57/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

Case no: 483/90

In the appeal of:

SONAP PETROLEUM (SOUTH AFRICA) (PTY) LTD APPELLANT

(Formerly known as SONAREP (SOUTH AFRICA)

(PTY) LTD).

and

HARALABOS PAPPADOGIANIS RESPONDENT

Coram: JOUBERT, BOTHA JJA et HARMS AJA.

Date heard: 12 March 1992

Date delivered: 30 March 1992

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# J U D G M E N T

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HARMS AJA:

The appellant (the plaintiff in the court a quo) is a supplier of petroleum products. As part of its marketing effort it finances property owners to enable them to erect garages and petrol filling and service stations on a particular property; it then leases from the owner the completed garage in terms of a long lease; it sublets it to an operator who, inter alia, sells its products; and it registers a mortgage bond over the property to secure the loan to the owner.

The respondent is the owner of a property situate in

Randfontein. On 18 February 1975 he, in terms of a notarial deed of principal lease, leased the property to the appellant (then known as Sonarep) for a period of 20 years. The lease was duly registered on 21 May 1975. The preamble recorded that the respondent was the registered owner of the property, that a garage building was about to be erected thereon and that the appellant had agreed to lease the property from the respondent. The lease then provided that the respondent would erect the garage out of monies which the appellant undertook to lend to the respondent; the premises leased would be used as a garage and related services; a fixed rent of R770.00 per month would be payable; the tenant had the right to sub-let and had, during the subsistence of the agreement, the right of first refusal to purchase the premises.

Of particular importance is clause 4 which reads as follows:

> "This lease shall, subject to the provisions of paragraphs 16,17 and 19 hereof, be for a fixed period of 20 (TWENTY) years certain, commencing on a date to be specified in terms of a certificate to be issued by SONAREP, that the LEASED PREMISES are substantially ready and complete in all respects and that beneficial occupation can be given by the owner to SONAREP, the date in such certificate being deemed to be the commencing date of this Lease."

As far as the clauses referred to are concerned, clause 16 gave the appellant the right to cancel the lease in the event of a total destruction of the leased premises. Should it not exercise this right, the period during which it is deprived of beneficial occupation was to be added to the fixed period of 20 years of the lease. Clause 17 granted it a right to terminate the lease in the event of a prohibition of or a restriction in the sale of its products as well as in the event of an expropriation. Clause 19 provided a right to terminate upon 60 days' notice in the event of <u>vis maior</u>.

The mortgage bond which secured the loan was registered on 14 May 1975. It recorded that R185 000.00 was lent and advanced by the appellant to the respondent at a rate of 5% interest per annum. Capital and interest had to be repaid in 240 consecutive instalments as from the date of completion as reflected in the certificate of completion. In conclusion it provided for the repayment of the full balance of capital if the lease was cancelled in terms of clauses 3, 16, 17 and 19 thereof or if it were to be cancelled or terminated otherwise than by effluxion of the fixed period as defined in clause 4 of the notarial deed of principal lease. (For purposes of this judgment the provisions of clause 3 of the notarial deed are of no consequence.)

It is clear from the aforegoing that the respective provisions of the notarial lease and of the mortgage bond were interrelated and interdependent.

The appellant failed to issue a certificate relating to the inception date of the lease. This fact came to the notice of one of its employees, Mr Cronje, during 1986. The available correspondence on file enabled him to determine the date as being 1 December 1974 and he then gave instructions that steps be taken to have the date of commencement fixed for purposes of the lease. For some reason or other, the attorney instructed decided, rather than having a certificate issued, to prepare a notarial addendum to the lease. That was done, the respondent's signature was obtained, so too the appellant's managing director's, and the addendum was thereafter notarially executed and registered at the beginning of 1987. The addendum reads, as far as is relevant, as follows:

> "(1) The Owner and Sonarep have agreed that with immediate effect clause 4 of the Main Lease is deleted and the following is substituted therefor:

> '(4) This lease shall, subject to the provisions of paragraphs 16, 17 and 19 hereof, be for a fixed period of 15 (FIFTEEN) years certain, commencing on 1st December 1974.'
>
> (2) In all other respects, the terms and conditions of the Main Lease shall remain unaltered and of full force and effect."

Not only was the commencement date fixed but, as a result of an unexplained mistake by the firm of attorneys, the term of the lease was reduced from 20 to 15 years. This mistake was not detected by any of the appellant's executives or officers until approximately September 1987. The respondent's insistence that no mistake had occurred led to litigation in the Witwatersrand Local Division in which the appellant claimed rectification of the addendum by replacing the 15 year term with a 20 year term, and, in the alternative, an order declaring the addendum in the light of the mistake to be void.

The court _a quo_ (_coram_ J H Coetzee J) dismissed the claim

with costs and subsequently granted leave to appeal to this Court. Although the evidence tendered on behalf of the respondent was rejected and that on behalf of the appellant accepted, the learned judge concluded that:

(i) the claim for rectification could not succeed since the appellant had failed to prove a common continuing intention to retain the period of 20 years mentioned in the principal lease;

(ii) the appellant's mistake was not iustus because it was due to its fault, i e the carelessness and inattention of its employees in not reading the proposed amendment to clause 4 properly before executing it;

(iii) the appellant did not prove that the respondent knew or ought to have known of the appellant's unilateral mistake.

Before proceeding to deal with the legal issues involved, it is necessary to consider the respondent's case and the trial judge's findings thereanent. The respondent relied in his plea on an oral agreement reached with one Potgieter (on behalf of the appellant) during 1986 in terms of which it had been agreed to amend the lease by reducing the period to 15 years. That defence was demonstrated in the evidence to have been based upon a patent falsehood. The same falsehood was contained in a letter that preceded the litigation. The respondent's evidence, on the other hand, was that the amending documents had been delivered to him by a messenger who informed him that the documents represented a new lease; he then read the documents; he noticed the reduction in term; he telephoned his attorney to discuss the date of inception but not the reduction in term; and his impression was that the reduction had been inserted intentionally. The trial judge stated in his judgment that he had gained the impression that the respondent was deliberately lying when he testified that

he had noticed the reduction of the period to 15 years. No reasons were proffered in respect of the impression, nor was any finding made in accordance therewith. I am of the view that it must be accepted as overwhelmingly probable that the respondent did in fact read the document, and that he thereafter telephoned his attorney and read the document to him over the telephone. This must be so in the light of the importance to the respondent of the lease (especially its term of duration). Both he and his attorney were fully aware that the original lease provided for a term of 20 years and that the bond repayments were linked thereto. It is, therefore, in spite of their denials, more than probable that they did discuss the change in term. At the trial, the appellant's counsel, in cross-examination, valiantly attempted to get the respondent to concede that, on reading the document, he did in fact realise that a mistake had occurred. The answers given indicated that that possibility did occur to him but, before counsel could

drive the point home, respondent's counsel intervened and that gave the respondent the opportunity to reconsider and deny. Further reference will, in due course, be made to this issue.

Rectification and unilateral mistake are mutually exclusive concepts. Rectification presupposes a common intention and unilateral mistake the absence thereof. Logically speaking, the claim for rectification must first be considered.

The appellant alleged in its pleadings that the addendum was executed with the intention to fix the commencement date of the lease, that the parties had no intention, nor did they agree, to amend the original period of the lease and that it was their common continuing intention to retain the original period. It follows from my finding that the respondent had read the addendum and had realized that the

term had been amended, that, in signing the document, he had the intention to "agree" to the reduction. If that is so, rectification cannot follow because there was no common intention not to amend. It is therefore unnecessary to consider the reasoning of the trial judge which was based on a different understanding of the underlying facts. Attention must now be focused on the alternative claim based upon mistake.

The mistake relied upon by the appellant was one committed during the expression of its intention ("Erklärungsirrtum" in German: Fevrier-Breedt A Critical Analysis of Mistake in SA Law of Contract, LLD dissertation, UP [1991] p142): it mistakenly believed that its declared intention conformed to its actual intention. The respondent's declared intention, on the other hand, did not differ from his actual intention. The dissensus

is, therefore, in a sense the result of the appellant's so-called unilateral mistake. Cf Asser Verbinternissenrecht, part II (1985) p144-5. I use the term "mistake" and not "error", because, although they may be used interchangeably, "mistake" rather "implies misundertanding, misinterpretation, and resultant poor judgment, and is usually weaker than error in imputing blame or censure."(American Heritage Dictionary sv "error".)

The law, as a general rule, concerns itself with the external manifestations, and not the workings, of the minds of parties to a contract. South African Railways and Harbours v National Bank of South Africa Ltd 1924 AD 704, 715-6. However, in the case of an alleged dissensus the law does have regard to other considerations: it is said that, in order to determine whether a contract has come into being, resort must be had to the reliance theory. Cf Saambou-Nasionale Bouvereniging v Friedman 1979

(3) SA 978 (A) 995-6; Reinecke and Van der Merwe 1984 **TSAR** 290. This Court has, in two judgments delivered on the same day by differently constituted benches, dealt authoritatively with the question of iustus error in the context of a so-called unilateral mistake. The first is George v Fairmead (Pty) Ltd 1958 (2) SA 465 (A) 471 B - D where Fagan CJ said the following:

> "When can an error be said to be justus for the purpose of entitling a man to repudiate his apparent assent to a contractual term? As I read the decisions, our Courts, in applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in effect, said: Has the first party - the one who is trying to resile - been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself? ... If his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame, and the first party is not bound."

The second is Schreiner JA's statement in National and Overseas Distributors Corporation (Pty) Ltd v Potato Board 1958 (2) SA 473 (A) 479 G - H:

> "Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (error) would have to be reasonable (justus) and it would have to be pleaded."

These dicta gave respondent's counsel the cue to argue that, in the absence of a misrepresentation by the respondent, the appellant could not succeed in its alternative claim. That is in my view an over-simplification. If regard is had to the authorities referred to by the learned judges, (see Logan v Beit 7 SC 197, 215; I Pieters and Company v Salomon 1911 AD 121, 137; Hodgson Bros v South African Railways 1928 CPD

257,261; Van Ryn Wine and Spirit Co v Chandos Bar 1928 TPD 417, 422-4; Irvin and Johnston (SA) Ltd v Kaplan 1940 CPD 647, and one could add Collen and Rietfontein Engineering Works 1948 (1) SA 413 (A) 430-1) I venture to suggest that what they did was to adapt, for the purposes of the facts in their respective cases, the well-known dictum of Blackburn J in Smith v Hughes (1871) LR 6 QB 597, 607, namely:

> "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

In my view, therefore, the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his

declared intention represented his actual intention? Cf Corbin on Contracts (one volume edition) (1952) p157. To answer this question, a three-fold enquiry is usually necessary, namely, first, was there a misrepresentation as to one party's intention; secondly, who made that representation, and thirdly, was the other party misled thereby? See also Du Toit v Atkinson's Motors Bpk 1985 (2) SA 893 (A) 906 C - G; Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd 1986 (1) SA 303 (A) 316 I - 317 B. The last question postulates two possibilities: was he actually misled and would a reasonable man have been misled? Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd 1983 (1) SA 978 (A) 984 D - H; 985 G - H.

In Horty Investments (Pty) Ltd v Interior Acoustics (Pty) Ltd 1984 (3) SA 537 (W) G A Coetzee J stated (at 539 G) that the "fault principle looms large" in determining whether an error is iustus (excusable). Apart from a few

loose and obiter statements I could not find any authority for this assertion. He then held that a mistaken party is not "able to rely on the lack of true consensus if his mistake was due to his own fault" (at 539 I - 540 A). The learned judge was influenced by the view expressed by J C de Wet, Dwaling en Bedrog by Kontraksluiting (1943) whose thesis was that the principles of estoppel provide the solution to the present problem. With respect to both the learned judge and the learned professor, it may be that estoppel merely bedevils the enquiry and that reliance thereon is not conducive to clear thinking. Cf Van Rensburg "Die Grondslag van Kontraktuele Gebondenheid" 1986 THRHR 448. The learned judge relied heavily upon the use of the word "blame" by Fagan CJ in the quoted passage. As I read the passage, the learned Chief Justice did not equate "blame" with negligence but referred to blame "in the sense [my emphasis] that by his conduct he has led the

other party as a reasonable man, to believe" that his apparent intention was his true intention.

The introduction of the fault principle has given rise to some academic displeasure (see the authors quoted in Nasionale Behuisingskommissie v Greyling 1986 (4) SA 917 (T) 925 I) and also practical difficulties, especially in the case of " contributory negligence" (Cf Ellison Kahn, Contracts through the Cases 2nd ed vol 1, p300: "The tenor of this approach is that an unreasonable error may be rendered reasonable by the greater unreasonableness of an error made by the other party!" Also Carole Lewis 1987 SALJ 371 at 376.) However, apart from anything else, it appears to be unnecessary. The decision in Horty's case would have been the same had the test formulated above been applied. In that case the one party presented to the other a proposed lease which had conflicting provisions relating to the duration of the lease. As the learned judge

himself found, a reasonable man would not have been misled to believe that the document expressed the true intention of its author (at 541 H - I). That was also the basis of the conclusion reached in Nasionale Behuisingskommissie v Greyling, supra, 926 D - F, 927 E - F. It may, in conclusion on this aspect of the case, be pointed out that this Court in Du Toit v Atkinson's Motors Bpk, supra, and Spendrifter (Pty) Ltd v Lester Donovan (Pty) Ltd, supra, did not consider whether the representor was negligent but merely whether a representation had been made; nor was the matter approached along the lines of estoppel.

In the present case the appellant represented to the respondent that its intention was to reduce the period of the lease. One has then to determine whether the misrepresentation had any effect, i e whether the respondent was misled thereby. If he realised (or should have realised as a reasonable man) that there was a real

possibility of a mistake in the offer, he would have had a duty to speak and to enquire whether the expressed offer was the intended offer. Only thereafter could he accept. Support for this can be found in Sherry v Moss WLD 3 September 1952 (unreported) but quoted by Ellison Kahn op cit p302 and Slavin's Packaging Ltd v Anglo African Shipping Co Ltd 1989 (1) SA 337 (W) 342 I - 343E. Goudsmit Pandecten-Systeem I para 52 p119 states in this context: "Dolus malus kan ook zwijgen zijn, waar spreken plicht is". De Wet and Yeats Kontraktereg en Handelsreg 4th ed p10 are of the view that "(v)erder bestaan daar geen gegronde rede waarom iemand deur 'n verklaring verbind moet wees indien die ander moes geweet of vermoed het dat eersgenoemde waarskynlik nie bedoel het wat hy gesê het nie..." See also Hartog v Colin and Shields (1939) 3 All ER 566; Solle v Butcher (1950) 1 KB 671 692-3. Asser, op cit p153, states that a contract is voidable if "de wederpartij in verband met hetgeen zij omtrent de dwaling wist of behoorde

te weten, de dwalende had behoren in te lichten". The snapping up of a bargain in the knowledge of such a possibility would not be bona fide. Whether there is a duty to speak will obviously depend on the facts of each case. Cf Diedericks v Minister of Lands 1964 (1) SA 49 (N) 54; 57 G - H.

In view of the trial judge's impression that the respondent had not read the document presented to him, it followed that, in his view, the question whether the respondent actually appreciated the possibility of a mistake, did not arise. I have already held that there was no good reason to disbelieve the respondent on this aspect. The fact that the respondent's evidence was rejected does not mean that one is not entitled to have regard to admissions made or to draw conclusions from his falsehoods.

One has then to consider whether the respondent's ultimate allegation that he had not considered the possibility of a mistake was, on the probabilities of the case, true. The respondent is an experienced businessman. He knew that the garage had been sub-let and that the appellant was making a profit in excess of R3500 per month on the sub-lease alone. He also knew that it derived income from the sale of its products by its tenant, the operator. He was fully aware of the fact that the addendum specifically provided that all the other terms of the lease were to remain unaffected, that the bond and the lease were closely connected, that the bond instalments were linked to the payment of rental and that the addendum did not make any provision for an accelerated payment of the loan. He then telephoned his attorney. Their evidence that the inception date only was discussed must be rejected because, not only was their evidence that the addendum was <u>read</u> to the attorney but also that they both knew of the 20 year term. The fixing

of the inception date was of minor importance whereas the other matter was material. The question can then justifiably be asked: why did they lie if they had not discussed the possibility of a mistake? And the answer has to be: because they did have such a discussion. This conclusion is strengthened by the fact that when asked why he thought the appellant intentionally wished to amend (as he had testified) the respondent gave spurious answers. So too, the fact that in order to justify the addendum, he had, in correspondence and pleadings, relied falsely on an antecedent agreement. Lastly, reference can again be made to his answers in cross-examination, that it had crossed his mind that the reduction was done either intentionally or in error. His retraction is not convincing. All this leads me to the conclusion that, as a matter of probabilities, the respondent was not misled by the appellant to believe that it was its intention to amend the period, but, on the contrary, that he was alive

to the real possibility of a mistake and that he had, in the circumstances, a duty to speak and to enquire. He did not but decided to snatch the bargain. That he could not do. There was, therefore, no consensus, actual or imputed, on this issue. Counsel agreed that, if that were to be the result, the interests of the parties would be served if the addendum were to be declared pro tanto void. This conclusion makes it unnecessary to consider whether the respondent, objectively speaking, as a reasonable man, should have appreciated the real possibility of a unilateral mistake.

In the light of the aforegoing the following order is made:

1. The appeal is upheld with costs including the costs of two counsel.

2. The order of the court a quo is set aside and the following order is substituted:

"(a) It is declared that the Addendum to Notarial Deed of Lease K1335/1975L, is void and of no effect insofar as it purports to reduce the period of the Main Lease from 20 to 15 years."

(b) Defendant is ordered to pay the costs of suit."

**HARMS AJA**

JOUBERT JA )
BOTHA JA ) CONCUR