

SOUTH AFRICAN LAW COMMISSION

PROJECT 39

INVESTIGATION INTO THE LEGAL CONSEQUENCES  
OF SUSPENSIVE CONDITIONS IN  
CONTRACTS OF SALE

REPORT

May 1986



To Mr H J Coetsee, MP, Minister of Justice

I have the honour to submit to you in terms of section 7(1) of the South African Law Commission Act, 1973 (Act 19 of 1973), for your consideration the Commission's report on the investigation into the legal consequences of suspensive conditions in contracts of sale.

  
G VILJOEN  
CHAIRMAN

30 May 1986



## INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are -

The Honourable Mr Justice G Viljoen (Chairman)  
The Honourable Mr Justice H J O van Heerden (Vice-Chairman)  
Prof J T Delport  
Mr J E Knoll  
Mr P A J Kotzé  
The Honourable Mr Justice P J J Olivier (full-time member)  
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## 1. INTRODUCTION

1.1 An article by P J J Olivier SC entitled "Opskortende Voorwaarde en die Koopkontrak"<sup>1</sup> appeared in the 1980 issue of De Jure. The author makes the statement that a false doctrine exists in our law of contract which is giving rise to a great deal of injustice. He formulates the false doctrine as follows: When a contract of sale is concluded subject to a suspensive condition there is no contract of sale pending the fulfilment of the condition, but an "innominate" contract. Once the condition is fulfilled, the "innominate" contract becomes a contract of sale. The injustice to which the false doctrine gives rise is that statutory provisions which regulate contracts of sale are evaded by making the sale subject to a suspensive condition.

1.2 In the article the author analyses the judicial decisions that have given rise to the false doctrine and refers to the statutory provisions which are thereby evaded. He also refers to the views of various writers who criticise the legal position as it has developed through judicial decisions. His conclusion is that it is pre-eminently a matter that deserves the attention of the South African Law Commission.

1.3 The Commission responded to Mr Olivier's suggestion by placing the matter on its programme for investigation after a preliminary study of the subject under the title: Investigation into the legal consequences of suspensive conditions in contracts of sale. The legal development and the

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1 At 238

present legal position with regard to the effect of suspensive conditions in contracts of sale were researched by the Commission with the aid of its secretariat. The conclusion arrived at was that the legal position as reflected in case law was not jurisprudentially justifiable. However, it appeared to the Commission that the current law did not really present particular problems or give rise to inequitable results in practice, especially since the legislature, whenever it found it necessary, also extended the limitations which it wished to impose on contracts of sale to such contracts that are subject to suspensive conditions. The question which had to be answered was whether the Commission should recommend a modification of the law solely in the interests of pure law. To enable it to answer this question the Commission distributed a working paper for general information and comment among jurists, representatives of commerce, and interested Government institutions. In the working paper the legal development and present legal position with regard to the effect of suspensive conditions in contracts of sale were set forth. A draft bill was included to show how the legal position would have to be changed in order to place it on a jurisprudentially justifiable basis. This draft bill forms Annexure A to this report.

1.4 After considering the comments received, the Commission published a further draft bill - Annexure B. At that stage there was a case pending in the Appellate Division of the Supreme Court which might have provided guidelines regarding the branch of the law in question. The investigation was, therefore, held in abeyance until the case was decided -

Tuckers Land and Development Corporation v Strydom.<sup>2</sup> The decision is discussed below.

## 2. THE ORIGIN OF THE SO-CALLED FALSE DOCTRINE

2.1 According to the general principles of the law of contract a contract of sale comes into being when the parties, the purchaser and the seller, reach consensus regarding the conclusion of an agreement by which the ownership in a specific thing is transferred by the seller to the purchaser in consideration of a specified sum of money. The seller accepts the obligation to deliver or transfer the thing and the purchaser accepts the obligation to pay the agreed price. Naturally the parties can agree on the time and place and delivery of the thing and the postponement of the payment of the price. They can also add other conditions to the contract by which some of their respective obligations or even the operation of the contract may be postponed or suspended altogether, pending the occurrence of an uncertain future event. In principle, however, the suspension of the obligations flowing from the contract should not affect the existence of the contract. The coming into operation of the suspended obligations is after all not dependent on the further consensus of the parties.

2.2 The case law had, however, already taken another direction early on. In the case Quirk's Trustees v Assignees of Liddle and Co<sup>3</sup> the facts were briefly the following. Quirk leased hotel premises to Liddle and Co

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2 1984 1 SA 1 (A)

3 (1885) SC 322

and at the same time sold the goodwill, furniture, stock and fittings of the hotel to the latter firm. Liddle and Co went insolvent and the lease was cancelled. The trustee of the insolvent estate resold some of the furniture and fittings to Quirk. The purchase price was payable in instalments and ownership in the goods was reserved by the trustee pending payment of the full purchase price. Quirk failed to pay in accordance with the agreement and himself went insolvent. His trustee laid claim to the goods, which in the mean time had been delivered to Quirk. The court decided that the ownership still vested in the seller of the goods, that is to say in the trustee of the insolvent estate of Liddle and Co.

2.3 The result of the decision cannot be faulted. It was after all a term of the agreement that ownership would not pass to the purchaser before the full purchase price had been paid. However De Villiers CJ based his decision on the fact that the sale was subject to a suspensive condition and that pending the fulfilment of the condition, no contract of sale had come into being. For this view he relied on Voet 18.1.26 and the Digest 18.1.80.3. The Chief Justice's translation of the latter text reads as follows:

No one can be deemed to have sold a thing of which it is agreed that the property shall not pass to the purchaser; but this is either a letting or some other kind of contract.

In 18.1.26 Voet deals with stipulations that may be added to a contract. Relying on D 18.1.80.3 he merely says that a term that ownership does not pass to the purchaser is rejected. The Digest text and Voet's comment thereon is obviously concerned with the case where the intention of the parties is that ownership will never pass to the "purchaser".

2.4 In his judgment De Villiers CJ also refers with approval to a similar view adopted in the case Fazi Booy v Short.<sup>4</sup> This case concerned a horse which was sold, ownership being reserved by the seller until the full purchase price had been paid. The court held that the stipulation constituted a condition which suspended the sale.

2.5 In Leo v Loots<sup>5</sup> the Transvaal court followed the approach of De Villiers CJ in the Quirk case. Innes CJ stated the following inter alia:

This decision was based upon the principle that such a condition (a suspensive condition) was repugnant to the very nature of a sale until the condition has been disposed of. This view is supported by authority (Voet 18.1.24). It has found general acceptance and we shall be well advised to adopt it.

A long line of decisions followed in which this view was followed without referring anew to any common law authority.<sup>6</sup> There are also decisions in which this view is criticised but the courts feel bound by the earlier decisions.<sup>7</sup>

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4 1882 EDC 301

5 2 EDL 301

6 Johnson v Samuels 1914 CPD 169; Mitchell's Piano Saloons v Theunissen 1919 TPD 392; Flax v Van der Linde 1928 CPD 495; Massey-Harris v Van der Walt 1932 EDL 115; Frasers v Nel 1929 OPD 182; S A Land Exploration Co Ltd v Union Government 1936 TPD 174

7 Kinsella v Hermanus-Mossel River Township 1945 TPD 104; Sentraalwes Personeel Ondernemings v Wallis 1978 3 SA 80 (T)

2.6 In Provident Land Trust Ltd v Union Government<sup>8</sup> the matter was raised in the Appellate Division. The question that had to be decided was whether a contract of sale had come into being between the parties in 1908 or in 1910. The transaction was entered into in 1908. From the outset the agreement was worded as a contract of lease. It was agreed that when the agreed purchase price had been paid in full by means of "rent instalments", but not before that event occurred, the agreement would constitute a contract of sale. Three of the five members of the court decided that the contract of sale had come into being at the time of payment of the full purchase price and not at the time of the conclusion of the agreement. De Villiers CJ held that -

... the conditions introduced into the agreement were wholly inconsistent with the existence of a contract of sale until the instalments had been duly paid.

In his judgment the Chief Justice also referred to the Quirk decision with approval.

2.7 The case Corondimas v Badat<sup>9</sup> was concerned with a true suspensive condition as contrasted with a term whereby the transfer of ownership in goods is merely postponed. A statutory provision<sup>10</sup> imposed a prohibition on the acquisition of certain immovable property by a White person from an Asian, except under a permit authorising such acquisition.

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8 1911 AD 615

9 1946 AD 548

10 Act 35 of 1943

The purchaser (a White person) and the seller (an Asian) entered into a contract whereby property which was subject to the prohibition was sold subject to the granting of the necessary permit. The permit was in fact granted after the conclusion of the contract. The question to be decided was whether the contract was void on the ground that when it was concluded authorisation under the permit was lacking. In other words the court had to decide whether, pending the fulfilment of the condition namely the granting of a permit, a contract for the acquisition of land had come into being in contravention of the relevant statutory provisions. The court decided that prior to the fulfilment of the condition no such contract had come into being:<sup>11</sup>

Where an agreement of purchase and sale is entered into subject to a suspensive condition, no contract of sale is there and then established, but there is nevertheless created "a very real and definite contractual relationship" which, on fulfilment of the condition, develops into the relationship of seller and purchaser ...

2.8 The Appellate Division also applied this principle in the case Palm Fifteen v Cotton Tail Homes (Pty) Ltd.<sup>12</sup> The owner of an unproclaimed township concluded agreements for the sale of stands in the township with purchasers subject to the condition that "... the sale hereby made, is suspensive and subject to the proclamation of the said township." The court decided that although a contractual relationship existed between the parties, no contract of sale with regard to the stands had taken place before the proclamation of the township. This view was subsequently

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11 At 558

12 1978 2 SA 872 (A)

followed in various cases, although it was sometimes criticised.<sup>13</sup> In Tuckers Land and Development Corporation v Somerville<sup>14</sup> for example it was said:

There is much to be said for the view that an agreement, subject to a suspensive condition, is already an agreement for the sale of land, pending the fulfilment of the condition ... In view, however, of the views adopted in Corondimas and Another v Badat 1946 AD 548 and Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd 1978 (2) SA 872 (A) it seems to me that this court must accept that, until a suspensive condition is fulfilled, there is no agreement for the sale of land, but an agreement of a different nature.

2.9 The matter was raised again in the Appellate Division in the case Soja v Tuckers Land and Development Corporation.<sup>15</sup> Once again it revolved round the sale of a stand in an unproclaimed township, subject to the proclamation of the township. The court found that the condition concerning the proclamation of the township was a suspensive condition and applied the principle accepted in Corondimas v Badat, namely that there was no contract of sale pending the fulfilment of the condition.

### 3. CRITICISM OF THE VIEW REFLECTED IN CASE LAW

As early as 1888 an anonymous writer criticised the ratio of the decision in Quirk's Trustees v Assignees of Liddle and Co. He wrote as follows:<sup>16</sup>

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13 Sentraalwes Personeel Ondernemings v Wallis 1978 3 SA 80 (T); Sentraalwes Personeel Ondernemings v Nieuwoudt 1979 2 SA 537 (C)

14 1981 2 SA 17 (C) at 19 F + H

15 1981 3 SA 314 (A)

16 1888 The Cape Law Journal Vol V 176



When a sale for credit has been effected and delivery has taken place, the purchaser thereby becomes owner of the thing sold. But an agreement may be attached to the sale that the property shall not pass unless, and until, the purchase price has been paid in full. Such an agreement is known as a pactum dominii reservati (Bort, *Nagelatene Werken*, 2, 7, 4; *Brunneman's Consilia*, 157; *Müchlenbrach, Doctrina Pandectarum*, 2, par 405; *Glück XVI*, par 1000, p 229). Vangerow says that this agreement is a very common one in modern times; and that it can be made under either a suspensive or a resolutive condition (*Lehrbuch der Pandecten*, 1, par 311, p 568). Such an agreement is not in conflict with the passage from the Digest (18, 1, 80 par 3) which has been cited to shew that it is forbidden by law. All that is said there is (what in itself seems pretty obvious) that where an agreement is attached to a contract that at no future times whatsoever the property should pass to the party acquiring possession of the thing, such a contract cannot be considered as a sale, but must be regarded as some other form of contract. And indeed in some cases the agreement of reserved ownership would coincide with the Lex Commissoria, a well known and perfectly valid agreement. The dictum in Quirk's Trustees v Assignees of Liddle can therefore hardly be upheld.

3.2 In an article which mainly analysed the legal effect of hire-purchase agreements, L de V van Winsen<sup>17</sup> in 1930 also criticised the decision. He was of the opinion that only the passing of ownership was suspended and not the contract itself. He considered<sup>18</sup> whether the reservation of ownership was compatible with a contract of sale and after analysing the various sources<sup>19</sup> concluded that where ownership was only temporarily reserved the pactum reservati dominii was compatible with the contract of sale.

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17 "Theories of hire-purchase" 1930 SALJ 385 at 390 et seq

18 At 390 et seq

19 D 41.2.38; D 43.26.20; D 2.14.43; Voet 18.1.24; Huber 3.4.40; Mullenbach Doctrina Pandectarium 3.5.405 and Glück 18.1.1000

3.3 In an article also on the subject of the hire-purchase agreement<sup>20</sup> Dr E Spiro refers to the condition concerning transfer of ownership and states that he cannot support the view that such a condition affects the contract itself. He says that in the legal systems of many other countries the condition affects only the passing of ownership.<sup>21</sup>

3.4 D P de Villiers went thoroughly into the effect of suspensive conditions on agreements in 1943.<sup>22</sup> He compared the views held by the courts with the principles to be inferred from the relevant Roman law texts<sup>23</sup> and the views of the Roman-Dutch writers.<sup>24</sup> According to him there was no room in Roman law for the view that the contract itself is postponed until fulfilment of the condition: "It is clear that the contract already exists and that some of the consequences come into operation immediately; however, others are delayed until fulfilment of the condition; if the condition is not fulfilled, the contract lapses again together with the consequences which have already ensued."<sup>25</sup> (Translation). He states that the Roman-Dutch writers did not examine this particular question in any great depth, but the fact remains that none of them assert that pending the

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20 "The hire purchase agreement in South African law and its problems" 1940 SALJ 263 at 267

21 Ibid. For example Germany, Australia, Hungary, Italy and also most of the writers on English and American law

22 "Die betekenis van die opskortende voorwaarde by 'n ooreenkoms" 1943 THRHR 13

23 Inst 3.20.25; Inst 3.15.4; D 45.3.26; D 44.7.42 and D 20.1.13.5

24 See inter alia Van der Linden Koopmans Handboek 1.14.9.2; De Groot Inleiding 3.3.47 and Voet 45.1.19

25 At 17

fulfilment of the suspensive condition the contract does not exist. According to him the judgment in Quirk's Trustees v Assignees of Liddle and Co was based on an incorrect interpretation of Voet 18.1.26 and the court's approach was in direct conflict with the Roman and Roman-Dutch authorities. Voet could only have meant that a term that ownership will never pass to the purchaser is inadmissible and Voet does not contend at all that transfer of ownership may not be postponed pending fulfilment of a condition. If Voet had meant that, it would have been contrary to what he said elsewhere about conditions in general. He also points out that passing of ownership can be postponed in many ways other than of a suspensive condition, for example a term that delivery will take place only after a certain date. Although, according to him, such cases regularly occur in practice, it has not yet been asserted that the coming into existence of the contract of sale is postponed in such a case. De Villiers further points out that the courts' approach has already given rise to problems in practice,<sup>26</sup> and he expresses the view that it is most desirable that the approach be reconsidered and brought into line with the Roman and Roman-Dutch law.<sup>27</sup>

3.5 Twenty four years later, in 1977, Cronjé and Lotz<sup>28</sup> were still expressing the hope that the Appellate Division would reconsider its

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26 At page 19 et seq he refers to cases where damages resulting from breach of contract and also redhibitory relief were granted before fulfilment of the conditions. This does not accord with the idea that the coming into being of the whole contract of sale is suspended

27 At 21. In 1949 in a review of an earlier edition of De Wet and Yeats Kontraktereg en Handelsreg Hamman also expressed the hope that "in future our courts will adopt the right attitude" (translation) 1949 THRHR 218 at 235

28 "Die koopkontrak en die opskortende voorwaarde" 1977 THRHR 276 at 284

construction of a contract of sale subject to a suspensive condition. Their article followed the confirmation of the courts' view in Cotton Tail Homes v Palm Fifteen (Pty) Ltd<sup>29</sup> and Le Roux v Sentraalwes Personeel Ondernemings<sup>30</sup> and they inter alia point out the following:

3.5.1 De Villiers convincingly shows what the relevant Roman and Roman Dutch law is and that there is nothing in South African Law to prevent a seller from reserving his ownership temporarily.

3.5.2 The Roman law rule that in the case of a cash sale ownership does not pass to the purchaser unless he has paid for the thing or given security was taken over by the South African common law. The rule applied even if the thing was handed over to the purchaser. In the light of this principle there is no reason why the seller who sells on credit cannot expressly agree to reserve the ownership which the law automatically reserves for him if it is a cash sale.

3.5.3 Obligatory acts and acts having consequences in terms of the law of things were confused in earlier cases under the influence of English law. In English law the contract of sale is not merely an obligatory pact but also an instrument whereby ownership is transferred. Consequently a condition in English law results in the contract of sale itself being suspended and not only the passing of ownership.<sup>31</sup>

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29 1977 1 SA 264 (W)

30 1977 2 SA 510 (C)

31 At 280. Cf also F W Mostert "Soja (Pty) Ltd v Tuckers Land and  
(Footnote Continued)

3.5.4 The courts' view that contractual relationships immediately arise between the parties in spite of the suspension of the contract is untenable. The nature of this contractual relationship has not been defined by the courts and "... the question is ... what the nature of such a contract is, according to what rules the rights and obligations must be determined, and how application of these rules differs from the situation should the contract of sale exist from the outset already." (Translation)

3.5.5 The view that a contract already comes into being pending the fulfilment of the condition but that it is not a contract of sale is untenable. This is particularly clear in the case of hire-purchase agreements which are also contracts subject to a suspensive condition. In the case of such a contract obligations are enforced which can exist only if there is a contract of sale between the parties.

3.5.6 "The reason why a pactum reservati dominii has been wrongly regarded as a suspensive condition is that the courts have neglected to differentiate clearly between the contract of sale as an obligatory pact and traditio as an act having consequences in terms of the law of things. In our law the contract of sale and traditio are completely separate acts, each with its own requirements and consequences. The purpose of a contract of sale is to create obligations. It is completed when the parties have agreed unconditionally to buy and sell a specific thing for a specific purchase price (Voet 18.1.24). The consequences of this, the obligations, then exist. The obligatory pact only creates the obligation to pass ownership but

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(Footnote Continued)

Development Corporation (Pty) Ltd 1981 3 SA 314 (A) Koopkontrak - opskortende voorwaarde - konstruksie van" 1981 THRHR 32

cannot transfer ownership itself. Ownership is transferred by a separate juristic act, traditio, whereby effect is given to the obligations which were undertaken in the contract of sale. In other words traditio does not complete the contract of sale but gives effect thereto. Under our law it is in any case not necessary for the existence of a contract of sale that the seller must undertake to transfer ownership to the purchaser."<sup>32</sup>  
(Translation)

3.5.7 "The correct construction of reservation of ownership is that it is agreed in the contract of sale that ownership may be reserved but this does not render the contract of sale itself conditional. The condition as such applies only to traditio." (Translation)

3.5.8 "In hire-purchase contracts the condition to which the passing of ownership is subject throughout is full payment of the purchase price. Now, payment is a constitutive element of the contract of sale and can never be a condition thereof. Consequently there can be no question of conditional obligations in this case, for if that were the case every sale would be conditional. In every sale the performance (delivery of the thing) is related to and dependent on the counter-performance (payment of the purchase price) ... Fulfilment by the purchaser of his obligation cannot be a condition for performance by the seller. Only if the whole agreement, that is to say delivery of the thing as well as payment of the purchase price, is made dependent upon a future uncertain event can one speak of a conditional sale." (Translation)

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32 At 282. Cf also D S P Cronjé "Die saaklike ooreenkoms by die eiendomsoordrag van roerende sake" 1978 THRHR 227

3.5.9 A contract is a fact which cannot be suspended. Only its consequences are susceptible of suspension.<sup>33</sup>

3.6 In an article on the sale of unproclaimed stands<sup>34</sup> T A R van Rhijn inter alia points out that although the purpose of a relevant Transvaal Ordinance is to protect the purchaser of an unproclaimed stand, the purchasers are deprived of the protection contemplated by the legislature by the suspensive conditions in contracts. The seller merely claims that the prohibition in the Ordinance on the sale of unproclaimed stands relates to contracts of sale but cannot apply to him because owing to the suspensive condition he had not concluded a contract of sale. In his opinion the situation is untenable and should receive the attention of either the courts or the legislature.

3.7 In 1980 Mr P J J Olivier SC of the Bloemfontein Bar summarised the criticism against the courts' view in an article and came to the conclusion that the courts' approach amounted to a false doctrine.<sup>35</sup> In his opinion the doctrine is so firmly established in South African case law that it is hardly to be expected that the Appellate Division will change its view.

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33 At 284. In this connection a statement by Windscheid (Lehrbuch des Pandektenrechts 1 1963 425) is referred to which is translated as follows: "That which is dependent on the condition is not the existence of the will but the existence of the effect which is contemplated by the will, not the will itself but the consequences thereof." In his thesis "Die eiendomsvoorbehoud by huurkoopkontrakte van roerende sake" 1977 (RAU) 96 Cronjé also pointed out that a contract as an agreement is a happening which either occurs or does not occur

34 "Die verbod op die verkoop van ongeproklameerde erwe" 1980 Modern Business Law 30 et seq

35 "Opskortende voorwaarde en die koopkontrak" 1980 De Jure 238

The legislature should intervene and the matter also deserved the attention of the South African Law Commission. In Quirk's Trustees v Assignees of Liddle and Co the court had given an interpretation to Digest 18.1.80.3 and Voet 18.1.26 which it had never had in South African law, and the passing of ownership and the conclusion of a contract were confused with each other. According to him the temporary reservation of ownership in a contract of sale pending the fulfilment of a condition was never inadmissible in Roman-Dutch law as received in South Africa and it is not this term which is referred to in the Digest text and Voet. In Roman-Dutch law there was furthermore a clear and recognised distinction between the conclusion of a contract of sale and the passing of ownership, but the court had confused the concepts in the case and thus introduced the false doctrine into our case law. The correct view is that there is a contract of sale and that the passing of ownership is postponed pending the fulfilment of the condition. In his opinion the Free State Provincial Division has consistently remained a remarkably sound approach.<sup>36</sup> He pointed out that the false doctrine had given rise to injustice. Statutory control of certain contracts of sale is evaded by making the sale subject to a suspensive condition. The result is that the prohibition does not apply in such a case and statutory control is frustrated, usually to the detriment of the purchaser.

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36 However cf Tuckers Land and Development Corporation v Strydom 1981 3 SA 231 (O) where Flemming J decided that "one cannot say that something is sold if it is still merely possibly sold - depending on the fulfilment of the condition - and that it is going beyond the conception of our legal system to say: 'The contract is binding immediately upon conclusion; what may be suspended by the condition is the resultant obligation or its exigible content' (Odendaalsrus Municipality v New Nigel Estate Gold Mining Co Ltd 1948 (2) SA 656 (O) to 665-667)" (Translation)



3.8 In a discussion of the operation of a condition Mr P M Nienaber of the Pretoria Bar took the view that the suspensive condition does not suspend a contract, an obligation or vinculum juris but only the claimability of the performance: "A contract or the coming into being of a contract is a fact, an event which does or does not take place."<sup>37</sup> (Translation)

3.9 With reference to the decision in Le Roux v Sentraalwes Personeel Ondernemings G E Devenish<sup>38</sup> takes the view, contrary to the court's finding, that in a case where a stand is sold subject to a suspensive condition that proclamation takes place, a contract of sale does come into being. He contends inter alia that "Only if it is possible to infer from the words used and the terms employed by the parties that they intended to bring into existence an interim innominate contract pendente conditione should the court treat the contract as such." In his opinion such an intention cannot be inferred in the case concerned.

3.10 Reyneke and Cronjé make the following statement in connection with delivery in hire-purchase cases:

Normally delivery takes place on the handing-over of the thing because it is the intention of the parties that the hire-purchase purchaser must become owner. Passing of ownership is not immediately effected because of the intention of the parties that ownership will be reserved until payment of the last instalment. Indeed here one has to do with a suspensive condition that does not affect the obligations under the

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37 "Opskortende of ontbindende voorwaarde?" 1967 THRHR 353-355

38 "The nature of contracts of sale subject to suspensive conditions" 1977 SALJ 385

hire-purchase agreement, but the operation of the real agreement by which transfer of ownership is effected.<sup>39</sup> (Translation)

3.11 Dr J M Otto deals with the matter fully in his doctoral thesis.<sup>40</sup> He refers to the case law, the courts' handling of the relevant common law authorities, the comment of the various schools of law on the text<sup>41</sup> which forms the basis of the courts' approach, the views of South African writers and the approach in other legal systems. He points out that the argument that a stipulation in terms of which ownership is reserved is void because it creates a non possessory pledge or an absolute pactum reservati dominii is generally rejected and that the legislature, for example, in section 5(1)(e) of the Credit Agreements Act, 1980<sup>42</sup> also recognises the existence of such a term. His conclusion is that the courts erred in their view of reservation of ownership mainly because of their incorrect interpretation of certain texts from Voet and in the Digest. That these texts were incorrectly applied is evident, according to him, from the comments of jurists from the various schools of law. There is a contract of sale from the outset and this view also accords with the intention of the parties, whether assessed subjectively or objectively. Otto believes that although the majority of writers regard the reservation of ownership as a suspensive condition, this

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39 "Eiendom op die huurkoopsaak, en kansellasië van onuitgevoerde kontrakte by insolvensie van die huurkoopverkoper" 1979 THRHR 389 op 392

40 "Die regte van 'n huurkoper ten opsigte van beëindiging van die kontrak" Thesis October 1980 (University of Pretoria) 57 et seq

41 D 18.1.80.3 on which Voet 18.1.26 is based

42 Act 75 of 1980. This section provides that a credit agreement must, if it is an instalment sale transaction, state the condition, if any, as to the reservation and passing of the ownership of the goods to which that credit agreement relates

is incorrect. He states that one has to do with a suspensive condition when the coming into operation of the obligation, and not the existence thereof, is made dependent on an uncertain future event. The uncertainty of the future action cannot lie in the fact that it will be in the future because every deferred performance would then be subject to a suspensive condition. The purchaser has no choice with regard to the payment of the purchase price. It is part of the agreement and part of his obligation to perform. In his opinion an unconditional sale comes into being.<sup>43</sup>

3.12 Furthermore, there are virtually no South African textbook writers who agree with the view of the courts and according to Dr Otto<sup>44</sup> there are few subjects on which writers in South Africa, whether in practice or academics, are in such agreement as that this doctrine should be eradicated from our law. The majority of writers agree that reservation of ownership does not suspend the contract of sale and that other suspensive conditions do not prevent a contract of sale from coming into being immediately.

3.12.1 According to De Wet and Yeats the courts interpreted Voet 18.1.26 incorrectly since this text refers to an absolute reservation. "There is no reason therefore not to regard a contract that has all the characteristics of a contract of sale as a contract of sale simply because the

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43 At 101 et seq. Dr Otto also comments on Olivier's article (par 3.7 supra) 1981 De Jure 198. Cf also his article "Eiendomsvoorbehoud en opskortende voorwaardes by die koopkontrak" 1981 THRHR 255 and 396

44 1981 De Jure 198 op 199

transfer of ownership is conditionally suspended, or the contract is so worded that it purports to be a lease."<sup>45</sup> (Translation)

3.12.2 MacKeurtan<sup>46</sup> says that the ratio for the decision in Quirk's Trustees v Assignees of Liddle and Co is incorrect in every respect and that a temporary reservation of ownership is a pactum adjectum. Its effect is not to suspend the contract of sale.

3.12.3 According to Van Rensburg, Lotz and Van Rhijn<sup>47</sup> the view that there is no contract before a suspensive condition is fulfilled is based on a misconception. Citing authorities, they point out that rights which are created by such a contract can be ceded or devolve even before fulfilment of the suspensive condition.

3.12.4 In an exhaustive discussion of the matter Flemming criticises the approach of the positive law and comes to the conclusion inter alia that there is no logical reason to regard the deferring of ownership as contrary to the nature of a contract of sale.<sup>48</sup>

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45 Kontraktereg en Handelsreg 3rd edition 1964 Butterworths: Durban at 246. In the 4th edition 1978 Butterworths: Durban at 135 the matter is not discussed so fully but it is stated that an agreement is an accomplished fact which cannot be argued away and that a condition does not affect the existence of the agreement nor the category in which the agreement falls (contract of sale or lease or any other kind of contract)

46 B O'Donovan MacKeurtan's Sale of Goods in South Africa 4th edition 1972, Juta: Cape Town at 97

47 The Law of South Africa - Contract Vol 5 1978 Butterworths: Durban at 96-97

48 Huurkoopreg 2nd edition 1974 Butterworths: Durban at 6

3.12.5 Mostert, Joubert and Viljoen believe that a reservation of ownership clause is not a suspensive condition, but a stipulation which regulates when ownership will at the earliest pass to the purchaser. Even if it is accepted that it is a suspensive condition, they consider that it would be more correct "... to say that it is not the coming into being of the contract that is suspended, but the obligations which are created by that contract."<sup>49</sup> (Translation)

3.12.6 Diemont, Marais and Aronstam,<sup>50</sup> Kahn,<sup>51</sup> Gibson<sup>52</sup> and Wille and Millin<sup>53</sup> are of the opinion that a contract of sale comes into being on the conclusion of the contract despite a suspensive condition.

#### 4. THE PRESENT VIEW OF THE APPELLATE DIVISION

4.1 In 1983 the Appellate Division once again had occasion to consider the effect of a suspensive condition on a contract of sale in the case of Tuckers Land and Development Corporation v Strydom.<sup>54</sup> Once again the

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49 Die Koopkontrak 1972 Butterworths: Durban at 102-103. The same opinion had already been expressed by Mostert "Opmerkings oor die risiko-reëling by die huurkoopkontrak" Huldigingsbundel Daniel Pont 240

50 The Law of Hire Purchase in South Africa 4th edition 1978 Juta: Cape Town at 12-19

51 Contract and Mercantile Law Through the Cases 1971 Juta: Cape Town at 527-528

52 South African Mercantile and Company Law 4th edition 1977 Juta: Cape Town at 89

53 Mercantile Law of South Africa 11th edition 1945 Hortors: Johannesburg at 168

54 1984 1 SA 1 (A)

dispute concerned the sale of an erf in a township which had not yet been proclaimed when the contract was concluded. At the time when the contract was concluded, section 57A of Ordinance 25 of 1965 (Transvaal) provided as follows:<sup>55</sup>

After an owner of land has taken any steps to establish a township thereon, no person shall, subject to the provisions of s 58, enter into any contract for the sale, exchange or disposal in any other manner of an erf in such township or grant an option to purchase or otherwise acquire any such erf, until such township has been declared an approved township.

The contract contained inter alia the following provision:

The sale hereby made is suspensive and subject to the due proclamation of the said township.

4.2 The Appellate Division, per Van Heerden JA, analysed the judicial decisions which had given rise to the so-called false doctrine, beginning with the Quirk decision, referred to above. The court came to the conclusion that the view expressed in the Quirk decision was patently wrong in so far as it implied that no contract of sale comes into being pending the fulfilment of the "condition" that ownership shall not pass to the purchaser before payment of the purchase price.<sup>56</sup>

4.3 The court also analysed the position where the contract as a whole is suspended pending the occurrence of a future event. In the first

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55 The court referred to the English version which is the signed text.

56 At 12 A

place the court referred to Provident Land Trust Ltd v Union Government,<sup>57</sup> the facts of which are set forth above. The court did not think that the express stipulation in the parties' agreement that a contract of sale between them would come into being only when the purchase price had been paid in full lent support to the view that the addition of a suspensive condition to the agreement is incompatible with the immediate coming into existence of a contract of sale.<sup>58</sup>

4.4 With regard to the Corondimas decision the court considered that the crux of the matter was the question whether either of the parties to the agreement had acquired or purported to acquire land in contravention of the relevant statutory provision. The court held the view that this question could have been answered purely on the basis that, whatever the nature of the agreement, the result of the suspension of the operation of the obligations was that the respondent had not acquired or had not purported to acquire any land, but that the parties were still mutually bound contractually. However, in that case the court decided on the grounds of an extended interpretation of the view held in Quirk as expressed in its ratio decidendi that where an agreement of purchase and sale is entered into subject to a suspensive condition no contract of sale is there and then established, but there is nevertheless created a "very real and definite contractual relationship" which becomes a contract of sale when the condition is fulfilled.

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57 1911 AD 615

58 At 12 F

4.5 Van Heerden JA expressed the view that it was difficult to accept on logical grounds that the mere addition of a condition suspending the operation of the obligations wholly or in part qualified the existence or nature of a contract.<sup>59</sup> He added that, so far as the common law was concerned, the authorities indicate that an agreement in terms of which a thing must be delivered in consideration of the payment of a purchase price is regarded as a contract of sale irrespective of the addition of a suspensive condition. He found it unnecessary, however, for the purposes of the case to be decided to rule that the Corondimas interpretation was incorrect.

4.6 With regard to the argument that the court must reject the ratio decidendi of the Corondimas decision, the court set forth the considerations that apply when the Appellate Division will depart from its previous decision. The most important consideration is that the previous decision must clearly be wrong. This is not, however, the only consideration. The court hesitates to depart from a previous decision if that decision has applied for a considerable time and persons have acquired rights and obligations on its authority. This might be the case in respect of the Corondimas decision. The court further considered the question whether upholding the Corondimas view could give rise to injustice. In this regard Van Heerden<sup>60</sup> said the following:

To my mind the view has little, if any, practical significance other than for the interpretation of statutes in which concepts such as "a contract of sale" or "sell" are used. Whether a sale subject to a

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59 At 16 D

60 At 18 C



suspensive condition is said not to be a contract of sale or to be a contract of sale that is not yet perfecta, there is no reason why the legal consequences which the common law attaches to such a sale will not still fully apply. And so far as legislation is concerned it will presumably be clearly indicated in the future, as has now been done with the amendment of section 57A(2), what is contemplated by the use of the above-mentioned concepts. Naturally the Legislature is further at liberty to amend statutory provisions in which the concepts appear, without encroaching on existing rights, if the present position in case law and this judgment result in effect not being given to the legislature's true but inadequately expressed intention. (Translation)

4.7 Corbett JA and Botha JA concurred in the judgment given by Van Heerden JA. Although Joubert JA and Viljoen JA agreed with the result of the main decision, each chose to deliver his own judgment. Joubert JA went fully into the common law authorities regarding suspensive conditions. With regard to the coming into existence of the contract, he came to the following conclusion:<sup>61</sup>

Fulfilment of the suspensive condition results in the purchase/sale being completed (perfecta) so far as the legal consequences are concerned. The purchase/sale had already been an accomplished fact since the conclusion thereof because the suspensive condition did not affect the existence thereof qua purchase/sale at all. Pendente conditione there was a conditional purchase/sale. Existente conditione the purchase/sale is divested of its conditional character so that it is converted into an unconditional purchase/sale. A new purchase/sale is not established when the suspensive condition is fulfilled because the purchase/sale has already existed from the moment that it was concluded although it was a conditional purchase/sale pendente conditione. (Translation)

Joubert JA came to the conclusion that judgments such as Corondimas v Badat in which it was pronounced, without consulting the common law, that in the case of a sale subject to a suspensive condition no contract of sale

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61 At 22 F

exists pendente conditione, are completely contrary to the common law. In his opinion the approach is incorrect and should not be followed.<sup>62</sup>

Viljoen JA also indicated in no uncertain terms that he did not agree with the Corondimas approach. He said:<sup>63</sup>

I agree with my colleagues that the common law has been seriously mutilated in the series of judgments referred to. But however much I should like to give rein to my puristic urge, this case is not the appropriate occasion to do so. (Translation)

He went on to say:<sup>64</sup>

I should like to agree with my colleague Joubert that the Corondimas case should not be followed in future, but since I base my judgment solely on the intention of the Legislature and not on the correctness or otherwise of the Corondimas case, I feel that an endorsement by me of my colleague Joubert's rejection of the Corondimas judgment would be obiter. (Translation)

4.8 To sum up, it may be said that although the court did not find it necessary in deciding the Strydom case to reject the Corondimas view, all the members of the court expressed doubts about the correctness of that view, and that the correct approach is clearly evident from the Strydom case, even if obiter.

## 5. CONCLUSION AND RECOMMENDATION

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62 At 25 A

63 At 26 A

64 At 27 E

5.1 As is evident from what has been said above, there can be little doubt today that the correct approach with regard to the effect of a suspensive condition which has been added to a contract of sale is that the obligations, or some of them, do not come into operation pending the fulfilment of the obligation, but that the suspension, however it is worded, does not affect the nature or existence of the contract. With regard to a stipulation whereby the transfer of ownership to the purchaser is reserved pending the payment of the full purchase price, the Appellate Division expressly rejected the Quirk view in the Strydom case, and there should no longer be any uncertainty in the future. With regard to the so-called suspension of the contract as a whole, the Appellate Division, it is true, did not expressly reject the Corondimas view, although the correctness of that view was strongly doubted. As has been pointed out, that view is probably of practical significance only where statutory provisions are involved where it is important to determine whether a transaction in fact constitutes a contract of sale. The legislature has in the past worded and will probably in the future word such provisions as to cover the situations that it wants to cover.

5.2 The Commission has seriously considered whether it should recommend that the legislature, in the interests of clarifying the law, should expressly provide that a suspensive condition in a contract of sale does not have the effect that pending the fulfilment of the condition no contract of sale comes into being. Since such a provision would have little practical significance, but might give rise to interpretation problems and because the legal position is relatively clear at present, the Commission decided not to recommend any intervention on the part of the legislature.



BILL

To regulate the operation of agreements which exhibit the essential elements of a contract of sale and is subject to a condition or in terms of which the passing of ownership is suspended and to provide for matters connected therewith.

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To be introduced by the Minister of Justice

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BE IT ENACTED by the State President and the House of Assembly of the Republic of South Africa, as follows:-

Operation of a condition or the suspension of the passing of ownership in agreements which exhibit the essential elements of a contract of sale.

1. An agreement which exhibits the essential elements of a contract of sale is, notwithstanding that -

- (a) the agreement or the operation of any part thereof is made subject to a condition; or
- (b) the passing of ownership is suspended in terms thereof; a contract of sale as from the time when it is entered into.

Application of  
Act to existing  
agreements.

2. Section 1 shall also apply to an agreement which has been entered into before the commencement of this Act and which is still in force at that commencement.

Short title.

3. This Act shall be called the Conditions and Suspension of Passing of Ownership in Contracts of Sale Act, 19 .

BILL

To amend the Interpretation Act, 1957, so as to state the effect of suspensive conditions in contracts of sale; and to provide for matters connected therewith.

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Introduced by the Minister of Justice

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BE IT ENACTED by the State President and the House of Assembly of the Republic of South Africa, as follows:-

Insertion of section 8bis in Act 33 of 1957.

1. The following section is hereby inserted in the Interpretation Act, 1957 (Act No. 33 of 1957), after section 8:

"Effect of suspensive conditions in contracts of sale.

1. (1) Whenever it falls to be determined whether an agreement constitutes a contract of sale, the fact that the agreement or the operation of any part thereof is suspended or that the passing of ownership from one party to the

other is deferred, shall not prevent the agreement from constituting a contract of sale, unless a contrary intention appears.

(2) Where the word "contract of sale", "buy", "sell" or "alienate" appears in any law, it shall include an agreement subject to a suspensive condition or whereby the passing of ownership from one party to the agreement to another party to the agreement is deferred, unless a contrary intention appears.

Application  
of this Act.

2. This Act applies to any agreement, contemplated in section 1, which has been entered into after the commencement of this Act.

Short title.

3. This Act shall be called the Interpretation Amendment Act, 1985.