LL

Case No 303/1989

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

DELOITTE HASKINS & SELLS CONSULTANTS
(PROPRIETARY) LIMITED — Appellant

and

BOWTHORPE HELLERMAN DEUTSCH
(PROPRIETARY) LIMITED — Respondent

CORAM: VAN HEERDEN, MILNE, KUMLEBEN, F H GROSSKOPF JJA et NICHOLAS AJA

HEARD: 1 NOVEMBER 1990

DELIVERED: 16 NOVEMBER 1990

JUDGMENT

VAN HEERDEN JA:

In August 1985 the respondent sued the appellant in the Witwatersrand Local Division for payment of the sum of R92 436,10. The respondent preferred a main claim and an alternative claim. Since the main claim was, in effect, abandoned in the trial court, and since counsel for the respondent did not seek to rely upon it in this court, nothing more need be said about it.

In the respondent's particulars of claim, as amplified, the alternative claim (hereinafter simply referred to as the respondent's claim) was based on the following averments:

1) On 30 July 1980 the parties entered into a written agreement in terms of which the appellant undertook to design and implement certain computer application modules for the respondent at an agreed remuneration of R50 000.

2) It was a term of the agreement that should the appellant fail to supply the complete system

by 30 June 1981 the respondent would be entitled to employ the services of a third party for its completion and to recover the costs from the appellant.

3) In breach of its obligation the appellant failed to supply the entire system by 30 June 1981, and "from December 1982 onwards" the respondent employed the services of third parties for its completion.

4) The costs occasioned by the employment of third parties amounted to R92 436,10.

The appellant filed a plea on the merits and a special plea. In the latter, as amplified, the appellant pleaded that the respondent's claim had become prescribed because the debt had become due more than three years before the service of the summons on the appellant. The liability upon which the claim was based arose, so the appellant alleged, when the breach of contract took place.

In its replication the respondent denied the

allegations in the special plea and furthermore averred that its claim only became "due" when it was reasonably able to assess the amount and nature thereof, which occurred "in or about February 1985". It would appear that this averment was founded on the provisions of s 1(3) of the Prescription Amendment Act 11 of 1984 which came into operation on 7 March 1984. Until that date s 12(3) of the Prescription Act 68 of 1969 had provided:

> "A debt which does not arise from contract shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

This subsection was amended by the 1984 Act in that the phrase "which does not arise from the contract" was deleted. However, in Protea International (Pty) Ltd v Peat Marwick Mitchell and Co 1990 (2) SA 566 (A), this court decided that the amendment

was not intended to operate retrospectively, i e, in respect of prescription which commenced to run prior to 7 March 1984. If, therefore, a debt became due prior to that date, the amended subsection has no application.

When the matter came to trial, the parties asked the court to adjudicate at the outset on the issue raised by the special plea. The court acceded to this request, presumably in terms of Rule of Court 33(4). No evidence was led, the issue being argued on the pleadings only. The appellant's argument was that the respondent could have sued the appellant on 1 July 1981 for the cost of completion of the computer system, and that prescription accordingly ran from that date. The respondent, on the other hand, contended that at the earliest prescription began to run in December 1982 when it employed third parties to complete the system (that date being less than three years prior to the service of summons). In particular the respondent

submitted that its claim was based exclusively on the provisions of clause 15 of the agreement between the parties. That clause reads:

> "Should the consultants [the appellant] fail to supply the complete system ... by 30 June 1981, the customer [the respondent] may, at his discretion, employ the service of a third party for the completion of the same, the costs of which will be met by the consultants."

The trial court found for the appellant and consequently dismissed the respondent's claim with costs. Its reasoning ran along these lines:

1) The agreement was one of locatio conductio operis. Should the workman under such a contract fail to complete the work by the promised date and the other party ("the employer") decide to take the benefit of the incomplete work, the employer is entitled by way of damages to the difference between the contract price of the work and the cost of having the work completed by another workman.

2) Clause 15 of the agreement did not

involve a deviation from the above principles. In particular it did not confer upon the respondent an independent contractual remedy.

3) A claim for damages based upon non-completion of the computer system postulates a cancellation of the agreement or a severable portion thereof. And although clause 15 "does not talk about cancellation, the notion is ... implicit in the very act of employing another contractor".

4) Nothing turns on whether the respondent's claim is founded on a common law remedy or on the provisions of clause 15. In either case the claim is one for damages flowing from the breach of a duty to perform within a stipulated period.

On analysis the view of the trial court seems to have been that clause 15 merely provided for a common law remedy which in any event would have been available had the appellant failed to complete the computer system by 30 June 1981. On this approach it is not

clear to me, however, why the court found it necessary to introduce the concept of cancellation of the agreement. Had the respondent cancelled the agreement, it would have been obliged to return, or at least to tender the return of, that part of the system already installed by the appellant. In any event, it is trite law that even if a party to a contract is entitled to resile because of the other party's failure to perform, he is not obliged to do so. He may instead claim performance, either in forma specifica (subject to the court's discretion) or by way of damages in lieu of performance: Farmers' Co-operative Society (Reg.) v Berry 1912 AD 343, 350. And if there has been partial (or defective) performance, damages may be claimed in lieu of incomplete performance ("complementary damages"). It would therefore appear that the true basis of the trial court's finding was this: clause 15 conferred upon the respondent no more or less than a remedy which in any event would have accrued ex lege

had there been a failure to perform fully by 30 June 1981; viz, a claim for complementary damages.

With the leave of the trial court the respondent appealed to a full bench of the Transvaal Provincial Division. Having set out a number of the provisions of the agreement the full bench (per Kriegler J) came to the conclusion that it is "one not fitting comfortably into any familiar legal niche, and that it cannot simply be categorized as a contract of locatio conductio operis". The court went on to hold that clause 15 did not introduce a mora date in the sense that this term is ordinarily understood, and that the remedy conferred by the clause did not co-incide with any common law remedy. In this regard Kriegler J said:

> "Plaintiff's [respondent's] alternative claim is not one for damages for breach of contract based on defendant's [appellant's] failure to complete its contractual obligations by an essential mora date. It is founded on clause 15 alone and not on the common law. That clause entitled the plaintiff, from 1 July

1981 onwards to make the election stated. Unless and until it made that election there was no obligation on defendant or 'no debt due'. It may well be - although I make no such finding - that it was implicit in clause 15 that plaintiff had to exercise that right within a reasonable time. But that does not derogate from the conclusion that such right did not arise, nor did defendant's consequent obligation or debt to bear the costs of the third party arise, upon the mere effluxion of time. Dies non interpellat pro hominem.

The proposition can be illustrated in this way. Assume 30 June 1981 had come and gone; assume further that plaintiff had not yet appointed someone else for the completion of the system. Could it, in those circumstances, have made any claim on respondent under clause 15? The answer is clearly in the negative. Defendant could have raised as a good defence to any such claim that any liability on its part was predicated by the exercise by plaintiff of the discretion vested in it by clause 15 to appoint a third party."

In the result the full bench reversed the decision of the trial court but subsequently granted the appellant leave to appeal to this court.

In my view nothing turns on the question whether the agreement is one of locatio conductio operis or whether it is an innominate contract. I

shall therefore assume, in favour of the appellant, that it falls within the former category.

The main submissions of counsel for the appellant may be thus summarised:

(1) Although the agreement did not specifically provide when the design and implementation of the computer modules should be completed, clause 15 did introduce a mora date. Had the appellant failed to supply the complete system by 30 June 1981, the respondent would have been entitled to exercise any of the rights normally arising from such a breach of contract. So, for instance, it could have cancelled the agreement, or have kept it intact and have claimed damages.

(2) Clause 15 did no more than simply spell out one of these remedies, i e, the right to claim complementary damages.

(3) Were the clause to be interpreted as conferring an additional remedy on the respondent, it

would lead to the absurd result that the respondent would be entitled to employ the services of a third party and simultaneously to exact performance in forma specifica, i e, to compel the appellant to rectify its incomplete performance.

(4) It follows that immediately the breach occurred the respondent could have sued the appellant for complementary damages. Hence the debt became due on 1 July 1981.

(5) Even if clause 15 required actual employment of a third party, there is no reason why the respondent could not have sued the appellant on 1 July 1981 for the cost of employing such a party to complete the system.

On the assumption that clause 15 did stipulate a mora date (and that the date did not apply only for the purposes of that clause), it seems clear that the submissions, apart from (5) above, raise one question only, viz, whether the remedy provided for by

the clause is co-extensive with a common law claim for complementary damages. Now, when a party fails to perform fully by the date specified for performance, the innocent party may forthwith claim such damages. If the agreement is one of locatio conductio operis, the measure of damages is the cost of completion of the work. This amount may be claimed whether or not any cost is actually incurred by the completion of the work, or whether or not the innocent party intends to engage the services of someone else to rectify the incomplete performance. Thus, the claim may be maintained even if the work was completed free of charge by a friend of the innocent party (cf G and M Builders Supplies (Pty) Ltd v South African Railways and Harbours 1942 TPD 120).

By contrast clause 15 makes provision for the recovery of the actual cost of completion of the system. In order to recover under this clause the respondent had i) to employ the services of a third

party and ii) to incur expenditure by doing so. It is unnecessary to determine whether such expenditure could be recovered in so far as it exceeded the reasonable or usual cost of completing the system; it suffices to say that unless expenditure was incurred as a result of the employment of a third party the respondent could not sue the appellant under clause 15.

It is therefore clear that the remedy provided by clause 15 differs markedly from an ordinary claim for complementary damages. In essence the clause limited the appellant's liability which would have arisen ex lege had the clause merely provided that the system was to be completed by 30 June 1981. It follows that the clause was intended to provide a remedy in substitution of, and not in addition to, a common law claim for complementary damages.

There is no provision in the agreement militating against the above construction of clause 15.

Indeed, clause 8 tends to support it. This clause limits in several respects the common law liability of the appellant. Thus, clause 8(1) provides that the appellant "shall not incur any liability by reason of any failure ... to fulfil any obligation in terms of this agreement if such failure is not due to the fault or negligent act" of the appellant. Again, clause 8.3 excludes liability for consequential loss and furthermore stipulates that if the computer system should prove defective after acceptance thereof by the respondent "then the ... [appellant's] ... liability shall be limited to rectifying the fault".

I therefore share the view of the court a quo that the respondent's claim is founded on clause 15 alone and not on a liability arising by operation of law.

I now turn to the fifth submission of counsel for the appellant. S 12(1) of the Prescription Act 68 of 1969 provides that "prescription shall commence to

run as soon as the debt is due". This means that there has to be a debt immediately claimable by the debtor or, stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately. See The Master v I L Back and Co Ltd and Others 1983 (1) SA 986 (A) 1004, read with Benson and Others v Walters and Others 1984 (1) SA 73 (A) 82. It follows that prescription cannot begin to run against a creditor before his cause of action is fully accrued; i e, before he is able to pursue his claim (cf Van Vuuren v Boshoff 1964 (1) SA 395 (T) 401).

As has been shown, the respondent could not have preferred a claim under clause 15 before, at the earliest, it had engaged a third party to complete the work for reward. Prior to such employment a necessary element of the respondent's cause of action would have been lacking and any claim based upon clause 15 would have been premature. The debt to which the

respondent's claim relates could therefore not have become due before the actual engagement of a third party.

The appeal is dismissed with costs.

H.J.O. VAN HEERDEN JA

MILNE JA

KUMLEBEN JA

F H GROSSKOPF JA

NICHOLAS AJA

CONCUR