154/95

Case no: 323/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

PHILMATT (PTY) LIMITED Appellant

and

MOSSELBANK DEVELOPMENTS CC Respondent

Coram: HEFER, F H GROSSKOPF JJA et VAN COLLER AJA

Heard: 21 August 1995

Delivered: 29 November 1995

JUDGMENT

F H GROSSKOPF JA:

The appellant launched an application in the Cape of Good Hope Provincial Division, seeking an order for the provisional winding-up of the respondent, a close corporation, on the grounds that it was unable to pay its debts, as provided in s 68(c) of the Close Corporation Act 69 of 1984, or alternatively, that it was just and equitable in terms of s 68(d) that the respondent be wound up. The court *a quo* (**Hodes AJ**) dismissed the application with costs, but granted the appellant leave to appeal to this court.

During 1991 the respondent purchased certain erf 184, Paternoster, situated in the municipality of Vredenburg - Saldanha ("the Paternoster property") with a view to develop it into a township comprising 72 erven. On 8 April 1992 the respondent entered into a written deed of sale ("the deed of sale") with Wale Street Industrial Finance Limited ("Wale Street"), or its nominee, in terms whereof the respondent sold to Wale Street, or its nominee,

23 of the proposed erven ("the 23 erven") for R18 639 per erf. A certain Esaias Frederick Snyman ("Snyman"), who was the sole member of the respondent at the time, concluded the sale and signed the deed of sale on behalf of the respondent. Snyman, acting on behalf of the respondent and others, entered into a further agreement with Wale Street ("the finance agreement"). The finance agreement was signed by Snyman on 8 May 1992. It provided *inter alia* for the appointment of Wale Street as the "sole agent" to raise finance in the sum of R2,8 million during the period 1 April to 31 December 1992 to pay for the purchase price of the Paternoster property and the development of the proposed township. It is common cause that Wale Street raised a sum of R135 000 on 8 April 1992, which is incidentally the date upon which the deed of sale was signed. Wale Street also provided other financial assistance before the finance agreement was eventually signed on 8 May 1992, but the total amount raised never came near R2,8 million.

On 29 October 1993 Wale Street nominated the appellant in writing as the purchaser in terms of the deed of sale, and the appellant accepted

such nomination ("the nomination agreement"). The appellant thereupon tendered performance of its obligations in terms of the deed of sale and demanded transfer of the 23 erven into its name. The respondent's reaction was that neither Wale Street nor its nominee was entitled to claim transfer of the 23 erven inasmuch as Wale Street had failed to honour its obligations in terms of the finance agreement.

The appellant then launched an urgent application in December 1993 seeking an interim interdict restraining the respondent from alienating any of the 23 erven. The respondent consented to the granting of such order, pending the determination of an action which the appellant had to institute on or before 31 January 1994. The appellant duly instituted the action, but before the respondent's plea could be filed the appellant applied on 23 March 1994 by way of an urgent application for the provisional winding-up of the respondent.

It is common cause that if the respondent were obliged to transfer the 23 erven into the appellant's name at a price of R18 639,00 each (which according to the respondent represented the cost price of each erf, without

making provision for any development costs), the respondent would indeed be unable to pay its debts, as provided in s 68(c) of Act 69 of 1984.

Judging only by the terms of the deed of sale, read with the nomination agreement, the respondent appears to be obliged, subject to due performance by the appellant, to transfer the 23 erven into its name. In the court *a quo* the respondent's opposition to the appellant's application for a provisional winding-up order rested mainly on two legs: first, that the respondent was entitled to rectification of the deed of sale which, if granted, would have had the effect of relieving the respondent of its obligation to transfer the 23 erven to the appellant; secondly, that the deed of sale was of no force or effect in terms of s 2(1) of the Alienation of Land Act 68 of 1981 ("the Act") inasmuch as a material term of the agreement between the respondent and Wale Street had not been reduced to writing.

The court *a quo* rejected the respondent's claim to rectification on the strength of certain *dicta* in **Weinerlein v Goch Buildings Ltd** 1925 AD 282 at 291, and **Meyer v Merchants' Trust Ltd** 1942 AD 244 at 254, to the

effect that rectification cannot be raised against an innocent third party such as the appellant. The respondent accepted this finding of the court *a quo*, and the question of rectification is accordingly not an issue any more.

The second leg of the respondent's argument was based on s 2(1) of the Act which provides as follows:

> "No alienation of land .... shall .... be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."

The sale of the 23 erven was clearly an "alienation" of "land" as defined in the Act. All the material terms of such alienation therefore had to be contained in the signed "deed of alienation" (ie the deed of sale).

It is necessary to refer briefly to the evidence in order to determine whether there were any alleged material terms of the alienation which were not contained in the deed of sale. Seeing that the proceedings in the court *a quo* were on notice of motion and that disputes of fact have arisen on the affidavits, the general rule, as laid down in **Plascon - Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984(3) SA 623(A) at 634 H-I, applies, viz that the matter

should be resolved on the basis of the facts averred in the appellant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent. In my view this is clearly not a case where the allegations of the respondent are so far-fetched or untenable that the court would be justified in rejecting them merely on the papers.

The only two deponents who have personal knowledge of the negotiations preceding the conclusion of the deed of sale and the finance agreement, and who would know whether any prior or contemporaneous oral terms of the deed of sale were agreed upon, are Snyman, who acted throughout on behalf of the respondent, and one Leon Stefan van der Westhuizen ("van der Westhuizen"), who negotiated on behalf of Wale Street. At the time when they deposed to their respective affidavits Snyman had ceased to be a member of the respondent, while van der Westhuizen had no further interest in Wale Street.

Snyman made the following allegations in his affidavit with regard to a contemporaneous oral term ("the oral term") which formed part of the agreement concluded between the respondent and Wale Street:

> "Ek bevestig spesifiek dat dit deurentyd deur die ooreenkoms tussen myself en Wale Street Finance Limited was dat hulle 23 erwe teen kosprys kon kry onderhewig daaraan dat hulle die nodige finansiering kon kry vir die aankoop van die grond en vir die finansiering van die dienste. (Dit wil sê die hele projek in geheel). Hulle kon nie die finansiering bekom nie en die ooreenkoms het gevolglik nie tot stand gekom nie."

Snyman further confirmed the following statement by one Anthony Robert Murris, who deposed to the answering affidavit on behalf of the respondent:

> "Dit was 'n uitdruklike term van die ooreenkoms dat die koopkontrak slegs werking sou hê indien Wale Street die finansiering sou bekom."

Van der Westhuizen specifically denied that there had been any such oral agreement. The court *a quo* pointed out that although the appellant was well aware of the serious dispute of fact which arose on the affidavits, it chose to argue the matter on the papers and not to apply for the matter to be referred to oral evidence. In the circumstances the general rule in **Plascon - Evans, supra**, applies, with the result that the respondent's version has to be accepted as correct for purposes of this case.

The court *a quo* found that it was clear from the affidavits filed on behalf of the respondent that the deed of sale was not intended to be the exclusive memorial of the whole of the agreement between Wale Street and the respondent, but that it recorded only part of a larger and partly oral agreement. It was held that the evidence showed that it was an express oral term of this larger contemporaneous agreement that the deed of sale was subject to a suspensive condition, namely that the respondent's obligation to perform would only come into operation once Wale Street had procured the necessary finance for the purchase of the Paternoster property and the financing of the services.

The court *a quo* referred to certain passages in the judgment of this court in **Johnston v Leal** 1980(3) SA 927(A) dealing with the so-called "parol evidence" or "integration" rule, and concluded that the deed of sale in the present case did not constitute an integration of the whole agreement, but only a partial integration, and that the integration rule therefore did not prevent the admission of extrinsic evidence relating to the oral term.

The court *a quo* further held that the oral term was a material term

of the sale and that failure to incorporate it in the deed of sale resulted in the sale being void in terms of s 2(1) of the Act. The court *a quo* concluded that the respondent was therefore not bound to transfer the 23 erven into the appellant's name at the agreed price, which would otherwise have rendered the respondent insolvent. The appellant's application for liquidation was accordingly dismissed with costs.

In this court the appellant submitted that the respondent is in law precluded from relying on extrinsic evidence relating to the oral term for the following reasons. It was contended in the first place that the admission of such extrinsic evidence would have the effect of transgressing the so-called parol evidence rule; secondly, that it would undermine the policy underlying s 2(1) of the Act, which seeks to prevent uncertainty and disputes concerning the contents of contracts for the alienation of land; thirdly, that the provisions of clause 9 of the deed of sale, in terms whereof Wale Street acknowledged that the deed of sale constituted the whole agreement between the respondent and itself, precludes the respondent from tendering evidence to contradict or qualify

the provisions of the deed of sale; fourthly, that the respondent is estopped from proving the oral term which would have the effect of avoiding the sale. I shall deal with these submissions seriatim.

The appellant's first argument was that the parol evidence rule prevents the admission of extrinsic evidence. This rule was formulated as follows by **Watermeyer JA** in **Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd** 1941 AD 43 at 47:

> "Now this Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence."

(See **National Board (Pretoria) (Pty) Ltd and Another v Estate Swanepoel** 1975(3) SA 16(A) at 26A-D; **Rielly v Seligson and Clare Ltd** 1977(1) SA 626(A) at 637C-D.) After pointing out that several writers on the law of evidence hold the view that these rules are not strictly rules of evidence the

learned judge proceeded as follows at 47:

> "Whatever may be the correct view as to the precise nature of the rules, it is clear that they do not prevent a party from setting up the case that the contract is not a presently enforceable contract inasmuch as it is conditional upon the happening of some event which has not occurred."

It follows that the integration rule does not preclude extrinsic evidence of a prior or contemporaneous oral agreement that the written contract shall not take effect except in a certain contingency. That much appears from the second passage from **Union Government v Vianini Ferro-Concrete Pipes**, **supra**, quoted above, and from the following remarks of **Innes CJ** in **Stiglingh v Theron** 1907 TS 998 at 1003:

> "But, again, evidence is admissible of a separate oral agreement constituting a condition precedent to the attachment of any liability under the written instrument. This is an exception to the general principle, more apparent than real, because such evidence does not essentially tend to vary the document. Accepting its terms as they stand, it aims at suspending its operation. If the suspension fails or ceases, then admittedly the contract takes effect in accordance with its ordinary meaning."

(See also **Aymard v Webster** 1910 TPD 123 at 129; **Johnston v Leal**, **supra**, at 938H and 946H). It remains problematical, however, to determine in what circumstances this exception to the parol evidence rule would apply, and when extrinsic evidence of a suspensive condition would be admissible. (See **Thiart v Kraukamp** 1967(3) SA 219(T) at 224A-226E; Hoffmann and Zeffertt **The South African Law of Evidence** 4th ed 309-312.)

It is not necessary, however, to decide whether the extrinsic evidence should be admissible on this basis, inasmuch as there is another and more compelling reason for allowing the evidence of the oral term in the present case. The object of the respondent in seeking to adduce this extrinsic evidence was not to incorporate the suspensive condition as a term of the deed of sale, and then to enforce such term by relying on Wale Street's failure to comply with the suspensive condition. Nor did the respondent seek to contradict, alter, add to or vary the terms of the deed of sale as such. The respondent merely wished to introduce the extrinsic evidence in order to establish the existence of a material oral term which was not incorporated in the deed of sale, and to show

that the deed of sale therefore did not constitute a valid and enforceable deed of alienation in terms of s 2(1) of the Act. See in this regard **Johnston v Leal, supra**, at 942H-943G, and more particularly at 943B-C where **Corbett JA** said that the aim and effect of the integration rule -

> "is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract."
> (Emphasis added.)

The learned judge further concluded at 943F-G:

> "To sum up, therefore, the integration rule prevents a party from altering, by the production of extrinsic evidence, the recorded terms of an integrated contract in order to rely upon the contract as altered; ...." (Emphasis added.)

The object of the respondent was certainly not to redefine the terms of the deed of sale, or to enforce the deed of sale as altered; on the contrary, the respondent sought to establish that the deed of sale was invalid and unenforceable. The admission of the extrinsic evidence in these circumstances

does not seem to me to be contrary to the parol evidence rule. In fact, in **Johnston v Leal**, **supra**, at 945E-946E the learned judge referred to a so-called qualification of the integration rule which relates to the validity of the transaction, and concluded (at 946E) that -

> "the parol evidence, or integration, rule does not preclude the court from enquiring into the true content of the transaction in order to determine the validity thereof...."

The learned judge found support for this qualification of the integration rule *inter alia* in the following general statement by Hoffmann **South African Law of Evidence** 2nd ed at 215 (which statement is repeated and extended in the 4th ed of Hoffmann and Zeffertt's **The South African Law of Evidence** at 300):

> "The fact that a transaction has been embodied in a document does not preclude a party from attacking its validity. For example, evidence may be adduced to prove that it was induced by fraud, duress or misrepresentation, or that it is void for mistake, illegality or failure to comply with the terms of a statute." (Emphasis added)

The respondent sought to introduce the extrinsic evidence with exactly that object in mind, viz to show that the deed of sale was void for failure to comply

with s 2(1) of the Act, inasmuch as it did not incorporate a material term of the sale. (A term "suspending the whole contract pending fulfilment of a condition" was held to constitute "a material term of the contract" (see **Johnston v Leal**, **supra**, at 937G-938A, and cases there referred to.))

I am of the view, therefore, that the parol evidence or integration rule does not prevent the respondent from adducing the extrinsic evidence.

The second reason advanced by the appellant why the extrinsic evidence should be disallowed, is that it would be contrary to s 2(1) of the Act and the policy underlying it. Counsel for the appellant relied in this regard on the following *dictum* in **Johnston v Leal**, **supra**, at 946H-947B:

> "The other possible obstacle to the admission of extrinsic evidence in this case is s 1(1) itself and the policy underlying it, viz as already indicated, the prevention of uncertainty and disputes concerning the contents of contracts for the sale of land and of possible malpractices in regard thereto. The main effect of the section is to confine the parties to the written contract and to preclude reliance on an oral *consensus* not reflected therein. It may be that where a contract of sale of land is complete and regular on the face of it, the admission of extrinsic evidence not excluded by the integration rule, eg evidence of an oral *consensus* providing for

> a suspensive condition not contained in the writing, would be regarded as being contrary to the section and the Act, even though the evidence were tendered not to contradict or vary the writing but merely in order to show that the writing failed to record the whole agreement of the parties and, therefore, did not comply with the section. Here it might be said that the admission of extrinsic evidence would permit a party to the contract to introduce uncertainty and disputes where, on the face of it, none exists. I express no positive view on this question, however, because, in my opinion, it does not arise in the present case."

(S 1(1) of the Formalities in Respect of Contracts of Sale of Land Act 71 of 1969 referred to in the passage quoted above contained provisions very similar to those set forth in s 2(1) of the Act.)

The general object of s 2(1) of the Act, and similar enactments which preceded it, has been considered in a number of cases, and it is generally accepted that the policy underlying this legislation is to prevent disputes, uncertainties and possible malpractices in respect of transactions which, as a rule, are of considerable value and importance. (See **Wilken v Kohler** 1913 AD 135 at 142 and 149; **Neethling v Klopper en Andere** 1967(4) SA 459 (A)

at 464E-F; **Clements v Simpson** 1971(3) SA 1(A) at 7A-B; **Johnston v Leal**, **supra**, at 939B-D.)

In the present case the extrinsic evidence is tendered - as postulated in the passage from **Johnston v Leal** quoted above - not to contradict, alter, add to or vary the deed of sale but merely in order to show that the deed of sale failed to record the whole agreement of the parties and, therefore, did not comply with s 2(1) of the Act. The admission of such extrinsic evidence may possibly lead to uncertainty and disputes where, on the face it, none exists, but in my view the respondent should, nevertheless, not be precluded from showing that the deed of sale is in fact of no force or effect. Extrinsic evidence to procure rectification of a contract of sale of land, or to prove that the contract is not binding because it was induced by fraud would, for instance, be admissible even though such evidence would introduce uncertainty and disputes. (See **Weinerlein's** case, **supra**, at 294; **Meyer v Merchants. Trust**, **supra**, at 253 and 254). The respondent tenders the extrinsic evidence for a similar reason and should in my opinion be allowed to do so. It should be pointed out

once again that the respondent does not seek to introduce the oral term with a view to contradict, alter, add to or vary the terms of the deed of sale. Such a course would clearly cause uncertainty and disputes in respect of the *essentialia* or other material terms of the deed of sale (see **Du Plessis v Nel** 1952(1) SA 513(A) at 538A-D). I therefore conclude that the admission of the extrinsic evidence for the respondent's purposes would not be contrary to s 2(1) of the Act, or the policy underlying it.

The appellant relied in the third instance on the provisions of clause 9 of the deed of sale which reads as follows:

> "The Purchaser [Wale Street] acknowledges that save as herein recorded, no statements and/or representations have been made by or on behalf of the Seller [the respondent] to induce the Purchaser to enter into this Agreement, and that this Deed of Sale constitutes the whole Agreement between the parties and no modifications, variation or alteration thereto shall be valid unless in writing and signed by both parties thereto."

When interpreting the terms of a written contract -

> "[t]he intention of the parties must be gathered from their

> language, not from what either of them may have had in mind." (per **Solomon J** in **Van Pletsen v Henning** 1913 AD 82 at 99).

Greenberg JA described this rule as follows in **Worman v Hughes and Others** 1948(3) SA 495(A) at 505:

> "It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties' intention was, but what the language used in the contract means, i.e. what their intention was as expressed in the contract."

(See further **Leyland (SA) (Pty) Ltd v Rex Evans Motors (Pty) Ltd** 1980(4) SA 271(W), at 273B-H, where the court adopted a strict construction when interpreting a clause similar to the present clause 9.)

It should be observed at the outset that clause 9 contains an acknowledgement by Wale Street only, and not by the respondent as seller. According to the language used in clause 9 the respondent never represented or acknowledged, or intended to represent or acknowledge, that the deed of sale "constitutes the whole agreement between the parties". In fact, the respondent neither represented nor acknowledged anything in terms of clause 9.

It should further be pointed out that the deed of sale was prepared by Wale Street, and in the event of ambiguity or inability to arrive at the true expressed intention of the contracting parties the deed of sale should be construed against its author, Wale Street, or its successor in title (see **Cairns (Pty) Ltd v Playdon & Co Ltd** 1948(3) SA 99(A) at 121-123).

But even if clause 9 was supposed to apply to the respondent as well, it is of no assistance to the appellant. The first part of clause 9 is in any event not relevant inasmuch as the oral term which the respondent seeks to introduce does not purport to contain any "statement" or "representation" made by the respondent "to induce" Wale Street to enter into the deed of sale. As regards the second part of clause 9, I can only repeat that the respondent does not seek to introduce the extrinsic evidence with a view to bring about any "modification, variation or alteration" to the deed of sale.

In my opinion, therefore, the provisions of clause 9 of the deed of sale do not preclude the respondent from tendering the extrinsic evidence.

Fourthly, the appellant submitted that the respondent is estopped from

proving the oral term with a view to establish that the deed of sale is of no force or effect. If the appellant's argument in this respect were to be upheld it would mean that the appellant could rely on the deed of sale even though it may be of no force or effect in terms of s 2(1) of the Act. Generally, where a statute requires that certain formalities have to be complied with in order to render a transaction valid, a failure to comply with such formalities cannot be remedied by estoppel (see Rabie **The Law of Estoppel in South Africa** 106, and authorities there referred to).

Counsel for the appellant however argued that the position is different where an innocent third party like the appellant steps into the shoes of one of the contracting parties. He submitted that the appellant may validly raise an estoppel against the respondent, inasmuch as the respondent represented, particularly in clause 9 of the deed of sale, to any innocent third party whom Wale Street might nominate as purchaser in its stead, that the deed of sale constituted the whole agreement between the parties. I have already indicated above that the respondent did not represent anything of the kind in clause 9 of

the deed of sale.

Counsel further relied on the judgment of **Hoexter AJA** in **Trust Bank van Afrika Bpk v Eksteen** 1964(3) SA 402(A) at 415H to 416C, in support of his estoppel argument. The approach adopted by **Hoexter AJA** in that case appears from the following passage in the judgment at 415H-416A:

> "The doctrine of estoppel is an equitable one, developed in the public interest, and it seems to me that whenever a representor relies on a statutory illegality it is the duty of the Court to determine whether it is in the public interest that the representee should be allowed to plead estoppel. The Court will have regard to the mischief of the statute on the one hand and the conduct of the parties and their relationship on the other hand."

It should be observed, firstly, that the judgment of **Hoexter AJA** was not concurred in by the other members of the court; and secondly, that the facts of that case differ materially from those in the present case. In coming to the conclusion that the plaintiff in that case should be allowed to raise estoppel the learned judge concluded, *inter alia*, that it was *dolus* on the part of the defendant to deny in the action against him the very fact which he deliberately

represented to the plaintiff as being true. That is clearly not the position in the present case. In the circumstances of this case I am of the opinion that the appellant should not be allowed to raise estoppel.

The appeal is dismissed with costs.

F H Grosskopf
Judge of Appeal.

Hefer JA
Van Coller AJA Concur