THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 231/2011
Not Reportable

In the matter between:

CHRISTODOULOUS DEMETRIADES **APPELLANT**

and

IOANNIS DEMETRIOS PERIVOLIOTIS **RESPONDENT**

Neutral citation: *Demetriades v Perivoliotis* (231/2011) [2012] ZASCA 8 (14 March 2012)

Coram: Mthiyane DP, Brand, Cloete, Mhlantla JJA and Boruchowitz AJA

Heard: **17 February 2012**
Delivered: **14 March 2012**

Summary: Interpretation of an agreement of sale of shares ─ whether it created reciprocity of obligations ─ party seeking to argue new case on appeal.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Legodi, Makgoka JJ and Ebersohn AJ sitting as court of appeal):

1 The appeal is upheld with costs, such costs to include the costs of two counsel.

2 The order of the court a quo is set aside and replaced with the following:

'The appeal is dismissed with costs, including the costs of two counsel.'

JUDGMENT

MTHIYANE DP (BRAND, CLOETE, MHLANTLA JJA and BORUCHOWITZ AJA CONCURRING)

[1] The appeal with leave from this court is concerned with the interpretation of a written agreement of sale of shares in a company registered in Tanzania. In terms of the agreement the respondent (the plaintiff) sold two hundred fully paid-up shares to the appellant (the defendant) for R3.5million. A dispute arose between the parties concerning payment of the purchase price and the initial question that fell to be determined in the high court and later by the full court was whether the agreement is one to which the principle of reciprocity applies.

[2] In an action in the North Gauteng High Court (Seriti J) the question was answered in the affirmative but on appeal to the full court with this court's leave, Legodi J with Makgoba JJ and Ebersohn AJ concurring,

held that on a proper construction of the agreement reciprocal obligations were not created between the parties, dismissed the *exceptio non adimpleti contractus* raised by the defendant and found that the appellant was obliged to pay the balance of the purchase price in terms of the contract.

[3] The appellant now appeals that decision with leave from this court. It is convenient to refer to the parties as they were in the high court. It bears mention however that in the appeal before us the plaintiff abandoned his earlier arguments on whether the agreement created reciprocal obligations ─ in fact he now concedes that it did ─ and disavows any reliance on the judgment of the full court, which he no longer supports. Notwithstanding his concession ─ which as will appear later in the judgment was well made ─ counsel considers that he has found a way around it. He submits that because the plaintiff tendered performance and the defendant refused to accept the tender, the plaintiff is entitled to succeed on appeal. He says that although the plaintiff's case was not pleaded in these terms, the defendant has no cause to complain because the so-called new case is capable of being raised on the papers as they stand and the issue now raised was sufficiently traversed in the court below.

[4] The convenient starting point is the agreement itself. On 17 September 2003 the plaintiff sold to the defendant 200 fully paid up shares in Thinamy Entertainment Ltd, a company registered in Tanzania, comprising 20 percent of the subscribed share capital of the company. As I have already indicated the purchase price of the shares was R3.5million.

[5] In terms of clause 8.2 of the agreement the balance of the purchase price of R2,5million was payable in twelve equal monthly instalments of R208 333,33, on or before the 7th of each month, the first instalment being payable on or before 7 October 2003.

[6] In terms of clause 9 the plaintiff undertook to ─ on or before 30 September 2003 ─ cause to be delivered to the defendant or his nominee:

'9.1 The share certificates together with share transfer form signed by the Seller;

9.2 Cession by the Seller in favour of the Purchaser for the said loan account;

9.3 The resignation of the Seller as director of the company;

9.4 A resolution approving of the transfer of the shares from the Seller to the Purchaser;

9.5 All books, documents and records in the Seller's possession relating to the company or the business.'

[7] In the particulars of claim the plaintiff alleges that the defendant breached the terms of agreement as follows:

(a) he only paid R55 000 towards the first instalment, being payable on or before 7 October 2003 as already indicated above, leaving an unpaid balance, on the first instalment, of R153 333,33;

(b) he failed to make any further payments;

(c) he is indebted to the plaintiff in the sum of R1 819 999,00 plus interest at the rate of 15,5 percent per annum a tempore morae.

[8] In his plea the defendant admitted:

(a) that he paid R55 000 towards the first instalment on or before 7 October 2003 as required under clause 8.2 of the agreement; and

(b) that he had not made any further payments.

The defendant denied further that he was obliged to pay because the plaintiff had failed to perform his part of the agreement by not delivering

the required documentation as required in clause 9 of the agreement. Such failure amounted to a repudiation of the agreement, which he accepted. The defendant pleaded that as a consequence he had cancelled the agreement.

[9] The defendant also filed a counter-claim for the repayment of the R55 000 he paid towards the first instalment of the purchase price. In the counter-claim he further alleged that:

(a) the plaintiff had breached the terms of the agreement by failing to comply with clause 9 of the agreement;

(b) the plaintiff repudiated the agreement, which repudiation he had accepted; and

(c) if it was found that he had not repudiated the agreement, the plaintiff would in any event not be able to comply with clause 9 of the agreement.

[10] In his plea to the counter-claim the plaintiff disputed the defendant's entitlement to the repayment of R55 000 alleging that the payment of the purchase price was not dependant upon the plaintiff fulfilling any obligations in terms of the agreement. The plaintiff further averred that he had never had the intention to repudiate the agreement. The plea to the counter-claim in effect averred that the agreement did not create reciprocal obligations and that the defendant was not entitled to succeed in his defence based on the *exceptio non adimpleti contractus*. As already indicated the plaintiff has abandoned this position and correctly so.

[11] For reciprocity to exist there must be such a relationship between the obligations to be performed by the one party and that due by the other

party as to indicate that one was undertaken in exchange for the performance of the other (see eg *Mörsner v Len*).[1] On a proper construction of the agreement between the plaintiff and the defendant, especially if regard is had to the paragraphs dealing with the plaintiff-seller's obligation to deliver the share certificate and other documents on or before 30 September 2003 (clause 9) and dealing with the defendant-buyers' obligation to pay on or before 7 October 2003 (clause 8.2), it is clear that the intention was to create reciprocal obligations. The relevant cases on the topic have emphasized that the overriding consideration is the intention of the parties as evident from the agreement in conjunction with the relevant background circumstances. See *Man Truck & Bus (SA) v Dorbyl Ltd t/a Dorbyl Transport Products and Busaf*.[2] On that approach there can be no question that the plaintiff had to deliver the documents by 30 September 2003 and the defendant thereafter pay by 7 October 2003, in exchange for the documents so delivered. It cannot be any clearer than that. Accordingly the finding of Seriti J that the agreement gave rise to reciprocal obligations was correct. It must therefore follow that the full court erred in its conclusion that the agreement did not create reciprocal obligations.

[12] One would have thought that once reciprocity was conceded and the plaintiff accepted that it had not delivered the share certificate and the other documents as required by clause 9, that would have put paid to all the issues in the case. This because the defendant in his pleadings had accepted the plaintiff's repudiation of the agreement, consisting in the plaintiff's refusal to perform an important term of the agreement. Whether the plaintiff subjectively intended no longer to be bound by the

[1] *Mörsner v Len* 1992 (3) SA 626 (A) at 634A.
[2] *Man Truck & Bus (SA) (Pty) Ltd v Dorbyl Ltd* t/a *Dorbyl Transport Products and Busaf* 2004 (5) SA 226 (SCA) para 12.

agreement, or whether he was actuated by a mistake of law in thinking he was entitled to enforce the agreement as he sought to do, is irrelevant: *Van Rooyen v Minister van Openbare Werke*.[3]

[13] Despite conceding reciprocity that would suggest that the end of the road had been reached in this litigation, counsel for the plaintiff submitted that he was entitled to argue a point that was not specifically pleaded. Relying on the principle laid down in *Shill v Milner*,[4] he argued that a court was on appeal entitled to permit a party to go beyond the pleadings where the issue had been traversed in evidence in the court below.

[14] The issue raised in this new point is the following. The defendant is liable to pay the amount claimed because the plaintiff tendered performance and the defendant refused to accept the tender. Furthermore the defendant failed to attend a meeting at his (the defendant's) attorney's offices in 2004 where the defendant would have been given the documents. The plaintiff is to date in possession of the share certificate and is still willing to deliver it to the defendant.

[15] As I see it there are two insurmountable hurdles that the plaintiff has to overcome. The first is that the agreement came to an end upon the acceptance by the defendant of the plaintiff's repudiation. The second is that the tender was withdrawn by the plaintiff in his amended particulars of claim where all reference to the tender was deleted. It is not now possible for the plaintiff to place reliance on a tender that was withdrawn

---

[3] *Van Rooyen v Minister van Openbare Werke* 1978 (2) SA 835 (A) at 844H-846A.
[4] *Shill v Milner* 1937 AD 101 at 105.

or to seek to put the clock back prior to the cancellation of the agreement. Accordingly the new point is without merit and falls to be rejected.

[16] Accordingly the appeal must succeed and the following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court a quo is set aside and replaced with the following:

‘The appeal is dismissed with costs, including the costs of two counsel.’

_____

K K MTHIYANE
DEPUTY PRESIDENT

APPEARANCES

For Appellant:	AB Rossouw SC (with him MS Janse van Rensburg) Instructed by: Grobler Levin Soonius Inc, Pretoria Naudes, Bloemfontein
For Respondent:	EA Limberis SC (with him BW Maselle) Instructed by: Kobus Burger Attorneys c/o Phillip Venter Attorneys, Pretoria Lovius Block Attorneys, Bloemfontein