REPORTABLE

IN THE SUPREME COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 6077/04

In the matter between:

IZAK ADRIAAN JOHAN DE VILLIERS Plaintiff

and

DAVID LAWRENCE CORNELIUS McCAY N.O. First Defendant

MARLENE McCAY N.O. Second Defendant

JUDGMENT DELIVERED THIS 28th DAY OF FEBRUARY, 2007

THRING, J.:

This case is, in essence, about what has become known in our law as a prior inducing contract and its effect, if any, upon the rights and obligations of the parties to the contract whose conclusion it has induced.

The facts, and the respective contentions of the parties

I shall attempt to summarise the facts on which the plaintiff bases his claim against the defendants as briefly as practicable. None of these facts are in dispute. The conclusions of law which may or may not flow from them, however, are in issue.

On the 30th June, 1993 a trust called The Sixteen Mile Beach Development Trust was created by trust deed, of copy of which is Exhibit "A 2". I shall refer to this trust as "the Development Trust". Its trustees were the plaintiff, the first defendant, one S.H. de Kock (now deceased) and the plaintiff's brother, W.S. de Villiers. The founders of the Development Trust were four other trusts, each of which was effectively controlled by the plaintiff, the first defendant, de Kock and W.S. de Villiers, respectively. The trust which was, in effect, controlled by the first defendant, and of which both defendants have at all material times been the trustees, is called the West Coast Trust. I shall refer to it as "the WCT". The trust deed of the Development Trust provided that each of the founding trusts was to lend and advance sums of money to the Development Trust in certain stipulated proportions. The trust deed also provided that in certain instances its founders were to determine matters, and that in the event of disagreement between the founders, the trusts of the plaintiff, of de Kock and of the first defendant (i.e. the WCT) were each to enjoy two votes, whilst that of W.S. de Villiers was to enjoy only one vote.

One of the objects for which the Development Trust was founded was the purchase of certain land at Yzerfontein. I shall refer to this land as "the property". It was to be developed as residential plots. In 1994 the Development Trust duly purchased the property for R8 million, and it was registered in the name of the Development Trust (or of its trustees). On

the 4th March, 1994 certain covering mortgage bonds (a copy of one of which is Exhibit "A 15") were registered by the Development Trust, as mortgagor, over the property in favour of the WCT as mortgagee. These bonds were to secure the Development Trust's indebtedness to the WCT "in respect of moneys loaned (sic) and advanced or to be loaned (sic) and advanced" (R800,000 in all) and in respect of "predetermined liquidated damages" (R280,000 in all). A balance sheet of the Development Trust dated the 29th February, 2000 (a copy of which is Exhibit "A 25") duly reflects these debts as owing by the Development Trust to the WCT, and as being secured by the mortgage bonds.

On the 16th November, 2000 the WCT, as the seller, represented by the first defendant as one of its trustees, and the plaintiff ("or nominee"), as the purchaser, concluded a written agreement of sale, to which I shall refer as "the main agreement", in terms of which, as it then read, the plaintiff purchased from the WCT for the sum of R1,250,000 a "merx" comprising, inter alia, "the Seller's entire right, title and interest in and to" the Development Trust. Clauses 5 and 12 of the main agreement had already been deleted by the first

defendant or his agent when the plaintiff signed it. Subsequently, on the 13th December, 2000 the purchase price of R1,250,000 stipulated in clause 2 of the main agreement was reduced by agreement between the parties to R1 million, the agreement was amended accordingly, and the amendment was duly signed by them. Still later, on the 27th June, 2003 the description of the first defendant in the heading of the document as "a trustee" of the WCT (the seller) was amplified by the addition of the words "and in his personal capacity", and this amendment was also duly signed by the parties. As it ultimately came to be, the main agreement reads as follows, as is reflected in the copy thereof which is Exhibit "A 28":

> "AGREEMENT
>
> between
>
> THE WEST COAST TRUST
> (No. /193) herein represented
> by David Lawrence Cornelius McCay
> in his capacity as a trustee, duly
> authorised thereto: and in his
> personal capacity
>
> ("Seller")
> and
>
> IZAK ADRIAAN JOHAN DE VILLIERS
> (Id no. 4612165034 08 1)
> or nominee

("Purchaser")

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1. The Seller hereby sells to the Purchaser who purchases the Seller's entire right, title and interest in and to The Sixteen Mile Beach Development Trust(No T865/93) ("SMBDT") and/or Salt Lake Syndicate (Pty.) Ltd. and/or the Sixteen Mile Beach Resort development ("the merx").

2. The purchase price of the merx shall be the sum of ONE MILLION RAND (R1,000,000-00) which shall be paid by the Purchaser to the Seller in cash against registration of the cancellation of the existing eight (8) mortgage bonds registered by SMBDT in favour of the Seller and cession to the Purchaser of the corresponding Loan and Option Agreements.

3. Registration of the abovementioned cancellations shall be attended to by the Seller's attorneys as soon as possible after signature of this agreement.

4. The Purchaser shall within fourteen (14) days of being so requested by the Seller's attorneys supply them with a bank guarantee for payment of the purchase price. Such request shall only be made a reasonable time before registration.

5. (deleted)

6. In the event of the Purchaser failing to provide a bank guarantee as provided for in paragraph 4 above or failing within fourteen (14) days of demand to pay any other monies for which he is liable in terms of this agreement or failing to comply with any other condition of this agreement within fourteen (14) days of being

requested in writing to do so the Seller shall be entitled to cancel this agreement forthwith.

7. As domicilium citandi et executandi the parties choose the following addresses:

The Seller: Invicta Bearings (Pty.) Ltd,
Constantia Uitsig.

The Purchaser: Sixteen Mile Beach,
P.O. Box 136,
YZERFONTEIN.
7351.

and agree that all mail shall be dispatched by pre-paid registered mail by the one party to the postal address of the other.

8. The Seller shall, in terms of this agreement, have no further right and/or title in and to the SMBDT or the property and development known as Sixteen Mile Beach Resort or in any partnership, trust, close corporation or company related thereto.

9. This agreement contains all the conditions of the agreement between the parties and no amendment shall be valid unless it is in writing and signed by both parties hereto.

10. The Seller and David Lawrence Cornelius McCay, in his personal capacity, declare that to the best of their knowledge and belief no trust or legal persona other than the Seller has any right to or interest in the merx hereby sold.

11. The parties hereto shall upon demand do or cause to be done or sign or have signed all such documents as may be necessary to successfully comply with and give effect to the provisions of

this agreement.

12.(deleted)

DATED at CAPE TOWN on this 16 day of November 2000.

AS WITNESSES

1. (Signed)_____

2. (Signed)_____

(Signed)_____
D L C McCAY

DATED at CAPE TOWN on this 16 day of November 2000.

AS WITNESSES

1. (Signed)_____

1. (Signed)_____

(Signed)_____
I A J DE VILLIERS"

On the 28th December, 2000 the plaintiff paid the purchase price of R1 million to the WCT, or its order.

On the plaintiff's case he thereupon became entitled, inter alia, to cession of the WCT's claims against the Development Trust (see clauses 2 and 11 of the main agreement) secured as they were by the mortgage bonds: in fact, his case is that this cession actually took place when he paid the purchase price, after having on the 13th December, 2000 been placed in possession by the first defendant of a general power of attorney (a copy of which is Exhibit "A 33") in terms of which the WCT empowered the plaintiff, inter alia, to transfer the

merx referred to in clause 1 of the main agreement. These claims then amounted to R1,080,000 (in terms of the bonds they were at that time still interest-free: but mora interest subsequently accrued on them).

On the 15th May, 2003 the Development Trust was provisionally sequestrated. The provisional order was subsequently made final. On the 29th October, 2003 the plaintiff submitted a claim against the trustees (in sequestration) of the Development Trust as "gevolmagtigde" of the WCT for R2,147,079.44. This consisted of the original capital indebtedness of the Development Trust to the WCT and mora interest accrued thereon as at that stage. However, the claim was not paid to the plaintiff. Instead, during June, 2004 the defendants recovered this debt from the trustees (in sequestration) of the Development Trust for the benefit of the WCT, instructing them to pay the dividend in respect thereof to the WCT, and the WCT then received and accepted payment of the dividend (which was the full amount claimed). The trustees (in sequestration) of the Development Trust paid this dividend to the WCT in good faith, thereby discharging the Development Trust's indebtedness to the WCT and rendering it nugatory from the plaintiff's point of view. The amount paid to the WCT was R2,481,700.30. The WCT refuses to remit this dividend to the plaintiff. All this is common cause.

The plaintiff avers that, in acting as they did, the defendants breached their obligations under the main agreement, and that he has suffered damages as a result in the sum which was paid to the WCT, and which ought to have been paid to him. He accordingly claims from the defendants in their capacities as the WCT's trustees payment of the sum of R2,481,700.30, with interest thereon at the rate of 15.5% per annum from the date of service of his summons, and costs.

The defendant's defence to this claim, as it emerged on the pleadings and during the trial, rests on certain events, most of which took place in 2000, and many of which are not in dispute. I shall attempt to summarise them, too, as briefly as I can.

In August, 2000 the first defendant indicated at a meeting with the plaintiff and others that he would be prepared to sell "his" (i.e. his and the WCT's) interests in the Development Trust to the plaintiff for

R1,250,000. He made the same offer to de Kock. The plaintiff, who is an attorney of this Court, then drew up the main agreement in its initial form. He sent this draft to Mr. Mervyn Key, also an attorney, who represented the first defendant and the WCT, on the 23rd October, 2000. On the following day Key telephoned the plaintiff and said to him that the first defendant had signed the main agreement after deleting clause 5, but that he (the first defendant) wished to "think it over for a few days" (apparently the first defendant was then about to leave for abroad).

In mid-November, 2000, the plaintiff thinks that it was on the 13th, he had a meeting with Key at la Colombe Restaurant, Constantia Uitsig. Key told him that the first defendant maintained that he (the plaintiff) owed the first defendant R500,000 in respect of other, unrelated transactions between them, and that the first defendant wanted one plot in the proposed subdivision and development of the property for each of his children. This was the first time that any transfer or delivery of plots to the first defendant had been mentioned. In his evidence the plaintiff readily conceded that it was made perfectly clear to him by Key that unless he agreed to do what the first defendant wanted in this regard the main agreement would not be concluded. Because he was extremely keen to finalise the main agreement, the plaintiff agreed to the first defendant's request. In his evidence the plaintiff more than once referred to the first defendant's conduct in this regard as "blackmail": but of course it was nothing of the kind. Key suggested that the plaintiff give the required undertaking in a separate letter. This the plaintiff did. He duly drafted and signed a letter which he dated the 16th November, 2000 (a copy is Exhibit "A 31"). It was addressed to the first defendant personally. It reads:

> "Dear David
>
> RE: SIXTEEN MILE BEACH
>
> I refer to the Agreement between us dated today and confirm that you will give me a General Power of Attorney against payment to you of the cash and that I shall procure that the company which

develops Sixteen Mile Beach transfers to you (or your nominee) three (3) beachfront residential plots which plots shall as closely as possible resemble the beachfront plots indicated on the attached provisional layout herewith marked “A” provided that the final approval of the layout be for at least seventy five (75) plots; provided further that should the final approval however be for anything up to thirty (30) plots the plots so to be transferred shall be one (1) and should the approved plots number from thirty one (31) to forty five (45) the plots so to be transferred shall be two (2).

The value of the said plots shall for Transfer Duty and/or VAT purposes be R100 000 (one hundred thousand Rand) each and the transfer costs together with any such Transfer Duty and/or VAT shall be payable by you.

It is also agreed that the causa for the above transfer shall be a sweetener for your selling control and shall fully and finally clear the slate between us.

Kind regards

(signed)
Sakkie.”

On the 16th November, 2000 the plaintiff met Key again at Constantia Uitsig. He handed him the letter, to which I shall refer as “the undertaking”. Key read it and indicated that he was satisfied with it. Key then produced the main agreement, which had already been

signed by the first defendant, and the plaintiff signed it. Nobody has ever signed the undertaking for or on behalf of the first defendant or the WCT. However, it is common cause that it was orally accepted by Key on behalf of the first defendant, and that it constituted a legally valid and binding oral agreement between him and the plaintiff. Henceforth in this judgment, wherever I refer to the undertaking I refer to it in this sense, viz. as the valid and binding oral agreement between the plaintiff and the first defendant as recorded in the undertaking.

Counsel on both sides are ad idem on the evidence that the first defendant was induced by the undertaking to conclude the main agreement, and that seems to me to be so.

It is part of the defendant's case that the obligation assumed by the plaintiff in the undertaking, viz. to procure transfer to the first defendant or his nominee of one, two or three plots, as the case may be, when the property was developed, was reciprocal to the WCT's obligations under the main agreement - in particular to its obligation to cede its claims against the Development Trust to the plaintiff - and that the plaintiff's subsequent failure to perform his obligations under the undertaking justified the withholding of its performance by the WCT under the main agreement.

The defendants contend that the main agreement was partly oral and partly written: the oral portion consisting of the undertaking, as orally accepted by Key on behalf of the first defendant.

The defendants contend furthermore that performance of the plaintiff's obligations under the undertaking has become impossible as a result of the sequestration of the Development Trust and the subsequent sale of the property by its trustees in sequestration to an outside entity over which the plaintiff has no control: supervening impossibility of performance has thus put an end to the parties' respective obligations under the undertaking;

alternatively, they plead that it has been terminated by the defendants by reason of the plaintiff's failure to procure the transfer of the plots. The plaintiff does not really dispute this.

The defendants contend further that, in consequence, the main agreement has "fallen away", alternatively that it has been terminated by them, and that they have consequently ceased to be bound by it. As a result, they contend, each of the parties is obliged to make restitution of whatever he or it has received to date under the main agreement, or under the undertaking, or under both. Alternatively, they plead that the undertaking introduced a tacit or implied resolutive condition into the main agreement, or a tacit term that, should the plaintiff fail to procure the transfer of the plots within a reasonable time, or become unable to procure such transfers, both the undertaking and the main agreement would "fall away" and all parties would be obliged to make restitution of what they had received under either or both of them. The defendants tender to repay the purchase price of R1 million to the plaintiff.

In a claim-in-reconvention the defendants seek, inter alia, the rectification of the main agreement by the deletion therefrom of clause 9, the inclusion of which they plead was occasioned by an error common to the parties. They also seek an order declaring that the agreement between the parties has been terminated, and costs of suit.

Only the plaintiff gave evidence.

Questions which arise

A number of interesting questions arise in this matter. They include: whether the main agreement between the parties was entirely written, or whether it was partly written and partly oral, inasmuch as the defendants contend that the orally accepted undertaking in effect formed part of it; whether the

plaintiff's obligations under the undertaking were reciprocal to performance by the WCT of its obligations under the main agreement, so that failure by the plaintiff to perform his aforesaid obligations justified the withholding by the WCT of its performance under the main agreement; whether, in other words, the undertaking imported "additional consideration" for the rights which had been sold to the plaintiff; whether a cession has ever taken place to the plaintiff of the WCT's rights against the Development Trust; whether the defendants are entitled to have the main agreement rectified by the deletion of clause 9 thereof; whether the parol evidence rule in this instance excludes evidence extrinsic to the document embodying the main agreement which goes to show that an additional term or terms was or were agreed upon by the parties; and whether a further term or terms is or are to be tacitly or impliedly read into the main agreement constituting a suspensive or resolutive condition which would come into operation on the plaintiff's failure to perform his obligations under the undertaking, or within a reasonable time.

However, in the view which I take of this matter it is not necessary to decide any of these questions, save to the very limited extent that follows, and I need say little more about them.

The Court’s assumptions

I propose to approach this case on the basis of the following assumptions, all of which are in favour of the plaintiff, but all of which are open to serious debate, and all of which were, indeed, debated at length by counsel in argument, but the correctness of none of which I find it necessary to decide, and therefore leave open:

(1) The main agreement and the oral agreement constituted by Key’s acceptance on behalf of the first defendant of the plaintiff’s undertaking did not constitute a single agreement, partly written and partly oral: they constituted two entirely separate and distinct contracts, each standing alone and independent of the other, save that, as is common cause, the first defendant was induced to conclude the main agreement by the fact that the plaintiff had given the undertaking, which the first defendant had accepted, much as if it had been no more than a representation;

(2) The plaintiff’s obligations in terms of the

undertaking were not reciprocal to the WCT's obligations under the main agreement in the sense that the plaintiff's failure to perform his obligations per se and automatically entitled the WCT to withhold performance under the main agreement; breach and/or termination of the undertaking might have this practical effect, but if it did, it was not because of any contractual reciprocity;

3) The undertaking did not import any "additional consideration" to be performed or delivered by the plaintiff in return for the rights which he had purchased from the WCT, over and above payment of the purchase price; it merely induced the conclusion by the first defendant of the main agreement;

4) The WCT's rights against the Development Trust were legally ceded to the plaintiff when he paid the purchase price on the 28th December, 2000;

5) The defendants have failed to establish that they are entitled to have the main agreement rectified by the deletion of clause 9 thereof;

6) The parol evidence rule excludes evidence extrinsic to the document which embodies the main agreement (Exhibit "A 28") which goes to show that that agreement contained other or additional terms; non constat, of course, because of assumption (1) above, that such evidence is inadmissible to prove the existence and terms of the undertaking as a separate, distinct and independent contract, as a prior inducing contract: see Christie, "The Law of Contract in South Africa", 5th Ed. 198-199;

7) Subject to what is set out above under assumption (2), the main agreement did not contain any tacit or implied term constituting a resolutive or suspensive condition rendering the performance by the plaintiff of his obligations under the undertaking, either within a reasonable time or at all, a condition on which the enforceability of performance by the WCT of its obligations under the main agreement depended.

The termination of the undertaking

As I have said, it is not disputed by the plaintiff that once the Development Trust had been sequestrated with effect from the 15th May, 2003 it lay beyond his power to procure the promised transfer of the plots to the first defendant: in effect, the undertaking had become impossible of performance by him. There is no evidence that he was to blame for this.

The general rule is that supervening impossibility of performance discharges a contract: it becomes void and no contractual remedy can be sought or obtained under it: see Peters, Flamman and Co. v. Kokstad Municipality, 1919 AD 427 at 434 – 435 and Christie, op. cit., 472. Insofar as may be necessary, the defendants have in any event given notice of the termination of "the agreement", which, on their case, includes the undertaking. As I have also said above, it is not really in dispute that the undertaking has been terminated. It seems to me that the event which caused this to happen was the provisional order of sequestration of the Development Trust. On the strength of what was said in the Peters, Flamman case, supra at 434 I find that the termination took effect ab initio, that is, as from the date when the undertaking was accepted by Key on behalf of the first defendant on the 16th November 2000.

The legal consequences of the termination of the undertaking

The undertaking is no more: it has become a nullity, and neither of its parties can now enforce it. The position is analogous, it seems to me, to that which arises where a contract has failed by reason of the fulfilment of a resolutive condition or the non-fulfilment of a suspensive condition or condition precedent. As to this Christie, op cit., says at 146:

> "The effect of fulfilment of a resolutive condition is to destroy the contract, and again the theory is that the fulfilment of the condition operates retrospectively so the contract will be regarded as if it had never existed.
>
> .....
>
> A question that has not received much attention in the modern law is the extent to which the parties must be made to disgorge what they have received under a conditional contract before it fails. The question may arise when a contract subject to a condition precedent has been partly in operation in anticipation of the fulfilment of the condition, which has then not been fulfilled; or it may arise when an operative contract has been destroyed by the fulfilment of a resolutive condition.
>
> A party who, in anticipation of the fulfilment of a condition precedent, has made payments under the contract is entitled to the return of the money, unless the contract provides otherwise....."

Goldstone, J.A. put it thus in Ex parte de Villiers & Another NN.O: in re Carbon Developments (Pty.) Ltd. (in liquidation), 1993(1) SA 493 (AD) at 505 A:

> "In the event of the insolvency of the debtor, sequestration would normally mean that the condition upon which the enforceability of the debt depends will have become incapable of

> fulfilment. The legal result of this would be that the debt dies a natural death (see De Wet and Yeats "Kontraktereg en Handelsreg" 5th Ed. Vol. 1 at 153; Christie "The Law of Contract in South Africa" 2nd Ed. at 169; Kerr "The Principles of the Law of Contract" 4th Ed. at 341). The result would be that the erstwhile creditor would have no claim which could be proved in insolvency."

In Wilkens N.O. en 'n Ander v. Bester, 1997(3) SA 347 (SCA) van Heerden, J.A., as he then was, said at 358 A:

> "Nou is dit geykte reg dat indien 'n voorwaardelike skuld betaal word in die waan dat die voorwaarde vervul is, die betrokke bedrag met die condictio indebiti teruggevorder kan word."

In Melamed & Another v. B.P. Southern Africa (Pty.) Ltd., 2000 (2) SA 614 (W) Blieden, J. said the following at 625 D-H:

> "A suspensive condition is a condition suspending the operation of the obligations from the contract, pending the occurrence or non-occurrence of a particular specified event (Design and Planning Service v. Kruger 1974(1) SA 689 (T) at 695C-D; Thiart v. Kraukamp 1967(3) SA 219 (T) at 225A-C). The agreement under consideration is subject to a suspensive condition. This entails that the agreement

would be discharged ipso iure on non-fulfilment of the condition (Dirk Fourie Trust v. Gerber 1986(1) SA 763 (A) at 773F-G; Design and Planning Service v. Kruger (supra at 697G-H)). In Tuckers Land and Development Corporation (Pty.) Ltd. v. Strydom (supra at 23H) Joubert, J.A. said:

> 'By nie-vervulling van die opskortende voorwaarde, wat nie aan die toedoen van die partye te wyte is nie, veral (sic: verval?) die koop/verkoop.'

.....

Where there has been performance pursuant to a contract subject to a suspensive condition pendente conditione the parties must restore that which they have received pendente conditione or conditione extincta. The authorities seem to indicate that restoration can be claimed with one or other of the enrichment remedies."

At 626 G-H the learned Judge, after considering the relevant authorities, concluded:

"From the above it is clear that payment made pendente condicione (sic: conditione?) may be reclaimed with the condictio indebiti. When the condition is not fulfilled the agreement on which it is based is discharged with retrospective effect and the parties have to restore that which they have performed (Tuckers Land and Development Corporation case supra at 20E-24H)."

There has been much debate in this matter about the applicability or otherwise of the parol evidence rule, and whether or not it excludes evidence of the undertaking. However, in my view, as long as the undertaking and the main agreement are regarded as being two separate, distinct and independent contracts, as the plaintiff contends that they were, and as I assume in his favour to be the case, I do not think that the problem arises. There is also, to my mind, nothing in the undertaking which is repugnant to the main agreement or inconsistent or incompatible with it. In Clark v. Muller, 1913 NPD 447 Broome, J., as he then was, said at 450:

> "But even if the written contract appears on the face of it to be a complete agreement proof may be given of a prior or contemporaneous oral agreement upon some collateral or independent matter, though relating to the same general subject, so long as it is not inconsistent with the terms of what has been reduced to writing. (Morgan v. Griffith, 6 Exchq., 70; De Lassalle v. Guildford [1901] 2 K.B., 215; Clifford v. Turnell, 57 Rev. Rep., 275; Frith v. Frith [1906] A.C. 254). Evidence is also admissible of any separate oral agreement, constituting a condition precedent to the attaching of any obligation. (Pym v. Campbell, 25 L.J. Q.B.,

277).”

And in du Plessis v. Nel, 1952(1) SA 513 (AD) Schreiner, J.A. said this at 529 C-E:

> “That in proper cases collateral agreements can be proved and sued upon is not open to doubt, and whether one states the parol evidence rule as being subject to an exception in respect of such agreements or as being exceptionless but to that extent a limited rule appears to be a matter of taste in the use of language. So, I apprehend, it is a matter of wording whether one treats agreements creating conditions precedent to the coming into force of a written contract as a kind of collateral agreement or as a distinct exception to or limitation of the parol evidence rule.”

(His was a minority judgment, but there was no disagreement amongst the learned Judges of Appeal on this aspect.) I agree with Christie, op. cit. where he says at 201:

> “In the result, we will be well advised to forget all about ‘collateral contracts’ and ‘additional consideration’ and to think only of prior inducing contracts. To assist our thinking we should remember that these contracts can be said to

> operate as conditions precedent to the written contract and are admissible in evidence on the same basis as conditions precedent and subject to the same limitations as to conflict with the written contract, but it must not be overlooked that they differ from normal conditions precedent by being contracts and therefore enforceable in their own right."

It is not necessary here to consider the question whether a claim for restitution in this context is based on enrichment, or is to be regarded as a distinct contractual remedy.

In my opinion the same principle applies where, as here, on my finding, the contract concerned (i.e. the undertaking) has failed for impossibility of performance: each of the parties must restore what he has received under it. See, in this regard, Legate v. Natal Land and Colonialization Co Ltd., (1906) 27 NLR 439 at 455, Ex parte de Villiers and Another NN.O.: in re Carbon Developments (Pty.) Ltd. (in liquidation), supra, loc cit. and Melamed and Another v. B.P. Southern Africa (Pty.) Ltd., supra, loc.cit. and cases there cited.

Restitution

The precise identification of the cause of action of a party to a contract which has failed without fault for restitution of what he has performed thereunder has been said, with one exception, not to be of importance, save that it was said to be covered by one or the other remedy for unjust enrichment: see Kudu Granite Operations (Pty.) Ltd. v. Caterna Ltd., 2003(5) SA 193 (SCA) at 202 E-F (paragraph [16]). In that case Navsa, J.A. and Heher, A.J.A., as he then was, said at 201 D-J (Paragraph [15]):

> "There is a material difference between suing on a contract for damages following upon cancellation for breach by the other party (as in Baker v. Probert 1985(3) SA 429 (A), a judgment relied on by the Court a quo) and having to concede that a contract in which the claim had its foundation, which has not been breached by either party, is of no force and effect. The first-mentioned scenario gives rise to a distinct contractual remedy: Baker at 439A, and restitution may provide a proper measure or substitute for the innocent party's damages. The second situation has been recognised since Roman times as one in which the contract gives rise to no rights of action and such remedy as exists is to be sought in unjust enrichment, an equitable remedy in which the contractual provisions are largely

irrelevant. As van den Heever, J. said in Pucjlowski v. Johnston's Executors 1946 WLD 1 at 6:

> 'The object of condiction is the recovery of property in which ownership has been transferred pursuant to a juristic act which was ab initio unenforceable or has subsequently become inoperative (causa non secuta; causa finita).'

The same principle applies if the contract is void due to a statutory prohibition (Wilken v. Kohler 1913 AD 135 at 149-50), in which case the condictio indebiti applies. There is no reason why contractual and enrichment remedies should be conflated. Caterna's case was one of a lawful agreement which afterwards failed without fault because its terms could not be implemented. The intention of the parties was frustrated. The situation in which the parties found themselves was analogous to impossibility of performance since they had made the fate of their contract dependent upon the conduct of a third party (KPMG) who was unable or unwilling to perform. In such circumstances the legal consequence is the extinction of the contractual nexus: se De Wet and Van Wyk, "Kontraktereg en Handelsreg" 5th Ed. Vol. 1 at 172 and the authorities there cited. The law provides a remedy for that case in the form of the condictio ob causam finitam, an offshoot of the condictio sine causa specialis."

In the present case the first defendant has received nothing under the undertaking: the plots which he was promised have not been forthcoming. Consequently there is nothing for him to restore to the plaintiff as a direct result of the failure of the undertaking per se.

The same cannot be said of the plaintiff. In terms of and pursuant to the undertaking, and because it induced the first defendant to act as he did, the plaintiff procured the first defendant's willingness to conclude the main agreement. As a result, the plaintiff received the benefits of the main agreement, including effective control, via the WCT's two founders' votes, of the Development Trust and, more importantly for the purposes of the present litigation, cession of the Development Trust's indebtedness to the WCT. Control of the Development Trust is, of course, now academic and of no value either to the plaintiff or to the WCT because of the sequestration of the Development Trust. But the defendants, in effect, seek retrospective restoration to the WCT of the claims against the Development Trust which it ceded to the plaintiff. Implicit in what they seek is the termination of the main agreement, the

conclusion of which was a benefit which the plaintiff received as a direct result of the undertaking.

In my judgment, applying the basic principles of restitution to which I have referred above, the defendants became entitled to such restoration when the undertaking was terminated, which I find took place retrospectively ab initio. When the WCT's claims against the Development Trust were ceded to the plaintiff on the 28th December, 2000, as I assume that they were, the plaintiff was not legally entitled to them: on the subsequent sequestration of the Development Trust on the 15th May, 2003 the defendants could lawfully have compelled the plaintiff to cede them back to the WCT. The recovery by the defendants of the claims on behalf of the WCT from the trustees of the Development Trust (in sequestration), although it had the effect of extinguishing the claims by having them paid, consequently did not constitute a breach by them of their obligations or of those of the WCT under the main agreement. In effect, the plaintiff's obligation to restore what he has received under the undertaking has, as a necessary consequence, the dissolution of the main

agreement: for his duty to restore is not compatible with the survival of the main agreement. This means, of course, that the WCT must likewise give restitution of what it has received under the main agreement by repaying the purchase price of R1 million to the plaintiff, as it has tendered to do.

The above conclusions may seem novel, but after careful consideration I can find no good reason to reject them. They appear to me to follow inevitably from what I regard as the applicable principles. Mr. Duminy, who appears for the defendants, was not able to refer me to any authority in which similar conclusions may have been drawn in the past, and I am not aware of any. However, in my view this does not preclude them.

Mr. du Toit, who replied for the plaintiff in the temporary absence of his leader, Mr. van Heerden, submitted that there was a numerus clausus of recognized grounds on which contracts can be terminated, and that the termination of an inducing agreement was not one of them. I am not aware of any such numerus clausus, and Mr. du Toit cited no authority for his proposition. He also submitted that what the plaintiff was obliged to return to the first defendant was an enforceable right,

and that the spes created by the acceptance of the undertaking, viz. that the first defendant (or the WCT) would conclude the main agreement, was not such a right. I do not think that this argument is sound. What the plaintiff became bound to restore was what he had actually received under the undertaking: as I have said, this included, on the assumptions which I have made, actual cession of the Development Trust's indebtedness to the WCT. Restitution to the WCT of these claims by necessary implication undoes the main agreement and dissolves it. I can see no reason in principle why such restitution should not be an inevitable consequence of the termination of the undertaking.

Summary

To sum up, I arrive at my conclusions by way of the following process of reasoning:

1) The undertaking became impossible of performance; the effect of this was to terminate the undertaking and render it void ab initio;

2) The undertaking was a prior contract which induced the conclusion of the main agreement; it was separate and distinct from and

independent of the main agreement; it contained nothing which was repugnant to or inconsistent or incompatible with the main agreement; evidence of its existence or content is thus not precluded by the parol evidence rule;

3) A prior inducing contract is analogous to a suspensive condition or condition precedent;

4) The failure of a condition precedent puts an end to the conditional contract which is dependent on its fulfilment; it “dies a natural death”;

5) The supervening impossibility of performance of the undertaking consequently put an end, not only to the undertaking, but also to the main agreement;

6) It follows that there must be restitution, not only of what the parties have received, respectively, under the undertaking, but also of what they have received under the main agreement: the position is the same as it would have been had a condition precedent governing the main agreement failed.

Conclusion

For the above reasons I conclude that the

plaintiff’s claim must fail and the defendants’ claim-in-reconvention must succeed, in part.

In the result I make the following order:

1. On the plaintiff’s claim-in-convention judgment is given in favour of the defendants, with costs.

2. On the defendants’ claim-in-reconvention an order is granted declaring that the agreement between the parties has been terminated, with costs.

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THRING, J.