



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case no: 100/02

In the matter between

KUDU GRANITE OPERATIONS (PTY) LTD

APPELLANT

and

CATERNA LIMITED

RESPONDENT

Coram: HARMS, FARLAM, NAVSA JJA, HEHER and SHONGWE AJJA

Heard: 6 MAY 2003

Delivered: 30 MAY 2003

Summary: Contract failing through no fault of parties - remedy - enrichment action - requirements - calculation of interest on claim.

JUDGMENT

NAVSA JA and HEHER AJA

NAVSA JA and HEHER AJA

[1] This appeal is against a judgment of Smit J in the Transvaal Provincial Division and raises the issue of the rights of parties who have performed in part where a contract becomes void due to intervening impossibility.

[2] The appellant is a South African company engaged in the marketing of granite throughout the world. The respondent is a company incorporated in the British Virgin Islands which has interests in granite quarries in Zimbabwe. For convenience we shall refer to the appellant as 'Kudu' and the respondent as 'Caterna'.

[3] During the 1990's the parties participated in a joint venture in granite mining operations in Zimbabwe through the medium of Ruenya. A change in the control of Kudu gave rise to conflicts of interest from its side. The parties therefore negotiated an end to their relationship as a result of which, during October 1997, they concluded a written agreement providing for the sale by Kudu to Caterna of its 49% shareholding and its loan account in Ruenya.

[4] The material terms of the agreement were these

'4.1 In consideration for the sale shares and loan account claims, Caterna shall make payment to Kudu of the sum of R4 000 000 (four million Rand), which shall be payable by Caterna as follows -

4.1.1 the South African Rand equivalent of Z\$3 723 727 (three million seven hundred and twenty three thousand seven hundred and twenty seven Zimbabwean Dollars) shall be discharged either partially or in full by way of transfer of stock by Caterna to Kudu or its nominees in Zimbabwe. Kudu undertakes to select at least six hundred cubic metres of stock

from that available (and not already sold) by Ruenya as at the 30th of September 1997, which selection must take place within 15 (fifteen) days from the effective date. Should any block selected by Kudu not be available then Ruenya shall be obliged to replace that block with any available block of similar dimensions and quality. Ruenya shall not be obliged to transfer stock over and above 600 cubic metres. The parties record and agree that the price attributable to the stock selected by Kudu shall be on a FOT Quarry basis and determined with reference to the Ruenya "B" price list a copy of which is annexed hereto as Annexure "B", less then percent. For invoicing purposes, the loan account of Z\$3 723 727 (three million seven hundred and twenty three thousand seven hundred and twenty seven Zimbabwean dollars) will be converted into American Dollars at the rate of 12-2951 Z\$ to 1 (one) US\$. As material is selected and invoiced the amount thus calculated will be reduced. Without derogating from the foregoing, upon completion of the selection process of material by Kudu, the balance, if any, payable by Caterna to Kudu shall be payable in cash into such bank account designated by Kudu for this purpose in accordance *mutatis mutandis* with the provisions of 4.1.3 below;

- 4.1.2 the rate of conversion of Zimbabwean Dollars into South African Rand in order to ascertain the sum by which the purchase consideration is reduced by the transfer of stock by Caterna to Kudu in terms of 4.1.1 above shall be converted from Z\$ into Rand at the rate of 2 - 6301 Z\$;
- 4.1.3 the sum of the difference between four million R4 000 000 (four million Rand) and the value of the materials selected by Kudu in terms of 4.1.1 above ("the differential amount") shall be payable by Caterna to Kudu in South African Rand, in cash into such bank account designated by Kudu for this purpose within sixty days of agreement being reached between the parties of the amount owing by CAG to Caterna (*the CAG loan account*) on the "effective winding up of CAG" including shareholders' loan accounts, profits, debtors and realisable assets and which agreement shall be reached within sixty days of the effective date. Should there not be agreement on the CAG loan accounts within the sixty day period then the parties agree to submit

the effective winding up of CAG and the finalisation of the CAG loan account for determination by KPMG which determination is to be made within fifteen days from such referral. The parties agree that any such determination by KPMG shall be final and binding, in the absence of any manifest error in calculation therein. . .

4.1.4 Caterna shall be entitled to cede the CAG loan account in writing to Kudu towards the discharge in part or full of the differential amount.'

[5] The granite blocks were duly selected by Kudu and delivered by Ruenya to Kudu's nominee. Invoices were generated by Ruenya and the agreed values of the blocks were entered in US dollar terms and debited against Kudu's loan account in Ruenya in Zimbabwean dollars.

[6] The parties could not reach agreement on the value of the CAG loan account as required by clause 4.1.3. Nor could KPMG. The agreement failed because of this on 14 October 1998.

[7] In January 1999 Caterna issued summons against Kudu in which it claimed the following relief:

- '1 An order declaring that the sale agreement, annexure "CL1" to the plaintiff's particulars of claim, has failed and become unenforceable;
- 2 An order directing the defendant to restore to the plaintiff at the Ruenya Mine in Zimbabwe the blocks of granite stock listed on the schedule, annexure "CL2" to the plaintiff's particulars of claim, on or before a date to be determined by the court;
- 3 In respect of each block of granite stock listed on the schedule, annexure "CL2" to the plaintiff's particulars of claim which the defendant has failed to restore to the plaintiff as directed, an order for judgment against the defendant and in favour of the plaintiff for the sum expressed in

column 8 of the schedule "CL2" in US dollars converted into South African rands on date of judgment;

4 Interest on each judgment debt at the prescribed rate from date of such judgment;

5 Costs of suit.'

[8] The basis of Caterna's case was set out in its particulars of claim as follows:

'14 Because the sale agreement has failed and become unenforceable and the defendant has received the blocks of stock described in 8 above, the defendant:

14.1 has been unjustifiably enriched at the expense of the plaintiff in the several sums set forth in column 8 of the schedule "CL2"; and

14.2 became, and is presently, obliged to restore such blocks of stock to the plaintiff at the Ruenya Mine in Zimbabwe, alternatively, where the defendant has disposed of and is therefore unable to restore a specific block of stock to the plaintiff: to restore to the plaintiff the value of such block of stock.'

[9] It was common cause that Caterna had received no performance from Kudu under the agreement and its obligation make any restitution does not arise in this appeal.

[10] Kudu's defence was and remained a denial that any of the elements necessary for an enrichment action had arisen from the failure of the agreement. It also denied Caterna's entitlement to return of the granite blocks or payment of their value.

[11] Smit J, after extensive, largely irrelevant, evidence from both sides, considered that two principal issues fell to be decided: first, whether Caterna was entitled to the return of the blocks; second, in respect of blocks which Kudu could not return, the measure of Caterna's financial entitlement.

[12] The learned Judge accepted the general principle that where an agreement fails

without fault on either side after partial performance, each party is entitled to the return of whatever was performed so as to restore the *status quo*. In his view, however, there is uncertainty about the true cause of action, some authorities favouring a basis of enrichment and others treating it as a distinct contractual remedy. As Smit J understood the divergent opinions, they gave rise to no material difference in approach. From this perspective it was therefore unnecessary to consider whether the elements of an enrichment action had been proved. Kudu was capable of returning only 11 of the 179 blocks of granite delivered pursuant to the agreement. Smit J proceeded to consider and decide the value of all but distinguished between them in the order which he made. (At least half the trial had been spent on the issue of the value of these blocks.) He found that the amount to which Caterna was entitled was their market value of US\$ 319 793 at the date of the trial. Despite initial evidence from Kudu's side to the contrary effect, an amount agreed between expert witnesses on both sides during the course of the defendant's case was found to provide the correct measure of that value.

[13] Smit J accordingly ordered Kudu to pay Caterna the sum of US\$319 793 converted into SA rands on the date of payment and to redeliver the remaining blocks of granite or their present-day value in US dollars, likewise converted.

[14] The present appeal against the judgment and orders in the Court below is with the leave of that court. Before us Kudu's main contentions were:

(i) The true basis of Caterna's claim was enrichment and the Court below, in deciding the matter on the basis described above, erred by equating the remedies

available to an innocent party who cancels a contract with that of a party who relies on the failure of an agreement without fault from the side of either party to it.

(ii) There was no evidence to prove any of the elements of an enrichment claim.

[15] Kudu's first contention is well-founded. There is a material difference between suing on a contract for damages following upon cancellation for breach by the other party (as in *Baker v Probert* 1985 (3) SA 429 (A), a judgment relied on by the Court *a quo*) and having to concede that a contract in which the claim had its foundation, which has not been breached by either party, is of no force and effect. The first-mentioned scenario gives rise to a distinct contractual remedy: *Baker* at 439 A, and restitution may provide a proper measure or substitute for the innocent party's damages. The second situation has been recognised since Roman times as one in which the contract gives rise to no rights of action and such remedy as exists is to be sought in unjust enrichment, an equitable remedy in which the contractual provisions are largely irrelevant. As Van den Heever J said in *Pucjlowksi v Johnston's Executors* 1946 WLD 1 at 6:

'The object of condiction is the recovery of property in which ownership has been transferred pursuant to a juristic act which was *ab initio* unenforceable or has subsequently become inoperative (*causa non secuta; causa finita*).'

The same principle applies if the contract is void due to a statutory prohibition (*Wilken v Kohler* 1913 AD 135 at 149-50), in which case the *condictio indebiti* applies. There is no reason why contractual and enrichment remedies should be conflated. Caterna's

case was one of a lawful agreement which afterwards failed without fault because its terms could not be implemented. The intention of the parties was frustrated. The situation in which the parties found themselves was analogous to impossibility of performance since they had made the fate of their contract dependent upon the conduct of a third party (KPMG) who was unable or unwilling to perform. In such circumstances the legal consequence is the extinction of the contractual nexus: see De Wet and Van Wyk, *Kontraktereg en Handelsreg* 5 ed vol 1 172 and the authorities there cited. The law provides a remedy for that case in the form of the *condictio ob causam finitam*, an offshoot of the *condictio sine causa specialis*. According to Lotz, 9 *LAWSA* (1st reissue) para 88, the purpose of this remedy is the recovery of property transferred under a valid *causa* which subsequently fell away. See De Vos, *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 3ed 65-6, cf *Holtshausen v Minnaar* (1905) 10 HCG 50; *Hughes v Levy* 1907 TS 276 at 279; *Snyman v Pretoria Hypotheek Maatschappij* 1916 OPD 263 at 270-1; *Pucjowski v Johnston's Executors*, *op cit*. It is sometimes suggested that the *condictio causa data causa non secuta* is the appropriate remedy. See para 85 of *LAWSA supra*. Indeed in *Cantiere San Rocco v Clyde Shipbuilding and Engineering Co.* 1923 SC (HL) 105, a case of a contract frustrated by the outbreak of war which made performance legally impossible, the Judicial Committee after an exhaustive consideration found that that was the remedy. Of this conclusion Professor Evans-Jones commented in 1997 *Acta Juridica* 139 ('The claim to recover what was transferred for a lawful purpose outwith contract (*condictio*

causa data causa non secuta')) at 157:

'The unhappy application of the *condictio causa data causa non secuta* in *Cantiere*. . . possibly resulted from the fact that the *condictio ob causam finitam* had no profile in Scots law at the time the case arose.'

The last-mentioned writer also notes, in 'Unjust enrichment, contract and the third reception of Roman Law in Scotland', (1993) 109 LQR 663 at 668:

'If the impossibility were seen to extinguish the contract from the moment of the impossibility, the remedy would be *condictio ob causam finitam*.'

[16] Except that the *condictio causa data causa non secuta* appears to apply to cases where a suspensive condition or the like was not fulfilled, the identification of the cause of action is not of importance since there appears to be no difference in the requirements of proof of the two *condictiones*. The essential point is that Caterna's claim is covered by one or the other remedy for unjust enrichment.

[17] It follows that to assess that claim one has to consider whether the following general enrichment elements are present:

- (i) whether Kudu had been enriched by its nominee's receipt of the granite;
- (ii) whether Caterna had been impoverished by procuring that Ruenya deliver the blocks from its stock;
- (iii) whether Kudu's enrichment was at the expense of Caterna;
- (iv) whether the enrichment was unjustified.

- 9 *LAWSA* (1st reissue) para 76. The quantum of Kudu's enrichment claim is the

lesser of the amounts of (i) and (ii).

[18] Before turning to a consideration of whether Caterna established a case in these regards, it is necessary to advert to a further misconception which affected both counsel and the Court *a quo*. This was to treat the granite blocks as if they were a subject-matter of the agreement of sale when it came to the question of what the defendant was liable to restore. Clause 4.1 of the agreement, understood in its proper perspective, meant that the blocks were no more than the coinage by which part of the obligation to pay the price for the shares and loan account was discharged. Each block was by agreement between the parties accorded a specific monetary value. On failure of the agreement Caterna was no more entitled to return of the individual blocks than it would have been to the actual notes in the denominations used to discharge a liability to pay in cash. Nor, if the value attributed by the parties to the blocks had been less or more than their market value, would either party have been entitled to insist on repayment of the difference, but only a return of the purchase price as agreed between them, ie that portion of the price of R4 million represented by blocks and quantified by reference to the Ruenya "B" price list. One is not thereby giving effect to contractual provisions of a contract which has failed; one is simply identifying the true substance of the prestation in terms of the transaction, which in this case was the payment of a monetary price and not the sale of blocks. The misconception led to at least half the trial being devoted to a determination of the market value of the granite blocks, a wholly irrelevant exercise. It resulted in the Court *a quo* ordering Kudu to

pay a market value for the blocks, a value which, as will be shown, was substantially in excess of the price which the parties attributed to them in their agreement.

[19] The evidence establishes that after 179 blocks had been delivered the purchase price of the loan account was reduced by the sum of the agreed values placed on the blocks by the parties. (The Ruenya "B" price list was not proved in evidence but the total of the prices debited against the loan account was Z\$2 455 950.35, which must have taken into account the agreed discount of ten per cent).

[20] Although physical delivery of the blocks was effected by Ruenya from its own stock, the evidence leaves no doubt that it acted as agent of Caterna and the latter is to be considered in law as the person that made the payment to Kudu. Caterna, therefore, had the right of action to recover it: *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd* 1997(2) SA 35 (A) at 42H-43D. To suggest, as Kudu's counsel did, that the debit of Kudu's loan account with the value of the stock was evidence of a direct sale by Ruenya to Kudu for which the latter paid, is to ignore the evidence.

[21] A presumption of enrichment arises when money is paid or goods are delivered. A defendant then bears the onus to prove that he has not been enriched: *De Vos supra* 2ed 183 quoted with approval in *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A) at 713 G-H. In the present case the defendant attempted to discharge that onus by reliance on the fact that its loan account in Ruenya had been debited with the full agreed value of the blocks delivered to its

nominee.

[22] That evidence requires to be considered in the broader context. Caterna and Kudu were, effectively, equal shareholders in Ruenya. The effect of the agreement was to render Caterna the sole shareholder. The sale included Kudu's loan account, the benefit in which passed to Caterna on the effective date (prior to the failure of the agreement), although the cession of Kudu's interest in that account was only to take place on the final date (in the event, after the agreement failed). The effect of the fulfilled agreement would therefore have been that Caterna both directed the affairs of Ruenya and became its loan creditor. In these circumstances it was appropriate for Smit, Caterna's representative and at the same time Ruenya's managing director, to cause the Kudu loan account to be debited. When the sale fell away the parties were restored to their position as equal shareholders. The debit on the loan account, having been made in anticipation of an event which would not take place fell to be reversed. The submission of Kudu's counsel, based on the evidence of Marcenaro, the chief executive officer of the Marlin group of companies of which Kudu was a member, was that Kudu (and, therefore, Ruenya) would not agree to the reversal of the entry, which stood, in consequence, as immutable proof of the discharge of Kudu's liability. But this also takes no account of reality and the inevitable legal consequence which could not be changed by Kudu's withholding of its co-operation: the *causa* for the debit having never materialised, there could be no doubt as to the right of Caterna to insist on its reversal by Ruenya. Kudu's enrichment in consequence of the payment of the

price to it stands unaffected after all the evidence is considered.

[23] It was submitted on behalf of Kudu that Caterna had not paid Ruenya for the granite blocks and the evidence was equivocal as to its intention ever to do so. So, it was argued, Caterna had not been impoverished by their delivery to Kudu. The real question is, however, whether Caterna incurred a liability to Ruenya arising from its procurement of delivery. If it did, then its patrimony was reduced by the amount of the liability. What is beyond dispute is that Ruenya, with the consent of both its shareholders, provided finance in the form of the blocks, to enable one to acquire the shares and loan account of the other. As a *quid quo pro* the loan account (which was in credit and remained so after the transaction) was debited with the equivalent amount. This was in itself a direct acknowledgment of Caterna's liability to account to Ruenya for what it had received. Caterna would hardly be in a position to resist any claim by Ruenya against it for the value of the blocks. Caterna established as a matter of inevitable inference that it had been impoverished as a result of the delivery of the blocks.

[24] The price attributable to the blocks in terms of the agreement was Ruenya's 'B' price list less ten per cent. There is no reason in the evidence to suppose that, as against Ruenya, Caterna would be entitled to claim the same discount. This supports the conclusion that the measure of its impoverishment was no less (and was perhaps more) than Kudu's enrichment.

[25] From the foregoing there can also be no doubt that that enrichment took place at

the expense of Caterna because Kudu received, Caterna was obliged to pay for the blocks and that its continued retention of the benefits of the failed agreement finds no justification in the evidence and is unfair to Caterna.

[26] Caterna therefore succeeded in its reliance upon the *condictio* and was entitled to judgment in the Court *a quo*.

[27] The quantification of its claim was not the market price but the component value which each block contributed to the monetary consideration for the sale. On this basis Caterna was entitled to repayment of the agreed price in respect of all 179 blocks (666.057m³) and to return of none. The agreement placed the exchange rate beyond dispute by deeming it to be 2.6301 Z\$ to 1R. The amount of Caterna's entitlement was thus R933 405.68 substantially less than the total of the amounts awarded by the trial Judge.

[28] The learned Judge made no order in respect of the payment of interest. In *Baliol Investment Co (Pty) Ltd v Jacobs* 1946 TPD 269 the Court held after a consideration of the common law that interest is not recoverable under the *condictio causa data causa non secuta* or under the *condictio indebiti* unless the subject of agreement or the debtor is in default or has been placed in *mora*. See also *CIR v National Industrial Bank Ltd* 1990 (3) SA 641 (A) at 654C-D, 659A-B. The matter is now regulated by statute: s 2A of the Prescribed Rate of Interest Act 55 of 1975 provides that the amount of every unliquidated debt as determined by a court of law shall bear interest as contemplated in s1, ie at the rate prescribed. S 2A(2)(a) further

provides that, subject to any other agreement between the parties, the interest on an unliquidated debt determined by a court of law shall run from the date on which payment of the debt is claimed by service on the debtor of a demand or summons, whichever date is the earlier. In the present case there was no evidence of a demand, but the summons was served on 6 January 1999.

[29] We are conscious of the fact that, despite the formulation of its case on the basis of enrichment, the relief claimed by the respondent was substantially different from that which we have found to be appropriate. That should not be a bar to this Court making an order which gives effect to the true issues between the parties where, as here, those issues have been fully ventilated.

[30] The appellant has achieved substantial success in the appeal and the costs should follow that result. The duration and scope of the trial was materially extended by the misinterpretation of the agreement and the resultant misplaced energies (of both parties) directed to proving the market value of the blocks, an exercise necessitated by the way Caterna's claim was formulated. Counsel were agreed that about half of the preparation and the trial were devoted to this issue. Fairness to the appellant requires that account be taken of that in the costs order which this Court will make.

[31] In the result the following order is made:

1. The appeal succeeds in part.
2. The order of the Court *a quo* is set aside and replaced by the following:
Judgment is granted in favour of the plaintiff for-

- (i) Payment of the sum of R933 405.68;
 - (ii) Interest on the said sum at 15.5% *per annum* from 6 January 1999 until date of payment;
 - (iii) One half of the costs of suit, on the basis that when two counsel were employed such a precaution was justified.
3. The costs of appeal, including the costs consequent upon the employment of two counsel, are to be paid by the respondent.

M S NAVSA AND J A HEHER
JUDGES OF APPEAL

HARMS JA)Concur
FARLAM JA)
SHONGWE AJA)