7/71

G.P.-S.33967—1968-69—1,000. J. 219.

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.

MAX MILLER and MADELINE MILLER *Appellant,*

versus

JACK DICKINSON *Respondent*

Appellant's Attorney Rosendorff & Venter *Respondent's Attorney*
Prokureur vir Appellant *Prokureur vir Respondent* Davidson Morris

Appellant's Advocate P.M. Wulfsohn *Respondent's Advocate*
Advokaat vir Appellant *Advokaat vir Respondent* C. J. Cohen

Set down for hearing on
Op die rol geplaas vir verhoor op 21-5-1971

3.5.71 R.10

Coram: Rumpff JA., Rabie ADP., Trollip JA. et Kotzé AJA.

WLD

9.45 a.m. — 11.00 a.m.
11.15 a.m. — 12.15 p.m.

C.A.V.

Rumpff JA.:

27.5.1971. The appeal is dismissed with costs.

Writ issued Lasbrief uitgereik	Bills Taxed.—Kosterekenings Getakseer.		
	Date. Datum.	Amount. Bedrag.	Initials. Paraaf.
Date and initials Datum en paraaf			

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MAX MILLER

and

MADELINE MILLER Appellants

and

JACK DICKINSON Respondent

CORAM: RUMPFF, JANSEN, RABIE, MULLER, JJ.A.
et KOTZÉ, A.J.A.

HEARD: 21.5.1971. DELIVERED: 27.5.1971.

J U D G M E N T

RUMPFF, J.A. : -

This is an appeal, by consent of the parties directly to this Court, against an order issued in motion proceedings in the Witwatersrand Local Division, with costs, whereby the appellants were directed to transfer to the respondent certain portion of a farm in the district of Krugersdorp, against payment of the amounts owing to the appellants in terms of a deed of sale entered into between the parties in 1964.

In/.....

In the preamble to the deed of sale, apparently a printed form, the appellants, who are the sellers, are described as being "of Vereeniging", and the respondent, who is the purchaser, is described as being "of Box 148 Randburg". In terms of the deed the purchase price is to be paid in instalments, but the purchaser is entitled at any time to repay the balance of the purchase price with interest, against which he becomes entitled to transfer of the property. Clause 13 of the deed, in so far as is relevant for purposes of this case, provides as follows:

> "Should the purchaser fail to pay on due date any instalment or other imposts as provided for in this Deed of Sale, but not otherwise, the sellers shall be entitled to give the purchaser written notice requiring the purchaser to remedy such default, and should the purchaser within twenty-one (21) days after the posting of such notice fail to remedy the default then and in such case, the sellers shall without further notice, have the option: -
>
> (a) To declare this Deed of Sale cancelled .... or
>
> (b) To sue forthwith for the recovery of the whole of the balance outstanding under this Deed of Sale, or for payment of any arrear instalments as the sellers may think fit."

Clause 17 of the deed of sale was intended by the draftsman to contain the address of the purchaser to which all notices were

to be sent but no address was inserted in the blank space provided in the clause for that purpose. As it stands, clause 17 reads as follows:

> "All notices required shall be sent by registered post to
> which address the purchaser accepts as his domicilium citandi et executandi for the purposes hereof."

According to the evidence before the Court a quo the respondent resided on his father's property which was adjacent to the property he bought under the deed of sale, until the middle of January 1969 when he moved with his family to Malvern, Johannesburg. From the commencement of his obligation to pay instalments under the deed of sale, the respondent had agreed with his parents that they would pay the instalments until he was in a financial position to do so. During the second half of 1968 the respondent's parents mentioned to him that they wanted him to take over the payment of the instalments but, according to the respondent, no agreement was reached. The respondent thought that his parents would continue to pay the instalments but discovered in May 1969 that

they had not done so since some date in 1968. His wife thereupon wrote to the appellants' attorney asking her to supply the respondent with the details of the amount of arrears. The appellants' attorney replied and notified the respondent that a registered letter dated 4 March 1969 had been sent to him, addressed to P.O. Box 148, Randburg, requesting him to pay within the period of 21 days the arrears then owing, that a further registered letter had also been sent on 26 March 1969, to the same address, notifying the respondent that the deed had been cancelled, because of his failure to pay the arrears, and that both letters had been returned on 29 April 1969 by the postal authorities, marked "unclaimed". The respondent was also informed that the appellants regarded the notices as being as valid as if they had been received by the respondent and that they were not prepared to revoke the declaration of cancellation. On the papers before the Court a quo the respondent did not deny that P.O. Box 148, Randburg was his postal address but he did not admit that it was his only address. He explained that after his move to Malvern, Johannesburg, he did not collect his mail

from P.O. Box 148,Randburg but requested his parents to do so. From time to time they handed him mail collected from that post box. The Court a quo, relying on Swart v. Vosloo (infra), held that as the notices addressed to P.O. Box 148, Randburg had not been received by the respondent, there had been no valid cancellation and that the respondent was entitled to transfer of the property against payment of what was owed by him.

In this Court it was not disputed on behalf of the appellants that in law, in the absence of an agreement to the contrary, a party to a contract who exercises his right to cancel must convey his decision to the mind of the other party and that cancellation does not take place until that happens. See Swart v. Vosloo, 1965 (1) S.A. 100 (A). A number of contentions were advanced, however, as to why in the present case the judgment of the Court should be held to be wrong. Before considering those contentions, it should be noted that in terms of the deed of sale the parties prima facie contemplated two notices to be given by the sellers in the event of the purchaser's failure to comply with the terms of clause 13. Firstly the

purchaser was to be given an opportunity to ~~remove~~ cure his mora by a notice demanding him to remedy his default. Failure to comply with this notice would not automatically have the effect of terminating the agreement because the sellers could at their option either declare the agreement cancelled or sue for any or all of the arrear instalments, so that prima facie a further communication to the respondent was contemplated. The respondent's case is that he did not receive the notice to remedy his default. A similar situation i.a. arose in Winter v. South African Railways and Harbours, 1929 A.D. 100 at p. 105, where it is put as follows:

> "The first question on this part of the case is what is the notice contemplated in clause 2 of the lease. The relevant portion of the clause reads as follows: -
>
> > 'Should the lessees fail to pay the said quarterly rental on the day on which the same shall fall due, the Administration after posting written notice to the lessees' address and receiving no payment within a further period of fourteen days, shall have the right to cancel this lease.'
>
> In order to entitle the Administration to cancel, two things were essential: (1) written notice had to be given, and (2) a period of 14 days had to elapse without payment of the rent in arrear."

If/.....

If a declaration of cancellation of an agreement by a creditor, in order to be effective, has to be brought to the mind of the debtor, in the absence of an agreement to the contrary, a notice to remedy a default before such cancellation, would, I think, a fortiori be required to be received by the debtor. The position in the present case seems to be no different, in the absence of an agreement, to that of the case of a creditor generally who has to put a debtor in mora and who, if he cannot find the debtor must, if necessary, resort to a process of summons in judicio. In the present case the draftsman of the deed of sale presumed that the sellers would do what is often provided for in this type of agreement, namely, that they would stipulate for the purchaser to remedy the default within a specified period after the posting of a written notice directed to an address elected by the purchaser. Such agreement would relieve the seller of the burden of tracing the purchaser if his address became unknown to the seller. Consequently, the draftsman of the deed of sale inserted clauses 13 and 17 which prima facie have to be read together. Because an address was not inserted

in clause 17, the parties did not agree to which address the warning notice from the sellers had to be sent to, and prima facie it became the duty of the sellers to bring to the actual notice of the purchaser the fact that they were demanding payment of the arrear instalments within the time agreed upon.

Counsel for the appellants firstly contended that the appellants had sent a registered letter in terms of clause 17 of the deed of sale and that it must be presumed - on the basis of the maxim omnia praesumuntur rite esse acta donec probetur in contrarium - that the receipt form, duly completed, had been put in the post box by the postal authorities. For this contention he relied on certain Postal Regulations which were not referred to in the Court below and which were handed to us under the provisions of sections 5 (1) and 5 (2) of Act 25 of 1965, which now authorise the Courts to take judicial notice of "any law or government notice or of any other matter" which has been published in the Gazette. Counsel for the respondent objected to the Gazette being handed in at this stage but, in view of my ultimate conclusion, it is unnecessary to decide

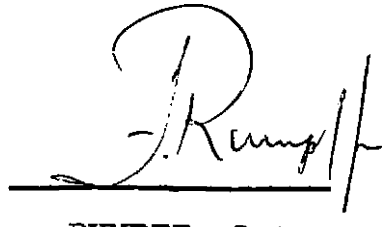
as the method of conveying the warning notice to the respondent, the contract expressly or by implication provides that the notice need not be communicated to the respondent himself or be received by him. It was sufficient for the appellants, so it was argued, to post the notice to an address of the respondent in order to comply with the terms of the deed of sale. In support of this argument counsel for the appellants referred us to a number of cases, some of which deal with contracts in which an address had been stipulated, while the others deal with the problem of a creditor requesting the debtor to pay him through the post. They do not assist the appellants. I think that from the failure to complete clause 17, a clause entirely for the benefit of the sellers, may be inferred a waiver by the sellers of the benefit contemplated by the draftsman as also the willingness of the sellers to be bound by the common law rules

applying to the situation. (Blundell v. Blom, 1950 (2) S.A. 625 at p. 633 and Inrybelange (Eiendoms) Bpk. v. Pretorius en 'n Ander, 1966 (2) S.A. 416 at p. 425.) In the result, in my view, having regard to the grammatical and ordinary meaning of the words of clause 13 and clause 17 of the deed of sale, there is no room for the construction contended for on behalf of the appellants.

An alternative contention advanced was that respondent had appointed the post office as his agent for the receipt of the warning notice. Attention was drawn to clause 13 which provides for a period after "posting", to clause 17 which refers to "registered post", and to the only address disclosed in the deed of sale, the respondent's post office box number. These features, supported by surrounding circumstances such as the fact that the parties, being in different places, would communicate with each other by post, and had done so in the past, and the fact that the appellants and their attorney knew no other address of the defendant, were said to give rise to the necessary implication that the respondent had appointed

the post office as his agent for receipt of the warning notice. I do not agree that the features enumerated by counsel lead to the inference which he suggested. The reference to "within twenty-one (21) days after the posting of such notice" in clause 13 constitutes no more than an agreement upon a method of communication and of fixing the time. Neither the terms of the deed of sale nor the surrounding circumstances indicate, in my view, an appointment of the post office as agent of the respondent. Finally, counsel for the appellants argued that because of the wording of clauses 13 and 17 and the surrounding circumstances referred to above, the respondent had waived actual receipt of the warning notice, that on the evidence before the Court a quo the respondent had deliberately evaded the attemps by the appellants to give notice in terms of the deed of sale, and that, moreover, the situation is akin to one to which the maxim lex non cogit ad impossibilia in law is applied, because the appellants had done everything which could reasonably be expected of them.

In my view there are no grounds to be found in support of any one of these contentions. The appeal is dismissed with costs.



RUMPFF, J.A.

JANSEN, J.A.
RABIE, J.A.
MULLER, J.A.
KOTZÉ, A.J.A.

Concur.