THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no: 241/12
Not Reportable

In the matter between:

SENWES LIMITED **Appellant**

and

MICHAEL FRANCOIS VAN DER MERWE **Respondent**

Neutral citation: *Senwes Limited v Michael Francois van der Merwe* (241/12) [2012] ZASCA 192 (30 November 2012)

Coram: **HEHER, SHONGWE, LEACH and THERON JJA and SOUTHWOOD AJA**

Heard: **15 November 2012**

Delivered: **30 November 2012**

Summary: Contract: Interpretation - clauses offering alternative remedies to non-defaulting party – whether such party retains claim for damages – whether the provisions of ss 83 and 84 of the Insolvency Act 24 of 1936 invalidated the agreement.

ORDER

On Appeal From: North Gauteng High Court Pretoria (Legodi, Thusi and Ismail JJ sitting as court of appeal):

1 The appeal is upheld with costs on the attorney and client scale and no order is made on the cross-appeal.

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

'The appeal is dismissed with costs on the attorney and client scale.'

JUDGMENT

SHONGWE JA (HEHER, LEACH, THERON JJA and SOUTHWOOD AJA concurring)

[1] This appeal concerns the interpretation of a deed of sale. On 6 March 2008, Claassen J in the North Gauteng High Court, Pretoria granted judgment in favour of the appellant (plaintiff) against the respondent (defendant) for payment of the sum of R9 172 394.69 for damages suffered. On 7 May 2009 this court granted the respondent leave to appeal to the full court, Claassen J, having refused leave. On 2 November 2011, the full court, per Legodi, Thusi and Ismail JJ, upheld the appeal and set aside the judgment and substituted it with an order dismissing the action with costs. On 23 March 2012, the appellant was granted special leave to appeal to this court, the full court having refused leave. The respondent also lodged a cross-appeal against that part of the order of the full court confirming the rejection by the trial court of the respondent's defence of invalidity of the sale agreement, on the basis of the provisions of ss 83 and 84 of the Insolvency Act 24 of 1936 (the Act). For convenience, I shall refer to the appellant as Senwes and to the respondent as the purchaser.

[2] The purchaser was the sole member of MJP Boerdery Close Corporation (the CC). On 14 September 2001, the CC applied for an order for provisional voluntary surrender. Subsequent thereto Senwes, as the major creditor of the CC, applied for

the final liquidation of the CC which was granted on 27 November 2001. Mr Venter, an attorney from Bloemfontein, was appointed as a further liquidator together with the two others already appointed.

[3] At the insistence of Senwes, an insolvency enquiry was arranged for 16 to 18 October 2002, because Senwes suspected that the purchaser was disposing of assets of the CC. Before the enquiry could start, the parties entered into negotiations which resulted in the conclusion of a written sale agreement, the interpretation of which forms the subject of this appeal. The sale agreement was concluded and signed on 17 October 2002. In the deed of sale Senwes is referred to as the 'eerste party' (first party) and the purchaser as the 'tweede party' (second party).

[4] The salient clauses of the deed of sale are the following:

'1. Ten opsigte van MJP BOERDERY BK (in likwidasie), kom die partye hierbo genoem ooreen dat die tweede party vanaf die eerste party aankoop, die eerste party se eis in gemelde gelikwideerde boedel.

2. Voormelde aankoopprys wat deur tweede party betaalbaar is aan eerste party, beloop die bedrag van R10 500 00-00 (**TIEN KOMMA VYF MILJOEN RAND**), welke bedrag die tweede party aan eerste party sal oorbetaal op die volgende basis:-

2.1. R2 500 000-00 (**TWEE KOMMA VYF MILJOEN RAND**) voor of op 31 DESEMBER 2002;

2.2. R3 000 000-00 (**DRIE MILJOEN RAND**) voor of op 31 JULIE 2003;

2.3. R2 500 000-00 (**TWEE KOMMA VYF MILJOEN RAND**) voor of op 31 DESEMBER 2003;

2.4. R2 500 000-00 (**TWEE KOMMA VYF MILJOEN RAND**) voor of op 31 JULIE 2004;

3.1 Die betaling van die eerste paaiement sal geskied deur die herfinansiering en/of aankoop van die bestaande huurkoop bates, wat insluit die volgende:

3.1.1. Een John Deere CTS Stroper met Greenstar;

3.1.2. Een sestoring Senwes spilpunt;

3.1.3. Een sesry John Deere Planter;

3.1.4. Een sesry John Deere Mielietafel

3.1.5. Een ses meter John Deere Koringtafel;

3.1.6. Een 8400 John Deere Trekker.

deur die tweede party en/of sy genomineerde.

3.2. Sodra die eerste party in besit is van ’n goedgekeurde bankwaarborg vir die betaling van die som van R2 500 000-00 (**TWEE KOMMA VYF MILJOEN RAND**) en/of betaling ontvang, sal die eerste party sy regte en belang in die bates in samewerking met die kurator en die boedel van MJP Boerdery BK (in likwidasie) aan die finansierder en/of die koper oordra.

3.3. Teen betaling van die eerste paaiement ten bedrae van R2 500 000-00 (TWEE KOMMA VYF MILJOEN RAND) teen 31 DESEMBER 2002 sal die eerste party afstand doen ten gunste van die tweede party van enige sekuriteit wat hy teen die gelikwideerde boedel het.

…

5. By wanbetaling van enige paaiement voor of op die vervaldatum soos hierbo gestipuleer, sal die volle uitstaande balans opeisbaar en betaalbaar wees.

6. Afgesien van die voormelde versnellingsklousule, kom die partye uitdruklik ooreen dat indien die tweede party versuim om die eerste paaiement soos op 31 Desember 2002 aan die eerste party te betaal sal die eerste party geregtig wees om: -

6.1. hierdie ooreenkoms as gekanselleer te beskou asof sy eis teen MJP BOERDERY BK nooit deur die tweede party oorgekoop is nie, waarna die eerste party normaalweg sal voortgaan en optree as ’n skuldeiser in die gelikwideerde boedel;

of

6.2. die tweede party gebonde te hou aan hierdie ooreenkoms en afdwinging daarvan te verg ooreenkomstig die voormelde versnellingsklousule en sal ’n sertifikaat van die eerste party se gemagtigde beampte dien as prima facie bewys van die kapitaal en rente uitstaande en verskuldig.

…

9. Indien enige van die party versuim om die bepalings van hierdie ooreenkoms na te kom sal die onskuldig party geregtig wees om die skuldige party kennis te gee by sy domicilium om sy kontrakbreuk reg te stel binne ’n tydperk van veertien dae, by gebrek waarvan die onskuldige party geregtig sal wees om die ooreenkoms te kanselleer en sy regte af te dwing in terme van die ooreenkoms of gemeenregtelik.’

[5] It is common cause that the purchaser failed to comply with the provisions of clause 2 of the deed of sale. Not a single instalment was paid to Senwes, therefore the purchaser was in breach of the sale agreement. On 13 February 2004, Senwes sent a letter of demand to the purchaser informing him of his failure to comply with clauses 2.1, 2.2 and 2.3 of the deed of sale and calling on him to make good the

breach within 14 days. It is further common cause that the purchaser also failed to comply therewith. Clause 9 unambiguously provides that in the event the guilty party fails to make good the breach, the innocent party shall be entitled to cancel the deed of sale and thereafter to enforce his rights in terms of the agreement or at common law.

[6] Indeed in or about August 2005, Senwes issued summons against the purchaser for damages in the sum of R9 172 394.69. This amount was calculated as follows: a sum of R1 327 605.31, being a dividend received by Senwes after proving a claim against the insolvent estate, was deducted from R10 500 000.00 being the purchase price set out in clause 2 of the sale agreement. The undisputed evidence during the trial indicated that at some stage, Senwes, in its capacity as a creditor, proceeded to file and proved a claim against the estate of R14 644 203.39 but only received a dividend of R1 327 605.31.

[7] Upon receipt of the particulars of claim, the purchaser raised various defences that are no longer relied upon.

[8] On the morning of the trial in the high court the purchaser introduced an amendment to the plea, which was not opposed. The amendment was to the effect that the sale agreement was invalid because it was contrary to the provisions of ss 83 and 84 of the Act. I shall deal in detail with these provisions later in the judgment.

[9] At the trial both Senwes and the purchaser led evidence. The trial court made credibility findings, discredited the purchaser and concluded that on the whole there was one version before it, that of Senwes, as supported by the evidence of the purchaser, where such evidence did not contradict that of Senwes. It consequently found for Senwes.

[10] The trial court decided the matter on the basis that ss 83 and 84 were not applicable. It did not deal with the provisions of clause 6.1. However, the court a quo added another dimension when it said in para 12 of its judgment that;

‘Whilst not easy to understand the essence of the defendant’s defence as raised in the plea, effectively, two issues were argued before us. Firstly, whether the agreement relied upon

was null and void ab initio. In the alternative, whether the plaintiff was entitled to claim anything from the defendant after having cancelled the agreement, and having participated in the liquidation proceedings.'

The court a quo reasoned that the focus should be the provisions of clause 6.1. In para 29 of its judgment, it said:

'Indeed the plaintiff upon cancellation elected to go and join the queue in the liquidation proceedings and was rewarded with a dividend in the amount of R1 327 605.31.'

The court a quo also reasoned that; '… the main purpose of the agreement was to take the CC out of liquidation. Accepting therefore, that, that was the purpose of the agreement, when it did not materialise, the plaintiff would have preferred to go back to the liquidation proceedings to safeguard its interest in the liquidation like any other creditor would do. This was what the plaintiff actually did.'

[11] The nub of this appeal lies in the interpretation of the sale agreement. There are two issues for determination by this court. The first involves an interpretation of clause 6.1 of the sale agreement and the second relates to whether the agreement is in contravention of ss 83 and 84 of the Act and therefore invalid.

[12] In interpreting the provisions of the sale agreement I must state from the outset that the purpose, context and the language used, should be the primary consideration for a sensible, rational and objective meaning of the document. (See *Jaga v Dönges NO and another*; *Bhana v Dönges NO and another* 1950 (4) SA 653 (A) at 662G – 663A and the cases therein cited.)

[13] I now deal with the interpretation of clause 6.1. Senwes contends that its claim against the purchaser is based upon a breach by the purchaser of the written sale agreement. It was and still is common cause that the purchaser breached the sale agreement in that he failed to make even a single payment to Senwes in compliance with clause 2 of the agreement. Therefore, argues Senwes, it has a right, in terms of clauses 5 and 9 of the agreement, to claim damages, notwithstanding the provisions of clause 6.1. I agree. Clause 6.1 creates an escape mechanism for the appellant at an early stage of its implementation. It relates only to a failure by the respondent to pay the first instalment timeously. In that event the appellant acquires the right to treat the agreement as cancelled 'as if the respondent had never sold his

claim against MJP Boerdery to Senwes' (in my paraphrase). The necessary implication is that no notice to remedy the failure is contemplated or required, presumably because, once Senwes elected to treat the agreement as at an end, the failure by the purchaser to comply with clause 2 of the agreement was not to be regarded as a breach in the context of an enforcible agreement but simply as a reason to end the legal relationship between the parties as if it had never been established. Hence the reason for the exclusion of the automatic acceleration despite the express provisions of clause 5. Clause 6.1 proceeds to state the 'normal' consequence of there never having been a sale of the claim, viz that Senwes, as a creditor of the CC would proceed with the proof of that claim in the estate.

[14] Clause 9, by contrast, contains a standard breach provision operative in the event of a failure to comply with any of the terms of agreement (not just the payment of the initial instalment). It refers to the guilt and innocence of the defaulting and non-defaulting parties; it requires formal notice to remedy a breach of the contract, and a right in the innocent party to cancel and enforce the terms of the agreement or its common law rights.

[15] Senwes pleaded reliance on clause 9 in its particulars of claim; the allegations of breach (in para 4), notice to remedy (para 5), cancellation (para 6) and breach of contract and damages flowing from it (para 8), are consistent only with such reliance. The reference to the proof of a claim in the estate (in para 7) is especially tied to the cancellation referred to in para 6 and clearly has nothing to do with the 'normal' consequence to which reference is made in clause 6.1.

[16] The purchaser, in his plea, admitted the allegations in paras 4, 5 and 6 of the claim. Exhibits C and D at the trial were formal notices to remedy the breaches. They refer not only to the failure to pay the first instalment but also to the purchaser's default in relation to the second and third instalments. As such they are reconcilable only with clause 9.

[17] The conclusion reached by the court a quo that 'the issue under discussion did not require to be decided mainly on fact, but by mere looking at 6.1' (clause 6.1) is, in my view incorrect. The sale agreement should be considered in its entirety and

not merely on the basis of isolated clauses (see *South African Warehousing Services (Pty) Ltd v South British Insurance Co Ltd* 1971 (3) SA 10 (A) at 17H.) A necessary conclusion from the proceedings and the evidence is that Senwes' case was derived entirely from clause 9 and that clause 6 was irrelevant to the dispute between the parties.

[18] Clause 2 provided the terms of payment of the purchase price of the claims. Clause 3 merely set out a means of effecting payment of the first instalment, ie by refinancing or selling the hire-purchase assets of the CC. This provision was however inserted purely for the benefit of the purchaser, who could utilise its mechanism or not as it suited him. The interest of Senwes lay in receiving the purchase price set out in clause 2. It had no interest in how the purchaser financed payment of the price and it could not insist on compliance with clause 3.1. Clause 3.2 in turn depended on the ability of the purchaser to raise the first instalment on the strength of refinancing or selling the assets. Here too, for the same reasons, Senwes had no interest provided it was timeously paid in full or unless the purchaser was able to achieve the sale or refinancing as contemplated in clause 3.1.

[19] I now turn to the question whether the provisions of the Insolvency Act prohibited the conclusion of the sale agreement. The purchaser raised the invalidity of the sale agreement due to the alleged conflict with s 83 read with s 84 of the Act. This defence was raised because the purchaser understood the merx to be the assets mentioned in clause 3.1.1 – 3.1.6 of the agreement. In my view his understanding was erroneous. The reference to the assets in clause 3.1.1 – 3.1.6 of the agreement was a reference to the means of payment open to the purchaser and not to the merx in the sale agreement. Clause 1 of the agreement makes it clear that the merx was the claim, as the purchaser admitted in his evidence under cross-examination.

[20] Section 83 of the Act deals with a situation where a creditor holds any movable property as security for its claim. In the present case, although the said assets were in the possession of Senwes, they were kept there for storage purposes and not because Senwes held them as security. Senwes was selling its right to claim

against the CC (in liquidation) nothing more and nothing less. In the present case both ss 83 and 84 are irrelevant and of no application. Both the trial and the court a quo rejected this defence and I agree with that conclusion.

[21] The appeal must succeed. Counsel for the purchaser conceded that the cross-appeal was unnecessary.

[22] The sale agreement provided for payment by the purchaser of costs on the attorney and client scale, in the event of Senwes instituting legal proceedings to enforce its rights.

[23] In the result the appeal is upheld and the following order is made.

1 The appeal is upheld with costs on the attorney and client scale and no order is made on the cross-appeal.

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

'The appeal is dismissed with costs on the attorney and client scale.'

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J B Z SHONGWE
JUDGE OF APPEAL

APPEARANCES

FOR APPELLANT	M P Van Der Merwe Instructed by: Tim Du Toit & Co Inc, Pretoria; Naudes Attorneys, Bloemfontein.
FOR RESPONDENT	B C Stoop and J J N Swart Instructed by: Dreyer & Dreyer Attorneys, Pretoria; McIntyre & Van Der Post, Bloemfontein.