150/85

125/83/AV

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

PHONE-A-COPY WORLDWIDE (PROPRIETARY)
LIMITED — Appellant

AND

JOHANNA MARTHA ORKIN — 1st Respondent

WILLIAM DOUGLAS ARMSTRONG — 2nd Respondent

CORAM: JANSEN, MILLER, VAN HEERDEN, JJA GALGUT and NICHOLAS, AJJA

HEARD: 1 May 1985

DELIVERED: 29 November 1985

J U D G M E N T

NICHOLAS, AJA

Mrs. Johanna Martha Orkin and Mr. William

Douglas .....

Douglas Armstrong (the respondents in this appeal, who were formerly married to each other), instituted an action in the Transvaal Provincial Division against PHONE-A-COPY WORLDWIDE (PTY) LTD (the present appellant) in which they claimed transfer of certain 12 flats in an existing block of flats in Pretoria. The parties stated a special case, in terms of Rule 33 of the Uniform Rules of Court, in which the agreed facts were set out and the issues stated. The case was heard by LE ROUX J who granted judgment in favour of the plaintiffs. (The judgment is reported sub nom. Orkin en 'n Ander v Phone-A-Copy Worldwide (Pty) Ltd 1983(3) SA 881(T), where the facts and issues are fully set out.) With the leave of

the .....

the Court a quo, PHONE-A-COPY (to which I shall refer as "the defendant") appeals against the whole of the judgment and order.

The case arose out of a written agreement of sale concluded on 10 July 1975 between PHONE-A-COPY WORLDWIDE (PTY) LTD as "THE SELLER", and

WILLIAM DOUGLAS ARMSTRONG & JOHANNA MARTHA ARMSTRONG
of Kronendal Hotel, Room 5G,
Pretorius Street
Pretoria

as "THE PURCHASER".

Clause 1 of the agreement reads as follows:

"1.

PREAMBLE

WHEREAS UNICADIA (EIENDOMS) BEPERK (The Owner Company) is, by virtue of

Certificate .....

Certificate of Consolidated Title No. 12014/1970, dated 27th April 1970, the registered owner of:-
Erf No. 1151 Arcadia, Registration Division J.R., Transvaal;
MEASURING
4493 (Four Thousand Four Hundred and Ninety Three) Square Metres;
whereon is erected a block of Eighty Eight (88) flats with garages and parking spaces, the said land with improvements aforesaid being mortgaged under First Mortgage Bond to THE BANK VAN JOHANNESBURG BEPERK;
AND WHEREAS the Owner Company, wherein the directors are identical to those of the SELLER, is about to prepare a Development Scheme ("The Scheme") under the Sectional Titles Act No. 66/1971 ("The Act") in respect of the said land with improvements aforesaid, and to apply to the City Council of Pretoria ("The Local Authority") for approval of the Scheme, and to the Registrar of Deeds for the Transvaal

("The .....

("The Registrar") for the registration of a Sectional Plan and the opening of a Sectional Register in respect of the Scheme;

AND WHEREAS unless and until the registration of the Sectional Plan and the opening of the Sectional Register aforesaid takes place, both parties are aware that this Contract will not enable the PURCHASER to obtain Sectional Title to the Unit hereby sold, but are nevertheless willing to conclude this Agreement, subject to the condition that if the registration of the Sectional Plan and the opening of the Sectional Register aforesaid cannot take place, then the SELLER shal be entitled to cause to be transferred into the name of the PURCHASER, in lieu of passing transfer of the Unit hereinafter mentioned, such number of shares in the Owner Company as the SELLER deems commensurate with the PURCHASER'S right to occupy the Sections....."

Clause 3 provides:

"3.

SUBJECT MATTER OF SALE

3.1 Subject to the further provisions of this Agreement and in particular those set forth in Paragraphs 1,2 and 19(b) hereof, the SELLER hereby sells to the PURCHASER who hereby purchases from the SELLER:-

(a) Flat Nos ("The Section") in the aforementioned block of flats known as UNICADIA; 402-403-404-405-406-407-202-203-204-205-305-304 (Twelve Flats).

(b) An undivided share in the common property, as defined in the Act and as applicable under the Scheme, to be apportioned to the Section in accordance with the Participation Quota (as defined in Section 24 of the Act) of the Section; (the Section and the said undivided share being collectively referred to as "the Unit").

(Clause .....

Clause 2 provides that the preamble is incorporated in the agreement, and clause 19(b) provides that -

"19.

(b) Should the SELLER not be able to obtain registration of the Sectional Plan and the opening of the Sectional Register aforementioned, the SELLER shall be entitled to cause to be transferred into the name of the PURCHASER, in lieu of passing transfer of the Unit, such number of shares in the Owner Company as the SELLER deems commensurate with the PURCHASER'S rights to occupy the Section."

The following definitions contained in s. 1 of the Sectional Titles Act No 66 of 1971 are relevant to the consideration of the preamble and clause 3:

"'common property', in relation to any

building .....

building or buildings in a scheme, means -

(a) the land on which the said building or buildings is or are situated; and

(b) such parts of the building or buildings as are not included in a section;

'development scheme' means a scheme in terms of which a building or buildings situated or to be erected on land is or are, for the purpose of selling, letting or otherwise dealing with parts of that building or buildings, divided or to be divided into two or more sections;

'land' means the land shown on a sectional plan as part of a scheme;

'participation quota', in relation to a section or the owner of a section, means the decimal fraction determined in accordance with the provisions of section 24(1) in respect of that section for the purposes referred to in section 24(2);

'quota .....

'quota', in relation to a section or the owner of a section, means the participation quota of that section;

'scheme' means a development scheme;

'section' means a section shown as such on a sectional plan;

'sectional plan', in relation to a scheme, means a plan -

(a) which is described as a sectional plan;

(b) which shows the building or buildings and the land comprised in the scheme as divided into two or more sections and common property; and

(c) which complies with the requirements of section 6;

and includes a plan in respect of an additional building or an extension of a building on the land shown on the sectional plan registered under this Act and a plan of subdivision of any section and a plan of resubdivision of any section defined on the sectional plan registered under this Act;

'sectional title register' means the register referred to in section 8(1)(b), and includes any sectional plan registered under this Act and the deeds registry's duplicate of any certificate of registered sectional title deemed to be incorporated in such register;

'undivided share in the common property' in relation to an owner, means the undivided share of that owner in the common property as determined in accordance with the quota of the section of which he is the owner, and, in relation to a section, means the undivided share in the common property apportioned to that section in accordance with the quota of that section;

'unit' means a section together with its undivided share in the common property apportioned to that section in accordance with the quota of that section."

In .....

In terms of s. 24(1) of the Act,

> "24.(1) The participation quota of a section or of the owner of a section shall be a decimal fraction, correct to three places, arrived at by dividing the floor area, correct to the nearest square metre, of the section by the floor area, correct to the nearest square metre, of all the sections in the building or buildings comprised in the scheme."

s. 3(2) of the Act provides that "a unit shall for all purposes be deemed to be land ....."

Of the issues set out in the special case, the Court a quo decided two: the first as to the sufficiency of the description in the agreement of sale of the property sold; and the second as to the validity of the cancellation of the agreement by the seller.

(a) .....

(a) Sufficiency of Description

It was submitted on behalf of the defendant that the description in clause 3 of the agreement of the property sold was not a sufficient compliance with the provisions of s.1(1) of the Formalities in Respect of Contracts of Sale of Land Act, No 71 of 1969, which provides that

> "No contract of sale of land .... shall be of any force or effect unless it is reduced to writing and signed by the parties thereto or by their agents acting on their written authority."

It is well settled that a provision such as this requires that there be set out in the writing the essential elements of a contract of sale, including a description of

the property sold. HOLMES JA said in Clements v Simpson 1971(3) SA 1(A) at 7 F-G:

> "The test for compliance with the statute, in regard to the res vendita, is whether the land sold can be identified on the ground by reference to the provisions of the contract, without recourse to evidence from the parties as to their negotiations and consensus."

It was argued in this Court (as in the Court a quo) that the description was inadequate "in respect of the section(s) sold and/or the common property and/or the participation quota." LE ROUX J held (at 895 H) that there was a proper description of the property as required by Act 71 of 1969.

In .....

In terms of the agreement, the res vendita (collectively referred to as "the Unit") comprises (a) "The Section" and (b) "an undivided share in the common property".

As to (a):

"The Section" is defined as comprising 12 specified flats, in the block known as UNICADIA.

It is clear that a property may be identified "by the name of the house or farm, as the case may be, by a street number or by a number on a general plan or survey". (Van Wyk v Rottcher's Saw Mills (Pty) Ltd 1948(1) SA 983(A) at 1005, and see the cases referred to in Forsyth & Others v Josi 1982(2) SA 164(N) at 172-173.)

The case of numbered flats is no different.

It is stated in the special case that UNICADIA is an existing block of flats, consisting of 88 flats, each of which is identified by a number attached to the front door. There is, therefore, no problem in applying, without the necessity of evidence from the parties, the language of clause 3(a) to the flats in situ. (Cf. Forsyth's case (supra) at 173 F.)

As to (b):

It is true that the "undivided share in the common property" could not be ascertained at the date of the agreement, but would become ascertainable only when a sectional plan was registered. That fact does not, however, in itself render the description insufficient.

In .....

In terms of s. 5(3) Act No 66 of 1971 an application for the opening of a sectional title register must be accompanied by a sectional plan relating to the scheme in question. "Sectional plan" is defined as a plan which inter alia complies with the requirements of section 6. In terms of s. 6(2) a sectional plan shall

" .....

(d) include a drawing to scale of each storey in the building or buildings shown thereon and define each section in the building or buildings with reference to the floors, walls and ceilings thereof (including any stoep, porch, balcony or projection), each section to be distinguished by a number;

(e) show the floor area to the median line of the boundary walls of each

section .....

section, correct to the nearest square metre, and the total floor area of all the sections, correct to the nearest square metre;

(f) have endorsed upon it a schedule specifying the quota of each section in the manner referred to in section 24(1) and the total of the quotas of all sections shown thereon;

....."

In terms of clause 3(b) of the agreement, the "undivided share in the common property" which was comprised in "the Unit" was "as defined in the Act and as applicable under the Scheme". In terms of the preamble, the scheme was to be prepared by the Owner Company and registered with the Registrar of Deeds. Upon such registration, the "undivided share" and the participation quota would be readily ascertainable "without recourse

to evidence from the parties as to their negotiations and consensus". Compare Tucker's Land and Development Corporation (Pty) Ltd v Kruger 1973(4) SA 741(A), in which the subject-matter of the contract there in issue was described as certain stands numbered with reference to a plan of a proposed township to be prepared by town planners. It was held that this was sufficiently precise to enable identification of the stands without recourse to the evidence of the parties concerned.

The conclusion is that "the Unit" was sufficiently described in respect of each of its components, i.e. "the Section" and "an undivided share in the common property".

LE .....

LE ROUX J was therefore right in deciding the first issue against the defendant.

2. Validity of Cancellation

Clause 4 of the agreement provided that the purchase price of the Unit was the sum of R109 500,00, payable in terms of sub-clause (d) in monthly instalments of not less than R1 181,00, subject to two provisions, the first of which is not applicable in the present case. In terms of the second,

> "(ii) the whole balance outstanding in respect of the purchase price hereunder and all interest due hereunder shall be paid in full not later than three (3) years after the date of signature hereof. Delivery by the PURCHASER of such bank or building society guarantees as may be required

by .....

by the SELLER in respect of the whole balance outstanding in respect of the purchase price hereunder and all interest as aforesaid, payable on registration of transfer, or alternatively, transfer of the shares in the Owner Company, referred to in Paragraph 19(b) hereof, and making provision for payment of interest up till date of transfer, or alternatively, transfer of the shares in the Owner Company, referred to in Paragraph 19(b) hereof, shall be deemed to be due fulfilment by the PURCHASER of his obligations aforesaid."

In terms of clause 12:

"12.

FORFEITURE AND CANCELLATION

Should the PURCHASER fail to pay any monies payable in respect of the purchase price hereunder, or any other monies payable under this Agreement

on .....

on the due date hereof, or should the PURCHASER fail to comply with any other obligation(s) under the Agreement within thirty (30) days after receipt by the PURCHASER of a letter handed over to the PURCHASER and for which an acknowledgement of receipt has been obtained, or after the posting of a letter, sent by prepaid registered post to the PURCHASER'S domicilium citandi et executandi, or to the PURCHASER'S last known residential or business address, informing the PURCHASER of the failure in question and making demand to the PURCHASER to carry out the obligation(s) in question within the said period of thirty (30) days, then and in such event, the SELLER shall be entitled, in addition to and without prejudice to any other rights available at law, to:-

(a) Either summarily cancel this Agreement; or

(b) Claim immediate payment of all monies payable in terms hereof,

as also damages and legal costs calculated on an attorney and client basis, including collection commission."

The parties made it common cause in the special case that the monthly instalments were paid punctually. The outstanding balance of the purchase price was, however, not paid within the said period of three years, namely, on or before 9 July 1978, or thereafter.

On 20 February 1980 the defendant's attorneys despatched by registered post to the plaintiffs, at the various addresses set out therein, a letter reading as follows:

"Our Ref: Mr Truter/V86

BY REGISTERED POST

Copies sent to: P O Box 781466
Sandton
2146

and to: 402 Unicadia Flats

734 Park Street

Arcadia

PRETORIA

0007

20th February, 1980

Mr W D Armstrong &

Mrs J M Armstrong

Kronendal Hotel

Room 5G

Pretorius Street

PRETORIA

0001

Dear Mr and Mrs Armstrong

DEED OF SALE DATED 10/7/75 IN RESPECT OF FLAT NUMBER 402,403,404,405,406, 407,202,203,204,205,305 and 304 UNICADIA FLATS: OUR CLIENT PHONE-A-COPY WORLDWIDE (PTY) LIMITED

We have been instructed by our client Phone-a-Copy Worldwide (Pty) Limited to claim from you, as we hereby do, immediate payment of the balance of the purchase price and interest due under the above-mentioned Deed of Sale.

In .....

In terms of clause 12(d)(ii) of the Deed of Sale the whole balance outstanding in respect of the purchase price and all interest due under the Deed of Sale should have been paid in full not later than three years after the date of signature of the Deed of Sale.

We hereby, on behalf of our client, inform you in terms of clause 12 of the Deed of Sale of your failure to comply with the terms of the Deed of Sale by not having paid the balance of the purchase price and interest aforesaid and hereby demand that the outstanding balance of the purchase price and all interest due under the Deed of Sale be paid within 30 (Thirty) days from the date of receipt by you of this letter.

Should you fail to make payment of the whole balance of the purchase price and all interest due under the Deed of Sale within 30 days from the date of receipt by you of this letter our

client .....

client shall, without prejudice to any other rights available at law, be entitled to summarily cancel the said Deed of Sale.

Yours faithfully

TRUTER & WESSELS

per:"

(The reference to clause 12(d)(ii) was an error - it should have been to clause 4(d)(ii). Nothing however turns on this mistake.)

The letter addressed to the plaintiffs at Kronendal Hotel was returned by the post office to the sender, marked "Gone away - no address left". The copy of the letter addressed to the plaintiffs at Unicadia Flats was similarly returned. The copy addressed to P O Box 781466, Sandton, which was at that time the

postal .....

postal address of Mrs. Orkin, was received by the plaintiffs: by Armstrong on 15 March 1980, and by Mrs. Orkin on 18 March 1980.

On 15 April 1980, the defendant sent, by registered post to the plaintiffs, at the various addresses set out therein, a letter in the following terms:

-

"Our Ref: Mr Truter/ms/V86

15 April 1980 BY REGISTERED POST

Copies to: Kronendal Hotel
Room 5G
Pretorius Street
PRETORIA
0002

and 402 Unicadia Flats
734 Park Street
ARCADIA, Pretoria
0083

Mr .....

Mr and Mrs Armstrong

P O Box 781466

SANDTON

2146

Dear Mr and Mrs Armstrong

DEED OF SALE IN RESPECT OF FLAT NUMBERS 402,403,404,405,406,407,202, 203,204,205,305 and 304 UNICADIA FLATS -CLIENT: PHONE-A-COPY WORLDWIDE (PTY) LTD

We refer to the above matter and to our letter of the 20th February, 1980. We have now been instructed by our client to advise you, as we hereby do, that our client has, as our client was entitled to do, cancelled and hereby ex abundanti cautela again cancels the above agreement with you as you have failed to comply with the terms of the agreement in that you failed to pay the outstanding balance of the purchase price within 30 days from date of receipt of our letter dated the 20th February, 1980 which letter

was, as stated therein, a demand in terms of clause 12 of the agreement. We are forwarding a copy of this letter to your attorneys, Messrs Rooth & Wessels of Pretoria for their attention.

Yours faithfully

TRUTER & WESSELS

per."

The letter addressed to P O Box 781466, Sandton was received by the plaintiffs: by Mrs. Orkin on 21 April 1980, and by Mr. Armstrong on 26 April 1980. The copies of the letter sent to the two other addresses were not delivered but were returned by the post office marked respectively "Gone away - no address left" and "Unknown".

This letter evoked the following reply:

"Mr .....

"Mr Truter/V86

Mr Van Zyl/mvv/381/80

13th May 1980

Messrs Truter & Wessels

P O Box 506

PRETORIA

0001

Dear Sirs

Phone-a-Copy Worldwide (Pty) Ltd /
Mrs J M Orkin (previously Armstrong)

We are acting on behalf of Mrs J M Orkin who has handed us your letter of the 15th ultimo with instructions to reply thereto.

Our client denies having received the demand provided for in Clause 12 of the agreement, and in particular denies having received the letter dated 20th February 1980 referred to in your aforesaid letter.

By virtue of your failure to give notice to our client as provided for in the agreement your client is not

entitled .....

entitled to cancel the agreement and the purported cancellation contained in your aforesaid letter is hereby rejected.

We have also been instructed to, as we hereby do, request of you a detailed statement showing the present balance outstanding.

Kindly acknowledge receipt hereof and furnish us with the aforesaid statement at your earliest convenience.

Yours faithfully

GROBBELAAR & VAN ZYL

Per N L van Zyl

Messrs Unimart (Pty) Ltd

P O Box 1625

RIVONIA

2128

copy for your information."

Clause 12 of the agreement, which is set out above, entitled the seller to summarily cancel the agreement inter alia should the purchaser fail to pay any

monies .....

monies payable in respect of the purchase price. That right to cancel was exercisable without notice.

It was, however, common cause that the Sale of Land on Instalments Act, No 72 of 1971 applied to this transaction. (This Act was amended by the Sale of Land on Instalments Amendment Act, No 49 of 1975, which came into force on 1 January 1976, which was after the date of the conclusion of the agreement of sale and it was agreed between the parties that Act No 72 of 1971 applied in its unamended form.)

The 1971 Act provided in sections 4(1), 13(1) and 16:

"4. (1) A contract shall contain -

(a) .....

(a) the names of the purchaser and the seller and their addresses in the Republic which shall serve as domicilium citandi et executandi for all purposes of the contract."

13. (1) No seller shall, by reason of any failure on the part of the purchaser to fulfil an obligation under the contract, be entitled to terminate the contract or to institute an action for damages, unless he has by letter handed over to the purchaser and for which an acknowledgement of receipt has been obtained,or sent by registered post to him at his last known residential or business address, informed the purchaser of the failure in question and made demand to the purchaser to carry out the obligation in question within a period stated in such demand, not being less than 30 days, and the purchaser has failed to comply with such demand.

16. Notice of change of an address stated in a contract in terms of section 4(1)(a), shall be given in writing and shall be delivered or sent by prepaid registered post by one party to the other."

It was held in Maharaj v Tongaat Development Corporation (Pty) Ltd 1976(4) SA 994(A) that

1. Sec 13(1) postulates two alternative methods of informing the purchaser of any default on his part and demanding that it be remedied within the period stated in the letter (being not less than 30 days):
   (a) by handing the letter over to the purchaser and obtaining an acknowledgement of receipt therefor; or
   (b) by sending it by registered post to the purchaser at his last known residential or business address.

   The seller is entitled to choose either one of the two alternative methods (at 1000 A-B)
2. The Legislature intended that, where the letter is posted, it should reach the purchaser, or, at least, be made available to him at an address where he is

likely .....

likely to be placed in possession thereof (at 1001C-D).

3. The period mentioned in the letter (being not less than 30 days) begins to run from the date on which it is received by the purchaser (at 1001 H).

In the present case, the letter sent to the plaintiffs at the Kronendal Hotel (which in terms of s. 4(1) of the 1971 Act was for all purposes of the contract their domicilium citandi et executandi) was not received by them.

The only letter which they did receive was that addressed to P O Box 781466 Sandton. There is nothing in the special case to say that P O Box 781466 Sandton was the last known residential or business address. All that is said is that it was at the relevant time the

postal .....

postal address of Mrs. Orkin. Does that mean that, even though it was received by the plaintiffs, it was ineffective for the purpose of s. 13(1)?

In Nordvaal Konstruksie Maatskappy (Edms) Bpk v Booysen 1979(2) SA 193(T), it was held at 196 G that the words in s. 13(1) and s. 16 of the Act, as amended by Act No 49 of 1975, were couched in peremptory terms, and that strict compliance with the requirements of the sections was essential to the cause of action of the seller who relied on a cancellation of an agreement of sale on instalments.

That case does not, however, bear on the question which arises for decision here.

It .....

It is unnecessary for present purposes to consider whether the whole of what is prescribed in the original sec. 13(1) in regard to delivery of the letter was peremptory. The only question for decision now is whether it was peremptory in so far as it specified "the last known residential or business address".

It has been recognised by this Court on more than one occasion that a statutory provision can be in part directory and in part peremptory. See Maharaj & Others v Rampersad, 1964(4) SA 638(A) at 645 E-F.

No general rule can be laid down as to when a legislative provision is directory only, and when it is

peremptory, with an implied nullification for disobedience.

See Leibrandt v South African Railways 1941 AD 9 at 12 in fine. In that case DE WET CJ adopted the words of LORD PENZANCE in the case of Howard v Bodington 2 P.D. 203:

> "I believe as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."

(See also Maharaj & Others v Rampersad (supra) at 643 F-G.)

Adopting .....

Adopting this approach, I have come to the conclusion that the provision as to "the last known residential or business address" was merely directory.

The general object of sec 13(1) was to ensure that the purchaser himself should be notified of his failure to fulfil an obligation under the contract and the time within which he is required to remedy it.

(Maharaj v Tongaat Development Corporation (Pty) Ltd (supra) at 1000-1001.)

There is no special significance in the "last known residential or business address". It is merely the last address of which the seller happens to have knowledge, and it may not be the address of the purchaser

in .....

in fact. It is not necessarily the address which, in terms of the contract read with s. 4(1)(a) of the 1971 Act, "shall serve as domicilium citandi et executandi for all purposes of the contract". (See Maharaj v Tongaat Development Corporation (supra) at 1001 C). Even if the letter is posted to that address, it is ineffectual unless the purchaser himself receives it. In providing for the method (b), the Legislature contemplated the possibility that a handing over to the purchaser might not always be possible or convenient. The alternative method was prescribed for the benefit of the seller (ibid at 1000 G-H). Provided that the letter sent by registered post is received by the purchaser,

it is a matter of no consequence that it was not sent to his last known residential or business address.

If, of course, the question of delivery of the letter should be in issue, evidence that it was sent by registered post to the purchaser's last known residential or business address, and not returned, would constitute *prima facie* proof of the delivery of the letter to the purchaser (*ibid* at 1001 D). But where (as in the present case) delivery is not in issue it is of no importance that it was not sent to that address.

The conclusion is that the fact that the letter, although received by the plaintiffs, was not received at their last known residential or business address does not make it in-

effectual .....

effectual.

It was submitted on behalf of the plaintiffs that the letter dated 20 February 1980 did not comply with the requirements of s. 13(1), in that it did not inform them what they were required to do in order to avoid the consequences of default; more specifically, they complained that it was not possible for them to establish or calculate the balance outstanding "in respect of the purchase price and all interest due under the deed of sale" to enable them to comply with the demand.

What .....

What had to be ascertained was whether the conditions set out in s. 13(1), on which the seller's right to terminate the agreement of sale was dependent, had been fulfilled. If the conditions had been fulfilled, then the right came into existence. Cf. Rautenbach v Venner 1928 TPD 26 at 30 in fine. It was only if the notice had been in such terms as to make it difficult for the plaintiffs to understand the details of what was demanded from them that it might be said that they had not received such notice as was contemplated by the section (ibid at 31).

In terms of s. 13(1) it was necessary for the seller to inform the purchaser of the failure to fulfil any obligation under the contract. That it did:

it informed them of the failure to pay (as required by) clause 12(d)(ii) - actually of clause 4(d) (ii), the balance of the purchase price and interest. What that balance was, was as readily capable of ascertainment by the purchasers as it was by the seller. The seller demanded that the purchasers carry out that obligation within the period of 30 days. When they failed to comply with the demand, the seller became entitled to terminate the agreement.

The final question was whether the cancellation was premature, and this can be shortly dealt with.

The period of 30 days prescribed by s. 13(1), began to run from 18 March 1980, and expired on 16 April

1980 .....

1980. It was submitted on behalf of the plaintiffs that the purported cancellation in the letter dated 15 April 1980 was, therefore, premature, and this submission was upheld by the Court a quo. (See 1983 (3) SA at 891).

HOLMES JA observed in Swart v Vosloo 1965(1) SA 100 (A) at 105 G that

> "it must be taken as settled that, in the absence of 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 cancellation does not take place until that happens."

Consequently, although the letter of cancellation was posted before the expiry of the period of

30 days, it did not take effect until it was received by Armstrong on 26 April 1980, which was after the period had expired. The cancellation was accordingly not premature.

The agreement of sale was, therefore, validly cancelled, and the plaintiffs should not have succeeded in their action. As a result the order made by the Court a quo must be set aside.

The appeal is upheld with costs, including the costs of two counsel. The order made by the Court a quo is set aside, and there is substituted therefor an order dismissing the plaintiffs' claims with costs, including the costs of two counsel.

H C .....

H C NICHOLAS AJA

JANSEN, JA
MILLER, JA
VAN HEERDEN, JA } Concur
GALGUT, AJA