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

**JUDGMENT**

REPORTABLE

Case No: 117/13

In the matter between:

**NORTHERN ESTATE AND TRUST ADMINISTRATORS (PTY) LTD** **APPELLANT**

**AGRICULTURAL AND RURAL DEVELOPMENT CORPORATION** **RESPONDENT**

**Neutral citation:** *Northern Estate and Trust Administrators V Agricultural and Rural Development Corporation* (117/13) [2013] ZASCA 174 (28 November 2013)

**Coram:** Lewis, Maya and Leach JJA and Swain and Meyer AJJA

**Heard: 6 November 2013**

**Delivered: 28 November 2013**

**Summary: Contract - whether sale of shares agreement consensually cancelled, expressly or by conduct. Cession - cedent's right to claim transfer of shares ceded - consequence of cession where debtor, in ignorance of prior cession, and cedent agreed to a cancellation of the sale of shares agreement.**

## ORDER

**On appeal from:** Full Court of the North Gauteng High Court, Pretoria (Mavundla J with Ranchod and Tuchten JJ concurring):

The appeal is dismissed with costs including those of two counsel.

## JUDGMENT

**MEYER AJA (LEWIS, MAYA AND LEACH JJA AND SWAIN AJA CONCURRING):**

[1] This appeal arises out of an agreement of sale concluded in May 2005 in terms of which the respondent, the Agricultural and Rural Development Corporation (the ARDC), sold shares it held in a company known as Outspan (Pty) Ltd to Mr Charles Andrew Boyes, trading at the time as Henley Farm (Boyes). Boyes paid the purchase price but the shares were not transferred to him. Subsequently the appellant (Northern Estate and Trust Administrators (Pty) Ltd) instituted action against the respondent alleging that Boyes had ceded his 'rights, title and interest' in a claim against the respondent for transfer of the shares, and claiming an order directing the respondent to transfer such shares to it.

At first instance, the matter came to trial in the North Gauteng High Court before Phatudi J who found that the cession relied on by the appellant had indeed taken place, but dismissed the appellant's claim, finding that Boyes and ARDC had agreed to cancel the sale of the shares. The appellant appealed unsuccessfully to a full bench, its appeal having been dismissed on 19 October 2012. The present appeal is with the leave of this cour

[2] tBy the time the matter went to trial it was common cause that a valid and binding sale agreement had been concluded between the ARDC and Boyes, who had paid the full purchase consideration for the shares to the ARDC. At their pre-trial conference the parties agreed that the only disputes between them were those set out in paragraph 9 of the particulars of claim (which related to the cession) and in paragraph 2.2 of the plea, which read as follows:

**'In the alternative, and in the event that the Honourable Court finds that an agreement, as alleged, or at all, was concluded between the said Boyes and the Defendant, the said agreement of sale was cancelled by agreement between [the] said Boyes and the Defendant expressly and the Defendant paid back the amount received from the said Mr Boyes in the sum of R145, 520.00,** *alternatively,* **tacitly in that the Defendant paid back the amount received from the said Mr Boyes in the sum of R145,520.00.'**

[3] Consensual cancellation is simply '. . . a contract whereby another contract is terminated'.[1] The express consensual cancellation of the sale agreement is alleged to have been concluded expressly at a meeting held on 5 November 2007 and, alternatively, by conduct during September 2008 when the ARDC repaid the purchase consideration to Boyes and he accepted the repayment. The question for decision in this appeal is whether the court a quo correctly endorsed the decision of the court of first instance that the ARDC discharged its onus of proving a consensual cancellation of the sale agreement. Appellant's counsel also raised a further argument before us, raised neither at the trial nor in the court below, that Boyes had been divested of his right to claim transfer of the shares by virtue of the cession of that right to the appellant on 1 April 2008 and that, consequently, only the appellant could thereafter have agreed to cancel the sale agreement.

[1] **Per Corbett JA in *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A) at 588H-I.**

[4] The issues that arose on appeal will be better understood against the following background. The ARDC was established in terms of the Northern Transvaal Corporation Act No 5 of 1994. During 2005, it embarked on a restructuring process which, inter alia, entailed the selling off of its movable and immovable assets, including shares which it or its subsidiaries held in various companies. Its acting managing director at the time, Dr Shaker (Shaker), had the requisite authority to approve the conclusion of the intended sale agreements on behalf of the ARDC. On 31 May 2005, as part of that process, the sale agreement was concluded, in terms of which Boyes purchased various shares from the ARDC for a total purchase consideration of R145 520.00. The sale agreement was approved by Shaker, and Boyes duly effected payment of the purchase price by means of an electronic transfer on the day of its conclusion.

[5] The ARDC's board of directors, however, resolved not to 'ratify' the sale of shares to Boyes at its meeting on 8 December 2005. Instead Shaker's successor as acting managing director, Mr M B J Maloa (Maloa), recommended that the sale of shares to Boyes should not be approved and that the shares be used to promote Black economic empowerment in the province. This was accepted by the board. Mr G D Esterhuysen (Esterhuysen), who at all material times was employed by the ARDC in the capacity of manager, corporate services and finance, and the only witness who testified about the alleged consensual cancellation of the sale agreement, explained in his evidence that the new course adopted by the ARDC board of directors entailed benefiting communities who were involved in the ARDC's former projects. The shares were to be 'remarketed' and, upon board approval, transferred to legal entities established by those communities at no cost.

[6] By letter dated 11 January 2006, the ARDC notified Boyes as follows:

> 'It is with regret that we have to inform you that the Board of Directors of the ARDC did not approve the sale of shares. They resolved that the shares must be remarketed.
>
> Please supply your Bank Details for the refund of the amount paid, R145 520.'

[7] Subsequently a dispute arose between the ARDC and Boyes about the validity of the sale agreement. Though the sale was approved by Shaker, the stance adopted by the ARDC was that no valid and binding agreement had come into existence as a result of the non-approval by its board of directors. Boyes, on the other hand, maintained that ARDC board approval had not been a requirement for the validity of the sale agreement, and insisted on receiving transfer of the shares. The dispute dragged on for a considerable period of time. The validity of the sale agreement was for the first time conceded on behalf of the ARDC at the pre-trial conference held on 28 April **2010**.

[8] On 5 November 2007, a meeting was held at the instance of Boyes. It was attended by Maloa, Esterhuysen, and a Mr Ngoasheng from the ARDC and Boyes. This was the meeting at which the express agreement of cancellation was alleged to have been concluded. Maloa led the meeting and only he and Boyes participated in the discussion. Esterhuysen's evidence about the discussion between Maloa and Boyes is unconvincing and ambivalent. He essentially testified about his 'impression' of the meeting. The high-water mark of his evidence is that Boyes accepted that the shares would not be transferred to

him ‘on condition’ that they be transferred to the beneficiary communities and not resold to any other party.

[9] Esterhuysen conceded that a cancellation of the sale agreement had not been discussed. Had an agreement in fact been concluded one would have expected that consensus would also have been reached regarding the repayment of the purchase price, which Esterhuysen conceded had not been discussed. Esterhuysen was also unable to explain why the purchase price had not been promptly repaid to Boyes after the alleged agreement had been concluded. Under cross-examination he conceded that if Boyes were to testify that the cancellation of the agreement had by no stretch of the imagination been agreed at the meeting, he would be unable to dispute it.

[10] Any agreement to cancel the sale agreement or to compromise the dispute would have had to be concluded between Boyes in his personal capacity and Maloa, representing the ARDC. Neither of them testified. And significantly, the minutes of a meeting of the ARDC board of directors held on 7 December 2007 record that Maloa -

**‘... reminded the board of directors of a possible legal case by the Boyes group. The group claim they purchased the ... shares legally’.**

Maloa’s reminder to the ARDC board of directors accords with the stance adopted by Boyes since the outset, which was that a valid and binding sale agreement had been concluded. Moreover, I find it improbable that Maloa would not have reported to the board of directors that Boyes had agreed that the shares might be transferred to the contemplated beneficiary communities had any cancellation agreement or compromise been concluded at the meeting.

[11] Accordingly, I conclude that the evidence of Esterhuysen failed to establish the conclusion of an express agreement on 5 November 2007 in terms of which the sale agreement was terminated or the dispute between Boyes and the ARDC compromised.

[12] I come now to the dispute between the parties relating to the cancellation agreement which is alleged to have been concluded by conduct during September 2008. In *Standard Bank of South Africa Ltd & another v Ocean Commodities Inc & others* 1983 (1) SA 276 (A) Corbett JA said that - **'[i]n order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged'.**[2]

[13] It is common cause that on 10 September 2008 the ARDC in fact repaid the purchase consideration in the sum of R145 520 to Boyes by means of a cheque deposited with ABSA Bank Ltd and credited to the account 'CA Boyes t/a Henley Farm', that being the account Boyes had used to make payment of the purchase price. Esterhuysen testified that the following day, while travelling from Venda to Polokwane he received a call from Boyes, who was agitated and upset about the money having been paid into that particular account. He told Esterhuysen that he had bought the shares in his personal capacity and that the money should have been paid into a different account. As Esterhuysen was driving, he requested Boyes to fax to his office the details of the bank account into which the money should be deposited. Esterhuysen acknowledged when he was cross-examined that he knew how Boyes 'felt' about the shares at the time of this conversation: he was 'unhappy' and Esterhuysen knew that Boyes did not want the money but the shares.

[2] **At 292A-C.**

[14] Significantly, the banking details of Boyes were faxed to Esterhuysen the next day by means of a letter dated 12 September 2008 from the company secretary, Ms Karen Adam, of South African Farm Management (Pty) Ltd, of which Boyes was a director. It read:

> **'Soos per Charles Boyes se telefoniese gesprek gister, is die terugbetaling van die bedrag van R145 520 vir die koop van Outspan aandele, in die verkeerde bankrekening betaal.**
> **Sal julle dit asseblief wysig, en in die onderstaande rekening betaal. Besonderhede is soos volg: . . . (details were then provided)'.**

Esterhuysen instructed ARDC's accountant, Mr J J Naude (Naude), to transfer the money to the account as requested by Boyes. Despite his best efforts, Naude was unable to persuade ABSA to do so. However, the amount paid on 10 September 2008 was never repaid to the ARDC.

[15] Relying on the trite principle that a party alleging a tacit contract must catalogue in its pleading the unequivocal conduct and circumstances from which the contract is to be deduced,[3] counsel for the appellant submitted that the letter transmitted to Esterhuysen on 12 September 2008 was not averred in the plea and could therefore not be relied upon by the ARDC in establishing the cancellation. There is in my view no merit in this submission. The conduct upon which the ARDC relied in its plea is that it paid the purchase consideration back to Boyes and that he accepted the repayment. The letter dated 12 September 2008 is one of the facts that would prove that allegation. In any event as Brand JA stated in *E C Chenia and Sons CC v Lamé & Van Blerk* 2006 (4) SA 574 (SCA):

[3] **See eg *Triomf Kunsmis (Edms) Bpk v AE & Cl Bpk en Andere* 1984 (2) SA 261 (W) at 267G-H.**

**'If counsel really believed that this evidence was irrelevant and thus inadmissible because it was not covered by the pleadings, he should have objected there and then. The plaintiff could then have tried to persuade the court that the evidence was indeed covered by the pleadings or, otherwise, sought an amendment. A party cannot be allowed to lull its opponent into a false sense of security by allowing evidence in the trial court without objection and then argue at the end of the trial, or on appeal, that such evidence should be ignored because it was inadmissible. It seems to me that when the defendant's counsel decided not to challenge both the admissibility and substance of [the witness'] evidence, he took a calculated risk and any possible prejudice resulting from such failure must be ascribed to the realisation of that risk and not to the plaintiff's departure from its pleadings.'**[4]

[16] There was in this instance also no objection to the introduction in evidence of the letter at the trial or any challenge to its admissibility or substance. On the contrary, the version of Boyes and that of his secretary regarding the letter was foreshadowed in the cross-examination of Esterhuysen, albeit that they were not called as witnesses. The cross- examination of Esterhuysen on this aspect reads as follows:

**'. . . Mr Boyes was under a lot of pressure with ABSA Bank he had a discussion with Ms Adam who was the group secretary of SAFM he merely told her they paid into the wrong account she took the initiative and wrote this letter without having been informed by Mr Boyes (1) that the funds should be re-deposited into this account (2) he did not provide her with this information she obtained this information from an administrative lady Mr Boyes did not give this information to her and she took her own initiative to wrote this letter because she could not get hold of Mr Boyes at that point in time. I just need to put that to you if you want to respond to that. — All I can respond to is that you know I requested the banking details and it was sent the following day as I testified.'**

4 **Para 15.**

[17] The conduct of the ARDC in repaying the purchase price that Boyes had paid pursuant to the conclusion of the sale agreement, and that of Boyes in accepting and retaining the repayment, seen against the background of the dispute between them and the ARDC's refusal to transfer the shares to Boyes, establishes unequivocally an intention on their part to cancel the sale agreement. This, in the absence of an answer by Boyes, is the only reasonable inference to be drawn from their conduct. Despite the fact that he was unhappy about the ARDC's conduct, and until the eleventh hour, insisted on transfer of the shares rather than repayment of the purchase consideration, Boyes nevertheless ultimately agreed to the cancellation of the sale agreement. *Consensus ad idem* on their part has been proved on a preponderance of probabilities.

[18] The appellant, however, argued at the hearing of the appeal that the agreement of Boyes and the ARDC to cancel the sale can have no legal effect since the finding of the court of first instance of a valid cession of Boyes's rights under the sale to the appellant on 1 April 2008 had not been impugned and the cession was fully operative at the time when the sale agreement was cancelled during September 2008. The consequence, so it was argued, is that Boyes by then could not legally have cancelled the sale agreement with the debtor (the ARDC). The ARDC objected to the argument being raised for the first time at the hearing of the appeal. However, this court 'is entitled to base its judgment and to make findings in relation to any matter flowing fairly from the record, the judgment, the heads of argument or the oral argument itself.[5]

[19] This argument as to the effect of the cession ignores the common cause fact that the ARDC received no notice of the cession prior to the institution of the

[5] **Per Harms JA in *Thompson v South African Broadcasting Corporation* 2001 (3) SA 746 (SCA) para 7, followed in *Cuninghame v First Ready Development 249* 2010 (5) SA 325 (SCA) para 29 and in *Nedbank Limited v Mendelow NO* (686/12) [2013] ZASCA 98 (5 September 2013) paras 17-18.**

action. Protection is afforded to a debtor who deals with a cedent without notice of a cession. It is trite that a debt is discharged if a debtor pays the cedent in ignorance of the cession.[6]

**This overall qualification holds true not only for payment but for any transaction entered into between the debtor and the cedent and reflecting on the debt, such as set-off, settlement, termination by agreement and release, the granting of an extension of time to pay or the acknowledgement of liability for the purpose of interrupting prescription.'[7]**

[20] SWJ van der Merwe, LF van Huyssteen, MFB Reinecke and GF Lubbe *Contract General Principles* 4th Ed at 416, correctly in my view, put the matter thus:

**The protection provided to a debtor, who deals with the cedent in good faith, has been extended to other situations, such as where the debtor, in good faith, concludes a compromise with the cedent, obtains release from him, or is granted an extension of the time for performance. The same holds true where the debtor, in good faith, attempts to set off against the cedent a claim, that only became liquidated after the cession. In all these cases the debtor is treated as against the cessionary as if the cedent is still the creditor, with whom the debtor could have transacted the extinction of the debt.'[8]**

[6] *Illings (Acceptance) Co (Pty) Ltd v Ensor NO* 1982 (1) SA 570 (A) at 578E-F.

[7] *LAWSA* Vol 2 Part 2 Second Edition para 48. PM Nienaber referred to the following cases in the footnotes to this passage: *Trust Bank van Afrika Bpk v Oosthuizen* 1962 (2) SA 307 (T); *Rixom v Mashonoland Building Loan & Agency Co Ltd* 1938 SR 207; *Turbo Prop Service Centre CC v Croock* 1997 (4) SA 758 (W); *Van der Byl & Co v Findlay & Kihn* (1892) 9 SC 178 at 181; *African Banking Corporation v Blauwklip Garden Co Ltd* (1908) 25 SC 946; *Lovell v Paxinos & Plotkin: in re Union Shopfitters v Hansen* 1937 WLD 84; and *Aussenkehr Farms (Pty) Ltd v Trio Transport CC* 2002 (4) SA 483 (SCA) at 496B-E.

[8] The learned authors referred to the following cases in the footnotes to this passage: *Brook*

[21] I conclude therefore that the prior cession of Boyes' right to claim transfer of the shares constitutes no impediment to the validity of the cancellation of the sale agreement subsequently concluded between the ARDC and Boyes.

[22] In all these circumstances the appellant had no right to claim transfer of the disputed shares. The appeal is dismissed with costs, including those of two counsel.

**P A MEYER**
**ACTING JUDGE OF APPEAL**

APPEARANCES:

*v Jones* 1964 (1) SA 765 (N); *Oosthuizen* (supra); *African Building Corporation* (supra); *Turbo Prop* (supra); *Van der Byl (supra)*; *Lovell* (supra); *Agricultural & Industrial Mechanisation (Vereeniging) (Edms) Bpk v Lombard* 1974 (3) SA 485 (O); *Stannic v Samib Underwriting Managers (Pty) Ltd* [2003] 3 All SA 257 (SCA); *Van Zyl v Look Good Clothing CC* 1996 (3) SA 523 (SE); and *Momentum Group Ltd v Van Staden* [2009] 4 All SA 218 (SCA).

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