

Case no 388/82.
m c

PERCIVAL WHYTE

- and -

FERNANDA SOARES DA COSTA COUTO

JANSEN JA.

Case no 388/82
m c

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

PERCIVAL WHYTE Appellant

- and -

FERNANDA SOARES DA COSTA COUTO Respondent

Coram: JANSSEN, JOUBERT, TRENGOVE JJA et
HOWARD, GROSSKOPF AJJA.

Heard: 10 May 1984.

Delivered: 13 SEPTEMBER 1985.

J U D G M E N T

JANSEN JA :-

The appellant sued the respondent in the magistrate's court at Johannesburg for the sum of R800, being the first instalment in respect of the balance of the purchase price of a dry-cleaning business sold by the appellant to the respondent. The business, at the time of the sale, was conducted on premises leased by the appellant from Trasu Properties (Pty) Ltd. The contract of sale, in the form of a written offer by the respondent accepted by the appellant, contained the following provisions :-

"4. This agreement shall be subject to the following conditions :-

(a) [deleted]

(b) The /

- (b) The Lessor agreeing to give me a new lease of the premises for a period of 3(three) years and -- months and an option to renew the lease for a further period to be negotiated commencing at a rental agreed to by the buyer.
- (c) The grant to me of the necessary Trading Licenses to enable me to continue running the said business. In this connection if the Licensing Authority is prepared to agree to the grant of a Licence subject to the alteration or renovation of the premises same is to be construed as a fulfilment of this condition and any alterations that might be required to the premises will be borne and paid for by the SELLER.
- (d) I undertake to do all things necessary to procure the fulfilment of these conditions.
- (e) In the event of either of the above two conditions not being fulfilled due to no fault of my own this

agreement /

agreement shall become of no force or effect and so far as possible the parties will be restored to the position they would have been in had it not been entered into. In particular I will in such event inter alia be obliged to restore the business and assets to the SELLER and account to him for all my trading and as against this I will be entitled to the refund of any moneys paid to the SELLER."

In his amended particulars of claim the appellant

alleged inter alia :-

"The said conditions were fulfilled, alternatively, fictionally fulfilled in that the lessor tendered to the Defendant a new lease of the premises for a period of three years and the necessary Trading Licences were obtained, alternatively, were capable of being obtained.

Alternatively /

Alternatively to the foregoing the said two conditions, if not fulfilled were due to the cause or fault of the Defendant."

To this the respondent pleaded that "the condition relating to the said lease is so vague as to be unenforceable" and that the agreement was accordingly of no force and effect; in the alternative she denied that the condition had been fulfilled in fact or otherwise. (It may be mentioned that fulfilment of condition (c) was not in issue in the trial and that at no stage before us has the appellant invoked clause 4 (d) as part of his case.)

At the trial the appellant succeeded in his claim: the magistrate held that the plea of vagueness failed and that the condition had in fact been fulfilled.

On appeal the Transvaal Provincial Division (per PREISS J, LE GRANGE J concurrente) however came to the

conclusion /

conclusion that the plea of "vagueness" should have been upheld. The conflicting views flow from a divergence in the interpretation of clause 4(b) of the contract.

It was suggested en passant by counsel for the appellant that clause 4(b) constitutes a resolute condition but this was not pressed and in the main the arguments proceeded on the assumption that it was indeed suspensive. On balance this assumption appears to be correct. There are, however, ex facie the document other difficulties in regard to the meaning of the clause. Does e.g. "agreeing to give me a new lease" imply consensus between the respondent and the lessor in respect of the terms of the lease and the conclusion

of a binding lease? Or does it merely mean "intimating to the respondent a willingness" to give a lease and an option to renew? Do the words "commencing at a rental agreed to by the buyer" only relate to the "option" or does it also relate to the "new lease"? Is the "further period" to be "negotiated" at the time of the granting of the "option" or at the time the "option" is to be exercised? The appellant contends that the effect of the clause is that "the condition would have been fulfilled immediately the lessor signified that he was prepared to agree to a lease for a period of three years with a clause containing an option in the stated terms", i.e. the appellant reads the "agreeing" in the clause as meaning: merely intimating a willingness to give such a lease and

such an option. The attitude of the respondent is then immaterial, as also the precise terms of the lease and option. The negotiation in respect of the further period is to be done at the time the option is exercised and the agreement in respect of the commencing rental is also to be arrived at that time. In the main this is the reading of clause 4(b) adopted by the magistrate. The respondent however contends that the proper construction is that accepted by the court a quo: viz "the lease referred to in clause 4(b) was one which would be acceptable to the defendant". In effect this postulates that the words "agreeing to give me a new lease" in the clause connotes binding consensus between the lessor and the respondent in respect of all the terms /

terms of the lease: "..... it is unrealistic to interpret the words 'the lessor agreeing' as meaning that any willingness by the landlord to enter into a lease with the defendant for three years, irrespective of its terms, would satisfy the condition". The ratio of the court a quo appears from the following :-

"It is clear that the intention of the defendant in stipulating for this condition was to ensure that the substantial purchase price paid for this business [R40 000: a deposit of R10 000 and monthly instalments of R800 spread over 37 months and a final payment of R400] would not be dissipated by securing a tenure of the premises for a short period only. What was stipulated for in the agreement was that the lease to be secured would be upon terms and conditions acceptable to her in the light of those circumstances."

That /

That the clause was inserted for the benefit of the respondent, so as to safeguard her investment, seems clear. Not only is this obvious from the contract itself but the appellant also understood this to be the position. According to him the respondent and her husband not only wanted a new lease for three years [the existing lease would have expired after two years] but they also wanted an option to renew it for a further three years: "They didn't want to feel that they've come into the business and after three years the landlord would kick them out". If "agreeing to give me a new lease" simply means "intimating to the respondent a willingness" to give a lease and an option to renew" and not "concluding a contract of lease",

the /

the respondent would have had no real assurance as to the future and the whole purpose of clause 4(b) would have been stultified. The lessor would not be bound in any way until he actually concluded a contract of lease. However, there seems to be no cogent reason for reading the clause in this way and it would do the language no violence to find a meaning in accordance with its purpose. In my view "agreeing to give ... a new lease" means "concluding a contract of lease".

The conclusion of a (binding) contract of lease would require consensus between the respondent and the lessor in respect of all the terms of the lease. The court a quo took the view that it was not implied that the terms to be agreed upon were ascertainable by

an "objective test of reasonableness" and this was not challenged before us. The terms would, therefore be a matter for negotiation. From the respondent's point of view, it follows that any terms offered to her would have to be acceptable to her. It should not be thought that this unduly favours the respondent as purchaser vis-à-vis the appellant as seller of the business. It must be remembered that when the contract was concluded it was obvious that the respondent was serious about taking over the business. Not only was she prepared to sign the offer but she was also prepared to make a deposit of R10 000 00. Obtaining a lease was essential to her plans. It was no doubt at that time considered unnecessary to fetter her discretion in relation /

relation to the terms of that lease. -

The interpretation adopted above, is essentially that of the court a quo. It, however, held that on its construction of clause 4(b) the contract was "void

for /

for vagueness". "Vagueness" was used in a wide sense so as to include those cases which exemplify the maxim nulla promissio potest consistere, quae ex voluntate promittentis statum capit (D.45.1.108.1).

The court considered the clause as equivalent to the pure potestative condition "si volam" and therefore as invalidating the whole contract. However, upon close consideration it is clear that the clause constitutes a mixed potestative condition: it does not depend entirely upon the will or whim of the respondent but also upon extraneous economic factors affecting the respondent. (Cf Wessels, Law of Contract, 2nd ed §§1290, 1313). It follows that clause 4(b) does not

per /

per se invalidate the whole contract between the appellant and the respondent, as held by the court a quo.

On finding that the contract between the parties is valid, the next question is whether the appellant has discharged the onus of proving that the condition had been fulfilled - an inquiry the court a quo was not called upon to make as a result of its view of the nature of clause 4(b). It has been accepted above that "agreeing" in the clause means the entering into of a binding contract between the respondent and the lessor. As it is common cause that no binding lease was ever entered into between them, the condition was obviously not fulfilled.

There /

There remains the appellant's alternative averment in its claim that the condition was fictionally fulfilled. In argument before us this aspect was not pressed, counsel preferring to base his argument on the appellant's interpretation of clause 4(b) and the contention that on that reading of clause 4(b) the condition had been fulfilled. The question of fictional fulfilment must nevertheless now be considered.

The principal cases on fictional fulfilment are collected in Van Heerden v Herman (1953(3) SA 180(T)) and Design and Planning Service v Kruger (1974(1) SA 689(T), 699H-700B). It is clear that if a conditional debtor prevents the fulfilment of the suspensive

condition /

condition and he is guilty of dolus in so doing, the condition is deemed to have been fulfilled. What dolus entails in this context has not yet been precisely delineated. However it seems at least clear that the debtor should have acted with the direct intention ("oogmerk") of preventing the obligation from becoming enforceable. The onus of proof in this regard lies on the conditional creditor.

The contention that clause 4(b) has been fictionally fulfilled must rest on the proposition that the respondent had failed to sign a proposed deed of lease prepared by the lessor's attorneys, with the direct intention of frustrating the contract of sale between her and the appellant. It may be assumed that the respondent's

husband /

husband (as her agent) had previously approved the terms embodied in that draft and that in fact the respondent failed to sign the draft. But in the circumstances it hardly be inferred on a balance of probabilities that because she had approved the proposed terms, she failed to sign the lease with the direct intention of frustrating the contract between her and the appellant. It appears that at the time the draft was ready for signing difficulties had arisen between the respondent and the appellant. Mr Levy (the lessor) spoke to the respondent (who had taken possession of the business in February 1980) on 1st April 1980. His evidence in this regard shows her state of mind :-

"Could we then please go to your note of the first of April. Perhaps a significant date,

1980,/.....

1980, 11h30. --- 1st of April 1980, 11h30.
 Saw mrs. Couto and son and Carlos. Mrs. C.
 complains counter trade no good. Last months
 only R1 317 and not R1 600 as promised and
 guaranteed. (?? By Pretorius and Whyte?)
 Has difficulties with Whyte and maintains that
 verbal guarantees take precedence over written
 agreement. (offer to purchase) Which she
 does not consider binding, as she had not
 signed the contract. I refused to be drawn
 into expressing an opinion and advised that
 I know nothing about the business, the
 discussions and negotiations and therefore
 could express no opinions.

Did mrs. Couto tell you that the turnover
 had been guaranteed? --- She implied it yes.

Did she tell you that verbal guarantees
 take precedence over her written agreement,
 the offer to purchase? --- Yes she did.

Did she tell you that she didn't consider
 that agreement to be binding as she hadn't
 signed the contract? --- She did."

On 16th April 1980 the appellant's attorneys threatened
 to cancel the contract, inter alia because the respondent

had /

had not yet signed the proposed lease. The reply to this on behalf of the respondent (dated 21 April 1980) raised the point that the respondent, although married in community of property, signed the contract without the assistance of her husband and also that the contract had been cancelled by "mutual consent". The attitude of the appellant, however, was that the respondent was a public trader and he denied the alleged cancellation.

It is significant that at this stage the respondent did not invoke the non-fulfilment of clause 4(b). It is only on 7 May 1980 that her attorney writes:-

"We record that our client persists in the allegations set out in our letter to yourselves of the 21st APRIL, 1980. In view thereof we do not intend dealing with the allegations contained in your letter of the

30th APRIL, 1980 as no good purpose can be served by our so doing. Our failure to deal with those allegations should, however, not be construed as an admission of the correctness thereof.

Without prejudice to our client's contentions in regard to the cancellation we advise that in any event the provisions of clause 4b of the Agreement of Sale have not been fulfilled in that, inter alia, certain terms contained in the proposed lease are not acceptable to our client."

The appellant would contend that it is to be inferred that the respondent did not sign the lease because she directly intended to frustrate condition 4(b) and thus the contract between her and the respondent. However, clause 4(b) was not initially invoked and it was only raised as an alternative on 7 May. Whilst maintaining that /

that the contract was at an end she could hardly have been expected to sign a lease, thus binding herself to a third party. An equally plausible inference to the one mentioned above, is that she did not sign the lease because she at that stage could not risk binding herself in this manner. In these circumstances it could hardly be held that the appellant has discharged the onus of showing the required dolus on the part of the respondent at any material time.

In my view the appellant has not established that the respondent failed to sign the draft because she had the direct intention of frustrating the suspensive condition. It follows that the court a quo cannot be faulted for arriving at the conclusion (albeit for different reasons) that the correct order the magistrate should /

should have made was: "Plaintiff's claim dismissed".

I would dismiss the appeal with costs,
including the costs attendant upon the employment of
two counsel.

E.L. JANSEN JA.

TRENGOVE JA concurs.

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

PERCIVAL WHYTE

Appellant

AND

FERNANDA SOARES DA COSTA COUTO

Respondent

CORAM: JANSEN, TRENGOVE, JOUBERT, JJA, HOWARD et
 GROSSKOPF, AJJA

HEARD: 10 May 1984

DELIVERED: 13 Sept 1985

J U D G M E N T

GROSSKOPF, JA

I have had the benefit of reading the judgment
 of JANSEN JA but find myself in respectful disagreement

with

with his interpretation of clause 4 (b) of the contract of sale. This clause, it will be recalled, reads as follows:

"4. The agreement shall be subject to the following conditions:

.....

(b) The lessor agreeing to give me a new lease of the premises for a period of 3 (three) years and - months and an option to renew the lease for a further period to be negotiated commencing at a rental agreed to by the buyer."

The crisp question on which I disagree with the views of JANSEN JA relates to the meaning of the

words

words "the Lessor agreeing to give me a new lease".

In my view these words in their ordinary sense require only that the lessor should, when approached, consent or agree to enter into a lease with the purchaser for a period of three years with an option to renew the lease as described by the clause. I do not think that the clause in its ordinary signification requires the actual conclusion of a contract of lease between the lessor and the purchaser.

I accept that the condition was inserted in the contract primarily for the benefit of the purchaser. This does not, however, in my view justify an interpretation which goes beyond the meaning of the words.

The

The willingness of the lessor to accept the purchaser as the lessee of the premises in itself provides some protection for the purchaser's interests, and there is no compelling reason suggested by the wording or context of the clause, the surrounding circumstances, or other relevant considerations, to suppose that the parties intended to provide any greater protection. The premises are described in the draft deed of lease, which the purchaser (respondent) ultimately did not sign, as "the first shop and interleading factory in the building known as World Centre, on the East side of the building in Fox Street, City and suburban, Johannesburg, presently occupied as a Dry Cleaning Depot and Dry

Cleaning

Cleaning Factory". The terms upon which business premises of this sort would be let could reasonably have been expected by the parties to conform to the ordinary standards of the market place. The parties may well have considered that, if the purchaser was acceptable as a lessee, there would be no difficulty with the terms of the lease. As I shall try to demonstrate later, no difficulty was in fact experienced in this regard.

Although

Although, as I have stated, I accept that clause 4(b) was inserted primarily in the interests of the purchaser, one should in considering the broader context of the contract (in so far as this may be relevant to its interpretation), not ignore the seller's interests. The seller sold his business and gave almost immediate occupation thereof to the purchaser. He had a clear interest in avoiding the possibility that the sale might be frustrated by the purchaser's unreasonable failure to conclude a contract of lease offered to her by the lessor. I do not think the court should be astute to ascribe a meaning to the clause which would permit the purchaser to achieve such a result.

To

To sum up, I consider that clause 4(b) required only that the lessor should express its agreement to grant a lease in accordance with the clause.

It may be accepted that this interpretation could in theory lead to difficult problems. What would happen, for instance, if the lessor were to indicate its willingness to enter into a lease but were to change its mind? And what is the legal effect (if any) of an "option" to renew a lease "for a further period to be negotiated commencing at a rental agreed to by the buyer?"

Such questions are, however, hypothetical.

If they were to arise the parties or the court may have

to

to decide them, relying perhaps, in some cases, on implied terms. So, for instance, it may be implied that the lessor's willingness to accept the purchaser as a lessee should not be withdrawn, i.e, should persist up to the moment that the lessee is able to conclude the contract of lease. But be that as it may, the fact that the clause suffers from defects or may in particular situations be difficult to apply, does not in my view justify the court in making a new contract for the parties which is highly prejudicial to the seller.

The next question then is whether the condition has been fulfilled. Evidence on this issue was given by the appellant himself and by Mr. Levy, a

director

director of Trasu Properties (Pty) Ltd (Trasu) who was authorized

to act on Trasu's behalf. The appellant testified that he made an

appointment for the respondent and her husband to see

Mr. Levy to discuss the lease. (According to Mr.

Levy this was on 7 February 1980). The respondent

herself did not attend the meeting, but it is not dis-

puted that her husband was authorized to represent her.

The appellant testified that "Mr. Levy went to great

extents (sic) to explain very carefully and very slowly,

all the various clauses in the lease they discussed

the rental" In answer to the question: "Was

Mr. Levy prepared to give an option to renew? Did he

communicate that?" the appellant said: "He was quite

prepared

prepared to give an option to renew for three years,
it was on terms to be negotiated between Mr. and Mrs.
da Couto and Mr. Levy who represented the company."

The appellant testified further that the respondent's
husband appeared to understand the explanation and seemed
to be quite satisfied with the proposed terms of the
lease. Although the appellant was questioned during
cross-examination on the events at this meeting, it
was not suggested to him that the evidence set out above
was incorrect.

Mr. Levy's evidence was to the effect that
he had no clear independent recollection of the negotiations,
but that he had contemporary notes from which he re-

freshed

freshed his memory. In general he confirmed the evidence of the appellant that the terms of the proposed lease were discussed in detail with the respondent's husband and that "he accepted it". Mr. Levy did not however recall that the period of the option was discussed. In regard to the option to renew he said: "Yes, I think it came up, and we said that we would be prepared to give an option for renewal, but the details and conditions of it should have been discussed in due course".

On 24 February 1970 Mr. Levy and the plaintiff visited the respondent's husband. During this visit the respondent's husband agreed to sign a contract of suretyship in connection with the lease.

Subsequently

Subsequently, on Mr. Levy's instructions, a draft deed of lease was prepared by his attorneys. The option of renewal in this draft was only for a term of two years. In the light of the plaintiff's evidence this would appear to be a mistake, but in any event Mr. Levy testified that Trasu was prepared to give an option for three years if requested to do so. Mr. Levy's evidence on all these aspects was not challenged in cross-examination.

To sum up: according to the evidence of the appellant and Mr. Levy, Trasu offered to enter into a contract of lease with the respondent for the period and on the terms mentioned in clause 4(b) of the contract of

of sale. In fact, on this evidence all the suggested terms of the lease were quite acceptable to the respondent's husband. Not only, as I have mentioned, was this evidence not challenged in cross-examination but neither the respondent nor her husband disputed it - in fact, neither of them testified at all. On the evidence as a whole I conclude that compliance with the condition in clause 4(b) was established.

In support of this conclusion it is instructive to note when and how the respondent first contended that the condition had not been fulfilled. The contract of sale was concluded on 5 February 1980. On 7 February 1980 the respondent's husband negotiated with Mr. Levy concerning the lease.

In

In the middle of February the respondent took occupation of the business. On 24 February the further meeting with Mr. Levy took place. Afterwards a dispute arose between the appellant and the respondent about the equipment and turnover of the business.

On 5 April 1980 the appellant sent a registered letter to the respondent threatening action because, so it was alleged, she had failed to comply with several of her obligations under the contract of sale, including, inter alia, her obligation to sign the deed of lease which had been prepared by Trasu's attorneys. The respondent apparently did not reply to this letter.

On 16 April 1980 the appellant's attorneys wrote a letter to

to similar effect. To this letter the respondent's attorneys replied, raising three defences, viz., a) that the respondent was married in community of property, and that her husband had not signed the contract of sale; b) that the contract of sale, if valid at all, had been cancelled by mutual consent, and that a new contract was being negotiated; and c) that the new contract could not be finalized because the parties could not agree which of them was to be responsible for the repair of certain equipment. These defences were disputed by the appellant's attorneys in a letter dated 30 April 1980.

On 1 May 1980 the appellant's attorneys again wrote, reiterating that the respondent had committed breaches

breaches of contract by, inter alia, failing to sign the lease, and threatening to cancel the contract of sale.

The respondent's attorneys replied to this letter on

7 May 1980, persisting in the allegations set out in

their letter of 21 April 1980. In the letter of

7 May the respondent's attorneys added the alternative

defence "that in any event the provisions of clause 4(b)

of the Agreement of Sale have not been fulfilled in that,

inter alia, certain terms contained in the proposed

lease are not applicable to our client". It should be

noted that even at that stage she did not contend that it

was her failure to sign the deed of lease which, per se,

amounted to a non-fulfilment of the condition. Her

contention

contention then was that the condition failed because of her dissatisfaction with some of the terms of the draft.

I find it difficult to accept this contention at face value. The respondent had been in occupation of the premises for almost three months. There is no suggestion in the evidence that she had, at any stage, expressed any concern or dissatisfaction to the appellant or to Mr. Levy about the proposed terms of the lease. The defences first raised by her made no reference to the terms of the lease. When her attorney did eventually raise this issue, they did so apparently as an afterthought, without providing any particulars as to the terms which the respondent allegedly found

objectionable ..

objectionable. Neither in cross-examination of the appellant's witnesses, nor in evidence on behalf of the respondent, was the alleged inadequacy of the deed of lease raised. In all these circumstances I cannot accept that any weight is to be attached for any purpose to the bare allegation in the letter of 7 May that "certain terms are not acceptable". The inference seems to me to be inescapable that the respondent was attempting to secure her release from the contract of sale and for this purpose clutched at the straw which was provided by the non-completion of the lease. The whole history of the matter convinces me that the condition contained in clause 4 (b) had not only been fulfilled

fulfilled as a matter of objective fact but also that the respondent fully realized this.

I would accordingly allow the appeal, and reinstate the magistrate's judgment. The respondent has argued that, if the appeal were to succeed, this Court should interfere with the magistrate's order for the payment of attorney and client costs by the respondent (defendant). The magistrate made this order because of the nature and quality of the defences raised by the respondent. It is accordingly necessary to consider the various bases upon which the respondent attempted to answer the appellant's claim. I have already referred to the letter of 21 April 1980 in which

the

the respondent's attorneys relied on the fact that she was married in community of property, and contended that the contract of sale had in any event been cancelled by mutual consent. As far as the respondent's marital status was concerned, the appellant's attorneys pointed out in reply that the respondent was a public trader and did not require her husband's assistance in concluding the contract. This became common cause at the trial, during which it also appeared that the respondent in fact enjoyed the assistance of her husband throughout all stages of the negotiations between the parties. The allegation that the contract had been cancelled by mutual consent was denied by the appellant's attorneys in their

letter

letter dated 13 April 1980, and was not pursued in the pleadings.

In their letter of 7 May 1980 the defendant's attorneys, as noted above, added the alternative defence that clause 4(b) had not been complied with in that certain terms in the proposed lease were not acceptable to the respondent. As I have indicated this suggested defence was in my view not only unsound but disengenuous.

In her plea, dated 15 September 1980, the defendant raised a number of defences. They may be summarised as follows:

(a) The condition in clause 4(b) was so vague as to be unenforceable and in the premises the contract
of

of sale was null and void;

(b) The said condition had not been fulfilled;

(c) The appellant had induced the contract
by fraudulent misrepresentations about the turnover of
the business; and

(d) The appellant had induced the contract
by fraudulent non-disclosure of defects in the equipment
which was used in the business which formed the subject
matter of the sale.

A further issue arose following on an amendment to the appellant's particulars of claim on 5 December 1980. Respondent denied in her amended plea that the condition in clause 4(c) of the contract of sale

(which

(which is quoted in the judgment of JANSEN JA) had been fulfilled, i.e., she denied that a trading licence had been granted to her.

In the result all the defences failed or were abandoned during the proceedings before the magistrate. The defendant admitted prior to the hearing that a licence had in fact been granted to her, and no serious attempt was made to substantiate the defences based on fraudulent misrepresentation and non-disclosure. All that remained were the two defences based on clause 4(b) of the contract. These defences failed, rightly in my view, before the magistrate. This brings me to the magistrate's reasoning in arriving at the conclusion that

that an award of a attorney and client costs was justified. In this regard he stated:

"As already indicated the court considers the first two defences (i.e., those based on clause 4(b) of the contract) as unjustified. They are also frivolous and vexatious and the defendant has added insult and injury by recklessly and unjustifiably alleging falsity and fraud. No basis whatsoever has been laid for making such claims, no mention thereof was made in cross-examination, and the allegations have not been withdrawn. They are found to be malicious and vexatious."

I would not myself stigmatize the defences based on clause 4(b) of the contract as frivolous and vexatious, and in this respect I disagree with the magistrate.

The respondent's counsel contended that also the defence

based

based on fraudulent non-disclosure, although unproven,
was not so unsubstantiated as properly to be described
as malicious, frivolous or vexatious. I do not propose
analysing the evidence on this aspect in detail. It
appears that the appellant sold the business to one
Pretorius in September 1977, from which time Pretorius
operated it until the appellant repossessed it immediate-
ly prior to the sale thereof to the respondent. The
appellant had no detailed knowledge of the machinery but
was aware of some obvious defects which he mentioned to
the respondent. Before giving occupation of the
business to the respondent, the appellant, according to
his undisputed evidence, arranged with the respondent

"that

"that Mr. Pretorius would work with them (the respondent and her husband) for a week or two weeks, and help them to operate the machinery and show them where everything is, as I know absolutely nothing about the machinery, in fact I don't even know where you turn the light on".

In view of this background there would accordingly have been no reason for the respondent to assume that the appellant was aware of any defects which there may have been in the equipment other than those expressly mentioned to her. Pretorius was the man who had worked with it, and he was made available to her to provide such information about the equipment as she needed. Nonetheless the respondent persisted until the end with the allegation

that

that the appellant had been guilty of fraudulent non-disclosure. I agree with the magistrate that this was malicious and vexatious. The magistrate's finding that the defence of fraudulent mis representation was also malicious and vexatious could not be seriously challenged. Although, as stated above, I consider that the magistrate was unduly severe in his strictures on the defences based on clause 4(b) of the contract, it seems that, in awarding attorney and client costs, he was influenced mainly by the reckless and unjustifiable allegations of falsity and fraud against the appellant. This was obviously a relevant feature. Moreover, the magistrate was also entitled, in my view,

to

to have had regard to the other spurious defences raised in the correspondence and the pleadings to which I referred above. The whole history of this matter shows, in my view, that the respondent raised every imaginable defence irrespective of its lack of foundation in the facts known to her or the seriousness of the misconduct imputed to the appellant. In these circumstances I consider that a award of attorney and client costs was fully justified.

In the result the appeal succeeds with costs, including the costs of two counsel. The order of the Transvaal Provincial Division is altered to read:

Appeal dismissed with costs. The order of the magistrate is

is re-instated, i.e. judgment is entered for the
plaintiff for R800,00 with interest thereon at 11%
per annum from 2 July 1980 to date of payment, and costs
as between attorney and client.

E M GROSSKOPF, JA

JOUBERT, JA }
HOWARD, AJA } Concur