

SOUTH AFRICA / JUDGMENT

Du Plessis NO and Another v Rolfes Ltd.
(500/94) [1996] ZASCA 45; 1997 (2) SA 354
(SCA); [1996] 2 All SA 390 (A); (29 March 1996)
[1996] ZASCA 45

COURT

Supreme Court of Appeal

BEFORE

Botha, Hefer, Nestadt, Harms, Zulman

CASE / FILE NUMBER

500/94

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Case no: 500/94

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

TAP DUPLESSIS NO : First Appellant HARRY KAPLAN NO : Second Appellant
AND
ROLFES LIMITED : Respondent
Coram
: BOTHA, HEFER, NESTADT,
HARMS JJA et ZULMAN AJA
Heard
: 5 March 1996
Delivered
: 29 March 1996

JUDGMENT

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ZULMAN. JA:

The appellants to whom I will hereafter refer as "the liquidators", are the joint liquidators of R McCarthy (Pty) Ltd ("McCarthy"). On 17 June 1988 McCarthy entered into a written contract ("the main contract") with the City Council of Johannesburg ("the City Council"). In terms of the main contract McCarthy undertook to refurbish and extend the Johannesburg Civic Theatre. Clause 15 of the main contract deals with the employment of nominated sub-contractors for the execution of specialist work and includes a provision for the conclusion of subcontracts between McCarthy and each sub-contractor upon specific terms.

In a letter dated 2 November 1990 the respondent, to whom I will hereinafter refer as "Rolfes" (being a member of a

3 consortium) was nominated by the City Council as a sub-contractor

to execute a substantial portion of the contract work. Pursuant thereto two contracts were concluded between McCarthy and Rolfes ("the sub-contracts") - one for the upper and the other for the lower mechanical stage installation at the theatre.

Rolfes thereafter executed certain work pursuant to the subcontracts. On 17 November 1992 a certificate of practical completion was issued by the City Council's engineer for the lower mechanical stage installation, recording that same had been handed over to the City Council on 8 November 1992 and that the guarantee and maintenance periods under the sub-contract had commenced on 3 September 1992.

On 6 May 1993 McCarthy was provisionally wound up by an order of court and the liquidators were appointed joint

4 provisional liquidators.

As at the date of McCarthy's provisional winding-up, the final testing and commissioning of the installations as well as certain uncompleted work, maintenance and repairs were still outstanding.

Retention monies under the two sub-contracts amounting to R885 708,69 were not yet due to either McCarthy or Rolfes and architect's certificates amounting to R605 985,21 had not been paid out by McCarthy to Rolfes, notwithstanding the fact that McCarthy had already received that money from the City Council.

On 11 November 1993 Rolfes, having failed to obtain payment from the liquidators of the said sum of R605 985,21, brought an application in the Witwatersrand Local Division claiming, inter alia, a declaratory order that the liquidators had elected to proceed with the sub-contracts and for an order directing the liquidators to pay Rolfes the said sum of R605 985,21. The application was opposed by the liquidators who filed detailed answering affidavits. These were replied to by Rolfes.

On 30 March 1994 the Court a quo (Duke AJ) made an order in favour of Rolfes declaring that the liquidators had elected to proceed with the sub-contracts and directing the liquidators to pay Rolfes the said sum of R605 985,21 as also various amounts of interest and costs including costs of senior and junior counsel in the application.

Although there is no order or judgment in the record before this Court of the Court a quospecifically granting leave to appeal, it was common cause that such leave had indeed been granted.

On 11 September 1994 Rolfes gave notice of a cross-appeal and thereafter on 20 September 1994 filed a "Supplementary Notice

of Cross-Appeal". However, at the outset of the proceedings before this Court, it was conceded by counsel for Rolfes that the cross-appeal could not be proceeded with since no leave to cross-appeal had been sought.

The essential issue in the appeal before this Court is whether the finding of the Court a quothat the liquidators had elected to carry on with the sub-contracts concluded between McCarthy and Rolfes was correct. If indeed there had been an election the necessary consequence thereof would be to render the claims which Rolfes has against the liquidators, costs of administration. These claims would, subject to available funds, be payable in full and Rolfes would not be merely a concurrent creditor in respect thereof. It is Rolfes's case that such an election took place either on 2 July 1993 or was a necessary consequence of an admitted election

by the liquidators made in August 1993 to carry on with the main

contract with the City Council. It will be convenient to describe the first election contended for as "the direct election" and to describe the second election as "the indirect election".

As regards the direct election, it was submitted by Rolfes, both in the Court and in this Court, that such an election was evidenced by the conduct of the liquidators in writing a letter dated 2 July 1993 and upon certain correspondence which preceded this letter. It therefore becomes necessary to examine this correspondence in some detail.

In a letter dated 7 June 1993 the liquidators, represented by one Bryden, advised all creditors of McCarthy, including Rolfes, of their appointment as provisional liquidators and the need for the provisional liquidators to decide whether or not to call for

8 completion of a number of executory contracts that McCarthy had entered into. The letter recorded, inter alia, that since their appointment, the liquidators had been "gathering information" on contracts entered into by McCarthy "with the view to making decisions on whether to complete certain or all of the contracts."

The letter furthermore pointed out that "not all of the required information has come to hand as at the date hereof and as a result no binding decisions have been made with regard to these contracts.

It is expected that final decisions will be made in the next plus minus ten (10) days." The letter was replied to by Rolfes in a letter dated 21 June 1993. In its letter, Rolfes referred to the fact that it was involved as nominated sub-contractors with McCarthy as the main contractor in alterations to the theatre. Reference was then made to the two sub-contracts which had been forwarded to the 9 liquidators under separate cover and to the fact that in terms of these contracts "the guarantee period which extends for a period of twelve months after the date of practical completion has not yet expired, but will expire on 2nd September 1993, and until such time as we are liable to back-up the guarantee in question insofar as defects are concerned and the like." The letter furthermore

expressed concern on the part of Rolfes "that substantial defect and maintenance items are still requiring attention and we have been requested to attend to these during the period 3rd to 8th July, and at other times when the theatre is available to us for maintenance work." The letter then concludes in these terms: "To enable us to comply with our defect and maintenance obligations, we need your go-ahead to continue the contract to enable us to return to site. Maintenance can only be effected while no productions are being 10 staged at the Civic Theatre. We have been advised by the Consulting Engineer that during the period 3rd to 8th July, no productions are taking place. It is therefore crucial that these dates be met and that we know our position immediately to enable us to programme the work."

On 30 June 1993 Rolfes sent a telefax to the liquidators noting that to date it had received "no response from you and would now urgently request your go-ahead in this matter". This telefax was followed by a further telefax dated 2 July 1993 pointing out that Rolfes had heard nothing from the liquidators and that" (a)s it is critical to the entire project that the work referred to is undertaken, we will proceed with this work on the basis that you have decided to continue with the contract, unless we hear from you, to the contrary, by close of business today, Friday, 2nd July

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1993. Would you please advise us as a matter of urgency, if you wish us to proceed." Bryden responded to this telefax on behalf of the liquidators, in a telefax dated 2 July 1993. The body of this telefax consists of one sentence reading as follows: "I am in receipt of your telefax dated 2nd July 1993 and advise that I am awaiting confirmation from the architect". It is this communication of the liquidators which forms the main basis for Rolfes contention that the direct election took place then.

Rolfes's telefax of 2 July wrongly seeks to impose an election upon the liquidators and furthermore the concluding sentence thereof detracts from the first part of it. Moreover the communication from the liquidators of the same date does not evince an election to proceed with the sub-contracts.

On the basis simply of the correspondence thus far I am of
12 the view that the Courta quowas plainly correct in its judgment
when it concluded that the liquidators had made no election on 2
July 1993 in respect of the sub-contracts.

There is substance in the view of the learned Judgea quo
to the effect that without an election to proceed with the main
contract, which, as I will indicate presently, only took place in
August 1993, an election to proceed with the sub-contracts would
offer no benefit at all to the general body of creditors of McCarthy.
On the contrary there would be prejudice to the creditors and the
company in liquidation since it would entitle Rolfes to claim,
"automatically as it were", payment of all the retention monies
together with monies due under various progress certificates which
had been issued, without any assurance that the City Council would
release the retention monies to the liquidators in due course.

13 This then leaves for consideration the contention advanced by
Rolfes concerning the indirect election. It was by virtue of this
election that the respondent was successful in the Courta quo.

It was common cause that in August 1993 the liquidators
unequivocally elected to carry on with the main contract. Relying
heavily upon this fact the Courta quoupheled Rolfe's counsel's
argument that the legal effect of the liquidators' election to carry on
with the main contract, (which was conveyed to Rolfes in August
1993) "carried with it as a necessary inference of fact an automatic
decision to honour all the contractor's obligations under the main

contract." The learned Judge came to this conclusion upon the basis that it was not necessary for him to decide certain factual issues which were in dispute on the papers. Rolfes's counsel adopted this approach in this Court and also contended that, upon

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a proper analysis of all the facts, there was an indirect election to carry on with the sub-contracts.

An examination of the events after 2 July 1993 reveals the following. On 6 July 1993 the liquidators received a "snag list" apparently prepared by the architect which served as an indication to the liquidators as to the outstanding sub-contract work. Having perused the "snag list" and in anticipation of the City Council being prepared to eventually pay retention monies to them, the liquidators instructed a quantity surveyor (Mr Keith Walters) to make contact with all the sub-contractors, to invite them to prepare quotations for the performance of the outstanding sub-contract work on the basis that the liquidators would employ them to perform such work, and to attend a meeting to debate the matter with them. On 7 July 1993 Walters telephoned a Mr Meyer of Rolfes and conveyed the

15 foregoing to him. Walters further indicated to Meyer that Rolfes was required to furnish a quotation for the performance of the outstanding sub-contract work and, to attend a meeting on 23 July 1993 at the offices of McCarthy. The meeting in question was duly held .

The liquidators were represented at the meeting by Bryden (the author of certain of the correspondence to which I have made previous reference and the deponent to the liquidators answering affidavit), Walters, and a Mr Watson. Rolfes was represented at the meeting by a Mr Hill, a general manager in its employ, and Meyer. The meeting is not referred to at all in Rolfes's founding affidavit.

According to Bryden the discussions were conducted on 23 July 1993 with a number of sub-contractors involved in the project;

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the main object in meeting with each sub-contractor, to whom this was clearly explained, was to ascertain "at what price such subcontractor was prepared to perform the outstanding obligations of McCarthy with respect to the sub-contract work of the contract. It was made clear to each sub-contractor that it was an 'all or nothing situation' in the sense that unless a satisfactory arrangement could be made with each and every sub-contractor

or an outside concern so as to ensure that the outstanding sub-contract work would be satisfactorily completed, there would be no point in the estate continuing with the main contract." At the meeting with Rolfes it was made "quite clear" to Rolfes that, "in order for the estate to decide whether or not it intended to continue with the main contract so as to entitle it to obtain payment from [the City Council] of the retention monies, (which it was at that stage thought to be

17 approximately R1,2 million), we required quotes from all subcontractors for the performance of the outstanding sub-contract work. We indicated that if the total of the amounts quoted would enable the estate to complete the outstanding sub-contract work at an amount less than the total of the retention monies, it might be worth the estate's while to continue with the main contract. The continuation of the main contract was therefore dependent on the financial viability of such an exercise. We explained that on that basis some benefit would enure to sub-contractors who would otherwise stand to lose everything that may already have become owing to them".

Bryden also states in his affidavit that he indicated to Hill and Meyer that if Rolfes performed further work after the granting of the winding-up order "remuneration therefor could possibly be

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built into the quoted figure and could perhaps be paid as such."

Bryden also states that he was however "in no position to take any decision in that the financial viability of the exercise as a whole required to be considered" and that he required the consent of the City Council "to put such an exercise into motion." According to Bryden, Hill and Meyer thereupon indicated that "by reason of the long standing working relationship that existed between the applicant and the architect in the project, (the applicant being a specialist theatre stage building contractor with a vested interest in insuring that no adverse publicity would attract to it), it would be prepared to perform such work free of charge but that it might submit a quote for such work as it had apparently performed after the date of the winding-up order." Bryden points out that he and the liquidators never consented to such work being performed by

19 Rolfes and states that the meeting concluded on the basis that

Rolfes would revert to him.

Rolfes in its replying affidavit deposed to by one Savvas, who was not at the meeting, but whose affidavit is confirmed in brief affidavits from Hill and Meyer places in issue what took place at the meeting and sets out certain events, which according to Rolfes, led to the meeting of 23 July taking place. According to the replying affidavit there was a general discussion at the meeting.

Rolfes was again requested to submit a quotation for outstanding work. Hill was not prepared to discuss "the legalities" of Rolfe's views with the liquidators in the absence of its attorney from the meeting "or before obtaining further legal advice in view of the stance adopted by the liquidators at this meeting which was contrary to Mr Hill's understanding and the advice received that the election

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had indeed already been made by the liquidators." The point is further made in Rolfes's replying affidavit that "in addition, in view of the liquidators' attitude Mr Hill wanted to consult with the other consortium members (as he was in any event obliged to do). He deliberately therefore remained non-committal and gave no undertakings whatever. What Mr Hill did say was that the applicant was continuing with the work in terms of the sub-contracts and therefore would levy no further charges. At no time was any undertaking given

" Hill undertook to refer the liquidators'

"request to the other members of the consortium and to revert to the liquidators" with Rolfes's attitude.

On 30 July 1993 Hill advised Walters that Rolfes had come to a decision in regard to the quotation sought by the liquidators and that Rolfes's response would be telefaxed to Watson that day. A

21 telefax was duly sent on 30 July 1993 by Hill to Bryden. In the first paragraph of the telefax it is stated that: "As explained at the meeting as far as Rolfes are concerned the work undertaken has been done in terms of our contract with McCarthy and on the basis that the contract has been continued by the liquidator. The correspondence reflects this position and in particular our letters of 21 June, 30 June and 2 July 1993". The telefax then goes on to record that: "In the circumstances we are continuing with such work as is required to be completed in terms of the contract and no quotation is necessary or appropriate in respect of such work. If you require a quotation for any other work outside the contract

would you please advise." On 18 August 1993 Hill sent a telefax to Bryden referring to a telephone conversation between himself and Walters on behalf of the liquidators on 12 August 1993. According

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to the telefax Walters confirmed "that the joint liquidators were continuing with the above contracts [that is the sub-contracts in question] both insofar as the Council was concerned and ourselves as nominated sub-contractors and informed the writer that the Council had been promised that the Civic Theatre upper and lower stage contracts would be completed by the third week of September 1993" The telefax then goes on to request payment of the sum of R605 985,21 in respect of certain architect's certificates and an additional amount of R16 714,46 in respect of late payments on certain invoices. Bryden responded to the telefaxes of 30 July and 18 August 1993 in a telefax dated 27 August 1993. In this telefax he expressed "shock" at what was stated in the telefax of 18 August 1993 "as it is at total variance with the discussions which took place at the meeting

" (this was the meeting which took place on 23

23 July 1993). Bryden also stated that: "You will recall that at the meeting you were informed that the Joint Provisional Liquidators were considering completing certain contracts depending upon the financial viability of the exercise. It was for this reason that you and other sub-contractors were invited to submit quotations for the fulfilment of the outstanding obligations in terms of the original contract entered into between R McCarthy (Pty) Ltd and the various sub-contractors." The point was further made that it was indicated at the meeting by Rolfe's representatives that they felt that "there was a moral obligation" on their "company to continue with the work and you undertook to complete the outstanding work and obligations at no charge. You will also no doubt remember that your attitude was applauded by Messrs Watson, Walters and myself and you again confirmed that it was not your intention to submit a

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quotation and indicated that you would continue with the work and

carry on maintaining the equipment installed by yourselves at no charge. It is on this basis that you have continued and are continuing to maintain and complete the work which you were contracted to do initially. Consequently, there is no question of any claim which you may have against the estate of R McCarthy (Pty) Ltd (In Provisional Liquidation) being treated in any way other than that prescribed for concurrent creditors."

On 15 September 1993 the liquidators' attorneys addressed a letter to Rolfes's attorneys recording the liquidators' version and in particular stressing that the liquidators had at no time elected to abide by the sub-contracts between Rolfes and McCarthy.

It is plain from a consideration of the foregoing correspondence, which preceded the application, that there was a

25 clear dispute of fact as to whether the liquidators, as a matter of fact, had elected to continue with the sub-contracts.

The Court sought to overcome this dispute, which it was plainly alive to, by finding, as stated previously, that the "second election relied upon by the applicant [Rolfes] is based upon the effect in law that the respondent's [the liquidators'] election to carry on with the main contract had during August 1994 as regards sub-contracts."

Before examining this approach further it would be well to bear in mind what are by now trite principles in regard to the question of the right given to a liquidator or trustee to make an election in regard to executory contracts entered into by an insolvent.

It is common cause that the sub-contracts here in issue are not

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of a kind specifically dealt with in the Insolvency Act 24 of 1936.

Insolvency Act 24 of 1936

They were not terminated by the liquidation of McCarthy, per se, but remained in force thereafter (see eg *Bryant and Flanagan (Pty) Ltd v Muller and Another* NNO 1978 (2) SA 807(A) 812 H and *Thomas Construction (Pty) Ltd (In Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546(A) 566 I to 567 A). The Insolvency Act is not a codification of our common law of insolvency although it is based on the common law with certain modifications. It follows from this that the common law of insolvency, save only to the extent that it may have been changed by the Insolvency Act or is inconsistent with it, is still of application (see eg *Fey NO and Whiteford NO v Serfontein and Another* 1993 (2) SA 605(A) 613 B - I; *Millman NO v Twiggs and Another* [1995] ZASCA 62; 1995 (3) SA 674(A) 679 H - 680 B; and *Janse van*

Bryant and Flanagan (Pty) Ltd v Muller and Another NNO

1978 (2) SA 807

Thomas Construction (Pty) Ltd (In Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd

1988 (2) SA 546

Insolvency Act or

Fey NO and Whiteford NO v Serfontein and Another

1993 (2) SA 605

Millman NO v Twiggs and Another

[1995] ZASCA 62

1995 (3) SA 674

Janse van

27Rensburp v Muller1996 (1) All SA 353(A) 356 h - i). At

Rensburp v Muller

1996 (1) All SA 353

common law a liquidator or trustee is not bound to perform

unexecuted contracts entered into by an insolvent before insolvency

unless he in conjunction with the general body of creditors

considers that such performance will be in their interests (see eg

Uvs and Another v Sam Friedman Ltd1934 OPD 80at 85; Ex

1934 OPD 80

parte Liquidators of Parity Insurance Co Ltd1966 (1) SA 463(W)

1966 (1) SA 463

470 F - H andMontelindo Compania Naviera SA v Bank of Lisbon

Montelindo Compania Naviera SA v Bank of Lisbon

and S A Ltd1969 (2) SA 127(W) 141 C - 142 A). If a trustee

1969 (2) SA 127

elects to abide by an executory contract he must of course perform

all the obligations of the insolvent. He must also give reasonable

notice of his intention to continue with the contract otherwise the

other party to the contract may treat the contract as being at an end

(Tanenev and Others v Zive's Trustee 1961 (1) SA 449(W) 452 -

1961 (1) SA 449

28 453) and hold the insolvent estate liable for any damages that it might have suffered as a consequence thereof. The claim for such damages is a concurrent one and does not form part of the costs of administration. As pointed out by Friedman J in Smith and Smith and

Another v Parton NO 1980 (3) SA 724(D) 728 H to 729 B:

1980 (3) SA 724

"

there is nothing in the law of insolvency which

affects uncompleted contracts in general; the contract is neither terminated nor modified nor in any other way altered by the insolvency of one of the parties (cf Uys and Another v Sam Friedman Ltd 1935 AD 165) except in one respect, and that is that, because of the supervening concursus, the trustee cannot be compelled by the other party to perform the contract. Put somewhat differently, this means that the contract survives the insolvency and, save in the respect mentioned, the trustee steps into the insolvent's shoes. The rule that a trustee has a right of election whether or not to abide by the contract is no more than one aspect of the application of this legal principle that I have enunciated."

Uys and Another v Sam Friedman Ltd

1935 AD 165)

concursus

It follows, as previously mentioned, that if a trustee elects to continue with the contract after liquidation this is an act of

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administration and the payments which he has to make under the

contract are expenses of administration. Such expenses taken in conjunction with the value of the performance of the other party may swell or diminish the free residue available to the general body of creditors. This is of course a factor which a prudent liquidator will have to have regard to in arriving at a decision whether or not to abide by an executory contract or to terminate it. Indeed in the instant matter it has been contended for on behalf of the liquidators that, at the time that Rolfe contended that they made their election, they were still about the process of giving consideration to the question of whether or not to abide by the two sub-

contracts. In order to decide whether or not to do so they had called for tenders, in effect to enter into new contracts with various sub-contractors to complete all outstanding work. This fact is plainly inconsistent with

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an election having already been made. As counsel for the

liquidators, put it they wished to do "their arithmetic first" before deciding whether or not it was to the advantage of the general body of creditors to continue with the sub-contracts or not. In my view they were perfectly entitled to adopt this attitude. In essence the liquidators stated they had not decided to continue with the sub-contracts, either on 2 July 1993 (which it will be recalled is the date contended for by Rolfe in regard to the direct election) or subsequently in August 1993 when they elected to continue with the main contract.

In my view there is substance in counsel's argument to the effect that the question of whether or not the liquidators elected to abide by the sub-contracts is a question of fact and not a question of law. If that question of fact is to be decided by a process of

31 inference the conclusion drawn must be consistent with all the

proved facts (cf *Bates and Lloyd Aviation (Pty) Ltd and Another*

Bates and Lloyd Aviation (Pty) Ltd and Another

v Aviation Insurance Co 1985 (3) SA 916(A) 939 F-940 A).

1985 (3) SA 916

Insofar as Rolfe relies upon conduct of the liquidators as

constituting an election to abide by the sub-contracts, that conduct

must be unequivocal. The doctrine of election, in general, is dealt

with succinctly by Watermeyer AJ, in *Sepal v Mazzur* 1920 CPD

Sepal v Mazzur

1920 CPD

634 at 644-645 in these terms:

"Now, when an event occurs which entitles one party to a contract to refuse to carry out his part of the contract, that party has the choice of two courses. He can either elect to take advantage of the event or he can elect not to do so. He is entitled to a reasonable time in which to make up his mind,

Whether he has made an election one way or

the other is a question of fact to be decided by the evidence. If, with knowledge of the breach, he does an unequivocal act which necessarily implies that he has made his election one way, he will be held to have made his election that way; this is, however, not a rule of law, but a necessary inference of fact from his conduct : see *Croft v Lumley* 6 H.L.C.,

Croft v Lumley

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672 at p. 705) per Bramwell, B.; *Angehrn & Piel v Federal Cold Storage Co Ltd* (1908, T.S., at 786) per Bristowe, J. As already stated, the question whether a party has elected not to take advantage of a breach is a question of fact to be decided on the evidence, but it may be that he has done an act which, though not necessarily conclusive proof that he has elected to overlook the breach, is of such a character as to lead the other party to believe that he has elected to condone the breach, and the other party may have acted on such belief. In such a case an estoppel by conduct arises and the party entitled to elect is not allowed to say that he did not condone the breach."

Angehrn & Piel v Federal Cold Storage Co Ltd

At the outset it is to be observed that there is no general legal principle of which I know which supports the proposition that the exercise of an election to abide by any executory main contract necessarily carries with it an election to abide by any executory subcontract (whether nominated or not). Indeed counsel for the parties were unable to refer us to any authority in support of such a proposition. As correctly pointed out by counsel for the liquidators it would ignore the independent status of the main

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contract and sub-contracts. Notwithstanding the fact that the subcontracts make reference to the main contract and the fact that there are references in the main contract to the sub-contracts the respective contracts remain separate. They are not to my mind so inextricably interlinked and intertwined so as to make them one contract. The provisions of the main contract *inter alios* actain so far as Rolfes as sub-contractor is concerned. Rolfes was not party to the main contract. There is no provision in the sub-contracts linking their existence or survival to that of the main contract in the context with which this matter is concerned. Even were the liquidators' refusal to continue with the sub-contracts to constitute a breach of the provisions of the main contract, this would be a matter between the City Council and McCarthy and is not something upon which Rolfes as sub-contractor can rely in

res inter alios acta

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contending for the survival of the sub-contracts. It may be of some

significance that in this matter, although the City Council was cited as the third respondent in the proceedings *quo*, it did not participate therein and sought no relief against the liquidators either compelling them to proceed with the sub-contracts or to take any other steps in regard to Rolfes. The Court *quo* in accepting the correctness of the argument submitted to it on behalf of Rolfes that the election to carry on with the main contract "carried with it as a necessary inference of fact an automatic decision to honour all the contractors' obligations under the main contract" made reference to a term of the main contract to the effect that the contractor was obliged to cede to the City Council any warranty or guarantee furnished to it by the sub-contractor in relation to the quality of materials, workmanship or any other factor having a bearing on the

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adequacy of the sub-contract works. The Court *quo* considered that these provisions indicated that the obligation of the liquidators to fulfil the contractor's obligations under the main contract included an obligation to comply, not only with the special preliminary and general conditions in order to afford the City Council the full benefit of Rolfes's guarantees in the manner prescribed in the contract, "but also an obligation to comply with the general conditions of contract" and in particular clause 15 thereof. Clause 15(f)(1) provides as follows:

"15(f)(1) The sub-contract referred to in sub-clause (a) hereof shall further provide that the provisions of clause 22 (a) and

- (b) hereof shall apply *mutatis mutandis* between the contractor and a nominated sub-contractor provided that where a nominated sub-contractor shall make default in any of the respects referred to in clause 22(a) hereof the engineer may instruct the contractor to give written and registered notice to the nominated sub-contractor of default as specified by the engineer and if such default shall continue for fourteen

mutatis mutandis

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days after such notice, the engineer may further instruct the contractor to determine the employment of the nominated sub-contractor under the sub-contract and provided further that where the engineer desires the determination of the employment of a nominated subcontractor for the reason that a nominated subcontractor's estate is sequestrated as insolvent, or if being a company it is placed in voluntary or compulsory liquidation, he shall instruct the contractor to determine the nominated sub-contractor's employment by written and registered notice."

The learned Judge also referred in this connection to clauses 22(a) and (b) of the main contract which deal with the circumstances under which the City Council becomes entitled to determine the main contract in further support of his conclusion.

In my view a proper consideration of these clauses does not support the proposition that the main contract and the sub-contracts are so inextricably bound up so as to make them one contract.

Furthermore as previously indicated the mere fact that the 37 liquidators might be in breach of their obligations in terms of the main contract in refusing to continue with the sub-contracts would not lead to the inevitable conclusion that by abiding by the main contract the liquidators necessarily elected to abide by the sub-

contracts. Such a breach might well afford the City Council relief against McCarthy but would not afford any relief to the sub-contractor.

In addition an examination of clauses 15(b), 15(c) and 15(g) of the main contract dealing with the position of nominated sub-contractors reveals that the clauses state plainly that no contractual privity of contract is created between the City Council and the sub-contractor.

Finally counsel for Rolfes sought to rely upon the doctrine of estoppel. Such reliance is misplaced. The factual basis

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for the estoppel was the liquidators' conduct between 2 July and 27

August 1993 which I have previously discussed. In my view it is not possible for this Court to decide the disputed matters raised in support of the estoppel contended for, without the hearing of oral evidence.

Counsel for Rolfes sought leave for evidence to be led either by way of a reference to evidence or by a way of trial. This application was only made during the course of argument before this Court. No notice of an intention to raise such an argument was given to the liquidators. Indeed in Rolfes's lengthy heads of argument the point is specifically made that the matter can be decided on the papers without reference to oral evidence. Furthermore in the Courta quo Rolfes resisted an attempt made by the liquidators to have evidence led in regard to certain disputed

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matters. It seems apparent from the way in which the matter was

argued and from the whole tenor of the judgment of the Court that no request was made by Rolfes for the hearing of oral evidence or for the matter to be referred for trial. In terms of Supreme Court Rule 6(5)(g) where an application cannot be properly decided on affidavit the Court has a discretion to dismiss the application or "make such such order as it seems meet with the view to ensuring a just and expeditious decision." Nothing has been put before this Court to indicate why no such application was made to the Court and as to why this Court should accede to the extremely belated request now made by counsel for Rolfes. Clear disputes of fact arose on the papers. These disputes are real and were anticipated by Rolfes in advance of launching the application. It would be wrong to attempt to resolve these disputes, which relate both to the

Rule 6(5)(g)

quo

40 election and estoppel, on the basis of alleged probabilities or improbabilities flowing from correspondence. Nor do I believe that the statements made on affidavit by the liquidators are so manifestly untrue and unconvincing that they can be justifiably disregarded (see eg *Peterson v Cuthbert and Co Ltd* 1945 AD 420 at 428 and

Peterson v Cuthbert and Co Ltd

1945 AD 420

Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales

Co (Pty) Ltd 1971 (2) SA 388 (W) 390 F - H). Furthermore where

1971 (2) SA 388

there is a dispute of fact on affidavit, the general rule is that relief should only be granted if the facts as stated by the respondents together with the admitted facts in the applicants affidavits justify such an order (see for example *Stellenbosch Farmers' Winery Ltd*

Stellenbosch Farmers' Winery Ltd

v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) 235 E-G and

1957 (4) SA 234

Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3)

[1984] ZASCA 51

1984 (3)

SA 623(A) 634 E-I).

41

Consequently the request for a reference to evidence cannot be acceded to.

In all of these circumstances the appeal must be upheld. The following order is accordingly made:

1

The appeal is upheld with costs, such costs to include costs consequent upon the employment of two counsel by the appellants.

The order of the Court a quo is set aside and replaced with the following order:

"The application is dismissed with costs".

3

The respondent is ordered to pay the costs of the application for leave to appeal.

42

4 The respondent's cross-appeal is struck off the roll with costs.

R H ZULMAN, AJA

BOTHA

JA)

HEFER

JA) concur

NESTADT

HARMS

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