THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no**: 572/11**

Not reportable

In the matter between:

DONALD & RICHARD CURRIE (PTY) LTD	**First Appellant**
RICHARD CURRIE	**Second Appellant**
and	
GROWTHPOINT PROPERTIES LTD	**Respondent**

Neutral citation:	**Donald & Richard Currie (Pty) Ltd v Growthpoint Properties Ltd (572/11) [2012] ZASCA 114(13 September 2012)**
Coram:	Lewis, Mhlantla, Bosielo, Leach and Tshiqi JJA
Heard:	24 August 2012
Delivered	13 September 2012

Summary: Where offer to convert equities in a company is made to holders by another entity, and offeree completes acceptance form in required manner, he cannot rely on his own errors in completing the form to avoid the contract that is concluded on the ground of reasonable mistake.

ORDER

On appeal from South Gauteng High Court, Johannesburg (Mbha J sitting as court of first instance).

The appeal is dismissed with costs.

JUDGMENT

LEWIS JA (MHLANTLA, BOSIELO, LEACH AND TSHIQI JJA concurring)

[1] Mr Richard Currie owned equities in Paramount Property Fund Ltd (Paramount). So did a company in which he and members of his family held the shares and of which he was a director, Donald and Richard Currie (Pty) Ltd (the company). On 18 December 2006 Growthpoint Properties Ltd (Growthpoint) made an offer by circular to all Paramount Linked Unitholders and B Debenture Holders to exchange what they held in Paramount for either linked units in Growthpoint, or for cash. I shall deal with the precise details of the offer in due course. The transaction fell within the definition of an 'affected transaction' in s 440K of the Companies Act 61 of 1973, and as such was governed by the Securities Regulation Code on Takeovers and Mergers. (Nothing turns on the provisions of the code.)

[2] Currie filled in the forms attached to the circular, intending to accept the mass offer both for himself and for the company. The completed forms indicated that Currie and the company accepted the offers for their equities and the consideration they elected to take was the cash amount stipulated per unit. When Currie received cheques for the amounts payable for his and the company's units he immediately sought to change what he had elected and insisted that he had really wanted linked units instead. He did not bank the cheques. When he was unable to persuade Growthpoint to reverse the transactions, he and the company instituted separate actions for declarations that the acceptances had been 'pro non scripto', and for delivery of the linked units that had been offered and the dividends that would have accrued had the linked units been transferred to them at the relevant time.

[3] The basis of the claim pleaded was that the forms as completed by Currie had been vague and manifestly confused, and that Computershare Investor Services (Pty) Ltd (Computershare), the agent (transfer secretary) of Growthpoint, which had attended to the receipt and processing of acceptances, should have realized this and not taken Currie and the company's election to take a cash consideration at face value. Growthpoint pleaded that it was Currie who had carelessly filled in the forms; that Computershare could not have known that Currie had intended to accept linked units instead of cash; and that Currie and the company were bound by Currie's election.

[4] The actions were consolidated at the start of the trial. The high court (per Mbha J) found that Currie and the company were not entitled to the linked units: they had claimed that their acceptances were null because of the errors made in their completion and that they could thus not claim performance since there were no contracts. Leave to appeal to this court was granted by the high court.

[5] The grounds of appeal are multiple. The essence of the argument on appeal was, however, that the acceptance of the mass offer was not void: that only the election to accept cash was affected by iustus error (that of Currie), and that it was, or should have been plain to Computershare, that Currie had elected, for himself and the company, to accept the offer of linked units in Growthpoint. The issues are thus considerably narrower on appeal.

The background to the claim

[6] Both Currie and the company had been the holders of Paramount B debentures. In 2005 these were converted to linked units. When Currie received the certificates of registration for linked units he noticed that there were certain errors on them (spelling mistakes) and he returned the certificates to Computershare for correction. Corrected certificates were not delivered to Currie until 12 January 2007, despite repeated requests made by him. He had been particularly anxious to obtain the corrected certificates before accepting the mass offer made in December 2006, which had to be accepted by Friday 26 January 2007. That was because he was uncertain whether he and the company held linked units or debentures. Nonetheless, he filled in the acceptance forms before receiving the certificates, on the assumption that he and the company owned debentures. And the company took a resolution to

accept the offer for its debentures and authorized Currie to sign on its behalf. It was in any event not necessary as Currie had general authority to bind the company. I shall return to the resolution.

[7] In his haste to sign the acceptance forms before a weekend when he was going away (although two weeks before the closing date for acceptance), Currie signed the election forms in the space for debenture holders to sign. And he filled in the block indicating that he wished to exchange the debentures for linked units. When he then received the certificates and discovered that he and the company held linked units and not debentures, he deleted what he had written in that block – 264 505 debentures for the company and 84 450 for himself – and wrote the same numbers in the block for linked shares. But instead of putting the figures in the block indicating that they wished to acquire the offered linked units (as he alleged he had intended to do), Currie placed them in the block electing a cash consideration. And that is what he and the company received.

[8] Before dealing with the errors that he made in completing the forms (which he conceded were negligent, and indeed 'incredible') I shall set out the pertinent terms of the offer and the layout of the election form.

The terms of the offer

[9] The introductory section of the circular in which the offer was made to all Paramount debenture and linked unit holders stated that it was important and required immediate attention. If such holders wished to accept the offer being made, they had to complete the acceptance, surrender and transfer forms and deliver them to Computershare by the closing date. The last sentence of the introduction read: 'If you do not wish to accept the offer you need not take any action.' Clause 4 in the offer document set out the financial consequences of the different elections.

[10] Paramount linked unit holders who accepted would receive, for each unit, one new Growthpoint linked unit. On the average price of Growthpoint units before the circular was issued, the offeree would receive a premium of 10.03 per cent. On the other hand, the cash consideration would be R6.71 for every Paramount linked unit. The financial consequences of accepting an offer for debentures were also spelled out. If offerees elected to do nothing, in terms of s 440K, provided that 90 per cent of

offerees made an election to accept Growthpoint linked units, then there would be a compulsory acquisition of the units or debentures of the remaining Paramount holders, who would then be in the position they would have been had they elected to take the linked units.

[11] Clause 4 also provided that Growthpoint reserved the right, in its discretion, to treat as invalid acceptances that were not accompanied by documents of title (the certificates) and to require proof of authority that the person who signed the acceptance form was authorized to do so. It stated further that all acceptances were irrevocable. If acceptances were only 'partial', in the sense that the offeree did not indicate whether it wanted to receive linked units or cash, the offeree would receive linked units as a 'default consideration'. The notes stated also that any alteration on the reverse side should be signed in full and not simply initialled, and that 'Any alteration may not be accepted by the offeror'.

The election form

[12] The form on which a Paramount equity holder who wished to accept the offer of Growthpoint linked units was printed on the reverse of the acceptance, surrender and transfer form. The front page required the offeree to indicate the number of Paramount linked units, or debentures, held by it. An asterisk next to the block for the figure referred to the term of the offer that if no number were specified the offeree would be deemed to have accepted the offer in respect of all units or debentures owned. Currie did not complete the first page.

[13] Part A of the reverse page (the election form) required details of names, addresses and telephone numbers of the offeree/acceptor. This was followed by a heading ('Election of offer consideration'). Below that the form stated:

'I/We elect to receive the following offer consideration (please indicate in the appropriate box the number of Paramount linked units and/or B debentures in respect of which you wish to choose either the cash consideration or the linked unit consideration, if applicable).

[14] This was followed by a table of four blocks, each with its own heading which indicated whether the offeree was a linked unit holder or a debenture holder, and whether a linked unit or cash was elected as consideration.

The first block was headed: 'Number of paramount linked units in respect of which the linked unit consideration is elected.' Currie left this block blank on both the forms that he filled in, the one for himself and the other for the company.

The second block was headed: 'Number of Paramount linked units in respect of which the cash consideration is elected.' It was this block that Currie filled in for himself and the company, inserting the number of Paramount units that he and the company held respectively.

The third block was headed: 'Number of B debentures in respect of which the linked unit consideration is elected.' Currie filled in this block before he received the certificates on 12 January 2007. He obviously thought then that he and the company held debentures. He later deleted the number in this block, but did not initial, let alone sign, the deletions.

The fourth block was headed: 'Number of B debentures in respect of which the cash consideration is elected.' Currie left this block blank on both forms.

[15] Further instructions followed the four blocks. They included the following:

'Payment to certificated linked unitholders and B debenture holders that do not have an existing bank mandate with the transfer secretaries will be made by cheque, posted at the offeree's own risk.'

Below the election blocks were further blocks to be filled in by offerees who held linked units and who wished to provide bank details so that payment of the cash consideration could be effected by electronic transfer. Currie wrote N/A in this section. Then followed the acceptance statement:

'I/we hereby surrender and enclose the linked unit certificates, certified transfer deeds and/or other documents of title, details in respect of which are set out in the table below, in respect of my/our holding of Paramount linked units and/or B debentures.'

Currie filled in his and the company's names on the two forms, and inserted the certificate numbers and the number of linked units held. And as I have indicated he signed both forms in the space for debenture holders.

<u>The alleged errors made by Currie that rendered the election void</u>

[16] Currie contended, first, that he erroneously filled in the blocks for debenture holders when in fact he and the company held linked units. That is why he deleted the figures in these blocks. But he testified that he had filled in these blocks because, before he received the certificates on 12 January 2007, he thought that he and the company held debentures. His choice was thus deliberate. And when he realized that that choice was not possible, he changed it.

[17] Second, he argued, he had erroneously filled in the block electing a cash consideration for the linked units, which was contrary to the company resolution that he was authorized to convert debentures in Paramount to linked units in Growthpoint, and contrary to his own intention. The resolution, taken at a meeting of directors of the company on 12 January 2012, authorized Currie to accept the offer to 'convert' debentures in Paramount to units in Growthpoint. Currie testified that he had sent the acceptance form for the company together with the certificates, and the resolution. He had a distinct memory (not even a shadow of doubt) of putting the resolution in the envelope that was delivered to Computershare.

[18] Despite this, in the covering letter, dated 15 January 2007, sent with the forms and the certificates, Currie made no mention of the resolution. He stated that he enclosed the forms for the company and himself and three certificates in respect of linked units. Computershare, which stamped the letter to indicate receipt, had no record of the resolution in its file. And if it had received one, it may well have questioned why the resolution referred to debentures when neither the company nor Currie held any. Given the failure to refer to the resolution in the covering letter, and the fact that Computershare did not have it on file, it is likely that the resolution was not sent. Nothing turns, however, on the discrepancy between the company form and the resolution.

[19] The third mistake alleged was that Currie failed to sign the deletions on the forms. This factor is also of no consequence in my view. The offeror was entitled to demand signature of alterations but did not have to. The form expressly stated that any alteration 'may' not be accepted by the offeror.

[20] Fourth, Currie argued that his signature in the block for debenture holders, and not unit holders which was adjacent to it, was an obvious mistake. But he had signed in that space because at the time of completing the form he thought that he

and the company held debentures. That he did not sign in the correct block when he received the certificates is a failure that was not satisfactorily explained. Moreover, since both Currie and the company held only linked units and not debentures, he was clearly signing for, and as, a linked unit holder.

[21] Currie argued in the fifth place that the fact that he had entered N/A in the section relating to banking details and electronic transfers showed that he had been mistaken since he did not want the cash consideration. But he conceded that he could also have shown, through this choice, that he did not want a transfer to his bank account. Indeed, a witness for Growthpoint (an employee of Computershare) testified that many people were reluctant to provide their banking details and preferred to receive payment by cheque.

[22] It will be apparent from the allegations of mistake made that Currie initially sought to argue that Computershare should have realized, because of the cumulation of errors on the form, that he was confused and mistaken. The scrip auditors (the employees of Computershare who processed the acceptance forms) ought to have contacted him to enquire what it was that he really wanted. They could not reasonably have believed that he elected to receive money for the Paramount units rather than Growthpoint units. He argued that they should have realized this all the more because the election to receive cash was not a wise one: the Growthpoint shares were worth considerably more than the cash consideration. Indeed, the moment Currie received the cheques for the units he tried to reverse the transactions.

[23] On the level of fact, the argument is a poor one. The election to receive a cash consideration was one offered to all debenture and linked unit holders. There is no reason to believe that every person who chose to receive cash was mistaken, simply because it was not a financially wise decision. The value of the linked units turned out to be considerably greater than was the cash consideration. There are many reasons why a shareholder may wish to realize shares. It was not for Computershare employees to second guess Currie's choice.

[24] The legal argument is also not sound. In order to avoid a contract, the person seeking to escape what appears to be a binding contract (in this case Currie) must show reasonable reliance on the other party's conduct in making the mistake. The

now classic authority on this is *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 at 239I-241E. The decisive question, said Harms AJA, was whether 'the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention . . .'. This entails a three-fold enquiry: was there a misrepresentation as to the non-mistaken party's intention? Who made the misrepresentation? And was the other party misled?

[25] Thus the enquiry suggested by Currie in this matter would be: did Computershare realize, or should it reasonably have realized, that Currie had not intended to elect the cash consideration? Did it have a duty to make enquiries about what Currie really wanted? The argument presupposes that it was Computershare that was mistaken. But that would not give Currie the right to resile. It was his mistake upon which he wished to rely. And in any event, the forms, even with the unsigned deletions, were not misleading. It was quite clear on the face of the forms that Currie elected to exchange his units in Paramount for cash. That is what he stated.

[26] Currie argued also, though before this court did not press the argument, that it was he who had been mistaken, and his mistake had been the result of Computershare's failure to furnish the corrected certificates timeously. The facts do not bear out the argument. Currie received the certificates two weeks before the closing date. He had ample time in which to complete the forms properly. He was not mistaken about anything. He deliberately filled in the block electing to exchange debentures in Paramount for linked units in Growthpoint; he deliberately signed in the block for debenture holders and he deliberately deleted the incorrect information. Nothing misled him into writing the number of linked units in the block electing to exchange them for cash. It was his mistake. And in his words, it was 'incredible' that he could have made such a mistake. It was simply not reasonable.

Was the acceptance of the mass offer unequivocal?

[27] Growthpoint argued that even if there had been some error on the part of Currie (or even Computershare, for that matter) there was no room for the application of the reliance theory of contract in determining whether an offer had been accepted. The offer made by it had to be accepted in one of two ways. The

offeree could submit the acceptance form with one of two elections – exchanging units or debentures for cash, or exchanging them for linked units in Growthpoint. Once the form was submitted (that is, the stipulated mode of acceptance was complied with) the contract was concluded. (It relied in this regard on *Driftwood Properties (Pty) Ltd v McLean* 1971 (3) SA 591 (A), as did the high court.) There was then no need for any enquiry as to whether the parties were misled or mistaken. Thus the high court had correctly found that the conduct of employees of Computershare was not relevant to any enquiry as to the validity of the contract.

[28] I agree that Computershare's function was only to determine whether the acceptances were unequivocal. They played no part in concluding any contract. That this was so is borne out by the evidence led to show that Currie had been treated differently from his daughter. She too had held linked units in Paramount and she also had debentures. She also wished to exchange them. On her form she ticked the blocks for both debentures and linked units in Paramount, signifying that she elected to take the linked units in Growthpoint. But she did not indicate how many of each she wanted to exchange. And she filled in her banking details despite not electing to take any cash consideration. The scrip auditor who checked her form was justly confused. She phoned Ms Currie (Miller) and asked for clarification, noting on the form that the election was to take Growthpoint units.

[29] Although the evidence was led in order to demonstrate that there was room for confusion, and that Computershare did make enquiries when a form was not correctly filled in, it demonstrated also what a truly equivocal acceptance was. The scrip auditor did not have the power to determine whether or not to conclude a contract. She was required only to check what election had been made and that it had been properly made. In Ms Currie's case, it was impossible to tell how many units or debentures she wished to exchange. In effect, when clarifying this, Computershare completed her acceptance for her.

[30] On the other hand, they did not have to make enquiries about Currie or the company's forms: both held only linked units, and the number held had been clearly filled in in the block indicating that they wanted the cash consideration. Since Growthpoint did not have to insist on a signature next to a deletion, there was nothing for them to ascertain. The deletion was clear. And as they did not hold

debentures there was no reason to ask whether Currie had signed as a unitholder or a debenture holder. Currie acted in such a way as to lead Computershare (as agent for Growthpoint) to consider that he had elected to take cash for his and the company's linked units. There was no reason to doubt his election and his unexpressed intention, whatever that may have been, was of no consequence.

[31] In my view, Currie accepted the offers made to himself and to the company, electing a cash consideration instead of linked units. The election was not severable from the acceptance, as Currie attempted to argue. The election was nothing more than acceptance in one of two stipulated modes. His mistakes, if they were mistakes at all, were far from reasonable. They were of his own making. Computershare, in processing the forms on behalf of Growthpoint, did no more than process the acceptance forms submitted by Currie, and act in accordance with his election. The high court correctly held that Currie and the company were bound by their acceptances of the mass offer.

Order

[32] The appeal is dismissed with costs.

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C H Lewis

Judge of Appeal

APPEARANCES:

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