THE SUPREME COURT OF APPEAL
**REPUBLIC OF SOUTH AFRICA**

# JUDGMENT

Case number: 664/08

In the matter between:

**SOUTHERNERA RESOURCES LIMITED** **APPELLANT**

**and**

**ALLAN GEORGE FARNDELL NO**
**(in his capacity as the Executor of the**
**Estate of the late Marjorie Diana Dent**
**(Estate Number 20514/1998))** **RESPONDENT**

Neutral citation: *SouthernEra Resources Ltd v Farndell* (664/2008) [2009] ZASCA 150 (27 November 2009)

**CORAM:** **Mpati P, Mthiyane JA, Lewis JA, Mhlantla JA *et* Hurt AJA**

**HEARD:** **10 November 2009**

**DELIVERED:** **27 November 2009**

**SUMMARY**: Sale of mineral rights – suspensive condition – sale complete (*perfecta*) upon fulfilment of condition – risk and benefit pass to purchaser on sale becoming *perfecta* – risk of loss or destruction of object of sale on purchaser.

# ORDER

**On appeal from**: North Gauteng High Court, Pretoria (Bam AJ sitting as court of first instance).

The appeal is dismissed with costs, which shall include the costs consequent upon the employment of two counsel.

# JUDGMENT

**MPATI P** (Mthiyane JA, Lewis JA, Mhlantla JA *et* Hurt AJA concurring):

[1] The only issue in this appeal is whether a sale of mineral rights had become *perfecta* before the date on which it became impossible for the seller to give transfer of the rights to the purchaser by way of registration of cession. The resolution of this issue entails a consideration of the question whether a stipulation in the written agreement of sale of the mineral rights constitutes a term or a condition.

[2] The facts are common cause. On 30 September 1995 the Estate of the late Marjorie Diana Dent ('the estate'), represented by the respondent in his capacity as executor, concluded a written agreement ('the agreement') with the appellant in terms of which the estate sold to the appellant certain mineral rights 'in, on and under' the farm Duitschland 95, situated in the Registration Division KS, Northern Province. The agreed purchase price was R1 792 269.64. It was to be paid in cash against registration of cession of the mineral rights into the name of the appellant. In terms of the agreement the appellant was required, within 30 days of the date of signature of the agreement, to furnish a bank guarantee as security for payment of the purchase price. The appellant's attorneys were to attend to the preparation and registration of the Notarial Deed of Cession of Mineral Rights.[1] Subsequent to the conclusion of the agreement the appellant furnished the required guarantee. However, due to uncertainty relating to the identity of

[1] A Notarial Deed of Cession of Mineral Rights was signed by the respondent on 10 October 2000.

heirs in the estate, there was a delay in the respondent obtaining the necessary consent to the sale from the Master of the High Court ('the Master'). Consequently, the guarantee was returned to the appellant, at its request, on the understanding that it would be furnished once the identity of the heirs had been confirmed.

[3] On 14 December 2001 the parties concluded an addendum to the agreement in terms of which clause 3.1 of the original agreement was amended to read as follows:

'The purchase price of the Mineral Rights is the sum of R1 792 269.64 . . . which amount will be paid in cash against registration of cession of the Mineral Rights into the name of the Purchaser. As security for the payment of the purchase price, the Purchaser will, within 14 (fourteen) days from the date on which the Purchaser is informed in writing by the Seller that the Master of the High Court has issued a certificate in terms of Section 42(2) of the Administration of Estates Act, 1965 . . . consenting to the sale of the Mineral Rights, furnish Seller's attorney with a bank guarantee or guarantees as required and approved of by the Seller or the Seller's attorney payable to the Seller or the Seller's nominee/s forthwith upon registration of cession at such place or places as the Seller stipulates.'

On 21 April 2004 the Master issued a certificate embodying his consent to the sale and on 22 April 2004 the respondent's attorneys dispatched a letter to the appellant's attorney advising of this fact. The letter elicited no response from the appellant. In terms of the agreement the appellant was required to furnish the bank guarantee by 6 May 2004.

[4] On 1 May 2004 s 3(1)(m) of the Deeds Registries Act[2] ('the Act') was repealed.[3] The subsection had provided that –

'[t]he registrar shall, subject to the provisions of this Act –

. . .

(m) register notarial cessions, leases or sub-leases of rights to minerals and notarial variations of such cessions, leases or sub-leases, notarial cessions of such registered leases or sub-leases . . . ;

. . . '

[2] 47 of 1937.

[3] By s 53 of the Mining Titles Registration Amendment Act 24 of 2003.

The effect of the repeal of s 3(1)(m) of the Act was that registration of cessions of mineral rights could no longer be effected.

[5] On 22 November 2004 the respondent's attorney caused to be delivered by hand, at the appellant's chosen *domicilium*, a letter by which the appellant was again advised that the Master's consent to the sale had been secured. The appellant was also requested to furnish the required bank guarantee. An identical letter was sent to the appellant's chosen *domicilium* by registered post. The appellant failed to respond and on 16 February 2005 the respondent's attorney sent a pre-paid registered letter to the appellant notifying it of its breach of the terms of the agreement.[4] The notice of breach was also ignored.

[6] In terms of clause 6 of the agreement the respondent was entitled, in the event of the appellant (as the defaulting party) failing to remedy the breach, 'to claim immediate performance and/or payment from the [appellant] of all its obligations in terms of this agreement, whether or not the same are then due for performance or payment'. Following another letter to the appellant dated 17 March 2005, in which the respondent's attorneys advised that the respondent was to 'implement its rights under the agreement', the latter instituted motion proceedings in the high court seeking, as against the appellant, an order for payment of the purchase price and other ancillary relief. The appellant opposed the order sought on the ground that the repeal of s 3(1)(m) of the Act rendered it impossible in law to effect registration of cessions in mineral rights as from 1 May 2004. The agreement, so the appellant's defence continued, accordingly lapsed due to supervening impossibility of performance. The respondent could not effect delivery of the *merx*.

[7] The respondent's case that the sale of the mineral rights was complete (*perfecta*) by 1 May 2004[5] was upheld by the court a quo (Bam AJ), which gave judgment in favour of the respondent as prayed. This appeal is with its leave.

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[4] The written agreement required that a party in breach be notified of the breach and called upon to remedy it within 14 days.

[5] The date of the repeal of s 3(1)(m) of the Mining Titles Registration Amendment Act.

[8] That the repeal of the statutory provision that enabled registration of cession of mineral rights made performance by the respondent (as seller) superveningly impossible is not in dispute. As a general proposition, a party to a contract is discharged from his/her obligation if impossibility of performance supervenes on account of a change in the law of the land.[6] But, as has been foreshadowed above, we are concerned in this matter with a contract of sale, which necessitates an enquiry as to where the risk of loss or destruction lay at the time that registration of the cession of the mineral rights became impossible. Simply put, was the sale *perfecta* by 1 May 2004, ie when registration of the cession of the mineral rights into the appellant's name became impossible? If it was, the benefit and risk attaching to the mineral rights sold passed to the appellant, as the purchaser, upon the sale becoming *perfecta*,[7] in which case the respondent, as seller, would be entitled to payment of the purchase price.[8]

[9] A sale is *perfecta* if it is absolute, in the sense that it is not subject to a suspensive condition.[9] It becomes *perfecta* once there is agreement on the *merx* (the thing sold) and the *pretium* (price) and any condition, resolutive or suspensive, has been fulfilled.[10] It is common cause that until such time as the Master had given his consent the sale was incomplete. It was subject to the Master's consent. Counsel for the respondent submitted that once the necessary consent had been obtained and communicated to the appellant in writing on 22 April 2004, the suspensive condition was fulfilled and the sale became *perfecta*. The risk accordingly passed to the appellant, so the argument continued.

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[6] J W Wessels *The Law of Contract in South Africa* (2 ed) Vol II paras 2671 and 2672.
[7] *Fine & Gluckmann v Heynecke* 1915 TPD 211; *Grobbelaar v Van Heerden* 1906 EDC 229; *W W Barrett v Ngazana* (1901) 22 NLR 223; *Garvin and others NNO v Sorec Properties Gardens Ltd* 1996 (1) SA 463 (C) at 467C and *Mulder v Van Eyk* 1984 (4) SA 204 (SE) at 207C.
[8] See the cases in n 7 above.
[9] A J Kerr *The Law of Sale and Lease* (3 ed) p 237; Voet 18.6.1.
[10] *Mnyandu v Mnyandu NO* 1964 (1) SA 418 (N) at 422H; *BC Plant Hire CC t/a BC Carriers v Grenco (SA) (Pty) Ltd* 2004 (4) SA 550 (C) para 41; *Mulder v Van Eyk* above n 7 at 207F.

[10] Counsel for the appellant contended, on the other hand, that clause 3.2 of the agreement, which stipulates that the purchaser 'shall procure that its attorneys do not lodge the cession of Mineral Rights until the Seller's attorneys are in possession of the guarantee . . . ', expressly held the act of registration in suspense until the guarantee was furnished. He submitted that the furnishing of the guarantee was a condition suspensive of the respondent's obligation to allow registration of the cession, such that transfer or delivery of the *merx*, by registration of the cession of the mineral rights, could not take place until that condition had been fulfilled. Counsel consequently argued that until that suspensive condition was fulfilled or waived, there was no agreement properly so called and the risk of supervening impossibility of contractual performance remained with the respondent.

[11] It is not uncommon to find, in an agreement of purchase and sale, a heading or sub-heading that reads: "Conditions of Sale'. What follows such headings are, usually, not true conditions which suspend the operation of the agreement, but enforceable terms of the contract, or both. As was said in *R v Katz,*[11] the word 'condition' in relation to a contract, 'is sometimes used in a wide sense as meaning a provision of the contract, ie an accepted stipulation', such as includes 'ordinary arrangements as to time and manner of delivery and of payment of the purchase price'. In the case of a true condition, however, whether suspensive or resolutive, the operation of the whole contract, or part thereof, and its consequences, depend upon an uncertain future event.[12] In other words, the operation of the obligations flowing from the contract is suspended pending the happening, or failure, of the uncertain future event. Fulfilment of a suspensive condition results in the contract being enforceable. And, normally, if the condition fails and the parties have not agreed otherwise, the contract is rendered void.[13]

[12] The difference between a term of a contract (contractual obligation) and a condition is best described by Holmes JA as follows:

[11] 1959 (3) SA 408 (C) at 417E.
[12] *Ibid* at 417E-F; *Design and Planning Service v Kruger* 1974 (1) SA 689 (T) at 695C.
[13] See R H Christie *The Law of Contract in South Africa* (5 ed) p 145.

'. . . a contractual obligation can be enforced, but no action will lie to compel the performance of a condition.'[14]

The question, then, in the instant case, is whether the stipulation in the agreement requiring the appellant to furnish a guarantee for payment of the purchase price within 14 days of written notice having been given to him of the Master's consent to the sale is a true condition, or a term of the contract.

[13] In my view, the appellant's obligation to furnish a guarantee for payment of the purchase price depended on two conditions. The first was the Master's consent to the sale taking place, which had to be obtained. The fulfilment of that condition was dependent upon the will of a third person, the Master, and not on any one of the parties. It was a casual condition.[15] The second, a potestative condition, was the conveyance of the fact of the Master's consent having been obtained to the appellant in writing. The fulfilment of this condition was entirely in the power of the respondent.[16] It is common cause that both these conditions were fulfilled.

[14] In terms of the agreement the appellant undertook to furnish the guarantee for the purchase price of the mineral rights within 14 days from the date of fulfilment of the second condition. Upon its fulfilment, the appellant thus became bound to perform its side of the bargain – to furnish the guarantee within the time stipulated in the agreement, ie within 14 days of the fulfilment of the condition (within 14 days after 22 April 2004).[17] The stipulation is an enforceable contractual obligation; a term of the contract.[18] The fact that the agreement contains a condition that the deed of cession of the mineral rights would not be lodged until the respondent's attorneys were in possession of the guarantee does not affect the position. The condition merely serves to ensure that the respondent is protected from parting with his rights, the subject matter of the sale agreement, without an assurance that it would be paid.

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[14] *Scott v Poupard* 1971 (2) SA 373 (A) at 378H; see also *MacDuff & Co Ltd (in liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573 at 590.
[15] *MacDuff* above n 14 at 588; F du Bois et al *Wille's Principles of South African Law* (9 ed) at 793.
[16] *Ibid.*
[17] *Jurgens Eiendomsagente v Share* 1990 (4) SA 664 (A) at 674E-675B.
[18] *Scott v Poupard* above n 14.

[15] Counsel for the appellant sought support for the proposition that clause 3.1 of the agreement – which stipulates when the guarantee was to be furnished – is a condition rather than a term of the agreement, from the judgment of Willis J in *Ingledew v Theodosiou*.[19] The relevant passage in the judgment reads:

'Mr *Solomon* criticised the Wilson agreement, *inter alia*, for the fact that it was a non-existent "enterprise" which was purportedly sold, that the second defendant was recorded therein as a VAT vendor when she was not, and that clause 4.1 thereof contains the following:

> "As security for the payment of such amount (the purchase price) the purchaser shall within 30 days of the signature date, furnish the seller's attorneys with a bank guarantee or guarantees as required by the seller, payable to the seller or the seller's nominee/s upon registration of transfer at such place or places as the seller stipulates."

This could be interpreted as a condition precedent or a suspensive condition that was not fulfilled by the purchaser.'[20]

The court was dealing in that case with two agreements in terms of which the owner of certain fixed property had sold the property to two individual purchasers, and the question whether the rule *qui prior est tempore potior est jure* was of application. Further down in the same paragraph the learned judge accepts that the agreement at issue contained 'the requisite elements or requirements of a sale' and that 'there are enforceable rights which [the parties] may exercise, the one against the other . . . '.

[16] It is difficult to discern, from the judgment, the basis upon which the learned judge suggests that the clause 'could be interpreted as a . . . suspensive condition'. I can find no reason why the seller in that case could not have been able to enforce performance (the furnishing of a guarantee) by the purchaser upon expiry of the period of 30 days. To the extent that the dictum of the learned judge may suggest that the clause, without more, may be said to contain a suspensive condition, I disagree.

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[19] 2006 (5) SA 462 (W).
[20] At para 52.

[17] It was further argued, on behalf of the appellant, that the qualification in clause 3.1 of the written agreement, in the present matter, conferring the power on the respondent's attorney to approve the required guarantee/s, suspended the operation of the agreement. This is because if the respondent's attorney were to reject a guarantee furnished by the appellant, there would be no agreement. I am unable to agree. If a seller or his or her agent were to reject a guarantee, the basis of the rejection would have to be reasonable. If not, his or her decision would be open to challenge. The discretion given to a seller in an agreement of sale to accept or reject a guarantee has to be exercised *arbitrio boni viri*.[21] It follows that when the appellant in the present matter was informed in writing on 22 April 2002 that the Master had issued a certificate consenting to the sale of the mineral rights, the agreement between the parties became unconditional. It became *perfecta*.

[18] In their heads of argument counsel for the appellant indicated that they would seek to argue two issues in this court. The first was whether the sale of the mineral rights was *perfecta* by 1 May 2004.[22] If it was, the second issue would be whether the coming into effect on 1 May 2004 of the Mineral and Petroleum Resources Development Act 28 of 2002[23] and the Mining Titles Registration Amendment Act,[24] s 53 of which repealed s 3(1)(m) of the Deeds Registries Act, resulted in supervening impossibility of performance having the effect of discharging the agreement of sale. Although counsel did not argue the second issue, they did not expressly abandon it. Counsel, however, conceded in argument, correctly so in my view, that if the sale was *perfecta* by 1 May 2004, then the risk of impossibility of delivery of the object of the sale, by registration of the cession of the mineral rights, passed to the appellant, as purchaser. The first issue now having been decided in the affirmative, the second does not arise. The appeal must therefore fail.

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[21] *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 707A-B; *Blake v Cassim and another NNO* 2008 (5) SA 393 (SCA) at paras 20, 21 and 22.
[22] The date from which cession of mineral rights could no longer be effected due to the repeal of s 3(1)(m) of the Deeds Registries Act 47 of 1937.
[23] The Act provides, inter alia, that a holder of mineral rights immediately before it took effect has the exclusive right to apply for a prospecting right or a mining right (item 8 schedule 2 thereof).
[24] Above n 5.

[19] In the result, the appeal is dismissed with costs, which shall include the costs consequent upon the employment of two counsel.

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JUDGE OF APPEAL

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