CASE NO. 127/86
/CCC

79/87

MILTON AMOILS	FIRST APPELLANT
SELIG PERCY AMOILS	SECOND APPELLANT
ARNOLD BERNARD VALKIN	THIRD APPELLANT

and

MIKE AMOILS	FIRST RESPONDENT
HYMIE AMOILS	SECOND RESPONDENT
PRETORIA COAL HOLDINGS (PTY) LIMITED	THIRD RESPONDENT

CASE No. 127/86
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

MILTON AMOILS	FIRST APPELLANT
SELIG PERCY AMOILS	SECOND APPELLANT
ARNOLD BERNARD VALKIN	THIRD APPELLANT

and

MIKE AMOILS	FIRST RESPONDENT
HYMIE AMOILS	SECOND RESPONDENT
PRETORIA COAL HOLDINGS (PTY) LIMITED	THIRD RESPONDENT

CORAM: CORBETT, HOEXTER, NESTADT JJA et NICHOLAS, KUMLEBEN AJJA

DATE HEARD: 14 MAY 1987

DATE DELIVERED: 27 AUGUST 1987

JUDGMENT/.....

J U D G M E N T

NESTADT, JA:

This appeal concerns the interpretation of a written agreement entered into at Johannesburg on 8 December 1978 between the late Louis Amoils and his brother Mike (the first respondent). It is against the dismissal, in the Witwatersrand Local Division, of an application for a declaratory order brought by deceased's executors (now the appellants) consequent upon a dispute arising between them and first respondent as to the meaning and effect of the agreement.

The agreement concerns a private company called Pretoria Coal Holdings (Pty) Ltd (the third respondent). It carries on business as a coal merchant.

Each/.....

Each of the brothers had an interest in it. That of first respondent was of a more direct nature. He was the registered holder of 2 500 shares in the company. In addition, he was one of its directors. Deceased was neither a director nor a member. However, he was the beneficial owner of half the shares registered in first respondent's name. This was the position prior to the conclusion of the agreement. It was one with which deceased was apparently not satisfied. Against a background of mutual ill will, disputes had arisen between him and first respondent regarding their interests in the company. The agreement was designed to resolve them. One of its terms was that first respondent would transfer the shares referred to into their joint names. This the articles of association of the company permitted

save that, in terms thereof, only the vote of first respondent would be accepted at meetings of shareholders. The provision of the agreement of most relevance, however, is that dealing with deceased's lack of representation on the company's board of directors. It provides:

> "4.2.2. Pursuant to the provisions of Article 9(j) of the Articles of Association of Pretoria Coal, henceforth as between Mike and Louis, Mike shall as a shareholder exercise his voting rights in Pretoria Coal so as to procure that in each alternate year with immediate effect he and Louis or their respective nominees shall alternate as directors of Pretoria Coal. For the first such year Louis or his nominee shall be appointed as director."

Mention must also be made of a further clause of the agreement reading as follows:

> "4.2.5. All monies received by Mike and Louis from Pretoria Coal from whatsoever cause arising shall be apportioned between them in equal shares and each of them shall account to the other of them in respect of all monies so received within 7 (seven) days of receipt thereof."

Effect was given to the agreement during deceased's lifetime. On 30 November 1979 the 2 500 shares were transferred into the brothers' joint names. And on 6 November 1979 first respondent, with effect from 1 November 1979, resigned as a director of the company and procured the appointment (for one year) of deceased's nominee, viz, second appellant (who is one of his sons)

in his stead. He was able to do this by virtue of the provision in the articles referred to in clause 4.2.2., namely, para 9(j). It is in these terms:

> "Joseph Silberman, Mike Amoils and Solly Rogalsky (or the successors in title to the shares held by such persons) while each is the registered holder of not less than 1 600 (One Thousand Six Hundred) shares in the Company shall each at all times be entitled but not obliged to appoint one Director to the Board of the Company ...."

(Apparently he still qualified as the registered holder of at least 1 600 shares even though "his" 2 500 shares were now held jointly with deceased.) On the expiration of second appellant's term of office on 1 November 1980, first respondent, as envisaged by the agreement, was re-appointed a director for the ensuing year.

That, as will be seen, was the last rotation

of directors which took place in terms of the agreement. On 25 May 1981 Louis died. In November 1981, when the next alternation was due to occur, appellants called on first respondent to procure, in his place, the appointment, as a director for the ensuing year, of first appellant (another son of deceased) as their nominee. Their contention was that deceased's rights under clause 4.2.2. had, on his death, passed to them. First respondent, however, disputed this and refused to do so. Instead, he appointed his son (the second respondent) as a director for 1982 (and, indeed, subsequently, for 1983, 1984 and 1985 as well). The directors fees paid to him for that period totalled R42 500. Appellant's demand, based on clause 4.2.5., that half this amount be paid to them, was also rejected.

It/ .....

It was in these circumstances that on 13 May 1985 the application referred to was launched. In substance, it was for a declaratory order (i) that first respondent (and his successors in title) are bound in each alternate year to procure the appointment as a director of third respondent of their nominee and (ii) that all fees received and to be received, by a director appointed pursuant to clause 4.2.2., be divided equally between first repondent and appellants (or their respective successors in title). In refusing the relief claimed and thus upholding respondents' opposition to the application, MELAMET J. held that the rights afforded deceased in terms of clause 4.2.2. were, on a proper interpretation thereof, personal to him and that they

accordingly terminated on his death. Clause 4.2.5., so it was further decided, had no application to monies received by the nominees of the parties to the agreement; thus first respondent was not liable to account, in terms thereof, for the director's fees received by second respondent.

I consider firstly the issue of the transmissibility of deceased's rights under clause 4.2.2. It embodies an agreement akin to one to vote for the appointment of a co-shareholder as a director of a company. Such an undertaking (ie one between members, acting as such) is valid and enforceable (see, eg, Unity Investment Company (Pt Ltd vs Johnson 1932 CPD 275 at 282 - 3; Diner vs Dublin 1962(4) S A 36(N) at 39 - 41). Indeed, neither in the court a quo nor before us was this in dispute. It follows that

deceased/ .....

deceased in his lifetime could have held first respondent bound to clause 4.2.2. The question, however, is whether his right to do so passed on his death.

In my opinion, and for the following reasons, it did:

(i) As a rule, contractual rights are transmissible on death unless their nature involves a delectus personae or the contract itself shows that this was not intended (Friedlander vs De Aar Municipality 1944 AD 79 at 93; Wessels' Law of Contract in South Africa, 2nd ed, vol 1 paras 1658 and 1662; Christie, The Law of Contract in South Africa pp 479 - 80).

(ii) This is not a case of a delectus personae. There was obviously no intention that Louis personally should necessarily be a director. The absence of harmony and trust between the parties negatives this. Besides, seeing that he and first respondent were to alternate each year, they would not be directors together. There is nothing to suggest that he possessed any special expertise as a director of third respondent. In any event, he had the unrestricted right to nominate anyone in his place. And, in relation to the three persons referred to in para 9(j) of the articles (which, by reason of clause 4.2.2, would, every other year, include deceased or his nominee), it is clear

that/ .....

that a personal exercise of their duties as directors was not contemplated. It will be remembered that para 9(j) provides for the successor(s) in title to their respective shares being entitled to appoint a director.

(iii) It is evident from a consideration of the agreement as a whole that its general intent was that the brothers' interest and say in the company be equalised, ie, that first respondent share with deceased the superior rights which he hitherto possessed. Thus, instead of first respondent alone being reflected in the register as owner of the shares, they were to be transferred into their joint names. In addition, all monies received by either of them

from third respondent were to be equally apportioned between them. The same, in my view, applies to first respondent's right to be or appoint a director. That right survives first respondent's death; para 9(j) expressly provides that it passes to the "successors in title to (his) shares". It is, in short, one attaching to (and enhancing the value of) the shares. Clearly, deceased's rights of co-ownership in the shares are part of his estate which devolved on his death. If, then, such shares are to have parity with those of first respondent, it is but a small step to conclude, as I do, that the

intent/ .....

intent was that deceased's rights under clause 4.2.2. also pass, on his death, to the successor in title to his shares. This would give effect to the rule stated in West Rand Estates Ltd vs New Zealand Insurance Co, Ltd 1925 AD 245 at 261 that "it is the duty of the Court to construe (the parties') language in keeping with the purpose and object which they had in view, and so render that language effectual."

(iv) Clause 4.2.5.6. of the agreement was strongly relied on by Mr Sapire, for appellants. It states:

> "This agreement shall be binding on both parties hereto and on all persons who acquire their respective shares or otherwise become entitled thereto, and each of the parties undertakes that he will not transfer or cause to be transferred any shares in the Company unless he shall previous thereto have bound the transferee to the terms of this agreement.

I understood the argument to be (i) that "all persons who acquire ... or otherwise become entitled" is wide enough to embrace not only inter vivos transferees of the parties' respective shares, but those who inherit them and (ii) that deceased's rights under clause 4.2.2., accordingly, passed on his death. The first proposition is correct but I am not sure about the second. It may be that the clause (which was probably inserted i.a. in recognition of and to overcome the principle that a voting agreement does not run with the shares so as to bind the transferee - Hahlo: South African Company Law Through the Cases 4th ed p 257) regulates only who is bound by the agreement, not to whom rights thereunder pass.

If/ .....

If this be so, then, whilst first respondent's successor in title would (in terms of para 9(j)) have been bound to appoint Louis or his nominee a director, it cannot be said that clause 4.2.5.6. had the further consequence that deceased's rights under clause 4.2.2. are transmissible to the heir to his shares. In any event, however, it does afford some support in this direction. It means that the successor in title to deceased's shares will be burdened with the obligations mutually undertaken in terms of the agreement. There are a number of them. Besides those stipulated in clause 4.2.5., they include

having to notify each other of meetings of the company, the holding of informal meetings inter se and exercising their votes to secure the payment of certain dividends. It is, so it seems to me, unlikely that it was intended that deceased's heir should not also have the concomitant benefit attaching to the shares, viz, the right to be or nominate a director. Furthermore, clause 4.2.5. would seem to contemplate and certainly includes i.a. the receipt of directors' fees by deceased and first respondent. By reason of clause 4.2.5.6. the obligation to divide such fees will, on deceased's death, devolve on the heir to his shares. This is an indication that his rights under clause 4.2.2. are similarly transmissible.

(v)/.....

(v) It is true, as was stressed by Mr Fine on behalf of first and second respondents (third respondent is not a party to the appeal), that certain clauses in the agreement specifically provide that the obligations thereby undertaken are binding, not only on the parties themselves, but on "their heirs, executors, administrators and assigns". The submission was that the absence of this expression in clause 4.2.2. was significant and showed that transmissibility of the rights created thereby was not intended, ie expressio unius est exclusio alterius. I do not agree. In the first place, one is again

dealing/ .....

dealing, not with rights, but with obligations.

Secondly, the maxim must be very cautiously applied (Florida Road Shopping Centre (Pty) Ltd vs Caine 1968(4) S A 587(N) at 603 C; Faure en 'n Ander vs Joubert en 'n Ander N O 1979(4) S A 939(A) at 948 E - F). Indeed, there are examples in the agreement of rights which, it was (correctly) conceded, are transmissible on deceased's death even though there is no express indication that this should happen. No inference against transmissibility can, accordingly, be drawn from the absence in clause 4.2.2. of the expression under consideration.

(vi) Another comparison, or rather contrast, relied on by respondents was that between clause 4.2.2. and

para 9(j). The latter, of course, gives not only each of the shareholders therein referred to but also their successors in title the right to appoint a director. The absence of such a provision in clause 4.2.2. was, so it was said, "the clearest indication" that deceased's rights thereunder were not intended to be transmissible. The argument (which commended itself to the court a quo) is not without merit. As MELAMET J pointed out, the parties could not but have realised that first respondent's right to appoint a director survived his death. Such right, however, flowed, not from the agreement, but from the articles. Para 9(j)

thereof/.....

thereof was referred to in clause 4.2.2. purely as the source of first respondent's power to procure deceased's appointment as a director. For the rest, the parties would not have been concerned with it. It seems to me, therefore, that the failure to expressly provide for the transmissibility of deceased's rights is, even looked at in the light of para 9(j), an equivocal or neutral factor.

(vii) It may be said that the words "as between Mike and Louis" in clause 4.2.2. are indicative of an intention to confine deceased's rights thereunder to his lifetime. I do not think so. They merely serve to emphasise that first respondent's rights under para 9(j) are henceforth, as far as he and deceased

are concerned, qualified or restricted by their private arrangement (embodied in clause 4.2.2.).

(viii) Of course, on appellant's construction, the attachment to the shares of the right of the owner thereof to be or nominate a director could operate in perpetuity. I see nothing wrong with that being the effect of the agreement. Para 9(j) is no different in this regard.

(ix) Para 7(b)(iv) of the articles stipulates that a shareholder is only entitled to bequeath his shares to one person. The suggested difficulty of nominating a director arising from the future possibility, when the estate is wound

up, of there being an even number of heirs to the shares, cannot therefore eventuate.

To sum up so far: the agreement does not reveal an intention that deceased's rights under clause 4.2.2. be exercised by him personally; on the contrary, it is to be inferred that the parties' aim was that the transmissibility of deceased's shares should carry with it the benefit of representation on the board of directors of third respondent, thus equating his position with that of first respondent; and there is nothing in the agreement which effectively detracts from this conclusion; indeed certain of its provisions support it. The

construction/ .....

construction of clause 4.2.2. contended for by appellants must, therefore, be upheld. I should add that it is alleged in the prayer to the notice of motion that deceased's shares are "presently held by the estate". It was not in dispute that appellants, as the representatives thereof, were and are (if their contention as to the meaning of clause 4.2.2. be correct) entitled to nominate someone as a director in terms thereof. Nor do respondents contend that they (respondents) are, for any reason, not able to procure such person's appointment.

Respondents rely on an alternative defence to the claim for a declaratory order in respect of clause 4.2.2., namely, that it has prescribed in

terms/ .....

terms of the Prescription Act, 68 of 1969. The period of prescription of the debt allegedly here in issue is three years (sec 11(d)). It would begin to run as soon as the debt is due (sec 12(1)). That, it was submitted, was 25 March 1982 (at the latest), being the date on which appellants were notified of first respondent's refusal to procure the appointment of their nominee as a director; appellants, so the argument continued, then had a complete cause of action for the declaratory order later sought; but thereafter more than three years elapsed before proceedings were instituted.

The initial question that arises is whether appellants' claim, being merely for a declaration

as/ .....

as to the proper interpretation of the agreement, rather than for an order that appellants' nominee be appointed a director, involves the enforcement of a debt at all. If not, then on this simple basis, the right to the relief claimed would not have prescribed. Even if this is so, however, it is still necessary, in my view, to consider the question of prescription. A court is unlikely to exercise its discretion in favour of the grant of a declaratory order in terms of sec 19(1)(a)(iii) of the Supreme Court Act, 59 of 1959, unless some tangible advantage to appellants would flow therefrom (Adbro Investment Co Ltd vs Minister of the Interior & Others 1961(3) S A 283(T) at 285 D; Reinecke vs Incorporated General Insurances Ltd 1974(2) S A 84(A) at 93 D - E). And there

would/ .....

would be no such advantage to appellants if, consequent upon the grant of the declarator sought, they actually claim an order for the appointment of their nominee as a director for a particular year or years, but are met with a successful plea of prescription. Plainly, in this situation, the enforcement of a debt would be involved. I accordingly proceed to consider whether the obligation or debt arising from clause 4.2.2., to which the declaratory order relates, is prescribed or not.

The issue is whether the debt was due, and, if so, when. A debt is due if it is immediately claimable (The Master vs I L Back & Co Ltd & Others 1983(1) S A 986(A) at

1004 G). This will only occur when the underlying cause of action (ie, every fact which is material to be proved to entitle claimant to succeed) is complete (Evins vs Shield Insurance Co Ltd 1980(2) S A 814(A) at 838 D - H; HMBMP Properties (Pty) Ltd vs King 1981(1) S A 906(N) at 909 D - fin). Applying these principles to the present matter, I do not think the argument under consideration can be sustained. Cardinal to it, is the proposition that appellants' claim relates to a single debt or cause of action (which accrued as alleged, ie, by March 1982). If, on the other hand, it relates to separate causes of action, which only accrue from time to time, then there will be a number

or/ .....

or multiplicity of debts. In this event, each becomes due and thus prescribes on a different date (see, eg, Slomowitz vs Vereeniging Town Council 1966(3) S A 317(A); Evins vs Shield Insurance Co Ltd, (supra); Thus, where a debt is payable in instalments, a claim for each, unless (possibly) where there is an acceleration clause (Western Bank Ltd vs S J J van Vuuren Transport (Pty) Ltd & Others 1980(2) S A 348(T)), is based on a separate cause of action (Cohen vs Sherman & Co 1941 TPD 134 at 137 - 8). That, in my view, is the position here. Clause 4.2.2. gives rise to a series of recurring, biennial obligations

on/ .....

on the part of first respondent (and the successor in title to his shares) to procure the appointment of his brother (or his nominee) and, on his death, the successor in title to his shares (or his nominee). As such, each of them constitutes a separate or distinct debt. Appellants' claim to have their nominee appointed must be taken to relate to future years. First respondent's obligations in respect of them are not yet due and appellants' corresponding causes of action have, accordingly, not yet accrued. And the feature that a composite order, declaratory of first respondent's obligations, is sought, does not detract from this. It is, in essence, a claim for a succession of separate

orders/ .....

orders declaratory of first respondent's obligations every alternate year. In the result the plea of prescription is rejected.

The second and remaining issue is whether the director's fees paid to second respondent were "received by Mike" within the meaning of these words as used in clause 4.2.5. If they were, then he will be bound to account for them as claimed by appellants. No difficulty arises from the use of the word "receive". It is used in its ordinary meaning, viz, "to take into one's hand, or into one's possession ...; to take delivery of (a thing) from another either for oneself or for a third party" (Commissioner of Taxes vs G

1981/ .....

1981(4) S A 167 (ZAD) at 169 F - G). Clearly the expression "(a)ll monies received" includes not only monies received by Mike and Louis personally but also monies received by their agents on their behalf. And plainly, it includes director's fees which indeed would obviously be the parties' major source of income from the company apart from dividends.

In his answering affidavit, Mike says that the director's fees were received by second respondent for his own benefit and that he paid tax on them. He then continues:

> "No part of these moneys was paid, whether directly or indirectly, by Hymie to me, nor did Hymie receive them on my behalf ... Hymie is not my nominee for the purpose of receiving director's fees and those fees are paid to him in his capacity as director

of/ .....

> of the Third Respondent. He has never paid me any amount at all in respect of these fees, nor has he accounted to me."

These averments were not disputed by appellants, and they must be taken as truly reflecting the arrangements between Mike and his son. Those private arrangements have, however, no bearing on the question to be considered here, namely, whether, for the purposes of clause 4.2.5. of the agreement, director's fees received by a nominee of Mike (or Louis) are to be regarded as "monies received" by him.

In its ordinary meaning, a "nominee" is a person who is nominated or appointed, and in the present context it connotes a person who is nominated to act as a director on behalf of Mike or Louis as the case may be - in other words

he is simply the agent of Mike or Louis. (Cf Sammel & Others v President Brand Gold Mine Co Ltd 1969(3) S A 629(A) at 666 D - G; Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd 1976(1) S A 441(A) at 453 A - B). It is an agent's duty to pay to his principal all property acquired by the agent ex causa mandati.

It is true that in one important respect the position of a nominee director differs from that of an ordinary agent. Citing ample authority, MARGO J observed in Fisheries Development Corporation of S A Ltd v A W J Investments (Pty) Ltd & Others 1980(4) S A 156(W) at 163 E - G that:

> "The director's duty is to observe the utmost good faith towards the company, and in discharging that duty he is required to exercise an independent judgment and to take decisions according to the best interests

> of the company as his principal. He may in fact be representing the interests of the person who nominated him, and he may even be the servant or agent of that person, but, in carrying out his duties and functions as a director, he is in law obliged to serve the interests of the company to the exclusion of the interests of any such nominator, employer or principal. He cannot therefore fetter his vote as a director, save in so far as there may be a contract for the board to vote in that way in the interests of the company, and, as a director, he cannot be subject to the control of any employer or principal other than the company."

This does not mean, however, that in other respects a nominee director does not have the same duties towards his principal as any other agent, including in particular the duty to account for all monies received in the course of his agency.

It/ .....

It was the manifest and declared object of clause 4.2.5. that all income received, including directors' fees, would, each year, irrespective of whether it was earned by Louis or Mike, be divided between them. They must, also, necessarily have contemplated that each was entitled (when it was his turn to be on the board) to appoint a nominee as a director and that such nominee would (probably) earn fees as such. In these circumstances, whether as a matter of interpretation or implication, the references to "Mike" and "Louis" must, perforce, be taken to include their respective nominees (appointed as directors pursuant to clause 4.2.2. and para 9(j)) This result would be one, and the only one, which is consistent with the object referred to; and it would avoid what was obviously not their intention, namely, that directors' fees be shares only when they personally acted as a director.

I do not agree with the suggestion that the reference to nominees in clause 4.2.2., as opposed to its absence in clause 4.2.5., is significant. Clause 4.2.2. was dealing with a special case, viz, representation of the parties on the board of directors of third respondent. If it was to be via a nominee, this had to be stated. But the same did not apply to the receipt of monies - which is what clause 4.2.5. deals with. Whilst, as I have said, respondents deny that, in receiving director's fees, second respondent acted as nominee of first respondent, it was not in dispute that second respondent was first respondent's nominee as director. This being so, first respondent became liable to deceased (and to his successors in title, including appellants)

to/ .....

to account for such fees in terms of clause 4.2.5.

It follows that the relief claimed by appellants in this regard should also have been granted.

The following order is made:

1. The appeal is upheld with costs.

2. The order of the court a quo dismissing the application with costs is set aside.

3. In its place the following is substituted:

"(a) It is declared that:

(i) on a proper construction of clause 4.2.2. of the agreement entered into between the late Louis Amoils and first respondent at Johannesburg on 8 December 1978,

the rights of the deceased in terms thereof were transmitted on his death and are enforceable by applicants and the successors in title to the deceased's interest in the 2 500 shares in third respondent owned jointly by him and first respondent;

(ii) on a proper construction of clause 4.2.5. of the said agreement, the expression "all monies received by Mike and Louis from Pretoria Coal from whatsoever cause arising"

includes/ .....

includes director's remuneration

received from third respondent by

their respective nominees appointed

as directors in terms of clause

4.2.2. of the said agreement.

(b) The first and second respondents are

jointly and severally to pay the costs

of the application."

H H NESTADT, JA

CORBETT, JA)
)
HOEXTER, JA)
) CONCUR
NICHOLAS, AJA)
)
KUMLEBEN, AJA)