IN THE COURT OF APPEAL FOR THE KINGDOM OF SWAZILAND

HELD AT MBABANE CASE NO.7,8 & 9/90

HIGH COURT CASE. 299/88

In the matter between:-

BANK OF CREDIT Appellant

AND COMMERCE INTERNATIONAL

(SWAZILAND) LIMITED

TONKWANE ESTATES LIMITED 1st Respondent

DAVID ASHWORTH CRABTREE 2nd Respondent

AND

In the matter between:-

TONKWANE ESTATES LIMITED Appellant

BANK OF CREDIT & COMMERCE

INTERNATIONAL (SWAZILAND) LIMITED 1st Respondent

DAVID ASHWORTH CRABTREE 2nd Respondent

AND

In the matter between:-

DAVID ASHWORTH CRABTREE Appellant

BANK OF CREDIT & COMMERCE

INTERNATIONAL (SWAZILAND) LIMITED 1st Respondent

TONKWANE ESTATES LIMITED 2nd Respondent

CORAM WELSH, KOTZE AND SCHREINER JJA

Date of hearing: 2nd April, 1991

For Bank of Credit & Commerce International (Swaziland Limited: TD Cloete S.C. (with him MVR Potgieter)

For Tonkwane Estates Limited: CZ Cohen S.C. (with him RA Kuper)
For David Ashworth Crabtree: PL Simmons

JUDGMENT

Schreiner JA: All the parties to the trial in the court below have given notice of appeal against the judgment of Hannah C.J. and the appeals were heard together. By agreement between the parties at the opening of the appeal the Bank of Credit and Commerce International (Swaziland) Limited ("the Bank") put forward its argument first and was followed by Tonkwane Estates Limited ("Estates") and then David Ashworth Crabtree ("Crabtree Snr"). The Bank then replied.

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In 1957 Crabtree Snr. bought the Remaining Extent of Portion 4 of Farm 73, Hhohho District, Swaziland and in the following year caused Estates to be registered. Estates had three shareholders, Crabtree Snr., his wife ("Mrs Crabtree") and Mr G Bertram, an Attorney of Mbabane. The purpose of establishing the company was to grow commercial forests on land registered in the name of Crabtree Snr.. A lease between Crabtree Snr. as lessor and owner of Portion 4 was entered into with Estates.

Crabtree Snr. was unable to produce the 1958 lease or a copy of it, but there is a minute of a meeting of Directors of Estates dated the 25th August of that year recording a resolution hiring Portion 4 at a rental of £400 per annum and a further decision by the company to assume liability for expenses which Crabtree Snr. had incurred in exploiting the timber on Portion 4.

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In 1960 Crabtree Snr. acquired the Remaining Extent of Portion 2 of Farm 73. He says that, on 9th October 1961 a second lease was entered into between himself and Estates the purpose of which was to extend the rights of the company under the 1958 lease to cover Portion 2. In addition, because there had been a serious matrimonial dispute between himself and his wife, the lease in favour of Estates was designed, coupled with the arrangements regarding shareholding, to bring about a situation in which Mrs Crabtree acquired the right to exploit the timber on her husband's land and so obtain some security for herself and the two children of the marriage. This was achieved by giving her the majority shareholding in Estates. As will appear hereafter the date of the matrimonial dispute is not clear.

Later between 1973 and 1974, Estates itself acquired three further portions of land for the purpose of establishing timber plantations. By 1979 the land owned by Crabtree Snr. had mature timber growing on it, whereas the timber on the land belonging to Estates was still immature.

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Crabtree Snr. identified as a copy of a copy of the 1961 lease a document which was attached to the pleadings in the trial which is presently under appeal. This was Document X and will be referred to as such in this Judgment. The authenticity of Document X is disputed by the Bank and it is this dispute which formed the main subject of the evidence which was led at the trial and of the argument which was presented to this Court. Attached to this judgment is a photostatic copy of Document X.

I will deal in greater detail with the contents of Document X and the minutes of a meeting of the Directors of Estates also dated 9th October 1961, which, it is claimed refers to it at a later stage in this judgment.

In 1979 there was sufficient mature timber to be cut and processed and money was needed for this operation. Tonkwane Saw Mill Company Limited ("Saw Mill") which had operated on the land of Crabtree Snr. since the 1960's and had sawed pine which it had bought from other people and had processed gum trees provided by Estates was to be the vehicle for the exploitation of this timber.

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In March 1979 Crabtree Snr. saw Mr Raza, the manager of the Bank at Mbabane. There was a general discussion about raising a loan of E500 000 for Saw Mill. During the same year he went to London and obtained from a merchant banker, a Mr Wynne, a feasibility study for the information of persons who might be interested in providing finance to Saw Mill for the project outlined in the study. A copy of the study, without certain of the Annexures was produced, at the trial.

Below the heading of "The Shareholders" it is said:-"Tonkwane Estates Limited is a private registered Swaziland Company which both leases (from DA Crabtree) and owns freehold timber land."
The writer of the study then refers to other assets which he attributes to Estates - buildings, industrial houses and sheds and access roads. However, to the extent that these were fixtures on the land belonging to Crabtree Snr. they were owned by him. The document then refers to the fact that all felling and logging is done by Saw Mill under close scrutiny and supervision of Estates. The study then deals with the initial plan which was for the manufacture of laminated and glued planks for container flooring and shelving and furniture.

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The question as to whether this document was shown to the Bank was an important issue between the parties at the trial because, if this was proved, at least knowledge by the Bank of the existence of a lease entered into before 1979 would have been highly probable.

When Crabtree Snr. returned from the United Kingdom he approached five organisations including the Bank which had its headquarters in Manzini. There he dealt with two persons - Messrs. Jafri and Naqvi. Crabtree Snr. says that there was a detailed discussion of each page of the feasibility study at the first meeting. There were several other meetings and, in particular, a gathering at the property itself where it was pointed out to the Bank's representatives where the property belonging to Crabtree Snr. and that of Estates lay. It was apparent that Estates was in occupation of the land.

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At the time of the trial both Jafri and Naqvi had left the Bank and were no longer available to give evidence. Though there was much criticism during the argument of the appeal about the failure to call witnesses, it was not suggested that either Jafri or Naqvi could have been called though, of course, they would have been important witnesses.

After discussion and a consideration of the project with the Bank it was finally agreed at a meeting in October 1979 that the Bank would finance the operation of Saw Mill. The first means of assistance was by an ordinary overdraft facility and the second by financing leases of equipment. The amount of the overall facility consisting of the overdraft (E256 000) and equipment leases (E178 000) was calculated, according to Crabtree Snr., by reference to the figures in the feasibility study translated from dollars into emalangeni at a rate of 1,15 emalangeni to the dollar and rounded off. The Bank rounded off the total to E440 000. The security was to be

mortgages by Crabtree Snr. and Estates over their respective properties and personal guarantees by the directors of Saw Mill. There

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were two directors, Crabtree Snr. and his daughter and, in the event, a guarantee was not obtained from Miss Crabtree. Later, a further guarantee for R570 000 was obtained from Estates. This amount has been paid with interest.

By 1986 the project had gone awry and the Bank was not prepared to finance it further. The amount owing to the Bank by Saw Mill was far in excess of what was estimated when the original facility was granted. It issued a summons and took judgment by consent on the 8th March 1988 against Saw Mill for E2 712 3215-87, against Crabtree Snr. for E1 835 000, and against Estates for E570 000. There were also orders in regard to interest and costs and, in the case of Crabtree Snr. and Estates, there were orders declaring the hypothecated properties executable.

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A warrant of execution in respect of the property of Crabtree Snr. was issued on the day of the consent judgment. A meeting took place on 7th April 1988 at which the Bank was represented by Raza and there were also present a Mr. Hayter, the Liquidator of Saw Mill, Mr Friedlander, the Attorney for the Bank and the Liquidator, Mr R Crabtree ("Crabtree Jnr.") and a Mr. Glaubitz, the manager of Saw Mill. At this meeting Crabtree Snr. claimed that Estates was entitled to fell trees and remove them from the property. According to Raza no mention was made of lease, but the Crabtrees state that it was mentioned. Hayter, Friedlander and Glaubitz did not give evidence.

Soon after the meeting of the 7th April 1988 a letter was sent by Estates to the Bank notifying the latter that it was intended to "fell and remove all trees which the company has planted and/or tended on the property ....." The writer of the letter, Mrs Crabtree, did not attempt to specify any ground on which the right to fell and remove trees was claimed. The Bank was warned that the removal of timber would commence on 28th April 1988 and was invited, if it so wished, to launch interdict proceedings to prevent this. Inadmissible evidence linked this letter with a visit by Mrs Crabtree to a leading Johannesburg Attorney by whom it was said to have been drafted.

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The bank did indeed launch proceedings on 26th April 1988 claiming a rule nisi calling upon Estates and Crabtree Snr. to show cause why they should not be interdicted from felling any trees on or removing trees from, Portions 2 and 4. The matter was set down for the 29th April and the next step was an application for a postponement by Estates in which Crabtree Jnr. filed an affidavit on its behalf. In his short affidavit he merely states that the "property concerned" i.e. the trees, were in fact the lawful property of Estates and that documentary proof of that ownership would be lodged at the postponed hearing in support of the contention. He says that it is imperative that the application be heard by not later than the 6th May when Estates would prove its ownership of the trees. There was no mention of any lease.

The application was postponed, and in his second affidavit dealing with the merits of the claim to an interdict, Crabtree Jnr. first states (para 9.3) that the trees on his father's property were in fact the lawful property of Estates but gives no reason why this should be so. He then later in the affidavit (para 9.8) discloses the real defence to the interdict as being Document X, a copy of which is annexed. He says that he is attempting to obtain the original of the agreement.

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Rooney J who heard the application was not persuaded that Estates obtained a right to cut and remove timber from the land registered in the name of Crabtree Snr. which was mortgaged to the Bank. He therefore interdicted Estates from felling or removing any trees from the properties owned by Crabtree Snr.

There was an appeal to this Court against the decision of Rooney J.. Delivering the judgment of the Court, Welsh J.A. disposed of certain legal contentions put forward on behalf of the Bank adversely to it. He also listed six disputed issues of fact which could not be decided on the papers before the Court. There were also lacunae which would have to be filled in if a proper decision was to be reached. In the result, the appeal against the judgment of Rooney J. was upheld and an order was made referring the matter to trial on terms relating to pleadings and other matters which had been agreed between Counsel.

Pleadings were filed. The parties were the Bank, Estates and Crabtree Snr. In its Statement of Claim the Bank sets out the facts leading to the consent judgment and, in paragraph 10 and 11, alleges:-

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"10. All the trees situated on the properties are of such a nature that they accede to the land comprising the properties and form part of the properties.

11. The Plaintiff is entitled to sell in execution the properties including the trees thereon free from claims of rights which have been made by the First Defendant [Estates], in the absence of an allegation and proof by the First Defendant of its said claimed rights and a finding by this Honourable Court that the First Defendant has such rights."

The prayer asks for an order declaring that the properties may be sold in execution "free of any claims by or encumbrances in favour of the First Defendant".

There does not seem to have been a plea from Crabtree Snr., but Estates in its plea admits the allegation in para. 10. To paragraph 11 it pleads as follows:-

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"4.1 In October 1961 the Defendants entered into a written contract ("the Lease") in terms whereof the Second Defendant [Crabtree Snr.] let the properties to the First Defendant. Annexure X hereto is a copy of the Lease.

4.2 Upon a proper construction of the Lease, it is one of indefinite duration subject to termination by the Second Defendant."
The Bank denies the allegations in para. 4.1 and 4.2 and, in particular, without affecting the generality of the general denial, denies that Estates and Crabtree Snr. entered into the lease alleged by Defendants, or any lease. In a further alternative reply, after raising an issue which was not persisted in, it pleads that Estates is estopped from relying upon Document X as against the bank.

I will deal with the terms of this pleading when I come to deal with the defence of an estoppel.

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On these pleadings the matter came before the learned Chief Justice. Evidence was led and, on the 11th April 1990, a judgment was delivered in which, after a careful consideration of the

evidence, Hannah CJ. came to the conclusion that Estates had not established that Document X sets out the terms of the lease between Crabtree Snr. and Estates. He puts it this way:-

"I am not satisfied that the photocopy produced in evidence is a true photocopy of the agreement referred to in the minute of the meeting held on 9th October 1961. In ray judgment it is just as likely that it was produced for the purposes of this case either because the original agreement could not be found or it was considered that the terms contained in the original agreement were not sufficiently favourable to Tonkwane Estates."

On the pleadings as summarized above this finding should have meant the end of the case. Estates had nailed its colours to Document X and the learned Chief Justice, assuming that the onus was on it to satisfy him on a balance of probabilities that this document was a true copy or a copy of a copy of an authentic original document reflecting a lease entered into in 1961 which was in operation at all material times thereafter, found that this had not been proved.

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The reality of the matter is that Estates had for many years been growing and cutting timber on the property of Crabtree Snr.. This it had sold to Saw Mill and the overwhelming probability is that this had been done under some form of lease or similar arrangement. That it was a lease is likely, though it is conceivable that there Vas some arrangement formulated as a personal servitude or similar grant. If it was not a lease the accounts of Estates would be incorrect because, wherever reference is made to the position of Estates vis-a-vis Crabtree Snr., they mention a lease.

In view of all the circumstances I am of opinion that the Chief Justice was correct in holding on the probabilities that there was a lease operating at relevant times. However without anything concrete before him, he finds that the lease was annual, running from the 9th October of each year and terminable on reasonable notice given. He finds that the rental was E800 per annum.

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The learned Chief Justice then proceeds in his Judgment to consider the question of whether Estates was estopped from relying upon the lease which he held to exist and found no such estoppel proved. He made a declaration that the properties could be sold subject to a yearly-tenancy in favour of Estates running from the 9th October 1989 to the 8th October 1990 at a rental of E800 per anhum and "subject only to the terms and conditions implied by law."

At the hearing of the appeals there was no support by Estates or Crabtree Snr. for the finding that there was a lease in the terms defined by the learned Chief Justice. It was contended, on their behalf, that there was a lease at relevant times and that the terms of this lease are to be found in Document X. The Bank contended that, though there must have been some form of lease entitling Estates to grow timber, its terms were impossible to identify once it had been established that this lease was not the original of Document X.

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The question of where the overall onus of proof lies is not an easy one. The Bank seeks a declaration that the properties may be sold free of any claim by or encumbrances in favour of Estates. Initially it had merely claimed an interdict against the removal and sale of timber pending the sale in execution and, in these proceedings, the same main issue was the existence and authenticity of Document X. The Bank wished to bring about a sale of the two portions of land belonging to Crabtree Snr. free of any lease. By threatening to proceed with the cutting and removal of trees on 20th April 1988, Estates brought about a situation in which the Bank was compelled to take action and assume the position of applicant or plaintiff. It, therefore

commenced the interdict proceedings and, when the matter was referred to trial and the relief sought was a declaration of rights, it found itself in the role of plaintiff.

The position at the close of pleadings is, on the authorities, the real consideration in deciding a question of overall onus (Pillay v Krishna 1946 AD 946 at 954; Mobil Oil Southern Africa (Pty) Limited v Mechin 1965 (2) SA 706 (A) at 710). This is presumably because the pleadings

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should be so framed as to identify the disputes between the parties and thus enable the Court to determine, "'upon broad and undefined reasons of experience and fairness" (Pillay's case (supra) at 954 quoting from Wigmore), where the onus should lie.

As pointed out in Hoffmann and Zeffert, The South African Law of Evidence Fourth Edition p 509, there are certain categories of case where the incidence of the onus may be settled by precedent, whereas in others it has to be decided purely upon principle. The present is a case where there appears to be no precedent and it must be determined on principle on its own facts.

The Bank commenced the proceedings and, prima facie, it must establish all that is necessary to entitle it to the declaration of rights which it seeks. This involves two things - proof of the judgment in its favour and also the absence of any encumbrance or right vested in Estates which would bring into operation the provisions of Rule 46 (10) of the Rules of the High Court. This Rule directs that, where property subject to a real right of a third party is sold in execution, the sale is to be subject to the rights of that third party unless he otherwise agrees.

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In paragraph 11 of its Statement of Claim which is set out above, the Bank, no doubt aware of its difficult onus position, attempts to put the burden of proof upon Estates and Crabtree Snr. by alleging that it is entitled to sell in execution " in the absence of an allegation and proof by the First Defendant [Estates] of its claimed rights." This is a contention of law which may or may not be correct and I do not think that, if the overall onus is really upon the Bank, the way in which it has been pleaded can have the effect of changing that onus. While the pleadings at the time of the trial might generally determine where the onus lies, a party should not be entitled to alter that onus merely by an unorthodox form of pleading.

For the Bank it could be argued that the question of who would be the plaintiff in the proceedings depended purely upon the tactical manoeuvres before the trial and the circumstances which existed at the relevant time. If Estates, instead of threatening to go ahead with the operation of felling the timber on Portions 2 and 4,

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had applied to Court for an order declaring that any sale would be subject to the lease in the form of Document X, the onus, having regard to the pleadings only, would have been upon it to establish this.

It is true that if the onus is on the Bank, it would have to establish a negative in circumstances in which the correct facts were all within the knowledge of Estates and Crabtree Senior. But the authorities show that considerations such as these do not generally affect the incidence of the overall onus (Gericke v Sack 1978 (1) SA 821 (A) at 827; Electra Home Appliances (Pty) Ltd. v Five Star Transport (Pty) Ltd. 1972 (3) SA 583 (W) at 584; Tucker's Land and Development Co-operation (Pty) Limited v Loots 1981 (4) SA 260 (T) at 265). There may of course be exceptions. Despite all that may be said in favour in placing the burden of proving that Document X is a copy

of an authentic document upon Estates and Crabtree Snr., I have reached the conclusion that this is a case where the overall onus has to be assumed by the Bank because it is seeking a declaration of rights in specific terms. This involves establishing, on the balance of probabilities, that

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Document X is not a copy of a copy of an authentic original document reflecting a contract of lease in the terms set out or, if it is, that it was not in operation in 1979 when the negotiations were conducted or when the consent judgment was taken.

The learned Chief Justice passed certain comments upon the demeanour of some of the witnesses who gave evidence before him. Of Crabtree Snr. and Jnr. he says:-"Although the Crabtree's remained largely unshaken in cross-examination their evidence came over as being glib, dogmatic and well rehearsed ..... " Of Raza he says:- "Raza although shaky upon some points of detail struck me as a totally honest and generally reliable witness."

These findings, coming as they do from a Judge of considerable experience and insight, must be given due weight by this Court when probabilities on disputed issues are considered. An attempt was made by Mr Simmons to

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persuade us that his assessment of the witness Raza was ex facie the record incorrect. There were undoubtedly discrepancies in Raza's evidence, but these may well be explicable on the ground of misunderstanding or faulty memory. The possibility of language difficulties must also be borne in mind. The learned Chief Justice was aware of the discrepancies when he made his finding on the demeanour of Raza. I do not think that we can reject them.

Mr Cloete who appeared for the Bank opened his attack upon the authenticity of Document X by referring to some odd evidence by Crabtree Snr. concerning the purpose of creating Estates and entering into the lease reflected in Document X. He said that there was a serious family dispute before the predecessor of Document X was brought into existence, and that this document contained a provision similar to Clause 4 of Document X. But he said that Document X was drawn up and his wife given the majority of the shares in order to give her and the children security. Then during the course of cross-examination, he was pressed to say why his wife was given 80% of the shares when Estates was formed in 1958 and he was very reluctant to reply, eventually saying that he could not remember what happened thirty years ago. One

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cannot but agree with Mr Cloete that the evidence of Crabtree Snr. on this aspect of the matter was unsatisfactory. On other matters going back for many years he seemed clear in his evidence.

The criticism of the failure to call Mrs Crabtree may conveniently be dealt with at this stage. She was allegedly a signatory of the original of Document X and the person who, by the time of the litigation, had the sole interest in Estates. She must, if Crabtree Snr. is to be believed, have been involved in the negotiations which led to the allocation of shares in Estates and the conclusion of both the lease of 1958 and Document X. Crabtree Snr. says that she was present during the negotiations with the Bank in 1979. She was also the signatory of the letter of the 10th April 1988 on behalf of Estates which was apparently written after a journey to Johannesburg in which no mention of the lease is made. She was present at the hearing and no special reason was advanced for not calling her.

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The learned Chief Justice considered that the failure to call Mrs Crabtree was something which he could properly take into account in deciding whether the original of Document X had been proved to be an authentic document which was in operation in 1979 and at the time when judgment was obtained. He said that, because she was one of the signatories of the disputed document, she was "an obvious witness" and that the failure to call her was to be viewed in a different light from the failure of the Bank to call Friedlander or Hayter. He concluded that an unfavourable inference was justified.

I agree with the conclusion of the learned Chief Justice. Mrs Crabtree was available as a witness, in theory for both sides. But notwithstanding the apparent tension between her and Crabtree Snr., she was the person who had the interest in Estates and must, if her husband is to be believed, have been very closely connected with the various matters in issue in the present proceedings. She may have been able to depose to things which her husband says had passed from his mind e.g. who drafted the agreement of

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which Document X is a copy; why it was that she received 80% of the shareholding and when this occurred; whether the dispute led up to the first agreement of 1958 and the terms of that agreement; why the letter of the 10th April 1988 contained no mention of a lease. There seems little doubt that her evidence on these and other subjects would have been of assistance to the Court.

The question of whether any inference,and if so what may be drawn when an available witness who is unlikely to be hostile to a party to litigation is not called has been discussed in a number of Appellate Division decisions in South Africa. Elgin Fireclays Ltd. v Webb 1947 (4) SA 744 (A) and Munster Estates (Pty) Ltd. v Killarney Hills (Pty) Ltd. 1979 (1) SA 621 (A) are the most helpful, but, ultimately, the matter is one for the trier of fact to decide on all the information available to him. Is this a case where it is reasonable to suppose that the decision not to call a witness was due to an opinion that there was adequate evidence already on record (Rand Coal Storage & Supply Co Ltd v Alligianes 1968 (2) SA 122 (T) at 123,

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124)? Is it a case where it would appear that the witness would give some evidence which was damaging to a party if called by him (Osborne Panama SA v Shell and BP South African Petroleum Refineries (Pty) Ltd. 1982 (4) 890 (A)) or merely would complicate the difficulties created by conflicts in the evidence of other witnesses (Munster Estates (Pty) Ltd. v Killarney Hills (Pty) Ltd. (Supra)? Is it a case where a witness is equally available to both parties and an inference should be drawn against both (Webranchek v L.K. Jacobs and Co. Ltd. 1948 (4) SA 671 (A) at 682)?

The present may well be a case where it was decided not to call Mrs Crabtree because, on the basic matter of the conclusion of the lease, her husband had given evidence which was not capable of direct contradiction by any person on behalf of the Bank and that her recollection about events of thirty years ago was likely to be inaccurate and would not add anything material to the overall picture painted by Crabtree Snr.. Any decision not to call a witness because it is thought that what he will say is

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already on record and is adequate is liable to go wrong. In the present case the learned Chief

Justice was not impressed by the way in which Crabtree Snr. gave his evidence and this was one of the reasons why he found that Document X had not been proved to be a copy of a copy of the lease. I think that he was justified in believing that the evidence of Crabtree Snr. was not wholly satisfactory and in drawing an adverse inference from the failure to call Mrs Crabtree.

An Appeal Court should not lightly disregard a finding on general demeanour by the trial judge (Munster Estates (Pty) Ltd. the Killarney Hills (Pty) Ltd (supra); Motor Vehicle Assurance Fund v Kenny 1984 (4) SA 432 (E) at 435). If one takes into account the impression which Crabtree Snr. made upon the trial court the failure to call Mrs Crabtree must count in the balance against him and Estates.

Another probability which the bank contends should operate very strongly against acceptance of the authenticity of the original Document X is the fact that, despite numerous occasions upon which the production of the document could have been expected, it was only in the second affidavit of Crabtree Jnr. in the interdict proceedings that the Bank saw it for the first time.

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In the feasibility study prepared by Wynne the lease is mentioned and I do not doubt that this document was given to the officials of the Bank stationed at Manzini -Jafri and Naqvi. The figures in emalangeni which were ultimately agreed upon for the initial advance correspond with the rounded off dollar amounts in the Wynne study and would appear to be based upon that study. Furthermore it is the kind of document which a bank would require before making any advance.

The only factor which could operate against this conclusion is that Raza did not find a copy of the study in the Bank file when he examined it. I do not think that this is enough to cause this Court to reject the evidence of Crabtree Snr. concerning the submission of the study to the Bank in 1979 which was some 8 years before Raza had cause to look for the document. The internal evidence of the correspondence between the dollar figures in the study and the extent of the facility agreed upon in emalangeni confirms that it formed a part of the negotiations in 1979. I think that it is likely that the persons responsible for determining the form of the security which would be required merely overlooked the possible significance of the lease. It seems to me therefore, that

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the Bank was aware in 1979 of the existence of a lease between Crabtree Snr. and Estates.

Then there are the meeting of 7th April 1988 and the letter of 10th April written after consultation with the attorney in Johannesburg. In regard to the meeting there is a conflict between Crabtree Snr. and Crabtree Jnr., on the one hand, and Raza, on the other, as to whether a lease was mentioned. Crabtree Snr. and Estates here rely strongly upon the failure to call Hayter, the Liquidator of Saw Mill and Friedlander, the Attorney for the Bank and the Liquidator. They were both present at that meeting. I think that this is a case where the failure to call the two witnesses must operate against the Bank. The person who denies that a lease was mentioned is Raza, but this is explicable on the ground of poor recollection. There is nothing in the evidence which indicates that any special attention was given to the existence of a lease of the timber rights; attention was directed to the other operations being carried on on the properties.

A probability operating against the correctness of the evidence of the Crabtrees is that, in written documents up to the second affidavit of Crabtree Jnr., the right to fell and remove timber is claimed to be based upon ownership

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of the timber including growing timber. This is inconsistent with a right based purely on a lease. Because of the finding of the learned Chief Justice concerning the credibility of Raza as opposed to the Crabtrees I do not think that this court would be justified in finding, positively, that a lease was mentioned, notwithstanding the failure to call Hayter and Friedlander.

Even if it is accepted that a lease was not mentioned at the meeting of 7th April 1988, this does not mean that the reason for this was that the document had not yet been forged and that the terms of the forgery had not been decided upon. Crabtree Snr. and Jnr., while saying that they at all times were aware of the existence of the lease, stated that they had not at that stage found a copy of it and thus did not know its exact terms. They knew that Estates had been planting and felling timber in terms of the lease entered into in 1961, but, without the written document they could not be certain of the exact terms upon which this had been done. Hence the reticence in emphasizing the existence of the lease.

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Crabtree Jnr. said in evidence that he found a copy of the lease before the 5th May 1988. It must have been very shortly before that date because he was not in possession of it on the 26th April 1988 when he swore to his first affidavit for the purpose of obtaining a postponement. In the result, even if the lease was not mentioned at the meeting on April 7th, this is merely a fact which may be taken into account in deciding whether there was a forgery subsequent to that date: it is not conclusive.

The letter signed by Mrs Crabtree on 10th April 1988 after the meeting in Johannesburg had the result which it was probably designed to secure, namely, to get the Bank into a position into which it was the applicant or plaintiff in litigation. If this was achieved, it would strengthen any contention that the onus was on the Bank to negative the existence of the lease and not upon Estates and Crabtree Snr. positively to prove it. This was no doubt an important consideration if the position at that stage was that, though convinced about the existence of

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a written document, it could not be found. When Friedlander wrote his letter of 22nd April he was in a position in which he could hardly decline to initiate proceedings.

In his first affidavit dated 27th April 1988 in which he asked on behalf of Estates for further time, Crabtree Jnr. alleges that the trees were the lawful property of Estates and that documentary proof of such ownership would be lodged in support of this contention. In his affidavit of 5th May 1988 the copy of document X is produced (Annexure E) and he says that he is attempting to obtain the original of the agreement. Crabtree Jnr. persists in contending that the timber on the property of his father is owned by Estates "by virtue of the land registered in the name of the Second Respondent [Crabtree Snr.] having been leased to First Respondent [Estates] for the purpose of growing trees thereon for almost the past 30 (thirty) years". As a contention of law the statement is, of course, wrong. Crabtree Jnr. in his second affidavit says that Document X was first discovered between the time of the filing of his first affidavit and when he went fully into the facts for the purpose of his second affidavit.

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For the Bank it is urged that the late production of Document X throws significant doubt on its authenticity as a photocopy of a photocopy of the original lease of October 1961. The importance of the production of the lease or a copy of it must have been obvious. The statement in the first affidavit of Crabtree Jnr. that documentary proof of ownership would be produced might have been a bold prediction if, at the 27th April, the lease had not been found but, if it was not found

before the filing of the answering affidavit, there were always other documents including the accounts of Estates which would fall into the category of the documentary proof of ownership promised in the first affidavit.

My conclusion on the probability created by the contents of the affidavits of Crabtree Jnr. is that it is something which strengthens the doubts which the other factors mentioned above instil and it cannot be gainsaid that the above consideration cannot but give rise to a feeling of unease about the authenticity of Document X.

On the other side of the balance, however, is the fact that it is common cause that there must have been some form of arrangement which entitled Estates to grow and cut the timber on the land of Crabtree Snr.. In certain of the annual accounts, there is reference to a lease and the

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probability is that whatever the arrangement was it was in the form of a lease rather than a personal servitude, or possibly, another form of arrangement. The evidence contains no indication at all that there was another lease in different terms. The question then is: assuming that there was a lease in existence in 1979 and 1988 does the evidence show, on a balance of probabilities, that it was the original of Document X?

Document X contains no internal indication which creates a doubt as to its authenticity. Its language is consistent with it having been drafted by someone with a measure of legal training or, perhaps, by a layman who had experience of contracts drawn up by lawyers. The typing is not perfect, e.g. the position of the figure 3 and the misspelling of "renewal" and this might indicate that it was not drafted in a lawyer's office. It has not been suggested that the signatures of Mrs Crabtree and Crabtree Snr. at the end of the document are not their signatures. Then there is the insertion of the word "commencing" in manuscript initialled by the signatories. If Document X is a forgery, the forger has been ingenious in using the initialled manuscript addition to give an impression of authenticity.

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A meeting of directors of Estates was held on 9th October 1961 which was the date of the signature of Document X. It is accepted by all parties that the minute of that meeting appearing in the minute book is genuine. After resolving that Estates would extend its forestry operations to include Portion 2 it was further resolved "that the relevant agreement with the landowner, which was tabled, be hereby ratified". Crabtree Snr. says that the document which was "ratified" was Document X. Is there any reason why this should not have been so? The use of the word "ratified" in the relevant resolution is perhaps not appropriate to an acceptance by Estates of the terms of an agreement entered into on the same day as the alleged ratification. But the term "ratified" is the kind of word which might well have been used by a man of business and not a lawyer to denote confirmation of something which had not yet been in operation.

The learned Chief Justice attached importance to the absence of a stamp on the copy of the document. He suggested that this might have been due to the fact that a stamp current in 1961 would not easily have been obtainable at the time of the forgery in 1988. I doubt whether the way in which the business of the Crabtree family was conducted would include the affixing of a stamp upon an internal family contract.

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If there had been some slight indication in the evidence that the document which was tabled at the meeting of the 9th October was not the original of X or that there was some agreement after

that date, the doubts raised on behalf of the Bank would have assumed overwhelming importance. But that is not so. The evidence is completely lacking in any indications of another agreement which might have been approved on the 9th October 1961 and I must therefore conclude that the original of Document X was the lease drawn up on that date and in operation at all material times.

For the Bank Mr Cloete argued that, even if the Court is satisfied as to the authenticity of Document X, Estates is estopped from relying upon it and, in particular, upon clause 4. He says that there was a duty resting on Crabtree Snr., which was not observed, to draw the attention of the Bank's representatives not only to the existence of the lease, but also to its terms. It is not denied that neither the original nor a copy of Document X was at any stage shown to the Bank during negotiations and that the terms of Clause 4 were not drawn to their attention.

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The plea of estoppel is contained in paragraph 4 of the replication of the Bank and is alternative to the denial that Estates and Crabtree Snr. entered into a lease a copy of which is Document X and also to the contention that the lease was ineffective as against creditors because it was not registered against the title deeds of the properties. This latter defence was not persisted in. The estoppel is pleaded as follows:-

".....the Plaintiff avers that the First Defendant is estopped from relying upon the said lease against the Plaintiff for the following reasons:-

4.1 At all material times herein the First Defendant represented by the Second Defendant by conduct negligently represented to the Plaintiff that the properties were not encumbered by any lease or other rights in favour of the First Defendant.

4.2 The Plaintiff accepted as correct the aforesaid representation and acted thereon when it required the properties to be mortgaged to it by the Second Defendant as mortgagor in favour of the Plaintiff as mortgagee.

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4.3 In so doing the Plaintiff acted to its detriment."

The Bank does not contend that during the negotiations between Crabtree Snr. and representatives of the Bank any positive statement was made by the former suggesting that the two properties owned by Crabtree were not encumbered by a lease or other right in favour of Estates. The argument is put forward on the basis of a misrepresentation by silence - a failure to disclose a very material fact which was within the knowledge of Crabtree Snr. but not of the representatives of the Bank and when it was apparent to all persons involved that the timber, as opposed to the land belonging to Crabtree Snr., was to be the real and substantial security should Saw Mill not repay the amounts advanced to it.

I think there is some substance in the contention of Mr Cohen that the replication of estoppel does not focus attention clearly on the real basis of the estoppel defence. A representation by conduct would ordinarily suggest some positive act, but the submission on behalf of the Bank is that there was an omission by Crabtree Snr. to make a disclosure which the law required him to make. In a sense, non-disclosure may constitute "conduct", but it seems to me that, in order to raise the matter squarely,

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the Bank should have stated that it was relying upon the failure to disclose the terms of Clause 4 of the lease. However, because the nature of the estoppel relied upon had been raised in the answering affidavits in the proceedings for an interdict which came before Rooney J., I consider that it would be undesirable to hold, at this stage that the defence of estoppel by non-disclosure cannot be raised. Mr Cohen did not suggest that his client had been prejudiced by the way in which the estoppel had been pleaded.

The argument on behalf of the bank was that, as between Estates and itself, the intention of registering the bond was to provide security, primarily of the trees, for the advance to Saw Mill; that the Bank had to rely upon Crabtree Snr. and Mrs Crabtree to make full disclosure of the relevant information; and the Bank had no independent sources of information available to it. Because Clause 4 constituted a substantial departure from what would have been the common law position on the termination of the lease, the circumstances demanded not only disclosure of the existence of the lease but also of its terms and in particular the terms of clause 4.

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For the purposes of this argument it must be accepted that the existence of the lease was known to the Bank. This, it was said, did not put upon the Bank the duty of requesting the production of the lease or of making enquiries concerning its terms should it be concerned to ascertain the extent to which its interests would be protected by the mortgage bond. It is said that the Bank was entitled to proceed upon the basis that the lease did not operate against the value of its security more unfavourably than the common law did.

Mr Cloete based his argument upon the judgment of Hoexter JA, in Resisto Dairy (Pty) Ltd. v Auto Protection Insurance Co. Ltd. 1963 (1) SA 632 (A), a decision of the South African Appellate Division. The question at issue in that case was whether the failure over a period of seven months by an insurance company to notify the insured that it had repudiated liability under a policy to indemnify the insured had led the insured to believe that the company had assumed liability and was proceeding to take over and conduct the defence or settlement of a claim by a third party in the name of the insured, a right accorded to it in terms of the policy. The insured had been prejudiced by

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this. The Court held there was a duty upon the insurer to notify the insured of its decision to repudiate within a reasonable time and that its failure to do so raised an estoppel against asserting the repudiation. At page 642 of the judgment, which was not based upon any principle peculiar to the law of insurance, a passage from the First edition of Spencer-Bower on Estoppel by Representation is quoted. A portion of the quotation is as follows:-

"The parties to a transaction are entitled to assume, as against one another, omnia rite esse acta; each of them is entitled to suppose that the other has fully discharged all such obligations (if any) of disclosure or action towards himself as may be created by the circumstances. If, therefore, he received from that other no intimation, by language or conduct, of the existence of any fact which, if existing, it would be the latter's duty, having regard to the relation between them, the nature of the transaction, or the circumstances of the case to reveal, he has legitimate ground for believing that no such fact exists or that there is nothing so abnormal or peculiar in the nature of the transaction or in the circumstances of the case, as to give rise to any duty of disclosure, and to shape his course of action upon that assumption; in other words he is entitled to treat the representor's silence or inaction as an

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implied representation of the non-existence of anything which would impose, or give rise to, such a duty, and, if he alters his position to his detriment on the faith of that representation, his representor is estopped from afterwards setting up the existence of such suppressed or undisclosed fact." (The Second Edition of the work is in the same terms.)

The first question is always, therefore, whether there was a duty to disclose. Mr Cohen relied upon South African authorities which indicate that, in general, there is no duty resting upon the seller of property to disclose the existence of a lease to a potential purchaser of immovable property. In Kruger v Pizzicanella and Another 1966 (1) SA 450 (C) it was held that there was no obligation to disclose an oral variation of a disclosed written lease to a potential purchaser. Van Winsen J. relied upon Essop Ebrahim and Sons v Hoosen Cassim 1920 NPD 73, a Full Bench decision in a not dissimilar case and de Wet v Union Government 1934 AD 59. In the de Wet case the existence of a lease had been disclosed but not its terms. One of the terms provided for set-off of accruing rental against a debt owed by the lessor the seller of the property to the lessee which was undoubtedly a radical departure from what

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would be expected in an ordinary lease. The court held that there was no duty to disclose.

The matter may also be considered from the point of view of the representee. Page J. in Dhayandh v Narain 1983 (1) SA 565 (N) at 575, dealing with the case of an unregistered personal servitude in existence prior to a sale of property, discussed what was required of the purchaser. He said "the law will not step in to assist a [person] .....who, having within his reach the means to ascertain and secure his rights, fails to exercise that diligence which the law should expect from a reasonable and careful person and does not avail himself of the means of knowledge accessible to him ....."

If there is a duty to enquire, there should be no duty to disclose. I can see no difference in principle between a case involving the sale of property where there is a prior lease or personal servitude, on the one hand, and arrangements for security for financing a commercial enterprise, as in present case, on the other.

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The Bank had the means to ascertain and secure its rights. It knew of the lease and could have protected itself by asking for and examining its terms. If the document had not been available, Estates could have been required to sign an agreement waiving all rights as lessee should judgment be sought by the Bank on the strength, of the mortgage. While there may be factual situations in which to withhold knowledge of the terms of a lease could give rise to an estoppel, the present is not one. There is nothing in the evidence which indicates that a situation ever arose during the course of negotiations which demanded a disclosure of the provisions of Clause 4 in order to avoid making a positive misrepresentation. Indeed, the evidence of negotiations contains little, if anything, about discussion concerning the security for the loan. Crabtree Snr. seems to have agreed to the requirements of the Bank on the matter of security and the Bank merely stipulated what it required - guarantees from the directors of Saw Mill and mortgages over the properties of Estates. If Crabtree Snr.was aware that the security might be

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inadequate, was he obliged in effect to say to the Bank: "Gentlemen might I point out that because of the terms of the lease and, in particular clause 4, I think you might find that the security which you require is inadequate"? I think not. The statement by Lord Templeman in Banque Financiere de la Cite v Westgate Insurance Co. Ltd. [1990] 2 A11ER 947 (HL) at 954 that

"a professional should wear a halo but need not wear a hair shirt" is apposite also to a person in the position of Crabtree Snr. in the present case.

In my view therefore the defence of estoppel fails and it follows that the appeal of the Bank fails. Those of Estates and Crabtree Snr. succeed.
The parties to the appeals have entered into a written agreement concerning the payment of costs of all the proceedings. In terms of this agreement and as a result of the decision of this Court the Bank will be obliged to pay the costs of Estates and Crabtree Snr. in all proceedings and, where two Counsel were used, the costs of two Counsel. This order will cover the costs in the interdict proceedings before Rooney J., the appeal from his decision to this Court, the trial proceedings before Hannah CJ. and the present appeals.

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I would therefore propose the following order:-

1. The appeal of the Bank is dismissed.

2. The appeals of Estates and Crabtree Snr. are allowed.

3. The order made by Hannah CJ. is set aside and there is substituted the following:-

"The Remainder of Portion 2 and the Remainder of Portion 4 of Farm 73, District Hhahho, Swaziland shall be sold subject to the provisions of a lease in the terms set out in the document dated 9th October 1961 and annexed to the plea of Estates marked X."

4(a) The Bank is ordered to pay the costs of Estates and Crabtree Snr. in all courts commencing with the application for an interdict dated 26th April 1988.

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(b) Where two Counsel were employed, such costs are to include the costs involved in the employment of two Counsel.

SCHREINER, JA

I agree and it is so ordered.

WELSH, JA

I agree

KOTZe, JA

Delivered on the ..14th day of June 1991.

Agreement, between David Crabtree and Tonkwane Letates Limited Whereas the parties have agreed that the company has and shall continue to establish a commercial forestry operation on portions two and four of Farm 73 in XXX District, How therefore these presente witness that

1. The company pay rent of eight hundred rands in arrear for each financial year for the land.

2. The company pay for all coats of establishing and insintaining and operating the plantations on the land and shall have Lull control of all such activities and shall tie entitled to harvest all XXX on the land for its exclusive benefit.

3. The parties thereto agree that the company shall have no right to demand renewal of this agreement Tor a period exceeding one financial year, provided that the agreement shall be deemed to renew in the absence of written notice from Cractee to the contrary.

4. In the event of the said notice being received, by the company, Crabtree shall be obliged to pay the auditor's valuation of the timber remaining and the improvements made by the company as at the end of the financial year next after the receipt of the said notice at the registered office.
for Tonkwane Estates Ltd

D.A. Crabtree