85/88

Case No 538/86 - mp

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ELIAS CHRYSAFIS	1st Appellant
DIMITRIOS CHRYSAFIS	2nd Appellant
ELDIM (PROPRIETARY) LIMITED	3rd Appellant

and

HARRY KATSAPAS	Respondent

CORAM: HOEXTER, VAN HEERDEN, NESTADT, STEYN, JJA et NICHOLAS, AJA

HEARD: 3 May 1988

DELIVERED: 30 August 1988

J U D G M E N T

HOEXTER, JA .....

HOEXTER, JA

In the Transvaal Provincial Division the three appellants sought certain orders against the respondent. The respondent resisted the application which was heard by DANIELS, J. The learned Judge dismissed the application with costs, including the costs consequent upon the employment of two counsel by the respondent. With leave of the Court a quo the appellants appeal to this Court.

The essential facts are the following. The third appellant ("Eldim") is a private company having an issued share capital of 200 shares. For the sake of brevity I shall refer to the first two appellants individually as "Elias" and "Dimitrios" respectively. Elias and Dimitrios each held 100 shares in Eldim and each was an unsecured loan creditor of Eldim. A company called Schannabels (Pty) Ltd. ("Schannabels") conducted the business of a restaurant

and.....

and coffee bar ("the business") in Sunnyside, Pretoria, under the name "Lady Annabel's". In 1980 Schannabels sold the business to Eldim. On 27 May 1981, when Eldim had not yet paid the full purchase price of the business to Schannabels, the shares in Eldim were sold to the respondent. The terms of the latter sale are set forth in a written agreement ("the written contract") between Elias and Dimitrios as the sellers and one Vladislavich as the purchaser. Vladislavich entered into the written contract as an agent for an on behalf of an undisclosed principal who was the respondent. Schannabels was also a party to the written contract. In terms of the written contract Elias and Dimitrios sold to the purchaser 200 shares in Eldim as well as their claims against Eldim in respect of their loan accounts. The purchase consideration was the sum of R315 000, being the agreed value of, inter alia -

> "...the goodwill attaching to the Company's business, the furniture, fixtures and fittings, plant and equipment, the stock-in trade, the cutlery, crockery

and glasses...."

Of the purchase price of R315 000 an intitial cash payment of R102 500 ("the deposit") was to be paid to the sellers in the ratio of 60% to Dimitrios and 40% to Elias. The balance of the purchase price was to be paid by the purchaser to the sellers in monthly instalments of R3 500. The written contract further provided that until the balance owing by Eldim to Schannabels had been paid in full such monthly instalments would be paid to Schannabels on account of the purchase price payable by the buyer to the sellers; and that when such balance had been paid in full -

> "....then in such event the Purchaser shall effect payment of the amount of R3 500,00 (Three Thousand Five Hundred Rand) per month to the Sellers jointly."

In due course Eldim's debt to Schannabels was in this wise discharged in full; and thereafter, in terms of the written contract, the respondent became obliged to pay monthly instal-ments of R3 500 to Elias and Dimitrios jointly. However, pursuant

to a separate transaction between Dimitrios and the respondent the former was obliged to make certain payments to the latter. Accordingly Elias and Dimitrios agreed with the respondent ("the oral contract") that instead of paying R3 500 monthly to the sellers jointly the respondent would simply pay Elias R1 750 monthly; and that payment of the balance (R1 750) of the monthly instalment would be effected by set-off of the aforesaid indebtedness of Dimitrios to the respondent.

Mention has already been made of the fact that under the written contract 40% of the deposit of R102 500 was payable by the purchaser to Elias. In January 1983 Elias instituted an action in the Transvaal Provincial Division ("the trial action") against Vladislavich (as first defendant) and Dimitrios (as second defendant) in which he claimed payment of R41 000 from Vladislavich. The trial action had not been heard when the present application was decided by DANIELS, J.

Later in 1983 Elias and Dimitrios purported to cancel

their sale of the shares to the respondent and thereafter they instituted motion proceedings in the Transvaal Provincial Division ("the earlier application") for an order that the sale had been duly cancelled. The earlier application (in which Elias was likewise the first applicant) was dismissed with costs and in September 1984 an application for leave to appeal against the judgment in the earlier application was refused. After the purported cancellation of the sale in 1983 Elias, on the advice of his then attorney, refused to accept further monthly payments of R1 750 from the respondent. Such refusal by Elias notwithstanding, the respondent made certain monthly payments of R1 750 in trust to his own attorney in respect of his monthly debt to Elias under the oral contract. In addition both Dimitrios and the respondent appear to have accepted that the respondent's indebtedness to Dimitrios in respect of one-half of the monthly instalments of R3 500

continued.....

continued to be discharged by the operation of set-off pursuant to the oral contract.

On 12 December 1983 the respondent's attorneys wrote a letter to the attorneys then acting for Elias in connection with the application for leave to appeal which was pending in the earlier application. The concluding paragraph of this letter reads thus:-

> "We confirm that the monthly instalments of R1 750,00 in respect of first applicant's share are being paid into our Trust account monthly. We believe that the previous arrangement with Second Applicant still continues insofar as his share of the monthly instalments is concerned."

In due course Elias changed his attorneys and thereafter he was represented by the firm Ross & Jacobsz. On behalf of Elias his new attorneys on 24 March 1986 wrote a letter to the respondent's attorneys. The heading to this letter

was....

was:

"re: E CHRYSAFIS / S VLADISLAVICH & D CHRYSAFIS"

In the opening paragraphs thereof Ross & Jacobsz discussed the future of the trial action which Elias had instituted in January 1983; and then a further matter was raised in the following terms:-

> "We would be pleased if you would kindly furnish us with full details regarding moneys paid by your client in trust for credit of our client.
> According to our calculations your client is presently in arrears with payments in a total amount of R57 750,00. Whereas, up to now our client has refused to accept payment due to previous advice received, he now insists on payment and should this amount not be paid at our office within 14 (FOURTEEN) days from date hereof, our client shall access (sic) any right he may have in terms of the agreement.
> We shall be pleased to receive your answer by return of post."

By letter dated 1 April 1986 the respondent's attorneys acknowledged receipt of the above letter and then proceeded to say:-

"With .....

"With the utmost respect we do not understand and cannot agree with the contents of the letter.
May we suggest that you obtain full instructions from your client before taking the matter any further.
The action between the parties relates to a claim by your client from our clients in an amount of R41 000,00.
Our client has not paid money into our offices for the account of your client."

On 7 May 1986 Ross & Jacobsz wrote the following letter ("the letter of demand") to the respondent:-

"re: E. CHRYSAFIS / S. VLADISLAVICH / YOURSELF / SCHANNABELS (PTY) LTD.
We act on behalf of Mr E Chrysafis.
In terms of the agreement between our client and Mr S Vladislavich monthly payments of R1 750,00 had been paid to our client.
.....
The abovementioned instalments were paid up to June 1983 and thereafter had not been paid.
We now hereby give you notice to pay the arrear amount of R61 250,00 being the total monthly payments from the 1st day of July 1983 to the 1st day of May 1986 at our offices within 14 (FOURTEEN) days from date of this letter.
Should you fail to pay the said amount, our client reserves his right to act according to clause 16 of the agreement.

A.....

A copy of this letter is being sent to your attorneys....."

In response to the letter of demand the respondent's attorneys on 20 May 1986 wrote a letter under the heading:

"re: E CHRYSAFIS / S VLADISLAVICH & H KATSAPAS"

to Ross & Jacobsz stating, inter alia -

"We find it hard to believe that E Chrysafis is now claiming an amount of R61 250,00 from our clients as we are of the opinion that no monies whatsoever are owing by our clients in terms of the agreement of sale.
We would appreciate it if you could obtain from your client a detailed statement of account reflecting all payments made by our clients relating to the purchase of the business.
Once we receive such statement we will be able to investigate the matter further.
We may mention that D Chrysafis has confirmed that he has no claim whatsoever against either Vladislavich or Katsapas."

Receipt of the last-mentioned letter was acknowledged in a letter dated 26 May 1986 by Ross & Jacobsz to the respondent's attorneys. In this letter Ross & Jacobsz wrote, inter alia :-

"Your .....

"Your Mr Stupel finds it 'hard to believe' that our client is claiming the arrears. Have you received instructions from client to deny the amount owing?"

and

"We fail to appreciate the significance of the 2nd last paragraph. You will remember that Mr D Chrysafis indeed accepted the monthly payments which is due to him. Your client, in terms of the deed of sale, had to pay R3 500,00 per month and it was agreed that one half would be paid to our client and the other half to Mr D Chrysafis. The latter, due to the fact that he had further agreements with your clients, accepted his share but our client, on advice received by his previous attorney refused to accept payments. It is quite clear that your client has now failed to comply with the relevant terms of the agreement and we are obtaining instructions as to the cancellation of the agreement."

On 9 June 1986 Ross & Jacobz addressed a further letter ("the letter of cancellation") to the respondent in the following terms -

"re: AGREEMENT OF SALE : E CHRYSAFIS / D CHRYSAFIS /YOURSELF - ELDIM (PTY) LIMITED:

We.....

We refer to our letter of demand dated the 7th of May 1986 in which you were requested to make payment of the arrears.
You have failed to comply with this demand and we are instructed by our clients, as we hereby do, to cancel the agreement.
We wish to draw your attention to the fact that we have been instructed by both Mr E Chrysafis and Mr D Chrysafis to cancel the agreement.
....."

Against the background of the correspondence reviewed above it is now necessary to quote in full the provisions of clause 16 of the written contract. It reads thus:-

"16. BREACH OF CONTRACT

Should the Purchaser fail or neglect to pay any one instalment of the purchase consideration on due date, or breach any of the terms or conditions or warranties hereof, the Sellers shall have the right, in addition to any other remedy available to them at Law, to call upon the Purchaser in writing, despatched to him by registered post, to make payment of the amount or amounts in arrear or to remedy the breach, as the case may be, within a period of 14 (Fourteen) days from the date of such notice. In the event of the Purchaser failing to comply with the terms of the notice within

the prescribed period, the Sellers shall be entitled at their option to:-

16.1 Demand from the Purchaser the full balance of the purchase consideration and interest then outstanding, which shall then immediately be due and payable; or

16.2 Take transfer of the shares in their possession and take cession of the Purchaser's loan accounts pledged in terms hereof in their name and to appoint a Director in the place of the Purchaser, in which event -

16.2.1 The Sellers or their nominee shall take control of Eldim (Proprietary) Limited and its business and assets;

16.2.2 The Sellers shall retain all amounts paid by the Purchaser as 'rouwkoop' without prejudice to any of their rights to claim from the Purchaser any additional damages which they may prove to have suffered by reason of the default of the Purchaser;

16.2.3 The Purchaser shall, on the Sellers taking over control of Eldim (Proprietary) Limited, immediately vacate the premises and hand over to the Sellers all books, documents and records belonging to Eldim (Proprietary) Limited; or

16.3 Sue for the amount of any arrear instalments."

I.....

I turn to the merits of the case. At the time of the application in the Court below, it was common cause in regard to the oral contract that although there had been due performance (through set-off) of the respondent's obligation to pay monthly the sum of R1 750 to Dimitrios, in the case of Elias the respondent was in arrears with his monthly payments in an amount between R45 875 and R63 500.

A matter in dispute on the affidavits before DANIELS, J involved the precise terms of the oral contract. The version of the respondent was that the monthly payment of R1 750 to Elias represented a payment:-

> "....to the First and Second Applicants...
> by paying the instalments to the First Applicant
> at the First and Second Applicants' request."

On the other hand Elias averred that in terms of the oral contract the respondent's monthly payment of R1 750 represented a payment to Elias and to him alone. For the purposes of

his judgment DANIELS, J accepted the version of Elias. That version is, I think, very strongly supported by the probabilities. In argument before this Court the validity of the assumption so made by DANIELS, J was not challenged. In my view that assumption was properly made; and the appeal should likewise be dealt with on the footing that the version of Elias is the correct one.

In the Court below the fate of the application hinged on the question whether a right to cancel the contract had accrued to the sellers when the letter of cancellation was sent to the respondent. That question was answered against the appellants. The learned Judge decided, in the first place, that, inasmuch as it had been written on behalf of Elias only, the letter of demand was "invalid and ineffective"; and thereafter he reasoned thus:-

"Once it is accepted that the letter of demand was

invalidly.....

> invalidly addresed on behalf of the one applicant only it must follow that the other applicant who was not joined in demanding payment could not validly acquire the right to cancel and that his joining in the cancellation as such is of no legal effect."

In terms of the written contract the respondent had to pay Elias and Dimitrios jointly a monthly instalment of R3 500. The conclusion of the Court a quo that the letter of demand was legally invalid was based upon the view adopted by the learned Judge that the respondent's obligation to pay such instalments was an indivisible one; and that the respective rights of Elias and Dimitrios to receive such instalments were also indivisible.

An argument to that effect was addressed on behalf of the respondent to the Court below, and it was repeated in this Court. The argument relies on features in the written contract such as the following: that Elias and Dimitrios are designated as "the Sellers"; that they are obliged jointly to sell the 200 shares comprising

the issued share capital of Eldim; that there is stipulated a single purchase price of R315 000 for the shares and loan accounts of both Elias and Dimitrios; that the deposit of R102 500 is described as a single sum; that Elias and Dimitrios are jointly obliged to deliver to the respondent the share certificates in Eldim and other relevant company documents; that Elias and Dimitrios are required to give warranties jointly; and that in clause 16, when reference is made to Elias and Dimitrios, use is consistently made of the plural ("the Sellers"). In the course of his judgment the learned Judge said in this connection:-

> "Various clauses in the agreement were referred to in support of this argument. The indications are clearly to the effect contended for. Apart from the specific clauses relied upon I am of the view that it can safely be said that the applicants intended to sell the business as such, and to divest themselves of their interests therein, so as to constitute the respondent the sole owner thereof. The fact that each one of them holds a number of shares, and that each of them individually obtained

> a loan account in the company cannot be construed as meaning that each sold his particular interest separately or individually."

It is clear, I think, that the sale by the appellants to the respondent was a unitary transaction in the sense that its plain object was the disposal of the total issued share capital of Eldim and the loan accounts of both Elias and Dimitrios. It is no less clear that in the event of a breach of the agreement by the respondent its cancellation required the concurrence of both sellers. From the fact that the agreement of sale was an indivisible one in the sense just indicated it does not necessarily follow, however, that the rights of Elias and Dimitrios to the monthly instalments of R3 500 stipulated in the written contract were indivisible. Subject to certain well-known exceptions - the law of partnership is one - the general principle of our law of contract is that if several obligees become jointly entitled

to .....

to certain rights there is a presumption that each co-obligee may sue the debtor for his pro rata share. See, for example, De Pass v The Colonial Government and Others (1886) 4 SC 383, 390; Alcock v Du Preez 1875 Buch. 130, 132; Miller v De Bussy 1904 TS 655; Lydenburg Estates v Palm and Schutte 1923 TPD 278; Glenn v Bickel 1928 TPD 186, 191. It seems to me to be open to doubt whether the terms of the written contract, examined as a whole, serve to displace the presumption in favour of the divisibility of the respective rights of Elias and Dimitrios to the monthly instalments of R3 500. A feature of the written contract which tends to point the other way is the specific provision for a 40%/60% division between Elias and Dimitrios in respect of the deposit of R102 500 payable by the purchaser. In the view which I take of the matter, however, it is unnecessary to express a firm opinion on the point. Assuming for purposes of argument that originally

and.....

and in terms of the written contract the rights of Elias and Dimitrios to the monthly instalments of R3 500 were indivisible, it seems to me that in any case their respective rights were clearly sundered after the conclusion of the oral contract. For the reasons which follow the conclusion seems to me to be inescapable that the respondent assumed a discrete legal obligation to pay Elias R1 750 per month; and that the correlative right of Elias to receive such sums became enforceable at the instance of Elias independently of and without the concurrence of Dimitrios.

The Court a quo took a different view of the matter. In the opinion of the learned Judge the effect of the agreement of sale fell to be determined by reference to the written contract alone. With regard to the later oral contract the learned Judge remarked:-

> "Clearly this arrangement was arrived at as a matter of convenience and suited the parties to the

agreement.....

> agreement from an administrative point of view. By adopting this manner or method of payment the tenor of the agreement and the intention of the parties were not changed or altered. The obligation to pay R3 500 per month to the sellers jointly remained unaltered. By dividing the payment it cannot be said that each seller individually acquired rights distinct and separate from those of the other seller."

It seems to me, with respect, that the above reasoning is unsound. When the oral contract was concluded the resultant position was that the written contract did not contain, and was no longer intended to contain the entire rights and obligations of the parties under the agreement. Thereafter the agreement was partly written and partly oral; and "the tenor of the agreement and the intention of the parties" had to be construed with reference not only to the written contract but also by reference to the oral contract which was supplemental to it. That the later oral contract was inspired by considerations of practical convenience is irrelevant to the

problem....

problem of interpretation of the agreement. For purposes of ascertaining the full content of the agreement it is necessary to see what terms were engrafted upon the written contract by the oral contract; and to see in how far the provisions of the former are qualified by the latter. Cf. J.M.Legate v Praagh & Lloyd (1906) 27 NLR 413; Brink v Botha 1943 CPD 176 at 179; Wessels, Law of Contract in SA Vol I § 1794/5; Christie, The Law of Contract in SA (1983) p.166. The effect of the two contracts construed together is that the respondent was legally obliged to pay to Elias in his own right each month the sum of R1 750.

In its judgment the Court a quo expressed the further opinion that had Elias in fact enjoyed an independent right to receive R1750 per month from the respondent, the legal consequence thereof would be to destroy any right on the part of Dimitrios to join Elias in cancelling the agreement of sale.

In.....

In this connection the learned Judge reasoned as follows:-

> "If, on the other hand, the right to obtain payment in respect of the shares sold was divisible as is contended for by Mr Smalberger the second applicant would have no cause whatsoever in cancelling the agreement. It was common cause that the 'payments' to the second applicant were up to date, and any attempt to place the respondent in mora to that extent would have been a futile exercise. It also follows therefore that the second applicant could in those circumstances not acquire the right to cancel the agreement."

I am unable to agree with the conclusion of the Court a quo that because the respondent's 'payments' to Dimitrios pursuant to the oral contract were up to date Dimitrios was precluded from acquiring a right to cancel the agreement. The circumstance that under the oral contract each seller had a right to his pro rata share (R1 750) of the total monthly instalment payable by the respondent cannot alter the respondent's legal liability to pay the sellers jointly a total monthly instalment of R3 500. It follows that if

in any month the respondent did not pay timeously the full instalment of R3 500 his omission to do so would rank as a failure or neglect "to pay any one instalment of the purchase consideration on due date" in terms of clause 16 of the written contract.

It remains to consider whether, as was contended by counsel for the respondent, the letter of demand was legally ineffective for the reason that it was written on behalf of Elias only. I do not think that it was legally ineffective on this account. In terms of clause 16 of the written contract -

> ".....the Sellers shall have the right ..... to call upon the Purchaser in writing ..... to make payment of the amount or amounts in arrear."

The phrase "the Sellers" in the above-quoted provision is capable of more than one construction. It may, on the one

hand.....

hand, be read as signifying "both Sellers acting in concert". On the other hand the phrase in question is also susceptible of the meaning "the Sellers or either of them as the case may be". That the latter construction may have been intended by the parties when the written contract was signed is suggested by the fact that clause 8 thereof makes specific provision for payment of 40% of the deposit of R102 500 to Elias and 60% thereof to Dimitrios. It is unnecessary, however, to speculate as to what construction would have been assigned to the phrase "the Sellers" in clause 16 of the written contract if the latter had stood alone as the sole repository of the agreement between the parties. It does not so stand. Clause 16 falls to be interpreted in the full contextual setting of an agreement which is partly written and partly oral. That agreement, as has been indicated earlier, provides for separate payments in specific amounts by the respondent to

Elias.....

Elias. So approaching the problem of construction the phrase "the Sellers" in clause 16 must, in my opinion, be read as bearing the signification "the Sellers or either of them as the case may be".

During argument in this Court counsel for the respondent urged upon us that, apart from the fact that the letter of demand had been written on behalf of only one of the sellers, the latter were precluded from cancelling the agreement for the further reason that at the time of the letter of demand the sellers - or Elias, at any rate - was in mora creditoris through his refusal to accept monthly payments of R1 750 from the respondent subsequent to the sellers' purported cancellation of the agreement in 1983; and that this state of affairs excluded the possibility of mora debitoris on the part of the respondent. The argument was that the sellers were not legally entitled to address the letter of

cancellation to the respondent in the absence of some earlier intimation to the latter that, despite his earlier refusal, Elias would thenceforth be willing to receive monthly payments of R1 750 from the respondent. In this connection much was sought to be made of the fact that the letter of 24 March 1986 addressed by Ross & Jacobsz to the respondent bore the heading -

"re: E CHRYSAFIS / S VLADISLAVICH / D CHRYSAFIS".

It was suggested that by this heading the respondent and his attorney were both confused and misled into the belief that what was said in the letter was intended by the author thereof to relate exclusively to the trial action; and that their perplexity of mind was illustrated by the tenor of the letter written by the respondent's attorney on 1 April 1986 ("we do not understand and cannot agree with the contents of the letter"). Bearing in mind (1) the contents of the letter

of 24 March 1988 and (2) the fact that when the application was heard it was common cause that in respect of his monthly payments to Elias the respondent was in arrears in an amount somewhere between R45 875 and R63 500, I find it surprising that the respondent or his attorney laboured under any such misapprehension. It is, however, unnecessary to say anything more in this connection for the reason that the letter of demand itself unequivocally manifested alike a recognition on the part of Elias that the agreement was legally effective and his insistence that the respondent should render performance according to its terms. Upon receipt of the letter of demand the respondent was no longer entitled to suspend his own performance; and by ignoring the letter of demand the respondent was in mora debitoris.

Part of the relief sought by the appellants in the Court.....

Court a quo was an order -

> "..... declaring all moneys paid by the respondent in terms of the deed of sale forfeited in favour of the first and second applicants."

Submitting that the grant for such an order in favour of the sellers would be inequitable, the respondent in his answering affidavit invoked the provisions of sec 3 of the Conventional Penalties Act, 15 of 1962; and in this regard the respondent made the following averments:-

> "Such forfeiture would amount to a penalty in terms of the Conventional Penalties Act .... and would be completely out of proportion to any prejudice which the First and Second Applicants allege they may have suffered. I, as an experienced business-man well versed in judging the value of restaurant-type businesses, say that the business LADY ANNABEL'S is today worth in excess of R500 000,00."

In the light of the conclusion of the Court below that the sellers were not entitled to cancel the agreement the learned

Judge .....

Judge found it unnecessary to express any opinion as to whether, if the sellers had been entitled to cancellation, such forfeiture would have represented an excessive penalty, and, if so, what reduction thereof would be equitable. On appeal it was submitted on behalf of the respondent that forfeiture of any amount paid by the respondent would be disproportionate to the prejudice suffered by the sellers.

Upon a reading of the affidavits filed in the application, so it seems to me, it does not appear prima facie that the penalty stipulated is out of proportion to the prejudice suffered by the sellers. Accordingly the onus is on the debtor (the respondent) to show that the forfeiture is disproportionate to the prejudice suffered by the creditors; and to what extent it should be reduced. See: Smit v Bester 1977(4) SA 937 (A) at 941A/943A. In my view the respondent has failed to discharge the onus. The respondent's

contention is based on his assertion that the value of the business was in excess of R500 000. It appears to me to be distinctly doubtful whether what is contained in the respondent's terse statement quoted above establishes his qualifications and competence to give expert testimony on the point. This particular problem need not, however, be further debated. In my opinion there is a further and insuperable difficulty in the respondent's way. Assuming the admissibility of his opinion on the matter, and discounting the fact that the respondent is hardly an independent witness, it seems to me that the opinion ventured by him is so baldly stated as to have no real evidential value. Whatever value may attach to the goodwill of the business together with its furniture, equipment and stock-in-trade, the real question here is what fair market value should be assigned to Eldim. The determination of fair market value necessarily entails an inquiry into the price at which the assets in question

(the 200 shares in Eldim and its directors' loan accounts) would probably change hands between a willing buyer and a willing seller both having reasonable knowledge of the relevant facts. A relevant fact which at once looms large is this: what were the nature and extent of Eldim's liabilities? The respondent's opinion is unsupported by any balance-sheet showing Eldim's assets and liabilities; and as to the latter the respondent's answering affidavit is entirely silent. For all this Court knows Eldim may at the time have had debts in excess of R500 000.

For the reasons aforegoing I consider that the appellants were entitled to the relief sought by them in the Court below and that the appeal should succeed. For the following reasons, however, some modification of the first paragraph of the order claimed in the Court below is necessary. As presently framed it proceeds on the assumption that the shares of Elias and Dimitrios have not yet been transferred

to.....

to the respondent, and that the latter has not yet been appointed a director of Eldim. The respondent alleges that in fact the said shares have been transferred to him and that he has been appointed a director of Eldim; and his claims are supported by the records kept by the Registrar of Companies. The parties are agreed that in the event of the success of the appeal an amendment of the first paragraph of the relief sought would be necessary, and that such amendment should be incorporated in the orders made by this Court. This appears from brief supplementary heads of argument filed by both sides at the request of this Court.

In the result the following orders are made:-

(a) The appeal succeeds with costs.

(b) The costs mentioned in (a) above will not include the costs occasioned by the supplementary heads of argument respectively filed on behalf of the appellants (dated 4 May 1988) and on behalf of the respondent (dated 9 May 1988). The costs

occasioned by the said supplementary heads. will be borne by the appellants.

(c) The orders made by the Court a quo are set aside and the following orders will be substituted therefor:-

"The following orders will issue -

(1) Directing the respondent to hand over the business known as Lady Annabel's and all documentation relating thereto to the first and second applicants on behalf of the third applicant, and to transfer all shares in the third applicant which may be registered in the name of the respondent to the first and second applicants in equal proportions, to inform the Registrar of Companies that he has resigned and is no longer a director of the third applicant, and to desist from in any way holding out that he is either a director or shareholder of the third applicant and to desist from purporting to act on behalf of the third applicant.

(2) Directing the respondent forthwith to vacate the premises known as Lady Annabel's, Sunnypark Shopping Centre, Esselen Street, Sunnyside, Pretoria, and in the event of his failure to do so, authorising the Deputy-Sheriff to place the applicants in possession of the said business and to eject, the respondent from the said premises.

(3) Declaring.....

(3) Declaring all moneys paid by the respondent in terms of the Deed of Sale forfeited in favour of the first and second applicants.

(4) Directing the respondent to pay the costs of this application."

G G HOEXTER, JA

VAN HEERDEN, JA)
NESTADT, JA)
STEYN, JA) Concur
NICHOLAS, AJA)