Bib. 159/86

383/84/AV

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SUNSHINE RECORDS (PROPRIETARY) LIMITED Appellant

AND

RUDI FROHLING 1st Respondent

TOMISLAV SVORINIC 2nd Respondent

HERMANN EUGSTER 3rd Respondent

GEORGE VARDAS 4th Respondent

CORAM: CORBETT, TRENGOVE, HOEXTER, GROSSKOPF, JJA et NESTADT, AJA

HEARD: 10 November 1986

DELIVERED: 28 November 1986

J U D G M E N T

GROSSKOPF, JA

This appeal concerns the interpretation and enforce-

ability ......

ability of a recording contract concluded on 12 December 1979 between the appellant and members of a pop music group called the Rag Dolls. This group consisted of five young musicians, and although its membership varied somewhat from time to time, it is admitted that the present respondents were members of the group and parties to the contract when the present dispute arose.

The history of the Rag Dolls was traced in the evidence from about 1979. It appears that the group's first experience in the field of professional contracts was on 6 July 1979 when they signed a management contract with Mr. William C. Boardman (also known as Billy Forrest) and Mr. Selwyn Miller, representing a company known as Selroy Music (Pty) Ltd. In terms of this contract Boardman was to be the group's creative

Manager ....

manager and Selroy Music (Pty) Ltd its business manager. Selroy Music then arranged for the conclusion of a recording contract between the Rag Dolls and EMI-Brigadiers (Pty) Ltd., the largest recording company in the Republic. This contract was concluded on 1 August 1979.

Some time later Mr. Graeme Beggs heard a final master tape which the Rag Dolls had composed and recorded for EMI-Brigadiers. Mr. Beggs owns and runs two specialized companies in the field of music, viz., a recording company, Sunshine Records (Pty) Ltd (the present appellant) and a publishing company, Breakaway Music Co. (Pty) Ltd (the Second Plaintiff in the Court *a quo*). In addition Mr. Beggs acts as manager for certain musicians. Thus he managed the group Clout, which enjoyed considerable success internationally ....

ly. Mr. Beggs also represented, through his companies, the South African interests of the group Abba who, he says, are "apparently the world's biggest selling record artists ever".

When Mr. Beggs heard the tape made by the Rag Dolls he was, in his words, "particularly taken with the songs, the copyrights, and I felt that given my input over a period of time I could perhaps produce something that was commercially viable on an international basis". He approached the Rag Dolls with a proposal that they sign up with his organization. They were willing to do so. Mr. Beggs then secured their release from their contracts with EMI and Selroy Music. He attempted to do likewise with Mr. Boardman, but failed. This did not cause Mr. Beggs any concern, and in fact Mr.

Boardman ....

Boardman had no influence on subsequent events.

On 12 December 1979 Mr. Beggs signed two contracts with the Rag Dolls whereby he personally, and both his companies, obtained rights in respect of the group's musical activities. The first contract in point of time was a recording contract between Sunshine Records and the group. In this contract Sunshine Records is called "the company"; the Rag Dolls are called "the Artiste Group" and each member of the group is called "the Artiste". Since this contract is basic to the present appeal I quote it in full. It reads as follows:

> "1. During the period of (3) THREE years from 1.12.1979 to 30.11.1982 the ARTISTE GROUP shall attend at such places and at such times and shall either alone or with others perform such musical work/s for the purpose of the COMPANY making recordings thereof as the COMPANY shall

from ....

from time to time direct.

2. The ARTISTE GROUP shall at the request of the COMPANY repeat the performance of any musical work/s until a perfect master matrix thereof shall in the opinion of the COMPANY have been obtained.

3. During the period of this Agreement the ARTISTE GROUP shall perform musical works for recording exclusively for the COMPANY and shall not perform nor directly nor indirectly assist nor advise nor be concerned in the performance for recording of any musical work/s for any other person, firm or corporation whereby the ARTISTE'S GROUP performance of any such musical work/s might be recorded in any form from which any gramophone records or any other contrivances might be offered, produced or performed to the public. After the termination of this Agreement the ARTISTE GROUP shall not perform for recording by any other person, firm or corporation any musical work/s recorded by the COMPANY under this Agreement until the expiration of seven (7) years from the date on which the COMPANY shall have placed on sale gramophone records or other contrivances of the ARTISTE'S GROUP'S performance of the same musical work/s. The ARTISTE/

ARTISTE GROUP may perform musical work/s at the premises and/or recording studios of other concerns, firms or organisations only with the prior written consent or instruction of the company.

4. For each perfect master matrix made by the COMPANY of a musical work/s performed by the ARTISTE GROUP the COMPANY shall pay to the ARTISTE/ARTISTE GROUP the sum of (N/A). In the event that the ARTISTE GROUP or COMPANY shall engage any additional Performer/s, not parties to this Agreement to perform with the ARTISTE GROUP for recording, the ARTISTE GROUP shall be responsible for the payment of such additional Performer/s of an equitable share of the above sum. Further in consideration of the above payment the ARTISTE GROUP in so far as he is the Owner of the copyright in any or all the musical work/s performed hereby licences the COMPANY to manufacture and sell throughout the world gramophone records or other contrivances reproducing such work/s.

5. All master matrices made by the COMPANY of musical work/s performed by the ARTISTE GROUP and all facsimiles and derivatives thereof shall be and remain the sole property of the

COMPANY.

6. The COMPANY shall be entitled to the sole right both present and future throughout the world, of production, reproduction, sale, use and performance and all revenue from broadcasting and television or film synchronisation and any other means, or all gramophone records, tapes, or other contrivances of musical works performed by the ARTISTE GROUP under this Agreement.

7. The COMPANY shall have the sole and irrevocable right at its discretion to commence or discontinue the said production, reproduction, sale, use and performance of gramophone records or other contrivances of musical work/s performed by the ARTISTE GROUP and the sole and irrevocable right to fix and alter the price/s of all such gramophone records or other contrivances and to use and publish the name of the ARTISTE GROUP and his photograph or likeness on catalogues, supplements, record-labels, press notices and other publicity material for advertising and trade purposes connected with the exploitation of gramophone records or other contrivances and to authorise any and all such acts and things.

8. The ARTISTE GROUP hereby warrants that the ARTISTE GROUP is under no obligation to any

person ....

person, firm or corporation whereby the ARTISTE GROUP is prevented from fulfilling the terms or conditions of this Agreement.

9. If the ARTISTE GROUP by reason of illness, absence or otherwise does not comply with Clause 1 or Clause 2 above to the satisfaction of the COMPANY or if the ARTISTE GROUP shall contravene any condition of this Agreement, then the COMPANY may forthwith cancel this Agreement in addition to enforcing against the ARTISTE GROUP such other remedies as the COMPANY lawfully has.

10. The ARTISTE GROUP shall not be entitled to assign the whole or any part of the ARTISTE'S GROUP rights under this Agreement.

11. The rate of royalty payable shall be 5% of 90% of the nett number of records and/or tapes sold by the COMPANY based on the retail selling price of the record in the Republic, less any taxes, duties, etc., less $6^{1}/2$% cover allowance.

12. This Contract shall be automatically renewed for a similar period unless notice of termination is given by the COMPANY in writing by registered post not later than one month before the expiration of this Agreement addressed to the ARTISTE GROUP at the above-mentioned address.

13. Notwithstanding the rates of royalty set out in Clause 11 above, the recordings made hereunder may be sold through any Record Clubs or any

foreign Record Company or distributor in terms of contracts with the COMPANY, and in such event the royalty rate for all such sales shall be one half ($^{1}/2$) of the rate specified in Clause 11 above, calculated on the Retail Price in such country, less any taxes, less $6^{1}/2$% cover allowance. It is furthermore agreed that the COMPANY may utilise all recordings in any Record Clubs as bonus, premium or free records and any such recordings so used shall be free of royalties.

14. Should any member of the ARTISTE GROUP resign or refuse to perform with the other members of the Group, or fail to attend recording sessions or in any way refuse or fail to co-operate either with the COMPANY or with the ARTISTE GROUP, the COMPANY shall be entitled to nominate replacements and the remaining members of the ARTISTE GROUP agree to record or continue the recordings with such nominated replacements. In such event the remuneration of the nominated replacements shall be the responsibility of the COMPANY and the remuneration accruing to the ARTISTE GROUP shall be reduced pro-rata to the number of members of the Group who have been replaced. The COMPANY shall however be entitled to continue to use the name by which the Group is

known although the personnel thereof is no longer the same, and shall be entitled to use that name for the duration of this Agreement, and for a period of three (3) years thereafter, even if all or the major portion of the Group are no longer concerned therewith.

15. The ARTISTE/ARTISTE GROUP hereby grants an option for the duration of this Agreement to and in favour of BREAKAWAY MUSIC CO. (PTY) LIMITED, its successors in title or assigns to acquire the sole, exclusive and world-wide copyright, including the United States of America, which may exist in regard to his/her/their composition for the music, lyrics, orchestration and/or arrangements of the musical work and/or his/her/their arrangements of non-copyright works, including the right to manufacture and market gramophone and other records and the right to receive all appropriate fees in respect of their use and performance and for the procuring against any infringement of the copyright the ARTISTE/ARTISTE GROUP hereby appoints the said BREAKAWAY MUSIC CO. (PTY) LIMITED to be his/her/their agents and attorneys and in their name to take all necessary action in that behalf and the aforesaid BREAKAWAY MUSIC CO. (PTY) LIMITED

undertakes to pay to the ARTISTE/ARTISTE GROUP half ($^1/_2$) of all the statutory royalties received by it in respect of the exercise of the copyright after deduction of the customary charges in respect of collections. The remuneration payable shall not include any sums paid in respect of the performance of the said record in circumstances where the lyricists or the creators of the subject matter of records do not normally receive a participation in any such sums in the territory where the said payment arises. All payments due to the ARTISTE shall be paid to him/her and all payments due to the ARTISTE GROUP shall be paid to the leader thereof. Payments shall be calculated up to the 30th day of June and 31st day of December in each year, and shall be paid within a period of SIXTY (60) days from such respective dates, but in relation to payments emanating from some third party the amounts paid by the COMPANY shall at such respective dates include only sums ac- received tually up to that date, the liability of the COMPANY being limited to such amounts as shall actually be received by it or should with due diligence be so received.

ADDITIONAL CLAUSES

16. The ARTISTE GROUP insist that the COMPANY make

available the services of Graeme Beggs to produce all the ARTISTE GROUP'S recordings unless otherwise agreed between the COMPANY, the ARTISTE GROUP and GRAEME BEGGS. The COMPANY agree to record the equivalent of one album per annum during the course of this agreement and any extension thereof.

17. The COMPANY agrees to pay the ARTISTE GROUP an advance of R2000 deductible from royalty earnings."

Mr. Beggs signed this contract on behalf of Sunshine Records as well as on behalf of Breakaway Music, in whose favour clause 15 of the contract operated.

Immediately after the conclusion of the above contract, Mr Beggs entered into a management contract with the group. In terms of this contract the Rag Dolls employed Beggs as their sole and exclusive manager and representative throughout the world with respect to their appearances and endeavours.

This ....

This contract was, like the recording contract, to continue for three years, renewable at the instance of Beggs for a further period of three years. During this period Beggs was to use reasonable efforts to assist the group in obtaining and negotiating engagements; to advise and guide them in their professional career; to promote their name and talents; and to carry on business correspondence relating to their career. Only Beggs was to accept engagements for the group. It was recorded that Beggs would maintain facilities reasonably adequate for the rendition of such services.

The group, for their part, would not, without Beggs's written consent, engage any other person, firm or corporation

to ....

to perform the services to be performed by Beggs under the contract, nor would they perform or appear professionally or offer to do so except with the consent of Beggs. In return for his services Beggs would receive a commission amounting to twenty-five percent of the gross consideration received by the Rag Dolls, and would in addition be entitled to reimbursement in respect of travel and other expenses incurred in the management and promotion of the group's affairs.

The contract recorded (in clause 6(a)) that, if any member of the group were to break the contract in any way, Beggs would suffer damages of at least R10 000. Clause 6(b) then provided that the group and its members were to be prompt and punctual in attending the engagements negotiated by Beggs and that they were to observe all lawful and reasonable orders given

by ....

by Beggs. Failure to comply with their obligations would render the group liable to cancellation of the contract and payment of the amount mentioned in clause 6(a) or any greater sum of damages which might be proved.

In terms of clause 13 Beggs waived all rights to commission earned prior to the release of the first seven single record in South Africa.

The ....

The combined effect of the two contracts was that Beggs obtained complete control over the group's professional activities for a period which he could extend to six years. As manager he could dictate whether and on what terms the group would appear professionally. As owner of Sunshine Records he controlled their recording activities. The nature and extent of this control will be examined in more detail later. And as owner of Breakaway Music Company he had an option extending over the period of the recording contract to acquire the sole, exclusive and world-wide copyright in the group's original compositions, lyrics, orchestrations and arrangements. Beggs himself describes how he persuaded the Rag Dolls to accept this regime:

"I ....

> "I then discussed it with the defendants and I made clear my situation with regard to contractual obligations. If we were going to go into the international market-place, as I had done with Clout, it would be important that I held all the strings, i.e. the management, the recording and the publication of the copyrights. They agreed, there was proof that this system had worked once before with amazing success internationally and they felt comfortable (about) entering into a parallel agreement similar to that which I had with Clout. At all times, M'Lord, the pivot point was the recording contract. That was the foundation on which their entire career would be based."

The Rag Dolls soon became disillusioned. Beggs showed little interest in his duties as manager and, as far as live performances were concerned, left them to their own devices. In evidence he sought to justify his lack of

interest ......

interest by contending that the parties had reached an understanding that his duties as manager would only really commence once the group had produced a gramophone record for the market. This understanding, he said, accorded with his philosophy that the career of a pop group could not commence before they had released a record album. This attitude might have been understandable if Beggs had actively promoted the group's career as recording artists. However, according to the evidence of members of the group, he did not do so. In this respect also, according to them, he proved lackadaisical and unreliable.

Matters came to a head in November 1980. The parties had arranged to meet on several occasions during that

month ....

month but on each occasion Beggs had cancelled the meeting. Finally they met on 13 November. Beggs played a tape-recording which the group had made of their composition King of Japan. The group was not satisfied with the production and Beggs agreed to re-mix it. He also undertook to release a record of another of the group's works. This would have been the first record to be released. Beggs and the group agreed to meet again the following week to make final arrangements for the release. Beggs did not keep this appointment. On Monday 17 November he flew to the Seychelles to meet a yacht which he had had built. He did not return to South Africa before January 1981.

The Rag Dolls then consulted their attorneys. The

attorneys ......

attorneys wrote letters to Beggs, Sunshine Records and Breakaway Music Company on 24 November 1980 cancelling the two contracts of 12 December 1979 on the grounds of alleged breach of contract by Beggs and the two companies. Correspondence followed in which the attorneys for Beggs and his companies contended, *inter alia*, that the purported cancellation by the Rag Dolls amounted to a wrongful repudiation of the contracts. Thereafter the two companies issued summons in the Witwatersrand Local Division against the present four respondents and one Michael Woitynek, who was the fifth member of the Rag Dolls at the time. Woitynek has since emigrated and was not represented at the trial or on appeal. The summons contained several claims which may be summarized as follows.

The ....

The first plaintiff (Sunshine Records, the present appellant) claimed:

a) payment, as cessionary of Beggs, of the amount mentioned in clause 6(a) of the management contract as a pre-estimate of damages for breach of contract;

b) payment of various amounts which the appellant had allegedly lent and advanced to the respondents, and in respect of which the respondents had signed acknowledgments of debt;

c) payment of an amount as damages for the breach of the recording contract. This amount represented costs incurred by the appellant in the implementation of this contract.

The ....

The second plaintiff (Breakaway Music) claimed an order declaring that it was entitled pursuant to clause 15 of the recording contract "to acquire the (respondents') copyright in their compositions for the music, lyrics, orchestration and/or arrangements of musical works".

For reasons that will become apparent I do not propose setting out the respondents' various defences to these claims. The matter came on trial before SPOELSTRA J. Before the end of the trial it had become abundantly clear that Breakaway Music had not exercised any option in respect of the respondents' copyright, and its claims were not pursued. The claims of the present appellant were all dismissed by the trial court. The claim in respect of the pre-estimate

of ....

of damages was rejected because, the court held, the respondents were entitled to cancel the management contract by reason of Beggs's failure to comply with his obligations and duties, which failure the court regarded as a repudiation of the contract. Moreover, even if this had not been so, the court would, under the Conventional Penalties Act (no. 15 of 1962) have refused to enforce the clause because "Beggs did nothing which would entitle him to any award in terms of clause 6(a)".

The claims in respect of the acknowledgments of debt were rejected because, the court found, the money had been advanced to the respondents in terms of clause 17 of the recording contract and was consequently repayable from royalties

earned ....

earned by the respondents. The court held that it was a tacit term of the agreement that repayment would only be made should royalties be earned. Since no royalties were earned these advances could not be recovered. The claim for damages for breach of the recording contract failed because the court *a quo* held that the recording contract was in undue restraint of trade and was therefore void and unenforceable.

With the leave of the court *a quo* Sunshine Records now appeals against this last-mentioned decision of the court, i.e., against the dismissal of its claim for damages for breach of the recording contract. There is no appeal against the court's rejection of the other claims.

In ....

In view of the finding of the court *a quo*, it is necessary to analyse the recording contract in some detail. The term of the contract was three years renewable at the instance of the appellant (but not at the instance of the respondents) for a further three years (clause 1 read with clause 12). During this period the following duties were imposed on the respondents. They were to attend at such places and at such times to perform alone or with others such musical works for the purpose of making recordings as the appellant might from time to time direct (clause 1). At the request of the appellant they had to repeat the performance of any musical work until a perfect master matrix thereof was, in the appellant's opinion, obtained (clause 2).

These ....

These master matrices would be the appellant's property (clause 5) and no payment was to be made to the respondents in respect thereof (clause 4). If the respondents were by reason of illness, absence or otherwise not to comply with clauses 1 or 2 to the appellant's satisfaction, or if they were to contravene any term of the contract, the appellant could cancel the contract (clause 9).

During the period of the contract the respondents were to perform musical works for recording exclusively for the appellant, and they were prohibited from performing or assisting, advising or being concerned in the performance for recording of any musical work for any person other than the appellant whereby their performance of such musical work

might ....

might be recorded in any form from which any gramophone record or other recording might be offered, produced or performed to the public (clause 3). After the termination of the contract the group was not to perform for recording by any other person any musical works recorded by the appellant under the contract until the expiration of seven years from the date on which the appellant had placed on sale gramophone records of the group's performances of the same musical works (clause 3). This last-mentioned provision was more onerous than it may seem. The appellant's attitude has consistently been that the words "recorded" and "record"in clause 3 and clause 16, with which I deal later, are to be interpreted literally. As I shall show when dealing with

clause .....

clause 16 I agree with this contention. On this interpretation music is "recorded" once a record is made of it, whether or not the record is released to the public. The consequence of this is that the bar imposed by clause 3 (i.e. the bar on performing music for recording by persons other than the appellant) would have come into force when the appellant made recordings of music performed by the respondents, but would have endured for seven years after the records were placed on sale by the appellant. Whether, and if so, when the records would be placed on sale, was under the appellant's complete control: clause 6 provided that the appellant would have the sole right, present and future, throughout the world, of production, reproduction, sale, use and performance, and all revenue from broadcasting and

television .....

television or film synchronisation, of all gramophone records performed by the respondents under the agreement. And clause 7 granted the appellant the sole and irrevocable right at its discretion to commence or discontinue the production, reproduction, sale, use and performance of gramophone records by the respondents, with various ancillary rights such as the right to fix and alter prices.

Reference has already been made to the option granted by clause 15 to Breakaway Music to acquire the sole copyright in the respondents' music, lyrics, orchestration and arrangements of musical works. This option was to continue for the duration of the recording agreement, and was apparently to relate to all material in which the respondents enjoyed copy-

right ....

right, whether or not such material was recorded pursuant to the recording agreement.

As appears from the foregoing, the recording contract imposed extensive duties, obligations and restrictions on the respondents. The question then arises: What reciprocal benefit did they derive from the contract? Firstly, the respondents were entitled to royalties on the sale of records or tapes (clauses 12 and 13) and on the exercise of copyright (clause 15). There was no suggestion in the evidence that the royalty rates were unreasonable or inadequate. The obligation to pay royalties would however only arise if records or tapes were sold, or if copyright were exercised. Prior to

that ....

that time the appellant undertook only to pay the Rag Dolls an advance of R2000 deductible from royalty earnings. The evidence discloses that this amount had been paid to the Rag Dolls by EMI, and that the appellant considered that it had complied with its obligations in this regard by paying EMI the amount owing to it by the Rag Dolls, without making any further payment to the Rag Dolls.

It is against this background that clause 16 becomes important. This clause provided inter alia that the appellant would "record the equivalent of one album per annum" during the course of the contract and any extension thereof. As I have indicated above, the appellant contended that this provision is to be interpreted literally. The respondents on the other hand suggested, in an alternative argument based on an alleged breach of contract by the appellant, that the word "record" should be interpreted to mean "record and release" - in other words, that the appellant was obliged to record and release to the public the equivalent of one album per annum. In my view the language of the clause is quite clear and accords with the meaning attached to it by the appellant. The interpretation suggested by the respondents would require the reading in, by way of interpretation, of words not found in the original text. No sufficient reason has been suggested for doing so. It is true that the meaning ascribed to the clause by the appellant would render the obligation imposed on the appellant an insignificant one, but there is no reason to suppose that this consequence was not intended by the appellant who was the <u>proferens</u>

of ....

of the agreement, and acquiesced in by the respondents. On the other hand the meaning suggested by the respondents would entail a jump into the unknown by the appellant, which would then have been required to publish the equivalent of an album of the respondents' works annually without any guarantee that the respondents would provide sufficient suitable works for this purpose. This seems an unlikely obligation to be assumed by the appellant. Of course, if there had been a clear obligation to release an album annually it may have been possible to imply a term to cater for the contingency that the respondents might not provide sufficient suitable works. The formulation of such a term would, however, have presented difficulties, particularly in defining how the suitability of the works would be determined. The fact that such an implication might have been necessary is a further reason for concluding that the parties did not intend the words "and release" to be read into the clause.

The only substantial reason advanced on behalf of the respondents for the interpretation proposed by them was that, if this interpretation were adopted, the contract would be fairer to the respondents and might therefore not be regarded as containing an undue restraint on trade. The rule ut res magis valeat quam pereat cannot however in my view be used to justify an interpretation of a contract contrary to its clear terms and the probable intent of the parties thereto. Vide Mc Cullogh v Fernwood Estate, Ltd 1920 AD 204 at 209; Hughes v Rademeyer 1947(3) SA 133 (A) at 138.

The relevant portion of clause 16 accordingly means,

in ....

in my view, that the appellant was obliged only to record, without necessarily releasing, the equivalent of one album per annum. The consequence of this is that the respondents were not entitled to any remuneration under the contract unless the appellant decided, in its sole discretion, to sell recordings made by the group, or unless Breakaway Music decided to make use of the copyright in respect of the respondents' music. The copyright seems to have been of less importance - the evidence discloses that the release of records was fundamental to the future of the Rag Dolls, not only for the royalties this would have produced but also for the publicity it would have provided, which would in turn have brought increased demand and higher fees for their performances.

It ....

It is convenient to summarize the salient features of the recording contract at this stage. The contract requires the Rag Dolls to perform for the purpose of recording when required to do so by the appellant. The results of their work become the property of the appellant, and Breakaway Music obtains an option to acquire the copyright therein. Complete control over the exploitation of the recorded works and the copyrights is retained by the appellant and Breakaway Music. During the subsistence of the agreement (three years, renewable to six) the respondents are not allowed to record elsewhere, and this prohibition is extended, in respect of recorded works, for a long period after termination of the contract. These are the obliga-

tions ....

tions and restrictions imposed on the respondents: the appellant, for its part, has no obligation save to record the equivalent of one album of their music per year. Having done so, the appellant would not be obliged to release or publish the recordings.

It might be argued, however, that commercial considerations would encourage the appellant to release records of the respondents' music if at all possible, and that this feature renders the contract less objectionable than it appears at first blush. A similar situation was considered by the House of Lords in A Schroeder Music Publishing Co. Ltd. v Macaulay (1974) 3 All E R 616 (HL), a case dealing with a contract obliging a composer (the respondent) to assign the

copyright ....

copyright in his compositions to a publishing company (the appellants). At p. 621 Lord REID said the following:

> "The respondent is bound to assign to the appellants during a long period the fruits of his musical talent. But what are the appellants bound to do with those fruits? Under the contract nothing. If they do use the songs which the respondent composes they must pay in terms of the contract. But they need not do so. As has been said they may put them in a drawer and leave them there. No doubt the expectation was that if the songs were of value they would be published to the advantage of both parties. But if for any reason the appellants chose not to publish them the respondent would get no remuneration and he could not do anything. Inevitably the respondent must take the risk of misjudgment of the merits of his work by the appellants. But that is not the only reason which might cause the appellants not to publish. There is no evidence about this so we must do the best we can with common knowledge. It does

not ....

not seem fanciful and it was not argued that it is fanciful to suppose that purely commercial consideration might cause a publisher to refrain from publishing and promoting promising material. He might think it likely to be more profitable to promote work by other composers with whom he had agreements and unwise or too expensive to try to publish and popularise the respondent's work in addition. And there is always the possibility that less legitimate reasons might influence a decision not to publish the respondent's work."

Similar considerations apply in my view to the facts of the present case.

I turn now to the law applicable to contracts in restraint of trade. This branch of the law was recently re-examined by this Court in Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984(4) SA 874 (A). For present purposes the effect of this judgment may be summarized as follows. (vide pp. 893-4). In determining whether a restriction on the freedom to trade or to practise a profession is enforceable, a court should have regard to two main considerations. The first is that the public interest requires, in general, that parties should comply with their contractual obligations even if these are unreasonable or unfair. The second consideration is that all persons should, in the interests of society, be permitted as far as possible to engage

in ....

in commerce or the professions - or, expressing this differently, that it is detrimental to society if an unreasonable fetter is placed on a person's freedom to trade or to pursue a profession. In applying these two main considerations a court will obviously have regard to the circumstances of the case before it. In general, however, it will be contrary to the public interest to enforce an unreasonable restriction on a person's freedom to trade.

Mr. Eloff, who appeared for the appellant, accepted the law as set out above, and conceded that the recording contract, if read as a whole, was unenforceable. I agree with this concession. The nature, extent and duration of the obligations and restrictions imposed on the respondents, together with the absence of any real reciprocal obligation on

the ....

the part of any other party, created such an extreme and serious restraint on the respondents' freedom to pursue their profession that a court should, in my view, refuse to enforce the contract. It was also common cause that the appellant, by claiming damages for breach of contract, was in effect seeking to enforce the contract.

The matter does not, however, end there. In the Magna Alloys case at p. 896 A to E, Rabie CJ held that a contract in restraint of trade is not necessarily wholly enforceable or wholly unenforceable, but that a court may, in the public interest, order that the whole, or only a part, or no part at all, of a restriction on trade be enforced. In so holding RABIE CJ expressed agreement with what had been said by BOTHA J (as he then was) in National Chemsearch (SA) (Pty) Ltd v Borrowman and Another 1979(3) SA 1092 (T) at

1114 F ....

1114 F - 1115 D and by VAN DEN HEEVER J in Drewtons (Pty) Ltd v Carlie 1981(4) SA 305 (C) at 312 C-D and 313 B-F. Mr. Eloff sought to invoke this finding in his favour as follows. The recording contract, he said, was admittedly objectionable if taken as a whole. However, if certain clauses were deleted and the ambit of certain others somewhat restricted, a court should not refuse to enforce the resultant amended contract. Consequently, the contention proceeded, the respondents were not entitled to cancel the contract as a whole, but should have continued to perform their obligations in the altered form in which, in terms of this argument, these obligations were enforceable against them. More specifically it was contended that the following clauses

could ....

could or should be deleted: Clause 3 (the restriction on performing etc. for recording organizations other than the appellant); clause 4 (lack of payment for master matrices); clause 7 (appellant's control over the production, sale etc. of records); clause 8 (warranty that respondents are not under obligations inconsistent with the contract); clause 9 (the appellant may cancel the agreement if the respondents do not comply with clause 1 or 2); clause 10 (the respondents may not assign their rights); clause 12 (the renewal clause); clause 13 (reduced royalty in certain cases); clause 14 (the appellant is entitled to nominate replacements in certain cases); and clause 15 (the option in favour of Breakaway Music Co,). This then left clauses 1,2,5,6,11,16 and 17.

Clause 1, which imposes the obligation on the respondents to attend at such places and at such times to perform musical works, alone or with others as the appellant shall direct, should, it was contended, be read subject to an implied condition of reasonableness on the appellant's part. The operation of clause 5 should also be cut down somewhat, it was suggested. This clause provides that all master matrices "made by the company" (i.e. the appellant) of musical works performed by the respondents, and facsimiles and derivatives thereof, would become the property of the appellant. The suggestion was that after the word "made" in the above quotation there should be inserted "and used for marketing". Similarly it was suggested that clause 6, which grants the

appellant ....

appellant extensive rights of production, sale, use, performance, etc. of gramophone records, tapes etc. of musical works performed by the respondents, should be limited to gramophone records, tapes, etc. "used by the Company (i.e. the appellant) for marketing". The effect of these deletions and amendments would be to transform the recording contract into an agreement which does not grant any undue privileges to the appellant and which does not restrict the respondents' right to have recordings made elsewhere. There is no reason to doubt that a court would, in the absence of exceptional circumstances which I cannot readily envisage, enforce such a contract. Does this avail the appellant in the present case?

Now ....

Now, firstly, it must be emphasized that the enforceability of contracts in restraint of trade is a matter of public interest depending on the circumstances prevailing at the relevant time, which is usually the time when enforcement is sought. Cf. Magna Alloys case, supra, at p. 894 F-G; 895 D-I, 897 C-E, 898 C-E. The onus of proving that enforcement would be against public policy is on the person resisting enforcement (ibid p. 893 A-D; 898 C-E). In the present case the appellant alleged in its particulars of claim that the respondents had wrongfully repudiated the recording contract by purporting to cancel it, and that the appellant had accepted the repudiation and cancelled the contract. The respondents pleaded that the contract was "against public interest" and was "an unlawful restraint of trade and unen-

forceable ......

forceable". No replication was filed. The issue before the trial court was accordingly whether the contract as a whole was against the public interest as an unreasonable restraint of trade. It was to this issue that evidence was directed, and it is common cause that the respondents discharged the onus of showing that the contract was unenforceable in the circumstances. If the appellant had wished to rely on less than the complete contract it was, in my view, obliged to raise this pertinently as an issue to be dealt with in evidence and argument. Vide the National Chemsearch case, supra, at p. 1114 D-F, 1116 G-H. The appellant has not done so, and this court should not in my view decide an issue on appeal which was not properly canvassed in the court a quo.

Apart ....

Apart from (or supplementary to) the feature just mentioned, there are also in my view other reasons for rejecting the appellant's contention. The Magna Alloys case (supra), and the National Chemsearch case (supra), have extended the court's power to depart from the expressed limits of a restraint, but they have not suggested that this power is to be entirely unrestricted. Thus BOTHA J said in the National Chemsearch case at p. 1117 A:

> "I imagine that when an unreasonable restraint is so formulated that it would require major plastic surgery, in the form of a drastic re-casting of its provisions, to make it reasonable, the Court will decline to perform the operation."

See also the discussion in Christie, The Law of Contract in South Africa, pp. 360-362. Without wishing to define with

exactitude ....

exactitude what degree of plastic surgery (to use BOTHA J's expression) would be permissible, I am inclined to think that the amendments suggested by the appellant in the present case are so far-reaching that a court would not have been prepared to enforce such a materially altered contract under any circumstances.

Be that as it may, even if such extensive amendment may be possible in particular circumstances, the facts of the present case rule it out in my view. The ratio for the partial enforcement of restraints is that the public interest requires it. Thus RABIE CJ stated in the Magna Alloys case (supra) at p. 896 E that the court should be empowered to order the partial enforcement of a restraint

clause ....

clause "in 'n gepaste geval, in die lig van die vereistes van die openbare belang". It would be impossible to list exhaustively the factors which a court, when determining whether a partial enforcement is justified, would consider as pertaining to the public interest, but I agree with the suggestion by BOTHA J in the National Chemsearch case (supra) at p. 1117 C-E, that a court may inter alia have regard to matters such as whether the restraint clause was calculated to be unduly oppressive or designed to act in terrorem, and whether partial enforcement would not operate harshly or unfairly towards the person bound by the restraint. In the present case, as I have indicated above, Beggs designedly obtained complete control over the professional activities of

the ....

the respondents. The respondents needed his assistance and were in no posision to reject his terms. It is true that Beggs made no attempt to assert his control over their live performances, but his motive in doing so was not to benefit them in any way, but rather to be spared the trouble of managing them at a stage of their careers when he did not consider it worth his while. He was of the view that their careers would not really commence before they became known as recording artists. If that were to have happened, he would no doubt immediately have asserted his rights as manager. But during the period of their association it was the recording contract that mattered. Beggs did not at any stage suggest that he might have been prepared to release the re-

spondents ....

spondents from any part of that contract. Even the argument presented to us on appeal concerning the partial enforceability of the contract was a purely legal or theoretical argument. There is no scintilla of evidence to suggest that Beggs would have been satisfied with the innocuous agreement which the appellant's counsel sought to excise from the recording contract. Indeed, the indications are all to the contrary, as is shown by the reasons he gave in the above-quoted passage for entering into the two contracts with the respondents. In short: Beggs wanted a complete monopoly of the respondents' professional activities without offering them anything substantial in return. The recording contract, which is the contract whereby he obtained the most important part of this monopoly, is unenforceable ......

enforceable precisely because he was too grasping. The court should therefore not, I consider, be astute to assist Beggs by holding that the contract could validly have been enforced in part only.

But it is not only a matter of not assisting Beggs; the respondents' position also falls to be considered. The respondents had entered into this contract hoping to promote their careers thereby. This hope proved unfounded, and they sought to resile from the contract. The contract as a whole had many objectionable features and was consequently unenforceable. The appellant had, as I have said, given no indication that it would not insist on strict and complete performance of the contract. Surely it would be grossly unfair to the respondents now to hold that parts of the con-

tract ....

tract were enforceable; that the respondents were therefore not entitled to resile from the contract; and that they were consequently liable for damages for breach of contract.

For the aforegoing reasons I cannot accept the argument that the recording contract was partially enforceable in the manner suggested on the appellant's behalf. In my view the contract was unenforceable in whole and in part, and the respondents were fully entitled to resile therefrom. Consequently they are not liable for any damages flowing from their cancellation of the contract. This decision renders it unnecessary to consider a further matter which was argued before us, namely, whether the damages claimed were in any event recoverable.

The ....

The appeal is dismissed with costs.

E M GROSSKOPF, JA

CORBETT, JA
TRENGOVE, JA
HOEXTER, JA
NESTADT, AJA

Concur