Case No 167/89

**IN THE SUPREME COURT OF SOUTH AFRICA**

**APPELLATE DIVISION**

In the matter between:

**MURRAY & ROBERTS CONSTRUCTION LIMITED** Appellant

and

**FINAT PROPERTIES (PROPRIETARY) LIMITED** Respondent

**CORAM:** HOEXTER, E M GROSSKOPF, NESTADT, KUMLEBEN, JJA et NIENABER, AJA

**HEARD:** 21 August 1990

**DELIVERED:** 9 November 1990

**J U D G M E N T**

**HOEXTER, JA .....**

HOEXTER, JA

In the Cape of Good Hope Provincial Division the respondent company ("FINAT") was the plaintiff in an action against Murray and Roberts Construction Limited ("MRC") as the defendant. In its action FINAT claimed damages in the sum of nearly R8,5m for alleged breach of contract. MRC excepted to FINAT's particulars of claim on the ground that they lacked averments necessary to sustain FINAT's cause of action. Before the exception was heard FINAT amended its particulars of claim and MRC amended its notice of exception. After hearing argument upon the exception FRIEDMAN, J (in whose judgment FOXCROFT, J concurred) held against MRC. The following order was made by the court a quo:-

> "Save that plaintiff is ordered to pay any wasted costs occasioned by the amendment to the particulars of claim as well as the costs, if any, of the exception relative to paragraphs

9 to 11 thereof, the exception is dismissed with costs."

With leave of the court below MRC appeals against the whole of the judgment given against it.

In what follows I shall refer to FINAT's particulars of claim simply as "the claim". In para 3 of the claim certain averments are made by way of background. It is recorded (in para 3.1) that during 1987 the Development Board of the House of Representatives ("the Board") negotiated with the Murray and Roberts Group of companies ("MURRAY AND ROBERTS") with a view to granting to MURRAY AND ROBERTS the exclusive right to service and develop certain townships in an area known as Blue Downs; and to market and "alienate" developed erven within such townships. Paras 3.2 and 3.3 of the claim read as follows:-

"3.2 In terms of the proposed agreement, MURRAY & ROBERTS was to:

(a) prepare and execute in phases the layout and development of townships, including site clearance, landscaping and installation of all services;

(b) develop the said townships in phases by erecting, inter alia, housing in terms of approved layouts;

(c) market and alienate such erven to qualified purchasers for and on behalf of the Board on terms and conditions to be agreed upon by the Board and MURRAY & ROBERTS.

3.3 In and during the latter half of 1987, Plaintiff entered into negotiations with MURRAY & ROBERTS with a view to obtaining the right to erect residential houses on certain erven in the phases to be developed by MURRAY & ROBERTS and to market such houses on terms to be agreed upon between the parties."

It is necessary to quote in full para 4 of the claim.

" THE AGREEMENT:

4.1 In and during November 1987, and at Cape Town, Plaintiff, represented by Messrs AIELLO

& LE TOURNIER, entered into a provisional oral agreement with Defendant, represented by MR P DU PONT, the terms of which were summarised in a letter, dated 23rd November 1987, addressed by Plaintiff to Defendant.

A copy of the letter is hereunto annexed, marked 'PCI'.

The salient terms of the agreement were the following:

(a) Plaintiff was to be allocated 400 erven on which residential houses were to be built by Plaintiff. Plaintiff was to market the said houses to qualified purchasers.

(b) The price payable to the Board on the sale of the houses to such purchasers, was to be between R11 500,00 and R12 000,00 per erf.

(c) Possession of serviced erven was to be given to Plaintiff by about May 1988 so as to allow Plaintiff to commence work at approximately the beginning of June 1988.

(d) Erven in each of the phases were to be allocated to Plaintiff on a **pro rata** basis.

(e) The erven allocated to Plaintiff were to be made available over a maximum period of three years.

(f) Erven were to be fully serviced when handed over to Plaintiff.

(g) Plaintiff was to clear marketing arrangements with Defendant.

(h) The design of the classes of houses to be built had to meet the approval

of Defendant.

4.2 On or about 10th December 1987, and at Cape Town, it was orally agreed between Plaintiff, represented by MR AIELLO, and Defendant, represented by MR DU PONT, that the terms of the provisional agreement as summarised in Annexure 'PCI' were in order and the agreement was finalised on those terms."

In para 5 of the claim it is alleged that by way of a letter dated 14 June 1988 MRC repudiated the agreement. Para 6 of the claim, which is particularised in an annexure to the claim, sets forth the computation of the damages claimed.

One of the grounds of exception was that whereas FINAT sought to recover special damages, its claim failed to allege that it had been within the contemplation of the parties that, upon a breach by MRC of the alleged

agreement, special damages would be suffered by FINAT. The amendment of the claim already mentioned cured this admitted defect and in consequence this particular ground of objection fell away. The remaining grounds of exception upon which MRC relied fell under two headings and may be summarised as follows:-

FIRST GROUND

(A) Main contention (see paras 4-6 of notice of exception):

The agreement relied upon by FINAT was for the sale of immovable property by the Board to FINAT. The claim avers neither that a fixed nor certain price for the sale was agreed. Accordingly the alleged agreement was inchoate or void for vagueness.

(B) Alternative contention (see para 6 **bis** of notice of exception):

If the alleged agreement were not an agreement of sale it was nevertheless incomplete, or void for vagueness. In support of contention (B) the following grounds are detailed in the notice of exception:-

(1) paras 6 bis 1 and 2

The sum to be paid to the Board upon the sale of the houses was a material term of the agreement between the parties.

According to the letter PCI

(a) an agreement in respect of the said sum "has to

be reached";

(b) the sum would "be approximately R11 500,00-R12 000,00"

(c) the sum would, in the future, be finalised between MRC and the Board.

(2) para 6 bis 3

The marketing arrangements for the sale of the houses represented a material term of the agreement and according to the letter PCI such marketing arrangements had to be agreed between MRC and FINAT.

(3) para 6 bis 4

The design and standard of the houses to be erected upon the erven represented a material term of the agreement and according to the letter "PCI" the standard of the houses had to be defined between MRC and FINAT.

(4) para 6 bis 5

As appears from para 4.1 read with para 4.2 of the claim the parties had not achieved agreement upon any of the material terms mentioned in (1), (2) and (3) above.

SECOND GROUND (see paras 7 and 8 of notice of exception):

The agreement relied upon by FINAT is for the sale of land. The claim does not aver that any

deed of alienation, as required by sec 2 of the Alienation of Land Act, 68 of 1981, was signed by the parties. Accordingly the alleged agreement is of no force and effect.

I proceed to consider the correctness or otherwise of the various points of objection covered by the notice of exception. The validity of the main contention under the first ground, and likewise the validity of the second ground, rests upon the proposition that the agreement involves a sale of erven by the Board to FINAT. FRIEDMAN, J rejected this proposition. His reasons for doing so were stated thus in his judgment:-

> "There was in fact no sale by the Board to plaintiff; the agreement on which plaintiff sues is one between plaintiff and the defendant. It is pleaded in paragraph 4.1(b) of the particulars of claim that plaintiff alleges that one of the salient terms of the agreement was that the price payable to the Board on the sale of the houses was to be between R11 500,00 and R12 000,00 per erf but apart from the fact that the word 'price' is referred to, there is nothing to indicate that

> there was a sale of these erven by the Board to plaintiff. On the facts pleaded, read with the annexures, the agreement on which plaintiff sues is capable of being construed as an innominate contract between plaintiff and the defendant in terms of which, out of the erven to be obtained by Murray and Roberts from the Board, 400 serviced erven were to be allocated by the defendant to the plaintiff for development and marketing by plaintiff for plaintiff's own account. In respect of each sale the Board was to receive an amount which was estimated to be between R11 500,00 and R12 000,00. In order to defeat an exception it is sufficient if the facts pleaded are capable of bearing this construction. I find that they are. Consequently the exception on the first ground fails.....For the same reasons the exception based on the fact that no deed of alienation was entered into as required by the Act cannot succeed."

Suffice it to say that I agree with the above-quoted reasoning and conclusions of the learned Judge.

In this Court the argument that FRIEDMAN, J had erred in dismissing (i) the main contention raised under the first ground of exception and (ii) the second ground of exception, was not seriously pressed. On appeal attention was devoted chiefly to the correctness or otherwise of the

alternative contention (B) raised by MRC under the first ground of exception to meet the eventuality that the main contention (A) might fail. In what follows I shall deal in turn with each of the terms which MRC alleges to be material and in regard to which it is not averred in the claim that agreement between the parties was reached. These terms are to be found at different places in a total of eight clauses set forth in the letter "PCI", to which letter reference will hereafter be made simply as "PCI". PCI was addressed by FINAT to Mr Du Pont, the Manager of MRC. It will be noticed that PCI draws a clear distinction between the first three clauses on the one hand and the remaining five clauses on the other hand. The introductory portion of PCI reads thus:-

> "re: Blue Downs Project (First Phase)
> Further to our previous discussions by telex, telephone and personally between yourself and our Mr E A Aiello and Mr J J A le Tournier, after which:
> - we agreed to put down in writing the points

which have been agreed to, namely points 1, 2 and 3 below, points which you have informed us have already been discussed with your chairman, Mr Veasey, and which you were prepared to confirm in writing.

- we appreciate the willingness of your company to write to us confirming the above, but as discussed we write to you in order that at the same time we set out those points which have been agreed to in principle, namely points 4 to 8 below. We therefore have pleasure in addressing to you the present letter."

Following upon this paragraph the aforementioned eight separate clauses are recited.

Clause 1) of PCI reads as follows:-

"1) PRICE OF PLOTS

An agreement on price has to be reached and you have indicated that this will be approximately R11 500 to R12 000 - per plot serviced. Finalisation will be a matter between you and the relevant authorities. As soon as you are able to determine the exact price that the plots will be made available to us you will inform us."

Having regard to what is set forth in para 3 of the claim the reference to "the relevant authorities" in clause 1 of

PCI signifies the Board.

Relevant to the inquiry in the present case is the oft-quoted dictum of LORD WRIGHT IN **Hillas & Co Ltd v Arcos Ltd** 147 LTR 503 at 514:-

> "Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects."

It must be allowed at once that PCI is composed in a somewhat staccato fashion, and that its terse language is often clumsy and not ideally clear. For example, it does not appear from clause 1 by what means and according to what criteria MRC and the Board are to achieve the "finalisation" of the price for erven. PCI is, however, "a commercial document executed by the parties with a clear intention that it should have commercial operation." (see

the remarks of COLMAN, J in **Burroughs Machines Ltd v Chenille Corporation of S A (Pty) Ltd** 1964(1) SA 669 (W) at 670 F-H); and a court should therefore not lightly hold its terms to be ineffective. Moreover, the question whether a purported contract may be void for vagueness does not readily fall to be decided by way of an exception. See **Delmas Milling Co Ltd v du Plessis** 1955(3) SA 447 (A); **Burroughs Machines Ltd** case (supra) at 676 F-H.

Counsel for MRC urged upon us that if the price mentioned in clause 1 of PCI were to be fixed by MRC and the Board this would not constitute a determination of price by reference to an external standard "without reference to the parties." For the reasons which follow I am not persuaded by this argument.

It is no doubt a general principle of the law of obligations that when it depends entirely on the will of a party to an alleged contract to determine the extent

of the prestation of either party, the purported contract is void for vagueness. Obvious examples of the application of the principle are afforded by the law of sale. If, for example, it is left to one of the parties to fix the price the contract is bad. In **Dawidowitz v van Drimmelen** 1913 TPD 672, WESSELS, J said at 676:-

> "If I say, for instance: 'I will buy your horse for what I think it is worth', or: 'for what I choose to pay for it', there is no sale. This principle applies to every form of contract. If a person who claims that he has made a contract proves that it depends wholly on his own will what part of it he should perform, then according to my view there is no contract; it is void for vagueness."

See further **Dharumpal Transport (Pty) Ltd v Dharumpal** 1956(1) SA 700 (A) at 707.

In the instant matter, as has already been pointed out, there is no contract of sale between FINAT and the Board. Nevertheless the amount payable by FINAT to the Board in respect of serviced erven is a material term

of the agreement between FINAT and MRC. It follows that if the parties had agreed that the amount so payable by FINAT to the Board would be determined by MRC, the purported contract would have been void. On the other hand, again using an example from the law of sale, there is a valid contract if the parties to the contract leave the determination of the price to a third party.

Clause 1 of PCI suggests the problem (in regard to which there would seem to be a dearth of authority) whether there exists a valid contract of sale between A and B if the price is to be determined not merely by B, but jointly by B and a third party C. As a matter of principle it is difficult, I think, to see why such a means of determining the price should invalidate the contract. The extent of the buyer's prestation would in that situation not depend wholly upon the will of B; and, on the face of things, determination of the price would then

involve a reference to an objective and external standard - the conclusion of an agreement between B and C. I say "on the face of things" because the possibility occurs to me that in practice the answer to the question posed might, in a particular case, hinge upon evidence as to (i) the relationship between the contracting parties, A and B, and (ii) the independence and competence of the third person, C, who is to determine the price jointly with B.

However that may be, I find it unnecessary for purposes of the present appeal to try to lay down any general rule. I confine myself to the essential facts and realities of the matter under consideration which comes before us by way of an exception. Here we have the case of an alleged agreement between a main contractor (MRC) and a sub-contractor (FINAT) involving erven supplied by a governmental agency (the Board). Presumably the parties (FINAT and MRC) would be disposed to regard the Board as a

responsible and independent institution. Clause 1 of PCI indicates between what limits the price as determined between MRC and the Board is likely to fall.

Having regard to what was pleaded, together with the special considerations mentioned in the previous paragraph, and further bearing in mind what the proper approach is at the exception stage, I find it impossible to decide that the particular type of innominate contract here alleged is invalid simply because it provides that the amount payable by FINAT to the Board has to be determined jointly by MRC and the Board. In the court below FRIEDMAN, J concluded that whatever price was fixed between MRC and the Board would become binding on FINAT, and that the exception based on clause 1 of PCI could not be sustained. I do not think that he was wrong in so deciding.

Lastly the arguments based on clauses 7 and 8 of

PCI must be considered. These two clauses read as follows:-

> "7. MARKETING ARRANGEMENTS
>
> As discussed, we are prepared to arrive at suitable marketing arrangements with you.
>
> 8. DESIGN OF HOUSES
>
> It is understood that the design of house we are to build must meet with your approval with regard to class of house to be built, but need not necessarily be more expensive or of a better class that you or other builders be allowed to build in that area. We suggest that a certain standard be defined to co-ordinate the standard of house to be built in this area."

Counsel for MRC contended that both the marketing arrangements and the design of houses were matters raised by the parties during their negotiations upon which agreement had to be reached. I disagree with this

argument which tends, I think, to overlook the dichotomy to be found in PCI to which attention has been drawn earlier. The potential importance of such a dichotomy is usefully illustrated by the following observations of CORBETT, JA in **CGEE Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd** 1987(1) SA 81(A) at 92 A-E:-

> "There is no doubt that, where in the course of negotiating a contract the parties reach an agreement by offer and acceptance, the fact that there are still a number of outstanding matters material to the contract upon which the parties have not yet agreed may well prevent the agreement from having contractual force. A good example of this kind of situation is provided by the case of **OK Bazaars v Bloch (supra)** (see also **Pitout v North Cape Livestock Co-operative Ltd (supra)**). Where the law denies such an agreement contractual force it is because the evidence shows that the parties contemplated that **consensus** on the outstanding matters would have to be reached before a binding contract could come into existence (see **Pitout's** case **supra** at 851 B-C). The existence of such outstanding matters does not, however, necessarily deprive an agreement of contractual force. The parties may well intend by their agreement to conclude a

> binding contract, while agreeing, either expressly or by implication, to leave the outstanding matters to future negotiation with a view to a comprehensive contract. In the event of agreement being reached on all outstanding matters the comprehensive contract would incorporate and supersede the original agreement. If, however, the parties should fail to reach agreement on the outstanding matters, then the original contract would stand. (See generally Christie **The Law of Contract in South Africa** at 27-8.) Whether in a particular case the initial agreement acquires contractual force or not depends upon the intention of the parties, which is to be gathered from their conduct, the terms of the agreement and the surrounding circumstances (see **Pitout's** case **supra** at 851 D-G).

In the introductory paragraph of PCI a clear distinction is drawn between "the points which have been agreed to" (identified by reference to clauses 1 to 3) and "those points which have been agreed to in principle" (identified by reference to clauses 4 to 8).

The statement in the introductory paragraph of PCI that in addition to matters on which firm agreement has been achieved there are further outstanding matters in

regard to which there has been agreement "in principle" means no more, so I consider, than that in respect of such outstanding matters the parties discern the rudiments of a possible later agreement which may be attainable through further negotiation. This is a far cry from counsel's bold contention that in the minds of the parties agreement "had to be reached" on the outstanding matters; and that in the absence thereof there would subsist between the parties no enforceable contract at all. The affirmation in the introductory paragraph of PCI of an agreement "in principle" on certain outstanding matters may just as well constitute a simple expression of willingness to treat with a view to possible later agreement. Indeed, the somewhat tentative language used in clauses 7 and 8 affords, I think, a strong pointer to the conclusion that this was in fact the intention. Clause 7 recites merely that FINAT is prepared:-

> "....to arrive at suitable marketing arrangements with you."

And clause 8 merely suggests:-

> "that a certain standard be defined."

In the absence of evidence bearing on the circumstances surrounding the agreement, as to which a court is ignorant at the exception stage, the intention of the parties has here to be divined from what is said in PCI. So approaching the matter it seems to me that the agreement pleaded is readily susceptible, at the very least, of an interpretation that the parties intended to conclude a binding contract in relation to the matters mentioned in clauses 1, 2 and 3 while at the same time intending to leave the matters dealt with in clauses 4 to 8 open for future negotiation with a view to the later superimposition of accessory terms on an already binding agreement. In my view there is no merit in that part of the exception based upon clauses 7 and 8 of PCI.

For the aforegoing reasons I conclude that the exception was rightly dismissed by the court below. The appeal is dismissed with costs, such costs to include the costs of two counsel.

G G HOEXTER, JA

E M GROSSKOPF, JA )
NESTADT, JA )
KUMLEBEN, JA ) Concur
NIENABER, AJA )