Case No 384/95

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

INVESTEC BANK LIMITED First Appellant

REICHMANS LIMITED Second Appellant

and

AUDREY CECILE LEFKOWITZ Respondent

CORAM: VAN HEERDEN, HEFER, EKSTEEN,
NIENABER et MARAIS, JJA

HEARD: 8 NOVEMBER 1996

DELIVERED: 27 NOVEMBER 1996

JUDGMENT

/NIENABER JA

NIENABER JA:

Mrs Lefkowitz, the successful applicant in the court below, now the respondent, was an employee of the second appellant, Reichmans Limited ("Reichmans"). Reichmans was a subsidiary of the first appellant, Investee Bank Ltd ("Investec Bank"). The cardinal question is whether she disqualified herself from taking up shares in Investec Bank, offered to her as an employee of Reichmans, when she relinquished her employment in 1994.

Mrs Lefkowitz commenced her employment with Reichmans in April 1987. During 1988 Investee Bank established The Investec Bank Share Trust to enable its employees and the employees of its subsidiary companies to purchase shares in Investee Bank. The trust deed is annexure F to the founding affidavit. Clause 2 thereof stated that "the scheme is intended as an incentive to employees to promote the continued growth of the company by giving them an opportunity to acquire shares therein." The trust was to be administered by two independent trustees. The trustees would offer scheme shares allocated to the trust by Investec Bank to

employees qualifying for the purchase thereof. In November 1991 Investec Bank resolved to substitute a new scheme for annexure F, termed The Investee Bank Share Purchase Trust Deed. This was annexure PRJ3 to the answering affidavit. Clause 2.2 thereof provided as follows:

> "The scheme is intended as an incentive to employees of the company and its subsidiaries and to employees of any other company in the group to encourage them to acquire an interest in the company by offering to employees the right to acquire scheme instruments in order to promote a proprietary interest in the success of the company and the group."

The new scheme resembled the old one in concept but differed from it in wording and detail.

It was this latter trust deed which was the operative one when, on 1 April 1992, Reichmans addressed a letter in the following terms to Mrs Lefkowitz:

> "We are pleased to confirm that we [are] able to offer you an option to take up an allocation of 500 Investec Bank Limited Shares.
> The Share Option Scheme has been so designed, that only on the effective date of you having to receive ownership and control of the shares, need you decide

whether or not you wish to take up the option.
The risk element, therefore, is totally eliminated in this scheme.
These shares will be sold subject to the terms and conditions of the Investec Bank Staff Share Option Scheme.
Your divisional manager has a copy of the Staff Share Trust which includes the rules of the scheme.
The sale price will be R20,50 per share and no deposit is payable.
Should you wish to consider this offer at the appropriate time, would you please notify Mrs Carol Sawkins on the 5th floor, of the Investec Bank building."

Without asking for a copy of the relevant trust deed Mrs Lefkowitz responded by intimating her "intention, in principle, to accept the shares in due course", as she put it in her founding affidavit.

A year or so later, on 4 May 1993, Investec Bank addressed a similar letter to Mrs Lefkowitz offering her the option of taking up 700 Investee Bank shares at R28,00 per share, the last paragraph of which letter reads as follows:

"Should you accept this offer in principle, would you please sign and immediately return the attached letter of

acceptance to Mrs Carol Sawkins on the 8th floor, of the Investec Bank building."

It is not disputed that Mrs Lefkowitz did so, again without first calling for a copy of the trust deed.

On 24 January 1994 Mrs Lefkowitz gave written notice of her resignation as an employee of Reichmans with effect from 28 February 1994. Shortly thereafter she had occasion to discuss the question of her share options with Mr Jacobson, Reichmans' managing director. There was a problem. As at the time when her resignation would take effect she would not have been employed for a period of two years reckoned from the dates on which each of the two offers had been made to her. On Jacobson's understanding of the terms of the trust deed she was accordingly precluded from exercising her options unless the trustees, acting on the instructions of the directors of Investec Bank, agreed thereto. He made such a recommendation in respect of the Reichmans offer of 500 shares but it was not accepted because the directors were fearful, so it was later explained, of creating "a dangerous precedent". That decision when conveyed to Mrs Lefkowitz

caused such a strain on her relationship with her employer that Jacobson agreed that she could depart immediately albeit on full pay and without prejudice to such rights as she may have had to take up her share options.

In the meantime Mrs Lefkowitz had consulted her attorney. On 9 February 1994 he wrote to Reichmans, inter alia:

> "As it is the intention of our client to exercise her rights she requires a copy of the Staff Share Trust including the rules of the scheme. Our client wishes to acquaint herself with the procedure which she is presumably obliged to follow in the exercising of her rights."

For a reason never adequately explained in the papers a copy of the obsolete scheme, annexure F, was handed to Mrs Lefkowitz to forward to her attorney, instead of the substituted scheme, annexure PRJ3. On 17 February 1994, when Mrs Lefkowitz was deemed still to be in Reichmans* employ, her attorney wrote to Jacobson, acting on behalf of both companies, as follows:

> "6. In summary:
>
> 6.1 my client has exercised, alternatively hereby

exercises the options granted to her in the letters referred to in paragraph 2 above;

6.2 Reichmans is called upon to deliver the certificate evidencing that such shares are registered in my client's name against which payment will be made, either to Reichmans or Investec, as you prefer." And again:

"8.1 This letter is addressed to you on the further assumption that the documents which you handed to Mrs Lefkowitz and which she in turn handed to us constitute the Investec Bank Staff Share Option Scheme and the Staff Share Trust referred to in the options extended to my client. If not, you will appreciate that my client has been or may be severely prejudiced."

The erroneous impression that the scheme was governed by the provisions of annexure F instead of annexure PRJ3 was compounded when, on 30 March 1994, a firm of attorneys, responding to the correspondence addressed to Reichmans and purporting to act on behalf of the trust, repudiated liability by referring to the provisions of the superseded trust deed, annexure F. It was stated:

"As Mrs Lefkowitz left the employ of Reichmans on 28

February 1994, she had not served a period of two years from the "option date" in relation to any shares and is not entitled to implement the sale of any shares."

Mrs Lefkowitz thereupon applied in the Witwatersrand Local Division for an order against Investec Bank as first respondent and Reichmans as second respondent, declaring, inter alia, that she had properly exercised her options and that she was entitled, against payment of the agreed option prices, to delivery of share certificates evidencing registration of respectively 700 and 500 shares in Investec Bank in her name.

Mrs Lefkowitz' notice of motion was dated 9 June 1994. After service thereof and before the answering affidavit was filed, she was advised by the companies' attorneys that the operative trust deed was not annexure F but annexure PRJ3. This was also the companies' stance in their answering affidavit. In her subsequent replying affidavit Mrs Lefkowitz insisted that because of what had passed between the parties, and whatever the position may be in regard to other employees, annexure F was the relevant document. Her attitude, as expressed in her affidavit, was that the provisions of annexure F suited her cause better than

those of annexure PRJ3.

Three questions thus arose for decision:

1. which trust deed prevailed;

2. was Mrs Lefkowitz to be non-suited because she resigned before two years had elapsed reckoned from the date on which the respective offers were made to her;

3. should the proceedings not have been instituted against the trustees of the trust rather than against the companies themselves?

The court a quo (Stafford J) found in Mrs Lefkowitz's favour. It did not regard the first question as crucial: the wording of clause 17.2 of annexure PRJ3 so closely resembled that of the corresponding clause of the earlier document, clause 20.3.1 of annexure F (a proposition disputed on behalf of Mrs Lefkowitz), that she would not be prejudiced were the matter to be decided on the strength of annexure PRJ3. On the second issue the court a quo concluded that clause 17.2 did not preclude Mrs Lefkowitz from exercising her options "in one tranche" before the two year period had elapsed; and on the third issue it concluded that the companies, being the true contracting parties, were properly

before court. In the result the court a quo not only granted the relief sought but also refused leave to appeal. Such leave was subsequently granted by this court on petition.

I deal with the three questions in the order in which they were posed. Ad 1: The operative trust deed.

When Mrs Lefkowitz initially accepted "in principle" the offers made to her by Reichmans and Investee Bank respectively to take up shares in Investee Bank, two separate agreements, pacta de contrahendo, were concluded. In terms of each agreement the company concerned undertook to keep open the substantive offer made to Mrs Lefkowitz to take up the stipulated number of shares at the stipulated price. The substantive offer was to be accepted by the exercise of what in legal shorthand is termed the option. Both the substantive offer and its acceptance were qualified by the trust deed, the provisions of which were expressly incorporated into the pacta de contrahendo. As a matter of objective fact the only trust deed which was operative at the time was annexure PRJ3. Annexure PRJ3 thus governed, in respect of each agreement, both the substantive offer and its

contemplated acceptance. Mrs Lefkowitz did not at first call for a copy of the trust deed, as she was invited to do. She took it as read. Consequently there could have been no mistake or misunderstanding on her part, at least at the initial stage, that annexure PRJ3 was the governing trust deed. In common with all the other employees who participated in the scheme Mrs Lefkowitz was therefore contractually bound by the terms of annexure PRJ3. The mere fact that a copy of the superseded trust deed, annexure F, was later erroneously furnished to her could not alter or qualify the terms of that agreement. Being an agreement it could only be altered by a new agreement between the parties to amend or novate it. Mr Jacobson, who caused the wrong document to be handed to Mrs Lefkowitz's attorney, clearly never intended to amend or novate the pacta de contrahendo or to resuscitate annexure F as the governing document and Mrs Lefkowitz could not reasonably have understood him to have had that intention. Yet the delivery of the incorrect document was not a legally irrelevant event. Mrs Lefkowitz exercised her option in the mistaken belief that annexure F was the relevant document. That belief was induced

in her by what on the face of it appears to have been negligent conduct on the part of the companies' representatives. There can be little doubt that had she wanted to resile from the exercise of her options, she would have been permitted to do so. But that is not what she was minded to do. What Mrs Lefkowitz sought to achieve was not the setting aside of the exercise of options according to annexure PRJ3 but the enforcement of sales according to annexure F. The real question on this part of the case is whether any legal basis existed upon which she could hold the two companies to terms which they had not intended to bind them.

As a general rule, so it has been said, the law "concerns itself with the external manifestations, and not the workings, of the minds of parties to a contract." (Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd v Pappadogianis 1992 (3) SA 234 (A) at 238I-J.) But that observation cannot apply to a post-contractual misrepresentation by a contracting party as to what his intention was at the time the contract was concluded. There is accordingly no scope in the circumstances of this case for the application of the so-called reliance theory (cf

Van der Merwe et al, Contract, General Principles, 29-32).

There was also some mention of estoppel but counsel for Mrs Lefkowitz readily conceded that, leaving aside other considerations which may preclude a reliance on estoppel, Mrs Lefkowitz had in any event not shown prejudice: there was no averment that she would not have exercised her options if PRJ3 had been furnished to her instead of annexure F; and since annexure F was forwarded to her only after she had resigned, it could not be contended that she would have delayed her resignation if the correct document has been furnished to her at the time.

In short, there is no basis on which Mrs Lefkowitz can rely on the terms of annexure F as governing her contractual relationships with Reichmans and Investee Bank. The governing trust deed was annexure PRJ3. It is clause 17.2 of that document which calls for interpretation.

Ad 2: Whether Mrs Lefkowitz was to be non-suited because of clause 17.2 of annexure PRJ3.

Mrs Lefkowitz exercised her options after five years of service and while she was still deemed to be in the employ of Reichmans but before the options had matured for two years.

The question is whether the exercise of those options was premature. The answer to that question must be sought in clause 17 of annexure PRJ3 which deals with options, and more particularly clause 17.2.

In clause 1 of PRJ3 "option" is defined as follows:

"option", granted under the scheme to an offeree, which when exercised in respect of any scheme instruments to which the option relates, will result in the sale by the trust or allotment and issue by the company of those scheme instruments to which such exercise relates to the offeree;"

"Option date" is defined as "the date on which the option is granted to an offeree".

Clause 17 in so far as it may be relevant reads:

"17. OPTIONS

17.1 An option shall lapse -

4. to the extent that it is not exercised by the 10th (tenth) anniversary of the option date in respect of the scheme instruments which are the subject matter of the option not so exercised; or

5. if a participant ceases to be an employee for a reason other than death or becoming a retired employee;

17.1.3

17.1.4 if any participant fails to exercise the option granted to him in respect of sufficient scheme instruments to make up 10% (ten per centum) of the scheme instruments under an option granted to him on any date on each of the anniversaries of that date referred to in 17.2.1 to 17.2.3 inclusive, in which event the option shall lapse in respect of the balance of shares referred to in this sub-clause 17.1.4 not so taken up.

17.2 An option may be exercised and the sale and/or allotment and issue of any scheme instruments by the trustees to a participant arising from the exercise of the option in respect of those scheme instruments may (subject to the provisions of clause 17.4) be implemented (if the participant so requests by written notice to the trustees) only on the dates (subject to the provisions of clause 17.2.2 [read 17.3.2] and 17.2.3 [read 17.3.3]) set out hereunder, namely -

6. up to 25% (twenty five per centum) of the total scheme instruments which were the subject of the option after the 2nd (second) anniversary of the option date;

7. up to 50% (fifty per centum) of the total

scheme instruments which were the subject of the option after the 3rd (third) anniversary of the option date;

8. up to 75% (seventy five per centum) of the total scheme instruments which were the subject of the option after the 4th (fourth) anniversary of the option date;

9. up to 100% (one hundred per centum) of the total scheme instruments which were the subject of the option after the 5th (fifth) anniversary of the option date;

or on such earlier date as may be agreed to by the trustees acting on the instructions of the directors.

17.3.1

10. Notwithstanding the terms of 17.2, if a participant dies before the arrival of the 10th (tenth) anniversary of an offer date, then at any time before finalisation of the estate or within 2 (two) years after the death of the participant, whichever date is the earlier, the participant's executor shall have the right and obligation at his election either to exercise the option concerned and to pay for the scheme instruments arising from the exercise of the option and have them released or to have the options lapse.

11. If a participant for any reason other than

retirement or death referred to in 17.3.1 and 17.3.2 respectively, does not remain as an employee of the group for a period of 10 (ten) years from an offer date, or if a participant leaves the employ of the group at any time prior to 10 (ten) years from an offer date, then upon the date upon which he ceases to be an employee or to be employed by the group, the trustees, in their sole and absolute discretion may either -

12. declare the options or part thereof held by the participant forfeited; and/or

13. demand that the participant exercise his election in respect of all or some of his options where the entitlement to exercise has not yet arisen and either to pay for the instruments concerned in full and have them released to him or to have the options lapse; and

14. the trustees may extend the period for election in terms of 17.3.3.2 for a maximum period of 2 (two) years from the date of the participant leaving the employ of the group, if in their opinion, special circumstances exist (for example, but not limited thereto, exceptional ill health or incapacity which in the opinion of a specialist medical practitioner renders the

participant for a period of not less than 2 (two) consecutive calendar months totally incapable of earning an income from his occupation for which he is suited by his knowledge, training, status and ability).

15. If a participant is dismissed for dishonesty, wilful misconduct, gross neglect of duty and/or gross insubordination, the trustees shall forthwith declare the options held by the participant forfeited and of no further force and effect.

16. Notwithstanding anything to the contrary in this clause 17 contained, the sale arising from the exercise of options shall to the extent that it has not yet been implemented by [be] implemented not later than the expiration of the 10th (tenth) anniversary of the option date.

17.5.1 For the purposes of this clause 17 a sale shall in respect of any scheme instruments sold to a participant arising from the exercise by that participant of an option, be implemented in respect of such scheme instruments by the delivery by the trustees of the scheme instruments to the participant against the payment by the participant of the purchase price of the scheme instruments to the trustees, it being recorded that the purchase price will be payable against delivery of the

relevant scheme instruments. 17.5.2 On implementation of a sale the risk in and benefit attaching to the scheme instruments will pass to the participant."

According to the interpretation of the court a quo, which was supported on behalf of Mrs Lefkowitz on appeal, she was entitled, even before the two year period had elapsed, to exercise each option "in one tranche" against the tender of payment of the whole amount owing in respect thereof. I am afraid that I cannot agree. On the view taken on her behalf her entitlement to exercise the options in toto arose on the dates when the options were granted to her, irrespective of her length of service thereafter. But it is clear from a reading of, for instance, clause 17.3.3.2 that the scheme contemplated a situation "where the entitlement to exercise has not yet arisen." Moreover, the reading advocated on her behalf would render the concluding words of clause 17.2, indeed the entire phasing structure of clause 17.2, superfluous. The phrase "only on the dates ... set out hereunder ..." qualify both the exercise of the option and the implementation (clause 17.5.1) of the ensuing sale. That means that an option

cannot be exercised before the stipulated date. So too the words "up to" qualify the maximum number of shares a participant is entitled to take up at each stage. The clause accordingly does not permit a participant in exercising his or her option to accelerate the stipulated date or to exceed the stipulated percentage. It was suggested on behalf of Mrs Lefkowitz that the staggered implementation was conceived and introduced into the trust deed because of its tax advantages for employees. A more plausible explanation which conforms to the stated purpose of the scheme as an incentive to employees, was that the clause was designed to encourage loyalty to, and improve productivity of, the employer companies by providing selected employees with a direct stake in the prosperity of their employer; and to achieve that end by establishing an incremental correlation between the length of subsequent service and the opportunity to acquire an accumulation of shares at a predetermined price in a rising market. The periods and the percentages stated in clause 17.2 constitute contractual restrictions on employees' rights to exercise the options granted to them. They may not exercise the option before the stated periods have elapsed nor to a greater

percentage. It is restrictive but not prescriptive: an employee is at liberty, by written notice to the trustees, to take up fewer shares than the number mentioned in clauses 17.2.1 to 17.2.4, and to claim the balance when it suits his or her finances better to do so, subject of course to clause 17.1 and clause 17.3.3 if he or she should in the meantime resign. What is, in my opinion, quite clear is that an employee cannot exercise his or her option in advance of the stipulated date (unless the directors agree thereto in terms of the concluding words of clause 17.2) or in excess of the stipulated percentage.

Viewed in that light Mrs Lefkowitz's purported exercise of the options granted to her was premature and as such ineffectual; and inasmuch as she was no longer in Reichmans' employ when the two year period eventually expired, clause 17.1.2 in effect disqualified her from ever taking up the shares allocated to her.

Ad 3: Whether the poceedings should have been instituted against the trustees.

This point was advanced by Investec Bank and Reichmans as an alternative answer to Mrs Lefkowitz's claim. In the light of the earlier conclusion that her purported exercise of the

options was ineffectual, it has become immaterial whether she instituted the proceedings against the companies or against the trustees. I may mention that the trustees had been given due notice of the proceedings but elected not to intervene.

In the result the appeal succeeds with costs including the costs of two counsel. The order of the court a quo is altered to read: "The application is dismissed with costs."

P M Nienaber Judge of Appeal

Concur:
Van Heerden JA Hefer JA Eksteen JA
Marais JA