IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 74/15

In the matter between:

ELLENISE SEPTOO **Appellant**

and

CITY OF JOHANNESBURG **Respondent**

Summary: Absolution from instance – principle restated – employer substituting first contract of employment with another contract- employee performing duties in terms of the second contract but reserving her right vis à vis the first contract - employee later seeking specific performance arising out of the cancellation of the first contract. Held enforcement and cancellation are inconsistent and mutually exclusive and cannot be exercised at the same time. Further that having accepted that the contract was cancelled, the only rights that could have been reserved was a claim for damages. This is so because when one party repudiates a contract, the other party has an election to either accept the repudiation and seek damages or refuse the repudiation and seek specific performance. The innocent party must make an election between them and cannot both approbate and reprobate the contract, or as the adage goes a party cannot blow both hot and cold. Labour Court correctly granted absolution from instance as the employer pleaded a case inconsistent with the relief sought – appeal dismissed with costs.

Coram: Waglay JP, Tlaletsi DJP and Phatshoane AJA

JUDGMENT

WAGLAY JP

[1] This is an appeal against the judgment of the Labour Court (Lagrange J) where the Labour Court granted absolution from the instance at the close of the Appellant's case.

[2] The relief sought by the Appellant in the Court *a quo* was for an order declaring that the employment contract entered into between the Respondent and herself, in terms of which she was appointed as a senior Human Resources Manager for a fixed period of five years, at a salary of R550 000 per annum, is binding and enforceable against the Respondent and that she be remunerated in accordance with that contract. She also claimed further and/or alternative relief.

[3] The Court *a quo* found that the Appellant had failed to make out a case for specific performance of the contract of employment pursuant to which she sought payment of the sum claimed. It found that the Appellant was not entitled to claim specific performance in circumstances where she had agreed that the contract had been cancelled.

[4] The Court *a quo* also found that the Appellant did not claim damages in the alternative and accordingly granted absolution from the instance.

[5] The facts leading to the dispute are not in issue. The Appellant had entered into a contract of employment in terms of which she would be appointed to the position of Senior Human Resources Manager for a period of five years with effect from 01 July 2008. In consideration for services rendered, she would be paid an annual remuneration of R550 000.00 (the first contract).

[6] The Appellant claimed that a week after the first contract was concluded, she was approached by the Respondent and advised that the person who had contracted with her on behalf of the Respondent did not have the authority to offer her the remuneration they had agreed upon as his authority was limited to a remuneration amount not exceeding R453 296.00 per annum. A new offer was then presented to the Appellant which was the same in all respects save that the remuneration was now reduced to R453 296.00 per annum.

[7] The Appellant accepted the new offer of employment (the second contract), reserving her rights arising from the first contract of employment. She commenced her employment in terms of the second contract and was remunerated in terms thereof.

[8] On 07 December 2009, 18 months after the first contract was concluded and 17 months after the conclusion of the second contract, the Appellant instituted the present action seeking an order for specific performance of the first contract. In the pre-trial minute concluded between the parties, it was agreed that the Appellant had conditionally accepted the second offer of employment on 06 August 2008 reserving her rights arising from the first contract. The Appellant claim for specific performance was for payment of the remuneration in terms of the first contract.

[9] During the Appellant's opening address at the Court *a quo*, her Counsel confirmed to the Court *a quo* that the Appellant's claim was for specific performance arising from the repudiation of the first contract. He further, in his opening address, indicated to the Court that the Appellant accepted the offer "R453 000" per annum remuneration but that was on the termination of the first contract of employment and the conclusion of the second contract of employment. In other words, during opening statement, Appellant's Counsel accepted that the first contact had been cancelled. He stated as follows:

> *'Ultimately the applicant accepted the R453 000 but that was on the termination of the previous contract of employment and the conclusion of a fresh contract of*

employment on R453 000. The applicant then sues on the first contract and requests specific performance in the form of payment of R550 000 over five years.'[1]

[10] In her evidence in chief, the Appellant indicated that her first contract was cancelled and that she had accepted the second offer of employment but had reserved the right to dispute the legality and fairness of the Respondent's "actions and omissions" relating to the first offer of employment made and accepted between the Respondent and her.

[11] Towards the end the Appellant's examination in chief, her representative asked the following question:

'… And so we have established that the City entered into a contract with you which it repudiated and could you just explain to the court what do you want out of this process, what are you claiming?'[2]

To which the Appellant answered that she:

'…entered into a contract on 1 July 2008 at a remuneration package of R550 000 per annum, which was cancelled so I therefore I would claim the R550 000 over a period of five years for the duration of that fixed term contract.'[3]

[12] During cross-examination, the following exchange occurred between the Appellant and Counsel for the Respondent:

'And if I understood my learned friend's addressed to the Court earlier, the first contract was terminated by the conclusion of the second contact? – That is correct'.

Yes but you reserve[d] your rights consequent upon this termination? That is right.'

[1] Record vol 1 at 51.
[2] Record vol 1 at 83.
[3] Record vol 1 at 83.

At the end of the cross-examination, the Respondent's representative, in conclusion, asked the Appellant as follows:

> *'Okay and then finally, just to confirm your claim here is for the amount of R550 000 per year for the five-year duration of the termination contract, is that correct? That is correct.'*

[13] Furthermore, the Appellant admitted that some two years after performing in terms of the second contract she had left the employ of the Respondent, a fact which was also recorded in the pre-trial minute.

[14] The submissions on behalf of the Appellant in this appeal is that the Court *a quo* could not and should not have granted absolution from the instance because:

(i) an election to cancel a contract requires positive conduct on the part of an innocent party in the form of an outward manifestation of that election which must be intended to come to the guilty party's attention;

(ii) an election to uphold the contract did not require the innocent party to express such election and that the guilty party could simply wait and do nothing until the date of performance arrived, in which event the contract remained alive and the Appellant was entitled to claim specific performance. Reference is made to the decision of *Anghem and Piel v Federal Coal Storage Co Ltd* 1908 TS 761 where the Court accepted the principle that mere delay accompanied by any active step indicating an intention of abandonment was not part of the assertion of the right;

(iii) the Court *a quo* came to its decision purely on the submissions made from the bar by the Appellant's Counsel and had not properly understood what was being conveyed by Appellant's Counsel. His argument, it was contended, was that the cancellation was a purported cancellation of the first contract, not an actual cancellation;

(iv) the question posed to the Appellant in cross-examination did not accurately reflect what had been stated in the opening address and that the Appellant had reserved her rights as indicated and must, therefore, be entitled to claim specific performance; and finally,

(v) the *onus* to prove that she had abandoned her claim for specific performance and wave that claim or exercise an election inconsistent with the claim was on the Respondent.

[15] The test for absolution from the instance sought at the close of the Plaintiff's case is not whether the evidence established what would finally be required to be established, but whether there is evidence upon which a Court applying its mind reasonably, to such evidence could or might (not should, or ought to) find for the Plaintiff (see *Municipality of Christiana v Victor* 1908 TS 1117; *Van Rensburg v Reid* [1958] 2 All SA 319 (E); and *De Wet v Western Bank Ltd* 1977 2 SA 1033 (W)) .

[16] Applying this test to the present case, there are two difficulties with the Appellant's submissions. The first is that the Appellant accepted the second contract and performed in terms of that contract; it was therefore not possible for her to perform in terms of her first contract nor did she tender such performance. Furthermore nearly two years after she concluded the second contract she resigned from the appellant's employ. Again there was no tender to perform in terms of the first contract; these actions were manifestly inconsistent with a claim for specific performance, more particularly for a declaratory relief that the first contract still subsisted.

[17] The second and more importantly, is the fundamental difficulty that arises from the fact that not only her Counsel, but the Appellant in her cross-examination acknowledged that the first contract had in fact been cancelled. This is clear from the extract of her examination and cross-examination referred to above. The submission by the Appellant's Counsel in the appeal that this was a purported cancellation is also manifestly ill-conceived or misconceived.

[18] While it is true that the Appellant had reserved her rights to claim on the first contract, this does not assist her in that as a matter of law, it is not open to the appellant to cancel a contract with the reservation of a right to enforce it. Enforcement and cancellation are inconsistent and mutually exclusive. Consequently, she could not choose one, but reserve her rights to exercise the other.

[19] In my view, having accepted that the contract was cancelled, the only right that could have been reserved was a claim for damages. This is so because when one party repudiates a contract, the other party has an election to either accept the repudiation and seek damages or refuse the repudiation and seek specific performance. Enforcement and cancellation are inconsistent with each other or mutually exclusive, the innocent party must make an election between them and cannot both approbate and reprobate the contract, or as the adage goes a party cannot blow both hot and cold. These are mutually exclusive choices and cannot be exercised at the same time. This signifies that an election of specific performance axiomatically excludes a case for damages unless the claim for damages is pleaded in the alternative in the event that the claim for specific performance failed.[4] The doctrine is stated by Watermeyer AJ in *Segal v Mazzur*[5] (approved in *Du Plessis and Another NNO v Rolfes Ltd* 1997 (2) SA 354 (A) as follows :

> 'Now, when an event occurs which entitles one party to a contract to refuse to carry out his part of the contract, that party has a choice of two courses. He can either elect to take advantage of the event or he can elect not to do so. He is entitled to a reasonable time in which to make up [**Page 639**] his mind, but when once he has made his election he is bound by that election and cannot afterwards change his mind. Whether he has made an election one way or the other is a question of fact to be decided by the evidence. If, with knowledge of the breach, he does an unequivocal act which necessarily implies that he has made his election one way, he will be held to have made his election that way;

[4] R H Christie *The Law of Contract in South Africa* 6ed (LexisNexis, 2011) at 553.
[5] 1920 CPD 634 at 644–645.

> this is, however, not a rule of law, but a necessary inference of fact from his conduct: see *Croft v Lumley* (1858) 6 HLC 672 at p 705 per Bramwell B; *Angehrn and Piel v Federal Cold Storage Co Ltd* 1908 TS 761 at p 786 per Bristowe J. As already stated, the question whether a party has elected not to take advantage of a breach is a question of fact to be decided on the evidence**,** but it may be that he has done an act which, though not necessarily conclusive proof that he has elected to overlook the breach, is of such a character as to lead the other party to believe that he has elected to condone the breach, and the other party may have acted on such belief. In such a case an estoppel by conduct arises and the party entitled to elect is not allowed to say that he did not condone the breach.' (my emphasis)

[20] On the Appellant's own version at most she could have claimed damages arising from the first contract because she had accepted that the first contract had been cancelled. Her claim for specific performance was inconsistent with her own positive conduct of concluding the second contract and then subsequently resigning. Put differently, the Appellant pleaded that she chose specific performance but she testified that the contract was cancelled. Her conduct did not support her pleaded case for specific performance. It follows that the Appellant's claim for specific performance was premised on a contract that had been cancelled which was incompatible with a claim for such relief.

[21] It was incumbent upon the Appellant to lead evidence supporting a claim for specific performance. However, not only was her evidence at odds with her pleadings, it was also irreconcilable with her claim. The Appellant's contention that the *onus* rests on the Respondent to prove that she had made an election is misplaced. Her evidence was that she had indeed made an election. Furthermore the difficulty with the Appellant's pleaded case was that there was nothing in the pleadings suggesting that should the order of specific performance fail, she would seek damages for the breach. This difficulty is compounded by the fact that the Appellant's evidence during the trial was that she considered the first contract as cancelled. A claim for specific performance is irreconcilable and incompatible with the cancellation of the contract. The court *a quo* properly held

that the alternative claim resulting from the cancellation was never pleaded and in the absence of an amendment to the statement of claim, it could not entertain such a claim. The court *a quo* also properly rejected the Appellant's contention that a claim for damages as an alternative cause of action premised on the cancellation of contract can be entertained based on the existence of a prayer for further or alternative relief. A claim for an alternative relief for damages in a case for specific performance cannot be premised upon the cancellation of the contract. It would only be so, had the Court found that the Appellant had made out a case for specific performance but that it was not feasible to grant that relief.

[22] In the circumstances, the Respondent rightly applied for absolution from the instance because the Appellant claim for specific performance without an alternative claim for damages was stillborn and the Court *a quo* was correct in granting absolution from the instance.

[23] In the result, I make the following order:

The appeal is dismissed with costs.

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Waglay JP

I agree

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Tlaletsi DJP

I agree

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Phatshoane AJA

APPEARANCES:

FOR THE APPELLANT:	Adv A Snider with Adv M Sibanda
	Instructed by JD Verster Attorneys
FOR THE RESPONDENT:	Adv H M Viljoen
	Instructed by Mncedisi Ndlovu and Sedumedi Inc