Case No 491/92

IN THE SUPREME COURT OF SOUTH AFRICA APPELLATE DIVISION

In the matter between:

D J DEVELOPMENT CC	1st Appellant
D G WILLIAMS-JONES	2nd Appellant
J P VAN BERGEN	3rd Appellant

and

NEIL ANDREW ARNOLD	Respondent

CORAM: VAN HEERDEN, SMALBERGER JJA et HOWIE, AJA

HEARD: 23 August 1993

DELIVERED: 6 September 1993

J U D G M E N T

HOWIE, AJA _____

HOWIE, AJA

At East London on 1 1 June 1 985 Neil Arnold, who is the respondent, and David Williams-Jones, the second appellant, signed a written agreement referred to throughout the litigation thus far as "HH1". Williams-Jones did so as promoter of a close corporation to be formed. In due course the corporation came into being under the name D J Development CC. It is the first appellant. Williams-Jones and Jesse van Bergen, the third appellant, were at all relevant times the members of the corporation.

For convenience I shall refer to the individual litigants by their surnames and to D J Development CC as "the corporation."

In broad outline the provisions of HH1 were these. Arnold and a corporation named Wild Coast Properties CC would procure the establishment of a company

called Club Wildcoast Share Block (Proprietary) Limited ("the share block company"). Arnold would then transfer to the share block company certain coastal land at Haga Haga, near East London, which he was about to acquire. Subject to local government permission the corporation would establish on the land a holiday resort consisting i.a. of a series of cabanas. Initially Arnold would be the share block company's sole director and shareholder but subject to the terms and conditions in HH1 he would transfer 10 shares to the corporation for R100 000. In return for the shares the corporation undertook two major obligations. One was to proceed with the construction of the first 10 cabanas. The other - and this is central to the case - was to ensure, at its expense and within a stipulated time, the installation, in respect of the 10 cabanas, of an access road, water and sewerage reticulation, and other infrastructure,

"as set out in the plan and specifications annexed hereto marked 'E'".

The relevant clause (3.12) went on to provide that:

> "The said Corporation undertakes to effect the aforesaid improvements to specifications which are acceptable to the appropriate local authorities and/or other Government bodies, and that all improvements mentioned herein will be completed to the satisfaction of the said Arnold."

All the terms and conditions in HH1 were deemed to be material (clause 3.18).

Clause 3.24 provided that the terms of the agreement constituted the entire contract between Arnold and the corporation and that no "warranties, representations or conditions" not recorded in HH1, and no variation of it, would be binding unless reduced to writing and signed by the parties.

When HH1 was signed the plan and specifications envisaged as annexure "E" were not attached. There was

in fact no annexure at all.

Notwithstanding the absence of annexure "E" the parties thereafter conducted themselves as if there was a binding contract between them.

Registration of the corporation occurred in due course under the name D J Development CC and not Wild Coast Properties CC.

On 23 August 1985 Williams-Jones and van Bergen signed a deed of suretyship purporting to secure due performance of the corporation's obligations to Arnold or the share block company "in terms of an agreement entered into between the parties."

In addition, the corporation proceeded with work on the cabanas, the road and the water and sewerage reticulation.

In 1987, at an advanced stage of the work, Arnold voiced his dissatisfaction with various aspects.

Later still, because he considered that his complaints had not been attended to, Arnold declared that he was cancelling the contract allegedly existing between himself and the corporation. He proceeded to sue the appellants in the East London Circuit Local Division, maintaining that the corporation had breached such contract in a number of respects. Williams-Jones and van Bergen were sued as sureties. Arnold claimed i.a. an order confirming cancellation and the return of the shares.

Basic to his claim was the contention that the contract on which he relied consisted of HH1 or, alternatively, HH1 as orally supplemented to embody a substitute term to replace the missing annexure "E" or, further alternatively, a tacit agreement, the content of which was essentially similar to the provisions of HH1 and again incorporated such a substitute term.

The appellants' defence of the action was,

primarily, that without the proposed annexure "E" - which they alleged had never existed - the agreement in HH1 was inchoate and did not constitute a binding contract, that it could not validly be supplemented and that because the parties all along thought that HH1 was binding they never intended a tacit agreement in its stead. In the second place the appellants denied, if there was a binding contract, that it had been breached in any way.

The trial Court (JENNETT J) held that HH1 on its own bound the parties and that the corporation had committed a breach of contract. It therefore granted an order confirming Arnold's cancellation and directing the corporation to return to him the shares which it still held in the share block company. Hence this appeal, the leave of the trial Court having been obtained.

In supplementary heads of argument filed shortly before the hearing of the appeal counsel for the appellants

conceded - properly, in my view - that if there had been a binding contract the corporation had breached its obligations in regard to the provision of sewerage reticulation. It was never in dispute that such breach entitled Arnold to the relief granted by the trial Court. In consequence the essential enquiry now is confined to the question whether there was ever a binding contract.

The evidential material in that regard comprises the testimony of Arnold, Williams-Jones and van Bergen read in the light of various documentary exhibits.

Most of the material facts pertinent to the question for decision were common cause or not really in dispute.

Arnold was the author of the holiday resort scheme. He was a hotelier whose father owned the farm from which the land concerned was later subdivided. Early in 1984 he engaged a team of consultants and secured

the interest of a Johannesburg developer. One of the consultants was a firm of quantity surveyors in which Williams-Jones and van Bergen were partners. For the purposes of a feasibility study and also in order to apply for the necessary local government approval of the scheme, Arnold approached specialists i.a. in the fields of civil engineering, water purification and sewerage treatment for advice and quotations. Their respective written responses comprise the documents referred to in the record as HH2, HH4, HH5 and HH6. These, together with various plans and representations accompanied Arnold's application to the relevant authorities, being the Department of Local Government of the Cape Provincial Administration and the Divisional Council of Kaffraria. Of these two bodies the former had the final decision-making power.

In March 1984 the Divisional Council recommended to the Department that the scheme be approved in principle

and in October 1984 the Department of Local Government gave its approval subject to a number of conditions, one of which was that septic tanks were not permitted.

Approval having been granted, Arnold then obtained cost estimates. After considering these and other implications of the initial scheme he had had in mind, Arnold decided to sever involvement with the Johannesburg developer, to embark upon a less ambitious scheme and to invite Williams-Jones's firm to consider participating in it not as a consultant but as a co-developer. The invitation was extended by letter dated 1 March 1985.

Williams-Jones accepted the invitation and asked van Bergen to view the site to assess the viability of the scheme in the light of their respective . financial resources. Both were keen on acquiring coastal holiday accommodation and if, as Arnold suggested in his overture to Williams-Jones, the firm built the first 10 cabanas for

its own account, Williams-Jones and van Bergen could take one for themselves.

In due course Williams-Jones and van Bergen decided to participate in the scheme in the form of a close corporation. Arnold's attorney, one Laurens, drew a draft agreement and submitted it to them. They referred it to their own attorneys for advice. The latter suggested a number of amendments, reference to which will be made presently. On the strength of the indicated involvement of Williams-Jones and van Bergen, the parties had informally agreed in the interim on the employment of a firm of civil engineers, Meyer and Associates, to compile tender documents and specifications in respect of the construction of an access road. Tenderers were to hold a site inspection on 21 May 1985 and tenders had to be received by noon on 24 May.

The parties had also agreed in the meanwhile upon

the continued relevance and application to the scheme of certain site layout and locality plans which had been drawn at various times by the architect originally engaged by Arnold, one Bridge. These were, respectively, exhibits B1, B2 and B3. In fact, Williams-Jones himself gave instructions to Bridge to draw sketch plans of a redesigned cabana unit because van Bergen would not accept the rondavel-type which was depicted in the documentation submitted earlier to the local authorities.

These sketch plans and the site plans, B1, B2 and B3, were available when, on 23 May 1985, Arnold, Laurens, Williams-Jones and van Bergen met to conclude an agreement. During their two to three hour meeting the draft was discussed, as also the amendments suggested by the attorneys acting for Williams-Jones and van Bergen. All such changes were agreed to, as were the remaining provisions of the draft. In addition, Arnold, Williams-

Jones and van Bergen signed plans B2 and B3. Only Williams-Jones signed B1 but nothing turns on that. Eventually, all concerned parted on the understanding that consensus existed on every material aspect and that Laurens would draw a finalised agreement. What he produced in due course was HH1.

On 24 May, tenders for the roadworks were opened. Williams-Jones considered that they were so far beyond the corporation's means that he not only rejected Meyer's design but terminated his services.

On 11 June 1985 one of the tenderers, Rieger' s Construction, having been invited by Williams-Jones to re-tender, wrote to the latter quoting a reduced price.

On the same day, HH1 was signed. It is appropriate at this point in the chronology to interpose a reference to some aspects of the wording of HH1 . The earlier draft was not produced in evidence but clause 3.8 .

of the draft had apparently referred to "plans and specifications as may be agreed upon in writing between the parties over a period of time." The advice received by Williams-Jones and van Bergen in a letter from their attorneys was that this was not acceptable and that reference should rather be made to plans and specifications which should be attached to the contract and initialled by the parties for identification. They went on to say that clause 3.9 referred to a diagram but that it had not been annexed. Their only comment on clause 3.12, which then ended with a reference to the work being completed to Arnold's satisfaction, was that provision should be made for arbitration in the event of a dispute between Arnold and the corporation.

As re-drawn in HH1, clauses 3.8, 3.9 and 3.12 read as follows:

"3.8 The said Corporation undertakes immediately upon transfer of the

aforesaid shares into the Corporation's name to proceed with the construction of 10 Cabanas, (Units) to be built in accordance with plans which are attached hereto marked "C" and form part of this Agreement.

3.9 The transfer of the aforesaid shares into the said Corporation' s name will entitle the said Corporation to the use of that portion of ground in respect of 10 designated units in accordance with the Use Agreement annexed hereto, which said units are defined in the annexed diagram which is also annexed hereto marked "D".

3.12 The aforesaid Corporation also . undertakes upon transfer of the aforesaid shares into its name to ensure that a proper and acceptable access road, water reticulation service, sewerage reticulation and all other basic infrastructure as set out in the plan and specifications annexed hereto marked "E" will be installed in respect of the first ten units entirely at the expense of the said Corporation within the aforesaid two year period. The said Corporation undertakes to

> effect the aforesaid improvements to specifications which are acceptable to the appropriate local authorities and/or other Government bodies, and that all improvements mentioned herein will be completed to the satisfaction of the said Arnold. In the event of a dispute arising between the parties in this connection, the parties agree that such dispute will be referred to an independent arbitrator whose decision will become final and binding upon the parties."

Reverting to the relevant events, Bridge wrote to Williams-Jones on 12 June confirming the latter's instruction that the architectural work (apart from working drawings of a standard cabana unit) was to be limited to site layout and locality plans and specifically that

> "Site layout indicating services, water and sewerage to common points and arrowed to supply and disposal to detail by others."

On 17 June Williams-Jones accepted Rieger's reduced quotation for the roadworks and requested that they be completed within 3 to 4 weeks.

Early in July work was commenced by Williams-Jones in respect of the cabanas and the water and sewerage systems.

On 5 August the Divisional Council approved all the various working plans submitted for the establishment of the resort.

On 8 August Rieger's Construction completed work on the road.

The suretyship, as mentioned earlier, was signed on 23 August.

On 17 December an addendum to HH1 was signed, recording, in effect, that the corporation had been registered as D J Development CC and that this was the entity which had entered into the agreement HH1 with Arnold.

Next it is necessary to make brief mention of how matters progressed as regards the water supply and sewerage

system. As already stated, work on those aspects began early in July. To obtain water, Williams-Jones at first engaged a borehole driller but in vain. A weir was then built on the river which ran past the resort but seepage under the wall prevented adequate water retention. From then on various other possible water sources were debated between Arnold and Williams-Jones, the former maintaining that the corporation was obliged to build a dam, the latter denying, such liability. That issue was still unresolved when Arnold decided to cancel although water, had, in the meanwhile, been obtained from a source on his father's farm.

As regards sewerage, Williams-Jones proceeded to instal septic tanks claiming that he had been authorised by the Divisional Council to do so. Arnold's eventual reaction was one of acquiescence provided the local

authorities did in fact approve. It is common cause, however, and indeed this is the reason for the concession by appellants' counsel on the matter of breach of contract, that the Department of Local Government never did approve.

It remains, as far as the relevant evidence is concerned, to mention two aspects on which Arnold's testimony conflicted with that of Williams-Jones and van Bergen. The first concerns the question whether, at their meeting on 23 May 1985, the documents envisaged as annexure "E" were in existence, available and agreed upon. Arnold declared that they were. He said they comprised the plan, B3, and the documents HH2, HH4, HH5 and HH6. He added that the last four were in fact read out by Laurens during the discussions and very definitely agreed to.

The other two witnesses denied these allegations categorically. They said that the quotations contained in

the four documents were so high they would have been unable, at those costs, to agree to enter into the project. Williams-Jones said that the plan and specifications envisaged as annexure "E" were not yet in existence at that juncture and that it was the parties' common intention that the details of the work referred to in clause 3.12 of HH1 would only be agreed and documented at a later stage.

The second area of dispute concerned the matter of septic tanks. Williams-Jones alleged having told Arnold that the Divisional Council had given unqualified consent to this form of sewage disposal. Arnold, on the contrary, said that Williams-Jones told him that he was, with the Divisional Council's consent, installing septic tanks purely as a temporary measure in order to try to achieve the earliest possible completion and sale of the first two cabanas.

The trial Judge recorded that he was unable to

accept Williams-Jones's evidence on sewage disposal in its entirety. Some of the latter's conduct during the performance of the work gave rise to "some disquiet" but he had not conveyed "the impression of deliberate untruthfulness in any of his evidence." Arnold had impressed as an honest witness and it was not possible to accept that he had been untruthful in regard to Williams-Jones's alleged statement that septic tanks were merely a temporary measure. In fact, said the Court, Arnold's evidence on this score was supported by van Bergen who claimed that he had been told the same thing by Williams-Jones. No finding was made in regard to van Bergen as a witness or as to the existence or otherwise of the documents sought to be attached as annexure "E".

The trial Court concluded that even if the parties had not agreed upon the plan and specifications referred to in clause 3.12 there nonetheless remained an

obligation, expressed in the remainder of that clause, to provide the required services in accordance with what was acceptable to the relevant authorities and that such obligation had been breached.

It is unnecessary for present purposes to have any further regard to the dispute about what Williams-Jones said to Arnold concerning septic tanks. However, in view of the arguments presented by the appellants' counsel the other disputed evidential issue remains to be considered. Counsel contended, firstly, that clause 3.12 of HH1 was unenforceable by reason of the non-existence of annexure "E" and as that clause was essential to the overall contractual scheme its invalidity brought the entire agreement HH1 down with it. Secondly, he submitted that as the parties had throughout the piece regarded HH1 as binding they could never have had the intention to enter into any later contract.

The first argument gives rise to the factual enquiry whether the documents contemplated as annexure "E" were available and agreed upon.

Giving full weight to the trial Judge's findings that were favourable to Arnold and critical, albeit mildly so, of Williams-Jones, it seems to me that Arnold's evidence as to the missing annexure "E" cannot prevail. The question here is not whether Arnold was truthful but whether the evidence of the other two witnesses can be rejected. Whatever the shortcomings of Williams-Jones, the evidence of van Bergen was not found wanting by the trial Court or attacked by Arnold's counsel on appeal. Van Bergen's evidence fully supports Williams-Jones on the present issue.

In addition, Arnold's evidence is open to criticism in a number of respects, all of which, one may accept, are attributable to bona fide reconstruction or

rationalisation. In the first place, if the intention was to annex HH2, HH4, HH5 and HH6 it is significant that they were not signed. By contrast, plans B1 , B2 and B3 were available and were intended as annexures. B1 was initialled by Williams-Jones and the other two signed by all. Secondly, there was no reason to incorporate HH6. That document, referring to a road 10,5 m wide, had by then been superseded by the specification in Meyer's tender document which i.a. required a road 4,5 m wide. Thirdly, Bridge' s letter of 12 June 1985, only a day after the signature of HH1, clearly indicates that at least Williams-Jones had up till then contemplated that drawings and specifications relative to the water and sewerage systems were to be compiled in future. It is unlikely he gave such instructions to Bridge if Arnold's evidence is correct. Fourthly, plain B3 could never have been contemplated as the plan referred to in clause 3.12.

Other evidence shows that plan B3 was destined to be annexure "C". What is more, as a contour locality plan it depicts little, if anything, of importance to a detailed description of the water and sewage systems. Finally, none of the documentary evidence contemporaneous with the period when the work mentioned in clause 3.12 was begun, or in progress, contains even a hint that that work was being done, or required to be done, according to the provisions of any of the documents which Arnold said were to be included as annexure "E".

Why the apparent reference to existing documentation was included in clause 3.12 may be explained, in my view, on the basis that the formula suggested by Williams-Jones's attorneys by way of amendment of the draft clause 3.8 (to provide for the incorporation of the contents of an existing annexure instead of leaving it to the parties to come to a future agreement on the

topic supposedly covered by the annexure) was adopted in respect of clause 3.8 and then simply repeated uncritically in respect of clause 3.12.

I conclude, therefore, that the matter must be decided on the evidence for appellants that when HH1 was signed no documentation contemplated in clause 3.12 was in existence.

On that footing, the phrase "as set out in the plan and specifications annexed hereto marked 'E'" could not possibly serve to prescribe how the required work was to be done. The purported obligation created by those words was accordingly unenforceable and void ab initio.

Despite that invalidity, said appellants' counsel, one could not strike out or ignore the offending words as to do so would involve making a contract for the parties. - That being so, he urged, the invalidity of the phrase in question rendered the entire paragraph invalid

and, with it, the whole agreement.

In my view, to disregard the unenforceable provision would not, in this particular instance, involve re-writing the agreement for the parties. The residual provisions of clause 3.12 clearly have sufficient exigible content. The corporation was obliged to perform the required work in a proper and acceptable manner and according to specifications acceptable to the relevant authorities. That is what the agreement said and that is undoubtedly how the signatories saw the position. Apart from their saying as much in evidence, it is quite plain that both Arnold and Williams-Jones were, with the aid of much discussion beforehand, and with the assistance of their respective attorneys, prepared to sign HH1 knowing that there was no annexure "E" and fully aware (on the - factual basis on which I have said the matter must be decided) that the plan and specifications mentioned in

clause 3.12 were not yet in existence much less agreed upon. The . absence of the plan and specifications therefore made no difference to them. In fact they disregarded the unenforceable provision even if they were not conscious of its invalidity.

Their intention to contract without agreement upon, or the existence, of those documents can also be demonstrated by employing the "officious bystander" test: Vogel, N.O. v Volkersz 1977(1) SA 537(T) at 549 A-C. There can be no doubt that the bystander's relevant question would have elicited the unanimous answer that the required infrastructure had to be constructed and installed according to the relevant authorities' specifications irrespective of the non-existence of the proposed annexure.

Appellant's counsel sought to suggest that even the residual provisions were, by reason of the uncertainty inherent in the . words "proper and acceptable",

unenforceable for vagueness in any event. Assuming in appellants' favour that the necessary foundation for that argument was sufficiently pleaded, it seems to me however that the use of those words does not lead to the incapacitating uncertainty contended for. There was obviously inherent in the situation some measure of choice and flexibility in relation to matters such as the route the road was to take, where piping was to be laid and what purification and reticulation systems were to be installed. In that context "proper" was, in my view, the equivalent of "proper and workmanlike" - a term well-known to the law concerning contracts of locatio conductio operis - and "acceptable" meant at the very least what it was later in the. clause virtually defined to mean, namely, that the local authorities had to approve concept and details.

Moreover, the evidence given by Williams-Jones under cross-examination, makes it abundantly clear that he,

like Arnold, knew and understood without any question what the corporation's obligations under clause 3.12 were and how they were properly to be fulfilled.

In the result HH1 constituted an enforceable binding contract despite the invalidity of the offending portion of clause 3.12 and appellants' first argument must therefore fail.

That renders it strictly unnecessary to deal with the second but I shall do so.

I accept for present purposes the submission that if parties perform under an invalid but supposedly binding contract such performance per se is insufficient to show that they intended to conclude a later, tacit contract on the same terms. Such' performance would generally be nothing more significant than conduct consistent with their belief that the first contract was binding. That belief, in turn, would in most instances preclude, or render

unnecessary, the formation of a further intention to contract: cf Rand Trading Co Ltd v Lewkewitsch 1908 TS 108

at 114-115.

I shall also assume for the purposes of the second argument that the invalidity in clause 3.12 rendered the whole of HH1 invalid.

Notwithstanding the force of those assumptions, the evidence here is that Arnold and Williams-Jones knew that in the absence of the envisaged annexure "E" HH1 did not prescribe how the work referred to in clause 3.12 was to be done. In that knowledge they nonetheless proceeded with the work on the cabanas. Rieger' s Construction was contractually engaged to build the road and Williams-Jones and Arnold took a variety of steps to achieve the installation of a water supply and sewerage system. The details of many of these measures (other than the architectural plans submitted to the Divisional Council)

were not documented as specifications and they were certainly not annexed belatedly by way of addenda to HH1. There was no attempt to act in accordance with what I have called the offending phrase in clause 3.12. In the circumstances, the steps the parties took were obviously aimed at supplementing the terms of HH1 and at furthering contractual ties between them. This must mean that such steps were taken animo contrahendi. Moreover, not only did such intention pertain to the supplementary measures but, as the word supplementary necessarily implies, to the other contractual ties as well. Such other ties could only have been the same provisions as were contained in HH1.

The unavoidable inference, therefore, is that subsequent to 11 June 1985 Arnold and the corporation contracted tacitly, or tacitly and orally, on the same terms as agreed to in HH1, duly supplemented. Furthermore, as all the conduct and events which are relevant in that

regard occurred prior to signature of the deed of suretyship, it follows that the latter must be understood as applying to that contract.

The sole counter offered by appellants' counsel in this connection was that clause 3.24 forbade any unwritten variation or additional term. The answer is that if HH1 was wholly invalid, as I have assumed for the purposes of the second argument, it was not capable in law of variation or supplementation. Once that is so, there is no question but that the parties' subsequent contract was binding.

For the reasons given above the appeal is dismissed, with costs, such costs to include the costs of two counsel.

C T HOWIE, AJA

Van Heerden JA)
Concur
Smalberger JA)