IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
In the matter of:

VISION PROJECTS (PROPRIETY) LTD

Appellant

and

COOPER CONROY BELL & RICHARDS INC

Respondant

CORAM : VIVIER, FH GROSSKOPF,

NIENABER ,SCOTT

et PLEWMAN JJA

HEARD : 25 AUGUST 1998

DELIVERED : 10 SEPTEMBER 1998

JUDGEMENT

SCOTT JA/.....

SCOTT JA:

The appellant is a property developer. The respondent is an incorporated practice of attorneys, notaries and conveyancers. The appellant sued the respondent in the Eastern Cape Provincial Division for damages which it alleged it had suffered by reason of a breach of mandate on the part of the respondent. The alleged mandate was to "link", ie effect simultaneously, the transfer of 15 erven from the registered owner, Allied Development (Pty) Ltd ("Allied"), to Time Housing (Pty) Ltd ("Time Housing") with the transfer of 14 of the erven from Time Housing to the appellant and the remaining erf from Time Housing to a Mr Cradock. It is common cause that the 15 erven were transferred from Allied to Time Housing and that one was in turn transferred to Cradock. The transfer of the remaining 14 erven from Time Housing to the appellant was not linked with the other transfers and by the time the transfer documents came to be lodged at the deeds office Time Housing had been placed in liquidation. In the

result the 14 erven remained registered in the name of Time Housing. The damages claimed by the appellant related to the amount which it subsequently had to pay to the liquidator of Time Housing in order to obtain transfer of the 14 erven as well as the costs arising from arbitration proceedings between the appellant and the liquidator. By agreement between the parties the issue of the quantum of the appellant's claim was allowed to stand over for later determination.

The Court a quo found that by not linking the respective transfers the respondent had acted in breach of its mandate from the appellant but that the latter had failed to establish that any loss it may have suffered was occasioned by the breach. It accordingly granted absolution from the instance. The appeal to this Court is with the leave of the Court a quo. The appellant contends that a causal link between the harm it suffered and respondent's breach was duly established. The respondent contends the contrary and argues that in any event the Court a quo

erred in finding that there had been a breach of mandate on its part. The issues in the appeal are accordingly the correctness of the Court a quo's finding of a breach of mandate and its finding that the appellant had failed to prove the existence of a causal connection between the breach and the appellant's alleged loss.

There is much which is common cause. In September 1991 Time Housing purchased from Allied 17 erven situated in the Municipality of Beacon Bay for a purchase price of R480 000,00. In terms of the agreement of sale a deposit of R85 000,00 was payable immediately and the balance on transfer or on 30 June 1992, whichever was the earlier. The deposit was paid. Thereafter, in March 1992 and before transfer had been given, Mr Brian Mackay, acting as trustee for a company to be formed, entered into a so-called "management buy-out agreement" with Time Housing and other companies in the Time group in terms of which he purchased inter alia the business of Time Housing (being its assets

and liabilities subject to certain exclusions) including the latter's rights under the agreement which it had previously concluded with Allied for the purchase of the 17 erven in question. On 19 June 1992 the appellant was registered as a company and it adopted the agreement concluded on its behalf by Mackay. Allied agreed to an extension until 31 December 1992 for the payment of the balance of the purchase price for the erven. The balance was duly paid by the appellant.

On 23 February 1993 Mr Peter Cooper, a director of the respondent, wrote to Time Housing on behalf of Allied calling on the former to take transfer of the 15 erven still registered in the name of Allied. By this time two of the original 17 had been transferred from Allied. The letter found its way to the office of Mr Graham McAlister, a director of the appellant. There was no immediate response, probably because at about that time McAlister was away on leave. A

reminder was sent by Cooper on 16 March 1993. Sometime thereafter McAlister telephoned Cooper and told him that the erven were to be transferred not to Time Housing but to the appellant. Cooper indicated that this was not possible and a meeting was arranged to discuss the matter. In the meantime and on 25 March 1993 the appellant wrote to the respondent advising that one of the erven was to be transferred to Cradock who had purchased it from the appellant.

The meeting was held in Cooper's office and was attended by McAlister as well as a manager employed by the appellant, Mr Vernon Brown. This was in early April. There is some dispute as to what transpired. What is common cause is that McAlister told Cooper that in terms of the management buy-out agreement the appellant had acquired the right to the erven and had subsequently paid Allied the balance of the purchase price. He said that the appellant required 14 of the erven to be transferred directly to it and one directly

to Cradock. He informed Cooper, too, that the appellant was concerned about rumours it had heard to the effect that the Time group was in financial difficulties. It is common cause that Cooper explained in some detail that the erven could not be transferred directly to the appellant and Cradock but that in terms of s 14 of the Deeds Registries Act 47 of 1937 the transfers had to follow the sequence of transactions so that all 15 erven would have to be transferred in the first place to Time Housing and thereafter 14 could be transferred to the appellant and the remaining erf to Cradock. I should mention that it appears that at the stage when the sale to Cradock was concluded the appellant was carrying on business in the name of Time Housing and that the name of the seller was reflected as Time Housing in the deed of sale. For the purpose of giving transfer to Cradock the intervention of the appellant in the sequence of transactions was, it would seem, simply ignored.

According to McAlister and Brown, Cooper went on to explain at the meeting that the transfers could be linked or effected simultaneously so that the erven could be transferred from Allied to Time Housing and from the latter to the appellant at the same time, and he proposed this as the solution to the problem which the appellant had with the property being transferred to Time Housing. This was denied by Cooper. He testified that he advised McAlister and Brown that the erven should be transferred from Time Housing as soon as possible but said he made no mention of linked or simultaneous transfers.

It was not in dispute that following this meeting Mackay, who was then the major shareholder and managing director of the appellant, telephoned Cooper to query the advice that the erven could not be transferred directly from Allied to the appellant and Cradock. He testified that their conversation centred around protecting the appellant's interests and that while he did not know anything

about linked or simultaneous transfers, Cooper had explained that this was the method by which the properties could be safely transferred to the appellant. This, too, was denied by Cooper, although he did at one stage in his evidence concede that he may have said to Mackay that the transfers could be effected simultaneously.

Although initially disputed, it was eventually common cause at the trial that there came into existence an attorney and client relationship between the appellant and the respondent and that the former instructed the latter to attend to the transfer of 14 of the erven from Time Housing to the appellant and one erf to Cradock. As far as the transfer of the 15 erven from Allied to Time Housing is concerned, Cooper regarded himself as acting for Allied. According to the appellant the instruction to proceed with the transfers to it and Cradock was on the basis that they would be linked to the transfer of the erven from Allied to Time

Housing. This, as I have said, was disputed by the respondent.

What followed is largely common cause. Because of the complicated nature of the management buy-out agreement and the absence in it of specific reference to the erven in question it was suggested by Cooper that as a matter of convenience a simple deed of sale between Time Housing and the appellant be prepared in order to facilitate the transfer of the 14 erven to the latter. For this purpose the appellant was required to obtain the full names of a person authorised by Time Housing to sign such an agreement as well as other documents, including a power of attorney. This appears to have taken some while. Eventually on 19 April 1993 the appellant wrote to the respondent supplying the necessary information. Cooper drafted a deed of sale recording that the purchase price had already been paid and under cover of a letter dated 23 April 1993 sent the agreement together with a power of attorney to the appellant to obtain the

necessary signatures. The appellant had the documents sent by courier to Johannesburg for signature by Time Housing's authorised representative. This person signed them on 29 April 1993. The following day, 30 April, the deed of sale was signed by Mackay on behalf of the appellant in Durban. They were received back by Cooper on 5 May.

In the meantime and on 29 April 1993, Cooper wrote to his correspondents in King William's Town (where the deeds office is situated) instructing them - "please lodge in conjunction with the following:

(a) Transfer: Allied Development/Time Housing (15 erven) -(Cooper Conroy).
(b) Transfer: Time Housing/T R Cradock : Erf 3911 (Cooper Conroy).
(c) Bond: Cradock/Standard Bank (Drake Flemmer & Orsmond).
(d) Transfer: Time Housing/Vision Projects (14 erven) - (Cooper Conroy)."

It was common cause that "in conjunction with" meant by way of linked or simultaneous transfer. At this stage, of course, the transfer referred to in

(d) could not be effected by reason of the absence of the documents awaiting signature. On 4 May 1993 the respondent's correspondent, on the instructions of Cooper, lodged the documents relating to the first three transactions (a, b and c) at the deeds office. The effect of this was to "delink" the transfer of the 14 erven from Time Housing to the appellant from the other transactions. It also meant that the documents for the transfer from Time Housing to the appellant could not be lodged until the other transfers (which remained linked) had been registered and the holding deed, ie Time Housing's title deed, had been uplifted. Cooper testified that he had instructed his correspondents to proceed with the first three transactions because of pressure put on him by McAlister to have the one erf transferred to Cradock and that he, Cooper, had at all times made it clear that as Allied's attorney he was not prepared to transfer the "Cradock property" from Allied separately from the other erven. This was denied by McAlister who

testified that it was equally important that all 15 erven be transferred from Time Housing.

On 6 May 1993 Time Housing was placed in provisional liquidation with effect from 5 May. Nonetheless, the transfer documents lodged on 4 May 1993 were processed and on 11 May 1993 the transfer of the 15 erven from Allied to Time Housing was registered simultaneously with the transfer of one erf from Time Housing to Cradock and the registration of the bond over the latter's property. In the result the 14 erven remained registered in the name of Time Housing which by then was in provisional liquidation.

Returning to the fate of the remaining transfer, viz the 14 erven from Time Housing to the appellant, it appears that on 6 May 1993 Cooper obtained the necessary rates clearance and on 7 May sent a completed set of transfer documents to his correspondents in King William's Town under cover of a letter which he

concluded by inquiring -

> "Is it not possible to lodge these documents to tie up with the others, or alternatively, once the others are registered, can these be expedited?"

This letter was probably delivered on Monday, 10 May 1993. The transfer documents were lodged on 13 May. On 19 May and while the transfer was still pending, news of the liquidation of Time Housing reached the Registrar of Deeds, King William's Town, and the transfer could not be registered without the authority of the liquidator. The transfer documents were duly withdrawn.

The appellant subsequently claimed transfer of the erven registered in the name of Time Housing from the liquidator. He opposed the claim and by agreement between the appellant and the liquidator the matter was submitted to arbitration. Following a hearing the arbitrator dismissed the appellant's claim with costs.

As previously indicated, Jennett J found on the probabilities that

Cooper had been given a mandate to link the various transfers and that by subsequently "delinking" the transfer of the 14 erven from Time Housing to the appellant, he had acted in breach of that mandate. In this Court counsel for the respondent attacked this finding. He pointed to certain imperfections in the evidence of the appellant's witnesses and submitted that the probabilities favoured the conclusion that Cooper's initial step to link the transactions was taken merely for practical conveyancing reasons rather than in pursuance of a mandate. I am inclined to think, albeit with some reservation, that there is insufficient basis for interfering with the finding of the Court a quo. However, in view of the conclusion to which I have come on the question of causation, it is unnecessary to decide the issue of the breach and I shall accept in favour of the appellant that there was such a breach.

I turn to the question of causation. The basis on which the arbitrator

decided that the liquidator of Time Housing was not obliged to give transfer of the erven to the appellant appears to be that both the agreement between Time Housing and Allied in 1991 and the subsequent agreement between Time Housing and the appellant were executory agreements entitling the liquidator to elect in each case either to abandon or enforce the agreement, and that the liquidator had elected to enforce the first agreement and abandon the second. In this Court it was common cause that the evidence established that the deed of sale drafted by Cooper and signed on behalf of Time Housing and the appellant in April 1993 was intended to be no more than a means of facilitating the transfer and was not in any way intended to be a novation of any portion of the management buy-out agreement concluded in 1992 which remained the agreement governing the relationship between them. In terms of this agreement Time Housing effectively ceded to the appellant its personal right to the erven which it had acquired in terms

of the agreement of sale concluded with Allied in 1991. It was not an executory agreement. By May 1993 when Time Housing was placed in liquidation that company had therefore long since divested itself of its right to claim transfer of the erven in question. The only reason why the properties were subsequently transferred into the name of Time Housing was, of course, to comply with the requirements of s 14 of the Deeds Registries Act.

In a series of decisions commencing more than a hundred and fifty years ago with Van Aardt v Hartley's Trustees 2 Menz 135 (143) it was held that if an insolvent, prior to his insolvency, purchases property but resells it before taking transfer, his trustee is bound on receipt of transfer to pass transfer to the purchaser against payment of the purchase price, if not already paid. (See also Trustee of Webster v Weakley 3 Searle 373; Trustee of Insolvent Estate of McCall v Hullet 22 NLR 215; Smith v Farrelly's Trustee 1904 TS 949 at 964.) In Britz v

De Wet NO en 'n Ander 1965 (2) SA 131 (O) the same approach was adopted where the insolvent, prior to his insolvency, had ceded his rights to receive transfer under a previous agreement of sale. (See also Ex parte Brucken 1952 (3) SA 227 (W) where following such a cession an order was granted authorising transfer directly to the cessionary, subject to the payment of transfer duty as if transfer had followed the sequence of transactions. For a criticism of the Court's failure to order the transfers to follow the proper sequence of the transactions, see Ex Parte Lindemann and Others 1963 (3) SA 735 (E) at 739 A - E.)

On the strength of these authorities counsel for the appellant conceded that his client had been entitled to transfer of the 14 erven from Time Housing and that the arbitrator's decision to the contrary was accordingly incorrect. In my view this concession was well made. I refrain, however, from expressing any view as to what the position would have been had Time Housing

sold the erven to the appellant as opposed to ceding its rights under the September 1991 agreement.

The effect of counsel's concession is, of course, that in law it mattered little whether upon the winding-up of Time Housing the erven were still registered in the name of Allied or Time Housing and had not yet been transferred to the appellant. In either event, the appellant was entitled to take transfer. It was submitted on behalf of the appellant, however, that the appellant was subjected to procedural and other disadvantages as a result of the erven being registered in the name of Time Housing and that a degree of protection would have been afforded to the appellant had the transfers been linked so as to ensure that the erven either remained in the name of Allied or were transferred via Time Housing to the appellant. In particular, it was pointed out that the burden of claiming transfer as well as the onus of proof would have been on the liquidator and not upon the

appellant.

It becomes necessary to consider the position which the appellant would have been in had the properties been registered in the name of Allied or the appellant at the critical time as opposed in each case to being registered in the name of Time Housing. I begin with the hypothesis that the properties would have remained registered in the name of Allied.

The liquidator was quite clearly determined to acquire the erven for the benefit of Time Housing in liquidation and it would seem improbable that he would not have taken steps to recover them had they still been registered in the name of Allied. There is nothing in the evidence to suggest that the dispute would in that event not have been submitted to arbitration; nor is there anything in the arbitrator's award to suggest that the result would have been any different had the properties been registered in the name of Allied. There is certainly nothing in the

award itself which would indicate that the result might have been different had the liquidator been the claimant in the arbitration proceedings and not the respondent. In any event, it was not contended that had the erven been registered in the name of Allied at the date of the liquidation they could have been transferred to the appellant other than via Time Housing and therefore without the co-operation of the liquidator. Had he refused to agree to the erven being transferred to the appellant the latter would have been in a position no different from that in which it ultimately found itself.

There is a further consideration that requires mention. The initial batch of deeds was lodged for transfer on 4 May 1993. The transfer, however, was effected only on 11 May 1993. Until then Cooper could have withdrawn the deeds at any stage and prevented the transfers from going through. According to Brown he learned on 6 May 1993 "through the company grapevine" that the Time group

of companies had been put into liquidation. Nonetheless neither Brown nor any one else in the employ of the appellant chose to inform Cooper of what had happened although the importance of communicating this to Cooper must have been obvious. Had Cooper been told, he would have withdrawn the deeds and all the erven would have remained registered in the name of Allied.

It follows that not only could the appellant itself have prevented the erven from being transferred to Time Housing after the commencement of the winding-up but there is nothing to show that the result would have been any different had the erven remained registered in the name of Allied.

I turn to what counsel for the appellant styled his "primary" contention. It is that but for Cooper's failure to link all the transfers the 14 erven would have been successfully transferred to the appellant and in that event the factual basis upon which the rights of the competing parties were determined

would have been different and it is likely that there would have been no incorrect award in favour of the liquidator. It was not the appellant's case that Cooper was in any way dilatory in attending to the transfers. Indeed, any delays that did occur were attributable to the conduct of the appellant. Counsel did not therefore suggest that the documents for the transfer of the 14 erven from Time Housing to the appellant could have been lodged at the deeds office before 11 May 1993, ie some 6 days after the winding-up had commenced. He argued, however, that had all the transfers remained linked and had the relevant documents been lodged on that day the transfers, according to the evidence, would have taken 7 days to be processed and would accordingly have been registered on 18 May 1993, being the day before the Registrar of Deeds received notice of the winding-up order.

Apart from other considerations, this somewhat tenuous basis upon which it is contended that the properties would have been transferred to the

appellant is dependant in the first place on such factors as the absence of any notes being raised by the Registrar which would have resulted in delay, or upon neither Cooper nor his correspondents becoming aware of the winding-up order prior to the registration of transfer. As Cooper explained, had he become aware of the winding-up he would have been duty-bound immediately to inform the Registrar, whereupon the deeds would have been rejected. What he would have done had he subsequently learned of the winding-up order was not canvassed in evidence and need not be considered. In any event, such a transfer taking place from beginning to end after the commencement of the winding-up without the power of attorney of the liquidator or even his knowledge could hardly have had the effect of placing the 14 erven beyond his reach and preventing him from having the transfers reversed. Indeed, I did not understand appellant's counsel seriously to contend the contrary. He submitted, however, that in such event, because the transfers

were linked, the erven would have to be transferred back to Allied. That may be, but it is of little consequence. The point is that the transfer of the erven to the appellant in the circumstances described above would not have afforded any protection against the liquidator's claim.

Had the erven been so transferred, it is improbable, having regard to the liquidator's attitude, that he would simply have done nothing. Once again, there is nothing to suggest that the parties in these circumstances would not have referred their dispute to arbitration as in fact they did; nor, having regard to the arbitrator's award, is there anything to suggest that the result would have been any different.

It follows that in my view the appellant has failed to show that the result would have been any different had the properties remained in the name of Allied or been transferred to the appellant in the circumstances postulated above.

In other words, it has not been shown that the breach on the part of the respondent was a causa sine qua non of the appellant's loss. The cause of the loss was the arbitrator's incorrect decision; not the respondent's breach. The question whether there was "legal causation" as opposed to "factual causation" (cf International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680 (A) at 700 E - J) accordingly does not arise.

The appeal is dismissed with costs

VIVIER JA

F H GROSSKOPF JA - CONCUR
NIENABER
JA PLEWMAN
JA