IN THE SUPREME COURT OF SOUTH AFRI(

(APPELLATE DIVISION)

In the matter between:

JOHANNES AUGUSTINUS LIEBENBERG — Appellant

and

ARTHUR MICHAEL NEVILLE — 1st Respondent

JOEL MELAMED N.O. — 2nd Respondent

CORAM: CORBETT, GROSSKOPF, SMALBERGER, MILNE, JJA et NICHOLAS, AJA

HEARD: 8 September 1988

DELIVERED: 29 September 1988

J U D G M E N T

GROSSKOPF, JA

Mr. A.M. Neville, the first respondent herein, and Mrs. E.M. Smit were the sole shareholders in a company called Wall Street Properties (Proprietary) Ltd. On 8 June 1979 they entered into a contract with the appellant, which was later

amended by an addendum dated 19 June 1979. The contract embodied two agreements of sale. The first was a sale to the appellant by Mrs. Smit and Mr. Neville of their shares in the company and the shareholders' loan accounts. The second was a sale by the appellant of a farm Appelsdrift in the district of Robertson to Mrs. Smit. The purchase price of the shares and the loan accounts was R60 000,00, which was to be abated by R24 000,00 being the amount owing under an existing mortgage bond which was to continue being the obligation of the company. The balance of R36 000,00 was to be set off against the price payable by Mrs. Smit for the farm Appelsdrift, as will be seen below.

The purchase price of the farm was R114 000,00. This amount was payable as follows (I quote from clause 18 of the contract as amended):

" a) By the set off of the amount of R36,000-00 (THIRTY-SIX THOUSAND RAND) being the balance of the purchase price of the shares referred to above.

b) Payment of the sum of R10,000-00 (TEN THOUSAND RAND) shall be due and payable by not later than the 31st JULY, 1979 and

R1,000-00 (ONE THOUSAND RAND) shall be due and payable on the 31st AUGUST, 1979.

c) Ethel Margaret Smit shall take over the First Bond with the Landbank for an amount of R67,000-00 (SIXTY-SEVEN THOUSAND RAND) and shall pending transfer into the name of Ethel Margaret Smit pay to the said Landbank the sum of R7,500-00 (SEVEN THOUSAND FIVE HUNDRED RAND) per year in reduction of the Bond and the PURCHASER records that the said amount is the only amount payable by the PURCHASER to the Landbank."

(The reference to the "purchaser" is, somewhat confusingly, a reference to the appellant who was the purchaser of the interest in the company, but was the seller of the farm).

After conclusion of the contract, various problems arose concerning the sale of the farm. I shall have to deal with the facts in somewhat greater detail later, but at present it suffices to say that disputes arose, inter alia, about the manner in which payment was to be effected by Mrs. Smit. The outcome of the matter was that Mrs. Smit never received transfer. On 6 August 1981 the appellant sold the farm to a third party. Transfer was passed to the new purchaser on 20 June

1982.

Mrs. Smit died on 10 March 1981, and the second respondent is the executor in her deceased estate.

The two respondents instituted action in the Witwatersrand Local Division for an order compelling the appellant to pass transfer of the farm against payment of the purchase price, and, in the alternative, an order compelling the appellant in effect to return what had been delivered or paid by Mrs. Smit and the first respondent pursuant to both agreements of sale embodied in the written contract. In this alternative claim the respondents relied on clause 19 of the contract, which made specific provision for restitution in certain circumstances. I come to this clause later.

At the trial before PREISS J the respondents abandoned their claim for specific performance, and proceeded solely with their alternative claim based on clause 19.

PREISS J held that it was unnecessary to decide whether clause 19 was applicable. He decided the case on the simple

basis that the entire contract had come to an end at the latest when the appellant sold the farm to the third party, and that, in the absence of a forfeiture clause, the respondents were entitled to restitutio in integrum. In this way the respondents obtained an order for exactly the same relief as they had claimed under clause 19, viz., an order directing the appellant to deliver to the respondents a resolution of the directors of the company in terms of which the control of the company, with the books, documents and records of the company, all necessary resignations by existing officers of the company and the formal cession of the loan accounts would be transferred from the appellant to the respondents; and an order directing the appellant to pay the second respondent the amount of R18 500,00 with interest at 12% per annum. With the leave of the court a quo the appellant now comes on appeal to this Court.

A substantial part of the appellant's heads of argument was devoted to the questions whether the court a quo was entitled to decide the case upon a basis which had not been pleaded, and

whether, in any event, its decision was correct even on that basis. However, these questions arise only if it were to appear that the respondents did not establish their case as pleaded, viz. that they were entitled to relief pursuant to clause 19 of the contract - a matter which the court a quo expressly left open. In my view this appeal can be best decided by determining the disputes as defined in the pleadings, and to this I now turn.

The cause of action pleaded by the respondents was based, as I have said, upon clause 19 of the contract. I quote this clause as amended by the addendum, and also as it should, by common consent, be rectified. Moreover I have added explanatory words in brackets to make it more easily understandable. As altered in this fashion it reads as follows:

> "It is recorded that in the event of Ethel Margaret Smit not being able to obtain transfer of the FARM into her name within 2 (TWO) years of the EFFECTIVE DATE (8 June 1979) through no fault of her own, then and in such event the SELLERS (i.e., Smit and Neville) shall be entitled at their option to cancel this Agreement in which event:-
> a) Ethel Margaret Smit shall immediately vacate

the farm and redeliver possession thereof to the PURCHASER (i.e., appellant).

b) The PURCHASER (appellant) shall immediately effect transfer of the shares in the COMPANY back into the name of the SELLERS (Smit and Neville) and in this event the provisions of Clauses 4, 5 and 6, hereinbefore set out, shall apply to such retransfer mutatis mutandis (these clauses deal with the formalities required to pass control of the company from the appellant to the respondents).

c) In the event of the PURCHASER (appellant) having bound himself as Surety and co-principal debtor for the repayment of the amount due in terms of the existing Mortgage Bond over the fixed property (i.e., the property of the company), the SELLERS (Smit and Neville) shall procure the release of the PURCHASER (appellant) as surety on behalf of the COMPANY in respect of the Mortgage Bond above referred to.

d) The PURCHASER (appellant) shall refund to Ethel Margaret Smit the sum of R11,000-00 (ELEVEN THOUSAND RAND) plus all monies paid by Ethel Margaret Smit to the Landbank in respect of the farm plus interest thereon calculated at the rate of 12% (TWELVE PER CENTUM) per annum."

The respondents' case was that Mrs. Smit had taken all necessary steps to obtain transfer of the farm in her name, but that, through no fault of her own, she was unable to obtain

transfer within two years of 8th June 1979. Thereafter, so it was alleged, both respondents had cancelled the contract. They accordingly claimed the remedies provided by clause 19.

The defendant denied that Mrs. Smit's failure to obtain transfer occurred through no fault of hers, and pleaded specifically "dat die oorledene (i.e., Mrs. Smit) nie haar verpligting in terme van die kontrak nagekom het nie en as gevolg hiervan is die eiendom nie op haar naam geregistreer nie". In particular, it was contended, Mrs. Smit had failed to pay the purchase price properly in terms of the contract. The validity of the appellant's contention depends largely on an interpretation of clause 18 of the contract to determine Mrs. Smit's obligations thereunder. To this I now turn.

Paragraphs a and b of clause 18 gave rise to no difficulties and for present purposes I need say no more about them. The nub of the case is paragraph c. This paragraph provides that Mrs. Smit "shall take over" a bond with the Land Bank for R67 000,00, being the balance of the purchase price.

In ordinary parlance this means that Mrs. Smit would assume the appellant's rights and obligations under the bond. This would obviously have required the consent and co-operation of the Land Bank and compliance with all deeds office requirements. In argument before us it was common cause that the only way in which Mrs. Smit could "take over" the bond in this sense was by the cancellation of the appellant's existing bond and the simultaneous registration of a bond in Mrs. Smit's name (cf. the use of the expression "oorneem" in the same sense in Van Jaarsveld v. Coetzee 1973 (3) SA 241 (A) at p. 244 A). On this interpretation the contemplation of the parties was that Mrs. Smit would pay a substantial part of the purchase price (being R67 000,00 less any annual amounts of R7 500,00 which may have been paid pursuant to the latter part of paragraph c pending registration of transfer) out of an advance from the Land Bank. It is interesting to note that, as shown above, the appellant also obtained the benefit of an existing bond as an abatement of the purchase price payable by him.

Mr. Wulfsohn, who appeared for the appellant, placed an entirely different construction on the expression "take over" in paragraph c. The parties' intention was, he said, that Mrs. Smit should accept responsibility for the appellant's financial obligations under the bond. That meant that she was not only obliged to pay the annual instalments of R7 500,00 pending registration of transfer, for which provision was expressly made in the paragraph, but that she should also settle the amount owing under the bond when she obtained registration of transfer. On this interpretation the expression "take over the First Bond" was equivalent to "pay the amounts due under the First Bond". As a matter of language this seems a most unlikely construction. If the parties had intended to stipulate merely that payment of these amounts was to be made to the Land Bank rather than to the appellant personally it would have been very easy to say so directly. During the argument there was some debate on whether this provision had been conceived in favour of Mrs. Smit or of the appellant. Mr. Wulfsohn was inclined at

first to accept that it was conceived for her benefit, but later contended that it served both parties' interests. However, on the interpretation espoused by him the provision does not seem to benefit her at all. The nett effect of clause 19 (c) would then be that Mrs. Smit was required to pay the amount of R67 000,00 in cash against transfer (I leave out of account the annual amounts of R7 500,00 which were payable even before transfer). This represents her normal common law obligation and she is hardly benefited by having to pay the Land Bank instead of the appellant direct. But be that as it may, purely as a matter of language I do not think Mr. Wulfsohn's construction can be accepted.

I turn now to the facts of the case in order to determine whether, in the light of my above interpretation of clause 18 (c), Mrs. Smit's failure to obtain transfer was "through no fault of her own" for the purpose of clause 19. It appears that some time after the conclusion of the contract Mrs. Smit went to the Land Bank accompanied by her husband, her

attorney, the appellant, the appellant's son and the appellant's attorney. This was in the first half of 1980 but the exact date is not clear. The purpose of the visit was, according to Mr. Smit, to ask the Land Bank "... if there was any chance of them granting the bond from Mr. Liebenberg (the appellant) to my wife". The officials at the Land Bank refused because Mrs. Smit was not a bona fide farmer. Thereupon Mrs. Smit decided to obtain finance elsewhere. On 9 July 1980 her attorneys wrote as follows to the appellant's attorneys:

> "We confirm our various telephonic discussions with you and confirm that our client, Mrs E.M.Smit, is most anxious that transfer of the property be registered as a matter of extreme urgency.
>
> A bond has been granted by Volkskas in Durban and we require to know the amount owing to Landbank so that the necessary guarantees may be raised.
>
> Would you please prepare the transfer documents as a matter of urgency and forward all documentation to us for signature by our client.
>
> Would you also kindly address a letter to Volkskas Bpk, Durban, (Attention Mr Foster) in order to obtain the necessary guarantees.
>
> It is also most urgent that a meeting be held between

us so that the matter can be finalised."

After some further correspondence Mrs. Smit's attorneys again wrote to the appellant's attorneys on 22 July 1980 setting out the amounts owing under the contract of sale according to their calculations. On 28 July 1980 the appellant's attorneys replied, disputing the correctness of the calculations in the letter of 22 July 1980 and stating the amounts which they contended were owing. After some further delay, caused by matters which are not relevant for present purposes, Mrs. Smit's attorneys wrote on 9 October 1980 to the effect that Mrs. Smit was prepared to arrange for a bank guarantee payable against registration of transfer of the property into her name for the amounts claimed by the appellant, although the correctness of the amounts was not conceded. On 29 October 1980 Mrs. Smit's attorneys duly sent a bank guarantee issued by Volkskas in favour of the appellant's attorneys for the amounts claimed by the appellant. In addition a cheque for R4 157,65 was sent for the costs of transfer, tansfer duty, etc., which was in accordance

with an account submitted by the appellant's attorneys. On 13 November 1980 the appellant's attorneys replied, acknowledging receipt of the guarantee and the cheque, but raising a number of objections. Only the following are still persisted in:

> "1. In terme van Klousule 18(c) van die Koopkontrak moet u kliënt die verband van Landbank ten bedrae van R67 000-00 oorneem en moet u kliënt ook jaarliks 'n bedrag van R7 500-00 aan Landbank betaal ter vermindering van die verband.
>
> 2. U kliënt is dus bewus van die feit dat die waarborg aan Landbank uitgereik moet word en nie aan ons firma nie.
>
> 3. Vir u informasie heg ons hierby aan 'n foto-afskrif van 'n brief van Landbank gedateer 4 November 1980 en omrede u kliënt nie sy verpligtinge nagekom het nie, dit is om R7 500-00 aan Landbank te betaal, moet u kliënt nie kla as Landbank die verband oproep nie. Ons heg hierby aan die waarborg wat u aan ons gestuur het en ons stel voor dat u 'n waarborg uitreik aan Landbank vir die bedrag aan hulle verskuldig nadat u kliënt R7 500-00 aan Landbank betaal het in terme van sy kontrak."

On 2 December 1980 Mrs. Smit's attorneys returned the guarantee under cover of a letter which, in so far as it is

relevant, reads as follows:

> "We return herewith the guarantee. Our client's obligation in terms of the agreement, was to supply the Seller or his agent being yourselves, with a guarantee for the amount of the purchase price.
>
> A guarantee for the amount in excess of what our client regards as the balance of the purchase price is attached hereto and is in fact the original guarantee which was forwarded to you some time ago."

To this the appellant's attorneys replied as follows on 12 December 1980:

> "Ons het u gevra om die waarborg uit te reik ten gunste van Landbank en klaarblyklik is u en u kliënt nou hardekwas ten spyte daarvan dat die kontrak uitdruklik bepaal dat u kliënt die Landbank Verband sal oorneem."

Finally, on 12 January 1981, Volkskas wrote to the appellant's attorneys asking for the return of the guarantee since Mrs. Smit was not proceeding with the transaction. The appellant's attorneys complied with the request on 15 January 1981. On 4 March 1981 they also returned the money paid in respect of costs of transfer. On 6 August 1981, it will be

recalled, the appellant sold the farm to a third party.

The question then is whether on these facts Mrs. Smit's inability to obtain transfer arose "through no fault of her own" within the meaning of clause 19 of the contract. There are two aspects to this question, namely whether she was at fault in any respect, and, if so, whether such fault was a cause of her inability to obtain transfer. The appellant contended throughout that Mrs. Smit had been at fault in two respects, namely in failing to pay an instalment of R7 500,00 to the Land Bank in terms of clause 18(c) of the contract, and by furnishing a guarantee in favour of the appellant's attorneys rather than in favour of the Land Bank.

I deal first with the matter of the R7 500,00. It is clear from clause 18(c) of the contract that the instalments constituted payments in respect of the capital amount of the bond. Mrs. Smit paid a first amount of R7 500,00 shortly after the conclusion of the contract. The appellant contended that Mrs. Smit should have paid a further instalment on 7 June 1980, which date was later extended to 31 July 1980. He had demanded, inter

alia in his attorneys' letters of 28 July 1980, 10 September 1980, 30 September 1980, 14 October 1980 and 13 November 1980, that she pay this amount to the Land Bank without delay. However, at the time when these demands were made Mrs. Smit was insisting on immediate transfer, and she preferred to treat the instalment as a part of the purchase price to be included in the amount of the guarantee. Her reason for this was not spelled out, but presumably she was loath to pay any further part of the purchase price otherwise than against transfer of the property. And it should be emphasized that this dispute did not relate to the amount of the purchase price, but only to the manner in which the instalment of R7 500,00 was to be paid. If transfer had been effected speedily, the payment of the instalment would have been unimportant, since the whole amount of the Land Bank's bond would in any event have had to be paid on or before registration of transfer in Mrs. Smit's name. In these circumstances the failure to pay the R7 500,00 direct to the Land Bank could hardly have been a reason why the appellant would have refused to pass

transfer if he had been otherwise satisfied with the arrangements for the payment of the balance of the purchase price. Indeed, the evidence makes it clear that the real reason why transfer was not passed was that the appellant was not satisfied with the nature of the guarantee which Mrs. Smit had provided. I did not understand Mr. Wulfsohn to contend otherwise. It follows that, even if Mrs. Smit had been at fault in not paying the instalment of R7 500,00 to the Land Bank, this fault was not a cause of her inability to obtain transfer.

I turn now to the alleged inadequacy of the guarantee, and propose first setting out briefly the relevant legal principles. It is a trite principle of the law of contract that the person to whom a debtor must make payment is the creditor or his agent, unless the contract itself provides otherwise. See De Wet and Yeats, Kontraktereg en Handelsreg, 4th ed., p. 234. The creditor may instruct the debtor to make payment to somebody else, and in such a case the debt will be discharged if payment is made to such a person, but a debtor is not compelled to accept

the creditor's instruction. (ibid.) In a sale of immovable property where payment has to be made against transfer it is customary to tender payment by way of a guarantee, usually a bank guarantee, that the money will be paid against transfer. See Breytenbach v. Van Wijk 1923 AD 541at pp. 546-7; Hammer v. Klein & Another 1951(2) SA 101 (A) at p. 105 E to H; and Linton v. Corser 1952(3) SA 685 (A) at p. 694 A to F. In accordance with the general principles mentioned above, the guarantee should be in favour of the seller or his agent unless the contract stipulates otherwise. If the seller instructs the purchaser to furnish a guarantee in favour of some other person the purchaser may, but need not, follow the instruction.

The appellant's main argument on this aspect of the case was that clause 18 of the contract required Mrs. Smit to pay the balance of the purchase price to the Land Bank, and not to the appellant. This was derived from the phrase "shall take over the First Bond with the Landbank", which, as I have said, the appellant interpreted as meaning that she was to accept

responsibility for the appellant's financial obligations under the bond. For the reasons I have given, I do not agree with this interpretation. In my view the contract contemplated that the Land Bank would grant Mrs. Smit a loan secured by a bond over the property. This did not happen. The consequence of the Land Bank's refusal to grant a loan may well have been that performance of the contract in the manner contemplated by the parties became impossible. Since this happened through no fault of Mrs. Smit's, she could possibly have adopted the attitude that the Land Bank's refusal was in itself sufficient reason for claiming the remedies provided by clause 19. I need not pursue this matter because Mrs. Smit accepted that she was still bound to pay the purchase price, which she tendered to pay to the appellant's attorneys. This, in my view, she was clearly entitled to do. On the construction I place on the contract, the Land Bank fell out of the picture entirely when it refused to grant Mrs. Smit a loan. Moreover, the provision that she "take over" the bond was, on the construction I have placed on

it, clearly one in her favour. See Van Jaarsveld v. Coetzee (supra) at p. 244 C-G. When the provision became impossible of fulfilment, she was entitled to waive it and perform her obligations in the normal manner, i.e., by payment direct to the appellant or his agent. Despite some prevarication in the evidence by Mr. Mills, the appellant's attorney, it is clear from the record that his firm, in whose favour the guarantee was issued, was authorized to accept payment on the appellant's behalf.

It follows that the appellant's refusal to accept this tender was unjustified. It was this refusal which resulted in Mrs. Smit's not obtaining transfer. Since she had always acted within her rights, as I have held, it follows that this happened through no fault of her own. All the requirements of clause 19 were accordingly satisfied.

In an alternative argument Mr. Wulfsohn contended that, even if clause 18(c) did not require payment to be made to the Land Bank, the appellant was, in accordance with general

principles, entitled to nominate the person to whom payment should be made, and he had so nominated the Land Bank. I have set out the relevant legal principles above, and their effect is that Mrs. Smit was not obliged to pay the Land Bank merely because the appellant gave an instruction to this effect. It follows that also on this approach her failure to make payment to the Land Bank cannot be considered a "fault" on her part.

In my view all the requirements for the invocation of clause 19 were accordingly present and the respondents were entitled to claim relief thereunder. The order granted by the court a quo was, as I have said, in accordance with the clause. Nevertheless, the appellant's counsel argued that an order in this form should not have been granted, for the reasons to be considered in the next paragraph.

In paragraph 11 of their Particulars of Claim the respondents alleged that the appellant had failed to comply with the provisions of clause 19(b) and (d) of the contract, more particularly in that he had failed to deliver to the respondents

the documents which would (I paraphrase) serve to vest the loan accounts and the control of the company in the respondents. The appellant admitted this in his plea, but added:

> "... verweerder pleit in elk geval dat verweerder nie in staat is en ook nie regtens verplig is om die dokumente soos gesmeek, aan eisers te verskaf nie."

Apropos of this allegation the appellant stated in further particulars that he was no longer owner of the shares in the company.

No evidence was led on this issue. Nevertheless Mr. Wulfsohn argued that the court a quo should not have ordered the delivery of the documents, because, he said, "the orders ad factum praestandum compelling the (appellant) to do what he was unable to do would be a brutum fulmen, as lex non cogit ad impossibilia." (I quote from the written heads of argument).

Of course, since no evidence was led, we do not know whether the appellant really was unable to carry out the orders ad factum praestandum. The first question which arises on this argument is accordingly where the onus lies to establish

impossibility of performance. Impossibility of performance can, under certain circumstances, result in the discharge of contractual obligations, and it is clear law that the person relying on such impossibility bears the onus of proving it. See Supervening Impossibility of Performance in the South African Law of Contract by W.A. Ramsden, pp. 53 and 103; Pothier, Obligations, para 620; Frenkel v. Ohlsson's Cape Breweries Ltd 1909 TS 957 at pp. 963-5 and 973; New Heriot Gold Mining Company Limited v. Union Government (Minister of Railways and Harbours) 1916 AD 415 at pp. 433, 438 and 462; Hoffend v. Elgeti 1949(3) SA 91 (A) at p. 104; and Grobbelaar N O v. Bosch 1964(3) SA 687 (E) at p. 691 C-E.

I did not, however, understand Mr. Wulfsohn to contend that the appellant's alleged inability to deliver the documents was of such a nature as to entirely extinguish his obligations under the contract. His point was, if I understood him correctly, that the court should not, in the exercise of its discretion, have ordered specific performance of the appellant's

obligation under clause 19 to deliver the said documents. This is the type of case which HEFER JA had in mind when he said:

> "... the Court will not decree specific performance where performance has become impossible. Here a distinction must be drawn between the case where impossibility extinguishes the obligation and the case where performance is impossible but the debtor is still contractually bound. It is only the latter type of case that is relevant in the present context, for in the former the creditor clearly has no legal remedy at all."

(Benson v. S.A. Mutual Life Assurance Society 1986(1) SA 776 (A) at p. 783 E-F). The incidence of the onus of proof in cases where impossibility is relied upon to defeat a claim for specific performance was discussed fully by MILLER JA when he delivered the judgment of the court in Tamarillo (Pty) Ltd. v. B N Aitken (Pty) Ltd 1982(1) SA 398 (A) at pp. 441 C to 443 G. Without coming to a firm conclusion on the incidence of the onus in the strict sense of the word, MILLER JA stated that the party relying on alleged impossibility

> "certainly bore the burden of alleging impossiblity and adducing evidence in support thereof - evidence of the facts or circumstances upon which it asked the Court to exercise its discretion against the grant of the

order prayed." (at p. 443 G).

In the present case the appellant adduced no evidence in support of his allegation of impossibility of performance. It follows that the court a quo was fully entitled to decree specific performance of his obligations under clause 19.

In the result the respondents have, in my view, established all the requirements for relief under clause 19 of the contract, and no reason has been shown why the Court a quo should not have granted the order which it did. It is accordingly not necessary to consider whether the court's reasons for reaching this result can be supported.

The appeal is dismissed with costs, including the costs of two counsel.

E M GROSSKOPF, JA

CORBETT, JA

SMALBERGER, JA
MILNE, JA
NICHOLAS, AJA

Concur