IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: A71/2017

In the matter between:

GPC DEVELOPMENTS CC	First Appellant
GERHARDT PETRA JANSE VAN VEUREN	Second Appellant
CORRY MARIA JANSE VAN VEUREN	Third Appellant
and	
ERENS JOHANNES UYS	First Respondent
(and all those who hold title and/or occupy	
Erf […] Bellville through him)	
CITY OF CAPE TOWN	Second Respondent

JUDGMENT DELIVERED ON 15 AUGUST 2017

GAMBLE, J:

INTRODUCTION

[1] The subject matter of this appeal is a residential dwelling located at […] B. Street, Loevenstein, Bellville, ('the property"), which is known in the deeds office as erf […] Bellville and is registered in the name of the first appellant, GPC Developments CC ("GPC").

[2] In April 2016 GPC approached this court on motion for an order for the eviction of the first respondent (a certain Mr Uys, to whom I shall refer as "*the purchaser"*), and all those occupying under him, from the property. The application, which was designed to restore possession of the property to GPC, was supported by the second and third appellants (Mr and Mrs van Veuren respectively, to whom I shall collectively refer as *"the sellers"*), the erstwhile registered members of GPC. As it happens, the sellers resided in a neighbouring property located at […] B. Street, Loevenstein.

[3] The City of Cape Town was cited as a co-respondent in the application by virtue of the provisions of s4 of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 19 of1998 ("PIE"). It did not participate in the proceedings at any stage, was not affected by the judgment granted in the court below and accordingly, nothing more needs be said in that regard.

[4] The application for eviction was dismissed on 28 July 2016 by Nuku J, who granted leave to appeal to the Full Bench on 24 October 2016. On appeal, as in the court *a quo,* the sellers were represented by Ms L Liebenberg and the purchaser by Mr JT Benade, both of the Cape Bar. We are indebted to counsel for their heads of argument and oral submissions in this appeal.

THE JULY 2012 DEED OF SALE

[5] The matter turns on 2 written agreements and some correspondence emanating from the parties' erstwhile attorneys. Firstly, during the period 23 - 25 July 2012 the sellers and the purchaser concluded a written deed of sale in terms whereof the property was effectively sold to the purchaser through the disposal of the members' interest in GPC. At the time the sellers each held 50% of such members' interest and the deed of sale made provision for the transfer of their entire interest (which included their loan accounts and any claims they held against GPC) to the purchaser for a consideration of R2,8m on a date described in the deed of sale as *"the effective date".*

[6] The effective date was, in reality, the date when the purchase price had been paid in full to the sellers and the members' interest was legally capable of being transferred to the purchaser. Occupation of the property, however, was almost immediate: it was agreed in the deed of sale to be 1 August 2012 and by all accounts the purchaser so took occupation. The apparent reason for this haste was because the sellers were in dire financial straits at the time and facing an imminent sale in execution of the property after foreclosure of the bond by the mortgagee.

[7] At the time that the deed of sale was concluded there was a mortgage bond registered over the property in favour of First Rand Bank in the amount of R1 832 000. The difference between this amount and the purchase price was R968 000, which the parties agreed would be liquidated by the purchaser by the

effective date at the latest.[1] It was further agreed that the *extant* arrears on the bond would be paid on signature of the agreement and would serve as a deposit on the sale.

[8] Although the deed of sale does not expressly say so, it is reasonable to infer that the parties contemplated that the purchaser might finance the balance of the purchase price through a mortgage loan which would be used to liquidate the bond in favour of First Rand Bank by the effective date. Further, while the deed of sale is silent in that regard it appears to have been an implied (or tacit) term of the agreement that the purchaser would be liable to pay the monthly instalments on the bond as they fell due until such time as the bond was settled in full. This much appears from the affidavits filed in the eviction application

[9] At this juncture it is necessary only to recite the provisions of clause 10 of the deed of sale, to which I shall revert later.

> *"10. <u>DEFAULT BY THE PRUCHASER</u>*
>
> *If the Purchaser commits a breach of this Agreement and/or fails to comply with any of the provisions thereof, then the Sellers shall be entitled to give the Purchaser 10 (Ten) working days' notice in writing to remedy such breach and/or failure, and if the Purchaser fails to comply with such notice, then the Sellers shall forthwith be entitled but not*

[1] A manuscript annotation to cl 4.1 of the deed of sale suggests that the parties contemplated that the effective date would be 1 August 2013.

obliged without prejudice to any other rights or remedies which the Sellers may have in law, including the rights to claim damages:-

10.1 to cancel this Agreement in which event the Purchasers (sic) shall at the option of the Sellers and without prejudice to any other rights which the Sellers might have, either forfeit all monies paid to the Sellers in terms hereof or alternatively be liable to the Sellers for damages in which case the Sellers shall be entitled to withhold any monies repayable to the Purchasers (sic) until their damages have been determined and then apply set off against such damages.

10.2 in the event of cancellation as contemplated in 10.1 above being caused by default of the purchasers (sic), the purchasers (sic) shall be obliged to sign (sic) all of their members' interest. For the purpose of this sub-clause, the Purchasers (sic) hereby irrevocably and in rem suam authorise and empower the Sellers to perform all the aforesaid acts and hereby ratify, allow and confirm all and whatsoever the Sellers may do by virtue hereof.

10.3 Immediately (sic) to recover from the Purchasers (sic) all amounts (including the balance of the purchase price together with interest) payable to them in terms of this contract.

10.4 In(sic) either even (sic) the Sellers shall be entitled to claim damages from the Purchaser as well as costs incurred as a result

of the breach, on the scale as between attorney and client and collection charges."

THE ADDENDUM OF 6 AUGUST 2013

[10] At the beginning of August 2013 the outstanding liability of GPC under the First Rand Bank bond had not been reduced at all, and of the sum of R968 000 which was then due to have been liquidated, only R240 694.72 had been paid. Manifestly, transfer of the members' interest could not take place and the parties accordingly concluded an addendum to the original deed of sale in terms whereof the purchase price was increased by R60 000 and a new arrangement made for payment of the balance of the amount then agreed to be due – R787 305,28[2] - which, it was agreed, would be paid into the trust account of the sellers' erstwhile lawyers, VGV Attorneys.

[11] The addendum is a comprehensive document intended to address all unresolved issues relating to payment which then existed between the parties. It is unnecessary for the purposes of this appeal to go into any detail regarding the terms of the addendum other than to refer to clauses 2.1 and 3 thereof which were designed to address payment of the outstanding amount of R787 305.28, the liquidation of the bond and the consequences of any failure to do so.

"2. Payment of the balance.…

[2] The sum is made up as to R968 000 + R60 000 - R240 694.72 = R787 305.28

2.1 The amount referred to above, being R787 305.28 … will notwithstanding the terms of the Original Agreement be payable into the Trust account of VGV Attorneys below on receipt of the signed CK2 documents.

3. <u>Repayment of FNB Mortgage Bond….</u>

The Purchaser herby (sic) indemnifies the Sellers against any liability with regards to the aforementioned FNB (sic) Mortgage Bond over the property and undertakes to repay the bond or have the Sellers formally released as sureties under such bond within no more than 2 years from the 1st of August 2013. As security for such undertaking the Purchaser will simultaneously herewith sign a form CK 2 transferring 100% of the members interest back to the Sellers as well as a session (sic) of any credit members (sic) loan account. The aforesaid documents are to be held in safekeeping by VGV Attorneys until such time as the bond has been settled or the Sellers have been released from the suretyship in favour of FNB relating to such mortgage bond. Should FNB, however, at any stage hereafter call upon either of the Sellers to perform the obligations of the Close Corporation as mortgagor in terms of the said mortgage bond the Sellers shall notify the Purchaser to immediately but by no later than 7 days after the date of the notice to that effect provide proof that it has settled all outstanding obligations in terms of the mortgage bond as up to that date. Should the Purchaser, however, fail to comply with such notice the Sellers shall be entitled to demand that

they either be formally released from the suretyships by FNB within a further 21 days after such period or be reinstated as members of the Close Corporation in which event the said attorneys are irrevocably authorised by the parties to lodge the CK2 with CIPC. In the latter circumstance the Sellers will be obliged to repay to the purchaser the aforesaid amount of R968 000.00 (Nine Hundred and Sixty Eight Thousand Rand), less all proven damages as suffered by the Sellers because of the Purchaser's breach of contract, including but not limited to loss of income from rentals, by no later than 31st of July 2015 plus interest on such amounts at the prime rate of interest from the date that the members interest was registered back into the name of the Sellers until date of payment thereof."

It appears that the parties understood that the purchaser's obligation under cl 3 of the addendum *"to repay the bond"* included the obligation to pay the monthly instalments due thereon.

[12] With reference to the terms of the original deed of sale, the parties recorded as follows in the Addendum –

"4. <u>No further amendments</u>

The parties confirm that the above are the only amendment (sic) to the aforesaid agreements and that no other amendments will be of any effect unless reduced to writing."

SUBSEQUENT DEVELOPMENTS AND DEMANDS ISSUED BY THE SELLERS

[13] It is common cause that –

- the sum of R787 305.28 was paid to VGV Attorneys during August 2013 in fulfillment of the provisions of cl 2.1 of the Addendum;
- by October 2014 the bond had not been liquidated; and
- as at that date the Purchaser was in arrears in terms of his obligation to pay the monthly instalment due on the bond.

[14] The failure on the part of the purchaser to liquidate the bond did not *per se* afford the sellers a cause of action to cancel the sale in October 2014: in terms of cl 3 of the addendum the purchaser had until 31 July 2015 to settle the bond. Nevertheless, on 27 October 2014 attorneys Kellerman Hendrikse, then acting on behalf of the sellers, sent a detailed letter of demand to the purchaser. The letter commences with a recital of the background facts and circumstances (as set out above) and continues as follows:

> *"6. You have fallen in arrears with the payment of the bond instalments due to the bank. The bank is currently owed an amount of R 47 000. Despite demand you have failed to pay the outstanding balance on the mortgage bond and caused the account to go into arrears.*

*6(sic). The full outstanding balance on the mortgage bond amounts to R47 000, 00 (**FORTY SEVEN THOUSAND RAND AND ZERO CENT**).*

7. We therefore demand payment to the bank of the outstanding balance within seven days of receipt hereof, and that you furnish us with written proof that the payment so demanded has been made, failing which our client will exercise the election afforded to them (sic) clause 3 of the addendum."

[15] The letter contains an obvious factual inaccuracy - the bond was in arrears due to non-payment of the monthly instalments in the sum of R47 000 but this did not constitute *"the full outstanding balance"* due on the bond, only the arrears. Accordingly, the demand for payment of the full outstanding balance (as opposed to arrears) was baseless. In any event, as the Sellers point out in the founding affidavit, further payments were made by the purchaser to the bank on 6 November 2014 and it would appear that the arrears were thereby brought up to date.

[16] On 10 December 2014 the same firm of attorneys delivered a further written demand to the purchaser. In this letter it was alleged, against the background similarly described above, as follows.

"6. On the 27th of October 2014 we sent you a letter of demand informing you that you have failed to meet your obligations in terms of the addendum.

7. In terms of a letter of demand sent, our client (sic) demand (sic) from you that you pay the outstanding bond instalments owed to the FNB within seven days after receipt thereof and furnish us with proof of the same.

8. In the event that you fail (sic) to do so, our clients informed you of their intention to exercise the election afforded to them in terms of clause 3 of the addendum.

9. On 6 November 2014 you did make a payment to the FNB for the earlier bond instalments but it was not done within seven days.

10. You have further fallen behind on Municipal rates and taxes and to date you are in arrear (sic) to the amount of R 60 000.00.

11. You have therefore failed to pay the outstanding bond instalments owed to the bank within seven days, failed to provide our client with proof thereof within seven days and to date you are in arrears with the payment of R60,000.00 in Municipal rates and taxes.

12. Therefore our clients hereby elect to exercise their rights afforded to them in terms of clause 3 of the addendum and therefore demand to be reinstated as members of the close corporation within 21 days after receipt hereof….."

[17] There was evidently no written reply to this letter but in the founding affidavit the sellers say the following –

"27. The first respondent failed to bring the arrears (sic) rates and taxes and utilities up to date.

28. The first respondent also failed to comply with clause 3 of the addendum in that he failed to repay the bond or have the members released as sureties under the bond by 1 August 2015 .

29. Above and beyond the sending of the letters aforesaid, I remained in almost constant contact with the first respondent relating to the non-performance of his obligations. Despite the fact that he was in manifest breach of the agreement the first respondent contended that it was yet his intention to give full effect to the terms of the said agreement.

30. In the hope that this was not yet simply another dilatory tactic on his part I instructed applicants' current attorneys of record, Messieurs (sic) CK Attorneys, to address a final missive to the first respondent putting him to terms to perform as per the agreement, a copy of which letter, dated 18 March 2016, is attached hereto…."

[18] In argument before this court Ms Liebenberg confirmed that the letter of 18 March 2016 was the demand upon which the sellers relied in this matter. It is therefore necessary to recite it in detail.

"We address you at the instance of our client, Mr and Mrs Janse van Vuuren (sic) and GPC Developments CC. We have been handed correspondence addressed to you by Messers Kellerman & Hendrikse Inc attorneys and have further taken instruction regarding certain issues outstanding between you and our clients.

From the content thereof it is apparent that the relationship between you and our client, with specific reference to the Memorandum of Agreement of Sale dated 25 July 2012 (as amended) ('the sale agreement') has over the last several months become troubled, and the perfection of the sale agreement has been unduly delayed.

It is our instruction, notwithstanding your diverse breaches of the sale agreement to date, that our clients yet wish to afford you a last opportunity to restore a more salubrious relationship and to give final effect to the terms of the sale agreement.

We inform further that hereinafter no latitude will be afforded as regards the enforcement of our clients' rights relating to the sale agreement.

In the circumstances therefore and in accordance with the terms of the sale agreement, and without any derogation or waiver of our clients' existing rights, we require as follows:

1. *Payment within 10 working days of the full residue of the purchase price being an amount of (vide clause 3.1 as read with clause 1 of the addendum to the sale agreement);*

2. *The provision within 10 working days of a written indemnity in favour of Mr and Mrs Janse van Vuuren (sic) against any liability flowing from FNB mortgage bond…..('the mortgage bond').*

3. *That you provide within 10 working days written proof at the instance of First National Bank that the full amount of the mortgage bond has been repaid or that Mr and Mrs Janse van Vuuren (sic) have been formally released as sureties under such bond.*

4. *We are further informed that you are engaged upon illegal alterations to client's property (as specified at clause J to the sale agreement) and have purported to market same for sale. This constitutes conduct prohibited by clause 6.2 of the sale agreement and you are called upon to desist with such conduct immediately but at the very least by no later than 10 working days hereof (sic)……*

In the event you do not comply with the requirements aforesaid then our clients will avail themselves of all remedies pursuant to your breach of the agreement, including but not necessarily limited to the cancellation of same, your ejectment from the property, the retention of all monies already paid by you and the recovery from you of the full balance of the purchase price together with interest….."

[19] In the founding affidavit it is said that the response to this letter was a *"deafening silence"* and so on 12 April 2016 the same firm of attorneys wrote to the purchaser yet again, purporting to cancel the agreement.

"The agreement entered into between you and our clients dated the 25th of July 2012 (as amended), as well as our letter dated 18 March 2016 refer.

On 18 March 2016 you were given a final opportunity to regularise the relationship with our clients pursuant to the non-performance of the obligations in terms of the agreement.

Despite such demand you have failed utterly to comply with your obligations in terms of the agreement and are accordingly in default of same.

You are herewith informed that the agreement between you and client is accordingly herewith cancelled and you are called upon to vacate our client's property located at […] B. Street, Bellville, Cape Town forthwith.

Kindly return the keys to the property to our offices at the below address within twenty-four hours.

Should you fail to so return the keys we have instructions to Institute (sic) an application in the Western Cape High Court for, inter alia, your ejectment from the property, the costs of which application will be for your account."

INITIATION OF LEGAL PROCEEDINGS

[20] An application, in the long form, was launched a week later, seeking only the eviction of the purchaser from the property and costs on a punitive scale. In the founding affidavit the relief sought was based on the allegation that the occupation of the property had become unlawful in light of the purported lawful cancellation of the sale of the members' interest:

"33. In the circumstances on the 12th of April 2016 applicants' attorneys of record dispatched to the first respondent a letter reiterating that the agreement between us was cancelled and reiterating the call to vacate the property."

[21] In the answering affidavit the purchaser took 2 points. Firstly, the *locus standi* of the sellers to claim eviction was challenged on the basis that they had effectively given up control of GPC to the purchaser. Secondly, it was said, the continued occupation of the property by the purchaser was not unlawful.

[22] The *locus standi* point was not dealt with in the judgment of the court *a quo* and it is not clear whether it was argued in that forum. Be that as it may, it was not a point raised on appeal. The only issue before this court was the question whether the purchaser unlawfully occupied the property in April 2016.

[23] In the answering affidavit the purchaser admitted that he was in arrears with the payment of various amounts due under the addendum. He also admitted that GPC had been unable to secure cancellation of the bond in favour of First Rand Bank or the substitution of the sellers' suretyships in favour of the bank. The explanations put up for these failures on the part of the purchaser to comply with the terms of the deed of sale and the addendum are not relevant to this judgment. Suffice it to say that the purchaser complained that the property was generally in a poor condition and that he had unexpectedly been required to spend vast amounts to render it habitable.

[24] There was no factual or legal basis raised in the answering affidavit in support of the bald allegation that the purchaser was in lawful occupation of the property notwithstanding the purported cancellation by the sellers in early April 2016.

The purchaser said only that the sellers had not availed themselves of the correct legal remedies[3], and went on to allege that he had already paid capital amounts totaling R1 028 000 to the sellers. He complained that the sellers were endeavouring to recover return of the property and forfeiture of all sums paid to them in circumstances where they were not permitted to do so. In the replying affidavit the sellers did not dispute receipt of the of the said sum of R1 028 000 but alleged that the terms of their agreement with the purchaser entitled them to forfeiture of all amounts paid by him.

JUDGMENT OF THE COURT *A QUO*

[25] In finding that the purchaser's occupation was lawful Nuku J considered the law relating to the cancellation of a contract in circumstances where the parties' agreement sets out a specific procedure to be followed when cancelling. The court made the following findings –

> *"[21] The agreement that was entered into between the second and third applicants and the first respondent sets out the remedies available to the applicants in the event of default by the first respondent. In particular, paragraph 3 of the Addendum provides that where the first respondent has failed to remedy the breach and the second and third applicants elect to be re-instated as members of the close corporation, the second and third applicants*

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[3] *"12.1 die regshulp hierin versoek, is nie die gepaste regshulp nie en is Applikante veronderstel om die remedies waarvoorsiening (sic) gemaak word in die ooreenkoms wat ons aangegaan het, uit te oefen.*

43.2 Tweedens, poog Applikante om my de (sic) eiendom te ontse, by wyse van 'n uitsettings aansoek, terwyl dit nie die regshulp is waarop hulle kan aanspraak maak nie en moes hulle, hulle verlaat het op die remedies waarop in die ooreenkoms voorsiening gemaak word.."

are obliged to repay an amount of R968 000.00…. to the first respondent, less all proven damages arising from the breach by the first respondent.

[22] In the letter addressed to the first respondent dated 10 December 2014, addressed by the second and third applicants, through their then attorneys Kellerman, Hendrikse Inc, the second and third applicants made an election and demanded to be re-instated as members of a close corporation within 21 (twenty one) days after receipt of the said letter. However, the second and third applicants did not tender the payment of the sum of R968 000.00…. as provided for in clause 3 of the addendum to the agreement.

[23] It is therefore clear that in terminating the agreement, the second and third applicants did not comply with the provisions of the termination clause, and as such, their termination is a nullity.

[24] As a result of the purported termination by the second and third applicants being a nullity, it follows that the first respondent still has the right to occupy the property until the agreement is properly cancelled in terms of the procedure provided for in the agreement."

ARGUMENTS ON APPEAL

[26] Mr Benade unreservedly supported the finding of the Court *a quo* and impressed on this court that in the absence of a tender to repay the sum of R968 000, the cancellation was a nullity. Ms Liebenberg, on the other hand, submitted that since the cancellation had been effected in terms of cl 10 of the deed of sale, no tender by

the sellers was required and, further, that they were entitled to retain all amounts paid by the purchaser in light of the forfeiture provisions contained in that clause.

[27] Counsel were in agreement regarding the applicable legal principles. In his judgment Nuku J relied on a passage in the 6th edition of *Christie.* The following passage in the 7th edition[4] is to the same effect:

> *"If the contract lays down a procedure for cancellation, that procedure must be followed or a purported cancellation will be ineffective."*

In the later edition the author refers to *Bekker* [5], *Hand* [6] *and Hano Trading* [7] in support of the approach.

[28] In *Bekker* Yekiso J, relying on the decision in *Godbold* [8], held as follows:

> *[17] The purpose of a notice requiring a purchaser to remedy a default is to inform the recipient of that notice of what is required of him or her in order to avoid the consequences of default. It should be couched in such terms as to leave him or her in no doubt as to what is required, or otherwise the notice will not be such as is contemplated in the contract.*

[29] In *Godbold* [9] the learned judge cautioned as follows:

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[4] GB Bradfield Christie's Law of Contract in South Africa (7th ed) at 637

[5] Bekker v Schmidt Bou-Ontwikkelings CC 2007(1) SA 600 (C)

[6] Standard Bank of SA Ltd v Hand 2012(3) SA 319 (GSJ)

[7] Hano Trading CC v JR 209 Investments (Pty) Ltd 2013(1) SA 161 (SCA)

[8] Godbold v Tomson 1970(1) SA 61 (D)

"The question for decision is always whether the conditions on which the right to cancel was dependent have been fulfilled (Rautenbach v Venner 1928 TPD 26 at 31). The purpose of such a notice is to inform the recipient of what is required to do in order to avoid the consequences of default, and if it is in such terms as to leave him in doubt as to the details of what he is required to do, then it may be that it will be held that the notice is not one such as is contemplated by the contract (Rautenbach's case, supra at p 31)"

[30] I understood Ms Liebenberg to accept that if cl 3 of the addendum was the operative provision in this case, the sellers' cancellation was a nullity in light of the failure to tender repayment of the amount of R968 000 to the purchaser. However, counsel stressed that the sellers had lawfully cancelled by relying on cl 10 of the deed of sale. Her argument was founded on the assertion that the sellers had an option, upon default by the purchaser of his obligations under the deed of sale (and in particular the failure to pay the outstanding balance due on the purchase price), to cancel under cl 10 and, having exercised that election, were not bound to resort to the provisions of cl 3 of the addendum.

[31] The argument raises two issues. The first is whether cl 10 of the deed of sale survived the addendum with its own cancellation provisions in cl 3, and, if so, whether the sellers unequivocally relied on the former clause when purporting to cancel. Regarding the first leg, Ms Liebenberg relied on *Total South Africa* [10] in support of the argument that the sellers were not required to exercise an election in

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[9] At 65C

[10] Total South Africa (Pty) Ltd v Bekker NO 1992(1) SA 617 (A) at 626G – 627C

light of the fact that they were not confronted with two inconsistent remedies. In the event of the latter situation, as Smalberger JA observed in *Total South Africa,* the approach was in accordance with the following *dictum* of Beyers JA in *Montesse Township* [11]-

> *"I am not aware of any general proposition that a plaintiff who has two or more remedies at his disposal must elect at a given point of time which of them he intends to pursue, and that, having elected one, he is taken to have abandoned all others. Such a situation might well arise where the choice lies between two inconsistent remedies and the plaintiff commits himself unequivocally to the one or the other of them. That is not the case here."*

[32] The issues raised by Ms Liebenberg were not traversed in the papers and it is not clear whether they were argued before Nuku J, his judgment being silent in that regard. Certainly, had the matter proceeded by way of action with claims for cancellation, damages, forfeiture, conventional penalties and the like, the case would have been properly pleaded and the parties, and the court, would have known where they stood. Be that as it may, in her written heads of argument Ms Liebenberg submitted that it was common cause that the purchaser had breached cl 3 of the addendum. She went on to submit that the sellers were therefore entitled to cancel the agreement utilizing cl 10, which she submitted was the only *lex commissoria* in either the deed of sale or the addendum permitting cancellation in the event of breach. I did not understand the oral argument to be any different.

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[11] Montesse Township and Investment Corporation (Pty) Ltd and Another v Gouws NO and Another 1965(4) SA 373 (A) at 380

LEX COMMISSORIA

[33] A contractual term styled a *lex commissoria* was the subject of the discussion in *North Vaal Mineral* [12]*:*

"Clause 9 is a lex commissoria (in the widest sense of a stipulation conferring a right to cancel upon a breach of the contract to which it is appended, whether it is a contract of sale or any other contract). It confers a right (viz to cancel) upon the fulfillment of a condition. The investigation whether the right to cancel came into existence is purely an investigation whether the condition, as emerging from the language of the contract (a question of interpretation), has in fact been fulfilled (Rautenbach v Venner, 1928 TPD 26)."

[34] The term *"lex commissoria"* has acquired a somewhat flexible meaning in our law of contract. *Van der Merwe et al*[13]*,* with reference to *inter alia Nel v Cloete*[14]*,* observe that the phrase denotes, primarily, a term which permits a contracting party to resile from an agreement on the ground of delay, but that it has also acquired a wider and more general meaning, *viz,* a stipulation conferring the right to cancel an agreement on the basis of any recognised form of breach. Such a term may include a right on the part of the creditor to claim forfeiture of amounts already received, but it is not limited to that right.[15]

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[12] North Vaal Mineral Co.Ltd v Lovasz 1961(3) SA 604 (T) at 606C

[13] Contract, General Principles (4th ed) at 299 fn126

[14] 1972(2) SA 150 (A) at 160

[15] Baines Motors v Piek 1955 (1) SA 534 (A) at 542 - 7

[35] *Christie* [16] provides the following useful synopsis in regard to a *lex commissoria*:

> *"The contract may explicitly state that if one party fails to perform a particular obligation by a specified time the other party is entitled to cancel the contract. In a lease where the landlord is given the right to cancel for non-payment of rent, such a provision it is usually called a forfeiture clause, and in a contract of sale where the seller is given the right to cancel for non-payment of the purchase price, a lex commissoria, but either description may be used in respect of any type of contract. Such clauses are valid and enforceable strictly according to their terms, and the court has no equitable jurisdiction to relieve a debtor from the automatic forfeiture resulting from such a clause.*
>
> *A clause fixing a time for performance and stating that time is of the essence is a forfeiture clause, and so is a clause prescribing a time for performance and giving the creditor the right to cancel after the debtor has been given notice to rectify its default within a further prescribed time and has failed to do so, but not a clause which does not place an unconditional unilateral obligation on the debtor to perform."* (Footnotes omitted)

[36] Applying the mandated approach to contractual interpretation, the court is required to consider the language chosen by the parties in their agreement contextually against the background facts and circumstances known to them and considered at the time of conclusion of the contract and give it its ordinary

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[16] *Op cit* 599

grammatical meaning. A sensible and businesslike interpretation should be sought provided it does not violate the actual wording of the agreement.[17]

[37] I agree with Ms Liebenberg that cl 10 of the deed of sale constitutes a classic *lex commissoria* in the sense discussed above. It affords the sellers the right to cancel in the event of default on the part of the purchaser after the latter has been given notice to remedy within 10 days and has failed to do so. In such event, the sellers may claim, inter alia, forfeiture of the amounts already paid to them by the purchaser.

[38] However, I do not agree with counsel's submission that cl 10 is the only lex commissoria available to the parties' in this matter. In my opinion, cl 3 of the addendum falls into the same category as cl 10 and, indeed there can be no reason in law why the parties to a contractual arrangement cannot agree on two (or more) terms which, independently of each other might afford the contractants rights of cancellation, forfeiture and the like in defined circumstances. So, viewing the addendum in its contextual setting (which must perforce include the terms of the deed of sale), we find the parties amplifying, in August 2013, the terms of their earlier agreement by the addition of very specific terms with defined obligations. It would seem that this became necessary by virtue of the fact that the purchaser had not performed as anticipated a year earlier.

[39] By all accounts, the situation which obtained when the addendum was concluded might have afforded the sellers a right to rely on cl 10 at that stage and

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[17] Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd [2014] 1 All SA 375 (SCA) at [10]-[17]; Betterbridge (Pty) Ltd v Masilo and Others NNO 2015 (2) SA 396 (GNP) at [8].

resile from the contract. But this did not happen: on the contrary, the parties took positive steps to keep the agreement alive. Central to this was the liquidation of the bond by the purchaser within a two year period and the release of the sellers as sureties for the obligations of GPC to the bank under the mortgage loan. Significantly, cl 3 has its own discreet breach provisions as regards notice and includes a term which is the complete antithesis of a forfeiture clause – an obligation on the sellers to repay the sum of R968 000 to the purchaser in defined circumstances.

[40] For the purposes of argument I am prepared to agree with Ms Liebenberg that the remedies available to the sellers were not inconsistent. However, in the circumstances of this case, upon the breach by the purchaser the sellers in fact made an election to pursue a particular remedy, and having done so they were bound by the contractual terms implicit in that choice.[18] In *Baines Motors* [19] van den Heever JA put it thus:

> *"When the purchaser has made default, the seller can elect whether or not he is going to put the lex commissoria into operation (D.18.3.3). Once he has exercised his option he cannot resile from that election (D.18.3.6.7; Voet [18.3.3])."*

CORRESPONDENCE RELEVANT TO THE CANCELLATION

[41] Turning to the correspondence sent to the purchaser by the sellers' attorneys the following scenario emerges. On 27 October 2014 the sellers' attorneys

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[18] Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd 1996(2) SA 537 (C) at 542E-G

[19] 547C

informed the purchaser that he was *"in arrears with the payment of the bond instalments due to the bank. The bank is currently owed an amount of R47 000."* This obligation, as I have said, is not expressly contained in the deed of sale, although it may have been an implied or tacit term. But that is neither here nor there.

[42] The demand of 27 October 2014 was clearly based on the provisions of cl 3 (in terms whereof the purchaser "*undertakes to pay the bond…within no more than 2 years from the 1st of August 2015"),* because the purchaser was given seven days to remedy the default. That is the remedial period referred in cl 3, whereas cl 10 accords a ten day period within which the purchaser may cure his breach. In any event, the sellers in fact go on to allege that in default of payment by the purchaser, they will exercise their election in accordance with cl 3. The fact that the demand impermissibly and erroneously seeks repayment of *"the full outstanding balance on the mortgage bond"* at a stage when it was not yet due was not a point taken by the purchaser at the time or in the answering affidavit, probably because the parties both understood that the real basis for the demand was to procure settlement of the arrears. The sellers accordingly elected to address the *extant* breach by the purchaser through the *lex commissoria* contained in the addendum.

[43] The demand of 10 December 2014 records that payment of the arrear bond instalments demanded the previous month had been made, although outside of the prescribed 7 day period. The failure by the purchaser to comply timeously with the demand clearly afforded the sellers an independent right to cancel. But there was a further complaint by the sellers: the purchaser was in arrears with the municipal rates and taxes due on the property in the amount of R60 000. Once again, the purchaser's

obligation to pay the rates and taxes does not appear *ex facie* the addendum. Nevertheless, reliance was expressly placed by the sellers on the provisions of cl 3 thereof in the December demand –

> *"…our clients hereby elect to exercise their rights afforded to them in terms of clause 3 of the addendum and therefore will demand to be reinstated as members of the close corporation within 21 days after receipt hereof."*

[44] Notwithstanding a clear election in December 2014 to demand their reinstatement as members of GPC, the sellers took no further legal steps for some 15 months. As appears from para 18 above, the sellers alleged that as of 18 March 2016 the purchaser had failed to

- bring the arrears referred to in the December demand up to date;
- settle the bond by 1 August 2015; or
- secure the release of the sellers as sureties for GPC.

[45] Relying on these alleged breaches by the purchaser, the sellers appear to have exercised a new election based on different causes of action arising from later breaches to the election purportedly exercised in December 2014. Whether there was a purported waiver of that earlier election is not clear, but since the issue was not properly ventilated in the papers it is not possible to consider whether, and how, to

apply the principle referred to in Bekazaku[20]- *"Once he has elected to pursue one remedy, he is bound by his election and cannot resile from it without the consent of the other."* I shall therefore assume, without deciding, that in March 2016 the sellers were no longer bound by their election of December 2014.

[46] When one considers the letter of demand of 18 March 2016 there is little doubt that the sellers sought to rely at that stage on breaches by the purchaser of the provisions of cl 3 of the addendum –

- The first numbered demand in the letter claiming payment of the outstanding purchase price refers to cl 3.1 (read with cl 1) of the addendum for purposes of the computation of the amount due;

- The request for indemnities in favour of the sellers for their liability to the bank arises exclusively from clause 3; and

- The release of the sellers from their suretyships is an obligation imposed on the purchaser exclusively by clause 3.

[47] Having opted to invoke the *lex commissoria* incorporated in cl 3 the sellers were therefore bound to observe the cancellation requirements of that clause, which required a tender to repay the sum of R968 000 and did not permit a claim for forfeiture. It is common cause that the letter of demand did not comply with cl 3 of the addendum and it must follow, in the circumstances, that the Court *a quo* was correct in finding that the cancellation was not lawful.

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[20] 542F

CONCLUSION

[48] In the result I would dismiss the appeal with costs.

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GAMBLE, J

DLODLO, J:

I agree and it is so ordered.

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DLODLO, J

FORTUIN, J:

I agree

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FORTUIN, J