Court 1
74/85

LL Case No. 16/1984

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

WILLIAM DESMOND THOMAS Appellant

and

PETER MICHAEL HENRY First Respondent

GROBLER, VAN VUUREN AND ASSOCIATES Second Respondent

CORAM: RABIE, CJ, CORBETT, CILLIé, BOTHA et VAN HEERDEN, JJA

HEARD: 3 MAY 1985

DELIVERED: 30 MAY 1985

JUDGMENT

/VAN HEERDEN, JA ...

VAN HEERDEN, JA:

During August 1982 the appellant and the first respondent (hereinafter referred to as the respondent) concluded a written agreement whereby the latter sold to the appellant a business known as the Glass Menagerie. The purchase price, excluding stock-in-trade, was R37 000. At a later stage the parties agreed that a further amount of R22 291,24 was payable for the stock.

Pursuant to the sale the appellant took possession of the business on 1 November 1982 and then started trading for his own account. Some ten days later, however, his attorneys wrote to the respondent that he had been induced to conclude the agreement on the strength of certain intentional and material misrepresentations made by the respondent. The latter was advised that the appellant had cancelled the sale and that he was tendering to restore the business with all its assets.

In a reply, dated 17 November 1982, the

respondent's attorneys rejected the appellant's allegations. It was admitted that prior to the conclusion of the agreement certain representations had been made by the respondent, but it was denied that they were untrue. Although no specific reference was made to the appellant's tender it was clearly not accepted.

During February 1983 the respondent brought an application against the appellant and the second respondent in the Witwatersrand Local Division. As against the appellant he claimed payment of the amount alleged to be due in terms of the agreement. The second respondent did not oppose the application and it is unnecessary to explain why it was joined as a party.

In the founding affidavit the respondent did not deal specifically with the alleged misrepresentations. He submitted that it was not necessary to do so. He went on to allege that, notwithstanding the "purported"

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cancellation, the appellant had continued to operate and was still operating the business. The crux of the application was that the appellant was obliged to pay the purchase price since his "purported cancellation is of no force and effect as he has approbated and reprobated".

In so far as the opposing affidavit is relevant for the purposes of this appeal, the appellant reiterated his allegations concerning the misrepresentations made by the respondent. In particular he alleged that the turnover of the business was not nearly the average sum of R10 000 per month as represented by the respondent. He admitted that he had continued to trade and was still carrying on business but stated:

> "Had I simply closed the business and withdrawn therefrom the following would have resulted:
>
> (i) The goodwill would have been lost forever. Such goodwill in the business as does exist must constitute an asset to the Applicant [the present respondent] and I

believe it was my duty to preserve this.

(ii) Paragraph 6 of the lease agreement makes it quite clear and in peremptory terms that the business must remain open for trading during normal hours on breach of which the Lessor is entitled to cancel the lease. The loss of the lease to the premises would have resulted in very substantial damage and prejudice to the Applicant."

(As regards (ii) above, it should be explained that the respondent had conducted the business from leased premises; that in terms of the sale either a lease or a sub-lease of the premises had to be granted to the appellant on inter alia the terms and conditions of the respondent's tenure, and that, with the consent of the lessor, the respondent had ceded to the appellant all his rights under the existing lease.)

The appellant made it clear that he had never intended to approbate and reprobate or, subsequent to the notice of cancellation, to run the business for his own account. And he submitted that for the purpose of

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preserving the business he was entitled to operate it for the benefit of the respondent.

The court a quo allowed the application with costs and ordered the appellant to pay the amount claimed by the respondent, but granted leave to the appellant to appeal to this Court. At the hearing of the appeal the appellant applied for condonation of his late noting and prosecution of the appeal. It was common cause that the application should be granted and that the appellant should pay the costs occasioned thereby, and it will be so ordered. It is to be noted, however, that the delay was caused solely by the negligence of the appellant's attorneys and that as against the appellant they are personally liable for such costs. Nor will they be entitled to debit the appellant with fees, or costs incurred by them, in regard to the application. That much was conceded by counsel for the appellant who was instructed by the said attorneys.

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The basis of the decision of the court a quo appears to have been as follows: The inference to be drawn from the appellant's continued operation of the business is that he decided to stand by the sale and to conduct the business for his own benefit. The explanations proffered by the appellant do not dispel that inference because he was not legally obliged to trade in order to restore the business and the rights ceded under the lease to the respondent. The appellant's conduct was therefore irreconcilable with a continuous intention to cancel the sale or, put somewhat differently, with an intention to rely on the cancellation. That being so, it was in the court's judgment immaterial whether the appellant had been entitled to rescind the sale.

The submissions made by the appellant's counsel were confined to the inference drawn by the court a quo from the appellant's continued operation of the business.

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At the outset it is necessary, however, to elaborate somewhat on the legal principles governing a case such as this one. It has often been said that if an innocent party is entitled to cancel a contract, whether on the ground of misrepresentation or breach of contract, he must exercise an election between two inconsistent remedies, i e whether to cancel or to abide by the contract; that the election of one remedy necessarily involves the abandonment of the other, and that he therefore cannot both approbate and reprobate. In Feinstein v Niggli and Another 1981 (2) SA 684 (A) 698, Trollip, JA said that election generally involves a waiver in the sense that one right is waived by choosing to exercise another right which is inconsistent with the former, and pointed out that election and waiver have been equated as being species of the same general legal concept. Hence the learned judge concluded that no reason exists why the same rule about the overall

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onus of proof applicable in waiver should not also apply to election mutatis mutandis. Trollip, JA, did, however, mention one possible qualification, i e whether in election, as distinguished from waiver, proof merely of the innocent party's knowledge of the material facts giving rise to his remedies suffices, or whether knowledge of his rights must also be proved. Although Trollip, JA, expressed a preference for the second possibility, he found it unnecessary to pronounce a firm view thereon.

Once the innocent party has decided to cancel - and has communicated his decision to the other party - he has, of course, exercised his election. He then no longer has a choice of remedies and may not, without the consent of the other party, undo his decision. The concept of election is therefore not appropriate in regard to conduct which appears to be in conflict with an intention to rely on the chosen remedy. It is

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perhaps more accurate to designate such conduct as a waiver or abandonment of an accrued right, but as was pointed out by Kumleben, J, in Mahabeer v Sharma N O and Another 1983 (4) SA 421 (D) 423-4, the term "waiver" (and, I may add, also "abandonment") is an imprecise one which can be used in different senses. However, for the sake of convenience I shall use the word "waiver" with reference to conduct of the innocent party which precludes him from relying on his prior cancellation of a contract (if, of course, the other party is prepared to accept the volte-face).

Whatever the correct terminology may be, the cardinal question is to what extent, if at all, the innocent party's subjective intent is relevant in determining whether such a waiver has been established. In Van Schalkwyk v Griesel 1948 (1)SA 460 (A), a lessee of immovable property instituted an action against the lessor on the ground that he had been induced to enter

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into the lease by certain fraudulent misrepresentations of the lessor. In his declaration the lessee alleged that he had cancelled the lease. He tendered occupation of the property to the lessor and claimed an order declaring the lease to be cancelled and an award of damages. One of the defences raised by the plea was a denial that the lessee had cancelled the lease. It was alleged that he had continued to occupy, and was still occupying, the property. The court of first instance found that the lessee had been entitled to cancel the lease and that the fact that he had remained on the property for some 4 months after the issue of summons did not debar him from insisting on cancellation. On appeal it was submitted that by so retaining occupation of the property the lessee had elected to stand by the contract and therefore had abandoned the remedy of rescission. The submission was rejected by this Court which quoted with approval (at p 473) the following

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passage from Halsbury's Laws of England, (2nd ed, vol 23, par 155):

> "The acts and conduct relied upon as evincing the representee's affirmance must be such as are more consistent, on a reasonable view of them, with that than with any other theory. It is not sufficient to point to acts of a neutral character, or acts which are equally consistent with a possible ultimate intention to disaffirm or with a mere suspension of judgment."

In parenthesis it should be pointed out that the above test was enunciated by Halsbury with regard to conduct of the innocent party preceding a cancellation, or purported cancellation, of an agreement. Hence the use of the phrases "a possible ultimate intention to disaffirm" and "a mere suspension of judgment".

At first blush it would appear that in applying the test only the objective manifestation of the innocent party's intention is relevant, and that factors such as the subjective motivation for acting in the way

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in which he did are immaterial. But that is not how the test was applied by this Court. Having pointed out that the burden of proving affirmance rested on the lessor, Tindall, JA, continued (at pp 473-4):

> "Considering all the circumstances of the present case, I am not satisfied that the plaintiff's conduct was more consistent with affirmance than with any other theory. Indeed the reverse is the case. The circumstances were peculiar and placed the plaintiff in a difficult position. The situation was not as simple as it is when the subject-matter of the contract consists of movables. The plaintiff had to have a roof over his head and his wife's and his furniture was on the premises. He stated that he knew of no place to which he could move, and there is no reason for doubting the correctness of this evidence; the difficulty of finding accommodation during recent years is a matter of common knowledge. The matter of the removal of his furniture also presented a problem; he could get no transport on the spot and he was short of money. It might have been anticipated when the contract was entered into that difficulties of this kind might arise in the way of the plaintiff if the contract were terminated. The negotiations between the attorneys for a settlement are also relevant. No question was put to elucidate when the negotiations finally broke down. ....

> All these circumstances are relevant in determining whether the plaintiff, who had repudiated and issued summons for rescission, thereafter lost his right to terminate the contract. For the reasons I have stated I find that this defence was rightly rejected by the trial Court."

It will be observed that the conduct of the lessee relied upon by the lessor, i e, the continued occupation of the property, was judged in the light of the reasons that influenced the lessee in not vacating the property for some time after his cancellation of the lease. At least to this extent the lessee's subjective intent was held to be material.

In Palmer v Poulter 1983 (4) SA 11 (T), a full bench of the Transvaal Provincial Division rejected a submission that it is not sufficient to prove acts of an innocent party evincing an intention to waive the right to rely on a prior cancellation of an agreement if in fact there was no such subjective intention. Ackermann, J, said (at p 20) that if such a party, with

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full knowledge of the facts, so conducted himself that a reasonable person would conclude that he had waived his accrued right to cancel the agreement (or had decided not to enforce a prior cancellation), a mental reservation to the contrary will not avail him.

In Mahabeer's case, supra, it was held that it is the decision of the innocent party to waive his right to cancel the agreement which is decisive, and not what the defaulting party was entitled to infer in this regard. (On appeal to this Court the point was left open: Appeal 474/1983.) It is not clear to me, however, whether the approach of Kumleben, J, is necessarily in conflict with that of Ackermann, J. I say so because Kumleben, J, did not pertinently decide that the objective manifestation of the innocent party's decision cannot be decisive, whilst in Palmer's case it was not considered whether regard should be had to the inferences which the defaulting party was entitled to draw from the conduct in question. In particular it was not suggested that

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the innocent party's explanations for his conduct - of which the guilty party may have been unaware - are not material.

In casu the respondent did not rely on the doctrine of estoppel. Nor did he allege that he was misled by the appellant's conduct. His approach was that the appellant had manifested an intention to abide by the sale and that as a matter of law he was precluded from relying on his (purported) cancellation of the sale. It appears to me that on the case made out by the respondent the conduct of the appellant may be either decisive or merely evidential material. If the test is whether the innocent party subjectively intended to waive his right to rely on the prior cancellation of the agreement, his conduct might have been such as to justify a rejection of his protestation that he nonetheless had no intention to waive his right. If, on the other hand, only the external manifestation of his

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intention is relevant, there would be no room for a finding that although his conduct was consistent only with an intention to abide by the contract, he nevertheless did not intend to waive - and therefore did not waive - his right. I find it unnecessary, however, to decide which is the test to be applied in this case since, whichever approach is adopted, the appeal must in my view succeed.

Counsel for the respondent did not submit that the appellant's conduct, viewed in the light of his explanation thereanent, was such as to justify a rejection of his allegation that he did not intend to affirm the sale. And for the reasons set out hereunder, I do not think that those explanations are unreasonable or unworthy of belief.

I turn to the conduct upon which the respondent relied. His counsel submitted that by the continued operation of the business after the receipt of the letter dated 17 November 1982, the appellant evinced

an unequivocal intention to abide by the sale. I cannot agree. If a purchaser of a going concern has cancelled the sale and, subsequent to a rejection of his tender to restore the business to the vendor, continues to trade, he may do so for his own benefit or to preserve the business for the seller. It is only if he retains the business as his own that his conduct is irreconcilable with an intention to rely on the act of cancellation. It is consequently necessary to determine the reason(s) why the appellant continued to trade.

It is clear that a substantial part of the purchase price represented the goodwill of the business. The appellant said - and it stands to reason - that if he had simply closed the business the goodwill would have been lost. At the very least a closure of the business would have had a detrimental effect on the goodwill. Moreover, there was a serious risk of the lease being cancelled which would have made it difficult,

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if not impossible, for the respondent to re-open the business on the same premises at some future date. Assuming, as one must for the purposes of this appeal, that the appellant was entitled to cancel the sale, the continued operation of the business therefore enured for the benefit of the respondent. (Whether the preservation of the business as a going concern made it impossible for the appellant to restore to the respondent the various components of the business, such as the stock in trade, does not arise in this appeal. The question whether the innocent party waived his prior cancellation and the further question whether he is precluded from relying on such cancellation because he has made it impossible for him to restore the merx, should not be confused with each other.)

Counsel for the respondent contended, however, that since the appellant's tender to restore the business to the respondent had been rejected, he was not legally

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obliged to continue operating the business, and that he would not have been liable for any loss suffered by the respondent as a result of a closure of the business. This submission is not borne out by clear authority but, assuming that it is sound, I do not think that it is decisive. The rejection of his tender placed the appellant in an invidious position. Had he closed the business, he could well have been met with a contention- whether sound or not - that he had made it impossible for himself to restore the business as a going concern to the respondent. Hence the decision to carry on trading in order to preserve the business was not unreasonable. In any event, a mistaken view of the appellant that he was obliged to continue trading cannot be equated with an appropriation of the business for his own benefit.

For these reasons I hold that it has not been proved that the appellant unequivocally evinced an intention to abide by the sale. It follows that the

respondent failed to establish a waiver by the appellant of his right to rely on the cancellation of the sale. I may add that this conclusion accords with the decision of the Supreme Court of Wyoming in Fryer v Campbell 43 P (2d) 994.

The respondent elected to proceed on notice of motion knowing that the dispute as to the alleged misrepresentations could not be resolved in motion proceedings. He has failed on the only point which the court a quo was called upon to decide on the papers before it, and it seems clear that, but for the court's erroneous view of the appellant's conduct, the application would have been dismissed with costs. Counsel for the appellant intimated, however, that in order to obviate unnecessary delay and costs, he would prefer the matter to be sent for trial, the notice of motion to stand as summons and the filing of the opposing affidavit as the first respondent's entry of appearance.

Counsel for the respondent submitted that, in the event of the appeal succeeding, the costs in the

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court a quo and the costs of the appeal should be ordered to be costs in the trial. In this regard he pointed out that at the trial the appellant may fail to establish the misrepresentations in question and thus his right to cancel the sale. In view of the fact that the respondent took the calculated risk of motion proceedings proving to be abortive, the submission is without merit.

In the result the following orders are made:

1) The appellant's application for condonation is granted and he is directed to pay the costs occasioned by the application.

2) The appeal is allowed with costs and the following is substituted for the order made by the court a quo:

(a) The matter is referred to trial. The notice of motion is to stand as the applicant's summons and the opposing

affidavit as the first respondent's entry of appearance. The applicant's declaration must be filed within a period of one month.

(b) The respondent is ordered to pay the costs of the motion proceedings, save for those costs relating to the notice of motion (which is to stand as summons), the service thereof and the filing of the opposing affidavit (in lieu of entry of appearance) which would have been incurred had a summons been issued and served and appearance entered in the normal course of the action.

3) The period of one month is to run from the date of this judgment.

H.J.O. VAN HEERDEN, JA

RABIE, CJ
CORBETT, JA
CILLIé, JA
BOTHA, JA

CONCUR