

SOUTH AFRICA / JUDGMENT

Rennie NO v Gordon NO and Another (103/87) [1987] ZASCA 101 (24 September 1987)

[1987] ZASCA 101

COURT

Supreme Court of Appeal

BEFORE

Corbett, Van Heerden, Grosskopf, Nicholas, Steyn

CASE / FILE NUMBER

103/87

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IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

ALAN M RENNIE, N O Appellant

and

RAEL GORDON, N O 1st respondent

DAVID JOHN RENNIE, N O 2nd respondent.

Coram: CORBETT, VAN HEERDEN, GROSSKOPP. JJA. NICHOLAS et STEYN, AJJA.

Date of appeal: 24 August 1987

Date of judgment:

JUDGMENT CORBETT JA:

The background facts in this matter may be summarized as follows. A company known as Rooderust (Proprietary) Limited ("Rooderust") established a

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2 township for residential purposes on certain land near Wellington in the Cape Province. The township, known as Wellington Extension No 28, Bergendal, was duly proclaimed as such on 17 January 1975. It comprised approximately 360 erven. While the township was still in the course of being established Rooderust commenced with the sale of erven therein and on 30 November 1972 one Joseph De Raedt entered into two deeds of sale in terms of which he purchased in all 24 erven from Rooderust. The deeds provided for an initial payment of ten per cent of the total pur-

chase price on the signing thereof and for the balance to be paid in monthly instalments over a period of years. On 7 April 1977 Rooderust passed a first mortgage bond in fa-vour of Standard Merchant Bank Limited ("SMB") over the whole of the township property to secure a loan of R250 000 and the interest payable thereon. On 8 December 1978 Rooderust was placed under provisional liquidation

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3and on 18 April 1979 the provisional order was made final. First respondent was initially appointed provisional li-iquidator of Rooderust and later, on 10 July 1979, liqui-dator. I shall refer to him individually as "the liquidator".

As at the time of liquidation some 325 erven in the township had been sold and of these 97 had been transferred to the purchasers thereof. The remaining 228 erven had been sold in terms of agreements whereunder the purchase price was payable in instalments over a period of years and transfer of the erven had not taken place. Included amongst these were the erven sold to De Raedt. It is common cause that these agreements of sale constituted "contracts" as defined in sec 1 of the Sale of Land on Instalments Act 72 of 1971 ("the Act"). For convenience I shall refer to such a contract as "an instalment contract".

The reciprocal rights and obligations of the

/ liquidator 4liquidator of a company and a person who had purchasedland from the company prior to liquidation in terms ofan instalment contract and when liquidation supervenedhad not yet taken transfer thereof, were at this timegoverned by sec. 14 of the Act. The Act was subsequently

repealed by the Alienation of Land Act 68 of 1981, which

substituted new legislation covering the same general

field and came into operation on 19 October 1982. It

was not argued in this case,however, that Act 68 of

1981 had any application. The relevant portions of

sec 14; as amended by sec 11 of Act 49 of 1975, read

as follows:

"14. (1) If land which has been sold under a contract, is sold by the trus-tee or liquidator of the insolvent es-tate of the registered owner of the land, or is sold in execution to meet one or more claims against that owner or his estate, the person who acquired under an agreement the right to claim trans-

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fer of that land from that owner or the estate of that owner who has died or is insolvent or, if such person is deceased or insolvent, his deceased or insolvent estate, shall, apart from any other claim which he or his deceased or insolvent estate may prove against the said owner or his deceased or insolvent estate, also be entitled to prove a claim against the said owner or his deceased or insolvent estate which shall be met from the proceeds of the land and which shall rank in preference directly after a claim which is secured by a mortgage bond over the land in question, for the portion of the purchase price which such person or his deceased or insolvent estate has paid under the agreement plus interest calculated at five per cent per annum on the said portion in respect of the period from the conclusion of the agreement to the date upon which the land is so sold by the trustee or liquidator or in execution.

(2) Subject to the provisions of any law or the common law under which

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6 certain juristic acts which an insolvent has entered into before the sequestration or liquidation of his estate, may be rescinded by a court of law, the trustee or liquidator of the estate of an insolvent who is the registered owner of land which has been sold under a contract, or the judgment creditor of a registered owner who has by virtue of a writ in execution against the immovable property of the registered owner attached land which has been sold under a contract, shall call upon the purchaser, or upon the intermediary or upon both, as the case may be, by written notice if the address of the purchaser or of the intermediary is known, or by two consecutive notices in a newspaper circulating in the district in which the address referred to in section 16 is situated and by notice in the Gazette, if such address is not known, to take transfer of the land, and if such purchaser or intermediary does not so take transfer of the land, it shall be sold by the trustee or liquidator or in execution, subject to the claim of the person referred to

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in subsection (1).

(3) When land sold under a contract is attached by virtue of a writ of execution against the immovable property of the registered owner or when land sold under a contract is registered in the name of any person in respect of whose estate a final order of sequestration or liquidation has been given, and that land is not encumbered by a mortgage bond

(4) When in the circumstances referred to in subsection (3) the land sold under a contract is encumbered by

a mortgage bond, the land shall, failing any other arrangement relating to the transfer thereof to the purchaser, be transferred, without prejudice to the rights of any purchaser who purchased the land from any intermediary, if any, by the deputy sheriff, messenger of the court, trustee or liquidator concerned, as the case may be, into the name of the person who has the right to claim

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fer of the land and who makes arrangements to the satisfaction, as the case may be, of the deputy sheriff or messenger of the court, as contemplated in the said subsection, or of the Master concerned, within thirty days after the purchaser or intermediary, or both, as the case may be, has or have been called upon in terms of subsection (2) to take transfer, for payment of the outstanding balance under the mortgage bond plus interest to the date of the registration of transfer and all such costs of sequestration and administration as relate to such land, including any endowment to be made in terms of any law to any person in respect of such land, and such other amounts as rank in preference prior to the claim secured by the mortgage bond, or of the outstanding balance under the agreement plus interest to the date of the registration of transfer, whichever of the two amounts may be the larger and all other costs in connection with transfer, as well as for the signing of all the documents required in connection with transfer:

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Provided that if the holder of a mortgage bond over the land has taken out a writ of execution in respect of the land, the person who takes transfer shall also pay the actual amount paid by the mortgagee or for which he is liable in respect of the attachment of the land, before he is entitled to transfer of the land.

- (5) If a person referred to in subsection (3) or (4) has, by virtue of the arrangements he was required to make under that subsection, paid more than the outstanding balance under the agreement plus interest to the date of the registration of transfer, he may recover the difference between the two said amounts from the person from whom he acquired the right to claim transfer of the land."

The general effect of these provisions and their impact on the position at common law were fully considered by this Court in the cases of *Glen Anil Finance (Pty) Ltd v Joint Liquidators, Glen Anil Development Corporation*

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Ltd (In Liquidation) 1981 (1) SA 171 (A), at pp 182 D - 184 E and *Gordon N O.v Standard Merchant Bank Limited* 1983 (3) SA 68 (A), at pp 82 A - 83 H, 90 E - 91 H, and what was said in those cases need not be repeated. Put briefly, the main innovations introduced by the Act (as compared with the common law), in a case where a company which has sold land under instalment contracts is placed under liquidation, are the following:

- (1) Whereas under the common law the liquidator had the exclusive power to decide whether to implement and enforce the contract vis-à-vis the purchaser or to terminate it — the purchaser having no say in the matter — under the Act this option is in effect given to the purchaser. In terms of the Act (sec 14(2)) the liquidator is obliged to give the purchaser notice to take transfer and then,

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depending on whether the land is encumbered by a mortgage bond or not, the purchaser has 30 days or 6 months, as the case may be, to decide whether to take transfer (against making the required financial arrangements) or not (sec 14(3) and 14(4)).

- (2) Whereas under the common law a purchaser who did not obtain transfer of the land sold to him merely had a concurrent claim against the liquidator for the repayment of instalments, in terms of the Act (see sec 14(1)) a purchaser who opts not to take transfer has a preferent claim for the repayment of such instalments, plus interest.

These innovations substantially improved the position of a purchaser under an instalment contract. As was stated by TRENGOVE JA in the Glen Anil case, supra at p 183 in fin,

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" [t]he principal purpose of the Legislature was obviously to protect the interests of a purchaser buying land under such a contract."

At the time of liquidation the principal asset of Rooderust was the township. Nevertheless the liquidator found its affairs to be (as he put it in a circular letter to instalment debtors) "highly complex and involved". Two of the problems confronting the liquidator were (a) uncertainty as to the legal validity of SMB's mortgage bond, and (b) uncertainty as to the obligations of a purchaser under an instalment contract who wished to take transfer of the land purchased by him and who, accordingly, was required by sec 14(4) to make arrangements to the satisfaction of the Maater "for payment of the outstanding balance under the mortgage bond". As to (a), the validity of the bond was being disputed on various grounds, including that it was a collusive dealing in terms of sec 31 of the Insolvency Act or a disposition without value in

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terms of sec 26 of the Insolvency Act. The bondholder, however, did not accept that its bond was invalid. As to (b), the uncertainty related to whether an individual purchaser under an instalment contract who wished to take transfer had to make arrangements for the payment of the whole outstanding balance under the bond (which at the date of liquidation amounted to R238 856) or of only a proportionate share thereof. And in this regard it is pertinent to note that

the bond itself contained a clause (clause 21) entitling the mortgagor from time to time to obtain releases of portions of the mortgaged property from the operation of the bond against payment of a release consideration of R1 200 per residential stand. The bondholder, SMB, took the view that any purchaser who wished to take transfer would have to make arrangements for the full amount owing under the bond; and that the release clause (clause 21) entitled

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Rooderust to obtain the release of erven only so long as it complied with the conditions of the loan, which it had not done. In this connection the bondholder indicated that, if necessary, it would seek to have the bond rectified to give effect to this term of the loan agreement.

To resolve the problem referred to under (b) above and with the authority of all known creditors other than SMB, the liquidator, in May 1979, instituted notice of motion proceedings claiming, inter alia, an order declaring that the amount for which individual purchasers who wished to take transfer would have to make arrangements, as regards "the outstanding balance under the mortgage bond", was R1 200 per residential erf. In the founding affidavit reference was made to the fact that the principal creditor of Rooderust was pressing

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for an interrogation of the persons concerned before the Master in order to determine whether there were grounds for setting aside the bond. The application was opposed by SMB, which raised the question of rectification. As at the date of the delivery of judgment in the Court a quo in the present proceedings this application was still pending. This application was precipitated by a letter dated 3 May 1979 written to the liquidator by Mr Attorney Lewis of the firm of Philip Sarembok and Lewis of Wellington, acting on behalf of one of the instalment contract purchasers, a Mr Werner Fehr. In this letter Mr Lewis expressed the firm opinion that the liquidator was obliged in terms of sec 14(2) to call upon purchasers by written notice to take transfer of their erven and that the maximum amount for which any individual purchaser would have to make arrangements in respect of the outstanding balance under SMB's bond

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was R1 200. He called upon the liquidator, inter alia, to give the appropriate notice to his client "forthwith" and threatened an application to court

if this were not done.

On 6 July 1979 the liquidator addressed a circular letter to all instalment contract purchasers referring to the vexed questions of the validity of the mortgage bond and the obligations of purchasers who wished in terms of sec 14(4) to take transfer of the erven purchased by them.

The letter reported on the action taken to resolve the latter problem, including the application to court launched in May 1979 and the issue of rectification raised by SMB. In the letter the liquidator further notified purchasers that the second meeting of creditors would be held during August 1979, that he would be giving purchasers notice in terms of sec 14(2)

/ and 17 and that at the second meeting of creditors he would take instructions on what action must be taken against the purchasers who do not exercise their rights in terms of the Act. The letter concludes:

"Purchasers will appreciate that extremely difficult legal problems and complications arise out of, inter alia, the question of validity of the Standard Merchant Bank bond, the doubt raised as to the correct wording of the bond and the interpretation to be placed on Section 14(4) of the above Act, which defines the purchasers obligations in respect of the bond if it is valid. Consequently, purchasers would be well advised to take advice from their own legal advisers as soon as they receive the Liquidator's notice in terms of Section 14(2) of the Act as to what steps each of them should take to protect his interests."

The first meeting of creditors of Rooderust (in liquidation) was held on 25 May 1979 and the second on 10 August 1979. During July the liquidator circulated his report to creditors and contributories. In

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this he reviewed the financial position of the company and discussed certain pre-liquidation transactions, including the passing of the SMB bond. He referred, inter alia, to the challenge to the validity of the bond and the problem as to the meaning and effect of sec 14(4) of the Act in regard to the financial obligations of instalment sale purchasers who wished to take transfer under sec 14. He expressed the view that he had "no option" but to give notice to such purchasers in terms of sec 14(2) and that in the event of a purchaser electing not to take transfer the courses open to him were (i) to enforce the contract against the purchaser under the common law or (ii) to sell the property without having cancelled the instalment sale or (iii) to cancel the instalment sale and thereafter sell the property.

The second meeting of creditors was duly held on 10 August 1979. At the meeting a resolution was

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passed authorising the liquidator, inter alia, to resolve in respect of each instalment contract purchaser who elected not to take transfer in terms of sec 14(2) —

"to enforce and complete such contract provided that if the Liquidator finds that the purchaser is unable to meet his obligations in terms thereof the Liquidator shall be entitled in his discretion to deal with that transaction and the land which forms the subject matter of that transaction in such manner as he may consider to be in the best interests of the majority in value of creditors."

Thereafter the liquidator gave notice in terms of sec

14(2) to all the instalment contract purchasers. De Raedt

received two identically worded notices (dated 17 August

1979) in respect of the two instalment sale contracts

entered into by him with Rooderust. The notices read:

"I write to you in my capacity as Liquidator of the above company, which was finally sequestrated on 18th April, 1979.

According to the records of the company, you have purchased the following pieces

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of land from the company in terms of an Instalment Sales Agreement: (then follow the numbers of the erven concerned).

The provisions of the Sale of Land on Instalments Act No 72 of 1971 apparently apply to this transaction, and I accordingly hereby call upon you in terms of Section 14(2) of the said Act to take transfer of the land described above. Your attention is specially drawn to Section 14 of that Act and it is recommended that you take legal advice thereon."

De Raedt did not respond to these notices.

The creditors' resolution also authorized the liquidator to hold an enquiry before the Master of the Supreme Court into the validity of the bond. Subsequently and after 17 August 1979 such an enquiry was in fact held.

As at the date of the second meeting of creditors only three claims had been proved against the company. They were —

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- (1) the claim by SMB based upon its first mortgage bond;
- (2) a claim for R1 023 646, 56 with interest proved by the Wellington Municipality in respect of moneys lent and advanced; and
- (3) an unsecured claim for R1 908,00 by one Brits.

This position also obtained on 17 August 1979. As at that date there were also pre-liquidation rates and taxes due to the Municipality of Wellington and/or the Divisional Council of Paarl for which no claims had been proved. If proved, these rates and taxes would constitute preferent claims ranking, in relation to the proceeds of the land, ahead of SMB's first mortgage bond (see sec 89 of the Insolvency Act 24 of 1936, read with secs 339 and 342 of the Companies Act 61 of 1973). These claimants had until 9 November 1979 to prove such claims and even

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thereafter they could still prove claims with the leave of the court or the Master, provided that final distribution had not taken place (see sec 44(1), read with sec 104, of the Insolvency Act and sec 366 of the Companies Act).

Thereafter disputes arose between the liquidator and SMB in regard to the liquidator's proposed course of action vis-à-vis instalment contract purchasers. This led, in March 1980, to an application to court (in the Cape Provincial Division) by the liquidator for an order declaratory of the liquidator's right, in terms of the resolution adopted by the creditors and de hors the provisions of sec 14, to give transfer to Fehr (who had also chosen not to take transfer in terms of sec 14) against payment by Fehr of the balance of the moneys owing by him under his contract. The legal issue raised was whether the liquidator could avail himself of the usual common law remedies to enforce an instalment contract

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against a purchaser who had chosen, in response to a notice given in terms of sec 14(2), not to take transfer. The application was opposed by SMB which had been cited as first respondent. Fehr, who was cited as second respondent, abided the judgment of the Court. The matter came before BROEKSMA J who granted the order as prayed (see *Gordon NO v Standard Merchant Bank Ltd and Another* 1980 (3) SA 495 (C)). SMB appealed against this decision to the Full Bench of the Cape Provincial Division, which upheld the appeal and ordered the dismissal of the application (see *Standard Merchant Bank Ltd v Gordon NO and Another* 1980 (4) SA 637 (C)). The Full Bench held that where a purchaser chose, in response to a notice under sec 14(2), not to take transfer the liquidator did not have the right to pursue common law remedies for the enforcement of the contract against the purchaser: the liquidator was obliged, in terms of sec 14(2), to sell the land, subject to the claim of the purchaser

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under sec 14(1). A further appeal to this Court confirmed the decision of the Full Bench (see *Gordon NO v Standard Merchant Bank Ltd* 1983 (3) SA 68 (A)).

On 31 October 1980 second respondent was appointed co-liquidator of Rooderust (in liquidation). Collectively I shall refer to first and second respondents as "the liquidators". And in April 1982 the liquidators commenced the legal proceedings against SMB earlier fore-shadowed, for an order declaring SMB's mortgage bond to be invalid. This action is still pending. Also during 1982 De Raedt was declared insolvent and appellant was appointed trustee to administer his estate.

Further disputes arose as to the validity of the notices sent by the liquidator to instalment contract purchasers in terms of sec. 14(2) and in August 1984 the liquidators instituted the present action in the Cape Provincial Division, citing appellant in his capacity

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25as trustee and claiming certain declaratory orders in respect of the instalment contracts entered into between Rooderust and De Raedt.

I shall not refer to the pleadings since they were superseded by a special case submitted by the parties in terms of Rule 33 of the Uniform Rules of Court. The foregoing summary of the background facts is gleaned from the special case and the documents annexed thereto. The questions of law in dispute which were submitted for adjudication by the Court were (I quote from the special case):

"1. Whether, in the light of:

- (a) The disputes and/or proposed or pending litigation concerning the validity of the mortgage bond and its terms relating to the release of erven for the purpose of transfer to individual purchasers: and/or (b) The fact that the liquidator was holding an inquiry to enable him to decide whether to contest the validity of the bond and

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therefore may well have instituted action challenging its validity; and/or

- (c) The fact that as at 17 August 1979 no claims had been proved in respect of such other amounts as might rank in preference prior to the claim secured by the mortgage bond, the period for proving claims not having expired at that date,

the liquidator could validly give notice in terms of Section 14(2) of Sale of Land on Instalments Act, Act No 72 of 1971.

- (2) Whether, in any event, the notices dated 17 August 1979 (annexures "G1" and "G2") were valid and complied with the requirements of Section 14(2) read with the provisions of Section 14(3) and 14(4) of the Act:

- (a) In the absence of any information therein enabling the purchaser to decide whether Section 14(3) or Section 14(4) applied;

- (b) If Section 14(4) applied, in the absence of detailed information therein in respect of the matters

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referred to in the sub-section so as to enable the purchaser to make the necessary arrangements to the satisfaction of the Mas-ter within the 30 day period provided for therein."

In regard to the first question, the liquidators contended that the liquidator could validly give notice in terms of sec. 14(2) of the Act, while the appellant contended that in the light of the facts referred to in 1(a), (b) or (c) above he could not. In regard to the second question, the liquidators contended that the notices were valid notices and complied with the requirements of sec 14(2) of the Act, whereas the appellant contended that in the absence of the information referred to in 2(a) or (b) above they did not. It was further agreed in the special case that if both these questions were answered in favour of the liquidators, then they were entitled to an order in terms of prayers (a),

- (b) and (c) of their particulars of claim;

/ but 28but that if either question was decided in appellant'sfavour, then the liquidators' claims should be dismissedwith costs. Prayers (a), (b) and (c) of the particularsof claim read as follows:

"(a) An order declaring that the notice to the insolvent, annexure 'A' , is a valid notice in terms of the provisions of section 14(2) of the Act;

- (b) An order declaring that the insolvent is a purchaser who, in respect of the said land did 'not so take transfer of the land' within the meaning of section 14(2) of the Act; (c) An order declaring that Plaintiffs are entitled and obliged to sell the said land in terms of the provisions of section 14(2) of the Act."

The matter came before AARON AJ who decided both questions in favour of the liquidators, made an order in terms of prayers (a), (b) and (c) and ordered that appellant pay the costs of the action. Subsequently, on 2 June 1986, AARON AJ granted leave to appeal to this

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Court and ordered that the costs of the application for leave to appeal be costs in the appeal. Appellant's attorneys proceeded with the usual steps necessary to bring the appeal before this Court. A record of appeal was prepared by the official recorders and transcribers, Sneller Opnames (Cape) (Pty) Ltd ("Sneller") and this was filed prior to the due date of 2 September 1986. This record was, however, incomplete. It contained the pleadings and judgment of the Court a quo, but not the special case and its annexures. Appellant's attorney discovered this only in January 1987 when it was brought to his attention by counsel who had been instructed to prepare heads of argument. Thereafter the missing portion of the record was prepared, filed and served

on the liquidators, but of course this was out of time. There is consequently before us an application for condonation of appellant's failure to file timeously the complete record of appeal.

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In his supporting affidavit to the petition appellant's attorney sets forth the foregoing facts and states that the record which he received from Sneller was certified by Sneller as being a true copy and that he relied upon this certificate and believed it to be a full record taken from the Court file when he forwarded it to his correspondents in Bloemfontein. He also states that the attorneys of record for the liquidators have indicated that the application for condonation will not be opposed.

At the hearing before us appellant's counsel moved the application for condonation. Counsel for respondents (the liquidators) indicated that while the application was not being opposed, he did not concede that the appeal had reasonable prospects of success. Since the grant or refusal of condonation is partly dependent upon the prospects of success, full argument on the merits of the appeal was heard and judgment was reserved.

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31 Before considering the merits and appellant's prospects of success, I wish to make some observations about the reasons advanced as to why an incomplete record was originally lodged with this Court. The explanation of appellant's attorney has already been recounted. It is, in my view, an unsatisfactory explanation. It reveals an apparent misconception as to the duty of an attorney in regard to an appeal record. As appears from the remarks of my Brother VILJOEN in the case of *Senator Versekerings-maatskappy Bpk v Lawrence* 1982 (3) SA 136 (A), at pp 144 G - 145 B, it is the duty of an attorney charged with prosecuting an appeal on behalf of a client to see that a proper record of appeal is placed before this Court and in order to discharge this duty (and incidentally to earn his perusal fee) he must peruse the record and satisfy himself that it is complete and in compliance with the Appellate Division rules as to form, etc. I infer

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that appellant's attorney did not do this. He merely relied on Sneller's certificate. This was not a proper discharge of his duty. Had he perused the record produced by Sneller in the required manner he would inevitably have realised that it was incomplete in a fundamental respect in that the most relevant documentation placed before the Court a quo, viz the special case, was missing. Appellant's counsel conceded that in the circumstances the perusal fee should be disallowed as between attorney and client and I shall make an appropriate order in this regard. I might just add that even the additional volume lodged out of time (which contained the special case and annexures) was not in proper form in that it lacked an index, an annoying and inconvenient defect. But I leave it at that.

I come now to the merits; and in considering them I shall commence with the first question posed in the special case, viz. whether the liquidator could validly give notice in terms of sec 14(2) of the Act at the time

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when he did, ie on 17 August 1979. In arguing that as at that date the liquidator had no power to give notice under sec 14(2), appellant's counsel relied mainly on the uncertainty as to the validity of the bond and as to the extent of the financial obligations of an instalment contract purchaser who wished to take transfer. He submitted that until these uncertainties had been removed the liquidator was not entitled to give notice under sec 14(2) and any purported notice given was premature.

Sec 14(2) - quoted above - provides that a liquidator of the estate of an insolvent who is the registered owner of land which has been sold under an instalment contract —

" shall call upon the purchaser

by written notice to take transfer of the land "

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The sub-section creates both a power and an obligation.

Counsel's argument that the power could not be exercised prior to the uncertainties referred to having been re-moved was based (a) on the opening words of sec 14(2) and alternatively (b) on a necessary implication in sec 14(2).

The opening words relied upon read:

"Subject to the provisions of any law or the common law under which certain juristic acts which an insolvent has entered into before the sequestration or liquidation of his estate, may be rescinded by a court of law "

Appellant's counsel submitted that, since at the time of the giving of the notice under sec 14(2) in the present case proceedings for the rescission of the bond, both under the common law and under secs 26 and 31 of the Insolvency Act, were contemplated, the opening words applied and they precluded the liquidator from giving such

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notice. This is a brand-new argument. It was not addressed to the Court a quo, nor did it figure in counsel's heads of argument.

In *S v Marwane* 1982 (3) SA 717 (A) this Court had to consider the meaning of the words "subject to the provisions of this Constitution" appearing in sec 93(1) of the Republic of Bophuthaswana Constitution Act 18 of 1977. MILLER JA, delivering the majority judgment, stated (at p 747 H - 748 A) —

"The words 'subject to the provisions of this Constitution' in s 93(1) of the Constitution clearly govern the provision that laws in operation immediately prior to the commencement of the Constitution are to continue in operation. The pur-pose of the phrase 'subject to' in such a context is to establish what is dominant and what subordinate or subservient; that to which a provision is 'subject', is dominant — in case of conflict it

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prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation. When the legislator wishes to convey that that which is now being en-

acted is not to prevail in circumstances where

it conflicts, or is inconsistent or incom- patible, with a specified other enactment, it very frequently, if not almost invariably, qualifies such enactment by the method of declaring it to be 'subject to' the other specified one. As MEGARRY J observed in *C and J Clark v Inland Revenue Commissioners*

(1973) 2 All ER 513 at 520:

'In my judgment, the phrase "subject to" is a simple provision which merely subjects the provisions of the subject subsections to the provi-sions of the master subsections. When there is no clash, the phrase does nothing; if there is collision, the phrase shows what is to prevail,"

Clearly in the present context the power and duty of the liquidator to give notice under sec 14(2) is made subject to the "provisions of any law or the common law" referred

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to in the opening words quoted above. For convenience of reference I shall refer to such laws as "rescission laws". Thus the rescission laws are dominant and the sub-stantive provisions of sec. 14(2) relating to the giving of notice are subordinate. The rescission laws referred to are those which give rise to the so-called "impeachable transactions" (see *Mars The Law of Insolvency in South Africa* 7th ed, chap 12) under the common law and various provi-sions of the Insolvency

Act, including secs. 26 (dispositions without value) and 31 (collusive dealings). Where a liquidator has reason to believe that a pre-liquidation transaction entered into by the company may be impeachable it is his duty to make proper enquiries into the transaction; and if then satisfied that it is impeachable it is his duty, provided that the creditors approve of his action, to institute proceedings to set aside the transaction (see *Turkstra v Goldberg* NO 1946 TPD 535,

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at pp 539-40; *Swadif (Pty) Ltd v Dyke* NO 1978 (1) SA 928 (A), at p 940 E - F). Where an instalment sale contract entered into by the company prior to liquidation is impeachable or thought to be impeachable, then clearly the liquidator's duty in terms of sec 14(3) to give notice to the purchaser is in conflict with his duty to take the above-described action in terms of the appropriate rescission law. This conflict brings into operation the opening words of sec 14(2), which decree that the rescission law and the duties imposed thereby are to prevail. That, in my view, represents the meaning and intended scope of the opening words of sec. 14(2). They have application only where an instalment contract is the transaction which may be rescinded. They do not apply in the case of other types of transaction entered into by the company, such as the passing of a mortgage bond, where the duty of the liquidator to investigate

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and if necessary take steps to rescind the transaction does not conflict with his duty to give notice under sec 14(2) to instalment contract purchasers. In my opinion, therefore, the argument founded upon these opening words has no prospects of success.

I turn now to the alternative argument based upon implication. Appellant's counsel, recognising that there was no express provision in sec 14(2) which precluded the liquidator from giving notice before uncertainties concerning the mortgage bond had been eliminated, sought to rely upon an implied provision to that effect. Over the years our courts have consistently adopted the view that words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands (see eg *Germiston Municipality v Rand Cold Storage Co Ltd* 1913 TPD 530, at p 539;

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Taj Properties (Pty) Ltd v Bobat 1952 (1) SA 723 (N), at 729 E-H; *S v Van Rensburg* 1967 (2) SA 291 (C), at 294 C-D; *The Firs Investment Ltd v Johannesburg City Council* 1967

(3) SA 549 (W), at p 557 B-C; *D E P Investments (Pty) Ltd*

v City Council, Pietermaritzburg 1975 (2) SA 261 (N), at

265 G-H; *Hamman en 'n Ander v Algemene Komitee Johannesburgse*

Effektebeurs, en 'n Ander 1984 (2) SA 383 (W), at p 391 H).

In the Firs Investments case, supra, TROLLIP J (as he then was) stated (at p 557 E-G):

"Moreover, a strong factor militating against the implication of any such limitation is the difficulty of formulating it. In contract a term will not be implied where considerable uncertainty exists about its nature and scope,

for it must be precise and obvious

I think that the same must apply to implying a term in a statute, for the process is the same "

In support of his argument that words must be

implied in sec 14(2) which limit the power of the li-

quidator to give notice to instalment contract pur-

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chasers, appellant's counsel stressed the difficult position in which such a purchaser finds himself where he is given notice under sec 14(2) and the uncertainties concerning a mortgage bond over the land, such as those

in the present case, remain unresolved. Because of the uncertainty concerning the validity of the bond -

so the argument proceeded - the purchaser does not know whether sec 14(3) or sec 14(4) applies. This affects

the time within which he must choose whether to take

transfer and make the required financial arrangements

and it also affects the nature and scope of the financial

arrangements he must make. Furthermore the unresolved

uncertainty as to whether under sec 14(4) the purchaser

must make arrangements for payment of the entire outstand-

ing balance under the bond or only a proportionate share

thereof further compounds the difficulties confronting

the purchaser who has to decide whether to take transfer :

or not.

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I do not think that these uncertainties lead

to the conclusion that it is necessary to imply a limitation upon the power of the liquidator to give notice under sec 14(2) in the sense that without such an implication effect cannot be given to sec 14(2) as it stands. It is true that as at 17 August 1979, when De Raedt and other purchasers were given notice under sec 14(2) there was sufficient uncertainty as to the validity of the bond for the liquidator to intend to initiate an enquiry into whether or not it was an impeachable transaction; and the purchasers had been informed of this. Nevertheless as at that date there was a bond registered over the land. Unless and until the bond was set aside as an impeachable transaction, the land was in fact "encumbered by a mortgage bond" within the meaning of sec 14(4) and purchasers to whom notice was given under sec 14(2) would have to react

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within the parameters of sec 14(4). Moreover, as was rightly emphasized by respondents' counsel, a purchaser wishing to take transfer is only required by sec 14(4) to "make arrangements" to the satisfaction of the Master for the payment, inter alia, of the outstanding balance under the mortgage bond. It was stated by the Judge a quo that in a case of uncertainty as to the validity of the bond the Master would in practice ask for security to be given for such amount as is eventually determined to be owing. Whether this is what does happen in practice is not, clear, but it certainly appears to be a practical and common sense way around the impasse.

The uncertainty as to the amount for which a purchaser wishing to take transfer should make provision in respect of the outstanding balance under the mortgage bond, ie whether for the full amount of the bond or a proportionate share, is a problem of statutory interpretation

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which could arise in many instances where land subject to a bond comprises erven which have been sold to different purchasers under instalment contracts. If in a particular case such a purchaser wished to take transfer he would have to make financial arrangements to the satisfaction of the Master. A dispute as to the correct quantum might arise and this might have to be resolved by the Court. And if this could not be done within acceptable time limits, then the purchaser might, as the Court a quo put it, have to make arrangements to cater for "the most adverse eventuality". But I can see no warrant for saying that sec 14(2) cannot be given effect to without the suggested implication.

Moreover there are factors which strongly militate against such an implication. Firstly, there is real difficulty in formulating the terms of the implication. Appellant's counsel was invited to do so and

/ eventually 45 eventually he suggested that the following words be implied and inserted after the word "shall" (in the phrase "shall call upon the purchaser) in sec 14(2) —

"..... once the trustee or liquidator

or judgment creditor, as the case maybe, has established whether the property is validly encumbered by a mortgage bond and which of subsections

(3) and (4) applies "

It is immediately to be noted that this formulation does not appear to cater for uncertainty about the amount for which the purchaser has to make arrangements in regard to the outstanding balance under the mortgage bond.

Furthermore, the word "established" in this formulation raises fresh uncertainty. At what point can the liquidator, for example, be said to have established a valid encumbrance? If he is satisfied as to the validity of the bond, is that sufficient? Suppose that he is so satisfied, but a creditor is not and

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the creditor threatens legal proceedings in terms of sec 32(1) of the Insolvency Act? And suppose a dispute as to the validity of the bond erupts after the notice has been given but before the time given to the purchaser to make his choice has elapsed? All in all it seems to me that the proposed implication creates more problems than it solves.

Secondly, it is obvious that where there is a dispute as to the validity of the mortgage bond, the suggested implication would hold up the giving of notice under sec. 14(2) for a substantial period of time, possibly even for years. Not only would this delay the realization of the insolvent estate — not a desirable state of affairs (cf the remarks of FRIEDMAN J in *Standard Merchant Bank Ltd v Gordon* NO 1980 (4) SA 637 (C), at p 647 F) — but it would also prevent a purchaser who wished to take transfer from exercising his right of

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choice pending "the establishment" of the validity of the bond. I cannot think that this could have been the intention of the Legislature.

Thirdly, as pointed out by the Judge a quo ,

sec 14 also applies to judgment creditors. This is

recognized by appellant's counsel in their formulation

of the suggested implication. And as the Judge a quo

rightly remarks —

"Unlike a liquidator, a judgment creditor will generally be in no better position than the purchaser of the erf as regards knowledge of the validity or terms of any mortgage bond that may be registered over the land. He will not be in the same position as a liquidator to institute proceedings to determine disputed questions. What is perhaps even more important is that it is unlikely that the legislature would have intended that although the property has already been attached, the sale in execution must be delayed until issues such as, e.g. the validity and terms of the mortgage bond, have been determined."

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Appellant's counsel submitted that it was implicit in sec 14(2) that the land in question must be capable of being transferred when the purchaser is called upon to take transfer; and that where, as in the present case, the very validity of the bond, as well as the amount which must be paid is in dispute and is the subject of pending litigation (to which the liquidator is a party), transfer cannot be given. This last conclusion is, to my mind, a non sequitur. Disputes about the bond would not prevent the liquidator from giving transfer to the purchaser. At most they might create uncertainty as to what financial arrangements a purchaser who wished to take transfer would have to make; but this uncertainty, as I have shown, would not create an insuperable obstacle.

Next it was argued on appellant's behalf that the effect of sec 14(2), (3) and (4) was to give the

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purchaser a "statutory right of election" whether or not to take transfer and that in order to exercise that right it must be ascertainable by the purchaser whether the land is encumbered by a bond or not and, if so, what the outstanding balance under the bond is. Consequently, so the argument ran, if these facts are not ascertainable the purchaser is not in a position to make a "meaningful election" and notice under sec 14(2) is not competent. This argument seems to merely repeat, in a different guise, the arguments already raised and considered. In so far as the "non-ascertainable" facts do really affect the purchaser's choice and introduce uncertainty, they are imponderables which the purchaser must take into account when deciding whether to take transfer or not.

With reference to para 1(c) or the questions of law formulated in the special case, it was argued

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by appellant's counsel that since at the time when the notice under sec 14(2) was given claims in respect of amounts which (if proved) would "rank in preference prior to the claim secured by the mortgage bond" had not been proved (this had reference to the unpaid rates and taxes due to the two local authorities) and since until proved the amounts of the claims could not be ascertained, the notice given was premature. This argument also rests upon an alleged implication. There is, in my view, no substance in it. Ascertainment of the quantum of these claims would not necessarily depend on proof and if a purchaser decided to take transfer it would be for the Master to decide what financial arrangement in respect of such claims should be made. Since claims may be proved, with the necessary leave, at any time before final distribution it seems unlikely that the Legislature would have intended realization

of 51 of the land to be held up in this way. There is, in my view, no basis for the suggested implication.

I come now to the second question raised in the special case. Appellant's argument here is really a variation upon the same theme. It stresses again the uncertainties as to whether sec 14(3) or sec 14(4) applied, the absence of detailed information about the amounts for which arrangements had to be made by a purchaser who wished to take transfer; and on this basis it contends, not that the liquidator had no power to issue the notices under sec 14(2), but that the notices themselves were invalid because they did not contain this information. This argument, too, rests upon the foundation of an implied provision. Most of the objections to an implied provision as to the liquidator's powers under sec 14(2), detailed above, are equally applicable here.

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In support of the submission that in order to enable the purchaser to make a proper election he must be furnished with all the relevant information, appellant's counsel referred to *Feinstein v Niggli and Another* 1981 (2) SA 684(A), at p 698 E - 699 D and *Thomas v Henry and Another* 1985 (3) SA 889 (A), at p 896 A-G. These cases dealt with election in the contractual sphere. In *Feinstein's* case the question was whether in the case of a contract vitiated by misrepresentation the representee had by his conduct elected to affirm the contract; and the Court expressed the view that election generally involves a waiver: one right is waived by choosing to exercise another right which is inconsistent with the former. The issue in *Thomas v Henry and Another* was whether a party to a contract who had cancelled it on the ground of misrepresentation should be held to have waived or abandoned his can-

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cellation by reason of his subsequent conduct. In *Feinstein's* case it was emphasized that the party alleging affirmation of the contract had to prove that the representee made his election with full knowledge of all relevant

facts.

I doubt whether it is correct to equate the

choice or option granted to a purchaser under sec 14(2) with an election in the sense referred to in Feinstein's case (cf the English case of *Young v Bristol Aeroplane Company Limited* 1946 AC 163, at pp 172-3, 176-7, 178-9, 189-90), but in any event I fail to see the relevance of the doctrine of election in the present case. The issue is not whether the purchaser is bound by his "election" not to take transfer, but whether the notice given him complied with the requirements of sec 14(2). And I fail to see the necessity for implying in sec 14(2) the requirement that the notice must contain all the infor-

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mation necessary to enable a purchaser to make an informed choice. After all, a person in his position could be expected to make some enquiries of his own. And it is to be noted that the notice draws attention to the Act and recommends that he take legal advice thereon. I accordingly do not think that the argument as to an implied provision or that the notice given was invalid has any prospect of success.

For these reasons I conclude that, having regard to the seriousness of appellant's failure to comply with the Rules of this Court and the lack of prospects of success, condonation should not be granted.

In regard to costs, the Court a quo made the costs of the application for leave to appeal dependent on the outcome of the appeal. The refusal of the application for condonation means that the appeal proper is

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55not adjudicated upon, but clearly in terms of the order of the Court a quo appellant must pay these costs. In order to obviate uncertainty I will make an order declaratory of the position.

It is ordered:

- (1) That the application for condonation of appellant's failure to lodge timeously the complete record of appeal be refused with costs, such costs to include the respondents' costs in relation to the appeal and also to include costs of two counsel.
- (2) That in terms of the order made by the Court a quo appellant must pay the costs of the application for leave to appeal.
- (3) That the costs of the perusal of the original (incomplete) record lodged with this Court be disallowed as between appellant and his attorney.

M M CORBETT

VAN HEERDEN JA) GROSSKOPF JA) NICHOLAS AJA) CONCUR STEYN AJA)

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Prepared on 13 October 2026 · Esheria