REPORTABLE

Case No: 97/2001

In the matter between:

VAN REENEN STEEL (PTY) LIMITED **Appellant**

and

ERROL JOHN BARNES SMITH NO **First Respondent**
RICHARD ROSSO **Second Respondent**

Coram: HARMS, MPATI, BRAND, NUGENT JJA and LEWIS AJA
Heard: 14 MARCH 2002
Delivered: 25 MARCH 2002
Subject: Mistake in contract; common assumptions – their effect.

JUDGMENT

HARMS JA/

HARMS JA:

[1] The issue in this appeal is whether a contract between the appellants on the one side and the respondents on the other is vitiated by the failure of a common assumption in relation to an existing or past fact in the absence of an agreement which elevated the correctness of the assumption to a term or condition of the contract. The Court below (Magid J) found against the appellants by relying on a statement of the Full Court in *Wilson Bayly Holmes (Pty) Ltd v Maeyane and Others* 1995 (4) SA 340 (W) 344I that –

'a common mistake relating to the existence of a particular state of affairs will not render the contract void unless it can be said that the parties expressly or tacitly agreed that the validity of the contract was conditional upon the existence of that state of affairs.'

[2] The first respondent (Smith) is the executor in the deceased estate of one Rowley. Rowley was the majority shareholder in Mortech Industries (Pty) Ltd. The second respondent (Rosso) and the second appellant (Hulton) each held a small number of the remaining shares. Hulton was, presumably since Rowley's

death, the managing director and Rosso did not, it would appear, play any significant role in the affairs of the company. Smith was not *au fait* with the details of the business but he was aware that the company was in a dire financial position: the bank had called up an overdraft of R3m and a claim of R0.5m against a failed creditor was worthless. He was not prepared to introduce further capital into the business and had either to liquidate the company or sell the estate's interest therein.

[3] Hulton, nevertheless, believed that an injection of capital would make the company viable. He was able to attract the interest of one Van Reenen, the managing director of the first appellant ('Van Reenen Steel'), and after a 'due diligence' undertaken by Van Reenen, who holds a chartered accountancy degree but is a businessman, Van Reenen Steel and Hulton purchased in an agreed proportion from Smith and Rosso all their shares and claims to loan accounts in the company.

[4] The appellants' case is that it was –

'the common intention of the parties that what was being bought and sold was a viable business, the assets and liabilities of which being known and disclosed by the balance sheet [of 31 March 1998]'

and that consequently –

'all the parties to the agreement laboured under the common and incorrect assumption of fact or common mistake of fact that Mortech had certain important attributes which it did not have.'

Further –

'The mistake lay in the fundamental assumptions of the value of the underlying assets being purchased, the assumption that what was being bought and sold was a viable business as well as the assumption that the assets were known and extant as disclosed by the balance sheet [of 31 March 1998].'

[5] The 31 March 1998 balance sheet is a handwritten document, ostensibly prepared by Van Reenen during his due diligence investigation. It has to be accepted that the balance sheet was discussed with Smith during the negotiations preceding the conclusion of the contract but it should be noted that

there is no allegation that Smith, or for that matter Rosso, had made any representations to the appellants concerning the correctness of anything contained therein. On the contrary, the sellers were not prepared to provide any warranties or indemnities beyond what was contained in the 1997 audited financial statements.

[6] The warranties and indemnities given or not given should be seen in the context of a contract of fifty-five pages, twenty of which deal with warranties and indemnities. Of special significance is clause 13:

'13.1 The Sellers bind themselves jointly and severally to the Purchasers in accordance with the warranties and indemnities given by them in the attached Schedule 5.

13.2 The Sellers acknowledge that the Purchasers are entering into this Agreement in reliance on the warranties, indemnities and representations given by the Sellers in terms of this Agreement.

13.3 Each warranty and indemnity given by the Sellers in terms of this Agreement shall be a separate warranty and shall in no way be limited or restricted by the provisions of any other warranty or indemnity.

13.4 The Purchasers acknowledge and agree that, save for the warranties set out in this Agreement and in the attached Schedule 5, no representations or warranties of whatsoever nature, whether express or implied, and whether oral or in writing, have been made or are given by the Sellers or by anyone else on behalf of the Sellers, relating to the Company or to the affairs or business of the Company.'

[7] The first problem facing the appellants is that they are unable to rely on a unilateral mistake because, as mentioned, the respondents were not the cause of the mistake in the sense discussed in *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A). The next problem is that it is common cause that the written contract expresses the parties' consensus. Reliance on the March statement is not permitted by their ultimate agreement. It is for these reasons that they take refuge in the 'doctrine' relating to assumptions and that they argue that a false common assumption relating to a present or past fact vitiates a contract even if it is not a term or condition of the contract.

[8] Assumptions or suppositions can have many forms and have different effects depending upon the circumstances. An assumption relating to a future state of affairs –

'relates to an agreement which is in operation and its recognition would have a direct bearing upon one of the terms of the agreement. Such a supposition is indistinguishable from a condition,'[1]

usually a resolutive condition, perhaps also a condition precedent or an ordinary term of the contract.[2] The use of the word 'supposition' or 'assumption' instead of 'condition' in this context is not conducive to clear thinking.

[9] Assumptions may also relate to present or past facts. If unilateral, one is back to the effect of a unilateral mistake on a contract. If common, unless elevated to terms of the agreement, they invariably amount to no more than the reasons for contracting (on those terms)[3] or, expressing the same idea, common mistakes relating to a motive in entering into the agreement ('dwaling in

[1] *Sonarep (SA) (Pty) Ltd v Motorcraft (Pty) Ltd* 1981 (1) SA 889 (N) 902F, a full court decision.
[2] *Williams v Evans* 1978 (1) SA 1170 (C) 1174F-1175F is consequently wrong.
[3] D Hutchinson 'Contract Formation' in Zimmermann & Visser *Southern Cross: Civil Law and Common Law in South Africa* 183-184.

beweegrede').[4] Whether or not a motive leading up to an agreement is based upon an assumption of fact, it remains a motive. A party cannot vitiate a contract based upon a mistaken motive relating to an existing fact, even if the motive is common,[5] unless the contract is made dependent upon the motive, or if the requirements for a misrepresentation are present.[6] The principle is as stated in *African Realty Trust Ltd v Holmes* 1922 AD 389 403 –

'But as a Court, we are after all not concerned with the motives which actuated the parties in entering into the contract, except in so far as they were expressly made part and parcel of the contract or are part of the contract by clear implication.'

[10] In *Bell v Lever Bros Ltd* [1932] AC 161 (HL), Lord Atkin dealt likewise with common mistakes (although he referred to them as mutual mistakes) and pointed out that there is an alternative mode of dealing with their effect (at 224) –

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[4] *Sonarep (SA) (Pty) Ltd v Motorcraft (Pty) Ltd supra* 901G-H; Christie *The Law of Contract in South Africa* 4 ed 380.

[5] *Banks v Cluver* 1946 TPD 451 458-459 accepted Von Savigny's classification. According to the latter an error in motive is one that does not affect the will of the contracting party but relates to the preliminary process of the formation of the will. It is contrasted with an error in respect of the transaction. See R Zimmermann *The Law of Obligations Roman Foundations of the Civil Tradition* 614; JC De Wet *Dwaling en Bedrog by Kontraksluiting* 4-6. Pothier *Traité des Obligations* 1.1.3.1.20 is to the same effect.

[6] *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 15 par 686, 688.

'It is said that in such a case as the present there is to be implied a stipulation in the contract that a condition of its efficacy is that the facts should be as understood by both parties . . .'

and that (at 225) –

'if the contract expressly or impliedly contains a term that a particular assumption is a condition of the contract, the contract is avoided if the assumption is not true.'

The latter statement accords with the views of De Wet & Yeats[7] that were quoted with approval by this Court in *Fourie v CDMO Homes (Pty) Ltd* 1982 (1) SA 21 (A) 27 esp *in fine*.

[11] In *McRae and Another v Commonwealth Disposals Commission and Others*[8] the Court in this context said that one must have regard to the basic theory of contract and pose the fundamental question: 'What did the promisor really promise?' –

'Did he promise to perform his part in all events, or only subject to the mutually contemplated original or continued existence of a particular subject matter? So questions of intention or 'presumed intention' arise, and these must be determined in the light of the words

[7] *Kontraktereg & Handelsreg* 4ed 138-139 now to be found in De Wet and Van Wyk *Kontraktereg & Handelsreg* 5 ed 154.
[8] (1951) 84 CLR 337 407-408 per Dixon and Fullagar JJ.

used by the parties and reasonable inferences from all the surrounding circumstances. That the problem is fundamentally one of construction is shown clearly by *Clifford v Watts* [(1870) LR 5 CP 577].'

[12] Van der Merwe *et al*[9] sum it all up:

'A *common mistake* is said to be present where both parties to an agreement labour under the same incorrect perception of a fact external to the minds of the parties. Such a mistake, of course, does not lead to dissensus: the parties are in complete agreement, although their consensus is based on an incorrect assumption or supposition. This kind of mistake can be related to the concept of a common underlying supposition ('veronderstelling') on which the parties base their contract. In this manner the parties can introduce a common motive into the (terms of the) contract so that a mistake in their common motive will render the contract without further effect.'

[13] It follows from this that the quoted statement in *Wilson Bayly Holmes* conforms to authority and principle.[10] The correctness of the conclusion can be tested in other ways. If the question were to be asked whether the appellants

[9] *Contract: General Principles* 19.
[10] See also *Hare's Brickfield Ltd v Cape Town City Council* 1985 (1) SA 769 (C) 781F-G; *McCulloch v Kelvinator Group Services of SA (Pty) Ltd* 1998 (4) SA 814 (W) 823E-824 and on appeal to the Full Court *Kelvinator Group Services of SA (Pty) Ltd v McCulloch* 1999 (4) SA 840 (W) 844J et seq.

would not have concluded the agreement had they known of the true facts, the answer is probably in the affirmative. There is, however, no reason to believe that the respondents, had they known the business was not viable, would not have sold it on exactly the same terms and conditions. Whether the business was viable or not was to them of no concern. The existence of the agreement was in their minds not subject to the correctness of their assumption. The viability of the business was not causally connected to their decision to sell, either at all or on the agreed terms. PS Atiyah[11] suggests that the answer is to be found in determining which of the parties assumed the responsibility for the truth of the assumed facts, or, in other words, which of the parties has (or ought to be treated as having) taken the risk of the facts turning out otherwise than expected; only in the rare and unlikely event of neither party having assumed this responsibility the falsity of the assumption will render the contract inoperative. There can be no doubt that it was the appellants who took that risk

[11] *An Introduction to the Law of Contract* 3 ed 191-192. Also Atiyah & Bennion 'Mistake in the Construction of Contracts' (1961) 21 *Modern Law Review* 421.

especially since Hulton knew the business, Van Reenen had conducted a due diligence and they were satisfied with a warranty based upon the 1997 audited statements and did not insist on one based upon the March 1998 statement.

[14] But, say the appellants, all of this is in conflict with the judgment in *Dickinson Motors (Pty) Ltd v Oberholzer* 1952 (1) SA 443 (A) 450. A similar argument was rejected in *Wilson Bayly Holmes*. The facts in *Dickenson* were these: the plaintiff claimed with the *condictio indebiti* repayment of an amount paid in error to the defendant. The substance of the plaintiff's case was that he had paid the amount in error because both he and the defendant thought that the car which was to be delivered to him in return for the payment was a Plymouth motorcar A, which had been sold to A G Oberholzer (plaintiff's son) by the defendant and had no idea that it was Plymouth B, which belonged to Alris Motors. The defendant then delivered Plymouth B to the plaintiff and thereafter Alris Motors repossessed it.

'That there was this error common to both the parties was not in dispute and the real issues in the case were what was the nature of the transaction which led to the payment and what legal consequences flowed therefrom.'

(Per Schreiner JA at 448D.) The common error referred to was the fact that the car delivered was car A and not car B. It follows from this quotation that the validity of the contract was not in issue, only the nature of the contract. There was consensus about the vehicle involved and the amount payable. The court was divided on the question of whether the contract was one of sale or not. Schreiner JA (Fagan JA concurring) held that it was and that because of the fact that the issues in the case were fully explored it was unnecessary to decide the matter with reference to the *condictio indebiti*. Since the plaintiff was lawfully evicted and the defendant had failed to give him quiet possession, the plaintiff was in any event entitled to repayment of the money (at 449D-H.) Van den Heever JA did not agree that the agreement was one of sale (at 451G) and found that it was an agreement to release car A by payment of the son's debt.

[15] In dealing with this construction of the agreement Schreiner JA made the statement upon which the appellants so heavily rely (at 450A-F):

'But if the transaction be regarded not as a fresh sale by the defendant to the plaintiff but as a release of the car by the payment of what was owing by A. G. Oberholzer to the defendant the result is the same. For once it is clear, as it undoubtedly is, that the plaintiff, to the defendant's knowledge, was only interested in obtaining the car and not in paying his son's debts except as a means of obtaining the car, the identity of the car at Vereeniging as the one that A. G. Oberholzer had bought from the defendant was of vital importance. The plaintiff would not, and the defendant knew that he would not, have considered paying his son's indebtedness except to secure the release of the car on which the money was owing. It was only because the defendant's officers believed that the car at Vereeniging was the one they had sold to A. G. Oberholzer that they were prepared to release it to his father against payment of his indebtedness. The £291 was paid under a common mistake in regard to a matter which was vital to the transaction and if either of them had been aware of the true position the transaction would not have gone through. In *Huddersfield Banking Company Ltd v Henry Lister & Son Ltd.*, 1895 (2) Ch. 273, LINDLEY, L.J., states the proposition,

"that an agreement founded upon a common mistake, which mistake is impliedly treated as a condition[12] which must exist in order to bring the agreement into operation, can be set aside, formally if necessary, or treated as set aside and as invalid without any process or proceedings to do so."

This seems to me to express in clear language a principle which is inherent in all developed systems of law. No question arises here of neglect on the plaintiff's part giving rise to the mistake; if blameworthiness were in issue the defendant, in whose possession the car was and who had the means of identifying it, was the more to blame. Assuming that so long as the plaintiff remained in possession of Plymouth B he could not have recovered the £291, once this was duly taken from him he was entitled to recover from the defendant what he had owing to a reasonable and common error paid for it. It follows that on this alternative view of the transaction, also, the appeal could not succeed.'

[16] Once again, the existence of the release agreement was not in issue. The parties were in agreement as to what was to be released. The reference to a reasonable and common error relates to the payment of the money and not to the

[12] In the reported *Huddersfield* judgment the word is 'consideration'. I have checked the signed judgment in the archives and Schreiner JA in fact used the word 'condition'. Whether this was a slip of the pen or the correction of an obvious mistake we do not know. The word 'consideration' – considering its technical meaning in English law – appears to make no sense in this context.

underlying transaction. The payment was for the release of car A; by delivering car B, car A was not released; the payment was consequently *indebite*. Counsel attempted to analyse the judgment as if it were a statute. It is not. In any event, the quotation from *Huddersfield Banking* (a case that dealt with past or present facts) disposes conclusively of the argument because it postulates that for a failed common assumption to vitiate a contract it must at least be reflected in an implied condition. It makes no difference if one were to call the mistake an incorrect assumption.

[17] The appellants finally relied upon the 'doctrine' of *error in substantia*. As Van der Merwe *et al* (at 18) point out, there is no need for such a doctrine in our law and our courts have yet to vitiate a contract on that ground.[13] If the *error in substantia* excludes consensus, it is operative or material; if it does not do so, it is inoperative or immaterial. In other words, by enquiring whether the

[13] *Papadopoulos v Trans-State Properties and Investments Ltd* 1979 (1) SA 682 (W) 687G.

error is one relating to substance, one is merely reformulating the primary question and making it more difficult to answer.

[18] Magid J was consequently correct in issuing a declaratory order to the effect that the agreement between the parties is of full force and effect.

The appeal is dismissed with costs.

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L T C HARMS
JUDGE OF APPEAL

AGREE:

MPATI JA
BRAND JA
NUGENT JA
LEWIS AJA