Case No 356/95

In the Supreme Court of South Africa Appellate Division

In the matter between:

BISMILLAH (VENDA) (PROPRIETARY) LTD.....Appellant

and

MAUNGEDZO ANDRIES NETSHITUNI.....Respondent

Before: Van Heerden, Hefer, F H Grosskopf, Olivier and Schutz JJA Heard: 12 November 1996 Judgment delivered: 27 November 1996

JUDGMENT

Olivier JA:

This is an appeal against an order absolving the respondent (defendant) from the instance with costs by Ngoepe AJ in the Supreme Court of Venda, the necessary leave to appeal having been granted by that court. Absolution was granted after the close of the appellant's (plaintiff's) case without the respondent having led any evidence or having closed his case.

Somewhat simplified, the facts on which the appellant relied in its evidence were as follows:

1. During March 1991 the appellant, represented by its sole director, Mr Saleem Osman, commenced negotiations with the respondent for the purchase of the latter's property known as Stand 472, Thohoyandou.

2. Eventually the parties concluded an oral contract for the sale of the stand at a price of R42 000,00.

3. The respondent indicated that he was not desirous of receiving payment of the said amount in cash, as he would rather buy a passenger bus from the appellant and allow set-off to operate. Since stage it was envisaged that the purchase price of the bus would be higher than that of the house, it was orally agreed that the respondent would pay the balance owing to the appellant in cash.

4. As the appellant did not have a suitable bus for sale at the time, one of his relatives found a suitable bus belonging to a third party, which then purchased and sold to the respondent for R55 000,00.

5. As the price of the bus exceeded the price of the stand, it was agreed that a written deed of sale in respect of the stand be drawn up reflecting that the full purchase price of the stand had been paid. The bus was placed in the respondent's possession and an oral arrangement was made for payment by the respondent of the balance of R13 000,00.

6. A deed of sale in respect of the sale of the stand, reflecting the aforesaid agreement, was prepared and subsequently signed by the parties. The relevant terms of the deed of sale read as follows:

> '2. The Purchase Price of the said PROPERTY hereby sold is the sum of R42000 (forty-two thousand rand) which sum the said SELLER hereby acknowledges having received in FULL SETTLEMENT of the Purchase price, from the said PURCHASER, and the said SELLER further acknowledges that the said PURCHASER'S obligation under this Agreement has thus been fully discharged, there being no further requirements to be met by the PURCHASER in this connection, and the said SELLER hereby expressly agrees that full ownership of the aforesaid PROPERTY shall,

upon the signing of this Agreement, pass from the SELLER to the said PURCHASER, including the right to any rentals accruing and liability for any rates and taxes payable.

7. Registration of Transfer of the said PROPERTY into the name of the PURCHASER shall be effected by the Conveyancers nominated by the PURCHASER and transfer shall be proceeded with immediately, as the PURCHASE PRICE has been paid as hereinbefore set out. All costs of transfer, including Transfer and stamp duty and other charges incidental thereto shall be paid by the PURCHASER upon presentation to him of the account from the Conveyancers.

8. The parties hereto acknowledge that this Agreement constitutes the whole contract between them and that no other conditions apply, except as are included herein.'

9. A few days later the respondent borrowed R2000,00 from the appellant to enable him to put the bus through a roadworthy test.

10. Some time later the respondent left the bus at

the shop of the appellant, indicating that he did not want it any more and that he would discuss the matter with the appellant later.

11. That evening a meeting took place between Osman, his cousin and the respondent. It was agreed that the appellant would take back the bus, that the sale of the stand would proceed and that the purchase price of R42 000,00 less the respondent's debt of R2 000,00 would be paid at the end of August 1991.

12. The appellant duly paid the amount of R40 000,00 to the respondent but the latter refused to give occupation or to transfer the stand to the appellant.

Such refusal gave rise to the action in the court a guo for an order compelling the respondent to grant the appellant occupation and transfer of the stand.

In his plea, the respondent averred that he was fraudulently induced to sign the deed of sale, it having been represented to him as the sale of a 'half bus' . The appellant' had paid him the sum of R40 000,00, but the money was not intended as a purchase sum for the property, but as a loan to refund one Lukhalimana who was a prior purchaser of the

property. In the event Lukhalimana had refused to rescind the sale, and, so it was alleged, the appellant now refused to accept repayment of the loan.

These defences were not actively pursued at the trial. The respondent's counsel, however, put two further defences (not pleaded) to the appellant's witnesses, Saleem Osman and his cousin Yusuf. Firstly, that the real agreement had been that the respondent offered the stand as a deposit on the purchase of a bus; that as the respondent was not satisfied with the bus and had returned same to the appellant, the sale of the stand had also fallen through. Secondly, the entering into the deed of sale and handing over of the title deed of the stand to the appellant was merely intended as a form of security for the payment of the purchase price of the bus.

At the end of the appellant's case, the respondent applied for absolution from the instance. Ngoepe AJ granted the application with costs.

Ngoepe AJ took the view that

> '...if a person approaches court on the basis of a particular agreement, then that person is bound by that agreement. If the evidence shows a different contract then of course it would be

> a misfortune which will befall that particular person because you stand or fall by the agreement which was averred in your summons, being the basis on which you approach court for a particular relief.'

In his view the real question was whether the appellant's evidence established the agreement as averred in the particulars of claim i.e. an agreement for a money price, or whether the agreement was that he would be paid by way of delivery of a bus. The learned judge came to the conclusion that the '...real agreement between the parties was that the [respondent] would get the bus and the [appellant] would get the house.' Therefore, he concluded, the agreement established by the appellant was not the agreement reflected in the deed of sale. Absolution from the instance was granted on that basis.

Ngoepe AJ clearly misconceived the legal and factual position. The appellant's evidence was that the deed of sale had been drawn and signed after the parties had reached consensus on "the purchase price of the stand and of the bus. Both of them were also in agreement that the deed of sale of the stand would incorporate an acknowledgement of receipt of the purchase price. Such acknowledgement was factually correct, in that the appellant (the purhaser) had

delivered a bus to the respondent (seller) at an agreed price exceeding the purchase price of the stand. Technically one could perhaps have clad the agreement in the form of barter, or the set-off mechanism could have been fully explained in the agreement. But the parties were clearly (according to the evidence presented up to this stage of the proceedings) satisfied to use the shorter, simpler and factually correct mechanism of an acknowledgment by the seller that the indebtedness in respect of the purchase price had been met by way of payment. In our law, other than in Roman law, we have a free and open system of contracts. What matters is the consensus between the parties, not the appellation we attach to it for the sake of convenience.

Due delivery of the bus by the appellant was not put in issue by the respondent. By such delivery the appellant performed its obligations under the deed of sale. The later repudiation of his obligations by the respondent was, on the evidence led so far, accepted by the appellant on the basis that the sale of the stand would go through, the only change being that the acknowledgment by the respondent that the purchase price had been paid would be ignored and that in lieu thereof the purchase price as agreed would be paid. Such an oral agreement is valid and binding - see Du Plessis v Van Deventer 1960 (2) SA 544 (A) at 549 G to

550 C; Neethling v Klopper en Andere 1967 (4) SA 459 (A) at 465 B - C, and Venter v Birchholtz 1972 (1) SA 276 (A) at 286 E - F.

The purchase price having been paid by the appellant, it was, on the evidence led so far, prima facie entitled to the relief claimed.

There was, therefore, evidence by the two Osmans on behalf of the appellant substantiating a valid contract which would entitle it to the relief claimed. No evidence having been led by the respondent, it was quite wrong for Ngoepe AJ to grant absolution from the instance (See Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409 G - H; Gascoyne v Paul and Hunter 1917 TPD 170 at 173).

In this Court it was also argued that Lukhalimana, the alleged first purchaser of the stand, should have been joined as a party to the trial proceedings. There is, in my view, no substance in this submission. No deed of sale between the respondent and Lukhalimana was placed before the court a quo, nor was it proved that he was a prior purchaser. In these circumstances there is as yet nothing to substantiate a plea of non-joinder.

When Ngoepe AJ gave leave to appeal to this Court,

he made no order as to the costs of the application for such leave. In this Court, counsel for both parties were in agreement that such costs should follow the costs of the appeal.

The following order is made:

13. The appeal succeeds with costs, which includes the costs of the application for leave to appeal.

14. The order of the court a guo is replaced by the following order: 'Absolution from the instance is refused with costs.'

VAN HEERDEN, JA)
HEFER, JA) CONCUR
F H GROSSKOPF, JA)
SCHUTZ, JA)