THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 414/2000

In the matter between:

GIDEON ANDRIES VAN DER WESTHUIZEN Appellant

and

JOHAN HEINRICH ARNOLD Respondent

Before: **MARAIS JA, HEHER *et* LEWIS AJJA**

Heard: **22 FEBRUARY 2002**

Delivered: **29 AUGUST 2002**

JUD G M E N T

LEWIS AJA/

LEWIS AJA:

[1] I have read the judgment of Heher AJA and regret that I cannot agree with his conclusion as to the interpretation of the exclusion clause in the 'koopbrief', and therefore also with the decision reached by him. There are, with respect, two important aspects of contractual interpretation that have not been accorded sufficient weight. First, in interpreting any provision of an agreement, the court should have regard to background circumstances regardless of whether it considers the wording ambiguous or uncertain. It is my view, in any event, that the words 'geen waarborge hoegenaamd' in the context of this sale are neither clear nor certain. Secondly, exclusion clauses should be construed bearing in mind that that they seek to limit or oust a party's common-law rights.

The background and surrounding circumstances

General principles applicable to interpretation

[2] In interpreting a contract a court must determine the intention of the parties as reflected by the terms of the contract. Where there is some uncertainty as to the meaning, or an ambiguity such that different meanings are possible on the literal wording of the contract, a court may have regard to surrounding circumstances. In the absence of uncertainty or ambiguity, evidence as to surrounding circumstances is inadmissible. Whether this should be the approach adopted is a question that does not, in my view, arise in this matter since the meaning of the words 'geen waarborge hoegenaamd aan my gegee is' is not clear to me. Accordingly extrinsic evidence should in my view be admissible to ascertain what guarantees were being referred to by the parties.

[3] Suffice it to say, for the purpose of this judgment, that the formalistic approach to the interpretation of contracts, one that precludes recourse to extrinsic evidence on what the parties intended in the absence of ambiguity or uncertainty, has been criticised by this Court, which has recently questioned whether the principle is justifiable. (See *Pangbourne Properties Ltd v Gill & Ramsden (Pty) Ltd* 1996 (1) SA 1182 (A) at 1187E—F) and *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 184A—E; see also the judgments of Jansen JA referred to in (1991) 108 *SALJ* 249 at 259ff and particularly that in *Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd* 1980 (1) SA 796 (A) at 805—6. For a general discussion of the interpretation of contracts see R H Christie *The Law of Contract* 4 ed 217ff and C H Lewis 'Interpretation of Contracts' in Reinhard Zimmermann and Daniel Visser '*Southern Cross: Civil Law and Common Law in South Africa'* 195ff.)

[4] On the other hand, it is trite that even where the wording of a provision is such that its meaning seems plain to a court, evidence of 'background circumstances' is admissible for the purpose of construing its meaning. In *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) Joubert JA said (at 768A—E):

> 'The correct approach to the application of the "golden rule" of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking to have regard:
>
> (1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract, . . .
>
> (2) to the background circumstances which explain the genesis and purpose of the contract, ie *to matters probably present to the minds of the parties when they contracted. Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 454G—H; *Van Rensburg en andere v Taute en andere* 1975 (1) SA 279 (A) at 305C—E . . . . (my emphasis)

> (3) to apply extrinsic evidence regarding the surrounding circumstances where the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions. . . .'

It is not apparent to me quite where to draw the line between background and surrounding circumstances. Perhaps it is a distinction without a difference. But it is clear that in construing the ambit of the exemption clause between the parties in this matter regard should be had at least to the 'matters probably present to the minds of the parties when they contracted' – the 'background circumstances'.

The 'background circumstances'

[5] On the assumption, for the sake of argument, that evidence of surrounding circumstances is inadmissible because the wording is on the face of it clear, evidence of the parties' negotiations and their subsequent conduct cannot be taken into account. And on any basis, direct evidence as to what they intended is inadmissible. But the evidence adduced in the trial court described not only what passed between the parties but also the background circumstances.

[6] As Heher AJA has pointed out, the evidence led at the trial (in both stages) was limited. It seems to me, however, that such evidence as there was of background circumstances indicated clearly that the only matter of interest to the parties was the physical and mechanical condition of the car. The seller (the appellant) knew very little about the car. It was registered in his name, and there was no doubt (although at some

stage this was raised as an issue) that he thought he was the owner. But he had no interest in the car other than as security for what Mr Swart, owed him. Swart had dealt with the buyer (the respondent), and had discussed with him the condition of the car and the repairs required to be effected. Swart had introduced the respondent to the appellant, and the former had then requested (although again this was the subject of some conflict) the 'koopbrief'. It was not disputed that the document in question was written by the appellant without any careful thought or preparation. It did not reflect the whole agreement between the parties, since certain aspects had been agreed orally previously by Swart and the respondent. The document was no more than a confirmation of various terms of the sale. It did not, for example, reflect the purchase price. The question whether it was the contract itself, or simply a written confirmation of the fact of the sale is not, however, before this Court.

[7] The parties had not met before the respondent went to the appellant's office to pay for the car. The matters discussed related to the condition of the car. The respondent knew that it required extensive repair. The appellant had not ever used or even seen the car (it is not clear, however, that the respondent knew this). Swart had had possession and had negotiated the sale to the respondent. He had bought the car from the previous 'owner'.

[8] The evidence of background circumstances, limited as it is, shows in my view that the parties did not put their minds to the question of the implied warranty against eviction, nor therefore to the exclusion of the respondent's liability for breach. Indeed, it

is unlikely that the respondent, a layman, knew of its existence. While the appellant was an attorney, his field of expertise was conveyancing.

[9] The principle that liability for breach of the warranty against eviction can be excluded is clear. But where the parties have not expressly excluded the obligation to perform a material obligation imposed on one of them, and where the background circumstances do not show that it was a matter present to the mind of either, can the phrase ‘geen waarborge hoegenaamd’, which is so general in its ambit, be taken to exclude specifically liability for the non-performance of the primary obligation of one of them? In my view, having regard to the background circumstances and to the general nature of the ‘koopbrief’ (which, as I have mentioned, did not embody the entire contract and was no more than a confirmation of the fact of the sale and of certain terms) the provision in the ‘koopbrief’ could have been intended to mean no more than that no express guarantees about the condition of the car would render the seller liable.

[10] Furthermore, as already indicated, I do not agree with the view of Heher AJA that the words are of such breadth that they are plainly to be construed as expressly excluding all liability for breach of warranties on the part of the appellant arising from the contract of sale, including liability for the breach of the implied warranty against eviction. On the contrary, I consider the phrase ‘geen waarborge hoegenaamd’ to be uncertain in its import. The learned judge in fact refers to the words as being of ‘indiscriminate breadth’. That suggests to me that they are vague rather than that they encompass an exclusion of absolutely every liability of the seller that may exist, irrespective of whether the parties

are aware of it. Accordingly, there should be a consideration of surrounding circumstances in order to determine what precisely was being referred to.

The surrounding circumstances

[11] The whole tenor of the respondent's evidence was that he believed that he was acquiring ownership of the car from the appellant as seller. He did not expect any guarantees in respect of the vehicle because he knew that it needed extensive repairs. He knew that it was defective. What was foremost in his mind when the car was sold to him was that he was taking responsibility for the requisite repairs.

[12] The appellant's evidence was to the effect that he had known nothing about the car. As indicated, he had not possessed it but had had it registered in his name, believing that he was acquiring some sort of security for a debt owed to him by Swart. The appellant stated, when explaining the wording of the 'koopbrief':

> 'Die idée daarvan was net om bevestig of om 'n skriftelike bevestiging te kry van mnr. Arnold dat hy hierdie kar voetstoots verkoop (sic), dat hy met ander woorde nie agterna terugkom na ons en sê maar hier was allerhande foute aan die kar nie, en in die tweede plek dat daar nie vir hom enige waarborge van watter aard ook al gegee is nie. . . . [D]ie bedoeling op daardie stadium was eenvoudig dat dit 'n bevestiging was van sy kant op skrif, op watter basis hy die kar koop.'

Thus, in my view, the evidence shows that the origin and genesis of the 'contract' was the respondent's request for confirmation that the car had been sold to him, and that the appellant's primary concern was to ensure that the respondent would not look to him for the cost of repairs. There is no suggestion that he was excluding all common law rights available to a buyer against a seller. The appellant claimed that he wanted only to ensure

that no guarantees had been given about the car. Does that indicate an intention to exclude the implied warranty against eviction?

[13] Evidence of negotiations and discussions was that when the respondent had asked for confirmation that the owner had sold the car to him, the appellant, being ignorant about the car, asked Swart what had been said to the respondent about it. The appellant was told that the purchase price was low because extensive repairs were needed to make the car roadworthy. Swart assured him that there was nothing in writing: the appellant told Swart that he was anxious to ensure that the car was sold ‘voetstoots’ (excluding liability for defects) and that no guarantees had been given to the respondent, who had not himself negotiated the sale. Both parties were thus concerned about the mechanical state of the vehicle. The respondent assumed that the appellant was the owner of the car. He knew that it was registered in the appellant’s name.

[14] The appellant did not regard himself as the owner, but acknowledged that the car was registered in his name. He testified that he had no expertise in the law relating to the sale of goods and had not wanted ‘come backs’. The appellant did, however, say that he wanted to ensure that the respondent knew that no guarantees had been given to the respondent. That evidence must be considered in the light of what the parties knew: what they were concerned about. And it appears from their testimony that what had been considered by them was the condition of the car alone.

[15] Do the surrounding circumstances – what passed between the parties, their negotiations and their conduct – accordingly show that the words ‘geen waarborge hoegenaamd’ included the implied warranty against eviction? In my view, the answer must be ‘No’. Although the phrase might be regarded at first blush as a complete catch-all, saving the seller from any liability that might arise by operation of law, or by virtue of representations or warranties, it cannot, given its generality, and the absence of any evidence that the question of title was considered or in contemplation, exclude the most fundamental obligation of the seller – to give undisturbed possession of the merx to the buyer.

[16] The only inference to be drawn from the circumstances is that the respondent did not intend or even contemplate that he might be deprived of possession by the true owner, and yet have no recourse to the appellant. If he had no such intention, how could there have been agreement on this aspect of the contract? The evidence does not show that the appellant had any such liability in mind either. He was concerned only to protect himself against any claim in respect of defects in the car, and against any representations or warranties that Swart may have made. He said as much. That does not mean that he intended to exclude liability for breach of a warranty implied by law. It is not a probable inference to be drawn from the evidence of either party.

[17]In the circumstances, I consider that the provision in the document that the appellant had given no warranties whatsoever does not exclude his liability for breach of the warranty against eviction. This does not mean that the words at issue are superfluous:

they refer also to express warranties which, having regard to the evidence of the parties, would have related to the condition of the car. I should at this point state that I agree with the reasoning of Heher AJA in respect of the grammatical construction of the provision, and that a distinction should be drawn between the voetstoots protection and the exclusion of liability for warranties.

The construction of exclusion clauses

[18]In view of the conclusion to which I have come on the interpretation of the particular provision in issue, I do not consider it necessary to traverse in any depth the principles established over the years as to the interpretation of clauses in contract that limit the liability of one or more of the parties. See in this regard Christie *op cit* 209ff. The author states (at 214—15) in particular that courts 'endeavour to confine exemption clauses within reasonable bounds . . . by interpreting them narrowly. The method is particularly applicable to clauses which do not specifically set out the legal grounds for liability from which exemption is granted.' Christie refers in this regard, *inter alia*, to *Essa v Divaris* 1947 (1) SA 753 (A), and a number of cases that deal with the exclusion of negligence as a ground of liability. This principle is discussed also in *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A), where the Court held, however, that the construction of the particular clause at issue did effectively exclude liability for negligence.

[19]It is also suggested fairly regularly (see in this regard Christie *op cit* 255—7) that exemption clauses should be construed *contra proferentem* – against the person for whose benefit the exemption is included, and at whose behest it is drafted. In this case, the entire 'koopbrief' was drafted by the appellant, and on the basis of the *contra proferentem* maxim, any doubt as to its meaning should be resolved in favour of the respondent. It is important to bear in mind, however, that the guides to interpretation, such as *contra proferentem*, should be resorted to only where the application of the general principles of interpretation fails to yield a clear meaning.

[20]Further, South African law does not recognise a doctrine of fundamental breach (as English law did at one stage), so that a party may exclude liability for failure to perform a material obligation under a contract: *Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd* 1993 (3) SA 424 (A) at 429—31 in which Hoexter JA discussed also the brief life of the doctrine in English law. It is noteworthy, however, that in the United Kingdom the Unfair Contract Terms Act 1977 would render the exemption of liability for the equivalent of the breach of a warranty against eviction ineffective: see Michael Furmston *Cheshire, Fifoot & Furmston's Law of Contract* 14 ed p 200.

[21]There does not, therefore, appear to be any clear authority for a general principle that exemption clauses should be construed differently from other provisions in a contract. But that does not mean that courts are not, or should not be, wary of contractual exclusions since they do deprive parties of rights that they would otherwise have had at

common law. In the absence of legislation regulating unfair contract terms, and where a provision does not offend public policy or considerations of good faith, a careful construction of the contract itself should ensure the protection of the party whose rights have been limited, but also give effect to the principle that the other party should be able to protect himself or herself against liability in so far as it is legally permissible. The very fact, however, that an exclusion clause limits or ousts common law rights should make a court consider with great care the meaning of the clause, especially if it is very general in its application. This requires a consideration of the background circumstances, as described in *Coopers & Lybrand v Bryant* (above), and a resort to surrounding circumstances if there be any doubt as to the application of the exclusion.

[22] I find, therefore, on a construction of the provision in question, having regard to evidence as to background and surrounding circumstances, that the appellant was indeed liable for breach of the warranty against eviction and I would dismiss the appeal with costs.

_____

C H LEWIS
ACTING JUDGE OF APPEAL

HEHER AJA

[1] **This is an appeal with leave of this Court against an order of the Cape High Court given on appeal from a magistrate. The single issue to which the grant of leave was confined was whether an agreement of sale concluded between the parties did not exclude the implied warranty against eviction. As will appear below, the ambit of debate was subsequently broadened at the instance of this Court.**

[2] The appellant is a conveyancing attorney. The respondent is a man in his seventies who, at the time of the trial, was employed by a fruit exporter at Cape Town harbour in an undisclosed capacity.

[3] The respondent sued the appellant in the magistrate's court of Kuils River for payment of R14 474,69 as damages. The circumstances given rise to the claim, as disclosed by the evidence, are substantially beyond dispute.

[4] During 1995 the respondent met a certain Swart who was offering a used Mercedes-Benz motor car for sale. They agreed on a price of R15 000,00. The respondent knew the vehicle was in a poor state. Probably, he discussed with Swart the obtaining of a roadworthy certificate since he afterwards accepted without query his responsibility for the cost of putting the vehicle in the necessary condition. The respondent seems to have taken delivery from Swart before meeting the appellant who, so Swart informed him, was the seller of the vehicle. Swart arranged a meeting between them at the appellant's offices on 2 May 1995. There the price was confirmed. The appellant, whether on his own insistence or at the respondent's request for a "koopbrief" is not clear, wrote out, off the cuff, a document which he handed to the respondent with the registration and license papers. It read as follows:

"Ek die ondergetekende,
Johan Heinrich Arnold
Id no. 2607295024004
Erken en bevestig hiermee dat ek die motorvoertuig beskryf as 'n Mercedes-Benz W123 met voertuigregistrasienommer 1232236A263451 en enjinnommer 10298062135500 hiermee voetstoots koop van Gideon Andries van der Westhuizen en dat geen waarborge hoegenaamd aan my gegee is of word deur gemelde verkoper of sy agent(e) nie.

Ek onderneem verder op my koste die voertuig aan die relevante padvaardigheidstoetse te laat onderwerp en dit op my naam te laat oordra binne 30 (dertig) dae vanaf datum hiervan."

[5] The respondent read the document. He signed it without comment. He drew a cheque in favour of the appellant which he handed to him. In due course he paid for the repair of the vehicle and caused it to be registered in his own name.

[6] During August 1995 the sheriff of the court descended with a writ taken out by a bank which claimed ownership of the vehicle. After discussing the problem with the appellant, the respondent paid an amount of R14 474,69 to the bank to protect himself against eviction . He then sued the appellant for damages in the amount paid by him, basing his claim on the implied warranty. The respondent did not seek repayment of the purchase price, a remedy which survives an agreement to exclude the implied warranty: *Vrystaat Motors v Henry Blignaut (Edms.) Bpk*. 1996(2) SA 448(A) 455 H - 456 B, an expedient which may have avoided the long and unsatisfactory struggle which ensued.

[7] The magistrate, eventually – in the interim there had been a successful appeal

by the respondent against a judgment of absolution from the instance at the close of his case – heard the evidence of both parties and Swart. Because of the view which he continued to hold, incorrectly, that the respondent had not proved that he paid the bank under a lawful threat of eviction, the magistrate again granted absolution and made no findings of credibility and no attempt to resolve conflicts of fact. The respondent appealed.

[8] The Court *a quo* agreed with the respondent that the uncontradicted evidence had been sufficient to prove an unassailable title in the bank. That finding is not in question before us. It also upheld his submission that the agreement between the parties did not exclude the implied warranty against eviction. The respondent therefore succeeded. The Court reasoned that the agreement made no reference to the implied warranty and that the words "geen waarborge hoegenaamd" related to and qualified the exclusion of the warranty against latent defects which preceded those words. In its view the language of the contract was clear.

[9] I am constrained to disagree, although I also think that the words which the parties used were unambiguous.

[10] On a plain reading of the document, the first paragraph manifests a dual intention: first, to protect the seller against a claim for latent defects (the "voetstoots" aspect), and, secondly, to provide him with a wider protection (expressed in the form of a "catch-all"), by excluding any possible reliance on any claim for breach of warranty arising from a source to which the parties may or may not have given specific thought. This is a common linguistic device. Certainly there is no express mention of the implied warranty against eviction. One would not expect there to be. Because of its residual nature (i.e. not being one of the essentialia of a contract of sale) the law recognizes that such a warranty may be excluded or renounced expressly: Van Leeuwen, Cens. For. 1.4.19.13-14, Voet 21.2.31, Pothier, Sale, para 182, *Alpha Trust (Edms) Bpk. v Van der Watt* 1975(3) SA 734(A) 745H – 746A. (It is unnecessary to consider the effect of an implied exclusion in this case since the words under consideration are of such breadth as to embody an express intention, but in general, whatever may be done expressly may just as effectively be achieved impliedly; *cf.* however, *Botha v Swanepoel* 2002 (4) SA 577 (T) 582 D - F.) Whether the parties intend that result depends in the first instance on the language they use in their contract. In the present instance there is no reason to conflate

the two parts of the protection under the “voetstoots” umbrella. That would render the phrase “geen waarborge hoegenaamd” superfluous, a result which flies in the face of the rule of interpretation that

“… one who reads a legal document, whether public or private, should not be prompt to ascribe – should not, without necessity or some sound reason, impute – to its language tautology or superfluity, and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use.”

Ditcher v Denison 11 Moore PC 325 at 357, cited with approval in *Wellworths Bazaar Ltd v Chandlers Ltd & Another* 1947 (2) SA 37 (A) 43. No sound reason to favour superfluity is discernible in this case.

[11] The interpretation relied on by the Court *a quo* also ignores the grammatical independence of the expressions as well as the forcefulness and indiscriminate breadth of “geen waarborge hoegenaamd” (no warranty whatsoever, absolutely no warranty at all), all of which is at odds with an intention to limit the protection accorded the seller in the sense understood by the Court *a quo*.

[12] Having read the judgment of Marais JA I am not persuaded that the segment "aan my gegee is of word deur gemelde verkoper of sy agent(e) nie" excludes reliance on a

warranty arising *ex lege*. Such a warranty is deemed by law to have been given to the party in whose favour it operates by the other party, whether or not either has brought his mind to bear on the subject. The language used in the contract under consideration was in my view apposite to and broad enough ("geen waarborge hoegenaamd") for an acknowledgment that the respondent released the appellant from an obligation arising by operation of law. The consensus of parties to a written contract is revealed in the breadth and unequivocality of the language which they use and not in the extent of the appreciation of all its consequences. Moreover, the use of the present tense ("geen waarborge hoegenaamd aan my gegee . . . word") in the context of an absence of any discussion concerning the contents of the document, emphasises that the parties intended the protection to extend to warranties about which nothing had been said between them, howsoever such warranties might otherwise attach to their contract.

[13] Given that "[t]he intention of the parties must be gathered from their language not from what either of them may have had in mind": *Van Pletsen v Henning* 1913 AD 82 at 99, the additional contribution which may be made by reference to the background circumstances in which the contract was concluded so as to enable the court to put itself

in the position of the parties at the time, and thereby to understand the broad context in which the words to be interpreted were used: *Richter v Bloemfontein Town Council* 1922 AD 57 at 69, *Coopers & Lybrand and Others v Bryant* 1995(3) SA 761(A) 768B, must perforce be limited, albeit that it is admissible to that end. Although we are in no position to resolve the conflicts left open by the magistrate – only selected portions of the evidence have been made part of the appeal record – it nevertheless seems clear that those elements of the appellant's case, which, if they had been known to the respondent at the time of contracting, might have influenced the interpretation of the document (e g the appellant had never been in possession of the vehicle, the beneficial owner and sole user was Swart, an unrehabilitated insolvent whose wife was employed by the appellant, the vehicle had

been registered in the appellant's name as security for a loan etc) were never brought to the respondent's attention and could not, therefore, be used against him. (I understand Schreiner JA in *Delmas Milling Co Ltd v Du Plessis* 1955(3) SA 447 (A) 454 G and Joubert JA in *Coopers & Lybrand v Bryant*, *supra*, 768 B, to have used the description "matters probably present to the minds of the parties when they contracted" in the limited

sense of matters of which both parties were aware.) I can find no admissible (or other) evidence within the category of background circumstances which justifies the narrow interpretation which the respondent's counsel attempted to support before us.

[14] If the plain language is to triumph, as it should, as the only evidence of the parties' intentions, I think the appeal should succeed.

[15] During the course of argument counsel were requested to address the court as to whether, in the circumstances of this case, grave injustice would be caused to the respondent should he not be permitted to recover the purchase price from the appellant in accordance with the remedy available to an evicted purchaser who has by agreement excluded reliance on an action for breach of the warranty. Counsel were, not surprisingly, taken unawares. The Court therefore offered them the opportunity to address written submissions. Counsel for the appellant duly submitted supplementary submissions opposing an 'extension' of the common law, arguing that the principles have been established for centuries, that no cause has been shown to depart from them, that 'hard cases make bad law' and that his client is entitled to the benefit of his contract despite the onerous consequences which it may hold for the respondent. None of these submissions

seems to meet the real thrust of the Court's question which was directed to whether it could properly treat the respondent's cause of action in the magistrate's court as one for substitute performance.

[16] Counsel for the respondent, after some prevarication, also addressed the Court on this issue. He relied on *Pick 'n Pay Retailers (Pty) Ltd t/a Hypermarkets v Dednam* 1984(4) SA 673 (O) for the proposition that the respondent's claim for what he paid to the sheriff was in substance a claim for repayment of the purchase price. In that case the plaintiff purchased a motor vehicle for R2 300 from the defendant. It delivered the vehicle to R as the winner of a prize in a competition organized by it. R was lawfully evicted by the Department of Customs and Excise. The plaintiff was obliged to reimburse R and to that end paid her R2 300. The plaintiff sued the defendant for payment of R2 300 as damages suffered in consequence of having to pay that amount to her. In an application for summary judgment it was contended on behalf of the defendant that the claim was illiquid and thereby not susceptible of recovery by such a procedure. After referring to *Alpha Trust (Edms) Bpk v Van der Watt supra*, De Wet J said (at 678)

‘In die onderhawige saak is dit dus na my mening duidelik dat eiser ten minste geregtig is om die koopprys van verweerder terug te vorder alhoewel hy nie die koopkontrak tussen hom en verweerder kanselleer nie. Indien eiser behalwe die koopprys nog ander skade gely het weens gemelde uitwinning kan sodanige vergoeding vir sy skade met die *actio empti* van verweerder gevorder word. Die bedrag wat eiser tans van verweerder vorder is na my mening vasgestel by wyse van ‘n ooreenkoms tussen die partye. Alhoewel daar na gemelde bedrag in eiser se besonderhede van vordering verwys word as skadevergoeding kan daar na my mening geen twyfel bestaan dat die bedrag van R2 300 wat eiser van verweerder vorder ’n gelikwideerde geldsom is nie. Eiser eis slegs die minimum wat hy op geregtig is as gevolg van die uitwinning van die betrokke voertuig, welke bedrag duidelik die koopprys van gemelde voertuig was. Indien eiser verdere vergoeding vir sy skade met die *actio empti* gevorder het van verweerder, sou sodanige vergoeding wat gevorder word slegs skadevergoeding wees en nie ’n gelikwideerde geldsom uitmaak nie.’

The Court accordingly held that the submission that the claim was not one for a liquidated amount in money was without merit. It appears from the passage I have quoted that the learned judge purported to lay down no precedent but considered the objection in the light of the particulars of claim and the facts available to him. I do not think the facts of the case before us are capable of sustaining the analogy. The respondent’s cause of action was founded on an assumption, based on a proper interpretation of the contract, that the warranty against eviction had not been excluded. He had the right, therefore, to sue for repayment of the purchase price and damages.

Cancellation of the contract of sale would be unnecessary (*Alpha Trust (Edms) Bpk v Van der Watt supra* at 748 I; *cf* De Wet and Yeats, *Kontraktereg & Handelsreg* 5 ed 331 fn 102, '*die koper by terugtrede geregtig is op terugbetaling van die koopprys, of hy nou skade gely het of nie')*.

In the event, the respondent sued for the amount paid by him to settle the bank's claim and thereby ward off eviction. He also alleged that he had been obliged to borrow the money on overdraft. He claimed the interest charged by the bank on the loan. The summons expressly described his claim as damages, and rightly so. If a purchaser, threatened by lawful eviction, enters into a transaction with the true owner to protect his possession, the transaction is *res inter alios acta* as regards the seller although it arises from his breach of contract. It is not ordinarily concluded by reference to the price already paid to him. There was in the context no correlation between the price contractually agreed between the respondent and the appellant and the amount which the former paid and claimed. He could in addition have sued for a return of the purchase price since the seller had not performed and his continued possession of the goods was not due to the seller at all. But he did not. Nor did he, at any stage of the proceedings up

to and including the present appeal, attempt to seek such relief. It was only in response to the prompting of the Court, realising that the pinch of the shoe was a forewarning of an otherwise mortal pain, that counsel sought to place a slant on his case of which neither side had until then been conscious and which had not been addressed in evidence or argument in three courts.

[17] I accept that it is trite law that

'in proceedings in the magistrate's courts, the duty of the court is not to pay too meticulous regard to the *ipsissima verba* of the pleadings but to try to get to the bottom of the real dispute, to try and determine what are the real issues between the parties and, provided no possible prejudice can be caused to either party, to decide the case on those real issues. The court is not confined within the technical limits of the pleadings.'

Ellison's Electrical Engineers Ltd v Barclay 1970 (1) SA 158 (RAD) 161 A – B. But, as Le Roux J emphasized in *Mastlite (Pty) Ltd v Stavracopolous* 1978 (3) SA 296 (T) at 299C,

'Both parties must willingly participate in the effort to canvas the new issue, otherwise the possibility of prejudice must almost inevitably arise which would be fatal to any attempt to depart substantially from the pleadings …'

As these authorities emphasise, it is essentially for the parties alone to define the scope of the issues, whether that be done directly by amendment of their pleadings or by the indirect broadening tacitly contemplated by the parties in the presentation of their cases. While I am inclined to think that no prejudice could have been uncovered by the appellant if the dispute had been approached as a claim for return of the price in the first instance, neither counsel has addressed us on this issue and it would be dangerous to make a finding in that regard. This is not a situation where the Court should make a case for the parties.

[18] Counsel for the respondent, absent a factual substratum for his initial argument, submitted that to deprive the respondent of a right to claim the price as damages would be unfair and in conflict with the convictions of right-thinking men. Counsel referred particularly to the remarks of R H Christie in his preface to the fourth edition of The Law of Contract that

'the gap between law and justice is steadily closing as the judges become more confident in applying the concepts of good faith and public policy.'

He also relied upon the dicta of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (A) 318 H – 326 G which the learned judge concluded with the words

'Ek hou dit as my oortuiging na dat die beginsels van die goeie trou, gegrond op openbare beleid, steeds in ons kontraktereg 'n belangrike rol speel en moet speel, soos in enige regstelsel wat gevoelig is vir die opvattinge van die gemeenskap, wat die uiteindelike skepper en gebruiker van die reg is, met betrekking tot die morele en sedelike waardes van regverdigheid, billikheid en behoorlikheid.'

In this regard counsel drew our attention to the comments of Christie, *op cit*, pages 19 and 20:

'There is every reason to hope that when the opportunity arises the Supreme Court of Appeal will apply Olivier JA's reasoning, harnessed to the concept of public policy, in the context of the unfair enforcement of a contract. The foundation has long since been laid by the Appellate Division's recognition that in our law the concept of good faith is applicable to all contracts, and its acceptance of the principle that in deciding whether public policy forbids the enforcement of a contract the circumstances existing at the time enforcement is sought must be taken into account. Public policy is a question of fact not law and changes with "the general sense of justice of the community, the *boni mores*, manifested in public opinion", public opinion being understood in the sense of seriously considered public opinion on the general sense of justice and good morals of the community. By limiting good faith in the enforcement of the contract to the requirement to show that degree of consideration to the legitimate interests of the other party that public policy demands, the Supreme Court of Appeal could tackle the unfair enforcement

of contracts with a flexible instrument free from the rigidity inherent in an Act of Parliament.'

Counsel referred to certain considerations which, he submitted, operated in favour of his client and warranted application of the good faith principle along the lines advocated by Prof Christie. The respondent had felt compelled to protect his own proprietary interest in the vehicle by paying R14 474,69 to the sheriff. The price of the vehicle had been R15 000. The difference was neither here nor there. He informed the appellant of the amount demanded from him against the threat of eviction. He reduced the scope of his potential claim against the appellant by only claiming from him the lesser amount. He did not resile from the agreement, but kept it alive. In all his dealings with the appellant he behaved with moderation and reason despite the predicament in which the appellant's breach of contract had landed him. While I do not disregard the force of the author's comments and the benefits of the flexibility to which he refers, the law which must be applied is that recently stated in *Brisley v Drotsky* 2002(4) SA 1 (SCA) in

which this Court had occasion to consider whether considerations of good faith provide an independent basis for the setting aside or non-application of contractual provisions and principles of the law of contract. The conclusion was that while good faith has "a creative, a controlling and a legitimating or explanatory function" it does not exclude consideration of other important contractual values or principles such as the sanctity of contract.

'Die taak van die howe in die algemeen en van hierdie hof in besonder is om hierdie grondliggende waardes wat soms met mekaar in botsing kom teen mekaar op te weeg en by geleentheid, wanneer dit nodige blyk te wees, geleidelik en met verdrag aanpassings te maak.' (at 15 I - 16 A)

I cannot find sufficient substance in the cumulative effect of the factors relied on by counsel in this case to warrant interference upon grounds of law rather than merely *ad misericordiam*. The action of the respondent in paying off the bank was not, by intent or effect, undertaken so as to keep the appellant's performance of his obligation to give undisturbed possession from being undone. When he was faced with a lawful threat which he could not resist, the performance was undone. That is why he became, and

remains, entitled to recover the purchase price. Nor do I consider that the attitude of the appellant in holding the respondent to his pleaded cause of action discloses any lack of good faith in relation to the performance of his obligations under the contract or otherwise. The seller has done nothing to bring about the purchaser's present dilemma. He has resisted a claim which had no merit according to its terms. At best for the respondent, the equities are evenly balanced. One cannot speculate as to what the appellant's attitude would have been if the claim had been properly presented from the outset. Appellant's counsel was, in my view, fully justified in submitting that the Court should confine the respondent to the course which he has followed of his own volition, a choice which hardly entitles him to claim legitimacy for his present interest. This Court would be wrong in fact and principle to treat the claim as a surrogate for recovery of the price.

[19] I would allow the appeal with costs.

J A HEHER

ACTING JUDGE OF APPEAL

MARAIS JA: [1] I have had the advantage of reading the judgments of Heher AJA and Lewis AJA. I agree with the conclusion reached by Lewis AJA but prefer to rest it upon a narrower and perhaps less controversial ground. If appellant wished to exclude liability for a breach of the warranty against eviction which warranty arose *ex lege* and existed whether or not the parties turned their minds to it, it behoved him to say so plainly and unambiguously. Having initially thought otherwise, maturer reflection has led me to conclude that the language he chose failed to achieve that purpose (if that was indeed his purpose).

[2] The words "en dat geen waarborge hoegenaamd aan my gegee is of word deur gemelde verkoper of sy agent(e) nie" are of the widest connotation but of critical importance, in my view, are the words "gegee is of word deur gemelde verkoper of sy agent(e)". Their ordinary meaning is that the **appellant (or his agent(s))** neither **gives** nor **has given** any guarantees or warranties whatsoever. They are, in my opinion, certainly apt to exclude all expressly given warranties whatever their content. I grant too

that the word “hoegenaamd” would cover both expressly given and tacitly given warranties. By tacit I mean: to be inferred as having been the unspoken but yet clearly intended consensus of the parties. But a warranty which arises *ex lege* and owes nothing to the consensus of the parties is another matter altogether. It is not a warranty which **is given** (either expressly or tacitly) **by the seller or his agent(s).** Are the chosen words apt to exclude such a warranty? I think not. In my judgment, plainer language than that which appellant chose would have been necessary to exclude effectively such a warranty.

[3] This conclusion makes it unnecessary for me to express any opinion on the question which the court raised and upon which counsel addressed further submissions. The appeal is dismissed with costs.

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R M MARAIS
JUDGE OF APPEAL