REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION (FUNCTIONING AS GAUTENG DIVISION,
PRETORIA – MBOMBELA CIRCUIT COURT)

CASE NO: 1080/19

1. REPORTABLE: YES/ NO	
2. OF INTEREST TO OTHER JUDGES: YES/NO	
3. REVISED.	
.....	.....
DATE	SIGNATURE

In the matter between:

ROHAN GREYVENSTEIN First Applicant

EXECUGOLF (PTY) LTD Second Applicant

and

MBOMBELA GOLF CLUB Respondent

JUDGMENT

Roelofse AJ:

[1] The first applicant is in possession of and the proprietor of the Pro Shop and an area known as "*the Hall*" situated at the Clubhouse of the Mbombela Golf Club. The operation is run by an entity referred to as ExecuGolf. ExecuGolf runs the Pro Shop and rents golf carts to members of the public visiting the Golf Club. ExecuGolf ostensibly does so in terms of a written lease agreement that was entered into between the first applicant (trading as Execugolf Pro Shop Nelspruit) and the respondent on 1 December 2015 (*"the agreement"*).

[2] The agreement grants the first applicant the exclusive right at the Golf Club to: give lessons and coaching in the game of golf; trade in golf equipment and golf clothing; repair and service golf equipment; purchase and sell second hand golf balls reclaimed on the golf course; hire out golf equipment; and to hire out motorised golf carts. The lease agreement commenced 1 December 2015 and was set to end on 30 November 2020.

[3] It a clear from the papers that the first applicant conducts the business through ExecuGolf. Whether or not the parties formally refer to the second respondent when reference is made by the respondent in the correspondence to ExecuGolf is unclear. I deem this issue of no consequence for the adjudication of this application save for what I set out below regarding the respondent's first preliminary defence.

[4] Clause 19.1 of the agreement and a breach notice directed to ExecuGolf by the respondent take centre stage in this application. I therefore recite them in full.

[5] Clause 19.1 of the agreement reads as follows:

> *"Should the Lessee default in any payment due under this lease or be in breach of its terms in any other way, and fail to remedy such default or breach within 14 (Fourteen) days after receiving a written demand that it be remedied, the Lessor shall be entitled, without prejudice to any alternative or additional right of action or remedy available to the Lessor under the circumstances without further notice, to cancel this lease with immediate effect, be repossessed of the Premises, and recover from the Lessee damages for the default or breach and the cancellation of this lease."*

[6] On 4 May 2018, the respondent directed a "*FINAL NOTICE*" to ExecuGolf and for the attention of the first applicant (*"the notice"*). The notice reads as follows:

> *"Good day Rohan*
>
> *Following the most recent Management Committee meeting which unfortunately you did not attend, it was resolved that a Final Notice be formally sent to ExecuGolf noting the following:*
>
> 1. *As per the lease agreement clause 6.1. all monies owed to the club be paid on or before the 7th of each month.*
>
> 2. *The premises are adequately stocked with merchandise and properly staffed with personal at all times (per clause 9.12)*
>
> 3. *Procure that the premises is maintained at a level which is in keeping with the standard of the building club (clause 9.13)*
>
> 4. *Appoint a qualified person to be in attendance at the premises and attend all meetings including the Jock Committee meetings (clause 9.16.2)*
>
> 5. *Promote the game of golf through operational structures that provide a fist class environment for members and guests. (clause 9.17.2)*
>
> *The Management Committee believe you are in breach of the above clauses of the lease agreement and therefore give you formal notice and 14 (fourteen) days to rectify the situation. (by 18th May 2018)*
>
> *The condition of the golf carts also must be considered and reviewed as golfers have recently experienced numerous breakdowns and technical issues during their game. A proposal on the way forward in this regard should be submitted to the Management committee within the above time period.*
>
> *Mbombela Golf Club prides itself in the standard of the facilities and services that it offers its members, their guests and visitors and must ensure that all service providers maintain this same level.*
>
> *I trust you find the above in order and should you wish to discuss this please feel free to contact me.".*

The respondent alleges that it acted under clause 19 of the agreement in addressing the

notice to ExecuGolf.

[7] Various meetings were held, and correspondence flowed between the parties subsequent to the notice. The respondent granted ExecuGolf an extension to make payment of amounts due to the respondent to the end of May 2018. On 28 January 2019, the respondent informed the applicant in writing that it terminated the agreement with effect on 31 March 2019 (*"the termination"*). The first applicant acknowledged receipt of the termination but disputed what the first applicant considered an "unilateral cancellation" of the agreement. The first applicant informed the respondent that he will revert to the respondent as soon as possible.

[8] On 21 February 2019, the respondent sent out a notice to its members. In terms of this notice, the respondent informed its members that the current Pro Shop duties will be taken back by the club including the golf cart fleet rental and management and an on-course store offering golf equipment, merchandise and club apparel. The respondent also informed its members that with time to come the applicant's Pro-Shop area will be earmarked for an indoor conference and banqueting area. Overall and properly considered, this notice communicated that the respondent would be taking over the first applicant's exclusive rights in terms of the agreement.

[9] On 13 March 2019, the first applicant's attorney sent a letter to the respondent. In this letter, the first applicant's attorney recorded that the purported cancellation of the agreement was unlawful and that the first applicant did not intend vacating the premises on 31 March 2019. The first applicant's attorney also recorded that the applicant denied having received the notice of breach and that no notice was sent as required in terms of Section 14 of the Consumer Protection Act 68 of 2008. The first applicant's attorney alleged that prejudice was being suffered by the applicant due to the purported cancellation of the lease. A demand was directed to the respondent: to retract the purported cancellation; to give notice to members that the lease would not terminate; that the respondent will honour the lease agreement with the first applicant and that the respondent would not obstruct the first applicant's business. The undertaking was sought by the close of business on 15 March 2019 failing which the

first applicant threatened to approach court.

[10] On 15 March 2019, the respondent answered the first applicant's attorney's letter. In this letter, the respondent recorded that it believed that it followed due course to terminate the contract; that the Consumer Protection Act does not apply; that the respondent would not heed the demand; that the respondent would resort to legal assistance if ExecuGolf does not vacate the premises and requested the applicant to comply with the cancellation.

[11] The applicants allege that subsequent to the aforesaid letter, the respondent commenced making alterations to its reception area to accommodate a Pro Shop. The respondent was also informed by the applicant's attorneys on 27 March 2019 that thirty new golf carts were delivered to the respondent that morning but that the carts were taken elsewhere. The applicant's attorneys informed the respondent that it has been established that the respondent intends using the golf carts in direct opposition with the applicant's business.

[12] The applicants approach this court for urgent interim relief aimed at protecting their rights flowing from the agreement pending finalization of proceedings to be instituted by the respondent for the confirmation of the cancellation of the lease agreement within thirty days failing which, the interim relief would become final.

[13] The applicants, in the founding affidavit denies that the first applicant was in breach of the lease agreement that would justify a cancellation. It is the applicants' case that the respondent's cancellation of the agreement is unlawful. The applicants allege that the respondent should have instituted legal proceedings for the confirmation of the cancellation of the agreement and that its actions amounted to self-helpful. In paragraph 7.6 of the founding affidavit, the first applicant alleges as follows:

"I also deny that the Applicants are in breach of the lease and that the cancellation is justified, even if the cancellation was procedurally in order."

[14] The respondent raises two preliminary defences. The respondent alleges that

the second respondent is mis-joined as the agreement was entered into between the first applicant and the respondent. This defence has merit as the first applicant himself alleges that the agreement was between him and the respondent and that the business of the Pro Shop "*....is operated under the auspices of the Second Applicant.*" This allegation is not enough to establish the second applicant's *locus standi*. The dispute concerns the lease agreement and the rights and obligations flowing therefrom. The second applicant may have an interest in the application. A mere interest is not sufficient – a direct and substantial legal interest that may be prejudicially affected by the court's order is required (See: Snyders and Others v de Jager [2016 ZACC 54). This requirement the applicants have not established. The second applicant is mis-joined. An appropriate costs order will be made to address this defect.

[15] The second preliminary challenge the respondent raises relates to urgency. The respondent alleges that the applicants have created their own urgency and that the applicants have not complied with this court's directives relating to urgent applications. I first deal with the allegation of self-created urgency.

[16] The first applicant knew unequivocally on 15 March 2019 that the respondent would not give an undertaking as requested and that the respondent intended to stand by the cancellation subsequent to the respondent's rejection of the first applicant's proposal on 1 March 2019. Surely the first applicant was entitled to attempt resolve the dispute prior to approaching court. In any event, the first applicant was only informed that golf cart bookings were redirected to the respondent on 28 March 2018.

[17] With regards to the respondent's contention that the applicants have failed to comply with court's practice directive regarding urgent applications concerns the requirement that exceptional circumstances must be shown if the an applicant in an urgent application does not comply with the requirement that the application must be ready by the Thursday at noon prior to the Tuesday when the application is to be heard. In this matter this requirement was not complied with. The respondent was granted until 1 April 2019 to deliver its answering affidavit. The application was enrolled for 2 April 2019. It is not in dispute that a golf tournament is arranged for 5 April 2019 and that the applicant derives substantial income from golf cart rentals. To

this extent I find that these circumstances are sufficiently exceptional for the applicants to have approached the court in the manner they did. The respondent's challenge to urgency fails.

[18] The first *in limine* defence succeeds. The second *in limine* defence is dismissed.

[19] The respondent's defence to the merits application is that it had lawfully cancelled the agreement between the parties as a result of ExecuGolf's breach of the agreement and ExecuGolf's failure to remedy the breach. The respondent denies that it has ever interfered with the applicant's business, that the reception area of the respondent was used as a Pro Shop and that it acquired golf carts. The respondent admits that the first applicant had exclusive rights to do business as a Pro Shop on the golf course and to operate the letting of golf carts but alleges that the rights seized on 31 March 2019 by virtue of the cancellation of the agreement.

[20] The applicants deny that the agreement was lawfully cancelled in terms of the Consumer Protection Act 68 of 2008 ("the Consumer Protection Act"). In his argument Mr Smith, who appeared for the applicants, argued that due to the non-compliance of the respondent with the provisions of Section 14 of the Consumer Protection Act, in that the breach notice gave the applicant only fourteen days to remedy the breach whereas the section provides for twenty days for the remedying of a breach, such notice was unlawful and therefore the ultimate cancellation also. There is no force in this argument. Section 14(2)(b)(ii) of the Consumer Protection Act provides as follows:

> *"the supplier may cancel the agreement 20 business days after giving written notice to the consumer of a material failure by the consumer to comply with the agreement, unless the consumer has rectified the failure within that time;"*

The clear meaning of this section is that it entitles a supplier to cancel an agreement after twenty days have elapsed subsequent to a notice of breach.

[21] The respondent relies on clause 19 of the agreement in its defence that it validly cancelled the agreement on 28 January 2019. Clause 19 of the agreement

constitutes a *lex commissoria*. In order for the respondent to lawfully rely upon clause 19 for the valid cancellation of the agreement, the court must be satisfied that the first applicant was sufficiently aware of his obligation and the consequences of not fulfilling his obligation. This must appear from the notice itself. It is not the wording that is decisive. What is decisive is whether the notice communicates the breaches, what is required and what is the effect of non-compliance.

[22] Put differently, a creditor who intends to cancel the contract on the ground of the debtor's *mora* must also warn the debtor that, in the event of his failure to rectify his default within the stipulated period, the creditor reserves the right to cancel the contract - see: Nel v Cloete 1972 2 SA 150 (A) 159H. The exact wording is immaterial provided it clearly and unequivocally informs the debtor that his failure to perform timeously may result in the cancellation of the contract – see: Kragga Kamma Estates CC v Flanagan 1995 2 SA 367 (A) 375C-F.

[23] It is not in dispute that the first applicant received the notice. The notice informs ExecuGolf and the first applicant what performance is required by the respondent. What the notice does not communicate is what the consequence would be if the alleged breaches are not remedied. The respondent does not say that a failure to remedy the alleged breaches will result in a cancellation of the agreement. As a matter of fact, the notice invites ExecuGolf or the first respondent to submit a proposal on the way forward.

[24] Having regard to the notice and the conduct of the parties subsequent to the notice, I find that the "FINAL NOTICE" sent on 4 May 2018 did not entitle the respondent to cancel the agreement on 28 January 2019. I am able to make this finding on the papers alone as the notice, on the mere face of it, suffers from a material defect.

[25] The applicant is seeking interim relief. In order to be granted interim relief the applicant had to establish the requirements for an interim interdict being a *prima facie* right, a real apprehension of irreparable harm, the absence of a satisfactory alternative remedy and the balance of inconvenience.

[26] The applicants rely upon their rights flowing from the agreement for the relief they seek. If the agreement still subsists, the first applicant continues to have those

rights which include those exclusive rights afforded to the first applicant in terms of the agreement. In light of the findings I made regarding the cancellation, the first applicant's rights in terms of the agreement still subsist. The first applicant has established a *prima facie* right.

[27] The respondent's conduct threatens the first applicant's rights in terms of the agreement. This is apparent from what the respondent communicated to its members on 21 February 2019. The first applicant established the apprehension of irreparable harm requirement.

[28] The respondent challenges the applicant's allegation that it does not have an alternative remedy by stating that the respondent has not violated any of the applicants' rights. The only basis upon which the respondent can make this allegation is that the agreement was validly cancelled on 28 January 2019. In light of my finding regarding the cancellation, there is no substance in the respondent's denial that the applicants' do not have an alternative remedy.

[29] In respect of the balance of convenience requirement, the applicants state that they are in peaceful possession of the facilities and that the respondent has spoliated their rights. The respondent meets this allegation with an admission that the applicants are in possession of the facilities and a denial that the respondent has spoliated the applicants' rights. Yet again the respondent's founds its denial of spoliation upon the validity of its cancellation of the agreement. In light of the finding I have made regarding the cancellation, the respondent's contentions are not sustained.

[30] I conclude by saying that had the notice not suffered from defect I might not have come to the applicants' assistance because the first applicant has not raised any real challenge to the alleged breaches and the first applicant has not established that any of the breaches were purged within the period afforded by the respondent. A right of cancellation accrues to a creditor in terms of a *lex commissoria* when the debtor fails to remedy the breach within the time afforded by the creditor. The remedy of a breach by a debtor after the time afforded by the creditor does not deprive a creditor of such right – see: Boland Bank Limited v Pienaar 1988 (3) SA 618 (A). See also Van Wyk v Botha & Others 2005 (2) All SA 320 (C) paras 53-55; Galaxias Properties CC

v Georgiou 2013 ZAGPJHC 399 para 38. Absent the defect in the notice, the applicants may should have been non-suited.

[31] I make the following order:

1. The respondent is interdicted and refrained from conduct that infringes the rights of the first applicant in terms of the lease agreement dated 1 December 2015 in respect of the Pro-Shop premises on the respondent's property (*"the agreement"*), and in particular the respondent is interdicted and restrained from:
    1.1 Interfering with the first applicant's golf cart bookings by players or by re-directing or taking golf cart bookings;
    1.2 Engaging in the letting of golf carts to its members in competition with the first applicant;
    1.3 Establishing of a Pro-Shop on the premises in competition with the first applicant;
    1.4 Distributing circulars or other communication indicating that the first applicant's lease of the Pro-Shop has terminated;
    1.5 Engaging in any other contact which is an infringement of the first applicant's rights in terms of his lease.

2. The orders above in paragraphs 1 to 1.5 shall operate as an interim interdict pending the valid termination of the agreement.
3. The respondent is ordered to pay the first respondent's costs in the application.

Roelofse AJ

Acting Judge of the High Court

DATE OF HEARING: 2 April 2019

APPEARANCES

FOR THE APPLICANTS: Mr Smith

Christo Smith Attorneys

FOR THE RESPONDENTS: Mr Kruger

Instructed by Du Toit Smuts Attorneys

DATE OF JUDGMENT: 3 April 2019