AVOID DAMAGES CLAIMS: STAND BACK AND MAKE SURE YOU ARE REALLY ENTITLED TO CANCEL

Du Preez v Tornel Props (Pty) Ltd (20714/14) [2015] ZASCA 134 (29 September 2015)

When contractual relationships sour, it is not uncommon to find that there are disputed issues between the parties and both may at any given time feel justified to cancel the agreement. This judgment explains clearly that our law deciphers the sequence of each party's actions, thereby ascertaining what prompted the cancellation and whether it was justifiable.

The Judgment can be viewed here.

FACTS

Du Preez and Jonker Projekte CC (Jonker CC) entered into a building contract in November 2006 in terms of which Jonker CC undertook to build a house on Du Preez's property for R1 million. The agreement provided that Du Preez would pay the contract price in scheduled progress payments as and when certain phases of the works were completed. The payments would be made after approval by an inspector or valuer.

A while after building works commenced, Jonker CC was liquidated. Subsequently, Tornel Props (Pty) Ltd (Tornel Props) purchased the sole right to complete the partially finished construction from Jonker CC. The offer referred to the building works of Du Preez and also included other projects undertaken by Jonker CC. The offer was accepted and the agreed amount was paid to the liquidators.

In December, Tornel Props and Du Preez concluded a partly written and partly oral agreement. The written portion of the agreement included the original building contract and annexures concluded between Jonker CC and Du Preez. It was understood that Tornel would complete the works in accordance with the building plans and specifications as attached to the original agreement and that Du Preez would pay the full contract price in scheduled progress payments as and when certain phases of the works were completed, and after approval by an inspector or valuer.

Tornel Props proceeded with the building works.

It appeared that during a December 2006 meeting, Tornell Props raised the question of VAT being excluded from the contract price. Du Preez rejected the suggestion and insisted that the terms of the contract price included VAT.

During March 2007 Tornel Props presented an invoice for a progress payment. The liquidators of Jonker CC advised Du Preez that the payment could be made. However, no payment was made.

In May a further invoice was sent for work performed up to date and including the previously unpaid amount. The invoice also contained a proviso that payment must be made within three working days from date of invoice, failing which Tornel Props would stop the building works because of cash flow problems. Discussions between the parties continued and included details of work still to be completed, such as whether Tornel Props was obliged to construct the swimming pool, the paving and the balustrades. Du Preez's stance was that Tornel Props was obliged to carry out this work in terms of the contract. Notwithstanding these disputes, the building works continued.

In May 2007 and in response to the previous invoice, Du Preez wrote to Tornel Props confirming the contract price, but said that payment was only due and payable upon completion of the building works. This was contrary to the provisions of the contract. The letter also advised that, should Tornel Props stop the building works, it would be tantamount to repudiation. (Du Preez's stance was clearly that no progress payments would be made.)

Tornel Props replied, confirming the contract price, but maintaining that it excluded VAT. The letter also alleged that the parties orally agreed that Tornel Props was not obliged to build the out-buildings, the paving, swimming pool and the balustrades. A further demand was made for payment of the outstanding previous invoice before a certain date, failing which Tornel Props would cease building and summons would be issued. Du Preez disputed that Tornel Props was obliged to construct the specified items and stated that if Tornel Props ceased building, it would be interpreted as a repudiation of the contract.

To this Tornel Props responded and indicated that it was clear that Du Preez did not intend to make any payment. As such it undertook not to perform any further building work until payment was received. Du Preez then indicated that the refusal to continue building constituted a repudiation by Tornel Props, which Du Preez accepted, and cancelled the agreement.

Tornel Props accordingly issued summons against Du Preez claiming damages on the basis that Du Preez breached the contract, alternatively repudiated it by failing to make progress payments. In the result, Tornel Props alleged it had cancelled the contract.

HELD:

- The refusal by Du Preez to make payment of the amount claimed by Tornel Props was not based upon the failure by Du Preez to have this amount approved by an inspector or valuer. Rather, the refusal was based solely upon Du Preez's contention that no payment would be made until the house was complete, contrary to the express terms of the agreement.

- It was clear from the correspondence that the peripheral dispute between the parties as to whether Tornel Props was obliged to build the disputed items, and whether VAT was included in the contract price, did not cause the termination of their contractual relationship.

- Tornel Props took the decision to cancel because Du Preez refused to make payment of any amount until the house was complete. It was clear that the decision by Tornel Props to cease building culminated in the termination of the contract. If Du Preez had tendered to make a progress payment, provided its value had been approved by an inspector or valuer in terms of the contract, the outcome would have been entirely different.

- Du Preez's refusal to make any payment at all until the house was complete appears to have been motivated by the fear that Tornel Props would not complete the house. Whether or not this was warranted, it certainly did not entitle Du Preez, in the face of the express wording of the contract, to refuse to make any payments until the house was complete. The safeguard in the contract for Du Preez lay in the right to insist that any claim for a progress payment be approved by a valuer or inspector.

- It was therefore clear that Du Preez never proved that she relied upon Tornel Props' alleged repudiation of the agreement - in refusing to build the disputed items and maintaining that VAT was included in the contract price - as justification for cancelling the agreement. Du Preez used the refusal by Tornel Props to continue building as an act of repudiation, thereby earning the election to decide to cancel the agreement, which Du Preez then did. The other issues, although complained of, were never relied upon as acts of repudiation by Du Preez.

- The central issue accordingly was whether the refusal by Tornel Props to continue building was legally justified or whether it amounted to a repudiation which entitled Du Preez to cancel the contract.

- The test for repudiation was objective, the enquiry being whether conduct exhibits a deliberate and unequivocal intention no longer to be bound by the terms of the contract. On the facts in the present matter, it was clear that Du Preez was obliged to make progress payments. The reciprocal obligation upon Tornel Props to continue building was dependent upon the performance by Du Preez of this obligation.

- The failure to comply with the terms and conditions of the contract by Du Preez in not making progress payments as agreed, entitled Tornel Props to withhold its reciprocal obligation to continue building the house.
- As such, Du Preez's objectively unjustifiable conduct in treating this as a repudiation of the agreement and purporting to cancel the agreement, amounted to a repudiation which Tornel Props accepted and justifiably cancelled the agreement.

The conclusion was accordingly that Du Preez repudiated the agreement by purporting to cancel the agreement, leading to its valid cancellation by Tornel Props.

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