GERGE DIEDERIK DU PLESSIS V VASANA NDJAVERA

CASE NO. (P) I 762/2001

2001/09/27

Maritz, J.

CONTRACT
INTERPRETATION OF CONTRACTS

Contract – claim for specific performance – defence based on *exceptio non adampleti contractus* – such defence inextricably linked to existence of reciprocal obligations in bilateral contract – defence not applicable if obligations are collateral.

Contract – interpretation of – whether obligations created therein are reciprocal or collateral – principle of reciprocity so appropriate to the nature of certain contracts that it applies by operation of law unless contrary intention appears – intention of the parties generally to be found in contract – words used in contract the recordial of common intention – ordinary grammatical meaning in context of other provisions, prevailing circumstances and factual background – obligations which the defendant claims has not been performed by the plaintiff held to be collateral – defence based on *exceptio* not competent.

CASE NO. (P) I 762/2001

IN THE HIGH COURT OF NAMIBIA

In the matter between:

GEORGE DIEDERIK DU PLESSIS **PLAINTIFF**

and

VASANA NDJAVERA

DEFENDANT

CORAM: MARITZ, J.

Heard on: 2001.05.02, 03: 2001.09.25

Delivered on: 2001.09.27

JUDGMENT

MARITZ, J.:

Plaintiff's action against the defendant is for payment of N$47 000.00, interest thereon at the rate of 23% p.a. and costs. His cause of action is based on a document, purporting in its heading to be an

acknowledgement of debt, executed under the hands of both parties on 7 August 1996 at Gobabis (the "acknowledgement"). In terms thereof the defendant acknowledges his indebtedness for payment of that amount and interest to the plaintiff in the following terms:

> I, (the defendant) herewith acknowledge to be truly and lawfully liable to (the plaintiff) in the sum of N$47 000.00 …in respect of water engines, implements, equipment, and effects purchased by me on the farm Maranika No 144, Gobabis district.
>
> The before-mentioned capital amount shall be subject to an interest of 23%...per annum which interest as calculated from the 1st of September 1996, together with the capital sum of N$47 000.00…, shall be payable by me to said GD Du Plessis on 1 September 1997.
>
> And I, the undersigned GD Du Plessis herewith undertake to move and install all outstanding pipelines on said farm as agreed as well as to clean the boreholes and to connect the existing pipelines…"

The contents of the acknowledgement may perhaps be better understood if it is noted that the Plaintiff also sold his farm "Maranika" to the defendant some time earlier but, at the time the acknowledgement was signed, the transfer was still pending. That sale was regulated by a separate contract. The terms thereof are not material to the issues in this action.

It is common cause between the parties that the defendant did not pay the sum of N$47 000.00 or any interest to the plaintiff on the due or any other date. According to his plea, he refused to do so because the plaintiff had failed to honour his undertaking in relation to the pipelines and boreholes referred to in the last paragraph of the acknowledgement. As a consequence, so the defendant pleads, he had to contract with third parties to render those services at a cost of N$46 040.00.

The plaintiff, on the other hand, maintains that he has complied with those obligations, or (according to an amendment allowed during the trial) that he has complied with some of them and is excused from complying with the remaining in terms of a tripartite contract subsequently concluded between the parties and one Riedel to the effect that the latter would to perform the outstanding services on a future date.

In the absence of an alternative claim by the plaintiff for the payment of a reduced amount (in the event of the court finding that his performance was incomplete) or of a counterclaim by the defendant, the main issues to e decided in this case can be summarised as follows: (a) Was the defendant’s obligation to pay the acknowledged indebtedness reciprocal to the plaintiff’s obligation to render the services stipulated in the last paragraph of the acknowledgement, thus

entitling the defendant to validly raise the *exceptio non adampleti contractus* as a defence to the claim for payment? (b) If so, did the plaintiff comply with all his obligations that constituted conditions precedent to payment of the acknowledged indebtedness? (c) If the answer to (b) is not in the affirmative, did the parties subsequently entered into a contract in terms of which the plaintiff is excused from discharging the obligations that he has failed to perform under the acknowledgement? I shall hereunder deal with those issues in that order.

Reciprocal or collateral obligations contemplated in the acknowledgement?

The *exceptio non adampleti contractus* as a defence in a action for specific performance is inextricably linked to the principle of reciprocity under a bilateral a contract – as Jansen, JA remarked after an extensive analysis of the Roman Law and the Roman Dutch Common Law in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk*, 1979(1) SA 391 (A) at 417H, the exceptio is a “meeganger” of the principle of reciprocity. It is only if and when there are reciprocal obligations contemplated in a contract (irrespective of whether they are to be discharged concurrently or consecutively) that the exceptio may afford a defence to a claim for specific performance. The position is, in my view, correctly stated in the judgment of Corbett, J (as he then was) in

Ese Financial Services (Pty) Ltd v Cramer, 1973 (2) SA 805 (C) at 808H to 809D:

> "In a bilateral contract certain obligations may be reciprocal in the sense that the performance of the one may be conditional upon the performance, or tender of performance, of the other. This reciprocity may itself be bilateral in the sense that the performance, or tender of performance, of them represent concurrent conditions; that is, each is conditional upon the other. A ready example of this would be delivery of the res vendita and payment of the purchase price under a cash sale. (See *Crispette and Candy Co. Ltd. v Oscar Michaelis, N.O. and Another*, 1947 (4) SA 521 (AD) at p. 537). Alternatively, the reciprocity may be one-sided in that the complete performance of his contractual obligation by one party may be a condition precedent to the performance of his reciprocal obligation by the other party. In other words the obligations, though inter-dependent, fall to be performed consecutively. An example of this would be a locatio-conductio operis whereunder the conductor operis is normally obliged to carry out the work which he is engaged to do before the contract money can be claimed. In such a case the obligation to pay the money is conditional on the preperformance of the obligation to carry out the work, but, of course, the converse does not apply (see, e.g., *Kamaludin v Gihwala*, 1956 (2) SA 323 (C) at p. 326; de Wet and Yeats, *Kontraktereg*, 3rd ed., p. 139)."

The question whether the obligations created in a contract are reciprocal or not, is to be ascertained from the intention of the contacting parties as expressed therein (See: *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk, supra,* at 418B-C). In some

type of contracts, such those referred to by Corbett, J. (i.e. contracts of sale or for the rendering of services), “the principle is so appropriate to the nature of the contract that it applies by operation of law unless a contrary intention appears.” (See; Christie, *The Law of Contract*, (3rd ed.) p.471; See further *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk, supra,* at 418D).

The fact that a contract is bilateral in nature affords no assistance in answering that question. Neither does the fact that the obligations are due on the same date (see: *Strydom v Van Rensburg*, 1949 (3) SA 465 (T) at 467). “For reciprocity to exist there must be such a relationship between the obligation to be performed by the one party and that due by the other party as to indicate that one was undertaken in exchange for the performance of the other and, in cases where the obligations are not consecutive, *vice versa*” (per Corbett, J in *Ese Financial Services (Pty) Ltd v Cramer, supra,* at 809E.) It is on this basis that I now turn to the interpretation of the acknowledgement on which the plaintiff’s cause of action is founded.

I shall accept for purposes of this judgment, as Mr. Kauta on behalf of the defendant contends, that the acknowledgment is in this case also a bilateral contract. A reading thereof shows that the indebtedness of N$47 000.00 and interest relates to the sale of movables and the last paragraph creates an obligation on the part of the plaintiff to render services in connection with pipelines and boreholes. As I have

mentioned earlier, unless a contrary intention appears, those types of contracts create reciprocal obligations. But does the acknowledgement, on a proper reading thereof, create such obligations in the circumstances of this case?

It is evident from the acknowledgement that the sum of N$47 000.00 constitutes the purchase price of movables purchased by the defendant on credit. By the nature of a contract for the sale of goods on credit, delivery of the *merx* would normally be a condition precedent to the obligation to pay. That condition, according to the acknowledgement, had already been fulfilled. As far as the preceding contract of sale is concerned, the acknowledgement is no more than an undertaking by the defendant to pay the purchase price and interest and to record the terms of payment. Mr Kauta, referring to the obligations created for the plaintiff in the last paragraph of the acknowledgement, argues that that they were reciprocal to and therefore conditions precedent to payment of the sum of N$47 000.00. He submits that, should the Court find that he did not comply with one or more of them, the *exceptio* as pleaded should be applied and the claim should fail.

I must, immediately point out that, although the acknowledgement refers both to a sale of movables and a *locatio-conductio operis* (both types of contracts where reciprocity is normally presumed), the

"reciprocity" contended for by the defendant in this case does not follow from the nature of those contracts. What the defendant's counsel submits is that the defendant's obligation to pay the purchase price under the contract of sale is conditional on (and therefore reciprocal to) fulfilment of the plaintiff's obligation to render certain services under a *locatio-conductio operis*. Those obligations, arising from two different types of contract, are not normally regarded as reciprocal in our law. What remains is to decide, regard being had to the formulation of the acknowledgement itself, whether the parties nevertheless have intended them to be reciprocal?

The intentions of the parties are, except under certain circumstances not relevant for purposes of this enquiry, to be found in the contract (in this case, the acknowledgement) itself (See: *Union government v Smith* 1935 AD 232 at 241). The words recorded in the written instrument are those that they have chosen to reflect their common intention in a memorial of the transaction. With that as a point of departure in the interpretation of contracts, a large number of rules have been developed in our law to ascertain the common intention of the parties. I need not refer to all of them, but only to those that find application in the circumstances of this case.

In so far as any of the parties relies on evidence, other than secondary evidence (such as which "outstanding" or "existing pipelines" or

"boreholes" the acknowledgement refers to), of what their intentions have been or how they have understood to be their obligations, the parol evidence rule must be applied (See: *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd,* 1941 AD 43 at 47). In this context, I have also carefully scrutinised the issues defined in the pleadings and have not found any express admission by the plaintiff that payment of the claimed amount is conditional upon performance of his obligations concerning the pipelines and boreholes. The furthest he has gone, is to state in the further particulars to his declaration, that payment of the sum of N$47 000.00 was not unconditional. Whether the "conditions" he had in mind related to those under the contract of sale or any other undertakings (such as those mentioned in the acknowledgment) are not apparent. The statement, in any event, falls short of an admission. Even if it is an admission, it relates to a question of interpretation that the Court is ultimately required to decide on.

There is nothing in the words of the acknowledgement, given their ordinary grammatical meaning (compare: *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd*, 1974 (1) SA 641 (A) at 646B) from which it is apparent that the defendant's obligation to pay the purchase price of the movables is reciprocal to the plaintiff's undertaking to render services in connection with certain boreholes and pipelines. Moreover, the amount of N$47 000.00 is, according to the express provisions of the acknowledgement, the *quid pro quo* for

the movables earlier sold by the plaintiff to the defendant. That amount does not include any consideration for the services still to be rendered by plaintiff in terms of the last paragraph of the acknowledgement. Neither is it liked thereto in any way except that it appears in the same document.

If the clauses creating those obligations are read in the context of the other provisions, due consideration being afforded to the prevailing circumstances and being read against the background of the other transactions (i.e. the sale of the movables and the sale of the farm), the apparent absence of reciprocity is strengthened. There is no indication that the preceding agreement of sale was linked to any obligation on the part of the plaintiff to render services. Moreover, interest on the purchase price was stipulated to run from 1 September 1996 – a date wholly unconnected to the date on which the plaintiff had to honour his undertaking to render the services referred to. No date by which the services should be rendered was specified in the acknowledgement. In such instances, a reasonable period would normally be implied by law and, before it could have been said the plaintiff was in breach, he first had to be placed *in mora* – and that could have been months after 1 September 1996. But even if the evidence by the plaintiff, that he thought that he should render those services before the date of transfer, can be regarded supplementary, the date of transfer was at that point in time uncertain.

The Court is therefore of the view that the defendant's obligation to pay the amount of N$47 000.00 plus interest thereon in respect of movables sold and delivered by the plaintiff to him is not reciprocal to the plaintiff's obligation to render services in connection with certain boreholes and pipelines. Those obligations, although incorporated in the same bilateral agreement, are collateral and distinct from one another. In the result, the *exceptio non adampleti contractus* (which is inextricably linked to the existence of such reciprocity) is not competent defence in this matter. On this basis alone, the plaintiff's claim must succeed. I should perhaps add that the defendant was at liberty to institute a counterclaim against the plaintiff had the latter been in breach of his contractual undertaking in relation to the pipelines and boreholes. That was not done.

This finding makes it unnecessary for the Court to deal with the remaining two purely factual questions referred to earlier in this judgement. To the extent that I may have erred in my interpretation of the acknowledgement or in the application of the law to the provisions thereof, it may be of some assistance if I deal with them briefly hereunder.

The judgment contains an analysis of the evidence

relevant to those issues and then concludes as follows:

Having considered all the evidence, I am satisfied that the plaintiff has proven on a balance of probabilities that (i) he was excused from the obligation to install Riedel's pipeline and, for that purpose, to move the pipeline to the farm Bonanza, in terms of the tripartite contract subsequently concluded and (ii) that he has honoured all the other undertakings given in the acknowledgement.

In the result, but mainly for the reasons mentioned as the Court's principal findings in the first part of this judgment, alternatively and in any event, on the basis of the Court's findings on the evidence and for the reasons mentioned in the last part of this judgement, the plaintiff's claim against the defendant succeeds.

In the result the following order is made:

1. The defendant is ordered to pay the plaintiff the sum of N$ 47 000.00.
2. The defendant is ordered to pay the plaintiff interest on the amount of N$47 000.00 at the rate of 23% per annum calculated from the 1st of September 1996 to date of payment.
3. The defendant is ordered to pay the plaintiff's costs of suit.

MARITZ, J.

ON BEHALF OF THE PLAINTIFF **Adv J J Swanepoel**

Instructed by: Dr. Weder Kruger & Hartmann

ON BEHALF OF DEFENDANT **Mr P Kauta**

Instructed by: Kauta Basson & Kamuhanga Inc.