

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2011/13797

DATE: 23/09/2011

NOT REPORTABLE

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

.....
DATE

.....
SIGNATURE

In the matter between:

O'EHLEY, BAZIL BRUCE N.O.
O'EHLEY, CYNTHIA BEATRICE LESTELLA N.O.
KEETON, ERROL NORMAN N.O.
O'EHLEY, BAZIL BRUCE

First Applicant
Second Applicant
Third Applicant
Fourth Applicant

And

ADZAM TRADING 197 (PTY)

LIMITED

Respondent

J U D G M E N T

LAMONT, J:

[1] The applicants representing the BRC Investment Trust (hereafter the Trust) and the fourth applicant personally brought these proceedings. The Trust and fourth applicant are hereafter referred to as the purchaser.

[2] The purchaser and the respondent entered into a contract in terms whereof the sellers sold certain share equity and agreed to cede certain ceded loans to the respondent. The respondent was in turn obliged to pay the purchase price in tranches. The sale was subject to a variety of conditions precedent which were to be fulfilled by not later than 3 March 2009.

[3] Certain of the conditions could be waived by the seller and certain by the respondent. Clause 2.4 of the agreement provides:

“2.4 If any of the ... conditions is not fulfilled by the 3rd ... March 2009 or such later date as may be agreed to by the parties, then, unless it is waived in writing by the party in whose favour it has been inserted in terms of this clause, the agreement shall not take effect and neither party shall have any further claim against the other as a result thereof.”

Clause 2.5 provided:

“2.5 Should this agreement lapse for failure of any of the suspensive conditions ... then and in such event the status quo ante shall be restored.”

[4] Certain persons including the seller and others furnished the respondent a variety of warranties and indemnifications. The respondent submitted that the parties who had furnished indemnities and warranties should have been and had not been joined to the proceedings. The current proceedings are formulated on the basis of the failure of the suspensive conditions and the rights of the seller against the respondent to treat the contract as unenforceable. The warranties and indemnities play no role in and the parties who gave them unaffected by the current litigation. In my view such parties do not have the legal interest required for a compulsory joinder.

[5] The respondent submitted that even if the suspensive conditions had not been fulfilled they had been waived by it and/or the seller was estopped from relying upon the non-fulfilment thereof.

[6] The respondent's attorney on 2 March 2009 wrote a letter from which it appears that the suspensive conditions 2.1.3, 2.1.4, 2.1.8 and 2.1.12 had not been fulfilled. On 6 March 2009 the respondent's attorney wrote setting out that the respondent was prepared to accept that the suspensive conditions had been fulfilled and that the respondent would make payments as if the suspensive conditions had been fulfilled in relation to two particular agreements. It is apparent that as at that time there were outstanding unfulfilled conditions. The seller instituted proceedings against the respondent under Case No. 2010/14604 claiming payment and, duly represented, must have signed a summary judgment affidavit as a summary judgment application was brought. In that affidavit the seller confirmed that the

suspensive condition had been fulfilled by way of referring to the relevant paragraph in the particulars of claim. The submission was that an affidavit having been signed on behalf of the applicant accepting the fulfilment of the conditions an affidavit could not now be signed on behalf of the applicant disavowing the existence of the fulfilment.

[7] It appears that the suspensive conditions were not fulfilled timeously

[8] The effect of the non-fulfilment of the conditions is that the agreement lapsed. The contract itself provides that in the event of the failure of suspensive conditions that the contract lapses and the *status quo ante* is to be restored (clause 2.5). The lapsing of the contract is in accordance with the law. See *Trans-Natal Steenkoolkorporasie Bpk v Lombaard en 'n Ander* 1988 (3) SA 625 (A) at 640. See also *Westmore v Crestanello and Others* 1995 (2) SA 733 (W).

[9] It is my view that if the affidavit incorrectly referred to the conditions as having been fulfilled, as the evidence in fact establishes, that there was an error. In my view there is no question of an election being made neither is there evidence supporting such an election. The effect of the non-fulfilment of the conditions is that the agreement lapsed. The contract itself provides that in the event of the failure of suspensive conditions that the contract lapses and the *status quo ante* is to be restored (clause 2.5). The lapsing of the contract is in accordance with the law. See *Trans-Natal Steenkoolkorporasie Bpk v Lombaard en 'n Ander* 1988 (3) SA 625 (A) at 640. See also *Westmore v Crestanello and Others* 1995 (2) SA 733 (W).

[10] It remains to consider whether the respondent waived its rights concerning the fulfilment of the suspensive conditions. The waiver is contained in a letter dated 2 March 2009 written by the respondent to George the respondent's attorneys. It contains a waiver of compliance with the suspensive conditions. Attached to it is a resolution empowering a person other than the signatory to the letter referred to to act on behalf of the respondent. Much was made of this. In my view the inference which the applicant seeks that I draw that the person who is authorised to act originally is the only person who was so authorised cannot be drawn. In my view the letter must be treated as if it is a letter from the respondent written by a person who had authority.

[11] There was no communication of the waiver to the seller either within the time period or at all.

[12] In my view it is a requirement that there be both communication and that the communication be timeous. See the *Lombaard* case *supra* and the *Westmore* case *supra*.

[13] It was submitted, relying on the authority of Cameron J in *Southern Witwatersrand Exploration Co Ltd v Bisichi Mining plc* 1998 (4) SA 767 (W) at 778G-780H that there need be no communication timeously or at all and that it is sufficient in there is some expression or manifestation of it which is communicated to the debtor or in some way brought to his knowledge.

[14] It appears to me that the judgment intended to convey that the respondent in some way manifests the waiver. This consideration in my view relates to the mechanism by which communication can take place rather than indication that at some later date there can be a manifestation consistent with a waiver which is acceptable to establish communication. The date was irrelevant in the matter as the manifestation was prior to lapsing of the condition (at 780 D) –H)

[15] In my view the case is distinguishable.

[16] In my view the authority strongly shows that the waiver necessarily must take place and be communicated prior to the expiry of the time period.

[17] Accordingly I find waiver not to have been proven.

[18] The respondent raised the question of estoppel submitting that the applicant by stating that the proposed conduct of the respondent in relation to the contract on the basis of the fulfilment of the condition met with its approval. In a letter dated 6 March 2009 the following was written:

*“Thank you for your mail. The contents meet with our approval.
Regards.”*

The first answer is that the response does not deal with all the outstanding suspensive conditions and further that there is no indication that the applicant would not rely upon the non-fulfilment of the conditions.

The second is that there was no representation

[19] The claim that there was an estoppel is founded upon an allegation that the response of the seller to the respondent's letter dated 6 March 2009 constituted a representation. In the respondent's letter of 6 March 2009 the respondent sets out that the respondent proposes making payments of certain amounts as if the suspensive conditions had been fulfilled and that in respect of two agreements to which the payments related the respondent was prepared to accept that the suspensive condition had been fulfilled and would deal with such other remaining parties in respect of the suspensive conditions. The response of the seller was "*Thank you for your mail. The contents meet with our approval.*" Upon a proper construction of the response there is no representation that the conditions had been fulfilled or that the seller would treat them as such. The sole message conveyed was that if the respondent chose to take certain steps that the applicant approved them.

[20] This in my view solves the issue of the estoppel. I would however add that I query whether or not an estoppel could ever be raised to create a contract which had lapsed. See *Westmore supra*.

[21] It was submitted by the respondent that it was “*impossible to unscramble the egg*”. The respondent submitted that as the contract was void the appropriate remedy lay in unjust enrichment. In my view this submission fails to have regard to the terms of the contract which provide what is to happen in the event the suspensive conditions are not fulfilled. The contract provides that there is to be a restoration of the *status quo ante*. The simple position is that what has been paid is to be recovered and what has been received is to be restored. Complexities concerning the affairs of other companies and other entities which have taken steps on the basis of the existence of the contract are irrelevant to this issue.

[22] It follows that I am of the view that the applicants are entitled to relief. I accordingly make an order in terms of paragraphs 1, 2 and 3 of the Notice of Motion.

ORDER

[23]

23.1 The share sale agreement entered into between the BRC Investment Trust Registration No. IT66/09 together with the fourth applicant and the respondent on or about 16 February 2009 is declared void *ab initio*.

23.2 The respondent is to forthwith return to the Trust and fourth applicant all shares and membership interests sold in terms of the agreement of the target companies and corporations listed in

Annexure "X" hereto against payment by the Trust and fourth applicant to the respondent of an amount of R2 350 000,00.

23.3 The respondent is to pay the costs of the application.

**C G LAMONT
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG**

Attorneys for Applicants	:	Van Nieuwenhuizen, Kotze & Adam
Counsel for Applicants	:	Adv. Marais SC Adv. Nieuwenhuizen
Attorneys for Respondent	:	Michaelides Attorneys
Counsel for Respondent	:	Adv. Kairinos
Date of hearing	:	21 September 2011
Date of judgment	:	