THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not reportable
Case No: 783/2017

In the matter between:

LYA LOUW	**FIRST APPELLANT**
MARIA JOHANNA ATKINS	**SECOND APPELLANT**
MARIA BLANKENBERG	**THIRD APPELLANT**
MARIA MAGDALENA BOOYSEN	**FOURTH APPELLANT**
MAGRIETA KAMFER	**FIFTH APPELLANT**
JOHANNA KAMFER	**SIXTH APPELLANT**
PATRICK LEONARD NO	**SEVENTH APPELLANT**
GEORGE RUDOLPH WHITTLE NO	**EIGHTH APPELLANT**
SABINA SWARTZ	**NINTH APPELLANT**
JOHANNA SUSANNA TAYLOR	**TENTH APPELLANT**

and

ASHRAF DAVIDS	**FIRST RESPONDENT**
SHEREEN MATHIR	**SECOND RESPONDENT**
MOEGAMAT ALIE DAVIDS	**THIRD RESPONDENT**

Neutral citation: *Louw & others v Davids & others* (783/2017) [2018] ZASCA 70 (29 May 2018)

Coram: Navsa, Swain JJA and Davis, Plasket and Rogers AJJA

Heard: 15 May 2018

Delivered: 29 May 2018

Summary: Breach of contract – agreement to sell members' interests in close corporation – whether cancellation justified when large proportion of purchase price paid and restitution unlikely – cancellation not justified.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Le Grange, Saldanha and Steyn JJ sitting as court of appeal):

The appeal is dismissed.

JUDGMENT

Plasket AJA (Navsa and Swain JJA, Davis and Rogers AJJA concurring)

[1] The appellants brought an application against the respondents in the Western Cape Division of the High Court, Cape Town, in which they sought an order that an agreement of sale in respect of the members' interests in a close corporation, concluded between them and the first and second respondents, was 'duly cancelled, alternatively that the said agreement is hereby cancelled'. They applied too for orders directing the respondents to do what was necessary to give effect to the first order; directing them to provide details of the close corporation's catch of fish in terms of its fishing quota; and directing the respondents to pay the proceeds of the catch to the close corporation.

[2] The central issue in the application, and in this appeal, is whether the cancellation of the agreement of sale was justified. In the court of first instance, Cossie AJ made an order cancelling the agreement, together with other relief that was more extensive than that claimed in the notice of motion. In an appeal to a full court, Le Grange J, with whom Steyn and Saldanha JJ concurred, found that cancellation was not justified in the circumstances, set aside Cossie AJ's order and

replaced it with an order dismissing the application with costs. This appeal is now before us as a result of special leave to appeal having been granted by this court.

Background

[3] A fishing quota to catch pilchards and anchovies was granted in terms of the Marine Living Resources Act 18 of 1998 (the MLRA) to the appellants, ten women from Lamberts Bay on the Cape west coast.[1] They had worked in the fishing industry for many years and the grant was intended to empower them economically. As they owned no vessel with which to catch pelagic fish and no access to processing facilities, they wished to sell the quota.

[4] The quota was held by a close corporation – Meermin Viserye CC (Meermin) – of which the ten women were members. Each of them held a ten percent members' interest in Meermin. Although Meermin had debts in the amount of R875 514.15, it had one asset of value – the fishing quota.

[5] The appellants had negotiated unsuccessfully with potential purchasers of the fishing quota. In due course they were placed in contact with the first respondent, Mr Ashraf Davids. On 8 July 2012 agreement was reached and reduced to writing between the appellants, on the one hand, and Davids and the second respondent, Ms Shereen Mathir, on the other, in terms of which the appellants sold them their members' interests in Meermin. They, in turn, transferred their members' interests to the third respondent, Mr Moegamat Davids, who is the first respondent's father. This transfer was not effected in terms of the agreement but in terms of a separate agreement to which the appellants were not parties. Its purpose, according to the respondents, was as security for funding provided to the first and second respondents by the third respondent.

[6] The agreed purchase price in respect of the members' interests in Meermin was a total of R4 million, to be paid to the ten former members of Meermin in equal amounts of R400 000 minus an equal proportion of Meermin's debt – R87 551 each.

[1] Two of the women had died. The executors of their deceased estates are the seventh and eighth appellants.

In terms of clause 3.1 of the agreement, the purchase price was payable on the 'effective date' which was defined in clause 1 to mean the 'date on which the Minister issues to the Corporation its annual small pelagic fishing permit for the 2013 fishing season'. That date was, according to Davids, 28 February 2013.

[7] In terms of clause 5, a set of obligations arose in respect of the appellants. On the date of signature, they were required to:

'5.1.1 present to the Purchasers signed and completed CK2 & CK2A Forms and applicable powers of attorney;

5.1.2 Provide an original set of valid tax clearance certificates for the Corporation, alternatively a certified copy of the Corporation's tax clearance certificate;

5.1.3 Appoint Davids as the Corporation's authorised representative and provide Davids with a Special Power of Attorney to obtain statements of account and any other documentation from the SARS;

5.1.4 Appoint Davids and Mathir as the only two signatories on the Corporation's bank account and each of the Sellers shall remove themselves as authorised signatories on the Corporation's bank account(s);

5.1.5 Complete all forms and documents required for the purpose of satisfying any regulatory requirements by the Fisheries Branch of the Department, including signing a section 21 transfer application form in terms of the Marine Living Resources Act, 18 of 1998;

5.1.6 Hand to the Purchasers all financial records, resolutions, minutes, contracts, fishing permits, fishing right allocation notifications, fishing right applications and any other document pertaining to the Corporation; and

5.1.7 Each member shall immediately cease to involve themselves in any way in the business of the Corporation and shall cease to hold themselves out as members of the Corporation. Should any member breach this provision or in any way prejudice this Agreement or act in a way that may threaten the issue of the Corporation's Small Pelagic fishing quota permit, then the Purchasers shall be entitled to withhold any payments that may be payable to the Sellers.'

[8] Clause 6 provided for the risk 'in and benefit attaching to' the members' interests passing to Davids and Mathir with effect from the 'closing date'. This was defined in clause 1 to be the 'date on which the Purchaser concludes a due diligence into the affairs of the Corporation, which date shall not be later than 90 days after the Signature Date'.

[9] Clause 9 recorded that the written agreement constituted the entire agreement between the parties and clause 10 contained a non-variation clause. It read:

'No agreement varying, adding to, deleting from or cancelling this agreement, and no waiver whether specifically, implicitly or by conduct of any right to enforce any term of this agreement, shall be effective unless reduced to writing and signed by or on behalf of the parties. It is recorded that there exists no collateral and/or other agreements and that this is the sole agreement entered into by and between the parties.'

[10] Despite the agreement contemplating a single payment to each of the appellants on 28 February 2013, amounts of between R18 000 and R30 465 were paid to them between the date of signature of the agreement and 26 November 2012, when a written addendum to the agreement was concluded. It amended the terms of payment of the purchase price.

[11] The addendum recorded in its preamble that, while the agreement provided for payment of the purchase price on the effective date, 'the Purchasers have made a number of payments to the Sellers' and that the 'Sellers have requested an amendment to the payment provisions as they presently desperately require income'. The addendum then set out a payment schedule of R50 000 per person per month from the date of its signature until 15 May 2013, when the final payments would be made.[2] As it happened, this was an error because one more tranche was due. The problem was solved by an oral variation of the addendum to include a payment of R50 000 per appellant on 15 June 2013.

[12] Despite this agreement, payments in smaller amounts than provided for in the addendum were made over a period that extended beyond 15 May 2013. Davids explained that this was as a result of an oral variation of the agreement and its addendum, the idea being to make smaller monthly payments to each applicant over a longer period of time.

[2] The addendum refers to 15 May 2012 as the date of the final payment. This is incorrect as the addendum was signed on 25 and 26 November 2012. The date intended must have been 15 May 2013.

[13] He stated that it had become apparent that a number of the appellants had been spending their R50 000 tranches within weeks of receiving them. As a result, he requested Mr Shaheen Moolla, his transaction and legal advisor, to send an e-mail to Mr Marcel Celliers, an accountant who represented some of the appellants. Moolla wrote:

'Further I hear that a number of the Meermin ladies are spending cash at a rate of knots which could very well mean that with 2 payment tranches left they will be without cash in the near future (especially over Christmas). With a recent transaction, my client was requested by the selling members to instead make monthly payments to them which will guarantee a steady and lengthy flow of cash.

Would the ladies you represent consider this or do they wish to receive their final 2 payouts as presently agreed?'

[14] Celliers reverted to Moolla telephonically and advised him to contact the individual appellants. This was done and, according to Davids, the appellants 'verbally agreed to the increased payment period, being R10 000 per month in respect of the remaining R100 000'.

[15] Thereafter, it appears that payments were made on this basis, together with other ad hoc payments at times, at the request of the applicants. For example, Davids stated that some 26 payments were made to Ms Lya Louw, the first appellant, amounting to R104 900 during the period 15 May 2013 and 14 January 2014, with the result that she was paid more than her due.

[16] In the result, Davids said, by 3 February 2014 when he became aware that the appellants had purported to instruct the Department of Agriculture, Forestry and Fisheries to cancel Meermin's fishing permits, three of the appellants had been paid in full (in fact, slightly more than their entitlement) and the remainder were owed a combined total of R160 000. When the respondents became aware of this conduct, they considered themselves entitled, in terms of clause 5.1.6 of the agreement, to withhold any payments still due. In the answering affidavit, however, they tendered to make those payments if the court considered them to be due.

[17] Prior to the service on the respondents of the application in which cancellation of the agreements was sought, none of the appellants, according to Davids, disputed

the new payment system and all of them 'received and accepted payment in terms thereof'. In his view, they had 'waived the right to insist that a variation of the Sale Agreement or the Addendum Agreement should be recorded in writing and signed by all the parties'. At no time prior to the service of the application did any of the applicants, or anyone representing them, communicate in any way with any of the respondents to indicate that their conduct amounted to a breach of the agreement and its addendum and they were never placed on terms to remedy their alleged breach.

The issues

[18] The crux of the appellants' case is set out in paragraph 32 of the founding affidavit which states:

'The Applicants have been advised that in view of the default of the First and Second Respondents in respect of payment of the purchase price, we are entitled to cancel the agreement of sale and to recover the said members' interest from the Third Respondent as we are doing by virtue of the present proceedings. We are advised that in any event the approval of the Fourth Respondent is a condition precedent to the sale becoming binding which has not been complied with. Needless to say, the Applicants will refund any amounts that may be due and payable to the First and Second Respondents pursuant to the said payments received from them.'

[19] From this, two issues arise for determination. The first is whether cancellation of the agreement was justified. The second is whether the sale was subject to the suspensive condition of the approval of the Minister of Agriculture, Forestry and Fisheries.

[20] Before turning to these issues, it is necessary to decide on certain of the disputed facts. Mr Potgieter, who appeared for the appellants, argued that the respondents' version that an oral agreement had varied the addendum ought to be rejected as far-fetched and uncreditworthy, and that the appellants' denial of the oral variation ought to be accepted.

[21] I do not agree for the following reasons. The correspondence between Moolla and Celliers establishes that the idea of smaller tranches being paid over a longer

period was indeed proposed. The appellants do not deny that payments were made in smaller amounts over a period that extended beyond the time of the last payment in terms of the addendum. Between May 2013 and January 2014, for instance, the first appellant was paid R109 400. It was not denied that, by the end of April 2013, all of the appellants had been paid R300 000 each. By the time the court of first instance cancelled the agreement, the position was that the first, seventh and ninth appellants had been overpaid (by relatively small amounts) and that a total of about R160 000 was owed to the remaining appellants, in amounts varying between R20 000 and R27 000. This indicates a continuation of payments in amounts smaller than the R50 000 tranches envisaged by the addendum. All of these factors lend credence to Davids' version. In my view, it must be accepted as one of the facts that an oral variation of the addendum was agreed to, as alleged by Davids. I express no view on whether, in view of clause 10 of the original agreement, the oral variation was legally effective, as it is not necessary to do so in this case. To the extent that the full court held that the oral variation was legally effective despite clause 10, this judgment does not endorse that finding. I shall assume that the oral variation, while agreed as a fact, was not legally enforceable.

Was cancellation justified?

[22] The argument advanced on behalf of the appellants is that the respondents were in breach of their obligation to pay the purchase price when, in May 2013, they failed to pay each of the appellants R50 000, as stipulated in the addendum. This entitled them to cancel, which they did when the court of first instance made an order in their favour.

[23] When a breach of a contract occurs, the innocent contracting party has an election: he or she may either abide by the contract and enforce it or cancel the contract.[3] If the option of cancellation is not exercised (in clear, unequivocal terms) within a reasonable time, it may be inferred that the innocent party has elected to abide by the contract.[4] In this instance, much can be said for the proposition that, by accepting payments from May 2013 to as late as January 2014, the appellants, by

[3] *Culverwell & another v Brown* 1990 (1) SA 7 (A) at 16J-17A.
[4] *Mahabeer v Sharma NO & another* 1985 (3) SA 729 (A) at 736E-I; *Kragga Kamma Estates CC & another v Flanagan* 1995 (2) SA 367 (A) at 373B-G.

that conduct, elected to abide by the contract, and must be held to their election.[5] I prefer, however, to deal with the matter on another basis.

[24] Generally speaking, a party to a contract may cancel it if it has been breached by the other contracting party and that breach is material[6] – in the sense, as it has been framed in various cases, that it goes 'to the root of the contract', affects 'a vital part of the contract' or relates to 'a material and essential term' or constitutes 'a substantial failure to perform'.[7] Ultimately, however, what is involved is a value-judgment that seeks to be fair to both parties. In *Singh v McCarthy Retail Ltd t/a McIntosh Motors*[8] Olivier JA held:

'I perceive the correct approach to be as follows: The test, whether the innocent party is entitled to cancel the contract because of malperformance by the other, in the absence of a lex commissoria, entails a value judgment by the Court. It is, essentially, a balancing of competing interests - that of the innocent party claiming rescission and that of the party who committed the breach. The ultimate criterion must be one of treating both parties, under the circumstances, fairly, bearing in mind that rescission, rather than specific performance or damages, is the more radical remedy. Is the breach so serious that it is fair to allow the innocent party to cancel the contract and undo all its consequences?'

[25] For present purposes, my assumption that the oral variation was not legally effective would mean that technically the respondents were in breach of their agreement with the appellants. On this assumption, I proceed to consider whether the circumstances justified cancellation.

[26] Even though the addendum stipulated a final payment in May 2013 (which erroneously would have left the appellants short-paid by R50 000 each, and which led to an oral variation of the addendum), it is clear that payments were made beyond the revised final date of payment of June 2013. These payments continued, without protest from the appellants until January 2014 when, according to Davids, the appellants acted contrary to their obligations in terms of clause 5.1.6 – an

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[5] *Culverwell & another v Brown* (note 3) at 17A-B.
[6] *Singh v McCarthy Retail Ltd t/a McIntosh Motors* 2000 (4) SA 795 (SCA) paras 11-12.
[7] L F Van Huysteen, GF Lubbe and M F B Reineke *Contract: General Principles* (5 ed) para 10.102 (at page 346).
[8] Note 6 para 15. See too Van Huysteen, Lubbe and Reineke (note 7) para 10.103 (at page 346).

infraction that entitled the respondents to 'withhold any payments that may be payable to the Sellers'.

[27] Irrespective of the effect of the non-variation clause on the oral variation, the respondents continued to pay in terms of the oral variation, and the appellants continued to accept those payments. They even made requests for ad hoc payments from time to time.

[28] By January 2014, three of the appellants had been paid in full and the remaining seven were owed amounts varying from R20 000 to R27 000. A total of R160 000 out of a purchase price of R4 million was outstanding. In other words, 96 percent of the purchase price had been paid when the application for the cancellation was brought. An insignificant amount was therefore due. On the facts which must be accepted in terms of the *Plascon-Evans* rule, the respondents were complying with the terms of an oral agreement to which the appellants had consented. At no time before the launching of the application had the appellants withdrawn from the oral agreement and asserted their rights.

[29] The ability of the appellants to tender restitution is doubtful.[9] In the founding affidavit it seems to be suggested that restitution may be effected after the appellants are paid what they claim may be due to them as a consequence of the cancellation of the agreement. This, it seems to me, amounts at best to a tender of restitution of the purchase price after a successful claim for damages of some sort. This tender is so vague, speculative and open to doubt that it amounts to no tender of restitution at all.

[30] When these factors are considered cumulatively, they point strongly against cancellation as an appropriate remedy: cancellation would not be justified and, in the light of the substantial payment of the purchase price and the unlikelihood of restitution, it 'would be a disproportionate sanction'.[10] In the result, the court below was correct to conclude that cancellation of the agreement was not justified.

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[9] On restitution generally, see *Feinstein v Niggli & another* 1981 (2) SA 684 (A) at 700F-701A; *Baker v Probert* 1985 (3) SA 429 (A) at 446E-F.
[10] *Botha & another v Rich NO & others* 2014 (4) SA 124 (CC); [2014] ZACC 11 para 49.

The Minister's approval

[31] It was raised in the founding affidavit that the Minister's approval of the sale of the members' interests in Meermin was a condition precedent of the agreement.

[32] The agreement, in unqualified terms, provides for the sale and purchase of 100 percent of the appellants members' interests in Meermin.[11] Provision is made for a purchase price of R4 million.[12] There is no express term in which provision is made for any condition precedent. The warranties given by the appellants include that they warrant that there were no outstanding dues in relation to the quota.[13] The agreement records that Meermin had submitted all regulatory documentation[14] and includes a warranty that the quota has not been contracted to or committed to any other person.[15]

[33] Significantly, the agreement placed an obligation on the appellants to complete the necessary forms to satisfy the regulatory requirements of the Fisheries Branch of the relevant department, including completing a section 21 transfer application form.[16] No warranty was given in relation to the necessary approvals in the present or future fishing years. It is clear from the terms of the agreement as a whole that the purchaser accepted the risk related thereto. In my view, given the clear express terms of the agreement, there is no room for a tacit term to the effect contended for.

[34] In any event, we were informed from the bar that Meermin has continued to operate on a temporary authorisation of some sort. It may be that once, pursuant to this judgment, it has been clarified that the appellants were not entitled to cancel the agreement, the controllers of Meermin will need to obtain approval from the Minister for the change in control in order for Meermin to continue receiving annual quotas. I do not minimise the importance of the transformation profile of quota holders.

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[11] Clause 2.1.
[12] Clauses 3.1 and 3.2.
[13] Clause 6.1.1.
[14] Clause 6.1.4.
[15] Clause 6.1.5.
[16] Clause 5.1.5.

However, the fact that such consent may be needed does not mean that the sale agreement was conditional.

Conclusion

[35] In the result, the appeal must fail. I note however that Ms Titus, who appeared, together with Ms Ostler, for the respondents confirmed that the tender to pay the outstanding amounts to seven of the appellants still stood. She also informed us that her clients did not seek a costs order in this appeal and that they abandoned the costs order in their favour in the court below.

[36] The appeal is dismissed.

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C Plasket

Acting Judge of Appeal

APPEARANCES

For appellants:	D Potgieter SC Instructed by: Moosa, Wagley & Petersen Inc, Cape Town Honey Attorneys, Bloemfontein
For respondents:	Z Titus and L Ostler Instructed by: Van Lieres, Cooper, Barlow & Hangone, Cape Town Rossouw & Conradie Inc, Bloemfontein