Case no 720/93

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

KRAGGA KAMMA ESTATES CC — First appellant

LESTER DENNIS BILLSON — Second appellant

and

JESSIE JOHANNA FLANAGAN — Respondent

CORAM: E M GROSSKOPF, NESTADT, KUMLEBEN, HOWIE JJA et NICHOLAS AJA

DATE HEARD: 19 AUGUST 1994

DATE DELIVERED: 29 SEPTEMBER 1994

J U D G M E N T

NESTADT JA:

The respondent sold and caused to be transferred certain fixed property to the first appellant. She instituted an action in the

South Eastern Cape Local Division claiming retransfer. The court a quo (Jansen J) upheld her claim on the ground that she subsequently cancelled the sale. An order that the property be re-registered in the respondent's name was granted. This appeal is against such order.

The main issue which arises is whether the respondent (to whom I refer as the plaintiff) validly cancelled the sale. In order to determine this, it is necessary to trace the nature and history of the dispute between the parties in some detail. As will be seen, the dispute is an unfortunate one. And it has taken a somewhat singular course. The plaintiff is an elderly widow. The property in question is a small farm. It has been her home for many years. The first appellant (I call it the first defendant) is a close corporation, one of

whose members is the second appellant (the second defendant). He is the son-in-law of the plaintiff. So we are concerned with a family quarrel involving an asset of some importance to the litigants.

The agreement of sale was entered into on 12 April 1991. Clause 2 thereof provides for a purchase price of R120 000 payable as to R70 000 "on signature hereof" and as to the balance of R50 000 at the rate of R500 per month. There is a lex commissoria entitling the seller, in the event of the purchaser breaching any of its obligations, to forthwith cancel the agreement.

Summons was issued on 1 April 1992. The plaintiff although alleging in her initial cause of action that the first defendant had failed to pay the R70 000, did not rely on this as constituting a breach of the agreement. Indeed there was no reference to the

agreement having been cancelled (on any ground). The plaintiffs claim was instead that she had never intended to sell the property; that the second defendant had represented the transaction to be one of lease; that induced by such misrepresentation she had entered into the agreement and caused the property to be registered in the first defendant's name in error; and that having discovered the true nature of the document she was entitled to retransfer of the property. The defendants denied these allegations. In particular, it was pleaded that the R70 000 had been paid. This, it was alleged, took place by way of an agreed set-off of an equivalent amount which it was said the plaintiff owed in respect of services rendered and loans made to her over the years by the second defendant and his wife. The matter went to trial on the basis of these pleadings. This was on 2

November 1992. The plaintiff gave evidence in support of her case. While she was still under cross-examination the matter was adjourned.

By the time the hearing was resumed on 11 October 1993, two events had occurred which materially altered the issues between the parties and the course of the trial itself. In the first place the plaintiff, perhaps having second thoughts about the cogency of her evidence, had amended her particulars of claim. The effect of the amendment was to claim transfer of the property on an alternative ground, viz that by reason of the non-payment of the R70 000. the plaintiff had cancelled the contract. This new cause of action was put on two bases. The one was that by refusing to pay the amount in question, the first defendant had repudiated the contract and that

the plaintiff had accepted such repudiation. This amendment, which was effected in terms of a notice to amend dated 6 May 1993 ("the first amendment"), reads:

> "7.7 The Defendant has refused to make payment of the said sum of R70 000.00 which sum has never been paid to the Plaintiff, and has consequently repudiated the contract between the Plaintiff and the First Defendant, the Plaintiff accordingly accepts such repudiation and demands retransfer of the property to her."

The other basis of the new cause of action was that the first defendant had been called upon to pay the R70 000 within a reasonable time; that it had failed to do so: and that the plaintiff had accordingly notified it of the cancellation of the agreement. The manner in which this amendment was effected is less straightforward. In the first amendment the following is averred as an alternative to

paragraph 7.7:

> "7.8 The Plaintiff hereby demands payment of the said sum of R70 000.00 (Seventy Thousand Rand), which sum has never been paid to the Plaintiff, and reserves the right to cancel the said contract in the event of the (first) Defendant refusing or neglecting to pay such sum within a reasonable period of time."

In a notice of intention to amend filed on 30 September 1993 ("the second amendment") the following paragraph was proposed to be substituted for the one I have just quoted:

> "7.8 The Plaintiff hereby cancels the agreement of sale as a consequence of the failure of the First Defendant to pay the said sum of R70 000.00, despite demand having been made upon the First Defendant by way of the Plaintiffs Notice of Intention to Amend dated 6 May 1993, and despite the lapse of a reasonable time."

When on 11 October 1993 the second amendment was moved, the defendants objected to it on the ground that it did not contain a

tender to repay to the first defendant what it had paid to the plaintiff under the agreement. (As will be seen, this related to the monthly payments of R500.) Consequently, the second amendment was not granted. The matter was then adjourned to enable the plaintiff to redraft her proposed amendment so as to incorporate such a tender.

Later the same day and by way of a third amendment the plaintiff was granted leave to substitute the following new paragraph 7.8:

> "The Plaintiff has cancelled the agreement of sale as a consequence of the failure of the First Defendant to pay the said sum of R70 000.00, such cancellation having been effected by a Notice of Intention to Amend filed of record on 30 September 1993 and by way of a letter addressed to the First Defendant's attorneys dated 5 October 1993, a copy whereof is annexed hereto, and despite demand having been made upon the First Defendant by way of the Plaintiffs Notice of Intention to Amend dated 6 May 1993, and despite the lapse of a reasonable time. The Plaintiff tenders to repay to the First Defendant such monies as the Plaintiff has received from the First Defendant pursuant to the said deed of sale."

Also on 11 October 1993 the defendants amended their plea in consequence of the plaintiffs amendments. Though maintaining their earlier denial that the R70,000 had not been paid, it was denied that the first defendant had repudiated the agreement or that the plaintiff had validly cancelled it. A number of defences were raised in this regard. In addition, the following was pleaded to paragraph 7.8:

> "First and Second Defendants have made tender to Plaintiff to fulfil all First Defendant's obligations in terms of the said agreement prior to Plaintiffs tender referred to in this paragraph, which tender was made to her on 11 October 1993, by tendering payment of R70 000.00 to Plaintiff on 11 October 1993 and in addition tendering to make further payments to her in terms of the said agreement which tender was refused by Plaintiff."

It was not in dispute that the tender referred to and its refusal took place after the second amendment was objected to but before the

grant of the third amendment (on 11 October 1993).

Thus it was that the issue of cancellation arose. However, the allegation that the plaintiff was entitled to avoid the contract on the grounds of mistake remained as the plaintiffs main cause of action. As I have indicated, the amendments to which 1 have referred were put forward as alternative causes of action. Prefacing both paragraphs 7.7 and 7.8 was the following statement (in the first amendment):

> "Alternatively, and in the event that the above Honourable Court should find that the Plaintiff intended to sell the property to the First Defendant (which is denied) then the Plaintiff alleges as follows:"

And (in relation to the cause of action advanced in paragraph 7.8) the letter of 5 October 1993 (cited in the third amendment) confirms this stance. It reads:

> "We wish to point out however that the amendment is only of relevance should the trial court find that the plaintiff and the defendant indeed entered into a deed of sale (which is still denied). Furthermore we wish to point out that the cancellation of the said deed of sale, on the aforementioned basis, is with immediate effect as a consequence of the first defendant's failure to make payment of the sum of R70,000.00 referred to in the deed of sale."

It was only on 12 October 1993 that what had been the plaintiffs main cause of action (that the agreement was void for mistake) was abandoned. Her claim for retransfer of the property was then based entirely on the alleged cancellation of the sale.

This brings me to the second event that I earlier referred to. It was the formulation on 12 October 1993 in terms of rule 33 of a special case for the adjudication of the court. In terms of this case the parties agreed that no further viva voce evidence would be led. In addition each party made a significant concession. The plaintiff

in effect withdrew her allegation that she had been misled as to the nature of the agreement. She agreed that it was "a valid...sale". On the other hand the first defendant admitted that it had failed to pay the R70 000.

In the result, the outcome of the trial depended upon whether the plaintiff had validly cancelled the sale. If she had (in either of the two ways referred to), she was, so the stated case further provided, entitled to retransfer of the property. This would be against repayment of the monthly amounts of R500 which the first defendant had all along paid to the plaintiff on account of the balance of the purchase price. As at October 1993 they totalled R17 000. On the other hand, so the parties also agreed, if the plaintiff had not validly cancelled the sale, her claim for retransfer would fail. The

issue thus formulated was to be resolved on the basis of the facts which I have outlined.

Obviously the first defendant's failure to pay the R70 000 constituted a breach of contract. It was a case of mora ex re (seeing that payment had to be made at a specific time, namely, on signature of the agreement). But on the plaintiffs cause of action as framed in paragraph 7.7, there had to be more than mere non-performance. The breach had to constitute a repudiation. I shall assume that it did. There is much to be said for the conclusion that by asserting (incorrectly as it turned out) that the amount had been paid, the first defendant was refusing to pay. If this be correct (and also bearing in mind the lex commissoria in the agreement) the plaintiff might ordinarily have been entitled to cancel on this ground.

However, as I have indicated, she did not purport to do so until May 1993. This was over two years subsequent to the conclusion of the agreement. In the meantime she had accepted the monthly payments of R500 which the first defendant had regularly been making on account of the balance of the purchase price. Mr Buchanan, for the plaintiff, rightly conceded that in these circumstances his client could not summarily accept the repudiation and cancel the agreement. Relevant in this regard is the following passage from an American judgment quoted in Williston on Contracts. 3rd ed, vol 6, sec 856 at 232:

> "Where time of performance is of the essence of the contract, a party who does any act inconsistent with the supposition that he continues to hold the other party to his part of the agreement will be taken to have waived it altogether. When a specific time is fixed for the performance of a contract and is of the essence of the contract and it is not performed by that

> time, but the parties proceed with the performance of it after that time, the right to suddenly insist upon a forfeiture for failure to perform within the specified time will be deemed to have been waived and the time for performance will be deemed to have been extended for a reasonable time."

It follows that the first ground on which the plaintiff relied for her right to cancel, namely that in May 1993 she accepted the alleged repudiation of the contract by the first defendant, is bad.

The matter turns then on whether the plaintiffs second ground, ie her purported cancellation of the contract some five months later, is sound. In support of a negative answer, the defendants pleaded and argued that:

(i) the plaintiffs delay in electing to treat the defendant's failure to pay the R70 000 as a repudiation and her acceptance of the monthly payment of R500 amounted

to a waiver of her right to cancel:

(ii) having failed initially to tender repayment of what the first defendant had paid her when she purported to cancel, the plaintiff was precluded from thereafter doing so; and

(iii) the plaintiff had, by denying the existence of the sale, herself repudiated the contract and, applying the principle of Erasmus vs Pienaar 1984(4) SA 9(T) and Moodley and Another vs Moodley and Another 1990(1) SA 427(D), the first defendant's obligation to pay the R70,000 was suspended until the plaintiffs breach was purged; by the time this occurred (when she acknowledged the contract as one of sale) the first

defendant had tendered payment of the R70 000. I do not propose to consider these points. There are others (also advanced on behalf of the defendants) which are decisive of the matter. I proceed to deal with them.

If Williston's statement is applied, the matter must be considered on the basis that the first defendant was afforded an extended time, reasonable in the circumstances, within which to make payment of the R70 000. If this be so, it was incumbent on the plaintiff that by way of a demand she place the first defendant in mora (ex personal. And (at the same time if she so wished) she had, in order to enable her to cancel, to give notice of her intention so to do in the event of non-performance. This, I take it, is what the plaintiff set out to achieve by what is stated in paragraph 7.8 of the

particulars of claim (as introduced on 6 May 1993 by the first amendment).

I am not sure that this is a correct approach. As has been indicated, the first defendant's mora was ex re. It may be that the time for payment of the R70 000 was not extended; that the plaintiff waived merely her right to cancel. However, on the assumption that the first defendant had to be placed in mora (ex personal the question for decision is whether this was done. If the demand for payment did not have this effect, an essential prerequisite to the plaintiffs right to thereafter cancel would be missing. So we must examine the terms of the demand. There was nothing per se impermissible about it being contained in the pleadings. It would be a case of interpellatio iudicialis. But whatever its form, the

demand had to be unambiguous and indicate a fixed date, reasonable in the circumstances, for performance (Nel vs Cloete 1972(2) SA 150(A) at 159 H). And, of course, it had to indicate that the creditor wished to receive his money (Douean vs Estment 1910 TPD 998 at 1001); that the debtor was required to perform (Alfred McAlpine and Son Pty) Ltd vs Transvaal Provincial Administration 1977(4) SA 310(T) at 351 H); and he must have been placed on terms to do so (Johannesburg City Council vs Norven Investments (Pty) Ltd 1993(1) SA 627(A) at 633 E). Whether this has been done, is a question of fact for the decision of the court (Wessels' Law of Contract, 2nd ed, Vol II para 2893).

Were these requirements satisfied in casu? I do not think so. To begin with, paragraph 7.8 (as originally framed in the

first amendment) specifies merely that payment be made "within a reasonable period of time". Such period is not defined; no date for payment is given. But there is a more basic difficulty with the notice. It must be read in conjunction with the recital that precedes and governs it, viz that it only operates "in the event that the...Court should find that the Plaintiff intended to sell the property to the First Defendant". It may have been proper to plead in this way. Provided no embarrassment or prejudice is caused, inconsistent claims may be made in the alternative (United Dominions Corporation (Rhodesia) Ltd vs van Eyssen 1961(1) SA 53 (SR) at 56 D-E; but compare Lloyds and Co (South Africa) Ltd vs Aucamp and Another 1961(3) SA 879(0)). But ours is not a problem of pleading. We are concerned with whether the plaintiff established a proper demand.

In my opinion she did not do so. Plainly, the demand was a conditional one. It was subject to an uncertain future event. This was the rejection of the plaintiffs main claim that the transaction was a lease. Such a demand was not capable of placing the first defendant in mora. Consider how it was supposed to react. The plaintiff was still unmistakably maintaining that there was no sale. But on this basis the R70 000 was not payable. So the very substratum of the demand (a finding of a sale) was negated by the plaintiff herself. Far from being an unambiguous demand, it was a futile, still-born communication which the first defendant was entitled to ignore. The agreement was accordingly not validly cancelled. This being so. the court a. quo should have dismissed the plaintiffs claim for retransfer of the property.

Even, however, if there was no need for the first defendant to have been placed in mora, the appeal must nevertheless succeed. This is because the agreement was not validly cancelled for other reasons. The termination of a contract has important consequences upon the reciprocal rights and duties of the parties (Swart vs Vosloo 1965(1) SA 100(A) at 115 E). Thus in order to be effective a notice of intention to cancel (to use the terminology suggested by Kerr: The Principles of the Law of Contract, 4th ed, 464) must be clear and unequivocal (Ponisammy and Another vs Versailles Estates (Pty) Ltd 1973(1) SA 372(A) at 385G). So, too, must the notice of termination itself (Putco Ltd vs TV & Radio Guarantee Co (Pty) Ltd 1985(4) SA 809(A) at 830 E). Tn my opinion neither the notice of intention to cancel (contained in

paragraph 7.8 of the first amendment) nor the purported cancellation (by way of paragraph 7.8 of the second amendment read with the letter a few days later of 5 October 1993) qualified as such. They were also framed in the alternative and made subject to a finding that the property had been sold. (The terms of the letter of 5 October 1993 make this point with particular emphasis.) They therefore suffered from substantially the same defects as the demand for payment. And they must share the same fate of being regarded as ineffectual.

Finally there is the question of costs. Those of appeal must, of course, be paid by the plaintiff (save that the costs of unnecessarily including in the record counsels' arguments on the application for leave to appeal will not be allowed). And, seeing

that her claim in the court below will, in the result, have failed, she would normally be liable for the trial costs as well. It was submitted, however, that the defendants should be ordered to pay the plaintiffs costs (alternatively that they should be deprived of their costs) up to 11 October 1993. This was the date when payment of the R70 000 was for the first time tendered. Until then, as I have said, the defendants had asserted that payment had been made. The argument was that this conduct (coupled with the fact that at the time of the conclusion of the agreement, the defendants had procured a receipt from the plaintiff for payment of the R70 000) justified a departure from the normal rule that costs follow the event. I am unable to agree. I am not sure that this approach is, on the wording of the stated case, open to the plaintiff. It was agreed that in the

event of the plaintiffs claim failing, she would pay such costs "as the plaintiff may be ordered to pay". Nothing more is said on the point. But besides this, there is no warrant for finding that the defendants acted dishonestly or that their plea that the R70 000 had been paid in any way increased the trial costs. Despite having now to pay the R70 000, the defendants were the substantially successful parties. They are entitled to their costs. The remaining question is whether these should include the fees of two counsel (employed by the defendants both in the trial court and before us). The plaintiffs case was that the value of the property was R420 000. The issues raised, at least until the special case, were not that simple. Thereafter it was the defendants as appellants who were burdened with the task of attacking the judgment a quo. In the circumstances, I consider that

the fees of two counsel should be allowed in both courts. The following order is made -

(1) The appeal is upheld with costs including the costs of two counsel. However, the costs of including in the record (pages 253-269) counsel's arguments on the application for leave to appeal will not be allowed.

(2) The order of the trial court is set aside and the following substituted:

"1. The plaintiffs action is dismissed with costs including the costs of two counsel. 2. The first defendant is ordered: (a) to immediately pay the plaintiff the sum of R70 000;

(b) in accordance with clause 2 of the deed of sale entered into between the parties on 12 April 1991, to pay the plaintiff the balance of the purchase price less the sum of R17 000 already paid."

H H NESTADT E

M GROSSKOPF JA)
KUMLEBEN, JA) CONCUR
HOWIE, JA) NICHOLAS, AJA
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