REPUBLIC OF SOUTH AFRICA

CASE NO. 326/97

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

THE GOLDEN LIONS RUGBY UNION — FIRST APPELLANT

ELLIS PARK STADIUM (PTY) LIMITED — SECOND APPELLANT

AND

FIRST NATIONAL BANK OF SOUTHERN AFRICA

LIMITED — RESPONDENT

BEFORE: HEFER, VIVIER, GROSSKOPF, MARAIS and SCHUTZ JJA

HEARD: 4 MARCH 1999

DELIVERED: 26 MARCH 1999

W P SCHUTZ

JUDGMENT

SCHUTZ JA:

The main issue is whether either or both of two rights to gain publicity were granted in perpetuity. The circumstances in which the subject arose are set out fully in the judgment of the court *a quo*, that of Boruchowitz J, reported as *First National Bank of SA Ltd v Transvaal Rugby Union and Another* 1997 (3) SA 851 (W). A detailed exposition of the facts is therefore rendered unnecessary and I shall confine myself to a summary, quoting only central passages.

At the time that the litigation started the appellant was known as the Transvaal Rugby Union, later as the Gauteng Lions Rugby Union. It is now known as the Golden Lions Rugby Union. I shall refer to it as "the union". It was

the first respondent in motion proceedings brought against it by the respondent on appeal, First National Bank of Southern Africa Ltd ("FNB"). The second respondent (now second appellant) was Ellis Park Stadium (Pty) Ltd ("EPS"), a company which manages the stadium at Doornfontein, Johannesburg, which is the headquarters and home ground of the union. The relief still in issue pertains to the promotion by the union of FNB's name by using its name in relation to the stadium's activities and the placing of free advertising by FNB in and about the stadium. FNB contends that it is entitled to this relief in perpetuity. This is what the fight is about. The union take the contrary view. FNB's case is founded upon the "funding agreement" and the "supplemental agreement", to which I shall refer below. Only the union and FNB were parties to these agreements but the union was obliged to procure EPS's compliance with them, as it became able to do after the conclusion of the funding agreement.

The stadium was owned by the former Johannesburg City Council but was

leased to the union under a 99 year lease. In 1985 the union ceded the lease to Volkskas Bank. Two years later, in 1987, the union wished to exercise a right of pre-emption to buy back the lease, which Volkskas was negotiating to sell to a third party. The union turned to FNB for a loan of R 26.65 million to buy the lease and the share capital of EPS. There is a dispute on the papers (no oral evidence was given) as to the degree to which FNB was motivated by magnanimity rather than commercial interest and as to the union's correlative gratitude or indifference towards FNB. Although the union's version is to be accepted on these matters, it is nonetheless common cause that the union did not have funds of its own to buy the lease and the shares and that in order to do so it borrowed the R 26.65 million from FNB.

The compact to provide this finance first took form in an agreement dated 24 July 1987 to which I shall refer as the "first funding agreement". The preamble recorded FNB's willingness to provide funds to allow the lease and share capital

to be bought in return for "being granted certain rights in regard to the use of the stadium and the operation thereof". Such few terms as might bear upon the case will be mentioned later. The full details do not matter, as the agreement was soon superseded - by the *funding agreement* of 22 August 1987.

The preamble to this agreement is in terms identical to those used in its predecessor. The loan was repayable after ten years. Elaborate provision was made for security. "*Until the repayment date*" FNB was given a preferential right to finance sales or leases of suites or individual seats in Ellis Park (8.2.4); as also the free use of a suite selected by it "*for so long as the bank wishes*" (8.2.5). In terms of clause 8.4 the union undertook to place all the banking business of itself and EPS with FNB "*until the repayment date*" (ten years hence). The critical clause 9 reads:

"9 PROMOTION OF THE BANK'S ASSOCIATION WITH THE STADIUM

9.1 The TRFU [an even earlier name of the union] *agrees, and shall procure that* EPS is bound to such agreement, that not later than 30 days after the

completion date *the name* of First National Bank of Southern Africa Limited *shall be used* and will feature prominently in *all* publicity campaigns and on all programmes, tickets or other documentation of whatsoever nature and in any way relating to the stadium or the sporting or other activities to be carried on therein as the bank deems appropriate and in *such a manner as to convey the bank's close association with and support of the stadium and the TRFU.*

9.2 The TRFU shall ensure and procure that *this promotion of the bank's name in close association with the stadium shall endure in perpetuity or until terminated by the bank*;

9.3 *Furthermore*, the parties shall procure that the area immediately above the TV screen in the stadium, and the entrances to and exits from the stadium as well as all other areas of the stadium and the grounds, as the bank may reasonably determine shall, if not already contracted out, all carry such free advertising of the bank's name as the bank might reasonably require, provided that the cost of erecting signs or billboards or advertising material shall be for the bank's account." (Emphasis supplied).

Clause 10.1 recorded that FNB would be "*entitled in perpetuity or until such rights are terminated by the bank*" to receive 50% of all net receipts from the sales or leases of all suites. Clause 16.2 recorded that the agreement constituted the parties' entire agreement and that variations, additions or alterations had to be

in writing in order to be valid.

The loan was used to acquire the lease and the shares in EPS and the union concluded a sublease with the latter, which was by then its subsidiary.

The *supplemental agreement* was concluded on 24 May 1988. The preamble recorded that the union intended applying for a stock exchange listing and that the parties had agreed to the early repayment of the union's indebtedness to FNB. This would involve such amendments to the funding agreement as were set out in the supplemental agreement. In terms of clause 5 FNB gave up its future 50% participation rights under clause 10.1 of the funding agreement, provided that if the loan should not be repaid by 26 July 1988, clause 10.1 would remain operative. Clause 7 reads in part:

"7 USE AND OCCUPATION OF SUITES AND ADVERTISING

7.1 Provided that the loan is repaid in full by not later than 26 July 1988, TRFU shall procure that the bank shall be entitled, *in perpetuity or until the bank in its sole discretion shall decide*, and at no cost whatsoever to the bank:

7.1.1. to the free, sole, exclusive and unencumbered use and occupation, whether for itself, its representatives or invitees, of the following executive suites and parking bays in the stadium:

7.1.1.1 suite number NW312 presently occupied by the Bank, comprising 30 seats .....

7.1.1.2 suite number SW308 comprising 71 seats .....

7.1.1.4 12 parking bays situated within the stadium area and within the area of those bays reserved for the TRFU with effect from the date of repayment of the loan in full;

7.1.2 to free entrance to the stadium and to the parking bays and suites referred to in 7.1.1 for the purposes of utilising such suites and bays as contemplated in 7.1.1;

7.1.3 to such *advertising of the bank's name in the space to be created* above the restaurant in the stadium, presently known as "The Touchdown Restaurant", in accordance with the current extensions to the stadium (which space is anticipated to be in size, approximately one executive suite wide and two executive suites high). For this purpose, the bank shall be entitled to all manner of reasonable advertising on such space having regard to the ambience of the stadium and provided

same does not materially adversely affect such ambience.

7.2 For the avoidance of doubt, it is recorded and the parties agree that *whether or not the loan is repaid earlier* in accordance with the provisions of this agreement or later in accordance with the provisions of the funding agreement, *the provisions of clause 9 of the funding agreement shall continue to apply* and be of full force and effect as between the parties as though incorporated in this agreement and *whether or not the funding agreement is cancelled.*" (Emphasis supplied).

Clauses 8 and 9 read:

"8 BANKING BUSINESS

TRFU shall use its best endeavours to procure that all its banking business and that of EPS shall be placed exclusively with the bank *in perpetuity or until such right is abandoned by the bank.*

9 PREFERENTIAL RIGHT TO FINANCE SALES OR LEASES OF SUITES

TRFU shall use its best endeavours to procure that the bank shall have preferential rights of financing sales or leases of the Ellis Park suites *in perpetuity or until such rights are abandoned by the bank.*" (Emphasis supplied).

Clause 13.2 provided that if the loan was not repaid by 26 July 1988 "the provisions of the funding agreement shall continue to be of full force and effect

.....". The supplemental agreement concluded with a clause 14.5 reading:

> "Save as otherwise *expressly varied* or as provided in this agreement, the provisions of the *funding agreement shall continue to be of full force and effect* in accordance with its terms." (Emphasis supplied).

The EPS listing took place in July 1988. FNB took up 10 million of the 30 million linked units and its merchant bank another 5 million. When the price of the shares later dropped below what dr Luyt, the president of the union, considered to be their true value, the union decided to buy them back. This again required finance. This time FNB was not ready to oblige and the union obtained funds from Trust Bank Ltd. It then withdrew its other banking business from FNB and in mid - 1989 the former close association with it came to an end, as indicated, at the instance of the union.

Boruchowitz J granted FNB a declaration that it was entitled, in perpetuity, to the rights defined in clauses 9.1 and 9.3 of the funding agreement. The union contends that the clause 9.1 rights did not survive the ending of the "close

association" between the union and FNB in 1989; in other words that the rights were not perpetual in nature but intended to have effect only for so long as FNB continued to be the union's banker. This view is the foundation of the union's first argument, that as a matter of construction clause 9.1 should be read in this way. The appellants' second argument concerns clause 9.3. It is that on a proper construction clause 9.3 stands on its own, is devoid of any provision for liability in perpetuity, and allows for termination on reasonable notice.

Clauses 9.1 and 9.2 - construction

Parties may agree to establish rights in perpetuity. This does not happen often, but it was done expressly in both agreements, and more particularly in clause 9.2 of the funding agreement. There is no escape from the plain word perpetuity. It stands out. Though, in its context it should no doubt in fairness be tempered to equate the ancient condition "For so long as the Coliseum shall stand." But what *is* this right that is to endure forever, asks the union? Is it simply

a right to have a name used and displayed? Or is it right to do so only in a certain manner, a manner which conveys not only a past but also a continuing business association with the union? As counsel for the union acknowledged, support for the latter view cannot be sought in the heading to the clause "Promotion of the association ...", as clause 1 of the funding agreement provides that headnotes are inserted for reference only and shall in no way govern or affect interpretation.

When one turns to the body of clauses 9.1 and 9.2 the meaning of the words is, to my mind, clear. The union agrees in clause 9.1 that EPS and itself shall use FNB's name. The rest of that clause is concerned with the manner of that use. This is true also of the reference to close association ("in such manner as to convey the bank's close association with and support of the stadium and the TRFU"). Clause 9.2 states that what the union shall ensure and procure is "that this promotion of the bank's *name* (my emphasis) in close association with the stadium shall endure in perpetuity." The plain meaning of all this is that it is

FNB's name that will be used in perpetuity. The words do not convey that the close association is to endure in perpetuity. What the union's argument amounts to is an attempt to replace the words "shall endure in perpetuity or until terminated by the bank" with the words "for so long as the close association lasts." The two statements are contradictory. The parties chose the one and not the other.

Moreover, the whole point of the funding agreement was the loan of R 26.65 million. That loan was repayable within 10 years. The obligation of the union to place the group's banking business exclusively with FNB ended on that repayment date (clause 8.4). So that the parties envisaged a possible termination date for their association most finite when measured against even attenuated eternity. Yet they chose to use the word perpetuity in clause 9.2. This clearly suggests that, at least at that stage, the parties did not intend to tie the duration of FNB's rights to the length of their commercial association, which is the union's argument.

The difficulties in the union's interpretation do not end there. The funding agreement is replete with instances where linking of an obligation to the termination of the loan (i.e of the close association, or much of it) is expressly stated. Examples are FNB's rights to participate in the fixing of the terms for the sale or lease of suites or seats (8.2.2), its preferential rights to finance the same (8.2.4) and its right to participate in the fixing of ticket prices (12.1). The contrast with clause 9.1 is plain.

The supplemental agreement provides further arguments against the union's interpretation. Clause 7.2 makes it quite clear that the clause 9 rights will continue even if the loan is repaid before the end of the original term and whether or not the funding agreement is cancelled. Coupled with the termination of the formerly unqualified obligation to place other business with FNB, this appears to be a clear indication that the survival of the naming rights and the continued close association were not linked, at least from the time of the supplemental agreement.

Moreover, the extension of occupational rights in perpetuity in clause 7, notwithstanding the agreement's contemplation of the end of the original association, is a clear pointer in the same direction. On top of this there are the terms of clauses 8 and 9, with their impositions of duties of endeavour continued into perpetuity, notwithstanding the ending, even if only for a time, of the association in anything like its original form.

There is a yet further reason rendering the union's construction a most unbusinesslike and most unlikely one. That construction involves that rights conspicuously cast in perpetuity were in fact capable of immediate unilateral subversion, by the union's bringing an end to the association in some way or another. Of course, it could be argued, and it has been argued, that the union had some sort of duty not to behave in such a manner. But I find the notion of a banker customer association kept alive in perpetuity by means of orders for specific performance so far fetched as hardly to be ascribed to the contemplation

of experienced businessmen.

My conclusion is that upon a construction of the funding and supplemental agreements as a whole, the construction of clauses 9.1 and 9.2 contended for by the union finds no support. Accordingly I am of the view that Boruchowitz J was correct in granting prayer 1.1 of the notice of motion.

Does clause 9.3 operate in perpetuity?

The answer to this question depends upon the construction of clause 9.3. The union points out that clause 9.3 contains neither express words providing for perpetual duration, nor words expressly linking the clause 9.3 rights with the clause 9.1 rights for purposes of their joint duration. Clause 9.2 comes before and not after clause 9.3, so that it does not, as far as its position is concerned, appear to relate to clause 9.3. Even more to the point, the argument proceeds, it does not in terms relate to clause 9.3, only to clause 9.1. This is so because what is to endure is "this promotion of the bank's name in close association with the

FNB contends that the rights in the two clauses are essentially the same. Both are concerned with the promotion of it's name. There is no reason at all why the parties should have treated them differently as regards duration. Indeed the clause 9.3 rights are merely the supplementary or ancillary rights. Accordingly, runs FNB's argument, upon a proper construction of clause 9 as a whole, clause 9.2 should not be accorded too literal and narrow a reading, but should be read so as to extend to clause 9.3 as well.

It is true that clauses 9.1 and 9.3 deal with the same sort of subject - the promotion of FNB's name. But their subject matter is, nonetheless, not identical. Clause 9.1 requires active promotion by the union of FNB's name in a way that conveys the close association, stemming principally, one would suppose, from FNB's provision of the funds which rescued the stadium from an outsider. What clause 9.3 contemplates is the making available of certain spaces about the stadium on which FNB may advertise its name, at its expense but without having

stadium on which FNB may advertise its name, at its expense but without having to pay for the space. Not only are the rights different, but I am by no means persuaded that they are merely ancillary. If perpetual they may be the more valuable of the two.

The union's reading might lead to a somewhat unbusinesslike result. Suppose that the clause 9.3 rights were terminable on reasonable notice, this would mean that immediately after the funding agreement was concluded the union could give appropriate notice, and upon its expiry let out the spaces to others. If this were so the rights would have been of limited value. But some rights are.

FNB also relies upon the word introducing clause 9.3 - "Furthermore." This, contends FNB in effect, means "more of the same", that is, more perpetual rights. The union counters that the word is neutral. It might mean what FNB says. It could equally well mean that something different is about to be added.

"Furthermore" is one of those many words that lawyers use as they take breath. The nature of what is to follow is not, in my opinion, at all defined by the word "furthermore" in the context of clause 9.

Having taken all these arguments into consideration it seems to me that the application of the basic rule - read the words in their context - to clause 9.2 must lead to the conclusion that that clause's provision for perpetual duration extends only to clause 9.1, not clause 9.3.

FNB has sought to rely upon the clause 9 contained in the first funding agreement as a background feature which turns the day. Background circumstances which explain the genesis and purpose of a contract are admissible: *List v Jungers* 1979 (3) SA 106 (A) at 120 B - E, *Coopers & Lybrand And Others v Bryant* 1995 (3) SA 761 (A) at 768 B - C. I have had regard to the old clause 9, but, having done so, am of the view that its effect upon the debate is neutral. It reads:

"9 NAMING RIGHTS

9.1 The TRFU agrees, and shall procure that EPS is bound to such agreement, that not later than 90 days after the completion date the official name of the stadium shall be changed to 'First National Stadium Ellis Park' or 'First National Stadium" as required by the bank, and that with effect from that date that name will be used in all publicity campaigns and on all documentation of whasoever nature and in any way relating to the stadium or the sporting or other activities to be carried on thereon, such as tickets, programmes and the like;

9.2 The parties shall procure that *the bank's naming rights shall endure in perpetuity* or until terminated by the bank;

9.3 Furthermore, the parties shall procure that the area immediately above the TV screen in the stadium, and the entrances to and exits from the stadium shall all carry such free advertising of the bank's name as the bank might reasonably require, and *for so long as it has naming rights* in respect of the stadium: provided that the cost of erecting signs or billboards or advertising material shall be for the bank's account." (Emphasis supplied).

It will be seen that the rights in this clause 9.1 were wider than those contained in the later clause, in that FNB was entitled not merely to have its name used on promotional material, but also to name the stadium after itself. FNB's entire naming rights were to endure in perpetuity or until terminated by itself, in

terms of clause 9.2. There was no mention at all of close association. Clause 9.3 was not silent as to duration, as it stated that the rights conferred by it would endure "for so long as it has naming rights." Accordingly, clause 9.2 would have applied also to clause 9.3. All of this indicates that for purposes of their perpetual duration the parties at this stage equated the clause 9.1 and 9.3 rights. So, contends FNB, the parties having recognized the substantial identity of the rights, what reason can be advanced why they may have wished to make a change? The problem with this argument is that when one looks at the new clause 9 one finds that the links between the perpetuity provision in 9.2 and the 9.3 rights have been removed with surgical precision. The expression "for so long as it has naming rights" has been removed and has not been replaced with something such as "for so long as it has clause 9.1 rights." Moreover, clause 9.2 has been reworded so as to refer in terms only to the rights defined in clause 9.1. This may have resulted from an oversight. But it may equally have been deliberate, so that there is no

secure basis for drawing any inference from the old clause 9.

That leaves clause 7.1.3 of the supplemental agreement, which expressly enjoins perpetual duration to a right to advertise on the new space created within the stadium. The nature of this advertising would have been essentially identical to that envisaged in clause 9.3 of the funding agreement. This leads to an eventual extraordinary contradiction, such that I am left wondering whether the parties succeeded in expressing their common intention correctly in the funding agreement (the doctors may say, whether I have interpreted their expressions of intention correctly). But I can see no basis on which I can use the supplemental agreement to contradict the funding agreement, when the former deals with subject matter different to that dealt with by the latter, and thus does not alter its terms (in contrast to a case such as *Chrysafis And Others v Katsapas* 1988 (4) SA 818 (A) at 826 C - G, 827 D - G). Upon a fair construction I think that clause 9.3 extended only to space in the stadium as it then was. There is no reason to extend its

meaning to cover any later additions, which might be built with funds procured from a source other than FNB.

Accordingly I am of the view that Boruchowitz J was wrong in holding that the clause 9.3 rights endured in perpetuity, and accordingly also in granting prayer 1.2 of the notice of motion.

Relief - 9.3

His order granting prayer 1.2 must be set aside. There was no counter-application by the union for a declaratory order that the clause 9.3 rights were terminable upon reasonable notice. What the union did was to raise as a defence the contention that these rights were terminable by the giving of reasonable notice. The question then is whether this court may and should put anything in place of order 1.2 other than a dismissal of FNB's prayer. FNB successfully sought relief in the court *a quo* on the basis of its contention, then accepted now rejected, that the clause 9.3 rights endured in perpetuity. The union maintained,

as indicated, that these rights were terminable on reasonable notice and as the argument in this court developed it became clear that FNB accepted that this was the only viable alternative construction if its argument based on perpetuity failed. But notice of termination was given by the union only after the replying affidavit had been filed. The letter giving notice was annexed to a subsequent supplementary affidavit. No further papers were filed. Once the construction of the contract was out of the way the remaining question would be whether the notice relied upon in fact allowed a time reasonable in all the circumstances. However, because of the way that the case developed, or failed to develop, this question was not fully canvassed and we are consequently unable to make any finding on it.

Two courses are open to us, to make no order in the place of the one deleted, thus allowing the bank to commence a new case if it chooses; or to remit the case in order to allow further evidence to be led. I consider that the former course is

the preferable one. Remittal may cause inconvenience and would leave costs hanging in the air after all these years.

Costs

In the court *a quo* FNB should have won on clause 9.1 but should have lost on clause 9.3. However, it was also successful in that on the day before the hearing the union conceded further important relief, relating to the free occupation rights and the additional advertising rights conferred by the supplemental agreement. As far as the appeal is concerned, the union has succeeded in setting order 1.2 aside, but has failed in relation to order 1.1. This means that both parties have had their substantial successes and substantial defeats. It is arguable that FNB enjoyed the balance of success, particularly having regard to the trial proceedings, but, notwithstanding, I consider that a fair order would be that each party pays its own costs in both courts.

Order

1. The appeal against order 1.1 of the court *a quo* is dismissed.

2. The appeal against order 1.2 is allowed and the following is substituted in its place:

"Prayer 1.2 of the notice of motion is dismissed."

3. The appeal against the order for costs in the court *a quo* (order 2) is allowed and the following is substituted in its place:

"Each party is to pay its own costs."

4. Each party is to pay its own costs of appeal.

W P SCHUTZ
JUDGE OF APPEAL

CONCUR
HEFER JA
VIVIER JA
GROSSKOPF JA
MARAIS JA