

SOUTH AFRICA / JUDGMENT

Gardner and Another v Margo (549/04)

[2006] ZASCA 36; [2006] 3 All SA 229 (SCA); 2006 (6) SA 33 (SCA) (28 March 2006)

[2006] ZASCA 36

COURT

Supreme Court of Appeal

BEFORE

Scott, Zulman, Van Heerden, Maya, Cachalia

CASE / FILE NUMBER

549/04

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THE

SUPREME COURT OF APPEAL

OF SOUTH

AFRICA

CASE NO:

549/2004Reportable
In the matter between
TONY
RICKY
GARDNER
First Appellant
OTR
MINING
LTD
Second Appellant
and
ROGER
HUGH
MARGO
Respondent

Before: Scott, Zulman and Van Heerden JJA, Maya and Cachalia AJJA

Heard: 9 March 2006

Delivered: 28 March 2006

Summary: Interpretation of contract – mandate for the sale of shares – guarantee given by company in respect of such sale – whether contrary to s 38(1) of the Companies Act 61 of 1973
Neutral
citation: This judgment may be referred to as *Gardner v Margo* [2006] SCA 36 (RSA)

JUDGMENT

VAN HEERDEN JA:

VAN HEERDEN JA:

Introduction

- [1] This appeal concerns the interpretation of a contract ('the mandate') entered into on 26 February 1998 between the first appellant, Tony Ricky Gardner ('Gardner'), and the second appellant, OTR Mining Ltd ('OTR'), on the one hand, and Mr Jan Abraham Joubert ('Joubert'), on the other. In terms of the mandate, Joubert instructed Gardner to sell a large number of Joubert's shares in OTR and the company gave a guarantee to Joubert in respect of such shares. Joubert subsequently ceded to the respondent, Roger Hugh Margo ('Margo'), 'all his rights, title and interest in and to all claims, including the claim for rectification, which he had against [Gardner] and [OTR]' in terms of the mandate.
- [2] Margo, as cessionary, sued Gardner and OTR in the Johannesburg High Court for payment of the unpaid proceeds of shares in OTR which Gardner had sold or (in respect of approximately 3,6 million shares) allegedly sold, in terms of the mandate as Joubert's 'sole agent'. Gardner had paid a substantial portion of the proceeds to OTR. Margo alleged in his Particulars of Claim that OTR was, inter alia, jointly and severally liable with Gardner for payment of that part of the proceeds of the relevant shares which it had received from Gardner. He also sought to hold OTR liable in terms of a guarantee which it had given to Joubert in terms of the mandate.

- [3] The appellants' main defence against Margo's claim was that, on a proper interpretation of the mandate, Joubert had, at the time of the cession to Margo, no remaining rights under the mandate against either Gardner or OTR. This being so, Margo acquired no rights as cessionary against either of the two appellants. The court a quo rejected this defence and, in the main, upheld Margo's claims with costs – hence the present appeal, which comes before us with the leave of that court.

Background

- [4] Joubert and Gardner were the founding members of OTR, which was established in 1995 as a management and exploration company to undertake the management of alluvial and eluvial mining and the processing of minerals. In late 1996, OTR purchased all the assets (including certain mineral claims) of the Gazankulu Gold Mining Company (in liquidation) ('Gazgold'). It thereafter set up base at a mine called Klein Letaba in Limpopo (one of the mines purchased from Gazgold) with the purpose of exploiting alluvial gold deposits in that area.
- [5] OTR was listed on the Johannesburg Stock Exchange ('JSE') on 22 September 1997. According to the pre-listing statement, its initial directors and shareholders were Gardner, Joubert, Margo, Anthony Gardner (Gardner's father), Kenneth Barnard ('Barnard'), Theodore Tromp ('Tromp') and Thomas Cook ('Cook'). Tromp and Cook were non-executive directors. Gardner's position in OTR was that of managing director and chairman, while Joubert was the mining director, Margo the legal director, Gardner senior the engineering director and Barnard the geological director.
- [6] Joubert and Gardner were the two major shareholders in OTR, their combined shareholding amounting to some 34 percent of the issued shares. In terms of a so-called 'pool agreement' entered into between the OTR shareholders ('the pool members') prior to the listing, no pool member was entitled to alienate any of the shares specified in the agreement to any 'non-pool member' for five years from the date of the listing, except in the manner set out in the agreement and subject to the pre-emptive rights of the other pool members.
- [7] According to the pre-listing statement, OTR had developed 'a unique approach to mining', utilising what was referred to in the trial as the 'OTR method of mining'. Gardner and Joubert both gave extensive, but conflicting, evidence regarding the genesis of the OTR method, what it entailed and the degree to which OTR's overall mining initiatives depended on the success (or otherwise) of this method. This evidence was analysed in some detail by the High Court in its judgment. However, on the view which I take of the issues, it is not necessary to repeat this exercise.

- [8] The written contract reads as follows:

'I, the undersigned,

JAN ABRAHAM JOUBERT,

Identity Number [2...]

hereby:

I instruct TONY RICKY GARDNER (Passport Number [7...]) to act as my sole agent (for a period of THREE (3) months from signature hereof) in the sale of TWELVE MILLION EIGHT HUNDRED AND FIFTY THREE THOUSAND FIVE HUNDRED AND EIGHTY (12 853 580) OTR Mining Ltd Ordinary shares. These shares are to be sold in tranches of ± FOUR MILLION (4 000 000) per month over a period of THREE (3) months as of date of signature hereof. OTR Mining Ltd guarantees the sum of FIVE MILLION ONE HUNDRED AND FORTY ONE THOUSAND FOUR HUNDRED AND THIRTY TWO RAND (R5 141 432) for these shares.

1.1 SEVEN HUNDRED AND FIFTY THOUSAND RAND (R750 000) is payable on the 3rd March 1998;

1.2 SEVEN HUNDRED AND FIFTY THOUSAND RAND (R750 000) is payable by the 31st March 1998; and

1.3 the remaining amount will be due and payable within a period of the next two months.

2 The amount payable to myself, Jan Abraham Joubert, will be the consideration amount of R0,40c (FORTY CENTS) per share.

3 With the above concluded this will amount to myself having no Ordinary shares in OTR Mining Ltd except those of the Management Pool shares. These shares will be sold at Tony Ricky Gardner's discretion.

4 OTR Mining Ltd agrees that my official retirement date shall be the 31st August 1998.

5 OTR Mining Ltd hereby agrees that on retirement I shall be entitled to keep my present car (Mercedes Benz C230) as my company retirement gratuity.

6 As previously agreed with OTR Mining Ltd I shall be entitled to 50% (FIFTY PER CENTUM) (after cost) of the proposed sale of 261 Granite Blocks, situated on the Bambini Farm in the district of Giyani.'

[9] The mandate was signed by Joubert and by Gardner and, although it is not indicated in the written agreement that Gardner was signing both in his personal capacity and on behalf of OTR, it was common cause that OTR was indeed a party to the agreement.

[10] The case advanced by Margo against Gardner in respect of the mandate, both in the High Court and on appeal, is that the express terms of the mandate (on a proper interpretation thereof), alternatively the terms implied by law, were that Joubert mandated Gardner to act as his sole agent to sell 12 853 580 of his ordinary shares in OTR in three 'tranches' of 4 284 526 shares each on 26 March 1998, 26 April 1998 and 26 May 1998, respectively, all of the shares to be sold at the then prevailing market prices. Margo contended further that Gardner was obliged to account to Joubert and to pay to him, upon receipt thereof, the full proceeds from the sale of Joubert's shares. In the alternative, Margo contended that the

written mandate did not correctly reflect

the common intention of the parties thereto; that the parties' common intention was that clause 2 would provide that '[t]he

minimum amount payable to myself, Jan Abraham Joubert, will be the amount of R0,40c (FORTY CENTS) per share' (my emphasis), and that the mandate should be rectified accordingly.

[11] In April 2000, prior to the trial in the Johannesburg High Court, the appellants tendered to account to Margo, which tender was made an order of court on 17 April 2000. Gardner then accounted to Margo in writing on 31 May 2000 and, after a further court order against Gardner and OTR in this regard, on 6 April 2001. The parties debated the account through their attorneys. In his particulars of claim, Margo stated that, 'to the extent of the facts set out under this heading and for purposes of this part of the claim' (ie the first claim against Gardner), he accepted 'the accounting as a true representation'. From the account, it is common cause that, during the period 31 March to 31 August 1998, Gardner sold a total of 9 200 000 of Joubert's

shares in OTR pursuant to the mandate. The total proceeds of such shares ('the accounted shares') was R10 274

277. Of these proceeds, Gardner paid R3 634 275 to Joubert, this amount being made up as follows: 9 200 000 shares at 40 cents per share (R3 680 000) minus R45 725. This last-mentioned amount was allegedly 'kept back' from the payment due to Joubert as representing the total amount owing and payable by Joubert to OTR in respect of cellular telephone charges paid by OTR to Joubert's cellular telephone provider and certain amounts provided by OTR to Joubert to acquire motorcycles on behalf of OTR, which Joubert allegedly failed to do. Of the balance of the proceeds of the accounted shares (R6 640 002), a total amount of R6 200 820 was paid by Gardner to OTR, while R439 182 was paid to third parties, mainly in the form of broker's commission.

[12] Based on the account rendered by Gardner, Margo claimed, firstly, that Gardner became liable to pay to Joubert, not later than 1 September 1998, the amount of R6 537 529, being the full proceeds of the accounted shares (R10 274 277) minus reasonable broker's commission of one percent (R102 743) minus the amount paid to Joubert (R3 634 275).

[13] In respect of the balance of 3 653 580 shares ('the unaccounted shares'), ie the number of shares specified in the mandate minus the 9 200 000 accounted shares, the accounting rendered by Gardner simply stated the following:

'Total number of shares instructed to sell: 12 853 580

Total number of shares sold: 9 200 000

Shares tendered to be returned to Joubert as unsold: 3 653 580 (these shares have been consolidated in terms of a shareholders resolution and the present consolidated shares come to 730 716 OTR Mining ordinary shares).’

[14] In his second claim against Gardner, Margo contended that the unaccounted shares were in fact sold by Gardner during the period 26 March 1998 to 26 May 1998 for not less than the then prevailing market price. In the alternative, Margo asserted that, on a proper interpretation of the mandate, Gardner was obliged to sell the unaccounted shares during this period for not less than the prevailing market price and that Gardner breached the terms of the mandate by thus failing to sell the unaccounted shares, as a

result of which breach Joubert suffered damages in an amount equal to the total market price, during this period, of the unaccounted

shares. Based on a prevailing market price of R1.20 per share, Margo asserted that, on either alternative, Gardner was liable to pay to him the amount of R4 384 296, being the number of unaccounted shares multiplied by the prevailing market price.

[15] As regards the prevailing market price utilised by Margo for the purposes of his claim against Gardner in respect of the unaccounted shares, Dr Braude, a former stockbroker, testified on behalf on Margo during the trial to the effect that, during the said period, the value of OTR’s shares was not less than R1.20 per share, and also that the reasonable commission for brokers selling shares was not more than one percent of the proceeds. This evidence was not seriously contested.

[16] Margo’s first claim against OTR was also premised on his contention that, on a proper interpretation of the mandate, the full proceeds of the shares sold by Gardner had to be paid to Joubert. Thus, OTR was not entitled to that portion of the proceeds which Gardner had paid to it (in the total amount of R6 200 820); it had been unjustifiably enriched at the expense of Joubert (or of Margo, as cessionary) by such payment, and it was thus jointly and severally liable with Gardner to pay this amount to Margo.

[17] The second claim advanced by Margo against OTR was essentially that, in terms of the mandate, properly interpreted, OTR guaranteed that Joubert would receive not less than R5 141 432 for the 12 853 580 shares to be sold by Gardner on his behalf. Margo alleged that, to the extent that judgment in respect of his other claims was less than this guaranteed amount, or to the extent to which he was able to recover less than the guaranteed amount from Gardner, OTR was liable to Margo for payment of the difference, plus interest.

[18] Gardner and OTR contended that the contract concluded between them and Joubert was partly in writing and partly oral. The written part of the mandate was embodied in the document signed by Joubert and Gardner on 26 February 1998.[1] Clause 1 and clauses 3 to 6 thereof meant exactly what they said. Clause 2 thereof, properly interpreted, meant that Gardner was obliged to pay to Joubert – and Joubert was correspondingly entitled to receive – only 40 cents per share from the proceeds of the shares sold on his behalf by Gardner. The

terms of the oral part of the mandate were (so it was pleaded) that:

[1] [A]ny amount received by the first defendant [Gardner] in excess of R0,40 per share, pursuant to the sale of the shares, would be paid to the second defendant [OTR] as compensation to the second defendant for certain losses it had suffered as a result of Joubert's negligent conduct in –

[1.1] erroneously determining – and thereafter misrepresenting to the second defendant – the predicted yield of gold per ton of alluvial gold bearing ore; and /or

[1.2] employing the incorrect mining method(s) for the extraction of the gold from such gold bearing ore.

[2] Alternatively to paragraph [1], any amount received by the first defendant in excess of R0,40 per share pursuant to the sale of the shares would be paid to the second defendant.

[3] any other amounts owed by Joubert to the company, arising from any cause whatsoever, including monies lent and advanced to him, or monies lent and disbursed for and on behalf of him would be set off against, and deducted from, any amount payable to him in connection with the sale of the shares.'

(My numbering.)

On this construction of the mandate, Joubert had received, in respect of the accounted shares, all that he was entitled to and Margo thus had no claim against either Gardner or OTR in this regard.

[19] Gardner and OTR denied that the unaccounted shares had in fact been sold and reiterated 'their previous tender, viz that the plaintiff may collect the remainder of the shares, ie 3 653 580, from Incentive Securities'. They also denied that a failure by Gardner to sell the unaccounted shares constituted a breach of the mandate resulting in a claim for damages in favour of Joubert.

[20] Finally, in response to Margo's claim against OTR based on the guarantee contained in the mandate, it was pleaded that the guarantee constituted a breach of the provisions of s 38 of the Companies Act 61 of 1973 in that it directly or indirectly amounted to the rendering of financial assistance by OTR for the purpose of or in connection with a purchase made or to be made of Joubert's shares in the company. It was hence invalid and unenforceable.

Interpretation of the mandate

(a) The meaning of clause 2

[21] As correctly submitted by counsel for the appellants, the terms of the mandate relied upon by Margo in support of both his claims against Gardner[2] and his first claim against OTR,[3] were not terms set out expressly in the mandate. So, while Gardner was indeed mandated to sell 12 853 580 of Joubert's ordinary shares in OTR in tranches of approximately four million shares per month over a period of three months, the intended sales were in no way linked to the three sale dates alleged by Margo.[4] There was no express term in the mandate to the effect that Gardner had to sell the shares at the prevailing market prices, nor to the effect

that Gardner was obliged to pay to Joubert, on receipt thereof, the full proceeds from the sale of Joubert's shares.

- [22] The High Court was of the view that, as the mandate did not provide a price at which Joubert's shares were to be sold but guaranteed to Joubert an amount of 40 cents per share, it must be interpreted, 'on a plain reading thereof', to mean that Gardner could sell the shares at any price not less than 40 cents per share. The High Court thus rejected Margo's contention that, in terms of the mandate, the shares had to be sold at the then prevailing market prices.
- [23] The written part of the mandate is silent about the fate of the proceeds of Joubert's shares over and above 40 cents per share. In this regard, the court a quo found that, because Joubert was the owner of the shares, the mandate must 'by necessary implication' be interpreted to mean that any proceeds beyond 40 cents per share belonged to Joubert, unless it could be shown that he had agreed to the balance of the proceeds being paid to someone else (in this case, OTR). Thus, the court held, in the absence of the oral part of the mandate relied upon by Gardner and OTR,[5] Gardner was in law obliged to pay to Joubert all the money which he received for Joubert's shares; he had no right to pay more than R6 million of such money to OTR. Having analysed the evidence in respect of the OTR method of mining, the court concluded that it could not find that Joubert was, as alleged by Gardner and OTR –

'the reason for OTR's financial disaster and was personally liable therefor. Such a finding is the basis why the alleged oral agreement would have been concluded, and in the absence of such a finding, the alleged oral agreement falls flat.'

In the circumstances, the court held that Gardner, as Joubert's agent, and OTR, to which the balance of the proceeds of the accounted shares were paid, were liable to Margo in respect thereof.

- [24] To my mind, the approach of the High Court in this regard was incorrect. The mere fact that Joubert was the owner of the shares does not justify the conclusion that, if the oral part of the mandate contended for by the appellants was not established, a term must necessarily be implied into the mandate to the effect that Joubert was entitled to the full proceeds of the shares sold by Gardner. The 'implied term' relied on by Margo (and accepted by the court below) was a term implied by law[6] and such a term is, as a general rule, not implied if it is in conflict with the express terms of the contract in question.[7] The first step in the interpretation of the mandate should therefore be to determine the meaning of the clause which deals specifically with 'the amount payable to' Joubert in respect of each share, viz clause 2.
- [25] The technique of interpretation of written contractual documents consistently adopted by the South African courts was summarised by Joubert JA in *Coopers & Lybrand v Bryant*[8] as follows:[9]

‘According to the “golden rule” of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument. . . .

The mode of construction should never be to interpret the particular word or phrase in isolation (in vacuo) by itself. . . .

The correct approach to the application of the “golden rule” of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

- (1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract....;
- (2) to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted....;
- (3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions.’

[26] To reiterate, clause 2 of the mandate states that ‘[t]he amount payable to myself, Jan Abraham Joubert, will be the consideration amount of R0,40c (FORTY CENTS) per share’. The ‘ordinary’ or ‘literal’ meaning of this clause is that Joubert will be paid an amount of 40 cents per share – the clause, and indeed the rest of the written document, does not provide expressly for the destination of the balance of the proceeds of any shares sold, in terms of the mandate, at a price greater than 40 cents per share. Having regard to the mandate as a whole, however, it is important to note that the amount of the guarantee given to Joubert by OTR in clause 1 thereof is equal to the total number of shares covered by the mandate (12 853 580), multiplied by an amount of 40 cents per share.

[27] As regards the nature and purpose of the mandate, it is also clear from the terms of the written contract that Joubert was, with the agreement of Gardner and OTR, severing his ties with the latter. As was submitted by counsel for the appellants, the contract cannot be regarded as being simply a straightforward mandate to sell shares given by Joubert to Gardner. This is illustrated by

the fact that the first payment of R750 000 to Joubert had to be made by 3 March 1998 (less than a week after the conclusion of the contract) and that this payment (as well as the second payment in the same amount, to be made by 31 March 1998) was not linked to, or dependent upon, the sale of any specific ‘tranche’ of shares by the dates specified. On the contrary, the mandate envisaged that the first ‘tranche’ of ±4 000 000 shares would be sold during a period of approximately one month from the date of signature thereof, without obliging Gardner to sell these shares on any single day during that month. The same applies to the sale of the other two ‘tranches’ of shares.

- [28] An examination of the circumstances prevailing at the time that the mandate was concluded ('matters probably present to the minds of the parties when they contracted'[10]) also casts considerable light on the meaning thereof. OTR was at that time experiencing severe financial difficulties. From the date of listing of the company (22 September 1997) to 28 February 1998, OTR recorded an operating loss of over R4,4 million with a revenue of only R599 000, as opposed to the net income of R4,131 million for the year ending February 1998 forecast in the pre-listing statement. This had meant a loss of six cents per share for that period, as opposed to the projected net income of 5.2 cents per share appearing in the pre-listing statement. OTR's provisional mining authorisation, issued on 25 April 1997, was withdrawn some time in November 1998 and had not yet been re-issued. Despite the lack of authorisation, it appears from the evidence that OTR had continued with mining activities at Klein Letaba during January and February 1998; indeed, following an on-site inspection carried out by the Department of Minerals and Energy on 9 February 1998, such mining activities were expressly reflected as 'illegal mining' in a follow-up document (dated 23 February 1998) emanating from the Department. OTR's permanent mining authority was only issued at the beginning of May 1998, ie after the mandate had already been concluded.
- [29] Despite his professed ignorance in this regard, Joubert as OTR's mining director, physically stationed at Klein Letaba where the inspections took place, was in all probability fully aware of the lack of mining authorisation and of the impact thereof on the legitimacy of OTR's mining operations. It is also unlikely in the extreme that Joubert, co-founder, director and major shareholder of OTR, was unaware of the parlous state of OTR's finances. A confidential 'OTR Mining Security Year End Report' dated 3 January 1998 noted that '[m]ost of the white employees are sceptical as to how long OTR will still be operational and it seems to me that each one is looking for greener pastures', and further that '[i]t seems to me that at this moment in time everybody associated with OTR locally, is of the opinion that OTR is not going to last long and that they want to get everything they can out of OTR while they still can.' As submitted by counsel for the appellants, if the

employees of OTR had this negative perception of OTR's future viability in January 1998, it is highly unlikely that Joubert was not also aware of the very serious operational and financial problems facing OTR at that stage. To put it mildly, this was not a very appropriate time, from OTR's perspective, for its mining director to decide to sell his shares and retire from the company.

- [30] In his testimony, Joubert denied having any knowledge of the price quoted for the shares concerned on the JSE around the time the mandate was entered into. The evidence as a whole, however, shows clearly that this was not true. Moreover, in my view, Joubert was, on the balance of probabilities, fully aware at that time that the dire state of OTR's operations and its consequent financial problems were not yet reflected in the share price as quoted on the JSE.

[31] It is common cause that it was Joubert who approached Gardner in February 1998 with the idea of retiring, leaving OTR and selling his shares. It is clear from the evidence that Joubert, who was 71 years old at the time the mandate was concluded, wanted his shares to be sold so as to enable him to retire and to provide financially for his post-retirement future and that of his family. He knew that he was bound by the provisions of the pool agreement and that this might constitute an obstacle to his selling his OTR shares himself. Gardner's evidence that Joubert needed some of the income from the shares urgently, as he was in the process

of purchasing a farming business, is borne out by the fact that, apparently at Joubert's insistence, the mandate provided for a first payment of R750 000 to be made to him within 5 days of the mandate being concluded, despite the fact that the first 'tranche' of shares was only to be sold within a month of the date of signature of the mandate.

[32] To my mind, all these circumstances make it probable that Joubert wanted to 'bail out' of OTR as quickly as possible, before the true state of the company's operations and finances filtered through to the market causing the share price to plummet. This being so, it is also probable that, as testified by Gardner, Joubert was indeed willing to accept a fixed price per share that was less than the prevailing market price at that time, and that the price of 40 cents per share stipulated in clause 2 was 'negotiated' between the two of them on the basis of the amount of money required by Joubert for his retirement (approximately R5 million according to Gardner), divided by the number of shares which Gardner was to sell on his behalf. This in turn is borne out by the amount of the guarantee given to Joubert by OTR in respect of the shares covered by the mandate.[11]

[33] Insofar as the 'language' of clause 2 may be said to be, 'on the face of it ambiguous', then a consideration of 'the subsequent conduct of the parties showing the sense in which they acted on the document'[12] also supports the conclusion that, properly interpreted, the mandate meant that Joubert was entitled to payment of only 40 cents per share of the proceeds of the shares to be sold by Gardner on his behalf. Following each of the six transactions whereby Gardner sold Joubert's OTR shares during the period March to August 1998, as reflected in the abovementioned accounting,[13] a statement was addressed by Gardner to Joubert showing the number of shares sold in the transaction in question, the total number of shares sold up to the date of the statement and the number of shares left to be sold. Each statement clearly indicated that the amount being paid to Joubert in respect of the sale of shares concerned had been calculated at the rate of 40 cents per share. Joubert ultimately admitted having received the first two of these statements (dated 31 March 1998 and 13 May 1998, respectively, and covering the sale of, in total, 5 470 000 shares), but denied receipt of the remaining four. It is also clear from a letter dated 15 July 1998, addressed by Joubert's attorney to Gardner, that he had had sight of (at least) the second statement. On the probabilities, both Joubert and his attorney were fully aware of the prevailing market price of OTR shares at the relevant time. However, neither Joubert nor his attorney made any mention of Joubert's 'entitlement' to the balance of the proceeds of the shares sold; on the contrary, the said letter from Joubert's attorney to Gardner simply stated that the

mandate given to Gardner ‘has now come to an end’ and demanded ‘that the share certificates in respect of the total shares remaining unsold...be made available to [Joubert] for his collection’. A letter dated 13 August 1998 subsequently addressed by the appellants’ attorney to Joubert’s attorney, stating that ‘the mandate of the 26th February 1998 was verbally extended by your client’ also did not provoke any demand from either Joubert or his attorney for the balance of the proceeds of the shares sold. It was only in about October 1998, when summons was first issued by Margo against Gardner and OTR, that it was contended – for the first time – that Joubert was entitled, in terms of the mandate, to more than 40 cents per share.

[34] In the light of the above, I am of the view that the meaning of clause 2 of the mandate, properly interpreted, is that Joubert was entitled to only 40 cents per share from the proceeds of the shares to be sold on his behalf by Gardner as his ‘sole agent’. This conclusion

puts paid to the implied term relied upon by Margo and (incorrectly) accepted by the High Court. However, as I interpret clause 2, this amount of 40 cents per share was to be net of any broker’s commission or other expenses incurred by Gardner in selling the shares. Counsel for the appellants wisely

conceded that this must be so.

[35] Turning to Margo’s alternative claim for rectification of clause 2,[14] there was, quite simply, no evidence before the High Court to support such a claim. Margo did not discharge the onus resting on him in this regard.

(b) The oral terms pleaded by the appellants

[36] As regards the destination of the proceeds of Joubert’s shares over and above 40 cents per share, the express provisions of the mandate are, as already pointed out, silent. The appellants contended that this ‘hiatus’ was overcome by oral terms agreed between the parties, whereby any amount received by Gardner in excess of 40 cents per share pursuant to the sale of the shares would be paid to OTR.[15] As submitted by counsel for the appellants, Margo bore the onus of disproving those terms contended for by the appellants, which he alleged were not terms of the mandate entered into by the parties.[16] In my view, from the evidence as a whole – including the evidence to the effect that, to Joubert’s knowledge, the approximately R6,2 million paid over to OTR by Gardner from the proceeds of the shares sold by him on Joubert’s behalf was

necessary to refinance the ailing company – Margo did not discharge this onus. On the contrary, it was, in my opinion, established on a balance of probabilities that, as part of the mandate concluded on 26 February 1998, the parties agreed that OTR would be entitled to payment of the proceeds of the shares in excess of 40 cents per share. This conclusion suffices to defeat Margo’s

first claim against OTR. It is not necessary to determine whether or not this payment was (as alleged by the appellants) intended to be compensation to OTR for losses suffered by it as a result of alleged negligent conduct by Joubert. It follows that Margo's claim against Gardner for payment of the balance of the proceeds of the accounted shares, as well as his claim against OTR for payment of the amount paid to it in respect of the accounted shares, were without merit and should have failed.

[37] Similarly, an analysis of the evidence indicates that, as contended by the appellants, the parties did in all probability orally agree that amounts owing by Joubert to OTR at the time of conclusion of the mandate would be deducted from any amount payable to him in connection with the sale of the shares;[17] certainly, Margo did not succeed in proving that this was not so. Gardner testified in some detail about the amounts allegedly owing and payable by Joubert to OTR, certain of which made up the R45 725 deducted – in terms of the accounting accepted by Margo as 'a true representation'[18] – from that part of the proceeds of the accounted shares owing to Joubert in terms of the mandate (R3 680 000 in total).[19] His evidence on this aspect was not seriously challenged. Thus, in respect of the accounted shares, Joubert had, prior to the cession to Margo, been paid everything to which he was entitled in terms of the mandate; he had no further

claim against either Gardner or OTR and hence no rights which he could cede. The appellants' defences against Margo's

claims concerning the accounted shares were good and their appeal against the orders made by High Court in this regard must succeed.

The unaccounted shares

[38] As indicated above,[20] Margo's second claim against Gardner was primarily based on the allegation that the unaccounted shares (3 653 580 shares in total) had in fact been sold by Gardner and that Gardner was obliged to pay Margo the proceeds. In view of my conclusion that Joubert was entitled to payment of only 40 cents per share (and not to payment of the full proceeds), Margo's claim against Gardner in respect of the unaccounted shares would, if successful, only entitle the former to payment of R1 461 432 (ie the number of unaccounted shares multiplied by 40 cents per share).

[39] Gardner's denial that the unaccounted shares had been sold must be viewed in the light of the abovementioned letter dated 13 August 1998 addressed by the appellants' attorney, Mr Tromp (also a director of OTR), to Joubert's attorney, in which the following statement was made:

'Our further instructions are that all the shares have been disposed of and that the proceeds will be paid to your client in due course.'

As submitted by Margo's counsel, this letter constituted at least strong prima facie evidence that all the shares covered by the mandate had indeed been sold. During cross-examination, Gardner confirmed that he had given the instructions which gave rise to this letter. His later attempt, during re-examination, to backtrack by saying that, at the time of the letter, Joubert's remaining shares were about to be sold by him, but that the sale fell through, was far from convincing.

[40] Furthermore, apparently in response to a request from OTR's auditors (in December 1998) for a directors' resolution confirming the details of 'the agreement for the selling of the shares of Mr J A Joubert, by Mr T R Gardner, dated 26 February 1998', a round-robin resolution was signed by each of the directors of OTR in April or June 1999. This resolution, which was passed long after the abovementioned letter dated 13 August 1998 from the appellants' attorney (and long after the sale of the remainder of Joubert's shares had, on Gardner's evidence, supposedly fallen through), stated, inter alia, the following:

'...it was agreed with Mr J A Joubert that Mr T R Gardner would dispose of Mr J A Joubert's shares in OTR at the best possible price and that Mr JA Joubert would retain 40c for every share sold and the balance of the selling price of the shares would be paid to the Company. The amount to be paid to the Company will be shown as income or a reduction in expenses.

In addition to the shares numbering 9 200 000 that were sold by Mr T R Gardner and which resulted in income of R3 600 000, further shares were sold the proceeds of which were received by the company and the amount due to Mr Joubert paid by the company....

This transaction is hereby ratified by the Board.'

(My emphasis.)

[41] It should also be noted that, according to Dr Braude's evidence, more than 38 million OTR shares were sold by unidentified sellers during the period of the mandate. During this period, Gardner sold OTR shares of his own to the value of at least R1 million and, in addition, he sold five million OTR shares from the 'senior staff incentive scheme' that he had in his possession and then replaced them with an unknown number of shares which were 'bought back'. Gardner himself described this latter share transaction as 'very very messy'. As Joubert's 'sole agent' for the sale of his shares in terms of the mandate, Gardner was obliged to keep the property of his principal separate from similar property and to account to his principal in this regard.[21] Gardner certainly did not fulfil this obligation: neither Gardner himself, nor Mr Ronald Lowenthal of Incentive Securities, who

testified on behalf of the appellants and in whose 'custody' Joubert's unaccounted shares were allegedly being held at the time the appellants 'tendered' to return them to Joubert and at the time of the trial, were able to identify which – if any – of the OTR shares held by Incentive Securities were Joubert's shares.

[42] It follows from the above that, in my view, the High Court was correct in its finding that Gardner had in fact sold the unaccounted shares and that it was unnecessary to consider Margo's alternative contention based on damages for breach of mandate by Gardner. As

nothing was paid to Joubert in respect of the unaccounted shares, he did have a remaining claim against Gardner under the mandate for payment of R1 461 432.[22] This claim was ceded to Margo. Margo's second claim against Gardner was, therefore, a good one, but only for the amount of R1 461 432, not for the amount of R4 384 296 (based on the prevailing market price of the shares) awarded by the High Court.

The guarantee given by OTR – s 38 of the Companies Act

[43] While conceding that OTR had, in terms of the mandate, guaranteed that Joubert would receive the sum of R5 141 432 for the 12 853 580 shares to be sold by Gardner on his behalf, the appellants pleaded that this guarantee constituted a breach of the provisions of s 38 of the Companies Act.

[44] The relevant part of s 38(1) of the Companies Act reads as follows:

‘No company shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise,

any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares of the company....’

[45] In *Lewis v Oneanate (Pty) Ltd*,[23] Nicholas AJA stated[24] that –

‘The object of a provision such as s 38(1) is the protection of the creditors of a company, who have a right to look to its paid-up

capital as the fund out of which their debts are to be discharged. . . .The purpose of the Legislature was to avoid that fund being

employed or depleted or exposed to possible risk in consequence of transactions concluded for the purpose of or in connection with the purchase of its shares.’

[46] Although the prohibition against the giving of financial assistance is couched in very wide and general terms –

‘There has ...been a tendency, in the light of the extremely wide terms of the prohibition considered in conjunction with the circumstance that contravention of the section constitutes a criminal offence, to give close attention to the underlying purpose of the prohibition and the real mischief at which it was aimed...and, with that in mind, to adopt what JC Beuthin has described in [(1973) 90 SALJ at 213] as “a much narrower approach to the section”.’[25]

[47] In *Lipschitz NO v UDC Bank Ltd*,[26] this court appears to have accepted the distinction drawn by Schreiner JA in *Gradwell (Pty) Ltd v Rostra Printers Ltd*[27] between the ‘ultimate goal’ of the transaction in question and its ‘direct object, and to accept that it is only

the direct object of the transaction that is relevant. If the direct object is not the provision of financial assistance by the company for the purpose of or in connection with a purchase of its shares, then it is irrelevant that the ultimate goal of the transaction was to enable a person to

purchase such shares.[28] Moreover, financial assistance within the meaning of s 38(1) is given only when the direct object of the transaction is to assist another financially – the s 38 prohibition is not contravened when the direct object of the transaction is merely to give another that to which he or she is already entitled.[29]

[48] As was submitted by Margo's counsel, the guarantee given by OTR to Joubert was not intended to provide financial assistance to anyone in respect of the purchase of OTR shares. The direct object of the guarantee was to provide Joubert with some security for that to which he was entitled in terms of the mandate, ie part of the proceeds of the shares to be sold on his behalf by Gardner. In my view, the guarantee does not fall foul of s 38(1) of the Companies Act and counsel for the appellants (once again, wisely) did not press this point at all.

[49] Margo's second claim against OTR should therefore succeed, but not to the extent that OTR is held liable jointly and severally with Gardner for payment of the balance of R1 461 432 owing to Margo in respect of the unaccounted shares. As OTR is, in terms of the mandate, a guarantor and not a co-principal debtor, OTR will only be liable to pay Margo in the event of (and to the extent of) Gardner not doing so.

Costs

[50] In view of what I have said above, the appellants have been substantially successful on appeal and are thus entitled to the costs of appeal. As regards the costs in the High Court, Joubert remains substantially successful in his action in that court and the costs order made by that court should stand.

Order

[51] The following order is made:

- (a) The appeal succeeds with costs.
- (b) Paragraphs 1 and 2 of the order of the High Court are set aside and replaced with the following:

'In the circumstances, an order is granted in favour of the plaintiff as follows:

1. Against the first defendant, for payment of the amount of R 1 461 432 plus interest thereon at the rate of 15.5 percent per annum from 1 September 1998 to date of payment.
2. Against the second defendant, for payment of the amount of R1 461 432 plus interest thereon at the rate of 15.5 percent per annum from 1 September 1998 to date of payment, the second defendant to be liable to make such payment only in the event that, and to the extent that, the first defendant fails to do so.'

B J VAN HEERDENJUDGE OF APPEAL

CONCUR:

Scott JA

Zulman JA

Maya JA

Cachalia JA

[1] See para 8 above.

[2] See paras 10 to 12 above (the first claim) and paras 13 to 15 above (the second claim).

[3] See para 16 above.

[4] Para 10 above.

[5] See para 18 above.

[6] As opposed to a tacit term, viz ‘an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances’: see *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531H- 532C.

[7] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* at 531E-F.

[8] 1995 (3) SA 761 (A).

[9] At 767E-768E.

[10] See *Coopers & Lybrand v Bryant* (supra) at 768B-C.

[11] See para 26 above.

[12] See *Coopers & Lybrand* (supra) at 768D-E.

[13] See para 11 above.

[14] See para 10 above.

[15] See para 19 above.

[16] See *Kriegler v Minitzer* 1949 (4) SA 821 (A) at 827-828 and *Topaz Kitchens (Pty) Ltd v Naboom Spa (Edms) Bpk* 1976 (3) SA 470 (A) at 478A-B. Cf *DF Zeffertt, AP Paizes & A St Q Skeen The South African Law of Evidence* (formerly *Hoffmann and Zeffertt*)

(2003) at pp 68 and 156.

[17] See para 19 above.

[18] See para 11 above.

[19] See para 11 above.

[20] See para 14.

- [21] See AJ Kerr *The Law of Agency* 3ed (1991) at p 187 and the authorities there cited.
- [22] See para 37 above.
- [23]
- [1992] ZASCA 174; 1992 (4) SA 811 (A).
- [24] At 818A-C.
- [25] *Lipschitz NO v UDC Bank Ltd* 1979 (1) SA 789 (A) at 797H-798A (per Miller JA).
- [26] *Supra* at 799E-F.
- [27] 1959 (4) SA 419 (A) at 425E-426E.
- [28] See *Fidelity Bank Ltd v Three Women (Pty) Ltd* [1996] 4 All SA 368 (W) at 378j-381f and further in this regard, MS Blackman “Companies’ 4 Lawsa (reissue) Part 1 para 127 at p 194, MS Blackman, RD Jooste & GK Everingham *Commentary on the Companies Act* (2002, with loose-leaf updates) Volume 1 at 4-63–4-64 and the other authorities cited by these authors.
- [29] See 4 Lawsa (reissue) Part 1 para 127 at p 192.

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