THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE
Case no: 734/2013

In the matter between:

BENJAMIN CHARLES JOSEPH VESAGIE NO	**FIRST APPELLANT**
BENJAMIN FRANCIS VESAGIE NO	**SECOND APPELLANT**
BENJAMIN CHARLES JOSEPH VESAGIE	**THIRD APPELLANT**

and

PAUL ERWEE NO	**FIRST RESPONDENT**
LOUIS STEFANUS VENTER NO	**SECOND RESPONDENT**

Neutral citation: *Vesagie NO & others v Erwee NO & another* (734/2013) **[**2014] ZASCA 121 (19 September 2014)

Coram: **Brand, Bosielo, Shongwe and Majiedt JJA and Gorven AJA**

Heard: **8 September 2014**
Delivered: **19 September 2014**

Summary: Contract-sale of shares- contract which makes provision for deferred payments of the purchase price and for the payment of interest on such deferred payments is a credit transaction in terms of s8(4)(*f*) of the National Credit Act 34 of 2005- contract null and void ab initio where seller of shares not registered as a credit provider in terms of s40 of that Act.

ORDER

On appeal from: Gauteng North High Court, Pretoria (Makgoba J sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and substituted by the following order:

'a) The claim is dismissed with costs.

b) The agreement, Annexure "A" to the plaintiff's particulars of claim, is declared to be null and void ab initio.'

JUDGMENT

Gorven AJA (Brand, Bosielo, Shongwe and Majiedt JJA concurring)

[1] This appeal turns on whether an agreement of purchase and sale provides that interest will be payable on deferred payments. If it does, the agreement amounts to a credit transaction under s 8(4)(*f*) of the National Credit Act 34 of 2005. In such a case, unless the party extending the credit is registered as a credit provider in terms of s 40 of the Act, the agreement is unlawful. The consequence of such a finding is that a court is required to declare the agreement null and void ab initio.[1]

[2] The first two appellants, as trustees of the BEN Trust, were nominated by the third appellant as the purchasers under an agreement for the sale of shares

[1] Other consequences also ensue which will be discussed later in the judgment.

and loan accounts in various companies. The third appellant concluded an agreement to this effect with the respondents as trustees of the ACE Trust. The third appellant in his personal capacity guaranteed the performance of the trustees of the BEN Trust. The shares and loan accounts were transferred to the first and second appellants. Payments of R750 000 were made under the agreement. No further payments were made. The respondents sued the appellants for the balance of R14 250 000, interest and costs.

[3] By the time the matter went to trial, the only live issue between the parties was whether the agreement in question constitutes a credit transaction as envisaged by s 8(4)(*f*) of the Act. It was agreed that, if the court found that the agreement falls within the ambit of s 8(4)(*f*) of the Act as a credit transaction, the claim should fail because the ACE Trust had not registered as a credit provider in terms of s 40 of the Act. Conversely, if the court found that the agreement does not amount to a credit transaction, the ACE Trust would be entitled to judgment as prayed.

[4] Section 8(4)(*f*) reads as follows:

'An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is–

(*f*) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of–

(i) the agreement; or

(ii) the amount that has been deferred.'

The parties were ad idem that the agreement is not one contemplated in subsection (2), nor is it either a credit facility or a credit guarantee. In addition, it does not attract a charge or fee. The only issue is whether it provides that interest is payable in respect of the amount for which payment has been deferred.

[5] No evidence was led. The trial court found that the agreement does not provide for interest to be paid in respect of the amount for which payment was deferred and that the agreement is therefore not a credit transaction. As a result, the court held that it was enforceable by the respondents. The appellants were ordered to pay the balance of the purchase price, interest and costs. The appellants appeal with the leave of that court. It should be mentioned that the respondents indicated prior to the hearing of the appeal that, although the first respondent would be in attendance and that the appeal was opposed, no formal appearance on behalf of the respondents would take place and no heads of argument would be delivered.

[6] The only paragraph of the agreement which bears on the issue at hand is paragraph 2. It is necessary to set this out in full. It reads as follows:

'2.1 Totale koopprys is R15 Miljoen waarvan die eerste R5 M betaalbaar is na 12 maande en die res, 18 maande na ondertekening van hierdie ooreenkoms.

2.2 Rente sal gehef word teen prima minus 1 %.

2.3 'n Minimum betaling van R50 000.00 pm betaalbaar nie later as die 28e van elke maand vanaf 28 Oktober tot 28 Februarie 2009. Daarna 'n minimum betaling van R100 000.00 per maand voor die 28e van elke maand.

2.4 Enige uitstel of verlenging van tyd vir betaling kan onderhandel word maar geskrewe toestemming tot die terme moet 14 dae voor die prestasie datum ooreeengekom word.

2.5 Indien enige betaling of enige voorwaarde tov hierdie ooreenkoms nie nagekom word nie:

2.5.1 sal 'n finale aanmaning om te presteer gestuur word per e-mail.

2.5.2 Indien die regstelling nie binne 14 dae gemaak word na versending van die e-mail, sal die totale uitstaande koopsom onmiddellik betaalbaar en opeisbaar wees.

2.5.3 Rente op laat betalings sal gehef word.'

[7] The agreement was concluded on 24 October 2008. The scheme of the agreement is as follows. There is no dispute that it provides that payment of the purchase price is deferred. In this regard, paragraph 2.1 specifies payment of

R5 million by 23 October 2009 and of the balance by 23 April 2010. Paragraph 2.2 provides that interest shall be levied at a specified rate. Paragraph 2.3 provides that minimum monthly payments must be made. Paragraph 2.4 provides a mechanism to reach agreement if the purchasers wish to further defer payments. Paragraph 2.5 provides what happens on breach. This is to the effect that, if the purchasers default on any payment and persist in the default despite written demand to remedy it within 14 days of the demand being sent by email, the balance of the purchase price outstanding at that time would become claimable and interest would be levied on late payments.

[8] The trial court held that paragraph 2.2 'has no meaning at all' but it states that interest shall be charged at the prime overdraft rate less one percent. Granted, it does not in terms say whether this interest is to be charged from the outset on the amounts outstanding without any default on the part of the purchaser. This does not, however, render the paragraph meaningless. At the very least, the parties are agreed that it specifies the rate at which interest must be charged on default. It must therefore be interpreted according to accepted principles.[2]

[9] Makgoba J took as his starting point for interpreting documents that 'a court should …uphold the agreement rather than destroy it.' In support of this departure point, he called in aid the maxim '*ut res magis valeat quam pereat*'. This court has held that the maxim operates as follows:

'It appears to me that, in construing a contract, the Court is not entitled to strain words because of the provisions of an Act which might affect the validity of the contract, or to be influenced by those provisions in determining whether the contract is reasonably capable of a

[2] As to which see a summary of the approach in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

meaning which will not make the contract invalid, but that when it has come to a conclusion that the contract is reasonably capable of such meaning, it will apply the maxim.'[3]

What is clear from this dictum, and the cases that follow it, is that the normal principles of interpreting a contract must be applied. This will determine whether the contract is reasonably capable of a meaning which will not make the contract invalid. If it is not reasonably capable of bearing such a meaning, the maxim does not apply. Where it is so capable, the maxim must be applied and the contract held to be valid.

[10] The maxim should therefore not be used as a point of departure in interpreting agreements. It must be applied only once this has happened and the agreement is ambiguous but is also reasonably capable of a meaning which will not make the contract invalid.[4] It 'cannot be used to justify an interpretation of a contract contrary to its clear terms and the probable intent of the parties thereto'.[5]

[11] It must therefore be considered whether the agreement is reasonably capable of bearing the meaning that interest is not to be levied on the deferred payment of capital. Paragraph 2.2, providing that interest shall be paid, is not qualified or made conditional on the occurrence of a future event. It simply provides that interest shall be levied ('gehef') at the rate of prime less one percent. The plain, unvarnished meaning of these words is that interest is to be charged by the sellers, not that it is to be charged only in certain circumstances.

[12] As was submitted on behalf of the appellants, since paragraph 2.2 follows directly after paragraph 2.1, 'it is contextually linked to the capital amount'.

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[3] *Hughes v Rademeyer* 1947 (3) SA 133 (A) at 138.

[4] This is also the thrust of the dictum in *Annamma v Moodley* 1943 AD 531 at 539, where it was said: 'If the agreement is capable of two meanings it should rather be construed in that sense in which it can have some operation than in that in which it cannot have any.'

[5] Per EM Grosskopf JA in *Sunshine Records (Pty) Ltd v Frohling & others* 1990 (4) SA 782 (A) at 792J-793A.

This accords with the interpretation that interest is to be levied on the outstanding capital sum from time to time. The words and the context taken together thus support this interpretation.

[13] In addition, the location of paragraph 2.2 as a separate paragraph to the breach paragraph in 2.5.3, lends support to the inference that the interest mentioned in paragraph 2.2 applies without any breach needing to occur. Both clauses specify that interest shall be levied. There is no conceivable reason why two paragraphs would be included if interest is only to be charged in one circumstance. If the drafters had wanted to limit the levying of interest to an occasion of default, the logical way of doing so would have been to omit paragraph 2.2 and stipulate the interest rate in paragraph 2.5 because interest would not apply under any other circumstances.

[14] As was submitted on behalf of the appellants, therefore, 'the apparent purpose to which clause 2.2 is directed is the levying of interest on the capital amount and the apparent purpose to which clause 2.5.3 is directed is the levying of interest on late payments'.

[15] On the general principles of interpreting agreements, accordingly, the agreement provides that interest is to be levied on any deferred payment from inception. The corollary of this finding is that the agreement is not reasonably capable of bearing the meaning that interest is only to be levied in the event of default. There is no ambiguity in this regard.

[16] Even if, after this analysis, it can be contended that any ambiguity remains, recourse may be had to surrounding circumstances, including the conduct of the parties 'showing the sense in which they acted on the

document'.[6] As will be seen, the sense in which the respondents acted on the agreement is totally at odds with the interpretation they now contend for.

[17] The first set of the respondents' particulars of claim included in the record contains paragraph 10.4 which alleges that one of the terms of the agreement is as follows:

'The balance of the purchase price of the shares would bear interest calculated from the date of conclusion of the agreement at a rate 1% below the prime rate of interest . . . '.

After alleging a breach, the particulars aver that:

'The unpaid balance of the purchase price of the shares, inclusive of interest thereon calculated at 1% below the prime interest rate as applicable from time to time and calculated up to 28 February 2012 amounts to R19 252 905.20, which amount is constituted and computed as set out in the account summary annexure "B" hereto. The ACE Trust is furthermore entitled to interest on the aforesaid sum of R19 252 905.20 calculated at the rate of 8% per annum (being 1% below the prime interest rate as currently applicable) from 1 March 2012 to date of payment.'

The schedule forming annexure "B" levies interest from day one on the deferred payments. It does not only show interest being levied after default by the appellants. This clearly shows the probable intent of the respondents that interest would be charged on the deferred payment of the capital sum.

[18] An amendment to the particulars of claim was precipitated by the appellants' plea to the effect that the agreement amounts to a credit transaction and that, because the respondents had not registered as credit providers in terms of s 40 of the Act, the respondents could not base a cause of action on the agreement. The amended particulars of claim replaced paragraph 10.4 with one referring to interest being charged only on breach and, after alleging a breach included the following paragraph:

[6] *Coopers & Lybrand & others v Bryant* 1995 (3) SA 761 (A) at 768C-E.

'The unpaid balance of the purchase price of the shares and loan accounts in the amount of R14 250 000.00 was payable by no later than 24 April 2010, being a date 18 months after the date of signature of the agreement. By reason of the failure of the Ben Trust to make payment of the balance of the purchase price by 24 April 2010, the ACE Trust is furthermore entitled to interest on the sum of R14 250 000.00 calculated from 25 April 2010 to date of payment, at a rate of 8% per annum compounded and capitalised monthly on the last day of each month, being 1% below the prime rate of interest which has applied at all times since 24 April 2010.'

[19] It is clear that the first time the respondents contended that the agreement only levied interest in the event of default, was after the point was taken in the plea. The conduct of the respondents in acting on the agreement accordingly adds further support to the conclusion that interest is to be levied on deferred payments and not only in the case of default.

[20] It remains to consider the finding of the court *a quo* that to interpret the agreement 'in such a manner that it would be rendered invalid due to the fact that it is struck by the provisions of section 8(4)(*f*) of the National Credit Act, will lead to unbusinesslike or oppressive consequences'. Far from leading to unbusinesslike consequences, the payment of interest on a deferred payment is a routine provision in business agreements. This is all the more so when the merx has been transferred and the purchaser has the use and enjoyment thereof without full payment having been made, as is the case in the present matter.

[21] As to oppressive consequences, the learned judge held that such an interpretation would require the respondents to refund the R750 000 paid to them without recovering the shares transferred by them to the appellants. One cannot, without more, make a finding that this would be oppressive. The respondents have had the benefit of the use of the shares and loan account. There is no evidence as to what that benefit might have been worth. I can

therefore find no warrant for such a conclusion. It is so that s 89(5)(*b*) in terms provides for the refund of any money received by the credit provider. The section which previously provided that the credit provider could not recover any performance made under the agreement has been struck down as unconstitutional.[7]

[22] The agreement in question is clearly a credit transaction as envisaged by s 8(4)(*f*) of the Act. It is accordingly void ab initio. The parties are required to make restitution of any performance which took place pursuant to the agreement. Makgoba J erred in using as his starting point for interpretation the point of view that a court 'should uphold the agreement rather than destroy it'. This starting point in essence decided the very issue which was in dispute. In this he erred and the appeal must be upheld. Section 89(5) of the Act requires a court to order that an agreement is void as from the date it was concluded if it is rendered unlawful by the Act. This will therefore form part of the order.

[23] The following order shall issue:

1 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel where two counsel were employed.

2 The order of the trial court is set aside and replaced by the following order:

'a) The claim is dismissed with costs.

b) The agreement, Annexure "A" to the plaintiff's particulars of claim, is declared to be null and void ab initio.'

T R Gorven

Acting Judge of Appeal

[7] This was s 89(5)(*c*) and was struck down in National *Credit Regulator v Opperman* 2013 (2) SA 1 (CC).

Appearances

For Appellant:	A B Rossouw SC
	Instructed by:
	Van Zyl Le Roux, Pretoria
	Honey Attorneys, Bloemfontein
For Respondent:	No appearance