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D & CLD 474/83

HARIBUDERPURSAD MAHABEER .... APPELLANT

and

KAMALAWATHI SHARMA N O .... FIRST RESPONDENT

GANPATH BALMOGIM .... SECOND RESPONDENT

HEFER, J A.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

HARIBUDERPURSAD MAHABEER ... APPELLANT

and

KAMALAWATHI SHARMA N O ... FIRST RESPONDENT

GANPATH BALMOGIM ... SECOND RESPONDENT

CORAM :RABIE, C J, KOTZé, MILLER, BOTHA et HEFER, J J A.

HEARD : 6 May 1985.

DELIVERED : 23 May 1985.

J U D G M E N T

HEFER, J A :

The litigation between the parties to this

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appeal has already found its way into the Law Reports on no fewer than three occasions. It commenced with an application which the appellant brought in the Durban and Coast Local Division. The application was heard by MILNE J (as he then was) and dismissed in a judgment reported in 1982(2) S A 157. The appellant appealed to the Full Bench of the Natal Provincial Division and, in a judgment reported in 1982(4) S A 242, the appeal was upheld; leave was granted to the parties to file further affidavits and the matter remitted to the Local Division to be heard afresh. Further affidavits were filed and thereafter KUMLEBEN J dismissed the application again. His judgment was reported in 1983(4) S A 421. With leave of KUMLEBEN J

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the appellant has finally appealed to this Court against the dismissal of his application.

What gave rise to the application appears from the three reported judgments where the allegations, denials and counter allegations in the papers were exhaustively recorded. I will not embark upon yet another recital save for focussing attention on the crucial issue again. It related in all three courts to the effectiveness of first respondent's cancellation of the agreement of sale entered into between appellant and Kamalnath Sharma. Appellant never contended that first respondent was not entitled to cancel the agreement; nor did he dispute that he received the letter of 14 August 1980 (annexure "C" to his

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founding affidavit) which evinced a clear election on her part to cancel the agreement in the event of his failure to comply with the demand made therein, nor, indeed, that first respondent was under the impression that annexure "C" effectively served to notify him in advance of the cancellation of the agreement in that event. He based his attack upon the cancellation on the absence of time-ous communication : annexure "C", he contended, conveyed no more than an intention to "declare the sale cancelled" and he received no further communication until February 1981 when his attorney was informed that the sale had been cancelled and the property resold to second respondent. His contention as to the effect of annexure "C" was upheld

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by the Full Bench and all that KUMLEBEN J was concerned with, was the effect of first respondent's failure until February 1981 to notify the appellant of the cancellation. That is the sole question which concerns this Court too. The appeal falls to be decided on the basis that first respondent decided to cancel the agreement and regarded it as properly cancelled thirty days after the receipt by appellant of annexure "C" (i e towards the second half of September 1980), but that appellant was only informed of the cancellation during February 1981.

Appellant's counsel submitted that this lapse of time (which he maintained was unreasonably long) brought about <u>per se</u> that the agreement was never effec-

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tively cancelled for, so the argument went, a right to cancel lapses unless it is exercised by informing the guilty party of the cancellation within a reasonable time. This submission cannot be upheld. A similar proposition was rejected by this Court in Potgieter and Another v van der Merwe 1949(1) S A 361 at p 371/2 where Pollock's statement in his Principles of Contract (8th ed p 618) that

> "omission to repudiate within a reasonable time is evidence, and may be conclusive evidence, of an election to affirm the contract; and this is in truth the only effect of lapse of time "

was accepted as correct. Unless it is read in context this statement and particularly the description of the

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evidential effect of the lapse of time as its only effect, may be debatable (cf the remarks of JANSEN J (as he then was) in North Vaal Mineral Co Ltd v Lovasz 1961(3) S A 604 (T) at p 612). But what Pollock was obviously at pains to emphasize, was what he says at p 630 viz that "time alone is no bar to the right of rescinding a voidable transaction". This was, of course, the statement of a writer on English law; it related, moreover, to the right to resile from a voidable contract. But it is clear that this view of the effect of the lapse of time on the right to resile from such an agreement was accepted by this Court as correctly reflecting the South African law affecting the right to cancel an agreement

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on account of its breach, by virtue of a lex commissoria. And I respectfully agree. Apart from the law relating to prescription, there is no principle of South African law of which I am aware that justifies a conclusion that a right may be lost through mere delay to enforce it and no reason exists for holding otherwise in the case of the right to cancel an agreement.

It is often said (usually on the authority of Voet (Comm. Ad. Pand. 18.3.2)) that the right to cancel an agreement must be exercised within a reasonable time. I have no quarrel with that statement - as far as it goes. But it does not follow that failure to exercise the right within such a time results ipso iure in its loss. In

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Potgieter's case (supra) this Court also approved in the present context of a passage which appears in Pollock at p 629 to the effect that

> "the contract must be rescinded within a reasonable time, that is, before the lapse of a time after the true state of things is known, so long that under the circumstances of the particular case the other party may fairly infer that the right of rescission is waived",

which puts failure to exercise the right to cancel within a reasonable time in its true perspective. Depending on the circumstances, such a failure may e g justify an inference that the right was waived or, stated differently, that the party entitled to cancel, has elected not to do so (cf Pienaar v Fortuin 1977(4) S A 428 (T) at p 433G;

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Becker v Sunnypine Park (Pty) Ltd 1982(1) S A 958 (W) at p 964/5; Smit v Hoffman en 'n Ander 1977(4) S A 610 (O) at p 616 G-H), or it may open the door to some other defence. In such cases the lapse of an unreasonably long time forms part of the material which is taken into account in order to decide whether the party entitled to cancel should or should not be permitted to assert his right. But per se it cannot bring about the loss of the right. (Cf Alfred McAlpine & Son v Transvaal Provincial Administration 1977(4) S A 310 (T) at p 325 F-G).

Appellant's counsel's further submission that first respondent has been shown to have waived the right in question cannot be upheld either. In rejecting the sub -

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mission in the court a quo KUMLEBEN J (quoting INNES CJ in Laws v Rutherford 1924 A D 261 at p 263) held that what had to be established was that first respondent

> "with full knowledge of her right,decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it."

Appellant's counsel challenged the correctness of this approach and submitted, on the authority of cases such as North Vaal Mineral Co v Lovasz (supra) and Becker v Sunnypine Park (Pty) Ltd (supra), that the enquiry relates, in a case like the instant one, not to the innocent party's actual decision or election whether to cancel or to affirm the agreement, but to the impression that his conduct and particularly his delay in informing the other party

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of his decision, creates in the latter's mind; and that if the circumstances are such that the other party may fairly infer an election to affirm the agreement, then the innocent party will be held to have waived the right to cancel whatever his actual election might have been. (See also Palmer v Poulter 1983(4) S A 11 (T) at p 20).

Whether this approach is in fact contrary to the views expressed in Potgieter's case (supra) or in Laws v Rutherford (supra), as KUMLEBEN J appears to have thought but of which I am by no means convinced, is a question not necessary to decide. Nor is it necessary to deal with the problem which arises when the innocent party's conduct creates an impression different from his actual decision.

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That problem does not arise in the instant case save in the context of estoppel with which I will deal later. The circumstances in this case differ materially from those in e g the Sunnypine case (supra). Appellant's breach of the agreement (his failure to pay the rates levied in respect of the property) did not meet with silence on first respondent's part; annexure "C" informed him of the breach and that in the event of his failure to rectify it, the agreement would be cancelled. The only conduct thereafter on first respondent's part on which reliance could be placed for her alleged waiver of the right to cancel was her failure to notify the appellant of the fact that she had exercised it. Her failure to do so has been adequately-explained. Appellant, moreover, does not claim thereby to have

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been led to believe that she had waived her right. His case is that he was and remained throughout under the impression that he had paid the rates and that first respondent accordingly had no right to cancel the agreement. Thus, where first respondent says that she never waived the right; where her conduct in selling the property to second respondent plainly indicates that she did not waive it, and where appellant does not claim to have been deceived into believing that she had done so, there is plainly no room for a finding that waiver has been established.

Appellant's counsel finally argued that first respondent is estopped from relying on the cancellation.

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The reason why KUMLEBEN J rejected that contention in the court a quo appears from p 425 G-H of the report of his judgment. In this Court appellant's counsel argued that the representation which forms the basis for the alleged estoppel and which, so the argument went, could reasonably be inferred from all the facts, was not only that first respondent had no right to cancel the agreement but also that if she did have such a right, she had abandoned it. What I understood counsel to convey was the following: after receiving annexure "C" appellant went and spoke to Watts (first respondent's attorney) and told him that he had paid the rates which had been levied until the date of the interview; what happened further between

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appellant and Watts is in dispute; but after the interview appellant received no further communication and this inaction on first respondent's part reasonably led him to believe that first respondent had either come to realise that she was not entitled to cancel the agreement, or, on the basis that she still considered herself to be entitled to cancel it, that she had elected not to do so.

The dispute which exists relating to what passed between appellant and Watts can, however, not simply be glossed over in the way that appellant's counsel did. For if Watts is correct in his assertion of what transpired at the interview, appellant had no grounds whatsoever for believing that the agreement would, for any reason, not be

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cancelled. The probabilities, in my view, plainly favour Watts' version, but be that as it may, there was no application for viva voce evidence to be heard and until the dispute of fact is resolved it simply cannot be said that appellant has discharged the onus which rests upon him to prove the facts relating to the alleged estoppel.

The appeal accordingly falls to be dismissed. But before making the order there remains another matter to be dealt with. The first notice of appeal to this Court was defective; it did not state in terms of Rule 5(2) of the Rules of this Court whether the whole or whether part only of the order was appealed against.

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Nor was it served on second respondent, because he had never taken part in the proceedings and had indicated in writing on several occasions in the course thereof that he abided the decision of the court. When the defect in the notice was brought to the attention of the attorneys for the appellant a fresh one was filed (only a few days after the time allowed by Rule 5(1) for the filing of a notice of appeal had lapsed) but again not served on second respondent. Appellant's attorneys anticipated that second respondent would sign a document indicating his unwillingness to take part in the appeal and his preparedness to abide the decision of this Court as well. But, after consulting first

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respondent's attorneys, he refused to sign the document in question . The notice of appeal was then served on him whereupon he intimated (through first respondent's attorneys) that he would only consider what part he would take in the appeal after receipt of a formal application for condonation.

That is how matters stood by the end of February 1984. An application for condonation was only launched during December 1984. There was no reaction by second respondent. First respondent filed a notice indicating her intention to oppose the application which was then enrolled in the normal course for the day on which the appeal would be heard. At the hearing

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of the appeal, there was no appearance for second respondent. First respondent's counsel at first opposed the application but eventually withdrew his opposition, save that he insisted that appellant be ordered to pay the costs occasioned by the application for condonation.

The question now is what to do about the costs of the application. To answer it does not require detailed discussion. All I need say is that whereas it cannot be said (as he alleged in his petition) that appellant was forced into an unnecessary application for condonation, first respondent's opposition to the application was utterly unreasonable. What she said in her opposing affidavit did not contribute

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in any way to the enquiry and I have been left with the firm impression that she merely sought to saddle the appellant with additional costs.

In conclusion it should be stated that the application for condonation was not opposed on the basis that there were no prospects of a successful appeal. This affects the form of the order which I am about to make.

In the result

(1) The appellant's failure to note the appeal timeously is condoned.

(2) Appellant is ordered to pay the costs relating to the application for con-

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donation on an opposed basis.

(3) The appeal is dismissed with costs.

J J F HEFER, J A.

RABIE, CJ.)
KOTZé, J A.) CONCUR.
MILLER, J A.)
BOTHA, J A.)

Saak Nr 233/83
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IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA

(APPèLAFDELING)

In die saak tussen:

J. M. GREYLING — Appellant

en

ISCOR — Respondent

Coram: JANSEN AR et WESSELS, ELOFF Wnd. ARR.

Gelewer: 29 Maart 1985.

AANVULLENDE UITSPRAAK

JANSEN AR:-

Aangesien die partye na behoorlike kennisgewing

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geen beswaar geopper het nie, word aanvullend tot die uitspraak van 29 November 1984 nou die volgende uitspraak gelewer en bevel verleen :-

Sedert die uitspraak van hierdie Hof gelewer is, is ons aandag daarop gevestig dat uitsluitsel nie gegee is t.o.v. die eiser se tweede eis vir betaling van die bedrag van R270-34 nie, alhoewel eiser spesifiek ook appèl aangeteken het teen die hof a quo se bevestiging van die landdros se bevel waardeur die eis afgewys is. Dit skyn ons dat dit gebiedend is dat ook oor hierdie eis wel uitsluitsel gegee moet word.

Ons is van mening dat die logiese konsekwensie van die bevinding van hierdie Hof, nl. dat die verweerder se "teeneis" (bestaande uit twee eise) verwerp word, is

dat die eiser teenoor die verweerder ook geregtig is op betaling van die betrokke bedrag van R270-34. In sy pleitstukke beweer die verweerder dat die Yskor Pensioen= fonds die bedrag aan hom oorbetaal het, en hy aanvaar blykbaar deurgaans dat hy aanspreeklik sou geword het om dié bedrag aan die eiser te betaal was dit nie vir sy "teeneis" wat hy as grond van skuldvergelyking aanvoer nie. In die lig hiervan moet die tweede eis ook toegestaan word.

Die appèl slaag tot die verdere mate dat die verweerder gelas word om die bykomende bedrag van R270-34 aan die eiser te betaal, tesame met rente teen 11% per jaar vanaf datum van betekening van die dagvaarding tot datum van betaling en koste.

E.L. JANSEN AR.

WESSELS Wnd AR)
ELOFF Wnd AR) Stem saam.