IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 10569/2017

In the matter between:

D J MOSTERT N.O.	First Applicant
C O MOSTERT N.O.	Second Applicant
A C VENTER N.O.	Third Applicant
E M MOSTERT N.O.	Fourth Applicant

(in their capacities as trustees for the time being of
Die Kromspruit Trust IT 2569/98)

And

H L DU PREEZ N.O.	First Respondent
M M DU PREEZ N.O.	Second Respondent
J V DE KOCK N.O.	Third Respondent

(in their capacities as trustees for the time being of the
Jacques Marais du Preez Trust IT 338/2012)

Date of hearing: 22 October 2019
Date of judgment: 8 November 2019

JUDGMENT

SAVAGE J:

[1] This is an opposed application in which the applicants, in their capacities as trustees of the Kromspruit Trust ('the KT'), seek an order that the respondents, in their capacities as trustees of the Jacques Marais Du Preez Trust ('the JT'), return two farms and other assets to the KT within five days following the alleged breach by the JT of the sale agreement entered into between the parties.

[2] On 16 November 2012 the agreement of sale was concluded between the KT and Mr Isak Mostert ('the sellers') and the JT and Du Preez Boerdery CC ('the purchasers') in terms of which the KT sold to the JT two farms, Dennelaan and Kanonkop, in the Witzenberg district ('the property'), with their associated water rights and property records, for the sum of R19 800 000.00; and certain shares in the Waboomsrivier cellar ('the shares') for R214 698.00. In addition, certain movables owned by Mr Mostert, mostly farm implements, were sold to the Du Preez Boerdery CC ('the CC') for R200 000.00. The effective date of the agreement was 1 March 2012, on which date the JT took occupation of the property.

[3] The agreement recorded that the purchase price of R20 million in respect of the property and shares, was to be paid by the purchasers to the sellers in monthly instalments over 20 years from 1 March 2013 to 1 March 2033, with interest. As security for the payment of the purchase price, the JT consented to the simultaneous registration of a first mortgage bond over the property in favour of the KT for R20 million. Transfer was to occur "(o)*n or as soon as possible after signature date*", in terms of clause 21.1, with the parties undertaking to sign all documentation required in this regard, on request. The JT agreed to maintain the property as a high quality grape farm; with the sale and purchase agreed to be a transfer of a going concern as envisaged in s 197 of the Labour Relations Act 66 of 1995 ('the LRA'). An acceleration clause in clause 5.3 of the agreement provided that should the purchaser fail to make any payment on the due date "*the full*

balance owing under this agreement shall then become due and payable without further demand".

[4] Clause 14.1 provided that:

"*14.1 Should the Purchaser default with the payment of any sum payable by it in terms hereof or should the Purchaser be in breach of any of its obligations in terms hereof and fail to remedy such default or breach within a period of fourteen (14) days after the giving of written notice to the effect by the Seller, the Seller shall be entitled but not obliged, without further notice and without prejudice to any other right or remedy which may be available to the Seller in terms hereof or at law –*

14.1.1 to claim and recover from the Purchaser forthwith the whole of the purchase price outstanding; or

14.1.2 to cancel this agreement to repossess the Subject matter and retain the aggregate amount of all amounts paid by the Purchaser to the Seller in terms hereof as a genuine pre-estimate of damages; or

14.1.3 alternatively, claim and recover from the Purchaser such damages as the Seller will have suffered or sustained in consequence of the Purchaser's default or breach, and/or such cancellation in which event the Seller shall be entitled to retain until the final determination of such damages and payment thereof by the Purchaser, all amounts actually paid by the Purchaser to the Seller in terms hereof".

[5] Clause 14.3 stated that "(t)*he provisions of clause 14.1 shall not be construed as binding the Seller to give any notice to the Purchaser before becoming entitled to claim and recover payment of any specific amount overdue*

and unpaid by the Purchaser or to enforce specific performance by the Purchaser of any obligation in terms hereof".

[6] It was recorded in clause 14.4 that the Purchaser has available the same remedies as does the Seller in the event of breach of any obligations in terms of the agreement, "*save that the Purchaser shall not be entitled to cancel this agreement unless the breach of the Seller is material and goes to the root of the contract and is not capable of being compensated for by way of a claim for damages*".

[7] The property was not transferred to the JT and the first mortgage bond contemplated in the agreement was therefore not registered over the property in favour of the KT. From the initial instalment due the JT did not make payment in terms of the agreed payment schedule. Although various indulgences in respect of payment were granted to the JT by the KT, revised payment terms were not recorded in writing and no amended agreement, although it was discussed, was concluded.

[8] In the founding affidavit to the applicant's notice of motion served on or about 15 June 2017, Ms Elizabeth Mostert stated that:

> "*31. The* [JT] *has failed to pay the* [KT] *any amount since November 2016, December 2016, January 2017, April 2017, May 2017 and June 2017, and is thus clearly in breach of the Agreement.*
>
> *32. In light of that breach the Agreement has been cancelled. I deal with the correspondence regarding the cancellation of the Agreement below.*"

[9] She continued that in terms of clauses 5.3 and 14 of the agreement the KT's attorneys sent a letter of demand dated 3 April 2017 to the JT and the CC in which they were given 14 days to pay the outstanding purchase price of R25 269 951.40, failing which the KT "*will cancel the sale agreement*" and demand return of the property. The letter stated further that the KT's attorneys

held instructions "*to cancel the agreement should you not remedy your breach timeously*". There is no dispute that the letter of demand was received by the JT.

[10] Ms Mostert stated further that:

> "*42. To date hereof the* [JT] *and* [the CC] *failed to make payment as demanded and failed to respond to that letter. The only inference that can be drawn is that the* [JT] *and the* [CC] *could not dispute the contents of that letter.*
>
> *43. To date of signature hereof the* [JT] *and* [the CC] *have failed to deliver the Subject Matter to the Applicants*."

[11] The JT and the CC were not thereafter informed that the KT had elected to cancel the agreement, nor informed that the agreement was cancelled. In the respondents' answering affidavit it was expressly denied that the KT was entitled to cancel the agreement or that they had validly done so, with the KT's purported cancellation stated to amount to a repudiation of the agreement, which repudiation was rejected "*in favour of holding* [the KT] *to the agreement*".

[12] Ms Mostert then stated that:

> "*46. In terms of clause 14.3 of the Agreement the Applicants are not required to give notice to the [JT] and [the CC] in order to enforce their rights to claim specific performance in terms of the agreement…*;
>
> …
>
> *The relief sought:*
>
> *50. In terms of clause 14 of the Agreement the [KT] is entitled to make an election to claim amounts owing in terms of the Agreement or to cancel the agreement and repossess the Subject*

Matter of the Agreement…and retain the aggregate amounts of all amounts paid by the Purchaser as a pre-estimate of damages.

51. The Applicants therefore seek that the Subject Matter of the Agreement (as defined) be returned to them. That Subject matter includes the Property, the Cellar Shares, Property Records and Water Rights….The [KT] *thus seeks specific performance of the provisions of the agreement which entitle it to claim back the property.*"

[13] In paragraph 57 of the founding affidavit it is recorded that the proceedings had been instituted by way of an application as there was "*no legitimate foreseeable factual dispute arising in respect of the relief sought*" since the respondents are in breach of the agreement and have failed, despite demand, to rectify said breach. As a result, Ms Mostert stated that the KT "*is entitled to cancel the Agreement and demand return of the Subject Matter*".

[14] The respondents oppose the application and in doing so stated that R8 596 470.81 has been paid towards settlement of the purchase price, with R9 659 000.00 spent in maintaining and improving the property. The JT denied it is in breach of the agreement, denied that the KT is entitled to cancel the agreement or claim back any portion of the subject matter and stated that it would be entitled to claim reimbursement of the sum of R9 659 000.00 and assert an improvement lien over the property which would entitle it to retention of possession of the property pending reimbursement. In addition, the application was opposed on the basis that the agreement created reciprocal obligations; a warranty as to the absence of any dispute with a third party had been breached; the CC had not been joined; the application had not been authorised by all trustees to the KT; and numerous disputes of fact which were "*clearly foreseeable*" are apparent which make it clear that the applicants should have proceeded by way of action.

[15] In reply Ms Mostert denied that the application had not been properly authorised by the KT; denied that the CC had to be joined when no relief was

sought against it; and denied that the KT had breached the warranty given to the JT. It was admitted that the property had not been transferred to the JT but stated that the JT had "*never called for transfer of the property, was in fact happy to delay transfer and agreed that it could be delayed until payments were up to date in terms of the sale agreement*". Furthermore, despite the terms of the agreement, Ms Mostert denied "*that there was any intention to transfer the property immediately*". It was further stated that "(p)*ayment in terms of the sale agreement was always independent of the transfer of the property and was regarded by the parties to the agreement as such*".

[16] To negate any lien Ms Mostert stated that the KT is prepared to put up security for the amount of the JT's claim for alleged improvements, which may be in the form and amount determined by the court.

Submissions of the parties

[17] Mr *Van Reenen* submitted for the applicants that the arguments advanced by the respondents are mainly of a technical nature and are designed to delay the resolution of the matter. The obligation to pass transfer of the property to the JT was never reciprocal on payments being made, the JT failed to provide transfer documentation on request and never sought transfer of the property to it because it could not pay. The agreement does not permit a lien to be exercised by the JT when it had an obligation to maintain the property; and the requirements for a lien had not been fulfilled, but that in any event security for an lien claim could be ordered. It was submitted, with reference to *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd*,[1] that it is for the respondents to place evidence before the court to persuade it to refuse specific performance since such relief may be granted only subject to the court's discretion. The JT has retained the property although clearly in breach of the agreement and, it was submitted, the KT is entitled to the relief sought by it.

[1] 1982 (1) SA 398 (A) at 442B-443F.

[18] In argument Mr *Newton* for the respondents indicated that while issue was no longer taken with the authority of the trustees of the KT to launch the application, it remained an application which is ill-conceived and fatally defective. This, he submitted to be so, in that the KT is in continual material breach of its obligations and warranties in terms of the agreement; it has never cancelled the agreement; the JT asserts a substantial improvement lien over the property; the CC, Mostert and the employees of the CC have not been joined as parties despite their substantial interest in the matter; and there are substantial and material disputes of fact which warrant the dismissal of the application. In argument it was stated further that on 30 September 2019 summons was issued against the JT and the CC on terms similar to the current application in which it was pleaded that the "*KT has cancelled the agreement, alternatively hereby cancels the agreement*" and seeks the return of the subject matter of the sale with damages of R20 million plus interest.

Discussion

[19] It is trite that the applicant in motion proceedings must make out a proper case in its founding papers.[2] The case made out in the founding affidavit by the applicants is that, as a result of the respondents' breach, the agreement has been cancelled. Yet, reliance is placed on clause 14.3 of the agreement to seek "*specific performance of the provisions of the agreement which entitle* [the KT] *to claim back the property".* While there may be no bar to a party seeking specific performance and in the alternative a claim for cancellation of the contract and return of the property delivered under it,[3] it is apparent that this is not the relief sought in this matter.

[2] *NCSPCA v Openshaw* 2008 (5) SA 339 (SCA) at para 29.
[3] *Walters v Andre* 1934 TPD 34.

[20] Cancellation and specific performance are distinct remedies available in response to breach of contract. In *Haynes* v *King Williamstown Municipality* [4] it was stated that –

> "…in our law a plaintiff has the right of election whether to hold a defendant to his contract and claim performance by him of precisely what he had bound himself to do, or to claim damages for the breach. (*Cohen* v *Shires, McHattie and King*, 1882 Kotzé's Reports, p. 41) This right of choice a defendant does not enjoy; he cannot claim to be allowed to pay damages instead of having an order for specific performance entered against him. (*Farmers' Co-operative Society* v *Berry*, 1912 A.D. 343 at p. 350.)

[21] The court in *Bekazaku Properties* (*Pty*) *Ltd v Pam Golding Properties* (*Pty*) *Ltd*[5] made it clear that a party who is entitled to resile from an agreement, is required to exercise an election between upholding the contract and cancelling it:

> "When one party to a contract commits a breach of a material term, the other party is faced with an election. He may cancel the contract or he may insist upon due performance by the party in breach. The remedies available to the innocent party are inconsistent. The choice of one necessarily excludes the other, or, as it is said, he cannot both approbate and reprobate. 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 party. Election is a species of waiver; an election to pursue one remedy involves the waiver or abandonment of the other. The onus of establishing that the party seeking to rely on the breach has elected to affirm the contract, is on the other party."

[22] In *Swart v Vosloo,*[6] the contract expressly permitted the lessor to "*declare the lease cancelled and terminated forthwith*". The court stated that:

> 'The termination of a contract has important consequences upon the reciprocal rights and duties of the parties thereto, and this would seem to provide further justification for holding that if the party decides to exercise a right to declare a contract cancelled he should intimate his election to the defaulting party effectively to terminate the contract, unless that contract itself provides, either expressly or by necessary

[4] 1951 (2) S A 371 (A D) at p 378

[5] 1996 (2) SA 537 (C); [1996] 1 All SA 509 (C) at 513.

[6] *Swart vs Vosloo* (supra).

> implication, that termination may be affected in some other manner other than communication to the defaulting party.'[7]

[23] In *Miller and Miller v Dickinson*[8] it was recognised that:

> "… in the absence of an agreement to the contrary, a party to a contract who exercises his right to cancel must convey his decision to the mind of the other party and that cancellation does not take place until that happens."

[24] The case set out by the applicants in the founding papers is one founded on cancellation. Having regard to clause 14.1, it is permissible for an agreement to prescribe a particular procedure to be followed by a party who decides to invoke the contractual remedy of cancellation;[9] and, where the contract provides for such a procedure, in order for the cancellation to be effective that procedure must be followed.[10]

[25] In oral argument the applicants' counsel suggested for the first time that there exists authority to the effect that if this court were to find that the agreement had not been cancelled prior to the launch of this application, that its cancellation is capable of being implied from the institution of these proceedings. In *Thelma Court Flats* (*Pty*) *Ltd v McSwigin* [11] it was recognised that:

> "There is ample authority for the proposition that the issue and service of a summons in cases of this nature is a formal intimation to the lessee of the lessor's contention that the contract has been broken and of the fact that he has to treat the lease as cancelled . . ."

[26] Similarly in *Nedcor Bank Ltd trading inter alia as Nedbank v Mooipan Voer & Graanverspreiders CC*[12] it was stated that if an aggrieved party approaches the court without previously giving notice of his or her election to cancel the contract, service of his summons is in itself an announcement of his election to

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[7] *Swart vs Vosloo* at 115 E.
[8] 1971 (3) SA 581 (A) at 587H-588A.
[9] *Swart vs Vosloo* 1965 (1) All SA 264 (A); 1965 1 SA 100 (A) at 112F-G.
[10] *GPC Developments CC and others v Uys* [2017] 4 All SA 14 (WCC) paras 27–35.
[11] 1954 (3) SA 457 (C) at 462. *See too Du Plessis v Government of the Rep of Namibia* 1994 NR 227 229G-H.
[12] [2002] 3 All SA 477 (T).

cancel and that the act of "*taking proceedings, is an election, an announcement of an election which is unmistakable*".[13]

[27] Clause 14.1 permits the applicants "*without further notice*" to invoke clause 14.1.2 and cancel the agreement. Having regard to the text, its context and purpose[14] it is clear that the procedure agreed by the parties is that the remedies set out in clause 14.1 may be invoked without further notice to the other party. On the face of it the words used could allow for an interpretation in relation to cancellation that the defaulting party does not need to be notified that the contract has been cancelled; and that no further notice need be given to the defaulting party before the election is made to invoke the remedy of cancellation.

[28] In *Jaffer v Falante*[15]it was stated that:

> "Communication to the defaulting party of the aggrieved party's election would appear to be desirable so as to crystallize the rights and position of the parties to the contract. For it to suffice for the aggrieved party merely to decide to cancel the contract without notifying his decision would leave the defaulting party in an invidious position."

[29] Although it may appear to be a more reasonable, sensible or businesslike interpretation of the clause given the important consequences of cancellation, that "no further notice" does not mean that no notice of the act of cancellation is required, it is not necessary for current purposes to determine whether this is so or not. The applicants state expressly in the founding affidavit that they have, prior to the launch of this application, cancelled the agreement with the respondents and the respondents deny this. This is not therefore a matter in which, on the applicants' version, the decision to cancel is one made in the founding affidavit or that cancellation is to implied from the launch of these proceedings. And, faced with the respondents' denial that cancellation has occurred, the applicants in reply put up no details as to how and when cancellation occurred to indicate that it has.

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[13] At para 13 with reference to *Jowell v Behr* 1940 WLD 144 at 146.
[14] *Betterbridge (Pty) Ltd v Masilo and others NNO* 2015 (2) SA 396 (GNP) at para 8.
[15] 1959 (4) SA 360 (C).

[30] As was stated in *Segal v Mazzur* [16]:

> "Whether he [i.e. the innocent party] has made an election one way or the other is a question of fact to be decided by the evidence. If, with knowledge of the breach, he does an unequivocal act which necessarily implies that he has made his election one way, he will be held to have made his election that way; this is, however, not a rule of law, but a necessary inference of fact from his conduct ...".

[31] Motion proceedings are concerned with the resolution of legal issues based on common cause facts because they are not designed to determine probabilities.[17] The well-established rule set out in *Plascon-Evans Paints v Van Riebeeck Paints*[18] is that where disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the respondent, justify such order. This is so unless the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.

[32] The applicants have not made out a case for the final order sought in this matter. A factual dispute exists as to the cancellation of the agreement, which is one which cannot be determined in these proceedings. That dispute raised is not fictitious, palpably implausible, far-fetched or untenable. Although not strictly forming part of these proceedings, support for this view is to be found in the particulars of claim appended to the summons issued by the applicants against the respondents out this court on 30 September 2019. Handed up during the hearing of this matter without objection, it is pleaded in the particulars of claim that "(t)*he KT has cancelled the agreement, alternatively hereby cancels the agreement*" with substantially similar relief sought to that sought in this application. Had the applicants indeed cancelled the agreement, it is difficult to understand why the alternative would have been stated if not because a factual dispute is contemplated.

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[16] 1920 CPD 634 at 644-645.
[17] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 26.
[18] 1984 (3) SA 623 (A) at 634E-635D.

[33] In any event, a factual dispute exists between the parties as to whether the respondents hold an improvement lien over the property, and if so the extent of such lien. Evidence was put up by the respondents as to extensive improvements effected to the property, in response to which the applicants raised material disputes. In this regard, the applicants tender that security can be provided by them in a form and amount determined by the court. This does not however cure the fact that the dispute concerning the lien cannot be resolved by way of motion proceedings given the disputes of fact which have been raised relating to it; and there is in any event, in my mind, no purpose served by a piecemeal determination of the disputed issues between the parties in this matter.

[34] Although the case made out by the applicants in the founding affidavit pivoted on the cancellation of the contract, they nevertheless rely on clause 14.3 to seek "*specific performance of the provisions of the agreement which entitle it to claim back that property*". Although the court will, as far as possible, give effect to the plaintiff's choice to claim specific performance, it has a discretion in a fitting case to refuse to decree specific performance and leave the plaintiff to claim and prove its *id quod est* interest.[19]

[35] Given the basis of the applicants' claim as set out in the founding affidavit and the factual dispute which exists related to cancellation, it is not appropriate to grant specific performance in this matter. Even if it were to be assumed for purposes of a claim of specific performance that the agreement had not been cancelled, and despite the fact that the applicants rely on clause 14.3 which refers to an obligation of the purchaser when the obligation to restore possession of the property arises following cancellation in terms of clause 14.1.2, the view I take is that another satisfactory remedy exists, is available and is currently being exercised by the applicants.[20] The contract entitles the applicants to restoration of the property on cancellation of the agreement. The applicants have instituted action proceedings against the respondents in which they seek as much.

[19] *Edrei Investments 9 (Pty) Ltd v Dis-Chem Pharmacies (Pty) Ltd* 2012 (2) SA 553 (ECP) at 556I-H.
[20] *Setlogelo v Setlogelo* 1914 AD 221 at 227.

The factual disputes which have arisen in this application can properly be determined in that matter.

[36] For these reasons it is unnecessary to determine whether the principle of reciprocity applies in this matter; whether the CC and employees of the respondent should properly have been joined as parties to the application; whether the respondents are in *mora creditoris*; whether the applicants have breached a warranty that the KT was not party to any dispute with a neighbour or third party; or whether the respondents hold an improvement lien over the property.

[37] The applicants have not proved an entitlement to the relief sought and the application must fail. Given as much there is no reason why costs should not follow the result.

Order

[38] In the result, an order is made as follows:

1. The application is dismissed with costs.

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K M SAVAGE

Judge of the High Court

Appearances:

Applicants: Adv D van Reenen

Instructed by Basson Blackburn Inc.

Respondents: Adv A Newton

Instructed by Louw Inc.