102/87

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the appeal of:

WERNER JAKOB FEHR .... appellant

and

RAEL GORDON AND DAVID RENNIE NNO.. 1st respondent,

and

STANDARD MERCHANT BANK LTD .... 2nd respondent

CORAM: Corbett, Van Heerden, Grosskopf, JJA, Nicholas et Steyn, AJJA.

DATE OF HEARING: 25 Augustus 1987

DATE OF JUDGMENT: 24 September 1987

J U D G M E N T

CORBETT JA

This appeal arises from the same factual circumstances as did the application for condonation and appeal

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contract purchasers, received a written notice in terms of sec 14(2) of the Sale of Land on Instalments Act 72 of 1971, as amended ("the Act"), dated 17 August 1979. The notice was in terms identical to that sent to De Raedt, as recorded in the judgment in the Alan M Rennie case, supra. Mr Attorney Lewis, of the firm Philip Sarembock and Lewis, who was himself an instalment contract purchaser of erven in the township, replied to the notice on his own behalf and on behalf of other instalment contract purchasers, including appellant. On appellant's behalf he wrote (on 6 September 1979):

> "We refer to your notice addressed to Mr Fehr calling upon him in terms of Section 14 of the Sale of Land on Instalments Act to elect whether he wishes to take transfer in terms of such Act or not.
> Please be notified that Mr Fehr does not elect to take transfer in terms of that Act. Please accordingly advise us whether you will enforce the Deed of Sale and request our client to take transfer or not. If so, we shall be pleased if you will advise us as soon as possible as Mr Fehr has in turn sold one

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> of the properties and has now been called upon to give transfer to the purchaser."

The purchaser to whom appellant had sold one of the erven was a Mr Swart. As will be recalled, the common law power of the liquidator to enforce the instalment contracts and to require the purchasers to take transfer (they having chosen to react negatively to sec 14(2) notices) was tested in the case of Gordon NO v Standard Merchant Bank Ltd, supra, wherein it was held by this Court that the liquidator did not possess this power.

In May 1984 the appellant, Mr Lewis and certain other instalment contract purchasers formed an association named the Rooderust Erf Purchasers Association ("REPA"). At the first meeting of the members of REPA a written constitution was adopted, from which it appears that the objects of the association are:-

/ "2.1 to ....

2.1 to institute such legal proceedings on behalf of the members of THE ASSOCIATION as may be required in order to ultimately obtain the registration of transfer of erven purchased by members from ROODERUST (PROPRIETARY) LIMITED (in liquidation) ("ROODERUST") and which erven were purchased prior to the liquidation of ROODERUST, and, if necessary, to compromise or settle any legal proceedings which may have been instituted;

2.2 to represent the members and to pursue, promote and protect the interests of the members in any legal proceedings so instituted."

At the same inaugural meeting it was resolved, inter alia, that appellant be appointed to represent the association in the contemplated legal proceedings.

Accordingly, in August 1984 appellant, "in his personal capacity and in his capacity as representative of Rooderust Erf Purchasers Association", commenced notice of motion proceedings, citing as respondents the liquidators of Rooderust - first respondent - and Standard Merchant

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Bank ("SMB") - second respondent - and claiming an order in the following terms:

"(a) Declaring the Notice given by First Respondent to erf purchasers in terms of Section 14(2) of the Sale of Land on Instalments Act dated 17 August 1979 (Annexure 'F10' to Applicant's founding affidavit) to be invalid.

(b) Declaring the purported election of Applicant pursuant to the notice given by Respondent in terms of Section 14(2) of the Sale of Land on Instalments Act dated 17 August 1979 to be ineffective and invalid.

(c) Calling upon Respondent to comply with Section 21 as read with Section 32 of The Alienation of Land Act No 68 (1981).

(d) Calling upon Respondent to thereafter comply with the provisions of Section 22 as read with Section 32 of The Alienation of Land Act No 68 (1981).

(e) Interdicting Respondent from selling any land (erf) purchased by Applicant or any ERF PURCHASER in terms of any agreement concluded prior to the liquidation of ROODERUST (PROPRIETARY) LIMITED until Respondent has complied with prayers (c) and (d) of this order.

/(f) Further..........

(f) Further and/or alternative relief.

(g) That First Respondent pays Applicant's costs."

The application was opposed by both respondents.

This matter also came before AARON AJ, who dismissed the application with costs. He subsequently granted leave to appeal to this Court.

A number of the contentions raised in the Court a quo, and even included in appellant's heads of argument, were not pursued in oral argument before us. Thus, it had been submitted in support of prayer (a) above that the sec. 14(2) notices to instalment contract purchasers were invalid because they were sent prematurely, ie before the questions as to the validity of SMB's mortgage bond and as to the amount for which a purchaser intending to take transfer would have to make arrangements "for payment of the outstanding balance under the mortgage bond", had been resolved.

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At the hearing before this Court, however, appellant's counsel abandoned this contention and conceded the validity of the sec 14(2) notices. Furthermore, it had been contended in the Court below and in the heads of argument (in support of prayers (c), (d) and (e)) that the Alienation of Land Act 68 of 1981 was retroactive in its effect and that in terms thereof all the instalment contract purchasers were given "a fresh right of election". Before us, however, appellant's counsel conceded that Act 68 of 1981 applied only if it were shown that the election originally made in terms of sec 14(2) of the Act was invalid. And it was the alleged invalidity of this original election which constituted what counsel termed "the main thrust" of his argument on appeal.

Before considering that argument there are two preliminary points which should be mentioned. The first relates to the locus standi of REPA. In this regard

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first respondent's counsel submitted, upon various grounds, that REPA had no *locus standi* in this matter and that consequently in so far as the appellant brought the application as the representative of REPA it should be dismissed *in initio* for that reason. It seems to me that from the practical point of view this point bears only on the question of costs. Clearly appellant, in his personal capacity, has *locus standi*. This was not disputed. Consequently the Court is required to deal on appeal with the merits of the application. If the appeal fails, then appellant will have to pay the costs, including those attributable to his having brought the application also on behalf of REPA. If the appeal succeeds, then and then only would it become relevant to enquire into REPA's *locus standi*, for if it has none, then a special order for costs would seem necessary; *aliter* if it has *locus standi*.

The second point relates to a special defence of

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res judicata, argued mainly on behalf of SMB. Briefly, it was to the effect that the validity of the election made by appellant was finally decided by this Court in *Gordon N v Standard Merchant Bank Ltd*, *supra*, to which case appellant was a party. As will appear from my consideration of the issue as to the validity of appellant's election, I do not find it necessary to deal with the question of *res judicata*.

Turning to the validity of appellant's election, appellant's counsel argued that when appellant exercised his choice in terms of sec 14(2) of the Act he mistakenly thought that he need not elect to take transfer under the sub-section because the liquidator would in any event call upon him to take transfer under the common law; that this mistake was induced by what he had been told by the liquidator and by the resolution taken at the second meeting of creditors; that the mistake was *justus* or reasonable in

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the circumstances; and that consequently his election was vitiated by mistake, induced by appellant having been misled; and that in the circumstances appellant was entitled to be relieved of the consequences of his election. This was the basis for prayer (b) of the notice of motion.

It seems to me that this argument fails upon more than one ground. It may be accepted as a fact that the reason why appellant chose not to take transfer in terms of sec 14(2) was because he anticipated at the time that the liquidator would seek to implement the resolution taken at the second meeting of creditors, viz in respect of each instalment contract purchaser who elected not to take transfer in terms of sec 14(2) —

> "to enforce and complete such contracts provided that if the Liquidator finds that the purchaser is unable to meet his obligations in terms thereof, the Liquidator shall be entitled in his discretion to deal with that transaction and the

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> land which forms the subject matter of that transaction in such a manner as he may consider to be in the best interest of the majority in value of the creditors" (resolution 2(m)(i));

and because he considered that from the financial point of view it would be to his advantage to receive transfer in terms of the action foreshadowed by the resolution rather than in terms of sec 14(2). It is also true that this proved to be a mistake in the sense that, as it turned out, the action foreshadowed by the resolution was not legally feasible (see Gordon NO v Standard Merchant Bank Ltd, supra). Nevertheless I do not think that this mistake vitiates the choice made by appellant under sec 14(2) not to take transfer or entitles the appellant to be relieved of the consequences of his choice.

In the first place, I am not persuaded that such a mistake is a relevant consideration. In the statutory

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dispensation created by sec 14 the purchaser is given a choice as to whether to take transfer or not. He must exercise this choice and take the required action entitling him to receive transfer within the time limits laid down by subsecs (3) or (4), as the case may be. If he fails to exercise his choice or to take the necessary action within the appropriate prescribed period, then he forfeits his opportunity to obtain transfer and the liquidator is enjoined to sell the land in question. Such failure may be due to inaction on his part, or it may even result from his ignorance of the position for, in terms of sec 14(2), where the address of the purchaser is not known to the liquidator, the latter may give notice by publication in a newspaper and the Gazette, and obviously such notice may not come to the knowledge of the purchaser. All this leads me to believe that in enacting sec 14 the Legislature was not concerned with the state of mind of each purchaser or with

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the motives which may or may not have induced him to make his election: it was merely concerned with what he did, ie whether he elected to take transfer of the land in the manner prescribed or not. The contrary interpretation would, I think, seriously prejudice the effective and expeditious sequestration or liquidation of the estate concerned. I would just add, however, that I express no opinion as to what the position might be if the choice of the purchaser were influenced by coercion or fraud.

However, even if I am wrong about this, I am of the view that appellant has not shown on the facts that his choice not to take transfer under sec 14(2) was induced by any alleged misleading on the part of the liquidator or by reason of the resolution of creditors. Mr Attorney Lewis was himself an instalment purchaser, knew the general position and received all circular letters and notices sent out by the liquidator. He was present at the second

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meeting of creditors. He also acted, as attorney, on behalf of a number of instalment contract purchasers, including the appellant. It appears from a letter addressed by Mr Lewis to the liquidator on 3 May 1979 that Mr Lewis had by that date received instructions to act on appellant's behalf in regard to the erven purchased by him. In this letter Mr Lewis expressed in fairly emphatic terms ("[W]e have no doubt whatsoever that our interpretation of the Law as set out above, is in fact correct........") his views on the legal position of instalment contract purchasers, particularly with regard to the mortgage bond held by SMB, and called upon the liquidator to, _inter alia_, give written notice to appellant in terms of sec 14(2) forthwith.

When appellant, among others, received his notice in terms of sec 14(2) he evidently consulted Mr Lewis, who informed him of the contents of resolution 2(m)(i) and advised him not to take transfer in terms of sec 14 as he

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would nevertheless receive transfer in terms of the resolution. This was stated by appellant in his founding affidavit and in a supporting affidavit Mr Lewis said:

> "I confirm that I advised all erf purchasers who sought my advice that in terms of Resolution 2(m)(i) they would in any event receive transfer of their erven even if they did not elect to take transfer in terms of Annexure 'F10' ".

(Annexure F10 was the notice sent by the liquidator in terms of sec 14(2).)

It is a necessary inference that appellant accepted and acted on Mr Lewis's advice for on 6 September 1979 Mr Lewis replied to the notice on appellant's behalf in the terms quoted above. It is to be noted that in this letter of 6 September 1979 the writer asks —

> "Please accordingly advise us whether you will enforce the Deed of Sale and request our client to take transfer or not."

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This seems to indicate a measure of uncertainty as to whether or not transfer would be tendered under the common law and that there was in appellant's decision to refuse transfer under sec 14 the element of a calculated risk. Be that as it may, the evidence establishes clearly, in my view, that, in deciding to react negatively to the sec 14(2) notice, the appellant relied on the advice given to him by his attorney. It is true that Mr Lewis in turn based his view on resolution 2(m)(i), but it was for him to evaluate the legal feasibility of the course of action proposed in that resolution when advising his client. Appellant's counsel conceded (correctly in my view) that if appellant's decision not to take transfer under sec 14(2) was motivated by his attorney's advice, then the argument that the election was vitiated by mistake could not succeed. That effectively disposes of the contention that the election made by appellant was invalid (such invalidity constituting the

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basis for prayer (b) of the notice of motion) and it is not necessary to consider the further questions debated before us, viz whether appellant's mistake was justus, whether it was a mistake of fact or a mistake of law and, if the latter, whether appellant could rely on a mistake of law, and the question of res judicata. In the light of concessions made, the finding that appellant has not established the invalidity of his election leads to the conclusion that Act 68 of 1981 has no application.

For these reasons I hold that the Court a quo correctly dismissed the application with costs. In regard to the grant of leave to appeal no order was made as to the costs of the application. Clearly, however, these must be regarded as being costs in the appeal and I shall treat them accordingly.

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The appeal is dismissed with costs. such costs to include the costs of two counsel. The costs of the application for leave to appeal are to be regarded as costs in the appeal.

M M CORBETT.

VAN HEERDEN JA)
GROSSKOPF JA)
NICHOLAS AJA) **CONCUR**
STEYN AJA)