GERHARDUS JOHANNES SCHOEMAKER Appellant

and

PIETER LUDOLF LOCHNER 1st Respondent

ELEANOR MARGARET LOCHNER 2nd Respondent

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

GERHARDUS JOHANNES SCHOEMAKER — Appellant

and

PIETER LUDOLF LOCHNER — 1st Respondent

ELEANOR MARGARET LOCHNER — 2nd Respondent

Coram: KOTZÉ, MILLER, VAN HEERDEN, JJ A , GALGUT et SMALBERGER, A JJ A

Heard: 12 November 1984

Delivered:

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## J U D G M E N T

KOTZÉ, J A :

On the 19th February 1976 the appellant

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(as purchaser) submitted to the respondents (as sellers) an offer in writing to purchase all the issued shares and loan accounts in the company Stephanibyz Praedium (Pty) Ltd (the company) for a purchase price of R35 000,00. The offer was submitted through an estate agent on a printed form used by the estate agent for transactions of that kind. The offer was accepted by the respondents on the same day "at 19.30 pm" (presumably 7.30 p m ). As is normal with this type of form certain standard provisions are printed in full and names, descriptions, amounts and one or two provisions of particular application are filled in with pen and ink in certain blank spaces specially provided for the purpose. Furthermore, as will hereafter appear, and as is also sometimes encountered in contracts of this kind, one blank space was left in the offer form.

It is necessary, for present purposes, to quote only four out of twelve paragraphs containing the terms and conditions of the accepted offer (the standard provisions are cited without emphasis and the particular or filled in provisions are cited with emphasis).

1. THAT the COMPANY is and will be on the transfer of the shares, the registered owner of certain property being certain piece of ground or Lot No./S <u>241</u> in the <u>TOWNSHIP of CHARTWELL AG: HOLDING</u>.
2. THAT the aggregate purchase consideration payable by me in respect of the sale of all the issued shares and in respect of the loan accounts shall be the sum of R <u>35,000-00 (THIRTY FIVE THOUSAND RAND.</u>) payable as follows:-

   (a) The sum of R<u>1000-00</u> <u>ONE THOUSAND RAND</u> shall be paid upon acceptance hereof to BRIAN COLLIS ESTATES (PROPRIETARY) LIMITED, who shall hold such sum in trust, pending transfer of the shares into the name of the Purchaser or his nominee and cession of the loan accounts into the name of the Purchaser or his nominee;

(b) The balance of the purchase price, namely the sum of R 34,000-00 (THIRTY FOUR THOUSAND RAND.) shall be secured by a Banker's or other approved Guarantee/s expressed to be payable against transfer of the said shares and cession of the loan accounts shall be delivered within 90 days of acceptance of this offer.

6. (a) IT is recorded that the COMPANY has passed a Mortgage Bond over the property referred to in paragraph "1" hereof in favour of:-

S.A. PERMANENT SOCIETY

for the sum of R 10,000-00 TEN THOUSAND RAND and 2nd bond for R 4,000-00 FOUR THOUSAND RAND in favour of Bloch which latter bond will be cancelled prior to transfer of shares and that the balance owing thereunder as at date hereof is R....................

In the event of the said balance owing under the said Mortgage Bond as at the date hereof being more than the aforesaid amount, the purchase consideration referred to in Paragraph "2" shall be reduced by the amount of such excess. In the event of the said amount being less then the purchase consideration will be increased by the difference in the said amount.

12. <u>This offer is conditional upon the Purchaser or the Agent or the Seller on behalf of the Purchaser, being able to increase the existing bond referred to in Clause 6(A) to R 20,000-00 TWENTY THOUSAND RAND, or alternatively, (b) to arrange a First mortgage bond on security of the property for the sum of 20,000-00 Rand at the prevailing rate of interest for a fresh Mortgage Building Society Bond in Johannesburg, in time FOR THE PURCHASER TO COMPLY WITH CLAUSE 2(b). The purchaser hereby undertakes and agrees to do all things necessary to enable the agent and/or THE SELLER TO FULFIL THESE CONDITIONS ON THE PURCHASER'S BEHALF</u>.

It is common cause that the suspensive condition contained in paragraph 12 was duly fulfilled. The appellant failed to furnish the guarantee referred to in (b) of paragraph 2 within 90 days of 19th February 1976 or at all. This failure led to litigation: the respondents issued summons against the appellant in the Witwatersrand Local Division for an order directing the appellant to deliver a banker's guarantee payable against transfer of all the issued shares and cession of the loan accounts in the company together with interest and costs.

The action was tried by NICHOLAS, J who found that there was no substance in either of two defences relied on by the appellant and entered judgment in favour of the respondents. The appellant now appeals against the said judgment.

The first of the two defences was pleaded as follows:

"2. (c) (i) The balance owing under the mortage bonds referred to in clause 6(a) of the said written agreement was left blank in that clause.

(ii) The amount left blank as aforesaid constituted a material term of the said written agreement and without it the purchase consideration payable by the Defendant in terms of the said written agreement was not capable of computation.

(iii) The parties intended that such amount should be inserted in the said written agreement.

(iv) In the premises the said written agreement is void and of no force or effect."

The second of the two defences was summarised by the learned Judge in the Court a quo as follows:

> "The second defence was that the agreement was void and of no force or effect by virtue of the provisions of section 38 (1) of the Companies Act No. 61 of 1973 which provides that no company shall give any financial assistance for the purpose of or in connection with a purchase made or to be made by any person of or for any shares in the company ...
>
> It was alleged in the plea ... that -
>
> '5(a) The parties to the said written agreement intended at all material times, and more particularly on the date of signature of the said written agreement, that the proceeds of the bond or bonds referred to in Clause 12 of the said written agreement

> would be used for the purchase of the shares and loan accounts sold in terms of the said written agreement, and more particularly for the payment of portion of the purchase price payable by the Defendant to the Plaintiffs in terms of the said written agreement.'"

No evidence was led in regard to either defence. Nor does the record disclose surrounding circumstances which bear on the issue.

The first defence.

Since the surrounding circumstances are of no assistance and no extrinsic evidence has been adduced to throw light on the reason why the blank was left in paragraph 6(a) the answer,

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if at all possible, must be gathered from the document itself. Although the process resorted to in this connection falls under "the general umbrella of construction" it does involve the drawing of inferences as to the intention of the parties. (See the remarks of CORBETT, J A , in Johnston v Leal, 1980(3) S A 927 at 940 i f - 941A). NICHOLAS, J , based his conclusion that the first defence was without substance on construction (i) referred to by CORBETT, J A , in Johnston v Leal, supra, at 940. NICHOLAS, J reasoned as follows:

> "In my opinion the second and third sentences in clause 6(a) were intended to provide for an adjustment of the purchase consideration up or down, depending upon whether the actual

balance owing under the mortgage bond referred to in the first sentence is lower or higher than the balance recorded in that paragraph. Where no balance is recorded, the inference, in the absence at any rate of evidence to the contrary, is that the parties did not intend that there should be such an adjustment and that the purchase consideration fixed in clause 2 of the agreement had been fixed without reference to the balance owing under the mortgage bond. The case is therefore one where (i) is the position.

The agreement is otherwise complete and contains the _essentialia_ of a contract of sale. The contract is accordingly valid and the second and third sentence of clause 6 (a) must be treated as _pro non scripto_."

I am in agreement with the conclusion arrived at by the learned Judge, but would follow a different route in reaching it. Construction (ii) mentioned by CORBETT, J A (that the blank was left open for future agreement because the essential particulars had not yet been settled) can, it seems to me, be disregarded in the present case: the blank relates to an existing, ascertainable fact - the balance owing under a specific bond on a specific date and there was nothing to settle or negotiate about. That leaves only construction (iii) viz that the parties intended the clause to form part of their contract, had agreed but for some reason left the space blank. This, to my mind, is the appropriate inference to be drawn in the present case. The parties intended paragraph 6(a) to be part of their agreement but left the blank for the reason that follows. Their minds were clearly directed to paragraph 6(a) - the filling in of particulars in regard to the S.A. Permanent and Bloch bonds

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demonstates that. It seems highly probable that if the parties intended these sentences to be regarded as not having been written they would have resorted to the simple expedient of drawing lines through them. Their failure to strike out the second and third sentences warrants the drawing of the said inference. Bearing in mind that the contract in the present case, unlike the contract of sale in Johnston v Leal, supra, is not one which by law is required to be in writing the drawing of an inference that the two sentences are to be regarded as pro non scripto is a less compelling one. Paragraph 6(a) must, therefore, be construed as it stands save in the following respect. The first sentence thereof, in its inchoate state, visualises the insertion of the name of the holder of a single bond, the amount for which it was passed and the balance owing thereunder as at the contract date but in its completed state there is a reference to two bonds. Since, however, it is specifically recorded that the second bond will be cancelled prior to the transfer of the shares, the reference to it may safely be disregarded in construing paragraph 6(a). The first sentence stripped of the reference to the Bloch bond has a clear meaning: it records the existence of a bond passed by the company over lot 241, Chartwell for R10 000,00 (the "aforesaid amount" referred to in the second sentence and the "said amount" referred to in the third sentence) and it contemplates the insertion in the blank space provided of the balance owing under that bond as at the date of conclusion of the contract (the "said balance" referred to in the second sentence). That balance might be more or less than the capital amount of the bond: more if readvances and interest exceed payments in reduction of the bond and less if payments in reduction exceed readvances and the accrual of interest. The amount owing under the bond represents a liability of the company and obviously is a consideration which affects the purchase price which presumably was assessed with reference to the sum for which the bond was passed. That is why the second and third sentences of paragraph 6(a) respectively provide for an adjustment of the price down or up: down if the balance owing exceeds the capital amount because in that event the liabilities of the company

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are more onerous and up if the balance owing is less than the capital amount because in that event the liabilities are less burdensome. Does the leaving blank of the balance owing under the bond as at 19th February 1976 render the entire contract void? I think not. As mentioned above writing is not required by law for the validity of a contract for the purchase of shares in a company. It follows, therefore, that an essential term of the contract cannot be said not to have been agreed upon. The probable reason for leaving the blank is that the balance owing under the bond as at 19th February 1976 was not at hand at the moment of contracting. The offer, after all, was accepted at 7.30 p m i e well outside normal office hours. But the parties knew that the omitted balance was readily ascertainable by a mere enquiry directed to the S.A. Permanent Society and that the purchase consideration could be easily calculated after such enquiry. In passing, reference should be made to a submission originally pressed by counsel for the appellant but later virtually abandoned by him. It ran along these lines. Had the blank space in paragraph 6(a) been filled in, and had the amount so filled in differed from the amount actually owing under the bond as at 19th February 1976, the purchase price would have had to be adjusted with reference to the difference between those amounts. It is possible that during negotiations preceding the making of the offer the amount allegedly owing under the bond was actually mentioned by the respondents or their agent; that both parties intended that it should be incorporated in paragraph 6(a) and that as a result of a mutual oversight the blank was not filled in. If this in fact was the case, the amount concerned - which might or might not have been the same as the amount actually owing under the bond, one does not know whether, and by how much, the purchase price fell to be adjusted. Assuming that the construction placed on the relevant part of paragraph 6(a) is correct - if the blank had been filled in - there is nothing to indicate that a figure was at any stage mentioned as the amount owing under the bond. Be that as it may, the possibility put forward by counsel is certainly no stronger than the possibility preferred by NICHOLAS, J , i e that the parties did not intend to fill in the blank space and consequently also did not intend that any adjustment of the purchase price should take place. And in accordance with well known rules of construction - which apply with equal force to the inferences to be drawn in the present case- if a contract is reasonably open to more than one meaning (or inference) a court will place the construction on it which upholds it rather than that which makes it void.

It follows that whichever of the two inferences (i e the one drawn by NICHOLAS, J or the one which I favour) is the correct one, the result is that the contract is valid and that the first defence was correctly held to be without substance.

The second defence.

Sec 38(1) of Act 61 of 1973 makes it illegal for a company to give, directly or indirectly, any financial assistance for the purpose of or in connection with a purchase by any person of or for any shares of the company. The second defence is based on paragraph 12 of the contract which is, in its entirety, a filled in provision. Paragraph

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12 merely envisages the increase of the existing bond from R10 000,00 to R20 000,00 or for obtaining in its stead a different bond for R20 000,00. And what is further envisaged is that approval for such increase or substitution be obtained

> "in time for the purchaser to comply with clause 2(b)"

i e within 90 days of the acceptance of the offer on the 19th February 1976. Paragraph 12 contains no stipulation whatsoever that the new bond should be registered and the proceeds thereof be available to the company within the 90 day period. That could take place at any time thereafter.

Clearly what the purchaser, from whom the offer emanated, desired to assure was that the proceeds of a bond for R20 000,00 would be available to the company. There is no suggestion in the paragraph that the proceeds of the bond should assist the purchase of the shares. It would accrue to the company - not to the purchaser. The sum of R1 000,00 referred to in paragraph 2(a) and the guarantee of R34 000,00 referred to in paragraph 2(b) had to be provided by the purchaser out of his own resources and not by the company. The purchaser clearly desired to obtain control of a company in respect of which he wished to have the assurance that it could raise a bond in the sum of R20 000,00 for a purpose not disclosed in the contract. This purpose may have been the acquisition of working capital or something else. I see no warrant for inferring that the proceeds of the bond were destined to provide direct or indirect assistance for the purpose of or in connection with the purchase of the shares of the company. The appellant, who bore the onus of establishing the illegality, failed to discharge it. I am of the view that the second defence also fails.

The appellant applied on valid grounds for an order condoning the failure to lodge the record timeously. The application is granted but the appeal is dismissed with costs including the costs occasioned by the application for condonation.

JUDGE OF APPEAL

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| MILLER, J A ) | | |
| VAN HEERDEN, J A ) | concur | |
| GALGUT, A J A ) | | |
| SMALBERGER, A J A ) | | |