VOGEL, NO v VOLKERSZ [1977] 1 All SA 618 (T)
(1977 (1) SA 537 (T))

Division: Transvaal Provincial Division
Judgment Date: 18 November 1976
Case No: not recorded
Before: Botha J, Franklin J and Melamet J
Parallel Citation: 1977 (1) SA 537 (T)

Keywords

Contract - Divisibility - Clause inserted for purchaser's benefit - Purchaser entitled to enforce contract independently of invalid clause

Contract - Forfeiture clause - Invalid contract - Pro tanto enforceability

Contract - Invalid - Statutory formalities not observed - Rectification

Contract - Rectification - Statutory requirements satisfied - Rectification introducing entirely new provision

Ownership - Vindication - Immovable Property - Pleading - Allegation of ownership and illegal possession - Tender to repay purchase price

Practice and Procedure - Pleadings - Reciprocal obligations - Tender of repayment

Sale of land - Contract - Rectification - Statutory formalities satisfied - Introduction of new term

Sale of land - Formalities - Mortgage bond - Redemption period and manner not specified

Cases referred to:

Akbar v Patel 1974 (4) SA 104 (T) - Followed

Babha v Bothner and Sons Ltd 1951 (1) SA 12 (T) - Referred to

Bal v Van Staden 1903 TS 70 - Referred to

Bushney v Joliffe 1953 (4) SA 273 (W) - Not followed

Cameron v Bray Gibb and Co (Pvt) Ltd 1966 (3) SA 675 (R) - Referred to

Cherry and Amm v Leask and Potgieter 1907 TS 702 - Referred to

Chetty v Naidoo 1974 (3) SA 13 (AD) - Applied

Collen v Rietfontein Engineering Works 1948 (1) SA 413 (AD) - Referred to

Da Mata v Otto NO 1971 (1) SA 763 (T) - Referred to

De Villiers, NO and Another v Summerson 1951(3) SA 75 (T) - Discussed and doubted

Dowdle's Estate v Dowdle and Others 1947 (3) SA 340 (T) - Distinguished

Dugas v Kempster Sedgwick (Pty) Ltd 1961 (1) SA 784 (D) - Referred to

Eastwood v Shepstone 1902 TS 294 - Referred to

Ebrahim NO v Hendricks 1975 (2) SA 78 (C) - Compared

Edelstein v Edelstein NO and Others 1952 (3) SA 1 (AD) - Referred to

G v F 1966 (3) SA 579 (O) - Referred to

Graham v Ridley 1931 TPD 476 - Applied

Jammine v Lowrie 1958 (2) SA 430 (T) - Distinguished

JO Markovitz and Son Trust Co (Pty) Ltd v Bassous 1966 (2) PH A65 - Referred to

Kourie v Bean 1949 (2) SA 567 (T) - Distinguished

Le Roux v Van Biljon and Another 1956 (2) SA 17 (T) - Referred to

Lindner and Another v Vogtmannsberger and Another 1965 (4) SA 108 (O) - Referred to

Messenger of the Magistrate's Court, Durban v Pillay 1952 (3) SA 678 (AD) - Referred to

Meyer v Kirner 1974 (4) SA 90 (N) - Referred to

Neethling v Klopper en Andere 1967 (4) SA 459 (AD) - Referred to

Nortjé v Pool, NO 1966 (3) SA 96 (AD) - Referred to

Papenfus v Steyn 1969 (1) SA 92 (T) - Referred to

Pattinson and Another v Fell and Another 1963 (3) SA 277 (D) - Referred to

Pucjlowski v Johnson's Executors 1946 WLD 1 - Referred to

Sacks v Venter 1954 (2) SA 427 (W) - Referred to

Sandmann v Schaefer 1969 (4) SA 524 (SWA) - Referred to

Spiller and Others v Lawrence 1976 (1) SA 307 (N) - Referred to

Strydom v Die Land en Landboubank van Suid-Afrika 1972 (1) SA 801 (AD) - Referred to

Van der Berg v Shaw NO 1933 TPD 242 - Referred to

Van Jaarsveld v Coetzee 1973 (3) SA 241 (AD) - Referred to

Venter v Liebenberg 1954 (3) SA 333 (T) - Referred to

Wilson v Smith and Another 1956 (1) SA 393 (W) - Referred to

Judgment

BOTHA, J.: This is an appeal against a judgment of a single Judge in the motion Court of the Witwatersrand Local Division, dismissing, with costs, an application brought by the appellant against the respondent.

The appellant is the duly appointed executor in the estate of the late Tetje Pattison, to whom I shall refer as "the deceased". The issues in the appeal relate to the validity of a deed of sale entered into between the deceased and the respondent, and to the rights and obligations of the parties flowing therefrom.

The relief claimed by the appellant in terms of his notice of motion was couched in the alternative. The main prayers were for orders declaring the deed of sale to have been cancelled on the ground that the respondent had committed a breach of contract, declaring the amounts of capital and interest paid by the respondent pursuant thereto, to have been forfeited to the appellant, directing the respondent to restore occupation and possession of the property to the appellant, and directing the respondent to

pay compensation at the rate of R300 per month to the appellant for the occupation of the property after the date of cancellation. In the alternative, the appellant claimed orders declaring the deed of sale to be of no force or effect, directing the respondent to restore occupation and possession of the property to the appellant, and directing the respondent to pay to the appellant a sum of R300 per month as compensation for his occupation of the property from 17 January 1975 to the date upon which he vacates the property.

The learned Judge *a quo* found that the deed of sale was valid, that the respondent had not committed a breach of it, and that the appellant had not been entitled to cancel it. Accordingly he dismissed both the main and the alternative claims made by the appellant. Hence the present appeal.

The deed of sale came into existence pursuant to an option granted by the deceased to the respondent to purchase the property concerned. It is not necessary to refer to the terms of the option. In the Court below it was argued on behalf of the appellant that the respondent had not validly exercised the option in accordance with the terms thereof. The learned Judge rejected that argument, and it was abandoned by counsel for the appellant at the outset of the hearing of the appeal. Consequently no more need be said about it. It was common cause in the appeal that the option had been properly exercised by the respondent on 30 November 1973, subject to the question of the validity of the deed of sale, as such, which was annexed to the option and which came into being as a result of the exercise of the option.

The deed of sale was in respect of a property which was and still is registered in the name of the deceased, and which is described as portion 22 (a portion of portion 1) of the farm Olifantsvlei No. 327 I.Q., in the district of Johannesburg, measuring 15 morgen 590 square roods (13,6903

hectares). It will be convenient to quote the relevant clauses of the rather lengthy document. The crosses in clauses 2, 3 and 33 below represent x's which have been typed over and superimposed upon words appearing originally in the roneoed form of contract which was used, cancelling those words (which are not reproduced below).

"2. The consideration for the said sale is the sum of R45 000, which amount the purchaser hereby acknowledges he owes to the seller as and from the date of the signing of these presents and promises and undertakes to pay or cause to be paid to the seller or his order, free of all exchange, as follows: R3 500 in cash before 30 November 1973 at 5 p.m. or the date the purchaser exercises his option to purchase, whichever is the earlier, xxxxxx and R293,95 in respect of interest and interest (*sic*) per month payable on the first day of xxxxxx the month xxxxxx after which the purchaser exercises his aforesaid option. The balances owing by the purchaser from time to time shall bear interest at the rate of 8½ per cent per annum, subject to clause 25 hereof, and calculated monthly in advance from the date on which the purchaser exercises his option.

3. Possession xxxxxx of the property hereby sold shall be given to the purchaser on the date on which the purchaser exercises his option ...

5. Transfer shall be given to the purchaser directly the purchase price has been paid or secured to the satisfaction of the seller, as well as all other amounts aforesaid and the purchaser shall then be obliged to take transfer forthwith and pay all costs, charges and duties in connection therewith.

9. This deed of sale constitutes the entire contract between the parties hereto and includes all terms and conditions, suspensive or resolutive, agreed upon

between the parties and cannot be varied except in writing.

13. The purchaser may at any time pay the balance of the purchase price, together with interest thereon to date of payment, or make larger payments than the periodical instalments provided for under this deed of sale.

16. Should the purchaser fail to comply with any one or more or all the terms and conditions of this deed of sale, and, more particularly, should default be made by the purchaser at any time in the payment of any instalment of the purchase price or payment of interest due or any other amount that may fall due under this deed of sale and fail to rectify such default within seven days of the posting by registered post of a notice requiring the purchaser to rectify such default the seller shall, in addition to all or any of his other legal rights, have the further right forthwith to declare this agreement cancelled by written notice addressed to the purchaser at the property, and to recover from the purchaser all the arrear instalments, interest or other monies; and further all amounts on account of the purchase price and interest which may have been paid by the purchaser prior to the date of such default shall be ferfeited to the seller and remain his property as ascertained and liquidated damages, and in addition the seller shall have the full right to take immediate possession and occupation of the said property in the same good order and condition in which it was delivered to the purchaser, together with all improvements thereon without payment of compensation whatsoever . . .

21. All payments made by the purchaser under this agreement shall in the first instance be allocated to the reduction of any sum or sums disbursed by the seller on behalf of the purchaser for rates and taxes, insurance premiums and repairs, together with interest thereon, thereafter to the payments of interest and lastly to the payment of the capital.

25. Notwithstanding anything to the contrary herein contained the rate of interest payable in terms hereof may be increased in direct relation to the rate charged by the United Building Society.

26. Notwithstanding anything to the contrary herein contained the purchaser shall be obliged to take transfer on or before the 1 December 1974.

33. Within one year from the date of exercise of his option the purchaser will pay to the seller a further sum of R7 750.

34. The seller hereby undertakes to grant the purchaser a first mortgage bond for 75 per cent of the purchase price bearing interest at 8½ per cent from the date of registration. Such interest is to be calculated and paid monthly in advance from the date of registration of the said mortgage bond. The said mortgage bond shall be registered on the standard form used by Leventhal and Kantor and the purchaser acknowledges that such a form has been exhibited to him."

The events giving rise to the present litigation can be summarised briefly. Simultaneously with the exercise of his option on 30 November 1973, the respondent paid to the appellant an amount of R3 500, thus complying with the requirement of clause 2 of the contract. At the same time a further amount of R293,95 was paid, representing the interest due under clause 2 for the month of December 1973. Thereafter the respondent continued to make monthly payments of R293,95 each, up to and including November 1974. The total amount of interest payments thus made by the respondent was R3 527,40. (A few further monthly payments were made after November 1974 but these have since been returned by the appellant to the respondent and no further reference need be made to them). On 28 November 1974 the respondent wrote to the appellant and offered to pay the amount of R7 750 due on 30 November 1974, in terms of clause 33 of the contract, in three instalments, on 30 November 1974, on 31 December 1974 and on 31 January 1975. The heirs in the estate of the deceased were not prepared to accept this offer and, on 2 December 1974, the appellant's attorney addressed a letter to the respondent calling upon him to

Page 622

pay the sum of R7 750 within seven days, failing which the sale would be cancelled in terms of clause 16 thereof. On 9 December 1974, the respondent's attorneys addressed a letter to the appellant's attorney, stating that sec. 13 of the Sale of Land on Instalments Act, 72 of 1971, applied to the sale, and that the respondent was accordingly entitled to 30 days' notice to comply with the obligation to make payment of the sum of R7 750. The appellant's attorney was advised that the respondent was making arrangements to pay this amount, that he tendered to take transfer of the property, that he required the appellant to grant him a first mortgage bond over the property for 75 per cent of the purchase price in terms of clause 34 of the deed of sale, and that he would sign all documents necessary to effect transfer simultaneously with the registration of the bond. On 10 December 1974 the appellant's attorney wrote a letter to the respondent in which the latter was given an extended period of time, until 13 January 1975, to make payment of the sum of R7 750, on the supposition that sec. 13 of the said Act did apply to the transaction (which was not admitted, but which counsel for the appellant in argument conceded did apply). Further, the respondent was referred to his obligation under clause 26 of the deed of sale to take transfer on or before 1 December 1974 "and by implication to pay the balance of the purchase price on or before that date", and he was called upon to comply with that clause by not later than 13 January 1975. With regard to clause 34 of the deed of sale, the letter pointed out that the deed of sale contained no stipulation as to the date of repayment of the bond or the capital instalments to be repaid in terms thereof. The respondent was advised that the absence of agreement on these material points rendered clause 34 unenforceable, that the appellant took the view that he was under no obligation to grant the respondent a bond, and that he would in fact not do so. In further correspondence between the parties' attorneys the respondent maintained his attitude that he was prepared to take transfer against registration of a bond and that the appellant was obliged to grant him a bond, while the appellant maintained that he was not so obliged and that the respondent was obliged to make payment of the balance of the purchase price against transfer. The sum of R7 750 was paid to the appellant's attorney on 10 January 1975, and it was agreed that it would be kept in trust pending the resolution of the dispute between the parties. On 16 January 1975 the appellant's attorney wrote to the respondent's attorney stating that the deed of sale was cancelled in terms of clause 16 thereof by reason of the respondent's failure to rectify his non-compliance with clause 26. The respondent was called upon to vacate the property forthwith. Subsequently, the sum of R7 750 was returned by the appellant's attorney to the respondent's attorney, who undertook to hold it in trust and available to the appellant, upon the footing that the respondent maintained that the deed of sale was valid and had not been lawfully cancelled. The respondent also refused to vacate the property.

In the course of the correspondence that passed between the appellant's attorney and the respondent's attorney, as outlined above, the latter obtained access to the file of the respondent's erstwhile attorneys who acted on his behalf at the time when the option and the deed of sale were drafted and settled towards the end of 1969 and the beginning of 1970. In that

Page 623

file there was a form of mortgage bond being used at the time by Messrs. Leventhal & Kantor, the firm of attorneys mentioned in clause 34 of the deed of sale, who were then acting on behalf of the deceased. The form is a standard form, in print, but it is in blank; no details at all appear in the blank spaces usually left in such a form for the insertion of the information relating to a particular transaction. So, for instance, nothing was filled in in the spaces provided for the names of the mortgagor and the mortgagee or the description of the property mortgaged. In particular, the space left for the insertion of details as to the manner of repayment of the capital and interest under the bond was left blank. From this form of bond, therefore, it is impossible to deduce what agreement, if any, had been arrived at between the deceased and the respondent as to the term of the bond or the manner of repayment of the capital advance to be secured thereby. There is no evidence that any other form of bond was used in the negotiations between the parties.

In the Court *a quo* the argument presented on behalf of the appellant was directed solely at the alternative relief claimed in the notice of motion, although the main relief was not abandoned. It was contended that the written contract lacked material provisions relating to the period of the bond referred to in clause 34 and the date upon or the manner in which the balance of the purchase price was to be paid by the respondent, that the contract accordingly did not comply with the requirements of sec. 1(1) of Act 71 of 1969, and that it was, therefore, void (see, e.g., as to the object of the Legislature, *Neethling* v. *Klopper en Andere*, 1967 (4) S.A. 459 (A.D.) at pp. 464E-F and 465A-B, and the older authorities cited there).

The learned Judge *a quo* rejected this argument. He held that it was clear from various clauses of the contract that the balance of the purchase price of R33 750 was payable on registration of transfer, that the respondent was obliged to take transfer on or before 1 December 1974, and that the deceased undertook to grant the purchaser a first mortgage bond for 75 per cent of the purchase price, being R33 750. On this basis, the learned Judge dismissed the contention that the contract had not with sufficient precision provided for a method of payment. With regard to the period that the bond would be in existence, the learned Judge accepted a submission made on behalf of the respondent that such a period is not normally specified in a bond. With regard to the payments to be made under the bond, the learned Judge referred to the provision in the standard form of bond used by Leventhal and Kantor that payments thereunder would continue until such time as the whole of the capital and other sums recoverable in terms thereof should have been fully paid; he observed that this had to be read in conjunction with the deed of sale, and held:

> "In the context this would mean that the respondent would continue to pay R293,95 per month until the final payment was liquidated."

It was recognised that clause 2 referred to the monthly payments of R293,95 as interest, and that continued payment of such monthly sums after the capital amount of R7 750 had been paid in terms of clause 33 would operate as also "reducing the capital",

> "resulting in a progressive capital redemption at an increasing rate, with the capital sum being repaid in full within a period of 20 to 25 years".

The learned Judge said:

> "The mere fact that the monthly payments of R293,95 remains (*sic*) constant after the payment of some R7 750 in terms of clause 33 of the deed is clearly in my opinion indicative of the fact that a payment not only in respect of interest, but also capital, was contemplated by the parties."

The learned Judge remarked that clauses 13, 16 and 21 referred to instalments and interest, indicating that interest as well as capital repayments had been contemplated by the parties, and held:

> "This fact also points to an apparent mistake or typing error in the use of the words 'interest and interest' in clause 2 of the deed of sale."

Finally, it was held that the deed of sale contained the whole of the contemplated contract and that detailed provisions relating to the bond and the period of the bond could not be said to have been essential to the sale. In this regard the learned Judge referred to the following cases: *Venter* v. *Liebenberg*, 1954 (3) S.A. 333 (T) at p. 338; *Lindner and Another* v. *Vogtmannsberger and Another*, 1965 (4) S.A. 108 (O); *Sacks* v. *Venter*, 1954 (2) S.A. 427 (W); *Pattinson and Another* v. *Fell and Another*, 1963 (3) S.A. 277 (D), as indicating the approach of the Courts to the question of interpretation which, where possible, favours the validity of the contract rather than its invalidity.

With respect, I am unable to agree with the reasoning of the learned Judge, for the reasons following:

It is true that the contract provided that transfer was to be taken by not later than 1 December 1974 (clause 26), at which date, if capital payments had been made as provided for (clauses 2 and 33), a balance of 75 per cent of the purchase price would have remained due, for which the seller was obliged to grant a bond to the purchaser (clause 34). The general scheme of how the contract was to be carried out was thus clear enough. The real difficulty, however, is to determine how and when the purchaser would be obliged to repay the balance of the purchase price as secured by the bond. This difficulty arises from the fact that clause 34 is silent upon the point; and, as I have explained, the "standard form" of bond referred to in that clause is similarly silent. Neither clause 34 nor the form of bond referred to therein affords a clue as to how and when the bond was to be redeemed.

It may be accepted that for the purpose of having sufficient certainty as to the manner of redemption of a bond it is not necessary to specify the period of its duration in terms, e.g. expressed with reference to a stated number of years. But in order to be sufficiently certain to be enforceable, the terms of the bond would at least have to provide how the capital sum secured thereby would be repayable, e.g. in stated monthly or other periodic instalments, or on demand, etc. Counsel for the respondent, quite properly, accepted the correctness of this approach. In this respect, too, both clause 34 and the form of bond referred to therein are silent.

The learned Judge *a quo* sought to overcome this difficulty by transposing the requirement of monthly payments as provided for in clause 2 to the payments to be made under the bond. This transposition is crucial and fundamental to the learned Judge's reasoning, and it is in this respect that I respectfully beg to differ from him.

Indispensable to the learned Judge's reasoning was the finding that the statement in clause 2 that the monthly payments provided for therein were

in respect of "interest and interest", was "an apparent mistake or typing error". It is to be observed that this finding was made in a process of interpretation of the contract (as opposed to the rectification thereof, a possibility to which attention will be given later in this judgment). I can find no warrant for this way of interpreting clause 2. The standard form of contract which was used in this case, leaving a blank space for the insertion of the amount which was required to be paid upon the signing of the contract, continued to read:

> "... and R (blank space) in respect of capital and interest per month payable on the *first* day of each and every month from (blank space)".

The word "capital" was crossed out by typing x's over it, and the word "interest" was typed in immediately after the deleted word "capital". With other crossings out and insertions, the standard form was thus altered to read:

> "... and R293,95 in respect of interest and interest per month payable on the first day of the month after which the purchaser exercises his aforesaid option".

The crossing out of the word "capital" in the roneoed form of contract appears to me to have been, *prima facie*, a deliberate act which signified that payments in terms of that clause were not designed or to be regarded as payments of capital, and the insertion of the word "interest" after the deleted word "capital" and before the existing words "and interest", tends, if anything, to confirm this view. Consequently, looking at the clause as it stands, I do not find any justification for a suggestion that there was "an apparent mistake or typing error" in it. On the contrary, the finding, as a matter of interpretation, that the clause was intended to cover payments of capital as well as interest appears to me to fly directly in the face of the facts.

In support of the learned Judge's approach, counsel for the respondent submitted that the words "interest and interest" created an ambiguity, permitting recourse to "surrounding circumstances" in aid of interpretation. The respondent, in his answering affidavit, described the circumstances under which he and the deceased had come to an agreement and the negotiations which led to the finalisation thereof. Counsel was unable, however, to point to anything in the respondent's affidavit which could appropriately be treated as "surrounding circumstances" for the purposes of supporting the learned Judge's interpretation of the contract. To be sure, the respondent has made allegations as to his actual intention and that of the deceased, and as to the oral agreement arrived at between the two of them, but these allegations are not admissible for the purposes of the interpretation of the contract. For the rest, counsel relied upon the so-called "intrinsic evidence"

reflected in the document itself, in support of the learned Judge's interpretation thereof. In my opinion, such evidence is in fact destructive of that interpretation, as will appear from what follows.

The basic, and, in my view, insuperable difficulty in the way of the learned Judge's interpretation of the contract, is that clause 2 and its provision for the payment of monthly instalments was obviously not intended to be operative after 30 November 1974. The amount of R293,95, being the monthly payment, was an exact calculation of the monthly interest due, at the specified rate of 8½ per cent per annum, on the sum of R41 500, which was the balance of the purchase price which clause 2

Page 626

envisaged would remain due after the exercise of the option and the payment of R3 500 in reduction of the purchase price. In terms of the contract, the purchaser was not obliged to make any further payment in reduction of the capital balance of the purchase price until 30 November 1974. It was reasonably to be expected, therefore, that the monthly interest payable to the seller would have remained constant at R293,95 up to 30 November 1974. On that day, the purchaser was obliged to make payment in respect of the purchase price of R7 750. But by the very next day, 1 December 1974, the purchaser was obliged to take transfer of the property, and (leaving aside for the moment clause 5, with which I shall deal later) it was contemplated in clause 34 that with the taking of transfer the seller would grant a bond to the purchaser for the balance of the purchase price then remaining. Plainly, it was intended that the bond to be registered against transfer would replace the purchaser's obligations under clause 2 of the contract. Clause 25 provided for an increase in the rate of interest in relation to the rate charged by the United Building Society, and clause 2 required payment of interest to be made as from the first day of the month after the exercise of the purchaser's option. Clause 34, on the other hand, required payment of the interest from the date of the registration of the bond, and in terms of clause 23 of the standard form of bond referred to, the mortgagor was entitled on three months' written notice to the mortgagee at any time to increase the rate of interest payable under the bond, up to a maximum in the aggregate of 1 per cent per annum. It seems to me to be clear that the contemplated bond was to have superseded the purchaser's obligations under clause 2 of the contract, and I am unable to subscribe to the idea that the parties intended the provisions of clause 2 to be carried forward and to be projected into the provisions of the bond, as to the payment of interest and capital in terms thereof. To arrive at such a result would require more than interpretation; it would require making a contract for the parties that they themselves did not make. Not even a strong desire to uphold the validity of the contract as far as clause 34 is concerned, rather than to conclude upon its invalidity, can justify such a course.

Counsel for the respondent relied upon clauses 13, 16 and 21, referred to by the learned Judge in support of his conclusion. In my view, those clauses are of no assistance. I see no significance in the reference in clause 16 to the payment of any instalments of the purchase price and the payment of interest (compare clauses 2 and 33), nor in the allocation in clause 21 of payments in reduction of interest before capital (compare clause 13), in relation to the question whether the monthly instalments prescribed in clause 2 were intended to continue as payments of capital and interest under the contemplated bond after 1 December 1974. Nor does clause 13 itself justify an inference that clause 2 contemplated that capital would be included in the monthly payments specified, since the concluding sentence of clause 2 suggests that if additional payments of capital were made, the amount of the monthly payments would be reduced proportionately, just as an increase in the rate of interest in terms of clause 25 would lead to an increase of the monthly payments. But even if that were not so, clause 13 would still not afford a basis for holding that it was intended that the monthly payments provided for in clause 2 would remain

Page 627

operative after transfer and the registration of a bond under clauses 26 and 34.

Counsel for the respondent argued that clause 34 justified a recourse to evidence as to the standard period of the bonds being used by Leventhal and Kantor, and for this purpose reliance was placed on the cases mentioned by the learned Judge and cited earlier. In my view this argument is untenable, because clause 34 does not refer to the standard *terms*, e.g. relating to the period of duration of the bond or the manner of payment of instalments of capital, which had still to be inserted in the standard form of bond which was mentioned in the clause and which contained the blank spaces described earlier. Apart from that, however, there is in any event no evidence at all in the respondent's affidavit or in the other papers before the Court as to any standard or usual period of bond or manner of payment of capital instalments in respect of bonds used by Leventhal

and Kantor at the time. These considerations suffice to distinguish all the cases referred to. For instance, in *Lindner's* case, *supra*, which was decided on exception, it was accepted that a provision in a contract reading "subject to building society bond being arranged" would let in evidence of the usual terms and conditions of such a bond and the ruling rate of interest demanded by building societies. In the present case, however, the evidence of the parties is already before the Court, and from the respondent's side no evidence *dehors* the documents has been adduced as disclosing any basis whatever upon which the *lacunae* in clause 34 and the form of bond used could be bridged (apart from statements as to intention and oral agreement, which are not admissible for the purpose). In *Pattinson's* case, *supra*, on the other hand, the Court was able to supplement unexpressed provisions of a bond, relating to time for payment, rate of interest, and so forth, with reference to, and on the strength of, provisions contained in the contract itself, something which, as I have already tried to demonstrate, cannot be done in the present case.

In my judgment, therefore, clause 34 of the contract was inchoate, because the period or the manner of redemption of the bond was not provided for; the contract, in so far as clause 34 is concerned, did not comply with the requirements of sec. 1 (1) of Act 71 of 1969; accordingly that clause, at least, is void and unenforceable.

This conclusion does not, however, dispose of the appeal. On the contrary, it opens the door to an enquiry into a number of other questions.

In the course of the argument before us the question was raised whether clause 34 could be regarded as being severable from the rest of the contract, more particularly by reason of the provisions of clause 5 of the contract (read with clause 13), which entitled the respondent to claim transfer upon payment of the purchase price or upon securing such payment to the satisfaction of the seller. This clause appears to be unrelated to the seller's undertaking to grant the purchaser a bond in terms of clause 34. The question of severability was posed accordingly, in the first instance, in this form: would the purchaser have been entitled, without reference to the unenforceable clause 34, to tender payment of the balance of the purchase price in cash on 1 December 1974, and to claim transfer against such payment? "Yes," answered counsel for the appellant, contending that clause 34 had clearly been inserted for the benefit of the purchaser, that he was

entitled to waive it, and that he could enforce the contract by tendering payment in cash and relying on clause 5 only. "No," replied counsel for the respondent, arguing that clause 34 was of vital importance in the contract, read as a whole, and that if that clause was bad, the entire contract was bad and could not be enforced with reference to clause 5 only.

Counsel for the appellant went further. On the basis that clause 34 was severable, he argued that the rest of the contract was valid and enforceable according to its terms. Therefore, so the argument proceeded, the purchaser was obliged to perform in terms of clauses 5 and 26, without being able to invoke the unenforceable clause 34, and if he failed to perform thus, the seller was entitled to cancel the contract in terms of clause 16 with the consequences detailed therein. Counsel for the respondent, taking his stance on the invalidity of the entire contract, countered by submitting that there was no room for applying clauses 5 and 26 separately, nor for any cancellation under clause 16.

The problem of deciding whether an illegal or void provision in a contract can be severed from the rest of it, so that the rest is enforceable independently of the offensive or unenforceable part, is a familiar one, but it arises in this case in a novel form, in respect of which I was unable to find direct assistance in such authorities as I have been able to consult (e.g. *Eastwood* v. *Shepstone*, 1902 T.S. 294 at p. 303; *Bal* v. *Van Staden*, 1903 T.S. 70 at pp. 81-2; *Cherry and Amm* v. *Leask and Potgieter*, 1907 T.S. 702 at pp. 713-4; *Collen* v. *Rietfontein Engineering Works*, 1948 (1) S.A. 413 (A.D.) at p. 435; *G.* v. *F.*, 1966 (3) S.A. 579 (O) at p. 587; *Cameron* v. *Bray Gibb & Co.* (*Pvt.*) *Ltd.*, 1966 (3) S.A. 675 (R) at pp. 676-7; J. *O. Markovitz & Son Trust Co.* (*Pty.*) *Ltd.* v. *Bassous*, 1966 (2) P.H. A65; 1966 *Annual Survey of S.A. Law* at pp. 77-79; *Sandmann* v. *Schaefer*, 1969 (4) S.A. 524 (S.W.A.) at pp. 529-530; Williston on *Contracts*, 3rd ed., vol. 6, para. 860 *et seq.*, and cf. vol. 3, para. 532, at p. 768; Cheshire and Fifoot, *Law of Contract*, 7th ed., pp. 358-360; and the other authorities referred to in the passages of those cited above). I propose to apply what I consider to be the fundamental and governing principle to be found in the authorities, namely, to have regard to the probable intention of the parties as it appears in, or can be inferred from, the terms of the contract as a whole.

I agree with counsel for the appellant that clause 34 must have been embodied in the contract as a benefit accruing to the purchaser. The form in which its provisions were cast, i.e. an undertaking by the seller to grant the bond to the purchaser, shows that it was intended to create a facility of which the purchaser could avail himself if he so wished (cf. *Ebrahim, N.O.* v. *Hendricks*, 1975 (2) S.A. 78 (C) at p. 80A-B). There is nothing in the clause itself to suggest that the seller was interested in obtaining an investment in the form of the bond; any suggestion to that effect is in any event negatived conclusively by the terms of clause 5, which obliged the seller to pass transfer even if the purchaser did not take up the bond under clause 34. It is clear, therefore, that the purchaser was not obliged to take up a bond from the seller. Had the provisions of clause 34 been complete and enforceable, it is beyond doubt that the purchaser would have been entitled to waive the benefit conferred on him thereby and to enforce the contract in terms of the provisions of clause 5 (see *Ebrahim's* case,

Page 629

supra, and cf. *Van Jaarsveld* v. *Coetzee*, 1973 (3) S.A. 241 (A.D.). Can it make any difference, then, that the clause is void for incompleteness? I do not see that it can. Notionally, from the point of view of the enforcement of the contract by the purchaser, there was no need for him to rely on clause 34, and that clause was dispensable in the context of the purchaser's right to enforce the contract; in that sense, the clause is in my view severable from the rest of the contract (cf. *Bal* v. *Van Staden, supra*), To demonstrate that this must be in accordance with the intention of the parties, it may be useful, I think, by way of analogy, to invoke the so-called "officious bystander" test which is well-known in the field of implied terms: had the relevant hypothetical question been put to the deceased and the respondent at the time of the contract, I have no doubt that both of them would have replied unhesitatingly: "Of course, if clause 34 is unenforceable, the purchaser will be entitled, if he so wishes, to enforce the contract by tendering performance of his obligation under clause 5 without reference to clause 34."

In my view, the aforegoing approach is not in conflict with the case of *Jammine* v. *Lowrie*, 1958 (2) S.A. 430 (T). In that case a contract had provided that the purchase price of immovable property was payable, *inter alia*, by the purchaser taking over an existing bond over the property and by registering a second bond over the property in favour of the seller, repayable in stated monthly instalments free of interest for the first two years, "thereafter the interest to be agreed upon". The Court held that this last-mentioned provision rendered the contract invalid by reason of sec. 30 of Proc. 8 of 1902 (T), the original predecessor of sec. 1 (1) of Act 71 of 1969. The purchaser had tendered payment in cash of the balance of the purchase price remaining after two years. The Court rejected an argument that this tender avoided the conclusion that the contract was invalid, DE WET, J., saying (at p. 431):

> "... the argument is that where a term is inserted for the benefit of the purchaser he can waive this benefit and so convert an invalid contract into a valid one. No authority is cited to substantiate this alleged principle which seems to me to be unsound. A contract which is *ab initio* void cannot, in my opinion, be validated by a subsequent act of one of the parties and in particular cannot be validated by the tender of a method of performance which differs from that specified in the contract itself".

In that case the question of severability had not, apparently, been argued, and it was not adverted to in the judgment. Whether the provision in question in that case was in fact severable from the rest of the contract need not be investigated here. The facts were different; the learned Judge observed that the method of performance tendered differed from that specified in the contract, whereas in the present case a tender of payment in cash would have fallen squarely within the ambit of clause 5. But be that as it may, the important point to be noted is that the Court must implicitly have accepted that the challenged term of the contract in that case was not severable from the rest of the contract, for the remarks in the passage I have quoted proceeded from the premise that the contract was invalid, meaning, in the context, the contract as a whole. When once the question of the severability of the inchoate clause is raised, as it has been in the present case, one cannot, *ex hypothesi*, postulate the invalidity of the entire contract as a premise; the question of severability must first be resolved,

Page 630

and if it is resolved in favour of severability, it follows that the rest of the contract has a right of existence as a valid contract *pro tanto.* I do not consider, therefore, that the general remarks in the passage from *Jammine's* case quoted above apply in the present case.

Thus far I have been considering the question of severability from the point of view of the purchaser's right to enforce performance in terms of clause 5, independently of the provisions of clause 34. My finding that the purchaser was so entitled means that, to that extent at least, the contract had an area of validity apart from clause 34. This position will be directly relevant to a question which is to be discussed later in this judgment, namely the possibility of a rectification of clause 34.

At this stage, however, the next question for consideration is whether it follows from what has been said so far in relation to severability, that the seller was entitled, upon the purchaser's failure to implement clause 5, to cancel the contract in terms of clause 16, with the consequences provided for in that clause, as was argued by counsel for the appellant. Counsel's argument was based on the supposition that if clause 34 was severable from the rest of the contract along the lines discussed above, i.e. from the point of view of the enforcement of the contract by the purchaser against the seller, then it must be severable for all purposes, including the enforcement of the contract by the seller against the purchaser. I am prepared to assume that in most cases, generally speaking, severability will operate in both directions and thus affect both parties equally, but in my opinion an analysis of the terms of the present contract shows that that is not the position in this case.

Looked at from the point of view of the enforcement of the contract by the seller against the purchaser, the issue of severability involves this question: was the seller entitled to demand that the purchaser should perform in terms of clause 5 while not being obliged on his part to grant a bond to the purchaser as contemplated in clause 34? In my view, the answer is "no". This follows from the wording of clauses 5 and 34. Clause 34, as I have said, was clearly intended to enure for the benefit of the purchaser, and the obligation placed thereby on the seller appears to me to be directly related to the purchaser's obligation to take transfer by not later than 1 December 1974 in terms of clause 26. It seems to me that clauses 26 and 34 are interdependent; the seller's undertaking in clause 34 to grant a bond is in the nature of a *quid pro quo* for the purchaser's undertaking in clause 26 to take transfer in a year's time. Clause 5, on the other hand, is worded in such a way that it places an independent obligation on the seller, while conferring a right on the purchaser which is in effect an alternative to his right under clause 34. Clause 5 does not purport to confer a right on the seller to claim transfer otherwise than in accordance with clause 26, read with clause 34. I agree with the argument of counsel for the respondent to this extent, that the scheme of the contract shows that clause 34 was material to, and inseperable from, the purchaser's obligation to take transfer in terms of clause 26. If the seller were entitled to enforce clause 26 independently of his own obligation to grant a bond under clause 34, and the purchaser found himself unable to obtain the required finance from an alternative source, the purchaser would be faced with the prospect of forfeiting the part of the purchase price already paid by him,

pursuant to a cancellation by the seller under clause 16, and possibly also with a claim for damages for breach of contract. As I read the contract, such a result was not intended by the parties. Using the bystander's test again, I am sure that at the time of the contract both parties would have replied to the relevant hypothetical question: "Of course, if the seller is not bound to and in fact does not offer a bond under clause 34, he will not be entitled to enforce the contract and the purchaser will not be liable as if on a breach of contract".

I have come to the conclusion, therefore, that from the point of view of the enforcement of the contract by the seller against the purchaser, clause 34 is not severable from the rest of the contract.

The result is that, while the purchaser could have waived clause 34 and enforced the balance of the contract against the seller on the basis that the balance of the contract constituted a valid and enforceable contract, the seller, in the absence of such a waiver by the purchaser, was not entitled to enforce the contract against the purchaser; from the seller's point of view, the contract as a whole is void and unenforceable against the purchaser. I can perceive nothing objectionable in this result. It is in accordance with what I conceive to have been the intention of the parties, as evidenced in their contract. The concept of a contract being void and unenforceable in one direction but valid and enforceable in another, is well known in our law (see, e.g., *Edelstein* v. *Edelstein, N.O. and Others*, 1952 (3) S.A. 1 (A.D.) at pp. 10 *in fin.* and 13F-H; *Messenger of the Magistrate's Court, Durban* v. *Pillay*, 1952 (3) S.A. 678 (A.D.) at p. 683A-B; *Strydom* v. *Die Landen Landboubank van Suid-Afrika*, 1972 (1) S.A. 801 (A.D.) at p. 814C-E), and although I am not aware that it has been applied in a context such as the present, I can see no difficulty in principle in doing so.

Applying the afore-going result to the facts of this case, it will be remembered that the attitude taken up by the appellant, in the correspondence referred to earlier, was that clause 34 was incomplete and unenforceable and that the appellant was not obliged to grant the respondent a bond in terms thereof, but that the respondent was obliged to take transfer in terms of clause 26 and to pay the balance of the purchase price against such transfer. The respondent, on the other hand, claimed to be entitled to a bond under clause 34 and tendered performance against registration of such bond; there was no waiver on his part of clause 34. In these circumstances, it follows from what has been said above that the attitude adopted by the appellant was wrong in law. He was not entitled to enforce the contract upon the basis of a severance of clause 34 from the rest of the contract. The contract being void from his point of view, he could not rely on an alleged breach of it by the respondent. Accordingly his purported cancellation of the contract in terms of clause 16 thereof was ineffective, and he could not claim forfeiture of amounts paid by the respondent by relying on clause 16. It follows that the appellant was not entitled to the relief claimed in the main prayers of his notice of motion. In the result (although for different reasons) the dismissal by the learned Judge *a quo* of the appellant's main claims was correct and cannot be disturbed.

I turn to a consideration of the appellant's alternative claims, which were based on the contention that the contract was void. It will be convenient

to deal with these claims first upon the basis on which the case was conducted in the Court below, i.e. without reference to the possibility of a rectification of clause 34, which is a matter that will be discussed later in this judgment.

Counsel for the respondent conceded, correctly in my view, that if it was held that the contract was void, the appellant would have been entitled to an order declaring that the deed of sale was of no force or effect, as claimed in para. (i) of the alternative prayers in the notice of motion. I have found that the contract was void and unenforceable from the appellant's point of view, which is the only relevant point of view on the facts of this case, in relation to this claim, and bearing in mind that it is the appellant who is the claimant. In the circumstances I consider that the learned Judge *a quo* should have granted this prayer.

Counsel for the respondent contended that the appellant was not entitled to any of the further relief claimed in his alternative prayers, on a number of grounds, with which I proceed to deal. In the first place, the appellant's claim to be restored to occupation and possession of the property concerned (para. (ii) of the alternative prayers) was resisted on the ground that the respondent was willing and prepared throughout to carry out his part of the inchoate agreement, whereas it appears from the papers that the heirs in the deceased's estate were opposed to the implementation of the agreement and instructed the appellant to refuse to offer the respondent a bond pursuant to clause 34. Counsel argued that the appellant could claim the ejectment of the respondent from the property only if he alleged and proved that the respondent was unable or unwilling to carry out his part of the inchoate agreement, and in support of the argument reliance was placed on the decision in *Bushney* v. *Joliffe*, 1953 (4) S.A. 273 (W) at p. 276A-D. *Bushney's* case was, however, dissented from by TRENGOVE, J., in *Akbar* v. *Patel*, 1974 (4) S.A. 104 (T), after a consideration and analysis of the earlier cases and the relevant legal principles involved. Counsel for the respondent invited us to hold that *Bushney's* case was right and *Akbar's* case wrong. The invitation is declined. I am in respectful and entire agreement with the reasoning of TRENGOVE, J., in *Akbar's* case, and there is nothing that I can usefully add to it. In the present case, the appellant made it clear in his founding affidavit that for the purposes of his alternative claims he was relying only on the facts that the deceased was the registered owner of the property and that the respondent was in possession of it, and, as *Akbar's* case shows, that was a sufficient cause of action for the claim to recover possession of the property. Although *Akbar's* case was not concerned with possible defences that could be raised against a claim in such a form, it follows from the *ratio decidendi* in that case, in my opinion, that it is no defence to such a claim that the respondent received occupation of the property pursuant to an inchoate agreement that he was willing and able to carry out. Since the claim is based on the owner's *rei vindicatio,* the *onus* is on the respondent to establish a right to continue to hold the property as against the owner (*Chetty* v. *Naidoo*, 1974 (3) S.A. 13 (A.D.) at p. 20B-D). The principles relating to condiction and unjust enrichment are not relevant and consequently it can be no answer to the owner's *rei vindicatio*, I consider, to say that the respondent is willing and able to carry out an agreement by reason of which he obtained possession,

but which is inchoate, void and unenforceable.

The next argument put forward by counsel for the respondent was that the appellant was not entitled to claim recovery of possession of the property without tendering to restore to the respondent, against delivery of possession, the moneys paid over by the respondent to the appellant pursuant to the invalid agreement. The appellant has made no such tender, and it was contended that his failure to do so was fatal to his claim for possession. For this proposition reliance was again placed on *Bushney's* case, *supra* at p. 276 *in fin.* Counsel linked the alleged obligation of the appellant to tender repayment to both the capital sum paid in reduction of the purchase price, which is still being retained by the appellant, i.e. R3 500, and the monthly payments of interest under clause 2, which totalled R3 527,40, to the extent to which they are still being retained by the appellant.

It will be convenient to dispose first of the appellant's alleged obligation to repay to the respondent the sum of R3 527,40, being the interest paid by the latter to the former in respect of the unpaid balance of the purchase price, in terms of clause 2. No authority was quoted in support of the proposition that the seller under an invalid agreement is obliged to restore to the purchaser the interest paid by the latter on the unpaid balance of the purchase price, against recovery of possession of the property. Such an obligation, if it exists, can be derivable only from the principles of our law relating to unjust enrichment and condiction, in the context of invalid agreements and the recovery of property delivered or money paid pursuant thereto, as to which, see e.g. *Pucjlowski* v. *Johnston's Executors*, 1946 W.L.D. 1 at pp. 6-8; *Wilson* v. *Smith and Another*, 1956 (1) S.A. 393 (W) at pp. 397-8; *Le Roux* v. *Van Biljon and Another*, 1956 (2) S.A. 17 (T) at pp. 19, 22-23; *Dugas* v. *Kempster Sedgwick* (*Pty.*) *Ltd.*, 1961 (1) S.A. 784 (D) at pp. 788-790, 793; and cf. *Nortjé en 'n Ander* v. *Pool, N.O.*, 1966 (3) S.A. 96 (A.D.) at pp. 117, 136. I am unable to find anything in the reasoning in these authorities to justify a claim by the respondent against the appellant for the repayment of the interest on the purchase price paid by the former to the latter. Apart from the relatively small amount of R3 500 paid in reduction of the purchase price, upon the respondent's exercise of his option, substantially the entire purchase price remained unpaid in terms of the contract for the period of one year during which the respondent was in occupation of the deceased's property and during which he was required to and did pay interest on the balance of the purchase price. According to the authorities referred to above, the appellant has no claim against the respondent for the value of the use and occupation of the property by the respondent during the year in question. In these circumstances I cannot conceive that the appellant will be unjustly enriched at the respondent's expense by the retention of the interest in question. The "rough and ready manner" in which the Courts seek "to readjust a shifting of *assets* pursuant to an invalid contract" (*Pucjlowski's* case, *supra;* my italics) does not in my view justify a claim by the respondent that his interest payments should be refunded to him by the appellant.

Turning next to the capital sum of R3 500, counsel for the appellant submitted, but without enthusiasm, that the case of *De Villiers, N.O. and Another* v. *Summerson*,

1951 (3) S.A. 75 (T), was authority for the proposition that the appellant was entitled to rely on the provision for forfeiture contained in clause 16 of the contract, in spite of the invalidity of the contract from the appellant's point of view. With respect, I have some difficulty in grasping the precise *ratio decidendi* of *De Villiers'* case on this point (see pp. 80F-81A). It would appear that it weighed with MURRAY, J., that it was the purchaser in that case who had defaulted in carrying out the contract, while the seller had at all times been willing and able to carry out his obligations under the agreement, and that the equities were all against the purchaser. In so far as the learned Judge exercised an equitable discretion in the context of a claim based upon alleged unjust enrichment, that case is clearly distinguishable from the present one, for here, as I have already mentioned, the purchaser was prepared to carry out his part of the bargain on the basis of the provisions of clause 34, and it was the appellant who refused to grant a bond under that clause; on that score, there is no consideration of equity to debar the respondent from claiming a refund of the R3 500 paid by him. However, in *Bushney's* case, *supra* at the top of p. 277, MURRAY, J., appears to have regarded his judgment in *De Villiers'* case as having laid down that a forfeiture clause in an invalid contract was a sufficient ground *per se* to defeat a purchaser's claim to a refund of the purchase price paid. If that was the true *ratio decidendi* in *De Villiers'* case, I must express my respectful disagreement with it. In my view, if a contract of sale is null and void, it is a legal impossibility to allow the seller to enforce the contract *pro tanto* by relying on a forfeiture clause contained in it in order to resist a claim by the purchaser for a refund of the purchase price paid by him pursuant

thereto. In my judgment, therefore, the appellant cannot avoid the obligation to restore the sum of R3 500 to the respondent by virtue of the provisions of clause 16 of the contract.

It is necessary to revert now to the argument that the appellant was obliged to tender repayment of the sum of R3 500 as a prerequisite to his claim to recover possession of the property. *Bushney's* case, *supra*, does afford support for the argument, but there are earlier decisions which may be used to question the validity of the approach in *Bushney's* case (see, e.g., *Van der Berg* v. *Shaw, N.O.*, 1933 T.P.D. 242 at p. 247, and *Babha* v. *Bothner and Sons Ltd.*, 1951 (1) S.A. 12 (T) at p. 15E-H; and, as to the *jus constituendum*, De Vos, *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg*, 2nd ed., pp. 150-1, 175). In the view I take of this matter, however, it is not necessary to analyse the cases mentioned, nor others in which the question of the necessity of a tender of restitution was considered. In my opinion, the principle adopted and applied in *Akbar's* case, *supra*, with which I associate myself, is decisive on the question now being considered. The principle is that the seller of property under an invalid contract of sale has a claim to possession based only on his ownership and the purchaser's possession of the property, in accordance with the general rule propounded in the line of cases running from *Graham* v. *Ridley*, 1931 T.P.D. 476, to *Chetty* v. *Naidoo, supra.* Nothing more is required to complete the seller's cause of action. It is true that in *Akbar's* case TRENGOVE, J., referred to the tender of the plaintiff in that case to refund to the purchaser what he had received in respect of the purchase price of the property

with the observation "as he is obliged to do in the circumstances" (at p. 110H), but in my respectful view that observation was clearly *obiter* and the learned Judge was not applying his mind to the question whether such a tender was an essential ingredient of the plaintiff's cause of action. To require such a tender would be to negate the very principle upon which the decision was based. If the seller bases his claim to possession simply on his ownership and the purchaser's occupation of the property, as he is entitled to do, it is for the purchaser to raise the point that the seller is obliged to refund what he has received by way of payment of the purchase price of the property. If the point is raised by the purchaser, or by the Court *mero motu*, the Court will obviously make its order against the purchaser to restore possession to the seller conditional upon the seller refunding to the purchaser whatever the latter has paid in respect of the purchase price of the property, but it is not necessary for the seller to tender such a refund.

In my judgment, therefore, the learned Judge *a quo* should have granted the appellant's claim for an order directing the respondent to restore occupation and possession of the property to the appellant, subject to the repayment by the appellant to the respondent of the sum of R3 500, against such restoration.

The appellant's remaining prayer on the alternative basis of claim (para. (iii) was for the payment of R300 per month from 17 January 1975, being the date from which the respondent was *in mora* in relation to the appellant's claim that he should vacate the property. The appellant alleged in his founding affidavit that R300 per month represented the reasonable value of the occupation and use of the property. The respondent in his answering affidavit placed this allegation in issue. A reasonable occupational value could not have been determined on the papers and no application was made to the Court *a quo* for the matter to be referred to evidence on this point. Accordingly the Court *a quo* could not have granted an order in terms of this prayer.

Having stated what I consider the outcome of the case should have been on the basis upon which it was conducted in the Court *a quo*, it is necessary to deal now with a question which was not in issue and not argued in that Court, but which was raised during the argument in this Court and on which counsel then joined issue before us. This relates to the rectification of clause 34 of the contract.

The factual basis giving rise to the question of rectification appears from the respondent's answering affidavit, in which he gives an account of the negotiations that took place between the deceased and himself and their respective attorneys at the time when the terms of the option agreement and the prospective deed of sale were settled. For the purposes of this judgment it is not necessary for me to go into the details of the respondent's account, nor to refer to the various draft documents prepared at the time, with the written queries made thereon, or to the correspondence that passed between the attorneys of the parties, as annexed to the respondent's affidavit. Suffice it to say that the respondent, in various passages of his affidavit, makes *inter alia* the following allegations: that the period of

the bond contemplated by clause 34 was in fact fixed during the negotiations at a minimum of 20 years; that the period of the bond was specifically discussed between the respondent and the deceased; that the respondent explained to the deceased that he would require a long term bond for 20 to 25 years, and that the deceased agreed to grant such a bond; that, with regard to the instalments payable under the bond, it was agreed that the payments of R293,95 per month (clause 2) would continue under the bond, with the effect (having regard to the payment of R7 750 in terms of clause 33) of not only liquidating the interest due under the bond, but also reducing the capital and redeeming it at an increasing rate, so that it would actually be repaid in full within a period of 20 to 25 years; and that it was not deemed necessary to spell out the terms of the bond in the deed of sale, it having been taken for granted, in view of the clear agreement between the respondent and the deceased, "or having simply been overlooked in error by everybody".

It was common cause in the Court below, as remarked by the learned Judge:

> "that if in fact this was the position, that the contract was void and of no force and effect, that any claim for rectification would fail".

The learned Judge had been referred, *inter alia*, to *Dowdle's Estate* v. *Dowdle and Others*, 1947 (3) S.A. 340 (T), and *Kourie* v. *Bean*, 1949 (2) S.A. 567 (T). The question of a rectification of clause 34 was not, however, argued nor considered in the Court below upon the footing of the severability of clause 34 from the rest of the contract, in the sense discussed earlier in this judgment. It is necessary, therefore, to enquire whether the principle adopted and applied in the cases mentioned applies to the facts of the present matter.

In both *Dowdle's* case and *Kourie's* case, *supra*, the contracts of sale in question were held to be null and void because of inadequacies in the description of the properties sold and the consequent non-compliance with the prescribed statutory formalities, and it was in that context that claims for rectification were held to be incompetent. Clearly, in those cases the contracts were void in their entirety and there was no question involved of the severability of the bad parts of the contracts from the rest of them. In the present case the position is fundamentally different. Here the deed of sale is not a nullity in its entirety and for all purposes. On the contrary, as I was at pains to explain earlier in this judgment, the respondent was entitled to enforce the contract against the appellant without reference to the offending clause 34. Hence a claim for rectification of clause 34 by the respondent in this case is a claim for rectifying a contract which, from his point of view, is not a nullity, but an enforceable contract. On this ground I am of the view that the cases of *Dowdle* and *Kourie, supra*, are distinguishable on the facts and that, as such, they do not govern the present situation.

The next question is whether there is anything in the reasoning in those cases which can be said to apply in the present case. In *Dowdle's* case, DOWLING, A.J., said at p. 354:

> "Before there can be rectification of a contract for the sale of fixed property there must be a written contract which, on the face of it, complies with the requirements of sec. 30 of Proc. 8 of 1902. It seems to me that this is implied in the reasoning of *Weinerlein* v. *Goch Buildings Ltd.*, 1925 A.D. 282, the *locus classicus* on the

> law relating to the rectification of contracts for the sale of fixed properties. As they stand, the deeds of sale DD and EE are nullities in that they manifestly fail to conform to the requirements of sec. 30. I agree with Mr. *Claassen's* contention that you cannot, by rectification, invest a document which, on the face of it, is null and void, with legal force."

The first part of this *ratio decidendi* was based on a consideration which was regarded as being implicit in the reasoning in *Weinerlein's* case. With respect, I entertain some doubt whether the consideration mentioned was in fact implicit in the reasoning in *Weinerlein's* case. DOWLING, A.J., was presumably referring to the judgment of DE VILLIERS, J.A., at pp. 289-291 of *Weinerlein's* case. In that case, however, the Court was not concerned with a contract which did not, on the face of it, comply with the statutory formalities. DE VILLIERS, J.A., was dealing with an argument that rectification of a contract which, on the face of it, complied with the statutory requirements would in itself run counter to the statutory provisions, and he contrasted the position where the parties had put nothing at all of their agreement into writing with the position where their agreement had been reduced to writing, but with an error contained therein (cf. the views of DIDCOTT, J., in *Spiller and Others* v. *Lawrence*, 1976 (1) S.A. 307 (N), in the passage at pp. 311G-312A). It seems to me to be arguable that DE VILLIERS, J.A., was not applying his mind to a situation where as a result of an error in the recording of an agreement the document did not on the face of it comply

with the statutory requirements, but where the rectification sought would cause the document thus to comply. However, for present purposes I need not, and do not, express any final opinion on this point. For the purposes of my judgment in this case it is sufficient to say that I do not find anything in the reasoning in *Weinerlein's* case, as interpreted in *Dowdle's* case, that could serve to preclude a claim by the respondent for the rectification of clause 34 of the contract in the circumstances of this case.

The second part of the *ratio decidendi* in *Dowdle's* case was the sole *ratio decidendi* in *Kourie's* case, where, without reference to authority, LUCAS, A.J., (DE WET, J., concurring) expressed himself tersely as follows, with reference to the contract in that case (at p. 572):

> "Being a nullity, it could not be rectified so as to become a valid contract."

In *Spiller's* case, *supra*, DIDCOTT, J., at p. 312, declined to accept this proposition as being one of general application outside the particular context in which it was formulated. With this approach I respectfully agree, although it must be mentioned that the type of situation with which the learned Judge was concerned in *Spiller's* case is not *in pari materia* in relation to the question in the present case. For my purposes it is not necessary to discuss the *ratio* of the distinction drawn by DIDCOTT, J., between the situation with which he was concerned and the position in the cases of *Dowdle* and *Kourie.* I shall assume (without, however, deciding) that in the *Dowdle* and *Kourie* cases it was correctly held that a contract which is a nullity because of non-compliance with the statutory formalities cannot be rectified. In my opinion, however, it does not necessarily follow, either in logic or in principle, that where a contract as such is not a nullity, but a severable clause in it is, because of being inchoate, such a clause cannot be rectified.

The *Dowdle* and *Kourie* cases have been referred to with apparent approval in subsequent cases (see, e.g., *Venter* v. *Liebenberg*, 1954 (3) S.A. 333 (T) at p. 338E-F, and *Papenfus* v. *Steyn*, 1969 (1) S.A. 92 (T) at p. 95H), but not in a manner that throws any further light on the present problem. Counsel for the appellant referred also to *Da Mata* v. *Otto, N.O.*, 1971 (1) S.A. 763 (T) at p. 772H, and *Meyer* v. *Kirner*, 1974 (4) S.A. 90 (N) at p. 97C-D, where it was held (quoting from the latter case), in relation to sec. 1 (1) of Act 71 of 1969, that

> "... the Court is left with no equitable jurisdiction which overrides public policy and statutory requirements in this regard".

In those cases, however, no question of rectification was involved, and I do not consider that the observation quoted was intended to embrace any reference to the equitable remedy of rectification (*Weinerlein's* case, *supra*).

In my view, therefore, the cases discussed above do not constitute authority which is decisive of the solution of the present question. I am thus free to pose the question, as a matter of principle: is there any reason in law for denying the respondent the right to claim rectification of clause 34? I can find none. Although clause 34 in itself may be said not to comply with the statutory requirements, and to be a nullity for that reason, it is severable from the rest of the contract, as I have found, and its invalidity does not taint the rest of the contract, from the point of view of its enforceability by the respondent. If the respondent was entitled to enforce the contract without reference to clause 34, it seems to me that the rest of the contract affords him a sound platform from which to launch a claim for rectification of clause 34. It is true that, on the grounds of public policy, the object of the Legislature was as far as possible to prevent uncertainty, disputes and malpractices, and that to that end it is required that all the terms agreed upon should be reduced to writing (see *Neethling* v. *Klopper en Andere*, *supra*, in the passages cited earlier in this judgment, and *Meyer* v. *Kirner, supra*, at pp. 97E-D, 97F-G—98D). But it is also public policy to allow mistakes in such a contract to be rectified, upon equitable grounds, and to prevent one party from deriving a benefit from a mistake to the detriment of the other (*Weinerlein's* case, *supra*). Opening the door to rectification necessarily lets in some measure of uncertainty and disputes, but it is the policy of the law to allow that, at least (according to the cases discussed above) where the contract as a whole is not a nullity. If the contract on the face of it complied with the statutory requirements, rectification would be allowed even to the extent of introducing an entirely new provision which had been omitted in error (*Venter* v. *Liebenberg, supra* at pp. 337D-338C). If the term of the agreement which clause 34 had been intended to record had been omitted in its entirety as a result of a mistake, the respondent could undoubtedly have claimed its insertion by way of rectification. I can perceive no consideration of public policy, nor any other reason, why the respondent should be in a worse position, in the circumstances of this case, because clause 34, instead of being mistakenly left out altogether, was by error inserted in the contract in an incomplete form.

In my judgment, therefore, the respondent was entitled, in principle, to claim rectification of clause 34. That being so, it must follow, I consider, that he is entitled to rely on the principles of rectification by way of defence

Page 639

to the appellant's claims which are based on the unenforceability of the contract from the appellant's point of view.

The short summary given earlier of the respondent's allegations pertaining to the question of rectification discloses a *prima facie* case for rectification. Counsel for the appellant, however, analysed the respondent's allegations and the available documentary evidence in detail in a forceful effort to persuade us that the probabilities weighed so strongly against the respondent's allegations in this respect, even although they are uncontradicted, that it should be held that his evidence on affidavit was inherently incredible and was to be rejected on the papers (cf. *Da Mata* v. *Otto, N.O.*, 1972 (3) S.A. 858 (A.D.) at pp. 869B-E, 870C). I have given careful consideration to counsel's submissions, but I have come to the conclusion that this is not a case where the respondent's evidence on affidavit ought to be rejected out of hand. Having come to that conclusion, and in view of the remarks which are to follow, it is obviously undesirable that I should comment on counsel's submissions or give my reasons for not acceding to his argument.

The appellant is not in a position to tender any direct evidence in contradiction of the respondent's allegations, which must, of course, in the circumstances, be subjected to close and careful scrutiny. Counsel for the appellant accordingly urged us at least not to make any factual finding on the issue of rectification on the papers, but to refer the matter for the hearing of oral evidence on this issue, more particularly to enable the appellant to test the respondent's evidence by means of cross-examination. Counsel for the respondent, very correctly and properly in my view, offered no opposition to such a course being followed, and in fact informed us that the respondent was willing to testify and to submit to cross-examination if so required. In the exercise of the wide discretionary powers vested in the Court by Rule of Court 6(5) (*g*), it appears to me that this is manifestly a proper case for making an order along the lines suggested, and this will be done.

For the sake of clarity, and as was sensibly requested by counsel on both sides, I propose to state briefly how the outcome of the issue which is to be referred to evidence will affect the fate of the appellant's application, in the light of what has been decided in this judgment. If the learned Judge hearing the oral evidence finds that the respondent has proved his defence based on rectification, it follows from what has been said earlier that the appellant's application will fall to be dismissed in its entirety, i.e. in respect of both the main and the alternative claims. If, on the other hand, the defence based on rectification is found not to have been proved, it follows that the appellant's application will succeed in respect of paras. (i) and (ii) of the alternative claims, to the extent, and subject to the order for repayment, indicated earlier in this judgment. The costs of the application will be a matter for decision by the Court hearing the oral evidence. Whatever the outcome may be, it is apparent that the appellant has achieved substantial success in this appeal and that he is entitled to the costs of the appeal.

A final matter remains to be mentioned. Counsel for the appellant suggested that if the issue of rectification was to be referred to evidence, it

Page 640

would be convenient to refer to evidence also the dispute as to the reasonable value of occupation of the premises (in connection with para. (iii) of the alternative claims), so that all the disputes between the parties could be resolved. Upon reflection, I am not disposed to accede to this request. The appellant's allegation as to the occupational value of the property was a very bald one, and the claim for the payment thereof is one akin to a claim for damages for holding over, which should not normally be put forward in motion proceedings. Apart from that, however, the expense of preparing and leading evidence on this issue will be wasted if it should happen that the respondent's defence is ultimately upheld. I would accordingly rather express the hope that, if it becomes necessary to determine the occupational value of the property, the parties with the assistance of their legal advisers will be able to do so by way of agreement, in order to avoid the costs of further litigation.

The following order is made:

1. The appeal is upheld, with costs, including the costs flowing from the employment of two counsel on behalf of the appellant.

2. The order made by the Court *a quo* is set aside and there is substituted therefor the following order:

   (*a*) It is directed that, on a date to be fixed by the Registrar, oral evidence be heard on the factual issue whether the respondent is entitled to a rectification of clause 34 of the contract, in accordance with the allegations contained in his answering affidavit.

   (*b*) At such hearing the respondent shall testify and be liable to be cross-examined on behalf of the applicant.

   (*c*) The respondent shall, if he so wishes, be entitled to call as a witness the deponent Mrs. T. L. Hollis.

   (*d*) Further witnesses, if any, may be called by either party if summaries of such witnesses' evidence are supplied to the other party not less than 14 days prior to the hearing.

   (*e*) Documents not annexed to the affidavits, if any, may be used by either party at the hearing if copies thereof are supplied to the other party not less than 14 days prior to the hearing.

   (*f*) The costs of the hearing of the application on 26 and 27 September 1975 are ordered to be costs in the cause.

FRANKLIN, J., and MELAMET, J., concurred.

Appearances

B O'Donovan, SC and R Grbich - Advocate/s for the Appellant/s

GM Israel - Advocate/s for the Respondent/s

AG Douglas, Johannesburg; Adams and Adams, Pretoria - Attorney/s for the Appellant/s

A Livingstone and Co., Johannesburg; Savage, Jooste and Adams, Pretoria - Attorney/s for the Respondent/s

Act 71 of 1969 has been repealed by s 34 of Act 68 of 1981

Repealed Act ×

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Page 552 of 1977 (1) SA 537 (T)

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Page 556 of 1977 (1) SA 537 (T)

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Page 557 of 1977 (1) SA 537 (T)

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