was room for doubt whether the Legislature intended the sub-section to have the far-reaching effects which its wide language appeared to convey. He doubted, however, whether a restrictive application of the sub-section could be achieved as a matter of interpretation and expressed the view (at 414 F-G) that it might well be that if the Legislature intended something different from what it appeared so plainly to have said, the desired result could be achieved only by amendment. The learned Judge accordingly assumed, without deciding, that clause 7 of the lease was void. He held, however (at 414H), that the provision in clause 8 for a

transfer to the lessor's nominee did not constitute a purported relinquishment of any right granted to the lessee under the 1928 Liquor Act, so that that provision was not nullified by sec 172(a) of that Act.

In Sandown Hotel (Pty) Ltd v Kleinmond Drankwinkel

(Edms) Bpk 1979(1) SA 655(C) VAN WINSEN J expressed a similar inability to understand what exactly the Legislature was seeking to achieve by sec 172(a) of the 1928 Liquor Act, but held (at 658G) that when a person enjoys a right to sell liquor from licensed premises for consumption off those premises and he contractually undertakes not to do so within a certain area within which his right would enable him to do so, he thereby pro tanto relinquishes his right under the Act with the result that such an undertaking is null and void by virtue of sec 172(a).

Despite / ...

Despite the criticism of sec 172(a) of the 1928 Liquor Act which was expressed in the Bank Station Hotel and Sandown Hotel cases, sec 191(a) of the present Act was enacted with a wording almost identical to sec 172(a) of the 1928 Act. The present sub-section has since been considered in John Antonie Investments (Pty) Ltd v Hersch 1988(1) SA 607(O), where it was held (at 610 G-I) that the sub-section rendered null and void a term in an agreement of lease which prohibited the removal from the leased premises of all licences pertaining thereto, since it purported to effect a relinquishment of the lessee's right under the Act to apply for a removal of the liquor licence from the leased premises as well as the right to apply for the transfer of the licence to any person. At the time the lease was

concluded there was no liquor licence in existence in respect of the leased premises although the parties contemplated that the lessee would apply for a liquor licence.

The lessee subsequently obtained transfer of a liquor licence held by a third person. In his judgment BESTER J distinguished the facts of that case from those in the

Bank Station Hotel case in the following words (at 611 H-J) :-

"I do not, however, wish to be understood as disagreeing with the conclusion arrived at by COLMAN J in the Bank Station Hotel case. On the contrary, it seems to me that the dictates of justice and common sense demand that, in the case of a contractual relationship such as existed between the parties in that case, the Court should take cognisance of the fact that, as between lessor and lessee, the licence really belongs to the lessor and that the assumption of a contractual duty by the lessee to restore that which had been entrusted to him during the currency of the

lease ought therefore not to be regarded as a provision whereby he, the lessee, purports to relinquish a right."

In my view sec 191(a) of the Act does not apply to contractual provisions such as those in the present case which oblige the lessee in certain circumstances to transfer a liquor licence to the lessor. Such contractual undertakings are by no means uncommon in our law and their validity has always been recognised by the Courts (Fick v Woolcott and Ohlssons Cape Breweries Ltd 1911 AD 214 at 230 and the Bank Station case, supra, at 416 B-C). In my view sec 191(a) refers only to the purported relinquishment of statutory rights and obligations conferred or imposed on a licensee in terms of the Act (the reference is to "any right or ... any obligation under this Act") and does not apply to common

law rights and obligations such as the right of alienating a licence. In any event, as the Judge a quo has pointed out in his judgment the right which the appellant contends it relinquished is the right to choose to whom to transfer the licence. That right was exercised, however, if, upon a proper construction of appellant's contractual obligations, it undertook to effect transfer of the liquor store licence to the fourth respondent. Any undertaking by appellant to effect transfer of the liquor store licence to fourth respondent would accordingly, in my view, not be invalidated by sec 191(a) of the Act.

What then is the nature and extent of the contractual obligation which appellant undertook to perform, and is it sufficient or substantial performance of that obligation for

the / ...

the appellant merely to effect transfer of the hotel liquor licence and not also the liquor store licence? Clause 11 of the main lease, incorporated by reference in the sub-lease, requires the appellant, upon the termination of the lease "to cause the then current hotel liquor licence to be transferred into the name of the landlord or his nominee".

A liquor licence, it has been stated in decisions of this Court, is a purely personal statutory privilege granted to a particular person under the liquor laws to sell liquor at particular premises. Its grant involves the exercise by the licensing authorities of a delectus personae so that the licensee cannot transfer or otherwise deal with the licence unless authorised thereto in terms of the Act, which provides for the strict supervision of the grant, transfer

and removal of licences. (See Fick v Woolcott and Ohlsson's

Cape Breweries Ltd, supra, at 230 and Slims (Pty) Ltd and

Another v Morris NO 1988(1) SA 715 (A) at 736I-737B).

Nevertheless, as I have pointed out, our Courts have

recognised contractual obligations such as the one under consideration and have ordered specific performance thereof.

In Fick's case, supra, INNES J said the following at p 230:-

"Contractual undertakings on the part of a holder to transfer his licence to some other person on the happening of certain contingencies are of frequent occurrence. But the expression, though convenient, is inaccurate. No holder can transfer his licence; that is the sole prerogative of the Licensing Court. So that the only way to give any effect to such an undertaking is to treat it as an agreement by the promisor to exercise in favour of the promisee such right to apply for a transfer as the statute gives him, and to do all things necessary on his part to enable the Licensing Court to deal with



the application. And that is what, in my opinion, an agreement to transfer a licence amounts to."

and at p 234 INNES J continued as follows :-

"Now, Woolcott undertook at the expiration of his lease - and it has admittedly come to an end - to deliver and transfer the licences to Fick. As already pointed out, that is an obligation which he cannot literally discharge. But it amounts in effect to an agreement to apply to the proper authority for a transfer in favour of his landlord, and to do all things necessary to place the application in due form before the Licensing Court. And that contract is one of which I think specific performance should be decreed."

To return to the present case, it is clear from the contractual obligation in question that the parties contemplated that what had to be returned at the termination of the lease was substantially the same hotel liquor licence, possessed / ...

possessed of the same rights and privileges as before.

In order to determine whether the return of only the hotel liquor licence measures up to that obligation, the substance of the licence which is returned, and not merely its form, must be considered. One of the special privileges which attached to the hotel liquor licence when it was transferred into appellant's name was the right to apply for and acquire authority under sec 87(1)(a) of the Act to sell liquor for off-consumption. Such authority had previously been granted and an off-sales business established, which appellant acquired, together with the hotel business, from the fourth respondent. The authority which is obtained under sec 87(1)(a) of the Act is to sell liquor under the hotel liquor licence for consumption off the licensed hotel premises / ...

premises within the district in which the hotel premises are situated. The sub-section provides that if the off-sales premises do not form part of the licensed hotel premises, they shall for all purposes be deemed to form part thereof. In terms of sec 34(1)(b) of the Act such an off-sales authority may, upon application to the Minister, be cancelled and a liquor store licence issued in respect of the premises on which the off-sales business was carried on. It seems clear that the Legislature intended the liquor store licence which is issued in terms of sec 34(1)(b) to replace the previously existing off-sales authority so that, once the conversion has been effected, there is no longer any room for the privilege to obtain authority under sec 87(1)(a) of the Act to sell liquor for off-consumption. It would surely

defeat the intention of the Legislature if the liquor store business could be carried on at the premises of the previous off-sales business while at the same time the hotel licensee could obtain a new authority under sec 87(1)(a) at different premises, thus repeating the cycle. That this is not the practise is also clear from what is stated by Mr D J Botha, the Deputy Chairman of the Liquor Board, in an affidavit filed by the respondents. He states that the holder of a hotel liquor licence would only be able to obtain an authority to establish an off-sales business at new premises in exchange for giving up the off-sales authority in respect of the previous off-sales premises. In other words only one off-sales authority would be allowed at any one time.

In / ...

In the same way the existence of the liquor store licence would prevent the grant of a new off-sales authority.

It is clear, therefore, that if the hotel liquor licence is returned without the liquor store licence the appellant will not have returned that which it had received and which it had undertaken to restore, namely the hotel liquor licence in its original form, together with all the rights and privileges attaching to it, in particular the privilege to obtain authority under sec 87(1)(a) of the Act to sell liquor for off-consumption.

Because of the sec 34(1)(b) conversion the appellant is no longer able to return literally what it undertook to return. It is able, however, to effect transfer of the liquor store licence, and in doing so it will restore

substantially / ..

substantially what it undertook to restore in the sub-lease, and no more. The appellant's obligation under the sub-lease amounts in effect to an undertaking to do all things necessary on its part to enable the fourth respondent to obtain the necessary authority to carry on an off-sales business. By effecting transfer of the liquor store licence appellant will thus, in my view, perform according to his contract and not by means of an equivalent or substitute act (per aequipollens) as suggested by counsel for the respondents. The fact that the off-sales business will be carried on under a sec 34(1)(b) conversion instead of under a sec 87(1)(a) authority is not, I think, of any significance. Nor will the fourth respondent be in any better position than if the unimpaired hotel liquor licence had been returned to him. Any holder of a hotel liquor licence may apply for a sec 34(1)(b)

conversion, and had the unimpaired hotel liquor licence been restored, the fourth respondent could have applied for such conversion to a liquor store licence if he considered it more valuable than the sec 87(1)(a) authority. I think that it can safely be assumed that such an application would have been successful.

In my view, therefore, the appellant is able to perform specifically its obligations under the sub-lease by effecting transfer of both the hotel and liquor store licences and I can find no equitable reason to deny the respondents the right to specific performance which they have in our law.

For these reasons I am of the view that the Court a quo correctly granted the order for the transfer of the

liquor store licence, even though that order was granted on the basis of the Court's finding that the sub-lease contained a tacit undertaking to that effect, about the correctness of which I find it unnecessary to express any view.

In the result the appeal is dismissed with costs, including the costs of two counsel.

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W. VIVIER JA.

CORBETT, JA)  
HOEXTER, JA)  
STEYN, JA)  
NICHOLAS, AJA)

Concur.