SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 297/2011

Not Reportable

In the matter between:

IRWING 514 CC **APPELLANT**

and

MNGANI PROPERTY 4 (PTY) LTD **RESPONDENT**

Neutral citation: *Irwing 514 CC v Mngani Property 4 (Pty) Ltd* (297/11) [2013] ZASCA 48 (28 March 2013).

Coram: Cachalia, Leach, Tshiqi, Majiedt et Pillay JJA

Heard: **26 February 2013**

Delivered: **28 March 2013**

Summary: Appeal – purchase and sale of shopping centre – default on payment schedule –cancellation of sale – claim for return of moneys already paid – counterclaim for damages – counterclaim referred to trial and postponed in terms of Uniform rule 22(4) – order in terms of that rule for payment into trust account pending determination of counterclaim impermissible – appeal upheld.

Cross appeal - notice of default containing sufficient detail – letter of cancellation therefore proper – cross-appeal dismissed.

ORDER

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

1. The appeal is allowed with costs and the order of the court a quo is set aside and substituted with the following:

'(a) The cancellation of the agreement by the respondent on 7 November 2008 is declared valid;

(b) The cancellation of the agreement by the applicant on 10 November 2008 is declared invalid;

(c) Judgment in respect of the applicant's claim of R5.375 million and interest thereon is postponed until the determination of whether the respondent is entitled to judgment in respect of its counterclaim provided that the respondent proceeds in terms of the order set out in paragraph (d) below;

(d) The respondent's counterclaim is referred to trial and the respondent is to deliver a declaration within 20 days of this order;

(e) Should the respondent fail to comply with sub-paragraph (d) of this order, the applicant shall be entitled to apply for judgment in respect of its claim of R5.375 million plus interest together with costs;

(f) Costs, including costs of the application are to be costs in the cause of the hearing of the counterclaim, subject to sub-paragraph (e) hereof.'

2. The cross-appeal is dismissed with costs.

JUDGMENT

PILLAY JA (CACHALIA, LEACH, TSHIQI ET MAJIET JJA CONCURRING)

[1] On 5 March 2008, the appellant (Irwing) and respondent, Mngani (Mngani) concluded a written agreement of sale ('the agreement') in terms of which Irwing sold to Mngani, as a going concern, a shopping centre ('the property') situated in Westonaria, Gauteng for an amount of R41 million. Irwing subsequently cancelled the agreement. Mngani disputed that the cancellation was valid.

[2] Mngani then applied to the South Gauteng High Court for an order declaring (a) Irwing's cancellation invalid; (b) its own cancellation of the agreement to be valid; (c) payment of R5.375 million. If Irwing's cancellation was invalid the further question that arose was whether Irwing's purported cancellation amounted to a repudiation of the agreement entitling Mngani itself to cancel the agreement, which it purported to do three days later, and recover the moneys it had paid towards the purchase price, ie R5.375 million. Irwing, in turn, counterclaimed that its cancellation was valid and that it was entitled to judgment in its favour for payment for damages in amount of R6.587 million arising from Mngani's breach of contract.

[3] The high court (Spilg J) held that Irwing's cancellation was good and dismissed Mngani's claim.[1] It also held that whilst Mngani was entitled to recover the moneys it had paid towards the purchase price of the property, Irwing had demonstrated prima facie that it had suffered damages in an amount of R6.587 million, after it had resold the property to a third party for some R8.5 million less than the price agreed upon in its contract with Mngani.

[4] The high court thus referred Irwing's counterclaim for trial and postponed judgment in respect of Mngani's claim for repayment of the moneys (R5.375 million) it

[1] In the court's order, the dismissal of the declarators was erroneously omitted. However the learned judge clearly dealt with them in the body of the judgment and dismissed both. It would be prudent to correct this omission later in this judgment.

had paid towards the purchase price of the property pending adjudication of Irwing's counterclaim; it also ordered Irwing to pay this amount into a trust account of an attorney in the interim.

[5] Irwing now appeals against the order requiring it to pay R5.375 million into an attorney's trust account on the ground that there was no factual or legal basis for it. Mngani cross-appeals the order dismissing its claim that Irwing's cancellation was invalid. Both the appeal and the cross-appeal come before us with leave of the high court.

[6] It seems to me that it would be convenient to first consider Mngani's cross-appeal because if Irwing's cancellation of the agreement was invalid it would dispose of its appeal. This follows inevitably from the fact that Irwing would in that event have to repay Mngani the sum it had paid towards the purchase price of the property and there would therefore have been no basis for the court below to have ordered that this amount be paid into the trust account of an attorney. I revert to the facts.

[7] In terms of Clause 1.2 of the agreement, Mngani had to pay the purchase price in specified instalments on specified dates. The relevant portions of clause 1.2 read as follows:

'1.2.1 R500 000.00 on 27 February 2008;

1.2.2 R500 000.00 on 28 February 2008;

1.2.3 R1 million on 5 March 2008;

1.2.4 R2 million on 12 March 2008;

1.2.5 On date of registration of transfer, a sum of R32 million, for which sum, the Purchaser shall issue or cause to be issued and delivered to the Seller, accepted bank guarantees for the amount of R32 million, payable against registration of transfer of the property into the name of the Purchaser. Such guarantee shall be issued within 30 days after undersigning of this agreement.

1.2.6 . . .

1.2.7 . . .

1.2.8 . . .

1.2.9 . . .'

[8] In clause 3.12, Irwing, as seller, warranted that 'the letting enterprise produces an annual income yield of a minimum of 9.50% defined as the annual net income before interest, finance charges and company taxation, expressed as a percentage of the purchase price of R41 million (Forty One Million Rand)'. By 14 March 2008, Mngani had complied with the aforementioned payment schedule – and had paid Irwing R4 million as agreed.

[9] Pursuant to clause 1.2.5 of the agreement, Mngani negotiated with Nedbank Limited ('the bank') a bank guarantee for R32 million. On 23 April 2008, the bank provided Mngani with a 'letter of grant' for R32 million. On 10 July 2008, it issued two guarantees totaling R32 million.

[10] It is common cause that prior to the registration of transfer, the bank cancelled the guarantees. Mngani was consequently in default of its obligation under clause 1.2.5.

[11] The parties thereafter entered into protracted negotiations to structure a suitable alternative payment regime in an endeavour to salvage the agreement. During the course of these negotiations, Mngani made further payments amounting to R1.375 million. So together with the R4 million that Mngani had paid earlier the total paid amounted to R5.375 million.

[12] Mngani remained in default of the agreement and on 31 October 2008, Irwing addressed a letter to it and put it on terms to remedy the default within 2 days in terms of clause 5.1 of the agreement. The letter reads as follows:

'**NOTICE OF DEFAULT IN TERMS OF OFFER TO PURCHASE BETWEEN MNGANI PROPERTY 4 (PTY) LTD & IRWING 514CC FOR THE LETTING ENTERPRISE KNOWN AS PICK 'n PAY SHOPPING COMPLEX, WESTONARIA**

We remind you that you are in default with regard to your obligations in terms of clause 1.2 of the

agreement. Your attention is also drawn to clause 5.1 of the agreement with regard to remedy of default.

Please advise as to how you will remedy this default.'

[13] Clause 5.1 of the agreement to which the letter refers, reads:

'5.1 Should either party default with the due performance of its obligations in terms of this offer and persist in such default for a period of 2 (two) days after it will have received a notice calling upon it to remedy such default, then notwithstanding any prior waiver, and without prejudice to any other claim which the aggrieved party may have, either in terms of this offer or at law, it shall be entitled to either: -

5.1.1 claim specific performance; or

5.1.2 be restored to its position status quo ante; or

5.1.3 declare this offer cancelled and to recover all damages it may have suffered or sustained by reason of such default.'

[14] Despite this, Mngani failed to respond and on 7 November 2008, Irwing wrote to Mngani a letter reading as follows:

'**NOTICE OF CANCELLATION OF OFFER TO PURCHASE BETWEEN MNGANI PROPERTY 4 (PTY) LTD & IRWING 514CC FOR THE LETTING ENTERPRISE KNOWN AS PICK 'N PAY SHOPPING COMPLEX, WESTONARIA**

I refer to the notification served on you on 31 October 2008 in which you have been requested to remedy your default in terms of the above agreement. As you have not remedied your default to date, the abovementioned agreement is hereby cancelled with immediate effect.'

[15] In response thereto, Mngani caused a letter dated 10 November 2008 to be delivered to Irwing. Therein Mngani alleged first, that Irwing's cancellation of the agreement was premature in that the period of seven days allowed for the default to be remedied had by the date of cancellation not lapsed. (It is common cause that Mngani was mistaken that the *mora* period was seven days. In terms of clause 5.1 the *mora* period was two days). Secondly, it stated that it regarded the premature cancellation of the agreement as a repudiation of the sale agreement which it accepted and in turn, was itself cancelling the said agreement. Mngani, inter alia, further sought a refund of all

moneys paid towards the purchase price amounting to R5.3 million, failing which it would sue for the recovery thereof. Irwing responded on 12 November 2008, ~~by~~ pointing out that contractually, the period to remedy any breach was 48 hours (2 days) and not seven days as alleged by Mngani and that it had not prematurely cancelled the agreement of sale.

[16] Mngani's case is that the high court erred in finding that Irwing's notice of cancellation on 7 November 2008 was valid. More specifically, it contends that the letter dated 31 October 2008 did not constitute proper notice of default so as to place it in *mora* as it omitted particulars of the alleged default, did not set out the steps to be taken to remedy the default and did not indicate the consequences should the unspecified default not be remedied.

[17] It is true that as a general proposition, a notice of default must be unambiguous and indicate a fixed date for performance. But Mngani could not have been under any illusion as to what the default was, since quite apart from the reference to clauses 1.2 and 5.1 of the agreement, the parties had been in negotiations over this issue, namely the provision of guarantees for R32 million. And the reference to these clauses in the agreement made this clear. What is more is that in its letter of 10 November 2008 Mngani's complaint was not that the cancellation letter was unclear, but that it was premature because of its belief that the *mora* period was two days and not seven days. This argument must consequently fail, as must the cross-appeal.

[18] I turn now to the Irwing's appeal against the order that it pay R5.375 million into an attorney's trust account pending the institution of an action for damages against Mngani. In making this order the high court purported to act in terms of Uniform rule 22(4). It reads as follows:

'(4) If by reason of any claim in reconvention, the defendant claims that on the giving of judgment on such claim, the plaintiff's claim will be extinguished either in whole or in part, the defendant may in his plea refer to the fact of such claim in reconvention and request that judgment in respect of the claim or any portion thereof which would be extinguished by such claim in reconvention, be postponed until judgment on the claim in reconvention. Judgment on the claim shall, either in whole or in part, thereupon be so postponed unless the court, upon the application of any person interested, otherwise orders, but the court, if no other defence has been raised, may give judgment for such part of the claim as would not be extinguished, as if the defendant were in default of filing a plea in respect thereof, or may, on the application of either party,

make such order as to it seems meet.'

[19] It is clear that rule 22(4) grants the right to a defendant, who has filed a counterclaim, to apply for a postponement of such part of a claim as admitted by him or her pending the determination of his or her counterclaim. In exercising this right, the defendant must demonstrate to the court that the counterclaim, if successful, will wholly or at least partially extinguish the plaintiff's claim. Generally the claim and counterclaim must sound in money.[2] In granting such an application for postponement, the court has a discretion which must be judicially exercised.[3] Normally the court will not give judgment on a claim before the counterclaim has been determined because 'if conflicting claims are made the subject of judicial order piecemeal, one party may suffer grave prejudice'.[4]

[20] Having found that Irwing had indeed properly cancelled the agreement, it follows that it conceivably has a claim for damages against Mngani. Its proposed claim is for R6.587 million – considerably more than the amount Mngani is claiming. So the court below was correct in referring Irwing's counterclaim to trial and in postponing judgment of Mngani's claim pending the outcome of the counterclaim.

[21] However rule 22(4) does not make provision for the court to order that any amount in favour of either of the parties be held in trust together with instructions to the trustee(s) as to how to deal with such money. The only basis upon which the court below could have considered granting such an order, was, if there appeared from the papers some factual basis to do so. There was no evidence to justify granting the order in question nor did Mngani seek it. In the circumstances the order falls to be set aside and substituted with the order set out below. As far as costs of the appeal are concerned, these should follow the outcome.

[22] There is one other aspect which bears mentioning. On 20 February 2013, before the hearing of the appeal scheduled for 26 February 2013, a notice of withdrawal of attorneys of record for Mngani was served on the office of the registrar, the attorneys for Irwing and the business address of Mngani. The cross-appeal was however not

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[2] *Amavuba (Pty) Ltd v Pro Nobis Landgoed (Edms) Bpk* 1984 (3) SA 760 (N) at 766H – I.
[3] *NTC Steel Services (Pty) Ltd v Jamor (Pty) Ltd (t/a Steel King)* 1984 (2) SA 629 (T) at 631H.
[4] *Van den Bergh & Partners Ltd v Robinson* 1952 (3) SA 747(SR) at 748. See also: *Consol Ltd t/a Consol Glass v Twee Jongegezellen (Pty) Ltd* 2002 (2) SA 580 (C) at 584E–587C.

withdrawn. This is the second time that Mngani's representatives have withdrawn from the appeal. The appeal was first set down for 30 April 2012. A notice of withdrawal by Mngani's attorneys was filed on or about 27 April 2012. As a result, the appeal was postponed sine die.

[23] At this hearing we were informed that the attorney for Irwing had in fact contacted Ms Nkosi, the chief executive officer of Mngani. She had indicated in writing that her legal representative had become unavailable and that she had not requested the date for the appeal on 26 February 2013. This was confirmed in an affidavit by Ms Erica Noelle Meerholz, a partner in the firm of attorneys representing Irwing. The appeal thus proceeded without Mngani being represented, In preparing this judgment cognizance was however taken of the submissions made by counsel in his heads of argument that were lodged before the hearing.

[24] In the result it is ordered as follows:

1. The appeal is allowed with costs and the order of the court a quo is set aside and is substituted with the following:

'(a) The cancellation of the agreement by the respondent on 7 November 2008 is declared valid;

(b) The cancellation of the agreement by the applicant on 10 November 2008 is declared invalid;

(c) Judgment in respect of the applicant's claim of R5.375 million and interest thereon is postponed until the determination of whether the respondent is entitled to judgment in respect of its counterclaim provided that the respondent proceeds in terms of the order set out in (d)below;

(d) The respondent's counterclaim is referred to trial and the respondent is to deliver a declaration within 20 days of this order;

(e) Should the respondent fail to comply with sub-paragraph (d) of this order, the

applicant shall be entitled to apply for judgment in respect of its claim of R5.375 million plus interest together with costs;

(f) Costs, including costs of the application are to be costs in the cause of the hearing of the counterclaim, subject to sub-paragraph (e) hereof.'

2. The cross-appeal is dismissed with costs.

R PILLAY
JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANTS:	ADV NORMAN DAVIS S C Instructed by: Tintingers Inc., Johannesburg; Symington & De Kok, Bloemfontein
FOR RESPONDENT:	NO APPEARANCE