L3/89

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the appeal of:

ROSEBANK PARKADE (PTY) LTD.....Appellant

and

CAPE PACIFIC LTD.....Respondent

CORAM: CORBETT CJ, NESTADT, MILNE, KUMLEBEN JJA, et NICHOLAS AJA.

DATE OF HEARING: 27 February 1989

DATE OF JUDGMENT: 3 March 1989

J U D G M E N T

CORBETT CJ:

Appellant, Rosebank Parkade (Pty) Ltd, a company incorporated under the company laws of the Republic of South Africa and having its registered office at No 14, Dorp Street, Cape Town, has at all material times been the holder of certain shares in a company known as Findon Investments (Pty) Limited

("Findon") and of a claim on loan account against Findon. Findon is the registered owner of a block of seven flats situated at 20 Victoria Road, Clifton. The shares held by appellant entitle the holder to occupy flat No 2 in this block ("the flat"), together with a garage and certain domestic staff quarters.

Respondent, Cape Pacific Limited, a company incorporated under the laws of the Bahamas and carrying on business at, inter alia, 50 Welbeck Street, London, England, instituted action against appellant in the court a quo (the Cape of Good Hope Provincial Division) claiming delivery of these shares in Findon and cession of appellant's loan account in Findon to it, together with certain ancillary relief. Respondent's cause of action was based upon an oral contract of sale of the shares and loan account, together with certain furniture in the flat, alleged to have been concluded on or about 22 February 1979 between appellant as seller -

represented by Mr Abraham Swersky, an attorney of Cape Town - and a Mr Arnold Shapiro or his nominee, as purchaser. It is further alleged that, in terms of the contract, Shapiro nominated respondent as the purchaser. Appellant defended the action, pleading that no such oral contract had been concluded and also raising certain alternative defences should the Court find that the oral contract had been established. The matter came to trial before Friedman J, who found in favour of the respondent and granted it the relief claimed and costs. With the leave of the trial Judge, appellant appeals to this Court against the whole of the judgment and order of the Court a quo. Before considering the arguments raised on appeal it is necessary to make some reference to the background facts and the evidence adduced by the parties on the disputed issues.

The Background Facts

Appellant formed part of what may loosely be described as "the Lubner group of companies", in which the moving spirit was a Mr Gerald Lubner. Lubner had originally been resident in South Africa and had conducted various businesses through companies in the group. In 1978 he took up residence overseas and became a non-resident in terms of the laws relating to exchange control. He appears to have had homes in various places, including London and Monte Carlo. Despite his change of residence Lubner kept control of the companies in the group and the businesses conducted by them. The principal place of business was No 14, Dorp Street, Cape Town. The senior official in the Cape Town office was a Mr Edward Bensimon, who died before the case came to trial. He had as his assistant a Mr Robert Flett, who was a chartered accountant. His principal attorney in South Africa was Swersky, who was

also a director of virtually all the companies forming the Lubner group. In fact when Lubner became a non-resident Swersky became the sole director of many of the companies, including appellant. Swersky nevertheless deferred to Lubner's wishes in all matters affecting the companies of which he was the director. The group fell into two parts: firstly, the companies in which Lubner personally held the beneficial interest, and, secondly, those in which the beneficial interest was held by four trusts which had been created by his father for the benefit of Lubner's children. In late 1978 and early 1979 Lubner was engaged in the reconstruction of various companies in the group.

In the normal course Lubner and his family occupied the flat whenever they were in Cape Town. Relatives, friends and business associates were also permitted to stay there from time to time. The question of selling the flat first arose at about the end of

1978 or the beginning of 1979, when Shapiro visited the Cape on holiday.

At the time Shapiro was the executive vice-president of Golden Products International ("Golden Products"), a company which had its head office in Geneva, Switzerland, and carried on the business of selling "soap and vitamins" direct to the consumer in South Africa, Europe, Japan and South America. The vice-chairman of the board of the company was a Mr Boyd Deel. Towards the end of 1978 Shapiro had attended a meeting of Golden Products in Europe. There he had had discussions with Deel and it had been agreed that on Shapiro's return to South Africa he would look for an apartment in Cape Town, suitable for the needs of Deel and himself. This was to be a personal venture on their part. The apartment was to be acquired in the name of what was termed "an off-shore company", ie a company incorporated outside South Africa. Shapiro

was given full authority to negotiate and conclude a deal.

While he was in Cape Town and was looking for a suitable apartment Shapiro came into contact with a Mrs J Sassoon of a firm of estate agents, known as Harrow Owen (Pty) Ltd ("Harrow Owen"). A director of this firm was Mr I T Hirschon. Mrs Sassoon took Shapiro to see the flat. Whether at that stage she actually had a mandate from the owner is not clear; but at all events Shapiro saw the flat and immediately realised that it was the type of apartment that he and Deel were seeking. He asked Mrs Sassoon to put up to the owner an offer of R135 000. This she did by conveying the offer to Bensimon. The offer included all the furniture and fittings, other than those items which Lubner did not wish to sell. Information concerning the offer was conveyed to Lubner by Bensimon in a telex dated 9 January 1979 and also in a letter

dated 15 January 1979. There is no evidence as to Lubner's immediate reaction to the telex and the letter; and Shapiro left Cape Town for Durban without having received a response to his offer. Before leaving he did, however, meet Hirschon and he told Hirschon and Mrs Sassoon that his attorney, Mr A M Edelson, of Durban, (who also acted for Deel) would be "contacting" them in regard to the flat.

In Durban Shapiro saw Edelson and instructed him to continue the negotiations on his (Shapiro's) behalf. In the meanwhile Shapiro proceeded on a business visit to Brazil. He nevertheless kept in touch with Edelson and Hirschon by telephone while he was away. Edelson also had telephone conversations with Mrs Sassoon, Hirschon and Deel, who at the time was overseas.

It would seem that in the interim Hirschon had taken over the negotiations from Mrs Sassoon. He

was acquainted with Swersky and knew that he acted for Lubner. He accordingly spoke to Swersky about the flat and indicated that he had a buyer for R135 000. Swersky told him, however, that the price would not be less than R200 000. Hirschon conveyed this information to Shapiro. Thereafter Shapiro telephoned Edelson and told him that the price of the flat was "increasing constantly" and that the owner was now wanting R200 000. Edelson, who was planning to visit Cape Town on 14 and 15 February 1979, agreed to call on Swersky and to endeavour to persuade the latter to accept R150 000. Edelson telephoned Swersky on 2 February 1979 and arranged to meet him in Cape Town on 15 February 1979.

The meeting duly took place on that date. Edelson and Swersky both gave evidence at the trial: the former was called by the respondent and the latter by the appellant. Their respective versions of what

transpired at this meeting diverge considerably, but it is common cause that Edelson did not succeed in persuading Swersky to accept a price less than R200 000. Edelson later reported back to Shapiro by telephone on what had been discussed at the meeting.

Shortly thereafter Shapiro returned to South Africa from Brazil and on 22 February 1979 he came to Cape Town to view the flat once again. He was accompanied by his mother.

The Alleged Contract

It is common cause that on the afternoon of Thursday, 22 February 1979 Hirschon took Shapiro and his mother to view the flat and that in the late afternoon they met Swersky at the Ambassador Hotel, Bantry Bay (of which incidentally Swersky was a part-owner). However, the respective versions of Hirschon and Shapiro (who both gave evidence, as respondent's witnes-

ses, at the trial), on the one hand, and of Swersky, on the other hand, as to what occurred at this meeting differ radically on certain fundamental issues. I shall try to summarize these versions in turn. In regard to the former version I shall, for reasons which will later emerge, rely mainly on the evidence of Hirschon.

Acording to Hirschon, Swersky made it clear from the start that there was no point in discussing the matter unless they were going to talk about a selling price of R200 000. Hirschon indicated that he had discussed this figure with his client, Shapiro, and the latter was ready to go ahead with the meeting. Shapiro and Hirschon then both asked Swersky whether he had a mandate from Lubner authorising him to conclude the transaction. Swersky assured them that he did: he said that he was a director of the company and could commit the company if Shapiro was prepared

to pay the price. To Hirschon's surprise (he had advised Shapiro that the price was excessive) Shapiro then said to Swersky -

> "I will pay you R200 000. If you accept that, I am happy to shake hands with you and consummate the deal".

This they then did, ie shake hands. The contents of the flat were discussed. Swersky said that the price of R200 000 included the contents of the flat, apart from such items of furniture and personal effects as Lubner wished to remove. Shapiro agreed to this. It was arranged that Swersky would discuss this with Lubner and find out what items he wished to keep. As to occupation of the flat, the date of 1 May 1979 was agreed upon. It appeared that the consent of the other shareholders in Findon (and as such flat-occupiers) to the sale had to be obtained and Swersky undertook to do this. Swersky was told that it would be a "cash

transaction" - there was no need for any borrowing to pay the price - and that the purchaser would be an overseas company to be nominated by Shapiro.

Hirschon described in detail how Shapiro and Swersky shook hands to indicate that a deal had been concluded. He said that Shapiro had previously been very ill and was still wearing callipers. Because of this he had great difficulty in standing up to shake hands on the deal.

In his evidence in regard to the discussions at the Ambassador Hotel Swersky agreed that at the outset he made it clear that there was no possibility of a deal at a figure under R200 000. Hirschon and Shapiro demurred, but eventually Shapiro indicated that he would be prepared to pay R200 000. Swersky then informed them that he would have to convey this to Lubner and that he would then "come back" to them. The question of the furniture was discussed. Swersky told

them that, assuming Lubner was prepared to sell, he would wish to exclude the major portion of the contents of the flat. In regard to occupation Swersky informed them that the earliest possible date would be 1 May 1979. Swersky denied that a deal was concluded on that occasion or that the parties shook hands in order to symbolize this fact. He further denied that he was told that the purchaser would be an off-shore company, though he did concede that at a later stage "there was some mention of a nominee". He testified that the suggestion that he told Hirschon and Shapiro that he had a mandate from Lubner to conclude a deal was "an absolute fabrication". There was no such mandate. Even in his capacity as a director of appellant his function was to serve his principal Lubner, who was the beneficial owner of the company.

That, in summary, represents the conflicting versions of the parties as to what occurred at the

meeting in the Ambassador Hotel on Thursday, 22 February 1979. This meeting was followed by a telephone call on Friday, 23 February. Again the evidence conflicts. According to Hirschon, he telephoned Swersky. One of the matters discussed was the furniture in the flat. Both Hirschon and Swersky had copies of an inventory and valuation of the contents of the flat, which had been prepared by Ashbey's Galleries of Cape Town (Document 48). They went through this inventory together and Swersky told him what items Lubner wanted to exclude from the sale. Hirschon made a note of these items on his copy of the inventory. Hirschon protested that the exclusions amounted to about 80 per cent of the items listed, but Swersky said that those were the things that Lubner wanted and "that is it". In the same conversation Swersky asked Hirschon what he knew about Shapiro and his financial means. Hirschon assured him that there was "no

problem" there. Swersky also enquired who the overseas purchaser would be and Hirschon told him that he did not know. Swersky asked whether "they could possibly do something overseas" about the purchase price and Hirschon said that he would broach the subject with his client. The question of agent's commission on the transaction was also discussed; and it was further arranged that they would meet again on the following morning, ie that of Saturday 24 February.

Swersky agreed in evidence that he did speak to Hirschon on the telephone that day, but stated that all that was discussed was an appointment to see him (Swersky), which was arranged for the following morning at 11h30. Swersky denied that there was any conversation about the furniture or any of the other matters mentioned by Hirschon.

As regards the meeting on the morning of Saturday, 24 February 1979 there are again material fact-

ual disputes. According to Hirschon, basically three matters were discussed at this meeting: the question of the manner of payment of the purchase price, the question of commission and the possibility of Shapiro obtaining earlier access to the flat, particularly in order to spend a weekend in April there. As regards the first-mentioned, it had been Shapiro's intention to pay for the flat by means of financial rands, but at the meeting Swersky suggested that payment be made in Switzerland in Swiss currency. Upon enquiry by Hirschon, he explained that this would be perfectly in order because "two non-residents could trade freely outside the borders of the country". After a discussion it was agreed that, of the purchase price, R105 000 would be paid in South Africa and that in respect of the balance an amount equivalent to R85 500 (ie R95 000 less a discount of 10%, ie R9 500) would be paid into Lubner's bank account at the Algemene Bank

Nederland (Suisse) A.G. in Zurich. The reason for the discount, or "afslag" as it was called, was to compensate Shapiro for the prejudice of not being able to use financial rands (at a very favourable discount) for this portion of the purchase price. Shapiro felt that he had to have some proof of the purpose of the payment to the Swiss Bank and to satisfy him Swersky dictated to Shapiro a letter reading -

> "Dear Gerald,
>
> In consideration of the sale by Rosebank Parkade (Pty) Ltd of its shares in Findon Investments to myself, I confirm having paid to your bankers the Algemene Bank Nederland In der Schweiz AG. Zurich a sum of R85,500-00 at the current rate of exchange in Swiss Franc's.
>
> Kind regards
>
> Yours sincerely".

Shapiro signed this. The original (Document 62) was given to Shapiro and a copy was kept by Swersky. At the end of the meeting Shapiro told Swersky

that his principal would be "contacting" either Hirschon or Swersky directly to "come to grips with the mechanics of what had been discussed". Swersky undertook to draw an agreement of sale recording the transaction.

Swersky's version is that the meeting was a short one. He had spoken to Lubner on the Thursday night (22nd) and Lubner had told him to get the purchasers to make a firm offer and "bring them over" to Lubner in Europe to conclude the deal. At the meeting Shapiro raised the question of payment overseas. He (Swersky) did not think such a payment would be legal, but did not raise any objection to the proposal. He agreed to draw a deed of sale so that this deed, once signed by the purchaser, could constitute a written offer which could be placed before Lubner. Swersky denies that he dictated the letter (Document 62), though he did advise Shapiro that if the deal was ultimately

concluded, he (Shapiro) would need proof by way of an acknowledgement, that Lubner had received the money in Switzerland. He further denies that there was discussion about an earlier occupation date or the use of the flat in April. There was, according to him, no talk of commission at the meeting.

On the basis of its version of what occurred on 22, 23 and 24 February 1979 respondent contended that an oral agreement for the sale of the shares had been concluded on either 22 or 23 February and that this agreement was varied, in regard to the mode of payment, on 24 February. On the basis of its version, on the other hand, the appellant contended that no agreement was concluded: all that happened was that certain negotiations took place.

The Subsequent Events

The subsequent events have some bearing on

the probabilities as to whether or not a contract was concluded over the period 22-24 February and I recount them as briefly as possible.

On Friday, 23 February 1979 Hirschon had addressed a letter to Swersky. It seems probable that Swersky received this letter early in the week commencing Monday 26 February. The material portions of the letter (Document 60) read -

> "Dear Abe,
>
> Re: Sale of Apartment No 2, No 20 Clifton to Mr M Shapiro
>
> As to our agreement with the purchaser, he buys the apartment voetstoots with all fittings and furniture and sundry items excluding the following:
> (Then follow a list of personal effects, furnishings and furniture.)
> Mr Shapiro would like to know when he can get vacant occupation of the apartment and also when the above-mentioned furnishings would be removed."

There is no written reply to this letter. Swersky stated in evidence that when he received this letter he sent for Hirschon and berated him for the contents thereof. He told Hirschon that he (Swersky) had "never done a deal" with him, that this was not the way to do business, that he was to take his letter and not "dare to do a thing like this again". He gave the letter back to Hirschon. All this was denied by Hirschon, who said that the "berating" related to an episode concerning a subsequent letter in July.

Shapiro and Hirschon visited the flat several times after 24 February in connection with certain repairs and alterations which Shapiro wished to have done and building contractors were consulted. Thereafter Shapiro returned to Johannesburg. On 8 March 1979 Swersky addressed a letter to Hirschon (Document 72), which reads as follows:

"I hand you herewith deed of sale in tripli-

cate for signature by your client and return to me in due course.

You will note that provision is made in the deed of sale for payment to you of a sum of R5500,00 but I confirm that in terms of the arrangements between us you will be entitled to receive from me a sum of only R5000,00 which sum I will pay to you against implementation of the transaction.

Kindly return to me the deed of sale in due course duly signed whereupon I will arrange to obtain the consents to the sale from the several remaining shareholders in Findon."

This letter was evidently delivered by hand. The draft deed of sale (Document 79) enclosed in the letter gave as the seller the name of the appellant, but the purchaser's name was left blank. It made provision for the sale of the relevant shares in Findon and of the seller's loan account for the sum of R105 000; for occupation of the flat to be given on 1 May 1979; and

for inclusion in the goods sold of certain furniture, as set forth in a list annexed to Document 79. After discussion with Swersky Hirschon added to this list certain items that were in the flat, but did not figure in Ashbey's inventory (and were not wanted by Lubner).

On the following day (9 March 1979) Hirschon had to go to Johannesburg on business. He accordingly took the three copies of the draft deed of sale with him and there handed them to Shapiro for signature by the purchaser. This is recorded in a letter from Hirschon to Shapiro dated 9 March 1979 (Documents 73 and 74).

Deel, an American resident in Switzerland, came on a business visit to South Africa in March 1979 and had a meeting with Swersky on the 14th of that month. Prior to this meeting he had spoken to both Shapiro and Edelson. From them he had understood that the flat had been purchased. He had also discussed

the terms of payment with Edelson (in Durban) and had expressed his concern as to whether the payment of portion of the price overseas would not constitute a contravention of the South African exchange control regulations. Edelson had advised him that if the seller was a non-resident then there would be no contravention and had suggested that reassurance be sought on this particular point from Swersky. Deel was due to visit Cape Town on other business: hence the meeting on the 14th.

At this meeting, which took place after Deel had inspected the flat and was also attended by Hirschon, Deel discussed with Swersky the possibility of using financial rands to pay the portion of the price that was to be paid in South Africa. This is common cause. According to Deel, they also discussed the legality of the payment overseas, with particular reference to the question as to whether the seller was

a non-resident; and Swersky assured him that the seller (or owner) was non-resident and that, therefore, part-payment overseas would not contravene exchange control regulations. This was flatly denied by Swersky, who testified that no such discussion took place. Swersky did, however, acknowledge that he telephoned Bensimon to find out details about Lubner's Swiss banking account and gave the information to Deel. According to Deel, it was never suggested during the meeting that a deal had not yet been done. Swersky was "adamant" that he had full authority to deal with the matter. He was never told that the purchaser would still have to persuade Lubner to "do the deal". If he had been told this he would have made arrangements to visit Lubner in Monte Carlo in order to obtain his agreement. Shortly after this meeting Deel returned to Switzerland.

In his evidence Deel also referred to the

aforementioned discussions which he had had with Shapiro in December 1978 in regard to the acquisition of an apartment in Cape Town. Deel himself then set about establishing the "off-shore" company that was to be nominated as purchaser. The name favoured was "Cape Pacific". Initially there was talk of a company incorporated in Jersey, but there were problems in regard to the proposed name. Deel accordingly instructed his solicitor at Nassau in the Bahamas, a Mr Julian Maynard, of the firm Seligman, Maynard & Co, "to take a company off the shelf". This expression apparently refers to the practice of solicitors in the Bahamas and elsewhere of holding the shares in dormant companies which are later made available to and utilized by clients for different purposes. Such a dormant company, named Graphic Productions Limited, was thus "acquired" by or on behalf of Deel and early in 1979 instructions were given by Deel for its name to be

changed to Cape Pacific Limited. The reason for this somewhat roundabout arrangement was that the islands constituting the Bahamas are apparently regarded as a convenient "tax haven". When he visited South Africa in March 1979 Deel assumed that his instructions to Maynard had already been carried out. It was evidently contemplated that Deel's London solicitor, Mr Michael Wilson-Smith, would represent his interests on the board of directors of Cape Pacific Limited.

Some time after his discussions with Deel in Durban Edelson received from Shapiro the draft deeds of sale and information in regard to Lubner's Swiss banking account. Edelson was proceeding to Europe on other business and he agreed to take the deeds of sale with him for signature by the purchaser. He met Deel and Wilson Smith in Geneva and the deed of sale was signed by the latter, as representative of Cape Pacific Limited, whose name was inserted as the purchaser.

This occurred on 26 March 1979. On the same day Deel arranged for the transfer of the equivalent in Swiss francs of R85 000 to Lubner's Swiss bank account in Zurich. In terms of a prior arrangement Hirschon was informed by cable (in code in order to preserve confidentiality) of the signing of the deed of sale and the transfer of the funds. Two days later Deel arranged for an amount of R105 000 in financial rands to be transferred to the credit of Harrow Owen's bank account in Cape Town in order to provide for the payment of the other portion of the purchase price. The funds arrived in Cape Town on 4 April.

In the meanwhile Swersky had visited Lubner in Monte Carlo and had discussed the transaction with him. This was on 28 March 1979. Swersky had taken a copy of the deed of sale with him, which he showed to Lubner. According to Swersky Lubner asked him about the legality of the transaction and he advised Lubner

that it was "an illegal deal". Lubner then said that he would have no part of the deal as presently structured, but made certain suggestions as to how it could be altered. Lubner also indicated that he wished to alter in certain respects the arrangements made in regard to the furniture. Lubner stated that he was coming to South Africa shortly and then "would do a deal on those terms".

Swersky returned to Johannesburg on 3 April 1979. From there he telephoned Edelson in Durban. According to Swersky, he told Edelson that Lubner was not prepared to do the deal as structured, that he was coming to South Africa, that he was prepared to do a deal on another basis and that he would attend to the matter personally. He added that Lubner insisted that whatever deal be concluded would have to be subject to exchange control approval. Edelson's version of this conversation is somewhat different. He told Swersky

that the deed of sale had been signed by the purchaser and the funds transferred. Swersky said to him that he had just returned from overseas, where he had had discussions with Lubner; that there was difficulty in proceeding with the transaction in its present form; and that he (Lubner) wished to have the method of payment of the portion of the purchase price which had been paid overseas varied. This would necessitate an application to exchange control. Edelson asked Swersky whether this meant that Lubner had changed his mind about the transaction. Swersky replied that this was not the case and added that if Lubner did change his mind he (Swersky) would not act for him and that if the matter ever went to court, he would be a witness. Swersky instructed him to retain the deeds of sale until the question of an application to exchange control had been resolved. Swersky also said that the payment in Zurich would be "reversed", ie

repaid to the transmitting bank. Edelson understood from this conversation that there would be a delay in the implementation of the agreement pending an application to exchange control and he reported this fact to his clients.

On about 5 April 1979 and after Swersky's return to Cape Town, Hirschon telephoned him to inform him of the arrival of the R105 000. Swersky then told him that he could not accept the money as Lubner was "having second thoughts". Hirschon was told to keep the money. He was also told that the payment in Zurich was to be reversed. This was eventually done on 2 July 1979.

During the weekend of 7-9 April 1979 and by arrangement with Swersky, Shapiro and some friends of his stayed in the flat. This seemingly insignificant fact assumed some importance later. Another pertinent fact in this connection is that when Shapiro arrived

at the flat he met a servant employed by Lubner named Christopher; and there was some discussion between Shapiro and Christopher about his remaining on in the apartment in the employ of the new owners.

In about the middle of April Lubner arrived on the South African scene, together with his wife and daughter. They came to Cape Town on 17 April. Shortly thereafter Lubner telephoned Hirschon and, as Hirschon put it, "screamed" at him. He complained about the fact that builders had been allowed into the apartment and had made marks on the walls; and that attempts had been made to "steal" Christopher from his employ. At about the same time Lubner met Swersky and Flett in the offices at 14 Dorp Street. According to Flett, Lubner was angry that Swersky was trying to make a commission on the deal and he told the meeting that his wife and child were upset about losing the flat and that he could not "go ahead with the deal". He also

upbraided Swersky for having allowed Shapiro and his party into the flat for the weekend in April. Flett stated in evidence that Swersky became "extremely angry" and "threatened to wash his hands" of Lubner's affairs if Lubner "reneged on the deal". Subsequently Lubner told Flett privately that he was definitely not going ahead with the deal, but that -

> ".... we must try and keep Mr Swersky sweet until such time as he could allow Mr Swersky to come to terms with the fact that it was all off."

On about 19 April 1979 Hirschon met Lubner at the Dorp Street offices. Lubner was pleasant and cordial. Lubner stated that he was disturbed by a rumour that was circulating about the deal in Johannesburg and that he was not prepared to proceed with the transaction on the basis proposed. The rumour which originated in statements made by Shapiro at a dinner

party was evidently to the effect that Lubner was concerned in an illegal deal involving part-payment overseas. Lubner spoke about the restructuring of the companies in the group so as to vest the shares in another company and stated that after this had been done he wished to apply for exchange control permission to do the deal. Lubner confirmed this at a second meeting on about 30 April 1979 and in a letter to Hirschon of the same date (Document 130).

At about this time Edelson was away on a hunting trip, but eventually on 7 May 1979 Hirschon told him over the telephone about the letter (Document 130) and of Lubner's avowed intention not to go ahead with the transaction as then structured. By then occupation of the flat had not been given by appellant. Edelson then endeavoured to make contact with Swersky and in the end managed to speak to him over the telephone on 18 May 1979. He asked Swersky whether it was

correct that Lubner now wanted to cancel the deal. Swersky replied that the "deal was definitely on" and that the application to exchange control would take some time. Swersky, in evidence, conceded that this conversation possibly took place.

On 4 June 1979 Edelson wrote a letter to Swersky, the material portion of which reads -

> "In this matter we have received an urgent telephone call from the purchaser who is overseas and who is now desirous that this matter be resolved without further delay.
>
> As you are aware it will be necessary for application to be made as a matter of urgency for exchange control authority to effect payment of the purchase price by the introduction of financial rand. In order to do so it is necessary to submit a copy of the sales agreement.
>
> We are also informed by our client that as yet the transfer of funds earlier arranged have as yet not been reversed.

Please let us hear from you as a matter of urgency."

Nothing transpired for a month and on 6 July 1979 Edelson telexed to Swersky a message that his client was adamant that the matter be finalised and insisted on being given occupation of the flat as from 15 July. In a telex dated 11 July Lubner informed Hirschon that he did not consider himself bound in any way and would resist any claim. By this time the payment in Zurich had been "reversed" and the money was available to the purchasers. On the same date, viz. 11 July, Hirschon wrote to Swersky a letter "confirming" the transaction relating to the sale of the flat, briefly recording its terms and indicating that both portions of the purchase price, the R105 000 and the R95 000, were available for payment against transfer of the shares. This letter resulted in Swersky berating Hirschon's partner, Levin (Hirschon had in the meanwhile gone overseas). This

is said to be confirmed by a letter written by Levin to Swersky on 17 July 1979. (This is the episode referred to earlier in this judgment in connection with Document 60.)

About the middle of July 1979 Hirschon visited Monte Carlo on other affairs. He made contact with Lubner in order to find out how the deal was proceeding. They had discussions on Lubner's yacht at St Tropez. Lubner indicated a reluctance to proceed with the transaction and asked Hirschon whether he could not put pressure on Shapiro to "drop the whole thing" and buy another apartment. Lubner in fact offered to pay Hirschon $50 000 if he was prepared to do this. Hirschon replied that he had no authority to cancel the contract or discuss terms or variations of any kind; and that he would not accept the money offered. About a month later, after his return from Europe, Hirschon met Swersky at the Ambassador Hotel and told him of his

meeting with Lubner. He also told him that Lubner felt that he was no longer bound by the agreement. Swersky replied that there was no way in which Lubner "could get out of the deal": he was committed to the deal.

During August and September 1979 Edelson was away in the United States of America and matters were left to drift. On 8 October 1979 and after his return to South Africa Edelson wrote to Hirschon demanding that the matter be brought to finality. A copy of this letter was passed on to Swersky. On 6 December 1979 Edelson wrote to Hirschon informing him that he (Edelson) had received instructions from respondent to institute action against appellant for specific performance of the agreement of sale. On 30 April 1980 motion proceedings were initiated. Appellant opposed and on 11 February 1982 these proceedings were withdrawn and action was instituted.

At some stage after his return from Europe in July 1979, Hirschon met Lubner in Cape Town. He told Lubner that litigation concerning the flat was imminent and the question of Hirschon being called as a witness cropped up in conversation. Lubner asked Hirschon whether he would consider becoming a "hostile witness", that is (so Lubner explained) being uncooperative with both parties so that neither wished to call him. Lubner stated that if Hirschon did this and gave him his files he (Lubner) would "make it worth (his) while". Hirschon refused to fall in with this suggestion.

The Judgment of the Court a quo

The trial before Friedman J commenced in February 1984, ran for a few days and then recommenced in February 1987, the intervening delay being due to the unavailability of the learned Judge. Consequent-

ly, as pointed out by Friedman J in his judgment, most of the witnesses were testifying to events that had occurred as long as eight years before. As a result memories had become blunted.

As I have indicated, respondent's case, in essence, is that an oral agreement for the sale of the shares, loan account and furniture was concluded on 22 February 1979 (or on 22 and 23 February) between Swersky, acting as the duly authorized agent of the appellant, and Shapiro, the purchaser to be Shapiro or his nominee; that this oral agreement was varied in regard to the mode of payment on 24 February 1979; and that subsequently and in terms of the contract respondent was nominated as the purchaser. Appellants' case is that no contract was so concluded or varied; that all that occurred was that Swersky, who had no mandate to conclude a contract on appellant's behalf, conducted negotiations with Shapiro and others resulting in the

production of a written offer (in the form of the deed of sale signed by respondent as purchaser) for submission to Lubner (who represented the appellant); that Lubner did not accept the offer; and that there was no proper nomination of the respondent as purchaser.

Appellant pleaded, in the alternative, that if an agreement was found to have been concluded, the agreement contravened reg. 10(1)(c) of the Exchange Control Regulations, promulgated in terms of the Currency and Exchanges Act 9 of 1933 and published under government notice No R1111, dated 1 December 1961 and was accordingly unenforceable. As a further alternative appellant pleaded that on or about 3 April 1979 an oral agreement was concluded between Swersky, representing the appellant, and respondent, represented by Edelson, not to proceed with the agreement, but to negotiate a fresh agreement which would be subject to permission from the Reserve Bank under the Exchange Control Regu-

lations. Appellant also denied that respondent was ever validly nominated as the purchaser under the agreement.

The trial Judge identified the issues in the case as being the following:

(1) Was an agreement concluded on 22 February 1979?

(2) If so, was that agreement varied on 24 February 1979?

(3) Was Swersky authorized to conclude an agreement?

(4) Was the variation legally enforceable?

(5) If not, what was the effect thereof?

(6) Did plaintiff validly become a party to the agreement?

(7) Did the agreement fall away in April 1979?

It is convenient to consider issues (1), (2) and (3) together.

The Agreement and Swersky's mandate

It is evident from my recital of the facts that there are fundamental differences between the version of the relevant facts deposed to by respondent's witnesses and that given in evidence by Swersky, who was the sole witness for the appellant. Lubner, though available and present during the trial, did not enter the witness-box. The resolution of the issues relating to the agreement and Swersky's mandate thus depends largely on questions of credibility. Relevant to this are the trial Judge's impressions of the witnesses, the inferences to be drawn from documents and other undisputed facts and the probabilities. And in this connection it must be borne in mind that a plaintiff does not have to demonstrate his case: it is sufficient if he can establish it upon a preponderance of probability.

As to the trial Judge's impressions, he found Shapiro to be an "unimpressive" witness - inarticulate, confused and "not particularly bright" - and was not prepared to rely on his evidence save to the extent that it was corroborated by other reliable evidence or the objective facts and the probabilities. Hirschon he found to be "a far better witness" and, despite his interest in the matter (agent's commission) and his confusion on certain issues, he held Hirschon to be "an honest and reliable witness". Of Edelson the trial Judge said:

> "Mr Edelson created a very favourable impression as a witness; he was calm, quietly spoken and answered questions fairly and without exaggerating,....."

Deel struck Friedman J as -

> ... completely honest and frank in the evidence he gave as to the role he

> played and I have no reason not to accept that evidence."

The trial Judge further stated -

> "Flett's role was insignificant. Making due allowance for the antipathy which he probably bears towards Lubner in view of the pending litigation between them, I found his evidence quite acceptable".

In regard to Swersky, Friedman J made no general observations as to credibility, but he did find that on a number of crucial issues Swersky's evidence either conflicted with the documentary evidence and/or the probabilities; and in the end he rejected Swersky's evidence on these issues. As regards the non-appearance of Lubner in the witness-box, the learned Judge listed a number of matters upon which Lubner could have given vital evidence and drew the inference, adverse to the

appellant, that had Lubner been called he would not have been able to support the version contended for by the appellant.

These findings on credibility by the Judge, who saw and heard the witnesses, are of the utmost importance and will not lightly be disturbed on appeal. Nevertheless, bearing in mind the considerable lapse of time between the occurrence of the relevant events in 1979 and the giving of evidence by the witnesses at the trial, it is also very important to examine the contemporary documents and the probabilities.

It is clear from the evidence that while the negotiations concerning the flat were in progress Lubner was kept constantly in the picture by his local staff, and by Swersky, by means of letters, telexes and telephone conversations; and that Lubner himself sent to them a number of telexes recording his views and wishes in the matter. I do not propose to refer to

these letters and telexes in any detail. Most of them are mentioned in the judgment of Friedman J. Generally speaking, they indicate that Lubner, after an initial reluctance, became very keen to conclude the deal with Shapiro - at a price of R200 000 - and put a certain amount of pressure on Swersky. This was resented by the latter, who asked to be allowed "to play the deal my way". It is further clear that Swersky spoke to Lubner on the telephone on the night of 22 February 1979, after his meeting with Hirschon and Shapiro. According to Swersky, Lubner told him to bring them to Monte Carlo in order to do a deal; but this did not occur. On 12 March 1979 Lubner telexed Bensimon:

> "Please have Swersky report to me on the Clifton sale".

This elicited the following telexed reply the next day from Bensimon:

"Clifton:

Swersky has drawn all papers and expects signature this week after which he will refer to you before signing".

Questioned about this, Swersky said that he certainly did not expect signature of that deed of sale because, as structured, it was illegal. It seems strange that, if that was his attitude, such a misleading message should have been sent by Bensimon to Lubner in answer to Lubner's enquiry. It also seems strange that Swersky should have gone to all the trouble to draw a deed of sale, to get it signed overseas by the purchaser and to take it overseas to Lubner if all along he knew that the deal as structured was illegal and therefore bound to be rejected by Lubner.

An important document, in my view, was Hirschon's letter to Swersky of 23 February 1979 (Document 60), the material portions of which have been

quoted above. This purports to record the fact that an agreement has been concluded with Shapiro and gives the list of furniture to be excluded from the transaction, as agreed to between Swersky and Hirschon over the telephone on 23 February. It is wholly consistent with Hirschon's version of what occurred on 22 and 23 February; and wholly inconsistent with Swersky's version. According to Swersky the letter was untrue and, in effect, a piece of sharp practice; Hirschon was berated for it; and the original was handed back to him. Hirschon denied this. The original was not produced at the trial: only a copy in Hirschon's possession was put in. Here the probabilities, in my view, overwhelmingly favour Hirschon and are against Swersky. Firstly, while it is, I suppose, conceivable that Hirschon might have tried to pretend in his letter that an agreement had been concluded in order to clinch the deal, I find it very unlikely that he would have

recorded in the letter a list of furniture excluded, if at that stage this had not even been discussed between Swersky and himself. Secondly, if as Swersky suggests this was in truth a fraudulent letter, I would have expected an attorney with Swersky's acumen and experience not to have left it at that, but to have himself written a letter placing the true position on record. Thirdly, there is the significant fact, emphasized by the trial Judge, that a comparison of the items of furniture listed in the annexure to the deed of sale drafted by Swersky with the list of excluded items of furniture in Hirschon's letter (Document 60) shows that the items in the annexure are all the items in Ashbey's inventory apart from those set out in Hirschon's letter. Leaving aside the contingency of an extraordinary coincidence, this suggests that Swersky and Hirschon did on 23 February discuss what furniture was to be excluded and that the letter

correctly records the results of the discussion. It also suggests that Swersky may well have had Hirschon's letter available to him when he drew the annexure to the deed of sale; though another possibility is that Swersky made an independent record of what items of furniture were to be excluded (using a copy of the Ashbey's inventory) at the time of his conversation with Hirschon. At any rate, I agree with Friedman J that the -

> "probabilities certainly favour Hirschon's version that there was a discussion between him and Swersky on the 23rd with regard to the furniture, during the course of which agreement was reached on the items to be excluded".

The subsequent conduct of the parties tends to support respondent's version of what occurred over the period 22-24 February and to contradict Swersky's.

In this connection I refer in particular to the preparation of the deed of sale by Swersky and its delivery to the purchaser's attorney (via Hirschon) for signature by the purchaser; the payment of R85 000 into Lubner's Swiss banking account (the identity of which was made known to the purchaser) and the payment of R105 000 to Hirschon in Cape Town for transmission to the seller; the arrangements made by or on behalf of Shapiro for alterations to and the renovations of the flat; and the opportunity given to Shapiro to stay in the flat during that week-end in April. This course of conduct seems to connote a concluded transaction.

The letter by Swersky to Hirschon (Document 72), which accompanied the copies of the deed of sale and which is quoted in full above, contains no suggestion that, as averred by Swersky, the deed was to serve merely as a written offer by the purchaser for Lubner's consideration. Nor is there any such suggestion in

Hirschon's covering letter to Shapiro, which enclosed the copies of the deed of sale and opened with the words -

> "I hand you herewith Deed of Sale in triplicate for signature by your good selves."

Had the position been as deposed to by Swersky I think it most probable that this would have been reflected in these letters.

Furthermore, there is a considerable amount of evidence, from various sources, that Swersky himself regarded Lubner as being committed to the transaction. Here I refer, for instance, to (i) Swersky's statement to Edelson over the telephone on 3 April 1979, as recounted by Edelson and detailed above, from which is to be drawn the clear inference that Swersky regarded Lubner as being bound by the agreement; (ii) Flett's evidence of Swersky's statement at the meeting on 17

April 1979 to the effect that he would wash his hands of Lubner's affairs if the latter reneged on the deal; (iii) Edelson's evidence that Swersky told him on 18 May that "the deal was definitely on"; and (iv) Hirschon's evidence (detailed above) that in July 1979 Swersky told him that there was no way in which Lubner could get out of the deal. In addition respondent led the evidence of Mr John Simon, an attorney of Cape Town. Simon testified to a meeting which took place on 3 May 1979 in Swersky's offices, at which he and Swersky and others were present. During the course of the meeting Swersky telephoned Lubner two or three times. After the meeting and in the course of general conversation one of the others present made reference to a deal of Lubner's in which Swersky was involved and Swersky replied: "I've told him that he's got a deal and that if he tries to get out of it, I will not act for him". In evidence Swersky admitted that he could

have used these words and that they related to the transaction here in issue. He explained that what he intended to convey was that Lubner was "morally obliged". He further explained that although in a normal context a "deal" would mean a contract, in the present context a "deal" meant a proposal to be submitted to Lubner. I do not find these explanations convincing. Indeed at one point in his evidence Swersky, when questioned about Edelson's visit to Cape Town and meeting with him on 15 February 1979, gave the following evidence:

> "He might at the end of that meeting have said 'Well, we are prepared to offer R200 000'.--- Then I would've called in the typist and would've dealt with the matter then and there. If he had an hour's appointment booked then I could've closed the deal on the spot.
>
> Oh, you would've closed the deal on the spot? You really.....--- Subject to Mr Lubner's approval.

Yes. --- Plain and simple.

Ah yes. You forgot about that, didn't you, Mr Swersky?-- I didn't forget about that.

You in fact could have closed it on the spot?--- I had no authority to close it on the spot but I would've...

So then what are you talking about calling in the typist and concluding the deal then and there?--- I would've taken down exactly what he was prepared to do and I would then have conveyed it to Mr Lubner.

Yes.--- But that's (indistinct)...

Then why did you talk about 'concluding the deal then and there'?-- I said 'closing the deal'."

A slip of the tongue or a glimpse of the truth? And as to the talk of a "moral obligation", I am in full agreement with the following passage in the judgment a quo:

"On the defendant's version there was no contract; all that happened was that the purchaser had made an offer and

had undertaken to communicate with Lubner overseas in order to endeavour to arrive at a contract. Neither Shapiro nor anyone else in Deel's organisation had in fact contacted Lubner overseas; a contract which Swersky knew to be illegal and which, according to him Lubner would have no difficulty in recognising as such, has been put to Lubner which he, on the defendant's version, immediately rejected as he was entitled to do; there was an attempt on the part of Shapiro to seduce Lubner's manservant, Christopher away from him; the plaintiff had unauthorisedly entered the flat and made marks on the wall and furthermore had spread a malicious rumour in Johannesburg about Lubner's willingness to enter into a transaction in contravention of the Exchange Control Regulations. Under these circumstances there could have been no moral obligation whatsoever on Lubner to have done a deal with the plaintiff, nor is there any basis upon which Swersky could reasonably have considered Lubner to

have been under such an obligation."

There are a number of other less important points on the probabilities, but elaborating them would amount to piling Ossa on Pelion. For the aforegoing reasons I agree with the finding of the Court a quo that in regard to the formation of the contract respondent's version of what happened is to be preferred to appellant's. And here I would just add that Lubner's failure to give evidence considerably weakened appellant's case. In so far, therefore, as the argument of appellant's counsel on appeal is based upon a preference for Swersky's version of the vital events over that of respondent's witnesses (other than Shapiro) it is ill-founded.

Appellant's counsel submitted that the evidence failed to establish that the parties reached final consensus on (a) the furniture to be included in the contract, (b) the date of occupation, (c) the

manner of payment and (d) who the purchaser was going to be; that if consensus was reached, this occurred at the earliest on 24 February 1979; and that this agreement, incorporating as it then did the terms for payment overseas, was invalid.

In my view, there is no substance in the argument that the parties failed to reach consensus prior to 24 February 1979. As to the furniture, I agree with the learned trial judge that according to the respondent's evidence it was agreed that the purchaser would buy the contents of the flat, less such items as Lubner chose to exclude, and that this was sufficient to constitute a valid and binding agreement (see Clements v Simpson 1971 (3) SA 1 (A), at pp 7 G - 8 A). And, in any event, as pointed out by the trial Judge, on the following day Hirschon and Swersky settled the list of furniture between them; this was later ratified by Shapiro; and thus it is really immaterial

whether the agreement was finally concluded on 22 February or 23 February. As regards the date of occupation, the respondent's evidence is that this was fixed for 1 May 1979. The manner of payment was, as far as the seller was concerned, by cash against delivery of the shares. It was of no moment to the seller whether or not the purchaser financed this by means of financial rands. And the purchaser was to be Shapiro, or his nominee. In short, I have no difficulty in concluding that consensus was reached on all these points.

The true position, therefore, is that on 22 February (or at any rate by 23 February) consensus was reached between the parties. The agreement as to the manner of payment reached on 24 February was consequently correctly viewed by the Court a quo as a variation of the original agreement.

The only remaining point on this aspect of the case is whether Swersky had authority to contract

on appellant's behalf. It must be conceded that, having regard to Lubner's position in the Lubner group, Swersky would probably not have been entitled to sell the shares without a mandate from Lubner. Swersky himself, of course, averred that he had no such mandate and that the most he was entitled to do was to obtain an offer for submission to Lubner. What Lubner would have said on the subject we do not know. What Hirschon, Shapiro, Edelson and Deel said is that Swersky either expressly stated that he had a mandate or gave out that he had a mandate. Moreover, had Swersky told them that he had no mandate I would have expected their subsequent conduct to be very different from what it was. I have indicated the evidence which, to my mind, indicates that the parties concerned, including Swersky, acted as though a deal had been concluded. As an experienced attorney, well versed in representing Lubner, Swersky could not have thought

that he had "concluded a deal" unless he in fact had had authority to do so. Lubner kept in close touch with Swersky and often spoke to him on the telephone. Swersky was at pains to reject any suggestion that he had spoken to Lubner prior to 22 February 1979. This seems improbable, particularly in view of his discussions with Edelson on 15 February. What I find significant is Swersky's emphasis on the "magic figure" of R200 000. Swersky could surely not have been so dogmatic about this amount being an acceptable price unless he had cleared this with Lubner. All in all, I find no fault with the trial Court's conclusion that Swersky was authorized to conclude the original agreement with Shapiro, or nominee.

Illegality

With reference to issues (4) and (5) above, the learned trial Judge held that the method of payment

agreed to on 24 February 1979, in so far as it involved the payment of money overseas, constituted a contravention of regulation 10(1)(c) of the Exchange Control Regulations and that this rendered this agreement null and void. He concluded, however, that this did not affect the validity of the original agreement, which remained valid and enforceable.

The question of illegality was debated before this Court. In view of my finding that an agreement was reached on 22/23 February, it does not seem to be necessary to decide the question of illegality. Respondent is not seeking to enforce the method of payment agreed to on 24 February: against its claim for delivery of the shares, etc. respondent tendered in the alternative payment of the sum of R200 000 in Cape Town. Nor is appellant insisting that this agreement be adhered to - in fact quite the converse. It has not been disputed by appellant that, whatever the effect

of the agreement of 24 February, the original agreement was valid and enforceable. I accordingly leave open the issue of illegality.

Whether Respondent became Party to the Agreement

As I mentioned earlier, the instruction given by Deel to Maynard early in 1979 was to "take a company off the shelf" and to change its name to Cape Pacific Limited. It was further intended that Wilson-Smith would represent Deel's interests on the board of the company and that this company would be the purchaser of the shares in Findon. The deed of sale was signed by Wilson-Smith in his representative capacity on 26 March 1979 on the supposition that all of this had been done. In fact at that stage though the company, Graphic Productions Limited, had apparently been "taken off the shelf", its name had not been changed, nor had Wilson-Smith been appointed to the board of directors.

Cape Pacific Limited, as a legal entity, did not then exist. This seems to have been due to the dilatoriness and/or inefficiency of the solicitors in Nassau.

After a careful analysis of all the evidence relevant to this issue Friedman J held that the name of Graphic Productions Limited was in fact changed by proper resolution to Cape Pacific Limited and that this occurred in May 1980. He further held that an undated resolution of Cape Pacific Limited "resolving and confirming" that (a) all contracts entered into in the name of Cape Pacific Limited should be for the benefit of the company and be thereby ratified and adopted by the company, and (b) the company should be responsible for each and every obligation incurred in the name of Cape Pacific Limited, though said to be effective from 28 January 1980, was in fact probably passed in May 1980. From this the learned Judge concluded that

respondent had established that Cape Pacific Limited was in fact nominated as the purchaser, but that such nomination did not become effective until May 1980.

Friedman J further accepted that the nomination in terms of the contract had to be made within a reasonable time and that normally nomination would be required to have been made before 1 May 1979, the date upon which occupation was to have been given.

He continued -

> "However, before that date arrived, the seller sought to delay implementation so as to allow it to obtain Exchange Control permission. This delay was agreed to by Shapiro through his attorney. Subsequently and without proceeding to obtain Exchange Control permission, the defendant repudiated the contract, which repudiation was not, however, accepted by Shapiro. Having repudiated the contract the defendant was not entitled to demand payment, nor could it have been prejudiced by any

> delay that took place in the nomination of a purchaser. The purchaser was the only party who was at that stage interested in enforcing the contract and Shapiro was entitled, in the circumstances, to make a nomination before the purchaser enforced its rights under the contract. The nomination made by Shapiro became effective when the company he nominated ratified the contract which had been entered into in its name. That occurred in May 1980. Consequently from that date the nomination of the plaintiff became effective. It follows therefore that plaintiff duly became a party to the contract and is entitled to enforce the rights acquired by it in terms thereof".

I can find no fault with this reasoning.

It was argued by appellant's counsel that the intention had been to <u>form</u> a new company with the name Cape Pacific Limited and that an existing company such as Graphic Productions Limited could not become a party

to the contract simply by changing its name and purporting to ratify the contract. I can find no basis for this submission in the evidence. On the contrary Deel, who arranged for the "creation" of a company under the name Cape Pacific Limited, stated in evidence that his instructions to Maynard in Nassau were given in the early part of 1979, prior to his visit to South Africa. Clearly therefore the nomination which took place shortly after the conclusion of the contract and resulted in the name of Cape Pacific Limited being inserted in the deed of sale at the time of signature by Wilson-Smith had this company in mind.

Did Agreement Fall Away in April 1979?

This desperate, last-ditch defence, which appellant bore the burden of proving, was founded on the telephone conversation between Swersky and Edelson on 3 April 1979. It has no substance. Whatever founda-

tion for a cancellation of the contract may be said to be found in Swersky's version of this conversation, there is obviously none in Edelson's version. In my view, Edelson's version must unquestionably be preferred. Apart from the general questions of credibility, which have been fully dealt with earlier in this judgment, it seems to me to be unlikely in the extreme that in the course of such a conversation Edelson would, without more ado and without reference to his clients, have agreed to a cancellation of the whole transaction. Moreover, the suggestion that there was such a cancellation is wholly inconsistent with the subsequent conduct of the parties, including Swersky's. And here I refer to his subsequent assurances that the "deal was on", etc, which have already been detailed.

In view of the conclusions which I have reached on the various issues, the appeal must fail.

The appeal is dismissed with costs, including the costs of two counsel.

M M CORBETT

NESTADT JA)
MILNE JA)
KUMLEBEN JA) CONCUR.
NICHOLAS AJA)