176/92

Case No. 344/91

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the appeal of:

PAUL ANTHONY LEWIS ..... Appellant

and

ONEANATE (PTY) LTD ..... 1st Respondent

BERGRIVIERSHOEK (PTY) LTD ..... 2nd Respondent

Coram: CORBETT C J et E M GROSSKOPF, NESTADT,

EKSTEEN J J A et NICHOLAS A J A.

Date Heard: 31 August 1992

Date Delivered: 28 September 1992

J U D G M E N T

NICHOLAS A J A:

Dewdale Farm lies in the Franschhoek Valley. It comprises two portions : portion 2 of farm No 1145, which is some 38 hectares in extent and is owned by Oneanate (Pty) Ltd ("Oneanate", which is pronounced as if it were written 1 & 8); and portion 1 of farm No 1145, which is owned by Bergriviershoek (Pty) Ltd ("Bergriviershoek") and also has an area of some 38 hectares. Oneanate, which holds all the shares in Bergriviershoek, is controlled by Mr G Lubner. It conducts a fresh fish farming operation on both portions of Dewdale Farm.

On 28 January 1990, Mr Paul A Lewis wrote to Lubner a manuscript letter which was "confirmed" by Lubner on behalf of Oneanate and Bergriviershoek. The complete document reads as follows:-

"PAUL A LEWIS
MAHé
BOX 652
SEYCHELLES
28 January 1990

G Lubner

c/o DEWDALE FARM

FRANSCHHOEK

Dear Mr LUBNER

Re : ONEANATE (PTY) LTD

BERGRIVIERSHOEK (PTY) LTD

I wish to confirm that you have accepted my offer to purchase the properties owned by the above two companies at Franschhoek and which comprise the farm and farming operations currently conducted by you under the name and style of Dewdale Farm.

The salient terms of our agreement are as follows:

1. Purchase price for the property, farms and commercial operations, tools, equipment and appurtenances etc. is R10 500 000 (ten million five hundred thousand rand).
2. This will be paid as to R7 000 000 in cash and the balance will be financed by way of a mortgage to be granted by Oneanate (Pty) Ltd for R3 500 000 repayable over a period of 3 to 5 years. Interest on the loan will be at 15% per year payable quarterly in advance. Principal will be repayable in tranches of R375 000 per quarter commencing at the beginning of the fourth year with a balloon

payment at the time the final tranche becomes payable.

3. The transaction will be structured in the most efficient manner possible (and as presently advised) the farm property owned by Oneanate (Pty) Ltd will be transferred to Bergriviershoek (Pty) Ltd. This will include the commercial and farming operations. I will thereafter acquire the shares and loan claims in the last mentioned company thereby giving me total ownership and control of the venture.

4. I will be responsible for all legal costs involved in giving effect to the transaction including costs of transfer from Oneanate to Bergriviershoek but you will be responsible for the commission of R250 000 due to Anton Buirski Associates Inc who have negotiated this transaction.

5. Inasmuch as this transaction will be subject to the approval of the Exchange Control division of the South African Reserve Bank, the deal will accordingly be subject to such approval being given both to me and to you and our respective interests.

6. Finally I wish to record that although we have reached agreement on all the main issues final documentation will still have to be

drawn and it is agreed that such documentation may incorporate terms which have not been specifically discussed. Notwithstanding as far as I am concerned we have 'a deal' and I shall be pleased if you would append your signature to this letter confirming this. I also wish to record that although I have entered into this agreement in my personal capacity I reserve the right to make the acquisition in whatever corporate or trust structure as I may be advised, in which event for the sake of good order, my signature to this letter may be regarded as binding on such corporate entity. I also confirm that you are dealing with me personally.

Yours sincerely
(sgd) P A Lewis
PAUL ANTHONY LEWIS

CONFIRMED
(sgd) G Lubner
G LUBNER on behalf of
ONEANATE (PTY) LTD
BERGRIVIERSHOEK (PTY) LTD.

AS WITNESS
(sgd) A Buirski
A BUIRSKI."

On 8 February 1990 Lewis advised Lubner by telefax that "there is not and never was a final deal" between the parties.

Oneanate and Bergriviershoek thereupon issued a summons out of the Cape Provincial Division on 19 March 1990, claiming an order on Lewis to perform the obligations undertaken by him in his letter, a copy of which was annexed to the Particulars of Claim as Annexure "D". Lewis excepted to the Particulars of Claim "on the ground that they lack the averments necessary to sustain the cause of action pleaded." The main grounds of exception were the following:-

"1. The alleged agreement upon which the Plaintiffs rely (annexure "D" to the Particulars of Claim), ex facie its own terms, does not constitute a binding agreement because:

1.1 The mortgage contemplated in clause 2 thereof constitutes the giving of financial assistance in contravention of section 38 of the Companies Act No 61 of 1973. This renders

the agreement unenforceable and void;

1.2 [the alleged agreement is void for vagueness because]

(a) of the inadequate and vague description of 'the property', farms, commercial operations, tools, equipment and appurtenances, etc.' being sold (clause 1);

(b) of the uncertainty and doubt as to the structure of the transaction as set out in clause 3;

(c) it is clear from the alleged agreement that the parties had not reached agreement on all the material terms of the agreement and/or by reason of the express intention of the parties to draw 'final documentation' which may 'incorporate terms which have not been specifically discussed' (clause 6)."

The exception was dismissed with costs including the costs of two counsel.

The matter now comes before this court in pursuance of leave to appeal granted by the court a quo.

Annexure "D" purports in the first unnumbered paragraph to confirm an acceptance by "you" (sc. Mr Lubner)

of an offer to purchase the properties owned by Oneanate and Bergriviershoek comprising the farm and farming operations currently conducted by "you" under the name of Dewdale Farm. However, Counsel on both sides were agreed that on a proper construction of Annexure "D" it is an "agreement" for the purchase by Lewis for R10 500 000 of Oneanate's shares and loan account in Bergriviershoek after certain preliminary steps had been taken, namely, the transfer by Oneanate to Bergriviershoek of portion 2 of farm No 1145 and of "the commercial or farming operations". In this way, Lewis would upon the acquisition of the shares in Bergriviershoek acquire "total ownership and control of the venture."

As used in paragraph 2 of Annexure "D" the word "financed" is inappropriate : a mortgage does not provide finance; its function is to secure a debt. It became common cause that the meaning of paragraph 2 was that the balance of the purchase price, amounting to R3 500 000, would be secured by a mortgage bond for that sum

to be passed by Bergriviershoek in favour of Oneanate. It was the case of the appellant/excipient that the passing of such mortgage bond would constitute a contravention of s 38(1) of the Companies Act, 61 of 1973. This provides:-

> "38 (1) No company shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares of the company, or, where the company is a subsidiary company, of its holding company."

In Lipschitz NO v U D C Bank Ltd 1979(1) S A 789 (A) this court had under consideration the provisions of s 86 bis (2) of the Companies Act 46 of 1926 to which s.38(1) corresponds. From the judgment of MILLER J A, with whom the other members of the court concurred, the following propositions may be extracted:

1. The prohibition against the giving of financial assistance is couched in very wide terms. It relates to "any" financial assistance, whether given "directly

or indirectly", and it relates to such assistance not only when it is given for the purpose of the purchase of or subscription for any shares in the company, but also when it is given "in connection with" such purchase or subscription (at 797 D-E).

2. The prohibition contains two main elements - the giving of financial assistance, and the purpose for which it is given. Although the two elements are linked to form a single prohibition, they are vitally different in concept (at 799 E).

3. There is no comprehensive definition of "financial assistance" in the section or elsewhere in the Act. From time to time various tests have been formulated by the courts as a guide to a proper answer to the question whether what a company has done in a given case constitutes the giving of "financial assistance" within the meaning of the section (at 798 B-C).

4. One such test is the so-called "impoverishment test",

which asks the question, has the company become poorer as a result of what it did for the purpose of or in connection with the purchase of its shares ?

(at 798 C-E).

5. The application of the impoverishment test is not always appropriate. In some cases the test may be a helpful guide and may often yield a clear and decisive answer to the problem. In other cases it may be not only unhelpful but irrelevant (at 801 D-E).

6. The section provides in terms that the giving of a guarantee or the provision of security constitutes the giving of financial assistance. In such cases, if the giving of the guarantee or the providing of the security is shown to be for the purpose of or in connection with the purchase of the company's shares, the section would be contravened, whether or not such guarantee or security actually renders or is likely to render the company poorer (at 800-801).

7 Although the section does not in terms prohibit the conclusion of a contract for the sale of shares in which there is provision for the giving of financial assistance, if a contract provides for future financial assistance which if actually given would be in contravention of the section, it is invalid and unenforceable (at 802B-803C).

The question in this part of the appeal is whether Annexure "D" so provides. As a first step towards answering the question, Annexure "D" must be interpreted. Since these are proceedings on exception, it must be borne in mind that the appellant has the duty as excipient to persuade the court that upon every interpretation which the Particulars of Claim, including Annexure "D", can reasonably bear, no cause of action is disclosed. Cf Theunissen en Andere v Transvaalse Lewendehawe Koöp Beperk 1988(2) SA 493 (A) at 500 E.

Paragraph 2 of Annexure "D", although

elliptic, is reasonably capable of the interpretation that Bergriviershoek is to pass a mortgage bond in favour of Oneanate for R3,5 million as security for the payment of the balance of the purchase price of the shares. The description of the property to be mortgaged is not spelled out, but paragraph 2 when read with paragraph 3 is reasonably capable of meaning that it will be the property owned by Oneanate (i.e. portion 2 of the farm No 1145) which is to be transferred to Bergriviershoek. Annexure "D" does not specify the way in which the transfer of the property and the passing of the bond are to be effected, but in order for the exception to succeed, the excipient/ purchaser would have to show that whatever course be adopted, it would result in the provision by Bergriviershoek of financial assistance in contravention of s.38(1).

I conceive that in the ordinary course the bond would be registered simul ac semel and pari passu with the registration of the transfer of portion 2 from Oneanate

to Bergriviershoek. If that is done there will be no moment of time when Bergriviershoek will own the property unburdened by the bond. (See Warner's Trustees v Wicht (1886) 4 S C 463 at 464). What will be acquired by Bergriviershoek will be portion 2 subject to the mortgage bond.

The object of a provision such as s 38(1) is the protection of creditors of a company, who have a right to look to its paid-up capital as the fund out of which their debts are to be discharged (See Trevor & Another v Whitworth and Another (1887) 12 A C 409 at 414). The purpose of the legislature was to avoid that fund being employed or depleted or exposed to possible risk in consequence of transactions concluded for the purpose of or in connection with the purchase of its shares (Cf Lipschitz N O v U D C Bank Ltd (supra) at 801 C).

If the course outlined above should be adopted, there will not result a giving of financial

assistance by Bergriviershoek in contravention of s 38(1). Although the passing of a bond constitutes the provision of security, it will not in the special circumstances of this case amount to the giving of financial assistance. It will not bind any of the assets which will be held by the company at the moment immediately prior to the passing of the bond. Unless the amount of the mortgage debt exceeds the realisable value of portion 2 (as to which there is nothing alleged in the Particulars of Claim), the company's financial position will in no way be altered by the transaction, and it will not be exposed to any possible risk in consequence of it. The simultaneous registration will no doubt facilitate the purchase of the shares, but it is Oneanate who will be giving the financial assistance by transferring to Bergriviershoek portion 2 free of any consideration, but subject to the mortgage bond.

In my opinion therefore ground 1.1 of the exception was rightly dismissed.

The second ground of exception is that the agreement is void for vagueness.

"The question whether a purported contract may be void for vagueness does not readily fall to be decided by way of exception". (per HOEXTER J A in Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd 1991(1) SA 508 (A) at 514 F). The reason is set out in the judgment in Burroughs Machines Ltd v Chenille Corporation of S A (Pty) Ltd 1964(1) SA 669 (W), which was cited by HOEXTER J A. With his usual clarity COLMAN J said at at 676 F - 677 A :

> "It has been held on more than one occasion, and in particular by the Appellate Division in the case of Delmas Milling Co v du Plessis 1955(3) S.A. 447, that a question of the kind with which I have been concerned, namely whether a purported contract is void for vagueness, should not lightly be decided on exception. There are circumstances in which a Court at the exception stage is able, with certainty or with a requisite degree of confidence, to say that what purports to be a contract is not a contract, and that the plaintiff has no case. But that is not always so. More frequently, when the attack upon the purported

> contract is based upon the vagueness or uncertainty in its language, the Court at the exception stage finds itself in a difficulty. There is always the possibility that evidence may resolve the uncertainties. The evidence to do that may be evidence of surrounding circumstances, which apparently is always admissible if the contract does not yield a clear interpretation on its wording alone. It may also be evidence of a different type which, according to the judgment in the Delmas Milling case, is to be received by the Court if all else fails. Such evidence may include evidence of prior negotiations or be of some other type which will clarify what is otherwise incapable of clear interpretation."

Annexure "D" is inept and inelegant, clumsy in expression and confused in thought and language. But that is not a ground per se for holding it to be ineffective.

It is clear that the parties intended that Annexure "D" should be a commercial document having commercial operation. The letter begins, "I wish to confirm that you have accepted my offer ..." It refers to "the salient terms of our agreement". It refers in paragraph 3

to "the transaction." In para 6 Lewis recorded that "as far as I am concerned we have 'a deal'". (Counsel for the appellants made a submission based on the use of the quotation marks. I do not agree with it. Such use would not be a sound reason for holding that "deal" did not bear its ordinary meaning of a business transaction or a bargain.) The deal was confirmed on behalf of Oneanate and Bergriviershoek by G Lubner. His signature was witnessed by A Buirski - it was recorded in para 4 that "You (viz Lubner) will be responsible for the commission of R250 000 due to Anton Buirski Associates Inc who have negotiated this transaction" ; and Anton Buirski & Associates Inc. appears on the summons as attorneys for the plaintiffs.

COLMAN J said in the Burroughs Machines case (supra) at 670 G-H :

> "It is my task ... to examine exh. 'A' in order to see whether or not it fixes a price, or provides for the fixing of a price with the requisite degree of certainty. In so doing I must, I think, have regard to the fact that exh. 'A' is a commercial

> document executed by the parties with a clear intention that it should have commercial operation. I must therefore not lightly hold the document to be ineffective. I need not require of it such precision of language as one might expect in a more formal instrument, such as a pleading drafted by counsel. Inelegance, clumsy draftmanship or the loose use of language in a commercial document purporting to be a contract, will not impair its validity as long as one can find therein, with reasonable certainty, the terms necessary to constitute a valid contract."

He continued by saying that the approach which the Court should adopt in a situation of this kind was helpfully described in the case of Hillas & Co Ltd v Arcos Ltd (1932) 147 LTR 503 (H L). LORD WRIGHT said at 514 :

> "Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects."

LORD TOMLIN said in that case at 512:

> "...the problem for a court of construction must always be so to balance matters, that without the violation of essential principle the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains."

See also Murray and Roberts Construction (supra) at 514 C-D; Soteriou v Retco Poyntons (Pty) Ltd 1985(2) S A 922 (A) at 931 G-I; and Genac Properties JHB (Pty) Ltd v N B C Administrators C C 1992(1) S A 566 (A) at 579 F-G.

At the same time it is not for the court to make a contract for the parties where they have not expressed themselves in such a way that their meaning can be determined with a reasonable degree of certainty. See the authorities quoted in the Burroughs Machines case at 671 A-C.

It is on these lines that I approach the problems raised by para 1.2 of the exception.

The first point argued on behalf of Lewis was not specifically alleged. It was that Annexure "D" did not

comply with s 2(1) of the Alienation of Land Act 68 of 1981, in terms of which no alienation of land will be of any force and effect unless contained in a deed of alienation signed by the parties or their agents acting on their written authority.

Annexure "D" provides for a sale of shares and loan claims, not for an alienation of land. It was argued, however, that the words in para 3, "the farm property owned by Oneanate (Pty) Ltd will be transferred to Bergriviershoek" amounted to an alienation of land, but that they did not, as the law requires, set out the terms in such manner that their force and effect could be ascertained without reference to any evidence of oral consensus of the parties. I do not agree that the words amount to an alienation of the farm property. It would be strange to find such an agreement in a letter addressed by Lewis to Lubner. The words amount to no more than a statement that Oneanate will procure the transfer of the property to

Bergriviershoek.

The next point taken relates to the use of the word etc in clause 1 of the letter. It was submitted that inasmuch as it is impossible to ascertain from the letter what exactly is encompassed by "etc", the purported contract is void for vagueness. I do not agree. As used in the context, the word "etc" (standing for the phrase et cetera) means "and other things of like kind or purpose as compared with those immediately theretofore mentioned" See Black's Law Dictionary 5th ed, p 465 s.v. Et Cetera. According to the Oxford English Dictionary et cetera means "And the rest, and so forth, and so on .... indicating that the statement refers not only to the things enumerated, but to others which may be inferred from analogy." The class to which the "tools, equipment and appurtenances" mentioned in para 1 belong, is the class of items in use in the "commercial operations" or "farming operations" currently being conducted on Dewdale Farm, and the function of etc is to serve as a

catch-all, so as to include all items of that class. Their identity will presumably be readily ascertainable by reference to the facts.

The third point taken relates to paras 3 and 6 of Annexure "D", and in particular to the first sentence of para 3.

Although that sentence contemplates the possibility in the future of a different "structure", Annexure "D" read as a whole is reasonably capable of the interpretation that the structure as there set out is the structure upon which the parties have agreed, but leaves open the possibility of a future agreement in this regard.

Para 6 records that "final documentation will still have to be drawn and it is agreed that such documentation may incorporate terms which have not been specifically discussed". That too is consistent with the interpretation that terms other than those set out in the letter may be subsequently agreed upon by the parties.

Where in the course of negotiating a contract the parties reach agreement on some points but there remain a number of material matters on which the parties have not yet agreed, the position may well be that a binding contract has not been concluded. Nevertheless

> "The existence of such outstanding matters does not, ... necessarily deprive an agreement of contractual force. The parties may well intend by their agreement to conclude a binding contract, while agreeing, either expressly or by implication, to leave the outstanding matters to future negotiation with a view to a comprehensive contract. In the event of agreement being reached on all outstanding matters the comprehensive contract would incorporate and supersede the original agreement. If, however, the parties should fail to reach agreement on the outstanding matters, then the original contract would stand."

per CORBETT J A in CGEE Alsthom Equipments et Enterprises Electriques, South African Division v G K N Sankey (Pty) Ltd 1987(1) SA 81 (A) at 92 C-E.

In my opinion a trial court might well hold

that the case is one which falls within CORBETT J A's dictum. Consequently the exception must fail on this ground also.

Counsel for Lewis did not make any specific point in regard to the words in the first unnumbered paragraph of Annexure "D", namely "the salient terms of our agreement are as follows". In my view this attitude was correct. The use of the word "salient" was consistent with the first sentence of paragraph 6.

My conclusion is that the exception was rightly dismissed by the Court a quo.

Application was made in initio for the condonation of the late filing of the appellant's power of attorney authorising the prosecution of the appeal. The respondents did not consent, but abided the decision of the court. In my opinion a sufficient case was made out and condonation is granted with a direction that the appellant pay the costs of the application.

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

H C NICHOLAS A J A

CORBETT C J

E M GROSSKOPF J A

NESTADT J A CONCUR.

EKSTEEN J A