161/98

REPUBLIC OF SOUTH AFRICA

REPORTABLE
**Case No: 183/97**

# IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

**GRAND MINES (PTY) LTD** **APPELLANT**

**and**

**TREVOR GIDDEY N O** **RESPONDENT**

**CORAM:** **SMALBERGER, NIENABER, HOWIE, SCHUTZ JJA *et* NGOEPE AJA**

**HEARD:** **3 NOVEMBER 1998**

**DELIVERED:** **23 NOVEMBER 1998**

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**JUDGMENT**

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**SMALBERGER JA . . .**

**SMALBERGER JA:**

On 18 May 1992 Bercon Mining (Pty) Limited ("Bercon"), a company carrying on mining activities, addressed a letter to the appellant ("Grand Mines"), the owner of a colliery, the relevant portions of which read:

> "OPENCAST PIT MINING AT YOUR NORTHFIELD COLLIERY - BRONKHORSTSPRUIT
>
> We thank you for the opportunity to tender for the abovementioned contract and submit our offer as follows:
>
> 1. RATE:
>
> The rate is R14,00 per R.O.M. ton delivered to stockpile at your screening plant on the mine.
>
> The above rate was calculated as follows:
>
> a) Ratio of not more than 2:1 (2M3 overburden to 1 ton of coal).
>
> b) Drill and blast of not more than 50% of overburden.
>
> The above rate includes:
>
> 1) Removal of hard and soft overburden to reclaim area.

2) Removal of coal seams and deliver to your screening, washing plant feeder or stockpile. (Should we not be able to deliver coal to your plant due to delays or breakdowns, we will supply a loader to feed the plant from stockpile).

3) Reclamation of pit mined by ourselves.

The above rate excludes VAT.

2. MEASUREMENT:

This will be as follows:

a) Ground levels taken before commencement of work.

b) Ground levels on top of hard rock.

c) Ground levels on top of coal.

d) Tons of coal over weigh bridge.

From these surveys, stripping ratios and hard & soft quantities will be calculated. Should the ratios and drills & blast quantities vary by more than 10% from the information supplied by yourselves the rates will be adjusted accordingly.

. . . .

5 PAYMENT:

Month-end will be the 25th of each month and payment is to be made by the 25th of the following month.

> A payment guarantee and contract is to be drawn up to both parties satisfaction prior to commencement of work."

It is common cause that Bercon's offer was accepted by Grand Mines and that the letter, apart from an alleged tacit term (about which more later), constituted their contract. I shall refer to the letter in question as "the agreement".

Bercon proceeded to mine and deliver coal pursuant to its undertaking until 24 May 1993, when the agreement was cancelled by Grand Mines. In June 1993 Bercon was provisionally liquidated; it was finally liquidated the following month. The respondent is the duly appointed liquidator of Bercon.

The respondent instituted action against Grand Mines in the Witwatersrand Local Division for, *inter alia*, the amount claimed to be

due to Bercon by Grand Mines for coal mined and delivered. Various defences to the action were raised. The matter eventually came before McArthur J. At the pre-trial conference the quantum of the respondent's claim was settled. It was agreed that the value of the coal delivered by Bercon to Grand Mines in terms of the agreement which remained unpaid amounted to R290 000.00. At the conclusion of the trial the learned judge found for the respondent in that sum plus interest and costs. Grand Mines was subsequently granted leave to appeal to this Court.

Before dealing with the issues on appeal something needs to be said about opencast mining and what it entails. As the name implies, it takes place in open pits, the size of which can vary in terms of length, width and depth. There was evidence of a previous pit at the colliery in

question being about 400 metres long, 80 metres wide and 20 metres deep. Mining commences, according to the evidence, with a cut which is initiated by the removal of the topsoil. The topsoil is put aside for later use when the rehabilitation process in respect of the cut is completed. Rehabilitation is a normal concomitant of mining. To rehabilitate in this sense is "to restore to a previous condition; to set up again in proper condition" (Shorter Oxford English Dictionary, Vol II, p 1784, s.v. "rehabilitate"). More will be said on this topic later. The next step is the removal of the overburden in order to reach the coal seams. The coal is then taken out and delivered to the screening plant. When all the coal in that particular cut has been mined, a new cut is opened. The overburden of the new cut is placed in the hole left by the previous cut in order to fill it up, and the topsoil of the previous cut

replaced to complete the rehabilitation of the area filled in. In this way mining proceeds cut after cut. When the mining of the final cut has been completed the overburden from the original or first cut should be available for filling up the last hole.

Clause 1(3) of the agreement provided that Bercon would effect "reclamation of pit mined by ourselves". The parties are agreed that the word "reclamation" is synonymous with "rehabilitation". The obligation to rehabilitate, which primarily rested upon Grand Mines as the colliery owner, was therefore contractually undertaken by Bercon. In terms of sec 68(2) of the Minerals Act 50 of 1991, regulations made under the Mines and Works Act 27 of 1956 remain in force until amended or repealed. Chapter 5 of the mining regulations current at the time of the agreement (see Government Notice R 537 of 21 March 1980) provided

in respect of rehabilitation:

> "5.12.2 Rehabilitation of the surface at any opencast mine shall form an integral part of the mining operations and shall, as far as is practicable, be conducted concurrently with such operations and, where applicable, in accordance with a programme laid down by the Inspector of Mines after consultation with the manager and approved by the Government Mining Engineer."

It is common cause that the rehabilitation Bercon undertook and was obliged to do had to be done, *inter alia*, in accordance with the requirements of the then applicable mining regulations. It therefore had to be done "as far as is practicable" (which I take it to mean "as far as is reasonably practicable") concurrently with the mining operations that

were being carried out.

The agreement was one of unspecified duration. According to the evidence it had the potential, at the time of its conclusion, to extend for a period of up to twenty years. Rehabilitation is an ongoing process which was intended to continue over the currency of the agreement. In the nature of things rehabilitation of a particular area cannot take place while coal is still being removed from that area. Rehabilitation of a pit can only be completed once the mining of the pit has ceased. There must inevitably be a lapse of time between the mining and delivery of coal to the screening plant and the rehabilitation of the affected area. The period involved would depend upon factors such as the size of the coal seam being worked and the quantity of coal to be removed. It is conceivable that weeks could go by without rehabilitation being

possible. Rehabilitation might also be subject to certain priorities. For example, in the winter months, as the evidence establishes, the emphasis would be placed on the mining of coal to satisfy increased demand rather than rehabilitation, with the result that rehabilitation would (at least temporarily) fall behind. In addition there was no programme of rehabilitation, either agreed between the parties or laid down by the Inspector of Mines, in terms of which Bercon was required to operate. In the absence of such a programme, while rehabilitation remained a contractual obligation, the performance of such obligation permitted of considerable flexibility and latitude. The parties, because of their active involvement in the mining industry, would have been alive to these considerations, or would have anticipated them, when the agreement was entered into.

In regard to rehabilitation, the judge *a quo* found on the evidence that Bercon had by May 1993 fallen so far behind with rehabilitation that it was safe to conclude that it had not complied with its obligations in that regard. The respondent did not seek to challenge this finding on appeal.

The main defence raised by Grand Mines to the respondent's action was the *exceptio non adimpleti contractus*. Where the common intention of parties to a contract is that there should be a reciprocal performance of all or certain of their respective obligations the *exceptio* operates as a defence for a defendant sued on a contract by a plaintiff who has not performed, or tendered to perform, such of his obligations as are reciprocal to the performance sought from the defendant. Inter-dependence of obligations does not necessarily make them reciprocal.

The mere non-performance of an obligation would not *per se* permit of the *exceptio*; it is only justified where the obligation is reciprocal to the performance required from the other party. The *exceptio* therefore presupposes the existence of mutual obligations which are intended to be performed reciprocally, the one being the intended exchange for the other (*Wynns Car Care Products (Pty) Ltd v First National Industrial Bank Ltd* 1991(2) SA 754 (A) at 757 E - F; *ESE Financial Services (Pty) Ltd v Cramer* 1973(2) SA 805 (C) at 809 D - E). Furthermore, for the *exceptio* to succeed the plaintiff's performance must have fallen due prior to or simultaneously with that demanded from the defendant (*Mörsner v Len* 1992(3) SA 626 (A) at 633 J). Whether or not obligations in terms of a contract satisfy these requirements and are reciprocal in the above sense (being the strict sense in which the word

is used in this judgment) is ultimately a matter of interpretation. Provided the requirements for the *exceptio* are met, it may equally be invoked in a contract where provision is made for periodic performance or performance in instalments (*Motor Racing Enterprises (Pty) Ltd (in liquidation) v NPS (Electronics) Ltd* 1996(4) SA 950 (A) at 961 I - 962 A).

Counsel for the parties were agreed that only two issues fell to be determined on appeal. The first, broadly stated, is whether Grand Mines's obligation to pay for coal delivered by Bercon was reciprocal to Bercon's obligation to rehabilitate. If it was, the accepted finding of the court *a quo* that Bercon was in breach of its obligation to rehabilitate would defeat Bercon's claim. The second related to whether it was a tacit term of the contract between the parties that in the mining process

no "pillars of coal" were to be left behind by Bercon and, if so, whether the performance of Bercon's obligation in this regard was reciprocal to the obligation of Grand Mines to pay for coal delivered. I shall deal with each of these in turn.

The resolution of the first issue depends upon the proper interpretation of the agreement. As its terms reveal, it is a contract of letting and hiring (*locatio conductio operis*). The principle of reciprocity would normally apply to such a contract unless there are indications to the contrary (*BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979(1) SA 391 (A) at 418 B - C). The overriding consideration is the intention of the parties. Whether in the present matter the performance of the respective obligations of Grand Mines and Bercon, or some of them, was reciprocal, therefore depends

upon their intention as evident from the terms of their agreement seen in conjunction with the relevant background circumstances (*Rich and Others v Lagerwey* 1974(4) SA 748 (A) at 761 E - 762 A; *van Rensburg en Andere v Taute en Andere* 1975(1) SA 279 (A) at 303 C - E.)

Clause 1 of the agreement provided that the quoted rate (R14,00 per R.O.M. ton) for coal delivered by Bercon to the screening plant at the colliery included (1) the removal of hard and soft overburden, (2) the removal of coal seams and the delivery of the extracted coal (the performance of both these obligations being clearly reciprocal to Grand Mines's obligation to make payment) and (3) rehabilitation of any pit mined by Bercon. The rate, being a composite one, must be taken to have made provision for the anticipated cost to Bercon of rehabilitation. The evidence provides no basis on which the cost of such rehabilitation

can be calculated separately or as a percentage of the overall rate. In this regard I am unable to agree with the finding of the court *a quo* that the rate was divisible as "there is no difficulty in allocating amounts of that unitary price to mining and rehabilitation". The fact that the rate was a composite, non-divisible one *prima facie* points to rehabilitation being a pre-requisite of, and a reciprocal obligation to, payment. But it is by no means conclusive of the matter. Nor does the mining regulation providing for rehabilitation, while underscoring the nature of Bercon's obligation in that regard, necessarily have a conclusive bearing on the issue of reciprocity.

Clause 2 of the agreement provided for measurement and the payment clause (clause 5) stipulated that "month-end will be the 25th of each month and payment is to be made by the 25th of the following

month".

The effect of the agreement was that Grand Mines was obliged, on the 25th of each month, and on presentation of an invoice, to pay, at the stipulated rate, for all coal mined, measured and delivered by the 25th of the preceding month. Its obligation to pay was fixed both in relation to a date and a formula, and the amount payable by it was readily ascertainable. Payment due was calculated according to the tonnage of coal delivered - the extent to which rehabilitation had taken place did not enter into the equation in determining payment. By contrast, rehabilitation was an ongoing process permitting of a degree of flexibility and latitude, to be conducted in phases, with no dates, schedules or any other specific criteria laid down for or regulating its performance. The circumstances of opencast mining are such that, to the

knowledge of the parties, rehabilitation of the area in respect of which coal was removed and delivered, and payment called for, could not always have preceded or occurred simultaneously with the time fixed for payment. Furthermore, given the nature and requirements of rehabilitation, practical difficulties could be anticipated in attempting to establish from month-end to month-end (as defined) whether rehabilitation was up to date. In short, while there was an agreed formula correlating mining and delivery of coal with payment there was no corresponding formula governing the relationship between rehabilitation and payment suggesting that the performance of the one was intended to be in return for the other. Having regard to these considerations I am of the view that the parties, notwithstanding the bilateral nature of their contract and the degree of inter-dependence

between payment and rehabilitation, could not have intended that they would be reciprocal obligations in the strict sense. This would be in keeping with what would seem to have been the main purpose of the parties in entering into the agreement, *viz.*, the mining and delivery of coal for resale by Grand Mines and payment to Bercon for the quantities of coal delivered by it.

The conclusion reached does not detract from the fact that Bercon was obliged to do rehabilitation. Nor does it mean that Grand Mines was remediless in the event of a failure by Bercon in this regard. It only means that payment and rehabilitation not being reciprocal obligations, Grand Mines could not raise the *exceptio* because Bercon was behind with rehabilitation or, for that matter, had not done any rehabilitation at all. It was always open to Grand Mines during the currency of the

agreement to have required Bercon, on threat of cancellation, to carry out its obligations in respect of rehabilitation by a certain date or, in response to Bercon's claim, to have counterclaimed for damages and to have sought a stay of judgment on Bercon's claim pending determination of its counterclaim. For reasons best known to it Grand Mines chose not to do so, not even as an alternative to the *exceptio*.

It follows that the appeal in relation to the first issue fails.

Turning to the second issue, I agree with the judge *a quo* that the term "pillars of coal" is more appropriate to underground mining, where pillars are needed as a support, than opencast mining. It would be more accurate to refer to a "wall", which is a cross-section of coal which defines the edge of a cut. According to the respondent's witness, Mr McGee, a director of Bercon and the person directly in charge of

Bercon's mining operations, the purpose of such a wall was to reduce water seepage into a cut. Whether or not that is so, the wall was the consequence of the mining technique employed by Bercon. The work performed by Bercon in terms of the agreement had previously been done for Grand Mines by Master Diggers (Pty) Ltd (a company effectively controlled and run by McGee). It is common cause that Master Diggers had operated in exactly the same way, also leaving walls of coal. Bercon simply carried on where Master Diggers had left off. Grand Mines had not previously objected to this method of mining. While it may have been inappropriate, it was not an impermissible method of mining. It was clearly in Bercon's own interests to mine in a manner designed to produce as much coal as possible.

A tacit term is an unexpressed provision of a contract which

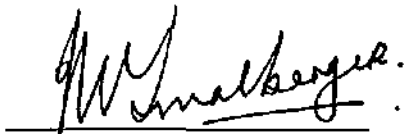
derives from the common intention of the parties, as inferred by the court (*Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974(3) SA 506 (A) at 531). If walls of coal were a cause for concern to Grand Mines, one would have expected them to insist upon an express term in the agreement prohibiting such walls being left, all the more so because the mining procedures of the past were likely to be repeated in the future. The absence of an express term in the circumstances tends to negate any suggestion that Grand Mines required such a term, or had such a term in mind. Significantly, in the letter of demand dated 21 May 1993 no reference is made to any such term, or that it had been breached. But even if it may have been reasonable from Grand Mines's point of view to have required such a term, it cannot confidently be said that the term was one which Bercon

would have agreed to had the matter been raised by the officious bystander, bearing in mind the way Bercon went about its mining business. Nor would such a term have been necessary to give business efficacy to the agreement. The evidence establishes that some coal wastage was inevitable; and, as I have pointed out, it was in Bercon's interest to minimise any coal loss. In the result a tacit term as contended for by the appellant cannot be inferred, and the appeal must fail on the second issue as well.

There remains for consideration a disputed item of costs. The parties were represented at the trial by junior counsel only. On appeal senior and junior counsel appeared on behalf of the respondent, and he seeks the costs of two counsel. New counsel, a senior, appeared for the appellant, but without a junior. The respondent acts in a representative

and fiduciary capacity. Once leave to appeal was granted it was probably a wise precaution to engage the services of a senior counsel. A substantial amount is at stake. The matter was not free from difficulty, as evidenced by the fact that this Court has been unable to reach unanimity on the outcome of the appeal. In the result the employment of two counsel was justified.

The appeal is dismissed, with costs, such costs to include the costs of two counsel.



**J W SMALBERGER**
**JUDGE OF APPEAL**

NIENABER JA )
HOWIE JA )concur
NGOEPE AJA )

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REPUBLIC OF SOUTH AFRICA

CASE NO.183/97

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

GRAND MINES (PTY) LTD APPELLANT

AND

TREVOR GIDDEY NO RESPONDENT

BEFORE: SMALBERGER, NIENABER, HOWIE, SCHUTZ JJA and NGOEPE AJA

HEARD: 3 NOVEMBER 1998

DELIVERED: 23 NOVEMBER 1998

SCHUTZ JA

# JUDGMENT

SCHUTZ JA:

The majority hold the view that the *exceptio non adimpleti contractus* is not available to the appellant as a defence to Bercon's claim for payment, because the appellant has not established: 1 that Bercon's admitted obligation to rehabilitate had become due before or on the contractual date for payment of the price; 2 that the duty to rehabilitate was reciprocal to the appellants' obligation to pay the price. I disagree with both these findings and would accordingly allow the defence and consequently the appeal.

This is a case in which the interpretation of the contract (which determines these two questions) depends considerably upon its background. The main

background factors are the ground itself, opencast coal mining practices, and the mining legislation. The relevant regulation reads:

> "5.12.2 Rehabilitation of the surface at any opencast mine shall form an *integral part of the mining operations* and *shall, as far as is practicable, be conducted concurrently with such operations* and, where applicable, in accordance with a programme laid down by the Inspector of Mines . . .." (Own emphasis).

The contract between the appellant and Bercon imposes upon Bercon as one of its duties "Reclamation of pit mined by ourselves." It is common cause that in the context of this case the words rehabilitation and reclamation may be used inter-changeably. Plainly Bercon had to reclaim in accordance with the regulation, even though the primary responsibility for compliance remained with the appellant.

The means by which observance of the regulation would be achieved would depend upon the nature of the ground and the mining practices appropriate to mining it. The logical way of mining and reclaiming in this case was described by the appellant's witness Montano. I shall give a brief summary of his

description.

After the area for the first cut had been selected, the topsoil would be removed and placed separately on one side. Then the remaining overburden would be removed. In the case only of the first cut this also would be put on one side, to be retained to fill the very last cut at the end of mining operations. The next step would be to mine and remove the coal. In all subsequent cuts the topsoil would again be put on one side, but the next layer of overburden would be slid or dozed or carried into the cavity left by the previous cut. This step, together with the dumping into the cavity of the rejects from the coal grading plant, would largely constitute the reclamation. All that remained was to bring back the topsoil and level it. Coal would then be mined from the second cut. And so mining and reclamation would proceed, as required by the regulations, "concurrently." It is all simple enough. Moreover, had this system been properly applied, I fail to see that there would have been great difficulty in judging whether reclamation was

keeping pace with mining or, if it was falling behind, in estimating the extent of the shortfall with some accuracy upon the deficit becoming apparent.

Bercon did not consistently mine in the manner explained. Montano described Bercon's conduct thus, "because they did not follow the right mining procedure, they were actually moving sand all over the place, they were mining like chickens, scratching all over a particular pit." He went on to describe how their methods entailed moving material back and forth unnecessarily. One of the things that he criticised particularly was their practice of filling a cut with material obtained elsewhere than from the next cut, thus frustrating the orderly progression from cut to cut with a minimum of shoving and hauling. On the evidence it was the adoption of these measures by Bercon, unmitigated by decisive corrective steps, that led to a mounting backlog of reclamation, which in the end assumed such proportions that Montano considered that it would be necessary to call in a surveyor to measure the extent of it.

The first question is whether at least a part of Bercon's obligation to reclaim had become due by May 1993, when the payment of the price claimed in this litigation became due in terms of clause 5 of the agreement, due subject, of course, to the availability of the appellant's defence. I say at least a part because a part would be sufficient. That is so because a plaintiff faced by the *exceptio* cannot escape it otherwise then by full performance: *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 419 G. Unlike the payment of the price, no express date has been specified for performance of reclamation works. But they must be performed as an integral part of and concurrently with mining. How this should be done has been explained. It follows from that explanation that there is no immediate correspondence in time between the delivery of a particular load of coal and the restoration of the surface that once lay above it. In fact there is an interval, at times probably a considerable interval. But once the bed of coal in a particular cut has been removed, it will not

be long afterwards that it begins to be filled with overburden from the next cut. And once this step has been completed, the demands of concurrency require that not long after that, the topsoil should be restored. The result of all this is that shortly after all the coal from a cut has been removed the obligation to commence restoration of the cavity from which it has been taken arises. Within a further time of no long duration reclamation will have to be completed. This means that the dates for reclamation march in step a few paces behind the dates on which coal is delivered. The calculation of the payment dates is based on these latter dates. The further result is, therefore, that there is a link in time between payment dates for particular coal, which come first, and reclamation dates for the space from which that coal was mined.

I realize that I have used imprecise terms in describing the duration of the intervals of time involved. But I do not think that that imprecision matters in the circumstances of this case. The court *a quo* held that on the probabilities Bercon

was not up to date with rehabilitation. On appeal Mr *van Blerk*, for Bercon, conceded that the court was not wrong in its finding of fact in this regard. Apart from this concession, I think that it emerged from the evidence clearly that by May 1993 there was a large amount of reclamation that had not been done. This appears from Mrs Hancock's failure even to attempt to take issue with Montano's statement to her on 17 May 1993 that she (meaning Bercon) owed him (meaning the appellant) half a million rands for rehabilitation. The conclusion is further confirmed by the refrain of Bercon's witnesses that rehabilitation could wait, and that Bercon was allowed to perform at a time convenient to itself, even if long after an area had been mined.

The conclusion I reach on the probabilities is that by May 1993 Bercon was *in mora* with regard to its obligation to reclaim, and this on an extensive scale. The *mora* I have in mind is *mora ex re*. The contract required concurrent reclamation. When the contract is applied to the ground, it is apparent that

numerous dates for reclamation had passed by May 1993. That is enough for the application of the *exceptio*, on the facts of this case. Had an argument arisen on the 25th of a month when payment was claimed, whether certain reclamation work which had not been done was already overdue, the ascertainment of the due date for reclamation might have been crucial to whether payment was due. But in the circumstances of this case I do not think that exact dates now matter. Whenever they were, they were past by May 1993.

Accordingly, differing from the majority, I am of the view that a substantial obligation to reclaim had become due before the contractual date for payment of the price was reached, so that the sequential requirements for the *exceptio* are satisfied.

The second question is whether the obligations to reclaim the surface and to pay the price are reciprocal. The appellant starts with three important advantages. First, as the contract is a bilateral one, the obligations on the two

sides are *prima facie* reciprocal, unless a contrary intention clearly appears from the terms of the contract: *Rich and Others v Lagerwey* 1974 (4) SA 748 (A) at 761 i f - 762 A. Secondly, reciprocity is presumed, again unless the contrary appears, in contracts of *locatio conductio operis: B K Tooling* (above) at 418 C. The contract in this case is a contract of that kind. Thirdly, whereas the existence of a divisible counter-performance creates a presumption that the performance is also divisible (see *Bob's Shoe Centre v Heneways Freight Services (Pty) Ltd* 1995 (2) SA 421 (A) at 430 B - C), the provision of a single remuneration for the performance of several obligations is an indication of reciprocity: *National Screenprint (Pty) Ltd v The Campbell-Scott Company (Pty) Ltd* 1979 (4) SA 393 (C) at 397 A - D.

With regard to this last point, clause 1 of the contract provides a single rate for the performance of several duties by Bercon, namely 1 removal of the overburden, 2 mining of the coal, 3 delivery of the coal and 4 reclamation of the

pit. That rate is R14 per run of mine ton delivered to stockpile. That rate, in terms of clause 2, may be varied if the ratio of overburden to coal, or the proportion of overburden to be blasted to that to be dozed, varies by more than 10 per cent from the estimated ratio or proportion. I shall return to this clause. As the appellant had not equipped itself to mine this mine, but had contracted out the whole mining operation, whilst remaining liable to comply with the mining regulations, it needed Bercon to perform all four of its duties. The performance of only one, two or three would not satisfy the appellant's need. This is in itself an indication of reciprocity. The appellant was to receive on entire performance.

Basing the calculation of payment on coal delivered was, to my mind, simply a sensible way of measuring work done and consequent saleable product supplied. The coal had to be brought to the screening plant, where there were weighing facilities. Of course the parties could have put themselves to the trouble of also precisely weighing topsoil and other overburden removed and then

returned, but they didn't do so, presumably because such a course would have cost more than it was worth. It is to be noticed that the measurement of overburden for the purpose of establishing ratios is expressed in terms of volume, not mass (" 2 $m^3$ overburden to 1 ton of coal"). Estimating or calculating volume would have been easier and cheaper than carting a weighbridge round the mine to twice weigh waste. But the fact that the parties did not provide a machinery for weighing materials produced by excavation or used for reclamation for purposes of payment for those processes separate from the payment for coal at R14 per ton, in no wise detracts from the fact that the R 14 per ton was intended to pay for these operations as well. The contract says as much - "The above rate includes . . .". Accordingly I consider that the provision of a single rate for all the work is a strong indication of reciprocity.

An even stronger indication is that the rate itself may vary, depending not at all on the tonnage of coal delivered, but upon the quantity of overburden

encountered when compared to coal, and its hardness (i e does it have to be blasted or can it be dozed, is it "hard" or "soft"?). Clause 2 of the agreement (already mentioned), which is headed "Measurement," needs to be quoted in full. It reads;

> "This will be as follows:
> (a) Ground levels taken before commencement of work.
> (b) Ground levels on top of hard rock.
> (c) Ground levels on top of coal.
> (d) Tons of coal over weigh bridge.
> From these surveys, stripping ratios and hard and soft quantities will be calculated. Should the ratios and drills and blast quantities vary by more than 10% from the information supplied by yourselves the rates will be adjusted accordingly."

The effect of this clause is that in the circumstance stated (variation by more than 10 per cent) the price payable will depend upon quantities of overburden. The price is not as directly related as is the case with coal, in the sense that a slippage of 10 per cent is allowed, but the fact remains that payment is dependent also on overburden volumes and types. If overburden falls within the range of estimates the price is R14 per ton of coal. If it varies by more than 10 per

cent the price will be either more or less. In my opinion this clearly establishes reciprocity.

There is another way of testing reciprocity. Suppose that instead of shifting overburden into the previous cut Bercon had carted it off and dumped it at some distant point in the veld. Suppose that upon Bercon's then claiming payment on the 25th of a month the appellant had refused to pay until the dumped material had been removed to the cut, i e until reclamation work already due had been done. It seems to me to be clear that the intention of the contract was that the appellant would have been entitled to adopt this stand; because the duty to pay was reciprocal to the duty to reclaim. But then the argument is raised that it would be very difficult, almost impossible, to measure from month to month whether there had or had not been proper reclamation. I am completely unimpressed by these difficulties. One must postulate a capable miner on each side, each wishing to get on with the job. Given the nature of the mining and the reclamation if properly

performed, and the provisions for measurement already mentioned. I can see no reason for supposing that estimates or measurements sufficient to allow the contract to proceed could not have been made.

These alleged difficulties lead on to Bercon's next argument, that the parties did not intend that the *exceptio* could be raised, but left the appellant to resort to claiming and proving damage, with or without cancellation. To my mind these difficulties would have to be real indeed before they could persuade me that the appellant was deprived of this most elemental, if least spectacular defence, and had cast upon him the onus of proving not merely the fact of late performance, but the exact extent of it and the cost of putting it right. In the meantime, absent the defence, he would have to continue paying, unless he cancelled; a remedy he might not desire to use, and which would entail proof of not merely a breach, but a breach going to the root (see Christie *The Law of Contract in SA* 3 ed 469). That the parties did not regard these difficulties as real is established by the contract

itself. As already mentioned, in order to find out whether the ratio between coal and overburden, and the proportion between blasted and dozed ("hard" and "soft") overburden had varied beyond the permitted 10 % variation, it would have been necessary to measure the volume of the overburden removed. What had been put back would visibly have been put back. What remained on the surface, provided it had not been allowed to accumulate for an undue time, could surely have been measured quite easily, if necessary with the aid of triangulation, or even with one of the more sophisticated electronic devices of our age.

For these reasons I am of the opinion that the obligations on the two sides were reciprocal to one another and that the *exceptio* was available to the appellant, having regard both to the facts and the law. In reaching my conclusion I do not rely at all on the statement made by the judge below that there is no difficulty in allocating the price to mining and rehabilitation.

But then there is a suggestion that because with the onset of winter the

appellant's representatives said that more emphasis should be placed on retrieving coal, with reclamation for the moment to take second place, the appellant had waived, or somehow lost its right to refuse payment until reclamation had been brought up to date. A little sensible give and take does not easily translate into waiver. On the evidence the backlog in reclamation was serious and it was mounting. The attitude of Bercon's representatives was, what is nowadays, I believe, called cool. It could wait. There was lots of time ahead. There were 20 years to go. One may imagine the reaction of the Inspector of Mines had the appellant adopted such a stance. If practical effect is to be given to the contract, Bercon's obligations with regard to reclamation can be no less than those of the appellant.

The appellant's representatives claimed that they complained constantly. Those of Bercon deny that complaints were made. To my mind there is a strong probability that there were complaints. The appellant (which remained liable for

compliance with the mining regulations) was faced with a rising liability, and its contractor, Bercon, was certainly not over-capitalized. It would have been extraordinary if it had not complained. Moreover, I accept the evidence of Montano and Diedericks on this aspect, in preference to that of McGee and Hancock, as being more credible and probable. I do not think that Bercon had a valid cause for complaint when the appellant took up the stand that Bercon had to bring reclamation up to date, whatever the need for coal. If Bercon was of the view that the appellant was calling for more coal than it was entitled to under the contract, it could have said so. It did not. If concentration on mining coal meant that it had no machines to do reclamation, then it did not have enough machines to fulfil all its obligations. The fact that there had been some latitude granted in the past provided no sufficient basis for saying that the contract had been varied, or that rights under it had been waived, or that it meant otherwise than what it said. Accordingly I do not agree with the majority that the contract envisaged the degree

of flexibility and latitude that has been contended for. To have consented to such latitude indefinitely would have been near-suicidal for a collier in the appellant's position. The approach of the majority does not, in my view, accord to clause 5.12.2 the urgency and imperativeness of the injunction to rehabilitate as an integral part of mining and as a concurrent part of it, that the clause deserves.

Finally, it has been laid at Montano's door that at the last stages he did not rely on non-reclamation as a defence to a claim for payment, but rather stressed Bercon's liability to him, thus implying a counterclaim it is suggested, because of the cost that would be entailed in bringing reclamation up to date. To my mind this is a matter of too great legal sophistication to lay at a layman's door. In so far as there is a criticism of the appellant for defending rather than counterclaiming, I would have thought that it is simply good tactics not to pay good money into an insolvent estate, rather than try to take bad money out of one.

I agree with the majority that the appellant has not established the tacit term

concerning "pillars". As I am of the opinion that the appellant should succeed for the reasons already given, there is no need for me to say more on the subject. I also agree with the majority that if the respondent is entitled to succeed, he is entitled to the costs of two counsel provided for in the majority judgment.

I would allow the appeal with costs and would replace the order below with one dismissing Bercon's claim with costs.

W P SCHUTZ
JUDGE OF APPEAL