123/85

SPINDRIFTER (PTY) LTD — Appellant

and

LESTER DONOVAN (PTY) LTD — Respondent

Case No: 151/84

mp

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SPINDRIFTER (PTY) LTD Appellant

and

LESTER DONOVAN (PTY) LTD Respondent

CORAM: JANSEN, HOEXTER, VAN HEERDEN, JJA
GALGUT et NICHOLAS, AJJA

HEARD: 3 September 1985

DELIVERED: 27 September 1985

J U D G M E N T

HOEXTER, JA .....

HOEXTER, JA

The appellant is a private company which carries on the business of a clothing manufacturer at Woodstock, Cape Town. It is a one-man business controlled by one Levison who is its managing director. The respondent is a private company which carries on business at Johannesburg as an organiser of professional trade exhibitions. As part of its business the respondent organises twice annually in Cape Town a fashion trade fair ("FTF") whereat businesses in the clothing trade may exhibit their products at stands allocated to them by the respondent. A summer FTF is held in February and a winter FTF during or about July/August. For both these exhibitions the contracts between the respondent and exhibitors involve a standard form of agreement whose provi= sions are printed on both sides of a single sheet of paper. Save for the date of the particular exhibition the provisions of the contracts for the summer and winter exhibitions

respectively .....

respectively are couched in identical terms.

The present appeal relates to a standard form contract ("the form") printed for use in connection with the Cape Town FTF organised by the respondent for the winter of the year 1981. The form constitutes an application to exhibit by an intending exhibitor to the respondent. I describe first the matter printed on the face of the form. At the top of the page there are three prominent boxed headings in bold print which, from left to right, read as follows: "FTF FASHIONS TRADE FAIR"; "24-27 JULY 1981 GOOD HOPE CENTRE TOWN R.S.A."; and "APPLICATION TO EXHIBIT". Beneath the headings aforesaid the form states "TO: FTF ORGANISERS" and then the postal address of the latter in the Transvaal is set forth. It is common cause that this is a reference to the respondent. Below the printed matter described above the face of the form is divided into six boxed paragraphs respectively numbered from 1 to 6. Beneath the sixth paragraph the following note occurs:-

"Note : .....

"Note: When completed this order forms part of the Exhibitors (sic) contract with the Organisers. Orders may be increased at the same rates."

Below the note, and at the foot of the page, are four boxed spaces described as being "For organisers use only", the fourth space being headed "Signed as accepted in Johannesburg and dated."

Paragraph 1 reads as follows:-

"1. I/We ..... hereby contract for and accept allocation of stand space at the Exhibition for the purpose of exhibiting products as generally described below and undertake to observe and be bound by the General Conditions as printed overleaf and to pay a deposit equal to 25% of all rentals as shown in section 4 immediately upon receipt of invoice together with total telephone payments and to pay the balance of all rentals and other monies due to the organisers on or before the 1st day of June 1981 without deduction for any reason."

Paragraph 2 bears the heading "GENERAL DESCRIPTION OF EXHIBIT" with a blank space for particulars. Paragraph 3 bears .....

bears the heading "STAND REQUIREMENTS AND RENTALS" and contains further printed matter with spaces to be filled in relative to the number of stand units reserved by the exhibitor at a rental of R1 000 per unit, and the exhibitor's choice of stands in order of preference. Paragraph 4 bears the heading "DETAILS OF APPLICANT" and contains spaces wherein the name and address of the applicant are to be filled in. The concluding line of the fourth paragraph reads as follows:-

"Signed _____ At (Town)_____On(Date)_____"

Paragraphs 5 and 6 are respectively headed "CATALOGUE ADVERTISING" and "FASHION THEATRE" and make provisions for the reservation of such further facilities as the exhibitor may desire.

On the other side of the form (to which side I shall refer as "the reverse side") the "General Conditions"

referred .....

referred to in paragraph 1 on the face of the form are set forth. What appears on the face of the form is printed clearly and may be read with ease and comfort. The same cannot be said of the printing on the reverse side of the form. The General Conditions are contained in nineteen separate paragraphs running in total to more than two thousand words. The printed matter on the reverse side is so compressed and is in print so fine that it can be read only with extreme difficulty and by dint of concentrated effort and straining of the eye.

Clause 4 of the General Conditions provides, inter alia, that should an exhibitor fail to mount an exhibit on the stand allotted to him he agrees to pay a penalty of R1 000 per stand unit allocated to him. Clause 13 of the General Conditions reads as follows:-

"13. In the event of the Exhibition not taking place for any reason except the

wilful .....

> wilful wrongful act or ommission (sic) of the Organisers this contract shall be terminated and the Exhibitor shall be entitled to a refund of any monies paid exceeding one half of the agreed cost of space. If the venue has to be altered, the Exhibition held in whole or in part in another hall, postponed, restricted or if there is a failure of any of the services of (sic) facilities usually available to Exhibitors for any reason whatsoever but an Exhibition is nevertheless held, the Organisers shall not be liable for any expenditure, damage, loss or other liability including consequential damage, incurred by the Exhibitor. The varied Exhibition so held shall, for all purposes, be deemed to be the Exhibition to which this agreement relates and the Exhibitor shall be bound to make payment of the monies due under this contract."

So much for the printed matter on the form. The respondent had an agent in Cape Town, a Mrs Katz, who canvassed for applications from intending exhibitors at the summer and winter exhibitions in Cape Town. On the form described above Mrs Katz required would-be exhibitors to fill in the necessary particulars on the face of the form and to affix their signatures in paragraph 6 thereof.

Mrs .....

Mrs Katz thereafter submitted the forms to the respondent in Johannesburg for consideration by it. If an application were approved by the respondent the latter's managing director would signify its acceptance by signing the form in the appropriate space already described. Mrs Katz was employed by the respondent on a commission basis. Upon acceptance of an application submitted to the respondent by Mrs Katz the latter was paid a commission calculated at R50 per stand unit hired by the exhibitor.

During February 1981 Levinson wished the appellant to exhibit on two stand units at the winter FTF to be held in Cape Town on 24/27 July 1981. On 28 February 1981, and at the Good Hope Centre, Mrs Katz produced for signature by Levinson the form in connection with the winter FTF. On behalf of the appellant Levinson signed his name as required in paragraph 4 on the face of the form. He also inscribed the name of the appellant company and its

address .....

address in paragraph 4; and in paragraph 3 he filled in the numerals "19" and "20" in the appropriate space to indicate that these two stand units were the appellant's first choice. Details of the applicable rental (namely R1 000 per unit) were filled in by Mrs Katz. Mrs Katz also completed the details required in paragraph 4 by filling in on the last line of that paragraph the place of signature ("Cape Town") and the date ("28.02.81") thereof. The spaces provided in paragraphs 1, 2, 5 and 6 on the face of the form were left entirely blank. It will be recalled that paragraph 1, which contains an undertaking by the would-be exhibitor to be bound by the General Conditions on the reverse side of the form, also provides a space wherein the name of the applicant is to be set forth. Mrs Katz sent the form, completed in the respects indicated, to Johannesburg where on 3 March 1981 the appellant's application was accepted under the signature of the respondent's

managing .....

managing director.

On 5 March 1981 the respondent sent the appellant an invoice reflecting as due by the latter to the former payment of R500 being the 25% deposit in respect of "Two stands at Fashion Trades Fair 24 - 27 July, 1981". On 21 April 1981 the appellant further received from the respon= dent an "Exhibitors Information Manual" which announced the dates of the winter FTF as being 30 July to 1 August 1981. The last-mentioned dates were not convenient to the appellant. They clashed with the dates of a business trip which Levinson was to undertake to Hong Kong. Levinson therefore at once sent to the respondent a telegram in the following terms:-

> "New dates do not suit this Company.
> Consider agreement cancelled."

In response thereto the respondent's administrative director, one Mrs Donovan, sent a telegram to the appellant stating, inter alia, that the applicant's application to exhibit

at .....

at the FTF winter show was binding and that:-

> "SLIGHT CHANGE OF DATE COVERED BY OUR PARAGRAPH 13 WHICH WAS READ AND ACCEPTED BY SPINDRIFTER THEREFORE MUST ASK YOU TO HONOUR YOUR OBLIGATION."

The winter FTF was held on the dates to which the appellant had objected and the appellant did not exhibit thereat.

In July 1981 the respondent instituted an action against the appellant in the Cape of Good Hope Provincial Division. The respondent claimed payment of R4 000 being R2 000 in respect of stand rentals and a penalty of R2 000 in respect of the appellant's failure to exhibit. The appellant entered an appearance to defend the action and in September 1981 the respondent made an application for summary judgment against the appellant. The appellant resisted the application. By consent between the parties the Court refused summary judgment and ordered the costs

of the application to be costs in the cause. In March 1983 the matter proceeded to trial before MUNNIK, JP. At the beginning of the trial counsel for the appellant sought a postponement on the grounds that the respondent had failed to make full discovery. Having heard argument thereon the learned Judge-President refused to grant a postponement and reserved his decision in regard to the wasted costs occasioned by the application. The trial then proceeded, the only witnesses called being Mrs Donovan on behalf of the respondent and Levinson for the appellant. At the end of the trial the Court below reserved judgment until February 1984 when judgment was given in favour of the respondent with costs. The costs awarded included the costs of the summary judgment application and the wasted costs of the abortive application for postponement at the beginning of the trial. With leave of this Court the appellant appeals against the whole of the judgment of the

trial .....

trial Court.

The plea filed in answer to the respondent's particulars of claim raised a number of defences some of which were abandoned during the course of the trial. It is unnecessary here to detail the various defences. The plea is prolix and rather clumsily drawn. However, the first and main defence advanced therein is tolerably clear, and it comes to this: Whereas the respondent intended to accept the appellant's application to exhibit at the FTF winter exhibition on the basis that the resulting contract would incorporate the General Conditions listed on the reverse side of the form, the appellant on the other hand intended to make an offer not subject to such General Conditions. Consequently, so pleaded the appellant, the parties failed to achieve consensus ad idem and there was no enforceable agreement on which the respondent could base its claims. In elaboration of this defence the appellant pleaded that at all relevant

times the respondent had been represented by Mrs Katz and the appellant by Levinson; that Levinson signed the form on 28 February 1981 in the presence of Mrs Katz; that the form reflected the dates on which the FTF winter exhibition would be held as 24 to 27 July 1981; that Mrs Katz knew that Levinson was unaware that the General Conditions were printed on the reverse side of the form; that Mrs Katz failed to advise Levinson of the existence of the General Conditions and more particularly the provisions of Clause 13 thereof; and that Mrs Katz failed to provide Levinson with a copy of the form. In a request for further particulars to the plea the respondent asked whether Levinson had intended to make an offer to the respondent on all the terms appearing on the face of the form. To this the appellant replied:-

> "Yes, with the exception of those contained in clause 1, to the existence of which his attention was not drawn and the terms of which were not present to his mind at the time at which he signed the proposal form."

As will appear in due course, the trial Court rejected the appellant's main defence. I turn to the evidence at the trial material to a consideration of the validity of that defence. In this connection little if anything hinges on the testimony of Mrs Donovan who had no dealings with Levinson before the latter signed the form on 28 February 1981. Levinson's own evidence relevant to the main defence may be summarised somewhat as follows. During or about January 1981 Mrs Katz paid a visit to the appellant's offices at Woodstock and introduced herself to Levinson as the respondent's agent. She tried to persuade Levinson to exhibit at both the summer and the winter FTF exhibitions to be held in Cape Town during 1981. At the time of this visit the summer exhibition was about a month away. Mrs Katz told Levinson that the dates for the winter FTF exhibition were 24 - 27 July 1981. At that stage Levinson showed interest in exhibiting at the summer

exhibition .....

exhibition and without finally committing himself he took what was loosely described in the evidence as being "an option" on stand no 29 at the summer exhibition. During this visit there was no discussion as to the contractual terms on which the respondent allocated stands to exhibitors. Mrs Katz followed up her visit to the appellant's premises with a number of telephone calls during which she tried to badger Levinson into signing an application for a stand at the summer exhibition, but in the result Levinson decided that there was not enough time left to enable the appellant to exhibit at the summer exhibition.

On 28 February, 1981, and while the summer FTF was in progress, Levinson visited the Good Hope Centre in order to see for himself what the exhibition had to offer. At the exhibition, and while he was speaking with a business associate, Levinson was buttonholed by Mrs Katz who suggested that he should come with her in order to choose a stand for the forthcoming winter FTF. Levinson responded

by .....

by saying that he would see her later, to which Mrs Katz demurred by saying that unless Levinson signed at once all the available stands might be taken. Levinson was not moved by this admonition but his respite was brief. Some fifteen minutes later Mrs Katz made a further and more determined approach to him. On this occasion she told him that the time factor was crucial and she led him to a place where a plan of the forthcoming winter exhibition was on view. There Levinson indicated to Mrs Katz what stands at the winter FTF would be acceptable to the appellant whereafter Mrs Katz produced the form and asked him to sign it. She told him that his signature thereon would secure space for the appellant at the exhibition.

In regard to the manuscript particulars filled in on the face of the form it has been indicated earlier in this judgment what was respectively written by Levinson and Mrs Katz. But the sequence in which the particulars were

inscribed .....

inscribed might here be noticed. Levinson says that he filled in the particulars affecting his first choice of stands in paragraph 3 before he affixed his signature to paragraph 4. Having signed the form he walked away from the table where the signing had taken place when he was called back by Mrs Katz who required him further to furnish the particulars required above his signature (the appellant's name and address and his own name in print) in paragraph 4. He complied with this request but as he was in a hurry to attend a wedding he left immediately afterwards.

Levinson told the Court that he signed the form without reading it and that Mrs Katz had failed to direct his attention either to the provisions of paragraph 1 on the face of the form or the presence of the General Conditions on the reverse side thereof. In this connection Levinson further testified that although the invoice dated 5 March 1981 sent to the appellant was accompanied by a

photocopy .....

photocopy of the form, such copy was of the face of the form only; and that he actually saw the General Conditions for the first time after 6 May 1981 when, following a request by his legal advisers, a copy thereof was obtained from the respondent. Had he been aware at the time of the existence of the General Conditions, so testified Levinson, he would certainly not have signed the form. He gave the following reasons:-

> "The dates were crucial to me inasmuch as that we had planned an overseas trip and the new dates of the show conflicted with this. At that time, having been a smaller business, I was the only person that could appear on our stand ..... because of product knowledge. I was not available to be at the stand ..... It would not have been any gain for our company."

Levinson was subjected to a lengthy and pertinacious cross-examination. More particularly was the issue of his knowledge or ignorance of the existence of the General Conditions on the reverse side of the form carefully explored

by counsel for the respondent. The cross-examiner put to Levinson on no less than six separate occasions that during her visit to the appellant's office during January 1981 Mrs Katz had left with him a standard form contract relating to the summer FTF exhibition. This was firmly and consistently denied by the witness. It was further suggested to Levinson that Mrs Katz had in fact specifically called his attention to the General Conditions on the reverse side of the form. This suggestion was emphatically repudiated by Levinson. As to what had induced him to sign the form without reading it Levinson gave the following answers in cross-examination:-

> "Did you read this document? ----- No, I did not. Why not? --- Because the document was pushed in front of me and said 'Sign. At all costs sign otherwise you will not get a stand.' .....
> I chose to sign because of the pressure that had been brought upon me to sign .....
> MUNNIK J P : The pressure that you would lose the stands if you didn't sign? ----- No, the pressure of getting Mrs Katz off my back."

The .....

The trial Court accepted the testimony of Levinson. In this connection the following findings were recorded in the judgment of the Court below:-

> "Mr Levinson averred that his attention was not directed to the contents of paragraph 1 and to the fact that there were any conditions on the back of Exh B. In fact his recollec= tion was that Exh B was presented to him 'in pad form' presumably therefore as the top sheet of such pad. I have no hesitation in accepting Mr Levinson's evidence in toto. Not only was he a patently honest witness but Mrs Katz who was available was not called by the Plaintiff at any stage to contradict him ....."

The Court a quo tested the validity of the appellant's main defence by applying to the facts of the instant case the principles enunciated by this Court in George v Fairmead (Pty) Ltd 1958(2) SA 465 (A). In delivering the Court's judgment in that case FAGAN, CJ remarked at 471 A/D:-

> "When can an error be said to be justus for the purpose of entitling a man to repudiate his apparent assent to a contractual term? As I read the decisions, our Courts, in

applying .....

> applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in effect, said: Has the first party - the one who is trying to resile - been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself? (vide Logan v Beit, 7 S C 197; I Pieters & Company v Salomon, 1911 A.D. 121 esp. at pp 130, 137; van Ryn Wine and Spirit Company v Chandos Bar, 1928 T P D 417, esp. at pp 422, 423, 424; Hodgson Bros. v South African Railways, 1928 C P D 257 at p.261). If his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound."

The learned CHIEF JUSTICE then considered (at 471D/472A) the facts in three decisions (Mans v Union Meat Co 1919 AD 268; Curtis v Chemical Cleaning and Dyeing Company Limited 1951 (1) AER 631 (CA); Shepherd v Farrell's Estate Agency 1921 TPD 62) whereafter he observed (at 472A):-

> "When a man is asked to put his signature to a document he cannot fail to realise that he is called upon to signify, by doing so, his

assent .....

> assent to whatever words appear above his signature. In cases of the type of which the three I have mentioned are examples, the party who seeks relief must convince the Court that he was misled as to the purport of the words to which he was thus signifying his assent. That must, in each case, be a question of fact, to be decided on all the evidence led in that particular case".

In the present case MUNNIK, JP pointed out that paragraph 1 on the face of the form contained not only a reference to the General Conditions printed overleaf but also an undertaking by the intending exhibitor to be bound thereby. Having regard thereto the learned Judge-President decided that on receipt of the form the respondent was entitled reasonably to assume that the appellant had read what appeared above his signature on the form and that he intended to be bound thereby. Dealing with the averment in the plea to the effect that Mrs Katz had known that Levinson was unaware that the General Conditions were printed overleaf the Court below found that this allegation was not supported

by Levinson's evidence; and it then proceeded to say:-

> "Nowhere does he say that Mrs Katz knew that he was unaware that the General Conditions were printed on the obverse side of Annexure 'A' (i e Exh. 'B'). Furthermore in my view the fact that she did not advise him of the existence of the General Conditions is irrelevant since paragraph 1 contained a specific reference to the General Conditions and to the fact that they were printed overleaf."

In the result the learned Judge-President came to the con= clusion that the appellant had not discharged the onus of proving that his mistake was due to a misrepresentation either by the respondent or by its agent Mrs Katz. Having further found the only other defence persisted in by the appellant to be without foundation the Court below accordingly gave judgment for the respondent.

Now it is true, as pointed out by the learned Judge-President in his judgment, that in the course of his evidence Levinson nowhere expressly said that Mrs Katz knew

that .....

that he was unaware that the General Conditions were printed on the reverse side of the form. And it is also true that paragraph 1 of the form contained a specific reference to the General Conditions overleaf. But while these features of the case are undoubtedly relevant to the inquiry they do not in themselves determine the matter. Whether or not Levinson was misled as to the purport of the document to which by his signature he apparently signified his assent is a question which requires an examination of the full facts of the case. Whether at the time of Levinson's signature of the form on 28 February 1981 Mrs Katz did not know that Levinson was unaware of the existence of the General Conditions on the reverse side of the form depends upon the particular circumstances leading up to and surrounding his signature. The evidence rightly accepted by the trial Court shows that during her visit to the appellant's offices in January 1981 Mrs Katz neither left with the appellant a copy of the form

nor called his attention to the existence of the General Conditions; and that when Levinson signed the form in the presence of Mrs Katz he did so without reading it. In these circumstances it seems to me to be a perfectly legitimate inference that at the time when Levinson signed the form Mrs Katz knew that Levinson was ignorant of the existence of the General Conditions. In my view, however, the real inquiry in this case is not so much whether or not Mrs Katz knew that Levinson was unaware of the General Conditions but a somewhat narrower one. The more important questions which suggest themselves seem to me rather to be (1) whether Levinson had reason to believe that the form he was about to sign contained a provision which made him liable to pay the respondent even if the winter FTF were to be held not on 24 - 27 July 1981 but on different dates; and (2) whether Mrs Katz had reason to believe that Levinson would have been prepared to sign the form if he had known that he was about

to incur the liability aforesaid.

When Mrs Katz visited the appellant's offices in January 1981 she expressly informed Levinson that the winter FTF would be held on 24 - 27 July 1981. The form submitted by Mrs Katz to Levinson for his signature on 28 February 1981 proclaimed, by way of a prominent heading in bold print on the face thereof, that the dates of the winter FTF were 24 - 27 July 1981. Upon any realistic view of the matter, so it seems to me, the dates on which the exhibition was to be held represented the very sub= stratum on which the negotiations between the appellant and the respondent's agent were conducted. In my view it is almost self-evident that Levinson had no reason whatever for believing that the form which Mrs Katz was urging him to sign contained a provision compelling him to pay the respondent for an exhibition which might be held on dates other than 24 - 27 July 1981. And it seems to me further

that .....

that Mrs Katz had no reason for believing that Levinson would have been prepared to sign the form had he known that he was incurring such a liability. As to that, it is hardly a matter of surprise, I consider, that at the trial counsel for the respondent preferred not to call Mrs Katz as a witness.

Accepting then that Mrs Katz had no reason to believe that Levinson, if informed of the far-reaching and drastic provisions embodied in Clause 13 of the General Conditions, would have been prepared to sign the form she put before him, then in my judgment it was her plain duty specifically to direct the attention of Levinson to the existence of the particular provisions of Clause 13. If in such a situation Mrs Katz were to remain mute her silence would quite clearly, I think, involve a misrepresentation (although perhaps an entirely innocent one) as to the existence in the contract of a fundamental provision wholly at variance with and repugnant to the tenor of their negotiations

up .....

up to that very moment.

In my view of the facts in the instant case, therefore, upon a proper application of the principles stated in George v Fairmead (Pty) Ltd, (supra), the error into which the appellant felt may correctly be described as justus. This conclusion is fortified, I think, by a number of other leading decisions of our Courts, to only two of which reference need here be made. A useful illustration of the principles applicable to a situation in which a signatory to a contract labours under a substantial misapprehension as to its real effect is to be found in the well-known case of Shepherd v Farrell's Estate Agency 1921 TPD 62 ("Shepherd's case"). The advertisement of an estate agent read "Our motto : No sale no charge". Shepherd was induced by this adver= tisement to put his business into the hands of the agent for sale. He signed an agreement put before him by the agent which was not explained to him and the purport of

which he did not appreciate, to the effect that he would pay commission on any sale whether arranged through the agent or otherwise. Shepherd sold otherwise than through the agent, who sued for commission. On appeal from a decision of a magistrate the Transvaal Provincial Division (MASON, BRISTOWE & GREGOROWSKI, JJ) held that the agent could not succeed because in the circumstances he bore the onus of proving that he had explained to Shepherd the variance between the agreement and the advertisement; and he failed to discharge the onus. Although the appeal was decided on the question of onus the true principle underlying it has recently been elucidated in the judgment of this Court in the matter of Du Toit v Atkinson's Motors Bpk 1985(2) SA 893 (A). In discussing Shepherd's case, VAN HEERDEN, JA, who delivered the judgment of the Court, remarked at 904I/905B:-

"Of .....

> "Of die Hof se benadering aangaande die bewyslas (of weerleggingslas) juis was, is nie ter sake nie en kan daargelaat word. Wat van belang is, is dat B nie aan die betrokke bepaling gebonde gehou is nie omdat sy onkunde aangaande die bestaan of inslag daarvan toe te skryf was aan A se skuld. En hoewel MASON, R nie in soveel woorde so gesê het nie, kom dit my voor dat A se verwytbaarheid berus het op 'n wanvoorstelling aan sy kant; dws stilswye oor die inhoud van die dokument wat daarop bereken was om die indruk te skep, en inderdaad by A die indruk geskep het, dat dit nie 'n beding bevat het wat in stryd was met dit wat die advertensie in die vooruitsig gestel het. So beskou, is daar geen fout met die beslissing te vind nie."

(See further the comments upon Shepherd's case by HATHORN, J in Wallace Hatton (Pty) Limited v Craig 1931 NPD 539 at pp 553 - 554). Although Shepherd's case was not mentioned in the judgment of the Court a quo on the merits, that decision was relied upon in argument on behalf of the appellant in support of its unsuccessful application to the Court below for leave to appeal. In his further judgment refusing leave to appeal the learned Judge-President found Shepherd's case

to .....

to be entirely distinguishable on the facts -

> ".... since it cannot be said that the plaintiff attracted the defendant to sign the contract by means of a statement which it did not intend to carry out.. Even assuming that he was attracted by the words '24th to 27th July 1981', at the top of Exhibit B, there is nothing to indicate that when the contract was signed plaintiff did not intend to adhere to the dates 24th to 27th July. All the contract contained was the clause entitling plaintiff to change the dates."

Despite the obvious differences between the facts in Shepherd's case and the facts in the instant matter, the principle underlying the former case seems to me to be applicable to the latter. In each case the signatory in whose mind the plaintiff had earlier implanted a certain belief was at the time of the later contract misled as to the effect of the contract by the silence of the plaintiff. In the instant case it is, so I consider, entirely immaterial that as at 28 February 1981 the respondent may have cherished a firm intention to hold the winter FTF on 24 to 27 July 1981.

What is material, however, is that having negotiated with the appellant on the basis that the exhibition would be held on those dates the respondent's agent failed to disabuse the mind of the appellant by explaining to Levinson, when the form was put before him for his signature, that in the small print on the reverse side of the form there was a clause in terms whereof the respondent might with impunity alter the dates of the exhibition and nevertheless exact from the appellant payment in full.

Before us the case for the appellant was argued by Mr Dison. I should add that he was not counsel for the appellant at the trial. Mr Dison contended that the present case could not be distinguished in principle either from Shepherd's case or from the decision in Du Toit v Atkinson's Motors Bpk, (supra). It is useful at this stage to refer to the latter decision. There the respondent had placed a newspaper advertisement offering for sale a 1979 model of a

Mercedes-Benz .....

Mercedes-Benz motor car. On the strength of the advertise=ment the appellant negotiated with the defendant and agreed orally to buy the car. Before taking delivery of the car, and at the request of the respondent's sales manager, the appellant signed a document as buyer without reading it. The document nowhere stated the year of manufacture of the car but contained a clause excluding the respondent's liability for any representation affecting, inter alia, the year of manufacture of the car. The effect of this clause was not explained to the appellant who later discovered that the car delivered to him was in fact a 1976 model. An action by the appellant in the Cape Provincial Division for cancellation of the contract having failed, his appeal to this Court was upheld. The essential facts and their legal consequences were thus succinctly stated by VAN HEERDEN, JA at 906 C/G:-

"Samevattend .....

"Samevattend is die posisie dan soos volg: Die advertensie was daarop gerig om die indruk te verwek dat die voertuig 'n bepaalde attribuut gehad het, en om aanbiedinge vir die aldus omskryfde koopgoed uit te lok. Op sterkte van die indruk, waarvan die respondent bewus was, het die appellant die voertuig gekoop. Deur niks te sê aangaande die effek van para 6 van die dokument nie, het die respondent se werknemers ..... die vertroue by die appellant verwek dat die dokument nie strydig met die advertensie was nie en derhalwe nie aanspreeklikheid uitgesluit het nie ten opsigte van voorstellings daarin vervat. Handelende in hierdie vertroue het die appellant die dokument geteken, onbewus van die inhoud of effek van para 6.

Na my mening het die respondent dus deur stilswye die appellant mislei, en is sy dwaling aangaande die dokument wel justus error. Of die appellant as gevolg daarvan hoegenaamd nie aan die bepalings van die dokument gebonde is nie, is nie ter sake nie en kan tersy gelaat word. Op sy beste vir die respondent is die appellant nie gebonde nie aan para 6 insoverre dit aanspreeklikheid uitsluit vir voorstellings vervat in die advertensie."

I agree with the submission of counsel for the appellant that the present case falls to be decided by the

principle .....

principle enunciated in Du Toit v Atkinson's Motors Bpk, (supra). For the reasons aforegoing I conclude that in all the circumstances of the instant case the maxim "caveat subscriptor" does not avail the respondent and that the appellant is not affected with constructive notice of the relevant provisions of Clause 13 of the agreement. It follows, in my view, that the trial Court erred in its rejection of the main defence raised and that its judgment in favour of the respondent cannot stand. It will be recalled that the appellant pleaded that through a lack of consensus between the parties no enforceable contract whatever came into being. I would stress that for purposes of the present appeal it is necessary to decide no more than that, as the result of the appellant's justus error in regard to the effect of the contract, the respondent is not entitled to hold the appellant liable in respect of an exhibition held on dates other than 24 - 27 July 1981 by

invoking those provisions of Clause 13 of the General Conditions which govern the postponement of exhibitions.

It remains to consider whether the ancillary orders for costs (being (1) the costs of the summary judgment application and (2) the wasted costs occasioned by the appellant's unsuccessful application for better discovery and postponement) require modification. MUNNIK, JP ordered the appellant to pay both (1) and (2). Having regard to this Court's view of the merits of the appeal it follows that the respondent was not entitled to claim summary judgment; and that it should bear the costs of that application. In regard to the application for better discovery and postpone= ment the learned trial Judge remarked in his judgment:-

> "It seems to me that the simple basis on which the issue of these wasted costs should be decided is the time honoured principle of costs following the result. There are to my mind no particular circumstances calling for a departure from this rule."

Before .....:

Before us it was not suggested that in so approaching the issue of these costs the trial Court had exercised its discretion improperly and accordingly there is no good reason for departing therefrom. It follows that these costs too should be borne by the respondent.

In the result the appeal succeeds with costs. The judgment of the Court a quo is altered to read:-

> "Judgment for the defendant with costs, such costs to include the costs of the summary judgment application and the wasted costs occasioned by the defendant's application for better discovery and postponement."

G G HOEXTER, JA

JANSEN, JA)
VAN HEERDEN, JA)
GALGUT, AJA) Concur
NICHOLAS, AJA)