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CASE NUMBER: 523/90

111/92

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

THE COMMISSIONER OF INLAND REVENUE

Appellant

and

RUSSELL KENNETH COLLINS

Respondent

CORAM: CORBETT CJ, BOTHA, VAN HEERDEN, VIVIER et
VAN DEN HEEVER JJA

HEARD ON: 15 MAY 1992

DELIVERED ON: 1 JUNE 1992

J U D G M E N T

VAN DEN HEEVER JA

Chemhold Investments (Pty) Ltd ("Chemhold") sold fixed property to the respondent. The contract consists of a printed form headed "Cash Deed of Sale" with spaces for the insertion of individual particulars, such as the identity of seller and purchaser (Chemhold and respondent respectively), a description of the property (lots 995 and 998 in Pinetown Township), the price (R725 000,00), and so on. The form emanated from the firm of estate agents which brought seller and buyer together, and clause 3 confers rights to commission on the agent. The blanks having been filled in, clauses regarded redundant deleted, and an "annexure A" incorporated by reference, the document was signed by respondent on 14 May 1987, on behalf of Chemhold the following day, and for the agent signifying acceptance of the benefits conferred by the stipulatio alteri on 20 May 1987.

Clause 15 of the contract provides:

"Any Agreement between the PURCHASER and SELLER to cancel, alter or add to this 'Deed

of Sale' shall not be binding and shall be of no force nor effect unless reduced to writing and signed by the parties before witnesses."

Clause 21 incorporates by reference Annexure A, which lies at the root of the present dispute and reads as follows:

"This agreement shall become binding upon the purchaser as a contract of purchase of sale (sic) only if the purchaser shall not have nominated a purchaser (hereinafter referred to as a nominee) who shall validly have accepted such nomination within ten days after the date hereof and

- (i) the parties undertake that pending such nomination or the expiry of the said period neither shall resile from this agreement unless in terms of specific provisions herein contained.
- (ii) upon such nomination and acceptance hereof by the nominee the purchaser shall by the purchaser's signature hereto be bound as surety for and co-principal debtor 'in solidum' with such nominee for the due and faithful fulfilment by the nominee of all the nominee's obligations as purchaser in terms of this agreement including any that may flow from breach of contract hereby renouncing the benefits of all the legal exceptions available to sureties with the full effect of which the purchaser acknowledges to be fully

acquainted.

- (iii) The date of sale shall be the date of such nomination or the expiry of the aforesaid period as the case may be."

The property has been transferred from Chemhold to the respondent's "nominee", NINE HAGART ROAD (PROPRIETARY) LIMITED ("the company"), which has paid transfer duty in respect of this acquisition.

Appellant contends that respondent also is liable for transfer duty. Respondent approached the Durban and Coast Local Division of the Supreme Court for a declaratory order that he is not obliged to pay any transfer duty arising out of this Cash Deed of Sale. In his founding affidavit respondent says that he nominated the company as purchaser in terms of the agreement; that the effect of this was to bring the case within the provisions of sec 5(2)(a) of the Transfer Duty Act No 40 of 1949; and that he paid no consideration for the purchase of the properties to Chemhold nor received any from the company in respect of its nomination.

In the answering affidavit Mr Stoltz, on behalf of the Commissioner, disputes respondent's conclusion of law. He fleshes the bare bones presented by respondent with the further fact, which is not disputed, that the company was incorporated only on 10 June 1987. Respondent had made available to the Commissioner a document entitled "Nomination and Acceptance of Purchaser" dated 9 July 1987. Mr Stoltz attaches a copy of this to his affidavit, as annexure B. He submits that, having regard to the date of incorporation of the nominee and the date of signature of annexure B, the nomination did not comply with the provisions relating to nomination in annexure A to the Cash Deed of Sale, though purporting to have been made in terms of that.

The preamble of annexure B refers to the agreement between Chemhold and respondent, though incorrectly alleging the date of that as having been 20 May 1987, and to the fact that the contract provides for

the nomination of a purchaser by the respondent within 10 days of the date of the signature of the contract. It goes on to state that on 25 May 1987 respondent verbally nominated the company as the purchaser, which nomination was duly accepted by the directors of the company; but, because it is necessary for the nomination and acceptance to be evidenced in writing, respondent now nominates the company as purchaser; and in his capacity as director of the company, duly authorized, confirms

"that nomination as purchaser in the aforementioned Cash Deed of Sale has been accepted. I further declare that (the company) will comply with all the terms and conditions contained in the Cash Deed of Sale ...

(3) Notwithstanding the date of signature hereof, the date of nomination being deemed to be 30th May 1987".

And annexure B is then signed by respondent twice: once personally as nominator, and again, this time in his representative capacity, as nominee.

In his replying affidavit respondent admits that the nomination was not effected within the ten day period provided for in the contract. Chemhold was however aware that respondent was taking steps to form a company which he intended nominating as purchaser. When annexure "B" was delivered to Chemhold, the latter accepted this as a nomination in terms of the Cash Deed of Sale, so that there was a tacit extension of the time limit within which he was empowered to nominate a purchaser in his stead. Respondent annexed to his own affidavit one by Mr MacCullum, the group secretary of the group of companies within which Chemhold falls. Mr MacCallum says he vetted the contract before it was signed. In approving it, he was fully aware that respondent intended to nominate a company which was in the process of being formed, as purchaser. He was also aware that the written nomination and acceptance on 9 July 1987 occurred after the expiry of the ten day period stipulated in Annexure A to the sale agreement.

Despite this delay,

"(Chemhold) ... regarded the nomination ultimately made as being in terms of the sale agreement and it accordingly transferred the properties under the agreement to the nominated purchaser".

The court a quo granted the declaratory order sought, with costs. The judgment is reported sv. COLLINS v COMMISSIONER FOR INLAND REVENUE 1990 (4) SA 619 (D).

It has been pointed out more than once in the past, that the title of the Transfer Duty Act No 40 of 1949 is a misnomer. In terms of section 2, duty is not levied on the transfer of property, but on

"the value of any property ... acquired by any person ... by way of a transaction or in any other manner ...".

Definitions in s 1 relevant for present purposes are:

"'Property' means land and any fixtures thereon, and includes -

- (a) any real right in land but excluding any right under a mortgage bond or a lease of property other than a lease referred to in paras (b) or (c)"

and

"'Transaction' means an agreement whereby one party thereto agrees to sell, grant, donate, cede, exchange, lease or otherwise dispose of property to another, or any act whereby any person renounces any interest in or restriction in his favour upon the use or disposal of property."

In COMMISSIONER FOR INLAND REVENUE v FREDDIES

CONSOLIDATED MINES LTD 1957 (1) SA 306 (A) it was held (p 311 B-D) that "acquiring property" as envisaged by s 2 means acquiring the right to acquire the ownership of property.

Mr Delport, for the appellant, argued that the Cash Deed of Sale constituted a transaction by which respondent acquired property as envisaged by s 2 so that he was liable for duty unless he could bring himself within the provisions of s 5(2)(a), and that he had not done so.

Paragraph (a) provides:

"If a transaction whereby property has been acquired, is, before registration of the acquisition in a deeds registry, cancelled, or dissolved by the operation of a resolute condition, duty shall be payable only on that

part of the consideration which has been or is paid to and retained by the seller and on any consideration payable by either party to the transaction for or in respect of the cancellation thereof."

Had respondent nominated the company within the ten day period afforded in annexure A to the deed of sale, respondent may well have escaped liability for duty on the basis that he did not acquire a ius in personam ad rem acquirendam against Chemhold. Despite the contract itself referring to him as the purchaser, annexure A in effect afforded him an election: whether to be bound to Chemhold as purchaser, or as surety. In that period, unless he intimated that he had exercised his election to be a purchaser in his own right, Chemhold could not have insisted on transferring to him against payment by him. The design of annexure A is not on the same lines as those of the more customary contracts of sale to a "purchaser or nominee" where the purchaser has been held bound immediately but with the right to assign subsequently. Cf HUGHES v RADEMEYER

1947 (3) SA 133 (A), 139.

It is however unnecessary to decide what is a hypothetical question. The fact of the matter is that respondent did not nominate the company timeously so that at midnight on 25 May 1987 the contract itself made the election on his behalf and willy-nilly the right to acquire the property vested in him with the corresponding obligation to pay as the result of the transaction. He fell squarely within the terms of s 2 of the Act. The less said about the purported written nomination plus acceptance of 9 July 1987, the better. Even assuming that a company not yet in existence could have accepted the nomination and that fiction could be converted into fact by a deeming clause, the fiction was faulty and the deemed date of the written nomination fell outside the vital period.

Mr Wallis, on behalf of respondent, did not abandon, but did not press, so much of the judgment of the court *a quo* as may hold that the transaction between

Chemhold and respondent was dissolved by the operation of a resolute condition.

That "the original purchaser was only intended to be bound pro tem until replaced in toto by the accession of the third party" (the reported judgment at p 625 I-J) is, with respect, no basis for a finding that the original transaction has been "cancelled, or dissolved by the operation of a resolute condition", which is what is required by sec 5(2)(a) before respondent is relieved of his liability. That respondent is no longer bound in terms of the original transaction is not enough to achieve that effect.

Having willy-nilly acquired a right that attracted duty, the facts that the respondent did not propose to pursue that right and that Chemhold did not subsequently hold him to the corresponding obligations, can make no difference vis-a-vis the fisc. The question is not what the intentions of the parties were, but

(a) whether respondent acquired property within

the meaning of s 2 of the Act; and

(b) whether

(i) a resolute condition scil.

contained in the transaction itself;

or

(ii) cancellation of the contract

terminated the relationship between the

parties so that Chemhold would be free to

dispose of the property by a transaction with

a stranger to this contract.

(Cf SECRETARY FOR INLAND REVENUE v HARTZENBERG 1966

(1) SA 405 (A) 409H.)

The answer to (a) we already know. As regards b(i), there is no resolute condition which could operate after midnight on 25 May 1987 to relieve respondent of the contract. Any alteration in the position of the parties thereafter could not come about as a result of the provisions of the Cash Deed of Sale but only as the result of concurrence of Chemhold.

As regards b(ii), no cancellation was ever effected. Clause 15 of the Cash Deed of Sale required that to be in writing. Accepting in favour of appellant that the contract could also have been cancelled orally, or by conduct, nothing of the kind happened. There is no indication that either party contemplated releasing the other from the agreement. As from 26 May respondent was the buyer in terms of the contract. After that he wanted the company to step into his shoes. He could cede his rights to the company. Delegation of his obligations required the consent of Chemhold. Such a total substitution was achieved, the company's right to transfer of the fixed property being derived from respondent, not from a new contract with Chemhold (as would have been the case had there been a cancellation). The Cash Deed of Sale as such remained intact.

Neither of the eventualities for which section 5(2)(a) provides having occurred, the appellant is not released from the liability for duty incurred in terms

of section 2 of the Transfer Duty Act by his acquisition of the right to property under the transaction with Chemhold.

The appeal succeeds, with costs. The order of the court *a quo* is set aside and there is substituted for it one dismissing the application for a declaratory order, with costs.

Leo v. d. Heever

L VAN DEN HEEVER JA

CORBETT	CJ)	
VAN HEERDEN	JA)	CONCUR
VIVIER	JA)	

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HEARD:

15 MAY 1992

DELIVERED:

1 JUNE 1992

JUDGMENT

BOTHA JA:

I agree with VAN DEN HEEVER JA that the appeal be allowed, for the reasons following.

In the Court a quo it was common cause that the respondent would have been liable to pay transfer duty, in terms of section 2(1) of the Act, in respect of the sale of the property by Chemhold to him, were it not for his nomination of the company ("Nine Hagart") as the purchaser on 9 July 1987 and Chemhold's subsequent acceptance of such nomination as substituting Nine Hagart for the respondent as purchaser. On this footing the only issue was whether or not these events served to relieve the respondent of liability by virtue of the provisions of section 5(2)(a) of the Act.

In argument before this Court, however, counsel for the respondent sought to change tack. He argued that the transaction between Chemhold and the respondent had not attracted liability for transfer

duty on the part of the respondent, by reason of the terms of Annexure "A" to the deed of sale. The argument is without merit. The effect of Annexure "A" was clearly to make the contract of sale between Chemhold and the respondent subject to the fulfilment of a suspensive condition, which was expressed in the words: "only if the purchaser shall not have nominated a purchaser who shall validly have accepted such nomination within ten days after the date hereof" The provision in paragraph (i) of Annexure "A" that "pending such nomination or the expiry of the said period" neither party "shall resile from this agreement" does not detract from the suspensive operation of the condition in relation to the contract of sale (cf Badenhorst v Van Rensburg 1986 (3) SA 769 (A) at 779D). The condition would fail if a nomination and acceptance occurred within the stipulated period of ten days, or it would be

fulfilled on the expiry of the period without such nomination and acceptance having occurred. With reference to the position pending the failure or the fulfilment of the condition, there is certainly room for an argument that no liability for transfer duty could arise, on the ground that no personal right to acquire the ownership of the property had yet accrued to either of the alternative potential purchasers. Similarly, if the condition had failed, there would certainly have been room for an argument that the respondent had not incurred liability for transfer duty, on the ground that no right to acquire the property had ever accrued to him. It is not necessary, however, to express a definite opinion in regard to those situations, for, in the event, the condition was fulfilled. When once the condition was fulfilled, there was no longer any room for the argument that the respondent did not incur liability for

transfer duty. The legal effect of the fulfilment of the condition was that the contract of sale became binding upon the respondent, and in consequence he became vested with the right to acquire the property. Hence, the conclusion is inescapable that he "acquired" the property within the meaning of section 2(1) of the Act.

That being so, it does not avail the respondent to contend that there was a tacit extension of the ten day period or a waiver of it, nor his counsel to argue (as he did) that by the subsequent nomination and acceptance of a new purchaser the parties were in substance merely giving effect to Annexure "A". As a matter of law, that is not what happened. The legal effect of the fulfilment of the condition could not be undone otherwise than by means of a tripartite agreement involving the three parties, by which the rights and obligations of the

respondent under the contract of sale were transferred to the new purchaser. That, in law, was what was accomplished by the respondent's nomination of Nine Hagart as purchaser, by the latter's acceptance of it, and by Chemhold's consent to it. Of itself, this re-arrangement could not serve to extinguish the respondent's already incurred liability to pay transfer duty. Whether or not it had that effect can be determined only with reference to the provisions of the Act.

The crucial question, then, is whether the events under consideration fall within the purview of section 5(2)(a) of the Act. Two situations are postulated in the section: where a transaction is cancelled, and where it is dissolved by the operation of a resolute condition. The latter situation cannot possibly arise on the facts of this case. As to the former, I do not find it necessary to consider

the possible effect of clause 15 of the deed of sale, requiring writing and the signatures of the parties for a cancellation of it, on the issue to be decided;

I shall simply assume in favour of the respondent that the terms of the clause do not militate against the arguments advanced on his behalf.

The gist of the argument for the respondent on this aspect of the matter was that the events under consideration constituted a delegation of the respondent's obligations under the contract of sale to Nine Hagart; that delegation is a species of novation, by which the respondent's obligations to Chemhold were discharged; and that (quoting from counsel's written heads of argument) "a termination of the contract by novation is a cancellation for the purposes of this section" (section 5(2)(a)). The argument requires, first of all, a consideration of the meaning of the concept of the "cancellation" of a

contract, in general, and then a consideration of the sense in which the word "cancelled" is used in section 5(2)(a).

In general, the word "cancellation" in the field of the law of contract is a well-known technical term of art. It covers both cancellation by agreement between the parties (consensual cancellation) and cancellation by one party on the ground of the other party's breach of contract (Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration 1987 (4) SA 569 (A) at 588H). In both instances, speaking generally, it connotes the undoing of the contract in its entirety, and the extinction of all the rights and obligations of both parties as they existed in terms of the contract. In the case of a consensual cancellation the usual consequences of the cancellation may, of course, be modified by the terms of the agreement of

cancellation; and in the case of a unilateral cancellation on breach it is to be noted that secondary rights and obligations flowing from the contract and its breach, e g in regard to damages, may be said to remain (Atteridgeville Town Council and Another v Livanos t/a Livanos Brothers Electrical 1992 (1) SA 296 (A) at 304D). Those qualifications apart, the "cancellation" of a contract normally means the wiping out of the entire contract and all the parties' rights and obligations under it.

In section 5(2)(a) the expression used is: "If a transaction is cancelled". On the face of it, there is no reason to think that the Legislature intended by that expression to convey anything other than the ordinary, well-understood meaning of the concept of the cancellation of a contract. That this is indeed what the Legislature had in mind, is to some extent pointed to by the

further provisions of the section. The reference to consideration paid to and retained by the seller contemplates a cancellation in the ordinary sense, because it is only in such a case that restitution and an obligation to restore consideration paid would arise, but for the provisions of a particular contract. And the position next referred to, where consideration is payable "for or in respect of the cancellation", is most frequently encountered in cases of a consensual cancellation in the ordinary sense. In any event, there is nothing in the section itself to suggest that the Legislature intended the word "cancelled" to be understood in a sense other than in accordance with its ordinary meaning. Nor is any indication to that effect to be found in any of the other provisions of the Act, or in the context of its scope and object as a whole. In my view, therefore, the cancellation which is dealt with in

section 5(2)(a) is of a kind which brings to an end the entire transaction in question, and hence the rights and obligations of both of the parties in terms of it. This view finds support in the interpretation which was placed on section 5(2)(a), read with section 5(2)(b), in the judgment in Secretary for Inland Revenue v Hartzenberg 1966 (1) SA 405 (A) at 409C-410D. It was held that for an agreement to qualify as a cancellation of a transaction as contemplated in the section, it was necessary that the jus in personam ad rem acquirendam acquired under the transaction be extinguished, and the seller's full rights of disposal over the property be restored. That is, of course, in accordance with the notion of cancellation as ordinarily understood.

Applying the views expressed above to the facts of this case, it is clear that the arrangement

by which Nine Hagart was substituted as the purchaser in place of the respondent did not constitute a cancellation of the contract as envisaged in section 5(2)(a). The legal effect achieved by the nomination and acceptance of the new purchaser was merely the transfer to it of the respondent's rights and obligations. Those rights and obligations were not extinguished and they did not come to an end. Nor was the contract wiped out; all of its terms (embodying the "transaction" as such) remained intact and operative as between the seller and the substituted purchaser. It is true, as was stressed in the argument for the respondent, that the delegation of the respondent's obligations brought about their discharge, but that does not mean that they ceased to exist; they were transferred to the new purchaser. Counsel's pivotal submission that there was a novation which resulted in "the

termination of the contract" can at best reflect only on the position that the respondent ceased to be bound by it; but for the purposes of applying section 5(2)(a) it is futile to focus only on the position of the respondent. Since the contract itself and the rights and obligations under it did not come to an end, the further argument that, because of the novation, there was a cancellation of the contract for the purposes of the section, is wrong, and must be rejected.

For the reasons given above I consider, with respect, that the reasoning in the judgment of the Court a quo was flawed, and that the result arrived at was wrong. Accordingly I concur in the order made by VAN DEN HEEVER JA.


A S BOTHA JA

CORBETT CJ

VAN HEERDEN JA

CONCUR

VIVIER JA