

SOUTH AFRICA / JUDGMENT

Absolute View (Pty) Ltd v Caterpillar Financial Services SA (Pty) Ltd (14425 / 2021) [2021] ZAGPJHC 592 (28 October 2021)

[2021] ZAGPJHC 592**COURT**

South Gauteng High Court, Johannesburg

BEFORE

S D J Wilson

CASE / FILE NUMBER

14425 / 2021

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****LOCAL DIVISION, JOHANNESBURG)****Case No: 14425 / 2021****REPORTABLE:**

NO

OF

INTEREST TO OTHER JUDGES: NO
REVISED.**DATE:**

28 October 2021

In

the matter between:

ABSOLUTE

VIEW (PTY)

LTD

Applicant

and

CATERPILLAR

FINANCIAL SERVICES SA (PTY) LTD

Respondent

JUDGMENT**WILSON AJ:**

1 The applicant (“Absolute View”) seeks relief setting aside and declaring unenforceable a series of terms in a contract it concluded with the respondent (“Caterpillar”). The contract was for the sale and financing of a number of heavy vehicles used for earthmoving and construction purposes. These are described in the contract as “the Units”. The value of the contract was in excess of R20 million.

2 Absolute View’s erstwhile sole director and shareholder (“Mr. Xaba”) stood as a guarantor for Absolute View’s obligations under the contract. The contract provided that, in the event of Mr. Xaba’s death, Caterpillar would have the right to terminate the contract forthwith, and to retake possession of the Units.

3 On 26 January 2021, Mr. Xaba died. On 27 January 2021, Caterpillar wrote to Absolute View and terminated the contract. It then instituted proceedings in the Mpumalanga Division of the High Court for the return of the Units. The application came before Legodi JP on 22 July 2021. In resisting the application, Absolute View argued that the Companies Act 71 of 2008 precluded the termination of the contract in circumstances where Absolute View had become incapacitated as a result of Mr. Xaba’s death.

4 Legodi JP rejected this contention. He granted an order for the return of the Units to Caterpillar on 26 July 2021. He refused leave to appeal on 11 August 2021. Absolute View is currently petitioning the Supreme Court of Appeal. Pending the outcome of that petition, Caterpillar has, by agreement between the parties, retaken possession of the Units for safekeeping.

5 Before me, Absolute View pursues two more ambitious arguments. The first argument is that the termination of the contract, without affording Absolute View the opportunity to remedy the loss of a guarantor for its obligations under the contract, was contrary to constitutionally informed public policy. Either the term permitting cancellation in these circumstances itself, or the manner in which that term was implemented in this case, ought to be set aside. The second argument is that a range of other terms in the contract which, on their face, authorise self-help, ought also to be set aside.

6 Tempting as it is, I do not think it would be right to explore the issues that Absolute View raises on the facts of this case.

7 I say this for two reasons. The first concerns the attack on the termination clause or its implementation. The second concerns the attack on the clauses of the contract that appear to authorise self-help.

The termination of the contract

8 I do not think that the termination clause can reasonably be said to be contrary to public policy on its face. On the best analysis of his argument, Mr. Ndobe accepted this. Caterpillar sought and received a personal guarantee for Absolute View's performance of its obligations under the agreement. Mr. Xaba stood as that guarantee. His death left Caterpillar without a critical part of the security it had bargained for. Having foreseen that possibility, Caterpillar reserved the right to terminate the contract in that event. Absolute View agreed to this arrangement.

9 Mr. Ndobe offered no submissions at all on why, generally speaking, an arrangement of this sort would offend public policy. I can think of none. What Absolute View and Caterpillar bargained for was a fairly standard *lex commissorium*. *Lex commisorie* are, loosely speaking, contractual clauses that entitle a party to cancel a contract, or impose some other penalty, immediately upon a specified event, usually a breach of one of the contract's terms. There are a range of reasons why that sort of arrangement might be agreed to. This case – in which Caterpillar wanted the right to terminate the agreement on death of a guarantor – provides a fairly typical illustration of why *lex commisorie* are, on their face, perfectly fair, commercially sensible devices to regulate business relationships.

10 The real thrust of Mr. Ndobe's argument was that the invocation of the cancellation clause was contrary to public policy in the circumstances of this case. The problem with this submission, though, is that there is virtually no factual information in Absolute View's founding affidavit that would allow me to assess the nature and extent of the prejudice caused to it by the exercise of Caterpillar's contractual powers. Nor is there anything that would lead me to conclude that Absolute View was, in all the circumstances, unable to reasonably avoid what it says was the oppressive impact of those powers. That would be the very first step in any assessment of whether the exercise of Caterpillar's rights was reasonable and consistent with public policy in this case. As the Constitutional Court has now twice held, the failure to provide information of this nature is generally fatal to constitutionally informed public policy challenges to the exercise of contractual powers (see *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC), paragraph 58 and *Baedica 231 CC v Trustees, Oregon Trust 2020* (5) SA 247 (CC), paragraph 95).

11 The termination of the contract a day after Mr. Xaba's death does appear unseemly. But the termination has to be seen in the context of the fact that, prior to Mr. Xaba's death, Absolute View had already failed to pay an amount due under the agreement; that no-one could have been under any misapprehension about what Mr. Xaba's death might mean for the contract; that the contract was freely entered into by a businessman of some means; and that there is nothing on the papers about what Mr. Xaba or Absolute View had done to consider and make provision for the possibility of Mr. Xaba's death. It is in this last consideration that the seeds of a case might be made out. Notionally, there might have been factual circumstances under which it could have been inferred that Caterpillar's exercise of its contractual powers was unreasonable.

12 The failure to set any of these circumstances out is fatal to this part of Absolute View's case. During argument, Mr. Ndobe invited me to consider the image of the Caterpillar's notice of termination being served on Mr. Xaba's grieving widow in the midst of her mourning. As much as that image evokes sympathy, there is no foundation for it on the papers. It might well have happened that way – the notice of termination was served by Sheriff – but, if it did, a court ought to be told by way of admissible evidence, not in counsel's submissions from the bar.

13 It is also important to point out that Caterpillar has, on at least one occasion, in a letter dated 26 March 2021, invited Absolute View to terminate this litigation, or at least hold it in abeyance, and come to a “commercially sensible resolution” of the dispute. If the substrate of Absolute View's case is that it wants to preserve its contract with Caterpillar, it is hard to see why this invitation was rejected out of hand.

14 Accordingly, there are no facts on which I can reasonably infer that Caterpillar has exercised its contractual powers unreasonably, unconstitutionally, or in a manner contrary to public policy. The facts that I can discern from the papers point, on balance, to the conclusion that Caterpillar has, in fact, conducted itself appropriately, given the commercial context of the relationship between the parties.

The self-help clauses

15 The second leg of Absolute View's case concerns a series of terms in the contract that appear to sanction self-help. Clause 10 (i) (g) of the contract, for example, entitles Caterpillar, as a remedy on breach, to enter any premises where the Units are kept, and to take possession of them “without notice, liability or legal process”.

16 On its face, this is a plainly illegal term. But Mr. Louw, who appeared for Caterpillar, encouraged me to read the clause together with the remainder of clause 10. Part of that text records that Caterpillar will approach a court to permit it to engage clause 10 (i) (g) in the event that Absolute View “breach[es]” the rights the clause confers. When clause 10 is read as a whole, Mr. Louw submitted, there can be no suggestion that it authorises self-help.

17 I am not so sure. The right to enter premises and seize property “without notice, liability or legal process” sits uncomfortably with the putative obligation to approach a court before retaking the Units. At the very least, clause 10 authorises Caterpillar to attempt an act of self-help before approaching a court to overcome any resistance it might meet. That sort of provision may well be contrary to public policy.

18 However, in this case, there is no suggestion, as Mr. Ndobe very fairly conceded, that Caterpillar has ever attempted any acts of self-help, whether on the authority of the contract or otherwise. Caterpillar's approach to the Mpumalanga High Court for authority to re-take the Units confirms that it has never asserted the right to help itself to the Units. In these circumstances, the legality of clause 10 (i) (g) and the other clauses in the contract that appear to authorise self-help is not an issue that arises on the facts. The issue is, in other words, moot.

19 I appreciate that I have a residual discretion to decide a moot issue if it is in the public interest to do so. But there is, I think, no need for another judgment confirming that self-help is inimical to the rule of law, and that contractual terms, regulations, and even statutes, that authorise self-help are generally invalid (see, as one of many examples, *Chief Lesapo v North West Agricultural Bank* [1999] ZACC 16; 2000

(1) SA 409 (CC)).

Order

20 When we make contracts, we plan our relationships with other people. We obtain rights and obligations, and we accord rights and impose obligations on others. We also accept that there are circumstances in which contractual powers may be exercised against us.

21 Where the terms creating those powers are illegal on their face, a court will not generally permit them to be exercised. Where they are perfectly lawful on their face, but their implementation turns out to be unconscionable, unlawful or otherwise so unacceptable or oppressive as to offend constitutionally informed public policy, a court will also step in. But only if the facts demand it.

22 Here, there are no facts on which a demand for intervention can be issued, and the application cannot succeed.

23 The application is dismissed with costs.

S D J WILSON

Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 28 October 2021.

HEARD ON:

25 October 2021

DECIDED ON:

28 October 2021

For the Applicant:

S Ndobe

Instructed by Ndobe Incorporated Attorneys

For the Respondent: PG Louw

Instructed by Werksmans Incorporated Attorneys

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