140/86

SHILLINGS C C — APPELLANT

and

ISAK JOHANNES ANDRIES CRONJE

AND FOUR OTHERS — RESPONDENTS

CASE NO. 462/85
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

SHILLINGS C C	APPELLANT
and	
ISAK JOHANNES ANDRIES CRONJE	FIRST RESPONDENT
CASSIM MAHOMED CASSIM	SECOND RESPONDENT
BENJAMIN JOHANNES VAN DER MERWE	THIRD RESPONDENT
PARIS CALLIS	FOURTH RESPONDENT
ANDRIES ESTERHUIZEN	FIFTH RESPONDENT

CORAM: RABIE CJ, JANSEN, JOUBERT, HOEXTER JJA *et* NESTADT AJA

DATE HEARD: 3rd NOVEMBER 1986

DATE DELIVERED: 27 NOVEMBER 1986

JUDGMENT/ ......

JUDGMENT

NESTADT, AJA

The issue in this appeal is whether an application brought by appellant in the Transvaal Provincial Division for an order declaring the five respondents, alternatively first, third, fourth and fifth respondents, jointly and severally bound to it under a written lease of certain immovable property in Pretoria, was correctly dismissed.

In terms of the agreement, which was entered into on 21 December 1984 for a period of five years at an initial monthly rental of R11 000, appellant, who was the owner of the premises in question, let them to respondents "as trustees for a Company to be formed". The property comprised a factory building and offices.

They were to be used by the lessee for the purpose of manufacturing "soft-drinks and allied products". No incorporation of any company having taken place, clause 36 of the lease became operative. It provides that in this event:

> "the Trustees shall be regarded as personally bound and liable, jointly and severally and in solidum, to this Agreement of Lease, in the same way as if their names and not the name of the Company had been given as the LESSEE herein, and in such event, they shall be entitled, jointly and severally and in solidum to all the benefits and subject to all obligations existing or created in this Agreement, as if they had entered into it in person... It is clearly understood that should the said Company not be formed ... then and in that event the signatories hereto shall be personally bound, jointly and severally to the LESSOR as LESSEE."

It/ ......

It was on the basis of this undertaking that appellant sought to hold respondents, each of whom signed the agreement, liable as co-lessees.

Respondents, however, failed to honour their obligations under the lease. In justification of their repudiation thereof they contended that it was in conflict with sec 27(1) (a) of the Group Areas Act 36 of 1966 (the Act) and was thus void for illegality.

The material part of sec 27(1)(a) reads:

> "If any group area is in terms of a proclamation under section 23(1)(b) a group area for ownership -
> (a) no disqualified person and no disqualified company ... shall, on or after the relevant date specified in the proclamation, acquire any immovable property

situate/ ......

> situate within that area, whether
> in pursuance of any agreement ...
> or otherwise, except under the
> authority of a permit ..."

It will be seen that the prohibition is against the acquisition of immovable property (by a disqualified person or company). There is no bar in the section itself to the letting of property (to a disqualified tenant). On behalf of appellant, however, it was accepted (a concession we assume to be correct) that, by reason of "immovable property" being defined (in sec 1 of the Act) to include "any lease" thereof, sec 27(1)(a) has this effect and that a lease in contravention thereof, constituting as it does an acquisition of immovable property, is illegal and unenforceable. This is what was decided

in Dorklerk Investments (Pty) Ltd vs Bhyat's Departmental Store (Pty) Ltd 1974(1) S A 483(W) (though the court was actually there dealing with the corresponding provisions of the earlier Group Areas Act, viz, sec 24(1)(a) of Act 77 of 1957). Neither on appeal to the full bench of the Transvaal nor, thence, to the Appellate Division (the judgment of this court is reported: see Bhyat's Departmental Store (Pty) Ltd vs Dorklerk Investments (Pty) Ltd 1975(4) S A 881(A)), was the validity of this finding challenged.

The defence raised by respondents rested on the following undisputed facts. The area in which the property is situate was, in terms of sec 20 of Act 77 of 1957, being the provision corresponding to

sec/ ......

sec 23(1) of the current Act, by proclamation 150 of 1958 (as contained in Government Gazette 6167 of 6 June 1958 and, by virtue of sec 49(2) of the Act, deemed to have been made under it) declared to be one for ownership by members of the White group; second respondent, a member of the Indian group, is accordingly, in relation to it, a disqualified person; no permit authorising the lease has been issued.

Appellant's answer to the point taken by respondents was a two-fold one, viz (i) that the lessee was a company within the meaning of the Act and as such not a disqualified one; accordingly the lease was not illegal and all five respondents were bound to it there-

under; (ii) alternatively, even if second respondent as a disqualified person was not liable to appellant, the others were. First, second, fourth and fifth respondents for their part, in notices filed by them under Supreme Court Rule 6(5)(d)(iii), opposed the application. (Third respondent did not oppose the application, nor was he a party to this appeal). This they did on certain legal bases, the nature whereof will appear shortly. They were upheld by the court _a quo_. Hence, with its leave, this appeal.

The first issue, relating to appellant's first prayer, concerns the status or identity of the lessee. It entails a consideration of the meaning of the expression "disqualified company" in sec 27(1)(a).

Certain further definitions contained in sec 1 of the Act are relevant in this regard. "Company" is stated to include *inter alia* "any corporate of unincorporate association of persons" ("'n ingelyfde of oningelyfde vereniging van persone"). A "disqualified company" in relation to immovable property, land or premises means a company "wherein a controlling interest is held or deemed to be held by or on behalf of in the interest of a person who is a disqualified person in relation to such property, land or premises". "Controlling interest", in the case of an association of persons, is "deemed to be held by a person of the same group as the majority of the members thereof".

The submission advanced on

behalf of appellant, but contested by respondents, was that they were an (unincorporate) association of persons and therefore a company. Plainly, if this be so, it was not a disqualified one. First, third, fourth and fifth respondents, being the majority of the members of the alleged association, belong to the White group; the controlling interest would therefore be deemed to be held by a person of that group; they were qualified to acquire (including lease) the immovable property in question. On this basis, I understood it to be common cause that all five respondents would be bound in terms of the lease because, by implication, second respondent would no longer be subject to the prohibition against disqualified persons acquiring immovable property in

terms of sec 27(1)(a).

The vital question thus is whether respondents were indeed an association of persons within the meaning of that phrase as used in the Act and whether it was such association which was the lessee.

The answer depends on the meaning of "association of persons". This concept, together with the deeming provision of "controlling interest", was introduced into the first Group Areas Act, 41 of 1950, by an amendment thereto brought about by sec 1 of Act 65 of 1952. The reference there was to "any incorporate or unincorporate association of persons". In the subsequent Group Areas Act, 77 of 1957, it was changed to

its/......

its present form of "any corporate or unincorporate association of persons". Obviously the difference between "incorporate" and "corporate" is immaterial.

The expression is not defined in the Act. In an attempt to construe it, counsel for appellant referred us to certain other legislative enactments such as secs 3, 21 30 and 31 of the Companies Act, 61 of 1973 and Supreme Court Rules 4(1)(a)(vii) and 14(1) in which it or rather "association" is used. Counsel for respondents in turn embarked on a survey of the historical antecedents of the Act coupled with certain submissions as to the probable reasons for the widening of the definition of company to include "association of persons". I

do not find either approach helpful in determining its meaning. Nor is it necessary to consider whether an association (corporate or unincorporate) might not, in any event, have fallen under "person" in sec 27(1)(a) regardless of the alteration to the definition of company (seeing that "person" is defined by sec 2 of the Interpretation Act, 33 of 1957, to include "any body of persons, corporate or unincorporate"). Because we are dealing only with an alleged unincorporate association, I also leave aside the significance (if any) of "any registered or unregistered corporate body" (which is a further part of the definition of "company") and the question whether "unregistered corporate body" might not encompass a corporate association of persons.

Save for the case of <u>Group Areas Development Board vs Hurley N O</u> 1961(1) S A 123(A) (to which I refer later), the meaning of "any corporate or unincorporate association of persons" as used in the Act (and its predecessors) has not, so far as I am aware, previously been considered by our courts (although it was adverted to in <u>Southern Durban Civic Federation vs Durban Corporation and Another</u> 1972(2) S A 133(D) at 138 C - E). The various text books dealing with the subject, whilst drawing attention to it being part of the definition of "company", do not attempt to explain its meaning (save that in some cases certain organisations are given as examples of an association). However, as Van Blerk JA, when dealing with the meaning of "person"

in the Interpretation Act, observed in C I R vs Witwatersrand Association of Racing Clubs 1960(3) S A 291(A) at 296 E, "oningelyfde assosiasies van persone wat nie gemeenregtelike universitates is nie, (is) nie aan ons regstelsel vreemd ... nie". This is borne out by the frequent use of the term and in particular "association of persons" in other legislation. Examples, besides the ones already mentioned, are those as far afield, in both time and subject matter, as Cape Act 3 of 1873 (dealing with Deeds Registration), sec 332(7) of the Criminal Procedure Act, 51 of 1977, sec 1 of the Heraldry Act, 18 of 1962 and sec 10(1)(cB) and (e) of the Income Tax Act, 58 of 1962.

The use of "persons" in conjunction with "association" is probably superfluous. "Unincorporate" refers to an association "which does not have a legal *persona* separate from its constituent members" (per Ogilvie Thompson JA in *C I R vs Witwatersrand Association of Racing Clubs*, *supra* at 302 A - B). "Corporate" would have a correspondingly opposite meaning. The central enquiry is the meaning of "association" ("vereniging"). It is defined in substantially the same terms by a number of dictionaries to which we were referred. I confine myself to the following. According to Black's *Law Dictionary* (5th ed):

"It is a term of vague meaning used to

indicate/......

> indicate a collection or organization of persons who have joined together for a certain or common object ... An unincorporated society; a body of persons united and acting together without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise."

The Afrikaanse Woordeboek of Terblanche and Odendaal gives the meaning of "vereniging" (and it was the Afrikaans version of the Act that was signed) as:

> "saambinding, saamvoeging; vrywillige organisasie van 'n aantal persone met 'n bestuur aan die hoof en statute en gerig op 'n doel wat nie met die openbare orde in stryd mag wees nie; die saamkom en saamwerk van persone tot 'n bepaalde doel, samekoms, geselskap, genootskap, maatskappy, klub".

(See, too, Nibo (Edms) Bpk vs Voorsitter van die Drank-

raad en Andere 1984(2) S A 209 (NCD) at 213 E - fin, where certain other dictionary definitions of the word are considered in relation to "any association of Coloureds or Asians" in sec 23(1)(b) of the Liquor Act 87 of 1977.

Some brief amplification of the criterion that "association" takes the form of an (organised) body of persons and its equation to a society is desirable. The appropriate Oxford English Dictionary definition of "body" is "a number of persons taken collectively; an aggregate of individuals". In Group Areas Development Board vs Hurley N O, supra, Steyn CJ, in rejecting an argument that certain persons were "an association" within the meaning of "company" in the Group Areas Act

In practice their union and consent usually take place by the approval and adoption of a constitution (LAWSA, Vol 1, s v "*Associations*", para 498, p 287), providing for membership of the association, office bearers and/or a committee and a name of the association.

In most cases there will be little difficulty in identifying a body of persons as an association within the meaning of the definitions referred to. The prime example of a corporate one (under the common law) is the *universitas* and (by statute) those registered as companies under sec 21 of the Companies Act. Illustrative of an unincorporate one is the well-known voluntary association in all its diverse forms. It

was not contended on behalf of appellant that respondents were an association of this latter kind. It was submitted, however, that the undisputed allegations contained in the founding affidavit established that, in signing the lease, respondents had combined together as a body of persons whose common purpose was its conclusion; their relationship was one of partners who, through the medium of a company, were to jointly conduct a business venture (ie a bottling factory) on the premises; this constituted an association of persons.

Now I suppose that in a manner of speaking and despite an undertaking of joint and several liability, it may be said that respondents joined together (with the stated

objective)/......

objective) and that this was done pursuant to an agreement or undertaking _inter se_ (as opposed to their acting independently of each other, as could happen; see Wessels' _Law of Contract in South Africa_, 2nd ed, vol 1, para 1494). To this extent they were associated with each other for a common purpose. However, the argument that they were an association of persons within its proper meaning is untenable and must be rejected. To hold otherwise would be an unwarranted extension of its ambit. They were in no sense members of an organised body. They were not an aggregate of persons. They did not join together and act collectively. They were simply five individuals who contracted

personal liability (in the event of the company not becoming the lessee). Joint contracting parties *per se* are not an association.

Appellant's reliance on a partnership requires special mention. I accept in this regard that the contemplated formation of the company was not inconsistent with the existence of a partnership and that, despite the absence of any actual mention in appellant's papers that respondents were co-partners, this was established. What was stated was that there was a "joint venture" (involving second, third, fourth and fifth respondents). There would not, however, appear to be any meaningful difference between it and

partnership/......

partnership (Bamford, The Law of Partnership and Voluntary Association in South Africa, 3rd ed, pp 11-12). The question is whether a partnership is an association. Funk and Wagnall's Standard Dictionary includes a partnership in the definition of "association". So does the Oxford English Dictionary sv "society" which is given as a synonym for "association". Black states that an unincorporated association may be profit making. The baldly stated view of Van Reenen, Land, Its Ownership and Occupation in South Africa, para E 3.29 at p 141 is that a "partnership would naturally be included in an association". In R v Milne and Erleigh (7) 1951(1) S A 791(A) and 830 - 831 it was held that a partnership fell within the scope of an "association of persons"

as used in sec 384(7) of Act 31 of 1917 (corresponding to sec 332(7) of the present Criminal Procedure Act). Of course, it by no means follows that a similar interpretation is to be given to this phrase as used in the Group Areas Act. Moreover, in the light of the definitions referred to earlier, it may be doubted whether a partnership can constitute an association of persons within its ordinary meaning. It is, however, unnecessary to express any opinion on the point and I do not. Even assuming that it does, it cannot assist appellant. It would only do so if the partnership was the lessee, thus justifying the conclusion that there had not been a prohibited

acquisition (in the form of a lease) by a disqualified person or company. But there is no question of the lessee being the partnership. The envisaged company not having been formed, clause 36 became operative. Its effect was to render respondents liable under the lease as joint contracting parties (who had undertaken liability *in solidum*). This circumstance *per se* is not sufficient to establish a partnership. Juristically, joint contracting parties are not necessarily partners (*Henwood and Co v Westlake and Coles* 5 SC 341 at 346; *Summers vs Oudaille* 1914 S R 91 at 92; Bamford, p 5; LAWSA vol 19, para 375, p 269).

To sum up so far, respondents, in leasing

the premises were, in my opinion, not an association of persons. Appellant's main prayer was therefore correctly refused.

I turn to a consideration of appellant's alternative cause of action referred to earlier, namely, that first, third, fourth and fifth respondents are bound to it (under clause 36 of the lease). The question that arises in this regard is the effect, if any, on their liability of second respondent being a disqualified person. Does it follow, as respondents contended, that appellant has no claim against any of them?

The answer depends, in the first place,

on/......

on the effect of the contract being illegal *vis-à-vis* one of the lessees (ie second respondent) and in particular whether the whole contract is thereby rendered unenforceable. This is what the court below found. The liability undertaken by respondents was *in solidum*. Where this occurs each of the joint and severally liable debtors can, at the creditor's option, be sued for the full debt. Nevertheless, there is only one debt or obligation although several debtors or *vincula juris* (Wessels, para 1512; Christie, *The Law of Contract in South Africa* p 249) or, as De Wet and Yeats, "*Kontraktereg en Handelsreg*" 4th ed, p 120 say, "meerdere verbintenisse... almal op een en dieselfde prestasie

gerig." It follows that if the obligation itself is void, or the debt extinguished, all the debtors are absolved (Wessels, paras 1513, 1525 and 1534). But their fates need not necessarily be the same. Their respective obligations may differ as when one contracts unconditionally, another _sub die_ and a third _sub condicione_ (De Wet and Yeats p 124). Even where their obligations are the same there may be situations where only that of the one debtor is defective and those of the others remain unaffected. This will be the case where a defence is personal to him. Wessels, para 1552, states in this regard:

> "Every debtor who is sued can either raise a defence personal to himself

(_pactum_/......

> (*pactum in personam*), e.g., that his obligation is conditional or voidable as far as he is concerned, or else he can set up a plea common to all (*pactum in rem*), e.g., that the whole obligation is void, but he cannot set up a defence personal to some of the other creditors e.g., that he is not bound because the debt is void as regards some other debtor."

Illegality may, of course, be the reason for the whole contract being void. It will, however, not always have this consequence. Illegality may be personal and confined to one of the contracting parties. Christie recognises this. At p 248 it is said:

> "(I)f one of the joint debtors has a good defence against the creditor's claim, or if the contract, as between him and the creditor, is voidable or even void *ab initio* the liability of

the/ ......

> the other joint debtors will remain unaffected if the contracts between them and the creditor, looked at separately, can be seen to be free of the defect existing in the one debtor's contract. Thus a defence such as misrepresentation or lack of contractual capacity may well affect one joint debtor only, whereas a defence such as illegality will probably (but not necessarily) affect all joint debtors equally."

As is apparent, joint debtors are being dealt with but the same would apply, *a fortiori*, to joint and several debtors. It is a question of whether the vice goes to the root of the whole obligation (Wessels, para 1495). If it does not, there can be a type of severance, not, as is usual, of terms, but of debtors.

Applying these principles to the present

matter, there can, in my view, be no question of the whole lease being vitiated by second respondent's disqualification. The need for him to have had a permit was personal to himself; the consequence arising from the fact that he did not, does not affect the validity of the obligations of the other respondents. It was not suggested that such a conclusion would defeat the object of the legislation. It would not. Nor is the liability of the remaining respondents to appellant in any way tainted by the illegality attaching to the transaction between appellant and second respondent. It may be that first, third, fourth and fifth respondents' rights of contribution against each other (and second

respondent)/......

respondent) are curtailed by second respondent not being liable to appellant. If this be so, it might affect their liability to appellant. There is authority that, on the release of one of two co-debtors, the liability of the remaining debtor to the creditor is reduced by the amount of the former's proportionate share (see Dwyer vs Goldseller 1906 T S 126 at 129; Boyce N O vs Bloem and Others 1960(3) S A 855(T) at 857 F - H; Kahn, Gratuitous Release of a Co-debtor Liable in Solidum, 1961 SALJ 25, though cf De Wet and Yeats p 123). It is, however, unnecessary to pursue this point. Appellant's (alternative) prayer is simply for a declaration that the lease is binding on first, third, fourth and fifth

respondents/ ......

respondents (jointly and severally). We are not concerned with the exact quantum of such liability.

The second and remaining matter that requires attention is whether, considered from the point of view of the intention of the parties, the non-liability of second respondent had the effect of invalidating the agreement *vis-à-vis* the remaining co-lessees. It is open to question whether respondents' notice under rule 6(5)(d)(iii) covers this point, but I take it that it does. The principle relied on by respondents was that which has been applied where a contractual document is signed by less than the full complement of intended signatories. In a number of cases, mostly of suretyship, it has been

held/ ......

held that in these circumstances those that signed were not bound - though in others an opposite conclusion was come to (see Just It (Pty) Ltd vs Phillips 1984(3) S A 922(C) where the authorities are referred to and discussed). I am not sure that the same principle applies where all parties to a contract sign but one is not bound because of illegality. I assume it does. Even so, it is unnecessary to examine the cases. The problem is one of interpretation. And this depends on the wording of the particular document under consideration. What has to be ascertained is whether the parties, judged by the language used, intend a joint contract (in the loose sense that unless all are bound none will be) or whether,

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on the other hand, they intend to be bound separately and individually (as well as jointly). In the present matter, despite the use of "lessee" (ie in the singular), I am satisfied that clause 36 is to be construed as rendering first, third, fourth and fifth respondents liable irrespective of second respondent not being bound. Not only does this conclusion accord with the rule that courts incline to a construction which renders the contract operative rather than inoperative (McCullogh vs Fernwood Estate Limited 1920 A D 204 at 209) but it finds support in the language used. The undertaking is to be personally bound "as if their names... had been given as the lessee". This is to be contrasted with

the/ ......

the use of the collective pronoun "we" in the cases referred to where, mainly on this basis, it was held that the liability of the co-debtors was not individually undertaken. Mr Swart, on behalf of respondents, stressed that it was apparent from the founding affidavit that second respondent played a leading role in the negotiations leading up to the entering into of the lease and that he was obviously one of the main participants in the venture. But this is a far cry from concluding that, if for some reason, he could not be sued, the others were freed of liability.

For these reasons the court *a quo*, in my judgment, incorrectly refused appellant's alternative

prayer. It should have been granted.

Second respondent will have been successful in resisting this appeal. He is therefore entitled to his costs both in this court and in the court below. Despite the failure of the appeal against the refusal of the main prayer, it was not disputed that in the event of it succeeding on the alternative prayer appellant is entitled to its costs of appeal against the other respondents (excluding third respondent).

The following order is made:

(1)(a) As against first, third, fourth and fifth respondents the appeal succeeds and is upheld.

(b) First, fourth and fifth respondents are jointly and severally to pay appellant's costs of appeal (including the fees of two counsel).

(2) As against second respondent the appeal fails and is dismissed with costs (including the fees of two counsel);

(3) The order of the court below is set aside. There is substituted the following order:

(a) The agreement of lease, Annexure C1 to the papers, is declared to be binding on first, third, fourth and fifth respondents jointly and severally;

(b) First, fourth and fifth respondents are to pay the costs of the application

jointly/ ......

jointly and severally;

(c) Applicant is to pay second respondent's costs.

NESTADT, AJA

RABIE, CJ)
JANSEN, JA)
JOUBERT, JA)
HOEXTER, JA)