

FINBRO FURNISHERS (PTY) LIMITED

Appellant

and

REGISTRAR OF DEEDS, BLOEMFONTEIN

1st Respondent

VAALOEWER BOERDERYE (EDMS) BPK

2nd Respondent

LINDA INVESTMENTS (PTY) LTD

3rd Respondent

VAALOEWER LANDERYE (EDMS) BPK

4th Respondent

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

FINBRO FURNISHERS (PTY) LIMITED

Appellant

and

REGISTRAR OF DEEDS, BLOEMFONTEIN

First Respondent

VAALOEWER BOERDERYE (EDMS) BEPERK

Second Respondent

LINDA INVESTMENTS (PTY) LIMITED

Third Respondent

VAALOEWER LANDERYE (EDMS) BEPERK

Fourth Respondent

CORAM: KOTZÉ, JOUBERT, TRENGOVE, HOEXTER

et BOTHA, JJA

HEARD: 14 May 1985

DELIVERED: 6 September 1985

J U D G M E N T

Hoexter, JA

Hoexter, JA,

This appeal involves the interpretation of a clause in a contract and a sub-section of a statute. The contract concerned is embodied in a notarial deed of cession of mineral rights and the relevant statute is the Deeds Registries Act, 47 of 1937. The first question is whether the "rights to minerals" ceded in terms of the notarial deed include rights to stone. Should that question be affirmatively answered the further question arises whether in terms of sec 3(1)(m) of Act 47 of 1937 the Registrar of Deeds has a legal duty to register such notarial cession.

The background to the appeal may be shortly summarised. The farm "Smaldeel" No 683 ("the farm") is situate in the Heilbron district of the Orange Free State. Relevant to the case is a portion of the farm ("the property") which is 1027,8384 hectares in extent. Before February

1964

1964, and under deed of transfer 7118/1948, the ownership both of the property and of the rights to minerals thereon was held by the third respondent. The property has since been divided into various subdivisions which are at present owned severally by the second, third and fourth respondents. The second respondent is the owner of subdivisions 2 and 3.

During February 1964, and by notarial deed of cession of mineral rights 22/1964MR, the third respondent ceded to a private company ("Finger Brothers") all the rights to minerals in respect of the property. On 13 October 1966, and by notarial deed of cession of mineral rights 110/1966MR, Finger Brothers in turn ceded all the rights to minerals in respect of the property to the appellant. All subdivisions into which the property has been divided are subject to the notarial deed of cession of mineral rights 110/1966MR in favour of the appellant.

During

During September 1980 the second respondent agreed to grant the right to prospect for stone on and to extract stone from subdivisions 2 and 3 of the property to a public company ("Hippo Quarries"), whereafter Hippo Quarries ceded such rights to a private company ("Constone"). Thereafter Constone received legal advice to the effect that, inasmuch as the appellant was the owner of the mineral rights in respect of the property, the rights to stone in respect of subdivisions 2 and 3 of the property vested in the appellant.

During January 1982, and as holder of the rights granted in terms of notarial deed of cession of mineral rights 110/1966MR, the appellant sold to Constone all the rights to stone in respect of the property. However, the Registrar of Deeds for the Orange Free State refused to register a cession of the said rights to stone in favour of Constone by the appellant as the holder of the mineral

rights

rights to the property. The view of the Registrar of Deeds was that the appellant's rights to minerals did not include rights to stone; and that the rights to stone vested in the surface owner(s).

Upon notice of motion the appellant and Constone ("the co-applicants") lodged an application ("the main application") in the Orange Free State Provincial Division. The Registrar of Deeds (OFS) was cited as the first respondent; and the second, third and fourth respondents were cited as surface owners having an interest in the matter. In the main application the co-applicants sought (1) an order declaring them to be the holder of all rights to stone in respect of the property under and by virtue of deed of cession of mineral rights 110/1966MR; and (2) an order directing the first respondent to register a notarial deed of cession of mineral rights in terms whereof all rights to stone in respect of the property were ceded

by

by the appellant to Constone. No order for costs was sought against any of the four respondents. The main application was not resisted by any of the four respondents. The first respondent filed with the Court a report setting forth certain legal submissions but stating that the first respondent abided the decision of the Court.

The co-applicants were companies based in Johannesburg. For the purposes of the main application they instructed a firm of Johannesburg attorneys: Deneys Reitz and Company ("Deneys Reitz"). In turn Deneys Reitz used the services of Goodrick and Franklin, a Bloemfontein firm of attorneys, as their correspondents and as attorneys of record.

The main application was heard on 7 October 1982. There was no appearance by or on behalf of any of the four respondents. Having heard counsel for the co-applicants the Court (HATTINGH,AJ) reserved judgment until 31 March 1983

when

when a judgment dismissing the main application ("the main judgment") was handed down. The main judgment is reported in 1983(3) SA at 191.

In argument before this Court it was common cause that the period within which any application for leave to appeal against the main judgment should have been made expired on 25 April 1983. Within the said period no such application was in fact made. However, by notice of motion dated 6 June 1983 a firm of Johannesburg attorneys, Raphaely-Weiner, made application on behalf of the appellant for condonation of the appellant's failure timeously to apply for leave to appeal; and, in the event of such condonation being granted, for leave to appeal against the main judgment. The application for condonation, which was not resisted by any of the four respondents, was heard by HATTINGH, AJ on 11 November 1983, and on the same date refused by the learned Judge. To the latter judgment I shall refer as "the condonation judgment". Following

a

a petition addressed by the appellant to the CHIEF JUSTICE, however, leave to appeal against the refusal of condonation by the Court below was granted by this Court which also, contingently upon the success of such an appeal, granted leave to the appellant to appeal against the main judgment.

In the application for condonation the notice of motion was accompanied by a founding affidavit (jurat 30 May 1983) by one Finger, a director of the appellant. To the founding affidavit were annexed (1) an affidavit (jurat 25 May 1983) by one Dale, an attorney and a partner in Deneys Reitz; (2) an affidavit (jurat 30 May 1983) by one Hoffman, a partner in the Johannesburg firm of accountants acting as the appellant's auditors; and (3) an affidavit (jurat 6 June 1983) by one Bortz, an attorney and a partner in Raphaely-Weiner. Of the events between 31 March 1983 (on which date the main judgment was delivered) and 10 June 1983 (when the condonation application was actually filed

in

in the Court below) there is to be found in Finger's founding affidavit a somewhat meagre account whose essential parts may be summarised as follows:-

(a) Finger states that on Friday 22 April 1983 attorney

Dale of Deneys Reitz -

"... received notification from Messrs Goodrick and Franklin of the outcome of the judgment, as is confirmed in his affidavit"
(my underlining).

In fact, however, Dale's affidavit does not provide such confirmation. All that Dale's affidavit states in this connection is the following -

"I received the Judgment in this matter on Friday the 22nd April 1983 and immediately despatched a copy thereof to Messrs Fisher Hoffman Stride and Company, the first Applicant's auditors."
(my underlining).

(b) Finger states that the appellant first became aware of the main judgment on Monday 25 April when Dale delivered a copy thereof to the appellant's auditors. (The correctness of these averments is confirmed by Hoffman

in

in his affidavit.)

(c) Finger states that for two or three days after 25 April 1983 the appellant and Constone discussed the possibility of an application for leave to appeal against the main judgment. The upshot of the matter was that Constone decided against and the appellant in favour of making such an application; but that the appellant further decided in this connection to instruct a firm of attorneys (Raphaely-Weiner) not previously involved in the matter.

(d) On 2 May 1983 Finger instructed attorney Bortz to take the steps necessary to enable the appellant to appeal against the main judgment. Bortz thereupon instructed his own Bloemfontein correspondents as a matter of urgency to obtain a copy of the main judgment "and all relevant documents" in regard thereto. Under cover of a letter from his Bloemfontein correspondents

dated

dated 10 May 1983 the said documents were received by Bortz on 16 May 1983. On 18 May 1983 Bortz instructed counsel to consider the matter and to settle the condonation application. (The correctness of these averments is confirmed by Bortz in his affidavit.)

I proceed to examine the reasons given by the Court below in support of its refusal to grant condonation. Dealing with the fact that the appellant became aware only on 25 April 1983 that the main application had been dismissed the learned Judge remarked:-

"The question arises who caused the delay? On the papers it is suggested that messrs Goodrick and Franklin caused the delay. If so, why was the Court left in the dark about the identity of the attorney responsible for the delay and why was no affidavit filed by the attorney concerned, offering an acceptable explanation for his suggested inordinate delay to notify the applicant of the judgment?

Counsel for the applicant, however, contended in this court during argument, that Dale was the

person

person who caused the delay, although Dale in his supporting affidavit does not admit such a fact"

The learned Judge proceeded to consider whether, had Finger sought to fasten the blame for late notification of the result of the main application on a particular attorney, such a direct accusation would have improved the appellant's chances of gaining condonation. The answer to this question against the appellant the learned Judge found in the oft-repeated judicial warning that there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered (see: Salojee and Another NNO v Minister of Community Development 1965(2) SA 135 (A) at 141 C/E; Immelman v Loubser en 'n Ander 1974(3) SA 816 (A) at 823G-824B; P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980(4) SA 794(A) at 799 E/H.)

Affecting the delay between the time that Finger instructed

Bortz

Bortz on 2 May until the application was filed on 10 June 1983, the learned Judge observed it was difficult to see why it had been necessary for Bortz to procure a copy of the judgment from Bloemfontein when the appellant's auditors in Johannesburg were already in possession thereof; and that there seemed to be no reason why the application for condonation could not have been lodged shortly after 25 April 1983. Lastly the learned Judge rejected a submission on behalf of the appellant to the effect that since the prospects of success on appeal were good the Court should be disposed to grant condonation. In this connection the learned Judge remarked -

"In the first place I must say that although I do not necessarily share counsel's views as to the merits of the appeal, there is for the reasons already stated no need to express any opinion on the merits. Once again I would like to refer to the case of Immelman v Loubser and I refer to page 824C where the learned Judge said:

'Redelike

'Redelike vooruitsigte op sukses by appèl is natuurlik ook 'n belangrike oorweging. Maar hoewel dit 'n belangrike oorweging is, is dit nie noodwendig in elke geval 'n deurslaggewende oorweging nie'".

It now falls to be considered whether there are grounds for finding, as counsel for the appellant urged us to find, that in refusing to grant condonation the Court below exercised its discretion improperly. In regard to the fact that the outcome of the main application was conveyed to the appellant only on 25 April 1983 the learned Judge correctly pointed out that on the papers in the application for condonation the Court is left in the dark as to the identity of the attorney who in this respect was at fault. However, insofar as in the condonation judgment the learned Judge remarked that the papers "suggested that messrs Goodrick and Franklin caused the delay" it is only fair to mention the following: In response to a question by this Court, during argument, counsel for the appellant took instructions and thereupon informed us

from

from the bar that Constone had been notified of the result of the main application already on 7 April 1983. As Deneys Reitz were acting for both applicants in the main application it is not unreasonable to infer from counsel's statement that on 7 April 1983 the result was already known to Deneys Reitz. It is not for this Court, however, to indulge in speculation on the matter. Suffice it to say that upon this important question it was the duty of the appellant and its legal advisers to make full and frank disclosure in their affidavits; and that they failed to do so. The effect of this shortcoming in the application has to be weighed together with all the other relevant circumstances in the case.

Turning to the delay which accompanied the bringing of the application for condonation, it cannot be said, I think, that Finger did not act expeditiously in instructing Bortz; or that Bortz was tardy in giving instructions to his correspondents in Bloemfontein. However, as to why it was

necessary

necessary to procure a copy of the judgment from Bloemfontein when one was available in Johannesburg, one must share the perplexity of the learned Judge. It seems also to have taken a long time (almost a fortnight) for the relevant papers from Bloemfontein to reach Bortz, although in this connection it should not be overlooked that for some six days (10 - 16 May) these documents were in the post. What does, in my judgment, call for some further explanation, is the delay between 25 May (when Dale attested his supporting affidavit) and 10 June 1983, when the application for condonation was filed with the registrar of the Court below. Making due allowance for the fact that during this period there were two weekends and also (on 31 May) a public holiday, it seems to me that there is no reason to disagree with the finding of the learned Judge that the application for condonation could and should have been filed well before 10 June 1983. But although it was the duty of the

appellant

appellant to make application for condonation so soon as it was discovered that the period within which leave to appeal might be sought had expired, it seems to me, nevertheless, that in the present case the delay was not so inordinate as to manifest a wilful disregard by the appellant of the rights of the other parties to the main application; or as to be inexcusable by ordinary and reasonable standards.

Attention has already been drawn to the fact that in considering the application for condonation the Court below found it unnecessary to express any opinion as to the appellant's prospects of success in an appeal. That portion of the condonation judgment last quoted above tends to suggest that the learned Judge found it unnecessary to assess the prospects of success for the reason that in applications of this sort it is not a conclusive factor. It seems to me, with respect, that, if the learned Judge so approached the matter, he was in error. It is true - as the

the authority relied upon by the learned Judge shows -

that the factor of prospects of success, taken by itself, >

can never be conclusive. But unless the cumulative effect

of all the other factors relevant to the application is

such as to render the application wholly and obviously

unworthy of consideration,, a Court is bound to assess an

applicant's prospects of success on appeal; and to weigh

such assessment together with all the other relevant

circumstances in the case. (Cf. Mbutuma v Xhosa Development

Corporation Ltd 1978(1) SA 681 (A) at 687A). Upon a reading

of the condonation judgment as a whole it is by no means

clear to me that the learned Judge regarded the cumulative

effect of the other relevant factors (the prospect of success

apart) as being clearly fatal to the application. But, in

any event, such a view of the facts would, I consider, be

an unduly stringent and insupportable one. In the

present matter the cumulative effect of the relevant factors

other

other than the prospects of success cannot be said, in my opinion, to be so entirely destructive of the application for condonation as to render superfluous an assessment of the appellant's prospects of success on appeal.

From what is said later in this judgment concerning the merits of the main application it must be taken to follow that had the Court below investigated the appellant's prospects of success on appeal it should have concluded, at lowest, that such prospects were reasonably good. It further follows that the Court below should have allowed the positive factor of such fair prospects of success to go into the scales in favour of the appellant's application for condonation. Nor does the matter end there. In my view there were also other positive factors propitious to the grant of condonation of which no mention is made in the condonation judgment and whose significance may have been overlooked by the learned Judge. These are the importance of

of the main application in clarifying the duties of registrars of deeds registries in terms of sec 3(1)(m) of Act 47 of 1937; the substantial sum of money at stake in the main application; and the absence of opposition to the application for condonation by any of the respondents coupled with the absence of any obvious prejudice to any of them in the event of the grant of condonation.

Upon a review of the chief factors relevant to the application for condonation the following broad picture emerges. (A) The appellant was made aware only at a very late stage that the main application had been dismissed. This fact, on the probabilities, was due to lack of care on the part of an attorney acting on behalf of the appellant. (B) The identity of the particular attorney so at fault is a matter for mere speculation because there is before the Court neither a disclosure of his identity nor an explanation for his lapse. Both these deficiencies in the

affidavits

affidavits in the application for condonation are deplorable.

(C) Although the appellant itself took reasonably prompt steps to have launched an application for condonation and for leave to appeal, there was on the part of the attorneys then acting for the appellant some procrastination in the filing of what was in essence a simple application. This delay, although not unduly protracted, was not satisfactorily explained. These are the factors militating against the grant of condonation. Ranged against them are the following factors conducing to the grant of condonation:- (D) The favourable prospects of success on appeal. (E) The importance of the main application both generally and in regard to the particular litigants. (F) The absence of prejudice to the respondents should condonation be granted.

As to the adverse factors mentioned in (A) and (B) above, the conduct of the unidentified attorney concerned, though lamentable, does not in my opinion involve such a

degree

degree of culpability that in consequence thereof his client should be penalised and denied relief. On the other hand, when the facts as a whole are surveyed it seems to me that it is in particular the one factor which the Court below elected to disregard - the appellant's prospects of success on appeal - which tips the scales in favour of the grant of condonation. The conclusion I reach is that in dismissing the application for condonation the Court below exercised its discretion improperly. Having considered all the relevant circumstances I am satisfied that the appellant has succeeded in showing the existence of sufficient cause for the indulgence sought by it; and that the appellant's failure timeously to apply for leave to appeal should be condoned.

I turn to a consideration of the merits of the main application. For the sake of brevity reference will be made to the notarial deed of cession of mineral rights between the third respondent as cedent and Finger Brothers as cessionary

as

as "the 1964 deed", and to the notarial deed of cession of mineral rights between Finger Brothers as cedent and the appellant as cessionary as "the 1966 deed". For purposes of construing the words "Mineral Rights" in both deeds certain portions of clauses 1 and 2 in each deed require particular scrutiny. I quote hereunder from clauses 1 and 2 of the 1964 deed:-

"1. THE said Appearerdoes hereby cede, assign and transfer unto and in favour of FINGER BROS. (PROPRIETARY) LIMITED its Successors-in-Title or Assigns, all the rights to Minerals of whatsoever nature, including precious and base metals, precious stones and mineral oils, other than the rights to sand and clay, in, on, under and in respect of"

(here follows a description of the property).

2. THAT the term "Mineral Rights" aforesaid shall include:-
- (a) All rights to minerals of whatsoever nature, including precious and base metals, precious stones and mineral oils other than the rights to sand and clay in, on, under and in respect of the said farms, including

all

all rights allowed by any law to the holder of the mineral rights and including the rights to any mynpacht or mining lease in respect of mining, exploitation and removal of the said minerals and metals in, on, or under the said farms.

(b)

(c)

(d) The right to the said FINGER BROS. (PROPRIETARY) LIMITED, its Successors-in-Title or Assigns, to remove from the said farms any minerals or mineral substances, or metals or ore and to bring on to the said farms any minerals or mineral substances or metals or ore, or other substances for treatment or manipulation or otherwise.

(e)

(f) That the said Mineral Rights shall not include the rights to sand and clay in the fixed properties, which shall remain the property of the said LINDA INVESTMENTS (PROPRIETARY) LIMITED."

Save that the appellant is therein described as the cessionary the wording of clause 1 of the 1966 deed is exactly the same as that of clause 1 of the 1964 deed. Clause 2 of the 1966 deed contains the following preface:-

"2. SUBJECT to the following terms and conditions as set out in the said Notarial Deed of Mineral Rights No. 22/1964 M.R. -

A. That

A. That the term 'Mineral Rights' aforesaid shall include:-"

Hereupon follow six sub-clauses (likewise lettered (a) to (f)) whose terms, save for minor and immaterial variations in language, correspond with those of the sub-clauses set forth in clause 2 of the 1964 deed.

These being the facts of the case I turn to the legal principles applicable to them. The word "mineral" is one of fluid content. The particular meaning to be assigned to it in any given case has been a matter much debated in our Courts. The same problem of definition has often arisen in English Courts, and a convenient summary of the position in English law is the following passage in Halsbury, Laws of England, 4th ed. vol 31, p.11, par 8:-

"'Minerals' admits of a variety of meanings, and has no general definition. Whether in a particular case a substance is a mineral or not is primarily a question of fact. The test is what 'minerals' meant at the date of the instrument concerned in the vernacular of the mining world, the commercial world and among landowners, and

in"

in case of conflict this meaning must prevail over the purely scientific meaning. Nevertheless 'minerals' is capable of limitation or expansion according to the intention with which it is used, and this intention may be inferred from the document itself or from consideration of the circumstances in which it was made."

A reference to the corresponding passage in the third edition of Halsbury, (supra), was made in the judgment of this Court in Falcon Investments Ltd v C D Birnam (Suburban) (Pty) Ltd and Others 1973(4) SA 384 (A) at 400C-401A. The decision in that case (to which reference will be made as "the Falcon case") will require full discussion later in this judgment. As a prelude to the consideration of the problems of interpretation which arise in the present case it is necessary to examine a number of decided cases in our Courts over the past ninety years in which, in a diversity of contexts, the meaning of the word "mineral" in scientific, popular and legal language has been discussed.

A convenient starting point is Donovan v Turffontein Estate Co (1895) 2 O.R. 298 ("the Donovan case"). This involved

involved the interpretation of a lease which gave the lessee the right to "alle mineralen, edelgesteenten, metalen, of ander delfstoffen". The Transvaal High Court found that the main object of the contract was the use of the leased property by the lessee for purposes of "landbouw en woning" and held that the lessee was not entitled to dig thereon for clay. In regard to the intention of the contracting parties KOTZÉ, CJ observed (at P304):-

"Die intentie moet worden afgeleid door het contract in zijn geheel te lezen, en wij moeten niet eene wetenschappelijke of buitengewone beteekenis aan het woord 'delfstof' geven, en zoo op die wijze klei er onder insluiten, wanneer het oogmerk van het contract en de gebruiken van ons volk, dit niet toelaten, wat dan ook de wet, of het costuum van de verschillende landen van Europa mag zijn."

Whether a particular lease included any right to minerals was considered by the Transvaal Surpreme Court (INNES, CJ, WESSELS & SMITH, JJ) in an appeal from a decision of BRISTOWE, J in the case of Brick & Potteries Co v Registrar

of

of Deeds 1903 TS 473 ("the Brick and Potteries case"). In terms of sec 16 of Law 20 of 1895 (Tvl) all grants of rights to minerals had to be drawn up in a notarial deed and registered by the Registrar of Deeds and transfer duty was payable on such grants. The lease in question gave the lessees the right to dig and remove all earths, clay, sand and other materials used in the manufacture of pottery, earthenware, bricks, etc. The Court decided that registration of the lease did not attract payment of transfer duty. In the course of his judgment INNES, CJ said (at p 480):-

"Now are earths, clay and sand included within the term 'minerals'? In the widest sense of the word there is almost nothing mined or taken from under the ground which is not a mineral. But after all the meanings of mining terms vary in different countries; and it seems to me more important to ascertain the sense in which the word is ordinarily used in this country than to define its exact etymological significance. That was the view taken by the late High Court in the case of Donovan v Turffontein Estates, where the Court attached great importance to the sense in which the word 'mineral' was habitually used in this country."

One reason which impelled the Court to conclude that clay was not a mineral within the meaning of Law 20 of 1895 was its reluctance to disturb the judicial construction put upon the word "mineral" in the Donovan case decided seven years earlier and which, so the Court considered, had "doubtless been frequently acted upon". But with an eye to the interpretation of sec 3(1)(m) of Act 47 of 1937 later in this judgment it is as well to notice here a further reason upon which INNES, CJ based his finding in the Brick and Potteries case. At pp 480-1 the learned Chief Justice remarked:-

"The learned judge in the court below held that the object of the Law was to impose transfer duty on the disposal of land and of all substances in the land the working of which is regulated by law, and he pointed out that clay was one of those substances. No doubt there is force in that view, but it does not seem to me at all conclusive. The object of sec 16 of Law No 20 of 1895 was not only to impose a tax upon all grants of minerals, but also to ensure the registration of such grants - a matter of the utmost importance in this country where such grants deal with mineral substances of great value, but of no importance in regard to clay or sand."

(My underlining.)

The

The next decision to be mentioned is New Blue Sky Gold Mining Co Ltd v Marshall 1905 TS 363 ("the New Blue Sky case").

There the Court (INNES, CJ, SMITH & CURLEWIS, JJ) had to consider whether fire-clay was a "mineral" within the meaning of the Base Metals and Minerals Law, 14 of 1897

(Tvl). At p367 INNES, CJ said the following:-

"As to the scientific definition of the word 'mineral', after hearing a great deal of evidence from experts it appears to me that the word may be used in at least two senses. First, in a very wide sense it may be taken to mean any portion of the earth's crust, not being animal or vegetable. But in its more specific sense it means an inorganic substance having a definite chemical composition and possessing characteristics not easy to define. Speaking generally, it has a crystallisation of its own and a certain degree of hardness and specific gravity."

Sec 2 of Act 14 of 1897 provided that the law applied to various substances (as, for example, iron, lead, copper, manganese and sulphur) each of which was a mineral in the narrow sense -

" as

"as well as coal, graphite and other mineral substances for the exploitation of which no other lawful provisions exist."

(My underlining).

In 1892 the Volksraad had ratified a Government Resolution regulating the exploitation of ordinary stone and clay, but not fireclay. Having concluded that the words of sec 2 which are underlined in the quotation above referred to the existence of the 1892 regulations, INNES, CJ commented at p369:-

"If they considered it necessary to insert those words in order to prevent ordinary clay and stone falling within the definition of mineral substances in the statute, it is quite clear that the Volksraad used the word 'mineral' in a much wider sense than the narrow one to which I have referred."

Dealing with the ambit of Act 14 of 1897 INNES, CJ further said (at pp369/70):-

"It does not follow that every portion of the earth's crust would come under the provisions

of

of that Law. In considering the point we must have regard to the scope of the statute. It is a mining law, intended to deal with substances of considerable value, because one of its provisions imposes a duty in favour of the State of 1 per cent. That is a fairly high duty, and could only be properly borne by valuable substances. If one looks at the Gold Law one finds that, in respect of gold mined on a mynpacht, the duty contemplated is $2\frac{1}{2}\%$; the duty under the Base Metals Law is two-fifths of that. Such a high duty could only have been imposed in regard to articles of considerable value. Fire-clay undoubtedly is a valuable substance. It is worth ten times as much as ordinary clay. Considering this question, therefore, in the light of all the evidence, of the language of Law 14 of 1897, and of the regulations of 1892, it seems to me that fire-clay is a mineral substance such as was intended to be exploited under the Base Metals Law."

The judgment of INNES, CJ in the New Blue Sky case was concurred in by the remaining members of the Court. In a separate judgment SMITH, J said the following (at p372) in regard to the Legislature's intention when it passed Law 14 of 1897 in respect of the exploitation of mineral substances:-

"The

"The legislature considered it necessary to exclude from the operation of this Base Metals Law substances such as stone, limestone and ordinary clay, and it seems to me that they considered that such substances as these would be comprised in the terms 'mineral substances' if they were not expressly excluded. It seems to me, therefore, that they meant to give a very wide significance to the term 'mineral substances'. If we look at the scope of the Law it seems to me that this view is strengthened. They were making provision for exploiting the resources of the country, not only in regard to metals, but also to the mineral substances known at the time and those which might be discovered in the future. They did not, therefore, attempt any definition of the term 'mineral substances'. It is natural to suppose that they would intend a wide meaning to be given to the term."

Half a century after the Donovan case had been decided in 1895 the decision in that case was relied upon by a full Court of the Transvaal Provincial Division in construing a sub-section in a rating ordinance. In Brick & Potteries Co Ltd v City Council of Johannesburg 1945 TPD 194 (the 1945 B & P case") a case was stated under the provisions of sec 15 of the Local Authorities Rating Ordinance, 20 of 1933.

The

The appellant's property had been valued as a brickfield with ordinary clay. Sec 9(2) of the Ordinance provided that :-

"....in valuing any rateable property under this section the valuer or valuers shall not take into account any value accruing to such property by reason of the presence of precious stones, precious metals or base metals or minerals therein or thereon."

The argument turned on the question whether ordinary clay was a mineral within the meaning of sec 9(2). This question was answered in the negative by a Court consisting of MARITZ and RAMSBOTTOM, JJ, each of whom wrote his own judgment. In the course of his judgment RAMSBOTTOM, J (at 210) quoted the following words of LORD LOREBURN, LC in North British Railway v. Budhill Coal and Sandstone Co 1910 AC 116 at p127:-

"When an Act of Parliament uses a word which has received^a judicial construction it presumably uses it in the same sense."

Thereafter RAMSBOTTOM, J proceeded to say (at 210/111):-

"This

"This is the principle which must be applied. In the year 1903, in the Brick and Potteries case, this Court, affirming the decision in Donovan's case (2 Off. Rep. 298) authoritatively decided that in the Transvaal the word 'minerals' in its ordinary sense does not include ordinary brickmaking clay. And when, in 1906, the Legislature directed the valuer to deduct any value accruing to land by reason of the presence of 'minerals' therein, presumably it used the word in the same sense. The valuer was not required to deduct a value accruing by reason of the presence of clay. As I have said, the word 'minerals' must be given the same meaning in the Ordinance of 1933 which it bore in 1906, and the word 'minerals' in sec 9(2) must be interpreted as excluding ordinary brickmaking clay."

In R. v. Day and Others 1952(4) SA 105 (N) the Court had to consider whether the excavation of sand for profit fell within the definition of a mine as defined in the Mines & Works Act, 12 of 1911, which inquiry in turn hinged on the question whether, for purposes of the Act, sand was a mineral. In sec 2 of Act 12 of 1911:-

"'mineral'

"..'mineral' shall mean and include all substances (including mineral oils) which can be obtained from the earth by mining, digging, dredging, hydraulicizing, quarrying, or other operations for purposes of profit;"

DE WET, J (in whose judgment SHAW, J concurred) held (at p108G) that as defined in the Act the word "mineral" was a word "of much wider import than the normal meaning of the word "mineral"; and that (at p 109A):-

"It is any substance obtained from the crust of the earth at any depth so long as it is obtained from the earth for purposes of profit."

The meaning of the word "mineral" in scientific, legal and popular language was further discussed by DOWLING, J in Glencairn Lime Co (Pty) Ltd v Minister of Labour & Minister of Justice 1948(3) SA 894 (T), a case in which it was decided that limestone and lime are "minerals" as this word is used in the definition of "mine" in War Measure 39 of 1943. At p898 of his judgment the following dicta by

FLETCHER-MOULTON

FLETCHER-MOULTON, J in Great Western Railway v Carpalla

United China Clay, Ltd (1909) 1 Ch. 218 (at p231) were

described by DOWLING, J as propounding "a useful test of what is a mineral in the ordinary and popular sense of the word":-

"If I were rash enough to venture a definition of 'mineral' I should say that it is any substance that can be got from within the surface of the earth which possesses a value in use, apart from its mere possession of the bulk and weight which makes it occupy so much of the earth's crust. I should not think that what in engineering cases is usually known as 'contractor's muck' is a mineral. To dig out ballast and crush stone and earth, a mere mixture of heterogeneous portions of the earth's crust, for the purpose of making embankments, where the material goes from one position in the earth's crust to another without modification or being submitted to any process of manufacture, does not seem to me to be making use of minerals, although no doubt the things that you are handling were originally within the earth's crust. Such materials have not a value in use apart from their bulk and weight, and they are only used as being capable of forming a portion of the earth's crust in a new position. On the other hand, everything that has an individual value in use appears to me to be fairly called a mineral."

In

In S v Funchall 1961(4) SA 52 (T) the appellant was charged with a contravention of a regulation under the Factories, Machinery and Building Work Act, 1941, in that he had failed to keep properly guarded machinery for the crushing of stone. The question was whether or not the machinery in question fell under the said Act. On appeal the Court held that stone was a mineral and that therefore the activity concerned fell within the Mines and Works Act, 27 of 1956. The issue in the case was described as follows by JANSEN, J (at p54 A/B):-

"Die sleutelvraag is dus of klip 'n delfstof is soos deur Wet 27 van 1956 (soos gewysig deur Wet 31 van 1960) omskryf:

"'n stof, hetsy in soliede of vloeibare vorm of gasvorm wat op natuurlike wyse in of op die aarde aangetref word en gevorm is deur of onderhewig was aan 'n geologiese proses, maar sluit nie water en grond in nie, tensy dit uit die aarde geneem word vir die produsering of ekstrahering daarvan van 'n produk van kommersiële waarde.' (art 1(iii))."

In

In regard to the ambit of the above definition the learned

Judge remarked (at 54 E/G):-

"Wat 'n mens dadelik tref van die definisie van 'delfstof' is hoe wyd dit is:

'n stof ... wat op natuurlike wyse in of op die aarde aangetref word en gevorm is deur of onderhewig was aan 'n geologiese proses'

Word hierdie woorde in hul gewone betekenis opgevat, dan is hulle wyd genoeg om water, grond en klip in te sluit. Dit is veelseggend dat die Wetgewer dit nodig geag het om water en grond uit te sonder - dit beklemtoon dat die definisie bedoel is om andersins wyd genoeg te wêes om dit in te sluit. Die feit dat klip nie uitgesonder is nie, kan slegs aandui dat die bedoeling was dat dit binne die bestek van die omskrywende woorde moet bly. Daar skyn geen dwingende rede te bestaan om van die gewone betekenis van die woorde af te wyk nie.

Steun vir hierdie standpunt kan gevind word in R v Day and Others, supra."

The next case to be examined deals directly with one of the problems of interpretation arising in the present appeal. In 1968 the compass to be assigned to the words

"rights

"rights to minerals" in sec 3(1)(m) of Act 47 of 1937 arose in the Transvaal in Ex Parte Erasmus 1968(4) 788 (T)

("the Erasmus case"). It concerned a lease granting the lessee the sole right to quarry, crush and remove stone and sand from certain land. The Registrar of Deeds had refused to register the lease in terms of sec 3(1)(m) of the Act, and the applicant duly applied to Court for an appropriate order. In terms of sec 3 (1) (m) of Act 47 of 1937 the Registrar of Deeds shall -

".... register notarial cessions, leases or sub-leases of rights to minerals and notarial variations of such cessions, leases or sub-leases, notarial cessions of such leases or sub-leases, certificates of registration of such rights, and reservations of such rights made in grants or transfers of land, and notarial variations of such reservations."

The application was heard by RABIE, J who pointed out that in its widest sense the words "mineral" appeared to include any portion of the earth's crust not belonging to the

animal

animal or vegetable kingdom; and (at 790 E/F) that such wide meaning was definitely not the usual meaning of the word. The learned Judge expressed the opinion (at 790 D/E) that in Act 47 of 1937 the word "mineral" did not bear such wide meaning:-

"... en wel omdat dié betekenis nie die gewone betekenis van die woord is nie en daar nie goeie rede bestaan om te dink dat die Wetgewer bedoel het dat die woord in 'n ongewone betekenis opgevat moet word nie, en omdat aanvaarding van hierdie wye betekenis tot heeltemal onwaarskynlike en onaanneemlike resultate sou lei."

In connection with the ordinary connotation of the word "mineral" the learned Judge considered the decisions in the Brick & Potteries case (supra); Donovan's case (supra); and R v Day and Others (supra). Thereafter RABIE, J observed (at 791 D/H):-

"Soos hierbo gesê, is dit na my mening uiters onwaarskynlik dat die Wetgewer in die bepalings betreffende huurkontrakte van regte op minerale in art 3(1)(m) die wye betekenis van minerale

in

in gedagte kon gehad het. By so 'n huurkontrak het die huurder die reg om die minerale wat hy vind weg te neem en vir homself toe te eien. Kyk bv Neethling v Vesta Gold Mining Co., 1903 T H 404 op bl 411, Van Vuuren v Registrar of Deeds, 1907 TS 289 op bl 294, en Edwards (Waaikraal) Gold Mining Co. Ltd v Mamogale, N O and Bakwena Mines Ltd, 1927 T P D 288 op bl 296-299, en dit volg dus dat as aan die woord mineraal sy wydste betekenis gegee moet word, die huurder van die minerale regte op die grond, bv. al die bo-grond, sou kon verwyder en aldus die eiendomsreg van die eienaar van die grond waardeloos sou kon maak. Dit kan nie gesuggeer word dat die huurder van minerale regte se regte so ver strek nie: in ons reg word juis gepoog om so ver moontlik 'n ewewig te bewaar tussen die kompeterende belange van die oppervlakte-eienaar en die huurder van die minerale regte (kyk, bv., Hudson v Mann and Another, 1950(4) SA 485 (T)), maar as die huurder nou so 'n wye aanspraak moet hê as wat die wye betekenis van die woord mineraal aan hom sou gee, sal daar nie juis sprake van die beskerming van die regte van die oppervlakte-eienaar kan wees nie. Dieselfde oorwegings geld by the uithouding van minerale regte by the toekenning of transport van grond wat ook in art 3(1)(m) van die Wet vermeld word: ook hier word getrag om die kompeterende belange van die oppervlakte-eienaar en die houer van die minerale regte so ver moontlik met mekaar te versoen (kyk, bv Douglas Colliery, Ltd. v Bothma and Another, 1947(3) SA 602 (T) op bl 610-612), maar as

die

die regte van die houer van die minerale regte so wyd moet wees as wat die wye betekenis van die woord mineraal dit sou maak, sou die oppervlakte-eienaar se eiendomsreg heeltemal waardeloos gemaak kon word."

Counsel for the applicant in the Erasmus case did not contend that the word "mineral" should be construed in the technical sense mentioned by INNES, CJ in the New Blue Sky case (supra, at p 367), that is to say, as "an inorganic substance having a definite chemical composition and possessing certain characteristics not easy to define"; and in this connection RABIE, J expressed the opinion (at 792A) that there were no indications in Act 47 of 1937 that the word "mineral" should be interpreted in a technical rather than in its colloquial sense. Counsel's submission was that the widest meaning of the word should be assigned to "mineral" in Act 47 of 1937, and that stone and sand fell within such extended meaning. Rejecting counsel's submission the learned Judge concluded (at 792 C/D):-

"Na

"Na my mening is klip en sand nie in 1937, toe die Akteswet aangeneem is, as minerale in die gewone betekenis van die woord beskou nie, en word dit vandag ook nie so beskou nie."

Accordingly the Court declined to make an order authorising the Registrar of Deeds to register the notarial deed of lease.

So far there have been considered in this judgment various decisions of the Transvaal and Natal Courts dealing with the meaning of the word "mineral" in relation to substances such as clay, fire-clay, sand and stone. This Court was called upon to pronounce upon the ambit of the word "mineral" for the first time in the Falcon case - to which decision brief reference has already been made earlier in this judgment. The substance involved in the Falcon case was a type of rock called andesite which is particularly suitable for use in concrete and in roadbuilding. The appellant was a public company and the owner of land in the district of Johannesburg on which an associated company

extracted

extracted andesite from a quarry. The andesite was then conveyed to a crusher plant to render it suitable for sale. The use of the land concerned was governed by the Southern Johannesburg Region Town-Planning Scheme, 1962. Sec 18 of the Scheme provided that:-

".....nothing in the foregoing provisions of this part of this Scheme shall be construed as prohibiting or restricting or enabling the Local Authority to prohibit or restrict -

(a) the winning of minerals by underground working, or the winning of minerals by surface working, or the erection of any buildings or the carrying out of any work which is incidental thereto as regards any land not included in established townships and agricultural holdings;
....."

One of the main issues in the case was whether or not the quarrying operations on the appellant's land fell within the exemption conferred by sec 18(a) of the Scheme. The Witwatersrand Local Division (whose decision is reported in 1973(3) SA 838 (W)) held that andesite was not a "mineral"

and

and that the operations in question did not amount to the "winning of minerals" within the meaning of the Scheme.

In an appeal to this Court it was contended on behalf of the appellant that "mineral" was a word encompassing a broad range of meaning; and that between its broadest and narrowest it was capable of bearing an intermediate signification wide enough to include stone, a substance which, apart from its mere bulk, has commercial value because of its special properties. The appeal succeeded. This Court disagreed with the finding of the Witwatersrand Local Division that for the purposes of sec 18(a) of the Scheme andesite was not a mineral. The judgment of this Court was delivered by RUMPF, JA who expressed his conclusion in the following words (at 405H/406A):-

"In the result, I am of the opinion, that the word 'minerals' in sec 18(a) was intended to be used in a wide sense. It is not necessary to determine its precise ambit; it suffices merely to say that the meaning is wide enough to include andesite as described in the evidence."

A

A noteworthy feature of the judgment in the Falcon case is that as part of the background against which to view the Scheme the Court found it necessary to examine a series of laws dealing with mines and minerals, such as the Precious and Base Metals Act, 35 of 1908 (T); the Mines and Works Act, 12 of 1911, the Base Minerals Act, 39 of 1942, the Mines and Works Act, 27 of 1956 and the Mining Rights Act, 20 of 1967. In regard to such legislative enactments the learned Judge pointed out (at 402 C/D):-

"As far as control over the exploitation itself of minerals is concerned, the State has consistently regarded the word 'mineral' in its widest sense."

Concerning the definition of "mineral" to be found in the various laws aforementioned the learned Judge further observed (at 402 G):-

"It

"It is not necessary to delimit the precise ambit of those definitions. It suffices merely to say that, according to the evidence in the present case, the substance andesite obviously falls within all those definitions."

Turning to the Town-Planning Scheme itself RUMPF, JA discerned (at 403B) in its provisions affecting mining activities the general intention that in certain specified areas the Scheme should not operate to prohibit or restrict mining; whereafter the learned Judge remarked as follows (at 403 D/E):-

"'Minerals' is not defined in the Scheme. It is desirable, I think, that the word should, if possible, be interpreted in such a way that the Scheme blends harmoniously with such other legislation. In the absence of clear indications to the contrary, it can be inferred, I think, that that must have been the intention of the local authority. Indeed, the local authority could hardly have intended 'mineral' to bear a narrower meaning than the same or similar expressions bore in the statutes just mentioned, especially in the Gold Law and Base Minerals Act, since that might have jeopardised the validity of the Scheme in certain respects."

Having

Having found other indications in the Scheme (at 404 A/H) suggesting that in framing it the local authority had used the word "minerals" in its wide sense, RUMPF, JA arrived at the following conclusions in the Falcon case (at 405 B/D):-

"Having regard to the Scheme as a whole and to the context of the Scheme within the framework of existing State legislation and to the duty imposed on a local authority to pay compensation, I am inclined to the view that the object of sec 18(a) was to ensure that the Scheme did not interfere with the exploitation of minerals of any kind on land not included in an established township or an agricultural holding. It is difficult to envisage why the local authority would have wanted to confine 'minerals' to its narrow meaning and to exclude the humbler and more commonplace substances like clay, stone, etc. After all, an economically exploitable deposit of the latter can often be most valuable and its exploitation can serve the public interest too and be thus equally worth preserving from interference by the Scheme."

It will be recalled that in the 1945 B & P case, (supra) RAMSBOTTOM, J invoked as an aid to the interpretation of sec 9(2) of Ordinance 20 of 1933 (T) the principle that

earlier

earlier judicial construction of a word raises a presumption that when the same word occurs in a later statute it is used in the same sense. In the Falcon case, and having quoted in this connection (at 399 A/B) from the relevant part of the judgment of RAMSBOTTOM, J, RUMPF, JA sounded the following cautionary note (at 399 B/C) in regard to the ratio of the 1945 B & P case:-

"Without considering the correctness itself of this decision, it may be expedient to refer to what was said by FAGAN, CJ., and SCHREINER, JA in Consolidated Diamond Mines of South West Africa Ltd v Administrator, S W A and Another, 1958(4) SA 572 (A D)."

In the last mentioned decision of this Court FAGAN, CJ (at 599) remarked as follows:-

"When we find in a judgment statements which attach meanings to particular words or phrases, we must remember that the Judge is dealing with those words or phrases in the context in which they occur and with reference to the subject-matter to which they relate. Beyond that, a statement as to the meaning of a word or phrase would be merely obiter dictum."

In

In the same case SCHREINER, JA stated at p 637:-

"It is sometimes said, and for certain purposes no doubt correctly, that the proper interpretation of a document is a question of law. But particularly in cases where the effect of the context bulks largely the approach must necessarily be rather that of the approach to questions of fact, to this extent at least that previous decisions on the meaning of the same words in different contexts can hardly be more than suggestive, and possibly only faintly suggestive, of the meaning that may be proper in the case under consideration."

This brings me to a decision on which the respondents in the present appeal sought heavily to rely. In Loubser v

Suid-Afrikaanse Spoorweë en Hawens 1976(4) SA 589 (T) -

to which I shall refer as "the Loubser case" - the defendant expropriated in terms of the Railway Expropriation Act, 37 of 1955, portion of a farm ("the land") belonging to a deceased estate. On the land was a deposit of clay suitable for brickmaking. The executors claimed compensation for the value of the land and included in the claim the value of the

clay

clay deposit. Against the title deed of the farm there was registered a reservation of -

"..the full and free and sole rights and interest in and to all the minerals, mineral substances and metals, oils, precious stones and coal at any time on, in an under the said farm without any exception, together with the sole right to deal with, alienate and dispose of the same at will."

The defendant contended that the said reservation of mineral rights included the right to exploit the clay deposit on the land and that no compensation in respect of the latter was claimable by the plaintiffs. In a comprehensive judgment involving a close examination of many of the decisions already discussed in the present case the Court (BOTHA, J) rejected the defendant's contention. Referring to authorities such as Donovan's case, (supra), the Brick and Potteries case, (supra), the New Blue Sky case, (supra), the 1945 B & P case, (supra), and the Erasmus case, (supra), BOTHA, J said (at 598 G/H):-

"Die

"Die vernaamste oorweging wat uit die genoemde Transvaalse beslissings blyk, vir die doeleindes van die huidige saak, is dat die gewone of populêre betekenis van die woord 'minerale' nie stowwe omvat soos gewone baksteenklei, sand of klip nie."

Dealing with the particular problem of interpretation posed by the facts of the case before him the learned Judge made the following comments (at 599 C/D):-

"Ek aanvaar as klaarblyklik korrek die gedagte dat die blote feit dat daar in vorige sake in bepaalde samehange beslis is dat 'minerals' nie klei omvat nie, nie per se daarop dui, nie eers prima facie daarop dui, dat daardie woorde in die onderhawige serwituut ook nie klei omvat nie. Die belang van die vorige beslissings is egter nie dat daar beslis is dat 'minerals' nie klei omvat nie; die tersaaklike perspektief waarin die vorige beslissings van belang is, is dat daar beslis is dat die gewone betekenis van die woord 'minerals' nie klei omvat nie."

In the course of his judgment in the Loubser case the learned Judge proceeded to consider in how far what was said in the Falcon case had whittled down the authority of the

Donovan

Donovan case, (supra), and the Erasmus case, (supra). In this connection he remarked (at 601F/602A):-

"Nou is dit so dat in die Falcon Investments-saak supra, die huidige HOOFGEGTER aangedui het dat die woord 'mineral' 'n verskeidenheid van betekenisse kan dra en dat die betekenis daarvan in enige bepaalde verband afhang van die bedoeling waarmee die woorde gebruik is

Daar is egter geen aanduiding hoegenaamd in die uitspraak van die Appèlhof, soos ek dit verstaan, dat die gesaghebbendheid van Donovan en Erasmus se sake in twyfel getrek is met betrekking tot die gewone betekenis van die woord 'minerals' in 'n samehang soos wat ter sprake is in die huidige saak nie. Inteendeel is daar uitdruklik daarop gewys (op bl 403 B) dat die Hof daar nie te doen gehad het met 'n kontrak tussen partye oor minerale regte of met wetgewing oor die registrasie van so 'n kontrak nie, wat dit duidelik maak dat die Appèlhof se uitspraak nie bedoel was om op sulke gevalle betrekking te hê nie. As 'n Regter van die eerste instansie is ek dus gebonde om die presedente van Donovan en Erasmus se sake te volg."

Upon consideration of all the arguments advanced to him

BOTHA, J concluded in the Loubser case (at 607 E):-

"dat

"..... dat daar geen rede is om te dink dat die woorde 'minerals' en 'mineral' in die serwituut nie hulle gewone betekenis dra nie, en dat die baksteenklei op die eiendom dus nie binne die trefwydte van die serwituut val nie."

In this review of the main earlier authorities upon the subject the last but by no means the least significant decision deserving mention is Belville-Inry (Edms) Bpk v Continental China (Pty) Ltd 1976(3) SA 583 (C) - the "Belville-Inry case". (Certain typographical errors in the report of the judgment should be noticed. On p585, between marginal letters E and F, the sub-paragraph preceded by the letter "(a)" is in fact the second sub-section of sec 3; and instead of the letter "(a)" there should be the numeral "(2)". On p588, opposite marginal letter B, the words "as used in the two sub-sections of sec 2" should read "as used in the two sub-sections of sec 3").

Sec 3 of the General Law Amendment Act, 50 of 1956 (as amended) reads as follows:-

"3.

"3. Formalities in respect of leases of rights to minerals -

- (1) No lease of any rights to minerals in land and no cession of such a lease shall be valid if executed after the commencement of this Act, unless attested by a notary public, nor shall such a lease or cession thereof be valid as against third parties unless registered against the title deeds of the land concerned or the certificate of rights to minerals concerned, as the case may be.
- (2) The provisions of sub-section (1) shall not apply to a lease of any rights to minerals granted or acquired under any law relating to prospecting or mining or to any cession of any such lease."

It should be pointed out that sub-sec 2 of the provisions quoted above was added by sec 33(1) of Act 80 of 1964. The Belville-Inry case concerned a notarially executed and registered mining lease in respect of a property in the district of Stellenbosch granting the lessee the right "to prospect and search for and to win, mine and recover all kaolin" on the property. In an application for a declaratory order heard by VAN WINSEN, J the first issue which

which fell to be determined was whether the lease in question was a lease of rights to "minerals in land" within the meaning of sec 3 of Act 50 of 1956. Addressing himself to this problem the learned Judge observed (at 585 G/H):-

"It is to be noted that the parties to the lease described it as a mineral lease, thereby indicating that they considered kaolin to be a mineral, and the lease was so registered in the transfer deed under which the applicant holds the property. If, however, kaolin is in fact not a mineral the treatment by the parties of it as such would not render it a mineral. Act 50 of 1956 does not itself define a 'mineral' and aid to interpret the meaning of that word in the Act must be sought elsewhere. While assistance can be sought from the meaning ascribed to the word in dictionaries, in the decisions of the Courts, and in the definition attached to the word in other statutes, it must be remembered that the enquiry remains one as to the sense in which the law-giver used the word in sec 3 of Act 50 of 1956".

After referring to the definitions of the word "mineral" to be found in a number of pre-Union and post-Union statutes, and having quoted from a number of earlier decisions on the meaning

meaning of the word "mineral" in differing contexts,

VAN WINSEN, J reached the conclusion that kaolin was in fact a "mineral"; that the parties had correctly described their lease as a lease of mineral rights; and that the lease in question fell within the ambit of sec 3 of Act 50 of 1956.

The reasoning which led the learned Judge to the above conclusion is stated thus (at 587H/588F) of the judgment in the Belville-Inry case:-

"Although sub-sec (2) of sec 3 of Act 50 of 1956 was only introduced by sec 33(1) of Act 80 of 1964 the section must now be read as amended. It becomes apparent, therefore, that when reference is made in sub-sec (1) to 'rights to minerals in land' the Legislature had in mind that these rights included such rights as those acquired under laws relating to prospecting and mining. At the time that the amendment was introduced the law relating to prospecting and mining contracts had not yet been consolidated by the terms of Act 20 of 1967, but the pre-Union legislation in the four colonies made provision for the acquisition under their terms of a right to prospect for minerals and to acquire rights to minerals. The rights so acquired were in relation to minerals as widely defined in such enactments.

Clearly

Clearly it is appropriate to harmonise the meaning of 'rights to minerals' as used in the two subsections of sec 2. If the word 'minerals' is to have a wide meaning when the rights in relation thereto are acquired under a law relating to prospecting or mining (e g, under the now repealed provisions of sec 3 of Act 39 of 1942) then the word should have the same meaning where the rights are acquired other than via such laws, that is, where the rights are acquired under contract with the owner of the ground on which the minerals are situate. With respect to aspects of the reasoning in certain of the above-quoted cases, I find it difficult to conceive why a statute should be so interpreted as to attach a meaning to a word like 'minerals' narrower than that assigned to it by definition in a number of statutes especially concerned with minerals and the rights associated therewith. More especially is this so when the dictionary meaning of the word in its more restricted sense generally accords with the definition contained in the relevant statutes (I use the phrase 'more restricted sense' to distinguish this meaning from the more general one, viz. that 'mineral' is anything not animal or vegetable). According to the evidence kaolin is the main raw material in the manufacture of china. It therefore has not inconsiderable commercial value as a constituent element of a manufactured article. To achieve its recovery from the ground it is necessary to mine for it in the sense that the overburden (sand) under which it lies has to be removed. To this extent kaolin would seem to differ from clay found lying on the surface of the ground."

The

The review of the decided cases undertaken above clears the way for a consideration of the matters in issue in this appeal. Accordingly I turn to an examination of the reasons which prompted HATTINGH, AJ to dismiss the main application. In what had been said by RUMPFF, JA in the Falcon case, (supra), the learned Judge in the Court below found (at 197A/B) no statement in derogation of the authority of either Donovan's case, (supra), or the Erasmus case, (supra). As to the meaning of the word "minerals" in its popular sense HATTINGH, AJ indicated (at 197 B/C) his agreement with the conclusion reached in the Loubser case, (supra), that in this regard the Donovan and Erasmus cases represented binding authority.

Dealing next with the definition of the term "Rights to Minerals" in the notarial deeds in the instant case, the learned Judge reached the following conclusion:-

"It

"It was contended that the fact that the right to sand and clay are expressly excluded from the definition of minerals, is of great importance to indicate that the parties were not using the word 'minerals' in its popular sense. It is, I think, clear that the ordinary meaning of the word 'mineral' in South Africa does not include stone, ground, sand and other like substances. Accordingly I am left unpersuaded by the submission on behalf of the applicant and find that the meaning ascribed to the word 'mineral' in its extended sense in the relevant clause, as intended by the parties concerned, is as used in its normal sense, and thus, excluding stone."

For the sake of convenience I here repeat the opening words of the relevant clause in which, both in the 1964 deed and in the 1966 deed, the term "Mineral Rights" is defined:-

"THAT the term 'Mineral Rights' shall include:-

All rights to minerals of whatsoever nature, including precious and base metals, precious stones and mineral oils other than the rights to sand and clay in, on, under....."

It seems to me, with respect, that in construing the relevant clause

clause to exclude stone the learned Judge failed to appreciate the true significance of the exclusionary words "other than the rights to sand and clay" in the particular context in which they occur. I am not sure that I grasp the process of inference which led the learned Judge to his conclusion that the term "mineral rights" in clause 2 did not include rights to stone. It seems to me, however, that the reasoning of the Court below might have been somewhat as follows: (1) Certain substances which belong to neither the vegetable nor the animal kingdom are nevertheless, in colloquial speech, not regarded as "minerals". (2) Within the class mentioned in (1) are substances like sand, clay and stone. (3) Clause 2 defines "minerals" so as to exclude sand and clay. (4) Since sand and clay fall within the class mentioned in (1) it must have been the intention of the parties also to exclude stone. If indeed the Court below so reasoned, such reasoning was, with respect, logically unsound. The fact that common parlance assigns a restricted meaning

meaning to the word "mineral" does not give the Court a licence to go behind the clear language of a particular contract. The construction put upon Clause 2 by the Court below seems to me to involve a departure from its ordinary and grammatical meaning; and a narrowing of the scope of the phrase "rights to minerals" by reading into the clause words which are not in it. A more natural exposition of the clause is, I consider, the following: The specific exclusion of sand and clay indicates that on the wide meaning which the parties themselves assigned to the phrase "minerals of whatsoever nature" the parties appreciated that sand and clay, unless specifically excluded therefrom, would be included thereunder. On that interpretation stone clearly falls within the clause. In argument counsel for the second and fourth respondents sought to explain away the words "other than the rights to sand and stone" by suggesting that the parties had intended to use "minerals" in a colloquial sense not

. including

including stone; and that the exclusionary words had been inserted in clause 2 simply, as counsel put it, to make assurance doubly sure. To my mind this suggestion lacks cogency. Had the parties in fact been at pains to exclude stone they would have manifested such intention by appropriate language. The words in fact employed by them point the other way. (See further in this regard: M O DALE in 1983 Annual Survey of S A Law p251; J C LAMPBRECHT (1984). 9 TRW pp 98-99; (1984) De Rebus p 484).

For the reasons foregoing I respectfully disagree with the construction put upon the clause by the learned Judge in the Court below. In my opinion the ordinary and grammatical meaning of clause 2 of the notarial cession of mineral rights in the present case is such that it includes rights to stone. Consequently it becomes necessary to consider whether in terms of sec 3(1)(m) of Act 47 of 1937 the first respondent was legally obliged to register

register the cession.

The ambit of the phrase "rights to minerals" in sec 3(1)(m) of Act 47 of 1937 has not so far been the subject of a decision by this Court. It is true that in the Falcon case, (supra), RUMPF, JA adverted briefly (at 398 D/F) to the finding in the Erasmus case, (supra); and that in so doing the learned Judge neither commented upon nor questioned the correctness of the decision in that case. However, inasmuch as RUMPF, JA was careful to point out (at 403B) that in the Falcon case this Court was -

"....not concerned with a contract between parties concerning mineral rights or with legislation dealing with the registration of such contracts."

his passing reference to the Erasmus case does not, I consider, amount to an endorsement either of the finding in that case or the reasons underlying it.

The ratio of the judgment in the Erasmus case
is

is that no good reason exists for believing that in sec 3(1)(m) of Act 47 of 1937 the Legislature intended to invest the word "minerals" with any unusual meaning; and that to construe the word "minerals" in the sub-section as signifying its widest meaning would involve incongruous consequences. The cornerstone of the judgment in the Erasmus case was, I think, the view of the learned Judge (expressed at 792 C/D) that neither at the time of the application (the year 1968) nor in the year 1937 when the Deeds Registries Act was passed were sand and stone regarded as "minerals" in the usual sense of the word.

Here a few general observations on the "popular" or "usual" meaning, in common parlance, of the word "minerals" may not be out of place. One must guard, perhaps, against an assumption that in colloquial speech the word "minerals" is a static or rigid concept having an

immutable

immutable content. To a particular community at a particular stage of its history and development the ambit of that word in colloquial language will be governed by a number of considerations, not the least significant among which are likely to be the intrinsic value and the possibility of commercial exploitation of the various non-organic substances to be found in the soil of the country in which the community lives. In one age a non-organic substance derived from the earth's crust may be regarded by the man in the street as insignificant and worthless. In a later era scientific and technological advances may have led the average citizen to recognise that the same substance, formerly despised, is a valuable commodity capable of successful commercial exploitation. In this way the range of the popular meaning assigned to the word "minerals" may with the passage of time undergo evolutionary change; and the compass of its usual meaning may be enlarged. Such an evolutionary process is not only probable but inevitable in a country such as the

the Republic of South Africa. Although large tracts of our land are unsuitable for intensive agricultural development our soil has been endowed with mineral resources which are at once both vast and varied. These include a number of base minerals vital to the industries (I use the word in its widest sense) of major foreign powers. We live in a country in which the exploitation of minerals represents an important part of the economy and a substantial portion of the national product. According to the latest (1984) Official Yearbook of the RSA some 85% of the production of the minerals industry, involving the exploitation of more than fifty different minerals, is exported. There are doubtless today generally accepted as "minerals" in the ordinary sense of ^{the} word many non-organic substances bearing exotic names whose very existence - let alone the possibility of their profitable commercial exploitation - were undreamt of by the worthy members of the old Transvaal Volksraad.

Moreover,

Moreover, in a country in whose daily existence the exploitation of minerals looms so large that its various facets are comprehensively regulated by legislation, it is further inevitable that the ordinary and popular sense of the word "minerals" will be influenced and moulded by the various legislative enactments governing "minerals". In South Africa the exploitation of minerals is governed by legislation which has, with the passage of time, proliferated and become increasingly elaborate. In all these circumstances it may well be open to doubt whether in 1985 the word "minerals" in common parlance in South Africa carries the same connotation borne by it ninety years ago when the Donovan case, (supra), was decided.

However, the words of a statute must be construed (unless subsequent legislation declares otherwise) as they would have been interpreted on the day when the statute was passed. In the instant matter we are concerned with a

statute

statute passed in 1937, and it is therefore in the setting and prevailing circumstances of that time that the mind and purpose of the legislature, as expressed in the language of sec 3(1)(m), must be defined.

There being no definition in Act 47 of 1937 of the meaning to be assigned to the word "mineral" in sec 3(1)(m) of the Act, we have to look at the ordinary and natural meaning of the word, unless that meaning is displaced by anything contained in the Act. But in so trying to construe the word "mineral" the matter must not, I think, be approached through the eyes of a reader who is entirely ignorant of or completely unschooled in the subject-matter of sec 3(1)(m). The nature of the inquiry to be undertaken in this sort of situation is neatly expressed in a dictum of POLLOCK B in the decision of the Exchequer Division in Grenfell v The Commissioners of Inland Revenue (1876) 45 LJQB 465. That was a case involving the construction of

the

the English Stamp Duty Acts. In the course of his judgment (at 472) POLLOCK, B remarked:-

".....I think that it was very properly urged by Mr Gorst that this statute is not to be construed merely according to the strict technical meaning of the language contained in it, but that it is to be construed in its popular sense, meaning of course, by the words 'popular sense', that sense which people conversant with the subject matter with which the statute is dealing, would attribute to it."

Now in the year 1937 in South Africa a person conversant with cessions and leases of rights to minerals would have known that there already existed a number of laws dealing with "minerals" in which laws a definition of that word is to be found; and that in such enactments "minerals" are often comprehensively defined. In the Belville-Inry case, (supra), at 586 F/G, VAN WINSEN, J correctly pointed out that the pre-Union laws dealing with minerals contained very wide definitions of base minerals. So, for example, it was provided in the Cape Mineral Law

Amendment

Amendment Act, 16 of 1907, that the term "Base Minerals":-

"... shall be held to mean Asbestos, Building Stone, Cinnabar, Clay, Cobalt, Copper, Crocidolite, Gypsum, Iron, Lead, Manganese, Magnesite, Nickel, Natural Gas, Oil, Salt, Slate, Tin and such other minerals, not being Gold, Silver or Platinum, as may from time to time be declared to be base minerals by Proclamation by the Governor."

And in the Transvaal sec 3 of the Precious and Base Metals Act, 35 of 1908, (the Transvaal Gold Law), defined "base metals" as meaning:-

"... quicksilver, iron, lead, copper, tin, zinc, cobalt, nickel, arsenic, manganese, antimony, bismuth, as well as the ore of such metals, and sulphur, coal, graphite, or any other mineral substances for the exploitation of which no special provision is made by law."

The broad definition of "mineral" in the post-Union Mines & Works Act, 12 of 1911, has already been mentioned in the discussion of the decision in R v Day and Others, (supra).

In

In passing it may be noticed how extensively that word was defined in the Republican precursor to Act 12 of 1911.

Paragraph C of Chapter II of Act 12 of 1896 (Mijnregulasies), stated:-

"Het woord 'Mineraal' zal insluiten alle stoffen die door mijnbewerkingen, met het doel om er winst uit te maken, uit die aarde verkregen kunnen worden."

Turning to post-Union legislation preceding the passing of the Deeds Registries Act in 1937, one sees that ^{the} definition of "base metals" in the Transvaal Gold Law was considerably expanded by the Mineral Law Amendment Act, 36 of 1934, sec 1 whereof substituted the following new definition therefor:-

"..'base metal' shall mean any mineral substance other than precious metals or stones as defined in section one hundred and sixteen of the Precious Stones Act, 1927 (Act No 44 of 1927) or water."

It

It is significant that the scope of the above definition is so broad that the Legislature deemed it necessary expressly to exclude water therefrom. (Cf. the remarks of JANSEN, J in S v Funchall, (supra), at 54 E/G, quoted earlier in this judgment; and the comments of RUMPFF, JA in Falcon case, (supra), at 402 F, in relation to the definition of "base metal" in the Base Minerals Act, 39 of 1942.)

The Native Trust and Land Act, 18 of 1936, regulates, inter alia, prospecting or mining on Trust Land. Sec 23(1)(c) of that Act provides that for the purposes of sec 23 -

"..... minerals shall be deemed to include all metals, precious or base, precious stones, and all clays, stones, earths, coals, oils or other mineral substances of whatever nature which may be dug or extracted or separated from the ground."

It is usual to credit the Legislature with a knowledge of the existing law on the subject dealt with.

In

In order properly to interpret a statute a court is entitled, and in some cases bound, to look at earlier statutes dealing with the same subject-matter. That for purposes of judicial construction of a more recent statute an examination of earlier statutes dealing with like topics affords a useful aid is an established principle of our law. See, for example, Eckhard, Hermeneutica Iuris, editio nova, Chap.XVIII, p803, axiom IV; Chap XXI, p806. That principle of interpretation was profitably invoked by RUMPF, JA in the Falcon case, (supra), and by VAN WINSEN, J in the Belville-Inry case, (supra). It seems to me, with respect, that in seeking to construe the word "mineral" in sec 3(1)(m) of Act 47 of 1937, the definitions of that word to be found in earlier relevant statutes constitute not merely a permissible but an essential source of guidance. So approaching the problem of interpretation in the present appeal I find myself in entire agreement with the view expressed in the Belville-Inry case (at 588 C) in the following words:-

"I

".....I find it difficult to conceive why a statute should be so interpreted as to attach a meaning to a word like 'minerals' narrower than that assigned to it in a number of statutes especially concerned with minerals and the rights associated therewith."

Furthermore, freely adapting to the facts of the present appeal the language of RUMPF, JA in the Falcon case, (supra), at 405 C/D, I likewise find it difficult to envisage why Parliament would have wished to confine the ambit of the word "mineral" in sec 3(1)(m) to a narrow meaning which would exclude a substance like stone, whose economic exploitation can often be most valuable and in the public interest. In the Falcon case the Court was concerned with a type of rock called andesite. Some indication of the profitability of that substance may be afforded by the fact (to which reference is made at 393H) that at the time of the application to the Witwatersrand Local Division the total cost of the quarrying project and stone-crushing plant had been approximately R3,3 million. The profitability of exploiting the stone with which the present appeal

appeal is concerned may be gauged from the fact that when the appellant sold to Constone all the rights to stone in respect of the property the former agreed to pay the latter for a period of 5 years from 1 January 1982 the sum of R100 000,00 per annum; and as from 1 January 1987 a royalty calculated at the rate of 3% per annum of the net bin price of crushed stone recovered from the property and sold therefrom, subject however to a minimum royalty of R2 000,00 per month.

It is obvious, of course, that not every stone and pebble or every deposit of rock has appreciable value. But since it is no less clear that certain types of stone do have considerable value it follows, I think, that in any discussion as to the possible status of stone as a mineral the factor of value must of necessity loom large. This is for the reason that - as is evidenced by a number of the statutory definitions and some of the judicial pronouncements considered

considered earlier in this judgment - in the process of trying to decide what non-organic substances are to be ranked as "minerals" and what are not, the value of the substance concerned is almost invariably employed as one of the criteria. And in my opinion this criterion assumes particular significance when one has to construe any statutory provision which is concerned with the registration of rights in respect of minerals. Because, as was pointed out as long ago as in 1903 by INNES, CJ in the Brick and Potteries case, (supra), at pp 480/481, it is with regard to mineral substances of great value that the registration of grants of rights in respect thereof is "a matter of the utmost importance in this country."

While in the Erasmus case, (supra), reference was made (at 791 A/C and again at 792 F/G) to the definition of "mineral" in Act 12 of 1911, the tenor of definitions of the word in statutes preceding Act 47 of 1937 was not relied upon in construing sec 3(1)(m). Nor, as far as one

is.....

is able to judge from the report of the decision in the Erasmus case, was the factor of intrinsic value, to which I have alluded, either relied upon by counsel in support of the application or weighed by the learned Judge in dismissing it. It seems to me, with respect, that in its interpretation of sec 3(1)(m) the Court in the Erasmus case erred in overlooking the two considerations to which I have called attention.

In my view the Legislature appreciated that the concept of a "mineral" is a flexible and elastic one which is fully capable of (and, indeed, in the circumstances of this country; inclined to) expansion with the passage of time; and the Legislature therefore elected, wisely in my opinion, not to attempt any definition of the word for the purposes of sec 3(1)(m). I consider that in so doing Parliament was deliberately making provision for the important matter of enabling registration to be effected of valuable rights in respect not only of mineral substances known

known and accepted as such in 1937, but in regard also to those mineral substances then known but as yet not capable of profitable economic exploitation; and in regard also to mineral substances as yet quite undiscovered. If this view of the matter be sound then it is natural to suppose that the Legislature intended a wide meaning to be assigned to the word "mineral" in sec 3(1)(m). And it seems to me that unless this interpretation involves consequences which are manifestly absurd or unreasonable such a wide meaning should be accepted as the true construction.

It does not appear to me that a construction of sec 3(1)(m) which puts a wide meaning upon "mineral" is attended by incongruous consequences. In the Erasmus case, (supra), at 791 D/H, the learned Judge reasoned that if the word in that sub-section were to bear its widest meaning a lessee of mineral rights would be entitled to remove all the top-soil on the property and so render worthless the rights of

of the owner of the land; and the learned Judge found any suggestion that the rights of the lessee were so extensive to be untenable and irreconcilable with the tendency of our law to maintain a balance between the competing claims of the owner and the lessee of the mineral rights. In weighing the cogency of the abovementioned reasons, however, the following considerations appear to me to be relevant. The first point to be noticed, I think, is this. I have already mentioned that in the Erasmus case the case advanced on behalf of the applicant was that there should be assigned to the word "mineral" in sec 3(1)(m) the widest meaning of the word; and it was on that footing that the Court dealt with the application. As RABIE, J pointed out (at 790B) the widest meaning would include, for example, "alle grond, klippe en selfs water." It is, however, not necessary to postulate the widest meaning of the word in order to reach a conclusion that "mineral" in sec 3(1)(m) includes stone. The question is rather whether or not between its broadest and narrowest significations the word "mineral" is susceptible of an intermediate meaning sufficiently wide to compass stone. Further, an

affirmative

affirmative answer to the last question does not entail, so I consider, any consequence at odds with the tendency of our law to reconcile, as far as possible, the competing claims of the mineral lease holder and the surface owner. Although our law tries to strike such a balance a situation may well arise in which the conflict of rights is insoluble. In such a situation the rights of the mineral holder prevail. The matter is put thus by MALAN, J in Hudson v Mann and Another, (supra), at 488 D/G:-

"The principles underlying the decisions appear to be that the grantee of mineral rights may resist interference with a reasonable exercise of those rights either by the grantor or by those who derive title through him. In case of irreconcilable conflict the use of the surface rights must be subordinated to mineral exploration. The solution of a dispute in such a case appears to me to resolve itself into a determination of a question of fact, viz., whether or not the holder of the mineral rights acts bona fide and reasonably in the course of exercising his rights. He must exercise his rights in a manner least onerous or injurious to the owner of the surface rights, but he is not obliged to forego ordinary and reasonable enjoyment merely because his operations or activities are detrimental to the interests of surface owner."

Last but not least, the following comments on the reasoning adopted in the Erasmus case made by Franklin and Kaplan, The Mining and Mineral Laws of South Africa, at p589, seem to me to be logically correct:-

"Lack of registration of a contract otherwise binding between the parties can in no way protect the surface owner from or prevent the destruction of the surface of the land, if that is what the contract contemplates."

Having due regard to the scope and purpose of sec 3(1)(m) of Act 47 of 1937, and with all respect to the contrary judicial opinions expressed in some of the decisions which have been cited in this judgment, I arrive at the conclusion that the word "mineral" used in that sub-section is apposite to express a meaning wide enough to include such stone as has a value apart from its mere bulk and weight, and which is obtained from the crust of the earth for purposes of profit; and I am satisfied that this is the true construction to be put upon it. In my view an

interpretation

interpretation of sec 3(1)(m) narrower than the one indicated above would render the sub-section inefficacious.

For the purposes of the present appeal it is neither necessary nor desirable to determine more precisely the ambit of the word "mineral" in sec 3(1)(m), and I expressly refrain from any such attempt.

It follows that insofar as the conclusions reached in the Erasmus case, (supra), are at variance with the views expressed in the preceding paragraph of this judgment the Erasmus case should be regarded as having been wrongly decided. Having regard to the peculiar facts of the Erasmus case the following observation affecting the function and duties of the Registrar of Deeds in terms of sec 3(1)(m) may be necessary. On the facts stated in the

report

report of the Erasmus case it would seem that the parties to the lease did not themselves regard the rights granted thereunder as "rights to minerals". The relevant substances (sand and stone) were not described as minerals in the lease. Whether in terms of sec 3(1)(m) the Registrar of Deeds has any duty to register a notarial cession or lease granting rights to a substance which may on a proper interpretation of that sub-section be a "mineral" but where the notarial deed itself does not describe the rights thereunder granted as rights to minerals, is a matter which does not arise for decision in the present appeal and one which I prefer to leave entirely open.

I have already noted my finding that upon a proper construction clause 2 of the notarial deed of cession of mineral rights in the instant case includes rights to stone on the property. The affidavits filed in support of the main application sufficiently establish, in

my

my view, that the stone on the property has a value apart from its mere bulk and weight, and that it can be quarried for the purposes of profit. In these circumstances, so I consider, the first respondent is legally obliged to register the notarial deed of cession in question. It follows that the Court below erred in dismissing the main application and that the appeal should succeed. However, since the second and fourth respondents were entitled to resist the appellant's application for condonation, and inasmuch as a consideration of that application required the merits of the appeal to be fully argued, it is appropriate that the appellant should bear the costs both of the application for condonation and of the appeal.

In the result the following orders are
made:-

(A)

(A) Condonation is granted in respect of the
appellant's failure timeously to apply for
leave to appeal.

(B) The appeal succeeds and the order of the
Court below is altered to read:

"The application is granted and orders
are made in terms of paragraphs (a)
and (b) of the notice of motion dated
17 August 1982".

(C) The appellant is to pay the costs of the
application for condonation and the costs
of the appeal.

G G HOEXTER, JA

KOTZÉ, JA)
JOUBERT, JA)
TRENGOVE, JA) Concur
BOTHAS, JA)

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

NINE HUNDRED UMGENI ROAD (PTY) LTD APPELLANT

and

K B A BALI RESPONDENT

CORAM: JANSSEN, KOTZÉ, VILJOEN, GROSSKOPF, JJA et
NICHOLAS, AJA

HEARD: 15 MAY 1985

DELIVERED: 12 SEPTEMBER 1985

J U D G M E N T

VILJOEN, JA

In the magistrate's court, Durban, the
appellant, as the plaintiff, succeeded in an action

in which/.....

in which it sued the respondent for payment of the sum of R1 590, interest a tempore morae and costs on the attorney and client scale, as provided for by the agreement to be referred to in more detail presently. The amount of R1 590 was alleged to be due to the appellant in respect of arrear rental for the month July, 1979, in terms of a written agreement of lease which existed between the parties. An appeal to the Natal Provincial Division of the Supreme Court succeeded with costs, and the judgment of the magistrate was altered to read: "The plaintiff's claim is dismissed with costs." Against the latter judgment the appellant now appeals, leave having been granted.

In/.....

In terms of the lease referred to the appellant, as the lessor, let to the respondent, "in his capacity as trustee for a company to be formed ('the lessee')" certain premises in Durban "for the purpose of (a) workshop and (b) motor showroom." The lease was to commence on 1 July 1978. The rental for the first year, ie from 1 July 1978 to 30 June 1979, was R1 500 per month and that for the second year, 1 July 1979 to 30 June 1980, was R1 590 per month.

The lease was signed by the respondent "for and on behalf of the lessee" on 5 June 1978 and by a director of the appellant, one Sweeney, on behalf of the appellant, on 6 July 1978. The

company/.....

company contemplated by the respondent, Optima

Motors (Proprietary) Limited, (hereinafter referred

to as the company), was incorporated on 27 June 1978.

It is common cause that the premises were made

available and that the lease commenced on 1 July 1978.

The agreement sued upon is a contract

for the benefit of a third party. Three issues

were debated in this Court (as in the Court a quo).

They were, firstly, whether, as a matter of fact,

there was an acceptance by the company of the

benefit stipulated in its favour; secondly, whether,

as a matter of law and, thirdly, as a matter of

construction of the contract, the respondent was

personally liable. As a first step towards success

it was/.....

it was crucial to the appellant's case to persuade this Court (as it endeavoured to convince the Court a quo) that the company had not accepted because, as was conceded by counsel for the appellant, if the company had accepted the respondent fell out of the contract completely. The evidence on the point is not harmonious. I shall, however, assume without deciding that the company did not accept the benefit of the stipulation.

It was submitted on behalf of the appellant that the respondent contracted with the appellant as "principal" and that consequently he was, prima facie, unless as a matter of interpretation of the contract the parties intended otherwise,

personally/.....

personally liable for the performance of the obligations and entitled to the rights of the lessee flowing from the contract. For this proposition counsel relied upon certain dicta in a number of decided cases. The first case he relied upon is McCullogh v Fernwood Estate Ltd 1920 AD 204. In that case Innes CJ pointed out that the trustee who contracts for a company to be formed acts not as agent but in his own name and on his own responsibility for the benefit of another. The contract in question contained a clause holding the trustee personally liable to the contract if the company did not adopt on a certain date. There was nothing said in that case which

supports/.....

supports the proposition submitted on behalf of
the appellant.

Reliance was also placed on the decision
in the matter of Ackermann, N O v Burland and
Milunsky 1944 WLD 172. It was there decided
that the consequence of making a contract for a
company to be formed, is that the so-called trustee
is acting as principal and that, therefore, if he
wishes to bring an action on the contract or to
set it aside before the company is formed he must
sue in his personal capacity and not in his capacity
as trustee for the company.

What the plaintiff claimed in that case
was the return of certain documents which comprised
a banker's guarantee and certain bills and
promissory/....

promissory notes which he had delivered in terms of a clause in the contract. He also claimed that the contract be set aside and for damages for fraudulent misrepresentation. He alleged in his declaration that he (personally) had parted with the documents and (personally) suffered damages by reason of a fraud which had induced him to enter into the contract and deliver the documents. On these facts the Court found that he should plainly be suing in his personal capacity. This case, likewise, does not assist the appellant.

In Semer v Retief and Berman 1948(1) SA

182 (C), another case to which we were referred,

Ogilvie Thomson AJ said at 194:

"Once/.....

"Once it be conceded that to contract as trustee in circumstances like these is to contract qua principal, it, in my view, follows that - subject always to the particular terms of the contract in question - the trustee will in his personal capacity have rights and be subject to obligations in regard to that contract."

This, clearly, cannot be construed to mean that the trustee acquires the rights and incurs the obligations of the third party under the contract.

In Bagradi v Cavendish Transport Co. (Pty)

Ltd 1957 (1) SA 663 (D), another decision relied

upon by counsel, the headnote, which accurately reflects the judgment, reads:

"As a person who contracts as trustee for a company to be formed contracts as a principal, he may at all times sue on the contract as such principal, unless and

until/.....

until the company, after it has come into existence, creates a vinculum juris between itself and the promisor by notifying its acceptance of the benefits of the contract. When the company does that, then the person contracting as trustee falls out of the contract altogether. Therefore, unless and until he falls out of the contract altogether, he may accept a repudiation by the other party to the contract and cancel the contract as well as sue for damages. Where he sues as a principal his rights and liabilities are not contingent on the non-adoption of the contract by the company; accordingly it is not necessary for him to aver in his declaration either that the company has refused to accept the agreement or that it has failed to accept it within a reasonable time." (The words "on the contract" were italicised by me).

Here again the Court did not suggest that the trustee acquired the rights or incurred the obligations of the third party pending acceptance of the/.....

of the benefit.

In the matter of Gardner v Richardt

1974(3) SA 768(C) Friedman AJ said at 770E:

"It seems to me that the question whether and the circumstances under which a person contracting as trustee for a company in the course of formation has the right to sue for specific performance of the contract, must be answered by reference to the terms of the particular contract under consideration; it is essentially a question of construction."

I respectfully agree.

For the reasons stated above I agree with the conclusion arrived at by the Court a quo that the trustee is not personally entitled to exact or obliged to render the performance which is stipulated for the third party unless the contract so provides.

This/.....

This brings me to the third issue. As an alternative to the second issue it was argued on behalf of the appellant that the contract does, if not expressly then at least by implication, provide for the respondent, pending the acceptance by the company of the benefit, to be personally liable. As I have stated above I shall, for the purposes of this branch of the argument, assume that the company did not accept the benefit.

In support of his contention in this regard counsel sought to rely on certain clauses in the agreement. He pointed out that it was provided that the lease would take effect from 1 July 1978. In terms of clause 6, he pointed out further, the

lessee/.....

lessee took the premises as they stood and was obliged to notify the lessor of any defect within a period of fourteen days of taking occupation of the premises, failing which the premises would be deemed to be in a good state of repair. If, counsel urged, the company failed to accept the benefit within fourteen days after the commencement of the lease, the person contemplated as the lessee, obliged to comply with clause 6, could only have been the respondent in his personal capacity. Another clause relied on was clause 11 read with clause 29. Clause 11 provided for the premises to be let only for the purposes specified in the agreement and clause 29 rendered the lease subject to and conditional upon the lessee obtaining the necessary trading licence

in/.....

in order to conduct its business from the said premises. This clause also required the lessee to undertake to make such application to the relevant authorities immediately upon signature of the lease by the lessor. Regard being had to these two clauses, counsel argued, the only person who could have been contemplated to be the lessee, at least until such time as the company obtained a trading licence, was the respondent because it was unlikely that the company would have accepted the benefit unless a trading licence to conduct the business for which it was formed had been obtained. Reliance was finally placed on clause 23 which entitled the lessor to cancel the contract upon failure to remedy any breach of the lease within/.....

within 14 days after despatch of a written notice calling upon the lessee to do so. As, it was contended, no one was indicated as the party obliged to comply with the terms of the agreement prior to acceptance of the benefit by the company, the parties could only have contemplated the respondent in his personal capacity to be the lessee.

I cannot accede to this argument. The contract is a perfectly straightforward one containing standard clauses. The description of the lessee as the trustee for a company to be formed is, per se, no indication, in my view, that prior to the acceptance by the company of the benefit stipulated in its favour, the trustee would be

personally/.....

personally liable on the contract. It cannot be said, in my view, that the parties necessarily contemplated the acceptance by the company of the benefit after the date of commencement of the lease and that they inserted these clauses to take care of such contingency.

A problem may arise if, pending the formation of the company and acceptance by it of the benefit, performance by the lessee of the terms

of a/.....

of a contract which does not also provide for the personal liability of the trustee, falls due. In such a case, in order to stave off cancellation and preserve the benefit for the company, the trustee or somebody else would be compelled to perform but by doing so he would not personally incur any liability under the contract. If the benefit stipulated for arose from a synallagmatic contract the converse would of course, also apply. If, in terms of the contract, the promisor were obliged to perform from the date of its inception, he would have to render such performance either to the stipulator, or to some other person indicated by the latter who would

accept/.....

accept the performance for the benefit of the company to be formed. But that would be done under such agreement as might be concluded, either tacitly or expressly, between the promisor and the stipulator. Such agreement would be superimposed upon the written agreement constituting the benefit. Failing performance of the lessee's obligations pending acceptance by the company the promisor can, in my view, do nothing but, on account of such non-performance, resile from the contract and would not even be able successfully to claim damages from anybody unless he had taken the precaution to provide, as was done in the present case, for the company's

directors/.....

directors personally to guarantee all the

obligations of the lessee in terms of the lease.

The appeal is dismissed, with costs.


JUDGE OF APPEAL

JANSEN	JA)	
KOTZÉ	JA)	
GROSSKOPF	JA)	- concur
NICHOLAS	AJA)	