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Court : South Africa Supreme Court of Appeal

Decided On : Mar-28-2014

Judge : Mpati P, Lewis, Bosielo, Wallis Jja & Van Zyl Aja

Appeal No. : 182 of 2013

Appellant : Comwezi Security Services (Pty) Ltd. and Another

Respondent : Cape Empowerment Trust Ltd.

Judgement :

On appeal from: Western Cape High Court, Cape Town (Traverso DJP sitting as court first instance):

1. The appeal is dismissed with costs including those of two counsel.
2. The period of ten days in para 21.2 of the order of the high court dated 5December 2012 is to be construed as a reference to ten days from the date of this judgment.

JUDGMENT

Van Zyl AJA (Mpati P, Lewis, Bosielo and Wallis JJA concurring)

[1] The issue which arises for decision in this appeal requires us to consider the conflict between two principles of law expressed as follows: A party may not repudiate a contract and at the same time seek the advantage of a stipulation in the very contract he has repudiated?. What is the theory that justifies such a principle? Against it there is the argument that an unaccepted repudiation is a thing writ in water? not affecting legal rights in any way . . . and that therefore all contractual rights remain available to the repudiating party.[1]

[2] The background facts relevant to the dispute between the parties appear from the judgment of this court in Comwezi Security Services (Pty) Ltd and another v Cape Empowerment Trust Ltd.[2]The first appellant, Comwezi, borrowed R4 million from the respondent, Cape Empowerment Trust Ltd (CET). Repayment of this amount was secured by way of a cession and pledge of shares in Comwezi held by the Grapsy Trust (the trust), which is represented by the second appellant, Mr Mowzer, in his capacity as its trustee. Comwezi failed to repay the loan and the parties entered into settlement negotiations. These culminated in the conclusion of a settlement agreement in terms of which the loan would be discharged by way of the issue to CET of 25 ordinary shares in the issued share capital of Comwezi.

[3] The settlement agreement entitled CET to conduct a comprehensive due diligence investigation in respect of the affairs of Comwezi before deciding finally whether to take up the shares in settlement of the amount owing to it. Both Comwezi and the trust accepted the obligation to co-operate with CET in conducting this investigation, and to lend their assistance. This included the obligation to make all documentation relating to Comwezi available for inspection. The relevant provisions in this regard are found in clause 7 of the settlement agreement:

7 DUE DILIGENCE INVESTIGATION

7.1 CET shall be entitled, immediately after the Signature Date to conduct a comprehensive due diligence investigation in respect of the affairs of Comwezi.

7.2 Comwezi and the Grapsy Trust shall co-operate with CET in conducting the due diligence investigation and shall procure that CET and its duly authorised

representatives are given every reasonable assistance in this regard, and that all documentation of Comwezi are made available for inspection.

7.3 . . .

7.4 . . .

7.5 . . .

7.6 CET shall have the sole and absolute discretion to proceed with or abandon this Settlement Agreement based on the outcome of its own findings and conclusions from the due diligence investigation.

7.7 CET shall, for purposes of the resolute condition contained herein, notify Comwezi by not later than 3 months after the Signature Date whether or not it is satisfied with the outcome of its due diligence investigation and accordingly whether it wishes to proceed with this transaction, provided that if CET fails to so notify Comwezi timeously, CET shall be deemed not to be satisfied.

[4] In terms of clause 10, which was described as a resolute condition, CET had to complete the investigation and notify Comwezi in writing that it was satisfied with the outcome thereof within 3 months after the date of the signing of the said agreement. If it did not do so, the settlement agreement would lapse, and the parties would revert to their respective positions under the loan agreement. CET was given the right to waive or relax the resolute condition. Clause 10 in its entirety reads as follows:

10 RESOLUTIVE CONDITION

10.1 The Parties agree that this Settlement Agreement is subject to the resolute condition that CET has completed the due diligence investigation set out in clause 7 in respect of Comwezi and has notified Comwezi in writing that it is satisfied with the outcome thereof by no later than 3 (three) months after the Signature Date.

10.2 In the event of CET not notifying Comwezi that it is satisfied with the outcome of the due diligence investigation, this Settlement Agreement will automatically fail and be of no further force and effect and the Parties shall restore the status quo

ante as near as possible and no party shall have any claim against the other party arising from this Settlement Agreement and for the avoidance of doubt, the Parties will then only be able to rely on the terms of the Loan Agreement to enforce its rights against the other.

10.3 The resolute condition contained herein is imposed for the benefit of CET and may be waived or relaxed, in writing, by CET prior to the period of 3 (three) months after the Signature Date.

[5] Relying on the power in clause 10.3, CET from time to time extended the three month period. It needed to do so by reason of Comwezis failure to comply with its obligation to co-operate with the due diligence investigation and to provide the necessary documentation to enable it to complete the investigation. The last extension was until 4 November 2011. Before the expiry of the extended time period CET approached the high court on application (the first proceedings) seeking an order to compel Comwezi to provide it with certain specified documentation; to assist CET in conducting the investigation; and to allow it access to Comwezis premises. Comwezi and the trust resisted the application, inter alia on the basis that clause 10.3 of the settlement agreement did not entitle CET to extend the three month period as it had purported to do, and that the settlement agreement had lapsed as a result. The high court held that the extensions were permissible and that the agreement remained in force. On 10 October 2011 it granted an order in favour of CET compelling Comwezi to co-operate with CET in the due diligence investigation. Comwezi was given 10 days to comply with the order.

[6] Comwezi lodged an appeal against that order. This court (per Wallis JA) found that on a proper interpretation of clause 10.3, it afforded CET the right to extend the period in which it had to inform Comwezi that it was satisfied with the outcome of the due diligence investigation, and by necessary inference, the period within which it was to conduct that exercise.[3] On 21 September 2012 the appeal was dismissed with costs. CET subsequently attempted to execute the order of the high court of 10 October, only to be informed by Comwezi that because the three month period had not been extended beyond 4 November 2011, the settlement

agreement had lapsed and that it would not comply with the order. It is common cause that CET did not extend the date for the finalization of the due diligence investigation, or the date for notifying Comwezi of the outcome of that investigation beyond 4 November 2011.

[7] This prompted CET once again to approach the high court for assistance. It applied for a declaratory order that the settlement agreement had remained valid and binding, and that Comwezi must comply with the order of 10 October 2011. The high court (per Traverso DJP) granted the relief sought. It is this order which forms the subject matter of this appeal. Relying on the decisions in *Erasmus v Pienaar*[4] and *Moodley and another v Moodley and another*[5] the high court found that the failure of Comwezi to comply with its obligations in terms of the settlement agreement. This, the court said, constituted a repudiation of the agreement, and it not only entitles the innocent party to cancel, but that, for as long as the repudiation endures, it suspends the obligation of the innocent party to perform in terms of the agreement.

[8] It was correctly acknowledged in argument by counsel for Comwezi that the refusal of Comwezi to cooperate in the due diligence investigation and its unjustified insistence that clause 10.3 of the agreement did not entitle CET to extend the time period for completing the investigation, constituted a wrongful repudiation of the agreement. The test to determine whether conduct amounts to a repudiation which justifies cancellation is . . . whether fairly interpreted it exhibits a deliberate and unequivocal intention no longer to be bound.[6] It is not in issue that CET, by insisting that Comwezi comply with its contractual obligation to render assistance in the investigation, elected not to accept the repudiation. The effect of that election was that the agreement remained in place and each party remained subject to all its obligations and liabilities. Comwezi relies on the following legal proposition in support of its contention that CET's failure to extend the time period beyond 4 November 2011 has resulted in the agreement lapsing:

A repudiation, as was once said, is *œa thing writ in water?* It merely affords the injured party an election to terminate the agreement by accepting the repudiation ... and unless and until that happens the repudiator's obligation to

perform and the other party's right to receive performance remain wholly unaffected.[7]

[9] Comwezis contention is that the failure of CET to cancel the agreement meant that it was bound to continue to extend the time period in clause 10 if it wished to maintain the contract in force. It argued that the failure of CET to do so beyond 4 November 2011 meant that the resolutive condition had not been fulfilled and the agreement had lapsed. Its noting of an appeal against the order of 10 October 2011 and the prosecution thereof cannot, according to Comwezi, in any way assist CET. It said that the effect of the appeal was simply to suspend the operation and the execution of the order. It did not operate to extend the period provided for in clause 10 of the agreement, or obviate the need for CET to take the steps it was obliged to take under the contract to keep it alive.

[10] What is immediately apparent from Comwezis submission (that its own unaccepted repudiation did not take away its entitlement to take advantage of the claimed failure of CET to comply with the terms of the agreement) is its inequity. What it amounts to is the following: Comwezi refused to cooperate in the due diligence investigation and to make the documentation requested available, on the basis that clause 10.3 did not entitle CET to extend the three month period in clause 10.1, and that the agreement had lapsed as a consequence. It adopted that position in the first proceedings. But now that its interpretation of clause 10 has been found to be incorrect and it must comply with its obligation to participate in the due diligence investigation, Comwezi seeks to rely on CET not having further extended the three month period beyond 4 November 2011. What it effectively seeks to do, to its own advantage, is to rely on the terms of the agreement it had elected to repudiate. It does not appear to me to be sound law to permit a person to repudiate a contract, and thereupon specifically to found upon a term in that contract which he has thus repudiated.[8]

[11] It is correct that repudiation as such does not have any effect on the rights and duties of the parties to a contract, as long as the innocent party is willing, prepared and able to perform his obligations. However, it is recognised that the repudiation of one party may in appropriate circumstances excuse the innocent

party from taking measures which it would otherwise have been obliged to take, or may suspend the performance of his own obligations, until such time as the repudiating party indicates his willingness to give effect to the contract. Appropriate circumstances would be that the innocent party cannot proceed without the co-operation of the repudiating party, or that the principle of mutuality of performance would entitle the innocent party to withhold its own performance.[9] This rule has its origin in the English law from where repudiation as a form of breach of contract made its way into our own law.[10] In *Erasmus v Pienaar* the court (per Ackermann J) dealt extensively with this rule and concluded that there exists sufficient authority for it to form part of our law. The decision in *Erasmus* has found approval in a number of subsequent decisions,[11] including decisions of this court.[12]

[12] The rationale for this rule is twofold: A party to a contract should not by its own unlawful conduct be allowed to obtain an advantage for himself to the disadvantage of his counterpart. It is a fundamental principle of our law that no man can take advantage of his own wrong[13] and to permit the repudiating party to take advantage of the other side's failure to do something, when that failure is attributable to his own repudiation, is to reward him for his repudiation.[14] The converse is that the innocent party is not expected to make the effort or incur the expense of performing some act when, by reason of the repudiation, it has become nothing but an idle gesture.[15] This is consistent with the general principle that the law does not require the performance of a futile or useless act. These principles are of general application and may find application in a variety of circumstances. The doctrine of fictional fulfilment of contractual terms is, for example, similarly based on the principle that a contractant cannot take advantage of its own wrongful conduct to escape the consequences of the contract.[16]

[13] Comwezi submitted that the principle in *Erasmus* and *Moodley* does not find application on the facts of the present matter. The argument was that this case does not deal with the failure of the innocent party to comply with a contractual obligation, but rather the failure of CET to exercise a contractual power or authority to extend the time period in clause 10.1 so as to prevent the fulfilment of a resolutive condition. It was submitted that the exercise of that power was not in

any way dependent on the co-operation or the due performance by Comwezi of its own contractual obligations. It is correct that clause 10.3 of the agreement does not provide for a right in the sense that there is a correlative duty. It is rather a power or authority that is an ability on the part of a person to produce a change in a given legal relationship by doing or not doing a given act. Its correlative is not a duty but a liability.[17]

[14] The difficulty with this argument is, however, that it focuses too narrowly on clause 10.3 of the agreement. The rights and obligations of the parties must be determined from the agreement as a whole. Clause 7.1 gave CET a contractual right to conduct a due diligence investigation. Clause 7.2 in turn placed an obligation on Comwezi to co-operate with CET in conducting that investigation. On a construction of clause 10.1, read with clauses 7.7 and 10.2, it clearly imposed a time limit on the envisaged investigation. It placed a contractual obligation on CET to complete it within three months or an extended time period as determined by it under clause 10.3. Clause 10.1 is clearly a term containing a resolute time clause. n Tydsbepaling kan op twee maniere aan n verbintenis toegevoeg word, t.w. opskortend en ontbindend. Ontbindend is die tydsbepaling wanneer die verbintenis of verbintenisse uit die ooreenkoms slegs tot op n sekere dag werking sal h[18]The label which the parties to the agreement attached to it cannot turn it into a resolute condition. There is a fundamental difference between a condition and a term containing a time clause. The former is subject to a future uncertain event. The latter on the contrary deals with the performance by a party of an obligation within a stipulated period.[19]Clause 10.1 falls in the latter category.

[15] The position is therefore that CET was clearly willing and able to comply with its contractual obligations. Due to Comwezi's refusal to co-operate, CET was prevented from completing the due diligence investigation within the required time period, that is, the time period as determined in accordance with the terms of the agreement. Its obligation to complete the investigation within that period was dependent upon Comwezi's co-operation. Its attempt at enforcing Comwezi's contractual obligation to render the necessary assistance was met with a wrongful insistence that clause 10.3 of the agreement did not entitle CET to extend the

three month period, and that the failure of CET to complete the investigation within that period meant that the agreement was no longer in existence. The position taken by Comwezi therefore amounted to an intimation that it would be an act of futility for CET to act in terms of clause 10.3 of the agreement. In these circumstances it would have served no purpose whatsoever for CET to continue to extend the time period in which to conclude the due diligence investigation.

[16] I therefore conclude that on the facts of this matter CET's contractual obligation to complete the due diligence investigation within the determined time period was suspended from 11 October 2011 when the high court in the first proceedings found that Comwezi was in breach of its obligations in terms of the agreement.

[17] In the result:

1. The appeal is dismissed with costs including those of two counsel.
2. The period of ten days in para 21.2 of the order of the high court dated 5 December 2012 is to be construed as a reference to ten days from the date of this judgment.

[1] Per Mahoney JA in *Ninas Bar Bistro (Pty) Ltd (Formerly Mytcoona Pty Ltd) v MBE Corporation (Sydney) Pty Ltd* [1984] 3 NSWLR 613 (CA) at 633.

[2] *Comwezi Security Services (Pty) Ltd and another v Cape Empowerment Trust Ltd*(759/11) [2012] ZASCA 126 (21 September 2012).

[3] *Comwezi Security Services (Pty) Ltd and another v Cape Empowerment Trust* above para 13.

[4] *Erasmus v Pienaar* 1984 (4) SA 9 (T).

[5] *Moodley and another v Moodley and another* 1990 (1) SA 427 (D).

[6] Per Williamson J in *Street v Dublin* 1961 (2) SA 4 (W) at 10B-C. See *Datacolor International (Pty) Ltd Intamarket (Pty) Ltd* [2000] ZASCA 82; 2001 (2) SA 284 (SCA) para 1.

[7] Per Hefer JA in *Culverwell and another v Brown* 1990 (1) SA 7 (A) at 28E-F.

[8] *Municipal Council of Johannesburg v D Stewart and Co(1902) Ltd* 1909 HL 53 at 56 referred to in *Hurwitzs Trustees v Magdeburg Fire Insurance Co* 1917 TPD 443 at 448 and *Erasmus v Pienaar* 1984 (4) SA 9 (T) at 24B.

[9] *Moodley* at 431E-F.

[10] S W J van der Merwe, L F van Huyssteen, M F B Reinecke and G F Lubbe *Contract General Principles* 4 ed (2012) at 308 and *Crest Enterprises (Pty) Ltd v Rycklof Beleggings (Edms) Bpk* 1972 (2) SA 863 (A) at 869C-H.

[11] *Moodley* at 430E-431I; *Culverwell and another v Brian* 1988 (2) SA 468 (C) at 475I-J.

[12] *GNH Office Automation CC v Provincial Tender Board, Eastern Cape* [1998] ZASCA 25; 1998 (3) SA 45 (SCA) at 51F-G; *Ashcor Secunda (Pty) Ltd v Sasol Synthetic Fuels (Pty) Ltd* (624/10) [2011] ZASCA 158 (28 September 2011) para 8 and *Food and Allied Workers Union v Ngcobo NO and another* [2013] 7 BLLR 648 (SCA) para 50.

[13] P M Nienaber *The Effect of Anticipatory Repudiation: Principle and Policy* (1962) *Cambridge Law Journal* 213 at 225, quoted with approval in *Food and Allied Workers Union v Ngcobo and another* para 50.

[14] *Moodley* at 431F-G.

[15] *Moodley* at 431G-H and *Erasmus* at 22E-H.

[16] *Macduff and Co Ltd (in liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573 at 591 and *Koenig v Johnson and Co Ltd* 1935 AD 262 at 272.

[17] G W Paton *A Textbook of Jurisprudence* 4 ed (1972) at 293.

[18] J C de Wet and A H van Wyk *Kontrakreg en Handelsreg* 5 ed Vol 1 at 146. A time clause may either be suspensive or resolute in its operation. It is resolute

when the obligation or obligations arising from the contract shall only be operative until a certain day. (my translation)

[19] De Wet and Van Wyk at 146; A J Kerr The Principles of the Law of Contract 6 ed at 457; Jurgens Eiendomsagente v Share [1990] ZASCA 81; 1990 (4) SA 664 (A) at 674I and Venter Agentskappe (Edms) Bpk v De Sousa [1990] ZASCA 37; 1990 (3) SA 103 (A) at 111D-F.

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