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CASE NO 197/95

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

MOTOR RACING ENTERPRISES (PROPRIETARY) LIMITED

(IN LIQUIDATION)

APPELLANT

and

NPC (ELECTRONICS) LIMITED

RESPONDENT

**COURT: VAN HEERDEN, KUMLEBEN, HARMS, SCHUTZ AND
PLEWMAN JJA**

Heard: 16 September 1996

Delivered: 26 September 1996

JUDGMENT

YAN HEERDEN JA:

On 4 December 1992 the appellant ("MRE") and the respondent ("Panasonic") entered into a written sponsorship agreement. MRE was then the lessee of a property known as the Kyalami race track ("Kyalami") and held the rights to stage the South African Formula 1 Grand Prix Motor Race ("the event") for 1993. Panasonic distributed various products in this country under the brand name Panasonic and wished to establish an association of that name and hence its products with the staging of the event. For that reason it agreed to sponsor the 1993 event. This was spelled out in clause 2.4 of the preamble of the agreement which recorded that:

"In order to continue to promote its name in the South African market place as well as in other countries of the world and in order to enhance the image and profile of its products in these territories, Panasonic has agreed to sponsor the event . . ."

In so far as material, clause 4 of the agreement provided as follows:

"4.1 Panasonic undertakes to sponsor the Event on the terms and conditions set out in this agreement.

4.2 Subject to clause 4.4, 7, 8 and 9 [to which clauses I shall revert] the sponsorship fee to be paid by Panasonic to MRE shall be R22 000 000.00 (twenty two million rand). . . which amount shall be paid as follows -

4.2.1 on 1 December 1992, the sum of R3 000 000.00 (three million rand):

4.2.2 on 1 February 1993, the sum of R2 000 000.00 (two million rand):

4.2.3 on the first business day after the Event has been held, the sum of R10 000 000.00 (ten million rand):

4.2.4 on the second business day after the Event has been held the sum of R2 000 000.00 (two million rand):

4.2.5 on 1 April 1993, the sum of R2 000 000.00 (two million rand):

4.2.6 on 1 September 1993, the sum of R3 000 000.00 (three million rand):

provided that if MRE has not delivered either or both of the guarantees referred to in Clause 4.3 below to Panasonic then Panasonic shall not be obliged to pay any amount referred to in Clause 4.2.1 and/or Clause 4.2.2 (as the case may be) to MRE unless and until either -

- A) MRE furnishes the guarantee referred to in Clause 4.3 below to Panasonic; or
- B) the first business day after the Event has been held.

4.3 MRE shall deliver to Panasonic guarantees, in a form acceptable to Panasonic and from a financial institution acceptable to Panasonic, which guarantees shall be for the amounts of the payments referred to in Clause 4.2.1 and 4.2.2 respectively, shall be irrevocable and unconditional and shall state that if, for any reason whatsoever the Event is not held on 14 March 1993 then the amount of those guarantees shall immediately be repaid to Panasonic."

MRE was wound up before the final instalment became due and subsequently that company, through its liquidator, initiated motion proceedings against Panasonic in the Witwatersrand Local Division. The main relief sought was an order directing payment by

Panasonic of the amount of R3 650 000 (being the aggregate of the final instalment and the sum of R650 000 underpaid in respect of the penultimate instalment). In its opposing affidavit Panasonic averred that numerous breaches of its obligations under the agreement non-suited MRE. As against this there was, in the founding affidavit, only a bald allegation that MRE had complied with all its obligations. The court a quo (Nugent J) consequently confined the issues to the question whether on the undisputed facts MRE was entitled to succeed. It held that the obligations of the parties were reciprocal and that because of the breaches relied upon by Panasonic MRE's claim was successfully met by the exceptio non adimpleti contractus ("the exceptio"). Hence he dismissed the application with costs but subsequently granted MRE leave to appeal to this court.

The main rights of Panasonic - and the corresponding obligations of MRE - are to be found in clause 6 of the agreement. This clause consists of 18 sub-clauses setting out Panasonic's rights in regard to inter alia the use of its brand name and logo; a circuit advertising package; signage on Kaylami and identification of its sponsorship on official printed material and official vehicles. Additional rights are set out in clauses 8, 9, 10 and 11. Since counsel for Panasonic rightly conceded before us that MRE failed to show that it had

fully complied with its numerous obligations, and nothing turns on the extent of the breaches relied upon by Panasonic, it suffices to set out, by way of illustration, the following examples of such breaches.

(1) Clause 6.1.3 provides that MRE shall procure that all public references to the event make mention of Panasonic's patronage and sponsorship. As a result of MRE's failure to comply with this obligation there were numerous references in the media to the event without any mention of Panasonic's patronage and sponsorship.

(2) Sub-clauses 6.1.1 and 6 provide that Panasonic will have the exclusive right to be the official sponsor of the event and that MRE shall procure that no other person shall have any naming rights in respect of the event. In breach of these provisions MRE permitted the erection of billboards on a section of the M1 highway advertising the event and displaying the brandname "Sasol" very prominently. This created the perception that Sasol (a company unrelated to Panasonic) was the or a sponsor of the event.

Before dealing with the contentions of counsel for MRE a few general remarks are apposite. Firstly, it is well established that the exceptio presupposes the existence of mutual obligations which are intended to be performed reciprocally, and that the parties' intention

is to be sought primarily in the terms of their agreement: Wynns Car Care Products (Pty) Ltd v First National Industrial Bank Ltd 1991 (2) SA 754(A) 757F. Secondly, in Rich v Lagerwey 1974 (4) SA 748(A) 761-2, Wessels JA rightly said that common sense seems to indicate that inter-dependent promises are prima facie reciprocal, unless a contrary intention clearly appears from a consideration of the terms of the agreement. In this regard it is, however, necessary to refer to a dictum in the minority judgment of Viljoen JA in Nesci v Meyer 1982 (3) SA 498(A) 513F which does not appear to be in conflict with anything said in the majority judgment. It reads:

"Die vermoede . . . wat 'n verweerder wat die exceptio opwerp gewoonlik help, nl dat dit prima facie aangeneem word dat die partye se wedersydse prestasies gelyktydig moet geskied, of dat die prestasie van die een party 'n voorvereiste is vir die prestasie van die ander party . . . , geld nie in die huidige geval nie want die prestasie van die verweerder bestaan nie uit die betaling van 'n enkele geldbedrag nie, maar uit die betaling van 'n reeks paaieemente oor 'n periode van ses jaar."

I do not think that Viljoen JA meant to convey that the presumption does not apply whenever the performance of one of the parties is to be made in instalments, but, if he did, I am unable to agree with him. Should such a party be sued for payment of an instalment there is in principle no reason why the presumption cannot be invoked in respect of an obligation which the other party had to perform before or on the date upon which that

instalment fell due (cf Rich, supra, at 762F-G).

Thirdly, it is necessary to deal with dicta to the effect that the exceptio is essentially a temporary defence raised in order to compel the other contracting party to perform his unfulfilled obligation(s): Dalinga Beleggings (Pty) Ltd v Antina (Pty) Ltd 1979(2) SA 56 (A) 60 D, and BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391(A) 419A. Those dicta should, however, be read in the context of the facts with which the courts were concerned. Both cases dealt with defective performance of an obligatio faciendi where it was still possible to remedy the defect. Indeed, in by far the majority of cases in which the exceptio has been invoked a similar situation obtained. In such cases the exceptio does in essence amount to a temporary defence. But non constat that the defence cannot succeed when a defective performance can no longer be remedied. In neither of the above two cases was that suggested. On the contrary, in BK Tooling at 435 C-D Jansen JA said:

"Soos gepoog is om hierbo aan te toon veronderstel die aanwending van die exceptio gewoonlik juis die voortbestaan van die kontrak en die moontlikheid dat volle prestasie nog kan geskied." (My emphasis.)

The untenability of a suggestion that the exceptio is only a temporary defence may be

illustrated by the following example. A contracts to build a house for B but his performance is defective in some respects. The defects can, however, be cured. Prior to the execution of remedial work, whether by A or another contractor, the house is burnt down as a result of a short circuit caused by lightning. Surely the exceptio does not vanish into thin air merely because remedial work is no longer possible.

I turn now to the contentions advanced before us by counsel for MRE. His main submission was that Panasonic's obligation to make payment of the sponsorship fee was reciprocal with MRE's obligations to hold the event and to "permit" Panasonic to sponsor the same, and not with any of MRE's further obligations. The main thrust of the argument ran along these lines. Clauses 6 to 11 show that all of MRE's obligations set out therein were to be performed prior to or on the day of the event. By contrast only the instalments provided for in sub-clauses 4.2.1 and 4.2.2 were to be made prior to that date. In terms of clause 4.3 these payments were refundable only if the event did not take place. Furthermore, if MRE failed to deliver the guarantees provided for in clause 4.3 Panasonic would not be obliged to pay the first two instalments until the first business day after the holding of the event. If the event was held under Panasonic's sponsorship, then not only would payments made under sub-

clauses 4.2.1 and 4.2.2 be non-refundable but, subject to a possible claim for damages flowing from MRE's breach of its further obligations, Panasonic would be obliged to pay the remaining instalments. This would be so because if reciprocity between the obligation to pay the sponsorship fee and all of MRE's obligations were intended clause 4 would have made that clear; the obligation to effect payment under sub-clauses 4.2.1 and 4.2.2 would not have been conditional only on the furnishing of the guarantees or the holding of the event, and Panasonic's right to a refund of those payments would not have been solely dependent upon the holding of the event.

Counsel's argument is flawed in several respects, but it suffices to mention the following. Only R5 million of the total sponsorship fee of R22 million was payable prior to the date on which the event was to be held. But, as counsel readily conceded, Panasonic would not have been liable to pay any of the instalments provided for in sub-clauses 4.2.3, 4.2.4, 4.2.5 and 4.2.6 if the event did not take place. Since those instalments were payable after the holding of the event, there was obviously no need to provide for a refunding of the same. And as regards the refunding of the first two instalments, this was not specifically linked to a breach of contract on the part of MRE. I say so because the amounts

would have been refundable if for any reason whatsoever - e.g. vis major - the event did not take place. Furthermore, since the parties could not have foreseen the extent, if any, of future breaches of contract by MRE, it would have been well-nigh impossible to make provision for a partial refunding of the first two instalments should the event be held but MRE be in breach of some of the obligations provided for in inter alia clause 6. In all probability they never anticipated that such breaches would warrant the withholding of even a major part of the total sum of R17 million which was payable after the staging of the event, and still less a claim to a refund of the first two instalments.

However, the most serious flaw in the argument is this. As stated, counsel for MRE conceded that Panasonic's obligation to pay the sponsorship fee was reciprocal with inter alia MRE's obligation to "permit" Panasonic to sponsor the event. But that "permission" did not exist in vacuo. It was specifically given concrete form in clause 6, the preamble to which reads:

"In consideration for the sponsorship by Panasonic in terms of Clause 4.1 MRE grants to Panasonic, and undertakes to procure that Panasonic is granted, the following rights
 . . . "

Clause 6.1.1 then provides that Panasonic will have the exclusive right to be the

official sponsor of the event. This is followed by any number of sub-clauses spelling out Panasonic's rights and, in most cases, MRE's corresponding obligations. Hence the conclusion is inescapable that the parties intended MRE's obligations under clause 6 to be reciprocal with Panasonic's obligation to pay the full sponsorship fee under clause 4.1.

Counsel for MRE contended, however, that Panasonic's undertaking, in terms of clause 4.1, to sponsor the event was not confined to payment of the sponsorship fee. Other clauses of the agreement imposed further obligations on Panasonic, so it was argued, and the phrase "in consideration for the sponsorship" in the preamble to clause 6 therefore comprised the consideration for the totality of Panasonic's obligations. I must confess to having difficulty in grasping the thrust of the contention. Be that as it may, the agreement did not lay upon Panasonic any obligation other than to pay the sponsorship fee. The most that can be said is that in terms of some clauses Panasonic, without being obliged to do so, had to take certain steps before it could call upon MRE to comply with its related obligations.

It will be recalled that in clause 4.2 payment of the sponsorship fee in instalments is stated to be subject to clause 4.4, 7, 8 and 9. The fact that only those four clauses, and not also clause 6, are mentioned in the introductory phrase of clause 4.2 led to a further contention

of counsel for MRE. In his submission the exclusion of clause 6 points to an intention of the parties that there should not be reciprocity between the obligation to pay the sponsorship fee and the obligations imposed by clause 6 upon MRE. The reality is, however, that the qualification brought about by the introductory phrase has nothing to do with reciprocity. It was inserted in clause 4.2 for the simple reason that clause 4.4 and the relevant sub-clauses of clauses 7, 8, 9 merely made provision for the deduction of certain amounts from the sponsorship fee. Those were amounts payable by MRE but actually paid by Panasonic.

It remains to deal with ancillary arguments put forward by counsel for MRE. Firstly it was submitted that any non-performance or defective performance of MRE's obligations could not be remedied after the holding of the event by either MRE or by a third party; that hence any reduction of the instalments payable under sub-clauses 4.2.3 to 4.2.6 could not represent the cost to Panasonic of having the incomplete or defective performance remedied by a third party, and that these considerations must have been in the contemplation of the parties when they entered into the agreement. Assuming all this to be true, it does not warrant counsel's conclusion that the parties could not have intended that Panasonic's obligations were to be reciprocal with MRE's further obligations. I need say no more than that the parties

could well have envisaged that in the event of non-performance or defective performance by MRE the total amount of R17 million payable under sub-clause 4.2.3 to 4.2.6 would be reduced by the value of the rights not enjoyed, or not fully enjoyed, by Panasonic (cf B K Tooling at p 423D-E.) In any event, the factors relied upon by counsel cannot militate against the clear indication of the parties' intention appearing from the preamble to clause 6.

Counsel for MRE also contended that it would be absurd if non-performance of any of MRE's "myriad" obligations would result in it not being entitled to be paid the balance of the sponsorship fee. However, it is well settled that the applicability of the exceptio is not dependent on the degree of non-performance (subject, of course, to the de minimis principle). Thus, a contractor who has to erect a building according to specifications may also have to comply with what is in effect a myriad of obligations, and if he fails to do so, a claim for the contract price may successfully be met by the exceptio irrespective of the extent of his breach of contract. Of course, in the postulated case the contractor is not necessarily remediless. If a proper case is made out for such relief, he may be entitled to claim a lesser amount than that provided for in the agreement. Since MRE did not seek such a remedy, it is unnecessary to speculate on how such lesser amount should have been determined.

But, argued counsel, it would be difficult for MRE to prove the extent to which the sponsorship fee should be reduced. That may be so, but should Panasonic's only remedy be a claim for damages, as contended for by counsel, it would be as difficult for Panasonic to prove the extent of the damages suffered by it. And it was after all MRE, and not Panasonic, that acted in breach of the agreement before the instalments under sub-clauses 4.2.3 to 4.2.6 became payable.

Finally, counsel for Panasonic relied upon sub-clauses 7.1, 7.3, 8.2, 9.2 and 14.1 as providing "indications which negative reciprocity" between MRE's further obligations and Panasonic's obligation to pay the sponsorship fee. It suffices to say that I find no such indications in those sub-clauses, or at any rate no indications which substantially weaken the above construction of the preamble to clause 6.

In conclusion I should say that I have not found it necessary to consider whether MRE's additional obligations under clauses other than clause 6 were reciprocal with Panasonic's obligation to pay the sponsorship fee. The reason is that the most important non-performances or defective performances relied upon by Panasonic concerned breaches by MRE of its obligations under clause 6.

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



H J O VAN HEERDEN
JUDGE OF APPEAL

Concur

Kumleben JA
Harms JA
Schutz JA
Plewman JA