IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA
HELD AT LOBATSE

COURT OF APPEAL CIVIL APPEAL CACLB-018-07
HIGH COURT CIVIL CASE NO. CC1619 -05

In the matter between:

BOTSWANA DEVELOPMENT CORPORATION APPELLANT

vs

TREDINNICK (BOTSWANA) (PTY) LTD RESPONDENT

T. W. Beckerling S.C., with him M.B. Marumo for the Appellant
A.I.S. Redding S.C, with him S. Vivian, for the Respondent

JUDGMENT

CORAM : **ZIETSMAN, J.A**
MCNALLY J.A.
LORD COULSFIED J.A.

MCNALLY J.A

1. I shall refer to the parties as B.D.C. and Tredinnick respectively. The facts giving rise to the dispute between them are relatively simple, and are as follows:-

    1. On 18 June 2002 and at Gaborone B.D.C and Tredinnick agreed in writing that B.D.C would and did grant Tredinnick an option, irrevocable for twenty four months, which was later extended by a

further nine months, to purchase certain land (the property) at a price of P250 per square metre.

2. On 16 December 2004, within the extended option period and before the option had been exercised, B.D.C informed Tredinnick in writing that:

   (a) B.D.C was not the owner of the property;
   (b) B.D.C. was not entitled to sell the property and would not sell it;
   (c) The property belonged to Commercial Holdings (Pty) Ltd which was the registered owner.

3. On 3 February 2005, Commercial Holdings wrote to Tredinnick offering one of the three plots concerned at a price of P300 per square metre.

4. On 4 February 2005, still within the extended option period, Tredinnick wrote to B.D.C purporting to exercise the option.

5. On 10 February 2005 B.D.C. replied, referring to its earlier letter and reiterating that it "is not the owner of the land, it is not entitled

to sell the land and cannot sell it. We are therefore not able to act on the Option Agreement you refer to."

2. This exchange of correspondence reflects poorly on the conduct of B.D.C. a wholly government owned public body, particularly so when it appears common cause that B.D.C. owns 100% of the shares in Commercial Holdings (Pty) Ltd. It is trite that in Roman Dutch Law one may validly sell something that one does not own. The seller's obligation is simply to put itself in a position to effect transfer when required to do so. One can only assume therefore that B.D.C. came to realize that it had made a bad bargain, and sought unilaterally to resile from it, using an excuse which is to say the least questionable. It had always known that the property belonged to Commercial Holdings (Pty) Ltd.

3. There was a certain amount of further correspondence, and Mr Lalonde of Tredinnick met with representatives of B.D.C. to see whether there was any way out of the impasse. Otherwise, he said, he would have to claim damages. Eventually Tredinnick instituted action against B.D.C. claiming damages.

THE PLEADINGS

4. The summons and particulars of claim were served on 9 June 2005. The plaintiff alleged in summary:

   1. That there had been a written irrevocable option agreement;

   2. That the option had been exercised, alternatively that Tredinnick had informed B.D.C that it intended to exercise the option;

   3. That B.D.C had repudiated the option, which repudiation had been accepted, alternatively was now accepted by Tredinnick;

   4. Alternatively B.D.C. had breached the warranty in the agreement, that the breach was material and Tredinnick had elected to cancel the option, alternatively hereby cancelled the option;

   5. The parties had contemplated that Tredininnick would suffer damages if there was a breach.

   6. Tredinnick had suffered damages in the sum of P35,029.890-00.

5. After further particulars were sought and delivered, B.D.C. filed its plea on 29 August 2005, alleging, and again I summarise:-

   1. That Tredinnick was obliged in terms of the agreement to exercise its option in a particular way and had not timeously or validly done so;

   2. That B.D.C. had not by its conduct repudiated the agreement or breached any warranty or representation contained in it;

   3. That Tredinnick could not and did not make the election (s) to accept the alleged repudiation or to cancel the agreement;

   4. Tredinnick's letter of 4 February 2005 was "inconsistent with an acceptance of a repudiation and/or cancellation" and amounted to "an election not to accept such alleged repudiation and / or not to cancel the agreement;"

   5. Having made this election it was not open to Tredinnick to accept the alleged repudiation and/or to cancel the agreement at any time after 4 February 2005 on the basis of the facts set out in B.D.C.'s letter of 16 December 2004;

6. In any event, save insofar as it purported to do so in its particulars of claim, Tredinnick did not communicate its alleged election to accept the repudiation and/or to cancel the agreement (neither of which are admitted) to B.D.C;

7. The agreement lapsed by effluxion of time prior to service of summons and/or prior to the communication of any acceptance of repudiation and/or cancellation to B.D.C.

6. When the matter came to trial Mr Lalonde gave evidence for Tredinnick. Significantly B.D.C. closed its case without leading evidence.

THE JUDGMENT:

7. The Court gave judgment on 5 March 2007 in favour of Tredinnick on the merits of its claim, it having been agreed that the merits would be dealt with separately, the question of quantum to be addressed later if necessary.

THE GROUNDS OF APPEAL

8. On 11 April 2007 the Notice of Appeal was filed, setting out the following grounds of appeal:-

1. The learned judge erred in finding that the Respondent validly

exercised its option to purchase the land the subject of the dispute.

2. Having found that the Respondent on 4 February 2005 made the election to enforce the agreement, then the learned Judge ought properly to have found that the Respondents' available course for any failure and/or refusal on the part of the Appellant to perform in terms of the contract was to sue for an order of specific performance prior to the expiry of the option.

3. The learned judge erred in finding that the Appellant was in breach of the representations and warranties made in terms of the option agreement.

THE NATURE OF AN OPTION

9. In an article in (1988) 105 SALJ at pages 547 – 552 by Professor Dale Hutchinson and B.J. Van Heerden the authors say, at 548

> "It is generally agreed today that an option entails an undertaking by an offeror to keep his offer open for a certain period. As such, it is a contract – a species of *pactum de contrahendo* – which like all other contracts is generally formed by a process of offer and

acceptance. What invites confusion, however, is the fact that the subject – matter of the option contract is the offer to enter into the "main" contract. Thus the option necessarily involves two offers: the 'main offer' (for example, an offer to sell) and an offer to keep that main offer open. Acceptance by the offeree of the latter offer calls into existence the preliminary or ancillary contract of option, while acceptance of the main offer – that is, the exercise of the option – gives rise to the main contract (for example, sale.)

10. Christie on Contract 5th Edition, says at p54:-

> "To understand the true nature of an option it is best to analyse it into two parts – an offer to enter into the main contract together with a concluded subsidiary contract (the contract of option) binding the offeror to keep that offer open for a certain period. On this analysis it is easy to see that the offeree is contractually bound to keep his offer open, and if he breaks this contract of option by disabling himself from performing it or by expressly or impliedly repudiating it he will be liable for damages for breach of contract."

ANALYSIS OF THE ARGUMENTS

11. It seems to me that the Appellant is wrong when it seeks to evade

liability for damages by focusing attention upon Tredinnick's letter of the 4 February 2005 purporting to exercise the option. We must begin the analysis by looking at B.D.C's own letter of 16 December 2004 in which it brazenly announces its intention not to abide by its contractual undertakings, and seeks to justify this by a series of statements which are at best half – truths (see paragraph 1.2 supra.)

12. This conduct in itself gives rise to an action for damages. But the measure of those damages will depend upon the reaction of the other party. In order to be entitled to claim what has been called the positive interesse, i.e. to claim what it would have gained had the option been exercised, it must show that it would probably have exercised the option. This is the clear effect of the decision in Sommer v Wilding 1984 (3) SA.647(A).

13. It was obviously with at least a layman's awareness of this requirement that Mr Lalonde of Tredinnick wrote his letter of 4 February 2005. In it he said:-

> "Kindly treat this letter as your notice in terms of Clause 1. 5 of the Option Agreement that Tredinnick hereby exercises its option to acquire the Property for the consideration provided for by Clause 1.2 of the Option Agreement. If you would be so kind as to prepare the deed of Purchase and Sale in accordance with

Schedule "B" of the Option Agreement and forward same to us by return it would be appreciated.

> "We confirm that against execution of the deed of purchase and sale that the purchase price shall be deposited into the account of Collins Newman & Co. as provided for by Clause 3 of the draft deed of purchase and sale.
>
> We look forward to your (sic) receipt of the deed of purchase and sale in executable form by return."

14. In evidence Mr Lalonde clearly confirmed that Tredinnick was ready, willing and able to proceed with the purchase of the property, and this was not questioned or controverted. It does not seem to me to matter therefore, whether his letter of 4 February 2005 was or was not a proper exercise of the option in terms of the provisions of clause 1.5 of the Option Agreement. However I have no difficulty in accepting the learned trial Judge's assessment that in the circumstances it was. At the least, it fulfilled the requirement in Sommer v Wilding (Supra) in that it showed "that he would probably have exercised the option." In any event, it is quite clear that Tredinnick did everything in its power to keep the option alive and to demonstrate that it was willing and able to exercise it, and would have done

so if not prevented by the determined refusal of B.D.C. to honour its agreement and take the steps, which, as the judge held, were incumbent on it to enable it to be carried out.

15. The next point made in the grounds of appeal and relied upon by Mr Beckerling in argument raised the dreaded spectre of "approbation and reprobation." It has so often been said that a party cannot do both. See Feinstein v Niggli & Another 1981(2) SA 684 (A) at 697 H and Thomas v. Henry & Another 1985(3) S.A. 889 (A) at 895 I – 896b G, specifically at 896A. If Tredinnick had approbated in its letter of 4 February 2005, by exercising its option, it could not later reprobate by cancelling the contract.

16. It is trite law that every case must be judged on its own facts, and there is a danger here of confusion – see the SALJ article to which I have referred to in paragraph 9 supra – because of the dual nature of the contract of option. It was necessary for Tredinnick to "approbate" in order to keep open its right to exercise the option. Having secured its position by doing so, it could then wait to see what B.D.C. would do next. When B.D.C, on 10 February 2005, repeated its determination not to act on the Option Agreement, Tredinnick "reprobated". It called a meeting with B.D.C and stated that it would have to claim damages unless some compromise could be reached. B.D.C. would not move.

17. There is nothing more clear here than that B.D.C. was in fundamental breach of the Option Agreement. I am equally satisfied that Tredinnick, having established its ability and desire to maintain the contract, eventually accepted the breach and was entitled to claim damages on the basis of positive interesse.

18. I would dismiss the appeal with costs, including the costs of two counsel, and it is so ordered.

DELIVERED IN OPEN COURT AT LOBATSE ON THIS 30th----DAY OF JANUARY 2008.

N. J. MCNALLY
JUDGE OF APPEAL

I agree

N. ZIETSMAN
JUDGE OF APPEAL

I agree

LORD COULSFIELD
JUDGE OF APPEAL