Republic of South Africa

IN THE SUPREME COURT OF APPEAL IN SOUTH AFRICA

Reportable

Case no: 543/98

In the matter between

VAN IMMERZEEL & POHL	**1ST Appellant**
COCCIANTE CONSTRUCTION	**2ND Appellant**
and	
SAMANCOR LIMITED	**Respondent**

CORAM: ***Olivier, Schutz JJA, Farlam, Brand, Chetty AJJA***

Date of hearing: **6 November 2000**

Date of delivery: **30 November 2000**

Construction Contract - Identity of Contractor - Prescription -Knowledge of identity of debtor- Proof of Cession - Damages claim by employer for breach of construction contract where work to be done on land of third party - contractor liable for breach by nominated sub-contractor - reduction of damages claim by amount of unpaid retention moneys - engineer's duty to supervise, breach of - whether engineer liable for breach of duty to supervise where contractor liable for overlapping damage caused by breach of construction contract - liability of contractor and engineer in solidum.

JUDGMENT

FARLAM AJA

[1] This is an appeal against a decision of Joffe J sitting in the Transvaal Provincial Division giving judgment in favour of the respondent against the first appellant in an amount of R973 544-48 and against the second appellant in an amount of R1208 533-48. A costs order was made against both appellants jointly and severally. In paragraph 3 of its order the Court ordered that the respondent would not be entitled to recover more than a total amount of R1208 533-48 from the two appellants.

[2] The respondent, Samancor Ltd ("the plaintiff"), originally instituted action during November 1993 against a close corporation known as Cocciante Construction CC ("the cc"), as first defendant, and the first appellant, Van Immerzeel and Pohl, a firm of consulting civil and structural engineers ("the engineer"), as second defendant.

[3] Subsequently, the plaintiff served amended particulars of claim on the second appellant, which had been joined as third defendant and which it sued in the alternative to the cc. The second appellant is a firm known as Cocciante Construction, whose sole proprietor is one Mario P Cocciante, who is also the sole member of the cc. In what follows I shall refer to the second appellant as "the firm" and to Mario P Cocciante as "Cocciante".

[4] The plaintiff instituted the action as cessionary of claims which it alleged had belonged, before they were ceded to it, to its erstwhile subsidiary, Samancor Chrome Ltd ("the employer"). At the end of the case the plaintiff asked for judgment only against the firm and the engineer.

[5] The claims in question arose from two contracts concluded late in 1989 relating to the construction of a water pipeline at Steelpoort. The first contract, which was concluded in writing in November 1989 between the employer and a party described in the contract as the contractor and identified as "Cocciante Construction", was for the construction of a waterpump installation and a water reticulation pipeline for the village of Steelpoort : in what follows I shall refer to this contract as "the construction contract".

[6] The second contract was concluded in writing in December 1989 between the plaintiff, which avers that it acted for its subsidiary, the employer, and the engineer. It was for the rendering by the engineer of all professional services required for the supervision of the installation of the water reticulation pipeline and the construction of the pump station in terms of the construction contract: in what follows I shall refer to the second contract as "the professional services contract".

[7] The work required by the construction contract was performed by a close corporation known as Cocciante and Borsei Civil Construction CC, the members of which were Cocciante and one Borsei, the latter of whom in fact supervised the construction of the pipeline and attended the various site meetings on behalf of the

contractor.
[8] Construction of the pipeline commenced in January 1990 and the pipeline was certified by the engineer as complete on 27 November 1990. On 24 January 1991 it was discovered that the pipeline was leaking and leaks occurred thereafter at regular intervals.
[9] These leaks in the pipeline were caused by corrosion which resulted from the sub-standard coating and lining of the pipes and the fact that the system installed to preclude corrosion by means of cathodic protection was in the circumstances ineffective both as originally designed and installed and later when upgraded. The trial court found, in my view correctly, that because of the defects it was necessary for the pipeline to be replaced.
[10] It was clearly established that the external surfaces of sections of the pipeline were not properly prepared, thus hampering the adhesion of the coating, and that the thickness of the external epoxy tar coating on sections of the pipeline was well below the specification requirements. In some places the epoxy coating was wholly absent. As far as the internal epoxy lining of the pipes was concerned, the middle two of six pipes examined exhibited a total lack of adhesion and it was highly probable, as the trial court found, that the epoxy lining in all six pipes available for inspection suffered from the same total lack of adhesion as was found on the two pipes which were inspected.

[11] It is clear on the evidence led at the trial that the contractor was responsible (a) for the purchase and installation of the pipeline with sub-standard coating and lining and (b) for the installation of the initial ineffective cathodic protection system, even though that installation was done by a sub-contractor of the contractor, Associated Corrosion Engineers (Pty) Ltd ("ACE"). The upgraded cathodic protection system was not installed by a sub-contractor of the contractor, but by one in direct privity with the employer. However, as it was conclusively proved that the reason the upgraded system also was ineffective was that corrosion was too advanced by the time the upgraded system was installed to be prevented by any cathodic protection system, the contractor is also responsible for the ultimately wasted costs of the installation of the upgraded system. Subject to certain legal contentions advanced by him, with

which I shall deal below, counsel for the firm did not dispute the contractor's liability for the costs of the installation of the upgraded system provided it was shown (as in my opinion it was) that the corrosion was in fact too far advanced to be prevented by the upgraded system in question.

[12] The trial court also found that it was quite clear that the engineer failed to perform the supervisory function that it was obliged to perform in a proper and workmanlike manner in terms of the professional services contract. This was because it failed to ensure (a) that pipes lined and coated as provided for in the construction contract were utilised, (b) that the pipeline was electrically continuous (as a result of which the initial cathodic protection system was ineffective) and (c) that when the installed pipeline was backfilled it was not damaged by rocks and stones which should not have been included in the backfill.

The parties were agreed that the fair and reasonable cost of replacing the pipeline amounted to R1 359 050-00.

[13] The employer paid amounts totalling R1 377 024-50 to the contractor pursuant to payment certificates issued by the engineer. The plaintiff conceded that an amount of R348 264-36 had to be deducted from this amount in respect of amounts not affected by defective workmanship and materials, but alleged that the resulting balance was the total which had been paid to the contractor in respect of defective workmanship and materials which would not have been paid if the engineer had complied with its obligations under the professional services contract. Had the contractor done its work the certificates in respect of which payment was made would not have been issued. The contractor not having done its work, the workmanship and materials paid for were worthless, as the pipeline had to be replaced.

The plaintiff conceded that for the purposes of computing the claim against both the contractor and the engineer an allowance had to be made for the fact that the pipeline installed in terms of the construction contract had been used for six years out of the period of 25 years for which it should have lasted.

[14] The damages awarded against the firm, as contractor under the construction contract, were made up as follows:

Agreed replacement cost of pipeline, multiplied

by 19 and divided by 25 to allow for use of def- R1 033 182-00
ective pipeline for 6 years
Fair and reasonable costs of remedial work car- 5
ried out to the pipeline while it was in use R 175 351-48

_____

R1

208 533-48

[15] The damages awarded against the engineer were made up as follows:

Total of amounts wrongly certified in res-
pect of defective workmanship and materials, R781 857-72
multiplied by 19 and divided by 25 to allow for
use of defective pipeline for 6 years
Fair and reasonable costs of remedial work R175 351-48
carried out to the pipeline while it was in use
The engineer's supervision costs paid by the em- R 16 335-28
ployer in respect of remedial work

_____

R973 544-48

[16] It is convenient to deal with the firm's appeal first.
Mr *Delport,* for the firm, advanced six main contentions, *viz*.:

(1) that the trial court should have found that the contractor in terms of the construction contract was the cc and not the firm;

(2) that if the contractor was indeed the firm, then the claim against it had prescribed before it was joined in the proceedings and the plaintiff's amended particulars of claim were served upon it;

(3) that any claim that the employer may have had against the firm was not validly ceded by it to the plaintiff;

(4) that the employer in any event did not suffer any damage as a result of any

breach of the construction contract so that there was nothing to cede;

(5) that ACE was not the firm's sub-contractor, with the result that the firm was not liable for ACE's defective work, and

(6) that the trial court erred in not deducting from the damages awarded to the plaintiff against the firm the retention money retained by the employer under the construction contract which amounted to R62 974.

Who was the contractor?

[17] In support of the contention that the contractor which entered into the construction contract was the cc, and not the firm, Cocciante Construction, *Mr Delport* submitted that the identity of the parties to a contract should be regarded as forming part of the terms of the contract and that the starting point has to be the contents of the contract as a whole. He pointed out that e*x facie* the contract the contractor was Cocciante Konstruksie for whom Cocciante signed as "Direkteur".

[18] This he submitted, was a clear indication that the contracting party on whose behalf Cocciante had signed was a juristic person. He contended further that evidence was admissible to show which juristic person Cocciante had acted for, namely evidence as to the background circumstances in existence at the time the contract was concluded. Among these circumstances were the facts that the firm is not a juristic person and Cocciante was not the director of a company but was the sole member of the cc, which is a juristic person. Another factor relied on by Mr *Delport* was the fact that the performance guarantee provided to the employer in terms of clause 26 of the construction contract was given in respect of the obligations of the cc and not the firm. It was further contended on behalf of the firm that the only evidence that was admissible to show on whose behalf Cocciante signed the construction contract consisted of the terms of the contract read as a whole and the background circumstances in existence at the time. He submitted that evidence of what happened some time after the contract was concluded was inadmissible.

[19] In my view it is clear that the trial court correctly found that the firm and not the cc was the contractor. It is not necessary to decide whether Mr *Delport's* submissions regarding the admissibility of some of the evidence which might be regarded as bearing on the question of the identity of the contractor are correct, because even if one approaches the matter on the lines contended for by him, *viz* that one can only look at the wording of the contract read as a whole and the background circumstances, one is led ineluctably to the conclusion that the firm was the

contractor.

[20] The construction contract clearly reflects the contractor as "Cocciante Construction", the name of a firm which existed and was known to the engineer, who prepared the tender documents for the employer and assisted it to choose the contractor, as being the name under which Cocciante traded. This in itself is the end of the matter. But if one is to go further, in

the tender documents Cocciante, by way of setting out his experience, referred to seven contracts, all of which were performed by the firm and none of which was performed by the cc. Mr *Delport* endeavoured to answer this point by saying that the reason for this was that the guiding mind behind the cc was Cocciante's. That may be so but the seven contracts were clearly not contracts which the cc could correctly claim as part of its previous contracting experience.

[21] It will be recalled that construction of the pipeline commenced in January 1990. According to the financial statements of the cc it "commenced trading operations on 1 March 1990". Cocciante was unable to explain how the cc could have started constructing the pipeline two months before it commenced operations.

[22] Clause 11 of the tender document required an authorising resolution to be lodged with the tender if the tender was submitted by a company. If the tender had been submitted by a legal person, as contended by the firm, one would have expected a resolution of the cc to have been submitted together with the tender. No resolution was in fact submitted.

[23] As far as the performance guarantee was concerned, this document was drafted by the Standard Bank of South Africa Limited and not by the contractor or the employer and no evidence was adduced that the bank was specifically requested to issue the guarantee on behalf of the cc. In any event it constituted performance of the contract, not part of its formation.

[24] The only point advanced by Mr *Delport* on this part of the case which might operate in the firm's favour is the fact that Cocciante signed the construction contract as "Direkteur". He was not in fact a director of any company at the time but was the sole member of the cc and the proprietor and person in charge of the firm. Does the use of the word "Direkteur" indicate, despite the factors mentioned above, that he was contracting on behalf of a legal person and not in respect of his firm? I think not. The word "direkteur" is defined as follows in *Die Afrikaanse Woordeboek:* "**1.** Hy wat ander persone of hul handelinge lei of beheer; bestuurder, hoof, toesighouer, superintendent: ... **2.** Lid van 'n liggaam van persone wat die sake van 'n bedryf, onderneming of 'n instelling bestuur; lid van 'n direksie". Similar definitions appear in the *Concise Oxford Dictionary* in respect of the word "director",viz.: "superintendent, manager, esp. member of managing-board of commercial company". It is thus clear that the word used by Cocciante can have a meaning which will apply in circumstances where a legal person is not necessarily involved. Nor does the word point toward a corporation in the form of a close corporation, which has members and not directors. In the circumstances I am satisfied that the first point argued on behalf of the firm is without substance.

Prescription

[25] In its replication to the defence of prescription the plaintiff pleaded , *inter alia*, that if it were found that prescription in respect of its claim would normally have

begun running more than three years before the firm was joined in these proceedings, it and/or the employer did not have knowledge of the identity of the firm as the debtor and could not by the exercise of reasonable care have acquired such knowledge before the filing of the engineer's plea to its particulars of claim.

[26] This replication is based on sections 12(1) and (3) of the Prescription Act 68 of 1969, as amended, which as far as is material, read as follows:

> "(1) Subject to the provisions of subsection...(3), prescription shall commence to run as soon as the debt is due.
> (3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor .... : Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

The question to be considered is: could the plaintiff, by exercising reasonable care have ascertained that the contractor under the construction contract was the firm at some stage more than three years before the firm was brought into the case? (Whether the relevant stage is when the firm was joined as a defendant or had served on it the amended particulars of claim is immaterial on the facts of this case.)

[27] In my view it must be accepted that when summons was issued the plaintiff believed that its debtor was the cc. If it had been in doubt as to the identity of its debtor at that stage it is overwhelmingly probable that it would have sued the firm in the alternative to the cc. If it was reasonable in believing at that stage that its debtor was the cc, then it could not have been unreasonable in not knowing that the true debtor was the firm. This Mr *Delport* readily conceded.

[28] It is accordingly appropriate to consider how it came about that the plaintiff sued the cc and not the firm when summons was issued in November 1993.

[29] I have already mentioned that the performance guarantee was given in respect of the obligations of the cc. This appeared to indicate that Cocciante had instructed the bank that the cc was the contractor.

[30] On 22 July 1991, after the pipeline had failed, a meeting was held at which the position in regard to the pipeline was discussed. Amongst those attending were three representatives of the engineer, and Borsei and Cocciante on behalf of the contractor. Two days after the meeting, on 24 July 1991, the engineer wrote to

"Cocciante Construction", referring to the meeting which had taken place on 22 July 1991, and gave instructions in terms of clause 49 of the General Conditions of Contract for certain corrective measures to be taken.
On 1 August 1991 the engineer wrote a further letter, this time to "Messrs Cocciante Construction". They referred to their previous letter of 24 July 1991 and said:

> "We consider 14 days sufficient time to start remedial work. This implies that you will re-establish on site on 5th August 1991. Should you fail to do so we will have no alternative but to give you notice of seven days and thereafter invoke clause 49(4) of the General Conditions of Contract. This implies that the employer (or his contractor) may effect the necessary repairs at your cost.
>
> ..."

[31] On the same day one PG Woodard, wrote the following letter to the engineer:

> "Dear Sirs,
> RE: SAMANCOR FERROCHROME (PTY) LTD. CONSTRUCTION OF A MAIN WATER SUPPLY LINE FOR STEELPOORT EXTENSIONS I AND II : CONTRACT NO. ANX2/S3/31/152/JAT.
>
> CATHODIC PROTECTION.
>
> I am writing to you on behalf of Cocciante Construction (Pty) Ltd *[sic: there is no such company]*.
>
> Arising out of the present problems being experienced on this pipeline due to an alleged failure of the cathodic protection system, I will be grateful if you would supply me with any information and data which you have in your possession, such as resistivity surveys or proposals which you may have made in the past concerning the cathodic protection system.
>
> ..."

This letter was sent to the engineer by facsimile transmission. The cover sheet contained the following message:

> "Herewith letter written on behalf of Mario Cocciante. Please phone me at your earliest convenience."

[32] After a meeting took place on 5 August 1991 between Woodard and the engineer, Woodard wrote as follows to the engineer on 7 August 1991:

"Dear Sirs,

Re: Cocciante Construction cc / Steelpoort Pipeline. 11

1. I am writing to you on behalf of Cocciante Construction cc, by whom I have been engaged to assist with the resolution of issues which have arisen on this contract.

2. I thank you for meeting with me on 5 August 1991, and for making certain documents available.

3. You have served notice that Cocciante should re-establish on site today to carry out certain repair and/or additional work, failing which you will serve a further 7 days notice and then invoke the provisions of clause 49 (4) of the GCOC.

4. My client regrets that it was not possible to re-establish on site today. He reports that the issues concerning contractual relationships and liability are complex, and are not capable of resolution without taking advice from their Attorneys. This is presently being done and a further response will be made to you as soon as possible."

[33] Further letters were written by Woodard to the engineer on 11 August 1991 and 21 August 1991, in both of which he referred to the construction contract and stated that he was writing on behalf of the cc. In the letter of 21 August 1991 he said that the cc would not be returning to the site pursuant to a letter written by the engineer in which it reiterated its instruction in terms of Clause 49 of the General Conditions of Contract that corrective measures on the coating and lining of the pipeline be proceeded with.

[34] In the circumstances I am satisfied that the plaintiff was reasonable in thinking, after that exchange of correspondence and in view of the representations made by Woodard, that the contractor was the cc. It follows that it was not unreasonable in not knowing that the real contractor was the firm.

[35] In its original plea the engineer did not plead to paragraph 3 of the plaintiff's particulars of claim (in which it was alleged, prior to the joinder, that the construction contract was concluded between the employer and the cc) on the flimsy ground that the allegations therein did not apply to it. In other words the employer's consulting engineer, who had acted on its behalf in concluding the contract, did not challenge the

allegation as to who the contractor was.

[36] In a request for further particulars for trial the plaintiff asked the engineer which allegations, if any, it denied in, *inter alia*, paragraph 3 of the particulars of claim. In its reply to this request, dated 10 February 1995, the engineer replied that the plaintiff did not require these particulars for the purposes of preparing for trial, but added that, as appeared from the construction contract which was annexed to the particulars of claim, the contract had been concluded with the firm and not with the cc. Until this warning note was sounded the position seems to me to have been that if the plaintiff had sought to find out who the contractor was, the performance guarantee would have told it the cc, the employer's consultant would have told it the cc and Cocciante himself would have told it the cc. 12

[37] This reply by the engineer caused the plaintiff to reconsider its position and to conduct certain further enquiries which led to its applying to join the firm as the third defendant and, after its application was successful, to serve amended particulars of claim on it. As less than two years elapsed from the time the particulars for trial to which I have referred were received by the plaintiff and the joinder of the firm and the service on it of the amended particulars of claim I am satisfied that the firm's special plea of prescription cannot succeed.

Was the employer's claim ceded to the plaintiff?

[38] On 28 June 1991 the plaintiff and the employer entered into an agreement in terms whereof the employer sold its business as an indivisible whole and a going concern to the plaintiff. Included in the business so sold (in terms of clause 3.3.5 of the agreement) were "the claims of the seller on the effective date against debtors in respect of the business ('the debts')". Clause 7 of the agreement provided that the "business" would be delivered to the plaintiff on the effective date and that delivery would include (in terms of clause 7.3) "the cession by the seller [the employer] to the

purchaser [the plaintiff] of the debts". In terms of clause 1.2.3 "the debts" mean "the debts referred to in clause 11".

[39] Clause 11 of the agreement is in the following terms:

> "11. DEBTS
> In regard to the debts-
> 11.1 the purchaser undertakes to send out monthly statements and follow up letters in accordance with the procedure hitherto adopted by the seller in order to recover the debts;
> 11.2 if any person who is a debtor in respect of any of the debts incurs a debt to the purchaser in respect of the business after the effective date, any payments made by such debtor shall, in the absence of an appropriation by him, be allocated to the oldest debts;
> 11.3 the cession of the debts shall incorporate any claims which the seller has against the sureties for those debts and all its rights in respect of security for those debts."

[40] On 30 September 1993 a further agreement, headed "Cession" was concluded between the plaintiff (described therein as "the Cessionary") and the employer (described therein as the "Cedent"). It reads as follows:

> "1. RECITALS;
> It is recorded:
> 1.1 On 28 June 1991 the Cedent sold to the Cessionary as an indivisible whole and as a going concern the business of the Cedent ('the 1991 agreement') comprising, *inter alia*, the claims of the Cedent as at 1 June 1991 against debtors in respect of the business of the Cedent ('the claims').
>
> 1.2 The 1991 agreement did not expressly provide for the actual cession in respect of the claims sold in terms thereof.
> 2. CESSION;
> In as much as the rights and obligations in respect of the claims may perhaps not yet have passed effectively from the Cedent to the Cessionary pursuant to the 1991 agreement the Cedent hereby, and in execution of the 1991 agreement cedes, transfers and makes over to the Cessionary the Cedent's right, title and interest in and to the claims including any claim which the Cedent had against COCCIANTE CONSTRUCTION CC and/or VAN IMMERZEEL & POHL.
> 3. ACCEPTANCE;
> In as much as the right, title and interest in and to the claims may perhaps not yet have effectively passed from the Cedent to the Cessionary, The Cessionary hereby accepts the cession."

[41] Mr *Delport* contended that the expression "debts" in the June 1991 agreement only referred to trade debts and he relied in particular on the provisions of clause 11 of the agreement from which he submitted it was clear that the word "debts" related to trade debts and not to claims for damages arising from breach of contract
He submitted that the plaintiff could not rely on the cession of September 1993

because it was clear that it was entered into "in execution of the 1991 agreement" and if that agreement only related to trade debts the claim ceded in terms of the 1993 agreement could not include a claim for damages. He submitted further the cession referred in terms to a claim against the cc and/or the engineer but did not mention the firm.

[42] In my view there is no substance in this point. It is clear in my opinion that the parties to the 1991 agreement intended that all the assets of the employer should be transferred to the plaintiff. It is inherently unlikely that they would have intended the employer, which was otherwise to be an empty shell, to retain its claim against the appellants and any other damages claim it might have but nothing else.
In the circumstances I am satisfied that the employer's claim against the firm passed to the plaintiff pursuant to the delivery referred to in clause 7.3 of the June 1991 agreement.

Did the employer suffer damage?

[43] The contention is that the employer did not suffer damage because the portions of land over which the pipeline was built did not belong to the employer (except for one portion which momentarily belonged to it on 3 February 1993 before it was transferred to the plaintiff). All the portions of land over which the pipeline was built belonged to the plaintiff by the time action was instituted but this is not relevant in the present case because the plaintiff's action is based solely on the claims ceded to it by the employer.

[44] Mr Delport, relying on *ISEP Structural Engineering & Plating (Pty) Ltd v Inland Exploration Co Ltd* 1981 (4) SA 1 (A), submitted that our law does not recognize a claim for damages as an alternative remedy to specific performance and that the respondent's claim against the firm is accordingly subject to the ordinary rules for the assessment of damages, with the result, so it was submitted, that it was incumbent on the plaintiff to prove that the patrimonium of the employer had been diminished as a result of the defective pipeline, which it had failed to do.

[45] Clause 49 of the General Conditions of Contract (to which the engineer referred in its letter to Woodard quoted in paragraph [30] above) provided, as far as is material, as follows:

> "49. (1) (a) ... [T]he expression 'Period of Maintenance' in these Conditions shall mean the period of maintenance named in the Tender, calculated from the date of completion of the

Works certified by the Engineer ... and in relation to the Period of Maintenance the expression 'the Works' shall be construed accordingly.

...

(2) To the intent that the Works shall at or as soon as practicable after the expiration of the Period of Maintenance be delivered up to the Employer in as good and perfect condition (fair wear and tear excepted) to the satisfaction of the Engineer as that in which they were at the commencement of the Period of Maintenance, the Contractor shall execute all such work of repair, amendment, reconstruction, rectification and making good of defects, imperfections, shrinkages or other faults as may be required of the Contractor in writing by the Engineer during the Period of Maintenance ...

(3) All such work shall be carried out by the Contractor at his own expense if the necessity thereof shall in the opinion of the Engineer be due to the use of materials or workmanship not in accordance with the Contract or to neglect or failure on the part of the Contractor to comply with any obligation expressed or implied on the Contractor's part under the Contract. ...

(4) If the Contractor shall fail to do any such work as aforesaid required by the Engineer, the Employer shall be entitled to carry out such work by his own workmen or by other contractors, and, if such work is work which the Contractor should have carried out at the Contractor's own cost, the Employer shall be entitled to recover from the Contractor the cost thereof..."

[46] It is thus clear that the construction contract gave the employer the right to claim from the firm the cost of re-executing work in respect of which the firm's work did not comply with the contract.

[47] The ISEP decision has been subject to severe criticism: see, *eg*, De Wet and Yeats, *Die Suid-Afrikaanse Kontraktereg en Handelsreg*, 5de uitgawe, 212. The point was, however, not argued before us. It is not necessary to decide on the correctness of the criticism in view of the fact that the decision is in my view distinguishable because in this case the employer (unlike the lessor in ISEP) had a contractual right to claim payment of money, *ie*, reimbursement for re-execution work done by another, in lieu of specific performance of that work by the contractor.

Did the employer, not being the owner of the land, suffer damage?

[48] Mr *Delport* further submitted that the employer could not have recovered damages from the contractor in this case because it had suffered no loss as it was not the owner of the land on which the pipeline was built.

[49] In my view on the application of ordinary principles of the law of contract Mr *Delport's* submission on this point must be rejected. Among the interests protected by remedies for breach of contract is the interest which an aggrieved party has in the performance of the contract. The guiding principle of our law on this point was stated by Innes CJ in a well-known dictum in *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22 as follows:

> "The sufferer by ... a breach [of contract] should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party."

There is accordingly no merit in Mr *Delport's* submission on this part of the case.

16

Was ACE the second appellant's sub-contractor?

[50] Mr *Delport* conceded that in order for his client to escape a finding that it was in breach because of its failure to instal an effective cathodic protection system the court had to find that ACE was not a sub-contractor of the firm.

[51] In regard to the question whether ACE was a sub-contractor of the firm it is necessary to refer to clause 61(1) of the General Conditions of Contract, which reads as follows:

> "61. (1) All specialists, merchants, tradesmen and others executing any work or supplying any goods for which provisional or prime cost sums are included in the Schedule of Quantities, who may have been or be nominated or selected by the Employer or the Engineer and all persons to whom by virtue of the provisions of the Schedule of Quantities or Specification, the Contractor is required to sub-let any work shall, in the execution of such work or the supply of such goods, be deemed to be sub-contractors employed by the Contractor and are herein referred to as 'nominated Sub-Contractors'. Provided always that the Contractor shall not be required by the Employer or the Engineer or be deemed to be under any obligation to employ any nominated Sub-Contractor against whom the Contractor shall make reasonable objection or who shall decline to enter into a sub-contract with the Contractor containing provisions:
>
> (a) that in respect of the work or the goods, the subject of the sub-contract, the nominated Sub-Contractor will undertake to the Contractor the like obligations and liabilities as are imposed upon the Contractor to the Employer by the terms of the Contract and will hold harmless and indemnify the Contractor from and against the same and from all claims, demands, proceedings, damages, costs, charges and expenses whatsoever arising out of or in connection therewith or arising out of or in connection with any failure to perform such obligations or to fulfil such liabilities and
>
> (b) that the nominated Sub-Contractor will hold harmless and indemnify the Contractor from and against:
>
> (i) failure of the sub-contract works if and where the design of the works was undertaken by the nominated Sub-Contractor,
>
> (ii) failure of the goods if and where the goods were manufactured and/or supplied by the nominated Sub-Contractor;
>
> (iii) any negligence by the nominated Sub-Contractor, his agents, workmen and servants;
>
> (iv) any mis-use by the nominated Sub-Contractor of any Constructional Plant, Temporary Works, or Materials provided by the Contractor for the purposes of the Contract; and from
>
> (v) any claims as aforesaid.'"

[52] Mr *Delport* submitted that the firm was not afforded the opportunity to object

to the appointment of ACE or to require it to enter into a sub-contract with the provisions referred to in paragraphs (a) and (b) of clause 61 (1).

[53] The difficulty one has with that submission is that Borsei, who, as I have said, supervised the construction of the pipeline and attended the site meetings, was not called as a witness.

It appears from the evidence that ACE was initially engaged by the engineer to carry out a corrosion survey on the pipeline. The field work for the survey was completed in July 1990 and ACE presented its report to the engineer on 12 September 1990.

[54] A site meeting was held on 13 September 1990 attended by Borsei at which the test report was handed to him and it was stated that ACE would be appointed to do the work.

On 18 September 1990 the engineer sent a memorandum to ACE which read as follows:

> "We refer to your report CP4266 dated 12/09/90:
> 1. We accept your recommendations and quotation as stated in the report. You must go ahead with the work as stated under points 1-5 of section 6 of the report. We would expect the work to be completed within 4 weeks, as stated.
>
> 2. You will be appointed on the contract . The main contractor is Coccianti and Borsei, and all claims for payment must be submitted to them."

On 26 September 1990 a further site meeting was held at which it was stated that ACE had been appointed and that the work which had started on 24 September seemed to be finished.

[55] It thus appears that Borsei knew five days beforehand that ACE was to be appointed. He had the opportunity to object and to request ACE to enter into a sub-contract as described in paragraphs (a) and (b) of clause 61 (1) of the General Conditions.

It follows that the firm's contentions on this part of the case also must be rejected.

Conclusion regarding the firm's liablility

[56] In the circumstances I am satisfied that the firm's appeal must be dismissed with costs, including those occasioned by the employment of two counsel.

Liability of the engineer

[57] Counsel for the engineer conceded that the parties to the construction contract were the firm and the employer and that the parties to the professional services contract were the engineer and the employer.

[58] In their heads of argument counsel for the engineer contended that on a proper interpretation of the professional services contract the engineer's duty of supervision only extended to such supervision of the contract as was required to enable it to satisfy itself that the pipeline was properly placed in position in accordance with the construction contract, but that it had no obligation , so it was contended, to see to it that each of the pipeline's constituent parts was manufactured in a workmanlike manner in accordance with its relevant specifications.

[59] When the matter was argued in this court it was conceded that the duty of supervision as contended for in the heads of argument was too narrowly stated and that the engineer had been obliged also to supervise the execution of the construction contract but, so it was contended, evidence was required, which had not been led, as to the extent of the supervisory duties which customarily rest on consulting civil engineers in circumstances such as were present in this case. It was accordingly submitted that the trial court should instead of granting judgment against the engineer have absolved it from the instance.

[60] The professional services contract is contained in two documents, a "Purchase order" sent by the plaintiff, acting on behalf of the employer, to the engineer and a letter from the engineer to the plaintiff in which the engineer acknowledged the receipt of the purchase order and set out the fees which would be payable to it under the contract.

[61] The Purchase order described the professional services to be rendered as follows:

> "The provision of all professional services required for the supervision of the installation of the water reticulation pipe line, and the construction of the pumpstation by Coccianti construction for Steelpoort Village *in accordance with* Contract Nos. ANX 2/53/31/152 and ANX 2/54/31/152."
>
> (The italics are mine.)

[62] Contract No ANX 2/53/31/152 was the construction contract. Clause 4 of the Samancor General Conditions forming part of it reads as follows:

> "QUALITY
>
> The goods shall be of the qualities and sorts described and equal in all respects to the Specifications, Samples and Drawings specified in the Order, or in the documents relating to the Order. Should there be no description or Sample exhibited, the goods shall be the best of their respective kind and shall be to the satisfaction of the Purchaser.
>
> All materials and workmanship shall be as specified and/or first-class quality. Any materials considered faulty

or incorrectly or badly erected or fixed shall be substituted, altered or changed at the discretion of the Purchaser, at the Seller's sole expense.
In the absence of anything to the contrary in the Order, all Materials and Workmanship shall comply with the appropriate British Standard Specification/s or SABS specification/s or such other International Standard/s as may be accepted for purpose of the order by the Purchaser.
Electrical work shall comply with the requirements of the latest issue of the South African Institute of Electrical Engineers Regulations applicable to the installation as well as all Local Authority By-Laws and any requirements for the local Supply Authority."

[63] It is clear in my view, on a simple interpretation of the contract, that the engineer was obliged to examine the quality of the materials delivered to the site. This included a duty to examine the pipes on site to ascertain whether the surface of the pipes had been prepared in accordance with the relevant specification before the coatings and linings were applied. This examination could according to the uncontested evidence easily have been done. If it had been done, millscale which was on the surface of the pipes would have been detected.

[64] The engineer's duties also included, in my view, an obligation to examine the pipes on site to ascertain whether the specifications regarding dry film thickness were complied with. This could also easily have been done. If this had been done the specified coating and lining thicknesses would have prevented, or at least have inhibited, the corrosion process.

[65] It was also clear on the evidence that the first cathodic protection system, which was installed by ACE, failed because electrical continuity, as required and provided for in the specifications, was not effected. *Inter alia*, twenty couplings which should have been installed were not and the zinc anodes specified were either not supplied or were not properly attached or electrically bonded to the pipeline. No explanation for the engineer's failure to pick up this clear deviation from the specifications was forthcoming.

[66] Another breach of the construction contract by the firm which should, and

could easily, have been picked up by the engineer, related to the fact that sections of the pipeline were extensively mechanically damaged during its installation because the contractor did not comply with the contract specifications regarding bedding material for the individual pipes and during the backfilling process stones and rocks were dumped onto the pipeline causing it to be damaged.

At one stage during the argument counsel for the engineer was asked whether there was any evidence at all of what his client had done by way of supervision : no answer was forthcoming. This comes as no surprise in the case of an engineer whose first line of defence was that his duties of supervision were of a most attenuated kind.

[67] It is accordingly clear, in my view, that the engineer certified defective workmanship and materials as if there had been compliance with the contract specifications and it failed to take reasonable steps to ensure that the construction work was carried out in a proper and workmanlike manner and in accordance with the contract specifications.

[68] I am accordingly satisfied that the engineer failed to perform its supervisory function in a proper and professional manner and that it failed to take reasonable steps to ensure that the construction work was performed in accordance with the provisions of the construction contract. In my opinion it has also been established that the engineer breached the implied terms of the professional services contract by issuing monthly payment certificates and a completion certificate in respect of defective work and materials provided by the firm. If those breaches had not occurred the employer would not have paid the firm for defective workmanship and materials (which were useless to the employer) and it would also not have paid for additional remedial work, which was recommended by the engineer and which was also valueless in the result.

[69] In regard to the amount of the damages claimable by the plaintiff from the engineer two main submissions (plus a further submission relating to the retention money to which I have referred above) were raised on appeal by counsel for the engineer.

[70] The first relates to the way in which the quantum of the plaintiff's claim against the engineer was computed. The amount the plaintiff claimed, and was awarded by the court *a quo* as damages against the engineer, comprises the total amount of the payment certificates issued by the engineer in respect of the pipeline (which, it will be recalled, proved to be wholly defective and required replacement), plus the

expenditure incurred by the employer, on the advice of the engineer, in attempting to remedy the defects that manifested themselves. From this amount were deducted the costs of items which were either not defective or were not rendered valueless. The amounts in respect of such items formed part of the final certificate issued by the engineer. The judge in the court *a quo* took the figures which he deducted under this head from the summary of the opinions of one of the plaintiff's experts, one Venter, who did not testify at the trial. Counsel for the engineer criticised the judgment of the trial court on this point and submitted that in view of the fact that neither Venter nor any other expert testified on this point there was no basis for calculating the deduction, which would mean that the quantum of the damages was uncertain.

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[71] I do not agree with this criticism. In my view counsel for the plaintiff were correct in submitting that the plaintiff was entitled to use the actual amounts certified by the engineer itself in respect of items which were, on the evidence, not affected by the defects and which did not require replacement.

[72] The final point argued by counsel for the engineer was that inasmuch as the plaintiff has a claim for damages against the firm and does not allege that the firm will not be able to satisfy the judgment in favour of the plaintiff that has been given against it in this case, it has not been shown that any loss has been suffered at this stage in consequence of negligent supervision or certification by the engineer, because a judgment has been given against the firm for the full amount of the loss, which judgment may well be satisfied.

[73] At the moment, so it was submitted, there exists merely a possibility that what were called "prospective damages" will be suffered should the judgment against the firm not be satisfied in full. Consequently, so it was argued, the plaintiff's action against the engineer was premature and should have been dismissed with costs.

[74] It was also argued that the engineer was not liable to the plaintiff because it was not foreseeable that the employer would suffer any loss as a consequence of the negligent issue of interim certificates. In this regard an attempt was made to draw a distinction between the negligent issue of a final certificate as opposed to an interim

one. The basis of the submission is the conclusive nature of a final certificate issued in terms of clause 64 of the General Conditions of Contract, whereas overcertification in an interim certificate can be adjusted in a later certificate and eventually finally put right in the final certificate.
[75] In my view no question of foreseeability arises nor can it be said that the plaintiff's claim against the engineer is premature.
[76] The correct position is that the engineer and the firm are independently liable for the same or similar damage. The plaintiff's causes of action against them are separate and independent based upon two separate if inter-connected contracts.

[77] It is interesting to note that the position in English law in a case such as this is set out as follows in *Hudson's Building and Engineering Contracts*, 11th edition, by I N Duncan Wallace QC, at *pp* 230-1:

> "...(C)ases of true joint liability, whether in tort or contract, are comparatively rare. Far more commonly in construction projects two or more persons may be *independently* liable, whether in contract or tort, for *the same (or similar) damage.* A classic example in contract would be the liability of the contractor to the owner for defective work, and of the A/E [architect or engineer] for a failure to detect or prevent it while supervising. The causes of action are separate and independent, and in some cases, including the above, the measure of damage may be very different... In the case of both joint and several claims, the remedies at common law were extremely primitive .... Individual several defendants in contract would be liable to judgment for the whole loss, whether sued separately or not, and such a party's only defence, either at trial or on execution of judgment, was to prove that the plaintiff had already 'realised' or satisfied his judgment through payment by or execution against the other party."

(The reason for the use of the past tense in the passage quoted from *Hudson* ("the remedies at common law *were* extremely primitive") is that the position in English law has to some extent been ameliorated by the Civil Liability (Contribution) Act (c.47) of 1978 which extended the effect of the Law Reform (Married Women and Tortfeasors) Act (25 and 26 Geo.5, c.30) [Part II of which is the counterpart of

Chapter II of our Apportionment of Damages Act 34 of 1956] to actions in contract.)
[78] Counsel for the respondent referred to the judgment of Judge Fay QC, sitting to conduct Official Referees' business, in *Hutchinson v Harris*, a case where a building owner sued an architect for, *inter alia*, defective supervision, reported on appeal at (1978) 10 BLR 19. In the commentary to the Court of Appeal judgment at 10 BLR 22-3 the following quotation is given from Judge Fay's judgment: 23

> "But as to the factor of Mr Bishop's work [the builder's work], Mr Walker submits that if the defendant was negligent in supervision or certifying, no damage is recoverable because the fault is Mr Bishop's and the plaintiff has not shown that Mr Bishop is unable to pay them. He elicited the fact that Mr Bishop is suing the plaintiff in the County Court for the balance of his account and that the plaintiff is counterclaiming against him in respect of this defective work. He points out that in *Sutcliffe v Thackrah* [1974] AC 727; 4 BLR 16], which I have mentioned, where the architect was responsible for the builders' negligence, the builders were insolvent. This is an interesting argument but not I think a valid one. It seems to be bereft of authority. But where the duty of a contracting party is to supervise the work of another contracting party, it seems to me there is a direct casual connexion between the supervisor's negligent failure to prevent negligent work, and the damage represented by that negligent work. No doubt the builder is also liable. It is a case of concurrent breaches of contract producing the same damage. In my judgment the plaintiff has an action against both, although she cannot obtain damages twice over."

[79] In my view it is important to bear in mind that we are not concerned in this case with the question as to whether the engineer, if it compensates the plaintiff for the damage that has been suffered, will have a claim of some kind for an indemnity from the firm. On the facts of this case overlapping damage was caused to the employer by two independent breaches of contract. I am aware of no legal principle which compels a plaintiff in a case such as this to excuss, as it were, one contract breaker before suing or recovering compensation from the other.

[80] In my opinion the principle laid down by Judge Fay QC in *Hutchinson v Harris, supra,* is correctly reasoned and in accordance with the principles of our law. See for the analogous position in delict *Nedcor Bank Ltd t/a Nedbank v Lloyd-Gray Lithographers (Pty)Ltd*, (an unreported decision of this Court, case 257/1998, delivered on 8 September 2000).

[81] It follows that, subject to the making of the necessary deduction in respect of the retention money, the order made by the trial court was correct. At the hearing of the appeal counsel were agreed that an amount of R62 974 should be deducted from both awards, in respect of retention moneys.

[82] The following order is made:

The appeals of both appellants are dismissed with costs, including those occasioned by the employment of two counsel, save that the order of the court below is altered by the substitution of the amount of R910 570 for the amount of R973 544-48 in paragraph 1 and the substitution of the amount of R1 145 559 for the amount of R1 208 533-48 in paragraphs 2 and 3.

I G Farlam AJA

CONCUR
OLIVIER, JA
SCHUTZ, JA
BRAND, AJA
CHETTY, AJA