IN THE COURT OF APPEAL OF SWAZILAND

Appeal Case No. 6/88

In the matter between

LANDAGE INVESTMENTS (PTY)LTD Appellant

and

BARRY STEPHEN REED Respondent

JUDGMENT
SCHREINER J.A :

The Appellant, Landage Investments (Pty) Ltd ("Landage"), is the owner of two stands in Sidwashini Industrial Township, Mbabane Extension No. 8. They are lots 978 and 979 ("the property"). One of them is undeveloped and the other has on it a commercial stock industrial building consisting of two warehouses, one of about 200 square metres and the other of about 100 square metres, and showrooms and offices covering about 140 square metres.

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The shares in Landage are owned by Mr A.E. Evans and his wife who during most of the events forming the subject matter of this appeal were living overseas. Mrs Evans was in England and Evans largely in Uganda.

Mr Reed, the Respondent, is a citizen of Swaziland who owns a bottlestore in Mbabane. He had rented a property at Sidwashini for storing his liquor but wished to purchase his own premises as a storehouse for liquor and for another enterprise which he was contemplating. Reed knew Evans and knew also that a Mr Martin, an estate agent, was leasing property on behalf of Evans. He attempted via Martin to negotiate for the purchase of the property but nothing came of it. Then Mr Cooper of the firm of Coopers & Lybrand which was the auditor of Landage suggested that he might write a letter to Evans who was then in England.

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Cooper did this on the 11th November, 1986, enquiring from Evans as to whether Martin had been in touch with him and whether he was interested in disposing of the property and buildings belonging to Landage. Evans then rang Reed and negotiations started. These culminated on the 30th November, 1986 when it was telephonically agreed that the property would be sold for E145 000. Reed was to have free occupation until the 31st January, 1987 after which he was to pay occupational rent at some unspecified rate until transfer of the property had been passed.

Evans emphasizes in his evidence the fact that he was most anxious that transfer should be passed without any delay. Reed does recall some element of urgency and remembers suggesting that Mr Boshoff of Robinson, Bertram and Company should do the transfer because he was efficient.

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On the day upon which the oral agreement was entered into the directors of Landage passed a resolution in England the terms of which were embodied in a minute which was signed by Evans and his wife. It is in the following terms:-

"The Company sell to Barry Stephen Reid all that property known as Plot 917, Sidwashini Industrial Estate together with all improvements thereon and Plot 918 Sidwashini Industrial Estate all for the sum of E145, 000 (One hundred and forty-five Thousand Emalangeni only) nett to the Company of all

costs, fees and charges. It was agreed further that Mr Reid be allowed immediate occupation of the property without payment of rent with such arrangement continuing until 31 January, 1987 at which time full occupational rent shall commence if transfer of ownership has not been completed."

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It is common cause between the parties that the stand numbers in this resolution are incorrect and that the resolution related to the property.

Also on the 30th November, 1986 Landage wrote a letter to Cooper. After thanking him for passing Reed's message on to him, Evans, on behalf of the Company, wrote:-
"Barry has requested that you act as go between for us and I am very happy to go along with this. I have agreed to sell the two plots of land at Sidwashini, including the warehouse, to Barry or his nominee company for the sum of E145 000.00 (One hundred and forthy-five thousand Emalangeni) nett to me. He will be meeting all the costs of transfer including stamp duties, attorney fees etc. I have agreed that he may have immediate occupation of the warehouse without any charge or rent.

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"This is subject to all legal formalities having been completed and the money paid over to the Landage Investments Account at Standard Bank, Allister Miller Street before 31 January 1987. If this has not been achieved by that date then the usual occupational rent should apply."

The writer of the letter states that, while he is happy for Cooper to act on his behalf, using the letter as authority, he realizes that for some matters this will prove difficult and proceeds to give information as to how he may be reached in Uganda. The letter is signed by Evans in his capacity as director and it is not disputed that the signature is that of Landage. There is a difference between this letter and the resolution in that in terms of the resolution it seems that occupation of the whole property was to be given to Reed whereas Cooper is told that he will be given occupation of "the warehouse" without stipulating which one.

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The position as at the 30th November, 1986 therefore was that an oral agreement of sale had been arrived at and certain arrangements made for completing the transaction.

Cooper then wrote to Robinson, Bertram and Company on the 3rd December, 1986 informing them of the agreement and instructing them to draw the necessary documentation. Since this document has also been relied upon by Reed as one of the alternative documents going to make up a written contract I will set out its terms:-
"The directors of Landage Investments (Proprietary) Limited have agreed to sell plots 978 and 979 Sidwashini to Mr Barry Stephen Reed of the Grog Shop Mbabane, for an amount of E145 000 net to the company. The directors of Landage Investments (Propriety) Limited and Mr Reed have

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both agreed that we should instruct you on their behalf, to draw up the necessary documentation to effect the aforementioned transfer as soon as possible. We understand that the title deeds of the property are in the possession of Standard Chartered Bank Swaziland Limited, Main Branch, Allister Miller Street, Mbabane. It has been agreed between the parties that all costs, duties and disbursements in this matter are for the account of the purchaser and that the net amount to be paid to Landage Investments (Proprietary) Limited on completion is E145 000, less any indebtedness on the part of Landage Investments (Proprietary) Limited, to Standard Chartered Bank Swaziland Limited. Please let us know if you require any further information to enable you to proceed in this matter." The letter was signed by Cooper. It does not contain any provision concerning occupation by Reed of the property as a whole or of the warehouse.

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On the 12th December, 1986 Robinson, Bertram and Company wrote a letter to Coopers and Lybrand to which were attached for submission to Mrs Evans a draft directors' resolution of Landage in duplicate and two copies of a deed of sale already signed by Reed. Cooper then sent the documents to Mrs Evans in England.

The draft deed of sale and resolution were not drawn up so as to reflect the particular arrangements which had been come to between Evans and Reed. The draft deed of sale contained mainly ordinary clauses which might be expected in a deed of sale with no unusual provisions.

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These were that the price should be payable against transfer with the lodgement of a building society or bank guarantee on request from the conveyancers (Clause 1), a voetstoots clause (Clause 2), possession to be given upon registration of transfer (Clause 4), and a undertaking to sign any further documents in order to effect transfer (Clause 5). There was also an inappropriate clause providing for the remedies of the seller in the event of a failure on the part of the purchaser to pay monies due under the agreement (Clause 6). These was no provision for immediate free occupation of the property or the warehouse by Reed until the 31st January 1987 and the payment of full occupational rental thereafter until transfer.

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By the beginning of January 1987 there had been no further developments and Reed got into touch with Boshoff of Robinson Bertram and Company and was told that the return of the signed deed of sale and resolution was still being awaited. The same answer was given when Reed got into touch with Cooper at the end of that month. I assume that Reed took occupation of the property early in December. On the 2nd February 1987 Reed, anticipating that the transaction would go forward, entered into a written lease with Swaziland Spares and Equipment in terms of which he let part of the premises which was known as "Shop No. 1" for a period of 3 years commencing on the 1st February, 1987.

On some date which is not specified Reed caused certain work to be done on the property. It was apparently necessary in order to get the premises into a lettable condition and the expenditure on maintenance and preservation of the property was E3 100.

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The evidence on this subject which is relevant to the question of the defence of a right to remain in occupation by reason of an improvement lien was adduced during re-examination of Reed without objection. There was no cross examination and no evidence to contradict it.

The deed of sale and draft resolution had not arrived in England by the end of February, 1987. Evans tried to find out from Cooper what was happening and eventually he travelled to Swaziland on the 7th March. On the 12th March he purported to withdraw from the sale on behalf of Landage. He says he wanted Landage to take control of the land. The reason for his withdrawal became a matter of some dispute at the trial.

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Evans says that he withdrew because nothing was being done to complete the transaction and he was anxious to sell the property. It was suggested on behalf of Reed that he did so because he expected to get a better price if he put the property on the market again. The learned Chief Justice was inclined to believe that it was the latter reason which caused Evans to withdraw. For the purposes of this judgment it does not matter which was correct.

Reed refused to vacate the property and in June, 1987 a summons was issued by Landage. The amended Particulars of Claim merely allege that Landage was the owner of the property and that

Reed was in unlawful occupation and refused to vacate. It was further alleged that Landage, as from the 1st February, 1987, was suffering damage in the sum of E2 500.00 a month as a result of the refusal to vacate. The prayer was for eviction, damages and costs.

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Landage applied for summary judgment and this was refused. In his affidavit in defence of the summary judgement application and in his plea Reed raised a number of defences not all of which were argued on appeal. The central issue on appeal was the contention on behalf of Reed that he was in possession of the property by virtue of a valid contract constituted by the resolution of the 30th November 1986 or the letter of Landage to Cooper of the same date or the letter from Cooper to Robinson, Bertram and Company dated 3rd December 1986, on the one hand, and the incomplete deed of sale signed by Reed on the 12th December, 1986 on the other. The plea, having set out the contract on which reliance was placed, also contained the following :_

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"It was further orally agreed between the Plaintiff and the Defendant, the Plaintiff being represented by one Allan G. Evans, that the Defendant would take occupation of the properties pending the transfer of the properties as aforesaid".

The Plaintiff then alleged that Reed was entitled to be in occupation by reason of the agreement of sale or by reason by the alleged oral agreement concerning occupation until transfer. The last defence was that Reed was entitled to remain in occupation by virtue of his lien for improvements and maintenance of the property.

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It will be convenient, I think, to deal at the outset with the issue of whether Reed has established that there were indeed two agreements, the first being an agreement of sale of property which may or may not be void because of the failure to comply with the formalities prescribed by Section 31 of the Transfer Duty Act of 1902 and the second being an independent oral contract which required no formality and gave Reed the right to occupy free of charge until the 31st January, 1987 and, thereafter, at some unspecified rental until transfer of the property to him.

I suppose that there may be situations in which it may be found that when the sale of land has been negotiated that there were two separate agreements, the one relating to the sale of the property and the other to occupation pending transfer, but the present facts do not render this a possibility.

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The right to occupy and the date upon which rental would be payable were part of the negotiations between the parties and appeared in the documents which were prepared by Evans. Occupation was given to Reed because it was envisaged that transfer would be passed to him: he could have no right to occupy if he had no right to insist upon transfer. The right to occupy was therefore a part of the transaction of sale. It is true that the draft deed of sale sent by Boshoff to Mrs Evans did not cover the question of occupation pending transfer, but it is not suggested that this was so because the agreement relating to occupation was a separate and independent contract on this subject.

It is probable that Boshoff did not know of any such arrangement because the letter from Cooper to him did not mention it. Alternatively, he must have considered that the terms of deed of sale were unimportant because transfer was about to be passed and the transaction concluded.

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It was pointed out in argument that it is not necessary to have a written document for the purpose of carrying out a transfer. But apparently Boshoff thought that some written agreement was desirable and I did not think that the form of the draft deed of sale can be relied upon to contradict the other

evidence which indicates clearly that there was one agreement covering the sale and occupation until transfer had been completed.

In his judgment the learned Chief Justice held that there was a written contract of sale of the property constituted either by the letter of the 30th November, 1986 from Landage to Cooper or the letter from Cooper (presumably authorised in writing by virtue of the letter of the same date to him) to Robinson Bertram and Company of the 3rd December, on the one hand, and the uncompleted deed of sale, dated 12 December 1986 signed by Reed, on the other.

The judgment does not deal with the contention that there were two separate agreements.

Section 31 of the Transfer Duty Act of 1902 provides:-
"No contract of sale of fixed property shall be of any force or effect unless it is in writing and signed by the parties thereto or by their agents authorised in writing."

This section is virtually identical to Section 30 of Proclamation 8 of 1902 (Transvaal) and is similar to Section 1 of Act 68 of 1957, Section 1(1) of Act 71 of 1969 and Section 2(1) of Act No. 68 of 1981 of South Africa. Thus, on the question which arises in the present case, authorities applying the South African Statutes can safely be regarded as persuasive authority in this Court.

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The contention on behalf of Reed that there was a written contract complying with the provisions of the Act cannot be sustained. Firstly, there is a distinction between the recording of the terms of an earlier oral agreement in signed documents and documents which purport to be and are intended to be the contract itself. Secondly, where more than one document is involved what must emerge is a single contract expressing consensus between the parties and not documents which exhibit only partial consistency one with the other and with no indication that a particular term emanating from one party has been agreed to by the other.

The only document which might have been intended to have contractual operation is the deed of sale signed by Reed.

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In the form in which it was dispatched to England it constituted an offer by Reed to Landage which, if it had been signed on behalf of Landage would have constituted a written contract. It certainly cannot be related to any of the other three documents relied upon in the pleadings.

As the learned Chief Justice pointed out the resolution signed by the two directors, Mr and Mrs Evans, was merely a record of what the board of Landage had decided to do. The fact that it sets out the terms of the agreement which was to be entered into so defining the ambit of the directors' decision cannot change the nature of the document. If Reed had become aware of the terms of the resolution it would not have been open to him to write a signed letter accepting the terms contained in it and so to have concluded a contract which was binding between Landage and himself.

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Landage would have been entitled to say that no offer had been made and, until this was done, there was nothing which could be accepted by Reed.

Having dealt with the signed resolution in what I consider to be the correct manner the learned Chief Justice did not approach the letter to Mr Cooper of 30 November 1986 in the same way.

This document, like the resolution of directors of the same date, does not from its terms appear to be part of an offer to Reed. It is true that it does contain what Evans said were the terms of the oral agreement, but the purpose of inserting details in the letter to Cooper was merely to inform him of the

history of the matter in order to obtain his (Cooper's) agreement to act as go between when Evans was not in Swaziland.

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It was not intended that Reed should see it and it reveals no contracting intention, save to the extent that it contemplates that Cooper would assist in giving effect to the agreement which had been concluded. Again Reed could not, had he seen this letter, have confirmed in writing that he agreed with its terms and so brought into being a contract complying with the Act.

The same may be said of the letter of Cooper to Robinson, Bertram and Company of the 13th December, 1986. Assuming that the letter from Evans to Cooper of the 30th November, 1986 constituted the necessary written authority to Cooper to conclude a binding contract in terms of the Act, this letter was not the exercise by him of that authority. It was not directed to Reed: it was merely an instruction to the attorneys to complete the transaction which had already orally been agreed upon.

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The decision of the Full Bench of the Transvaal Provincial Division in Jackson v Weilbach's/Executrix 1907 TS 212 is apposite. The Court was concerned with the question of whether the signed statutory declarations of buyer and seller could constitute a written contract for the purposes of the Transvaal Transfer Duty Proclamation. Innes CJ. at 217 emphasises that the statutory declarations were not intended by the parties to contain a contract. The same is said by Smith J. at 219 (and see too Raywood v Short 1904 TH 218 at 222; van Zyl v Potgieter 1944 TPD 294 at 296; Morrison v Hanson 1937 WLD 144 at 146 -147).

Counsel for Reed in his argument contended that, provided that there were signed documents from which, taken together, it may be inferred that consensus had been reached by the parties on the material terms of an agreement, the requirements of the Act were satisfied.

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This ignores the distinction between a contract which is in writing and documents from which it can be inferred that an oral agreement had been reached but which were not intended themselves to constitute that contract. In this latter case the documents merely constitute a memorandum or note of the oral agreement (See the "memorandum or note" of Sections 4 and 17 of the English Statute of Frauds, Section 4 of the Sale of Goods Act, 1893 and Section 40(1) of the Law of Property Act, 1925).

The wording of the present Act does not permit of such an approach because it requires the contract itself to be in writing and not merely that there should be written evidence of it (see Raywood v Short (supra) at 222).

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My view concerning the nature of the documents relied upon as constituting the signed writing by or on behalf of Landage makes it unnecessary to investigate the further question of whether any of these documents and the draft deed of sale are sufficiently explicit to enable a court to ascertain the terms of the written contract. The absence of any condition in the draft deed of sale providing for free occupation until 31 January, 1987 and thereafter, the payment of occupational rental and the presence of a voetstoots clause and other provisions not to be found in the Landage documents , show that they cannot be integrated into one contract. I do not think that the matter is made easier for the purchaser merely by reason of the consideration that the voetstoots clause and other clauses of the draft deed of sale even for the benefit of Landage. This only mean that, if put to Landage, it would probably have agreed but certainly not that it did agree.

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Clause 6 of the draft deed has no relation to any of the contracts of the Landage documents and is,

indeed, inappropriate in a situation where the draft deed itself provides for a single payment to be made.

There was debate at the hearing of the appeal concerning the meaning of the words "material term(s)" of the contract and "essentialia" in the judgment of Corbett J.A. in Johnston v Leal 1980 (3) SA 927(A). Having found that all but one of the documents relied upon could not be part of a written contract between Landage and Reed, it is not necessary to express any view as to what are "material" terms and what are "inmaterial" terms in the present case. It seems to me, however, that all terms which have been orally agreed upon are "material" terms and the word was not used by the learned Judge as the equivalent of "essentialia" which usually means those terms which are necessary to create a binding contract of a particular kind.

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Naturally if, by an error common to both parties, a term has been omitted from the signed writing it may be inserted by the procedure at rectification and, in this way, a contract containing only the essentialia may be a binding contract, but the contract is the written agreement with all the agreed terms.

I am therefore of the view that the defence of Reed that he has a contractual right to occupy fails and, subject to the defence of the lien, the ejectment order asked for by Landage must be granted.

Logically the next question would be whether the claim for occupational rental has a basis in law, but this matter is best disposed of after there has been a finding on the issue of the existence of a lien.

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The evidence, sketchy though it is, is sufficient to establish that Reed carried out maintenance work on the property to the value of E3 100. He caused a signboard to be removed, grass to be cut, the driveway to be cleaned and levelled and certain doors and a toilet to be replaced. This was done in order to make the premises suitable for letting and it was not argued that he would not be entitled to be paid for this.

Until he is paid he may exercise his lien and remain in possession. Though the dates when the work was done does not appear in the record, on the probabilities it took place in December 1986 or January, 1987 because the lease which was concluded is dated 2nd February, 1987. Counsel for Landage did not advance any reason why the lien should not be recognized by this Court.

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Turning now to the question of the claim for damages, it was argued that a person in wrongful occupation of property is liable in delict for damages suffered by the owner of the land as a result of such wrongful occupation. It is not necessary to deal with the validity of this submission because in the present case, having found that there was a valid lien in favour of Reed throughout substantially the whole period of his occupation, the basis of unlawful occupation which is fundamental to the claim cannot be established. Counsel for Reed did not seek to base his argument in favour of compensation for wrongful occupation upon the ground that there had been some form of unjust enrichment as a result of it. In this he was probably correct (Pucjlowski v Johnston's Executors 1946 WLD 1; Vermaak v Van Heerden 1978 (4) SA 348 (W) at 351).

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It follows that the court may make an order for ejectment subject to the payment by Landage of the sum of E3 100.

Lastly, the question of costs. For Reed it was said that because no tender of payment for the maintenance of the property had been made by Landage, he had established his right to occupy which right will remain until the payment has been made. Reed raised the defence of a lien in the

affidavit in the summary judgment proceedings and in his subsequent plea. There was no replication so it must be assumed that Landage denied the validity of that defence. At the trial no evidence was led by Landage to rebut the defence of lawful occupation under a lien and it was not dealt with in the judgment of the learned Chief Justice because he found that Reed was in occupation by virtue of a valid contract. In these circumstances it is contended that Reed was really the successful party in the litigation because no right to eject him had been established.

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I do not agree with this argument. The central issue between the parties was the existence of a binding contract which entitled Reed to insist on transfer. It is true that the pleadings were in the form' of a vindicatory claim alleging unlawful occupation by Reed, but the parties were in fact disputing who was entitled ultimately to ownership of the property. The right to continue to occupy pending payment for expenses incurred and the right to occupational damages were peripheral matters which concerned only the period pending a final decision on the central issue of who was entitled to the property. In my view therefore the costs in both courts should be paid by Reed.

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It should be mentioned that at the beginning of the appeal Landage applied for condonation for the late filing of the record. This was not opposed by Reed. The delay in filing the record was not due to any negligence on the part of Landage or its legal representatives. The costs of the application and of the postponement of the appeal which occurred during the March session of this Court should therefore be costs in the cause. It is to be hoped that the necessary arrangements will be made in the future to enable records to be available within the times laid down by the Rules.

The order which I would propose is:-
1) The appeal is allowed.
2) The order of the learned Chief Justice is set aside and the following substituted :-

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A The Respondent is ordered to vacate lots 978 and 979 situated in Mbabane Extension Number 8 (Sidwashini Industrial Township) on payment by the Appellant of the sum of E3 100.
B The Appellant's claim for payment of damages for unlawful occupation is dismissed.

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C The Respondent is ordered to pay the costs both in the High Court and in the Court of Appeal, such costs to include the costs of the application for condonation for late lodging of the record and the postponement of the trial in March, 1988 consequent upon such late filing.

WHR SCHREINER J.A.

WELSH J.A. : I agree and it is so ordered.

LEON J.A. : I agree