135/96

bw/ Case no: 312/95

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

CAPE DAIRY CO-OPERATIVE LIMITED **Appellant**

and

FRANK WALLACE FERREIRA **Respondent**

Court: **Van Heerden, Vivier, Marais, Olivier and Zulman JJA**

Heard: **5 November 1996**

Delivered: **22 November 1996**

JUDGMENT

Van Heerden JA:

The basic question raised by this appeal is whether the respondent was still a member of the appellant on 1 November 1993.

The appellant is a dairy co-operative incorporated under the Co-operative Act 91 of 1981 ("the Act"). Towards the end of 1992 the respondent decided to terminate his membership of the appellant. The reason was that he intended marketing his dairy products in competition with the appellant, and that in terms of clause 99 of the appellant's statute he could not do so whilst being a member of the appellant. During November or December 1992 the respondent informed one Thompson, a director of the appellant, of his intention and the reason therefor. Thereafter, during April 1993, the respondent met an employee of the appellant, Marais, and told him that he (the respondent) wished to resign as a member of the appellant. Marais

then handed him a printed form which he completed and signed in Marais's presence.

I shall revert to the contents of the form. At this stage it suffices to say that during June 1993 the respondent received a letter from the appellant's "hoofbestuurder: lededienste." The letter was dated 16 June 1993 and read as follows:

> "Aansoek om beëindiging van lidmaatskap is ontvang en is goedgekeur op 'n direksievergadering gehou op 15 Junie 1993. Aangeheg 'n tjek ten bedrae van R700-00 ten opsigte van u aandele kapitaal gehou in Kaap Suiwelkoöperasie Beperk . . . ."

During September 1993 the appellant's members adopted two special resolutions. These resolutions, which became operative on 1 November 1993, bestowed on the appellant's members certain benefits which need not be detailed. The respondent did not receive such benefits and consequently initiated motion proceedings against the

appellant in the Cape Provincial Division. He contended that in terms of clause 33(1) of the appellant's statute the termination of his membership became effective only at the end of the appellant's book year (28 February 1994) and hence sought orders declaring that he was entitled to the said benefits. The application was opposed by the appellant on the ground that the respondent's membership of the appellant was terminated when the decision of the board of directors approving his application was communicated to him in June 1993. The court a quo (Van Zyl J) found for the respondent and consequently granted the declaratory orders sought by the respondent. Subsequently it gave the appellant leave to appeal to this court.

In order to grasp the import of the reasoning of the court a quo reference must be made to the contents of the form completed and signed by the respondent and to certain provisions of the appellant's

statute. The heading of the form is "Application for Termination of Membership in Cape Dairy Co-operative Limited" and it reads as follows:

> "I, the undersigned . . . . [the respondent] . . . hereby apply for the termination of membership in the abovementioned co-operative.
> In view of the fact that I have permanently relinquished my dairy farming in the area served by the co-operative, I will no longer be making use of the services of the co-operative."

Clauses 29 and 33 of the statute, in so far as material, provide:

> "29(1) Die aandele wat geregistreer is in die naam van 'n lid wat sy boerdery permanent gestaak het, word op skriftelike kennisgewing van die lid en op aanbeveling van die raad [the board of directors] by besluit van die lede op 'n algemene vergadering, ingetrek.
>
> (2) Sodanige intrekking sal nie binne 12 maande na die datum waarop die lid sy boerdery gestaak het, gedoen word nie.
>
> 33(1) 'n Lid wat bedank het, se bedanking tree slegs aan die einde van 'n boekjaar in werking en dan slegs indien hy minstens drie maande voor die einde van

> die boekjaar aan die koöperasie kennis gegee het van sy bedanking. Die koöperasie moet so spoedig moontlik die ontvangs van sodanige kennisgewing skriftelik erken. Sodanige kennisgewing word nie teruggetrek nie sonder toestemming van die raad wat skriftelik aan daardie lid oorgedra is.
>
> (2) Die aandele van 'n lid wat bedank het word by besluit van die raad ingetrek. Die bedrag wat op die aandele wat ingetrek is opbetaal is, word volgens oordeel van die raad en mits fondse beskikbaar is binne 'n tydperk van tien jaar na datum van intrekking aan die gewese lid terugbetaal . . . "

It was rightly common cause, both in the court a quo and on appeal, that Marais mistakenly handed the respondent the wrong form to complete and sign. What was wrong, was the printed reason given in the form for the application for termination of membership. It was also common cause that the respondent submitted the completed and signed form in order to bring about termination of his membership. The issues in the court a quo were accordingly confined to (i) whether

a member and the appellant's board of directors may by agreement effect a summary termination of membership and if so, (ii) whether the respondent and the board in fact agreed so to terminate the respondent's membership. If either question were answered in the negative, the respondent's membership would, of course, not have terminated by 1 November 1993.

It is not entirely clear whether the court a quo was of the view that the statute does not preclude termination of membership by agreement between a member and the appellant's board (as opposed to all its other members). It did hold, however, that no agreement directed at a summary termination of the respondent's membership was concluded. The court's main reasoning appears from the following passage in the judgment:

"The use by the applicant [the present respondent] of a standard

> form of termination of membership and the respondent's approval thereof appear to indicate that the parties were relying on the provisions of the statute rather than attempting to bypass them. The incorrect use by the applicant of the standard form relating to a clause 29(1) termination of membership and the incorrect approval by the respondent of such form of termination are indicative of ignorance or confusion regarding the applicable provisions of the statute. It can certainly not be inferred from these documents that the parties intended to exclude the provisions of the statute. If that had been the case one would have expected some form of express waiver of the rights arising from the statute or at least a clear and unambiguous expression of the intention to terminate the applicant's membership with immediate effect. This would have to be expressed in so many words, alternatively in such a way that it could not be regarded as compatible with the provisions of the statute."

Before us counsel for the respondent supported this reasoning but in his heads of argument also submitted that unless the consent of all the members of the appellant is obtained, membership may be terminated only as prescribed by the appellant's statute. I do not agree. There is admittedly no provision in the statute which

specifically authorises termination of membership by agreement between a member and the appellant's board. Nor, however, is such termination expressly precluded by the statute or the Act. Indeed, s 81 of the Act provides that membership of a co-operative may be terminated, and that shares in a co-operative may, subject to the provisions of the co-operative's statute, be cancelled inter alia if a member resigns as such. Furthermore, s 107(1) of the Act, in so far as material, empowers the board of directors of a co-operative to exercise and perform the powers and duties of the co-operative subject to its statute.

Turning to the appellant's statute, clause 9 authorises its board to approve of an application for membership, whilst clause 11 provides that, subject to a qualification which is inconsequential for present purposes, membership is acquired by the allotment or transfer of

shares to the applicant. Membership is therefore acquired by virtue of an agreement between the applicant and the board. If the ordinary principles of the law of contract were to apply, that agreement could at any time be terminated by the mutual consent of the member and the board. It would indeed be surprising if that could not be done. Assume that after approval of an application for membership, but prior to the allotment or transfer of shares to the applicant, he changes his mind and requests the board to consent to a cancellation of his approved application. There can surely be no reason why the only parties to the agreement which was concluded under clause 9 of the statute should not be competent to rescind it by mutual consent. And since shares are allotted or transferred pursuant to such an agreement, there is likewise no reason why resultant membership cannot be terminated by a further agreement between the member and the board.

The untenability of the submission under consideration may be illustrated by reference to the facts of this case. If the agreement in question were to be precluded by clause 33 of the appellant's statute, then, notwithstanding approval by the board of an explicit application by the respondent for summary termination of his membership, he would have been debarred from freely marketing his dairy products for a period of some seven months after the date of the approval. It therefore seems to me that the power to bring about a summary termination of membership applied for by a member is by necessary implication conferred upon the appellant's board by clauses 9 and 11 of the statute read with sections 81 and 107(1) of the Act. (A similar conclusion was reached by Berman J in his unreported decision in Savage v Cape Dairy Co-operative Limited, CPD case no 4389/94.)

I now turn to the above quoted passage in the judgement of the

court a quo. I cannot agree that the use of the standard form and the board's approval of the request embodied therein indicate that the parties intended to give effect to the express provisions of the statute. In his replying affidavit the respondent says that when Marais handed him the standard form he (Marais) was aware that the respondent wished to resign as a member because the latter intended marketing his own milk. This purpose he obviously wanted to achieve in the near future. Indeed, the respondent did not deny the appellant's allegation that "(t)he termination of membership which . . . [respondent] . . . applied for was intended to have immediate effect." When submitting the completed and signed form the respondent therefore sought to terminate his membership as soon as possible. He may not have been aware of the relevant provisions of the statute but he was clearly inviting such action on the part of the respondent as

may have been necessary to bring about a summary termination of his membership. This is borne out by the fact that he signed an application for termination of membership as opposed to a unilateral notification of resignation. In effect the respondent therefore sought the appellant's consent to a summary termination.

The only inference to be drawn from the appellant's letter of 16 June 1993 is that the board did so consent. First, it was stated in so many words that the respondent's application for termination of his membership had been approved of; an approval which would have been unnecessary under clause 33 of the statute. Second, the repayment of the amount paid up in respect of the respondent's shareholding was consistent only with a termination of membership achieved by consent. For had the respondent's application constituted no more that a notification of his intention to resign under the statute,

payment could, in terms of clause 33(2), have been made only when the resignation became operative, i.e. on or after 1 March 1994. (Counsel for the appellant did submit that clause 33(2) permitted an earlier payment but the submission clearly lacks substance.)

Unlike the court a quo I would not have expected "some form of express waiver of the rights arising from the statute" if the parties intended to terminate the respondent's membership by consent. I say so because clause 33 spells out the consequences of a unilateral act of a member, and has no bearing on a termination sought to be achieved by agreement.

In conclusion I should perhaps deal with a letter, dated 3 May 1993, written to the respondent by the appellant's financial manager in Port Elizabeth. The writer acknowledged receipt of the application under consideration, and said that it had been forwarded to the

appellant's head office for further attention. This letter, so it was argued by counsel for the respondent, was consistent with an intention on the part of the appellant to apply the provisions of clause 33; the reason being that clause 33(1) requires an acknowledgment of receipt of a notice of resignation. All that need be said is that the letter constituted no more than a colourless acknowledgment of receipt and that it had in any event been written before the respondent's application came to the notice of the board. Hence, it has no pertinence to the legal effect of the approval of that application.

In the result I am of the view that by unequivocal conduct the respondent and the appellant's board agreed to terminate the former's membership. That being so, the respondent ceased to be a member before 1 November 1993.

The appeal is allowed with costs, including the costs of two counsel, and the following is substituted for the order of the court a quo:

"The application is dismissed with costs."

HJO VAN HEERDEN
JUDGE OF APPEAL

Concur

Vivier JA
Marais JA
Olivier JA
Zulman JA