179/91

261/90
N v H

TOTAL SOUTH AFRICA (PTY) LIMITED

and

JACOBUS NICHOLAS BEKKER N O

SMALBERGER JA -

261/90
N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

TOTAL SOUTH AFRICA (PTY) LIMITED Appellant

and

JACOBUS NICHOLAS BEKKER N O Respondent

CORAM: JOUBERT, HEFER, SMALBERGER, EKSTEEN, JJA, et NICHOLAS, AJA

HEARD: 1 NOVEMBER 1991

DELIVERED: 28 NOVEMBER 1991

J U D G M E N T

SMALBERGER JA:-

On 18 November 1988, one Johannes Petrus Jansen Van Vuuren ("Van Vuuren") applied on notice of motion in the Transvaal Provincial Division for an order staying the execution of a writ issued against

.....2/

him at the instance of the appellant ("Total") pending an action for a declaratory order. The application was opposed by Total, which in turn counter-applied for the sequestration of Van Vuuren's estate. The matter eventually came before PUCKRIN AJ. He dismissed Van Vuuren's application with costs, and granted an order provisionally sequestrating Van Vuuren's estate. Van Vuuren has since then been represented by the respondent as trustee in his insolvent estate. The respondent noted an appeal to the Full Bench of the Transvaal Provincial Division. The Full Bench (per KRIEGLER J, STAFFORD J and ROOS AJ concurring) allowed the appeal and granted an order staying the writ of execution pending the institution by the respondent of an action for an order declaring the writ to be invalid. The provisional sequestration order was not affected by the outcome of

.....3/

the appeal and remains in force. The judgment of the Full Bench is reported as Bekker NO v Total South Africa (Pty) Ltd 1990(3) SA 159 (T) ("the reported judgment"). The present appeal comes before us in consequence of special leave thereto having been granted by this Court.

Before I proceed to the merits of the appeal it is necessary to dispose of an argument raised by Mr Wulfsohn, for the respondent, concerning the alleged non-appealability of the order issued by the Full Bench. The nub of his argument was that the order is a simple interlocutory one and as such is, on a proper interpretation of the relevant provisions of section 20 of the Supreme Court Act 59 of 1959 as amended ("the Act"), not appealable despite the grant of special leave by this Court. As provided for in section 20(1) of the Act this Court,

.....4/

subject to the necessary leave to appeal having been granted in terms of section 20(4), is empowered to hear

> "(a)n appeal from a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of such a court given on appeal ...."

As appears from its terms, section 20(1) caters for two distinct situations. The first relates to an appeal from a judgment or order of the court of a provincial or local division sitting as a court of first instance. In this context the distinction between a "judgment" and an "order" is as follows: a "judgment" relates to a decision given upon relief claimed in an action, while "order" refers to a decision given upon relief claimed in an application on notice of motion or petition or on summons for provisional sentence. (See Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration 1987(4) SA 569 (A) at 580 D - E). The

.....5/

second situation relates to an appeal from a judgment or order of such court "on appeal", that is, where it sits as a court of appeal from a decision of a single judge. In this context the words "judgment or order" relate to the decision given by such court on the question or questions at issue between the parties to the appeal, and any order incidental thereto, including the upholding or the dismissal of the appeal.

Views differ on the question whether the words "judgment or order" in section 20 embrace (or are capable in certain circumstances of embracing) a "simple interlocutory order" emanating from the court of a provincial or local division sitting as a court of first instance, and whether such an order is appealable (as opposed to a mere "ruling" which is not - Van Streepen's case (supra) at 580 F). (See in this

.....6/

regard, e g, South African Druggists Ltd v Beecham Group plc 1987(4) SA 876 (T) at 879 D to 880 B; Government Mining Engineer and Others v National Union of Mineworkers and Others 1990(4) SA 692 (W) at 704 G - 705 G and authorities there cited; and see also in general Van Streepen's case (supra) at 583 G to 584 C.) The question has not been finally resolved by this Court. I refrain from expressing any opinion on the point as it is unnecessary to do so for the purposes of the present appeal. We are dealing here with the question whether the Court a quo's decision constitutes "a judgment or order .... given on appeal" as envisaged by section 20(1). In my view it clearly does. The Court a quo's decision was twofold in effect: it (1) allowed the appeal, with costs, against the judgment of the Court of first instance, and set aside the order made; and (2) substituted its

own order staying execution of the writ. Whatever the position may be with regard to (2), (1) is clearly a "judgment or order... given on appeal" as envisaged by section 20(1), as Mr Wulfsohn ultimately conceded. The matter was therefore appealable with special leave of this Court.

In seeking the relief which he did, Van Vuuren relied principally (as does the respondent) upon the terms of an agreement entered into between Total and one J J N Fourie ("Fourie") on 20 August 1986 ("the agreement"), particularly clauses 1 and 2 thereof. The crux of Van Vuuren's case was that no valid causa existed for the issue of the writ, which was accordingly invalid and unenforceable. In the circumstances it was incumbent upon Van Vuuren to make the essential allegations in his founding affidavit necessary to support the relief he sought.

.....8/

This, as will appear more fully later, he failed to do.

The background to Van Vuuren's application is set out in some detail in the reported judgment at 165 B - 167 H and need not be repeated in full herein. In order to facilitate the reading of this judgment, however, it is necessary to briefly recapitulate certain of these facts. As at 1 March 1986 Van Vuuren and Tornado Transport (Pty) Ltd ("Tornado") (a company effectively owned by him) were jointly and severally indebted to Total in a sum in excess of R2 000 000. At that time Tornado was under provisional judicial management. Total instituted action against Van Vuuren for the amount due by him. The matter was settled, and on 29 April 1986 an order of court was made in terms of which Van Vuuren was obliged to pay Total the sum of R2 842 866-80 plus interest, costs and collection charges by 11 June 1986 ("the settlement

.....9/

order"). Van Vuuren failed to pay on due date. As a result Total caused a writ of execution to be issued against Van Vuuren on 18 June 1986. The writ was never executed because on 22 July 1986 Van Vuuren's estate was provisionally sequestrated. It appeared that two months previously Van Vuuren had disposed of his shareholding in Tornado (which comprised all the shares bar one) to a company called Dawes Ltd. The latter company was controlled (at least ostensibly) by Fourie, a chartered accountant, who was a long-time friend and financial adviser of Van Vuuren. Following upon an offer of compromise in terms of the Companies Act 61 of 1973, Tornado was discharged from provisional judicial management on 19 August 1986. The following day the agreement was concluded.

.....10/

The terms of the agreement are set out (by way of quotation or summary) in the reported judgment at 167 J - 169 G. Because of the importance they assume in the determination of the issues on appeal it will be convenient to set out herein the provisions of clause 1 and certain of the provisions of clause 2 thereof. Before I do so specific mention should also be made of the preamble to the agreement which, after recording Van Vuuren's indebtedness to Total, states (in paragraph B) that "Fourie has agreed to intercede on behalf of Van Vuuren". Thereafter clauses 1 and 2 provide -

> "1. Subject to the condition that Fourie faithfully carries out the terms of this Agreement and performs the obligations herein contained on the due dates thereof, Total agrees that it shall not proceed against Van Vuuren in respect of its claim against Van Vuuren arising out of a settlement which was made an Order of Court in

.....11/

the Supreme Court of South Africa Transvaal Provincial Division under Case No. 2667/86.

2. In consideration for its undertaking aforesaid, Fourie agrees and undertakes to pay to Total an amount of R500 000,00 which amount shall be paid as follows:-

2.1. An amount of R60 000,00 shall be paid by Fourie to Total by not later than the 1st of September 1986.

2.2 The balance of R440 00,00 shall be paid by way of monthly instalments of not less than R10 000,00 the first instalment to be paid on the 7th of November, 1986.....

2.3 .....

2.4 ....."

It is common cause that Fourie paid the amount of R60 000,00 but thereafter failed to pay the instalment of R10 000,00 due on 7 November 1986. He also breached certain of his other obligations under

.....12/

the agreement. On 17 November 1986 Total issued a provisional sentence summons against Fourie for the accelerated balance of R440 000,00 plus interest and costs. The matter was ultimately settled, and the settlement agreement was made an order of Court. Its principal provisions are summarised at 166 D - F of the reported judgment. Fourie did not initially pay his instalments under the settlement agreement timeously, but it is accepted by Total that subsequently Fourie complied fully with his obligations in terms thereof.

The main issues on appeal are the following: what rights, if any, did Van Vuuren acquire under the agreement, and did the terms of the agreement, or the conduct of Total, release him from his legal indebtedness to Total under the settlement order of 29 April 1986? The answers to these questions are to be found, in the main, in the proper interpretation of the

.....13/

agreement, particularly clauses 1 and 2 thereof. These clauses fall to be interpreted with a view to ascertaining the intention of the parties to the agreement having due regard to the words used in their proper contextual setting, and to any admissible surrounding or background circumstances (Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd and Others 1980(1) SA 796 (A) at 804 A -806 A). Despite pleas for a more liberal approach (see the Cinema City case at 805 G - H), the generally accepted view of our law is that reference to surrounding circumstances is only justified in cases of uncertainty or ambiguity (Pritchard Properties (Pty) Ltd v Koulis 1986(2) SA 1(A) at 10 C - D). Mr Wulfsohn did not contend to the contrary. This does not exclude a court being informed "of the background circumstances under which a contract was concluded so as to enable it to

.....14/

understand the broad context in which the words to be interpreted were used" (List v Jungers 1979(3) SA 106(A) at 120 C; and see too Van Rensburg en Andere v Taute en Andere 1975(1) SA 279 (A) at 303 D; Swart en 'n Ander v Cape Fabrix (Pty) Ltd 1979(1) SA 195 (A) at 202 C). Apparently "background" circumstances are something different from "surrounding" circumstances (see Swart's case at 201 A) but, (as in Swart's case) it is not necessary to pursue this matter further for the purposes of the present appeal. What is clear, however, is that where sufficient certainty as to the meaning of a contract can be gathered from the language alone it is impermissible to reach a different result by drawing inferences from the surrounding circumstances (Delmas Milling Co Ltd v Du Plessis 1955(3) SA 447 (A) at 454 H; Rand Rietfontein Estates Ltd v Cohn 1937 AD 317 at 328). The underlying

.....15/

reason for this approach is that where words in a contract, agreed upon by the parties thereto, and therefore common to them, speak with sufficient clarity, they must be taken as expressing their common intention (Christie: The Law of Contract in South Africa, p 177).

Ex facie the agreement it is one between Total and Fourie, and Van Vuuren is not a party thereto. It was contended on behalf of the respondent, however, that Van Vuuren became a party thereto. Two possible bases for this were suggested. The first was what was referred to in the respondent's heads of argument as a "direct tacit agreement" between Total and Van Vuuren (and presumably also Fourie) by which Van Vuuren became a party to the agreement. By this was apparently meant that it was an implied term of the agreement that Van Vuuren would be a party to

.....16/

it. Not only are there insufficient factual allegations to support such a submission, but it is also hit by clauses 8.3 and 8.4 of the agreement which expressly excludes any implied term not recorded in the agreement, or any variation thereof not in writing. Not surprisingly Mr Wulfsohn did not pursue this point.

The second argument advanced was that clauses 1 and 2 of the agreement constituted a stipulation for the benefit of Van Vuuren (a stipulatio alteri), and that he became a party to the agreement by accepting the benefit offered. As was pointed out by SCHREINER, JA in Crookes NO and Another v Watson and Others 1956(1) SA 277 (A) at 291 B - C "a contract for the benefit of a third person is not simply a contract designed to benefit a third person; it is a contract between two persons that is designed to enable a third person to come in as a party to a

.....17/

contract with one of the other two". The mere conferring of a benefit is therefore not enough; what is required is an intention on the part of the parties to a contract that a third person can, by adopting the benefit, become a party to the contract. (Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd 1984(3) SA 155 (A) at 172 D - F). The agreement itself does not disclose any intention on the part of Total or Fourie that Van Vuuren could become a party thereto. There is no express wording to such effect, nor is there any provision in the agreement for the acceptance by Van Vuuren of any benefit thereunder. Furthermore the terms of the agreement (leaving aside the possible effect of clause 8.3) do not support a necessary implication to that effect. Total and Fourie would have been at liberty to cancel the agreement at any time without reference to Van Vuuren.

.....18/

Apart from these considerations, Van Vuuren does not specifically allege in either his founding or his replying affidavit (as one would have expected him to do) that the parties to the agreement intended a stipulation in his favour. But even if there was an intention to benefit Van Vuuren, there is no evidence, direct or circumstantial, that Van Vuuren ever accepted such benefit at a time when it was open to him to do so. He himself does not allege that he accepted any such benefit, or that a contract came into being between himself and Total. It follows that Van Vuuren has not made out a case for a stipulatio alteri in his favour, the benefit of which he accepted.

It is common cause that had Fourie "faithfully" performed his obligation under the agreement "on the due dates thereof" Van Vuuren's indebtedness to Total under the settlement order would

.....19/

effectively have come to an end. It is not necessary to consider the precise juridical basis on which this would have occurred. What is the position where, as was the case, Fourie failed to perform his obligations under the agreement in the manner stipulated? Was Total, in such event, entitled to look to both Fourie (under the agreement) and Van Vuuren (under the settlement order), as found by the Judge of first instance, or was it obliged to elect to proceed against the one or the other, as held by the Court a quo? The answer lies essentially in the proper meaning of clauses 1 and 2 of the agreement within the context of the agreement as a whole. In this respect the Court a quo stated (at 171 C - D) of the reported judgment) that:

.....20/

> "(T)here is nothing in annexure 'E' [the agreement], certainly nothing express, to the effect that respondent could proceed under both the judgment against Van Vuuren and annexure 'E'. ..... In my view a purely linguistic interpretation of annexure 'E' ineluctably leads to the conclusion that respondent was afforded the benefit of an election, and no more."

I respectfully disagree. In my view the clear meaning of the words of clauses 1 and 2 is to the contrary, and there is no room for putting Total to an election.

In terms of clause 1 of the agreement Total undertook not to proceed against Van Vuuren in respect of its claim against him provided Fourie faithfully carried out the terms of the agreement and performed his obligations thereunder on the due dates thereof. In return (in "consideration") for this undertaking Fourie agreed to pay Total the sum of R500 000-00 in the amounts and at the times set out in the agreement.

.....21/

(It is important to note that Fourie's payment was to be for Total's undertaking - it was not to be in substitution for Van Vuuren's indebtedness to Total.) In my view the learned Judge of first instance correctly interpreted these clauses as a conditional pactum de non petendo - an undertaking not to sue Van Vuuren conditional upon the due and punctual performance by Fourie of the obligations imposed upon him. When Fourie breached the terms of the agreement the condition to which the pactum was subject failed and Total's undertaking not to sue lapsed. This left Total free to recover from Van Vuuren his outstanding indebtedness under the settlement order; at the same time it was entitled to enforce performance by Fourie of his obligations under the agreement. These are two separate and distinct rights of action, each with its own valid causa. No question of election

.....22/

arises, either from the wording of the agreement or by operation of law. Where remedies are not inconsistent the pursuit of one cannot per se exclude the other. In this respect the words of BEYERS JA in Montesse Township and Investment Corporation (Pty) Ltd and Another v Gouws NO and Another 1965(4) SA 373(A) at 380 in fine are particularly apposite where he said:

> "I am not aware of any general proposition that a plaintiff who has two or more remedies at his disposal must elect at a given point of time which of them he intends to pursue, and that, having elected one, he is taken to have abandoned all others. Such a situation might well arise where the choice lies between two inconsistent remedies and the plaintiff commits himself unequivocally to the one or other of them. But that is not the case here."

In the present instance Total was not faced with two inconsistent remedies; it had separate remedies against Van Vuuren (based on the settlement order) and Fourie (based on the agreement). It was at liberty to

pursue both. An election generally involves waiver: one right is waived by choosing to exercise another right which is inconsistent with the former (Feinstein v Niggli and Another 1981(2) SA 684(A) at 698 G). Unless Van Vuuren can show that Total either expressly or by its conduct abandoned its remedy against him any argument based on election must fail. Van Vuuren never sought to make out such a case.

The effect of the judgment of the Court a quo is that Total waived its rights against Van Vuuren when it elected to proceed against Fourie after the latter had breached his obligations under the agreement. From that it follows that if Total had been unable to recover from Fourie in full, it could not have reverted to its claim against Van Vuuren. It is unlikely that the parties to the agreement could ever had intended that, and no such intention is manifest from the

.....24/

agreement.

The Court a quo went further and concluded (at 174 E of the reported judgment) that the same result was arrived at "whether interpreting the contract linguistically or contextually". In using the word "contextually" the Court a quo appears to have had in mind, in particular, the wording of paragraph B of the preamble and "the factual matrix in which the contract was cast" ie the surrounding circumstances. It also held that "(t)he word the parties used to describe their contract and the general tenor thereof points to a form of expromissio" (at 172 J).

It is permissible to have regard to the words of the preamble in interpreting the agreement but, as pointed out by the Court a quo (at 171 H) "a preamble is generally regarded as subordinate to the operative portion of a contract which, if clear, carries more

.....25/

weight than anything in the preamble". The use of the word "intercede" signifies no more, in my view, than an intention on the part of Fourie to intervene or interpose on Van Vuuren's behalf to enable Van Vuuren, as it were, to keep the wolf from the door, and to give him time to try and revive his flagging financial fortunes. It was not used in the sense that the term "intercessio" was used in the Roman Law. In this respect Wessels' Law of Contract in South Africa, 2nd edition at 968 states, inter alia, the following:

> "3778. There are several ways in which a person, without being compelled to do so by law, may intervene in a contract between two parties ob majorem creditoris securitatem. The Roman jurists called this intervention an intercessio on the part of the stranger to the contract ('per intercessionem aes alienum suscipiens' (D. 14.3.19.3). 'Se medium inter debitorem et creditorem interponere' (Voet,16.1.8)).
> 3779. The term intercession is a convenient one to denote the intervention of one person (intercessor) in the obligation of another either by way of substituting or adding a new

.....26/

> debtor (Nov., 4.1; C.8.40(41).19).
> 3780. The stranger may either intervene by contracting with the creditor in such a way that the original debtor is completely liberated, or else he may promise the creditor to become liable for the debt, the original debtor continuing to remain bound. In the former case, called expromissio by the glossators, there is a complete novation - the old debtor and intercessor are liable, they may either both be principally bound to the creditor or else the debtor may be principally liable, whilst the intercessor is only bound in subsidium, ie., in case the creditor cannot obtain payment from the principal debtor."

Underlying intercessio, and the related concept of expromissio, is an assumption of liability for the debt of another. Clauses 1 and 2 of the agreement, whether taken alone or in the context of the agreement as a whole, are not open to the interpretation that Fourie assumed Van Vuuren's debt to Total, or any part thereof. Such interpretation flies in the face of the clear and unambiguous wording of the clauses in question - which in the clearest of terms record that

.....27/

Fourie's undertaking to pay R500 000 to Total is in consideration for the latter's undertaking not to proceed against Van Vuuren. (It must also be borne in mind that under the agreement Fourie secured an acquittance from Total in respect of Tornado's liability to it - at a time when he effectively controlled Tornado through Dawes Ltd. The R500 000 he undertook to pay Total was not therefore entirely unrelated to any personal benefit received by him.) In the circumstances there is no need to have regard to surrounding circumstances. It is impermissible to draw inferences from such circumstances inconsistent with the clear wording and meaning of clauses 1 and 2 of the agreement. In this regard it is interesting to note that in his replying affidavit Van Vuuren specifically disavowed that any amount paid by Fourie was in part payment of his (Van Vuuren's) indebtedness

.....28/

to Total. With regard to the amount paid by Fourie in respect of his liability to Total Van Vuuren said:

> "Die bedrag is deur Fourie aan Respondent betaal nie tot gedeeltelike delging van enige bedrag wat ek aan Respondent verskuldig was nie, maar tot delging van die bedrag wat hy self aan Respondent verskuldig was."

It is also not without significance that the later settlement agreement between Total and Fourie did not contain a similar undertaking to that in clause 1 of the agreement, which strongly suggests that the parties never had in mind that the subsequent fulfilment by Fourie of his obligations would operate to release Van Vuuren from his indebtedness to Total.

Various other arguments raised in the respondent's heads of argument were not persisted with on appeal, and therefore do not require attention. In the result Van Vuuren failed to establish that there was no valid causa for the writ issued against him by

.....29/

Total. It follows that the Judge of first instance correctly dismissed Van Vuuren's application, and that the Court a quo erred in arriving at a contrary conclusion.

The appeal is upheld with costs, including the costs of two counsel. The order of the Court a quo is set aside and there is substituted in its stead the following order: "Appeal dismissed with costs, including the costs of two counsel."

J W SMALBERGER

JOUBERT, JA)
HEFER, JA) CONCUR
EKSTEEN, JA)
NICHOLAS, AJA)