

366/84/AV

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

A.A. MUTUAL INSURANCE ASSOCIATION LIMITED

Appellant

AND

CENTURY INSURANCE COMPANY LIMITED

Respondent

CORAM: CORBETT, JOUBERT, HOEXTER, JJA, GALGUT et
NICHOLAS, AJJA

HEARD: 5 May 1986

DELIVERED: 16 May 1986

J U D G M E N T

NICHOLAS, AJA

This appeal arises out of motion proceedings in
the Witwatersrand Local Division of the Supreme Court.

On

On the application of CENTURY INSURANCE COMPANY LIMITED

("CENTURY"), a company incorporated in England, the Court

a quo granted an order against A.A. MUTUAL INSURANCE AS-

SOCIATION LIMITED ("AA MUTUAL"):

- a) interdicting AA MUTUAL from redeeming the 200 000 eight percent cumulative redeemable participating preference shares in AA MUTUAL held by CENTURY;
- b) directing AA MUTUAL to withdraw its notice of redemption dated 30th October 1981; and
- c) for costs.

With the leave of the Court a quo, AA MUTUAL now appeals to

this Court.

The facts, so far as they relate to the issue in the appeal, are not in dispute.

Ss.

Ss. (1) and (3) of s. 43 of the Companies Act,

No 46 of 1926 (which was the Companies Act in force at all material times), provided:

"43. (1) Subject to the provisions of this section, a company limited by shares may, if so authorized by its articles, issue preference shares which are, or at the option of the company are to be liable, to be redeemed: Provided that -

(3) Subject to the provisions of this section, the redemption of preference shares thereunder may be effected on such terms and in such manner as may be provided by the articles of the company."

In terms of regulation 6 (bis) of AA MUTUAL's Articles of

Association -

"6.(bis)

"6.(bis) The Company may create Preference Shares and any Preference Share may, with the sanction of a Special Resolution, be issued on the terms that it is, or at the option of the Company is liable to be redeemed. The Special Resolution creating such Redeemable Preference Shares shall determine the rights and privileges attaching thereto, as well as the terms of redemption."

In terms of the first of two special resolutions passed at an extraordinary general meeting of shareholders of AA MUTUAL on 26 June 1969, and duly registered by the Registrar of Companies, it was resolved:

"1. THAT the authorised capital of the Company be and it is hereby increased from R30,000 divided into 300,000 Ordinary Shares of 10 cents each to R1,030,000 divided into 300,000 Ordinary Shares of 10 cents each and

1,000,000

1,000,000 Cumulative Redeemable
 Participating Preference Shares of
 R1,00 each by the creation of 1,000,000
 Cumulative Redeemable Participating
 Preference Shares of R1,00 each, to
 which Preference Shares the following
 rights, privileges and conditions shall
 attach, that is to say:-

....."

There then follow clauses (a) to (g). In terms of

clause (a) the rights included -

- (a) the right, in priority to any payment of
 dividend on any other class of shares, to
 receive
 - (i) a fixed cumulative preferential
 dividend at the rate of 8% per annum;
 and
 - (ii) an additional cumulative preferential
 dividend calculated on the company's
 profits.

In terms of clause (g) -

"(g)

"(g).(i) the Company may at any time on six months' notice in writing to the holders thereof out of any profits or moneys of the Company which may lawfully be applied for that purpose redeem all or any of the said shares,

-
- (ii) The shares to be redeemed shall be determined by a resolution of the Board of Directors of the Company.
 - (iii) The Company shall give to the Holders of the shares chosen for redemption notice in writing of the Company's intention to redeem the same and fixing a time (not less than six months ahead) and place for the redemption and surrender of the shares to be redeemed.
 - (iv) At the time and place so fixed each such holder shall be bound to surrender to the Company the certificate for his shares to be redeemed and the Company shall pay to him the amount payable in respect of such redemption."

On

On 22 October 1969 CENTURY and AA MUTUAL concluded a written agreement in terms of which CENTURY sold to AA MUTUAL the entire insurance business then owned and operated by CENTURY in the Republic of South Africa, including the assets being the goodwill, furniture, fittings, office equipment and the like which were the property of CENTURY at that time.

Clauses 16, 17 and 21 of the memorandum of agreement were in the following terms:

"Clause 16. The consideration payable by A.A.M. (sc. AA MUTUAL) to CENTURY for the acquisition of CENTURY's business in South Africa, as set out in the Agreement, shall comprise:

- (a) The agreed estimated realisable value or the written down depreciated

book

book value in the books of CENTURY on the effective date (whichever is the greater) of the furniture, fittings, office equipment and motorcars sold by CENTURY to A.A.M. in terms of this Agreement, plus

- (b) The sum of R200 000,00 in cash payable by A.A.M. to CENTURY on the effective date. Simultaneously with such payment being made, CENTURY shall apply and subscribe for 200 000 cumulative redeemable participating preference shares of R1 each in the capital of A.A.M. as created by special resolution of the A.A.M. passed on the Twenty sixth day of June One thousand nine hundred and sixty nine. A.A.M. undertakes to allot such shares at par for cash against CENTURY's application therefor.

Clause 17. Notwithstanding the terms and conditions relating to the aforesaid preference shares, A.A.M. hereby undertakes:

- (a) That it will not, while CENTURY or any approved transferee holds such

shares

shares, exercise the rights in terms of Clause(s) [.... (g) of the conditions attaching to such preference-shares entitling A.A.M. to redeem such shares

- (b) That it will, within receipt of six months' notice in writing from CENTURY, redeem such shares on the conditions set out in Clause (g) of the conditions attaching thereto.

Clause 21 Insofar as may be necessary for the protection of CENTURY's rights under this Agreement, A.A.M. undertakes to procure that a resolution is passed by its shareholders at A.A.M.'s Annual General Meeting ratifying the special privileges granted to CENTURY under Clause 17 hereof and simultaneously with the ratification of this Agreement by the Board of A.A.M., A.A.M. undertakes to procure confirmation from the Automobile Association of South Africa that it will vote in favour of such ratification at such Annual General Meeting."

CENTURY

CENTURY duly applied for and was allotted the 200 000 shares referred to in clause 16. (It does not appear whether the steps referred to in clause 21 were taken, but neither party sought to raise any point in this regard.)

In its replying affidavit CENTURY pointed out (and I did not understand this to be challenged) -

".... that in accepting the 200 000 Redeemable Preference Shares in respect of the purchase consideration of R200 000, it was appreciated by both parties that the value of the said shares, by reason of the participating preferent Dividend would be far in excess of their par value..... It was known to both that the value of the Applicant's short-term insurance business sold to Respondent far exceeded R200 000."

It

It was, no doubt, such considerations which led to the inclusion of clause 17 in the memorandum of agreement.

In a letter to CENTURY dated 30 October 1981 (which is the notice of redemption referred to in paragraph (b) of the order appealed against), AA MUTUAL stated:

"A Board decision was taken to redeem the 200 000 8% Cumulative Redeemable Participating Preference Shares held by you and in terms of Clause (e)(sic) of the 'Conditions of Issue' you are hereby given six months' notice with effect from the 1st November 1981 of the intention to redeem these shares.

These shares will be redeemed at par. Our settlement cheque, which will include pro-rated dividends earned, will be handed to you on 1st May 1982 in exchange for the Share Certificate."

In

In a letter by CENTURY's attorneys dated 30 March 1982 a demand was made that AA MUTUAL withdraw the notice contained in the letter dated 30 October 1981, and it was advised that failing such withdrawal by 7 April 1982, proceedings would be instituted. The demand was not complied with and the application was accordingly launched on 22 April 1982.

The only question which the Court a quo was asked to decide, was whether AA MUTUAL was precluded by clause 17 of the agreement dated on 22 October 1969 from redeeming the redeemable preference shares held by CENTURY. That was also the only issue in the appeal.

It was contended on behalf of AA MUTUAL that clause

17 of the memorandum of agreement was not binding on AA

MUTUAL. The argument as I understood it was this.

What has to be considered is the combined effect of para-

graphs (a) and (b), namely, that so long as CENTURY holds

the 200 000 shares, they are not liable to be redeemed

save at CENTURY's option. Such a result is incompatible

with s. 43(1) of the Act, and with regulation 6(bis) of the

Articles of Association - both of which require that the

preference shares which a company is empowered to issue are

preference shares which are, or at the option of the com-

pany are to be liable to be redeemed.

Now it may be assumed for present purposes that paragraph (b) of
clause 17 is unenforceable. In terms of s. 43(3) of the

Act

Act, the redemption of preference shares may be effected on such terms and in such manner as may be provided by the articles of the Company. Regulation 6(bis) of the Articles of Association confers the power to issue preference shares on the terms that they are, or at the option of the company are liable to be redeemed. The special resolution creating the redeemable preference shares (which resolution, in terms of regulation 6(bis), shall determine the rights and privileges attaching to the shares, as well as the terms of redemption) provides in clause (g) that the company may redeem all or any of the said shares. Prima facie, therefore, ~~FOREWAVE~~ WAVE MUTUAL has no power to enter into a contract such as paragraph (b), which seems to be in conflict with its Articles.

There

There is however no warrant for "combining" paragraphs (a) and (b). They are separate and distinct from one another and are clearly severable. Paragraph (b) purports to confer on CENTURY a right to redeem, whereas paragraph (a) places a clog on the exercise of AA MUTUAL's power to redeem. CENTURY has not sought to exercise the power contained in paragraph (b), and the matter does not arise in these proceedings.

The short question is whether paragraph (a) is unenforceable. There is nothing in that paragraph which is incompatible with s. 43, with regulation 6(bis) or with the special resolution. The effect of that paragraph is merely that AA MUTUAL renounces pro tanto the right to

redeem

redeem which it has. Such a renunciation is unobjectionable.

Subject to certain exceptions, every person can renounce a right conferred by law solely for his own benefit. One of the exceptions is that no one can renounce a right contrary to law (e.g., where the result of the renunciation would be to effect something either expressly forbidden by statute or absolutely illegal by common law, or where the result of a renunciation by an individual would be to abrogate the term of a statute which in its nature is mandatory and not merely directory.) See Ritch and Bhyat v Union Government (Minister of Justice), 1912 AD 719 at 734-735.

The

The right to redeem under the special resolution is one solely for the benefit of the company. It was not created in the public interest. Until the enactment of section 43 (which was introduced into our companies legislation by s. 21 of Act No 23 of 1939 (as amended by s. 23 of Act No 46 of 1952)), it was considered that the public interest required that shares should not be redeemable - the general rule was that a company could not issue redeemable preference shares, because redemption would amount to an illegal purchase by the company of its own shares. See Trevor v Whitworth (1887) 12 App. Case 409; Pennington's Company Law, 4th ed., p. 192. The interests of creditors cannot be affected by a waiver by the company of its right

to

to redeem - on the contrary their interests are best served if there is no redemption. The company may redeem none or all or any of the redeemable preference shares, as it pleases and as determined by the board of directors. No member, nor any one else, has grounds for complaint if the company decides not to redeem any shares. Nor can the rights of any person other than the company be affected if the company enters into an agreement by which it renounces pro tanto its right to redeem any particular shares. There is nothing in s. 43, or in regulation 6(bis) of the Articles, or in the first special resolution, or in the common law, which obliges the company to redeem or which prohibits an agreement not to exercise the right of redemption

redemption, unless, possibly, the effect of the agreement is to deprive the shares concerned of their character of redeemable preference shares, e.g., by providing that they are under no circumstances to be redeemed.

Paragraph (a) of clause 17 is not such an agreement. In ordinary circumstances, the undertaking not to redeem operates only while CENTURY (or an approved transferee from CENTURY) holds the shares. Their character as redeemable preference shares is unaffected.

No other ground was advanced to justify a conclusion that paragraph (a) is unenforceable. The result is that the appeal must fail. In granting leave to appeal the Court a quo directed that the costs of the application for

leave

leave, including the costs of opposition,, be reserved for

determination by the Court of Appeal. In my view those

costs should be costs in the appeal, and it is so ordered.

The appeal is dismissed with costs, including

the costs of two counsel.

H. C. NICHOLAS, AJA

CORBETT, JA }
JOUBERT, JA } Concur
HOEXTER, JA }
GALGUT, AJA }