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Case no 539/87
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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

LIONHEART FREDERICK DAVID WILSON Appellant

- and -

WERNER SPITZE Respondent

Coram: HOEXTER, BOTHA, E M GROSSKOPF, VIVIER,
EKSTEEN JJA.

Heard: 28 February 1989.

Delivered: 16 March 1989.

J U D G M E N T

VIVIER JA.

VIVIER JA :-

This is an appeal, with the leave of the Court a quo against a judgment delivered by VAN DEN HEEVER J in the Cape Provincial Division in an action for damages for breach of contract.

The facts relevant to this appeal are the following.

On 10 May 1982 the respondent, to whom I shall refer as the defendant, sold a certain property at Kleinmond to the appellant, to whom I shall refer as the plaintiff, for the amount of R11 000 plus a pro rata share of rates and taxes on the property as from the date of transfer, costs of transfer, bond costs and interest on the purchase price. The written offer to purchase, signed by the plaintiff on 29 March 1982 and by the defendant on 10 May 1982, was set out in one of the standard, printed forms commonly used by estate agents.

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The general section of this document described the property sold as "erf 4886, subdivided in 5 erven no's 5903, 5904, 5905, 5906 and 5907", and the parties intended that transfer of these five subdivisions would be given to the plaintiff in five annual instalments. In order to provide for this the printed form was adapted and a special condition added at the end. As a result a degree of uncertainty was created in the document, to which I shall refer as the deed of sale. The general section of the deed of sale provided that the plaintiff "shall within 7 days of the acceptance of this offer pay a sum of R1 100 and the balance of the plot price, which will be suitably guaranteed, against registration of transfer" (my emphasis). The special condition fixed the purchase price of each plot at R2 200, named erf 5907 as the first plot to be transferred and provided for

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staggered implementation of the contract in the following

words :-

"Mr Wilson will buy erf no 5907 and pays (sic) R2,200 for this erf. Balance guaranteed, against registration of transfer. Balance on other 4 erven is R8,800 and on this he will pay 14% interest p.a. Every year he will buy one erf at R2,200 and takes (sic) transfer before 1 April. Interest to be calculated, every year on balance. All 4 erven must be sold to him before 1 April 1986 or early date if suitable to him."

The general section of the deed of sale provided for possession

to be given "on the date of transfer from which date interest

on the balance of the purchase price will be payable at 14

percent per annum". The plaintiff was required "to keep

the entire erf 4886 clear of bush and fire hazard".

Erf 5907 was only registered in the plaintiff's

name /

name on 7 April 1983. The transfer documents, which had to be prepared by the defendant's attorneys in terms of the deed of sale, were only ready for signature by the plaintiff in August 1982. On 17 August 1982 defendant's attorney ("Orman") wrote to the plaintiff requesting him to arrange an appointment with him in order to sign the transfer documents and to pay a deposit of R250 on account of the transfer fees and his pro rata share of the rates. The plaintiff failed to respond to the letter, despite a written reminder addressed to him on 3 September 1982. On 28 September 1982 Orman wrote to the plaintiff that unless he complied by 11 October 1982 with the aforesaid conveyancing requirements the defendant would cancel the contract. Early in October 1982 the plaintiff paid the deposit required and / ...

and signed the transfer documents, but he thereafter failed to pay the balance of the purchase price of erf 5907 or to give a suitable guarantee for the payment of the purchase price when the transfer documents in respect of that plot were lodged with the Registrar of Deeds on 28 November 1982.

The defendant eventually had to issue summons in the Magistrate's Court on 13 January 1983 for payment of the balance of the purchase price of erf 5907 and, after initially defending the action, the plaintiff only paid the balance on 1 March 1983. During the period from 22 November 1982 to 1 March 1983 the plaintiff on more than one occasion undertook to pay but did not keep his word.

In a letter dated 14 March 1983 addressed by Orman to the plaintiff's attorney ("Watermeyer") the

plaintiff /

plaintiff was asked to nominate the next plot to be transferred to him and he was informed that the purchase price would have to be "duly guaranteed and paid without any hassles". The plaintiff's response was set out in a letter addressed by Watermeyer to Orman on 23 March 1983 viz that he was obliged to take transfer of no more than one plot per year and that, although he anticipated that he would be in a position later during 1983 to take transfer of the second plot, he was reserving his rights in that regard. This letter should be read together with an earlier letter which Watermeyer wrote to Orman on 17 March 1983 saying that the plaintiff had to take transfer of the second plot not before 1 April 1984. On 23 March 1983 Orman wrote to Watermeyer threatening that if the plaintiff

failed /

failed to nominate the next erf to be transferred and to guarantee payment of the purchase price the defendant would cancel the contract and claim damages.

On the day following the registration of the first plot, erf 5907, in the plaintiff's name, i.e. 8 April 1983, Orman addressed the following letter to the plaintiff :-

"It is our client's contention that you were to have taken transfer of Erf 5907 in the course of the calendar year 1982, and as you are aware, our client submits that he was able and willing to register the transfer to you in December 1982.

Notwithstanding the foregoing, our client submits that you were required in any event, to have taken transfer of another subdivided erf by the 1st April in each year, the second subdivided erf to have been taken by you before the 1st April 1983, with the proviso that all four of the remaining subdivided erven were to have been taken by you before the 1st April 1986.

As you have failed to take any steps whatsoever to accept the second subdivided erf, our

client / ...

client now places you in mora by hereby notifying you that unless you have, by 5 p.m. on the 16th May 1983, in writing, communicated to this office the number of the next subdivided erf which you will take AND SIMULTANEOUSLY have suitably guaranteed payment of the purchase price plus interest and costs due thereanent, our client will consider you in breach of the agreement, thereby entitling our client forthwith thereupon to cancel the aforesaid Deed of Sale, and you are hereby informed that our client will accordingly, without further notice, so cancel the agreement, holding you liable for such damages he may suffer by reason of your breach.

A copy of this letter is being forwarded to your attorneys."

Orman's letter of 8 April 1983 crossed with a letter dated 11 April 1983 addressed by Watermeyer to Orman stating that the plaintiff was now prepared to take transfer of a further plot, which had to adjoin erf 5907, at the end of May 1983. On 26 April 1983 Watermeyer, in reply to Orman's letter

of 8 April 1983, wrote that :-

"we can find no reference in the deed of sale to any obligation on our client to furnish you with a guarantee unless one interprets the words 'balance guaranteed' to mean this. It seems to us, however, that this should be interpreted more as being confirmation on our client's part that he can fulfil his obligations

We do not wish to fight with you at each stage here. Our client has a lot at stake. He does wish to proceed with the transaction and has every intention of fulfilling his obligations in terms of the deed of sale."

The defendant was not satisfied with a mere confirmation but insisted on a guarantee in the form of the plaintiff depositing sufficient money in Watermeyer's trust account to cover the purchase price of the next plot to be transferred

plus /.....

plus interest at the rate of 14 percent from 1 January 1983 to date of transfer. This was clearly stated in Orman's next letter to Watermeyer, dated 2 May 1983. In this letter Orman also gave notice that since the plaintiff was prepared to accept transfer of any adjacent plot, erf 5906 would next be transferred to him. Thus the demand for the plaintiff to nominate the next plot, mentioned in Orman's letter of 8 April 1983, fell away.

The defendant's demand that a guarantee in respect of the purchase price of erf 5906 be furnished by 5 pm on 16 May 1983 was not met. The following morning Watermeyer telephoned Orman to tell him that he had now received sufficient money into his trust account to furnish the guarantee demanded. There was a conflict at the trial between the evidence of

Orman and Watermeyer as to what was said on that occasion.

Watermeyer's version, which was not accepted by the trial

Court, was that Orman gave an undertaking that the defendant

would proceed with the transfer of erf 5906, despite the fact

that the demand for a guarantee had not been met by 16 May

1983. Orman's version, which was accepted by the trial Court,

was that he gave no such undertaking but that he instead told

Watermeyer that he would obtain his client's instructions.

Orman testified that he did so and that the defendant insisted

that the contract be cancelled. The cancellation was conveyed

to the plaintiff in a letter from Orman to Watermeyer dated

18 May 1983.

The plaintiff thereupon instituted the present proceedings, claiming transfer into his name of erf 5906. Lengthy pleadings followed, including several amendments to the Particulars of Claim. When the defendant sold and transferred all four remaining plots to a third party, the Particulars of Claim was finally amended to be confined to a claim for damages in an amount of R48 200. The trial came before VAN DEN HEEVER J who held that the defendant's cancellation of the contract was justified and dismissed the plaintiff's claim with costs, save for certain special orders as to costs.

VAN DEN HEEVER J interpreted the deed of sale as requiring the plaintiff to furnish two guarantees in respect of the purchase price: the first one being the standard

transfer /.....

transfer guarantee that the balance of the "plot price" of erf 5907 would be paid against registration of that plot in the plaintiff's name and the second being an advance guarantee in respect of the purchase price of R8 800 of all four remaining plots. The learned judge held that the latter guarantee had to be given at the time when erf 5907 was transferred to the plaintiff, irrespective of whether the defendant was at that stage able to lodge with the Registrar of Deeds the necessary documents to effect transfer of the remaining plots. It was consequently held that, having failed to provide the latter guarantee by 15 December 1982 i.e. the date when the defendant was ready and able to pass transfer of erf 5907, the plaintiff was already in mora even before the letter of 8 April 1983 was written.

Before this Court Mr Burger, who appeared on behalf of the defendant, advanced no argument in support of the interpretation placed on the deed of sale by VAN DEN HEEVER J, and for the reasons which follow I am unable to agree with that interpretation.

As regards the first guarantee referred to by VAN DEN HEEVER J, it is a well-established rule of our law that where a contract of sale of land provides for cash to be paid against transfer, so that the merx ought in theory to be delivered pari passu with payment of the purchase price, the practical expedient is resorted to whereby the buyer fulfils his obligations by furnishing the seller with a suitable guarantee that the purchase price will be paid on registration of transfer of the property into his name. The expedient is adopted since, under our system of land registration, it is virtually impossible/....

impossible in practice for payment and transfer to take place pari passu, as an interval must necessarily elapse between the time the transfer documents are lodged in the Deeds Office and the moment of registration, and the buyer cannot know before-hand when to be in attendance with his money. The reason for permitting the buyer to adopt the said expedient is to protect the financial interests of both parties and to overcome their possible mutual distrust or uncertainty that if the one performs the other may be unable or unwilling to perform (per TROLLIP JA in AA Farm Sales (Pty) Ltd (t/a AA Farms) v Kirkaldy 1980(1) SA 13(A) at 17B-C).

In a case such as the present, where no time is fixed in the contract for payment or transfer, the date upon which the buyer is obliged to furnish a transfer guarantee according to/....

to the rule enunciated above, depends upon the date on which the seller will be able to lodge the documents required for transfer in the Deeds Office. I will return to this aspect later. The parties are, however, free to stipulate that the buyer should give a guarantee before transfer and irrespective of whether the seller is ready and able to lodge the transfer documents with the Registrar of Deeds. Such a provision places an additional burden on the buyer and requires clear language. (Wehr v Botha NO 1965(3) SA 46(A) at 60E-H).

In the present case the provision in the general section of the deed of sale requiring a suitable guarantee to be furnished for the "balance of the plot price" clearly referred only to the balance of the purchase price of the first/....

first plot to be transferred. The general section did not deal with the transfer of the remaining four plots. The special condition which was inserted to deal with the staggered transfer of all five plots, logically commenced by again referring to the first plot to be transferred, namely erf 5907, and thus repeated what had already been provided in the general section of the deed of sale with regard to the guarantee of the purchase price of that plot. Nothing was said in the special condition about any guarantee in respect of the purchase price of the remaining four plots, so that the aforementioned rule applied, entitling the seller to require the standard transfer guarantee to be furnished in respect of those plots. In my view the wording of the deed of sale provided no basis for the finding of the learned Judge a quo

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that a special advance guarantee was required in respect of the purchase price of the remaining four plots.

The aforesaid letter of demand of 8 April 1983 clearly did not call for anything more than the standard transfer guarantee in respect of the purchase price of erf 5906.

The question whether that letter served to place the plaintiff in mora in respect of the transfer of erf 5906, was answered, in my view, by Orman himself. His evidence at the trial was quite clear that neither at the time when the letter of 8 April 1983 was written nor on 16 May 1983 was the defendant in any position to take immediate steps to give transfer of erf 5906. Orman said that his practice was not to commence preparing the necessary transfer documents, and so incur costs, until he was assured that the buyer would pay the deposit/....

deposit in respect of the transfer costs and that he would take transfer. For that reason he required confirmation in the letter of 2 May 1983 that the purchase price had been paid into Watermeyer's trust account as well as an undertaking that the purchase price would be paid against transfer, before starting to prepare the necessary transfer documents. Orman testified that he would have required at least another two months before he could have lodged the transfer documents with the Registrar of Deeds. This, no doubt, is the reason why Orman did not in the letter of 8 April 1983 nor in the subsequent letter of 2 May 1983 inform the plaintiff that the defendant would without delay after receipt of the guarantee called for, lodge the necessary transfer documents in the Deeds Office.

I return to the question as to when a seller is entitled to demand a transfer guarantee where no time is fixed in the contract for payment or transfer. The rule, as laid down in cases such as Hammer v Klein and Another 1951(2) SA 101(A) at 105H-106C and Linton v Corser 1952(3) SA 685(A) at 694A-E, is that a seller is not entitled to demand a transfer guarantee upon a date earlier than that on which he proposes to lodge with the Registrar of Deeds the documents required for transfer. As the buyer cannot know when the seller will be ready to lodge, there is a duty upon the seller, when demanding a transfer guarantee, to inform the buyer when he proposes to lodge. It does not have to be an exact date, and it will be sufficient compliance with the rule if the seller informs the buyer that he will without any delay after receiving/....

receiving the required guarantee, lodge the necessary documents in the Deeds Office. In Linton's case CENTLIVRES CJ put the rule thus at 694D-E:-

"The rule is sufficiently complied with if it is obvious (as it was in the present case) to the purchaser on the receipt of the demand that the seller is in a position to take immediate steps to give transfer, and will do so, as soon as he is furnished with a satisfactory guarantee."

In the present case the rule was clearly not complied with and the letter of 8 April 1983 did not, therefore, serve to place the plaintiff in mora in respect of his obligation to furnish a transfer guarantee for the purchase price of erf 5906.

Mr Burger also relied on the demand in the letter of 8 April 1983 for the transfer costs to be guaranteed as a separate ground justifying the purported cancellation of the

contract/.....

contract. The letter called for one guarantee in respect of both the purchase price and transfer costs and since the defendant would, on Orman's evidence, not have started preparing the transfer documents without the guarantee which, as I have shown, he was not then entitled to, it follows, in my opinion, that he was not entitled to a guarantee for the transfer costs either.

Mr Burger further submitted that even if, on an application of the principles set out in Hammer v Klein and Another, supra, and Linton v Corser, supra, the plaintiff was not placed in mora by the letter of 8 April 1983, the demand for a guarantee for the purchase price of erf 5906 was nevertheless justified on another ground. He submitted that the plaintiff's attitude, as evinced in the letters of 17 and

23 March 1983, to which I have referred above, not only amounted to a repudiation of the contract, but that his conduct over a lengthy period of time gave rise to the reasonable inference that he was unable or unwilling to pay the purchase price of erf 5906. Under these circumstances, Mr Burger submitted, the defendant was entitled in law to require reasonable security for the payment of the purchase price and, when that was not forthcoming by the reasonable deadline set by the defendant, to cancel the contract.

The authorities referred to by Mr Burger in support of his submission all deal with the situation where, subsequent to the sale, the purchaser either becomes insolvent or he becomes generally unable to pay his debts so that the seller runs the risk of losing the purchase price. They nearly

all deal with sales where the seller had to perform first, either according to the naturalia of the agreement or where the parties so stipulated. The first decided case relied on by Mr Burger was Ullman Bros Ltd v Kroonstad Produce Co 1923 AD 449 where the buyer, after the conclusion of a sale on credit, notified the seller that he could not pay and requested a settlement. The seller replied that he regarded the contract as cancelled and would claim damages. The buyer's reply to this was that he would then rather accept delivery of the goods and at the request of the seller went on to give instructions for delivery. The seller then demanded a guarantee for payment and when the demand was not met, cancelled the contract and claimed damages. This Court held that the seller's cancellation of the contract was justified. It was suggested

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by Mr Burger that the basis for the decision was the buyer's failure to provide security. De Wet and Yeats, Kontraktereg en Handelsreg, 4th ed at p 180, footnote 11, express the view that the decision is unsatisfactory in that it does not clearly distinguish between repudiation and the buyer's failure to furnish security. It would appear from the judgment of KOTZE JA (INNES CJ and SOLOMON, DE VILLIERS and WESSELS JJA concurring) that the true ratio decidendi was that the cancellation was justified on the ground of the buyer's repudiation of the contract and that, by calling for security, the seller did not waive his right to accept the repudiation and cancel the contract. At p 454 of the report KOTZE JA referred to the buyer's initial notification that he was unable to pay

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and his offer to settle the matter by the payment of a stated amount of damages, and said that this amounted to a clear intimation of his inability to complete the contract and pay for the maize. The seller was justified in so regarding it, and acted within his rights, when, on the receipt of this letter, he informed the buyer that his only course was to sell out against the buyer, giving him at the same time notice thereof.

KOTZE JA went on to deal with the question whether, by demanding security, the seller had waived his right to accept the repudiation and cancel the contract and concluded, at p 456, that he had not done so. In support of his finding that the seller was entitled to regard the buyer's intimation of his inability to pay as a repudiation KOTZE JA referred at p 456 to Ex parte Stapleton 10 Ch D 586, where JESSEL MR said that if

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a person, who has entered into a contract for the sale of goods on credit, gives to the vendor before the latter has parted with his goods that which in effect amounts to a notice that he has parted with all his property and is unable to pay the price, it is equivalent to a repudiation of the contract. KOTZE JA concluded his judgment by pointing out (at p 458) that "reference was made to the civil law, and to the Commentaries of Domat and Pothier thereon. It is not necessary to pursue the matter further than making a few observations." After referring to the views of these two writers and to D 18.6.1.3 the learned Judge said that "The rules, therefore, which we observe in commercial dealings at the present day find support and sure foundation in the principles of the Roman Law".

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In the paragraph from Domat referred to
(The Civil Law, Vol 1, book 1, title 2, sec 22, Strahan's
translation) the following is said:

"If the seller is in manifest danger of losing
the Price, through the insolvency of the Buyer,
or for some other causes, he may keep the thing
sold, by way of pledge, until the Buyer has
given him security for his payment."

Pothier, Contract of Sale, sec 67 is to the same
effect (Cushing's trans) :-

"But if the affairs of the buyer subsequently
become deranged, so that the seller runs the
risk of losing the price, the latter may
defend himself against a delivery of the
thing, notwithstanding the term of credit
given, at least, if the buyer does not offer
payment, or to furnish a sufficient surety
for the payment of the price".

In the passage from the Digest referred to by

KOTZE JA, Ulpian states that if the buyer of wine is in default the seller may hold back the wine or else sell the wine in good faith provided he mitigates the buyer's loss so far as he can without detriment to himself.

Mr Burger also relied on the decisions in Chadwick v Henochsberg 1924 TPD 703 and Hayne NO v Narun Bros 1926

OPD 207. In the first-mentioned case the seller cancelled a contract of sale of goods to be delivered in instalments, the price of each instalment being payable on delivery, after the buyer failed to pay for the first deliveries and his estate was provisionally sequestrated. He made an offer of composition to his creditors, after which the provisional order was discharged. The Court held that the offer of compromise

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could reasonably be regarded as an intimation to the seller that the buyer was unable to pay the amount due under the contract and that he could not and did not intend to perform his obligations under the contract. It was held that this amounted to a repudiation of the contract which the seller accepted, thereby bringing the contract to an end.

In Hayne NO v Narun Bros, supra, the buyer of goods on credit became unable to pay his debts and assigned his estate before delivery of the goods. When the seller heard of the assignment he called for a bank guarantee for the purchase price, failing which he would cancel the contract. It was held (at p 213-214) that the seller's knowledge must be deemed equivalent to notice by the buyer, and that it immediately

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entitled the seller to ask for an assurance from the buyer as to the safety of the purchase price by requiring either payment or security, and to cancel the contract if security was not furnished within a reasonable time. The court relied on the passages from Domat and Pothier quoted above which it said (at p 213), had apparently been stamped with authority in Ullman's case, supra, although no direct support for it could be found in the Roman-Dutch writers.

The rule as stated by Pothier and Domat was clearly designed for the protection of the seller in credit sales where, before delivery, the buyer becomes unable to pay the purchase price. I doubt whether there is any need for the application of the rule in a sale of land for cash in our law

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where the obligations of the seller and buyer are reciprocal and concurrent and where the seller is adequately protected by the ordinary guarantee which is dealt with in the cases of AA Farm Sales, Hammer v Klein and Linton v Corser to which I have referred above. It is not necessary, however, to express a firm view on the matter since the facts of the present case provide no basis for the application of the rule.

It was never alleged on the pleadings that the plaintiff was unable to pay his debts or that he had repudiated the contract. Neither was there any mention of this in the letter of demand of 8 April 1983 or in any of Orman's other letters pertaining to the transfer of erf 5906. The plaintiff's ability to pay

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the purchase price under the contract was thus never in issue at the trial and was not canvassed, despite the fact that he had delayed and prevaricated in paying the balance of the purchase price of erf 5907 and only paid on 1 March 1983.

The same applies to the repudiation relied upon by Mr Burger. It will be recalled that in his letter of 17 March 1983 Watermeyer stated that the plaintiff had to take transfer of the second plot only by 1 April 1984 and that in the letter dated 23 March 1983 Watermeyer implied that, having taken transfer of erf 5907 during 1983 the plaintiff was not obliged to take transfer of another plot in that same year. I do not think that the attitude displayed in those two letters amounted to a repudiation of the contract, but, assuming that it did,

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the repudiation was not accepted by the defendant who elected to abide by the contract and claimed performance in Orman's letters of 8 April 1983 and 2 May 1983, thereby keeping the contract alive. Furthermore, long before the purported cancellation, it was made clear in Watermeyer's two letters dated 11 April 1983 and 26 April 1983 that the plaintiff no longer contended that he only had to take transfer of the second plot in 1984, but that he was now willing to take transfer of erf 5906 by the end of May 1983. The fact that this was after the date stipulated in the deed of sale, i.e. 1 April 1983, is not important in view of Orman's evidence that he was in any event not ready to give transfer.

Mr Burger /

Mr Burger went further and submitted that even though the plaintiff's repudiation aforesaid was not accepted by the defendant, it nevertheless entitled the latter to demand security for the payment of the purchase price. Mr Burger could not refer to any authority in support of his submission and I do not think that it is sound. The repudiation was rejected by the defendant and that was the end of the repudiation as such. The contents of Watermeyer's letters of 17 and 23 March 1983 certainly provided no basis for any inference that the plaintiff was unable to pay his debts.

I am accordingly of the view that defendant's cancellation of the contract was not justified. It follows

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that when he sold the four remaining plots to a third person he acted in breach of his obligations under the contract with the plaintiff, entitling the latter to damages. There was no dispute between the parties as to the actual amount of damages to be awarded. The evidence of the plaintiff's witness, Sabbe, established that the total market value of the four remaining plots, as at the respective dates on which they would have been transferred to the plaintiff, was R53 000. From this amount must be deducted the purchase price of R8 800 and interest thereon /.....

thereon of R2,156 which the plaintiff would have paid under the contract, resulting in an amount of damages to be awarded of R42 044.00.

There remains the special order as to the costs of the postponed hearing of the trial on 19 February 1985 to be dealt with. This is the only one of the special orders as to costs made by the trial judge which was challenged on appeal. The trial was due to commence on 19 February 1985 but was postponed sine die following an application for the amendment of the plaintiff's Particulars of Claim which was made and granted that day. The trial Court ordered the plaintiff to pay the wasted costs occasioned by the amendment. In the unamended Particulars of Claim the plaintiff had relied upon an unsigned, and thus invalid deed of sale, and in the

alternative alleged that the defendant was estopped from denying that he had signed that deed of sale. A signed deed of sale was later annexed to the defendant's plea, but thereafter the plaintiff waited for more than a year until the first day of the trial before applying for an amendment of his Particulars of Claim so as, inter alia, to replace the deed of sale he was relying upon with the one annexed to the defendant's plea and to delete the alternative allegations of estoppel. On the pleadings as they stood up to the first day of the trial the defendant had to assume that the plaintiff did not accept the document annexed to the plea as the true deed of sale and that he persisted with the grounds set out in his Particulars of Claim. When the amendment was granted the defendant was consequently entitled to consider

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his position. In my view VAN DEN HEEVER J was justified in ordering the plaintiff to pay the costs occasioned by the postponement and no good reason exists for interfering with the exercise of her discretion.

In the result the following order is made :-

1. Save as regards the trial Court's special order as to the costs occasioned by the amendment to the Particulars of Claim on 19 February 1985, the appeal succeeds with costs, such costs to include the costs of two counsel.
2. The following order is substituted for para 1 of the order granted by the trial Court:

"Judgment/....

"Judgment for the plaintiff in an amount of R42 044-00 with costs, save as set out in para 3 of this order."

3. Interest a tempore morae on R42 044-00 is awarded to the plaintiff from 16 March 1989 to date of payment.

W. VIVIER JA.

HOEXTER JA)

BOTHA JA)

Concur.

E M GROSSKOPF JA)

EKSTEEN JA)