IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

WYNN'S CAR CARE PRODUCTS (PROPRIETARY) LIMITED — Appellant

and

FIRST NATIONAL INDUSTRIAL BANK LIMITED — Respondent

CORAM : JOUBERT, HEFER, KUMLEBEN, GOLDSTONE JJA *et* KRIEGLER AJA.

HEARD : 8 MARCH 1991.

DELIVERED : 26 MARCH 1991.

JUDGMENT

HEFER JA.

HEFER JA:

This appeal is against a judgment of the Witwatersrand Local Division directing the appellant to pay the respondent an amount of R506 508,35 with interest and costs. Leave to appeal was granted on petition to the Chief Justice.

Respondent is the cessionary of the lessor's rights under an agreement of hire entered into in writing between the appellant and CICS Bureau (Pty) Ltd ("C I C S") on 1 August 1985. In terms of the agreement CICS let to the appellant certain computer equipment for a period of five years at a monthly rental of R9 000 escalating at the rate of $12^1/_2$ % per annum. Relying on appellant's failure to pay the rentals for December 1987 and a clause in the agreement providing for the acceleration of all amounts payable, whether due or not, in the event of appellant's default in the punctual payment of the rent, the respondent claimed the rentals for the full period of the lease.

It is not necessary to analyse all the issues raised in the pleadings since it emerged at the hearing of the appeal that there are only two decisive questions. The agreement of hire was expressly made conditional upon the conclusion between the parties of an agreement of maintenance and an agreement of computer services. (These agreements will henceforth be referred to as the "maintenance agreement" and the "services agreement" respectively. They were concluded on the same day on which the agreement of hire was signed.) Appellant's case is that the three agreements ie the agreement of hire, the maintenance agreement and the services agreement, as well as a written quotation submitted by CICS before the agreements were entered into, are all indivisible parts of a single integrated transaction; and that its obligation to pay rent in terms of the agreement of hire is reciprocal to CICS's obligation to maintain the equipment in terms of the maintenance agreement and to supply and maintain an on-line computer service in terms of the services agreement, which, it is alleged, CICS repudiated or failed to fulfil. The first question is whether there is indeed the reciprocity of obligations for which the appellant contends. If this question, and the second question (which will be discussed later), are decided against the appellant the appeal falls to be dismissed.

It is not inappropriate to be reminded that the exceptio non adimpleti contractus - which is essentially the appellant's defence - presupposes the existence of mutual obligations which the parties intend to be performed reciprocally, the one being the intended exchange for the other (Ese Financial Services (Pty) Ltd v Cramer 1973(2) SA 805 (C) at 809 D-E: De Wet and Yeats, Kontraktereg en Handelsreg, 4 ed 177). Since their intention is to be sought primarily in the terms of the agreement (Rich and Others v Lagerwey 1974(4) SA 748 (A) at 761 in fin) the enquiry turns in any particular case on the interpretation of the agreement (BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979(1) SA 391 (A) at 418 B).

Appellant's counsel submitted that the intention of the contracting parties in the present matter should not be determined merely from the terms of the agreement of hire, but from the terms of the three agreements considered as a whole. The crux of his argument is that the agreement of hire is only one of the parts of a more comprehensive transaction which is of such a nature that it must be inferred that the appellant's obligation to pay rent was intended to be reciprocal to CICS's obligations in terms of the other two agreements. Basically the argument amounts to this: The appellant required a computer service. Instead of acquiring a system of its own it entered into a transaction with

CICS in terms whereof the latter would install and maintain modems, printers and other equipment at appellant's branches in various parts of the country which would be connected to CICS's main frame where the processing of data would be done. Without proper maintenance of the equipment and access to the main frame, and unless CICS performed the processing services for which it contracted, the equipment installed in the branches would be useless. This justifies the inference of reciprocity between the obligations undertaken in the various agreements.

The argument fails to appreciate the clear distinction between separate agreements which are, for practical and commercial considerations, linked and interdependent and those agreements which the parties in addition wish to be reciprocal in the legal sense. The transaction plainly involved more than the lease of the equipment and it is clear that the system would be inoperative and the equipment of no use to the appellant unless CICS performed in terms of the maintenance agreement and the services agreement. But that is not the end of the matter. The transaction was a multi-faceted one. It was for the parties to decide how they would formalise every aspect of their relationship. They elected to do so in three separate and distinct agreements and unless the terms of the agreements considered as a whole clearly evince the intention that there would be reciprocity between the obligations undertaken in each, there is no room for an interference to that effect.

The first indication of the parties' intention is in Clause 13 of the agreement of hire. It reads as follows:

> "This Agreement is the sole rental agreement between the parties hereto. CICS and the customer shall not be responsible for any undertakings, representation or warranty given orally or otherwise which is not specified in this Agreement... "

Clause 13 must be read with Clause 21.1 which is in the following terms:

> "Without derogating from anything aforesaid, the Customer declares that it has not been induced or influenced to enter into this Agreement and does not rely in entering into this Agreement on any statement of CICS, whether related to the Equipment or any aspect of this Agreement, and gives no warranties to the Customer in connection with the Equipment. All warranties implied by common law are expressly excluded from this Agreement. Provided that the provisions of this Clause shall not be construed so as to release CICS from any obligationsin terms of the Maintenance and Computer Services Agreements, the conclusion of which are conditions precedent to the conclusion of this Agreement."

The last sentence of Clause 21.1 is misleading. Although framed in that form, it is not a true proviso since it does not relate to anything said earlier. But what is of significance, is that it is expressly limited to the provisions of Clause 21.1 itself - "the provisions of <u>this Clause</u> shall not be construed so as to release CICS from any obligations.....". The so-called proviso does not derogate from the terms of Clause 13 and can only be reconciled with the latter on the basis that, although CIC would be obliged to perform in terms of the maintenance agreement and the services agreement, its failure to do so could not stand in the way of enforcement of its rights under the agreement of hire.

Clause 10 of the agreement of hire is in even more explicit terms. It reads as follows:

> "The Customer shall not be entitled for any reason whatsoever to withhold any payment due in terms of this Agreement nor shall it be entitled to set off against any rentals payable in terms hereof, any present or future claim which the Customer may have against CICS from whatever cause."

The services agreement contains a similar provision viz:

> "Under no circumstances shall the Customer have the right to set-off against any amounts owing by it under the Agreement any amount which it alleges is due to it by CICS from any cause whatsoever and the Customer shall not have the right to withhold payment of any amount due to CICS for any reason whatsoever."

These two provisions remove any doubt which may otherwise have existed as to the parties' intention. Their effect is plainly that there is no reciprocity between appellant's obligation to pay the rentals and CICS's obligation to perform in terms of the maintenance agreement.

The agreements contain other indications pointing the same way but I do not find it necessary to mention them since the provisions referred to appear to me to be decisive.

It will be noticed that I did not refer to the terms of the quotation in arriving at this conclusion. I did not do so because, firstly, there is no indication that it was ever accepted, secondly, it was superseded by the formal agreements and, thirdly, it is of no real assistance. It does reveal that what CICS offered the appellant was a "package deal inclusive of hardware and standard monthly processing" and to that extent it serves to confirm that the transaction involved more than the lease of the equipment. But otherwise nothing material emerges from its terms. Appellant's counsel referred us to Schedule III of the quotation where it is said that there would be a "basic charge of R9 000,00 per month (subject to an annual escalation of 12½ %) which will be in the form of a processing charge for the volumes of transactions and masterfiles....." and that the monthly rental of the equipment amounting to R1 060 would be included in the "basic charge". I do not know what relevance this has. As already mentioned the quotation was superseded by the formal agreements and the amount of R9 000,00 escalating as aforesaid is reflected in the agreement of hire as rental for the equipment.

Having dealt with the first of the two questions on which the outcome of the appeal depends, I turn to the second one.

Appellant pleaded that

"(i) Clause 10 of Annexure 'A' (ie the agreement of hire) is unconscionable and incompatible with the public interest and therefore contrary to public policy and void ab initio.

(ii) The said clause 10 is not severable from the remainder of the agreement and accordingly the whole of annexure 'A' is void ab initio."

The trial court rightly rejected this defence. As I understand appellant's argument it is that clause 10 is unconscionable and incompatible with the public interest and contrary to public policy since it effectively precludes the appellant from raising CICS's failure to comply with its obligations in terms of the other agreements as a defence to a claim for rentals and compels it to pay the rentals without the beneficial use of the equipment. There is no substance in the argument. That the appellant is precluded from raising CICS's failure to comply with its obligations in terms of the maintenance agreement or the services agreement as a defence to a claim for rentals in terms of the agreement of hire is due, not to the provisions of clause 10, but to the fact that the parties entered into three separate agreements between which there is no reciprocity. There is nothing to prevent the appellant from proceeding against CICS in terms of the maintenance agreement and the services agreement. That a claim against CICS cannot be fruitfully pursued (it is alleged in the plea that CICS has stopped trading after transferring all its assets to another company) is irrelevant since the validity of clause 10 cannot be adjudicated upon in the light of an unforeseen subsequent eventuality. The provision may at first blush appear to be harsh but harshness as such does not afford a contracting party the right to resile from his bargain. There is a readily identifiable reason for the inclusion of such a provision in the agreement of hire. Clause 9 entitles CICS to cede its rights to "any other person" and obliges the appellant to make all payments to the cessionary if so required. (There is no similar provision in the maintenance agreement or in the services agreement .) The inference is irresistible that clause 10 was inserted, if not solely then at least partially, for the purpose of facilitating a cession. Viewed in this light particularly clause 10 is clearly not against the public interest.

In conclusion two matters must be mentioned. The first relates to certain evidence led at the trial and the other to the order of costs. At the trial the appellant led the evidence of its financial director at the time the agreements were entered into but who did not sign any of them although he had taken part in some of the negotiations. The purpose of the evidence appears to have been to present the court with the so-called surrounding circumstances. In this court appellant's counsel was unable to show us how the evidence assisted his case. The surrounding circumstances can in any event only be resorted to in cases where the intention of the parties does not emerge with sufficient clarity from the agreement itself. This is not such a case and it is unnecessary to deal with the evidence.

The trial court awarded the respondent its costs on the attorney-and-client scale in terms of a provision in the agreement of hire. Counsel were agreed that costs should be awarded on the same scale in the event of the appeal being dismissed.

The result is that the appeal is dismissed with costs which shall include the costs pertaining to the employment of two counsel and shall be taxed on the scale as between attorney and client.

J J F HEFER JA.

JOUBERT JA)
KUMLEBEN JA) CONCUR.
GOLDSTONE JA)
KRIEGLER AJA)