IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

REPORTABLE

CASE NO.: 97/33333

In the matter between :-

INGLEDEW, NORMAN
PLAINTIFF

and

THEODOSIOU, DIMETRYS **FIRST DEFENDANT**

WILSON, CAPRICE **SECOND DEFENDANT**

JUDGMENT

WILLIS J:

[1] The plaintiff claims an order:

a) declaring that the agreement entered into between the first

defendant and the second defendant on 12 October 1995, a copy of which is annexed hereto as annexure C" is of no force and effect:

b) that the first defendant be ordered forthwith to take all steps and to sign all documents that may be necessary to effect transfer from the first defendant into the name of the plaintiff of erf 432 Clifton Township in Cape Town, measuring 417 square meters and held under Deed of Transfer T7381/1992 and which is situated at 44A Fourth Beach, Clifton ("the property");

c) that if the first defendant fails to take any step(s) and/or to sign any document(s) that may be necessary to effect transfer of the property from the first defendant into the plaintiff's name within three days after written demand has been delivered to the first defendant at 103 Fourth Road Hyde Park, Sandton or to the first defendant's attorney of record calling upon the first defendant to take such step(s) and/or to sign such document(s), that the sheriff for the district of Johannesburg be authorised and directed to take such step(s) and to sign such document(s) on behalf of the first defendant;

d) that unless, within three days of this order the first defendant appoints conveyancing attorneys to attend to the registration of the transfer of the property into the name of the plaintiff, attorneys Cliffe Dekker Fuller Moore Inc be and are hereby appointed as conveyancing attorneys to attend to the registration of transfer of the property from the first defendant into the name of the plaintiff;

e) that the first and second defendant be ordered to pay the costs of this action, including all reserved costs of the preceding applications, on a scale of attorney and client;

f) granting to the plaintiff further and alternative relief.

[2] The prayer for costs betrays a mere hint of the mountain of litigation which forms the backdrop to the less than idyllic scene which is to be painted herein.

[3] The plaintiff seeks to enforce an agreement of sale which he signed on 4th January 1996 as purchaser of the property. It is common cause that the first defendant signed the document in question, as seller, on 15th January, 1996. The purchase price is recorded therein as R750 000, 00 (seven hundred and fifty thousand rands).

[4] After the plaintiff had closed his case, the first and second defendant applied, in terms of Rule 33 (4) of the Uniform Rules of Court, for me to make an order in terms of which the question as to the validity of this agreement, with particular reference to the provisions of section 2 (1) of the Alienation of Land Act, No. 68 of 1981 would be decided separately from the other questions in the *lis*. I made such an order and, on this issue, the first and second defendants closed their case without leading any evidence. I delivered my judgment on this issue on 15th May, 2006. I decided that a valid and binding agreement as between the plaintiff and the first defendant had indeed been entered into in respect of the sale of the property. I reserved the question of costs on this issue.

[5] Immediately thereafter, the first and second defendants applied for my recusal from the matter on the grounds that I had manifested bias. I dismissed that application with costs, delivering my judgment *ex tempore*.

[6] The first and second defendants had signed an agreement dated 12th October, 1995 in terms of which the first defendant sold to the second defendant an “enterprise”, described therein as a

"commercial concern" for R800 000,00. Included in this "enterprise" is the property in question, which, it is common cause, is a residential property.

[7] As this agreement (between the first and second defendants) had been concluded before the agreement between the plaintiff and the second defendant, the first and second defendants' case was that the maxim of *qui prior est tempore potior est jure* applied and the plaintiff should be denied the relief which he seeks. That, in essence, was the remaining dispute between the parties or, at least technically, between the plaintiff and the second defendant. Although correspondence in two different letters addressed by the first defendant's present attorneys dated 25th November, 1997 records that they had advised their client (the first defendant) to "abide the decision of a Court" and, furthermore, the first defendant deposed to an affidavit on 12th February 1998, in relating to the issue now before me in which he records that he will "abide the decision of the above Honourable Court", in his plea in this matter, he denies that the plaintiff "is entitled to any of the relief set out in the prayers." It has been clear throughout the trial in this matter that the first defendant was far from indifferent as to whether it was plaintiff or second defendant who succeeded in obtaining transfer of the property: he was desperate that second defendant should succeed.

[8] Counsel for the parties referred to this agreement, concluded between the first and the second defendant, as "the Wilson agreement". I shall adopt the same description. The second defendant is Caprice Wilson. Conversely, the agreement between the plaintiff and the first defendant was called "the Ingledew agreement". I shall do the same. The plaintiff is Norman Ingledew.

[9] In his declaration, the plaintiff alleges, *inter alia*, that the Wilson

agreement was not "entered into as a *bona fide* arms length contract between the first and the second defendants." For this reason, among others, so the argument went, the Wilson agreement should not prevail over the Ingledew agreement. By reason of what follows, I shall not consider the other strings to the plaintiff's bow.

[10] Whether or not the Wilson agreement was a "*bona fide* arms length contract between the first and the second defendants" is a question of inference to be drawn from the facts put before me. After I had dismissed the application for my recusal, the first and second defendants testified. They called no other witnesses.

[11] Born in 1955, the first defendant is what the newspapers would nowadays refer to as a "property tycoon" or a "property mogul" (without in any way intending any disrespect to the Muslim dynasty of Mongol origin which ruled much of India in the 16th-19th Centuries). Together with his two brothers, he inherited a property dynasty from his late father. Since the late 1980's, he had been actively involved in the property business. One may fairly say that it is "in his blood." He has a degree in accountancy but failed to take the final steps necessary to qualify as a chartered accountant by reason of his business interests in property.

[12] As his erstwhile attorney, Brian Lebos, who testified under subpoena during the plaintiff's case, conceded, the first defendant made the classic error of "imperial overreach." Like a splendid eland that has waded too far into a water-hole to get the advantage of the best water, he became mired in a bog in which his situation was desperate. The predators were circling. This process began in late 1994.

[13] I should record, as I did in my earlier judgment, that although

Brian Lebos testified during the case for the plaintiff, he was astute not to breach attorney-and-client privilege between himself and the first defendant.

[14] I should also record that, on 27th June, 2003, the first defendant, together with his two brothers, concluded a nifty agreement with his principal creditor, ABSA Bank Limited ("Absa") in terms of which all his debts were settled. It seems that his attorneys acting for him in the present matter must take much of the credit for this. Almost miraculously, the eland was winched out of the bog. Today he presides over an empire of lucrative shopping-centres situated in affluent areas.

[15] Commencing in November 1994, a string a judgments were taken against various companies of which the first defendant had been a director and against the first defendant personally. The first defendant had provided security for the debts of these companies in the form of his personal suretyship. By August 1995, the first defendant's exposure stood at several million rands.

[16] During the early part of 1995, proposals mooted between the first defendant and Absa to settle the first defendant's indebtedness came to naught. In March 1995, the sheriff delivered a *nulla bona* return after he had attempted to secure payment from the first defendant of his debts. The attorneys for Absa then threatened to sequestrate the first defendant. An application for the sequestration of the first defendant was brought but that was defended and no order taken. The sequestration application was settled in the composite agreement concluded between Absa and the first defendant (together with his two brothers) on 27th June, 2003, to which I have referred in para [14] above.

[17] The property in question was attached by Absa on 31st March

1995by virtue of a judgment that had been obtained against, *inter alia*, the first defendant, under case number 32963/94, on the 2nd March 1995, in respect of which a company known as Select Capital Markets (Pty) Ltd was the principal debtor.

[18] The property in question was due to be sold in execution on 17th August, 1995. Lebos, the attorney acting for the first defendant at the time, Anthony Canny the attorney from Routledges, the firm which was acting on behalf of Absa, together with their respective clients, all agreed with each other that it would be in the best interests of the parties if the property were to be sold by private treaty rather than in execution. The reason for this was that the property was likely to realise a higher price if it were sold in this manner. If the proceeds of the sale were paid over to Absa, this would reduce the first defendant's indebtedness to the mutual benefit of first defendant and Absa. That, at least, was the version of Lebos, corroborated by Canny. The first defendant denies that he agreed to this.

[19] To this end, a power of attorney was furnished by the first defendant in favour of Absa on the 17th August 1995, in terms of which (the power of attorney) the first defendant authorised Absa to sell the property, on behalf of the first defendant, subject to certain terms and conditions, the most significant of which was that, in the event of Absa obtaining an offer, the first defendant would be given 48 hours to obtain a better offer, failing which Absa would sell the property. The first defendant says, however, that he was "forced" by Lebos to sign the power of attorney.

[20] Consequent upon the signing of the power of attorney, the sale of execution of the property which had been advertised to take place on 17th August 1995 and an entity known as "Aucor Cape" or

more commonly as “Aucor” in these proceedings were instructed by Absa to find a buyer for the property.

[21] The buyer whom Aucor found was the Plaintiff. As I have already said, the plaintiff signed the document giving rise to his claim on 4th January 1996. The plaintiff, who had been holidaying in Cape Town at the time, had seen Aucor’s advertisements. Plaintiff was aware at the time of signing the document that the property had been attached by Absa, and that Absa had the authority to dispose of the property on behalf of the owner. The owner was, and still remains, the first defendant.

[22] The document was forwarded to Lebos on 15th January, 1996. Lebos, after having failed to negotiate a better price for his client (the first defendant), advised the first defendant to sign the document which he (the first defendant) did on 15th February, 1996. Meticulous contemporaneous notes kept by Canny show that Lebos at all times acted astutely to advance the interests of his client, the first defendant, even to the extent of attempting, on 2nd August, 1995, to strike a bargain that if R300 000,00 could be raised to extinguish a particular debt, covered by a mortgage bond, in favour of Absa over certain properties in Mayfair, the price realised from the sale of the Clifton property should be paid to Absa “in full and final settlement” of all the first defendant’s debts to it. This was unacceptable to Absa.

[23] According to further meticulous contemporaneous notes kept by Canny, he had telephoned Lebos on 29th January, 2006 at 2.30 pm. Lebos had advised him to the effect that “the deal was complete” and that arrangements should be set in motion for the first defendant to sign the agreement in which the plaintiff was stipulated as the purchaser (the Ingledew agreement).

[24] Lebos is now in his 70's and in frail health. His health, he says, has affected his memory. Lebos fairly conceded that he had no independent recollection of most of the events in question. Despite advancing years and frail health, this is hardly surprising for a busy attorney, as he was, trying to remember events that occurred more than ten years ago. Nevertheless, he was adamant that prior to signing the Ingledew agreement, the first defendant had neither given him the Wilson agreement nor discussed it with him. He may, in a moment of confusion, under rigorous cross-examination by counsel for the second defendant, have conceded that he could not remember this. There can, however, be little doubt as to the resolution of his commitment to these facts. These facts are corroborated by the fact that later correspondence addressed by the first defendant' s present attorneys, who took over the file in this matter from Lebos, to the second defendants attorneys strongly suggests that the Wilson agreement was not in their file and therefore was not, in all probability, handed over to Lebos by the first defendant.

[25] On 27 September 1996, the plaintiff brought an application to compel the first defendant to transfer the property. This application was referred to by counsel as "the first application." I shall do the same. This application was opposed by the first defendant. In that application the first defendant made no mention of the Wilson agreement but contended that he had validly cancelled the Ingledew agreement in a letter which he personally had sent to the plaintiff directly on 8th June 1996. The first application was heard by Nugent J, as he then was. He handed down judgment on 24th February, 1997. Nugent J made an order declaring that the Ingledew agreement had not been cancelled and ordered the first defendant to pay the plaintiff's costs. By reason of the fact that the bank guarantee issued purportedly in terms of the Ingledew agreement

had been revocable whereas it should have been irrevocable, Nugent J held that he could not order the transfer to go ahead. The question of the nature of the guarantee has since been resolved and nothing, in the case before now me, turns on this. Nugent J dismissed the first defendant's application for leave to appeal on 30th July, 1997. The first defendant thereupon submitted a petition to the Supreme Court of Appeal ("the SCA") for leave to appeal. The SCA dismissed that petition on 9th October, 1997.

[26] According to both the first and the second defendants, it was only in November, 1997 that the first defendant disclosed to the second defendant that, acting on wrong legal advice given to him by Lebos, he had signed the Ingledew agreement. The first defendant says that he had been too embarrassed to admit earlier to the second defendant that he had sold the property to the plaintiff.

[27] After this disclosure by the first defendant to the second defendant, she was taken by the first defendant's brother Antonys (known to most who know him as "Tony") to the attorneys who act for the second defendant. The first defendant (or at least what has loosely been described as the "Theodosiou Group") has assisted her with the payment of her legal fees throughout this saga. This was the first time since the Wilson agreement had been signed that the second defendant took any steps of any nature to assert her rights in terms of that agreement (the Wilson agreement). She says that the reason for this was that she had assumed that the delivery of the guarantee and the transfer of the property would not be required until the disputes between the first defendant and Absa had been resolved. In any event, it was only after this visit by the second defendant to her attorneys in late 1997 that the plaintiff learned of the existence of the Wilson agreement.

[28] During November 1997, the plaintiff, having performed all his

obligations in terms of the Ingledew agreement, was, through his attorneys, attempting to secure the cooperation of the first defendant's attorneys in obtaining transfer of the property. In late November 1997 the second defendants' attorneys made it clear to the plaintiff's attorneys that that their client wished to take transfer of the property and would be relying on the fact that her agreement (the so-called Wilson agreement) with the first defendant had been entered into prior to the Ingledew agreement.

[29] On 26th November, 1997, the first defendant signed a power of attorney for the property to be transferred to the second defendant. It would seem that on the same day he also signed the requisite "Declaration by the Seller" and the second defendant the requisite "Declaration by the Purchaser" although these latter two documents are undated.

[30] On 28th November, 1997, the plaintiff, having warned the first defendant through his attorneys that he would do so, brought an application to compel the first defendant to transfer the property to him (*i.e.* he sought an order of specific performance). This application was referred to by counsel as "the second application". On 18th December, 1997 the second defendant brought an application to intervene[1] and to be joined as an interested party in this second application. She relied on the so-called Wilson agreement. In her founding affidavit the second defendant said that "I do not intend merely to oppose this application, but wish to bring a counter-application authorising transfer into my name." The first defendant in his answering affidavit to this application said that he would "abide the decision of the above Honourable Court." As I have

1 An example of an application to intervene in a matter of competing purchasers is to be found in the case of *Croatia Meat CC v Millennium Properties (Pty) Ltd (Sofokleous Intervening); Sofokleous v Millennium Properties (Pty) Ltd and Another* 1998 (4) SA 980 (W)

noted earlier, in correspondence in two separate letters dated 25th November, 1997 sent by the first defendant's present attorneys, they had indicated that they had advised their client, the first defendant to "abide the decision of a Court."

[31] The parties agreed that the matter should be referred to trial and on 14th December, 1999 an order was taken by consent between the parties in terms of which the matter was referred to trial. The plaintiff's Notice of Motion in the second application was to serve as a simple summons and the plaintiff was to file a declaration. This is the declaration that forms the basis of the pleadings in this action. The first defendant excepted to this declaration but the exception was dismissed. Despite previous indications that the first defendant would "abide the decision" of the court, in his plea, as I have noted earlier, he denied that the plaintiff was "entitled to any of the relief set out in the prayers."

[32] Although the second defendant said in her founding affidavit in the application to intervene that she would bring a counter-application against the first defendant for the transfer of the property into her name, in her plea in this action she has simply prayed for the dismissal of the plaintiff's claim.

[33] The second defendant began a serious relationship with the first defendant's brother, Sedrick Christos in 1985. This relationship continued until 1998. It appears that complications arising from Sedrick's pursuit of a "spiritual path" brought about the end of the relationship. She had assisted the Theodosiou brothers in the operation of their restaurant business but, at the time she signed the Wilson agreement, she had been living on a permanent basis for a number of years in the family mansion in Hyde Park with the Thodeosiou brothers, their mother and "various of their girlfriends from time to time." Interestingly, the address which she gave for

herself in the Wilson agreement was that of her sister in Gillitts, Kwazulu/Natal. Had she given her true address at the time, it would have been the same as that of the seller, the first defendant. In her application to intervene, she said she regarded herself as a "housekeeper". Various epithets have been used to describe her relationship with Sedrick, none of which is quite apposite: "girlfriend", common law wife, mistress, lover, etc. Nevertheless, it is clear that her relationship with Sedrick was, for more than ten years, one of substantial intimacy, a shade away from the formal status of a wife. Moreover, her relationship with the first defendant was also one of considerable intimacy: they lived together in the same family mansion and saw each other on an almost daily basis. I make this observation without any connotation of incestuous impropriety.

[34] The first and second defendant's accounts of how the Wilson agreement came into being differ somewhat.

[35] Both claim that on 2nd June 1989 she had invested the sum of R350 00,00 as a loan to "the Theodosiou Group" which was to pay interest at 17% *per annum*. As proof of this, they relied on "acknowledgement of debt" which had been signed by the first defendant, but not by the second defendant, the original of which had been kept in the first defendant's possession. The first defendant said that he had later given this original document to Lebos but Lebos denied this. They claim that the source of her funds had been an inheritance of the sum of R361 486, 87 which she had received from her late father. She had sought the first defendant's advice on how best she should invest this sum and he had invited her to invest the sum with "the Theodosiou Group". The final liquidation and distribution account for the estate of the second defendant's late father was dated 20th August 1990 (*i.e.* after the

date of the loan) and, although it records an inheritance of this sum of R361 486, 87 due to the second defendant, it does not record an advance payment – indeed the document seems to indicate that, as at 20th August, 1990 that was the amount which would be paid to her. It is true that the truth of the contents of this account was not admitted but the second defendant did, however, rely on this document in her application to intervene.

[36] As noted earlier, the first defendant claims that Lebos had "forced" him to sign the power of attorney which he had given to Absa to sell the property and that Lebos had told him that the property was an extravagance. Also, he had been told by Absa that he should try to find a buyer for the property. Mindful of Lebos' advice about the extravagance of the property as well as Absa's advice to him to find a buyer, he thought it would be a good idea to sell the property to her. The loan of R350 000,00 which the second defendant had made had, with the accumulated interest, grown to a little over R800 000,00. This would have been a good price for the property. If he sold the property to her for this price, this would extinguish the amount of his indebtedness to her by way of a set-off. In other words, faced with a sale in execution of the property because, on the version of Lebos and Canny, he could not pay his debts, he would nevertheless fund his own sale of the property; he would give her the R800 000,00 which she would, in turn use to buy the property and which would result in the cancellation of the bond in favour of Absa and the reduction of his indebtedness to Absa accordingly. The first defendant said that he had sufficient liquid funds at the time to give effect to the transaction. The loan of R400 000,00 had been mooted between him and the second defendant merely because it "might have suited" them. The Wilson agreement was signed on 12th October, 1995 and during early November he took it to Lebos and instructed him to proceed with the transfer.

[37] The second defendant, on the other hand, says that in September 1995 the first defendant had told her that he had a substantial indebtedness to Absa and that he needed to sell the property in order to discharge this. The price of R800 000,00 for the property could be funded by R400 000,00 paid to her by the first respondent in partial redemption of her investment made in 1989 and by her taking out a loan of R400 000,00 from a bank which would be secured by the registration of a mortgage bond over the property.

[38] In October 1995 the second defendant was introduced to Nedbank (a division of Nedcor Bank Ltd), with whom she had no previous relationship as a customer, by the first defendant and made an application to borrow R400 000,00 as a "homeloan" to purchase the property. This application was approved "in principle" by Nedbank on 31st October, 1995.

[39] The attorneys acting for Nedbank in respect of the expected conveyancing that would arise from this homeloan wrote to Lebos on 6th November 1995 requesting him to forward to them various documents and information. Lebos wrote to both them and Routledges (who were acting for Absa) in response thereto. In the letter to Routledges, he says that he knew "nothing" about this sale of the property. His bewilderment was patent. Indeed he reproached Routledges for not giving the requisite 48 hours notice, in terms of the power of attorney given to Absa, for his client, the first defendant, to be able to secure a better offer. In other words, he clearly was unaware, at that time, that the first defendant had sold the property to the second defendant in terms of the Wilson agreement.

[40] Susan McKenzie, a conveyancing secretary employed by the

attorneys acting for Nedbank in respect of the proposed registration of the mortgage bond, testified that she had telephoned the second defendant in November 1995 to ask her to make an appointment to sign the necessary documentation to give effect to the registration of the bond. The second defendant had advised her that she was not proceeding with the transaction. McKenzie then endorsed the file "NTU" which means "not taken up". The file was archived on 16th January, 1996 but produced in evidence at the trial. On 21st November, 1995 Canny wrote to Lebos to inform him that his client, Absa, had been advised that "Nedcor are not going ahead with the matter".

[41] The second defendant denied this conversation with McKenzie and said that when she had discussed the question of signing the documents as requested by Nedbank's attorneys with the first defendant, he had advised her that he was still "sorting matters out with Absa" and that she should ask them to be patient. She was in no hurry to take transfer and the delay in the registration of the bond would save her interest. Apart, possibly, from drawing on the interest and/or capital of her loan to "the Theodiou Group" and an informal allowance paid to her by the first defendant's brother, Sedrick, she had no source of income from which to pay the interest and redemption of the homeloan.

[42] The first defendant said that when he had been called upon to sign the Ingledew agreement, he had protested to Lebos that there was the Wilson agreement but Lebos had advised him it was "not worth the paper it was written on" and had "forced" him to sign the Ingledew agreement. Lebos denied this.

[43] The first defendant said that Lebos had never informed him of any of the judgments taken against him or kept him informed of any of the developments in regard to the Ingledew agreement. Lebos

denied this. The first defendant says that until the morning on which he was “forced” to sign the power of attorney giving Absa authority to sell the property, he was ignorant of the developments that gave rise to the signing thereof. Lebos disagreed. The first defendant denied that he had informed the deputy sheriff of the facts recorded in the *nulla bona* return to which reference had been made above.

[44] If the first defendant’s account is to be believed, Lebos did not merely suffer from occasional lapses of negligence in attending to the first defendant’s affairs but actively set about sabotaging the first defendant’s interests. This is inherently unlikely. This is not how one attracts and retains clients. One does not survive for as long and as successfully as Lebos has as an attorney (he was not shy to let it be known that he has become a very wealthy man) if this is how one conducts one’s practice. There has been no motive either apparent or even suggested for such a bizarre scenario. But, most tellingly of all, Canny’s meticulous contemporaneous notes reveal Lebos to have been an astute and street-wise attorney valiantly fighting for his (the first defendant’s) corner.

[45] I have difficulty believing that the first defendant could have been unaware for almost a year of both his own and his companies’ financial woes. Even if the summonses had been served on *domicilia citandi et executandi*, even if Lebos had failed to inform him of all the communications which he had received on behalf of Absa, even if Lebos had negotiated with Absa on his behalf in feverish frolic of his own, a businessman such as he is likely to have had regular dealings with his bankers and, given the objective facts in this case, the bank’s attitude to him is likely to have been a little frosty.

[46] I have difficulty in accepting the say-so of the first defendant

that the sheriff falsely recorded information and communications from the first defendant in his *nulla bona* return.

[47] Furthermore, despite some creative submissions in accountancy by the first defendant's counsel, I have difficulty in believing that (a) as a matter of objective fact, the first defendant would have been in a financial position to have paid the second defendant to give effect to the transaction and (b) could have believed that he was in a position to do so. Moreover, given the decision to sell the property by private treaty to avoid a sale in execution, it would not have made sense from him to revive what had, in effect, been a dormant debt which the first defendant owed to the second defendant. Being the astute businessman that he is, he would have had other priorities.

[48] I find the second defendant's account of how she invested R350 000,00 with the first defendant or "the Theodosiou Group" from an inheritance received before her late father's estate had been wound up, unconvincing.

[49] I also find her delay of more than two years in taking any steps to enforce her agreement with the first defendant irreconcilable with a serious and deliberate intention to acquire the property.

[50] I also accept the submission of the plaintiff's counsel that it seems more than mere coincidence that the first time that the Wilson agreement emerged from the woodwork was soon after the SCA had dismissed his petition in the case in which he had opposed the plaintiff's claim for relief on the basis that he, the first defendant had validly cancelled the Ingledew agreement. In that action the first defendant had made no mention of the Wilson agreement. Interestingly, on the question of the assertion of rights in respect of the property against the first defendant, one can have no hesitation

in pointing to the plaintiff and saying: "*Prior est tempore!* "

[51] Counsel for the defendant's were astute to unpack every facet upon which the *Mr Solomon* relied his submissions as to the inferences to be drawn in this case. I accept that, taken individually, there are aspects in respect of which the plaintiff may fail to get past the post. But facts, the significance of which may each be as light as a feather, can accumulate to create a bag so heavy that it can deliver a resounding and even deathly blow. That, in my view, has happened in this case.

[52] *Mr Solomon* criticised the Wilson agreement, *inter alia*, for the fact that it was a non-existent "enterprise" which was purportedly sold, that the second defendant was recorded therein as a VAT vendor when she was not, and that clause 4.1 thereof contains the following: "As security for the payment of such amount (the purchase price) the purchaser shall within 30 days (thirty) days of the signature date, furnish the seller's attorneys with a bank guarantee or guarantees as required by the seller, payable to the seller or the seller's nominee/s upon registration of transfer at such place or places as the seller stipulates." This could be interpreted as a condition precedent or a suspensive condition which was not fulfilled by the purchaser. Nevertheless, I shall accept, in favour of the first and second defendants, that it appears from the document comprising the Wilson agreement that, as between themselves, there was *consensus ad idem* that the first defendant would sell the property to the second defendant. The Wilson agreement does indeed contain the property as the *merx* or *res vendita*, the agreed price of R800 000,00 as the *pretium*, the first defendant as the seller or *vendor*, the second defendant as the purchaser as the *emptor* (or, more correctly, the *emptrix*). I therefore shall accept that the

requisite elements or requirements of a sale[2] as between the first and second defendants *inter se* have been established. In other words, as between the first and second defendants, there are enforceable rights which they may exercise, the one against the other, should either of them choose to do so.

[53] As has been said in the oft-quoted case of *AA Onderlinge Assuransie Assosiasie v De Beer*[3]:

"Dit is, na my oordeel, nie nodig dat 'n eiser wat hom op omstandigheidsgetuienis in 'n siviele saak beroep, moet bewys dat die afleiding wat hy die Hof vra om te maak die enigste redelike afleiding moet wees nie. Hy sal die bewyslas wat op hom rus kwyt indien hy die Hof kan oortuig dat die afleiding wat hy voorstaan die mees voor-die-hand liggende en aanvaarbare afleiding is van 'n aantal moontlike afleidings."

This passage has been referred to with approval in numerous cases.[4]

In *Ocean Accident and Guarantee Corporation Ltd v Koch* [5] Holmes JA said:

"As to the balancing of probabilities, I agree with the remarks of Selke J, in *Govan v Skidmore* 1952 (1) SA 732 (N) at 734, namely

"... in finding facts or making inferences in a civil case, it seems to me, that one may, as Wigmore conveys in his work on *Evidence,* 3rd ed., para 32, by balancing probabilities select a conclusion which seems to be the more natural or plausible, conclusion from amongst several conceivable ones, even though that conclusion

2 See, for example, Voet 18.1.1; Wille and Millin, *Mercantile Law of South Africa*, 18th ed, Hortors at 177 and Mackeurtan's *Sale of Goods in South Africa,* 4th ed, Juta's Part III (The later 5th edition has been missing from the High Court library since 2004)

3 1982 (2) SA 603 (A) at 614H

4 See, for example, the judgment of Zulman JA in *Cooper & Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) at para [7]; *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport* 2000 (4) SA 21 (SCA) at para [9]

5 1963 (4) SA 147 (A) at 159C

is not the only reasonable one."

I need hardly add that "plausible" is not here used in its bad sense of specious, but in the connotation which is conveyed by words such as acceptable, credible, suitable. (*Oxford Dictionary*, and Webster's *International Dictionary*)."

This *dictum* has been referred to with approval in innumerable cases.[6]

[54] Having regard to the facts, disputed and undisputed, set out in paras [5] to [42] above, I consider the most "voor-die-hand liggende en aanvaarbare afleiding" and the more plausible, acceptable and credible conclusion, on a balance of probabilities, is that the Wilson agreement was not a *bona fide*, arms-length contract concluded between the first and second defendants. It is not clear to me quite why they did so, although I can think of several explanations. This does not affect the finding that, whatever the reason why they entered into the agreement, it was not *bona fide*. It certainly was not arms-length. I should add that my finding is that both first and second defendants were not *bona fide* even though the second defendant may have been manipulated by first defendant. At very least, she had agreed to "help him out" in the situation by being a party to an agreement which she knew could not be genuine but which she thought could perhaps redound to her benefit.

[55] Having found that the Wilson agreement is valid as between the first and second defendants and the that it was not a *bona fide*

6 See, for example, *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd* 1976 (1) SA 708 (A) at 713 E-G; *Smit v Arthur* 1976 (3) SA 378 (A) at 386B-D; *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) at 1028B-C; *Hülse-Reutter and Others v Gödde* 2001 (4) SA 1336 (SCA) at para [14]; *Jordaan v Bloemfontein Transitional Local Authority* 2004 (3) SA 371 (SCA) at para [379]; *De Maayer v Serebro; Serebro v Road Accident Fund* 2005 (5) SA 588 (SCA) at para [18]

arms length agreement, I must now decide whether the fact that it was not a *bona fide* arms length agreement can defeat the operation of the maxim *qui prior est tempore potior est jure.*

[56] In *Krauze v Van Wyk en Andere*[7] Hefer JA, as he then was, delivering the unanimous judgment of the Court said at 171G:

"Oor die benadering tot die beregting van mededingende persoonlike regte voortspruitend veral uit opeenvolgenge verkopings van dieselfde saak aan verskillende kopers bestaan daar in the provinsiale afdelings tans volkome eenstemmigheid."

He then referred to various cases[8] and modern writers[9] and goes on to say:

> "(D)it kan nie langer betwyfel word dat die stelreël *qui prior est tempore potior est jure* aan die wortel lÍ van die voorkeur wat aan eerste verleen word."[10]

This case has recently been approved by the SCA in *Wahloo Sand BK v Trustees, Hambly Parker Trust*[11]. In that case Cloete JA said at para [11]:

> "The maxim is essentially based in equity."

Cloete JA's judgment was approved by three other judges of the SCA.

[57] In the case of *Barnard v Thelander*[12], Vivier J, as he then was, said[13]:

"In al die onlangse beslissings van ons Howe waarna *McKerron* se

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7 1986 (1) SA 158 (A)

8 These are: *Van der Merwe v Scheepers and Others v Coligny Village Council* 1946 TPD 147; *Le Roux v Odendaal and Others* 1954 (4) SA 432 (N); *Botes v Botes en 'n Ander* 1964 (1) SA 623 (O); *Barnard v Thelander* 1977(3) SA 932 (C); *Campbell v First Consolidated Holdings (Pty) Ltd* 1977 (3) SA 924 (W)

9 Norman's *Purchase and Sale in South Afica* 4th ed at 103; Mackeurtan's *Sale of Goods in South Africa* 4th ed at 173; Wille and Millin's *Mercantile Law of South Africa* 18th ed at 218; Kerr *The Principles of the Law of Contract at 375;* Van Jaarsveld, Coetzee and others *Suid-Afrikaanse Handelsreg* at 108

10 At 171I

11 2002 (2) SA 776 (SCA) at para [15] of Brand JA's judgment and para [10] of Cloete JA's judgment

12 1977 (3) SA 932 (C)

13 At 938G

artikel verwys is, is die eenparige standpunt dus ingeneem dat die eerste koper se persoonlike reg voorrang geniet bo dié van ’n latere koper, en dat die eerste koper, in die afwesigheid van spesiale omstandighede wat die balans van billikheid raak, geregtig is op ’n interdik wat oordrag aan ’n latere *bona fide* koper verhinder, en ook geregtig is op reële eksekusie teenoor die verkoper.” (my emphasis)[14]

Barnard’s case was referred to with apparent approval in *Krauze’s* case.[15]

[58] In *Barnard’s* case, Vivier J referred to an illuminating series of academic articles[16] which began with that which had been published by Professor Mc Kerron in the *South African Law Times* in 1935. They are erudite and entertaining. In these articles, the old authorities were comprehensively researched and extensively quoted. It emerges from the academic debates in these articles that the learned authors were grappling with an issue which is still relevant today: why should the *qui prior* maxim apply to successive sales, even if a successive purchaser is *bona fide*? On the other hand, it does not seem to make sense if no one can obtain an interdict to compel transfer. Ordinarily, there is no contractual nexus between the earlier purchaser and a successive one. The right to obtain an interdict, as between the competing purchasers, does therefore not arise *ex contractu*. The *bona fide* successive purchaser has not committed a delict against the earlier purchaser. The remedy does not arise from the *Lex Aquilia.* The relief clearly does not arise *ex delictu.* It seems clear from these articles that the

14 This view has found favour with R.H. Christie in The Law of Contract 4th ed, Butterworths at 610 and see the judgment of Brand JA in the *Wahloo Sand* case (*supra*) at para [16] where he refers to Christie’s work

15 At 171H

16 These are “Purchaser with Notice”, in *The South African Law Times*, 1935 178 by Professor R.G. McKerron; “Double Sales and Frustrated Options” (1948) 65 *SALJ* 564 by *G..A Mulligan KC*.; “Double Sales” (1953) 70 *SALJ* 22 by Professor J.E. Scholtens; “Double Sales: a Rejoinder” (1953) 70 *SALJ* 299 by *G. A. Mulligan QC*; “Double, Double Toil and Trouble” (1954) 71 *SALJ* 169 by *G.A. Mulligan QC*; “Successive Sales” (1974) 91 *SALJ* 40 by Professor E.M. Burchell

concept of *qui prior est tempore potior est jure* originated in our common law in regard to hypothecations, which are, of course, real rights. In successive sales, prior to the vesting of ownership by transfer, neither party has any vested real rights. One has to do with contesting personal rights which the purchasers have against the seller. The issue clearly presented lawyers with a knotty legal conundrum. Apart from the 1974 article by Professor McKerron, Broome JP referred to this series of articles in *Le Roux v Odendaal and Others*[17] as did Macdonald J, as he then was, in *BP Southern Africa v Desden Properties & Another*[18] and Hofmeyr J, as he then was, in *Botes v Botes*[19]. The *Le Roux*, *BP Southern Africa* and *Botes* cases met with the approval of Vivier J in *Barnard's* case.[20]

[59] In *Ex parte Coney* [21] Quénet J, as he then was, quoted with approval Jelf J in *Booth v Walkden Spinning and Manufacturing Company Ltd*[22] in which Jelf J had said:

"First come first serve is one of the necessary axioms of this life of ours."

With due respect to both Jelf and Quénet JJ, I do not consider this "axiom" to be an axiom at all. It is not a self-evident truth.[23] It is, more likely, part of the enduring (and perhaps even endearing) morality of English public schoolboys. But, as anyone who has been a little boy at boarding school will know, it is a less than perfect summary of justice.

[60] In *Hofgaard v Registrar of Mining Rights and Others*[24] Curlewis J said:

"Now I think it is the principle which this court recognises that,

17 1954 (4) SA 432 (N)
18 1964 (2) SA 21 (SR)
19 1964 (1) SA 623 (O)
20 At 938H
21 1952 (3) SA 745 (SR)
22 1909 (2) KB 268
23 See, for example, the *Oxford Dictionary*
24 1908 TS 650 at 654

> where two innocent persons have to suffer, if both parties have a right of action or a claim against a third person, the Court should endeavour, if there is to be any hardship, so as to order that the hardship shall be as little as possible and that the person who is likely to be most damaged should be assisted."

But, as Vivier J noted in *Barnard's* case:

> "In *Hofgaard* se saak was die aansoek vir 'n tydelike interdik *pendente lite*, en soos Hofmeyr J (soos hy toe was) in *Botes* se saak *supra* op 627 daarop wys, was die beslissing vermoedelik gebaseer op beginsels van toepassing by tydelike interdikte waar die oorwig van billikheidsoorwegings op die voorgrond geplaas word."[25]

[61] It is important to note that *qui prior est tempore potior est jure* has frequently been referred to (most recently in the *Wahloo* case[26]) as a *maxim*. In other words, it is short, pithy statement expressing a general truth[27] rather than a rule of law.

[62] It seems that equitable considerations lie behind the reason why *qui prior est tempore potior est jure* has remained a maxim and has not been elevated to the status of a rule of law. Hefer JA, said in *Krauze's* case:

> "In die beslissings waarna ek in hierdie verband verwys het, word telkens gewag gemaak van die feit dat die reël nie op onbillike wyse toegepas moet word nie. Ek aanvaar dat dit so is."[28]

Hefer JA does, in this passage, refer to it being a "reël" but earlier, in the passage quoted in para [56] above, he refers to it as a "stelreël". It is my understanding that the English translation of "stelreël" is "maxim".[29] In the *Wahloo* case which is, as far as I am aware, the most recent reported judgment of the SCA dealing with

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25 At 935H. See, also, the judgment of 0livier JA in the *Wahloo* case (*supra*) at 793H-I
26 (*Supra*) at para [11]
27 See, for example, the *Oxford Dictionary*
28 At 173I-J
29 See, for example, Bosman, Van der Merwe en Hiemstra *Tweetalige Handboek.*

the *qui prior est tempore potior est jure* principle, Cloete JA said:

> "I accept that the maxim should not be applied unfairly. This Court said so, in terms, in the *Krauze* case at 173I-J. It is in this context that the equities fall to be considered."[30] (The emphasis is my own.)

[63] In my respectful opinion, the intellectual justification for the application of the maxim is to be found in the *BP Southern Africa v Desden Properties* case where Macdonald J said:[31]

> "In my view, by far the more important aspect is the general effect which the decision in any particular case is likely to have. It is the policy of the law to uphold, within reason, the sanctity of contracts. It follows that courts of law should, as far as possible, in matters of this kind, adopt an approach which will discourage sellers from entering into contracts the performance of which will necessarily involve a breach of an earlier contract and by adopting such an approach reduce a potential cause of hardship. The concern of the courts should primarily be with the removal of the cause of these cases of hardship rather than with the result in a particular case."

These remarks were pertinently approved by Vivier J in *Barnard's* case[32] which, as noted above has, in turn, been referred to with approval in *Krauze's* case. The application of the maxim *qui prior est tempore est tempore potior est jure* has, as its root, therefore, the policy of upholding of the sanctity of contracts (*pacta sunt servanda*) and discouraging sellers from engaging in activities that undermine this principle.

[64] If the underlying policy consideration behind the application of the maxim *qui prior est tempore potior est jure* is that of upholding the sanctity of contracts (*pacta sunt servanda*) and discouraging sellers from engaging in activities that undermine this principle, then on the facts of this case, I have no doubt that the obverse of

30 At para [12}; 788I-J
31 At p25D-E
32 At 938D

the general principle should be applicable. The policy consideration that one should promote the principle of *pacta sunt servanda* requires, in this case, that effect should be given to the Ingledew agreement. Never mind anything else, if one applies to second defendant's own version of events as set out in her application to intervene and which gave rise to her being joined in what ultimately became a trial action, then to allow her 'contract' to prevail over that of the plaintiff, would undermine the sanctity of contracts and encourage persons in the position of the first defendant to resort to such arrangements. The history of this matter is a melancholy catalogue of attempts by the first defendant to undermine the principle of the sanctity of contract. Herein lie the "special circumstances" which justify a departure from the general principle.

[65] Mr *Maritz*, who appeared for the second defendant, relied on *Brisley v Drotsky*[33] to submit that the proper time for making the assessment is the time when the Court is asked to make the order, taking into account the relevant circumstances at that time. I shall accept that this is so.

[66] Mr *Maritz* also relied on the case of *Afrox Healthcare BPk v Strydom*[34] in which Brand JA, delivering the unanimous judgment of the Court said:

"Waneer dit by die afdwinging van kontraksbepalings kom, het die Hof geen diskresie en handel hy nie op die basis van abstrakte idees nie, maar juis op die basis van uitgekristaliseerde en neergelegde regsreëls."[35]

Mr *Maritz* submitted, on the basis hereof, that having found that the agreement between the first and second defendant was not invalid *inter se*, I had no discretion in the matter. I do not understand this passage in the *Afrox v Strydom* case to have reversed Cloete JA's

33 2002 (4) SA 1 (SCA) at para [29]
34 2002 (6) SA 21 (SCA)
35 at para [32]

judgment in the *Wahloo* case. It does not help to snatch a quote from an SCA judgment out of context. Besides, the issue with which this judgment is concerned is not the Wilson agreement *in vacuo*. The second defendant's personal rights against the first defendant are competing with the plaintiff's rights against the same person in respect of the same property. As between the plaintiff and the second defendant, there is no contractual *nexus.* I find this submission unhelpful.

[67] Mr *Maritz* also relied on the following passage from *South African Forestry Co Ltd v York Timbers Ltd*[36]:

"Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty."

The second defendant cannot, however, escape the fact that the case law, with which I have dealt in pars [56] to [62] above, makes it clear that *qui prior est tempore potior est jure* is a maxim and not an absolute rule of law. Furthermore, my personal sense of fairness and equity has, in this case, been influenced only by my resolute belief in the principle of *pacta sunt servanda.* This belief is hardly either eccentric or idiosyncratic.[37] In any event, such discretion as I

36 2005 (3) SA 323 (SCA) at para [27]

37 In *Knox D'Arcy Ltd v Shaw and Another* 1996 (2) SA 651 (W) at 660F-G, Van Schalkwyk J said that this principle has a well established pedigree and referred to an illuminating article by Coenraad Visser, *The Principle Pacta Sunt Servanda in Roman and Roman-Dutch Law, with Specific Reference to Contracts in Restraint of Trade* (1984) 101 *SALJ* 641 in which Visser submits that it has not only been a principle of Roman and Roman-Dutch Law but has been received throughout the Western World. In South Africa the principle has been affirmed in numerous different cases. See, for example, also *Nedbank Ltd v Van Zyl* 1990 (2) SA 469 (A) at para [470I]; *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at para [763F] and [777C-D]; *Ex Parte Minister of Justice: In re Nedbank Ltd v Abstein Distributors (Pty) Ltd and Others* 1995 (3) SA 1 (A) at para [176H]; *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at para [17E-F]; *Afrox Healthcare Bpk v Strydom* 2002 (6) Sa 21 (SCA) at para [23]; *Ndlovu v Ngcobo* 2003 (1) SA 113 (SCA) at para [63.5]; *Juglal NO v Shoprite Checkers t/a OK Franchise Division* 2004 (5) SA 248 (SCA) at para [10]; *Novick and Another v Comair Holdings Ltd and Others* 1979 (2) SA 116 (W) at para [158D-E];*Commercial Grain Producers Association v Tobacco Sales Ltd* 1983 (1) SA 826 (ZS) at para [832E]; *G K Breed (Bethlehem) (Edms) Bpk v Maritn Harris & Seuns (OVS) (Edms) Bpk* 1984 (2) SA 66 (O) at para [170E]; *Nedbank Ltd v Van der Berg and Another* 1987 (3) SA 449 (W) at para [452D]; *Donelly v Barclays National Bank Ltd* 1990 (1) SA 375 (W) at para [381H-

may have does not depend on private whim or fancy. I shall deal with this issue in the immediately succeeding paragraph.

[68] It seems clear from the *Krauze's* case and the *Wahloo* case that, when it comes to the concept of *qui prior est tempore potior est jure*, a Court has an equitable discretion to ensure that the maxim is not, in a particular case, applied unfairly. This discretion must be exercised judicially; it may not be influenced by wrong principles or a misdirection of the facts; and the Court must not reach a decision which, in the result, could not reasonably have been made by a Court properly directing itself to all the relevant facts and principles.[38] In summary: in the absence of the Wilson agreement, the plaintiff is entitled to specific performance in respect of the Ingledew agreement. Can the second defendant's invocation of the *qui prior est tempore potior est jure* maxim trump the Ingledew agreement? I am of the view that it cannot.

[69] As the relief sought by the plaintiff in prayer (a) may affect the rights of the parties to the Wilson agreement, *inter se*, I shall cast the order slightly differently from the manner in which it has been sought. This will be less burdensome to the first and second defendants. I accept the submissions of the first and second defendant's counsel in this regard.

I]; *Sibex Engineering Services (Pty) Ltd van Wyk and Another* 1991 (2) SA 482 (T) at para [499E-F]; *Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate(Pty) Ltd* 1992 (2) Sa 459 (C) at para [460H]; *Kotze & Genis (Edms) Bpk en `n Ander v Potgieter en Andere* 1995 (3) SA 783 (C) at para [786C-D]; *First National Bank of Soutern Africa Ltd v Boputhatswana Consumer Affairs Council* 1995 (2) SA 853 (BGD) at para [867A]; *Santos Professional Football Club (Pty) Ltd v Igesund and Another* 2003 (5) SA 73 (C) at para [86H] *Living Image Interiors v Mather* 1996 (3) SA 445 (N) at 449B; *Garden Cities Inc Association v Northpine Islamic Society* 1999 (2) SA 268 (C) at 271D; *Fidelity Guards v Pearman* 2001 (2) SA 853 (SECLD) at 861A-F and the reference therein to the article by CJ Pretorius *Covenants in Restraint of Trade: An Evaluation of the Positive Law* (1997) *THRHR* 6;

38 See, for example *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at para [11]

[70] Having regard to all the circumstances of this case, I consider it appropriate that the first and second defendant should be jointly and severally liable to pay the plaintiff's costs in this action including all previously reserved costs. I also consider it appropriate that the costs should include the costs of two counsel.

[71] The following is the order of the Court:

a) The first and second defendant may not, as between themselves, exercise any rights which may arise from the agreement entered into between them on 12th October 1995, a copy of which was annexed to the plaintiff's declaration as annexure "C" thereto, to the detriment of the plaintiff's right to take transfer of erf 432 Clifton Township in Cape Town, measuring 417 square meters and held under Deed of Transfer T7381/1992 and which is situated at 44A Fourth Beach, Clifton ("the property");
b) the first defendant is forthwith to take all steps, and to sign all documents that may be necessary, to effect transfer from the first defendant into the name of the plaintiff of the aforesaid property;
c) in the event that the first defendant fails to take any step(s) and/or to sign any document(s) that may be necessary to effect transfer of the property from the first defendant into the plaintiff's name within three days after written demand has been delivered to the first defendant at 103 Fourth Road Hyde Park, Sandton or to the first defendant's attorney of record calling upon the first defendant to take such step(s) and/or to sign such document(s), that the sheriff for the district of Johannesburg be authorised and directed to take such step(s) and to sign such document(s) on behalf of the first defendant;
d) unless, within three days of this order, the first defendant appoints conveyancing attorneys to attend to the registration of the transfer of the property into the name of the plaintiff,

attorneys Cliffe Dekker Fuller Moore Inc shall be appointed as conveyancing attorneys to attend to the registration of transfer of the property from the first defendant into the name of the plaintiff;

e) the first and second defendants are to pay the plaintiff's costs in this action, including all costs reserved in the preceding applications and all costs previously reserved in this action, which costs are to include the costs consequent upon the employment of two counsel;

f) first and second defendant are jointly and severally liable, the one paying the other to be absolved, to pay the costs aforesaid.

DATED AT JOHANNESBURG THIS 15th DAY OF JUNE 2006

N.P. WILLIS
JUDGE OF THE HIGH COURT

Counsel for the Plaintiff: *R A Solomon SC* (with *K. Tsatsawane*)
Attorneys for Plaintiff: Thomson Wilks

Counsel for the First Defendant: *K.W. Lüderitz*
Attorneys for the First Defendant: Allan Levin & Associates

Counsel for the Second Defendant: *N.G.D. Maritz SC* (with *R.A Foden*)
Attorneys for the Second Defendant: Adams & Adams

Dates of hearing: 11th, 12th 15-19th, 22nd-26th & 29th May, 2006

Date of judgment: 15th June, 2006