

6a/87

CASE NO. 463/85
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

LTA CONSTRUCTION LIMITED

APPELLANT

and

BEYERS ENTERPRISES

RESPONDENT

CORAM: RABIE ACJ, JANSEN, VILJOEN, NESTADT JJA
et BOSHOFF AJA

HEARD: 17 FEBRUARY 1987

DELIVERED: 13 MARCH 1987

J U D G M E N T

NESTADT JA/

NESTADT, JA:

I have, regretfully, come to a different conclusion, viz., that the appeal ought to succeed. In my opinion the trial court should, for the brief reasons which follow, have refused the application for absolution.

The facts and relevant principles of law are fully set out in the judgment of Boshoff AJA. It is necessary for me merely to stress those which I consider of particular importance to the view I take.

The issue was, of course, whether at the end of plaintiff's case there was, prima facie, evidence on which one or other of the two repudiations relied on could/

could or might be found. Unless it was clear that the answer was no, plaintiff's claim should not have been dismissed; defendant should rather have been left to deal with plaintiff's evidence or close its case without doing so.

In what follows I confine myself to the repudiation which it is alleged took place on 17 October 1983. Vos's evidence, whilst not always consistent, lends itself to a finding that, on this date, defendant did not simply query what would happen if it breached its obligations but notified him that, because of certain "cash-flow" problems it was experiencing, it "could not continue with the contract" and "would have to go into

default"/.....

default" (unless plaintiff came to its (financial) assistance in the respects set out in the judgment of my Brother).

In my view, this statement constituted or was capable of constituting a repudiation of the contract. It went or can be construed as going beyond a mere threat to (possibly) default. It ostensibly amounted to a deliberate, serious and unambiguous declaration by defendant that it was unable to perform, i e, that it was not in a position to continue with and complete the contract. It is clear that an assertion of this kind is or can be an (anticipatory) repudiation. The following remarks of Devlin J in Universal Cargo Carriers Corporation vs Citati 1957(2) Q B 401 at 437 - 8 are apposite in this regard:

"Since/

"Since a man must be both ready and willing to perform, a profession by words or conduct of inability is by itself enough to constitute renunciation. But unwillingness and inability are often difficult to disentangle, and it is rarely necessary to make the attempt. Inability often lies at the root of unwillingness to perform. Willingness in this context does not mean cheerfulness; it means simply an intent to perform. To say: 'I would like to but I cannot' negatives intent just as much as 'I will not.' ... If a man says 'I cannot perform', he renounces his contract by that statement, and the cause of the inability is immaterial."

(See, too, Christie: The Law of Contract in South Africa,

501; De Wet and Yeats: Kontraktereg en Handelsreg,

4th ed., 154; Joubert's LAWSA, vol 5, para 225

and, in particular, Kerr: The Principles of the Law of Contract, 3rd ed., 333 seq).

In plaintiff's letter of 24 October 1983

it is alleged that defendant "wish(ed) to go into

default". This was not so. Defendant hoped the

contract/

contract would continue. Thus Vos said: "If I re-
 collect, they said they would prefer if we could sal-
 vage the situation". However, it matters not that
 there be no intention or subjective desire on the part
 of the defaulting party to terminate the contract (Van
Rooyen vs Minister van Openbare Werke en Gemeenskapsbou
 1978(2) S A 835(A) at 845 fin - 846 A; Universal Cargo
Carriers Corporation vs Citati (supra)). In the last-
 mentioned case the approach was stated (at 436) to be
 the following:

"The test of whether an intention is
 sufficiently evinced by conduct is whether
 the party renouncing has acted in such
 a way as to lead a reasonable person to
 the conclusion that he does not intend
 to fulfil his part of the contract."

Jansen JA in Tuckers Land and Development Corporation
(Pty) Ltd v Hovis 1980(1) S A 647(A) at 653 D - E,

approved/

approved of this dictum by describing it as "both practical and fair". In other words, a type of objective test is applied (LAWSA, para.225). Nor, so it seems to me, does the request for plaintiff's help that accompanied defendant's statement detract from its aforementioned consequences. Vos acceded under cross-examination to the suggestion that it was "a serious one". But defendant had no contractual right to any indulgence from plaintiff; there was no obligation on plaintiff to grant the request; plaintiff would have been entitled forthwith to refuse it and, in the result (if the views expressed above be correct), then and there to cancel the contract.

This, however, did not happen. It was only in terms of its letter dated 24 October 1983 that

plaintiff/.....

plaintiff purported to accept defendant's repudiation.

The factual allegations contained in this letter do not, as already indicated, fully accord with Vos's evidence as to the events of 17 October 1983. This, however, bears on his credibility; it is not a matter of moment at the present stage of the proceedings. What has to be considered is whether plaintiff's reaction, before 24 October 1983, to defendant's repudiation and the latter's conduct in the interval, precluded plaintiff's subsequent decision to rescind the contract. Vos testified that on 17 October 1983 he undertook to enquire of his superiors whether "we could assist them in any way as requested" and to report back to defendant. At the same time, he told defendant that, as far as securing plaintiff's agreement to the supply of diesel was concerned, he anticipated no "difficulty"

or/

or "problem"; indeed he, at the meeting, consented to defendant immediately using diesel from plaintiff's tanks. There is some uncertainty as to whether defendant, in the days following, took advantage of this offer but what did happen was that it continued working at the site "for a few days" and even (possibly) until 24 or 25 October 1983 (on which date Mr van Rooyen was still on site).

In my respectful opinion, none of the circumstances referred to in the preceding paragraph rendered plaintiff's cancellation of the contract on 24 October 1983 unjustified. Defendant's continued performance of (some of) its obligations after 17 October 1983 cannot,

on/.....

on Vos's evidence, be regarded as a retraction of its previous repudiation. It is reconcilable with defendant, on a temporary basis, preserving the status quo pending plaintiff's decision as to how, if at all, defendant's quandary was to be resolved. Though plaintiff's initial stance during the conversation that took place on 17 October 1983, was that "plaintiff would not or could not release them (sic, defendant) from the contract" this was not its final attitude at the meeting. The latter was, in effect, that plaintiff would consider assisting defendant. But plaintiff did not commit itself to assisting defendant. Nor is there any warrant for necessarily inferring from Vos's preparedness to do so that/.....

that he did not consider what defendant had told him to be a repudiation or that plaintiff thereby waived its right to cancel. In principle, the desire of contracting parties to avoid a threatened repudiation by the one and, following upon negotiations between them, their attempting to obviate this occurring, does not, where no mutually acceptable solution is found, per se preclude the other from cancelling the contract (see in support hereof, Kerr, 343). And, contrary to what the trial court found, Vos did revert to defendant. On a date which he could not specify but which he said was before 24 October 1983 he "suggested to Mr van Rooyen that we employ him and I said that was the only solution we could come up with". A tenable construction of this communication is, /.....

is, to put it at its lowest, that defendant's request for assistance was thereby refused. The employment of defendant would have been inconsistent with the maintenance of the original contract between the parties. The fact that defendant was to let plaintiff know what its attitude to the "solution" was, makes it surprising that plaintiff, without further ado, wrote its letter of 24 October 1983. There was, however, no legal obligation on plaintiff to have waited to hear from defendant before doing so.

In the result, though plaintiff's election whether or not to cancel the contract was, after 17 October 1983, delayed, its eventual decision on 24

October/

October 1983 to do so was nonetheless, prima facie, a legitimate one. I should add that it was neither pleaded nor argued on behalf of defendant that plaintiff's subsequent invitation to defendant to resume the contract was a bar to its previous cancellation.

The plaintiff may not have established a clear case but it was, in my view, sufficient to ward off an application for absolution. This being a minority judgment it is unnecessary to deal with whether, in the event of the appeal succeeding, the withdrawal of defendant's counter-claim in the court below was unconditional and therefore should stand and whether the costs of appeal should include the costs of two counsel.