CASE NO. CA 7/93

IN THE HIGH COURT OF NAMIBIA

In the matter between

APPELLANT

C . J . W MACK

versus

UNI-SIGNAL (PTY) LTD RESPONDENT

CORAM: STRYDOM, J.P. et **TEEK, J.**

Heard on: 1993/08/02

Delivered on: 1993/09/15

JUDGMENT

STRYDOM, J.P.: This is an appeal from the Magistrate's Court, Windhoek. The claim of appellant arose from a sale of immovable property, namely Erf No 189, Klein Windhoek, to the respondent. The said erf was put up for sale at a public auction. In terms of the Conditions of Sale, which was read out at the start of the auction, the seller (appellant) was given 72 hours from the date of sale to confirm it (clause 1). In terms of clause 3 of the Conditions the highest bidder on whom the sale was knocked down, was required to sign the said conditions as soon as possible after the sale. Clause 12 of the Conditions provides for possession of the property by the purchaser. In this paragraph a blank is left in the typewritten text presumably to add a date from which possession by the purchaser can be inserted. No date was filled in but in the space for such date was written in handwriting and in

brackets the words "to be arranged."

Other relevant clauses in the Conditions of sale are clause 6 which provides that from the date of possession of the property the balance of the purchase price not yet paid shall bear interest at a rate of 20% per annum until date of registration of transfer thereof in the name of the purchaser. Likewise clause 9 provided that from date of possession the purchaser shall become liable to pay all Municipal rates, taxes, water, electricity and other charges.

In terms of the appellant's summons it is alleged that the parties on the 26 November 1990, orally agreed that the respondent would take occupation of the premises on 1st December, 1990 subject to the terms and conditions of the written agreement. It is then further alleged that between the date of occupation and the 25th January, 1991, when the property was transferred in the name of the purchaser, the appellant had paid an amount of R328,30 to the Windhoek Municipality in lieu of rates, taxes, water and electricity. Paragraph 6 of the summons further alleges that "the occupational interest on the balance of the purchase price from date of possession being the first of December 1990 to date of transfer, namely the 25th January 1991 at 20% aforesaid amounts to R4 586,31." It is furthermore alleged that notwithstanding demand the respondent neglected to pay the amount claimed. The amount claimed by the appellant is R3 853,99 after deducting a sum of R800,00 which he received during the relevant period from a tenant who

occupied one of the buildings on the premises. The balance claimed by appellant is not correct but nothing turns on that.

In his plea, respondent admitted that an oral agreement was entered into by the parties on the 26 November 1990 but stated that the effect of the agreement was only to put him in possession of a small part of the property in order to effect improvements. In terms of the plea it was further agreed that such qualified occupation would take place on the 1st December, 1990 and that no occupational interest would be payable in respect thereof.

The respondent further pleaded that he was only put in full and proper occupation of the premises on the 9th January, 1991. Consequently the respondent admitted being liable for occupational interest as from the 9th January, 1991 to the 24th January, 1991 in an amount of Rl 146,57. However the respondent instituted a counterclaim for Rl 250,00 and the debt of Rl 146,57 was set off against the amount of Rl 250,00.

At a later stage the respondent amended his pleadings by deleting every reference therein to his admission that he is liable to pay occupational interest as from the 9th January, 1991 to the 24th January, 1991.

At the trial the appellant was called to prove his version of the oral agreement of the 26th November, 1990. He testified that the conditions of sale was read out by the

auctioneer at the sale. The highest bidder was one Roos who acted on behalf of the respondent, and the property was knocked down to him at an amount of R152 000,00. Roos also signed the conditions of sale on the 26th November, 1990. From the evidence it further transpires that the appellant, who had 72 hours in which to accept the offer, was made a higher offer for the property which led to the respondent increasing his offer to R155 000,00. This was the offer which was then accepted by appellant. All this took place a day or so after the auction was held.

Appellant further testified that immediately after the property was knocked down to the respondent, Roos came to him and asked him whether he had anything against it that he, Roos, could start breaking the place down and start renovating it. Appellant then testified that he told Roos that he could start straight away but that he would then be liable to pay water, electricity and everything. Roos accepted this. Appellant further stated that there was still a tenant on the property, a Mr Bila, but that he only occupied a little outbuilding on the premises. Appellant said that Roos was fully aware of the fact that Bila was still occupying this outbuilding.

Appellant further testified that he gave Roos the keys to the buildings before the 1st of December, 1990 and when he came onto the premises a week later operations for the renovating of the building were already in full swing.

The appellant, under cross-examination, said that at the

time the oral discussions took place between himself and Mr. Roos, neither of them ever mentioned occupational interest as provided for by the contract. It was only at a later stage that his attention was drawn thereto when it was claimed.

Judging from the evidence it seems to me that appellants pleadings are wrong when alleging that the oral agreement was concluded on the 26 November, 1990. This was the date when the contract was finally signed. The auction however took place on the 24th November and it was immediately thereafter that the parties, according to the evidence of the appellant, concluded the oral agreement.

After conclusion of appellant's evidence a certain Kessler testified that he could remember that after the auction a discussion took place, between appellant and Roos but as to what was said, his evidence is very vague.

After the appellant closed his case the respondent applied for absolution. This application was rejected. Thereafter the respondent closed its case without leading any evidence. After hearing argument the magistrate dismissed the appellant's claim with costs. This was mainly done on the basis that because writing was statutorily required for this type of contract it was inadmissible for appellant to prove, by way of an oral contract, the date of occupation, which , so I understand the judgment, also included the date from which the municipal rates and taxes were payable.

On appeal before us, Mr Swanepoel, for the appellant, wisely abandoned that part of the appeal which concerns the rejection of the payments made to the Municipality of Windhoek in the amount of R328,20.

In support of the appeal Mr Swanepoel submitted first of all that because the sale was effected by public auction, the contract did not fall within the ambit of article 1 of Act 71 of 1969. It was therefore not statutorily required that the contract, in order to be valid, should be in writing.

Secondly it was argued that this specific oral contract was not inadmissible as a result of the application of the parol evidence rule.

Mr Botes on the other hand submitted that in order to qualify for a sale by way of public auction, all steps to conclude a valid sale must be taken at the auction. Where, as is the case here, the seller needs only accept the offer after 72 hours after the auction, it can no longer be said to be a sale by public auction. In any event, so Mr Botes argued, the subsequent increase of the offer from R152 000,00 to R155 000,00 finally changed the character of the sale so that it cannot be said that this was a sale pursuant to a public auction. Consequently in order to be valid the contract must have been in writing and seeing that possession was a material term of the sale agreement the oral agreement between the parties was unenforceable.

It was further pointed out by Mr Botes that the oral

agreement was entered into by the parties on the 24 th November, 1990, that was before the written sales agreement came into being on the 26th November, 1990. That being the case evidence regarding the oral agreement militates against the parol evidence rule and was therefore inadmissible. Lastly Mr Botes submitted that the appellant did not prove even prima facie the oral agreement relied on by him for his claim of occupational interest.

The first point argued by counsel, namely whether the fact that the appellant was given 72 hours within which to accept or reject the offer after the auction, disqualified such a sale from being effected at a public auction, was in my opinion authoritatively answered by O'Hagen, J, in Sugden v Beaconhurst Dairies (Ptv) Ltd. 1963(2) 174 (E.C.D.) where the Learned Judge stated the following at p 187 pa A-D, namely:

> "The next question is whether the transactions in which the second and third applicants purported to buy can properly be described as public auction sales. The essence of each of these transactions is that by the conditions of sale the auctioneer was not obliged to accept the highest bid, but the bidder was bound to keep his offer open for a stated period, during which the auctioneer might convey the seller's acceptance of the bid by signing the memorandum attached to the conditions of sale. In my opinion the fact that a sale was not to be concluded at the fall of the hammer does not mean that the transaction was something other than an auction sale. It is the form which distinguishes an action from the ordinary form of contract between individuals. In the present case

> the transaction in which the highest bidder became bound to buy the property bid for, if the seller accepted his bid, was effected at a public auction, and the fact that the completion of the sale in other words the acceptance of the bid was made dependent on an event other than the formal declaration of the auctioneer at the time of the sale does not appear to me to effect the issue. It is simply a case where the seller reserved the right to decline the highest offer made, while the offeror was bound if the seller decided to accept the bid. I do not think any of the transactions in this case are governed by section 1 of Act 68 of 1957"

(See further as to the nature of an auction: Clark v C P. Perks & Son 1965(3) S.A. 397 (E.C.DJ)

In the case of Pledge Investments v Kramer, N.O: In Re Estate Snelesnik 1975(3) 696 (A) the Appeal Court was called upon to decide whether it was necessary for the administratrix of an estate, who had sold immovable property of the estate by public auction, to give written authority to the auctioneer to sign the conditions of sale. The public auction took place on the 7th September, 1972 and the sale was confirmed by the administratrix on the 8th September, 1972, by appending her signature to the document. (She had seven days to confirm the sale.) At p. 703H - 704A Trollip, J.A., dealt with this point as follows:

> "Finally as to the formalities in respect of Contracts of Sale of Land Act, 71 of 1969, its provisions are inapplicable to a contract of sale of land by public auction (section 2). There the sale of the property was by public auction. And the fact that is was then recorded and made

> effective in the signed document did not render it any the less a sale by public auction. Hence the signed document cannot be regarded, as was contended, as being itself the contract for the sale of the property, separate from and independent of the auction sale, and which therefore had to comply with the formalities prescribed in section 1(1) of the 1969 Act ..."

I therefore conclude that the fact that the appellant had signed the conditions of sale at a later occasion, as provided for by the contract, did not have the effect of removing this sale out of the ambit of section 2 of Act 71 of 1969. It still would have remained a sale pursuant to a public auction.

However after the auction was concluded the respondent had raised its offer from R152 000,00 to R155 000,00. This increase of the purchase price did not occur at the public auction so that it cannot be said "that the publicity attendant upon the offer and acceptance could fairly be regarded, and was apparently regarded by the Legislature, as an adequate substitute for the safeguard of writing." (per Coleman, J., in Campbell v First Counsolidated Holdings, 1977(3) S.A. 924 (W.L.D.) at 929 E.)

As a result of the aforesaid I must therefore conclude that the offer made by the respondent whereby the purchase price was raised from R152 000,00 to R155 000,00 was a separate transaction which did not form part of the public auction. This being the case I am therefore of the opinion that the transaction is governed by the provisions of section 1 of

Act 71 of 1969 and in order to be valid the contract between the parties must be in writing.

This brings me to the second point namely whether in the circumstances it was also required that an agreement determining the date of occupation or possession should also have been in writing.

The requirement to determine such a date is not one of the essentialia of the contract of sale and the question is therefore whether the parties intended that this would be a material term of their agreement in which case their failure to come to such an agreement in writing would render their oral agreement invalid for non-compliance with the provisions of Act 71 of 1969. (See in this regard Johnston v Leal 1980(3) S.A. 927 (A); Mulder v van Evk, 1984(4) 204 (SECLD) and Smit v Walters. 1984(2) 189 (T.P.A.))

In order to determine the intention of the parties the court unfortunately only has the evidence of the appellant as the respondent did not testify. It is however clear that by insertion of the words "to be arranged" in clause 12 of the agreement that the parties envisaged a separate contract. All that was required was the determination of a date upon which the buyer would take possession, as the other terms of the occupational interest were fully set out in clause 6 of the agreement, i.e. the percentage payable, the amount on which it was payable and the events which will have to take place in order to determine the period over which such interest would be payable.

As far as the intentions of the parties are concerned a very important indication would in my opinion be the conduct of the parties. In this regard the appellant's evidence that immediately after the auction he was orally asked by Roos, on behalf of the respondent, whether he could start straight away with renovations and he was then given oral permission to do so, stands unchallenged. It was then also verbally agreed that respondent would be liable for payment of rates and taxes but will become entitled to rent collected from the tenant. It seems to me that the parties have clearly demonstrated by their conduct that they did not intend the further agreement regarding a date as from which the provisions of clauses 6 and 9 would come into operation to be in writing.

It was also never put in cross-examination to the appellant that it was the intention of the parties that such determination should be in writing. In fact it was pleaded by the respondent that he took occupation of a small part of the premises on the 1st December, 1990 and that this was in terms of an oral agreement, albeit with a rider that it was also orally agreed that for such possession no occupational rent was payable.

In the circumstances I have come to the conclusion that the parties did not require the oral agreement to be in writing and that it is therefore enforceable. If what Mr Botes argued is correct and it was indeed the intention of the parties to determine a date for possession to be in writing it may be that the fact that they did not do so may render

the whole agreement invalid.

Is evidence of this oral agreement inadmissible because of the parol evidence rule? I do not think so. In Johnston v Leal, supra at 944 B - C the following is stated by Corbett, J.A., as he then was, namely:

> "Where a written contract is not intended by the parties to be the exclusive memorial of the whole of their agreement but merely to record portion of the agreed transaction, leaving the remainder as an oral agreement, then the integration rule merely prevents the admission of extrinsic evidence to contradict or vary the written portion; it does not preclude proof of the additional or supplemental oral agreement."

In this regard the written agreement between the parties signifies that it does not contain the whole contract between the parties by stating in clause 12 thereof that possession of the property was "to be arranged" between the parties. The oral agreement proved by the Appellant did just that and did not in any way contradict or vary the written agreement. In my opinion the appellant was therefore entitled to lead evidence of the oral agreement and to rely upon the terms thereof. From this it follows that the Magistrate was in my opinion wrong to exclude this evidence.

Lastly Mr Botes argued that the appellant did not prove the oral contract whereby possession of the premises was given to the respondent on the 1 December, 1990. This argument was presented on two points:

Firstly Mr Botes referred us to the various statements of the appellant which amounted to the fact that at the time of the oral agreement he had not thought of the 20% occupational interest and that it was never mentioned between the parties. Whether the appellant, at the stage when the oral agreement was entered into, had in mind the payment of occupational interest is in my opinion irrelevant. This, as to under what circumstances the respondent was to become liable for occupational interest, was determined by the provisions of the written agreement. Similarly did the written agreement determine as to when the respondent would become liable to pay for the municipal rates and taxes. Once possession is given the provisions of clauses 6 to 9 of the agreement provide that respondent will then be liable to pay such rates and the occupational interest. Appellant's evidence that he never agreed on possession being given on the 1st December, 1990 must be read against his evidence that it was agreed that respondent could start his operations "straight away", i.e. even before 1 December, 1990. The fact that occupational interest was calculated as from the 1st December, 1991, as was also the payment of rates and taxes, is to the advantage of respondent. Any uncertainty is however cleared up by respondent's plea which admits that possession of the property was taken by it on the 1st December, 1990. Its further allegation that this was only gualified possession for which no occupational rent was payable cannot stand in the light of the appellant's evidence to the contrary which was left unchallenged by respondent. Evidence in this regard would in all probability have been inadmissible as

against the parol evidence rule.

Secondly Mr Botes argued that full possession was never given to respondent because of the presence of the tenant in the outbuilding. In this regard the appellant testified that Roos was at all relevant times aware of the situation. It further seems to me that clause 20 of the agreement takes care of this argument. This clause provides:

> "The Purchaser takes the property subject to any leases in force in respect thereof and he hereby acknowledges being acquainted with the terms and conditions thereof."

I have consequently come to the conclusion that the Magistrate erred in not giving judgment for the appellant and consequently the following order is made:

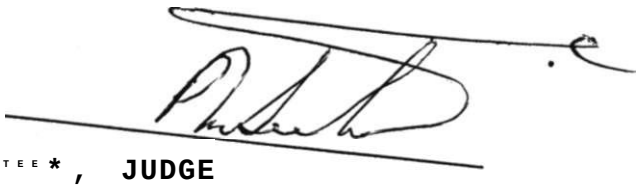
(1) The orders of absolution and that costs be costs in the course made by the Magistrate, are set aside.

(2) Judgment is entered for the appellant (plaintiff) in the amount of R3 404,10 together with interest a tempore morae and costs of suit.

(3) The respondent (defendant) is ordered to pay the costs of appeal.

STRYDOM, JUDGE PRESIDENT

agree



TEE*, JUDGE

ON BEHALF OF APPELLANT:
ATTORNEYS:

ON BEHALF OF RESPONDENT
ATTORNEYS: