

## CANCELLATION OF AN AGREEMENT HAS A SPECIFIC CONSEQUENCES: MAKE THE RIGHT CHOICE

**Mostert NO and Others v Du Preez NO and Others (10569/2017) [2019] ZAWCHC 150 (8 November 2019)**

*In our law, when a party breaches an agreement, the right to exercise an election is bestowed on the 'innocent' party. The remedies are juxtaposed: the innocent chooses either to cancel the agreement or to hold the other to the agreement and claim specific performance. This decision must be taken with caution to avoid a scenario as in the present judgment, where the innocent party sought to cancel the agreement but nonetheless relied on the agreement to claim certain relief.*

The Judgment can be viewed [here](#).

### FACTS

In November 2012 the Kromspruit Trust ('the KT') sold two farms and other assets as a going concern to the Jacques Marais Du Preez Trust ('the JT') for R20 million. The effective date of the agreement was 1 March 2012, on which date the JT took occupation of the property.

The purchase price was to be paid in monthly instalments over 20 years, with interest. As security for the payment of the purchase price, the JT consented to the simultaneous registration of a first mortgage bond over the property in favour of the KT. Transfer was to occur on or as soon as possible after signature date. The JT agreed to maintain the property as a high quality grape farm.

Clause 14.1 provided that:

*"14.1 Should the Purchaser ... be in breach of any of its obligations ... and fail to remedy such default or breach within a period of fourteen (14) days after the giving of written notice ..., the Seller shall be entitled but not obliged, without further notice and without prejudice to any other right or remedy which may be available to the Seller in terms hereof or at law –*

*14.1.1 to claim and recover from the Purchaser forthwith the whole of the purchase price outstanding;  
or*

*14.1.2 to cancel this agreement to repossess the Subject matter and retain the aggregate amount of all amounts paid by the Purchaser to the Seller in terms hereof as a genuine pre-estimate of damages; or*

*14.1.3 alternatively, claim and recover from the Purchaser such damages as the Seller will have suffered or sustained in consequence of the Purchaser's default or breach, and/or such cancellation in which event the Seller shall be entitled to retain until the final determination of such damages and payment thereof by the Purchaser, all amounts actually paid by the Purchaser to the Seller in terms hereof".*

Clause 14.3 stated that "(t)he provisions of clause 14.1 shall not be construed as binding the Seller to give any notice to the Purchaser before becoming entitled to claim and recover payment of any specific amount overdue and unpaid by the Purchaser or to enforce specific performance by the Purchaser of any obligation in terms hereof".

The property was never transferred to the JT and the contemplated mortgage bond not registered over the property. From the initial instalment due, the JT did not make payment in terms of the agreed payment schedule. Although

various indulgences in respect of payment were granted to the JT, revised payment terms were not recorded in writing.

The KT's attorneys had sent a letter of demand in April 2017 to the JT giving them 14 days to rectify the breach, failing which the KT "*will cancel the sale agreement*" and demand return of the property. The letter stated further that the KT's attorneys held instructions "*to cancel the agreement should you not remedy your breach timeously*". The JT had failed to remedy the breach within the stipulated period. No further communication was forthcoming from the KT's attorneys.

The KT subsequently brought an application to Court alleging that the JT was in breach as it had failed to make the payments as agreed and that the agreement has been cancelled as a result. It sought the return of the farms in terms of clause 14 of the agreement.

In the JT's answering affidavit, it was expressly denied that the KT was entitled to cancel the agreement or that they had validly done so, with the KT's purported cancellation stated to amount to a repudiation of the agreement. To this the KT responded and alleged that in terms of clause 14.3 of the agreement, the KT was not required to give notice to the JT in order to enforce their rights to claim specific performance in terms of the agreement.

The JT further argued that it had spent some R8,9 million towards settlement of the purchase price and R9,6 million in maintaining and improving the property. The JT denied that it was in breach of the agreement, denied that the KT was entitled to cancel the agreement or claim back any portion of the subject matter and stated that it would be entitled to claim reimbursement of the sum of R9,6 million and assert an improvement lien over the property which would entitle it to retention of possession of the property pending reimbursement.

## HELD

- The case made out in the founding affidavit by the KT was that, as a result of the JT's breach, the agreement had been cancelled. Yet, reliance was specifically placed on clause 14.3 of the agreement to seek specific performance of the provisions of the agreement which entitled it to claim back the property.
- Whilst a party may seek specific performance and, in the alternative, a claim for cancellation of the contract and return of the property delivered under it, it was apparent that this was not the relief sought in this matter.
- Cancellation and specific performance are distinct remedies available in response to breach of contract. In our law, when one party to a contract commits a breach of a material term, the other party is faced with an election. He may cancel the contract or he may insist upon due performance by the party in breach. The remedies available to the innocent party are inconsistent. The choice of one necessarily excludes the other, or, as it is said, he cannot both approbate and reprobate. Once he has elected to pursue one remedy, he is bound by his election and cannot resile from it without the consent of the other party. A defendant does not have the right to exercise this choice; he cannot claim to be allowed to pay damages instead of having an order for specific performance entered against him.
- The KT's case before the Court was founded on cancellation and the claim for specific performance was thus not available to it, as pleaded.
- Further, these were motion proceedings; a mechanism for the resolution of legal issues based on common cause facts, not factual disputes. For the latter, action proceedings must be instituted. The present case was one for the latter as there were clear disputes of fact, not only with regard to whether there was cancellation (which the JT denied), but also as to whether the JT held an improvement lien over the property, and if so the extent of such lien.
- The KT had thus not proved an entitlement to the relief sought and accordingly the application failed.

## CONCLUSION

The application was dismissed with costs.