THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number : 231/07
Reportable

In the matter between :

IZAK ADRIAAN JOHAN DE VILLIERS — APPELLANT

and

DAVID LAWRENCE CORNELIUS McKAY NO — FIRST RESPONDENT
MARLENE McKAY NO — SECOND RESPONDENT

CORAM : MPATI DP, NAVSA, CLOETE, PONNAN *et* CACHALIA JJA

HEARD : 10 MARCH 2008

DELIVERED : 27 MARCH 2008

Summary: Contract: 'entire agreement' clause; provisions of another contract must be left out of account because even if factually relevant this are not legally relevant.

Neutral citation: This judgment may be referred to as *De Villiers v McKay NO* (231/07) [2008] ZASCA 16 (27 March 2008).

CLOETE JA/

CLOETE JA:

[1] It is common cause in this appeal that the appellant entered into a written contract ('the contract') with the West Coast Trust ('the WCT') represented by the first respondent, who was one of the trustees and duly authorised to conclude the contract by his wife, the second respondent and the other trustee. In terms of the contract in its ultimate form the WCT sold to the appellant, who purchased, inter alia the WCT's entire right, title and interest in and to The Sixteen Mile Beach Development Trust ('the Development Trust') for a purchase price of R1m. It was anticipated at the time that the Development Trust would develop a township on land owned by it. The purchase price was duly paid.

[2] Before the contract, already signed by the first respondent, was given to the appellant for signature, the appellant at the first respondent's insistence handed to a third party a written undertaking ('the undertaking') which he had signed and in terms of which he undertook to 'procure that the company which develops Sixteen Mile Beach transfers to you (or your nominee)' plots in the intended development. The appellant, who was the only witness who testified at the trial, said that the undertaking was embodied in a document separate from the contract at the first respondent's express request, communicated through the third party. The appellant also said explicitly in his evidence in chief, and more than once in cross-examination, that had the undertaking not been furnished by him, the contract with the WCT would not have been handed to him for signature. The undertaking was not signed by the first respondent or anyone else.

[3] At the time that the contract was signed, the Development Trust was indebted to the WCT in certain amounts. The Development Trust was subsequently sequestrated. The respondents as trustees of the WCT recovered from the Development Trust's trustees in insolvency an amount of R2 481 700,30 being the total of dividends in respect of the debts owed by the Development Trust to the WCT; and the respondents have refused to remit the dividends to the appellant. The

respondents' defence to the appellant's claim for payment of the total is that the obligation to transfer stands in the Sixteen Mile Beach Development has become incapable of performance because the property on which that development was to have taken place, was sold on the insolvency of the Development Trust to a third party over whom the appellant has no control. It was common cause at the trial, and remained common cause on appeal, that this sale rendered performance of the appellant's obligation in terms of the undertaking to transfer stands to the first respondent or his nominee, impossible. The learned judge in the court *a quo* (Thring J) held[1] that the undertaking was a prior agreement which had induced the conclusion of the contract (to which he referred as 'the main agreement'); that:

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

and

'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.'

[4] It is not necessary to deal with the legal validity of the novel approach followed by the learned judge in the court *a quo* because that approach was not competent in view of the provisions of clause 9 of the contract. That clause provides:

'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.'

The effect of this clause is that for the purposes of the contract, the provisions of the undertaking must be left out of account. Therefore, although as a matter of fact the respondents would not have entered into the contract had the appellant not given the undertaking, that fact is irrelevant in law in proceedings to enforce the terms of the contract.

[5] In my view the approach adopted by this court in *Wynns Car Care Products (Pty) Ltd v First National Industrial Bank Ltd*[2] is decisive of the appeal. There, the

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[1] [2007] JOL 19403 (C).
[2] 1991 (2) SA 754 (A).

appellant had hired certain computer equipment from the respondent's predecessor in title, CICS, in terms of a written agreement of hire. The agreement of hire was expressly made conditional upon the conclusion between the parties of an agreement of maintenance and an agreement of computer services. The crux of the argument advanced by the appellant's counsel was that the agreement of hire was only part of a more comprehensive transaction which was of such a nature that it had to be inferred that the appellant's obligation to pay rent was intended to be reciprocal to CICS' obligations in terms of the other two agreements. Hefer JA said:[3]

'The argument fails to appreciate the clear distinction between separate agreements which are, for practical and commercial considerations, linked and interdependent and those agreements which the parties in addition wish to be reciprocal in the legal sense. The transaction plainly involved more than the lease of the equipment and it is clear that the system would be inoperative and the equipment of no use to the appellant unless CICS performed in terms of the maintenance agreement and the services agreement. But that is not the end of the matter. The transaction was a multi-faceted one. It was for the parties to decide how they would formalise every aspect of their relationship. They elected to do so in three separate and distinct agreements and, unless the terms of the agreements considered as a whole clearly evince the intention that there would be reciprocity between the obligations undertaken in each, there is no room for an [inference] to that effect.'

The learned judge of appeal analysed provisions of the agreement of hire, including clause 13 which provided that:

'This agreement is the sole rental agreement between the parties hereto. CICS and the customer shall not be responsible for any undertaking, representation or warranty given orally or otherwise which is not specified in this agreement . . . '

and clause 10, which provided that:

'The customer shall not be entitled for any reason whatsoever to withhold any payment due in terms of this agreement nor shall it be entitled to set-off against any rentals payable in terms hereof, any present or future claim which the customer may have against CICS from whatever cause'

as well as provisions in the services agreement similar to clause 10 of the agreement of hire. In the light of these provisions Hefer JA concluded that there was no reciprocity between the appellant's obligation to pay rentals and CICS' obligation to perform in terms of the maintenance agreement.

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[3] At 758A-D.

[6] In the present appeal, the conclusion of the contract was conditional upon the furnishing of the undertaking in the same way that in *Wynns* the conclusion of the agreement of hire was conditional upon the conclusion of the other two agreements. It is true that the undertaking did not have a provision similar in effect to clause 9 of the contract, whereas all of the three agreements in *Wynns*, taken together, did; but that is a distinction without a difference. The point is that the obligations owed under the contract in the present matter, and those owed under the agreement of hire in *Wynns*, were not reciprocal to other agreements (the undertaking in the present matter and the two other agreements in Wynns) because of what the parties had expressly agreed.

[7] There are only two possibilities in the present appeal. Either the obligation to procure the transfer of the plots contained in the undertaking was to form part of the consideration for the WCT's obligations owed to the appellant under the contract, or it was not. If it was not, the appellant's inability to perform this obligation is irrelevant to his obligations under the contract. If it was, then, in the absence of rectification to delete clause 9, it cannot be relied upon because of the plain provisions of that clause. In either event, the appellant's obligation to procure transfer of the plots was not reciprocal to the obligations of the respondents under the contract and it follows that the inability of the appellant to perform that obligation is no answer to his claim that the respondents perform their obligations under the contract.

[8] Rectification of the contract to delete clause 9 was indeed sought by the respondents. But there was no evidence to support it. The plaintiff stoutly maintained in the face of repeated cross-examination on the point that the obligation to procure the stands contained in the undertaking was not part of, or additional to, the consideration due from him in terms of the contract. If that evidence is accepted, there is no room for rectification. If it is not, there is no evidence that can be relied upon by the respondents to discharge the onus on them to prove the common continuing intention of the parties for which they contend.

[9] Counsel representing the respondents adduced a separate and distinct argument which did not depend on rectification and which, as I understood it, depended upon the proposition that the undertaking was a separate agreement enforceable in its own terms. If that is so, the obligations which it imposed on the appellant were not reciprocal to the obligations imposed in the contract; and the fact that a claim against the appellant based on the undertaking is worthless, is irrelevant ─ as Hefer JA said in the *Wynns* matter:[4]

'That a claim against CICS cannot be fruitfully pursued (it is alleged in the plea that CICS has stopped trading after transferring all its assets to another company) is irrelevant since the validity of clause 10 cannot be adjudicated upon in the light of an unforeseen subsequent eventuality.'

[10] The appellant's counsel asked for the costs of two counsel in the event of success. That application was not opposed and was in my view warranted.

[11] I make the following order:

1. The appeal succeeds with costs, including the costs of two counsel.
2. The order of the court *a quo* is set aside and the following order substituted:

'The defendants are ordered to pay to the plaintiff:

(1) the sum of R2 481 700,30 together with interest thereon calculated at the rate of 15,5% per annum from date of service of the summons on them to date of payment; and

(2) the plaintiff's costs of suit, including the costs of two counsel where two counsel were employed.'

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T D CLOETE
JUDGE OF APPEAL

Concur: Mpati DP
Cachalia JA

[4] At 759J-760A.

NAVSA JA:

[12] I have had the privilege of reading the judgment of my colleague Cloete JA. I agree with his conclusion and the order suggested by him. I am constrained, however, to add the remarks set out hereafter.

[13] I agree that the effect of clause 9 of the contract is as set out in para 4 of my colleague's judgment. The person who negotiated the contract on behalf of the third party was an attorney who, acting on the instructions of the former, made certain alterations to it but retained clause 9 in the form recorded in para 4 above. Thus, it is no accident that the claim for rectification by the respondents was pursued only half-heartedly, with neither the attorney nor the third party testifying in the court below. In the ordinary course that would have been the end of the matter.

[14] The court below, mindful of the appellant's concession that the contract would not have come into being had the undertaking not been given, sought to come to the rescue of the respondents by resorting to the mechanism of a 'prior inducing contract'. The undertaking addressed by the appellant to the attorney refers to an oral agreement reached earlier.

[15] The problem with the approach followed by Thring J in the court below is that this court in *Du Plessis v Nel* 1952 (1) SA 513 (A) emphatically stated that, if the terms of the prior inducing contract contradict, alter, add to or vary the written contract evidence to prove them will not be admitted.[5] In the present case the undertaking, if admitted on the basis advanced by the respondents, has the effect of adding to the purchase consideration ─ increasing it by the number of plots to be made available. The court below was therefore, in the circumstances of this case,

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[5] See in this regard the discussion in R H Christie *The Law of Contract in South Africa* 5 ed (2006) at p 198-199. At p 199 the following appears:
'[I]nsisting that the prior oral contract be not inconsistent with the written contract in order to qualify to be proved by evidence, the Appellate Division in *Du Plessis v Nel* was confirming the long line of South African cases in which the law has been similarly expressed and applied.'

precluded from having regard to the provisions of the undertaking.

[16] It is necessary to record that the undertaking was addressed to the attorney acting on behalf of the third party after its terms had been discussed with him and as explained by my colleague was not signed by the third party.

[17] The respondents, in persisting before us with the contention that the contract and the undertaking could be married, compounded the error by the court below. Of course it is open to parties to an agreement to stipulate that one of them undertakes an obligation in respect of a third party. The contract itself does not provide for this and, as pointed out above, the terms of the undertaking cannot be used in relation to the obligations of the parties spelt out in the contract.

[18] If the respondents had proved the rectification claimed, then of course they would have had a remedy. Alternatively, if the third party had proceeded against the appellant, relying on the terms of the undertaking, he might, subject to the validity of those terms insofar as they comply with the legislative provisions regulating the transfer of land, have been successful. It is therefore not correct, as contended for on behalf of the respondents, that they were without remedy.

[19] The facts in *Wynns*, referred to by my brother Cloete JA, are not wholly comparable. In *Wynns* this court, very early in the judgment, reminded itself that the *exceptio non adimpleti contractus*, which essentially was the appellant's defence, presupposes the existence of mutual obligations which the parties intended to be performed reciprocally, the one being the intended exchange for the other.

[20] In *Wynns* the appellant had entered into a lease agreement in terms of which it leased computer equipment from a company. That agreement, in specific terms, was conditional upon the conclusion of two other agreements entered into at the same time. The suspensive condition was fulfilled and three self-contained and self-regulating agreements came into being. In terms of the two other agreements the

company had respectively agreed to maintain the computers and to provide computer services. The appellant had failed to pay the rental under the lease agreement for one month and contended that since the company had not maintained the computers nor provided the services in terms of the services agreement the appellant was entitled to withhold rental due in terms of the lease agreement. This court rightly held that the parties had elected to formalise the relationship in three separate and distinct agreements and since there was no reciprocity between the obligations undertaken in each the abovementioned contention advanced by the appellant was fallacious.

[21] Furthermore, in *Wynns*, as recorded by my colleague Cloete JA, the lease agreement specifically recorded that there had been no inducement or influence to enter into that agreement.

[22] In addition, in *Wynns*, clause 10 of the lease agreement recorded the following:

'The customer shall not be entitled for any reason whatsoever to withhold any payment due in terms of this agreement nor shall it be entitled to set-off against any rentals payable in terms hereof, any present or future claim which the customer may have against [the company] from whatever cause.'[6]

[23] The services agreement contained a similar provision:

'Under no circumstances shall the customer have the right to set-off against any amounts owing by it under the agreement any amount which it alleges is due to it by [the company] from any cause whatsoever and the customer shall not have the right to withhold payment of any amount due to [the company] for any reason whatsoever.'[7]

[24] Hefer JA, after considering the provisions referred to in the preceding paragraphs, said the following:

'These two provisions remove any doubt which may otherwise have existed as to the parties' intention. Their effect is plainly that there is no reciprocity between appellant's obligation to pay the

[6] At 758H-J.
[7] At 758J-759A.

rentals and [the company's] obligation to perform in terms of the maintenance agreement.'[8]
That is the ratio for the decision.

[25] To sum up. In *Wynns* there were three *written* agreements signed by the same parties. In the present case there was an undertaking to a third party following on an oral agreement – the undertaking was not signed by both parties. In *Wynns* the first written agreement was, in specific terms, conditional upon the other agreements being signed and the condition was fulfilled. There is no such condition in the present case. In *Wynns* each relevant agreement had a clause insulating each agreement against intrusion by the other.

[26] In the present case, absent rectification, clause 9 is a bar against merging the undertaking and the contract. That should be the end of the matter. There is no reciprocity and for the reasons stated above there is no room for the admission of a prior inducing contract.

[26] For these reasons I concur in the conclusion reached by Cloete JA and the order proposed by him.

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M S NAVSA
JUDGE OF APPEAL

[8] At 759A-B.