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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

ADRIAN CHARLES NASH ..... appellant

and

GOLDEN DUMPS (PROPRIETARY) LIMITED... respondent

Coram: CORBETT, MILLER, HOEXTER, VAN HEERDEN et NICHOLAS JJA.

Date of hearing: 18 February 1985

Date of judgment: 27 March 1985

J U D G M E N T

CORBETT JA: In this appeal the appellant is Mr Adrian Nash. I shall refer to him as Nash. The respondent is a company known as Golden Dumps (Pty) Ltd ("Golden Dumps").

/ Nash.....

Nash instituted action against Golden Dumps in the Witwatersrand Local Division claiming certain relief (the nature of which I shall detail later). After a protracted trial the Court ordered absolution from the instance and made a special order as to the costs of the case. With the leave of the Court a quo Nash now appeals against the whole of the judgment to this Court. The essential facts giving rise to the dispute between the parties may be summarized as follows.

Golden Dumps was incorporated in 1977. At all times material the chairman of, and sole shareholder in, the company was a Mr Loucas Pouroulis. Pouroulis, a Greek Cypriot by birth, emigrated to and settled in South Africa in 1964. He held a diploma in what he described as "mining engineering and metallurgical engineering" from the National Technical University of Athens. After his arrival in South Africa he obtained employment in the mining division of the Anglo American Corporation at the East Daggafontein Mines.

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While there he worked on the re-evaluation of the mine to see whether there were sufficient ore reserves to justify a continuation of mining. In 1971 he left the Anglo American Corporation to start his own business. In the course of time he acquired a large number of claims in respect of mines which had been closed down and where the mining rights had lapsed, and also certain surface rights, which entitled him to search for and extract gold which had been left behind in slimes dumps, rock dumps and elsewhere in and around the mining plant. In the exercise of these rights he carried out highly profitable "clean-up" operations at the East Daggafontein and South Roodepoort mines. He also conducted underground mining operations with some considerable success. In 1978 a company known as Modder 74 (Pty) Ltd ("Modder 74") was formed to establish a plant at the New Modderfontein Mines for the recovery of gold there by a new method of recovery, called

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the carbon-in-pulp method. Pouroulis was the sole shareholder in Modder 74. The function of Golden Dumps was to hold on his behalf certain of the mining rights acquired by Pouroulis and to provide management services for the group.

In 1979 Pouroulis acquired a 20% interest in Government Gold Mining Areas Limited ("GGMA") and Golden Dumps took over the management of GGMA. The other major shareholder in GGMA was Mercabank Ltd ("Mercabank"). At the time the managing director of Mercabank was a Dr C Ferreira. In late 1979 and as a result of a suggestion emanating from Ferreira negotiations commenced for the take-over by GGMA of Pouroulis's shareholding in Modder 74 and his other mining interests. These negotiations continued into 1980 and eventually on 26 June 1980 Mercabank published an announcement to the effect that agreement had been reached in principle that (I mention only the more important and relevant matters) the L C Pouroulis

/ Group.....

Group mining interests in the East Rand would be acquired by GGMA against the issue to Pouroulis of 4 300 000 ordinary shares in GGMA in consideration of a purchase price of approximately R6 000 000; that the name GGMA would be changed to Consolidated Modderfontein Mining Limited ("Modderfontein"); and that application would be made to the Johannesburg Stock Exchange to have the shares in Modderfontein listed. The announcement further stated that this agreement was subject to the approval of the Government, of the shareholders in general meeting and of the Johannesburg Stock Exchange. This proposed transaction was generally referred to in the evidence as "the merger". Some six months were to elapse, however, before (on 6 January 1981) a formal agreement giving effect to the merger was executed. It was during this period of six months that the events giving rise to the dispute between the parties occurred.

It had become apparent that the management team employed by Golden Dumps, whose strength lay in mining metallurgy, lacked someone with financial and administrative expertise.

/ Pouroulis.....

Pouroulis was accordingly on the look-out for someone with the right qualifications, who could be appointed to the position of financial director of the group and could act as his "second-in-command". He discussed his problem several times with a business associate of his, a Mr David McKay, a director of Rand Merchant Bank. Towards the end of July/beginning of August, 1980 McKay mentioned to Pouroulis that Nash was coming to South African from England and that he might be the man that Pouroulis was seeking.

At that time Nash was living in London. He was the proprietor of a small company known as Global Oil Limited and was engaged in what he described as "commodity trading and commission broking", particularly in the crude oil market. During 1980 he found it very difficult to make a reasonable living and he and his wife thought it would be a good idea to emigrate. He decided to come to South Africa to try to find employment here and, if successful, to start

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a new life here. He spoke to McKay, an old friend, and McKay promised to do what he could to assist him.

Nash arrived in South Africa on 7 September 1980. McKay met him and he was invited to stay at McKay's home. The first person Nash was introduced to was Pouroulis. They met at the home of Pouroulis on the evening of 7 September. Thereafter they met on a number of other occasions prior to Nash's return to London on 20/21 September. Pouroulis described to Nash the composition of his group and its activities and the nature of the proposed merger. He also told Nash that he was looking for a financial director. Nash made a good impression on Pouroulis and on the other senior executives in the group.

One of the matters which was raised in discussions between Nash and Pouroulis was the possibility of raising money

/ overseas.....

overseas in order to provide working capital for the new company to be created in terms of the merger. There is some dispute in the evidence as to the background to and nature of these discussions concerning the raising of working capital. According to Nash, Pouroulis told him that for the merger to be successful he needed a substantial amount of investment capital. Nash indicated that he knew "certain people" overseas, including some Arab institutions, who might be interested in providing the investment capital. Pouroulis then asked him to "look around" and try to find such an investor on his return to London. If Nash found someone who was interested in principle, he was to inform Pouroulis, who would then join him in London and continue the negotiations. Nash was to have no authority to conclude any contract. Pouroulis told Nash that if he (Nash) could successfully introduce the investor, he (Pouroulis) would make available to him

/ (Nash).....

(Nash) a large block of shares in the new company at a substantial discount.

During the course of their discussions Pouroulis also told Nash that he planned to "internationalize" the group, ie undertake mining and associated projects overseas, and in this connection Pouroulis stated that he was investigating a project in Venezuela. Pouroulis also wished to have the shares of the company listed on the London Stock Exchange. He asked Nash, while in London, to make preliminary enquiries in regard to these matters as well.

On 19 September 1980, according to Nash, he had lunch with Pouroulis. During the course of conversation the latter indicated that the position of financial director would be offered to Nash and, since Nash would require some time to explore the possibilities of finding an investor, 15 October 1980 was agreed upon as a suitable date for him to

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commence employment with the company. Pouroulis said that he would put this in writing. After lunch a letter was drafted and handed to Nash by Pouroulis. It is written on a Golden Dumps letterhead and is signed "L.C. Pouroulis Chairman." It is dated 19 September 1980. The body of the letter reads as follows:

> "Dear Adrian
> I am pleased to be able to offer you a position with our Group in the capacity of Financial Director with effect from 15th October 1980.
>
> Your commencing salary will be R60 000,00 per annum, and you will have the free use of a Mercedes 230 Automatic motor car.
>
> On conclusion of your negotiations abroad of all matters concerned with the re-organisation and amalgamation of Modderfontein Seventy-Four (Pty) Limited and Government Gold Mining Areas (Modderfontein) Consolidated Limited, you will be entitled to 200 000 shares in the new company broken down as follows:
>
> 75 000 at 1c each
> 75 000 at 50c each, and
> 50 000 at R1,00 each."

Nash.....

Nash stated in evidence that, after the letter was handed to him, he looked at it and "accepted it" (meaning, presumably, the offer contained in the letter). It was then that he learned for the first time the number of shares that were being offered to him and the prices. On the following day Nash left for London. Pouroulis's version of the events leading up to the writing and handing over of this letter differs from Nash's mainly in regard to whether the shares were promised as a quid pro quo for introducing an investor. I shall refer to his contrary version later.

Shortly after arriving in London Nash made approaches to a Mr Henry Howard, a certain Mr Omar Namouk, an executive of the First Arabian Trading Corporation, and a solicitor, Mr Anthony Lawson-Smith of the firm Spinks, Lawson-Smith, Berry and Co. He had various meetings and discussions with them. Namouk, in particular, showed interest. On

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30 September Nash telephoned Pouroulis and told him what he had achieved. It was agreed that Pouroulis would come to London on 6 October. On the following day Nash sent a telex to Pouroulis listing the information and documents that the latter should bring with him to London. On the same day Nash had a discussion with Lawson-Smith, as a result of which it was arranged that Pouroulis should meet a Mr Gordon of the stock-broking firm of Laing and Cruickshank. It appears from the evidence that Laing and Cruickshank is one of the largest broking firms in London and that it specialises in the raising of money for mining purposes. The initial aim of this meeting with Mr Gordon is a factual issue between the parties, with which I shall deal later.

Pouroulis duly arrived in London on Monday 6 October 1980. On that day and the next day (Tuesday) Pouroulis met Henry Howard, Omar Namouk and Lawson-Smith.

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The meeting at the offices of Laing and Cruickshank took place on Wednesday 8 October. Although there is some dispute as to exactly what happened at this meeting, the essentials are clear. Shortly after the meeting had commenced and it had become apparent what Pouroulis was seeking, viz. the raising of investment capital, a Mr Tim Hoare was called in. Hoare, a director of Laing and Cruickshank, was in charge of "international affairs and mining" and had a special knowledge of the South African gold mining industry. As he put it, it was his job "to know everything that happens inside the South African gold mining industry". He had heard of Pouroulis and knew about the proposed merger. He suspected from the start that Pouroulis was "looking for money". Pouroulis outlined the group's mining rights and activities. Hoare was impressed with what he heard and told Pouroulis that if these facts were all correct he (Hoare) "would try very hard to raise the money for him".

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They discussed the amount of money that would be required. Pouroulis mentioned a figure of R10m. Hoare suggested an amount of R15m. Hoare advised that the simplest way of raising the money was by way of a rights issue underwritten by Laing and Cruickshank. He explained in evidence that when Laing and Cruickshank underwrote a rights issue in this way, it arranged for the issue to be sub-underwritten by a number of financial institutions, with whom Laing and Cruickshank shared the underwriting commission. Hoare also advised Pouroulis that, as an incentive, there be a private placing of shares with the institutions asked to act as sub-underwriters. Hoare told Pouroulis that he would be visiting South Africa in about three weeks' time and would then visit the mine and further investigate the whole proposition. Hoare asked that in the meanwhile he be given a feasibility study, covering the whole project, by 14/15 October 1980.

Pouroulis returned to South Africa on 8 October.

/ Nash.....

Nash stayed behind. According to Nash, Pouroulis was delighted with the result of the meeting with Laing and Cruickshank and instructed Nash to notify the First Arabian Trading Corporation that he no longer wished to proceed with negotiations with it. Nash did so. Nash was also asked, before leaving London, to prepare and deliver the feasibility study requested by Hoare. This was done. Hoare then indicated that he would need a fuller feasibility report, showing full capital expenditure schedules, profit and loss forecasts, and generally giving much more detail.

Nash returned to South Africa on 17 October 1980 and assumed his position as financial director of Golden Dumps and the group. At the invitation of Pouroulis he stayed from then until his return to London on 8 December 1980 at the former's home. He and other executives of the group worked on an expanded feasibility study. Towards the end of October Hoare visited the mine and on the same day the new feasibility study was handed to him. At about the same time Lawson-Smith came to South

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Africa in order, as he put it, "to lend a helping hand in getting the package together". Hoare examined the project and had discussions with Pouroulis and others. On 11 November 1980 Hoare came to "an agreement in principle" with Pouroulis that Laing and Cruickshank would go ahead with "the deal".

As Hoare explained, however, an agreement in principle was "a long way from" an underwriting agreement. There was much to be done by the company in putting together a prospectus, obtaining the necessary approvals and so on. On Hoare's side, he had to persuade the board of Laing and Cruickshank to agree to underwrite the rights issue; he had to persuade a suitable number of financial institutions to agree to act as sub-underwriters; and he had to organize the rights issue at the London end. One of the practical problems at this juncture was an unstable gold price. It reached a high point of over $700 at about the time of the negotiations in October/November 1980, but after that showed a rapid decline

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and by mid-December was hovering around the $600 mark. This tended to sap the confidence of would-be investors.

On 8 December 1980 Nash returned to London. Now that (as he thought) his future was settled, he had to settle his affairs in London, arrange for the removal of his possessions to South Africa and for his wife and child to travel to South Africa. While in London he also attended meetings with Lawson-Smith and Laing and Cruickshank in regard to the merger and the rights issue. He kept in telephone and telex communication with Pouroulis. On 22 December he returned to Johannesburg with his wife and baby son. They stayed at the house of David McKay, who was elsewhere on holiday. Theyspent Christmas day at the home of Pouroulis. On that occasion, according to Nash, he raised with Pouroulis the question of the transfer to him of the 200 000 shares referred to in the letter of 19 September. Pouroulis reassured him that

he would arrange to have the matter concluded shortly. (Nash had prior to this made the necessary arrangements with his bank to provide the funds to pay for the shares.) In evidence Pouroulis denied this conversation about the shares.

Two days later, on 27 December, came the bombshell. Nash attended a meeting at the company offices at the request of Pouroulis. Present, apart from Pouroulis himself, were the managing director, Mr Holmes, Mr Willis, the company's security officer, and Pouroulis's secretary. The meeting was tape-recorded and a transcript, put in as an exhibit at the trial, gives a full and explicit account of what occurred. From the start and, as the trial judge aptly put it, "in language redolent of the gutter", Pouroulis launched into a violent personal attack on the wholly unsuspecting Nash. It is not easy to follow portions of this somewhat rambling tirade, but in essence Pouroulis charged

Nash with various administrative shortcomings, eg not arriving at meetings on time or at all, with having misrepresented his background and qualifications or not having disclosed certain discreditable facts in regard thereto, and with having misused his position as financial director, eg by attempting to change the group's attorneys, running up excessive telephone bills, etc. One of the main complaints was that it had been represented to Pouroulis that Nash was a chartered accountant and had an engineering degree and that Pouroulis had ascertained that this was not true. (This alleged representation later constituted one of the issues at the trial.) Pouroulis concluded this so-called meeting by informing Nash that he was dismissed, with immediate effect, from his position in the company. At no stage was Nash given any opportunity to answer the charges against him. Indeed, when on a few occasions he intervened and asked to be given a chance to explain, Pouroulis rudely shut him up and

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continued with the tirade. Pouroulis later conceded under cross-examination that he was "not interested" in Nash defending himself in any way.

What induced Pouroulis to take this action and behave in this fashion? It would seem, from the evidence, that initially Pouroulis was very impressed with Nash. Nash was charming and articulate. Pouroulis took an immediate liking to him. He offered Nash the position of finance director without any real investigation of his background and qualifications. Subsequently, largely as a result of comments made by others, eg Lawson-Smith and Hoare, he began to entertain doubts about Nash's competence and suitability for the position. This culminated in his sending Willis to London early in December 1980 with instructions to investigate Nash's background and the truthfulness of a curriculum vitae which Nash had provided towards the end of November. Willis returned from London on 23 December and made a verbal report to Pouroulis

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over the telephone. He followed this with a written report delivered to Pouroulis on 27 December. Pouroulis read it shortly before the meeting at which Nash was dismissed. The report is a damning document. It reflects adversely on Nash's competence, qualifications, private and domestic life, on the correctness of some of the claims made in Nash's curriculum vitae, on Nash's financial position, on his character in general and on his business integrity. If the report is correct, it demonstrates Nash's unsuitability for the position to which he had been appointed by Pouroulis. The report obviously enraged Pouroulis, evidently a man of few inhibitions, and this accounts for his behaviour at the meeting of 27 December.

In the new year Nash reacted. On 6 January 1981 his attorneys wrote a letter to Golden Dumps, for the attention of Pouroulis. The letter was delivered by hand and received by Pouroulis on 8 January. The relevant portion of this letter

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reads as follows:

"We have been consulted by and act for Mr A C Nash.
We understand from Mr Nash that on the 29th December 1980 you purported to terminate his employment with the company and that such purported termination constituted an unlawful repudiation of the contract as recorded in a letter from you to Mr Nash dated the 19th September 1980. Mr Nash hereby accepts such repudiation and cancels the contract on the grounds of such repudiation.

In terms of this contract with you our client, in addition to his salary and certain other benefits, was entitled to the transfer to him of 200 000 shares in Government Gold Mining Areas (Modderfontein) Consolidated Limited (to be renamed Consolidated Modderfontein Mines Limited) on the following basis:
75 000 shares at 1-cent each;
75 000 shares at 50-cents each;
50 000 shares at R1,00 each.

Our client's entitlement to the transfer of those shares was to arise upon the conclusion of his negotiations overseas 'of all matters concerned with the reorganisation and amalgamation of Modderfontein Seventy-Four (Pty) Limited and Government Gold Mining Areas (Modderfontein) Consolidated Limited'. We are instructed that these negotiations were successfully concluded by our client prior to the 29th December 1980.

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> Accordingly, our client hereby tenders payment of the sum of R85 750,00 against delivery of the shares in negotiable form to us. Payment will be by way of a currently dated bank guaranteed cheque. Should delivery of the shares not be made to us by close of business on Friday, 9th January 1981, our client will institute proceedings to compel such transfer."

On 9 January the attorneys acting for Golden Dumps replied, denying liability and refusing to accede to Nash's demands.

In the meanwhile the parties concerned went ahead with the implementation of the merger and the rights issue. Towards the end of December 1980 difficulties arose because of the aforementioned fluctuations in the gold price. The sub-underwriters became nervous and there was uncertainty about the price at which the new shares were to be offered. Pouroulis went to London to assist Hoare in persuading sub-underwriters to participate and generally in the implementation of the project. Ultimately they were successful. On 6 January 1981 the acquisition agreement giving effect to the merger was concluded between Pouroulis

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and GGMA and on the following day the underwriting agreement, between GGMA and Laing and Cruickshank, was signed. Significant dates in the implementation of the rights issue were: 22 January 1981, being the date of the general meeting of shareholders of GGMA called to approve the merger and the rights issue (which involved an increase in authorised and issued share capital); 26 January, commencement of dealings in letters of allocation; 30 January, the opening date of the rights offer; and 20 February, the closing date of the rights offer.

In February 1981 Nash instituted his action against Golden Dumps claiming delivery of 200 000 shares in negotiable form in Modderfontein, against which Nash tendered payment of the sum of R88 250, being the total cost of such shares in terms of the letter of 19 September 1980. Certain other claims were also made, but they later fell away and need not be mentioned. In his particulars of claim Nash alleged :-

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(1) the conclusion of "an oral agreement" between the parties, the "material terms whereof" were set forth in the letter of 19 September;

(2) that it was an implied term of the agreement that the shares in the new company, referred to in the letter, would be delivered to Nash by Golden Dumps upon the date the shares were issued or, alternatively, on the date they became available in negotiable form - these dates being alleged to have been 22 January 1981 and 26 January 1981 respectively;

(3) that pursuant to the agreement Nash concluded negotiations abroad on all matters concerned with the reorganisation and amalgamation of Modder 74 and GGMA; and

(4) that in the premises he was entitled to delivery of the shares claimed.

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Further particulars were requested, inter alia, as to the nature of the negotiations to be concluded abroad, and these were furnished by Nash. I shall refer to these particulars in more detail later. Golden Dumps pleaded, in essence (I shall elaborate later) –

(1) the conclusion of an oral agreement between the parties "in or about" September 1980, of which the letter of 19 September was said to be "a brief confirmation" and alleged that this agreement contained terms which are different from those alleged by Nash;

(2) that Nash had failed to do what was required of him under the contract;

(3) that Nash had made to Pouroulis, acting on behalf of Golden Dumps, material misrepresentations which induced Golden Dumps to enter into the contract, viz. that he held a B.Sc degree in engineering conferred

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on him by a university and that he was a qualified chartered accountant (other misrepresentations were alleged, but not pressed at the trial), and that on 27 December 1980 Golden Dumps had accordingly cancelled the agreement with Nash and terminated his employment with immediate effect; and

(4) that in the circumstances Nash was not entitled to the shares.

Various sets of further particulars and a replication followed, but it is not necessary at this stage to refer to these, save to note a denial in the replication that Nash made the misrepresentations alleged.

The main findings of the trial Judge (COETZEE J) at the conclusion of the trial appear to have been -

(a) that the agreement between the parties as reflected in the letter of 19 September was -

"... a typical remuneration package of a senior executive in a substantial company.

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It combines a big salary with a motor car and a share option...."

and that the portion of the agreement relating to the shares did not constitute a separate mandate;

(b) that Golden Dumps had failed to prove the alleged misrepresentations;

(c) that the condition upon which Nash's right to the shares depended (viz. that everything necessary for the successful launching of the reconstituted and recapitalised company (Modderfontein) had been done) had been fulfilled on 7 January 1981, when the underwriting agreement was signed;

(d) but that inasmuch as Nash's right to these shares had accrued due, and become enforceable as a cause of action only after the cancellation of the contract, Nash was precluded by the principle of law stated in Crest Enterprises (Pty) Ltd v Rycklof / Beleggings.....

Beleggings (Edms) Bpk, 1972 (2) SA 863 (A)

from enforcing his right to delivery of the shares.

Hence the order of absolution from the instance.

As to credibility, the trial Judge had the following to say about the main protagonists, Nash and Pouroulis:

> "As far as the plaintiff is concerned, I did not get the impression that, generally speaking, he was as a witness, unworthy of belief. Various aspects I think, as I've already pointed out, he possibly over-emphasised whilst under-emphasising others, e.g. his view of the agreement was less probable than that of Pouroulis, but he was generally quite careful and not given to extravagance or over-statement. Pouroulis is almost the opposite. He is a strange amalgam of smooth efficiency and crudity, of generosity and cruelty. His is an overbearing bulldozing personality. He can be utterly impatient and impetuous. This was particularly demonstrated in the witness box. Very frequently he would hardly have gathered the general drift of the questioner's question, even that of his own counsel, before completely ignoring it and confidently propounding whatever he had in his own mind, as if the speaker's enquiry did not exist..... In the course of carrying on in this fashion in the witness box he, at times, recklessly disregarded the truth, for the moment."

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The learned Judge then proceeded to give examples in support of his general assessment of the credibility of Pouroulis. In all it amounts to a fairly devastating indictment. It appears to me to be well justified.

I proceed now to consider the merits of the appeal.

First the contract: What constituted the contract between the parties and what was its meaning and effect? Despite what had been stated in the pleadings, it was common cause in argument before this Court that the letter of 19 September constituted a written offer to Nash, which the latter accepted verbally or, at any rate, by conduct. As to the meaning and effect of the letter, however, the parties were very far from being ad idem. It was Nash's case that the letter comprised (i) an employment "package", viz. appointment as financial director of the group with effect from 15 October 1980 at a commencing salary of R60 000 per annum and including the free use of a motor-car, and (ii) a mandate

/ to.....

to conduct negotiations abroad, upon the successful conclusion of which he (Nash) would become entitled to 200 000 shares in the new company at the prices stipulated. In evidence Pouroulis, on behalf of Golden Dumps, presented a fundamentally different interpretation of the contract. According to him, the entire letter merely set out Nash's employment package, which included the appointment to the position of financial director and, by way of remuneration, a salary, free use of a motor-car and a share option. He denied that the share option was in any way linked to what Nash had been asked to do in London; nor had he said that it was in discussions leading up to the conclusion of the contract. Had Nash still been employed by the company when the shares became available he would have been entitled to purchase them, irrespective of whether he was a good or bad financial director. In support of his version Pouroulis pointed to the fact that other senior employees of the company.

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The trial Court, as I have indicated, preferred the version put forward by Pouroulis. With reference to the submission of Nash's counsel that the letter of 19 September contained a mandate, COETZEE J said:

> "The plaintiff's difficulty is that this letter of the 19th September 1980, which is the agreement between the parties, does not say anything like this at all. A mandate has to be tortured out of it. Making allowance for the fact that it was composed in a hurry and that the letter itself is not explicit (and in certain respects, vague) it seemed to me on the first reading to be a typical remuneration package of a senior executive in a substantial company. It combines a big salary with a motor car and a share option. After taking into account every background and surrounding fact urged upon me by Mr Grbich, this remains my impression after a last reading of this letter. I think that the probabilities are really overwhelmingly against the plaintiff."

With respect, I am unable to agree with this conclusion. The letter itself expressly links Nash's entitlement to the shares with the conclusion of his (Nash's)

/ negotiations.....

negotiations abroad of the matters mentioned. This is wholly inconsistent with the notion that the share option was merely part of Nash's remuneration package, to which he would, willy-nilly, have become entitled had he still been the financial director when the shares in the new company became available. Moreover, in evidence Pouroulis, who after all drafted the letter, was hard pressed to explain the words "On conclusion of your negotiations abroad.....". He appeared to concede at one stage that once the negotiations were concluded and the merger successfully completed Nash would become entitled to the shares, but almost immediately thereafter added: "But as part and parcel of him being a financial director". He explained that he wrote the words in question "in the heat of the moment"; and at one stage went so far as to suggest that the "negotiations" mentioned in the letter did not refer to the period while Nash was in England between 19 September and 15 October but to some other unspecified time:

/ "Later. Could.....

"Later. Could be the next year."

On the other hand, the only link between the share option and the employment package is that they are contained in the same letter. Bearing in mind, however, that both the employment package and the mandate to conduct negotiations abroad had been discussed by the parties and that the purpose of the letter was to record what had been agreed upon between them, this is not surprising. What is surprising is that if, as Pouroulis insists, Nash's entitlement to the shares was solely dependent on his being financial director when the shares became available, Pouroulis should have drafted the letter the way he did.

A fundamental weakness in the case as presented by Pouroulis on behalf of Golden Dumps is the fact that Pouroulis's version of the contract as given in evidence by him is not to be reconciled with what, on his instructions, had been stated in the

/ respondent's...

respondent's plea. Here it was alleged that in terms of the agreement Nash was required, with regard to the amalgamation and reconstruction of the companies (Modder 74 and GGMA) to do a number of things, including the finding of "a prospective lender abroad" of the moneys required to finance the merger project, and that upon the conclusion of a contract between such lender and the reconstructed company, and the issue of shares in the new company, Nash would be entitled to purchase shares in the new company in the quantities and at the prices stated in the letter of 19 September. The plea went on to allege that, for various reasons, Nash had failed to perform his "mandate" (the plea uses this very word) and, therefore, did not become entitled to receive any shares. It is to be noted that the version of the contract thus given in the plea broadly accords with that advanced by Nash, both in his pleadings and in evidence. Pouroulis, on the other hand,

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was not able adequately to explain the disparity between his version of the contract, as given in evidence, and the plea.

The trial Judge considered that the probabilities were "overwhelmingly" against Nash's version of the contract. In so far as it is relevant and permissible to have regard to probabilities arising from the circumstances surrounding the conclusion of the contract, they appear to me to favour Nash's version rather than Paroulis's. The evidence establishes that as at 19 September 1980 Pouroulis was keen to go ahead with the merger, but that a substantial injection of investment capital was urgently needed to make the merger a viable proposition. Pouroulis, under cross-examination, resisted the suggestion that he was then "desperate for money", but the objective facts tend to belie his denial. Modder 74 was running at a substantial loss, had never declared a dividend and owed the State some R498 000. Golden Dumps had a bank overdraft of about R500 000. GGMA was operating at a substantial loss

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and was also non-productive of dividend income. There was, therefore, reason for Pouroulis to be prepared to reward substantially any person who succeeded in finding abroad the necessary investment capital. In this connection I may mention that it was common cause that the parties to the contract contemplated that Pouroulis would provide and make available to Golden Dumps the shares in the new company (Modder) required to discharge the obligation to Nash. Pouroulis was due to acquire 4 300 000 such shares in terms of the merger and could thus provide the shares without difficulty.

The size of the share option given to Nash is a factor of some significance. It far exceeded the number of shares (50 000) granted by way of option to, e g, the managing director, who had been in the service of the company for a number of years. This suggests, on the probabilities, a reward for a successful conclusion of negotiations to be

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conducted abroad rather than the ordinary incentive shares given to senior executives. It is true that Pouroulis may well have also had in mind that Nash was to be a senior member of his management team and visualized him holding a number of company shares, but it does not follow from this that the real consideration for the shares was not to be the successful conclusion of negotiations abroad or that Nash would qualify for the shares only if he was the financial director at the time of their issue.

For these reasons I am of the view that, contrary to the finding of the Court a quo, the share option contained in the letter of 19 September was contingent, as the letter indicates, on the successful conclusion by Nash of the negotiations abroad. It was in effect the reward for the carrying out of a mandate.

/Continuing.....

Continuing with the interpretation of the contract, the next matter to be considered is what negotiations were contemplated by the agreement. The letter merely speaks of "your negotiations abroad of all matters concerned with the reorganization and amalgamation" of Modder 74 and GGMA. In order to identify what negotiations the parties had in mind it is permissible to have regard to the evidence as to what was arranged in this connection by Nash and Pouroulis. According to the further particulars to plaintiff's (Nash's) claim, "reorganization" and "amalgamation" in this context were understood by the parties to mean —

"(i) The acquisition by GGMA of certain of the mining interests of one L C POUROULIS ("POUROULIS"), the sole shareholder of the Defendant's issued shares in East Rand and the entire issued share capital of MODDERFONTEIN 74;

(ii) The raising of additional working capital for CONSOLIDATED MODDERFONTEIN MINES LIMITED ("CONSOLIDATED MODDERFONTEIN") for its proposed mining activities after the acquisitions referred to in paragraph (i) above;

/ (iii) The.....

(iii) The execution of all matters incidental and necessary to give effect to the aforegoing."

This appears to be borne out by the evidence. In effect, therefore, Nash's main task was to introduce someone overseas who was prepared to provide the additional working capital required to enable the new company Modderfontein to carry on its proposed mining activities. About this there does not appear to be much dispute. It is implicit in this that the negotiations referred to in the letter were to be successful negotiations. This was common cause.

To sum up, I am of the view that the last paragraph of the letter of 19 September did constitute a separate mandate in terms whereof it was provided that if Nash successfully concluded abroad negotiations which were aimed mainly at introducing a source of additional working capital, he would become entitled to purchase 200 000 shares in the new

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company, if and when the new company was formed and the shares became available. Thus, the mandate having been successfully carried out, Nash's entitlement to the shares was still contingent upon the occurrence of a future uncertain event and could be implemented only after that event had occurred.

The next issue to be considered is whether Nash did what he was required to do in order to earn the right to the 200 000 shares in the new company. The trial Judge found that Pouroulis —

> "..... conceded that whatever Nash could have done 'abroad', had been done by the 15th October 1980 and he (meaning Pouroulis) was obviously then very satisfied with what Nash had achieved at that stage."

A conclusion that Nash had done what was required of him to earn the right to the shares is also implicit in the Court's finding that by 7 January the condition upon which Nash's right to the shares depended had been fulfilled; and generally in the Court's reasons for non-suiting Nash on the ground of the Crest Enterprises principle.

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In my view, this conclusion is amply borne out by the evidence. There is no question that, through Lawson-Smith, Nash introduced Pouroulis to the firm of Laing and Cruickshank; that Laing and Cruickshank were interested in the project from the moment of introduction; that Laing and Cruickshank ultimately entered into an underwriting agreement with GGMA; and that this underwriting agreement enabled GGMA (later called Modderfontein) to raise the required working capital by way of a rights issue.

It was submitted on behalf of respondent that Nash did not effect the introduction of Laing and Cruickshank to Pouroulis at all; and that, in any event, the purpose of the meeting at which Pouroulis met Gordon and Hoare, of Laing and Cruickshank, on 8 October was not the raising of money, but to discuss the listing of shares on the London Stock Exchange (the so-called 163 listing). The first of

/ these.....

these submissions may be likened to grasping at a straw. It is based on certain evidence given by Pouroulis that on a number of occasions prior to September 1980 he had heard from a stockbroker in South Africa, a Mr Peter George, that if at any time he needed to "raise finance" for "the merged operation" Laing and Cruickshank of London would be interested in helping him to do so; and on evidence given by Hoare that he knew and kept in touch with Peter George and from him had heard about Pouroulis. Pouroulis's evidence in this regard is, to my mind, somewhat suspect; and, in any event, I do not think that it assists the respondent's case. If Peter George did give Pouroulis this information about Laing and Cruickshank (and here it is to be noted that George was not called as a witness), it is strange that, when the company urgently needed working capital, Pouroulis should not, of his own initiative, have approached Laing and Cruickshank, either directly or through

George; or, at any rate, have instructed Nash to do so while in London. Moreover, it is also strange that, when Pouroulis was told in London that a meeting had been arranged with Laing and Cruickshank, he should not have mentioned to either Lawson-Smith or Nash that this was the very firm George had advised him to approach about finance. Having regard to these factors and also bearing in mind the finding by the trial Judge in regard to Pouroulis's credibility generally, I find this evidence unconvincing. Be that as it may, the person who was actually instrumental (through Lawson-Smith) in bringing together Pouroulis and Hoare, of Laing and Cruickshank, was Nash. There is no gainsaying this introduction. Nor do I think that the fact that Hoare may have heard, in some vague fashion, about Pouroulis before the meeting makes any difference. This prior knowledge may have made Hoare more receptive to the approach by Pouroulis, but it does not, in my view, detract from the significance and efficacy of the introduction by Nash.

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The submission that the purpose of the meeting was not to discuss the raising of money is also, in my opinion, without foundation. One's immediate reaction to this submission is: if that is so, then it is remarkable how quickly discussion at the meeting turned to the raising of money. Nash's evidence is that the meeting was arranged in order to discuss the raising of capital. This is contradicted by Lawson-Smith. Lawson-Smith's evidence in this regard appears to be unreliable. The arrangements for the meeting were made tentatively by Lawson-Smith on 2 October, some four days before the arrival of Pouroulis in London. It is clear from the contemporary notes made by him that on 1 October he had a lengthy meeting with Nash at which he was fully informed as to the proposed merger and the plans for development and expansion by the new company. The notes of this meeting conclude with the following:

/"Cash .....

"Cash requirement for 4 ventures and SA
is $20 m. Still short. Recommended
Laing and Cruickshank.
(Richard Morris)."

Under cross-examination Lawson-Smith conceded that money-raising was discussed at this meeting (and that he recommended Laing and Cruickshank in this connection), but he drew a distinction between money required for overseas development and that required for the South African development of the merged interests of Pouroulis and GGMA. The need for the latter, he says, was raised for the first time on either 6 or 8 October, and then by Pouroulis. I find this alleged distinction between external and internal capital requirements improbable and unconvincing. It also appears to be contradicted by Lawson-Smith's note (quoted above); and at one stage in his evidence he virtually conceded this. If, as seems probable, Nash on 1 October discussed with Lawson-Smith all the capital requirements of the group and Lawson-Smith recommended in this connection Laing and Cruickshank, it seems inescapable that one, at any rate, of the

/ purposes.....

purposes of the meeting with Laing and Cruickshank was to discuss the raising of capital for the merger and the South African operations of the new merged company. At that stage the plans for overseas development were somewhat nebulous and the need for such capital not urgent. The need for "South African capital", on the other hand was real, clearly defined and urgent. It may be that a 163 listing was also on the agenda for the meeting (and that in this regard Nash's evidence to the contrary is incorrect), but in that event it was merely a minor item compared with the raising of capital.

Respondent's counsel raised certain other arguments in support of the submission that Nash did not "earn" his entitlement to the shares. None of them, in my view, is well-founded; and they do not merit discussion.

On appeal respondent's counsel also argued the defence of misrepresentation, which foundered in the Court

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a quo. In his judgment COETZEE J dealt comprehensively and cogently with this defence. Nothing was said in argument on appeal to show that his conclusion was wrong. I am convinced that it was correct and I agree with the reasons given. I do not consider it necessary to elaborate. This defence, therefore, cannot succeed.

I come now to the final issue in the case, viz. the applicability of the principle laid down in the Crest Enterprises case. Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to "repudiate" the contract (see Van Rooyen v Minister van Openbare Werke 1978 (2) SA 835 (A), at 845 A-B). Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon

/ communication.....

communication of his acceptance of repudiation and rescission to the party who has repudiated (see 5 LAWSA par 226). The consequence of this is that the rights and obligations of the parties in regard to the further performance of the contract come to an end and the only forms of relief available to the party aggrieved are, in appropriate cases, claims for restitution and for damages. Where, however, a right to performance under the contract has accrued to one party prior to rescission, this right is not affected by the rescission and may be enforced despite rescission. This rule was enunciated by GREENBERG J (with SOLOMON J concurring) in Walker's Fruit Farms Ltd v Sumner, 1930 TPD 394. In the Crest Enterprises case, supra, it was held (at p 870 G) that -

> "....the rule in the Walker case, supra, is confined to cases where, prior to the rescission of a contract by one party's acceptance of the other's repudiation, there exists a right which is accrued, due, and enforceable as a cause of action independent of any executory part of the contract."

/ It.....

It would seem that a similar rule applies in English law, see Hyundai Heavy Industries Co Ltd v Papadopoulos and Others 1980 [2] All ER 29 (HL), at pp 34-6, 39-40, 45.

It was common cause in the present case that Nash's right to receive the 200 000 shares in the new company, against payment of the option price, did not become "accrued, due and enforceable as a cause of action" until after 8 January 1981, the date upon which Nash's letter of rescission was delivered by hand to Golden Dumps. The Court a quo concluded that in view of this, and applying the rule stated in the Crest Enterprises case, Nash's rescission of the contract on 8 January 1981 precluded him from enforcing a right to delivery of the shares. The learned Judge nevertheless expressed the feeling that non-suiting Nash appeared to him to be an "inequitable" application of the rule, since by 8 January there was nothing further that Nash had to do or could do. Nash "...was indeed entitled to what was about to be created, of which

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there was certainty in the minds of all the persons concerned and involved in the scheme. They, of course, included the very parties to the contract". The learned Judge suggested that this Court might add a suitable qualification to the rule in order to avoid inequitable results. In the view I take of the matter it is unnecessary to consider this suggestion.

The trial Judge's conclusion was probably an inevitable consequence of his holding that the letter of 19 September, as accepted by Nash, constituted "a typical remuneration package", combining a salary, the use of a motor-car and a share option. Contrary to this, I have found that the share option was the consideration or reward for carrying out the mandate relating to the successful conclusion of negotiations abroad.

This mandate was quite distinct from Nash's duties as financial director under his contract of employment. In fact at the time when the agreement was made on 19 September 1980 it was contemplated that the negotiations would be completed, successfully or otherwise, prior to 15 October 1980, the date upon which Nash's contract of employment was due to

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commence. In truth, therefore, though the employment contract and the share option/negotiation mandate were contained in the same agreement and were linked in a practical sense, juristically they were separate agreements, with independent sets of reciprocal rights and obligations. (Cf. Wessels, Law of Contract, 2nd ed., par 1615). This general view of the contract leads one, in my view, to a conclusion different from that reached by the trial Judge in regard to the applicability of the rule in the Crest Enterprises case.

When Pouroulis dismissed Nash from his position as financial director, he made no mention whatever of the share option. His repudiation related, and must be taken to have been intended to relate, only to the employment contract. In the circumstances it was, in my opinion, open to Nash to accept the repudiation of the employment contract only; and his acceptance thereof would not affect the rights and obliga-

tions relating to the share option. (See 5 LAWSA par. 226; De Wet and Yeats, Kontraktereg en Handelsreg, 4th ed., pp 155-6; Christie, Law of Contract, pp 522-3; cf Salzwedel v Raath 1956 (2) SA 160 (E), at p 163 E - F). Indeed, it may be doubted whether in the circumstances it was open to Nash to do more than accept repudiation of the employment contract.

What did Nash do? He wrote, or caused to be written, the letter of 6 January 1981. The full text of the relevant portion of this letter has been quoted above. The letter is somewhat unclear in that, having averred that Golden Dumps purported to terminate Nash's employment with the company and that such purported termination constituted an unlawful repudiation of "the contract" as recorded in the letter of 19 September, it proceeds to state that Nash accepts such repudiation and cancels "the contract" on the grounds of such repudiation. The use of the words "the contract" in this context is somewhat ambiguous. The words may be intended to refer only to the contract of employment or they may refer to both the

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contract of employment and the mandate. Two factors, however, point to the former alternative. Firstly, Pouroulis, acting on behalf of Golden Dumps, had only purported to terminate the contract of employment. Nash appreciated this, and in fact the letter refers to this. Secondly, after announcing Nash's acceptance of the repudiation, the letter proceeds to refer to Nash's entitlement to the 200 000 shares in Modderfontein and to demand delivery of the shares against payment of the option price. This clearly negatives any suggestion of a rescission of the contractual obligations relating to the shares. It is true that the letter seems to indicate that Nash and his attorneys thought that his entitlement to the shares had already accrued at the time of writing, but, in my view, that cannot gainsay the whole tenor of the letter which is: "I accept the termination of my employment as financial director, but I insist upon the implementation of the obligation of Goden Dumps to deliver the shares to me".

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In view of the legal separability of the contract of employment and the mandate, it was competent for Nash to adopt this attitude and, in my judgment, that is in substance what he did. If that is so, then clearly the Crest Enterprises principle does not apply because the rights and obligations of the parties in regard to the share option/mandate were never rescinded.

On appeal, respondent's counsel raised the argument that Nash's summary dismissal had been justified. The trial Judge rejected a defence based on a similar argument on the ground that it had not been properly pleaded. Before us respondent's counsel sought to remedy this by applying for leave to amend respondent's plea and asking that the matter be remitted to the Court a quo for the hearing of further evidence on this issue. Respondent's counsel conceded, however, that if the Court's finding were that the contract of employment and

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the mandate were separable, this defence and the applications to amend and for remittal fell away. Accordingly, no more need be said of this.

For these reasons I am of the view that Nash is entitled to the order claimed by him.

The appeal is allowed with costs and the order of the Court a quo is altered to read:

"(1) Defendant is ordered to deliver to plaintiff 200 000 shares in negotiable form in Consolidated Modderfontein Mines Limited against payment by plaintiff to defendant of the sum of R88 250,00.

(2) Defendant is ordered to pay costs of suit."

M M CORBETT

MILLER, JA)
HOEXTER, JA)
VAN HEERDEN, JA) CONCUR.
NICHOLAS, JA)