THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 38/03
Reportable

In the matter between :

MAN TRUCK & BUS (SA) (PTY) LIMITED APPELLANT

and

DORBYL LIMITED t/a DORBYL TRANSPORT PRODUCTS AND BUSAF RESPONDENT

CORAM : MPATI DP, ZULMAN, FARLAM, CLOETE, LEWIS JJA

HEARD : 17 FEBRUARY 2004

DELIVERED : 25 MARCH 2004

Summary: Contractual obligations held to be reciprocal. A decision to refer motion proceedings to evidence held not to be appealable.

JUDGMENT

CLOETE JA/

CLOETE JA:

INTRODUCTION

[1] The factual matrix against which this appeal falls to be decided is the following. Africa Truck & Bus (Pty) Limited ('ATB'), whose rights ultimately devolved upon the appellant, entered into a lease agreement with Dusbus Leasing Co CC ('Dusbus'). In terms of the lease agreement ATB leased 12 buses to Dusbus for a period of 60 months and for a total consideration in excess of R11 million, payable in instalments. ATB had manufactured the chassis of the buses and a division of the respondent had supplied the bodies, which had been purchased from it by ATB for over R3 million. ATB further undertook to Dusbus, in terms of a maintenance agreement also concluded with Dusbus, to maintain the buses for an agreed fee; and Dusbus agreed to make the buses available to ATB to enable this to be done.

[2] As ATB's exposure in terms of the Dusbus lease was significant, it concluded what has in these proceedings appropriately been termed a 'risk sharing agreement' with the respondent. It is the terms of that agreement, and in particular, clauses 4 and 5 thereof, which lie at the heart of the dispute between the parties. (The references in the agreement to 'DTP' are references to a division of the respondent.) Clause 4 provides:

'ATB will maintain, service and repair the 12 buses under the terms of a maintenance agreement entered into by and between ATB and the debtor as far as the bus chassis

are concerned. ATB will further make sure that DTP can inspect the condition of the buses from time to time but at least every six months at the premises of ATB. Necessary other repairs will be carried out at a workshop dedicated by DTP, for the account of the debtor.'

Clause 5 provides inter alia:

'In the event of ATB being required to re-possess the 12 buses under the lease agreement because the Debtor fails to pay the deposit, the accelerated instalment or/and any of the monthly instalments or for any other reason DTP hereby undertakes to make payment of the guaranteed amount as defined per Par.6) to ATB within 7 days of written notice to that effect being delivered by ATB on DTP.'

[3] Dusbus defaulted by failing to pay instalments due in terms of the lease agreement and the buses were repossessed. The appellant, as the successor in title to ATB's rights, sued the respondent for payment of the guaranteed amount. That amount was defined in accordance with a formula set out in clause 6 of the agreement.

[4] The guaranteed amount was calculated by the appellant at over R1,4 million and the appellant, as applicant, instituted motion proceedings against the respondent for payment of this amount, interest and costs. The court of first instance (Jordaan AJ) granted such an order. On appeal, the full court of the Witwatersrand Local Division (Cachalia J, Marais J and Jajbhay AJ concurring) set the order aside and referred the matter for the hearing of oral evidence. The formulation of the issues was, by agreement, left to the parties and the full court required this formulation to

be referred back to it by a fixed date. Special leave to appeal further was subsequently granted by this court.

THE ISSUES

[5] The dispute between the parties has essentially three facets:

(a) Did ATB, in terms of clause 4 of the risk sharing agreement, undertake vis-à-vis the respondent to maintain the buses in terms of the maintenance agreement between ATB and Dusbus?

(b) If so, was this undertaking reciprocal to the respondent's obligation to pay ATB the guaranteed amount if Dusbus defaulted in its obligations in terms of the lease agreement between ATB and Dusbus?

(c) If so, should the full court's decision to refer the matter for the hearing of oral evidence, be set aside?

I shall deal with each question in turn.

OBLIGATION TO MAINTAIN

[6] It was submitted on behalf of the appellant that the first sentence of clause 4 of the risk sharing agreement was merely a recital similar to the recitals in clauses 1 to 3 of that agreement and that it imposes no obligation on ATB to maintain the buses in terms of the maintenance agreement. There are three reasons why this argument is fallacious.

[7] First, there is a clear change in language in clause 4 when contrasted with the language used in clauses 1 to 3. Those latter clauses begin:

‘1. ATB has entered into 12 Lease Agreements with “Dusbus Leasing cc…

2. ATB purchased the adequate 12 bus bodies from BUSAF, a division of “DTP”…

3. DTP is aware of the contents of the lease agreement…’

Clauses 1 to 3 are obviously recordals. But the language of clause 4 is different. It does not begin ‘ATB has undertaken to Dusbus to maintain’. It begins ‘ATB will maintain’. These latter words are indicative of an obligation undertaken to the respondent to be performed in the future, not a recordal of an obligation already undertaken by ATB to Dusbus. There was some discussion during argument as to the content of the obligation undertaken by ATB to the respondent. I do not appreciate the difficulty. Clause 10 of the risk sharing agreement expressly conferred the right on the respondent, in the event of ATB breaching any of the terms of that agreement, and provided seven days written notice was given, to enforce the agreement by way of specific performance or to cancel the agreement and institute damages for its breach. ATB’s obligation to the respondent was to comply with the contract it had with Dusbus. It is for that very reason that the second sentence of clause 4 of the risk sharing agreement imposes an obligation on ATB to make sure that the respondent could inspect the condition of the buses from time to time.

[8] Secondly, it was, correctly, conceded on behalf of the appellant in argument that the second and third sentences of clause 4 impose obligations on respectively ATB and the respondent — in the case of the

former, to ensure that the respondent could inspect the buses from time to time; and in the case of the latter, to carry out ‘necessary other repairs’ (which obviously means repairs other than the repairs to be performed by ATB in terms of the maintenance agreement. That obligation was owed to ATB, not to Dusbus as is suggested in para [35] of the judgment of my learned colleague Lewis JA). The language is the same in each case: the word ‘will’ is used. It would therefore be strange if the first sentence, which uses the same language, was merely a recordal of a past event and the two sentences which follow impose positive obligations for the future. But what is decisive in the language used is that the second sentence, which clearly imposes an obligation on ATB, begins ‘ATB will further’. The plain meaning is that an additional obligation is being undertaken. The question ‘additional to what?’ receives an obvious reply: additional to the obligation in the first sentence.

[9] Thirdly, the creation of an obligation on the part of ATB vis-à-vis the respondent to comply with its obligation to Dusbus would make commercial sense. The respondent was obliged to pay the guaranteed amount if the buses were repossessed. If this took place, the buses were, in terms of clause 7 of the agreement, to be sold and the profit or loss was to be shared as to 29,5 per cent by the respondent and 70,5 per cent by ATB. The exposure of the respondent was therefore significant. If the cause of Dusbus’s default was lack of maintenance of the buses by ATB,

the respondent would in effect be guaranteeing ATB's default and agreeing to bear part of the consequences of that default — unless ATB undertook vis-à-vis the respondent to maintain the buses in accordance with the maintenance agreement.

[10] I therefore conclude that ATB, in terms of clause 4 of the risk sharing agreement, did undertake vis-à-vis the respondent to maintain the buses in terms of the maintenance agreement between ATB and Dusbus.That brings me to a consideration of the next question, namely, whether the obligations in the first sentence of paragraph 4 are reciprocal to the obligations in paragraph 5 of the risk sharing agreement.

RECIPROCITY OF OBLIGATIONS

[11] The appellant's counsel advanced an argument as to the reciprocity of the obligations which it would be convenient to dispose of at the outset. The argument was that the lease agreement contained a clause which provided that Dusbus would not be entitled to withhold payment of any rentals for any reason whatsoever; and that the maintenance agreement provided that Dusbus had to pay the charges due in terms of that agreement without deduction or set off. The suggestion was that, because of these clauses, Dusbus was not entitled to raise the *exceptio non adimpleti contractus* against the appellant for payments due under either the lease or the maintenance agreement. It is not necessary to analyse the effect of these clauses. Assuming that counsel is correct, any limitation of

the rights of Dusbus in terms of its contracts with ATB cannot enure to the benefit of ATB or its successor in title, the appellant, in terms of its separate contract with the respondent. Put conversely, the fact that the risk sharing agreement made ATB's obligations owed to Dusbus in terms of the maintenance agreement enforceable against ATB at the suit of the respondent, does not mean that the respondent's rights were limited in the same way that Dusbus's rights may have been. Any limitations on Dusbus's rights in its contracts with ATB were, so far as ATB's contract with the respondent is concerned, *res inter alios acta*.

[12] The essential question in this part of the inquiry is whether the respondent's obligation to pay ATB the guaranteed amount was reciprocal to ATB's obligation to the respondent to maintain the buses under the maintenance agreement. In contracts which create rights and obligations on each side, it is basically a question of interpretation whether the obligations are so closely connected that the principle of reciprocity applies: *B K Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 418B and authorities there quoted. Where a contract is bilateral the obligations on the two sides are prima facie reciprocal, unless the contrary intention clearly appears from a consideration of the terms of the contract: *Rich and Others v Lagerwey* 1974 (4) SA 748 (A) at 761 in fine—762A; *Grand Mines (Pty) Limited v Giddey NO* 1999 (1) SA 960 (SCA) at 971C—D. (The reference to *Grand*

Mines is to the minority judgment of Schutz JA but it is not in conflict with the majority on this point — cf 966C.) But reciprocity of debt in law does not exist merely because the obligations which are claimed to be reciprocal arise from the same contract and each party is indebted in some way to the other. A far closer, and more immediate correlation than that is required: *Minister of Public Works and Land Affairs and Another v Group Five Building Ltd* 1996 (4) SA 280 (A) at 288E—F. The overriding consideration is the intention of the parties; and the question whether the performance of respective obligations was reciprocal, depends upon the intention of the parties as evident from the terms of their agreement seen in conjunction with the relevant background circumstances: *Grand Mines* at 966C—E and authorities there quoted.

[13] In the risk sharing agreement, the obligation on the respondent at issue is to make payment of the guaranteed amount if the buses are repossessed. That was the whole purpose of the agreement; clause 1 says so, in terms:

'It is the purpose of this agreement to record the shared risk to be borne by the parties in relation to the lease agreements pertaining to the buses in the instance of any default by the "Debtor" on any or all of the leases and/or upfront payments.'

Maintenance of the buses was important to the respondent. If they were not maintained properly, they could not be used to best advantage by the lessee, Dusbus, and this would adversely affect their revenue earning

capacity — so increasing the possibility of a default by Dusbus, a repossession by ATB and the consequent obligation on the respondent to pay the guaranteed amount. Maintenance of the buses was equally important if the repossession had nothing to do with lack of maintenance of the buses by ATB. As I have already said, in the event of repossession, the amounts recoverable by the respondent in terms of clause 7 of the agreement would be adversely affected or the respondent's loss would be increased, if the buses had not been maintained. As a matter of commercial reality it is therefore overwhelmingly probable that the parties intended that the respondent's obligation to pay the guaranteed amount would be in exchange for, and therefore reciprocal to, ATB's obligation to maintain the buses in terms of the maintenance agreement. Indeed, ATB's obligation to maintain the buses (and the ancillary obligation to make the buses available to the respondent for inspection) was the only obligation it owed the respondent in terms of the risk sharing agreement. I respectfully point out that the contract does not, as the appellant's counsel contended, provide that the obligation on the respondent to pay the guaranteed amount was undertaken in return for the financial outlay made by ATB in paying for the buses. It is also important to emphasize that, for the reasons given in paras [6] to [9] above, ATB owed a duty enforceable by the respondent to maintain the buses in terms of ATB's contract with Dusbus. That vital fact is, with respect, not accorded sufficient weight by Lewis JA

in para [53] of her judgment. To paraphrase the reasoning of Colman J in *Rich* (753 *in fine*) approved by this court (762A), this does not appear to be a contract whereunder the respondent undertook, unconditionally, to part with a substantial sum of money merely because ATB had made a promise to it. I accordingly respectfully disagree with the approach of Lewis J in para [38] of her judgment.

[14] To sum up: the risk sharing agreement was a bilateral agreement. The obligations of the parties were therefore prima facie reciprocal. No contrary intention appears from the terms of the contract read in conjunction with the relevant background circumstances — indeed, the probabilities are that that is precisely what they intended. I accordingly conclude, to use the words of Corbett J in *ESE Financial Services (Pty) Limited v Cramer* 1973 (2) SA 805 (C) at 809D—E, that the first sentence of clause 4 of the risk sharing agreement and clause 5 thereof do constitute 'such a relationship between the obligation to be performed by the one party and that due by the other party as to indicate that one was taken in exchange for the performance of the other'.

[15] In view of the considerable reliance placed by the appellant's counsel on the decision of the majority in *Grand Mines* and in particular, the phrase 'reciprocal obligations in the strict sense' used by Smalberger JA at 967D, it would be appropriate to analyse that decision in a little detail. The facts are adequately set out in the headnote as follows:

The respondent, as the liquidator of B, had sued the appellant in terms of a contract between B and the appellant. In terms of the contract B mined coal from a site owned by the appellant and delivered it to the appellant. The amount to be paid to B was calculated on the 25th of each month and paid one month later. It was a term of the contract that B was obliged to rehabilitate the site, which was an opencast mine, during the course of the mining. There had been no programme of rehabilitation agreed between the parties nor had one been laid down by the Inspector of Mines. Prior to its liquidation B had fallen behind with the rehabilitation, such that it had not complied with its obligations in this regard. In defence to the respondent's action for payment for coal already mined and delivered the appellant had raised the *exceptio non adimpleti contractus*, averring that B's obligation to rehabilitate the site was reciprocal to its obligation to pay.

Both judgments in the case restated the general rule that the principle of reciprocity would normally apply to a contract of letting and hiring (966C; 971D). The majority found that the intention of the parties was nevertheless that B's obligation to rehabilitate was not reciprocal to the appellant's obligation to pay. The reasons for this conclusion appear from the passage at 966H—967D as follows:

'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.'

Smalberger JA then continued at 967D:

'Having regard to these considerations I am of the view that the parties, notwithstanding the bilateral nature of their contract and the degree of interdependence between payment and rehabilitation, could not have intended that they would be reciprocal obligations in the strict sense.'

This latter passage must not be taken as laying down a new test for reciprocity. All that the *dictum* means is that, although there were bilateral obligations, the obligation to rehabilitate was not reciprocal to the obligation to pay.

[16] Counsel representing the appellant submitted that there were four similarities between the facts in the present matter and those in *Grand Mines*. The first was formulated as follows:

'Payment of the guaranteed amount is fixed both in relation to an event (i.e. repossession, *inter alia*, "*for any reason*") and a formula. This event and formula take no account of whether ATB has performed its obligation to maintain the buses. No specific penalty is prescribed for failure to comply with the obligation to maintain the buses other than the ability of the Respondent to invoke the general breach clause, something which it never did.'

But *Grand Mines* did not hold that the obligation to rehabilitate was not reciprocal to the obligation to pay, simply because there was no formula regulating payment in respect of the obligation to rehabilitate. *Grand Mines* held that because there was a monthly obligation to pay for coal mined, measured and delivered, which was fixed in relation to a date and a formula, whereas there was no such formula in respect of the obligation to rehabilitate, the parties could not have intended the obligation to rehabilitate to be reciprocal to the obligation to pay. It was the contrast which was vital to the decision of the majority. In the present matter the facts are entirely different. The respondent was obliged to make a one-off payment if the buses were repossessed. The appellant was obliged, over a period of time, to maintain the buses in accordance with the maintenance agreement. There is simply no basis for holding that the obligations are not reciprocal. And the absence of a penalty clause begs

the question: if the respondent's obligation to pay the guaranteed amount was reciprocal to the appellant's obligation to maintain the buses in terms of the maintenance agreement, there would be no need for such a clause — the respondent could resist a demand for payment on the basis of the *exceptio non adimpleti contractus*.

[17] Lewis JA in para [48] of her judgment quotes a passage from *Ese Financial Services* and concludes:

'One would have expected the risk-sharing agreement in this case likewise to have spelled out in clear terms that, in the event of ATB failing to maintain the buses, it would not be entitled to payment of the guaranteed amount.'

With respect, I disagree. In *Ese Financial Services* there were two obligations on the defendant: to pay a fee to the plaintiff for the management of the defendant's investment portfolio; and to pay a bonus equivalent to one-sixth of the capital appreciation of the portfolio in excess of ten per cent. The former obligation was obviously dependent on the plaintiff's performance of its obligation to manage the portfolio. The latter was held not to be so dependent. It was in this context that Corbett J made the remarks at 810H—811A quoted by Lewis JA, namely:

'Had the parties intended the payment of the bonus to depend, as a precondition, not only upon the achievement of the required capital appreciation but also upon the satisfactory performance by plaintiff of its duty of management, then one would have expected the contract to have reflected this in clear terms.'

The present is not an analogous case. As I have already pointed out, the

obligation which ATB undertook vis-à-vis the respondent to maintain the buses in terms of the maintenance agreement was the only obligation undertaken by ATB to the respondent in terms of the risk sharing agreement.

[18] The third similarity between the facts in *Grand Mines* and the present appeal relied upon by the appellant's counsel was formulated as follows:

'Maintenance of the buses is by definition not something which can take place simultaneously with payment of the guaranteed amount upon repossession of the buses. In theory, repossession of the buses could occur even before any bus has been brought in for its first service.'

But it is trite that the mere fact that one party has to perform first and in full, does not mean that the other party's obligation cannot be reciprocal. And if a bus were to be repossessed before it had been brought in for its first service, that would mean that there would be no room for the *exceptio*. It does not mean that the obligation to maintain in terms of the maintenance agreement cannot be reciprocal to the obligation to pay.

[19] The second and fourth similarities relied upon by the appellant's counsel were said to be the following (the italicised quotations are from the passage in *Grand Mines* set out in para [15] above):

'The obligation to maintain the buses (to the extent that it can be interpreted as an obligation owed to the Respondent and not to the lessee, Dusbus) is an obligation required to be performed as an "*ongoing process permitting a degree of flexibility and*

latitude " over a protracted period of time. The obligation to pay the guaranteed amount is not.'

And:

'As in the *Grand Mines'* case, "*given the nature and requirements*" of bus maintenance "*practical difficulties could be anticipated in attempting to establish*" at the time when payment of the guaranteed amount is demanded that maintenance is "up to date"…. Will a failure to effect a proper oil change enable the Respondent to escape an obligation in excess of R1 million?.... If a service is conducted two days late, does that trigger the *exceptio*?'

These arguments are also without merit. In *Grand Mines* the majority did not hold that the obligation to rehabilitate was not reciprocal to the obligation to pay simply because of practical difficulties. It held that the difficulties in ascertaining whether the obligation to rehabilitate was up to date, in contrast with the fixed and definite formula correlating mining and delivery of coal with payment, militated against a finding that the obligation to rehabilitate was reciprocal to the obligation to make payment. If the appellant's argument were correct, it would mean that the majority decision in *Grand Mines* would be authority for the proposition that, in a contract of *locatio conductio operis* where A undertook to maintain B's fleet of motor vehicles and B undertook to pay A each month for doing so, the obligations of the parties are not reciprocal because it would be difficult to ascertain whether the maintenance was up to date at the end of each month — which plainly is not the law.

[20] In conclusion on this aspect: the attempt by the appellant's counsel to find similarities between the facts in *Grand Mines* and the facts in the present matter overlooks the reasoning of the majority, which was that obligations contained in a contract of *locatio conductio operis* are prima facie reciprocal; but that on the particular facts of that case the intention of the parties was that the obligation to rehabilitate was not to be reciprocal to the obligation to pay. In the present matter, for the reasons given in paragraph [13] above, the intention of the parties as a matter of commercial probability must have been that the obligation on the respondent to pay the guaranteed amount was reciprocal to ATB's obligation to maintain the buses in terms of the maintenance agreement. I agree, with respect, with Lewis JA's statement in para [52] of her judgment that the materiality of an obligation does not render it *per se* reciprocal. But where, as here, both parties know that it is important to a party who may be called upon to perform an obligation that the other party should have performed its obligation, the probabilities must be that the parties intended the latter performance to be reciprocal to the former.

REFERRAL TO EVIDENCE

[21] It was submitted on behalf of the appellant that there was not a sufficient dispute of fact to warrant the full court referring the matter for the hearing of oral evidence. The short answer to this submission is that this direction is not appealable. It is not a 'judgment or order' within the

meaning of those words in s 20(1) of the Supreme Court Act, 59 of 1959. This court held in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532J—533B:

'A "judgment or order" is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings (*Van Streepen & Germs (Pty) Ltd* [v *Transvaal Provincial Administration* 1987 (4) SA 569 (A)] at 586I—587B; *Marsay v Dilley* 1992 (3) SA 944 (A) at 962C—F). The second is the same as the oft-stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief (*Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another* 1992 (4) SA 202 (A) at 214D—G).'

The direction of the full court that evidence be led, has none of these attributes. The position is, for practical purposes, identical to that dealt with in *Union Government (Minister of the Interior) and Registrar of Asiatics v Naidoo* 1916 AD 50. In that matter, a single judge of the Transvaal Provincial Division directed an application made upon motion to stand over for the production of oral evidence. Both parties consented in writing to an appeal being had direct to the Appellate Division. The court held that special leave to appeal was necessary, but, as no order had been made upon the motion, an application for such leave was premature and should be refused. Innes CJ said at 52:

‘There has been an application for relief, but no decision upon it. The prayer of the petition falls under nine separate heads, and in regard to none of them has any order been made. The application has merely been postponed for further evidence. When the enquiry is resumed the judge may decide in favour of the present applicants on the facts; or he may possibly, though very improbably, revise his view of the law upon further argument. But if he does neither; if he finds against the applicants on the law and the facts, and grants the relief prayed for, it will then be competent for them to appeal and to raise every point upon which they now wish to rely. The fact is that the present application is for leave to appeal not against the order of the learned judge — for he has made none — but against his reasons. It is entirely premature, and must at this stage be refused.’

CONCLUSION

[22] The appeal is dismissed with costs, including the costs of two counsel.

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T D CLOETE
JUDGE OF APPEAL

Concur: Mpati DP
Zulman JA
Farlam JA

LEWIS JA

[23] The central issue in this appeal is whether obligations undertaken by the parties under a so-called 'risk-sharing agreement' were reciprocal, such that malperformance by the appellant entitled the respondent to raise the *exceptio non adimpleti contractus* as a defence against a claim for payment in terms of the contract. If the obligations are found to be reciprocal, the second issue arises, namely whether there are factual disputes between the parties which preclude the matter being decided without the hearing of evidence.

[24] The court of first instance, although finding that the obligations were reciprocal, such that the *exceptio* would avail the respondent in the event of malperformance on the part of the appellant, considered that there was not clear evidence before it that the appellant was guilty of a failure to perform, and granted the application. On appeal with the leave of the court, a full bench (Johannesburg High Court, per Cachalia J, Marais J and Jhajbhay J concurring) agreed with the court below on the issue of reciprocity, but referred the matter to oral evidence for the determination of what it considered to be disputes of fact on the nature of the appellant's performance. Special leave to appeal against these findings was granted by this court.

Background

[25] The appellant is the cessionary of rights under the risk-sharing contract originally between Africa Truck & Bus (Pty) Ltd ('ATB') and the respondent. That contract was one of several concluded between various parties at much the same time, and which formed part of what was essentially one commercial transaction. Those germane to the dispute between the parties included a contract of lease between ATB and Dusbus Leasing CC ('Dusbus'), under which ATB let to Dusbus 12 buses for a period of 60 months. ATB entered into a further contract with Dusbus undertaking to maintain the buses during the currency of the lease. ATB was the manufacturer of the bus chassis. The respondent supplied the bus bodies. The risk-sharing contract was concluded because of the exposure to risk of ATB in terms of the lease. I shall deal with this aspect later.

[26] The buses were delivered to Dusbus, which in due course failed to make two monthly payments, in February and in May 1999. The lease was accordingly cancelled in May 1999, and the buses repossessed, by a finance company in which the rights vested at the time. The appellant, in whom the rights under the lease and the risk-sharing agreement vested pursuant to cessions from the finance company and ATB, demanded

payment of the sum guaranteed by the respondent under the risk-sharing agreement. The *exceptio* was raised by the respondent as its principal defence: ATB had failed to maintain the buses in accordance with the terms of the maintenance agreement, and in accordance with an obligation undertaken to the respondent in the risk-sharing agreement so to do. It could thus not claim performance from the respondent.

The salient terms of the agreements

The lease

[27] Dusbus hired the buses on the basis that it would pay rental to ATB in accordance with a schedule attached to the lease. Clause 8.1 provided: 'The Lessee shall pay the Lessor as rental for the use of the Goods [the buses], the amounts specified in the First Schedule at the time or times therein stipulated. All payments in terms of this Agreement shall be made without deductions of any kind . . . .'

Clause 8.2 stated:

'As long as this Agreement remains in force the Lessee *shall not be entitled to withhold payment of any rentals for any reason*

whatsoever. Without derogating from the generality of the aforegoing *the Lessee shall not be entitled to withhold payment of any rental by reason of the fact that the Goods are defective, have been damaged or cannot be operated or used* or have been lost or stolen or that the Seller [the definition in the contract includes the manufacturer of the goods or the seller of the goods to the lessor] or anyone else has failed to make good any breach or fulfil any warranty or representation and in the event of any dispute arising between the parties, the Lessee shall, pending settlement of or a decision in such dispute, *continue to pay all rentals and other amounts payable in terms hereof on their due dates for payment as set out in the First Schedule on the basis however that no such payment shall derogate from any liability of the Lessor.*' (My emphasis.)

The maintenance agreement

[28] This contract, also between ATB and Dusbus, imposed on ATB obligations to maintain and to service the buses at regular intervals during the currency of the lease. In turn, Dusbus was liable to make the buses available for inspection and repair and to use the buses in a fashion regulated by the contract. Clause 4.5 of the contract provided that Dusbus would pay to ATB the charges calculated in terms of the agreement

monthly ‘without deduction or set-off’.

The risk-sharing agreement

[29] Although the contract was referred to by the appellant, during the course of the litigation, as a ‘risk-sharing agreement’ counsel for the appellant submitted at the hearing of the appeal that it was more appropriately termed a ‘guarantee agreement’. In my view, nothing turns on the label of the agreement and I shall refer to it as the ‘risk-sharing agreement’. It is this agreement that is the crux of the dispute.

[30] This contract was concluded between ATB and the respondent. It records, in clause 1, that ATB had entered into the lease with Dusbus in respect of the 12 buses with an ‘aggregate net asset value’ of R7 385 832, payable over six months. The clause continues:

‘It is the purpose of this agreement to record the shared risk to be borne by the parties in relation to the lease agreements pertaining to the buses in the instance of any default by the “Debtor” [Dusbus] on any or all of the leases and/or upfront payments.’

[31] Clause 2 records that ATB had purchased the buses from BUSAF, a division of the respondent, for the sum of R3 111 721.20; that sum represented 42,13 per cent of the ‘total net asset value of the buses’.

Clause 3 set out the details of the payment schedule. It is clause 4 that is central to this dispute. It reads

'ATB will maintain, service and repair the 12 buses under the terms of a maintenance agreement entered into by and between ATB and the debtor as far as the bus chassis is concerned. ATB will further make sure that DTP [the respondent] can inspect the condition of the buses from time to time but at least every six months at the premises of ATB. Necessary other repairs will be carried out at a workshop dedicated by DTP, for the account of the debtor.'

[32] Clause 5 provides that in the event of ATB having to repossess the buses because of Dusbus's failure to pay the deposit or any instalment due in terms of the lease, on the receipt of written notice to this effect, the respondent will pay to ATB a 'guaranteed amount' determined in accordance with clause 6. Clause 6 sets out a formula for the determination of the amount, and it is this sum that the appellant claims from the respondent. Clause 10 sets out the remedies of the parties in the event of breach: on notice to the other party to remedy any breach, either party may demand specific performance or cancel and claim damages for the breach.

[33] The respondent relies on the breach of the obligation to maintain the buses said to have been imposed on ATB by clause 4 in asserting that the appellant cannot claim the guaranteed amount. At no stage did the respondent call upon ATB to remedy any breach, nor did it seek to cancel the contract, in terms of clause 10.

The meaning of clause 4 of the risk-sharing agreement

[34] The appellant argues that clause 4, or at least the first sentence of the clause, is no more than part of a preamble to the contract, recording the contractual arrangements between ATB and Dusbus. An examination of the contract does indeed reveal that the first three clauses recite the background against which the contract is concluded. But the fourth clause is more difficult to classify as introductory, or as a simple recital. The first sentence states that 'ATB *will* maintain, service and repair the 12 buses under the maintenance agreement'. The second sentence reads 'ATB *will further make sure* that DTP can inspect the condition of the buses from time to time but at least every six months at the premises of ATB'. The third sentence is of a different ilk: 'Necessary other repairs will be carried out at a workshop dedicated by DTP, for the account of the debtor [Dusbus]'.

[35] The respondent argues that the wording of the first sentence clearly

indicates that ATB is undertaking an obligation not only to Dusbus but also to the respondent to maintain the buses in terms of the maintenance agreement. The second sentence, it contends, is even clearer: ATB undertakes to make the buses available for inspection. The third sentence, on the other hand, seems to impose an obligation on the respondent to Dusbus: other repairs will be done at a workshop 'dedicated by DTP, for the account of the debtor'. The nature of this undertaking was not the subject of any debate and is not in dispute.

[36] The first sentence, the respondent contended, could not have been intended simply as a recital, when the second clearly imposes an obligation on ATB to make the buses available for inspection, and the third can be read as imposing an obligation on the respondent. It would be strange, contended the respondent, to include in one clause a recital of background relating to the maintenance agreement, as well as two undertakings. The presence of the two undertakings was further indicative of the conclusion that the first sentence also amounted to an undertaking.

[37] Counsel for the appellant conceded that the second sentence does embody an obligation. And it was not disputed that the third sentence likewise required the respondent to effect 'other repairs' to the buses – presumably those not covered by the maintenance agreement.

[38] The clause is certainly not a model of clarity. The context, and a reading of the three agreements together, suggest in my view that the first sentence was probably intended to mean no more than that ATB had undertaken the obligation to maintain the buses to Dusbus, and that it would honour that undertaking. Its obligation to the respondent was not to maintain the buses, but to comply with the contract with Dusbus. But whatever the intention may have been, the language used is not appropriate to a recital, and is different from the first three clauses which are clearly recordals.

[39] If clause 4 imposed an undertaking on ATB to the respondent to maintain the buses, and if Dusbus had not defaulted in the payment of rentals, but ATB had failed to maintain the buses, or done so in an unacceptable fashion, could the respondent, rather than Dusbus, sue ATB for performance or to remedy the defective performance? What would the content of the obligation be? Is it simply an obligation to comply with the contract with Dusbus? The respondent argues that in effect the ‘relevant clauses’ of the maintenance agreement are incorporated in the agreement between ATB and itself. The respondent would, on that basis, have been entitled to claim performance in terms of the maintenance agreement between ATB and Dusbus.

[40] In my view this is a very strained interpretation of the provision. It is highly improbable that the parties, when reaching the agreement, intended that the respondent, rather than Dusbus, could enforce ATB's obligation to Dusbus to maintain the buses. It is not necessary, however, to decide this point. For even if the first sentence of clause 4 is construed as an undertaking to the respondent, can it be said that the respondent's obligation to pay to the appellant the guaranteed amount is dependent on the appellant's having maintained the buses?

Are the obligations of the parties reciprocal?

[41] The court below, confirming the decision of the court of first instance in this regard, held that the risk-sharing contract between the parties was such as to impose reciprocal obligations. Taking into account the wording of clauses 1, 2 and 3 of the contract, the court concluded that the parties had intended that ATB be indemnified only if it had fulfilled its obligations to Dusbus under the maintenance agreement. It would not make commercial sense, said the court, for Dusbus to enter into the lease if it had no guarantee that the buses would be maintained. Thus, concluded the court, because the obligations of the parties were reciprocal, failure to perform in terms of clause 4 – that is, failure to maintain the buses in the respects alleged – entitled the respondent to raise the *exceptio non*

adimpleti contractus.

[42] The general principles governing the determination whether obligations of parties to a contract are reciprocal, such that the *exceptio* may be raised, have been set out most recently by this court in *Grand Mines (Pty) Ltd v Giddey NO* 1999 (1) SA 960 (SCA), a case relied upon extensively by both the courts below, and by counsel for the appellant. Smalberger JA, delivering the judgment of the majority of the court (Schutz JA dissenting on the facts) stated (at 965E-I):

'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. Interdependence 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* . . . Furthermore,

for the *exceptio* to succeed the plaintiff's performance must have fallen due prior to or simultaneously with that demanded from the defendant. . . . Whether or not obligations in terms of a contract satisfy these requirements and are reciprocal in the above sense . . . 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.' (My emphasis.)

See also *ESE Financial Services (Pty) Ltd v Cramer* 1973 (2) SA 805 (C) especially at 808G-9G and *Motor Racing Enterprises (Pty) Ltd (in liquidation) v NPS (Electronics) Ltd* 1996 (4) SA 950 (A) at 961E-H.

[43] Thus while bilateral contracts are generally presumed to embrace reciprocal obligations, the parties may determine otherwise. In general, contracts of sale, lease and service are reciprocal: the seller must deliver the goods before the buyer pays the price; the lessor must provide vacant possession of the goods or the premises before the lessee pays the rental; and the builder or any other service-provider must do the work before claiming payment. If there is no performance then nothing is payable. But parties very often do change the usual consequences of the contract. Accordingly, even though there is a presumption that fully bilateral

contracts impose reciprocal obligations, in determining whether the *exceptio* will avail a defendant one must construe the contract itself in order to determine the parties' intention. And for the obligation to be reciprocal in the strict sense 'there must be such a relationship between the obligation to be performed by the one party and that due by the other party as to indicate that one was undertaken in exchange for the performance of the other and, in cases where the obligations are not consecutive *vice versa* . . .' (per Corbett J in *Ese Financial Services* above at 809D-E).

[44] The appellant contends that if it has an obligation to the respondent to maintain the buses, imposed on it by the risk-sharing agreement, it is not given in exchange for, and is not dependent on, the obligation to pay a guaranteed amount on the repossession of the buses. The essence of the contract is that the respondent agrees to bear a share of the risk undertaken by the appellant in terms of the lease agreement with Dusbus. It does so, argues the appellant, in return for the financial outlay made by ATB in paying for the buses (as recorded in clause 2 of the risk-sharing agreement). That is reinforced by the statement in clause 1 that the 'purpose of this agreement' is to 'record the shared risk to be borne by the parties in relation to the lease agreement . . . in the event of any default' by Dusbus.

[45] Any obligation to maintain the buses imposed on it, the appellant argues, is reciprocal only to the obligation imposed in clause 4 on the respondent to effect 'other repairs'. In *Grand Mines* above, which counsel for the appellant submitted was particularly instructive in this case, this court found that the obligations of the parties were not, in the strict sense, reciprocal, and thus that performance from the one could be claimed despite the failure to perform by the other. The obligations of one party, Bercon Mining, were to mine coal from a site, and, because the mine was opencast, to rehabilitate the site during the course of mining. The obligation of the appellant was to pay a monthly sum to Bercon calculated on the basis of what had been mined the previous month. Bercon had fallen behind with its rehabilitation (no programme for rehabilitation had been agreed) and was thus in breach of an obligation. When the liquidator of Bercon sued for payment the appellant raised the *exceptio*. In concluding that the obligations to pay and to rehabilitate were not reciprocal, Smalberger JA said (at 966H-967E):

'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 or 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 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 interdependence 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.'

[46] The appellant contends that the similarities in this case to *Grand Mines* are significant. First, payment of the guaranteed amount is fixed in relation to an event – the repossession of the buses for any reason. The payment guaranteed was fixed by formula set out in clause 6 of the agreement. Second, the obligation of ATB to maintain the buses was ongoing and to be performed over the period of the lease. Maintenance of vehicles by its nature cannot take place simultaneously with payment of an amount in the event of repossession. And it would be impracticable to determine what maintenance was outstanding at the time of repossession. What degree of failure, asks the appellant, would justify the refusal to pay the guaranteed amount?

[47] The appellant relies also on *Ese Financial Services* (above) in which

it was held that the obligation to manage a share portfolio was not reciprocal to the payment of an amount on the occurrence of a particular event, the appreciation in value of the shares. This amount was in the nature of a bonus and was payable in the event of 'a planned objective being achieved': it was not, said the court (at 810E-G), payable as consideration for the 'satisfactory performance by the plaintiff of its duty of management'. The satisfactory performance might have contributed to the achievement of the objective, but this was not necessarily the case. Similarly, in this case, proper maintenance of the buses might have precluded Dusbus's default: but the obligation to maintain the buses could hardly be said to have been *given as consideration for* payment of the guaranteed amount.

[48] In *Ese Financial Services* (at 810G-H) Corbett J pointed out that the appreciation of the investment might have been achieved despite the 'supine inactivity' of the plaintiff or because of its 'perfect efficiency in administration'. But, he continued (at 810H-811B):

'Had the parties intended the payment of the bonus to depend, as a precondition, not only upon the achievement of the required capital appreciation but also upon the satisfactory performance by plaintiff of its duty of management, then one would have expected the contract to have reflected this in clear terms.'

One would have expected the risk-sharing agreement in this case likewise to have spelled out in clear terms that, in the event of ATB failing to maintain the buses, it would not be entitled to payment of the guaranteed amount.

[49] A further argument adduced by the appellant is that the lease and maintenance agreements between ATB and Dusbus both contain clauses (set out above) requiring Dusbus to pay rental and charges without deduction notwithstanding any failure in performance by ATB, and that these clauses throw light on the intention of the parties to the risk-sharing agreement. Reciprocity was expressly excluded in those contracts, it was argued, and thus must be excluded in the risk-sharing agreement too. If Dusbus is required to pay no matter what, why should the respondent be in a different position?

[50] In my view, however, the risk-sharing agreement is completely different in nature from the lease and maintenance agreements. There were no regular payments to be made by any party. Only one payment was to be made, by the respondent, if and only if the buses were repossessed. One cannot thus infer from the exclusion of reciprocity in the contracts between ATB and Dusbus any intention that payment was to be made despite the non-performance by ATB under the contract with the

respondent.

[51] The respondent contends that the reciprocity of the obligation to maintain and the obligation to pay the guaranteed amount is to be found in the fact that the contract is bilateral: the respective obligations are accordingly presumptively reciprocal. Reciprocity is also to be found by having regard to the commercial context. The purpose of the risk-sharing contract was to spread the risk of the lease with Dusbus in the event of default by Dusbus. It was fundamental to the arrangement that the buses be properly maintained: if not, the risk would obviously be increased. That was why the parties agreed expressly, in clause 4, that ATB maintain the buses.

[52] This argument is flawed, in my view, for it assumes that the materiality of an obligation renders it *per se* reciprocal. That is not so. Obligations are reciprocal where the parties intend that the performance of the one obligation be dependent on, and given in exchange for, the performance of the other obligation. That the obligations are important does not make them dependent on nor given in exchange for their respective performances.

[53] I also do not accept the contention that, because the reason – the motive – for including the obligation to maintain the buses in the risk-sharing agreement was the wish to reduce the risk of default by Dusbus, the obligation became reciprocal to the respondent's obligation to pay the guaranteed amount. The motive for including a term in a contract cannot affect the meaning of the term or the ordinary consequences of the contract. Put differently, the respondent might have assumed the risk only because there was a maintenance agreement between ATB and Dusbus in place. But it does not follow from that that the obligation to pay the guaranteed amount was dependent on an obligation to a different party (Dusbus) to maintain the buses.

[54] In my view, the respondent's obligation to pay the guaranteed amount was not dependent on ATB's obligation to maintain the buses. The respondent undertook to pay the guaranteed amount on repossession of the buses on Dusbus's default or 'for any reason'. The amount was guaranteed, and was payable on the happening of an event. The obligation to pay was absolute once the event occurred. ATB undertook to maintain the buses in a separate and independent maintenance agreement with another party – Dusbus. Maintenance was an ongoing operation throughout the currency of the lease. It was required to be

performed irrespective of any obligation of the respondent to ATB. The obligations were accordingly not reciprocal in the sense required for the successful invocation of the *exceptio*.

[55] The conclusion reached does not have the effect of leaving the respondent without a remedy. Provided that there was indeed an obligation to the respondent imposed on ATB to maintain the buses, and if it can prove damages as a result of the failure to maintain the buses in terms of the maintenance agreement, then it will have a claim against the appellant. Clause 10, referred to earlier, sets out the remedies available to either party in the event of breach of the contract. But the respondent cannot escape payment by raising the appellant's non-performance if any. Accordingly, it is in my view unnecessary to determine whether there were disputes of facts warranting a referral to evidence.

[57] I would uphold the appeal with costs, and order the respondent to pay the sum of R1 418 396.50; and interest on this sum at the rate of 15,5 per cent per annum from 7 July 2000 to date of payment.

C H Lewis

Judge of Appeal