CG CASE NUMBER: 494/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

TWENTY SEVEN BELLEVUE CC Appellant

and

STUART JOHN HILCOVE Respondent

CORAM: JOUBERT, SMALBERGER, EKSTEEN, VAN DEN HEEVER JJA et MAHOMED AJA

HEARD ON: 3 MARCH 1994

DELIVERED ON: 24 MARCH 1994

J U D G M E N T

VAN DEN HEEVER JA

Appellant applied on notice of motion in the Natal Provincial Division for an order declaring that respondent is personally liable as purchaser in terms of an agreement of sale of fixed property known as Bellevue of which appellant is the seller. The application was unsuccessful, but appellant obtained leave to appeal to this court. The Natal judgment is reported in 1992 (4) SA at 523.

The founding affidavit records that appellant is the registered owner of the property in question. It was leased to respondent for farming purposes. The lease is annexed marked A. On 6 March 1989 the property was sold by appellant on the terms set out in a written document, annexed as B. During February 1990 respondent, wanting to develop the land as a free settlement area, asked appellant for its consent to his dealing with the property as if he were already the registered owner. Appellant on 23 March signed a written consent (annexure C) to respondent's making such

application. Respondent by his signature signified his acceptance of the benefits conferred in the document. His power of attorney authorising a firm of town and regional planning consultants to take the matter further, is annexure D. Their letter to the Secretary of the Free Settlement Board in Pretoria constitutes annexure E to the founding affidavit. The last annexure, F, is a letter to appellant from a firm of attorneys dated 4 September 1991, on behalf of a close corporation registered on 13 August 1991 under the name of Bellevue Extension Development CC. This letter states that the deed of sale, B, was signed by respondent as trustee for a close corporation or company to be formed; Bellevue Extension Development CC at its inaugural meeting on 21 August 1991 decided not to adopt the agreement of sale; and respondent (to whom I refer in what follows by his surname, Hilcove) is not personally liable under the agreement of sale.

Paragraph 8 of the founding affidavit

complains that "respondent's attitude towards the property has, until this year, been that of a buyer who intends exercising as many of the rights of an owner as possible while delaying as long as possible the inconvenience, risk and expense of acquiring ownership".

The only additional fact set out in the brief affidavit, is that the repeal of the Group Areas Act on 30 June of 1991, rendered the Free Settlement Areas Act No 102 of 1988, which was repealed on the same date, a dead letter.

The agreement of sale reads as follows:

"MEMORANDUM OF
AGREEMENT OF SALE BY AND BETWEEN
Twenty Seven Bellevue C.C.
(No.CK 86-20928-23)
(hereinafter together with its heirs, Administrators or assigns refered to as the SELLER)
and
Stuart John Hilcove, (as trustee for a company or Close Corporation to be formed), born 22nd February 1949, (hereinafter together with his heirs, Executors, Administrators and assigns refered to as the PURCHASER)
Identity Number 49 0222 5091 001

Whereas the SELLER is the registered owner of a farm commonly known as 'Bellevue' and officially described as

The Farm Bellevue No.14681 situate in the County of Pietermaritzburg, Administrative District of Natal in extent 379,7061 hectares

and agrees to sell it to the PURCHASER who agrees to purchase it under the following terms and conditions;

now Therefore witnesseth

1.

The purchase price shall be payable in cash against registration of Transfer of the property into the name of the Purchaser. The Purchaser shall make payment of the purchase price by not later than the 1st day of April 1992 and the amount of the Purchase Price shall be

If paid before 1st April 1990, the sum of R5,000,000 (Five Million Rand) If paid after 1st April 1990, but before 1st April 1991, the sum of R5,250,000 (Five Million Two Hundred and Fifty Thousand Rand) If paid after 1st April 1991 but before the 1st April 1992 the sum of R5,500,000 (Five Million Five Hundred Thousand Rand)

2.

It is acknowledged that the Purchaser at present occupies and farms the property bought and sold under this agreement and pending

transfer of the property into his name it is agreed that he shall continue to occupy it under the same terms and conditions at present applicable under an agreement between the parties hereto, dated 22nd December 1987.

3.

All conveyancing costs and transfer duty incurred in transferring the farm into the name of the Purchaser shall be borne by the Purchaser who shall nominate the conveyancers.

4.

The Purchase Price and any other payments payable hereunder shall be paid without deduction to the Seller in Pietermaritzburg in the currency of the Republic of South Africa.

5.

In the event of any payments in respect of the Purchase Price or other charges for which the Purchaser is liable herein, remaining unpaid for a period of fourteen days after due notice demanding payment in writing has been given by the SELLER or his agent to the Purchaser, the SELLER shall have the option of either enforcing at law the terms of the contract or of cancelling the contract and re-entering into possession of the property without further notice to the Purchaser, and, in the event of the SELLER cancelling the contract and re-taking possession of the property, any and all improvements made to the property herein shall become the property of the Seller

without compensation to the Purchaser.

> The notice in writing above referred to shall be validly given to the Purchaser by posting same in a prepaid envelope addressed to the Purchaser at 187 Boshoff Street, Pietermaritzburg which address the Purchaser declares to be his domicilium citandi et executandi."

It was signed by Cyril James Pettit (who also deposed to the founding affidavit), and Hilcove. The document records that Pettit did so "for Twenty Seven Bellevue C.C. (No CK 86-20928-23)". Hilcove's signature is unqualified.

In his opposing affidavit Hilcove admits the identity of the parties, the lease, and the sale, contends that annexure B is unambiguous in reflecting his capacity therein as that of a trustee for a close corporation or company to be formed, and submits that the extraneous evidence of subsequent events tendered to interpret or contradict B, is inadmissible. Alternatively, should it be held to be admissible, then what Hilcove did in the course of those subsequent

events was done in his capacity as trustee, not personally. In so far as annexures C and D conflict with B, "such conflicts are merely incorrect statements of the factual or legal position". And the "inconvenience, risk and expense of acquiring ownership were delayed because there was no obligation under the contract for the close corporation or company to be formed to acquire ownership prior to April 1992". Hilcove concedes that "to be strictly correct", clause 2 of the contract should be rectified "to accord with both parties' common intention at the time (which inadvertently and bona fide by mistake was not recorded strictly correctly)" so that purchaser in the first line becomes Stuart John Hilcove and the pronoun in the phrase "pending transfer ... into his name" becomes the purchaser's. Hilcove accordingly asks that the application be dismissed with costs.

The court a quo held that B is not ambiguous, that clause 2 is simply the result of "clumsy and

inelegant draftsmanship" and that annexures C and D are therefore inadmissible.

The contract undoubtedly has flaws. The identificatory heading includes inappropriate descriptions of both parties. The phrase in brackets after appellant's name and registration number is not suitable to an abstract entity; but the phrase at least does reveal that the draftsman was aware that a neuter genitive, "its heirs" is appropriate in relation to such an abstraction, though ignoring the impossibility of that abstraction having heirs. It is appropriate to record the date of birth and identity number as identifying features of a human purchaser, for Deeds Office purposes. What function that information serves when the contracting party is not to take transfer himself, escapes me. That merely by the way. Clause 2 constitutes a far more serious obstacle to accepting Hilcove's contention that the contract is unambiguous, though requiring a little tinkering. It incorporates by

reference the prior lease between appellant and Hilcove, and says that the parties to that are also the parties to this. The masculine pronouns in the phrase "pending transfer into his name it is agreed that he shall continue to occupy" the property, refer to one and the same man, not to both a man and an abstract entity. To make clause 2 compatible with a purchaser who is not Hilcove personally, but a third party not yet in existence, the tinkering suggested by Hilcove does not go nearly far enough. The clause would have to be rewritten to read something like this:

> "It is acknowledged that Hilcove at present occupies and farms the property bought and sold under this agreement and pending transfer of the property into the name of the purchaser it is agreed that Hilcove shall continue to occupy it under the same terms and conditions as are at present applicable under an agreement between himself and the seller, dated 22nd December 1987."

Those terms and conditions are set out in a letter by

the estate agent who negotiated its terms (the same

agent on whose letterhead B was typed). Both parties

signed to record their "confirmation and acceptance" of those. (There is no question in Hilcove being' a tenant in any other capacity than personally.) They relate to rental, the use to which the property may be put, and so on, but also provide that either party may terminate the lease cm six months written notice (clause (1)), that Hilcove may make improvements but will not be compensated for them, and that he has a right of preemption should an offer be made for the property. Failure to exercise that right "shall not alter the terms of termination of this agreement as set forth in paragraph (1) of this letter". Rewriting clause 2 of B as suggested causes a further ambiguity, read with the lease. Since according to B, Hilcove "shall continue" in occupation until transfer is passed, clause 2 is incompatible with the lease the terms of which it purports to preserve.

If clause 5 intends to refer not to Hilcove personally as purchaser but to a third party who is to

benefit under the agreement between appellant and the trustee, it makes provision for eventualities that cannot occur. In what follows I refer for convenience to the notional entity that was to be created according to Hilcove's contention, as "the company". Clause 5 contemplates only one situation, namely that a buyer is liable, (not "may become liable should it adopt the contract") . For clause 5 to have any purpose at all, the company would have had to accept the benefit conferred on it by Hilcove as trustee, to become liable to appellant for the purchase price and transfer duty. (Conveyancer's fees are a matter between the conveyancer and the buyer.) But the company can only forfeit improvements if it has been given occupation of the property to be able to make improvements at all. since in terms of clause 2 Hilcove stays on until registration, which is to be effected pari passu with payment by the company of the purchase price, no cause for cancellation for failure to pay that could arise.

And the pronoun, his, is again wrong in the sentence dealing with the present selection of a domicilium citandi et executandi for a presently non-existant entity. Were it accepted that both parties regarded Hilcove personally as the buyer, all these problems fall away, the choice of domicilium would be sensible as well as grammatical, and clause 2 could stay as it is.

While that part of the initial description of the purchaser consisting of the phrase, "(as trustee ... etc)" stands, the contract is ambiguous and contradictory. In so far as it may be necessary, it is therefore permissible to have regard to the subsequent conduct of the parties to identify the purchaser intended in the contract: Hilcove himself, or Hilcove-as-trustee. (MARTIAN ENTERTAINMENTS (PTY) LTD v BERGER 1949 (4) SA 583, (EDL) 616, 618; WOODBURN MANSIONS (PTY) LTD v POWELL 1961 (3) SA 893 (D) at 899; MTK SAAGMEULE (PTY) LTD v KILLYMAN ESTATES (PTY) LTD 1980 (3) SA 1 (A) 12F-13B.)

14 Annexure C,

signed by both parties, sets out in its preamble that appellant sold the property to Stuart John Hilcove; that "the said Hilcove" was then already in occupation and farming it and continues to do so; that Hilcove "has not, as yet, taken formal transfer of the property but will do so in terms of the Agreement of Sale on or before the 1 April 1992"; and that Hilcove has asked for permission to deal with the property in the period before formal transfer is registered as if he were already the registered owner. Appellant then consents to Hilcove's applying to have the farm declared a free settlement area, but "Hilcove shall use the property for farming purposes only, until transfer thereof is registered in his name". The consent again specifically records that appellant sold the property "to Hilcove as a farm and for no other purpose". And Hilcove signed at the foot of this document in his personal capacity since he added no qualification to his signature, below the sentence: "I

accept the benefits conferred upon me in terms of this Consent subject to the conditions contained therein".

The power of attorney he signed also describes him, without qualification, as the purchaser of the property from the appellant. The letter to the Free Settlement Board that flowed from this describes him, proleptically and in the plural, as "the registered owners" who wish to develop the property into a township once it has been declared. (Only as owner would he have had locus standi, in terms of sec 7 (3) (a) (ii) of the Free Settlement Act No 102 of 1988, read with sec 1 of the Town Planning Ordinance No 27 of 1949 (Natal), to make such application.)

The suggestion in Hilcove's opposing affidavit of a "mutual error" in regard to clause 2 of the deed of sale, has no merit. Analysis of the agreement itself weighs against accepting that appellant intended to contract with Hilcove for the benefit of a third party not yet in existence. Moreover the lease directly

contradicts any suggestion that appellant was not perfectly content with clause 2 as it stands. The lease namely records that "Your CC and Hilcove acknowledge that the farm Bellevue is for sale which is the prime reason for the uncertain period of this agreement". The last clause of the lease, giving Hilcove a right of preemption - moreover, to be exercised within forty-eight hours - should another buyer make an offer during his tenancy though safeguarding his position in regard to notice should he not do so, negates any suggestion that appellant was in agreement that Hilcove should in effect be given a lengthy option which would keep other buyers at bay until Hilcove decided what he wanted to do.

The last straw grasped by Hilcove, that the matter cannot be decided against him on the papers because of a dispute of fact necessitating that his version be accepted, on the grounds of decisions such as PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD 1984 (3) SA 623 (A) at 634E-635C, has even less merit.

The dispute is alleged to have been raised by Hilcove's denial of the subsequent facts set out by appellant, supplemented by his statement that whatever he did, he did as trustee and not in his personal capacity. The fact that Hilcove says so does not mean that he is telling the truth. (Cf DA MATA v OTTO, NO 1972 (3) SA 858 (A) 868G-869E.) There is no suggestion that there is any thing apart from his alleged reservatio mentalis to contradict the objective evidence of annexures c and D, that he accepted that he was a party to B in his personal capacity.

Once the phrase "(as trustee for a company or Close Corporation to be formed)" is excised from the description of the purchaser in the deed of sale as being unintended surplusage, that contract forms a coherent and logical whole. I am satisfied that appellant intended by annexure B to bind Hilcove personally as purchaser of the property and that Hilcove intended to be so bound.

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

The order of the court below is altered to read -

"1. It is declared that the respondent, John Stuart Hilcove, is liable personally as purchaser in terms of the agreement of sale of the property described as the Farm Bellevue No 14681 situate in the County of Pietermaritzburg, Administrative District of Natal, in extent 379,7061 hectares, of which the applicant is the seller.

2. Respondent is to pay the costs of the application, including the costs of two counsel."

L VAN DEN HEEVER JA

CONCUR:

JOUBERT JA)
SMALBERGER JA)
EKSTEEN JA)
MAHOMED AJA)