THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 197/2023

In the matter between:

J J G NEL	**FIRST APPELLANT**
IVY JEWEL 3 (PTY) LTD	**SECOND APPELLANT**
IVY JEWEL 4 (PTY) LTD	**THIRD APPELLANT**
LABONTE 1 (PTY) LTD	**FOURTH APPELLANT**
LABONTE 2 (PTY) LTD	**FIFTH APPELLANT**
SILKBLAZE 3 (PTY) LTD	**SIXTH APPELLANT**
SILKBLAZE 4 (PTY) LTD	**SEVENTH APPELLANT**
RUSTYROSE 52 (PTY) LTD	**EIGHTH APPELLANT**

and

P J J CILLIERS	**RESPONDENT**

Neutral citation: *Nel & Others v Cilliers* (197/2023) [2024] ZASCA 57 (19 April 2024)

Coram: NICHOLLS, MATOJANE, and MOLEFE JJA, and BAARTMAN and MBHELE AJJA

Heard: 13 March 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email; publication on the Supreme Court of Appeal website, and released to SAFLII. The time and date for hand-down is deemed to be 11h00 on the 19th day of April 2024.

Summary: Contract – specific performance – whether either of two contracts is unlawful and unenforceable for failure to comply with section 8 read with section 40 of the National Credit Act, 35 of 2005 (the NCA) – whether the appellants are entitled to relief in terms of a contract despite a concession made at a pre-trial conference that certain clauses in the contract fall foul of provisions of the NCA and that those clauses are not severable from the rest of the contract – whether it was necessary for the respondent to have accepted the concession before the appellants could be held to it – whether parties had abandoned their first contract – whether the first contract was inchoate or a simulated agreement – whether the appellants were entitled to relief in respect of either contract.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Ally AJ, Jansen van Niewenhuizen J and Bokako AJ sitting as a full court):

(a) The appeal is upheld with costs, including the costs of two counsel where so employed.

(b) The order of the full court is set aside and replaced with the following:

'(i) The defendant is ordered to pay the first plaintiff the amount of R5 million plus interest on the amount of R5 million at the rate of 15.5% from 1 March 2011 to date of payment.

(ii) The defendant is ordered to pay the costs of the action including all reserved costs and the costs consequent upon the employment of two counsel.'

JUDGMENT

Baartman AJA (Nicholls, Matojane and Molefe JJA and Mbhele AJA Concurring):

[1] The dispute in this appeal is whether either of the two contracts entered into between Mr JJG Nel (the first appellant) and Mr PPJ Cilliers (the respondent) is lawful and enforceable. Both the Pretoria high court (the trial court) and the full court of the Gauteng Division of the High Court, Pretoria (the full court), dismissed the first appellant's claims for specific performance and damages arising out of various breaches of the two agreements. This appeal is with special leave of this Court.

Contractual history

[2] The first appellant is a businessman and the controlling mind behind the second to the eighth appellants (the companies). The respondent is an attorney and businessman. In 2006, the respondent was developing an upmarket golf estate through Legend Golf and Safari (Pty) Ltd (the development company) in the Sterkrivier area in Mpumalanga when the first appellant approached him and showed an interest in investing in the development.

[3] The first appellant and the respondent concluded a sale of shares agreement in terms of which the respondent sold 5% of the development company to the first appellant for R8 million. In 2007, the respondent recruited major new investors from Kuwait, which resulted in a restructuring of the development company. The first appellant had the option to exchange his 5% share in the old company for 2.5% in the restructured entity. He chose to opt out of the development as he did not approve of the new investors.

[4] The respondent, believing that the development would yield good returns, advised him against withdrawing as he estimated that his shares would appreciate to R30 million in three years' time. He offered to purchase the first appellant's shares for R30 million after a period of three years. The first appellant agreed and drafted the first agreement (D1), dated 18 February 2008, consisting of four separate agreements. Relevant to this judgment is clause 2 which provides the following:

'(2) The sale of shares agreement (the sale of shares agreement) in terms whereof the respondent purchases the first appellant's 5% share in Legend and Safari Resort for R30 million, payable on or before the end of February 2011, interest free and tax friendly.' (Own translation from Afrikaans.)

[5] Contract D1 further provided that the companies would each purchase an erf in the development which the first appellant would finance through an Absa mortgage bond. The respondent would market two of the erven, the profit on which would finance the other five erven. The respondent made an initial payment of R6 million but defaulted on his other obligations. Therefore, on 20 June 2011, to accommodate the respondent, the parties entered into a second agreement (D2) and agreed that the share price would be reduced to R12 million instead of R30 million.

[6] In terms of D2, the amount of R6 million that had already been paid in terms of D1 was regarded as an initial payment. The respondent undertook to pay the balance of R6 million in three equal annual cash instalments of R2 million each. The payments would attract interest at the agreed rate. The respondent made one further payment of R1 million on 31 July 2012 to the first appellant, whereafter all payments stopped. It was common cause that neither the first appellant nor the respondent was registered

as a credit provider in terms of the National Credit Act 35 of 2005 (NCA). Litigation followed.

The pleadings

[7] The pleadings in this matter are extremely confusing. It is thus not surprising that the parties disagreed about the issues in dispute. Before this Court, the appellants' counsel had difficulty explaining the pleadings and instead sought to rely on his heads of argument to clarify the pleaded case and the relief sought, while the respondent's counsel sought to rely on amendments not included in the appeal record.

[8] The appellants issued summons, seeking specific performance, based on the terms of D2 as follows:

'1. That the defendant be ordered to design, construct and complete four fully furnished hotel suites on each of the aforementioned erven in accordance with the Residential Design Guidelines issued in terms of the articles of association of Legend Golf and Safari Resort Home Owners Association…

2. That the defendant be ordered to pay the second to eighth [plaintiffs'] levies in terms of the articles of association of Legend Golf and Safari Resort Home Owners Association…

3. That the defendant be ordered to pay the second to eighth [plaintiffs'] municipal rates and taxes in respect of the aforesaid erven…

4. Costs of suit.'

[9] Alternatively, the appellants sought conditional relief based on D1 as follows:

'Plaintiffs conditional claim against the defendant for payment of the balance of the purchase price in terms of a sale of shares agreement

11. This claim is subject to the above [High Court] finding that the agreement attached as D2 is invalid and unenforceable for whatever reason.'

'1 Payment of the amount of R23 million.

2. Interest on the amount of R23 million at a rate of 15, 5% per annum from 1 March 2011 to date of payment.

3. In the alternative to paragraphs 1 and 2 above:

3.1 Payment of the amount of R5 million.

3.2 Interest on the amount of R5 million at Absa Bank's prime interest rate plus 3,5%, compounded monthly and calculated from 1 March 2011.

4. Cost of suit.'

The 19 August 2020 pre-trial concessions

[10] The appellants' counsel made the following formal concession at a pre-trial conference:

' 3.2.6. The plaintiffs concede that clauses 2,3 and 4 of 'D2' fall within the ambit of section 8 of the [NCA]. . . as alleged in 6.3.1.3 of the plea.

3.2.7. The plaintiffs deny that clauses 2, 3 and 4 of 'D2' amount to a separate and distinct credit agreement as alleged in paragraph 6.3.1.3 of the plea.

3.2.8 The plaintiffs admit that neither the first plaintiff . . . nor the companies were registered as credit providers as required by section 40 [of the NCA] as alleged. . .

3.2.11 . . . [I]t would be the plaintiff's case in argument that clauses 2, 3 and 4 are invalid but not severable from the remainder of 'D2' in view of which the whole of 'D2' should be held to be invalid and that an amendment to the plaintiff's particulars of claim was not necessary to present such an argument.'

In the trial court

[11] The first appellant was the only witness in the trial before Baqwa J. The first appellant admitted that he had drafted the agreements and submitted them to the respondent for approval. The latter made minor changes to the agreements. However, that admission came after the first appellant had gone to great length, in examination-in-chief, to convince the trial court that the respondent had drafted the agreements because he was legally trained.

[12] The first appellant said that he understood figures and the agreements were structured in a manner that would be tax effective. Therefore, the term 'tax friendly' meant that there would be further negotiations about the tax liability. The first appellant said that D2 was meant to 'substitute D1' because the respondent had not performed in terms of that agreement. A reading of the trial record reveals that the first appellant was not an impressive witness. The trial court dismissed the appellants' claim, holding that the parties had abandoned D1 and that D2 was 'unlawful and unenforceable'. However, the learned judge granted leave to appeal to the full court.

In the full court

[13] In the full court, the appellants argued that D2 was not a credit agreement. Instead, so the submission went, it was 'a negotiation or settlement of a dispute regarding the payment of the R30 000 000. . . [therefore] in terms of *Ratlou v Man*

Financial Services SA (Pty) Ltd,[1] D2 is not a credit agreement in terms of [the NCA] and therefore neither unlawful nor invalid'. The court reasoned that the submission 'firstly flies in the face of the concession made by the appellants which concession was never withdrawn', was contrary to the pleaded case and to the first appellant's testimony. The court further relied on *Du Bruyn N O and Others v Karsten*[2] in holding that D2 was 'an unlawful and unenforceable' credit agreement within the meaning of section 8 read with section 40 of the NCA.

[14] The court rejected the submission, on behalf of the appellants, that D1 could be revived once it found D2 was 'unlawful and unenforceable', because the first appellant had testified that D2 had replaced D1 which it found was 'an abandonment of D1, therefore D1 could not be resuscitated'. The court held that D1 was inchoate. Although, the respondent did not plead that D1 was inchoate, the court was persuaded that the first appellant had placed the issue before it when he testified that the parties still had to 'discuss how exactly certain clauses will be performed'.

[15] The full court held that that testimony 'clearly evidences incompleteness' therefore the appellants could not rely on D1. In any event, it was further held that the 'deferment of payment' of R30 million meant that D1 was a credit agreement in terms of the NCA and as the provisions of that Act had not been complied with, D1 was unlawful and unenforceable. Therefore, the court dismissed the appeal and refused the application for leave to appeal.

Discussion

[16] It is necessary to deal with the status of the pre-trial admission upfront. The appellants persisted with their claim for specific performance in terms of D2 despite the pre-trial concession referred to above. Before this Court, the appellants' counsel made the startling submission that the appellants could not be held to the concession because the respondent had not accepted it.

[17] There is no merit in that submission. Pre-trial proceedings are important, legally binding proceedings in which the issues to be determined at trial are identified and

[1] *Ratlou v Man Financial Services SA (Pty) Ltd* [2019] ZASCA 49; 2019 (5) SA 117 (SCA).
[2] *Du Bruyn N O and Others v Karsten* [2018] ZASCA 143; 2019 (1) SA 403 (SCA).

crystallised. The trial proceeds based on the dispute that remains after all admissions and concessions have been made. If that is not the position, the pre-trial process is a costly waste of time. In this matter, the respondent, as he was entitled to, defended the claim based on the concession made in respect of D2. The appellants did not withdraw the concession when they had the opportunity to do so.

[18] The concession meant that the appellants then proceeded on the basis that the affected clauses in D2 were not severable, therefore the appellants could not place reliance on that agreement. The full court thus correctly held that D2 was unlawful and unenforceable for failure to have complied with certain of the provisions[3] of the NCA. It follows that the appellants could only obtain relief in terms of D1 if that contract was lawful and enforceable. I turn to that enquiry.

Is D1 a simulated agreement?

[19] The respondent pleaded that D1 was a simulated agreement. A court considers the substance of an agreement irrespective of what its form purports to be. The full court did not consider whether D1 was a simulated agreement. In my view, for the reasons I deal with below, D1 was not a simulated agreement. The full court found that D1 was inchoate and therefore the appellants could not rely on it for relief. I now turn to that finding.

Was D1 inchoate?

[20] The issue of inchoateness arises in respect of clause 2 of D1 which provides as follows:

'Peet Cilliers koop Koos Nel se 5% (vyf Persent) aandeel in Legend Golf en Safari Resort (Pty) (Ltd) vir die bedrag van R30 000 000.00 (dertig miljoen Rand). Vermelde bedrag is betaalbaar voor of op einde Februarie 2011, is nie rentedraend nie, en die transaksie sal "Belasting vriendelik" wees'

([The respondent] purchases the first appellant's 5% interest in Legend Gold and Safari Resort (Pty) Ltd for the amount of R30 000 000, which amount is payable on or before the end of February 2011, will not attract interest, and the transaction would be tax friendly.) (Own translation from Afrikaans.)

[3] Section 8 read with section 40(1).

[21] The appellants bemoan their disadvantage as they alleged that the issue had not been canvassed in the pleadings, at the pre-trial conference, nor did the appellants' counsel lead the first appellant on the issue. In argument, counsel submitted that the issue was not even dealt with in consultation as it was not an issue on the pleadings, therefore no admissible evidence was led to explain the term 'tax friendly'. Conversely, the respondent's counsel argued that the issue had been raised on the pleadings. The respondent's counsel did not abandon reliance on this issue before this Court.

[22] Although the full court accepted that the inchoate issue had not been pleaded, the court nevertheless dealt with the issue, because the first appellant had testified about it. However, the first appellant's testimony in answer to a question from the trial court at the close of his evidence-in-chief. Having accepted that the issue was not canvassed in the pleadings, it was impermissible for the full court to raise an issue not in dispute and to pronounce on it in circumstances where the issue had not been fully canvassed at the trial.[4] In this matter, it caused prejudice to the appellants who were denied the opportunity to place their version supported by admissible evidence before the court. In *Fisher v Ramahlele,*[5] this Court held as follows:

'Turning then to the nature of civil litigation in our adversarial system it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to basic human rights guaranteed by our Constitution, for 'it is impermissible for a party to rely on a constitutional complaint that was not pleaded. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.

[4] *Minister of Safety & Security v Slabbert* [2009] *ZASCA* 163; [2010] 2 All SA 474 (SCA) para 11: 'The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.'

[5] *Fisher and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) paras 13-14.

It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.' (Footnotes omitted.)

[23] The full court held that since the onus was on the appellants to prove the agreement, the first appellant's testimony that the agreement was incomplete could be held against him. This Court, in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[6] held that the interpretation of written instruments must follow the triad of language, context and purpose. In this regard it held:

' . . . Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. . . . Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible, or business like for the words actually used . . .

All this is consistent with the 'emerging trend in statutory construction'. It clearly adopts as a proper approach to the interpretation of documents the second of the two possible approaches mentioned by Scheiner JA in *Jaga v Dönges NO and another*, namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow…'

[24] To merely accept a litigant's 'say so' on the meaning of the words used is impermissible. The full court ought to have undertaken an interpretative analysis applying the triad. In any event, the first appellant was an unsatisfactory witness. He

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[6] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) paras 18-19.

complained about his poor memory and claimed that the events had happened 14 years earlier and that he had difficulty in remembering what had happened 'last week…never mind 14 years ago'. Therefore, the finding that D1 is inchoate stands to be set aside on appeal.

Was D1 abandoned?

[25] The appellants argued that D1 was revived because D2, the novated contract, was unlawful and unenforceable. The full court rejected that argument on the basis that the first appellant had testified that D2 had replaced D1. Therefore, the full court concluded that 'that is an abandonment of D1 and same cannot be resuscitated'. In *Acacia Mines Ltd v Boshoff*[7] (*Acacia*) this Court held the following:

'The question which to my mind must first be answered is whether the First Prospecting Contract was abandoned or not. If it was abandoned, then the subsequent contract was an entirely new and self-contained contract, and its validity in no way affects the position. There is no direct evidence of abandonment. . . It is therefore a matter of inference whether there was an abandonment or not.'

[26] The objective facts, from which the inference must be drawn, are that the respondent had defaulted on his obligations in terms of D1, therefore, D2 came into being. In the latter agreement, the parties attempted to make the respondent's obligations incurred in terms of D1, manageable. This is obvious from the introductory paragraph that confirms that the respondent's obligation in terms of D1 was to pay R30 million and that he had been unable to comply with that obligation, as a result of which D2 had been entered into. There is nothing in either contract to suggest that the parties considered D1 to have been an unlawful agreement as was the case in *Acacia* where the parties entered into the second contract because their first prospecting contract was worthless. In *Acacia,* the money that was paid fell due in terms of the second contract. In this matter, the money was paid in respect of both contracts in respect of the same obligation.

[27] In *Acacia*, the court also found that the second agreement made no mention of the first agreement, a factor that points to an abandonment of the first agreement. D2

[7] *Acacia Mines Ltd v Boshoff* 1959 (4) SA 330 (A) at 336E-G.

makes introductory reference to the D1. Finally, in *Acacia* the court said: 'It is also significant that in entering into the Second Prospecting Contract the company commenced proceedings *de novo* and used the same machinery as is ordinarily used for entering into new contracts'. In this matter, the parties in D2 expressed their intention to renegotiate the R30 million obligation due in terms of D1.

[28] The objective facts indicate that the parties to D2 considered their first agreement valid and binding. Therefore, when the respondent defaulted, they attempted to enter into another valid contract to deal with the respondent's obligations incurred in terms of their first agreement. I find myself in respectful disagreement with the full court's finding that the intention of the parties was to abandon D1 based on first appellant's unreliable evidence. The objective facts do not support that finding.

Does D1 fall foul of section 8(4) of the NCA?

[29] The full court found that the deferment of payment of R30 million in D1 fell foul of the provisions of section 8(4) of the NCA. The section provides as follows:

'8. Credit agreements…

(4) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is –

(a) a pawn transaction or discount transaction;

(b) an incidental credit agreement, subject to section 5(2);

(c) an instalment agreement;

(d) a mortgage agreement or secure loan;

(e) a lease; or

(f) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of –

(i) the agreement; or

(ii) the amount that has been deferred.'

[30] The contemporaneous correspondence between the parties indicates that the agreement between them was primarily about the sale of shares. The respondent estimated that the shares would appreciate and made optimistic predictions. Their first agreement, D1, was drafted pursuant to that estimation. The intention was always that

the amount should be paid in monetary value. No 'charge, fee or interest' was payable by the respondent on the purchase price for the shares.

[31] The first appellant, being an accountant, was anxious to have the money paid into one of the entities under his control to minimise any adverse tax implications. That does not make the agreement inchoate, nor does it defer the payment. Instead, the first appellant's interest in the development company would appreciate as per the respondent's optimistic predictions if he remained invested for a further three years. The first appellant had invested R8 million in the development and only received R7 million in return. It follows that D1 is not a credit agreement in terms of the NCA.

Conclusion

[32] The appellants' concession that certain clauses in D2 contravened the provisions of the NCA and that those provisions were not severable from the rest of D2 was the basis on which the trial was conducted. It follows that the appellants could not obtain any relief based on D2.

[33] I am persuaded that the real intention of the parties is ascertainable and that D1 is not a simulated agreement.[8] The first appellant wanted to opt out of the development, but the respondent persuaded him that his shares would appreciate considerably in three years. The contracting parties' true intention is recorded in D1; the latter does not fall foul of section 8(4) of the NCA. It follows that the first appellant is entitled to relief based on the respondent's breach of his obligations in terms of D1.

[34] As indicated above, the pleadings are confusing. The appellants' counsel made it clear that the claim is not for R23 million; it follows that this Court can only award the lesser amount. It bears repeating that the appellants' conditional/alternative claim was for the amount of R23 million in terms of D1, alternatively the payments of R5 million plus interest and costs. The appellants, as they were entitled to, abandoned part of their claim for R23 million. It follows that the alternate claim succeeds.

[35] As a result, the following order is made:

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[8] M A Fouche, J V du Plessis and A J Kerr *The Principles of Law of Contract* 6 ed (2004).

(a) The appeal is upheld with costs, including the costs of two counsel where so employed.

(b) The order of the full court is set aside and replaced with the following:

'(i) The defendant is ordered to pay the first plaintiff the amount of R 5 million plus interest on the amount of R5 million at the rate of 15.5% from 1 March 2011 to date of payment.

(ii) The defendant is ordered to pay the costs of the action including all reserved costs and the costs consequent upon the employment of two counsel.'

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E D BAARTMAN

ACTING JUDGE OF APPEAL

APPEARANCES:

For appellant:	A B Rossouw SC (with him J H A Saunders)
Instructed by:	Jaco Roos Attorneys Inc., Pretoria
	Noordmans Inc., Bloemfontein
For respondent:	J D Maritz SC
Instructed by:	Savage Jooste & Adams Inc., Pretoria
	Pretorius & Vennote, Bloemfontein.