144/85

J DA C PEREIRA

and

H LANDMAN

Case No: 318/84

mp

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

J DA C PEREIRA — Appellant (Defendant a quo)

and

H LANDMAN — Respondent (Plaintiff a quo)

CORAM: KOTZé, HOEXTER, VAN HEERDEN, GROSSKOPF, JJA et NICHOLAS, AJA

HEARD: 1 November 1985

DELIVERED: 15 November 1985

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J U D G M E N T

HOEXTER, JA ....

HOEXTER, JA

On 2 April 1980, and at Boksburg, the appellant sold a stand in that town to the respondent. The deed of sale ("the contract") was embodied in a standard printed document consisting of three pages. The printed document was completed in manuscript by the appellant's attorney and then signed by the parties. The printed contract falls into two parts, the first of which is on page 1 of the document under the heading of "Preamble". Adjacent to printed matter on the left-hand side of page 1 the preamble provided blank spaces for completion before signature by the parties. Here were to be inscribed, for example, the names of the seller and the purchaser respectively; a description of the property sold; details of the amount of the purchase price and how it was to be paid; and the dates whereon transfer, possession and occupation of the

property .....

property sold were to be given.

In the preamble, and against the printed words "Purchase Price", there was written by hand:-

> "R24 000,00 TWENTY FOUR THOUSAND RAND ONLY.
> R7 000,00 ON 2.4.80 TO BE RELEASED TO SELLER IMMEDIATELY AND R7 000,00 ON 2.6.80.
> IF NOT PAID DEED OF SALE AUTOMATICALLY CANCELLED."
>
> (My underlining)

In what follows I shall refer to the provisions underlined by me in the above quotation as "the hand-written cancella= tion clause". Other blank spaces provided in the preamble were filled up in handwriting to provide that transfer of the property sold was to be taken and possession thereof was to be given on 2 June 1980, but that the purchaser would occupy the property sold from 2 April 1980 at a monthly rental of R150; that the costs of the deed of sale and the costs of transfer would be paid by the purchaser, and that

guarantees .....

guarantees would be furnished by 2 June 1980.

The second part of the contract was prefaced, at the top of page 2, by the following printed heading:-

> "Subject to the terms incorporated in the Preamble, the Purchaser and Seller agree that the Contract of Sale between them shall be subject to the following further provisions:-"

whereupon followed, on pages 2 and 3 of the document, fifteen printed clauses. Thereafter, and at the foot of page 3, blank spaces were provided for the signature of the seller and the purchaser respectively, together with the inscrip= tion of details affecting the date and place of signature in each case. I quote hereunder the provisions of the printed clauses 12 and 15:-

> "12. Subject to the right of the Seller to take necessary steps at all times to protect the land and improvements thereon, the Seller shall on non-compliance by the Purchaser of any of the provisions of this agreement,

send .....

send by prepaid registered post a notice to the Purchaser at his last known business or residential address, calling upon the Purchaser to remedy such non-compliance within 30 (thirty) calendar days, failing which the Seller shall be entitled to:

(a) cancel this agreement between the parties;
(b) retake possession of the property sold immediately after the lapse of the said period;
(c) retain as rouwkoop or as a pre-estimate of the Seller's liquidated damages all monies paid by the Purchaser;
(d) sue the Purchaser for any other loss or damage sustained by him as a result of such breach;

or alternatively:

(a) Claim the balance of the purchase price and interest and any other costs or charges forthwith on tender of transfer of the property to the same address by prepaid registered post, for which amounts the Purchaser shall supply the Seller with acceptable guarantees within ten (10) days of such notice.

.....

15. Should the Purchaser

(a) take steps to surrender his estate, or
(b) have a provisional order of Sequestration against him initiated or
(c) attempt to arrange a compromise or settlement of his debts with his creditors, or

(d) become ...

(d) become insolvent, the Seller shall be entitled to accept such action as a material breach of this contract and may, without notice to the Purchaser take the action referred to in paragraph 12(a), (b), (c) and (d)."

The respondent breached the terms of the contract governing the payment of the purchase price stated in the preamble. Having duly paid R7 000 on 2 April 1980 the respondent failed to make the second payment of R7 000 on or before 2 June 1980. By reason of this breach, and during July 1980, the appellant elected to cancel the contract and communicated this fact to the respondent. During August 1980 the appellant sent to the respondent a cheque for R6 780 in repayment of the respondent's initial payment of R7 000 less a deduction of R220 in respect of occupational interest. The respondent refused to accept the appellant's aforesaid cancellation of the contract. During September 1980 the respondent sought to enforce performance of the contract by instituting an action against

the appellant in the Witwatersrand Local Division. The appellant resisted the action and filed a counterclaim for ejectment of the respondent from the property sold.

The essential facts of the matter are common cause and they fall within a small compass. A minute of a pre-trial conference recorded, inter alia, the following:-

> "3.5 Dit is gemeensaak dat verweerder geen kennisgewing ingevolge die bepalings van klousule 12 van die ooreenkoms aan die eiser gegee het nie.
>
> 3.6 Verweerder het sy keuse om die ooreen= koms te kanselleer voor 17 Julie 1980 uitgeoefen en eiser so meegedeel....."

The sole issue at the trial (I quote again from the minute) was confined to the following narrow limits:-

> "2.1 Of die skriftelike ooreenkoms van 2 April 1980 (bundel bladsy 5) outomaties gekanselleer kon word weens eiser se versuim om die bedrag van R7 000,00 op 2 Junie 1980 te betaal en daardeur gekanselleer is en of verweerder aan eiser 'n skriftelike kennisgewing moes gegee het ooreenkomstig die bepalings van klousule 12 van die ooreenkoms alvorens dit gekanselleer kon word."

The said minute further noted an agreement that should the trial Court decide the sole issue in favour of the respondent the Court would order registration of transfer of the property sold in the name of the respondent, with costs, against payment of R10 000 by the respondent to the appellant; whereas if the issue were resolved adversely to the respon= dent the appellant would be entitled to an order, with costs, ejecting the respondent from the property sold.

The trial came before WEYERS, J. No witnesses were called and the trial Court was invited to decide the issue on the basis of the agreed facts. The learned Judge decided that the appellant had been legally obliged to give the respondent written notice in terms of clause 12 before cancelling the contract. Accordingly judgment was entered in favour of the respondent. With leave of the trial Court the appellant appeals to this Court against the whole of the judgment of the Court below.

I .....

I proceed to examine the reasons underlying the decision of the Court a quo. Upon a comparison of the provisions of the hand-written cancellation clause with the provisions of the printed clause 12 the trial Court arrived at the following conclusion:-

> "It is clear that there is a contradiction between the two .....the first purporting to deal with an automatic event without notice, and the second giving the option to purge his default."

Having regard to the contradiction found by it, and on the authority of decided cases such as Simmons v Hurwitz 1940 WLD 20; Bull v Executrix Estate Bull and Another 1940 WLD 133; Hayne & Co Ltd v Central Agency for Co-operative Societies (In Liquidation) 1938 AD 352 the trial Court accepted as "settled law" that:-

> "..... in such cases the handwritten clause carries more weight than the printed wording."

The above observation notwithstanding the learned Judge

shrank from applying the relevant principle. Immediately after the passage of the judgment quoted above the learned Judge went on to say this:-

> "However, the fact that the written word carries more weight than the printed word does not mean that clause 12 disappears or falls away."

To overcome the deadlock the Court a quo felt impelled, as a last resort in the process of interpretation, to invoke against the appellant the maxim verba fortius accipiuntur contra proferentem. By this path the trial Court finally arrived at the conclusion that the contract:-

> ".....envisages notice by registered post to the purchaser in all instances where it has not been specifically excluded as was done in clause 15, as was not done in the clause dealing with automatic cancellation."

Had the Court below in fact applied the principle governing the construction of contracts containing irreconcilable hand-written and printed provisions, it would

have .....

have been obliged to give full rein to the provisions of the hand-written cancellation clause; and there would have been neither need nor room for an invocation of the contra proferentem rule. It is unnecessary, however, to say anything further in this regard for the reason that I find myself unable to share the opinion of the learned Judge that the hand-written cancellation clause and clause 12 stand in opposition to one another. It is an established principle of interpretation that a written agreement ought to be so construed that effect is given to every clause in it; and that apparent inconsistencies should, so far as possible, be reconciled. In my judgment the hand-written cancellation clause and clause 12 are not so inconsonant as to be incapable of standing together in the same agreement. Indeed, for the reasons hereunder mentioned it seems to me that these two clauses may be quite naturally and satis= factorily reconciled.

From .....

From a passage in the judgment of the Court below to which reference has already been made it appears that the learned Judge found a contradiction between the hand-written cancellation clause and clause 12, such contra= diction residing in the feature that while the latter clause gives the purchaser an opportunity of purging his default before the seller is legally entitled to cancel, the hand-written cancellation clause purports -

> "... to deal with an automatic event without notice....."

Now it is clear that, in the absence of any agreement to the contrary, a party to a contract who wishes to exercise his right to cancel the contract must convey his decision to the mind of the defaulting party; and that cancellation does not take place until such communication is made. See: Swart v Vosloo 1965(1) SA 100 (A) at 105G. If I understand his judgment correctly the learned Judge seems to have

construed .....

construed the hand-written cancellation clause to be self-acting in the sense that the purchaser's failure to pay would result, ipso facto, and without any communication by the seller to the purchaser that the former had elected to cancel, in the termination of the contract. In my opinion the hand-written cancellation clause cannot be so construed. Despite the forcible language in which this clause is couched it is clear, I think, that the purchaser's failure to pay does not by itself, and without more, render the contract null and void. Upon non-payment by the purchaser the seller may elect whether to cancel the contract or to keep it alive and to insist upon its performance by the purchaser. See: Associated Manganese Mines of S A Ltd v Claassens 1954(3) SA 768 (A) at 774 A/B. Accordingly in the present matter the appellant was obliged to convey to the mind of the respondent (as in fact the appellant did) his decision to cancel. It follows that the trial Court

erred .....

erred in construing the hand-written cancellation clause as it did; and that the contradiction between the two clauses apprehended by the trial Court was more apparent than real. In arriving at its final conclusion the Court below sought further to rely on the feature that while clause 15 specifically dispenses with the need for prior notice to the purchaser, the hand-written cancellation clause does not. This feature of the contract does not, I consider, provide support for the construction which the Court below put upon it. Since paragraphs (a), (b) and (c) of clause 15 relate to the financial status and stability of the purchaser and not to non-compliance by the purchaser with any of the terms of the contract, it is tolerably clear, in my opinion, that the "notice" dispensed with in clause 15 can hardly be the same "notice" prescribed by clause 12. The latter notice calls upon the purchaser to remedy some or other breach by him of the contract's terms.

In .....

In my view a scrutiny of the hand-written cancellation clause and clause 12, in their full contextual setting, yields no real incongruity between their respective provisions. The scope and function of these two clauses are not the same, and they are designed to provide different and separate remedies. First, the hand-written cancellation clause may be invoked by the seller only in the event of a particular breach of the contract, namely, the purchaser's failure to pay an instalment of the purchase price. Clause 12, on the other hand, encompasses a breach of any of the terms of the contract. The last-mentioned breaches would include, for example, the purchaser's failure to pay the costs of the deed of sale or the costs of transfer; the purchaser's failure to pay a monthly rental in respect of occupation enjoyed by him prior to transfer; or the purchaser's failure to furnish acceptable guarantees within the stipulated period. Second, the event which entitles the

seller to cancel pursuant to the hand-written cancellation clause is the mere breach of the contract therein described; what on the other hand entitles the seller to cancel pursuant to clause 12 is not simply the breach of some term of the contract by the purchaser but the latter's subsequent failure, after the seller has sent him a notice by registered post, to remedy the particular breach. Third, the nature of the relief available to the seller under clause 12 differs radically from that provided by the hand-written cancellation clause. The ordinary rule is that a party repudiating a contract and seeking restitution must himself make restitution. It is therefore incumbent upon a seller who cancels a contract of sale to restore to the purchaser any part of the purchase price already paid him, unless it is part of the agreement that such should be forfeited upon the purchaser's default. Whereas the hand-written cancellation clause provides merely for cancellation (albeit a cancellation

taking effect immediately upon communication of his election to cancel by the seller to the purchaser), clause 12 provides that if the defaulting purchaser ignores the seller's notice and remains in default the seller may claim, in addition to cancellation, forfeiture of the monies already paid by the purchaser as rouwkoop or as a pre-estimate of liquidated damages. To sum up, therefore, upon the purchaser's failure to pay an instalment of the purchase price the seller, should he wish to cancel, has to decide whether he desires either (1) prompt and certain cancellation, with each party restoring to the other what has been given and received under the contract or (2) cancellation delayed by a period of thirty days in terms of the registered notice prescribed by clause 12, and further contingent upon the purchaser's failure to remedy his default; but which cancellation may be coupled with additional relief in the form of forfeiture of monies already paid by the purchaser.

For .....

For the reasons aforegoing it seems to me that, so far from being discordant, the two clauses in question harmonise; and that it is possible, without any real difficulty, to give effect both to the written words of the hand-written cancellation clause and the printed words of clause 12 in a fashion which lends practical efficacy to the contract. It follows that the trial Court should have resolved the issue before it in favour of the appellant and that its judgment cannot stand. In this Court the appellant was represented by both senior and junior counsel, but on behalf of the appellant it was fairly conceded that the problem of interpretation involved was not one of substantial difficulty and that an order allowing the costs of two counsel would hardly be appropriate.

In the result the appeal succeeds with costs, such costs to include the costs of the application to the

trial .....

trial Court for leave to appeal. The judgment of the trial Court is altered to read:-

> "Judgment with costs is entered in favour of the defendant and by agreement an order will issue ejecting the plaintiff, and all those claiming any right of occupation through him, from the property, being stand no 1456, known as Leeupoort Street, Boksburg."

G G HOEXTER, JA

KOTZé, JA )
VAN HEERDEN, JA ) Concur
GROSSKOPF, JA )
NICHOLAS, AJA)