182/79

N.v.H.

ELECTRICITY SUPPLY COMMISSION

AND

STEWARTS AND LLOYDS OF SA (PTY) LIMITED

HOLMES, AJA

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between :

ELECTRICITY SUPPLY COMMISSION — Appellant

and

STEWARTS AND LLOYDS OF SA (PTY) LIMITED — Respondent

CORAM: WESSELS, MULLER, CILLIÉ, JJA,
et HOLMES, TROLLIP, AJJA

HEARD: 10 MARCH 1981

DELIVERED: 27 MARCH 1981

JUDGMENT

HOLMES, AJA :

The appellant (plaintiff in the Court a quo) suffered damage in the sum of R252 287,53 as the

result/.....

result of an explosion caused by the respondent's breach of contract in supplying a defective length of piping in some high pressure pipe work for certain boilers and turbo-generators at a power station. The question is whether the claim had become prescribed by the time that summons was served. The matter came before the Witwatersrand Local Division on an agreed statement of facts under Rule 33 of the Uniform Rules. The Court a quo was requested "to determine whether the Plaintiff's claim for damages for breach of contract had become prescribed on 30 June 1975, and to make such award of costs in relation to this stated case as may to it appear just". The Court a quo held in favour of prescription and gave judgment for the defendant (now respondent) with costs. That decision is reported in 1979 (4) SA 905 (W).

It appears from the agreed statement of facts that -

1. During 1968 the appellant invited tenders for the supply and installation of high

pressure pipe work for certain boilers and turbo-generators at the Arnot Power Station.

2. On 20 March 1968 the respondent submitted a tender, which was accepted on 5 August 1968.

3. A written contract document was signed by the parties on 13 March 1972 and 3 July 1972. A copy is filed with the agreed statement.

4. After the acceptance of the tender on 5 August 1968, the respondent proceeded to supply and instal the required high pressure pipe work. This was before the formal contract document had been signed. The parties were, however, both aware at all relevant times, of the form which the said agreement, and all other documents contained in the contract, would take.

5. Included in the pipe work supplied and installed by the respondent was a length of piping which, unknown to the respondent, was not made of suitable material and which was not in conformity with the specification

to/.....

to which the respondent had undertaken to conform. The respondent accepts that this length of piping was defective and not in contract condition. Wherefore the respondent accepts that it was in breach of the terms of the contract.

6. The said length of piping was incorporated in the piping forming part of Unit No. 2 in the Arnot Power Station. The completion date for this unit was stated in the contract to be the end of July 1971. This unit was in fact completed and handed over by the respondent to the appellant on or about that date, and certainly on a date more than three years before 30 June 1975. That was the date when the summons was served.

7. From about the end of July 1971, Unit No. 2 went into maintenance period as contemplated by clause 47 of the general conditions of the contract.

8. The last unit to be completed was handed over after the end of July 1972, that is to say, after the completion date as specified in the contract.

9. Unit/.....

9. Unit No. 2, including the length of defective piping, operated until 4 June 1974, on which date it failed, causing an explosion and resultant damage to the appellant for which the respondent is liable in contract, unless the appellant's claim had become prescribed.

10. The appellant had no knowledge of the respondent's breach of contract before the explosion on 4 June 1974.

11. The parties reached agreement on all issues, save that the respondent contended that the appellant's claim for damages had become prescribed by 30 June 1975 when the summons was served on it, by virtue of the provisions of section 12 of the Prescription Act, No. 68 of 1969.

12. It was also agreed that the appellant, in submitting that its claim had not become prescribed, was free to contend that the Prescription Act, No. 18 of 1943, applied; and that the respondent did not accept that that was the case. (As I understand it, it was thus open to the appellant to seek refuge under either Act.)

The/.....

The damages claimed in the particulars of claim annexed to the summons were as follows -

"(a) Physical Damage:

The reasonable costs to repair the damage to the Power Station to its pre-explosion state R127,356-32

(b) Consequential Loss:

Costs of having to transfer generation of electricity elsewhere from 20h28 on 4/6/74 to 02h22 on 4/7/74 resulting in a MW loss of 300 and GWh loss of 210,3 amounting to a total of R116,900-00"

These figures were later modified: the judgment of the Court a quo records, as being agreed, that the quantum of damages suffered by the appellant was R252 287,53 and that it became liquidated on 12 January 1977. This was accepted by counsel in this Court. The contract price,

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as finally modified, was R892 596-70. The retention money of 5% of the F.O.B. and erection price, provided for in clause 36(g), would, relatively, be a modest sum.

Section 16 (1) of the Prescription Act, No. 68 of 1969, provides that chapter III thereof (which deals with the prescription of debts) applies to "any debt arising after the commencement of this Act". Such date of commencement was 1 December 1970.

In terms of section 11 (d) of the said Prescription Act, the period of prescription in respect of a debt is three years. It was common cause in this Court that a debt is -

> "that which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another".

See/.....

See Shorter Oxford English Dictionary; and see also Leviton and Son v De Klerk's Trustees, 1914 CPD 685 at 691, in fin. "Whatever is due - debitum - from any obligation".

Prescription begins to run as soon as the debt is due; see section 12(1) of the said Act.

Counsel for the appellant contended that the first and only claim for damages accruing to the appellant, and the only corresponding debt owing by the respondent, arose only on the date of the explosion on 4 June 1974, less than three years prior to service of the summons on 30 June 1975.

Counsel for the respondent on the other hand, contended that the debt became due when Unit No. 2 was handed over to the appellant on or about the end of July 1971. The appellant's claim had accordingly been extinguished, so it was submitted, by virtue of the provisions of section 10 (1) and 11 (d) of the 1969 Act,

by/.....

by the time that the summons was served on 30 June 1975.

Thus the divergence between counsel, as to the date when the three year period of prescription had run its course, was -

(a) for the appellant, June 1977

(b) for the respondent, July 1974.

Summons was served, it will be remembered, on 30 June 1975.

Early in the hearing before this Court, my Brother TROLLIP raised the question whether, on the facts of this case, prescription could only start to run after the expiration of the twelve-month period of maintenance. The latter began "about the end of July 1971"; see paragraph 7 of the agreed statement of facts, supra. That was also the date when Unit No. 2 was completed and handed over. Thus the twelve-month maintenance period beginning "about the end of July 1971" would expire about the end of July 1972; and the pre= scriptive period of three years thereafter would

complete/.....

complete its course on or about 31 July 1975. Summons was served on 30 June 1975. That was within the pre= scriptive period. Thus the enquiry. (The point had been raised but rejected in the Court a quo.)

Counsel for the appellant, after savouring the point cautiously, adopted it as part of his argument; and it was canvassed by both sides. I proceed to examine it because, if sound, it steers a safe course 'twixt the possible Scylla of the appellant's contention that pre= scription began to run only when the explosion took place on 4 June 1974, and the potential Charybdis of the respondent's riposte that prescription started to run when Unit No. 2 was handed over, on or about the end of July 1971.

Filed with the agreed statement of facts is a copy of the contract between the parties. I proceed to examine certain relevant provisions, including clause 47 which provides for a maintenance period of twelve months.

Schedule D (at page 101 of the record) provides, inter alia, that, in regard to Unit No. 2, the completion date at which the steam piping is to be available for commercial service, is the end of July 1971.

Clause 2, (as substituted in the addendum to the contract at page 87 of the record) under the heading "Works to be carried out", provides, inter alia, that the works to be carried out and the prices for such works shall include ..... "things to be supplied and the setting out carrying out construction completion and maintenance of the Contract Works ..... " (My italics).

Clause 27 is headed "Quality of materials and workmanship". Inter alia, it is to the effect that if at

any/.....

It is agreed that Unit No. 2 (to which the defective pipe related) went into the maintenance period about the end of July 1971.

Clause 37 is in the following terms -

> "All costs, damages or expenses which the Commission may have paid for which under the Contract the Contractor is liable may be deducted by the Commission (and it is hereby irrevocably and in rem suam authorised to do so) from any moneys due or becoming due by it to the Contractor under the Contract and/or may be recovered by action at law or otherwise from the Contractor."

Clause 46 is to the effect that, when the works have been completed, they shall be taken over by the appellant, with notification to the respondent; but that the respondent is not thereby relieved of any liability in respect of any defects in material or workmanship which may develop within the period of maintenance referred to in clause 47.

Clause/.....

any time during the progress of the contract works or within the period of maintenance (my italics), the appellant is dissatisfied with any materials or workmanship or with any part or parts of the contract works on account of such materials being faulty, the respondent shall immediately remove such materials and reconstruct such part of the works; and whether the works are finished or under maintenance, such reconstruction shall be at the cost of the respondent.

Clause 36 provides for payment stage by stage. Paragraph (d) stipulates that the final 15% (save as to retention monies referred to in paragraph (e)) is to be paid at the expiration of one month after the contract works have been taken over by the appellant. Then paragraph (e) provides that the remaining 5% of the total contract price (referred to as retention money) is to be paid at the expiration of twelve months after the completed works have been taken over.

It/.....

Clause 47 -

"MAINTENANCE

47. - For a period of twelve months after the Contract Works have been taken over under Clause 46, the Contractor shall be responsible to the extent in this Clause expressed for any defects in the material and workmanship that may develop under the conditions provided for by the Contract and under proper use arising from faulty materials design or workmanship in the Contract Works but not otherwise and shall remedy such defect at his own cost when called upon to do so by the Commission who shall state in writing in what respect any portion is faulty.

If it becomes necessary for the Contractor to replace or renew any defective portions of the Contract Works under this Clause the provisions of this Clause shall apply to the portions of the Works so replaced or renewed until the expiration of six months from the date of such replacement or renewal or until the end of the abovementioned period of twelve months whichever may be the later. If any defects be not remedied within a reasonable

time/.....

time the Commission may proceed to do the work at the Contractor's risk and expense but without prejudice to any rights which the Commission may have against the Contractor in respect of such defects.

All inspection adjustments replacements or renewals carried out by the Contractor during the maintenance period shall be subject to the same general conditions as the Contract.

The Contractor shall provide at his own cost all materials plant tools and things superintendence and labour necessary for the maintenance of the Contract Works.

Save as in this clause expressed, the Contractor shall be under no liability in respect of the said defects after the Works have been taken over."

Clause 49 is worthy of mention. It is to the effect that, between the time that the appellant commences to use any portion of the plant and the expiry of the maintenance period, the respondent shall have available,

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at not more than 24 hours' notice, an operating representative who shall be a skilled engineer fully experienced in the operation of the type of plant installed. His duties will be to advise on the running of the plant, and he shall be capable of making, and shall make, adjustments and repairs to the plant in case of breakdown. And the respondent is to take immediate effective steps to keep the plant in operation during the maintenance period.

It/.....

It is clear from all of the foregoing provisions of the contract, including the penultimate paragraph of clause 47, supra, that the contractual relationship between the parties continues until the end of the period of maintenance. In other words, the respondent's obligation under the contract was to hand over Unit No. 2 on 31 July 1971 and to maintain it for a year thereafter. The appellant's basic obligation included payment of the remaining 5% of the contract price at the expiration of the maintenance period.

So long as this contractual relationship lasted, the parties' rights and remedies lay within the four corners of the contract. This includes clause 47 (read with clause 46) which is to the effect that for a period of twelve months after the contract works have been taken over, the respondent shall be responsible to the extent in this clause expressed for defects in the material and

workmanship that may develop within the maintenance period ..... from faulty materials design or workmanship in the Contract Works but "not otherwise ..... "

The last paragraph of clause 47 is also significant: the contractor is under no liability in respect of defects developing during the maintenance period, "save as in this clause expressed".

The/.....

The effect of the foregoing passages, in my view, is this. If any defect due to the respondent's fault should develop during the currency of the contract including the maintenance period, the appellant's rights and remedies are those specified in the contract. If any such defect developed afterwards, only common law rights and remedies (if any) are available. In the present case the defect developed after the expiration of the maintenance period. Hence the appellant's claim for damages was one under the common law and not under the contract. I shall assume, for it was not challenged, that despite the wording of the contract such a claim was available to the appellant.

The question was raised whether such a common law remedy would have been available to the appellant if the defect had developed (i.e. to say, if the explosion had occurred) during the maintenance period. It is not

necessary/.....

necessary to express a firm view on that problem because that did not happen here. However, I venture to suggest that the position would have been as follows. Any common law remedy would only have been available during the maintenance period if, and to the extent that, the contract itself allows or preserves it. That is the force and effect of the words in clause 47 quoted above. Consequently, as to the physical damage to the works caused by the explosion, the appellant's right or remedy would be that specified in clause 47 - to call upon the respondent to restore the works to their pre-explosion state; and if the respondent should default, to do this itself and recover the cost from the respondent. The consequential damages claimed by the appellant were for "the cost of having to transfer generation of electricity elsewhere" for about a month. It is doubtful whether any such damages would have been occasioned during the

maintenance/.....

maintenance period; but, if they could have been, the appellant could probably have recovered them from the respondent under clause 37 or 47, for the latter clause preserves "any right which the Commission may have against the Contractor in respect of such defects". After the expiration of the maintenance period the consequential damages could probably be recovered under the common law.

There was argument on both sides as to when the respondent's debt in the appellant's common law claim (based on defective material in breach of contract) became due within the meaning of section 12 (1) of the Prescription Act, 68 of 1969.

It/.....

It is not necessary in the present appeal to fix that date precisely. It is sufficient to say that, in this case, the appellant's common law right of action (which is the correlative of the respondent's debt) was not available during the subsistence of the contractual relationship which included the maintenance period.

In other words, it is sufficient to say that the earliest point at which prescription could begin to run, in the present case, was after the end of the period of maintenance, which was about the end of July 1972. Three years thereafter would expire about the end of July 1975. Prescription was therefore interrupted when the summons was served on 30 June 1975. Hence the appellant's claim is not extinguished.

Finally/.....

Finally, it was common cause that, in the event of the appeal succeeding, an order should be made in the terms which follow:

In the result -

1. The appeal is allowed with costs, including those consequent upon the employment of two counsel.

2. The order of the Court a quo is set aside; and it is replaced by an order -

   (a) declaring that the plaintiff's claim, agreed at R252 287,53, is not prescribed;

   (b) that the defendant is to pay the costs, including those consequent upon the employment of two counsel.

3. By/.....

3. By consent, the question whether interest accrues and, if so, at what rate, is referred to the Court *a quo* for decision, with power to make an appropriate order as to costs.

G N HOLMES
ACTING JUDGE OF APPEAL

WESSELS, JA)
MULLER, JA) CONCUR
CILLIÉ, JA)
TROLLIP, AJA)