47/1959

G.P.-S.134917-1955-6-1,000. U.D.J. 219.

47/59

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate ~~Provincial~~ Division.)
(~~Provinsiale~~ Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

ADOLPHE BOESCH Appellant,

versus

(1) ESME V. BARK, (2) B. GUTTENBERG. Respondent.

Appellant's Attorney / Prokureur vir Appellant Rosendorff
Respondent's Attorney / Prokureur vir Respondent Goodnick & Franklin

Appellant's Advocate / Advokaat vir Appellant B. Ettlinger & H Rothschild
Respondent's Advocate / Advokaat vir Respondent O. Rathouse Q.C. & D.A. Melamet

(TPD) *Set down for hearing on / Op die rol geplaas vir verhoor op* Friday, 30th October, 1959.

(B)

Coram: Schreiner, Malan, van Blerk, Ramsbottom et Botha.

C.A.V.

Postea: Thursday 12th November 1959

appeal dismissed with costs

Schreiner J.A.
Malan J.A.
van Blerk J.A.
Ramsbottom J.A.
Botha A.J.A.

[signature]
Reg.

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

ADOLPHE BOESCH Appellant

and

E. U. BARK and B.GUTTENBURG,N.O. Respondents

Coram: Schreiner,Malan,van Blerk,Ramsbottom JJ.A.et Botha A.J.A

Heard: 30th October, 1959. Delivered: 12-11-1959

J U D G M E N T

RAMSBOTTOM J. A. :- This is an appeal from the judgment of WILLIAMSON J., in the Transvaal Provincial Division, in favour of the respondents in an action in which the respondents, as plaintiffs, claimed payment by the appellant of the sum of £2500. The respondents are the executors testamentary of the late Emile Eichenberger who died in April 1953, and their claim was founded upon an agreement for the dissolution of partnership between the late Eichenberger and the appellant. I shall refer to the respondents as the plaintiffs and to the appellant as the defendant.

Prior to January 28th 1952 the defendant and Eichenberger carried on business in partnership. The partnership owned a retail confectionery shop in Plein

Street/.....

Street and another in Emmarentia,Johannesburg, where it carried on business under the name of Geneva Confectionery. It also owned all the shares in a company called Metropolis Confectionery (Proprietary) Limited through which it carried on a similar business in Malvern,Johannesburg. The ~~plaintiff~~ partnership did its own baking; cakes for the Plein Street and Emmarentia shops were baked behind the shop at the Plein Street premises, and the cakes for the Malvern shop were baked on the premises at Malvern.

During 1951, difficulty arose with regard to the baking side of the business. It was feared that the Johannesburg Municipality would put a stop to the baking at Plein Street with serious consequences to the retail business. The defendant ~~decided~~ considered it necessary to start baking elsewhere; his idea was to form a private company that would operate a bakery which would supply the shops with their requirements. Eichenberger was unwilling to embark on a venture which would necessitate the investment of capital and which would be attended by risk of loss. In those circumstances it was decided that the partnership should be dissolved, the basis of the dissolution being that Eichenberger was to have the Malvern business and the defendant was to have the Plein Street and the

Emmarentia/.....

Emmarentia businesses. The partners considered that the two latter businesses were more valuable than the Malvern business and they agreed that the defendant should pay to Eichenberger the sum of £2500. At the same time, they knew that the defendant intended to float a company to operate a bakery, and they had in mind that the venture might be a failure; they agreed therefore that the £2500 was not to be paid (except in an event that is not material) until a period of five years should have elapsed, and they agreed, further, that on the happening of a certain condition within that period the defendant would be relieved of his obligation to pay.

The agreement was recorded in a deed of dissolution which was signed on January 28th 1952. Clauses 1 to 6 of the deed provide for the division of the assets and liabilities of the partnership and then come two clauses that are material to this dispute :-

"7. In consideration of all the foregoing, the said Boesch shall pay to the said Eichenberger the sum of £2500:0:0 (two thousand five hundred pounds), being the amount agreed between the parties as the full consideration for the withdrawal of Eichenberger from the said partnership and the disposal by Boesch to the said Eichenberger of his shares in and claims against the said company (the Metropolis Confectionery (Proprietary)Ltd). The said amount of £2500:0:0 shall carry interest at the rate of 5%(five per cent) per annum, payable monthly in arrear on the last day of each

month,/.....

month, from the 29th day of February, 1952, and such interest shall continue to be paid monthly in arrear by the said Boesch to the said Eichenberger until the 31st day of January 1957 subject to the provisions of clause 8 hereof.

The said Boesch shall pay the capital amount of £2500:0:0 to the said Eichenberger on the 1st day of February 1957, subject, however, to the provisions of clause 8 hereof.

8 (a) It is recorded that the said Boesch is about to float a company to be known as Geneva Bakery (Proprietary) Ltd or by such other name as may be acceptable to the Registrar of Companies for the purpose of carrying on business in the township of Richmond, Johannesburg. It is agreed that should the said Boesch dispose of more than 50%(fifty per cent) of his shareholding or sell the controlling interest in that company them, notwithstanding the provisions of clause 7 hereof the amount of £2500:0:0 due thereunder shall forthwith fall due and payable in one sum.

(b) It is further agreed that should the said company to be floated in terms of the provisions of sub-clause (a) hereof go into liquidation before the 1st day of February 1957 on the ground that it is unable to pay its liabilities in full, then, if it in fact pays only a dividend to its creditors in respect of the full amount of ~~its~~ their claims, the said Eichenberger's claim against the said Boesch in the sum of £2500:0:0 as set out in clause 7 hereof shall be waived in toto and the said Eichenberger shall have no further claim against the said Boesch. "

The dissolution was effective as from the close of business on January 31st 1952.

In due course the defendant caused the Geneva Bakery (Pty)Ltd to be registered. This

company/.....

company commenced and carried on a ~~baking~~ bakery business in hired premises situated in a building in Richmond, Johannesburg, which had been acquired by a private company in which the defendant and an associate held all the shares. I shall refer to the Geneva Bakery (Pty)Ltd as the Bakery Co.

The share capital of the Bakery Co. was £100 divided into 100 £1 shares. Of these shares 99 were held by the defendant and 1 by Eichenberger. The directors were the defendant and Eichenberger, but the latter was bound, by agreement, to vote both as a shareholder and as a director in accordance with the instructions of the defendant. After Eichenberger's death his place was filled by one Lewenstein. The defendant was in fact the sole owner of the company and the controller of its business. The working capital of the Bakery Co. was provided by money lent to it by the defendant.

In 1956, the liabilities of the Bakery Co. exceeded its assets, and the defendant, as a creditor, presented a petition for its winding up. A provisional order was granted on June 19th, and a final winding up order was made on July 10th 1956. The facts relating to the obtaining of the winding up order will be stated presently. In the winding up, the assets of the Bakery Co. realised less than

the liabilities and the creditors were awarded a dividend of 11/6 in the pound.

In those circumstances the defendant contended that the conditions contained in clause 8(b) of the deed of dissolution had been fulfilled and that his obligation to pay the sum of £2500 on February 1st 1957, and interest thereon pending the arrival of that date, had been extinguished. That contention was disputed by the plaintiffs, and on October 7th 1957 summons was issued in this action.

In their declaration the plaintiffs allege the agreement by which the defendant bound himself to pay £2500 on February 1st 1957 and claim payment.

The defendant, in his plea, relies on clause 8 (b) of the agreement. After stating that the Bakery Co. had been formed and had been liquidated in 1956, he says :-

"The said company was placed under liquidation on the ground that it was unable to pay its liabilities in full and did not pay its creditors in full but in fact paid only a dividend to its creditors in respect of the full amount of their claims, the amount of the said dividend being 11/6 in the pound. In the premises the said Eichenberger's claim against the defendant is waived in toto."

The plaintiffs' replication was a denial that the Bakery Co. "was placed under liquidation on the date alleged, and/or on the ground alleged, ~~and/or on the general ground alleged,~~ or that/.....

that if it was placed under liquidation on the date and on the ground alleged, that it did not pay its creditors in full. "

They deny that Eichenberger's claim has been waived. They then allege that they are entitled to payment for the following reasons :-

"Plaintiffs say that the defendant, with the deliberate intention of defeating the said Eichenberger's claim for the payment of the sum of £2500 on the 1st day of February 1957, and with the deliberate intention of escaping from his obligation to pay the said Eichenberger the said sum of £2500 on the said date, was the cause of the liquidation of the said company prior to the 1st day of February,1957, on the ground that it was unable to pay its liabilities in full, and was the cause of the said company being unable to pay its liabilities to its creditors in full but only a dividend of 11/6 in the pound on their claims, thereby deliberately and intentionally bringing about and causing the conditions to happen pursuant whereto he would be released from his obligation to pay the said Eichenberger the said sum on the said date and which said conditions but for the aforesaid acts on the part of the defendant would not have occurred. "

On the pleadings, the onus was on the defendant to prove that the Bakery Co. had been placed in liquidation,that it had been placed in liquidation on the ground that it was unable to pay its debts, and that in the liquidation it had been unable to pay its creditors in full. Those allegations were put in issue in the main replication. The alternative replication was an allegation that the defendant had brought about the

fulfilment/.....

fulfilment of the resolutive condition contained in clause 8(b) of the deed of dissolution with the intention of extinguishing his obligation to the plaintiffs and that, in consequence, the resolutive condition was not fulfilled in his favour. Assuming that, in law, this is a good answer to the defendant's plea, the onus of proving the facts upon which the plaintiffs rely is on them.

In order that the case may be clearly understood it is necessary to set out the facts in considerable detail. That was done by WILLIAMSON J. in his judgment, which is reported s.v. Bark and Another NN.O. v. Boesch (1959 (2) S.A. 377), but it will be convenient to recite them again.

On the dissolution of the partnership the defendant owned the two retail shops in Plein Street and in Emmarentia and in both places he carried on business under the name of Geneva Confectionery. He owned the equipment necessary for the baking of the cakes that were required by the shops, and he held permits from the Wheat Control Board without which baking could not be carried on. Those permits authorised the use of 24 square feet of oven space, and the right conferred by them has, conveniently, been called "oven space".

After the dissolution of the

partnership/.....

partnership the Bakery Co. was registered. As I have said above its capital was £100 and it was solely controlled by the defendant. The share capital was obviously insufficient to provide working capital, and the necessary capital was, from the beginning, provided by the defendant by way of loans. The "oven-space" permits were transferred to the Bakery Co. and the defendant was credited with £750 as representing their value. It is not clear from the evidence, but presumably equipment was transferred in the same way; equipment purchased must have been bought with money lent by the defendant. A motor delivery van was bought, and at a later stage the Bakery Co. acquired permits for another 18 square feet of "oven-space" for which £25 a square foot was paid.

At some stage, the date is not material, the Emmarentia shop was transferred to a company called Geneva Confectionery (Emmarentia) (Pty)Ltd that was wholly owned by the defendant, and early in 1954 the defendant opened a third shop, in Hillbrow, that was owned by a company called Geneva Confectionery (Hillbrow) (Pty) Ltd which, also, was solely owned by the defendant.

The business of the Bakery Co. was almost entirely confined to the supply of confectionery to the three retail shops. Although the Emmarentia and the Hill-

brow/.....

-brow shops were owned by companies, as far as the defendant was concerned they both belonged to him together with his Plein Street business; they were all financed by him and all profits were at his sole disposal. In those circumstances no great care was taken in accounting as between the retail businesses and the Bakery Co. The evidence is that early each morning the Bakery Co. delivered to each of the three shops its requirements for the day. The arrangement was that the owner of each shop was to pay the Bakery Co. the retail price of the goods delivered less 25% of that retail price; the evidence is that that is common practice in the confectionery trade. That arrangement however was not cafried out. It was inconvenient for the bakery staff to count or value the goods dispatched in the early morning and no record was kept by the Bakery Co. of what it had supplied to any of the three shops. If the counting and valuing had been done at the shops the fact that that had not been done by the Bakery Co. would not have mattered, but it was not done at the shops. There was therefore no record of what had been supplied or what the retail businesses owed for their purchases. What was done was this :- At the end of the day, in each shop, the takings were counted and three quarters of the takings were credited to the Bakery Co. The Bakery Co. therefore did not get paid for the goods it had supplied, it was only paid for the goods that the retail businesses had sold; losses due to

goods/.....

goods remaining unsold or to pilfering thus fell upon the Bakery Co. This system, which has not been said to be common practice in the confectionery trade, was advantageous to the shops, but not to the Bakery Co. The annual balance sheets and profit and loss accounts of the Bakery Co. were not put in but the evidence is that in each year it showed a loss. In view of the system of accounting between the shops and the Bakery Co. that is not surprising. The working capital of the Bakery Co. was supplied by the shops. At the end of each week each shop transferred to the Bakery Co. so much of its cash takings as it did not need for its own purposes. Some of the money transferred was, I presume, payment for the cakes supplied; the excess was treated as a loan to the Bakery Co. One imagines that no ordinary bakery supplying the retail trade could have operated on this system, but since all four businesses, in effect, belonged to the defendant, it did not matter to him where the profit or the loss was made; if the bakery made a loss as the result of the system, the profits of the shops were correspondingly increased. In fact, the shops made very satisfactory profits

Emile Eichenberger died in April 1953, andhis rights under the deed of dissolution passed to his executors who became entitled to receive the interest on the £2500 and the capital when it should fall due. In 1954 the

obligation/.....

obligation to pay the interest had become irksome to the defendant, and the idea of having to pay the capital in February 1957 was distasteful to him. He therefore applied his mind to the question of how he could free himself from those tiresome obligations. Clause 8 (b) of the deed of dissolution of partnership presented the obvious means of escape, and he decided to use it for that purpose.

Three conditions had to be fulfilled.

1. The Bakery Co. had to be liquidated before February 1st 1957.

2. The ground of the liquidation had to be that it was unable to pay its liabilities in full.

3. In the winding up the company had, in fact, to pay only a dividend to its creditors.

If these three conditions could be fulfilled the obligation to pay interest and the debt itself would disappear. Condition 2 seemed to present little difficulty. The Bakery Co. was working on borrowed capital, it had been working at a loss, as shown by its books, and it could not pay its liabilities in full. Whether condition 3 would be fulfilled depended upon what the assets were worth and would fetch if sold. If the defendant was sure that conditions 2 and 3 would be fulfilled, condition 1 presented no difficulty; as a creditor the defendant could

himself/.....

himself apply for the liquidation of the company on the ground that it could not pay its debts.

It was considered advisable, however, to take certain preparatory steps. There was no intention to wind up the bakery business; that had to be kept going in order that the shops might receive their daily supplies of confectionery. To ensure perfect continuity of the bakery business the defendant caused to be registered a new company called A.Boesch (Proprietary) Ltd of which he was the sole beneficial shareholder and director. This company was to take over the bakery business as a going concern and was to buy all the assets of the Bakery Co.; it was to carry on the bakery business without interruption. It had the same capital as the Bakery Co. - £100 - , it was to carry on business in the same way, and except for its name it was identical with the Bakery Co. which it was to succeed.

A Boesch (Pty) Ltd having been registered, an agreement was drawn up to record the sale by the Bakery Co. of all its assets to the new company. That agreement was signed on August 27th 1955 by the defendant on behalf of the seller and by his nominee shareholder and co-director, Lewenstein, on behalf of the purchaser. The agreement provided that A Boesch (Pty) Ltd purchased from the Bakery Co. its fixtures and fittings, a motor van, the stock-in-trade and its right to

"oven-space"/.....

"oven-space". The purchase price was £4280, being £2180 the book value of the fixtures and fittings, £500 the book value of the motor van, £850 for stock-in-trade, and £750 for"oven-space". The additional 18 feet of "oven-space" seems to have been overlooked, and nothing was allowed for good-will. The agreement provided for payment of the purchase price in instalments of £100 per month, for interest at 6% per annum, and for the payment in full of any unpaid balance if an instalment should not be paid on due date or after written demand. Debts owing to the Bakery Co. were to remain its property, and it was to pay all its liabilities. The liabilities consisted of debts which were owing to trade creditors and of loans which were owing to the defendant or his companies. The money required to pay the trade creditors was provided by the defendant and his companies whose claims against the Bakery Co. were thereby increased. The final result was that the liabilities of the Bakery Co., which consisted of debts owing to the defendant and his companies, amounted to £4405. 19. 7. The only asset of the Bakery Co. was the debt owing by A.Boesch (Pty) Ltd in respect of the purchase price of the assets. That debt, originally £4280,was reduced. It was found that the stock-in-trade of the Bakery Co. was not worth £850 but was worth £412. 18. -. and the necessary adjustment reduced the purchase price to £3842. 18. -. A. Boesch

(Pty)/.....

(Pty) Ltd paid some of the Bakery Co's trade debts and its debt was thereby reduced to £3415. 7. 7. The result of this whole transaction was that the business of the Bakery Co. was brought to an end and its position was, as it were, frozen with liabilities amounting to £4405. 19. 7 and with an asset of £3415.7.7 . The Bakery Co. was therefore unable to pay its liabilities in full.

Nothing more was done in respect of the Bakery Co. until the following year. In June 1956 the defendant applied for the winding up of the company; a provisional order was granted on June 19th, and a final order on July 10th 1956. The Bakery Company was then wound up. Its only asset was the debt owing by A. Boesch (Pty) Ltd. No instalment or interest had ever been paid. The defendant was,in effect, the only creditor and on a resolution passed by him the asset of £3415. 7. 7 was ceded to him for £2500; unpaid interest seems to have been ignored. That further reduced the value of the assets, but as the defendant and his companies were the sole creditors and A.Boesch (Pty)Ltd was the sole debtor, this was of no consequence. No money passed, but the dividend which, on paper, was payable to creditors, was reduced to 11/6 in the pound.

The defendant was of the opinion that all the conditions contained in clause 8(b) of the deed of dissolution had now been fulfilled, and he claimed that his obligations/...

-ligations under that agreement had been extinguished. That was disputed, and in due course the plaintiffs instituted action.

The promise to pay £2500 was not disputed, and at the trial the defendant assumed the onus of proving his defence. He proved that the Bakery Co. had been placed in liquidation prior to February 1st 1957; that was not disputed. He proved that at the date of the winding up order the assets of that company viz. the debt owed by A.Boesch (Pty)Ltd, were insufficient to pay the debts; that was not disputed. He proved that the creditors had received only a dividend on their claims; in view of the relation between the assets and liabilities that existed at the time of the winding up, that could not be disputed. Finally, he produced the petition on which the winding up order was granted to show that the Bakery Co. had been liquidated on the ground that it was unable to pay its liabilities in full. That allegation was disputed and the issue raised will be considered presently.

Before I deal with that issue, however, I wish to refer to the alternative answer which is contained in the replication. The validity of that answer depends upon whether the equitable principle of the fictional fulfilment of a condition that was applied in MacDuff & Co.Ltd (In Liquidation) v. Johannesburg Consolidated Investment Co. Ltd.

(1924/.....

(1924 A.D. 573) and in Koenig v. Johnson & Co.Ltd.(1935 A.D.262) is applicable in the present case. In both those cases the condition that was held to have been fictionally fulfilled was suspensive. In the MacDuff case, the defendant had entered into an agreement with ~~the plaintiff~~ the MacDuff Co., in terms of which the ~~plaintiff~~ MacDuff Co. promised to sell its undertaking and assets to a company which the defendant undertook to promote, for an agreed consideration. The ~~plaintiff~~ MacDuff Co. undertook, before a certain date, to convene meetings of shareholders at which ~~the plaintiff~~ it was to be put in voluntary liquidation and at which the liquidator was to be authorised to sell its undertaking and assets to the new company in accordance with the agreement. The obligation of the defendant to form the new company and to cause it to conclude the purchase was therefore conditional upon the holding of the meetings and the passing of the necessary resolutions. In order to avoid its obligation, the defendant bought all the shares in the MacDuff Company and appointed its nominees to be directors. Through the action of the defendant no meetings were held and no resolutions were passed. The ~~plaintiff~~ MacDuff Co. was subsequently ordered to be wound up by the Court on the petition of a creditor, and the liquidator, the plaintiff, brought action against the defendant. It was held that the condition upon the performance of which the defendant's obligation depended had been fictionally

fulfilled/.....

fulfilled. In Koenig v. Johnson & Co.Ltd, the parties had entered into a contract of sale that had been partly performed both by the seller, who had delivered part of what he had sold, and by the buyer who had paid part of the purchase price in terms of the contract. The balance of the purchase price was payable on delivery by the seller of two patents. The ~~purchaser~~ buyer, by withholding assistance that it was ~~the~~ ~~buyer's~~ its duty to render, intentionally prevented the seller from obtaining one of the patents. The delivery of that patent was deemed to have been effected. In that case, too, the condition, upon the performance of which the buyer's obligation depended, was suspensive.

In the present case the condition was purely resolutive. The contract was binding and the defendant's obligation to pay £2500 was complete. Assuming that the resolutive condition was fulfilled, by acts of the defendant performed with the intention of extinguishing that obligation, the contention is that it must be deemed not to have been fulfilled. In short, it is contended that the doctrine of fictional fulfilment of a suspensive condition should be extended to include a fictional non-fulfilment of a resolutive condition. This contention commended itself to WILLIAMSON J. and he adopted it. He held that the defendant, with the intention of avoiding his obligation, had brought about the fulfilment of the condition, and therefore, applying - in reverse - the prin-

ciples/.....

-ciples enunciated in the MacDuff case the condition must be deemed not to have been fulfilled. He gave judgment for the plaintiff on that ground.

In this Court, Mr. Ettlinger on behalf of the defendant, conceded that the principle of fictional fulfilment could be used to bring about a fictional non-fulfilment of a resolutive condition, but he contended that the plaintiffs had not proved the facts which had to be proved in order to bring the principle into operation. We were referred to the passages in Williston on Contracts (revised edition Vol.3 paragraph 677 at page 1952), in the German Civil Code (paragraph 162) in the Restatement of the Law of Contract (Vol. 1 section 307 at page 453) and in Lee and Honoré The South African Law of Obligations (paragraph 76, page 21) on which WILLIAMSON J. relied, and to De Wet and Yeats Kontrakreg en Handelsreg (2nd Edition page 76) (see also a note by Professor Ellison Kahn in the South African Law Journal (1959) Vol. LXXVl,page 247), but we were informed that no case and no Roman-Dutch authority could be found in which the doctrine of fictional fulfilment had been thus extended. If, therefore, it were necessary to decide the question, Mr. Ettlinger's concession would not relieve this Court of the duty of examining the law and of giving a decision thereon. But in my opinion the case can and should be decided on another ground

and/.....

and I therefore consider it undesirable to express any opinion as to the correctness of Mr. Ettlinger's concession. This renders it unnecessary to deal with the interesting points which were argued with regard to what the plaintiffs had to prove in order to make good their case on this ground.

I have mentioned above that the onus was on the defendant to show that the Bakery Co. had been liquidated on the ground that it was unable to pay its liabilities in full. The defendant's case on that point was that the Bakery Co.'s liabilities in fact exceeded its assets, that he was entitled to apply for a winding up order on that ground, and that he had done so. In the petition which the defendant presented for the winding up of the Bakery Co., he stated that that company was indebted to him in the sum of £1742. 0. 4 in respect of cash lent. He then said :-

"5. Your petitioner found that the respondent company was unable to continue its business operations on account of lack of capital and consequently the business of the respondent company as a going concern was on the 27th August,1955,sold to A. Boesch (Pty)Ltd a company in which your petitioner held the majority of shares for £3842. 18. -. The purchasing company,A.Boesch (Pty)Ltd,however assumed certain liabilities of the respondent company which reduced the amount payable by the purchasing company to the sum of £3415. 7. 7. The purchase price of £3415. 7. 7 is payable to the respondent company in instalments of £100 per month.

Your petitioner effected payment on behalf of the respondent company of all the amounts owing by the respondent company

to/.....

to trade creditors and in addition thereto the respondent company is indebted to the Geneva Confectionery (Pty)Ltd in the sum of £1994. 18. 8 and Geneva Confectionery (Emmarentia) (Pty) Ltd in the sum of £669. -. 7. The total liabilities of the respondent company, therefore, amount to £4405. 19. 7. Subject to A Boesch (Pty)Ltd effecting payment of the full amount of the purchase price due in terms of the deed of sale aforementioned, there will be a deficiency of £1090. 12. -.

6. In view of the fact that the respondent company is unable to pay its debts and is in fact insolvent and is no longer carrying on its business, your petitioner submits it is just and equitable that the respondent company be placed in liquidation"

I share the doubt that was expressed by WILLIAMSON J. as to whether the inability of the Bakery Co. to pay its debts was even a formal ground for the winding up, but assuming that it was, Mr. Ettlinger did not contend that that was enough to fulfil the condition contained in clause 8(b) of the deed of dissolution of partnership. Mr. Ettlinger's argument was that the parties contemplated the possibility that the Bakery Co. might be unsuccessful, that it might become insolvent, and that it might, for that reason, be wound up, and having those possibilities in mind they agreed that if that state of affairs should come about the defendant would be released from his debt. Consequently, he argued, once the stage was reached when the Bakery Co. could not pay its debts the defendant was entitled to apply for its liquidation in order that he might be released, as had been agreed. If he were to

to pay its debts was not the reason for the winding up. That is demonstrated by the fact that the business of the company was transferred to another company, A. Boesch (Pty)Ltd, which was identical in every respect with the Bakery Co. and was in no better position to pay its debts than was the Bakery Co. If A. Boesch (Pty) Ltd was able to carry on the business of the bakery, the Bakery Co. could have done so itself, and the fact that it could not pay its creditors in full was not the true reason for the liquidation. Furthermore, the value of the assets of the Bakery Co. and its true ability to pay its creditors was not determined in the winding up; the value of its assets was determined by the defendant himself when he sold the assets to the new company. The true reason for the winding up of the Bakery Co. was that the defendant wished to escape from his obligations. In order to do that he sold the assets of the Bakery Co. and deprived it of its capacity to carry on its business. He caused the business to be carried on without any change by an identical company, which like its predecessor, conducted its business at a loss. Thereafter he caused the Bakery Co. to be liquidated - not because it could not pay its debts but because, to effect his purpose, he had to bring about its liquidation before February 1st 1957.

In my opinion the condition,

properly/.....

properly interpreted, was not fulfilled and the defence failed on this ground. I consider that this should be the basis of the decision. In saying that, I do not ~~im~~ suggest in any way that WILLIAMSON J. was wrong in applying the principle of the MacDuff case . In my opinion the case can be decided without invoking that principle and I prefer to leave open the question whether it should be extended.

The appeal is dismissed with costs.

W. H. Rumbold.

Schreiner, J.A.
Malan, J.A.
Van Blerk, J.A.
Botha, A.J.A.
} Concur.