

SOUTH AFRICA / JUDGMENT

**Sommer v Wilding (258/82) [1984]
ZASCA 53; [1984] 4 ALL SA 356 (AD)
; 1984 (3) SA 647 (A) (22 May 1984)
[1984] ZASCA 53**

COURT

Supreme Court of Appeal

BEFORE

Rabie, Jansen, Trengove, Viljoen, Hefer

CASE / FILE NUMBER

258/82

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(258/82) J vd M

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

BARRY GEORGE SOMMER APPELLANT

and

JOHN WILDING RESPONDENT

CORAM: RABIE, CJ, JANSEN, TRENGOVE, VILJOEN, JJA et HEFER, AJA

HEARD: 5 MARCH 1984 DELIVERED: 22 May 1984

JUDGMENT

VILJOEN, JA

In /

2.

In an action instituted by the appellant as plaintiff against the respondent as defendant in the Durban and Coast Local Division the respondent was absolved from the instance, with costs. Against this order the appellant now appeals. In the action the appellant claimed an amount of damages alleged to have been suffered by him as a result of the wrongful repudiation (which he accepted) by the respondent of an option granted by the latter to the former to purchase fifty per cent of the issued share capital in a Johannesburg based company Trumatic (Proprietary) Limited (hereinafter referred to as Trumatic).

3.

In the Trial the appellant gave evidence and two ex-perts, one on each side, were called to give evidence on the value of the shares at the time of the repudiation of the option, the case of the appellant being that his damages amounted to the difference between the price stipulated for in the option and the value of the shares at the date of the repudiation. The respondent did not give evidence. The trial Court held, on the particular facts of this case, that it was necessary for the appellant to prove that he probably would have exercised the option, that he failed to discharge this onus and that he could accordingly not succeed in his action.

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The evidence of the appellant, who lives in Natal, may be summarised as follows: During 1979 he had a discussion with one John Robertson, director and shareholder of a company Sutton Engineering Products (Pty) Ltd, trading under the name of Trumatic Natal. He learned that Trumatic Natal was the sole distributor of a range of products which were assembled and marketed by Trumatic. This product range embraced vibration and compaction equipment, trowels, grinders, and other equipment used in the building industry. As a result of this discussion he met the respondent in Johannesburg in August 1979. The

appellant, /

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appellant, who was at the time contemplating joining Robertson in his business, told the respondent that Trumatic Natal was considering extending its activities to embrace the sale of products assembled by Trumatic throughout South Africa and possibly internationally. The respondent was interested because, as he explained to the appellant, although he had of necessity to attend to the marketing and sales side of his business he did not really enjoy that particular branch of Trumatic's activities and would prefer to concentrate on the assembly side of the products and on the development and manufacture of an engine to be called the Trumatic engine./

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engine. He undertook to consider the proposal and

said he would communicate with the appellant the following week when he would be in Durban.

They duly met in Durban the next week when the respondent told him that he was not interested in giving Trumatic Natal the right to distribute the products of Trumatic throughout South Africa as he would thereby be putting the entire sales operation of his business in their hands. The respondent told him that he felt it was prudent to give Trumatic Natal the distribution rights in the Cape where sales were not good and where there was some scope for promoting the

sale /

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sale of Trumatic products. The idea of promoting international sales, the respondent told him, appealed to him., It was eventually agreed that, for the purposes of distribution of Trumatic's products, a new company would be floated in which Trumatic would hold 50% of the shares and the appellant the other 50%. Together they instructed an attorney, one Wartski from Durban, to draw up the agreement. They further discussed overseas markets, the pros and cons of exhibiting the products on trade exhibitions and the best way to penetrate the overseas market. After the discussions the appellant approached the South African

and /

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and Foreign Trade Organisation (SAFTO) for information about ways and means to enter the overseas market. He was advised to join SAFTO as a member. He did so in the name of Trumatic Sales. All correspondence by SAFTO was to be addressed to him but, as a matter of courtesy, he arranged for copies to be sent to Trumatic Johannesburg. He also made enquiries about trade fairs to be held overseas and reported to the respondent the results of his enquiries. Certain preliminary arrangements were made by the two of them to travel overseas' to attend a trade fair. This was all done in accordance with the spirit of the proposed agreement, he said.

In /.

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In August 1979 he took the draft distribution agreement which Wartski had drafted with him to Johannesburg and had another discussion with the respondent. At this meeting the respondent expressed some concern about the working margin the new company would enjoy, ie, the margin between the price Trumatic would charge the new company for the products and the price at which the new company would be able to sell the products on the open market. The respondent expressed the view that possibly the only way to overcome this problem was to do away with the middle man and he suggested that the appellant should take shares in

Trumatic./

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Trumatic. The appellant readily accepted this suggestion because he saw in it quite a few benefits for himself. In furtherance of this proposition, during dinner that night, they discussed many things. It was contemplated that the appellant would join the company in a full-time capacity and take charge of the sales promotion side of Trumatic. They discussed ia the profitability of Trumatic, the percentage shares he would take up and at what price. They also discussed such matters as the salary to be paid to each and other benefits each' would enjoy including the use of a company car. It was agreed that the appellant would be a full partner

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in every respect and the respondent offered him 50% of the shares of Trumatic at R200 000. They discussed directorships. He would become a director, they agreed, but the desirability of bringing in other directors to strengthen the management of the business was also mooted and discussed in considerable detail. It was eventually agreed between them that when back in Durban the appellant would settle the wording in which an option for the purchase of 50% of the shares was to be couched and to remit it to the respondent by telex. It was further agreed that, in the meantime, the respondent would cause the necessary resolution for the sale of the shares /

12.

shares to be passed at a shareholders' meeting and that he would return the option, duly completed,, to the appellant together with the latest financial statement of Trumatic.

On 23 August 1979 the respondent received the following telex from the appellant:-

"Minutes of a meeting of the shareholder of Trumatic (Pty) Ltd. Held at C/T 4th Street and 4th Avenue, Booysens Reserve, Johannesburg on the 23rd August, 1979.

RESOLVED

That the shareholder grant to Barry George Sommer or his nominee an option to purchase 50 percent of the issued share capital and the shareholder's claims against the company on loan account for the sum of R200 000, which option shall remain open for acceptance until 28th September, 1980.

CONFIRMED "

13.

The option, duly confirmed and signed by the respondent, was, as drafted, subject to one amendment, returned to the appellant. The amendment was the substitution of an amount of R300 000 for R200

000. Upon enquiry by the appellant why the respondent increased the amount of R200 000 to R300 000 the respondent replied that the figure of R200 000 had merely been a negotiable figure. The option, as amended, was accepted by the appellant.

The appellant testified that he firmly intended to exercise the option as soon as possible. The only reason why he stipulated for a year's option

was /

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was because he had a service agreement with the company by whom he was then employed. This agreement only expired on 30 June 1980. Before leaving that company he wanted to have the transfer of his interests to Trumatic all "tidy". He did not have a particular date in mind when he was going to exercise the option, but it certainly was going to be in that current year (1979), he said.

On 6 September 1979 the appellant wrote to the respondent that it was his intention to exercise the option before its expiry date in the name of a nominee and he also requested the respondent to agree to an extension of the option

to /

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to embrace 80 per cent of the shareholding in Trumatic The letter reads as follows:-

"Dear John,

I would like to refer again to the option you have granted me or my nominee to purchase 50 percent of the issued share capital of Trumatic (Pty) Limited, and the shareholder's claim. It is my intention to exercise the option before its expiry date, in the name of a nominee. I was thinking of floating a company to be known as Trumatic Holdings (Pty) Limited as the nominee, but would obviously require your consent to the use of that name. Would you be so kind as to advise me if the consent would be forthcoming.

I have been, without success, endeavouring to contact you to discuss further, the extension of the option to embrace 80 percent of the shareholding and loan account. Apparently your accountant considers the figure too low,

but /

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but the sum of R480 000,00 is in accordance with my present option of R300 000,00 for 50 percent. I look forward to an amicable discussion with yourself and or your accountant, when convenient to you, on the question of the further 30 percent, and wonder if you would be so kind as to deal with this aspect when replying.

It is with sincerity that I ask you not to view our association as a possible impediment to your own progress or as a desire on our part to interfere in the day to day running of the business. There is no doubt in my mind that my associates and myself will be able to make a very positive contribution to the growth and strength of the company without trying to change what has proved to be a formula for success.

As soon as I hear from Charles Schnaid regarding the information we requested from Ireland, I will contact you and arrange a meeting to discuss our strategy."

17.

The reference to Ireland related to investigations made by the appellant to establish a branch business overseas. On 11 September 1979 the respondent replied as follows:-

"Dear Barry,

I have had long discussions with my auditor who also acts as my financial advisor. He advises me against the selling of Trumatic shares for a mere sum of R300 000,00 and I feel that the figure of R480 000,00 for 80% is far too low a figure. With me relinquishing all the reigns of Trumatic. For as you must realize that a mere 20% of any private company is basically not worth the paper it is written on.

Therefore I feel that at this stage further negotiations on this matter seem somewhat pointless.

However /

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However I must hasten to add that bearing in mind that I still owe the company a somewhat large amount because of the Income Tax position I found myself in and which I discussed with yourself.

At the same time the ground you have laid, I will make sure is not wasted.

Assuring you of my close friendship at all times. Best regards."

This letter elicited a lengthy response dated 21 September 1979 from the appellant, as follows:-

Thank you for your letter of the 11th September 1979. If, by your second paragraph, you mean negotiations relating to a possible extension of the option from 50% to 80% are somewhat pointless, I am inclined to agree.

However, /

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However, I must make it clear once again that the option relating to the 50% is a concluded deal at R300 000,00 and will be exercised in due course by me or my nominee.

I am surprised at your reference to a 'mere R300 000,00'. You will no doubt recollect that the first amount asked by yourself was R200 000,00 which, in the written option, you increased to R300 000,00, and when questioned about the difference claimed that the figure of R200 000,00 had been negotiable.

You may have forgotten the circumstances surrounding your granting of the option, which I do not consider it necessary now to detail the sequence of events leading up to the grant, but I feel I must emphasise again that not only was it you yourself who set the purchase price of R300 000,00, but it was you who suggested that I buy into Trumatic (Pty) Limited in the first place.

Let me please remind you further that not only is the option in writing, but also when you telephoned /..

19.

telephoned me at the Towers Hotel, and told me your adviser told you not to sell the other 30%, you quite clearly affirmed, (though it was not necessary to do so) the 50% deal at R300 000,00 because (as you said), of the much needed management expertise I would introduce into Trumatic. Of course as the deal had already been concluded, this did not really carry the matter any further. The conversation ended by my asking you to please keep me informed of developments relating to the exhibition, which you agreed to do.

Your remark about the ground I have laid prompts me to remind you of the following, which I have no intention of seeing wasted. Firstly, all the dealings with Howarth Schnaid, Horwitz & Partners regarding the, formation of a company overseas, and the questions relating to taxation and the employment of our staff in Ireland. Secondly, the enquiries and arrangements I made in regard to the Interbuild Trade Fair in the United Kingdom, and our plan that you and I should travel together to attend the exhibition. Thirdly, the lengthy discussions /

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cussions I have had with the South African Foreign Trade Organisation to learn as much as possible about incentives to exporters and potential markets, etc. Fourthly, the time, effort and expense I have already incurred in Trumatic matters, including the distribution agreement drawn up by Wartski Greenberg.

From what I have already said, you must gather that nothing your auditor now advises you can alter the position. It appears to me that the real difficulty lies in the fact that he has, presumably, told you that you will be required to pay back the loan account. Incidentally, the only discussion you have had with me on the Income Tax position was at dinner at the Towers Hotel where you said that as we were going into business together, I would find out about it anyhow, and proceeded to explain that the company was caught for back taxes and about ± R250 000,00 was paid by the company. You mentioned further that as a result of this, the development of the Trumatic engine was delayed. The taxation position is reflected on page 11 of the

Balance /

21.

Balance Sheet you sent me in the course of the deal. I feel I must say that as you or your companies borrowed a large sum of money, (possibly interest free) as at February 1977, amounting to R372 587,00, you can hardly object to Trumatic being repaid. I would be prepared to consider an extension of time within which you pay back any amount in excess of R300 000,00 depending of course on what that sum now is.

I would like to conclude by saying that I too am most anxious to continue a close friendship, even more so as we are to be associated in Trumatic's business, for the good of the company, as well as our own."

The reaction of the respondent was to "cancel the option" by letter dated 1 October 1979:-

I acknowledge receipt of your letter dated the 21st September 1979, and I will hereby answer /

22.

answer your letter paragraph by paragraph, so that you do not misunderstand my cancelling, of the option to purchase 50% (fifty percent) of Trumatic (Pty) Ltd.

Although my reading of your letter of the

21st instant tells me that you did get the

message of the cancellation of any further negotiations.

My letter of the 11th September was as stated pointless to negotiate further, and also meant to cancel the option to purchase any percentage of Trumatic (Pty) Ltd. Although the option was given the option has forthwith been withdrawn.

I do not remember saying this or that, as what I recall is that you were doing all the talking and I consider this all hearsay.

The ground you have laid has simply caused me a great deal of trouble, as no one authorised you /

23.

you to see Howarth, Schnaid, Horwitz & Partners. I have gone along simply to keep you from embarrassment. This also applies to you where SAFTO is concerned. Nobody authorised you to apply to SAFTO on behalf of Trumatic and certainly no authorisation was given to you to charge the account to Trumatic. After you applied for membership on Trumatics behalf SAFTO advised me per telephone and asked for Mr Somer who was employed by Trumatic, switchboard will bear this out. This type of presumption I do not need let alone the management potential, hereby my cancelling the option to purchase.

As explained to you when I was last in Durban I have been exporting for many years and have never found the need to consult SAFTO. This is because all the ground work has been done without your management potential. All this was not necessary as no authorisation was given, hence you proceeded blindly and I cannot be blamed for this.

Regarding the distribution agreement you know

as /

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as well as I that this document does not exist as it was cancelled before it was written, and if the document is written I certainly have not seen it. At the same time it was your instructions that your lawyer do the writing up of this nonexistent nonentity. As far as I am concerned too much has been presumed on your behalf.

My auditor had nothing whatsoever to do with my cancelling the option to purchase fifty per cent of Trumatic (Pty) Ltd. Your own actions prompted the cancellation of the option to purchase. The two Market Indicators are not needed nor required and are hereby returned.

To conclude my answers to your letter I feel that this unhappy situation cannot possibly end in a working relationship."

What the respondent resented and caused him to retract the option was, it appears from his letter /

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letter, what he regarded as presumptuous meddling by the appellant in the affairs of the company. He pleaded

in this vein but he never gave evidence to substantiate the allegations made in his plea. The learned trial Judge, held, on the evidence of the appellant, that there was no justification for the cancellation, of the option by the respondent. The justification of the repudiation is not in issue in this appeal and I need say nothing more about it.

On the issue as to whether it was necessary

for the appellant to prove that he would probably have exercised the option, the learned Judge said:-

"In my view, unless it can be said that it is probable that the plaintiff would have exercised /

26 exercised the option during its currency,

then it cannot be said that the plaintiff

has suffered any damages by reason of its repudiation, for indeed, having regard to the facts of the present case, if the plaintiff would not have exercised the option, it is difficult to see what loss he could be said to have suffered. Certainly, any claim for damages based upon a difference between the market value of the shares and the option price, (at whatever date one might care to take for that exercise,) must necessarily depend upon the assumption that at some stage or another during the option period, the plaintiff would have converted his option into an agreement of sale and become, not the option holder, but the purchaser of the shares."

To resolve this issue the learned Judge analysed the evidence of the appellant and the two experts. He described the appellant as an extremely

good /

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good and honest witness and a man who appeared to him to be a person of reasonable business acumen, including reasonable business caution. The appellant made it clear at various stages throughout his evidence, said the trial Judge, that whether or not he ultimately exercised the option would depend, inter alia, upon the advice he would take and receive from his accountant or from his lawyer. A consideration of the evidence of the two experts led the learned Judge to conclude that it was clear that while on the one hand an accountant would have advised him that the value of the shares he intended buying was greater than the option price, such

accountant /

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accountant would no doubt have sounded a note of warning to the effect that Trumatic was showing something of a "down turn" in its profitability. The learned Judge further considered the appellant's financial circumstances the probable friction and lack of co-operation between him and the respondent, the unlikelihood of the appellant and the respondent coming to terms regarding matters such as a service contract between the appellant and Trumatic and the dividend policy to be pursued by

the latter, and concluded as follows:-

"To sum up thus far, one has the situation that the plaintiff during the option period would, on the positive side, have been

required /

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required to make a decision whether to invest R300 000,00 in shares which he believed, or would have been advised, had a market value of between R367 000,00 and R380 000,00. On the other hand he would have been faced with having to make that decision in the absence of a service contract, in the absence of certainty regarding dividend policy - indeed, in the absence of any certainty that he would receive any monthly or annual income, at least in the near future, on his investment. He would be 'locked in' with a person who had already displayed some antagonism towards him. He would be faced with a situation where the company had shown something of a 'down turn', the exact extent of which would not have been readily or easily determinable during the option period. I doubt very much whether, in these circumstances, the plaintiff's accountant and his legal advisers, whoever they might have been, would have advised the plaintiff to invest all his assets and more in such a venture. I have little doubt but that his advisers would have

suggested /

30.suggested his using his means to provide himself with a much more secure and definite and less complicated source of livelihood. Accepting, as I do, the business acumen of the plaintiff, the fact that he is not, to my mind, a chancer, I have little doubt but that the plaintiff would, as he himself said he would, have followed this advice. Put differently, I am far from persuaded, on a balance of probability, that the plaintiff would ever have exercised the option. On the contrary, and although it is unnecessary for me to go this far, I consider it extremely unlikely that he would have done so.

It follows that I have not been persuaded that the plaintiff has suffered any damages in this case since he could, and would, to my mind, only have suffered damages, for the reasons I have already given, if it could be said that he would have exercised the option."

The failure of the parties to agree

on / 31.

on certain vital terms of the contemplated composite agreement between them was, as appears from the evidence and also the judgment of the learned Judge, canvassed in the Court a quo in the context as to whether the appellant was, in view of so many outstanding details of the transaction not having been agreed upon, likely to have exercised the option. A few days before the appeal was due to be heard counsel were requested to file further heads of argument on the question as to whether, regard being had to the matters upon which agreement still had to be reached, the option would, upon the exercise thereof, have become a legally enforceable contract /

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contract as envisaged by the parties. Counsel duly complied with this request and the matter was argued in this Court. However, due to the failure of the respondent to raise this matter as a substantive legal defence in the Court a quo it was deemed desirable to consider the appeal on the basis on which the matter was contested in and dealt with by the Court a quo. The first inquiry therefore is whether the learned Judge was correct in holding that there was an onus on the appellant in view of the nature of the damages claimed to prove that he probably would have exercised the option.

Attacking the decision of the learned

trial /

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trial Judge that the appellant had to prove that he would probably have exercised the option, counsel for the appellant, contending that the appellant need not have done so, relied on the following dictum in *Boyd v Nel* 1922 AD 414 at 421/2:-

"But what if during the period of the option the defendant breaks the agreement by dis-abling himself from fulfilling it or ex-pressly repudiates it? Can he then be heard to say: non constat that you would have bought even if I had not done what is complained of, and therefore you have no action? In my opinion he cannot (C.4.10.5). According to the terms of the agreement the plaintiff has the full period for considera-tion whether he should buy or no. He is entitled to demand that the defendant should abide by the agreement, and as that was not done an action for damages will lie. (cf. Voet

18.1.2; /

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18.1.2; Carpz. Def. For. Pt. 2 Const. 32 def. 8; Van Zutphen Ned. Prak. sub voce Voorkoop No. 5)"

That the grantee not only in the case of an option, but also of other related pacts, is entitled to damages (*id quod interest*) in the event of a breach of the pact, is fully borne out by the authorities referred to by De Villiers JA, Voet, Com ad Pand 18.1.2, dealing with a pact to sell a definite thing "to no one else but to me", says that if the other party to the pact sells that thing to another *actio mihi competit ad quod interest*, which is translated by Gane as "I enjoy an action for damages due to his not having complied /

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plied with the agreement" and by Berwick as "I enjoy an action for damages due to the non-fulfilment of the pact". Carpzovius Def For Pt 2 Const 32 Def & deals with the *jus protimeseos* and uses the words: *ad interesse ei, cui ex conventione jus protimeseos fuit acquisitum*. Van Zutphen Ned Prak sub voce *Voorkoop* writes that if an article which is subject to the right of pre-emption is sold and delivered by the grantor to a bona fide third party such sale is valid and cannot

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be rescinded; however, the grantee has a personal action against the seller "om teghens den selven te ageren tot schade en de interesse." What has to be decided in the present case is not, however, whether the appellant as grantee of the option concerned is, upon breach of the option pact, entitled to damages but whether he is entitled to damages as if the option had been exercised. Whether he would be so entitled was specifically left open by De Villiers JA in *Boyd v Net supra*, who said at 422:-

"Whether he will be able to recover as if the option had been exercised is another matter, and need not be decided at the present stage."

The learned Judge of Appeal further refrained from deciding what the exact measure of damages was in the event of a breach by the grantor of an option. He said, however, that, on the analogy of a person who in ignorance buys a *res sacra*, the plaintiff would "certainly" be entitled to claim what he would have had if the contract had not been concluded at all. He referred to D 18.1.62.1 and I 3.23.5: *ut consequatur, quod interfuit ejus, ne deciperetur*. That is the so-called negative *interesse* which is normally claimed in the case of fraud or misrepresentation in

contractual /

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contractual context. Cf. De Wet & Yeats *Kontraktereg en Handesreg* 4th edition at 3& i f - 39:-

"Die misleier het hom nie verbind om sy verklaring waar te maak nie, maar het die misleide deur die wanvoorstelling beweeg om tot sy nadeel te handel, en is daarom nie aanspreeklik vir die ander se positiewe interesse nie, maar slegs vir sy negatiewe interesse of *id quod interest non esse deceptum*."

If that were the only measure of damages applicable in the instant case that would be the end of the appellant's case because, apart from the fact that he claims as if on the contract of sale and not on the option, he claims the so-called positive interesse, viz that he should be placed in the same position as if the contract

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had been properly performed. *Victoria Falls & Transvaal Power Co Ltd v Consolidated Lanlaagte Mines Ltd* 1915 AD 1 at 22. I do not, however, read the judgment in *Boyd v Nel* supra as ruling out all possibility of the positive interesse measure of damages applying in the event of a breach of the option pact. The word "certainly" used by De Villiers JA indicates to me that the learned Judge of Appeal meant that the plaintiff would be entitled, at least, to his negative interesse.

Whatever the measure of damages might be upon the breach of an option pact, however, the Court is

not, /

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not, in the instant case, directly concerned with the measure of damages to be applied. What it is concerned with is the causal nexus between the breach of the option pact and the damages claimed which do not arise from the mere breach of the option pact, but are claimed, as the learned Judge a quo put it, "as if the option had already been exercised and that what had been repudiated was not the option but the agreement of sale." Causation of damage in contractual context is normally dealt with where only one contract is involved when the enquiry is whether, regard being had to the measure of damages which is applicable, the required causal connection is

present /

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present between the breach of the contract or the wrong committed and the loss suffered. In the instant case there are two contracts involved, the option agreement and the contract of sale. True, the option pact was entered into with the specific object of its being converted, upon the exercise thereof, into a contract of sale. But before such exercise a very important link in the causation chain, the exercise of the option, is missing. I could not find any common law authority either pro or contra the proposition that a breach of the option pact would per se entitle the grantee to damages as if the option had been exercised. The texts and authorities

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I have referred to and consulted merely state that the plaintiff is entitled to his *id quod interest*. In support of his argument that the learned Judge *a quo* erred in deciding that the appellant had to prove that he would probably have exercised the option counsel has, in addition to his reliance on *Boyd v Nel* *supra*, referred this Court to the judgment of Murray J in *Israel v Louverdis* 1942 WLD 160, in which case certain leased premises had become useless to the lessee

because /

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because the lessor had rendered it impossible for the lessee to have the beneficial use thereof. The lessee claimed damages for the loss of occupation, not only in respect of the remaining period of the lease but also in respect of the period of renewal, for which provision was made in the lease. The defendant excepted and applied for the relevant objectionable allegations to be struck out. Murray J reasoned as follows at 167/8:-

"Although the decision in *Boyd v Nel* (*supra*) did not decide whether the measure of damages would be the same as if the option had actually been exercised, it seems to me that (if there is a proper analogy between sale and lease) the reasoning of such decision concludes the

44.

present case: the basis of the decision is that if the grantor of an option breaks his agreement by disabling himself from fulfilling it or expressly repudiates it, it does not lie in his mouth to say *non constat* the grantee would have purchased even if the grantor had not done what is complained of, and consequently the grantee has no action. It does not seem necessary to express a definite opinion as to what the precise measure of damages is, but Mackeurtan, *Sale of Goods* (2nd edit., p. 31) deduces from the decision in *Sher v Allan* (1929 O.P.D. 137), a case concerned with breach of a right of pre-emption, that the measure of damages in a breach of an option to purchase, although not exercised, is the difference between the option price and the market price as at the date of the option holder's acceptance of the breach. I see no reason to hold, at this stage, that it is impossible for the defendant to prove at the trial (if it is necessary for him to prove it) that he would in all probability have exercised the option

of /

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of renewal, or that by being deprived of the benefit of occupation under the lease for the remainder of the original term plus the renewal period, he has suffered £1,890 as general damages."

Even though Murray J did not, therefore, decide that it was unnecessary for the plaintiff to prove at the trial that he would in all probability have exercised the option, he nevertheless referred, with apparent approval, to what Mackeurtan said. In the 4th edition of Mackeurtan's Sale of Goods in South Africa by O'Donovan the view set out in the earlier edition is repeated at 58/9 under par 89:-

"Where an option to purchase is granted for

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a fixed period and during that period the grantor breaks the agreement by disabling himself from fulfilling it or by expressly repudiating it, he is liable to the option holder in damages although the latter has not exercised his option. In *Boyd v Nel* the Appellate Division refrained from deciding what the measure of damage would be in such a case; but on the analogy of *Sher v Allan* it would be the difference between market price and option price as at the date of the option holder's acceptance of the breach."

As I shall presently indicate that I do not agree with this interpretation of the judgment in *Sher v Allan* which, is reported in 1929 OPD 137. There appears to me, furthermore, to be a distinction between the facts in *Boyd v Nel* and *Israel v Louverdis*. In the former case Boyd incurred certain expenses / 47.

expenses after the option had been accepted in respect of which he suffered a loss when the exercise of the option was rendered impossible. Those damages would flow directly from the breach of the option pact. It may be that included in the amount of damages claimed in *Boyd v Nel* were amounts for loss of profit but they were not specified as such. De Villiers JA regarded the damages, at the exception stage, as general damages. In the *Louverdis* case it seems to me that at least a certain amount of damages in respect of the period after renewal was clearly included in the total amount claimed. In this respect the reliance by Murray J on *Boyd v Nel* supra is not

completely /

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completely warranted. In *Sher v Allan* supra to which Murray J referred in *Israel v Louverdis* supra the facts are not stated fully. What may be gleaned, however, in so far as it is necessary to determine the facts for the purposes of the instant case, is the following:- In terms of a clause in the agreement between the parties the lessee was given the first option (or choice, or opportunity) to purchase the property, should the lessor desire to sell; should he not decide to purchase within fourteen days after getting written notice, the seller could sell to a third party. The owner

sold /

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sold to a third party without giving the lessee notice. It was held by McGregor AJP that the lessee, the plaintiff in the case, was entitled to damages computed on the basis of the difference between the price for which the property was actually sold to the third party and offers which were subsequently received for the property. These data the Court used to determine the market value. It appears, however, that there were previous negotiations between the parties when an offer was made and rejected and that the Court assumed, for purposes of computing the damages, that the plaintiff would have made or repeated his offer. This case is,

therefore, /

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therefore, no authority for the view expressed by Mackeurtan.

I have come to the conclusion that the necessary causal nexus has, in the absence of proof that the appellant would probably have exercised the option, not been established and that the learned Judge was right in coming to the conclusion that one cannot, either as a matter of logic or as a matter of law, treat the; claim as if the option had been exercised.

This being my conclusion it might well have been necessary for the appellant, in view of the requirement of a proper cause of action to be framed, to have alleged in his particulars of claim that he would have exercised the option.

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In my view, however, the fact that he did not do so, doesnot affect the matter. An exception might have been

taken by the respondent, but if it succeeded, the appellantcould simply have amended his particulars of claim.The appellant was not prejudiced because this issue waspertinently raised in the course of the trial and was

fully canvassed in evidence.

This brings me to counsel's alternative argument that if the trial Judge correctly required the appellant to discharge an onus of proving that he would during the option period have exercised the option, he had discharged this onus. Counsel contended that the judgment of the trial Judge is permeated with considerations based upon the absence of co-operation between the parties pending the exercise of the option when the approach should have been to assume that the admitted

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good relationship would have continued especially in the absence of the respondent testifying otherwise. In my view no evidence from the respondent could have made the worsening relationship between the parties any clearer than the terms of the letters referred to. Trumatic

was a one man company. The respondent had always acted as he liked. He even borrowed from the company when he liked. Even though he initially might have considered it a good idea to have a "partner", as he saw it, he appears soon to have sensed that the introduction of someone of the calibre of the appellant into the company might result in a complete upheaval of his, until that stage, placid private as well as business life. It is clear that he felt his position

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as sole controller of the affairs of the company threatened. He obviously feared, particularly in view of the 80% offer following so soon in the wake of the 50% option, that he and his company were in danger of completely being swallowed up. That this was so is well illustrated by certain extracts from his letters referred to above. He wrote in the following terms :- "With me relinquishing all the reigns of Trumatic" and: "For as you must realize that a mere 20% of any private company is basically not worth the paper it is written on." At that stage already he felt that further negotiations, even in respect of the 50% share purchase, were pointless. In spite of this remark in his letter

he / 54he was still, although half-heartedly, it must be assumed, prepared to give effect to their arrangement. That is why he wrote that he would make sure the ground that the appellant had laid would not be wasted and why he assured the appellant of his close friendship at all times. The appellant's letter of 21 September 1979 did nothing, it seems, to assuage the fears of the respondent. In uncompromising and relentless language he made it clear that he was holding the respondent to their arrangement and that he insisted upon the loan being repaid to Trumatic by the respondent. This letter prompted the respondent, in his letter dated 1 October 1979, to "cancel" the option, a step which he must tentatively

have /

55have considered to take even when he wrote his letter of 11 September

1979. It now appeared that the respondent, although he wrote in his letter of 11 September that the ground the appellant had laid, would not be wasted, that the laying of this ground, of which the respondent was reminded in detail by the appellant in his letter of 21 September, caused the respondent considerable concern. He regarded the appellant's activities as presumptuous. He wrote that his auditor had nothing to do with the cancellation but that it was the appellant's own actions that prompted the cancellation of the option to purchase. The letters reflect a rapid deterioration of the relationship. When the letter of cancellation was written there was hardly anything left of the

cordiality / 56cordiality which marked their relationship at the start. The respondent became firmly convinced that they would never work amicably together. He wrote in his letter of 1 October 1979: "...I feel that this unhappy situation cannot possibly end in a working relationship." I do not therefore agree with counsel that it must be assured that the good relationship would have continued. In any event, submitted counsel, a lack of co-operation on the part of the respondent might have indicated to the appellant that the option was, as the appellant put it in

his evidence, a "good deal" and would, therefore, have encouraged its exercise. This might have been a good argument if it was clear to the appellant that the only reason for the cancellation was the belief, on the part of the respondent, that the shares were worth

more / 57 worth more than R300 000. Although this belief appears to some extent to have caused the respondent to cancel the option, it is evident from the correspondence that this was not the main reason. The change in respondent's attitude is clearly reflected in his letters. The appellant must have realised that the prospect of their working cordially together had waned drastically. The fact that he did not exercise the option but elected instead to sue for damages is some indication, in my view, that that was his state of mind. This view is fortified by the fact that the appellant must have realised that the respondent still held the whip hand. Much had still to be agreed on between the parties, the most important of which was that an employment contract would

have / 58 have had to be entered into between Trumatic, as represented by the respondent, and the appellant. Another factor which the learned trial Judge correctly, in my view, took into account as rendering the exercise of the option by the appellant unlikely, is the particular nature of his rights should the option be exercised. They were such that, if it turned out that the two of them could not collaborate satisfactorily, a sale or a cession of his equity would not be easy to effect. As the learned trial Judge pointed out, the appellant made it clear that he regarded the option as one personal to himself, or his nominee in the sense

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that he was entitled to nominate a company of which he in turn would be the sole beneficial holder and which would own his interests in Trumatic. That the option was not intended to be freely cedable seems, said the learned Judge, to receive some support from the provisions of Trumatic's articles of association which contain an absolute prohibition against the transfer of shares in the company by a shareholder to another person who is not already a shareholder unless the directors agree thereto in writing. The articles do not, the learned Judge points out, as is often the case in private companies, contain provisions whereby the remaining shareholders /

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holders can be compelled to purchase the shares of any shareholder who wishes to sell, nor do they grant them any right of pre-emption.

In the Court a quo counsel for the

appellant argued, a submission which was repeated in this Court, that the plaintiff had indicated in his evidence

that it was probable that he would have exercised the

option prior to the end of 1979 — even before the 1979

figures became available. It was submitted that if the Judge accepted the evidence of the plaintiff as that of an honest person, he should have accepted what the plaintiff said in this regard and found, on the strength

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of that evidence alone, that the plaintiff would probably have exercised the option. Dealing with this submission in his judgment, the learned Judge referred to certain extracts from the evidence and expressed the view:-

"It is, I think fairly obvious from the answers given by the plaintiff that a great deal of water had to flow under the bridge before the plaintiff would have been in a position finally to decide whether or not to exercise the option."

The learned Judge expressed the view that it was extremely unlikely that the plaintiff would have contemplated exercising or, even if he had contemplated

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it, would in fact have exercised the option before the end of

1979. He referred in fair detail to the evidence of the two experts and the circumstances surrounding the activities of the company generally and concluded as follows:-

"What is clear is that, while on the one hand an accountant would have advised him that the value of the shares he intended buying was greater than the option price, such accountant would also no doubt have sounded a note of warning to the effect that the company was showing something of a 'down turn' in its profitability."

I agree with this finding. Apart from the factors

referred to by the learned Judge there is the further consideration that there was no urgency about the

matter./

matter. The appellant had specifically made provision for a long option period and his evidence that the only reason why he in fact stipulated for a year's option was because his service agreement with the other company expired only in June 1980 and that he wanted to have "this all tidy" before he in fact left the other company is inconsistent with an intention to exercise the option within that current year (1979). It was contemplated that he would join Trumatic in Johannesburg in a full-time capacity if he did exercise the option

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You needed time? I needed a certain amount of time, obviously.

Both to acquire money and to have a more careful look at Trumatic? No, I didn't need it to acquire the money, but I needed to have a look at Trumatic because I only had one balance sheet to work on."

Regard being had to all the factors taken into account by the learned trial Judge, his judgment that the appellant would probably not have exercised the option is, in my view, correct. The appeal is dismissed, with costs, including the costs consequent upon the employment of - two counsel.

JUDGE OF APPEAL

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Prepared on 12 October 2026 · Esheria