

J DA c PEREIRA

and

LANDMAN

Case No: 318/84  
mp

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between :

J DA c PEREIRA Appel lant  
( Def endant a quo)

and

H LANDMAN Respondent  
(Plaintiff a quo)

CORAM : KOTZé , HOEXTER , VAN HEERDEN , GROSSKOPF ,  
JJA et NICHOLAS, AJA

HEARD : 1 November 1985

DELIVERED : 15 November 1985

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J U D G M E N T

HOEXTER, JA . . . .

HOEXTER JA

1 0 0

On 2 April 1980, and at B0ksburg, the  
appellant sold a stand in that town to the respondent. The  
deed of  
sale ( "the contract" ) was embodied in a standard printed  
document consisting of three pages. The printed document  
was completed in manuscript by the appellant' s attorney  
and  
then signed by the parties. The printed contract falls  
into two parts, the first of which is on page I of the  
document under the heading of " Preamble" . Adjacent to  
printed matter on the left-hand side of page I the  
preamble  
provided blank spaces for completion before signature by

the parties. Here were to be inscribed, for example, the names of the seller and the purchaser respectively; a description of the property sold; details of the amount of the purchase price and how it was to be paid; and the dates whereon transfer, possession and occupation of the property.....

property sold were to be given.

In the preamble, and against the printed words  
 " Purchase Price" , there was written by hand: -

"R24 000,00 TWENTY FOUR THOUSAND RAND ONLY .  
 R 7 000,00 ON 2.4. 80 TO BE **RELEASED** TO  
 SELLER IMMEDIATELY AND R7 000, 00 ON 2.6.  
 80.

IF NOT PAID DEED OF SALE AUTOMATICALLY CANCELLED. "

(MY underlining)

In what follows I shall refer to the provisions underlined  
 by me in the above quotation as "the hand-written cancella=  
 tion clause" . Other blank spaces provided in the preamble  
 were filled up in handwriting to provide that transfer of  
 the property sold was to be taken and possession thereof  
 was to be given on 2 June 1980, but that the purchaser would  
 occupy the property sold from 2 April 1980 at a monthly  
 rental of R 150; that the costs of the deed of sale and the  
 costs of transfer would be paid by the purchaser, and that

guarantees....

guarantees would be furnished by 2 June 1980.

The second part of the contract was prefaced,  
at the top of page 2, by the following printed heading: -

" Subject to the terms incorporated in the  
Preamble, the Purchaser and Seller agree that  
the Contract of Sale between them shall be  
subject to the following further provisions: -  
't

whereupon followed, on pages 2 and 3 of the document, fifteen  
printed clauses. Thereafter, and at the foot of page 3,  
blank spaces were provided for the signature of the seller  
and the purchaser respectively, together with the inscrip=  
tion of details affecting the date and place of signature  
in each case. I quote hereunder the provisions of the  
printed clauses 12 and 15:-

'12. Subject to the right of the Seller to take  
necessary steps at all times to protect the  
land and improvements thereon, the  
Seller shall on non-compliance by the Purchaser .  
of any of the provisions of this agreement,

send....

send by prepaid registered post a notice to the Purchaser at his last known business or residential address, calling upon the Purchaser to remedy such non-compliance within 30 (thirty) calendar days, failing which the Seller shall be entitled to:

- ( a ) cancel this agreement between the parties;
- ( b ) retake possession of the property sold immediately after the lapse of the said period ;
- ( c ) retain as roughwork or as a pre-estimate of the Seller' s liquidated damages. all monies paid by the Purchaser;
- ( d ) sue the Purchaser for any other loss or damage sustained by him as a result of such breach;

or alternatively:

- (a) Claim the balance of the purchase price and interest and any other costs or charges forthwith on tender of transfer of the property to the same address by prepaid registered post, for which amounts the Purchaser shall supply the Seller with acceptable guarantees within ten ( 10) days of such notice.

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15 . Should the Purchaser

- (a) take steps to surrender his estate, or
- (b ) have a provisional order of Sequestration against him initiated or

( c ) attempt to arrange a compromise or  
settlement of his debts with his creditors,  
or

( d ) become .

( d ) become insol vent, the Seller shall be entitled to accept such action as a material breach of this contract and may, without notice to the Purchaser take the action referred to in paragraph 12 {a) , ( c ) and ( d ) . "

The respondent breached the terms of the contract governing the payment of the purchase price stated in the preamble. Having duly paid R 7 000 on 2 April 1980 the respondent failed to make the second payment of R 7 000 on or before 2 June 1980. By reason of this breach, and during July 1980, the appellant elected to cancel the contract and communicated this fact to the respondent. During August 1980 the appellant sent: to the respondent a cheque for R6 780 in repayment of the respondent's initial payment of R 7 000 less a deduction of R 220 in respect of occupational interest. The respondent refused to accept the appellant's aforesaid cancellation of the contract. During September 1980 the respondent sought to enforce performance of the contract by instituting an action against

the...



the appellant in the Witwatersrand Local Division. The appellant resisted the action and filed a counterclaim for ejectment of the respondent from the property sold.

The essential facts of the matter are common cause and they fall within a small compass. A minute of a pre-trial conference recorded, inter alia, the following :  
—

„3 . 5 Dit is gemeensaak dat verweerder geen kennisgewing ingevolge die bepalinge van klousule 12 van die ooreenkoms aan die eiser gegee het nie.

3 . 6 Verweerder het sy keuse om die ooreenkoms te kansel leer voor 17 Julie 1980 uitgeoefen en eiser so meegedeel. . .  
. . . "

• The sole issue at the trial ( I quote again from the minute)  
was confined to the following narrow limits:-

" 2 . 10f die skriftelike ooreenkoms van 2 April 1980 (bundel bladsy 5) outomaties gekanselleer kon word weens eiser se versuim om die bedrag van R 7 000, 00 op 2 Junie 1980 te betaal en daardeur gekansel leer is en of verweerder aan eiser h skriftelike kennisgewing moes gegee het ooreenkomstig die bepalinge van

klousule 12 van die ooreenkoms alvorens  
dit gekanselleer kon word. "

The....

The said minute further noted an agreement that should the  
trial Court decide the sole issue in favour of the  
respondent

the Court would order registration of transfer of the

property sold in, the name of the respondent, with costs,

against payment of RIO 000 by the respondent to the  
appellant;

whereas if the issue were resolved adversely to the respon=  
dent the appellant would be entitled to an order, with costs,  
ejecting the respondent from the property sold.

The trial came before WEYERS, J. No witnesses  
were called and the trial Court was invited to decide the  
issue on the basis of the agreed facts. The learned Judge  
decided that the appel lant had been legally obliged to  
give the respondent written notice in terms of clause 12  
before cancel ling the contract. Accordingly judgment was  
entered in favour of the respondent. With 1 eave of the  
trial Court the appellant appeals to this Court against

the whole of the judgment of the Court below.

# 1

I proceed to examine '\*\*\*' the reasons underlying the decision of the Court a quo. Upon a comparison of the provisions of the hand-written cancellation clause with the provisions of the printed clause 12 the trial Court arrived at the following conclusion: -

"It is clear that there is a contradiction between the two . the first purporting to deal with an automatic event without notice, and the second giving the option to purge his default. "

Having regard to the contradiction found by it, and on the authority of decided cases such as Simmons v Hurwitz 1940

WLD 20; Bull v Executrix Estate Bull and Another 1940

WLD 133; Hayne & co Ltd vCentral Agency for Co-operative Societies (In Liquidation) 1938 AD 352 the trial Court accepted as "settled law" that: -

...in such cases the handwritten clause carries more weight than the printed wording. "

The above observation notwithstanding the learned Judge shrank

....

shrank from applying the relevant principle. Immediately

after the passage of the judgment quoted above the **learned**

Judge went on to say this: -

"However, the fact that the written word carries more weight than the printed word does not mean that clause 12 disappears or falls away . "

To overcome the dead hock the Court a quo felt impelled, as

a last resort in the process of interpretation, to invoke

against the appellant the maxim verba fortius accipiuntur

contra proferentem. BY this path the trial Court finally

arrived at the conclusion that the contract:-

".... envisages notice by registered post to the purchaser in all instances where it has not been specifically excluded as was done in clause 13, as was not done in the clause dealing with automatic cancellation."  
"

Had the Court below in fact applied the principle governing the construction of contracts containing irreconcilable hand-written and printed provisions, it would have....

have been obliged to give full rein to the provisions of the hand-written cancellation clause; and there would have been neither need nor room for an invocation of the contra proferentem rule. It is unnecessary, however, to say anything further in this regard for the reason that I find myself unable to share the opinion of the learned Judge that the hand-written cancellation clause and clause 12 stand in opposition to one another. It is an established principle of interpretation that a written agreement ought to be so construed that effect is given to every clause in it; and that apparent inconsistencies should, so far as possible, be reconciled. In my judgment the hand-written cancellation clause and clause 12 are not so inconsonant as to be incapable of standing together in the same agreement. Indeed, for the reasons hereunder mentioned it seems to me that these two clauses may be quite naturally and satisfactorily reconciled.

From...

From a passage in the judgment of the Court below to which reference has already been made it appears that the learned Judge found a contradiction between the hand-written cancellation clause and clause 12, such contradiction residing in the feature that while the latter clause gives the purchaser an opportunity of purging his default before the seller is legally entitled to cancel , the hand-written cancellation clause purports -

"...to deal with an automatic event without notice. . . ."

NOW it is clear that, in the absence of any agreement to the contrary, a party to a contract who wishes to exercise his right to cancel the contract must convey his decision to the mind of the defaulting party; and that cancellation does not take place until such communication is made. **See**

Swart v Vosloo 1965 ( 1 ) SA 100 (A) at 105G. If I understand his judgment correctly . the learned Judge seems to have

construed...

construed the hand-written cancellation clause to be self-acting in the sense that the purchaser's failure to pay would result, ipso facto, and without any communication by the seller to the purchaser that the former had elected to cancel, in the termination of the contract. In my opinion the hand-written cancellation clause cannot be so construed. Despite the forcible language in which this clause is couched it is clear, I think, that the purchaser's failure to pay does not by itself, and without more, render the contract null and void. Upon non-payment by the purchaser the seller may elect whether to cancel the contract or to keep it alive and to insist upon its performance by the purchaser. See : Associated Manganese Mines of S. A Ltd v Claassens 1954 ( 3 ) SA 768 (A) at 774 A/B. Accordingly in the present matter the appellant was obliged to convey to the mind of the respondent (as in fact the appellant did)



his decision to cancel .

It follows that

the trial Court

erred....

the hand-written cancellation  
 erred in construing clause as  
 it did; and that the contradiction between the two clauses  
 apprehended by the trial Court was more apparent than real .  
 In arriving at its final conclusion the Court below sought  
 further to rely on the feature that while clause 15  
 specifically dispenses with the need for prior notice to  
 the purchaser, the hand-written cancellation clause does  
 not . This feature of the contract does not, I consider,  
 provide support for the construction which the Court below  
 put upon it. Since paragraphs (a) , ( b ) and (c) of clause 15  
 relate to the financial status and stability of the purchaser  
 and not to non-compliance by the purchaser with any of the  
 terms of the contract, it is tolerably clear, in my opinion,  
 that the "notice" dispensed with in clause 15 can hardly  
 be the I same "notice" prescribed by clause 12. The  
 latter notice calls upon the purchaser to remedy some or  
 other breach by him of the contract's terms .

In .....

the hand-written cancellation  
 In my view a scrutiny of clause

and clause 12, in their full contextual setting, yields no  
 real incongruity between their respective provisions .The  
 scope and function of these two clauses are not the same,  
 and they are ' designed to provide different and separate  
 remedies . First, the hand-written cancellation clause may  
 be invoked by the seller only in the event of a particular  
 breach of the contract, namely, the purchaser's failure to  
 pay an instalment of the purchase price. Clause 12, on the  
 other hand, encompasses a breach of any of the terms of the  
 contract . The last-mentioned breaches would include, for  
 example, the purchaser's failure to pay the costs of the  
 deed of sale or the costs of transfer; the purchaser's  
 failure to pay a monthly rental in respect of occupation  
 enjoyed by him prior to transfer; or the purchaser's  
 failure to furnish acceptable guarantees within the

the hand-written cancellation  
stipulated period. Second, the event

which entitles the

seller....

seller to cancel pursuant to

clause is the mere breach of the contract therein described;

what on the other hand entitles the seller to cancel  
pursuant

to clause 12 is not simply the breach of some term of the

contract by the purchaser but the latter's subsequent  
failure,

after the seller has sent him a notice by registered post,

to remedy the particular breach. Third, the nature of the

relief available to the seller under clause 12 differs

radically from that provided by the hand-written cancellation

clause. The ordinary rule is that a party repudiating a

contract and seeking restitution must himself make

restitution . It is therefore incumbent upon a seller who

cancels a contract of sale to restore to the purchaser any

the hand-written cancellation  
part of the purchase price already paid him, unless it is  
part of the agreement that such should be forfeited upon the  
purchaser' s default. Whereas the hand-written cancellation  
clause provides merely for cancellation (albeit a

cancellation taking

....

taking effect immediately upon communication of his election

to cancel by the seller to the purchaser) , clause 12 provides

that if the defaulting purchaser ignores the seller 's notice

and remains in default the sel ler may claim, in addition

to cancellation, forfeiture of the monies already paid by

the purchaser as rouwkoop or as a pre-estimate of liquidated

damages . To sum up, therefore, upon the purchaser' s

failure to pay an instalment of the purchase price the

seller, should he wish to cancel, has to decide whether he

desires either ( 1 ) prompt and certain cancellation, with

each party restoring to the other what has been given and

received under the contract or ( 2 ) cancellation delayed by

a period of thirty days in terms of the registered notice

prescribed by clause 12, and further contingent upon the

purchaser's failure to remedy his default; but which .

cancellation may be coupled with additional relief in the

form of forfeiture of monies already paid by the purchaser.

For.....

For the reasons a foregoing it seems to me that, so far from being discordant, the two clauses in question harmonise ; and that it is possible, without any real difficulty, to give effect both to the written words of the hand-written cancellation clause and the printed words of clause 12 in a fashion which lends practical efficacy to the contract. It follows that the trial Court should have resolved the issue before it in favour of the appellant and that its judgment cannot stand. In this Court the appellant was represented by both senior and junior counsel, but on behalf of the appellant it was fairly conceded that the problem of interpretation involved was not one of substantial difficulty and that an order allowing the costs of two counsel would hardly be appropriate .

In the result the appeal succeeds with costs, such costs to include the costs of the application to the trial.....

trial court for leave to appeal .

trial Court is altered to read: -

19.

The judgment of the  
" Judgment with costs is entered in favour of  
the defendant and by agreement an order will  
issue ejecting t.he plaintiff, and all Chose  
claiming any right of occupation through him,  
from the property, being stand no 1456, known .  
as Leeupoort Street, Bok3burg . t'

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G G HOEXTER, JA

KOTZé, JA )

VAN HEERDEN, JA ) Concur

GROSSKOPF, JA )

NICHOLAS, AJA)