

SOUTH AFRICA / JUDGMENT

**Batsalani Coral Investments (Pty)
Ltd v CII Rental Pool Company Cape
Town (Pty) Ltd (A140/2018) [2020]
ZAGPPHC 587 (27 August 2020)
[2020] ZAGPPHC 587**

COURT

North Gauteng High Court, Pretoria

BEFORE

Fisher, Louw, Jordaan

CASE / FILE NUMBER

A140/2018

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA,
GAUTENG
DIVISION, PRETORIA
(1)

REPORTABLE: NO
(2)
OF
INTEREST TO OTHER JUDGES: NO
(3)

REVISED: NO
Case Number: A140/2018
In

the matter between: BATSALANI
CORAL INVESTMENTS (PTY) LTD
Appellant
And,
CII
RENTAL POOL COMPANY CAPE TOWN (PTY) LTD
First Respondent

JUDGMENT**FISHER J:****Introduction**

[1] The appellant who was the applicant in the court below appeals the judgement of Constantinides AJ in the Court below. The first respondent opposes the appeal. The second, third and fourth respondents are respectively the Body Corporate of the Sectional Title Scheme in issue, Hilton International Manage LLC (Hilton), and Cii Hotel & Resorts Cape Town (Pty) Ltd (Cii) which is an associate company of the first respondent. These respondents do not oppose the appeal. I thus refer to the first respondent as 'the respondent'

The

facts

[2] The application was based on three written agreements between the appellant and the respondent which all have the same terms (the agreements). The agreements provided for and were part of a scheme which operated in the following way: The appellant had purchased six sectional title units from Cii. These units were situated within and part of an enterprise which was run by Hilton as an hotel, trading as 'The Hilton Cape Town'. The units were furnished and equipped for the purposes of providing accommodation to hotel guests of Hilton. The units were described in the agreements as being part of a 'rental pool' meaning that they were offered as hotel accommodation in the scheme for the purposes of earning an income. In terms of the agreements the respondent was appointed as 'rental pool operator' and as such would attend to the management of the scheme. This would entail the respondent calculating the amount owing to the appellant from the letting out of the units, in accordance with an agreed formula.

[3] In May 2012, addenda to the agreements were concluded in terms of which the respondent delegated the management of the scheme to Hilton which was thus became the 'rental pool manager'.

[4] Clause 9.3.2 of the addenda is central to this appeal. It deals with the entitlement of the appellant to withdraw its units from the scheme. It provides that the appellant was entitled to withdraw its units from the rental pool at any time after 19 February 2013 on twelve months' notice if the appellant's net income from a unit for any calendar year was less than 7% of the purchase price that the appellant had paid to Cii for the units. Put simply, this was an 'escape clause' which allowed the appellant to exit the scheme if it wasn't getting the requisite return on investment. The drop below 7% would be the 'trigger event' which would allow for the exit on twelve months' notice. The clause provided that the notice go to both the

respondent and Hilton.

- [5] The appellant did not get its return of 7% and above and it thus It gave written notice to withdraw.

The defences in the court below

- [6] In the Court below the respondent sought to challenge both the occurrence of the trigger event and the validity of the notice.

Trigger Event

- [7] As to the trigger event, it set up disputes as to the financial position of the parties such that it contended that the drop below 7% could not be accepted without resort to evidence. Pertinently, in paragraph 24.5 of the appellant's replying affidavit the following is stated as to this central issue:

'The [respondent] has never refused to pay any amount which may be due to the [appellant] However, there is a longstanding dispute between the (appellant) and [the respondent] and Cii ... regarding the [appellant's] income and its extent'.

- [8] It was thus argued as follows by the respondent

' Accordingly if is clear that there is a dispute between the [appellant! (on the one hand) and [the respondent and Hilton] (on the Other) in regard to the quantification of Owner's Income. Whilst this dispute persists, nothing in the [appellant's] papers or the relief which it seeks herein or in the agreements. entitles the [appellant] to withdraw its units from the Rental Pool. The [respondent and Cii] have never failed or refused to pay any amount which has been found to be due to the Applicant'

- [9] The respondent placed vague reliance on litigation between the appellant and Cii to support its contention that it was not established that the income received was below the 7% threshold. The implication was that because of that litigation it was not possible to determine how much was owed by the respondent to the appellant and thus resort must be had to oral evidence.

Validity of Notice

- [10] The Court was persuaded to find that there was a dispute of fact as to whether the trigger event had occurred. It thus held that the point as to whether the notice given sufficed for the purposes of the withdrawal had 'become academic' and the matter was thus determined on the finding that there was an irresolvable dispute of fact which should have been anticipated by the appellant. The application was dismissed with costs.
- [11] As to the notice, the applicant contended that it was not in accordance with the agreement and thus of no effect. I will deal later with the intricacies of the respondent's argument on this point.

The appeal

[12] In this appeal, Mr Daniels SC who appeared for the respondent sensibly conceded that as to the 'trigger event' there was, in fact, no dispute. No payment at all had been made to the appellant under the rental pool scheme and the dispute which generated the litigation purportedly relied on to establish a dispute was between Cii and the appellant and not between the appellant and respondent. It is clear that the reference to this litigation by the respondent in the Court below was nothing more than a sleight of hand used in a bid to conjure a dispute where there was actually none. Unfortunately, this did the trick and the matter was dismissed in the Court below.

[13] This leaves the notice point, to which I now turn.

[14] In terms of clause 9.3.2 the appellant is entitled to withdraw the units from the rental pool at any time after 19 February 2013 :

3.1. by giving 12 months written notice to the respondent and Hilton:

3.2. in the event that the net "Owners Income" is less than 7% of the purchase price paid by the appellant for the unit in question;

3.3. provided that the unit was available to the Rental Pool for every night during the relevant calendar year, or if not available every night, that the aforesaid 7% has been reduced pro-rata.

[15] In order to effect the withdrawal under clause 9.3.2 the appellant gave written notice by means of a letter addressed by the appellant's attorneys, Honey Attorneys to Norton Rose Fulbright, the respondent's attorneys dated 22 May 2015 and a letter addressed by appellant's attorneys to respondent's attorneys dated 3 June 2015. As I have said, there was at this stage no direct notice given to Hilton. A withdrawal letter dated 28 July 2015 was delivered to Hilton on 6 August 2015.

[16] The withdrawal letter dated 22 May 2015 provided notice of withdrawal in terms of clause 9.3.2 to the respondent. In this letter, the appellant's attorneys made the error of thinking that there was a measure of goodwill and common sense at play and it asked that the notice be onward transmitted by the respondent to Hilton and that confirmation of this notification be given to it. It appears the thinking behind this approach was that the appellant had no direct relationship with Hilton, the contractual relationship being between Hilton and the respondent. However the respondent did not give any confirmation that it had transmitted the notice to Hilton and indeed the respondent is correct in the stance that it takes. being that it had no obligation to forward the notice to Hilton.

[17] In due course, the appellant's attorneys realized that it would need to provide notice in terms of the agreement, separately to Hilton. It thus attended to delivering this notice of withdrawal on 6 August

2015. In doing this it made a second error - it assumed notice to Hilton from the date of the withdrawal letter to the respondent i.e. 22 May 2015 and indicated in the letter to Hilton that this was the date from which the twelve month period would run.
- [18] The respondent was reluctant to allow the release of the units. It began casting about to find fault with the notices. It was first suggested that the notices had specifically to make reference to the trigger event to have validity. It was then suggested that the fact that the two notice letters were not sent simultaneously was a problem. These issues are, wisely, not persisted with. But the respondent still has one point in relation to the notice. This has become the remaining issue in this appeal. The letter to Hilton, it argues, is non-compliant with clause 9.3.2. in that it purports to have the notice period run from a date earlier than the date of the receipt of the notice. Thus it says that whilst the respondent received timely notice, the notice given to Hilton was short by nearly 3 months when calculated from the date of receipt. It argues that this invalidates the notice and that as clause 9.3.2 provides for notice to both the respondent and Hilton there has not been notice of withdrawal as prescribed by the agreements.

Discussion

- [19] Mr Roodt SC for the appellant relied on two cases which he argued were analogous to the facts in this case.
- [20] In *Chesterfield Investments*[1] In considering the effect of a premature cancellation by the respondent of a sale agreement of immovable property, the Court held that, although the cancellation was initially of no force or effect as the date for cancellation had not yet arisen 'if, at the date on which the seller is entitled to cancel, he evinces an attitude that the contract has been cancelled, I do not think it matters whether he relies on the original premature cancellation or on a fresh cancellation, save, maybe, if the date upon which his cause of action arose becomes important'.
- [21] In *Beck v Du Toit*[2] the respondent defaulted on a sale agreement in respect of immovable property by failing to make timely monthly payments. The applicant had the right to cancel if respondent failed to perform. The letter of cancellation referred to non-performance for the month of February. In the application, a defence of waiver in respect of this payment was raised. This could not be determined on the papers. However there had been no payment for March and this non-payment was thus relied on by the applicant. The court held that the applicant could rely on the respondent's undisputed late payment for the month of March in that she had 'consistently manifested the attitude that the deed of sale has been cancelled by her, and where she had a valid and undisputed ground for cancellation at the time she instituted motion proceedings for cancellation, she is entitled to rely on such ground even though she has not stated in her affidavit in so many words that she is claiming cancellation on that ground.'

[22] These judgments show a movement away from undue formalism and towards an appreciation of the purpose of the particular notice in a commercial context. Of course, each matter must be examined on its own facts. There may indeed be circumstances where resort to formalism is justified in the context in question and a purposive treatment should be applied.

[23] Mr Daniels argued that Beck and Chesterfield were distinguishable from the .present situation in that they dealt with cancellation whereas this case dealt with the giving of a period of notice in order to enable the respondent and Hilton to have the time within which to regulate their commercial affairs according to the notice period given. He argued that because short notice was given to Hilton, reference being had to the date specified as that from which the notice was said to run , the notice was invalid and should be discounted. This in turn, the argument goes, made the first notice of no effect as notice was to be given to both the respondent and Hilton.

[24] As I have said, the intention of the parties as to the purpose of the notice is important The notice provision, purposively construed, requires that the appellant give notice to the respondent and Hilton of the fact that it would withdraw the units from the pool. The fact that a prescribed date from which the notice would run was expressed in the notice did not change the fact that such intention had been clearly expressed and continued to be expressed. The respondent would

have been aware of the fact the agreed revenue was not being realised and that it was in jeopardy of having the investment withdrawn from the scheme. Indeed this trigger event allowed for the withdrawal on notice. The date was superfluous. All that needed to be conveyed was the intention to withdraw. In terms of the contract. once that was conveyed the hour glass would be turned and the time would run its course of a year. The suggestion that the insertion of a date could have the effect of invalidating the notice seems to me to invite into the commercial scheme a measure of formalism which would be counterintuitive.

[25] Furthermore, by the time that the application was brought the yearlong notice period had elapsed, in both instances by some months. Thus, this is not a case of an attempt to claim relief prematurely.

Conclusion

[26] The appeal thus succeeds with costs

Order

[27] I thus make the following order:

1. The order of Contantinides AJ is set aside and replaced with the following.

- (a) The first respondent is to release the sectional title units 802,803. 808,809, -s14 and 8l 6 operated by the first respondent and held in the second respondent's scheme, from the rental pool to the applicant within five days of delivery of this order.
 - (b) The Sheriff of this Court is authorised to effect the aforesaid order in the event that the first respondent does not comply therewith.
 - (c) The first respondent is to pay the costs of the application:
2. The first respondent is to pay the costs of the appeal.

FISHER J

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

I concur,

LOUW J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I concur.

JORDAAN AJ

Date of Hearing: 5 August 2020

Judgment

Delivered: 27 August 2020

Appearances:

Counsel for the Appellant: Adv P.T Road SC with Adv I.L Posthumus.

Instructing Attorneys: Geodes & Seedat Inc.

Counsel for the 1st Respondent: Adv J.P Daniels SC with Adv K Premhid.

Instructing Attorneys: Mervyn Taback Inc.

[1] Chesterfield Investments (Pty) Ltd v Venter 1972(2) SA 19 W

[2] 1975 (1) SA 366 O

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