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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

CASE NO: 2022-018387

DOH: 20 September 2023

1) REPORTABLE: NO

2) OF INTEREST TO OTHER JUDGES: NO

3) REVISED.

DATE 28 May 2024

SIGNATURE

In the matter between:

NEW SALT ROCK CITY (PTY) LTD
Registration No. 2007/005000/07

First Applicant

ZAMIEN INVESTMENTS 102 (PTY) LTD
Registration No. 2003/006135/07

Second Applicant

CSHELL 80 (PTY) LTD
Registration No. 2005/029828/07

Third Applicant

**FREDERICK WILHELM AUGUST
LUTZKIE 6[...]**

Fourth Applicant

And

KILKEN PLATINUM (PTY) LTD
Registration No. 2003/001334/07

First Respondent

KILKEN INVESTMENTS (PTY) LTD
Registration No. 2020/551840/07

Second Respondent

KILKEN ENTERPRISES (PTY) LTD
Registration No. 2020/551835/07

Third Respondent

KILKEN HOLDINGS (PTY) LTD
Registration No. 2020/551830/07

Fourth Respondent

ZUNAID ABBAS MOTI
ID: 7[...]

Fifth Respondent

CITAX INVESTMENTS SA (PTY) LTD
Registration No. 2021/000194/07

Sixth Respondent

ANY RENTAL (PTY) LTD
Registration No. 2007/010332/07

Seventh Respondent

JUDGMENT

**THIS JUDGMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE
CIRCULATED TO THE PARTIES BY EMAIL. ITS DATE AND TIME OF HAND
DOWN SHALL BE DEEMED TO BE 28 MAY 2024**

Bam J

Introduction

1. The applicants claim delivery and transfer of a helicopter together with publicly traded shares from the respondents. The claim arises from a settlement agreement they had cancelled in June 2022, following what they said was the respondents' failure to perform.

2. The respondents raise three defences. Firstly, they say the time and conditions for them to perform their obligations never arose; in addition, given the reciprocal nature of their obligations, the respondents were under no obligation to perform until and unless the applicants had purged their own non-performance, which they never did. The result is that the applicants' right to enforce the Rouwkoop provisions of the agreement simply never arose. Secondly, they say the applicants made an election to cancel the agreement. Cancellation precludes enforcement. The applicants are accordingly not allowed to simultaneously blow hot and cold. They are bound by their election. Thirdly, by all parties' accounts, the Settlement Agreement was cancelled. Cancellation has the result that all the obligations under the Settlement Agreement are extinguished and can no longer be enforced. There is a further complaint about new matters in reply and in the Heads of Argument, which I address in the course of this judgment. The respondents further complain that the present application is an abuse of the court's processes.

A. BACKGROUND

3. The facts are uncomplicated and are common cause. They are: During 2020 and over a number of months, Salt Rock (the first to the third applicants) acquired 35.1% of shares in the first respondent, for which it paid a consideration of R242 million. The remainder of the shares of 64.9% are held by the second to the fourth respondents (Newshelf).
4. In early March 2021, a dispute arose between the applicants and the first respondent in relation to a short paid invoice for management fees claimed by the applicants. In April 2021, the applicants issued a demand in terms of Section 345 (1) of the Companies Act 61 of 1973. The first respondent reacted by launching urgent legal proceedings in the Durban High Court to interdict the applicants from winding it up (the Sec 345 interdict application).
5. In July 2021, following a breakdown in discussions between the Fourth applicant, Lutzkie and the Fifth respondent, Moti, the applicants launched urgent proceedings in this court for relief in terms of Section 163 of the Companies Act

71 of 2008. The application was enrolled for 16 February 2022. In the lead up to the hearing in February, Lutzkie and Moti concluded a settlement agreement on 19 October, which was subsequently amended on 25 October 2021 (Settlement Agreement). The relevant material terms of the Settlement Agreement read, *inter alia*, that:

(i) The majority in the first respondent would acquire the minority shareholding.

(ii) The parties agreed to '*stop litigation now*'.

(iii) The applicants were to be paid an amount of R350 million on or before 31 January 2022, otherwise the '*shares and helicopter [would be] Rouwkoop if not paid*'.

(iv) Frikkie, the fourth applicant, was to 'put [the minority's] shares into [an] attorney's trust account until the R350m [had been] paid and the shares transferred.' The reference to Frikkie is a reference to Lutzkie.

6. The following events which have relevance in determining breach of the Settlement Agreement and are not in dispute:

6.1 On 13 December 2021, the applicants gave notice of their intention to amend the relief sought in the Notice of Motion in the Sec 163 application.

6.2 On 11 January 2022, following an objection by the respondents to the proposed amendment, the applicants launched an application to amend the relief sought in the Sec 163.

6.3 On the eve of the hearing of 15 February, the applicants filed further Heads of Argument in the Sec 163 application and further notified the respondents of a new order they intended moving for during the hearing. The application in terms of Sec 163 and the application to amend were heard on 16 February.

6.4 On 17 March, the applicants filed a supplementary affidavit in the Sec 345 Interdict Application in the Durban High Court.

7. The judgment in the Sec 163 application was handed down on 17 May 2022, where the court found that the application had been compromised/resolved by the October 2021 settlement. It ordered that the matter be removed from the roll and called upon the applicants to pay the respondents' costs.
8. On 16 June 2022, the applicants cancelled the Settlement Agreement, which the respondents accepted in September 2023.

B. THE LAW

Exceptio non adimpleti contractus

9. Very briefly, the principle of reciprocity (*exceptio non adimpleti contractus*) recognises the fact that, in many contracts, the common intention of the parties, expressed or unexpressed, is that there should be an exchange of performances.¹ The common intention is that neither should be entitled to enforce the contract unless he/she has performed or is ready to perform his/her own obligations.² It is common cause in the present case that the parties obligations were reciprocal. A perusal of the terms of the Settlement Agreement reveals that the parties had agreed to stop litigating against one another.

Election

10. The doctrine of election proceeds from the point that an injured party in a contract, owing to his or her contracting party's failure to perform, has options.³ They can elect to treat the contract as binding or cancel the contract. Once an election has been made, it is binding. The rationale for the binding nature of the

¹ *Cradle City (Pty) Ltd v Lindley Farm 528 (Pty) Ltd* (1212/2016) [2017] ZASCA 185; 2018 (3) SA 65 (SCA) (6 December 2017), paragraph 20.

² *Euhar Truck & Bus (SA) (Pty) Ltd v Dorbyl Limited t/a Dorbyl Transport Products and Busaf*, CASE NO: (38/03), (25 MARCH 2004), paragraph 12.

³ *Sandown Travel (Pty) Ltd v Cricket South Africa* (42317/2011) [2012] ZAGPJHC 249; 2013 (2) SA 502 (GSJ) (7 December 2012), paragraph 31.

election stems from the principle that no one can take up two positions⁴ which are inconsistent with each other.

Consequences of cancellation of an agreement

11. In *Naka Diamond Mining (Pty) Limited v Johannes Frederick Kloppe NO & Others*, a party to a joint venture agreement, Naka, sought to enforce certain obligations that its partner, SouthernEra (Pty) Ltd, had incurred in terms of a joint venture agreement which had been cancelled. The court held:

‘...cancellation of a contract results in termination of the obligations created thereby. ‘If a contractual obligation has not yet been fulfilled, cancellation has the result that obligations from the contract are extinguished and can therefore no longer be enforced.’⁵

C. DISCUSSION

1st Defence: *Exceptio non adimpleti contractus*

12. The respondents submit that the applicants had failed to perform. The very first obligation owed by the parties towards each other was to cease litigation. In breach of the term of the settlement agreement which said, ‘*Stop litigation now*’, the applicants continued to litigate. I have isolated the steps taken by the applicants as of 11 December onwards.⁶ They are not in dispute. As a consequence, submit the respondents, they were entitled to withhold their performance until such time that the applicants had purged their non-performance or, at the very least, tendered to perform, which the applicants failed to do. As I understand the applicants’ response, they do not deny that the parties’ obligations were reciprocal. They also do not deny that they continued to litigate. Nor do they engage directly with the defence. Instead, they conflate the question of reciprocity with a conditional contract. They then set off, arguing that the stance raised by the respondents that the contract was conditional is a new one. The point in reciprocal contracts is that no party is entitled to enforce the

⁴ Sandown note 9, paragraph 31; *Chamber of Mines of South Africa v National Union of Mineworkers* (243/86) [1986] ZASCA 152 (28 November 1986), paragraph 22 - 23

⁵ (277/2021) [2022] ZASCA 94 (17 June 2022), paragraph 23.

⁶ Paragraph 6 of this judgment.

contract until they have performed or have tendered their own performance. I conclude that the applicants have failed to overcome the defence raised by the respondents.

2nd Defence: The applicants made an election

13. It is common cause that the applicants wrote to the respondents on 16 June 2022 informing them of their cancellation of the settlement agreement. The respondents duly informed the applicants of their acceptance of the cancellation during September, terming it acceptance of the applicants' repudiation. The law does not countenance that a person can hold two positions that are inconsistent with one another. An injured party in an agreement, as a result of the actions of the other contracting party, has options. They can either treat the contract as valid and enforce the obligations or cancel it and sue for damages. The applicants decided to cancel the agreement. Cancellation precludes enforcement. They cannot now seek to enforce the very same contract they cancelled. Again, the applicants fail to confront this defence or answer it cogently. I conclude that the applicants are bound by their election. On this basis, the claim cannot succeed.

3rd Defence: The consequence of cancelling an agreement is that the obligations arising therefrom are extinguished.

14. It is not in dispute that the settlement agreement was cancelled. It no longer exists. Whether it was cancelled on 22 June or in September, cancellation has the result that all the obligations under the Settlement Agreement are extinguished and can no longer be enforced. As the court said in *Naka Diamond*, cancellation of a contract results in termination of the obligations created thereby. On this defence too, the applicants have no plausible response.

Purpose of affidavits in motion proceedings

15. The enduring purpose of affidavits in motion proceedings — that they serve as pleadings and evidence — is established law. The main foundations of the application are the allegations of fact stated in the founding affidavit because that

is the case to which the respondent is invited to affirm or deny.⁷ It is thus impermissible for a party to make a new case in a replying affidavit, as the respondent is allowed only one opportunity to deal with the applicant's cause of action and present evidence in opposition in the answering affidavit.⁸ It is not pedantry to hold parties to their pleadings; it is an integral part of the principle of legal certainty which is an element of the rule of law.⁹

16. I mention some of the new matters raised by the applicants for the first time in the replying affidavit and their Heads of Argument. For example, contrary to the applicants' assertions in the founding affidavit that the parties concluded a valid, enforceable and unconditional settlement agreement, the applicants suggest in their replying affidavit that the obligation to stop litigation on their part was conditional upon the respondents delivering the helicopter and transferring the shares.¹⁰ The short answer is, this is not the applicants' case. However, given that the respondents have had the opportunity to engage with the new matter, I address it. The applicants are not entitled to blow hot and cold. At first, the agreement was unconditional. It cannot now be conditional for them to get around the fact that they did not stop litigating. In any event, purely from reading the language used in the agreement ('stop litigation now') and in the context of the entire document, it would be a stretch to arrive at the meaning now contended for by the applicants¹¹. The point must fail.

17. In their Heads of Argument, the applicants raise the defence of waiver which was not pleaded. In this regard, the applicants query the respondents' silence when the applicants committed the breaches of the settlement agreement only for their acceptance of the applicants' repudiation to be conveyed by the deponent to the opposing affidavit in the liquidation proceedings. They query the deponent's

⁷ *Director of Hospital Services v Mistry* (272/77) [1978] ZASCA 126 (9 November 1978).

⁸ *Gold Fields Limited and Others v Motley Rice LLC*, In re: *Nkala v Harmony Gold Mining Company Limited and Others* (48226/12) [2015] ZAGPJHC 62; 2015 (4) SA 299 (GJ); [2015] 2 All SA 686 (GJ) (19 March 2015), paragraph 122.

⁹ *South African Transport and Allied Workers Union and Another v Garvas and Others* (CCT 112/11) [2012] ZACC 13; 2012 (8) BCLR 840 (CC); [2012] 10 BLLR 959 (CC); (2012) 33 ILJ 1593 (CC); 2013 (1) SA 83 (CC) (13 June 2012), paragraph 114.

¹⁰ Paragraph 15 of the replying affidavit.

¹¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality*, 920/2010 [2012] ZASCA 13, paragraph 18.

authority and point to the length of time it took the respondents to convey their acceptance of the repudiation. Ultimately, the applicants contend that the respondents have waived their right to cancel. This point cannot be traced to any of the applicants' affidavits. It surfaces for the first time in the Heads of Argument. Garvas informs that parties must be held to their pleadings. On the basis that the respondents have dealt with the point in their Heads of Argument, I address it. For over half a century, our courts have laid down the law that no one is presumed to have waived their rights. In *Road Accident Fund v Mothupi*, it was said that 'the onus is on the party alleging it [waiver]. In this regard, clear proof is required of an intention to do so and that the conduct from which waiver is inferred must be unequivocal, that is to say, consistent with no other hypothesis'.¹²

18. The applicants have made no attempt to discharge the onus required to establish waiver. The conduct demonstrated by the respondent throughout, points to a party who had no intention to waive any of their rights. The applicants in their founding affidavit refer to a cryptic response received from the respondents after they had warned them of the looming date for performance, in January 2022. In this regard, the respondents wrote back advising that no purpose will be served by engaging with the contents of the applicants' letter and on the 31 January 2022, they simply did not make the payment of R350 million. At a minimum, it can be said that on the basis of that letter, the respondents intended not to debate the contents of the letter but at the same time, they made it clear that they do not agree with the applicants. The respondents had taken steps opposing the applicants' intended amendment prior to the hearing of the matter in February 2022. These are not steps consistent with a party intending to wave their rights. The applicants have failed to discharge the onus placed on them to establish waiver.

D. CONCLUSION

19. For all the reasons set out in this judgment, the application must fail. The

¹² *Road Accident Fund v Mothupi* (518/98) [2000] ZASCA 27; 2000 (4) SA 38 (SCA); [2000] 3 All SA 181 (A) (29 May 2000), paragraph 19.

respondents seek costs, including the costs of two counsel. As the successful party, the respondents are entailed to costs but not costs of two counsel.

E. ORDER

20. The application is dismissed. The applicants must pay the respondents' costs.

N.N BAM
JUDGE OF THE HIGH COURT,
PRETORIA

Date of Hearing: **20 September 2023**

Date of Judgment: **28 May 2024**

Appearances:

Applicants' Counsel: **Adv J.J Brett SC with Adv J.G Smit**
Instructed by: Gothe Attorneys
Queenswood, Pretoria

Respondents' Counsel: **Adv A.R Bhana SC with**
Adv T Dalrymple
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