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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

VIRGINIA LAND AND ESTATE COMPANY LIMITED ..... FIRST APPELLANT

TUCKERS LAND AND DEVELOPMENT CORPORATION (PROPRIETARY) LIMITED ... SECOND APPELLANT

and

VIRGINIA CENTRAL CITY PROPERTIES (PROPRIETARY) LIMITED ..... RESPONDENT

CORAM : VILJOEN, VAN HEERDEN, GROSSKOPF, NESTADT, JJA et NICHOLAS AJA

HEARD : 14 SEPTEMBER 1987

DELIVERED : 27 NOVEMBER 1987

J U D G M E N T

VILJOEN, JA

The litigation in this matter commenced in the form of an application on notice of motion brought

by the/.....

by the respondent against the two appellants (hereinafter referred to as Virginia Land and Tuckers respectively) and third respondent who is not a party to this appeal, praying for an order declaring that the "purported" cancellation by Tuckers on the 7th November 1980 of the sale of certain stands by Virginia Land to the respondent, is of no force and effect. In support of this contention the respondent relied upon, firstly, a written variation of the agreements of sale in terms of which, it was alleged, extension was granted to pay outstanding balances on the stands purchased; secondly, on the invalidity of the notice which was given to remedy the breach by the respondent of the deeds of sale; thirdly, on estoppel,

fourthly, on waiver, and fifthly, on the exceptio doli generalis. Answering and replying affidavits were filed which disclosed a number of factual disputes which could not be decided on paper. The matter was, consequently, referred by Van Reenen J for the hearing of oral evidence on those issues and eventually, after a fairly lengthy hearing, Moll JP delivered a judgment in which he rejected all but one of the grounds raised by the respondent. The one ground on which the latter succeeded was the exceptio doli generalis, the learned Judge President finding, on the facts of the case, that the enforcement by Virginia Land of its rights in terms of the deeds of sale would be unconscionable

conduct/.....

conduct on its part and would cause great inequity. Leave having been granted by the Court a quo the appellants now appeal to this Court.

The transactions which gave rise to this litigation were 85 separate deeds of sale which were entered into during or about June 1973 between the respondent, then known as Elegant Dry Cleaners (Pty) Limited, for the purchase of 85 stands in the township of Virginia, situate in the district of Ventersburg, Orange Free State, from Virginia Land. These deeds of sale were in identical terms. Each deed provided for the payment of a deposit and the balance in monthly instalments. A rate of $8\frac{1}{2}\%$ p a interest was stipulated to be paid on the outstanding balance and in

terms of the agreement the purchase price and all other charges were to be paid in full within six years of the date of signature thereof, by the purchaser. The purchaser, clause 8 of the agreement provided, shall be entitled to possession of the land on signature thereof by the seller and from that date the former shall be liable for all rates and other charges leviable in respect thereof and shall refund any prepayments made by the seller in this regard. A cancellation clause provided that in the event of the purchaser failing to pay any amount payable in terms of the agreement promptly on due date or committing a breach of any of the other terms or conditions of the agreement the seller shall, should

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the purchaser fail to make such payment and/or remedy such breach within thirty days after written notice has been given to the purchaser informing him of the failure in question and demanding that he carry out the obligation in question within such period, be entitled to cancel the agreement, to claim payment of all arrear payments due, to take possession and occupation of the land and to retain all payments made by the purchaser to the seller prior to cancellation, or, in the alternative, to cancel the agreement and recover from the purchaser such damages as the seller may prove it has sustained as a result of such breach together with all other costs and charges for which the purchaser is liable

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in terms of the agreement.

Clauses 15(2) and (3) read as follows:

"15.2 This Agreement constitutes the entire Agreement between the parties and no representations, warranties or undertakings shall be of any force or effect save as recorded herein. No variation of or addition to this Agreement shall be of any force or effect unless reduced to writing and signed by the parties or their duly authorised agents.

15.3 Any indulgence shown, extension given or right waived on the part of the Seller whether relating to the payment of instalments or any other matter or thing shall in no way operate as an estoppel against the Seller or in any way limit its rights hereunder or modify or alter the same and the Seller shall be entitled at any time to exercise its rights in terms of this Agreement as though no indulgence were shown, extension given or right waived."

The/.....

The respondent relies, in the main, upon a written agreement of variation of the deeds of sale. Such variation is to be found, substantially, it is contended, in a series of letters which passed between the parties or their attorneys who acted for them. Van Reenen J identified certain disputes of fact on which he ordered oral evidence to be led. The dispute relating to the written variation was one of them. I shall assume, without deciding the issue, that such evidence is, for the purpose of interpreting the correspondence relied on, admissible and, even though my main task, as I see it, is to analyse the correspondence, I shall, although as sparingly as possible, refer, in the course of relating the history of the matter,also, where

necessary, to the evidence led.

When the six year period within which the purchase price had to be paid in full, was nearing its end, the firm of Regenbaum, Rapeport, Fanaroff & Partners ("Rapeport"), who was acting for the respondent in a rates dispute between the parties, was, by letter dated 28 March 1979, written by Tuckers' attorneys, Joel Melamed & Hurwitz ("Melamed"),reminded as follows:

> "We would point out that the balance of the purchase price payable in terms of the Deeds of Sale are now falling due for payment. Your client has been in communication with our client in this regard.
>
> Entirely without prejudice and without in any way conceding that our client will give your client an extension of time for payment will you please advise us what extension of time your client requires."

Because/.....

Because the respondent has accorded the rates dispute more relevance than it, in my view, deserves, it has to be briefly explained. It arose when Tuckers held the respondent liable for rates and taxes in terms of clause 8 of the deeds of sale. In spite of this provision Hotz, the principal director of the respondent, maintained that the respondent was not obliged to repay to Tuckers the full amount paid by Tuckers to the municipality. He relied upon an agreement alleged by him to have been entered into between Tuckers and the respondent in terms of which Tuckers accorded the respondent a concession in respect of the rates. The terms were, according to Hotz, that for

the first three years after the date of purchase of the stands in question the respondent would pay 20% of the amount levied by the Virginia Municipality and for the following three years 30%. Only after expiry of the 6 year period referred to or such earlier date as transfer would be passed would the respondent be obliged to pay the full 100%. For the first two years after the purchases, Hotz testified, the latter was sent accounts by Tuckers which reflected the rates at 20% but thereafter it was sent accounts for the full 100%, which, according to Hotz, was in breach of the concession. The refusal by the respondent to pay the full 100% resulted in an application to Court by Tuckers which matter was, according to

the evidence, save for the question of costs, eventually settled. The costs question, the respondent maintains, was inextricably tied up with the dispute relating to payment of the purchase price, and reference to both disputes will, therefore, perforce have to be made in what follows.

To revertto the reminder ("the first reminder") of 28 March 1979 - apparently there was no response thereto from the respondent. On 15 May 1979 Melamed wrote another letter to Rapeport about the rates dispute, but added ("the second reminder"):

> "We would point out to you that the balance of the purchase price payable by your client in respect of the properties purchased by your client from our client falls due for payment on the 21st June 1979.

Would you please advise what arrangements your client intends to make in regard to payment thereof."

On 3 July 1979 a third reminder, (to which I shall refer as the final reminder), reading as follows, was sent to Rapeport by Melamed:

"We would point out to you that the full amount payable by your client under the deed of sale has fallen due for payment.

Unless this amount is paid forthwith, our instructions are to issue summons."

On 5 September 1980, that is more than a year later, a letter (annexure W) was, in respect of each stand on which an amount (which was inserted) was still owing, written by Melamed to the respondent:

"You have entered into a written Agreement with us in terms whereof the above stand

was to be sold to you.

The Agreement specifically provided for the payment of the full contract price within a period of six (6) years from the date of the aforesaid Agreement.

In spite of the aforegoing obligation, you have failed and/or refused to effect payment of the full purchase price within the period stated above. We now hereby demand from you, payment of the full purchase price at present amounting to R..... within a period of thirty one days after receipt by you of this letter, at our offices, failing which the aforesaid Agreement will be cancelled without further notice or delay. In that event, all moneys paid to date will be retained and we further reserve the right to institute action against you for the further relief set out in the Agreement."

To this mora notice I shall refer as the demand.

On 7 November 1980 the agreement relating

to each/.....

to each stand on which an amount was still due, was cancelled in the following terms (annexure Z):

> "With reference to our letter of the 5th September, 1980, we wish to inform you that in view of your non-compliance with our demand, we have cancelled the agreement."

To this letter I shall refer as the notice of cancellation.

It is this notice of cancellation which the Court a quo declared to be of no force or effect. These three letters, the final reminder, the demand and the notice of cancellation, demarcate specific stages in the course of events and for the purposes of this case the history of the correspondence and negotiations between the parties

in between them has to be traced and analysed.

It is common cause that the 85 stands referred to were purchased by the respondent from Virginia Land for the purpose of resale at a profit. It is alleged in the respondent's founding affidavit that subsequent to the final reminder negotiations were conducted between respondent's attorneys, Tuckers' attorneys and directly between attorney Rapeport on behalf of the respondent and Mr Hymie Tucker, who represented both Virginia Land and Tuckers, with a view to settling both the disputes concerning the rates and taxes and the claim made for payment of the outstanding amounts claimed under the deeds of sale. In endeavouring to sub-

stantiate the grounds of attack against the notice of cancellation copious reference was made in the founding affidavit to the nature and purport of the oral discussions held by and to the correspondence which passed between the parties, including the final reminder, the demand and the notice of cancellation referred to above. These allegations were supplemented, as I have said, by the oral evidence. The main answering affidavit was sworn to by Mr Hymie Tucker ("Tucker") who, however, died before the hearing of oral evidence commenced. He admitted the correspondence and although he could not remember all the details, he agreed in his affidavit that certain oral discussions took place between the parties but his attitude was essentially that

Virginia Land did not, at any stage during the negotiations, whether in writing or orally, waive any of its rights in terms of the deeds of sale. He also denied, as alleged by the respondent, that either Virginia Land or Tuckers had, by their conduct or at all, led the respondent to believe that Virginia Land was abandoning its right to claim payment in terms of the deeds of sale. Clause 15 of each deed of sale specifically provides, he pointed out, that indulgences, extensions or waivers would not operate as an estoppel or limit Virginia Land's rights in terms of the deeds of sale. He added that there was no written variation of the deeds of sale as required by clause 15.2 thereof. On the issue of

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the relationship between Virginia Land and Tuckers, his attitude, as expressed in his affidavit, was that the respondent's representatives well knew that Tuckers was representing Virginia Land and that it was the latter which cancelled its agreements with the respondent, which, he said, it was perfectly entitled to do. In the replying affidavit Hotz repeated and enlarged upon the submissions made in the founding affidavit.

The first event of note dealt with in the papers and the evidence,was a meeting, during August 1979, after the dispatch and receipt of the final reminder, between attorney Rapeport, on behalf of the respondent, and Tucker when, according to the

allegations in the founding affidavit, Tucker,before he would consider a request for an extension of the dates of payment, required certain information from the respondent concerning the amounts still due on certain of the stands in question which, to the knowledge of Tucker, the respondent had resold to third persons. Tucker, it was alleged in the founding affidavit, also required payment of R2 000 on account of arrear instalments. That Tucker required to know "what the state of the various transactions" (as it was put) was, was repeated in the evidence of Rapeport, particularly, he said, in respect of those stands whose transfer was imminent. Tucker, Rapeport personally testified, was not interested in cancellation at that stage. He made it

clear/.....

clear to Rapeport that he was interested "in money". The R2 000, Rapeport said, was required to be paid by his client not as arrears but to show the latter's bona fides. This statement was not quite true, because it appears from other evidence that the respondent was indeed in arrear with its instalments. Nor, as will appear from my reasoning below, did Tucker require to know what, generally, the state of the various transactions was. According to Rapeport it was implicit in the whole discussion that the 6 year period was "to fall away as such."

As a result of that meeting the following letter, dated 23 August 1979 (annexure D) was sent by Rapeport to Tuckers:

> "We confirm that Mr Hack who, in conjunction with your Attorneys Stabin and Gross, is attending to effect registration of transfer to various purchasers, has furnished you

with a schedule reflecting:

(a) The matters in which transfer is being proceeded with.

(b) The amount that will accrue to you upon registration of transfer.

(c) The amount which will accrue to our client upon registration of transfer.

As arranged, we enclose our client's cheque for R2 000 on account of arrear instalments, and in due course, await to hear from you regarding the proposed settlement negotiations."

On the same day a letter (annexure E) was written to Melamed advising the latter that a schedule as required had been furnished to Tucker as well as a cheque for R2 000.

It is significant that a schedule reflecting only the state of those transactions in which transfer

was at that stage being proceeded with, was supplied. The inference is that that was all that Tucker was interested in at that stage. Rapeport thereafter communicated telephonically with Tucker after which he wrote to Melamed the following letter dated 28 August 1979 (annexure F):

> "We refer to the recent telephone conversation between Mr Tucker and the writer and enclose our Trust account cheque for R4 952,36 as also our client's cheque for R9 530,66 the aggregate of which amounts must be allocated in settlement of the balance of the purchase price in respect of the undermentioned stands as set out hereunder:
>
> | | | | |
> |---|---|---|---|
> | Stand No | 1256 | - | R 1 879,49 |
> | " | 1257 | - | R 1 879,49 |
> | " | 1298 | - | R 1 550,42 |
> | " | 1301 | - | R 1 929,55 |
> | " | 1350 | - | R 3 631,36 |
> | " | 1296 | - | R 1 942,97 |
> | " | 1274 | - | R 1 463,61 |
> | | | | R14 276,89 |
>
> Plus interest on

R 14 276,89

the above amount
calculated at
the rate of $8\frac{1}{2}\%$
per annum as
from the 1st Ju-
ly 1979 to 31st
August 1979 R 206,13

R 14 483,02 "

In response to annexure E Melamed wrote to Rapeport (annexure G) on 31 August 1979 advising him that the contents of annexure E had been discussed with his client and that the latter was prepared to enter into an overall arrangement with the respondent on the following conditions:

"1. In regard to the pending actions which relate to the rates our client advises that the rates position has been adjusted.

2. Your client is to pay to our client in

regard to rates such amounts as our client actually pays out in respect of rates.

3. The cheques on which the actions have been founded are to be returned to your client.

4. Your client is to pay our taxed party and party costs of the actions.

5. In regard to the balances which have now fallen due for payment, the following provisions are to apply:

(i) An amount of R15 000,00 is to be paid by the 15th September 1979, the said sum of R15 000,00 is to be allocated towards the balances of all the erven.

(ii) The full proceeds from each transfer which you are attending to are on registration to be paid to our client.

(iii) Your client need not pay any instalments for the next six months.

(iv) The position under this heading is to be reviewed at the end of January 1980.

Would/.....

> Would you please confirm that the aforegoing is acceptable to your client. Our client requires this matter to be brought to finality within four days from date hereof."

This letter was written and dispatched prior to Melamed becoming aware of the contents of annexure F because after having been informed of the receipt by Tuckers of the letter and on the same day Melamed wrote to Rapeport as follows (annexure H):

> "Your letter of the 28th instant addressed to our client refers.
>
> If the sum of R14 483,02 paid under your letter of the 28th instant is to be regarded as the payment of R15 000,00 referred to in paragraph 5(i) of our letter, then our client states that he is not prepared to allocate the payments in accordance with your letter as our client is only prepared to accept the R15 000,00 and to allocate same on the basis as set out in our letter. If the R15 000,00 paid is an additional payment, then obviously

this does not apply.

In regard to interest our client is not prepared to agree to calculate interest at $8\frac{1}{2}\%$ per annum. Our client contends that as the amounts have now fallen due for payment, our client is entitled and is charging interest at the rate of 14% per annum.

Please let us hear from you urgently."

Rapeport explained in evidence that the amount of R14 483,02 was indeed to be regarded as the payment of R15 000. He testified that after his first meeting with Tucker and having furnished him with the schedule referred to he again spoke to Tucker (this, inferentially, was the telephonic discussion) when Tucker required to be apprised of the amount he could expect from the respondent and Rapeport mentioned a figure to Tucker of approximately R15 000. Annexure F

was/.....

was written subsequent to the telephone conversation and must have been received by Tuckers after having instructed Melamed to write annexure G because the latter was written in response to annexure E and nothing is said in annexure G about the telephone conversation. The inference is, therefore, that the R15 000 was mentioned during the first meeting between Rapeport and Tucker. If at that meeting Tucker had understood the amount of R15 000 to be offered in settlement of the balance of the purchase prices in respect of certain specified stands which were about to be transfered as distinct from stands which were already in the process of being transferred the conditions in paragraph 5 would not have been worded as

they were because as appears from annexure D Tucker required a schedule reflecting the matters in which transfer was being proceeded with or, as it was put in annexure E "matters in which we are presently attending to effect transfer to our clients' purchasers." That such was the purport of what Tucker understood appears from the terms as set out in paragraph 5 of annexure G. If the R15 000 or about R15 000 was meant to be the proceeds of transfers of stands which thereafter (i e after "presently"), upon payment of the balances outstanding, qualified for transfer, condition 5(i) would be inconsistent with condition 5(ii). The latter refers to "each transfer which you are attending to." The full proceeds from each such transfer were on regi-

stration to be paid over to Tuckers. Apart from that an amount of R15 000 was to be paid into a general fund "to be allocated towards the balances of all the erven." If the sum of R15 000 were to be thus allocated transfer of stands could only have been effected once the total indebtedness on all the stands was settled. The R15 000 might again have been referred to in the telephone conversation but if Rapeport mentioned the R15 000 as relating to stands whose registration was imminent that is certainly not the sense in which Tucker understood it. This appears from the second letter, annexure H, written by Melamed on 31 August 1979.

Despite Melamed's request in annexure H:

"Please/...

"Please let us hear from you urgently," Melamed had to write to Rapeport again (annexure I) on 26 September 1979:

> "Unless we hear from you by return of post our instructions are that our client will regard the matter as not having been settled and our client will take such further action against your client as it may be advised."

Even this letter did not spur the respondent into immediate action because on 22 October 1979 Melamed was compelled to write another letter (annexure J) to Rapeport, as follows:

> "We refer you to our letter of the 31st August 1979 wherein we set out the basis on which our client is prepared to settle this matter. You have not replied to our letter. We also require your client to consent to the payment of our costs. In regard to our costs your client is also required to let us have an amount of R5 000,00 which is to be held in trust until taxation of our Bill of Costs or until the

amount of our costs has been agreed upon. Should our Bill of Costs be taxed at a lesser figure or agreed upon at a lesser figure, any difference will be refunded to your client. Should our Bill of Costs be taxed at a higher figure or should a higher figure for costs be agreed upon then your client will be required to pay the difference.

Unless we hear from you within four days from date hereof to the effect that the matter has been settled on the basis of our said letter as read with our further letter addressed to you dated the 31st August 1979 our instructions are to institute action against your client for the full balance outstanding in terms of the Deed of Sale."

This letter elicited at long last the following response (annexure K) dated 24 October 1979 from Rapeport:

"We refer to your letters of the 31st August

and 26th September 1979.

Our client is compelled to allocate the sum of R14 483,02 paid under cover of our letter of the 28th August 1979, on the basis stipulated therein by virtue of the fact that unless the monies are so allocated, our client will be unable to obtain transfer of the specific erven from your client, and in turn effect transfer to its Purchasers.

However, the stipulation that the monies be so allocated is not with any ulterior motive, and it is respectfully submitted that such allocation is not prejudicial to your client by virtue of the following facts:

(a) When the writer met with Mr Tucker, it was proposed that the matter be settled on the basis that our client would pay to yours all monies received from its Purchasers.

(b) In most instances, the balance of the purchase price payable by our client's Purchasers to it has been secured by a guarantee payable against registration of transfer of the property into the name of the Purchaser.

(c) Therefore,/...

(c) Therefore, in addition to the amounts paid to your client under cover of our letter of the 28th August 1979, your client will, upon registration of the erven enumerated therein, receive a substantial additional payment, which amount he need not allocate to specific erven.

We may mention that we have instituted action against a number of our client's Purchasers and anticipate receiving payment from such Purchasers in the near future, whereupon our client will again be in a position to effect a substantial payment to your client.

The properties enumerated in our letter of the 28th August 1979 are presently being transferred and payment of the balance due by our client's purchasers to it will be paid over to your client upon registration of transfer which we anticipate will be in the near future. In fact, two transfers are presently in the Bloemfontein Deeds Office.

We trust that the aforegoing clarifies the situation, but if you have any further queries, kindly let us hear from you."

Significantly/...

Significantly Rapeport did not claim in this letter that Tucker very well knew that the amount of R14 483,02 was meant to represent the R15 000 mentioned during the meeting or the telephone conversation.

On 1 November 1979 Rapeport wrote to Melamed (annexure L) as follows:

> "We acknowledge receipt of your letter of the 22nd October 1979 and trust that you have by now received our letter of the 24th October.
>
> We confirm that if in fact, the matter is settled, having regard to the contents of our letter of the 24th ultimo, our client is prepared to effect payment of your costs.
>
> We are meeting with our client during the course of next week in order to arrange for further payment to be made to your client, and we will then discuss the question of your costs.
>
> In the interim, we await to hear from you

regarding the contents of our letter of the 24th ultimo."

Melamed never confirmed that the matter was "settled." The only response was the following curt reply, dated 19 December 1979 (annexure M), from Melamed:

"We refer you to your letters of the 24th October last and 1st November last.

Unless payment of our costs is effected by the 10th proximo our instructions are to place this matter on the Roll for hearing."

On 22 January 1980 Rapeport wrote to Tuckers as follows (annexure O):

"We enclose for your reference copy of a letter addressed to your Attorneys Stabin, Gross & Shull, under cover of which we sent them a cheque for R2 156,70 being payment of the balance of the purchase price in respect of Erf 7285 Virginia.

We now enclose our Trust account cheque for R4 182,18 in settlement of the balance of the purchase price in respect of the undermentioned stands (inclusive of rates and taxes to 31st March 1980):

Stand No 1254- R2 410,85
" " 1340- R1 771,33

Our client has just received statements of account from you from which it appears that you have not deducted the sum of R14 483,02 sent by us to you under cover of our letter of the 28th August 1979, and have in fact continued to charge our client interest on such amount.

Would you kindly investigate and let our client have amended statements of account reflecting credits in respect of the amounts sent to you under cover of our aforementioned letter of the 28th August 1979 as also credits in respect of interest debited after such date.

There are a number of matters presently in the Deeds Office in respect of which transfer is anticipated during the course of next week, such matters having been lodged on the 14th instant.

Once/.....

Once these transfers have been registered, we will again communicate with you and will let you have further payment."

A letter written by Rapeport to Melamed on 22 January 1980 (annexure P) dealt inter alia with the costs in the rates dispute. The letter reads:

"We refer to previous correspondence in connection with the above matter and enclose for your reference copy of a letter today addressed to your client.

Insofar as your costs are concerned, we enclose our Trust account cheque for R2 000 on account thereof.

There are a number of matters presently in the Deeds Office awaiting registration, and as soon as these are registered we will be able to let you have a further payment on account, of your costs.

In the interim, kindly let us have a draft Bill of Costs."

From this letter it would appear that the

respondent had in mind using some of the proceeds of the transfers towards payment of Tuckers' costs. This would be in breach of the agreement contended for by the respondent.

On 29 January 1980 the Credit Controller of Tuckers responded by writing to Rapeport (annexure Q) as follows:

> "We refer to your letter of the 22nd instant together with your payment of R4 182,18 in respect of Stands 1254 and 1340, Virginia, respectively.
>
> We refer to the fourth paragraph of your letter, and confirm that we received payment from you during August, 1979, in the amount of R14 483,02. This payment was, on Mr H Tucker's instructions, credited to a suspensive account, pending clarification of the break-down for credit to your client's various stands.
>
> We have now received the break-down, and have passed the necessary credits to the correct stands, together with interest adjustments.

Mr Tucker wishes to extend his apologies for any inconvenience caused.

We are also arranging to send amended accounts to your clients."

A number of further letters were presented to the Court a quo from which it appears that the respondent, when remitting amounts to Tuckers, requested such amounts to be allocated to specific stands. To these requests Tuckers invariably acceded. These amounts included balances owing by the respondent on stands which could then be transferred and payments "on account" in respect of other stands. The respondent's evidence indicates, and there was no contradictory evidence, that, although not every small amount received from the respondent's purchasers was immediately paid over to Tuckers, such

amounts/.....

amounts as were received, were paid over from time to time. I have to assume, therefore, that this indeed happened.

On 5 September 1980 the demand, annexure W, was sent. Rapeport thereafter arranged to discuss the matter with Tucker on 3 October 1980. On this date Tucker was, however, not available and one Karp of Tucker's office undertook to telephone Rapeport when Tucker would be available for another meeting. Karp agreed, on behalf of Tucker, to "suspend" the period of 31 days proposed in the notice pending the meeting and also agreed that the respondent's rights would be reserved. Thereafter Rapeport met again with Karp and Tucker concerning the matter at which

meeting Tucker insisted that Tuckers was entitled to give the notices in question and refused to debate the matter. His attitude was that unless payment was made the deeds of sale in question would be cancelled.

In a letter (annexure Y) dated 17 October 1980 Rapeport wrote to Tuckers placing on record that the demands were premature and denying that Tuckers would be entitled to cancel the agreements. On 7 November 1980 the notice of cancellation, annexure Z, followed.

In this Court counsel for the appellants contended that, while the learned Judge President was right in all other respects, he was wrong in finding that the facts supported the exceptio doli generalis.

Counsel for the respondent, on the other hand, submitted that the learned Judge President was right in finding for the respondent on the exceptio but argued that he erred in two respects, viz in finding that it had not been shown that there had been a written variation of the deeds of sale and, secondly, in finding that the demand, annexure W, was a valid notice in terms of clause 10 of the deeds of sale. I shall deal with the respondent's contentions first.

In the course of their argument counsel for the respondent referred to the correspondence and submitted that the settlement was finally concluded on 19 December 1979. The argument was developed as follows: On 1 November 1979, in reply to the demand in annexure J

(Melamed's letter dated 22 October 1979): "We also require your client to consent to the payment of our costs," Rapeport replied, per annexure L: "If in fact the matter is settled, having regard to the contents of our letter of the 24th ultimo our client is prepared to effect payment of your costs." In answer, therefore, to Melamed's inquiry as to whether the matter had been settled Rapeport indicated, on behalf of the respondent, that, if the allocation of the sum of R14 483,02 to specific erven was acceptable to Tuckers, the matter was settled. Thereupon the requests on behalf of Tuckers for confirmation that the matter had been settled ceased and on 19 December 1979 Melamed, per annexure M, referring

to annexures K & L, claimed payment of the costs. Melamed, acting on behalf of the respondent, had therefore indicated that the matter had been settled. The terms of the settlement, contended counsel, are those set out in annexures G, H, J & K, read with annexure L. The terms, except in so far as they relate to the rates dispute, were, in counsels' submission:

(a) An amount of R15 000 was to be paid by 15 September 1979.

(b) The amount of R14 483,02 was to be regarded as the amount of R15 000 which was to be allocated to specific erven indicated by the respondent.

(c) The full proceeds of all the transfers, whether or not such proceeds exceeded the balance owing by the respondent on the relevant stands, including the instalments

received from third party purchasers, were to be paid to Tuckers.

(d) The respondents did not have to pay instalments for 6 months after 31 August 1979.

(e) The position was to be reviewed at the end of January 1980.

(f) Interest at the rate of 14% per annum was payable on the outstanding balances as from 1 July 1979.

(g) Virginia Land would not be entitled to claim payment of the balance of the purchase price on any stand otherwise than in terms of the extension arranged. In counsels' submission the position was not reviewed at the end of January 1980 because, the matter only having been settled in December 1979, the need for such review fell away.

Effect was given to the settlement, the argument proceeded, in that the costs in respect of the rates dispute were paid, the rates claims were

apparently/....

apparently paid and moneys received by the respondent from purchasers were paid over to Tuckers.

It was further argued that the written variation contended for complied with the requirements of the deeds of sale which did not require the agents of the parties to be authorised in writing. The written agreement amounted, in counsels' submission, to no more than an extension of time in which to pay the purchase price and was therefore not affected by the requirement in section 1 of the Formalities in respect of Contracts of Sale of Land Act, No 71 of 1969, that the agents should be authorised in writing. Reference was made to Sinclair v Viljoen 1972(3) SA 579(W) 582 B - E; Neethling v Klopper en Andere 1967(4)

SA 459(A) 465 B - C; Venter v Birchholtz 1972(1)

SA 276(A) 286 C - F.

I shall assume, without deciding, that counsel are correct in submitting that, if the letters constituted a written variation to extend the time for payment, Melamed and Rapeport, who wrote the letters, need not have been authorised in writing. In my view the correspondence does not reflect a written agreement as relied upon by counsel for the respondent. On the amount of R15 000 the parties do not seem to have been ad idem at all. It is true that an amount closely approximating the amount of R15 000, viz the amount of R14 483,02, was paid before 15 September 1979 but that was clearly not the payment which

Tucker or for that matter, for the reasons stated above, even Rapeport had in mind, as complying with the condition on which both parties agreed orally and which Melamed, on behalf of Tucker, expressed in writing in paragraph 5(i) of annexure G.

In terms of paragraph 5(ii) Tucker required the full proceeds from each transfer, which Rapeport's firm was attending to at the time, on registration to be paid over to Tuckers and, in addition, in terms of paragraph 5(i), a sum of R15 000 to be paid into a general fund, or "free residue" as Rapeport termed it, to be allocated towards the balances owing on all the stands. An amount of R2 000 on account of arrear instalments had been paid (see annexure D) and, provided

the R15 000 was paid into the general fund, Tucker would for a period of six months not require any instalments to be paid by the respondent (see par 5(iii) of annexure G). A schedule reflecting the matters in which transfer was being proceeded with and details as required in paragraphs (b) and (c) of annexure D had been supplied to Tucker (see annexure E), but no other details. I am unable to read into annexure G a condition that the full proceeds of transfers to be attended to in the future would have had to be paid to Tuckers. There is simply

no provision made therefor in annexure G. The first occasion on which reference to a condition of that nature was mooted, was in annexure K when Rapeport wrote:

> "(a) When the writer met with Mr Tucker, it was proposed that the matter be settled on the basis that our client would pay to yours all monies received from its Purchasers,"

with the following benefit to accrue to Tuckers as pointed out in (c):

"Therefore,/.....

"Therefore, in addition to the amounts paid to your client under cover of our letter of the 28th August 1979, your client will, upon registration of the erven enumerated therein, receive a substantial additional payment which amount he need not allocate to specific erven."

There is nothing to be found in the correspondence to prove that Tucker agreed that the proposal referred to had been made during their discussion or that, if he had initially, in framing the conditions in paragraph 5 of Annexure G, overlooked it, he agreed thereto after receipt of annexure K. Even though all moneys, whether in the form of balances paid prior to transfer or on account, might have been paid over to Tuckers, Tucker never seemed to have insisted

on strict performance in this regard and, what is more, the respondent does not seem to have regarded its own offer in annexure K that the "substantial additional payment" need not be allocated to specific stands seriously because it proceeded to require payments to be allocated to specific stands. Tucker kindly obliged - see annexure Q. The inference is that neither Rapeport nor Hotz was convinced that a written agreement varying the deeds of sale had been concluded. Further proof of this state of mind on the part of Rapeport (and probably also on the part of Hotz, who was advised by Rapeport) is his admission in evidence that he might, when speaking to Tucker

after his client had received the demand, have used the expression that this was a "ragmanis" case, a yiddish word which means "pity", in other words, that Tucker should have pity on the respondent and not enforce Virginia Land's legal rights.

That Tucker was prepared to grant the respondent some extension beyond the six year period was foreshadowed in the first reminder referred to above when, after Hotz had been in touch with Tucker, a promise was held out in the following guarded terms:

> "Entirely without prejudice and without in any way conceding that our client will give your client an extension of time for payment will you please advise us what extension of time your client requires."

When Tucker eventually did grant the respondent some extension beyond the six year period he

increased/...

increased the interest rate from $8\frac{1}{2}$ % p a to 14% p a. Tucker's reasoning appears from the following sentence in annexure H:

> "Our client contends that as the amounts have now fallen due for payment, our client is entitled and is charging interest at the rate of 14% per annum."

The increase of the interest rate is not inconsistent with an extension of time granted on sufferance. The circumstances indicate that Tucker was agreeable to granting to the respondent some respite from the operation of the strict term of the six year period but on condition that it pay a higher rate of interest. The respondent was given notice of the increase of the interest rate per annexure H on 31 August 1979 when the process of negotiations about

an extension of time was still in its early stages and when Tucker envisaged a fixed period of six months as a provisional extension. No agreement in writing was finally reached but Tucker did in fact allow the respondent some respite beyond the six year period and was, in my view, justified in demanding a higher rate of interest for as long as he was prepared to grant the indulgence.

The costs relating to the rates dispute were, it is true, dealt with in the correspondence pari passu with the extension of time issue but it was not, as I interpret the correspondence, a condition precedent the fulfilment of which was intended to clinch the settlement. In my view the

payment of costs was a collateral issue only and an obligation to be performed by the respondent which Tuckers would, regard being had to annexure M, have insisted upon independently of any settlement of the extension of time issue.

The respondent's main difficulty in its endeavour to convince this Court that the deeds of sale were varied in writing relates to the aspect of the period for which the extension, if any, was granted. Counsel for the respondent were constrained to argue that the need for a review after the provisional period of six months stipulated by Tucker fell away. It is implicit

in/.....

in this argument that the deed of sale was varied to the effect that an extension was granted for an indefinite period until such time as all balances owing by the respondent would be paid. I have reasoned above that the parties never agreed in writing on an extension of time in which to settle the entire indebtedness. For the purposes of considering this aspect I shall assume that the parties had reached an agreement of sorts in writing in December 1979 that an extension would be granted. As to the period for which the extension was granted counsel had, perforce, to rely on extraneous circumstances. It is, of course, not necessary for every term in a written agreement to be spelled out in

express/.....

express terms. Surrounding circumstances may, under certain circumstances, be relied upon to supplement the writing. In the present case, however, the surrounding circumstances do not assist the respondent. At the commencement of the negotiations Tucker made it clear that, if any agreement were reached along the lines which he suggested and which, incidentally, he required to be concluded urgently, he would require this agreement to be reviewed in six months time. This indicates that he did not intend to relinquish control of the situation or to abandon the initiative. He would decide whether to grant a further extension or not. There is nothing to be read between the lines of the various letters that,

in spite of the matter not having been reviewed after six months, Tucker had altered his resolve in this connection. It is true that he did not invoke the forfeiture clause after the expiration of six months, but this is consistent with the promise he tacitly held out when he originally stipulated for a review after six months, that a further extension might be considered. The fact that he tacitly granted such further extension did not justify either Hotz or Rapeport in assuming that the failure by Tucker to invoke the cancellation clause after six months amplified whatever written agreement might have come into existence by providing an implication that Tucker would indefinitely continue to allow

the respondent to pay the outstanding balances as and when it suited it.

For the reasons stated I am not persuaded that the correspondence reflects a written variation of the deeds of sale as contemplated in clause 15.2 thereof or that Tuckers conduct is consistent with anything but a mere indulgence as contemplated in clause 15.3. The onus was upon the respondent to prove such written variation. It failed to discharge this onus. The whole matter could have been removed from the realm of uncertainty by either Hotz or Rapeport coming to fixed terms with Tucker on the conditions for a settlement including the period for which it would last. For the failure to agree in

writing on the terms proposed including the period for which such a settlement would last Hotz and Rapeport had only themselves to blame. Tucker, it seems, was quite prepared to enter into such a written settlement but,due to the respondent's equivocation, it was never concluded.

I turn now to consider the attack on the demand. In support of their submission that the learned Judge erred in finding that the notice (annexure W) was a valid demand in terms of clause 10 of the deeds of sale, counsel for the respondent advanced the argument that the demand was bad in law because it was not a notice by or on behalf of Virginia Land, the seller. It referred, counsel argued,

to a written agreement "with us", i e Tuckers which demanded payment on its own behalf as is clear from the words, "We now hereby demand from you payment of the full purchase price ------ at our offices, -----" and it reserved to itself the right to institute action against the respondent. It cannot be argued, submitted counsel, that the defect in the notice is cured by what the respondent knew or should have known. Cancellation is a drastic step, counsel argued, and unless there are clear indications to the contrary to be found in the agreement of sale, one must assume, they submitted, that the notice should in clear and concise language describe the failure in question and the obligation the carrying out of which is demanded

and/.....

and not require evidence of conversations between the parties and other extrinsic evidence to determine what the failure was and what is demanded. At best for the appellants, they contended, the notice is not clear but confusing. Furthermore, the argument proceeded, in terms of the deed of sale payment had to be made at the place set out in the schedule being Virginia Land and Estate Company Ltd, 23rd Floor, Trust Bank Centre, cor Eloff and Fox Streets, Johannesburg, or such other address as Virginia Land may from time to time appoint in writing. In annexure W another address was appointed for payment viz "at our offices" which are situated at Diamond Corner, Eloff and Market Streets but such appointment does not purport to have

been made by Virginia Land but was done by Tuckers. For this reason also, it was contended, the forfeiture notice is not a valid notice.

On the letter head of annexure W the following appears:

> "Tuckers Land and Development Corporation
> (Pty) Ltd
> Township Developers"

On the photostat copy of the schedule to the deed of sale attached to the papers the seller is described as follows:

> "The Seller Virginia Land and Estate Company Limited a fully owned subsidiary of Tucker's Land Holdings Ltd..."

The letterheads of letters written by Tuckers to Rapeport reveal that Tuckers is likewise a wholly

owned subsidiary of Tuckers Land Holdings Ltd. Both Rapeport and Hotz regarded Tuckers as the company which attended to the administration of the matters of the Tucker group of companies and Tucker himself as representing and attending to the affairs of both Tuckers and Virginia Land. Tucker in fact described himself in his affidavit as being a director of both companies. Payments were throughout made to Tuckers at its offices at Diamond Corner and credited by it to the accounts concerned. It was with Tuckers that Rapeport negotiated in writing and the oral negotiations were conducted between Rapeport and Tucker. When Tuckers referred to "us" it clearly, in my view, embraced the entire group of Tucker Companies. Virginia

Land/.....

Land was obviously the company in the group which was established for the purpose of developing the township of Virginia and which figured as the seller but the evidence discloses that the activities of the group were, for the purposes of administration and representation, centralised in Tuckers. It is common cause that the respondent received the notice. In my view there was substantial compliance with the provision in clause 10 and the learned Judge President correctly rejected the argument that the demand was invalid.

I proceed to deal with the exceptio doli generalis issue. There is a judgment pending in this Court as to whether the exceptio doli generalis was

ever received in the Roman Dutch law. Had it been necessary to do so I would have delayed this judgment until after delivery of the judgment referred to, but in view of the conclusion to which I have come that is not necessary.

The learned Judge President referred to the judgment of Colman J in the case of Novick and Another v Comair Holdings Ltd and Others 1979(2) SA 116(W) 156 if - 157B in which reference was made, at 156F, to Otto en 'n Ander v Heymans 1971(4) SA 148(T) where the Court recognised the exceptio doli as an independent remedy where "the conduct of a party taken as a whole was conduct which, in the particular circumstances of the case, could not be tolerated or permitted." Colman J pointed out, how-

ever, the learned Judge President remarked, that Otto's case supra did not "specify any limits within which the Court had jurisdiction to regard conduct as so intolerable or impermissible that the litigant guilty of it should be denied the rights which the law would otherwise afford him." It was in this regard, said the learned Judge President, that the learned Judge said the following:

> "But there must be limits, and they must be narrow ones. It is not consonant with public policy, or with modern jurisprudence, to accord the power to a Judge to refuse relief otherwise available at law, or to grant relief not otherwise available at law, merely because, in the exercise of an unfettered equitable discretion, he thinks it would be just, in the circumstances of the case before him, to act in that way.
>
> I would respectfully adopt, in that regard,

the observations of JANSEN, J (as he then was) in North Vaal Mineral Co Ltd v Lovasz 1961(3) SA 604 (T) at 607 - 8. I must assume, as he did, that the remedy exists. But I shall follow him in his assumption that a minimum prerequisite for its application is the presence of the circumstances mentioned by TINDALL, JA in the Zuurbekom case supra, namely that the enforcement of his rights by one of the litigants would be unconscionable conduct on his part, and would cause some great inequity. What other limits there may be upon the field of operation of the exceptio I do not know, although I assume that they must exist."

The learned Judge President also referred to Rand Bank Ltd v Rubenstein 1981(2) SA 207(W) and to Edwards v Tucker's Land (Pty) Ltd and Development Corporation 1983(1) SA 617 (W).

He accepted on the evidence that in the discussions which Rapeport had with Tucker the depressed

state of the property market was raised and discussed and that Tucker expressed concern about the fact that he was getting very little by way of "cash flow". Tucker knew, said the learned Judge President, that the respondent had resold some of the stands purchased from Virginia Land to purchasers at a higher figure than that at which it had purchased the stands. In addition thereto Tucker must have appreciated that the respondent was receiving money by way of instalments from its purchasers and that upon payment of the balance of the higher purchase price which would then accrue to the respondent the latter would be obliged to effect transfer. The sooner therefore the respondent was able to receive transfer from Virginia

Land the sooner it was able to effect transfer to its purchasers. "There is no doubt in my mind", said the learned Judge President, "that it was by reason of the aforegoing that Tucker required the schedule which contained the necessary information in this regard." This together with the payment of arrears of R2 000 had the result, he said, of Tucker staying his hand in regard to the final reminder. He mentioned the fact that subsequent to providing the schedule and the R2 000 the respondent on 28 August 1979 (annexure F) sent R14 483,02 to Tucker being the balance of the purchase price and interest of seven nominated stands. Tucker or Tuckers accepted payment made on this basis at a time when the full purchase prices on all the

stands were payable, the learned Judge President remarked, and he referred to other payements made by the respondent. But more important, he said, was the fact that as from February 1980 to August 1980 (a period of seven months) Tuckers accepted payments not only in respect of the balance of the purchase price of stands but also payments made on account of a number of stands nominated by the respondent. It was submitted on behalf of Virginia Land and Tuckers, the judgment proceeded, that all that was held out on behalf of first respondent was that, firstly, it was prepared to accept all monies received by respondent from its purchasers, secondly, that upon registration of stands into the names of respondent's purchasers

Virginia Land would receive such further payments and allocate those payments as it chose and that, thirdly, it retained its right to cancel. "In so far as the first two points are concerned," said the learned Judge President, "that flows from Rapeport's letter of 24 October 1979 (annexure K)". That was, he continued, clearly departed from by Tuckers in February 1980 and he proceeded to say:

> "As for retaining its right to cancel it seems to me that by accepting payment of the balance of the purchase price on nominated stands and allocating other payments as aforesaid this was clearly inconsistent with any intention of relying on a right to insist on payment by applicant of the full purchase price on the remaining stands.
>
> What second respondent on behalf of first respondent held out to applicant, was that it was prepared to accept payments toward

> the balance of the purchase price on nominated stands and payments on account of certain stands to which such amounts were allocated. Applicant was in my view lulled into a false sense of security."

According to Hotz, the learned Judge President said, there was an improvement in the property market during 1980. He was able to dispose of 30 stands during June 1980 to the third respondent in the Court a quo. The forfeiture notice of 5 September 1980, he pointed out, came within a couple of months after the transaction between the respondent in this Court and the third respondent in the Court a quo and he expressed the opinion that apart from the improvement in the property market there appears to be no other reason why without more the said notice

should suddenly have been sent to the respondent. As a result the respondent suffered heavy losses. He went on to refer to the evidence of one Maree, who worked for Tucker at the time. After the cancellation Tuckers "sold" to Maree certain of the stands the deeds of sale whereof had been cancelled. Maree, in turn, "sold" these stands to purchasers at a considerable profit. These were fictitious purchases and sales because Maree never paid any money, nor did he receive the proceeds of the sales to other purchasers. The money went to Tuckers. This money, said the learned Judge President, would have accrued to the respondent but for the cancellation of the deeds of sale. He concluded that the

enforcement/..

enforcement by Virginia Land of its rights in terms of the deeds of sale would be unconscionable conduct on its part and would certainly cause great inequity.

The essence of the learned Judge President's reasoning seems to be that Tucker had, by his conduct in accepting the payments in the form and manner in which they were made, lulled the respondent into a false sense of security and when it suited him, at a time when the property market was improving, suddenly pounced upon an unsuspecting respondent and cancelled the deeds of sale which act amounted to unconscionable conduct.

I am in respectful disagreement. It may be true that the property market was depressed when the

parties conducted negotiations during the latter half of 1979 and that it improved during 1980, but the respondent was not caught unawares. It should have made provision for such an eventuality as in fact occurred. Apart from the fact that it had a full two months in which to make arrangements for payment of the balance,the evidence does not indicate that the respondent was, to the knowledge of Tucker, in a precarious position financially and that it could not at that stage meet its commitments under the deeds of sale. Hotz said he had cash flow problems and that he relied upon payments made by the respondent's purchasers to pay Tuckers but there is no evidence that he attempted and failed to make any arrangements for

payment/.....

payment within the notice period which was extended for a month. Instead of doing so Rapeport and Hotz took up the attitude, finally, at tremendous risk, it seems, that the cancellation notices were bad in law. I say finally because immediately after receipt of the notice it seems that Rapeport's approach to Tucker was, having regard to the use of the word "ragmanis", more in the nature of a supplication than reliance upon a right.

In any event, I do not agree that Hotz or Rapeport was lulled into a false sense of security. If they were, they had, as I have said in another context, only themselves to blame for it, because the facts do not support an inference that they were

justified in taking for granted that Tucker's forbearance would endure indefinitely. The learned Judge President seems to suggest that Tucker, in deviating from the strict conditions for a settlement which he initially imposed and his continuing for a considerable period to accept payments from the respondent and to allocate these payments in accordance with the latter's requirements, thereby represented that he would not invoke the forfeiture provisions in the deeds of sale. I do not agree. Tucker accepted and allocated balances on stands and gave transfer of those stands. This conduct is, as I have pointed out, perfectly consistent with an indulgence granted to the respondent. Neither is the fact that Tuckers accepted payments on account and allocated such amounts to certain specific stands, inconsistent therewith. It is uncertain whether these amounts which were paid over exceeded the aggregate

amount of the monthly instalments stipulated for under the deeds of sale, but the bigger the payments were, the sooner would the balance on all the stands be paid off and the less would remain to be paid if and when the crunch came and the forfeiture clause were invoked. The fact that Tuckers accepted everything that the respondent paid over cannot therefore be said to have prejudiced or misled the respondent. It is true, that, despite the respondent's dilatoriness to reply, per Rapeport, to Melamed's urgent letters, and its failure to agree to the terms proposed by Tucker, the latter did not, for a considerable period, enforce the forfeiture provisions but it would be ironical if his forbearance in this regard were per se to be found to be unconscionable conduct. As I have pointed out above in another context, Tucker clearly indicated that he was prepared

to grant a provisional extension but he reserved to himself the right to review the position after six months. His tacit acceptance of the deviation by the respondent from the strict terms of his proposal for a temporary settlement and his failure to review the matter after six months did not, in my view, constitute a representation that he was prepared to wait indefinitely for payment of the balance due.

What Tucker's motive was in entering into fictitious sales with Maree and from him to others, is uncertain but it seems to me to be irrelevant to the present inquiry. The deeds of sale had been cancelled already and if the cancellation were lawful

it was no concern of the respondent's how Tucker dealt with the stands. I accept that the respondent suffered a loss as a result of the cancellation but while it is unfortunate I do not, if the cancellation cannot be impeached, appreciate the relevance thereof. The only reasonable inference to be drawn from the facts is that, regard being had to Tucker's patience for more than a year, Hotz and Rapeport anxiously entertained the hope that he would for an indefinite period refrain from invoking the forfeiture provisions. They could not have been and were not misled. In my view the learned Judge President erred in arriving at the conclusion that Tucker's conduct was unconscionable.

In the result the appeal succeeds with costs, including the costs of two counsel.

For/.....

For the order of the court a quo the following order is substituted: The application is dismissed with costs, such costs to include the costs of two counsel.

JUDGE OF APPEAL

VAN HEERDEN JA)
)
GROSSKOPF JA)
) - concur
NESTADT JA)
)
NICHOLAS AJA)