Case No 469/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

WILSON RASILINGWANI MUFAMADI	First Appellant
JESSE NTANGANEDZENI MUTHIGE	Second Appellant
ALPHEUS OFHANI MAKHUVHA	Third Appellant
HIGHSON THAETSHELESANI MAKHUVHA	Fourth Appellant
and	
DORBYL FINANCE (PTY) LIMITED	Respondent

Coram: JOUBERT, HEFER, NESTADT, F H GROSSKOPF JJA et MAHOMED AJA.

Heard	Delivered
24 February 1994.	29 March 1994.

J U D G M E N T

F H GROSSKOPF JA:

The appellants were the defendants in an action brought by the respondent as plaintiff in the Supreme Court of Venda. The respondent's main claim was for damages following on the principal debtor's breach of contract. The appellants were sued as sureties and co-principal debtors. The Court a quo (Le Roux CJ) gave judgment in favour of the respondent, but granted the appellants leave to appeal to this Court. The amount awarded as damages was much less than the sum claimed, but there was no cross-appeal by the respondent.

The parties reached agreement on a number of material issues at two pre-trial conferences. In the result the matter became a stated case for all practical purposes. Only one witness, a director of the respondent, testified briefly at the trial.

The undisputed factual background is the following. On 10 July 1985 the respondent and Lukoto Bus Service (Pty) Limited ("the company") entered into a written agreement, styled "Instalment Sale Master Agreement" ("the agreement"), in terms whereof the respondent agreed to sell to the company buses and other vehicles. The agreement made provision for separate schedules being signed for every vehicle sold by the respondent to the company. Pursuant to the agreement the respondent sold and delivered 33 buses and other vehicles ("the goods") to the company over a period of time.

It was a term of the agreement that ownership in the goods would not pass to the company until receipt by the respondent of all amounts payable by the company in respect of the goods. The agreement further provided that in the event of the company failing to make due payment in terms thereof the respondent would be entitled to cancel the agreement and obtain repossession of the goods. The respondent in addition had the right to claim

 as damages the difference between the outstanding balance under the agreement, and the "value" of the goods as determined in accordance with clause 14.2 of the agreement.

The provisions of clause 14.2 are of crucial importance in the determination of the case. The clause reads as follows:

> "14.2 Whenever it is necessary to determine the value of the Goods, or any of them, for any purpose under this Agreement, such value shall, at the election of the Seller, be determined either by the valuation of an appraiser nominated by the Seller (whose valuation shall be final and binding on the Buyer and the Seller), or, such value shall be deemed to be the net amount realised on a sale of the Goods by the Seller on such terms and conditions as the Seller deems fit."

On 12 December 1986 the four appellants and one Nehemiah Masala Lukoto ("Lukoto") bound themselves in writing to the respondent as sureties for and co-principal debtors with the company for the proper payment of all amounts owing by the company to the respondent.

5 The company breached the agreement by failing to make payment to the respondent of the instalments due under the agreement, whereupon the respondent duly cancelled the agreement on 5 July 1990. Prior to cancellation, and as early as 27 June 1990, the respondent obtained an order of the Court a quo for the interim attachment of the goods. In pursuance of the Court order the sheriff attached the goods. The sheriff also attached five additional vehicles which had not been sold by the respondent to the company. These five vehicles were valued together with the other vehicles, and they were subsequently sold by the respondent as part of the repossessed goods. It is however common cause between the parties that these events have no effect on the outcome of this appeal.

The respondent, as it was entitled to do in terms of clause 14.2 of the agreement, immediately appointed an appraiser to determine the value of the goods which had been repossessed from the company. It

was subsequently agreed by the parties at one of the pretrial conferences that the respondent had in fact appointed an appraiser in terms of clause 14.2 and that the appraiser had valued the goods at R214 200. In the result the appraiser was not called as a witness to testify at the trial, and the appellants were accordingly not afforded the opportunity to cross-examine him. There was therefore no evidence to suggest that the appraiser had not acted bona fide in all respects.

The parties further agreed at one of the pretrial conferences that the repossessed goods (which had been valued at R214 200 on 5 August 1990) were subsequently sold to Lukoto on 30 August 1990 for a cash price of Rl 000 000. On 26 November 1990 there was a new sale of the same goods to Lukoto. The cash price was then increased to Rl 186 539, due mainly to the addition of a sum of R150 000 for future insurance premiums. The question whether the appellants would have been entitled eventually to a credit of Rl 000 000 or Rl

539 when computing the respondent's damages, remained one of the ancillary issues which the trial Court had to determine.

It was further common cause that the total balance outstanding at the time of cancellation of the agreement was Rl 366 018. According to the respondent's calculations its damages amounted to Rl 151 818, being the difference between the amount of Rl 366 018 and the appraiser's valuation of R214 200. The respondent contended that once it had elected to appoint an appraiser to determine the value of the goods it was entitled but also bound in terms of clause 14.2 to use the appraiser's valuation of R214 200 in the computation of its damages. The appellants on the other hand maintained that they were entitled to a credit of at least Rl 000 000, being the cash price at which the goods were sold to Lukoto.

The principal issue which the Court a quo had to determine, was whether clause 14.2 of the agreement

was contrary to public policy and therefore void. The learned trial Judge held that the clause was indeed contrary to public policy and unenforceable.

The Court a quo further considered the ancillary issue mentioned above and decided that the appellants were entitled to a credit of Rl 000 000, being the cash price of the goods agreed upon at the time of the first Lukoto sale on 30 August 1990. The learned trial Judge concluded as follows:

> "(I)t seems to me that the parties considered a price of Rl million to be the fair market value of the goods. In this wa, Plaintiff [Respondent in the present proceedings] obtained a value for the repossessed goods and this is the sum which in my view should be deducted from the total sum owing as at the date of cancellation ..... Thus, the sum due by them should be reduced by Rl 000 000,00 which leaves R366 018,15."

The Court a cnio accordingly ordered the appellants, jointly and severally, to pay the respondent damages in the sum of R366 018,15, together with interest thereon at the agreed rate of 2% per month compounded monthly, from

July 1990 (being the date of cancellation of the agreement) to date of payment.

The appellants appealed against this order of the Court a quo. They contended that the Court a quo erred in accepting the price of Rl 000 000 for which the goods had been sold to Lukoto as constituting proof of the actual market value of the goods, and in using this amount to determine the respondent's damages. They contended that there should have been absolution. The appellants further maintained, in the alternative, that interest on damages should only be awarded from date of judgment, and not from date of cancellation of the agreement.

Shortly before the appeal the respondent conceded that it was only entitled to interest as from 24 March 1992, being the date on which judgment was delivered in the Court a quo. I express no opinion on the correctness or otherwise of this concession. The respondent also tendered the wasted costs incurred to

date thereof (26 January 1994) in respect of the appellants' supplementary heads of argument. Those heads dealt specifically with the question of interest. The appellants applied for condonation of the late filing of these supplementary heads of argument, and for an order that the costs of that application be costs in the appeal. The respondent did not, however, tender to pay the costs of the application for condonation.

Apart from the order for the payment of damages and interest thereon, the Court a quo also ordered the appellants to pay the respondent an agreed sum of R21 098,47 in respect of certain additional claims. Although the appellants were granted leave to appeal against the whole of the judgment of the Court a quo this aspect was never raised on appeal. There was in any event no suggestion that the appellants did not owe this money. This order must therefore stand.

As I have said, there was no cross-appeal. The respondent submitted, nevertheless, that the Court a quo

erred in holding that clause 14.2 was void. If this argument were to be upheld the appellants' appeal must fail. If clause 14.2 were in fact valid the appellants would be liable for damages far in excess of the amount actually awarded. On the basis of clause 14.2 the respondent is entitled to damages in the amount of Rl 151 818. While the respondent, in the absence of a cross-appeal, must abide the decision of the Court a quo, it cannot be prevented from arguing that clause 14.2 is indeed valid, and that the appeal should fail inasmuch as the appellants would then at least not be entitled to challenge the amount of damages actually awarded.

The respondent has urged us to find that the provisions of clause 14.2 of the agreement were not contrary to public policy and therefore invalid and unenforceable. The legal principles governing such an inquiry have been set out fully in Sasfin (Pty) Ltd v Beukes 1989(1) SA 1(A) at 7I-9G. In the subsequent case of Botha (now Griessel) and Another v Finanscredit (Pty)

Ltd 1989(3) SA 773(A) Hoexter JA had to deal with a

similar problem and remarked as follows at 782J-783B:

> "In such an investigation (see the remarks of Smalberger JA at 9A-G of the Sasfin case) there must be borne in mind: (a) that, while public policy generally favours the utmost freedom of contract, it nevertheless properly takes into account the necessity for doing simple justice between man and man; and (b) that a court's power to declare contracts contrary to public policy should be exercised sparingly and only in cases in which the impropriety of the transaction and the element of public harm are manifest."

In considering the provisions of clause 14.2 it should be borne in mind that it is "the tendency of the proposed transaction, not its actually proved result" which determines whether it is contrary to public policy (per Innes CJ in Eastwood v Shepstone 1902 TS 294 at 302; Sasfin's case supra at 8I-9A, 14F; Botha's case supra at 783C).

The Court a quo found that the main problem with clause 14.2 was that it placed the respondent as seller in a position where it could virtually determine

arbitrarily how much damages it wished to extract from the company as the defaulting buyer, without reference to the usual objective standards laid down by the law in such cases. The learned trial Judge further remarked:

> "It is the Seller who has the election whether to use the valuation of the appraiser or the measure provided by a sale, whichever proves to be the most advantageous for him. He can even dictate the terms of the sale without reference to the unfortunate Buyer who must eventually foot the bill. If the valuation by the appraiser is not to his liking, he can simply manipulate the purchase price of the goods to increase his claim for damages: or he can 'elect' to abide by a ridiculously low valuation and line his own pocket by selling at the market value to a willing and able buyer, thus making a handsome double profit. On any test,.....it seems to me indisputable that this provision contravenes all the tenets of simple justice between man and man, business morality and 'social and economic expedience'. In my view the defendants are correct in their submission that it offends against public policy and that it should be declared void and unenforceable."

The provisions of clause 14.2 are set out above. I respectfully disagree with the adverse interpretation thereof by the Court a quo. In my opinion

these provisions do not afford the seller the

untrammelled powers of manipulation contemplated by the Court a quo. The seller is obliged in terms of the clause to make an election as to how the value of the goods should be determined, either by the valuation of an appraiser or by the sale of the goods, in which event the value is deemed to be the net amount realised on such sale. Once the seller has made his election he will be bound by it. Should he elect to appoint an appraiser he will be bound by his valuation, whatever the amount thereof may be, and he will be obliged to calculate his damages on that basis. Clause 14.2 specifically stipulates that the valuation "shall be final and binding on the buyer and the seller". In my opinion the clause does not afford the seller the right to obtain both a valuation and a price which a buyer is willing to pay, and only then to make an election. I am of the view that it would in any event always be open to the buyer to show collusion between the seller and the appraiser, if such

be the case, or fraud or mala fides on the part of either or both of them. Should the seller on the other hand elect to determine the value of the goods by means of the price realised on the sale of the goods, he will be bound by that price. Although the seller has the right to prescribe the terms and conditions of such a sale, the clause clearly contemplates a bona fide sale concluded between the seller and the buyer at arm's length.

In my judgment clause 14.2, properly construed, is not contra bonos mores or contrary to public policy.

In the result, and for the reasons set out above, the appeal against the award of damages must fail. The following order is made:

1. The appeal is dismissed, save that interest on the sum of R366 018,15 is to run from 24 March 1992 instead of 5 July 1990.

2. The appellants are to pay the costs of the appeal, which will include the costs of the application for condonation. However, the costs of the appellants'

supplementary heads of argument are to be paid by the respondent.

F H GROSSKOPF JA

JOUBERT JA) HEFER JA)
NESTADT JA) MAHOMED
AJA) Concur