Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE DIVISION, CAPE TOWN]

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(WESTERN CAPE DIVISION, CAPE TOWN)

APPEAL CASE NO. **A525/2015**

CASE NO. **4832/2014**

In the matter between:

ASHRAF DAVIDS	First Appellant
SHEREEN MATHIR	Second Appellant
MOEGAMAT ALIE DAVIDS	Third Appellant
MINISTER OF AGRICULTURE, FORESTRY & FISHERIES	Fourth Appellant
COMPANIES & INTELLECTUAL PROPERTY COMMISSION	Fifth Appellant
MEERMIN VISSERYE CC	Sixth Appellant

and

LYA LOUW	First Respondent
MARIA JOHANNA ATKINS	Second Respondent
MARIA BLANKENBERG	Third Respondent
MARIA MAGDALENA BOOYSEN	Fourth Respondent
MAGRIETA KAMFER	Fifth Respondent
JOHANNA KAMFER	Sixth Respondent
PATRICK LEONARD N.O	Seventh Respondent
GEORGE RUDOLPH WHITTLE N.O	Eighth Respondent
SABINA SWARTZ	Ninth Respondent
JOHANNA SUSANNA TAYLOR	Tenth Respondent

Judgment Delivered: 27 October 2016

LE GRANGE, J:

[1] This is an appeal against the whole judgment and order of Cossie AJ, which was delivered on 7 October 2014. The First to Third and Sixth Appellants ("The Appellants"), after petitioning the Supreme Court of Appeal, was granted leave to appeal to the Full Bench of this Division.

[2] At the heart of this case is the order by the court a quo cancelling an agreement of sale in respect of the members' interest in the Sixth Appellant, Meermin Visserye CC

("the CC"), which was concluded on 8 July 2012 between the Respondents and First and Second Appellants, respectively. The court a quo ordered, inter alia, that the Appellants' take all necessary steps to transfer the shares in the CC to the Respondents in equal shares; to provide full details to the Respondents in respect of the 2013 and 2014 catch under the small pelagic fishing permit held by Meermin Visserye (Pty) Ltd; and to pay the proceeds of the said 2013 and 2014 catch to the Respondents'.

[3] The salient facts underpinning this matter briefly stated are the following. The late Antjie Leonard and Catherine Johanna Adams (whose executors are the Seventh and Eighth Respondents respectively), including the remaining Respondents, were awarded a small pelagic fishing permit for quotas of 383.11 tons of Pilchards and 2348.49 tons of Anchovy. The permit was issued to the CC. The members' interest in the CC was held in equal shares by the Respondents. The surviving Respondents are all elderly women hailing from the West Coast fishing town of Lamberts Bay who had been engaged in a variety of capacities in the fishing industry for some time, but had never previously possessed or operated their own fishing permit. Soon after the CC was awarded the fishing permit, it became apparent that the Respondents would be unable to harvest the relevant quotas themselves due to a number of reasons and were prepared to sell their members' interest in the CC. The selling of fishing rights and quotas in this manner appears not be an uncommon feature in the fishing industry.

[4] According to the Respondents, the husband of the Second Appellant and a former official of the Department of Sea Fisheries, approached them regarding the sale

of the fishing permit. On 8 July 2012, the Respondents eventually concluded a sale of the entire members' interest in the CC to the First and Second Appellants for a purchase price of R 4-million. The principal asset of the CC was the said small pelagic fishing permit. In terms of the agreement of sale, the purchase price was payable in a lump sum of R 400 000 to each of the Respondents.

[5] An addendum to the sale agreement was concluded on 25 November 2012 which essentially amended the payment provisions in the sale agreement. According to the Addendum, the Respondents were to receive an amount of R 50 000 payable from 'February 2012 to May 2012'. The Addendum also made provision for the pro rate deduction of monies owed to K Cookson and a certain firm of attorneys.

[6] The Appellants also rely on a further oral agreement between the parties. According to the Appellants, by early May 2013, it became apparent that a number of the Respondents were spending the R 50 000 payments within one or 2 weeks of receiving such payments. According to the Appellants it was then agreed that smaller payments should be made to the respective Respondents. In this regard, the Appellants stated in the answering affidavit that the First Respondent requested more than 20 ad hoc payments between 16 July 2013 and 14 January 2014. These payments apparently amounted to a total of R 63 900 resulting in an overpayment in the amount of R 2 900 to the First Respondent. According to the Appellants none of the Respondents took issue with the revised payment period option.

[7] There is some dispute as to whether the First and Second Appellant's husband convinced the Respondents to sell their members' interest in the CC. According to the Appellants, the Respondents were actively looking for a buyer since February 2012. They initially approached other interested parties.

[8] According to the Appellants, the Second Appellant's husband acquiesced to meet the CC's members after repeated advances by them. The Appellants also stated that it was only after a meeting with all the members of the CC in July 2012 that the Respondents resolved to sell their interests to the Appellants. Moreover, five of the Respondents' according to the Appellants were assisted by a professional financial advisor in their dealings with the Appellants and the assertion that the Respondents were taken advantage of, due to their advanced age, is unfounded.

[9] It is not in dispute that the CC's only asset, at the time, was a fishing right granted in terms of the provisions of s 18 of the Marine Living Resources Act, 18 of 1998 ("the MLRA") for a small pelagic fishery, to exploit anchovy and pilchard. Annual permits are issued in terms of the provisions of s 13 of the MLRA which detail the specific quantities a fishing right holder may catch in a particular fishing season. It is not in dispute that in 2012 the CC had a quota for 383.11 tons of pilchards and 3248.49 tons of anchovy.

[10] Whatever the dispute might be as to who started the negotiations between the parties, what is evident on the papers filed of record, is that the Respondents were

unable to harvest from the sea the CC's quota on their own. They willingly entered into the sale agreement with the Appellants on 8 July 2012, whereby they sold the entire members' interest in the CC, as it then was, to the First and Second Appellants in terms of a written agreement of sale ("the sale agreement"). The entire member's interest in the CC was thereafter, on 10 September 2012, transferred to the Third Appellant.

[11] The material terms of the sale agreement can be summarised as follows:

11.1 The purchase price was to be R4 000 000.00 payable in equal amounts of R400 000.00, less set-off of any liabilities of the CC, to each of the Respondents.

11.2 The purchase price was payable on the effective date, being the date on which the Fourth Appellant ("the Minister") issued to the CC its annual small pelagic fishing permit for the 2013 fishing season.

11.3 100% of the members' interest in the CC was to be transferred to the purchasers by the sellers.

[12] It is not in dispute that in November 2012 all the Respondents signed a form for the authorisation of the transfer in terms of s 21 of the MLRA. The Department of Fisheries in the interim apparently simplified the relevant forms and as a result did not

process the completed authorisation form. In January 2014, the Respondents again assisted the Appellants to complete the form as required by s 21 of the MLRA.

[13] According to the Respondents when the full amount of the purchase price became due and payable during November 2012, the First Appellant approached them, where it was apparently suggested by the First Appellant that if the Respondents were to take the purchase price in a lump sum they could be exposed to a substantial tax liability. The Respondents aver they were persuaded by the First Appellant to accept payment of the purchase price in installments of R50 000 per month until June 2013 to avoid such tax liability. As a result, the parties on 25 November 2012 signed an addendum agreement, which changed the payment structure.

[14] The addendum recorded the advance payments made, being R 212 165, to the Respondents and the deductions for amounts owing to creditors, namely Cookson and to the Respondents Attorneys. According to the Addendum (as recorded in paragraph 3), payments were to be made as follows: (a) immediate payment of R 50 000 less the advanced amounts, and a pro-rata contribution to settle the debt to Ms. Cookson; (b) on 20 December 2012, R50 000 each, less a pro-rata contribution to cover 50% of the debt to the Attorneys of the Respondents; (c) on 15 January 2012 (sic), the same as the previous months; and (d) from 15 February 2012(sic) to 15 May 2012(sic) (four months), R50 000 each per month. (*It is evident that the date 2012 as reflected in the Addendum in paragraph 3.4 to 3.5 should have read 2013*).

[15] The Respondents in the Founding Affidavit, premised the relief sought in the court a quo on the following material averments, namely, that the Appellants had breached the sale agreement and defaulted on their obligations by underpaying them in terms of the Addendum; the members' interest in the CC was transferred to the Third Appellant on 10 September 2012, at which time the full purchase price had not been paid; the approval of the Fourth Appellant was a condition precedent to the sale becoming binding which had not been complied with; and that the First and Second Appellants caught the fishing quota for the 2013 season without any authorisation which resulted in the fishing permit being revoked by the Fourth Appellant ("the Minister").

[16] In paragraph [29] of the Founding Affidavit, the Respondents aver that the Appellants failed to make the full payment of R 400 000 to each of them as stipulated in the addendum agreement and only made the following payments to them during the course of 2012-2014:

<u>First Respondent</u> - R 281 090.10 (27 November 2012 to 2 November 2013)

<u>Second Respondent</u> - R 222 655.05 (15 January 2013 to 9 November 2013)

<u>Third Respondent</u> – R 248 650.10 (15 December 2012 to 14 December 2013)

<u>Fourth Respondent</u> – R 269 155.05 (27 November 2012 to 15 January 2014)

<u>Fifth Respondent</u> – R 250 655.05 (27 November 2012 to 20 September 2013)

<u>Sixth Respondent</u> – R 274 655.05 (29 November 2012 to 24 December 2013)

Seventh Respondent – R 254 755.05 (27 November 2012 to 20 December 2013)

Eight Respondent – R 181 600.00

Ninth Respondent – R 286 705.95 (27 November 2012 to 14 January 2014)

Tenth Respondent – R 244 255.10 (27 November 2012 to 13 December 2013)

[17] The Appellants in disputing the relief sought, raised a number of defences. Firstly, the Appellants denied that they were fishing unlawfully in 2013, and without a permit. According to the Appellants, the CC was issued with a valid fishing permit by the Minister in February 2013. It was attached to the Answering Affidavit. The Appellants disputed the actual amounts owing to the Respondents and claimed some of the Respondents had in fact been overpaid. According to the Appellants, they were entitled to withhold payments in terms of clause 5.1.6 of the sale agreement when it came to light that the Respondents had caused the permit of Meermin Visserye for 2014 to be revoked by the Minister. (*Clause 5.1.6 of the sale agreement essentially provides that each Respondent shall immediately cease to involve themselves in any way in the business of the CC and shall cease to hold themselves out as members of the CC. Furthermore, if any of the Respondents breach the provision or in any way prejudice the agreement or act in a way that may threaten the issue of the CC's permit, the Appellants shall be entitled to withhold any payments that may be payable to the Respondents*).

[18] The First Appellant also tendered payment of any part of the purchase price still outstanding although it suggested that such amount (if any) was never quantified by the Respondents. The Appellants also aver that the Respondents signed the necessary documentation including the CK2 amendment forms to allow for the change in membership of the CC to occur. Accordingly the agreement of sale did not provide a date by which this should happen and as such there was nothing untoward about the Third Appellant becoming the sole member on 10 September 2012. The Appellants further aver that they were never notified of an alleged breach of the agreement of sale nor were they placed in *mora*.

[19] It is evident that there are a number of common cause facts between the parties but equally seriously disputed facts. The following are not in dispute: the resignation of the Respondents as members of the CC and the signature by them on the relevant CK2 forms was not subject to receipt of the purchase price or any other condition; all the Respondents had signed the relevant documents for transfer of a fishing right as required by s 21 of the MLRA in November 2012 and assisted the Appellants again in January 2014 to complete the form in this regard.

[20] It is also evident that the averment by the Respondents of illegal fishing by the Appellants in 2013 was erroneous. The CC was issued with a valid permit to fish in 2013. Furthermore, in terms of the Addendum, the Appellants were authorized to represent the CC in dealings with the Department of Fisheries, mainly for the purpose

of seeking authorization for the sale transaction in terms of the provisions of s 21 of the MLRA.

[21] The central dispute between the parties is whether the Appellants breached the sale agreement and Addendum by underpaying the Respondents at the time the monies were due and owing, and if found that there was such a breach whether it was material to allow the Respondents to cancel the sale agreement. The Respondents also alleged the sale agreement was subject to the provisions of s 21(2) of the MLRA.

[22] The court a quo pronounced that *'the agreement of sale is subject to the provisions of section 21(2) of the Act and that compliance with the provisions of this section is a term of the agreement ex lege.'*

[23] It is perhaps convenient to consider firstly whether the sale agreement was indeed *ex lege* subject to the provisions of s 21(2) of the MLRA.

[24] The provisions of s 21 (2) of the MLRA require that an application to transfer a commercial right be submitted to the Minister and that *"subject to the provisions of the MLRA and any applicable regulation"* the Minister may in writing approve the transfer of the right.

[25] It is not in dispute that the s 21 application was lodged with the Department of Fisheries for approval by the Minister. That application has not been determined. It has neither been granted nor rejected.

[26] The Acting Director-General ("Acting D-G") in the Department of Fisheries deposed to an affidavit on behalf of the Minister. The Acting D-G, opined that as a matter of law approval was required under its General Policy and under its Transfer Policy for the transfer of a commercial fishing rights and as result, according to the Acting D-G, the sale agreement was subject to s 21 of the MLRA.

[27] I will accept that the purpose of s 21(2) of the MLRA, read with the General Policy and Transfer Policy of the Department of Fisheries, is to ensure that substantive transformation within the fishing industry is not undermined by allowing untransformed applicants gaining access to fishing rights where otherwise they would have been excluded.

[28] The sale agreement, in casu, clause 5.1.5, provides that *"on the Signature Date, the Sellers shall - complete all forms and documents required for the purposes of satisfying any regulatory requirements by the Fisheries Branch of the Department, including signing a s 21 transfer application form in terms of the Marine Living Resources Act, 18 of 1998."*

[29] In National Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at 603, at para [18], the Supreme Court of Appeal reiterated the present state of our law regarding interpretation of documents, be it legislation, or contracts. It held that *'[Whatever] the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document. '*

[30] In the present instance, the Acting D-G, is absolutely correct that the transfer of a commercial fishing rights must be subjected to the MLRA's General Policy and Transfer Policy before approval by the Minister. The only difficulty is on a proper reading of the contract between the parties, in this instance, such statutory approval

was not an express or an implied suspensive condition to the sale agreement. Moreover, there is no basis to suggest that s 21(2) of the MLRA, properly interpreted, specifically requires that an application under that section is obligatory when an interest in a close corporation, as in this instance, is sold. At best the section merely stipulates that an application for the transfer of a commercial fishing right must be submitted to the Minister and that such an application must be approved in writing. Moreover, on a careful reading, the MLRA is silent as to s 21(2) obligatory nature in instances where an interest, as in this case, is transferred. To suggest otherwise would in my view be to cross the divide *'between interpretation and legislation'* and to 'make *a contract for the parties other than the one they in fact made*'. See Endumeni, supra at 603 at paragraph [18].

[31] The Department of Fisheries is however not powerless. If s 21(2) is not complied with it can take action under s 28 of the MLRA. In instances where the interest in a close corporation is transferred and s 21(2) is not complied with, section 28 authorizes the Department of Fisheries to call for an explanation as to why it should not revoke, suspend, cancel, alter or reduce the appropriate fishing right.

[32] In my view s 21(2) of the MLRA at present has no bearing on the sale of the member's interest in a close corporation, and non-compliance with the provisions of the MLRA cannot affect the validity of the sale of an interest in a close corporation holding commercial fishing rights. It follows the court a quo's finding that ('*the agreement of sale is subject to the provisions of section 21(2) of the Act and that compliance with the provisions of this section is a term of the agreement ex lege')* cannot be sustained.

[33] Turning to the issues whether all the Respondents were underpaid at the time the monies were due and payable and if so whether such underpayment by the Appellants amounted to a material breach that justifies cancellation of the sale agreement.

[34] It is common cause that the parties on 25 November 2012 signed an addendum agreement, which changed the payment structure.

[35] It is not in dispute that five of the Respondents appointed a financial advisor to assist them. The financial advisor apparently pointed out certain inaccuracies in the Addendum, amongst others that there was a shortfall of one payment in the restructuring of the payments. The last payment of the remaining amount should have been in June 2013. According to the Appellants, both parties accepted the omission in the Addendum and a payment was added for June 2013, without being reduced to writing.

[36] The Appellants deny the Respondents were entitled to the full payment in the amount of R 4, 000,000. The Appellants took serious issue with the fact that the Respondents failed to mention the liabilities of the CC which amounted to R 875 514.15 that had to be set-off against the total purchase price. Furthermore, according to the

Appellants, the Respondents received payments during the period July 2012 and November 2012, and failed to mention it.

[37] According to the Appellants, by April 2013 each of the Respondents received a total amount of R 300 000, inclusive of the amounts forwarded to pay the debts of the CC as provided for pro-rata in terms of the sale agreement and Addendum.

[38] The Appellants further alleged that the Respondents, in particular the First and Ninth Respondent who would normally speak on behalf of all the Respondents, orally agreed in May 2013 to a further restructuring of the remaining R 100 000 payments to an increased payment period option of R 10 000 per month. In this regard, it was recorded in the answering affidavit that the First Respondent was paid a total amount of R 63 900 between July 2013 and January 2014 resulting in her being paid some R 2 900 more than the total purchase price agreed to, for her 10% members' interest.

[39] According to the Appellants the First, Seventh and Ninth Respondents had been fully paid by February 2014 and the remaining Respondents were owed a total amount of R 160 000. It was also during the same period that the Appellants became aware that the Department had been approached by the Respondents to cancel the fishing permits of the CC. According to the Appellants, the conduct of the Respondents in having the permits cancelled was a breach of clause 5.1.6 of the sale agreement and therefore they were entitled to withhold payments to the Respondents. The Appellants

also tendered to pay these amounts if it was found that they were not entitled to withhold it.

[40] The Respondents in their replying affidavit denied that an oral agreement was entered into to extend the payment option beyond June 2013. Moreover, they denied that the full purchase price was paid by the Appellants by the effective date as agreed in the sale agreement and Addendum. It was also specifically denied that the First, Seventh and Ninth Respondents were paid in full.

[41] It is now trite in our law that motion proceedings, 'unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits which have been admitted by the respondent together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or un-creditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.' (See Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634-635*;* Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) paras 55 and 56; Thint (Pty) Ltd v National Director of Public Prosecutions

<u>and others; Zuma v National Director of Public Prosecutions and ot*hers*</u> 2008 (2) SACR 421 (CC) paras 8-10.)

[42] Counsel for the Respondents, Mr. D Potgieter SC, conceded that the court a quo erred in ordering the proceeds of the 2013 and 2014 catch be paid to the Respondents as the actual relief sought was that the proceeds be paid to the CC and not the Respondents individually. It was argued on behalf of the Respondents that on the Appellants' own version there was a material breach of the sale agreement and the Addendum. It was contended that by the end of April 2013 an amount of R 100 000 per members' interest was still outstanding and it was never paid in terms of the addendum agreement by end of June 2013. According to Mr. Potgieter, the material breach occurred during the period May 2013 and a right to cancel the sale agreement accrued to the Respondents which they were entitled to exercise. It was further contended that the allegation of an oral agreement is far-fetched and untenable and was correctly rejected by the court a quo. An argument was also advanced that even if payments were made after June 2013 to February 2014, the Respondents were still underpaid and such indulgence did not detract from the breach and entitlement to cancel the contract.

[43] Counsel for the Appellants, Mr. Borgström, assisted by Mrs. Z Titus, argued that the factual dispute regarding the amounts paid to the Respondents should be decided on the version advanced by the Appellants. It was contended that the First, Seventh and Ninth Respondent by February 2014 were fully paid by the date that the Court a quo

cancelled the agreement and the remaining Respondents were owed small amounts that ranged between R 20 000 to R 27 000 each. Moreover, it was argued that the Appellants were lawfully entitled to withhold the said monies under clause 5.1.6 of the sale agreement but despite that it tendered payment thereof and as a result cancellation of the contract was not just and equitable in these circumstances.

[44] In the present instance, the Appellants' version that there was an oral agreement to further regulate the payments beyond the dates stipulates in the Addendum cannot be regarded as far-fetched or untenable, despite the non-variation clause in the sale agreement. The Respondents on their own version at paragraph [29] of the Founding Affidavit, placed reliance on payment dates beyond what is claimed by them as the effective date of payment. It is also not in dispute that the Addendum to the sale agreement contained certain errors as to the date and times of payments. This was seemingly not rectified in writing but varied orally. The Respondents in excepting monies beyond the stipulated date in the Addendum and them assisting the Appellants to apply for approval under s 21 of the MLRA in January 2014 is also at odds with the suggestion that no oral agreement existed to regulate further payments. In fact it rather demonstrates that the effective date of payment could not have been as stipulated in the Addendum. If the converse is correct and strict adherence is to be given to the sale contract and Addendum than the last payment of R 50 000 should have occurred on 15 May 2012 and not in 2013 as accepted by all. The effective date of 15 May 2012 in any event in the present circumstances would lead to 'insensible and unbusinesslike' results. It would also undermine the purpose of the sale agreement.

[45] But even if it is accepted, on the Respondents' version, that the date of May 2013 was the specific time fixed for the final payment then the Respondents did not exercise their right to cancel the sale agreement with Appellants in clear and unequivocal terms within a reasonable time.

[46] The Respondents on their own version accepted further payments from the Appellants until January 2014. In fact, at the time that the matter came before the Court a quo, the Respondents had still not cancelled the contract. It was indeed the Court a quo who cancelled the contract.

[47] It is now trite in our law of contract that if a material breach occurs, the innocent party has an election of whether to abide by or cancel the contract. See: Culverwell and Another v Brown 1990 (1) SA 7 (A) at 16J - 17A. Furthermore, if the innocent party elects to cancel, this election must be communicated to the guilty party, by words or deeds, in clear and unequivocal terms and no cancellation takes effect until this has been done. Swart v Vosloo 1965 (1) SA 100 (A) at 104H – 105A; Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd 2001 (2) SA 284 (SCA) at 299E – 301 H; Kragga Kamma Estates CC and Another v Flanagan 1995 (2) SA 367 (A) at 373F -374F. Moreover, if the innocent party does not exercise its right of cancellation within a reasonable time, the inference arises that the party has elected not to cancel, as stated in Mahabeer v Sharma NO and Another 1985 (3) SA 729 (A) at 736.

[48] Similarly, a failure to cancel in a reasonable time, and the acceptance of payments, indicates an election to abide by the contract (see Kragga Kamma Estates CC supra at 373 E-F) and if the election has been made to abide, the innocent party is bound by its election and cannot change its mind (see Curlverwell supra at 17A).

[49] On these stated principles, in the present instance the fact that the Respondents failed to cancel the contract within a reasonable time and willingly accepted monies until January 2014, is indicative that they elected to abide by the contract. The indulgence clause upon which some reliance was placed by the Respondents, can therefore not arise in this case.

[50] The Appellants' view that they were entitled to lawfully withhold the monies from the Respondents as a result of their interference in the issuing of the 2014 permit by the Department of Fisheries, is not without substance. But even if they were not entitled to withhold the monies, the Appellants tendered payment.

[51] The issue now is whether in these circumstances, where more than two thirds of the Respondents monies were indeed paid, whether the breach to withhold the monies was so material to justify cancelation of the sale agreement.

[52] In Singh v McCarthy Retail Ltd t/a McIntosh Motors 2000 (4) SA 795 (SCA) at 803 F-G, the SCA held that: "*The test, whether the innocent party is entitled to cancel*

the contract because of the malperformance by the other […] entails a value judgment by the Court. It is, essentially, a balancing of competing interests – that of the innocent party claiming rescission and that of the party who committed the breach. The ultimate criterion must be one of treating both parties, under the circumstances, fairly, bearing in mind that rescission, rather than specific performance or damages, is the more radical remedy. Is the breach so serious that it is fair to allow the innocent party to cancel the contract and undo all its consequences?"

[53] In my view, on a conspectus of all the evidence, I am not convinced that in treating both parties fairly and equitable and where more than two thirds of the purchase price had been paid, cancellation of the sale agreement and Addendum was justified. In this regard see also <u>Botha and Another v Rich N.O. and Others</u> 2014 (4) SA 124 (CC) at 145 E.

[54] For these stated reasons it follows that the Court a quo's order should be set aside and that the appeal should succeed with costs.

[55] In the result, I would make the following order.

The Appeal succeeds with costs. The court a quo's order is set aside and substituted with the following: "The Application is dismissed with costs"

LE GRANGE, J

I agree

STEYN, J

[56] Saldanha J. I agree with the judgment of Le Grange J and with the proposed order. I would however, in the circumstances of this matter be remiss if I did not record the following observations I've made with regard to the conduct of the parties. The record in the proceedings resembles the oft repeated narrative of the disempowerment of women and in particular those in fishing communities who due to historical poverty and marginalization have not been able to fully benefit from policies and programs in new order legislation. That, the respondents had to resort to the sale of their interests in the close corporation as a result of their inability to fully exploit for themselves the

awarded fishing quotas reflects on the empowerment program of the Department of Fisheries.

[57] Moreover, the rather patronizing attitude in which the appellants dealt with the respondents who they considered to have been squandering the payments that they received is deprecated.

[58] The failure of the true empowerment of the respondents is in my view indicative of a blight on the progressive and well intentioned transformation initiatives in the fishing industry and the Department (on behalf of the Fourth Appellant) is urged to pay closer attention to the conditions and the capacity of recipients of fishing quotas in historically impoverished and disadvantaged communities.

SALDANHA, J