

SOUTH AFRICA / JUDGMENT

Affinity Logic (Pty) Ltd and Others v Fourie NO and Others (26609/2003) [2005] ZAGPHC 261 (2 June 2005)

[2005] ZAGPHC 261**COURT**

High Courts - Gauteng

BEFORE

S J Mynhardt

CASE / FILE NUMBER

26609/2003

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA /ES****(TRANSVAAL PROVINCIAL****DIVISION)****CASE NO: 26609/2003****DATE:**

2/6/2005

not reportable

IN

THE MATTER BETWEEN:

AFFINITY LOGIC (PTY) LTD PLAINTIFF

AND

JOHN

LOUIS CARTER FOURIE NO 1ST

DEFENDANT

KAREN

KEEVY NO 2ND

DEFENDANT

JOHANNES

FREDERICK KLOPPER NO 3RD

DEFENDANT

WILLIE

LEGOABE SERITI NO 4TH

DEFENDANT

CONSOLIDATED

NEWS AGENCIES (PTY) LTD

(in

liquidation) 5TH

DEFENDANT

JUDGMENT

MYNHARDT, J

Introduction

[1] This is an exception by the defendants to one of the claims of the plaintiff as set out in its amended particulars of claim.

The plaintiff has instituted action against the defendants for payment, firstly, as a concurrent creditor in the insolvent estate of the fifth defendant, of the amounts of R7 926 007,85 and R144 655 544,00 together with interest thereon from 24 July 2002 to date of payment thereof, and, secondly, for payment, as part of the costs of administration in the insolvent estate, of the amount of R5 969 091,62 together with interest thereon from 1 August 2003 until the date of payment thereof.

The exception is against the claim for payment of the amount of R144 655 544,00 only.

The plaintiff relies on the provisions of a written contract for its claims. This contract was entered into in May 2001. On 27 July

2002 the fifth defendant was provisionally liquidated by order of the Witwatersrand Local Division of the High Court of South Africa. That order was made final on 3 October 2002.

The plaintiff's claim for payment of the amount of R7 926 007,85 is a claim for payment of arrear instalments which were payable in terms of the contract and which has already accrued as at the date of liquidation. The claim for payment of the amount of R5 969 091,62 is a claim for payment for services rendered by the plaintiff to the fifth defendant after liquidation thereof and at the request of the liquidators, the first to fourth defendants.

The claim for payment of the amount of R144 655 544,00 is alleged to be a claim for payment of pre-estimated damages suffered by the plaintiff as a result of a breach of contract by the fifth defendant prior to its liquidation on 27 July 2002.

The plaintiff's claim

[2] The claim is based on breach of contract.

In paragraph 5.8 of the particulars of claim the provisions of clause 20.2 of the agreements are paraphrased. This paragraph sets the scene for what is to follow. In terms thereof it is alleged that on the happening of "an acceleration event" such as described in clause 20.1 and relating to the liquidation or judicial management of the Consolidated News Agencies (Pty) Ltd (in liquidation) ("the CNA"), "all of the service fees not yet due by CNA to the plaintiff in respect of the period from the date of the occurrence of such event to 30 June 2008 would immediately become due and payable, ..." For purposes hereof it can be accepted that that is a correct paraphrase of the provisions of clause 20.2.

In paragraph 7 of the particulars of claim it is alleged that "The liquidation of CNA" was an "acceleration event" for the purposes of clause 20 of the agreement. That allegation is strictly speaking not correct. The acceleration events mentioned in clause 20.1 of the agreement all relate to events occurring prior to liquidation. So, for instance, is the date

of the last signed of any affidavit to any notice of motion in any application seeking the liquidation, whether provisional or final, of the CNA, an acceleration event for the purposes of section 20. No point of this was made by the defendants' counsel during argument.

In paragraph 9.1 of the particulars of claim it is alleged that "By virtue of the acceleration event" the plaintiff

"became entitled as a pre estimate of damages to the payment of service fees up to 30 June 2008 in the amount (including Value-Added Tax) of R173 990 625,00". It is further alleged that the plaintiff has received certain payments subsequent to the acceleration event which are then deducted so that the outstanding amount comes to R144 655 544,00.

That amount according to paragraph 9.3 of the particulars of claim, "constitutes the damages sustained by the plaintiff as a result of the failure by CNA to comply with its obligations in terms of the ... agreement".

It is therefore clear from the allegations in the particulars of claim that the "acceleration event" relied on by the plaintiff, being the date of the last signed of any affidavit to the notice of motion in the application seeking the liquidation of CNA, is regarded by the plaintiff as a breach of contract. That breach of contract triggered the acceleration clause provided for in clause 20.2 of the agreement resulting in "all of the service fees not yet due by CNA" becoming immediately due and payable and which amount is then alleged to be a pre estimate of damages.

The fact that the plaintiff claims payment of the aforesaid amount as a concurrent creditor in the insolvent estate of CNA, the fifth defendant, shows that, according to the plaintiff, the claim arose prior to the liquidation of CNA and that it had also been quantified prior to liquidation.

The exception

- [3] The first ground of the exception is that the plaintiff's particulars of claim "lack the averments necessary to sustain a cause of action" for the claim for payment of the amount of R144 655 544,00 as and for damages. The second ground thereof is that the provisions of clause 20.2 of the written agreement on which the plaintiff relies for its claim, are "unenforceable because they are contrary to public policy and because they are designed to accord on liquidation" a preference to the plaintiff over and above other creditors, and, a contractual claim against the fifth defendant which purports to bind the liquidators.

The contract

- [4] The agreement is one for the provision of certain services by the plaintiff to the fifth defendant, prior to its liquidation. In terms thereof the plaintiff would provide "certain information technology outsourcing services" to the CNA. The CNA has outsourced "its

current information technology functions" to the plaintiff who is referred to as "the service provider" in the agreement. The services which the plaintiff would render to "the client", the CNA, were those set out in annexure "E" to the agreement. It is not necessary for present purposes to refer to that annexure in detail. The plaintiff would be the "exclusive provider" of those services to the CNA.

- [5] The contract was for a period of eight years with effect from 1 July 2000 and it would terminate on 30 June 2008.
- [6] As a quid pro quo for the rendering of the services to it the CNA was obliged to pay to the plaintiff "an annual fee equal to R35 500 000" excluding Value-Added Tax, for the first year of the contract ending on 30 June 2001. In respect of the succeeding years until 30 June 2008, that fee would be increased or decreased annually in accordance with the formula laid down in clause 5.7.2 of the agreement.

This "annual fee" of R35 500 000,00 consists of two components according to clause 6.4.3 of the agreement. The one component is the "fixed costs component" which is stated to be approximately R15 million. The second component, the balance of the annual fee, relate to "the variable costs component" of the fee. The reason for these two components is to be found in clause 6.4.1 of the agreement which records that the plaintiff "shall incur certain fixed costs ... and certain variable costs ... in rendering the services to the client (the CNA) under this agreement".

The "annual fee" is, for purposes of the agreement, the "service fees" which are payable to the plaintiff by the CNA for the rendering of the services to it. Those service fees were payable, in terms of clause 5.2 of the agreement, "in advance on or before the 15th of each calendar month ('due date') of an amount equal to the services fees divided by 12 (twelve)". The plaintiff had to submit a tax invoice to the CNA at least five days prior to each due date in order to obtain payment.

- [7] Clause 14 of the agreement deals with "events of default" or breach of contract. It has two components. The one relates to "service provider events of default" and the other to "client event of default". In each case a number of instances are mentioned which would give rise to the other party's entitlement to "terminate" or cancel, the agreement on not less than three months prior written notice to the party who has committed the breach of contract.

One of the instances of breach of contract by the plaintiff is to be found in clause 14.1.2 of the agreement which reads as follows:

"14.1.2 The earlier of the date of issue of a certificate by any Master of the High Court of South Africa as contemplated in s 9(3)(b) of the Insolvency Act, no 24 of 1936 (or any like provision in any legislation which may succeed the said Insolvency Act), in any application for the liquidation, whether final or provisional, of the service provider or, the date of the last signed of any affidavit to any notice of motion in any application seeking the liquidation, whether provisional or final, of the service provider or, the date of the last signed of any affidavit to any notice of motion in any

application seeking an order placing the service provider under judicial management, whether provisional or final or, the proposing of any resolution by the shareholders of the service provider for the voluntary winding-up of the service provider;"

An instance of a breach of contract by the CNA, which would entitle the plaintiff to cancel the agreement, is to be found in clause 14.3.1 which reads as follows:

"14.3.1 a failure by the client to make timeous payment to the service provider of any amount due by the client to the service

provider in terms of this agreement if such failure is not rectified within 10 (ten) days of receipt of a written notice by the client from the service provider of such failure;"

[8] Clause 19 of the agreement provides for the "Put". The essence of this clause is that it provides for the plaintiff to sell to the CNA that part of its business which is exclusively utilised by it in providing the services to the CNA. The so called "put assets" will form part of the merx to be sold to the CNA. The "put assets" are defined in clause 1.2.21 of the agreement to mean, in essence, that it comprises

those assets of the plaintiff which are exclusively utilised by it to render the services to the CNA.

The purchase price of the "put business" is to be calculated in accordance with the formula laid down in clause 19.2. It is to be the sum total of the net book value of the assets comprising the put business and "the put option payment". This component of the purchase price is defined in clause 1.2.23 to mean "the aggregate of the unrecovered losses, the loss of future profits and the contractual and retrenchment costs ..." Each of these three concepts are defined in clauses 1.2.36, 1.2.16 and 1.2.7 respectively. From the perspective of the plaintiff it is clear that clause 19 provides a mechanism to enable

it to recover from the CNA not only the future profits that it would have earned had it provided the services until 30 June 2008 but also damages in respect of the losses and expenses that it had incurred in setting up the necessary infrastructure to enable it to render the services contracted for.

In terms of clause 19 the plaintiff would only be entitled to sell the business to the CNA if the agreement has been terminated or cancelled "for any reason whatsoever, including, but not limited to, due to a force majeure event or breach of this agreement by the service provider (the plaintiff)".

[9] Clause 21 is the counterpart of clause 19. It provides a mechanism to the CNA to purchase the same business that clause 19 relates to, from the plaintiff on termination, or cancellation, of the agreement "for any reason whatsoever, including, but not limited to, due to a material breach of this agreement by the client, (the CNA)".

The CNA would, however, only be entitled to purchase the business if the plaintiff does not exercise its rights in terms of clause 19.

The purchase price of the business will be calculated according to clause 21.2, *mutatis mutandis* in accordance with the formula and on the same terms and conditions as contemplated in clause 19.2.

[10] Clause 20 is for purposes of this judgment, of the utmost importance. It reads as follows:

"The inapplicability of the put

20.1 For the purposes of this clause an 'acceleration event' means:

20.1.1 the earlier of the date of issue of a certificate by any Master of the High Court of South Africa as contemplated in s 9(3)(b) of the Insolvency Act, no 24 of 1936 (or any like provision in any legislation which may succeed the said Insolvency Act), in an application for the liquidation whether final or provisional, of the client; or

20.1.2 the date of the last signed of any affidavit to any notice of motion in any application seeking the liquidation, whether

provisional or final, of the client; or

20.1.3 the date of the last signed or any affidavit to any notice of motion in any application seeking an order placing the client under judicial management, whether provisional or final; or

20.1.4 the proposing of any resolution by the shareholders of the client for the voluntary winding-up of the client.

20.2 Upon the occurrence of the first of anyone of the acceleration events contemplated in clause 20.1:

20.2.1 the provisions of clause 19 shall be regarded as *pro non scripto* and the provisions of this clause 20 shall *ipso facto* be of immediate application without any further action or notice by or to any of the parties hereto; and

20.2.2 all of the services fees not yet due by the client to the service provider in respect of the period from the date of the occurrence of the first of anyone of those events contemplated in clause 20.1 to the termination date shall become due and payable ('outstanding amount'), and the outstanding amount shall be calculated by discounting the face value thereof at prime less 2% (two percent) from the due dates for the payment for each of the monthly services fees as contemplated in clause 5.1 to the date of the actual payment of the outstanding amount.

20.3 Notwithstanding the provisions of clause 20.2, the service provider in the sole and absolute discretion of the service provider shall be entitled within 20 (twenty) days of the occurrence of the first of the events contemplated in clause 20.1 upon written notice to the client and/or the liquidator of the client, as the case may be, to reinstate the provisions of clause 19 whereupon this clause shall cease to be of any application."

The argument on behalf of the plaintiff

[11] Mr Burger SC who, together with Mr Fagan, appeared for the plaintiff, contended, in a nutshell, that clause 20 of the agreement deals with breaches of the contract by CNA. In the event of such a breach of contract occurring it automatically gives rise to a claim for damages which is then also quantified in terms of clause 20.2.2. The clause is therefore a classic example of a contractual pre estimate of damages which is enforceable by the plaintiff. In terms of section 3 of the Conventional Penalties Act, 1962, 15 of 1962, the defendants can request the court to reduce the penalty which the court would be able to do if it finds that the aforesaid amount is out of proportion to the prejudice suffered by the plaintiff because of the breach of contract by the CNA.

In regard to the second leg of the exception counsel submitted that in so far as the excipients rely on the principle that a court is entitled to strike down contractual provisions because they are found to be contra bonos mores, this court should be loath to exercise such a power at this stage because evidence may be led at the trial which may enlighten the court as to the background to the contract.

The reason why clause 20 was included in the contract, submitted counsel, is fairly obvious. A careful reading of the contract reveals, submitted counsel, that the plaintiff had to incur expenses to acquire the necessary assets, the so called dedicated assets as counsel called them, to enable it to render the services for which it had contracted, to the CNA. That initial capital outlay as well as the capital outlay that would be required of the plaintiff during the term of the contract to acquire further assets, had to be protected in one way or another. If the contract had run its course the plaintiff would recover its capital

outlay and profits. A mechanism had, however, to be invented to protect the plaintiff in the event that the CNA commit certain

breaches of contract during the term of the contract and the plaintiff does not want to terminate, or cancel, the contract. The

provisions of clause 20 constitutes that mechanism.

The argument on behalf of the excipients

[12] Mr Slomowitz SC, assisted by Mr Limberis, submitted on behalf of the excipients that the reliance placed on clause 20 by the plaintiff for the contention that it deals with breach of contract, and the consequences arising therefrom, is misplaced. That clause does not deal with breach of contract but with acceleration events. It also does not deal with damages as a consequence of any breach of contract, let alone a pre estimate of damages. It deals with the circumstances giving rise to the triggering of an acceleration clause. That is why the contract is not terminated on the happening of any of those events.

Because the clause does not deal with breach of contract and damages arising therefrom, the particulars of claim discloses no cause of action for the claim for payment of the amount of R144 655 544,00.

In regard to the second leg of the exception counsel submitted that clause 20 "is an attempt to oust the effect in insolvency of the concursus creditorum that all creditors be treated equally, as well as to circumvent the powers of the liquidators in respect of executory contracts". Its aim is to deprive the liquidators of their election whether or not they will regard themselves as being bound thereto. (I am quoting from paragraphs 20 and 22 of counsels' written heads of argument.) A clause which has that effect is in conflict with time-honoured rules of law, submitted counsel.

The resolution of the dispute

- [13] I agree with the submission of plaintiff's counsel that the plaintiff had to, and will have to, incur expenses in order to acquire the so called dedicated assets. It is clear from, inter alia, clauses 1.2.33, 3.2.2, 7.4 and 19 that some assets of the plaintiff have been acquired, and will have to be acquired, specifically for the purpose of rendering the services to the CNA and that some part of its business is being, and will be, utilised exclusively to provide the services to CNA.
- [14] It is also clear from the provisions of clauses 19 and 21 of the agreement that in the event of a breach of contract giving rise to the termination, or cancellation, of the agreement in terms of either clause 14.2 or clause 14.4 thereof, that the plaintiff's capital outlay will be protected fairly well because the plaintiff would recover its future profits and other losses, in the event of clauses 19 and 21 being implemented.

A similar situation will prevail in the event of the contract being terminated on account of force majeure in terms of clause 15. Clause 15.4 provides for the termination of the agreement upon the happening of a force majeure event that cannot reasonably be remedied by remedial action. In such a case the plaintiff is entitled to implement the provisions of clause 19 and if it does not do so, the CNA can implement clause 21.

In the event of the agreement being terminated by the plaintiff because of a breach of contract committed by the CNA and clauses 19 and 21 are not implemented, the plaintiff will have to sue for any damages sustained by it and it will have to prove its damages in the ordinary and normal way. The same principle would apply to CNA should it seek to hold the plaintiff liable for any damages that it may have suffered.

- [15] The provisions of clause 20 stand in contrast to the situation which would prevail if clauses 19 and 21 of the agreement are implemented on termination of the agreement.

Unless the plaintiff cancels, or terminates, the agreement in terms of clause 20.3 by reinstating the provisions of clause 19, which necessarily has the effect that the agreement would be cancelled or terminated, the agreement continues to exist if clause 20 becomes operative.

In the present case the plaintiff has not alleged that it had cancelled the agreement in terms of clause 20.3.

[16] The fact that the agreement continues to exist if clauses 20.1 and 20.2 become operative, necessarily means that the plaintiff is obliged to continue to render the services that it had contracted to do.

In the present case the plaintiff did not tender in its particulars of claim to continue to render the services. The reason for that, submitted counsel, is that it is alleged in paragraph 10.3 of the particulars of claim that the liquidators have repudiated the agreement. I agree with that submission. Therefore, nothing turns on the absence of a tender in the particulars of claim.

[17] The first question that now arises is whether or not clause 20 deals with breach of contract?

Counsel for the excipients have emphasised the fact that the clause does not in terms refer to breach of contract as such. That is, of course, correct. The clause speaks of acceleration events. Counsel is also correct in having pointed out that the word "damage(s)" is not used in the clause. The clause provides that "all of the services fees" which have not yet become due, becomes due and payable immediately.

I do not think that the answer to the question is as simple as was suggested by counsel for the excipients. The mere fact that the clause does not refer specifically to breach of contract or to damages, and that the contract continues to exist, does not necessarily mean that the acceleration of the service fees is not based on a breach of contract.

[18] The four acceleration events listed in clause 20.1 are not listed as breaches of contract by CNA in clause 14.3 which contains a list of client events of default which would entitle the plaintiff to cancel the agreement. What is of significance in the present context is that clause 14.3.1 provides that if CNA fails to make timeous payment of any amount due by it, and that failure is not rectified within ten days of the receipt of a written demand from plaintiff, that failure of CNA will constitute a "client event of default" or, a breach of contract, which would entitle the plaintiff to cancel the agreement. In the present case the plaintiff could, therefore, have cancelled the contract, if it had wanted to do that, because of the non payment of the instalments pleaded in paragraph 8 of the particulars of claim.

What is also of significance is the fact that the four acceleration events of clause 20.1 have, as their counterparts, the status of breaches of contract in clause 14.1.2 in the event of those events occurring in the case of the plaintiff. Those events could then lead to cancellation of the agreement by CNA in terms of clause 14.2.

[19] The fact that the occurrence of similar events, in the case of the plaintiff, are regarded as breaches of contract in clause 14.1.2 gives rise to the inference that they should also be regarded as breaches of contract should they occur on the side of CNA. The fact that they are called "acceleration events" in clause 20 does not necessarily mean, in my view, that they are not to be regarded as breaches of contract.

The only reason, in my view, why those four events are called "acceleration events" in clause 20 is because the consequences thereof differ, in terms of clause 20, from the consequences of their counterparts in terms of clause 14.2.

It should also, in this context, be borne in mind that, in law, an acceleration clause in the true sense of the word, only becomes operative if there has been a breach of contract. See Van der Merwe et al, *Contract, General Principles*, 2nd edition at 351; *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others* 1982 3 SA 618 (D&CLD) at 624A B ("the Parekh case").

I conclude, therefore, that the four acceleration events mentioned in clause 20.1 must be regarded, in law, as breaches of contract.

[20] The next question is whether or not the acceleration clause is a penalty clause in terms of the provisions of Act 15 of 1962 as was contended by plaintiff's counsel.

It is trite law that it is not every term that is linked to a breach of contract that falls within the ambit of Act 15 of 1962. So, for instance, does a true acceleration clause which merely accelerates the payment of instalments that have not yet become due, not fall within the ambit of the Act. See the Parekh case at 628E G; Christie *The Law of Contract* 4th edition, at 648 649; Van der Merwe, *op cit*, at 416; Kerr *The Principles of the Law of Contract* 6th edition at 790; *The Law of South Africa* ("LAWSA"), First Reissue, Volume 5 Part 1, par 258 at 296 297.

[21] It may be argued in the present case that clause 20 is not a pure acceleration clause which merely accelerates the payment of service fees that have not yet become due. See, the Parekh case at 628B E.

[22] Counsel for the plaintiff argued that the acceleration clause, clause 20, in the present matter falls in a different category than the ordinary case of an acceleration clause like the one in the Parekh case. For this proposition counsel relied on the judgment of VAN HEERDEN, JA in *Deloitte Haskins and Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 1 SA 525 (A) ("the Deloitte case"). In that case the court was concerned with a clause in a contract which authorised the creditor, in the event of the other party to the contract not supplying the system contracted for by a certain date, to employ the services of a third party to complete the system and the cost thereof would then have been for the account of the other party to the contract. The learned judge of appeal found at 532B D that the clause differed materially from an ordinary common law claim for complementary damages, which would have been the remedy provided for by the common law in such a situation, and that the clause was therefore "intended to provide a remedy in substitution of, and not in addition to, a common law claim for complementary damages".

The plaintiff's counsel submitted that the Deloitte case is authority for the proposition that an acceleration clause can be constructed in a manner that the implementation thereof amounts to specific performance of the contract. The reason why that could be the case is because the clause then enforces "the payment of pre quantified damages which had not previously been owing and which had been reciprocal to the performance by the claimant of its obligations under the

agreement, but where the acceleration event has extinguished that reciprocity (the postulate being that the company is to be liquidated as in the present case). In this third example one is dealing with a true pre estimate of damages." (I quote from counsels' written heads of argument.)

[23] According to counsel the plaintiff is merely seeking to enforce a concurrent claim for a pre estimate of damages and such a claim is permissible in law also according to Mars *The Law of Insolvency in South Africa* 8th edition, at 144.

According to the learned author of Mars, *op cit*, the trustee, or liquidator, cannot unilaterally cancel a contract, an executory one, but he can either abide by the contract or repudiate it. If the liquidator repudiates the contract, the other party can either accept or reject the repudiation. If that party rejects the repudiation, he/she "has to be satisfied with a concurrent claim for a monetary substitute for performance. At the same time the creditor must tender counter performance."

[24] Counsel for the excipients submitted that the opinion of Mars is wrong. Counsel submitted, relying on Meskin *Insolvency Law* paragraph 5.21.1 at 5 54/6, that in the case of an executory contract of the kind that the court is dealing with in the present case, the repudiation of a contract by the trustee or liquidator, has the effect, in law, that the other party merely has a claim for such damages as he/she might be able to prove. There is, therefore, no talk of that party rejecting the repudiation by the trustee, or liquidator, and it is not possible, in law, for such party to have a concurrent claim for a monetary substitute for performance.

[25] In the present matter, as I have already stated, the contract has already been repudiated by the liquidators and it has already been terminated.

[26] According to Meskin, *op cit*, the other party to an executory contract cannot compel the liquidator to perform it. If the liquidator repudiates the contract the other party is left with nothing more than a concurrent claim against the insolvent estate for the damages that he/she might have suffered as a consequence of the termination of the contract.

In my view the opinion expressed by the learned author of Meskin is borne out by, at least, the judgment of BOTHA, JA in *Norex Industrial Properties (Pty) Ltd v Monarch South Africa Insurance Co Ltd* 1987 1 SA 827 (A) at 837H 840C. See also: *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 2 SA 546 (A) at 566I 567A; *Glen Anil Finance (Pty) Ltd v Joint Liquidators, Glen Anil Development Corporation Ltd (in liquidation)* 1981 1 SA 171 (A) at 182D 183C.

In *Smith and Another v Parton* NO 1980 3 SA 724 (D&CLD) at 728H 729E FRIEDMAN, J dealt with the effect of liquidation or insolvency of a party to a contract on the continued existence of an executory contract. The learned judge pointed out, firstly, that the existence of the contract is not affected by the mere fact of the insolvency of the party thereto except in one respect and that is that "the trustee cannot be compelled by the other party to perform the contract". It was also held that if the trustee decides not to perform, the other party cannot compel performance by the trustee "but must content himself with a monetary claim either for performance or for damages

for non performance of the insolvent's contractual obligations, as the case may be".

In the context of the present case it would, in any event, not be possible for the plaintiff to institute "a monetary claim ... for performance ... of the insolvent's contractual obligations. ..." because of the nature of those obligations. It follows, therefore, that the plaintiff will have to be content with a claim for damages for non performance of CNA's obligations.

In terms of the common law the plaintiff would therefore not be able to enforce payment of the service fees against the liquidators. The plaintiff would have to institute an action for payment of damages against the liquidators of CNA in which event the onus would be on the plaintiff to prove its damages in the normal way.

This conclusion really amounts to a finding that the second leg of the exception must be upheld. Although counsel for the excipients initially argued that what the plaintiff is trying to do pursuant to clause 20 is contra bonos mores according to the judgment of SMALBERGER, JA in *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) ("the Sasfin case"), Mr Slomowitz made it clear during his oral address that the excipients rely on the principles discussed in this

paragraph of my judgment. There is, therefore, no need to consider the judgment in the Sasfin case.

[27] It is also, in my view, not open to the plaintiff to argue that its right to payment of the service fees has accrued prior to the liquidation of CNA and that it can enforce it even after the concursus creditorum had taken place. The reason for that is simply that the contract in question is an executory contract in terms of which both the plaintiff and CNA had to perform and to render prestation and counter-prestasion for a number of years until 30 June 2008. There was reciprocity between the prestation to be rendered by the plaintiff, the provision of the services, and the counter-prestasion of CNA, payment of the service fees in monthly instalments. The fact that the contract was repudiated by the liquidators affected the reciprocity that existed between the prestations of the two contracting parties and extinguished it in regard to the prestation of the plaintiff that had to be rendered in the future until 30 June 2008. As a matter of law, the plaintiff cannot, therefore, be permitted to enforce its entitlement to payment of those instalments that would have become due and payable in the future.

[28] I still have to deal with the argument of plaintiff's counsel that clause 20 of the agreement provides for a pre estimate of damages which is enforceable in terms of Act 15 of 1962.

I do not agree that the acceleration event has extinguished the reciprocity which had existed previously between plaintiff's prestation and the counter-prestasion of CNA. In the Deloitte case the position was different. Once the third party had completed the work that the one contracting party had to perform the prestation that had to be rendered by that party was completed and nothing further could be exacted from him in that respect. The only obligation remaining was to pay the cost of completing the task.

In the present case the obligation of the plaintiff to render the services remained and survived the acceleration event. Likewise the right of the CNA to insist on the rendering of the services and its obligation to permit the plaintiff to render the services remained and survived the acceleration event. The obligation of the CNA to pay for the services was not extinguished by the acceleration event; those instalments only had to be paid at an earlier date than what they would have had to be paid in the normal course of events. The repudiation of the contract by the liquidators had the effect, as I have already said, to extinguish that reciprocity between the respective prestations of the parties and that fact is fatal to any suggestion that the plaintiff is entitled to enforce its entitlement to accelerated payment of the instalments.

There is, in any event, in my view no indication in clause 20 that the clause was intended by the parties to constitute a genuine contractual pre estimate of damages in the event of a breach of contract occurring which gives rise to termination, or cancellation, of the contract. See: Kerr, *op cit*, at 788. There is, generally speaking, no correlation between the full contract price bargained for by one party, and the damages that he/she may suffer in the event of a breach of contract by the other party. In the present case I can find no indication in either clause 20 or any other clause(s) of the contract that the difference between the damages that may be suffered by the plaintiff and payment of the future instalments had been considered by the parties and that they have agreed on the quantum of the damages that they have considered that the plaintiff will suffer in the event of a breach of contract by the CNA. In this

regard it is also of significance that the four acceleration events relate to the insolvency of CNA which might lead to its demise.

I find it difficult to accept that the parties would only in that scenario have quantified the damages that might be suffered by the plaintiff and not also in the case of the other breaches mentioned in clause 14 in the event of clauses 19 and 21 not

being utilised. This lacuna fortifies my view that clause 20 was not intended to provide for a pre estimate of damages.

A further reason, in my view, why clause 20 cannot be regarded as providing for a pre estimate of damages, is the fact that the court will not be able to come to a conclusion about a possible reduction of the amount in terms of section 3 of Act 15 of 1962 if the court does not know whether or not there would have been a reduction, or increase, in the services to be rendered, and the service fees payable therefor, in the future in terms of clauses 5.8.1 and 6 or, for that matter, a capital project in terms of clause 25. The effect, if any, of these events on the contract would be virtually impossible to determine in an action for the reduction of the amount of the damages. This factor militates, in my view, against a construction of clause 20 as a term providing for a pre estimate of damages.

[29] In the result I have come to the conclusion that the exception should be upheld with costs. No objection was raised by plaintiff's counsel to the request by counsel for the defendants that the costs of two counsel be allowed in such an event.

[30] Order

1. The exception is upheld with costs including the costs of two counsel.
2. The plaintiff is granted leave to amend its particulars of claim, if so advised, within one month from the date hereof.

S J MYNHARDT

JUDGE OF THE HIGH COURT

26609-2003

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