35a/88

Case No 53/85
/MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

Between:

THE BANK OF LISBON & SOUTH AFRICA LTD Appellant

AND

ANTONIO DE ORNELAS First Respondent

JORGE DE COSTA DE ORNELAS Second Respondent

Coram: RABIE ACJ et JANSEN, JOUBERT, HEFER et GROSSKOPF JJA.

Heard: 9 MARCH 1987

Delivered: 30 MARCH 1988.

J U D G M E N T

JANSEN /....

JANSEN JA:

I have had the privilege of reading the judgment by JOUBERT JA, but I find myself, unfortunately, driven to a different conclusion.

The respondents (applicants in the Court a quo) raised the replicatio doli (generalis), but the underlying principles are the same as those of the exceptio doli (generalis).

Whether the exceptio has any role to play in our modern law is a matter of debate. The chief supporters of the defence are e g: P van Warmelo (Exceptio Doli 1981 De Jure 203-22); A J Kerr (The Principles of the Law of Contract 3ed 107-8, 137-42, 174; 1971 SALJ 408; 1981 THRHR 88-9, 93-4; 1981 SALJ 159); P Aronstam (Consumer Protection, Freedom of Contract and the Law, 168 et seq,

1979 THRHR 21 et seq); A D Botha (Unpublished thesis June 1981, Die Exceptio Doli Generalis in die S A Reg; 1980 THRHR 255-266 - where the author arrives at a contrary conclusion which he does not continue to support in his thesis). The main critic is J C de Wet. In his thesis, "Estoppel by Representation" in die S A Reg (1939), he deals with the exceptio at pp 83-89. He concludes that "die exceptio doli generalis geen aanspraaklikheids= beginsel bevat nie, en dus nie die grondslag van aanspraak= likheid by estoppel kan vorm nie". This dismissal of the exceptio doli (generalis) from the arena as a separate substantive defence has been adopted by some later writers, including Van Huyssteen (Onbehoorlike Beïnvloeding en

Misbruik/...

Misbruik van Omstandighede in die S A Verbintenisreg, 1980, p 23 n 174) and P J J Olivier (Aanspreeklikheid weens Onskuldige Wanvoorstelling by Kontraksluiting, 1964 THRHR 20,26,28), in respect of their particular fields of enquiry. They see the exceptio doli generalis merely as a label for a defence that the plaintiff has no cause of action.

Since the beginning of this century the exceptio has however often been raised in our Courts as a substantive defence. Single judges felt themselves constrained to recognize its existence, but their reactions run the gamut of unbelief (Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd, 1977(2) SA

436(T)), scepticism (e g North Vaal Mineral Co Ltd v Lovasz, 1961(3) SA 604(T)), circumspection (e g Novick and Another v Comair Holdings Ltd and Others, 1979(2) 116(W), 155H-157B) and enthusiasm (Rand Bank Ltd v Rubenstein 1981(2) SA 207(W)). In recent times a full bench of the Transvaal Provincial Division however had no difficulty in accepting that the exceptio doli constituted a defence which is not "'n skerp omlynde regswetenskaplike figuur nie maar 'n regsmiddel wat na gelang van al die feite in 'n gegewe geval aan 'n party toegeken word as die Hof meen dat daar anders ontoelaatbare onreg sou geskied" (Otto en 'n Ander v Heymans (1971(4) SA 148(T), 155 C-E); and a full bench of the Cape Provincial Division in

Sonday / ...

Sonday v Surrey Estate Modern Meat Market (Pty) Ltd

(1983(2) SA 521(C)) found it to be clear that the exceptio doli generalis "has been accepted as part of our law and applied as such for a considerable period of time, both by Provincial Divisions as well as the Appellate Division" (per TEBBUTT J). This Court has certainly always assumed that such a defence at least exists. Whether it has in fact gone further and applied the underlying principles is a question that will be returned to later.

The roots of the exceptio in its modern guise must be found in the treatment of the subject in the Digest title De Doli Mali et Metus Exceptione (D.44.4),

where / ...

where inter alia the following is found :-

> Ideo autem hanc exceptionem praetor proposuit, ne cui dolus suus per occasionem juris civilis contra naturalem aequitatem prosit. (D.44.4.1.1).

Seen as a substantive defence the exceptio would imply that in appropriate circumstances a Court could grant relief where the strict law would have an effect contra naturalem aequitatem, and in so doing it would modify the law. Broadly speaking this is what happened in Rome and in the course of time new defences developed as a result (e g exceptio non numeratae pecuniae etc).

Critics of the survival of the exceptio would have one believe that the defences so developed constituted a numerus clausus to this day. This would deny the possibility

of / ...

of the law being adapted according to the exigencies of the times and in the light of the changing *mores* and concepts of fairness and proper conduct. It must be emphasized that seen as a substantive defence the *exceptio* is no longer a procedural device, as it once was in the hands of the Praetor to enable the objective standard of *bona fides* to be applied to *negotia* which would otherwise have given rise to *judicia stricti juris*.

It / ...

It is said that the recognition of the exceptio doli in this sense would be an infraction of the freedom of contract and of the principle that pacta servanda sunt - that it would lead to legal uncertainty. Freedom of contract, the principles of pacta servanda sunt and certainty are not however absolute values. They did not prevent the modification in England of the common law by Equity, which inter alia gives relief against "unconscionable"bargains :-

> "There is a well developed jurisdiction in equity independent of the principles as to undue influence to set aside catching and unconscientious bargains. The English cases are centred in the last century. But in Australasia the jurisdiction still flourishes." (Meagher, Gummow and Lehane: Equity, para 1601).

Moreover / ...

Moreover, the twin concepts of freedom of contract and pacta servanda sunt have, during this century, increasingly come under assault as a result of inter alia rampant inflation, monopolistic practices giving rise to unequal bargaining power, and the large-scale use of standard form contracts (often couched in small print). (Cf. Asser-Rutten II, Algemene Leer der Overeenkomsten, 1979, Chapter V). In 1895 the Dutch jurist Molengraaf expressed the following view :-

> "Meer en meer wint de overtuiging veld dat het dogma der contractsvrijheid ..... niet als de hoogste wijsheid mag gelden. Men is gaan inzien, dat er hoogere beginselen zijn dan het pacta sunt servanda; dat het recht slechts dan een, 'ars boni et aequi' mag heeten, als het in overeenstemming is met ethische beginselen en tot doorvoering daarvan heeft medegewerkt."

(as) / ...

(as cited by Van Huyssteen op cit p 128 n5). Sub=

sequent developments in the Netherlands confirm his

assessment. The operational field of B W Art 1374.3

("Zij [overeenkomsten] moeten te goeder trouw worden

ten uitvoer gebragt") has expanded to include not only

the supplementing of an agreement ("aanvullende werking")

as a result of "de eisen van redelikheid en billikheid",

but also the limitation of an agreement ("beperkende

werking") (cf P Abas, Beperkende werking van de goede

trouw, 1972). This development has culminated in the

Nieuw Burgerlijk Wetboek Art 6.5.3.1:-

> "1. Een overeenkomst heeft niet alleen door partijen overeengekomen rechtsgevolgen, maar ook die welke, naar de aard van de overeenkomst, uit de wet, de gewoonte of de eisen van redelijkheid en billijkheid voortvloeien.

> 2. Een tussen partijen als gevolg van de overeenkomst geldende regel is niet van toepassing, voor zover dit in de gegeven omstandigheden naar maatstaven van redelijkheid en billijkheid onaanvaardbaar zou zijn."

In the United States a somewhat similar development has taken place. The Uniform Commercial Code contains provision against "unconscionable" contracts (U C C para 2.302) and this has, according to Calamari and Perillo (Contracts 2d 1970 para 9-39) "entered the general law of contracts". They cite the Restatement of the Law of Contract 2d (1979) Vol 2 para 208 :-

> "If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result."

The / ...

The authors in para 9-40 point out :-

> "'Unconscionable' is a word that defies lawyerlike definition. It is a term borrowed from moral philosophy and ethics. As close to a definition as we are likely to get is 'that which affronts the sense of decency'."

They also say in para 9-37 that "the legislative purpose of the section (viz of the U C C) is illuminated by the following language in the official comment :-

> 'This section is intended to make it possible for the courts to police explicitly against contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract.' "

The / ...

The ideal that the law should be certain, is often contrasted with adjudication by the length of the Chancellor's foot. In relation to such an argument adduced in Preller and Others v Jordaan (1956(1) SA 483(A)) against the acceptance of an extended meaning of dolus and the recognition of a remedy based on undue influence, FAGAN JA, delivering the judgment of the majority, said (at 493 E): "Daar is egter vertakkings van die reg waarin uit die aard van die saak die beginsels elasties moet wees omdat dit alleen aangedui kan word in woorde waarvan die toepassing in grensgevalle soms moeilik mag wees, maar dit in sigself kan geen rede wees om 'n andersins gesonde ..... remedie uit ons reg te weer nie".

Apart from statutory innovations, there are in any event a

number of well recognized instances in our law of contract where freedom of contract and the principle of pacta servanda sunt and the ideal of certainty give way to other considerations. A few examples may be mentioned. A creditor has a right to specific performance but a Court may in the exercise of its discretion refuse to make such an order. The discretion

> "is aimed at preventing an injustice - for cases do arise where justice demands that a plaintiff be denied his right to per= formance - and the basic principle thus is that the order which the Court makes should not produce an unjust result which will be the case, eg, if, in the particular circumstances, the order will operate unduly harshly on the defendant. Another principle is that the remedy of specific performance should always be granted or withheld in accordance with legal and public policy ....."
>
> (per HEFER JA: Benson v S A Mutual Life Assurance Society 1986(1) SA 776 (A), 783 D-E).

A restraint of trade is not per se invalid or unen=

forceable - but it is so if it offends against the public interest (Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984(4) SA 874(A)). In delivering the judgment of the Court, RABIE CJ points out :-

> "Omdat opvattings oor wat in die openbare belang is, of wat die openbare belang vereis, nie altyd dieselfde is nie en van tyd tot tyd kan verander, kan daar ook geen numerus clausus wees van soorte ooreenkomste wat as strydig met die openbare belang beskou kan word nie. Dit sou dus volgens die beginsels van ons reg moontlik wees om te sê dat 'n ooreenkoms wat iemand se handelsvryheid inkort teen die openbare belang is indien die omstandighede van die betrokke geval sodanig is dat die Hof daarvan oortuig is dat die afdwing van die betrokke ooreenkoms die openbare belang sou skaad." (891 H-I).

> "Die opvatting dat 'n persoon wat 'n beperking wil afdwing nie die las dra om te bewys dat dit redelik inter partes is nie, bring nie mee dat oorwegings van die redelikheid of onredelikheid van 'n beperking nie van belang is of kan wees nie." (893 H).

Die / ...

> "Die belangrike vraag is dus nie of 'n oor=
> eenkoms van so 'n aard is dat dit ab initio
> ongeldig is nie, maar of dit 'n ooreenkoms
> is wat die Hof, gesien die vereistes van
> die openbare belang, nie behoort af te
> dwing nie." (895 D-E).

The Court may reduce a stipulated penalty "to such an extent as it may consider equitable in the circumstances" (Act 15 of 1962, section 3 - reinstating the common law).

Not only contracts against public interest or public policy are subject to control by the Court, but also those offending the boni mores. In this field reference must be made to the sense of justice ("regsgevoel") of the community, as is the case in delict, where it is now recognized that there is no numerus clausus of actionable wrongs.

Perforce our Courts must in a variety of cases work with the prevailing mores and the sense of

justice / ....

justice of the community as a norm. In principle there can be no real objection in the case of the exceptio to determine an objective standard of aequitas along similar lines.

In discussing the exceptio reference is some= times made to its fate in German law. It is said that at the time of the introduction of the BGB it was a dead letter. However, the true position seems to be that it was considered obsolete because its underlying principles were absorbed into the requirement of bona fides (cf BGB article 242). Reference to a few writers will illustrate the general approach: A Brinz, Lehrbuch der Pandekten (1884) p 379:-

"So/...

"So stehen wir in Betreff der Frage: gibt es noch Exceptionen?? im wesentlichen und mehr als je [8]) zu Albrecht, dem in neuerer Zeit durch Krüger, Eisele, Bekker [9]), Birkmeyer wieder Bahn gebrochen ist. Exceptionen aber um der neu auftauchenden Billigkeiten oder Billigkeitsgründe willen für deren erste Geltendmachung bis zu ihrer allgemeinen Anerkennung (wo die Exceptio dann zur Einrede würde) mit Birkmeyer fortzuführen, scheint uns weder nothwendig noch möglich."

F Regelsberger (Pandekten (1893) p 686 :-

"V. Es gab bei den Römern eine exceptio des allgemeinen Inhalts, dafs sich der Kläger durch seine gegenwärtige Rechtsverfolgung mit Treu und Glauben in Widerspruch setze. Das war die exc. doli generalis seu doli praesentis[9]. Durch die Aufnahme in die formula wurde dem Beklagten die Möglichkeit eröffnet, vor dem Judex jeden besondern Exceptionsgrund zur Geltung zu bringen (L. 2 § 5 de doli m. exc. 44, 4), aber auch eine sonstige Bemänglung des Klaganspruchs, indem die Frage, ob sich die klägerische Rechtsverfolgung als dolos darstellt, in das Ermessen des Judex gestellt war[10].

In der prozessualischen Bedeutung ist die exc. doli gen. für uns weggefallen. Dagegen ist der materielle Begriff in unser Recht übergegangen, dafs eine Rechtsverfolgung unzulässig ist, die mit den Grundsätzen von Treu und Glauben in Widerspruch steht. Ein so allgemeiner Rechtssatz ist allerdings nicht ohne Bedenken, da er dem richterlichen Ermessen einen ungewöhnlich freien Spielraum einräumt. Allein eine Rechtsprechung, die mit dem lebendigen Rechtsbewufstsein des Volks in Einklang bleiben will, kann seiner nicht entraten[11]. Bewufste Rechtswidrigkeit des Klägers ist kein Erfordernis (L. 36 V. O. 45, 1). Man kann diese Verteidigung Einrede der anstöfsigen Rechtsverfolgung nennen. Sie ist eine verneinende Einrede."

Windscheid - Kipp, Lehrbuch des Pandektenrechts (1900)

p 180 n 7 in fine :-

"In der Praxis ist exceptio doli häufig nichts als der Ausdruck für die Geltendmachung des Princips der bona fides von Seiten des Beklagten, was dem römischen Grundgedanken der exceptio ganz entspricht."

H Dernburg/...

H Dernburg - P Sokolowski (System des Römischen Rechts (1911)) p 323-4 :-

> "Die produktive Kraft der exceptio doli generalis ist nicht erloschen. Fortwirkend hat sie lebendige Kraft. Sie ist ein Organ des wahren Rechts in Fällen geblieben, in welchen die Anwendung einer gesetzlichen Regel dem Wesen der Sache und den Zwecken des Rechtes zuwiderliefe.[19] So auch unter der Herrschaft des B.G.B."

(However, in the end art 138 ("a transaction that offends good morals (guten Sitten) is void") proved to be a more fruitful source of development. (Cf John P Dawson: Unconscionable Coercion: The German Version, 1976 Harvard Law Review, p 1041).

In our law the requisite of good faith has not as yet absorbed the principles of the exceptio doli nor has the concept of contra bonos mores as yet been specifically applied in this field. To deny the exceptio right of place would leave a vacuum.

This / ....

This Court has certainly not considered the exceptio doli to be an empty shell. In Trust Bank van Afrika Bpk v Eksteen (1964(3) SA 402(A) at 411 A-C) the majority of this Court referred inter alia to Waterval Estate and Goldmining Co Ltd v New Bullion Gold Mining Co Ltd (1905 TS 717)as a case on estoppel where "nie nagelaat is om na die grondslae waarop dit in ons reg sou rus, te verwys nie". In that case CURLEWIS J said that "the doctrine of estoppel in pais is merely an extended interpretation of the principles underlying the exceptio doli mali". He specifically refers to D.44.4.1. Clearly what happened here was that a new defence, not specifically described in our authorities, was thus accepted on the ground of "natural justice". To that

extent / ...

extent the law was modified. In Preller and Others v Jordaan (supra) the majority of the Court extended the meaning of dolus as to enable an equitable remedy on the ground of undue influence to be adopted where the existing authorities did not go as far. (This was a case of dolus praeteritus, but it is nevertheless an instance where the law was modified as a result of equitable consideration). In Weinerlein v Goch Buildings Ltd (1925 AD 282) the Court accepted a remedy of rectification not on any contractual theory of consensus but as a result of equity. It is true that DE VILLIERS JA cited what he considered to be direct authority for the remedy (at p 289), but both WESSELS and KOTZé JJA refer to the exceptio doli. In Mouton v Hanekom (1959(3) SA 35(A) at 40 B-C) a full bench of this Court applied the following dictum of WESSELS JA (at p 292 of the Weinerlein-case) :-

"The / ...

> "The exception (exceptio doli) lies whenever the Court regards it as a fraudulent act to rely on your summum jus when you know full well that your claim is founded on a mutual error."

The existence of the exceptio doli as a defence based on equity is demonstrated by the decisions of this Court; moreover, our lower courts have overwhelmingly assumed for many years such a defence to be available. Although the underlying principle is to be traced back to the Digest it seems, in view of the aforegoing, to be of no crucial import whether the leges dealing with the exceptio were received in Holland or fell into disuse. However, it is significant that Groenewegen in his De Legibus Abrogatis, where he deals with D.44.4.,

does / ...

does not state the relevant leges to be inapplicable.

Nor does Voet (ad Pandectas) do so under this Title, although he is careful to state where the modern law differs in other instances. In 1793, J van der Linden (ad Voet 1.1.2) says the following :-

> "Jure nos Romano uti, quoties scriptae apud nos Leges, vel recepti mores & consuetudines de re controversa nihil certi statuunt, satis constat, Merula Man. van Proced. Lib. I. Tit 4 Cap.1 § 5 n. 6 nunc enim Jus Romanum, ut jus commune, esse receptum, multae posteriorum Principum, Caroli inprimis V. & Philippi II, multae item Ordinum Hollandiae Leges significant: palam quippe, deficientibus Legibus propriis, remittunt ad jus scriptum vel commune, quo utroque Romanorum Civile intelligi certum est. Atque ita servat utraque Curia, nisi vel manifesta Reipublicae ratio, vel perpetuae Consuetudinis auctoritas obstet. Bynkershoek in Praefat. ad observ. jur. Rom. part. 1. pag. 1 & 2."

This / ...

This must be read in conjunction with Van der Keessel's Rule 11 as stated in his Praelectiones :-

> "Wie die Romeinse Reg aanvoer vir sover dit nie openlik strydig met uitdruklike wette of 'n bekende gebruiksregreël of die stelsel van die vaderlandse reg of 'n ander instelling van die staat is nie, het daarmee 'n goeie grond vir sy eis aangevoer en word nie verplig om die besondere erkenning daarvan te bewys nie."
> (Transl. Gonin Vol I p 81).

It would seem that in the absence of contrary statutes or usage it must be accepted that the principles of the exceptio doli were in fact part of the Roman Law that was received in the Netherlands. Although there appears to be no or little mention of the exceptio, in the sense discussed above, being used in practice, the occasion may not have presented itself in view of the social circumstances existing and the mores of the times. Van Huyssteen

(at / ...

(at p 72) refers to Obs. Tum Novae vol 2 nr 1049 where the Hooge Raad had applied D.45.1.36. Van Huyssteen considers the lex was cited "heeltemal buite sy betekenis", but was this not rather an example of the Court using the principles of the exceptio to extend a remedy where there would not otherwise have been one available?

The exceptio doli generalis constitutes a substantive defence, based on the sense of justice of the community. As such it is closely related to the defences based on public policy (interest) or boni mores (cf Ismail v Ismail 1983(1) SA 1006(A), 1025F-1026C). Conceivably they may overlap: to enforce a grossly unreasonable contract may in appropriate circumstances be considered as against public policy or boni mores. By the nature of things no general definition can be given of what would consti= tute dolus. In Zuurbekom Ltd v Union Corporation

Ltd (1947(1) SA 514(A)) an example is to be found: where the enforcement of a "remedy by the plaintiff would cause some great inequity and would amount to unconscionable conduct on his part" (per TINDALL JA at p 537). However, each case must be judged on its own facts in the light of the sense of justice of the community.

The facts in the present case present a number of salient features: the respondents were suppliants for an overdraft (or its increase); they had not equal bargaining power with the Bank; standard forms with standard terms were used by the Bank; the Bank stipulated for security far beyond its needs; the respondents never

actually / ...

actually contemplated that the security would cover anything but the overdraft. These facts go beyond mere unreasonableness of the contract per se (cf Paddock Motors v Igesund 1976(3) SA 16(A)). In my view it would offend the sense of justice of the community to allow the Bank to use the strict wording of the documents to retain the securities after payment of the overdraft. I find support for this in the views expressed by BOTHA J in Rand Bank Ltd v Rubenstein (1981(2) SA 207(W)) and that of the judge a quo in the present matter.

I would dismiss the appeal.

E.L. JANSEN JA.