IMPROVAIR (CAPE) (PTY) LTD v ESTABLISSEMENTS NEU 1983 (2) SA 138 (C)

Citation 1983 (2) SA 138 (C)
Court Cape Provincial Division
Annotations

GROSSKOPF J

1982 *August* 24 - 27; *November* 26

Flynote : Sleutelwoorde

International law - Contract - Proper law of contract - Determination of where no express or tacit choice of law made by parties - Intention to be imputed to parties - Factors to be considered - Semble: modern tendency to adopt objective approach, viz to determine the system of law with which the transaction has its closest and most real connection.

Headnote : Kopnota

The plaintiff, a South African company, and the defendant, a French company, had formed an association with a view to their submitting joint tenders for the installation of the air-conditioning in a nuclear power station to be built at Koeberg, Cape. They had concluded a written agreement on 6 December 1977 in which they, *inter alia*, specified their respective obligations and responsibilities for the tenders and for the work to be done if their tenders were successful. At that stage they had no idea whether their tenders would be accepted, nor did they know what form their contracts with one or more of the members of the consortium who had contracted to build the power station would take if their tenders were accepted. Their relationship *inter se* would not be affected by those contracts,

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whatever their form and terms, as this would continue to be regulated by their written agreement. Their tenders were accepted by each member of the consortium and separate contracts were concluded with each. Arising out of a dispute between the parties in regard to their contract with one of the construction companies, the plaintiff sued the defendant for relief pursuant to their agreement. The defendant filed a special plea in which it raised the issue whether French or South African law governed the agreement. No express choice of law had been made in the contract nor was there any evidence that a tacit choice had been made.

Held, that, where no express or tacit choice of law had been made, an intention in regard thereto had to be imputed to the parties.

Held, further, that, at the time when the agreement was concluded, the parties' connection with work to be done in South Africa was either a matter of future uncertainty or one of unrealised hope; that the connection with South Africa was at that stage too tenuous to

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justify a conclusion that South African law was the proper law of the contract.

Held, further, upon an examination of the terms of the agreement, that the defendant had played the dominant role in the association between the parties in the sense that it was responsible for directing all administrative, financial and technical aspects both of the preparation of the tenders and the work on the site.

Held, accordingly, that French law had the closest and most real connection with the transaction between the parties and that they must be taken to have intended French law to apply. The special plea was thus upheld with costs.

Semble: The modern tendency is to adopt an objective approach to the determination of the proper law of a contract where the parties did not themselves effect a choice, ie to determine "the system of law with which the transaction has its closest and most real connection", rather than to follow the traditional solution which is to impute an intention to the parties as to what is the proper law of the contract, as held in *Standard Bank of South Africa Ltd v Efroiken and Newman* 1924 AD 171. From a practical point of view the different formulations would, however, seldom, if ever, lead to different conclusions. The legal system "with which the transaction has its closest and most real connection" or "die engste verbonde regstelsel" would in most cases be the one which the Courts would presume to have been intended by the parties. The Court is, however, probably bound by the rules laid down the *Efroiken* case, but the application of the objective formula, which is preferable, would not lead to a different result.

Case Information

Argument on a special plea. The facts appear from the reasons for judgment.

S Aaron SC (with him *D G Scott*) for the plaintiff.

R J Grbich for the defendant.

Cur adv vult.

Postea (November 26).

Judgment

GROSSKOPF J: The plaintiff, a South African company formerly known as Associated Air Conditioning and Refrigeration Corporation (Pty) Ltd, entered into a written contract with the defendant, a French company, on 6 December 1977. Various disputes have arisen between the parties, and the plaintiff instituted the present action for relief pursuant to the contract. The only issue which is now before the Court is one raised by the defendant in a special plea, viz whether the contract is governed by French or by South African law. It is common

cause that, if French law applies, the action cannot proceed and the disputes between the parties have to be settled by arbitration conducted in terms of French law. If, on the other hand, the contract is governed by South African law the defendant does not wish to have the matter settled by arbitration, and the special plea must then fail. In such event the defendant

must be given the opportunity to file a plea on the merits and the issues raised by such a plea will have to be decided by this Court.

It will be convenient to commence by setting out the relevant facts. The plaintiff is a company specialising in ventilation and air-conditioning. It is a member of a large South African group of companies which is prominent particularly in the construction industry. The defendant is a large and long-established French company which is also engaged in the field of ventilation and air-conditioning. In February 1966 the parties concluded a so-called licensing agreement (exh A25) whereby the plaintiff was licensed to design, manufacture and sell the defendant's air-conditioning equipment in respect of the textile industry. This licence covered the Republic of South Africa and adjacent areas. The agreement contained a clause which specifically recorded that the agreement would be governed by and construed in accordance with the laws of France. The agreement was concluded for a fixed period of ten years after which it would continue from year to year unless terminated by notice. In fact it has not been terminated and is still in force.

The defendant's activities in the field of ventilation and air-conditioning are however not limited to the textile industry. In particular it has a separate division, called the Division U, which specializes in the ventilation and air-conditioning of nuclear installations. On 30 June 1967 the plaintiff wrote to the defendant to inform it that nuclear power generation was to be introduced in South Africa. The letter continues by requesting the assistance of the defendant in obtaining information and in jointly seeking to secure contracts in respect of the air-conditioning of the proposed nuclear power station. This letter was followed by a further one of 5 July 1967 stressing the plaintiff's interest in the matter. The defendant replied on 24 July 1967 to the effect that its Nuclear Power Department had been contacted and would make every effort to collect and transmit relevant information to the plaintiff.

There the matter rested for some years. What happened in the meantime was related in evidence by Mr Forgeois, who was at the time in charge of the defendant's Division U. The defendant had previously been associated with other French companies, and in particular with three companies designated in evidence as Framatome, Alsthom Atlantique and CGEE Alsthom, in the construction of nuclear power stations in France. Among these power stations was one at Tricastin. These three companies in due course formed the consortium which contracted with Escom to erect a nuclear power station at Koeberg, near Cape Town, on the model of the one at Tricastin. For convenience I shall refer to these three companies collectively as the consortium. Each of the three companies which comprised the

consortium was responsible for a part of the Koeberg project, and all three required the services of experts in ventilation and air-conditioning.

At some time, probably in 1974, Mr Forgeois was approached by Framatome and invited to submit a tender for the ventilation and airconditioning at Koeberg. At the same time he was told that the South African authorities required that South African companies should participate in the venture. Mr Forgeois knew about the relationship between plaintiff and defendant and was aware of the plaintiff's approach to the defendant in 1967. He made enquiries from the defendant's textile division and received favourable reports about the plaintiff. On 18 September 1974 the defendant wrote to the plaintiff informing it of the

approach from Framatome and requesting particulars about the plaintiff's capacity to provide the goods and services required for the Koeberg project. The plaintiff replied in a letter dated 3 October 1974. Thereafter further correspondence followed in which the parties explored the possibility of co-operation. By 13 March 1975 the relationship between the parties had reached the stage that the plaintiff considered "our association with yourselves" a sufficient reason to consult the defendant about overtures which the plaintiff had received from other foreign companies interested in the Koeberg project. At the defendant's request, the plaintiff did not respond to these overtures.

On 11 June 1975 the defendant telexed the plaintiff suggesting *inter alia* that Mr King, a director of plaintiff's, should visit France

"for a clear and precise definition of your possibilities as well as those existing in your country".

Mr King accepted this suggestion and travelled to France in October 1976. During his visit he had discussions with representatives of the defendant as well as representatives of the three members of the consortium. In their discussions Mr King and representatives of the defendant agreed in principle on the basis upon which the plaintiff and defendant would co-operate in the preparation and submission of tenders. At that stage the defendant had already provided preliminary estimates to the three members of the consortium. This had required a great deal of discussion and negotiation between these companies and the defendant, in the course of which attention had obviously also been given to the role which the plaintiff was to play.

After Mr King's visit to France the parties proceeded with their preparations for the tenders. By May 1977 it was considered desirable that one of the plaintiff's engineers, Mr Gould, should visit France to work on the tenders. On that occasion he spent some months there. On 23 August 1977 the plaintiff sent to the defendant a tender in respect of the plaintiff's share of the work to be done for Framatome; and on 23 September 1977 it sent, in the same way, a tender for the work to be done for Alsthom Atlantique. The defendant did not, however, immediately transmit these tenders since the arrangement between the plaintiff and the defendant was that their tenders would be complementary and would be submitted jointly.

On 24 October 1977 Mr Gould was urgently summoned by the defendant to France because CGEE Alsthom wanted a tender by 10

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November 1977, and Mr Gould's assistance was required for its preparation. This deadline was apparently extended because on 17 November 1977 we find that a meeting was held between Mr Gould and representatives of the defendant and CGEE Alsthom about the structure of the tender to be submitted by the plaintiff and the defendant; and on 21 November 1977 the plaintiff addressed its tender to CGEE Alsthom, via the defendant. Framatome had written to the defendant inviting a tender by 25 November 1977 at the latest.

During Mr Gould's visit, the defendant prepared a draft agreement between the parties. Mr Rigaut, an engineer, drew up a document by extracting and, where necessary, adapting

clauses or paragraphs from similar contracts previously concluded by the defendant with various other companies in France. The completed draft was submitted to Mr Forgeois for his approval and, after translations into English, the draft was handed to Mr Gould under cover of a letter dated 18 November 1977 to take back with him to South Africa. In this letter the defendant asks the plaintiff to examine the draft "and return a copy to us with your agreement or your possible comments".

Mr King met Mr Gould in Cape Town on 24 November 1977 and discussed the whole matter with him. He also telephoned the defendant, and was told that it was essential for him to visit France before the end of the year. On 5 December 1977 he arrived in Lille. He had the draft contract with him, which had in the meantime been approved by the plaintiff. On the next day (ie 6 December 1977) the contract was signed on the plaintiff's behalf by Mr King, and on the defendant's behalf by Mr Forgeois.

It will be convenient at this stage to set out the provisions of the contract. I quote it in full since no part can in my view be considered irrelevant. It reads as follows:

"Agreement

between Associated Air

and Neu

Article I

Following the invitation to tenders for air-conditioning and ventilation equipment for 900 Mw nuclear power plants making up the two parts of Koeberg, Associated Air and Neu decided to submit joint and several offers for the whole of the aforementioned equipment.

Depending on the requests of the different customers, the orders should be sent:

either to Neu alone,

or to the two companies (separate contracts or not).

The services and supplies for which each company is responsible are to be specified for each order, the general basic principles being nonetheless defined in this protocol and in the Technical Appendix.

In the case of orders, the two companies agree to produce, depending on the needs of the project, the different installations, according to the specifications and costs estimates submitted as tenders and according to the customers' specifications.

The association shall end on the day of the final payment of the work carried out.

For the application of the present articles, are designated as follows:

Neu.....N.

Associated Air..... AA.

Article II

The two companies hereby declare that they are free of any previous

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commitment of the same nature and agree to form this exclusively reciprocal joint and several association.

Article III

N is responsible for directing the operations. To this effect, it will have the following responsibilities:

to represent the association with regards to the customers (or their representatives) and to ensure a liaison with them concerning all administrative, financial and technical problems (except possibly in the case of a direct assembly contract order to AA),

to forward to AA copies of documents received from or sent to the customers or their representatives,

to coordinate the execution studies and establish the plans for executing the work in agreement with AA,

to report when needed on the progress of the works, on complementary offers or modifications, and to take action concerning the resulting payments,

to keep the accounts of the operation constantly up to date, as far as the distribution of the payments is concerned,

and in a general manner, to study and propose solutions capable of solving problems concerning the function and representation of the association.

Article IV

Each company assumes the technical and financial responsibility of its part of the contract, and receives payment corresponding to its services and supplies, from the customer.

For each specific order, an appendix to the present agreement will specify the amounts to be due to N and AA.

Article V

The payments by the customers are to be as follows:

in Francs for the French part,

in Rands for the South African part.

The payments in South Africa will be:

either deposited on an N bank account with immediate transfer on to an AA account (in the case of an order only concerning N),

or deposited on an AA bank account (in the case of a separate order to AA).

In the latter case, AA must notify N immediately of the payments carried out.

Article VI

Except for the application of art III above, each company will manage its works independently, will cover charges due to their execution, and will provide a personal guarantee.

Each company will assume full and entire responsibility of its works and of damages of any nature, be they direct or indirect, that could result from a lapse from its obligations, in particular in the case of delay, faulty construction, defects in the materials or poor workmanship. As a general rule, the weight of the responsibility incurred falls on the company of the two which is to blame.

After final handover, each company continues to be responsible for the consequences of its works.

It will cover all the civil responsibility risks concerned, according to the rules of common law, both during the works and after their hand-over.

The two companies must mutually prove having underwritten insurances.

The two companies have their own quality organization, and are personally responsible of their 'quality insurance' services.

Article VII

In the event of penalties or of non-payment concerning part of an order, two cases can be considered:

1. If the loss is due to an error or delay caused by one of the two companies, this company agrees to pay the corresponding amount to the assignee. If the funds are not to be transferred immediately, they will be entered as debit to the company responsible until final payment.

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2. If the loss is not definitely imputable to either of the two companies, it will be taken in charge by the association, the consequent lack of payment being withstood by each member in proportion to its share of the work.

Article VIII

In case of default of one of the two companies, for any reason whatsoever, all the financial consequences will be the responsibility of the defaulting company.

Article IX

The two companies will attempt to amicably resolve any disagreement concerning the interpretation or execution of the present agreement.

In the case of failure to reconcile, the two companies must each designate an arbitrator and agree to submit to the common decision of the arbitrators if they come to an agreement concerning the dispute.

If the two arbitrators cannot come to an agreement, they are to designate a third arbitrator whose decision cannot be appealed.

If the two arbitrators cannot agree on the choice of the third arbitrator, the latter will be named by injunction. The arbitrators will have the normal power of arbitrators, and will not be compelled to conform to the delays and forms of procedure under pain of being declared void by the rules of procedure.

Article X

The terms of this protocol also apply in the case of future extensions, be they foreseeable or not, during a time lapse of five years, starting from the first contract obtained.

However, either of the two companies is always free to not put in a tender, hence handing over any further portions of work to the other company.

Article XI

When, because of the joint responsibility of the two companies in regard to the customers, the association is held responsible for works incumbent on one of the two companies, the company responsible agrees to make it immediately a personal affair, and to cover all the financial and other consequences resulting from decisions, complaints or coercive measures from the foreman."

The technical appendix, to which reference is made in the contract, lays down in general terms the distribution of duties between the parties, but adds "to be completed later for each separate contract". The defendant's duties were in essence those already defined in art III of the contract with additional obligations to supply certain items of equipment. The plaintiff's duties were in general to supply the rest of the equipment and to do the work on site at Koeberg.

After 6 December 1977 the parties continued their co-operation. This entailed extensive negotiations with the three members of the consortium. For the purpose of finalizing the tenders and negotiations Mr Gould spent months in France. Ultimately the joint venture produced results. The final tender to Framatome was submitted in about October 1978, and on 5 February 1979 this was accepted. The Framatome contract was concluded between Framatome and the defendant. The defendant in turn subcontracted with the plaintiff by means of a written order dated 5 July 1979. CGEE Alsthom formed a South African division which accepted the plaintiff's tender on 27 February 1979. Its head office in France had apparently already contracted with the defendant on 2 June 1978. A contract was also concluded with Alsthom Atlantique. The parties proceeded to perform these various contracts. However, in relation to the Framatome contract, disputes arose, which form the

subject-matter of the present action.

I return now to the question at issue, viz whether the disputes under the contract of December 1977 fall to be decided under French law or

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South African law. This involves the determination of what is usually called the proper law of the contract, although the expression has been criticized (see Spiro *Conflict of Laws* at 166 - 7). By the proper law of a contract is meant the system of law which governs the interpretation, validity and mode of peformance of the contract. It is often said that the proper law is ascertained in terms of what the parties agreed or intended or are presumed to have intended. See, eg, Joubert *The Law of South Africa* vol 2 at 356 (chapter by *C W H Schmidt*). Where the parties expressly agree that their contract is to be governed by a particular legal system, there is usually no difficulty in finding that the agreed system constitutes the proper law of the contract. Difficulties arise, however, where there is no express agreement. In such event there may be cases in which a court may conclude that the contract contains a tacit term concerning the law to be applied. I use the expression "tacit term" in the sense discussed in cases such as *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) at 525 - 6, 531 - 3. It is clear that such a term should not readily be implied - in the oft-quoted words from Reigate v Union Manufacturing Co* 118 LT 479 at 482 it should be implied only "if it is necessary in the business sense to give efficacy to the contract". This formulation would not often be helpful in determining what the proper law of the contract is, because, although it may often be necessary for business efficacy that some law be designated to govern the contract, the requirements of business efficacy would seldom dictate that the governing law should be system A rather than system B. There may nevertheless be circumstances, eg, where the contract deals with concepts peculiar to a particular system, in which the parties may be held to have agreed tacitly that their contract should be governed by a particular legal system. I should imagine, however, that such cases would be rare.

The true problem arises where no express or tacit agreement was concluded. The traditional solution to this problem is to impute an intention to the parties. In *Standard Bank of South Africa Ltd v Efroiken and Newman* 1924 AD 171 at 185 DE VILLIERS JA said:

"... it must not be forgotten that the intention of the parties to the contract is the true criterion to determine by what law its interpretation and effect areto be governed... But that also must not be taken too literally, for, where parties did not give the matter a thought, courts of law have of necessity to fall back upon what ought, reading the contract by the light of the subject-matter and of the surrounding circumstances, to be presumed to have been the intention of the parties."

This approach, which relied heavily on earlier English authorities, is no longer followed in English law. In *Bonython v Commonwealth of Australia* 1951 AC 201 at 219 Lord SIMONDS, in delivering the judgment of the Privy Council, said the following:

"... the substance of the obligation must be determined by the proper law of the contract, ie, the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection."

This formulation has been applied by English Courts in subsequent cases, which are collected in *Coast Lines Ltd v Hudig & Veder Chartering NV* (1972) 1 All ER 451 (CA) at 457. In this latter case MEGAW LJ discussed the *Bonython* formula as follows (at 457 - 8):

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"I think it is not without significance to note that the connection which has to be sought is expressed to be connection between the *transaction*, ie the transaction contemplated by the contract, and the system of law. That, I believe, indicates that, where the *actual* intention of the parties as to the proper law is not expressed in, and cannot be inferred from, the terms of the contract (so that it is impossible to apply the earlier part of the *Bonython* formula, the system of law 'by reference to which the *contract was* made'), more importance is to be attached to what is to be done under the contract - its substance - than to considerations of the form and formalities of the contract or considerations of what may, without disrespect, be described as lawyers' points as to inference to be drawn from the terms of the contract."

No South African case has been quoted to me in which the *Bonython* formula has been considered with reference to our law. In *Benidai Trading Co Ltd v Gouws & Gouws (Pty) Ltd* 1977 (3) SA 1020 (T) a Full Bench of the Transvaal Provincial Division did, however, place much reliance on the decision of the House of Lords in *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* 1971 AC 572, in which *Bonython's* case was followed and applied. A thorough discussion of the role played in our law by the presumed intention of the parties in the ascertainment of the proper law of the contract where no express or tacit choice of laws was made is to be found in *Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg* by J C W van Rooyen, published in 1972. This author reaches the following conclusion at 217 - 8 of this work:

"Indien daar geen werklike regskeuse was nie, is dit volgens oordeel van die skrywer onsuiwer om van 'n vermoedelike bedoeling te praat. Afgesien daarvan dat dit 'n *contradictio in terminis* is om 'n objektiewe faktor (vermoede) naas 'n subjektiewe faktor (bedoeling) in een asem to besig, is dit verder onrealisties om van 'n bedoeling te praat as daar geen bedoeling teenwoordig is nie. In die Anglo-Amerikaanse en Suid-Afrikaanse regspraak kom hierdie onsuiwerheid nog telkens voor, maar gelukkig is daar 'n sterk beweging daarteen, in die Europese regspraak en literatuur waarneembaar.

Dit word aan die hand gedoen dat daar, by gebrek aan 'n regskeuse, 'n ondersoek van die sosiale funksie van verbandhoudende regsreëls moet plaasvind. Sodra die sosiale funksie bepaal is, moet die feitelike aanknoping van die kontrak met die geldingsgebied van daardie regsreël ondersoek word en alleen só sal bepaal kan word of die kontrak binne die geldingsfeer van een regstelsel, ter uitsluiting van 'n ander, val; steeds moet die engste verbonde regstelsel aldus bepaal word. Mettertyd sal dit dan ook blyk dat die belangeswaartepunt gewoonlik by die een regstelsel (bv die reg van die verkoper) val. Op hierdie wyse sal die oplossings mettertyd 'n eenheidspatroon aanneem en sal internasionale regsekerheid toeneem. Daar moet dus nie, in navolging van ons ou skrywers, 'n magiese en allesoorheersende betekenis geheg word aan die *locus contractus* of *solutionis* nie. Dit is dan ook te

betreur dat ons Howe soveel waarde heg aan die *locus solutionis*. Veel meer waarde kan volgens skrywer byvoorbeeld geheg word aan die gemeenskaplike domisilie; die domisiliêre regstelsel het juis die behartiging van die kontraktante se belange ten doel en behoort gevolglik oor die algemeen 'n belangrike rol te speel. Dit is betekenisvol dat ons Howe al by geleentheid die sosiale funksie van die moontlik toepaslike regsreël ondersoek het, eerder as om werktuiglik oor te gaan tot 'n toepassing van die *lex rei sitae*, die *lex loci solutionis* of die*lex loci contractus*.

Die *lex causae* is dus die gekose regstelsel of by gebrek aan 'n keuse, die engste verbonde regstelsel."

See also *Spiro* (*op cit* at 158 - 60).

The above authorities demonstrate, in my view, that the modern tendency is to adopt an objective approach to the determination of the

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proper law of a contract where the parties did not themselves effect a choice. From a practical point of view the different formulations would however seldom, if ever, lead to different conclusions. The legal system "with which the transaction has its closest and most real connection" (*Bonython's* case *supra*) or "die engste verbonde regstelsel" (*Van Rooyen* (*supra*)) would in most cases be the one which the Courts would presume to have been intended by the parties. Since I am probably bound by the rules laid down in *Efroiken's* case *supra* it is comforting to know that application of the *Bonython* formula, which, with respect, I prefer, would not lead to a different result.

Some subsidiary points should be noted here. An indivisible contract laying down reciprocal rights and obligations can, as a matter of logic, not be governed by more than one proper law. I exclude contracts where the parties expressly agreed otherwise, or possibly some other exceptional cases. But in the ordinary contract which forms an organic whole the parties' rights and obligations would be distorted if some were to be governed by one system of law and others by another. The same logic applies in a temporal sense - the proper law which is assigned to a contract at the time of its formation should continue to apply until all rights and obligations thereunder are extinguished.

The rule that a contract is normally subject to a single proper law has, however, one exception, or apparent exception. Although the substantive obligations of the parties should be governed, and should continue to be governed, by a single system of law, the manner of performance may differ according to the *lex loci solutionis*. See *Van Rooyen* (*op cit* at 196 - 202, 209); Cheshire and North *Private International Law* 10th ed at 238 - 9; *Auckland City Council v Alliance Assurance Co Ltd* (1937) 1 All ER 645 (PC) at 655 - 6; *Mount Albert Borough Council v Australian Temperance and General Mutual Life Assurance Society Ltd* (1937) 4 All ER 206 (PC) at 214; *Zivnostenska Banka National Corporation v Frankman* (1949) 2 All ER 671 (HL) at 683.

In *Efroiken's* case *supra* at 188 - 9 and *Shacklock v Shacklock* 1948 (2) SA 40 (W) at 51 appear suggestions to the effect that a single contract would or might be governed by different proper laws merely because there are more than one *locus solutionis*. If this is the true meaning of these *dicta* which were *obiter* only, I am in respectful disagreement

therewith.

I turn now to the application of the law to the facts of the present case. It is common cause that the contract of December 1977 contains no express choice of law. It was however argued by Mr *Grbich*, who appeared for the defendant, that a tacit agreement to submit to French law should be inferred. The factors upon which he relied are, for the greater part, also relevant to the further enquiry, viz what, in the absence of consent, the presumed intention of the parties was, or which system of law has the closest and most real connection with the transaction. It will accordingly be convenient to consider the relevant facts with reference to all the questions which arise where no express choice of laws exists.

I propose dealing first with matters which were relied upon in argument but to which I attach little or no weight. The first is the licensing

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agreement of 1966. As noted above, this agreement contains a specific choice of French law. The contract of December 1977, although between the same parties, was of an entirely different type and involved a different department of the defendant company. In my view it is a *non sequitur* to argue that, because the parties agreed that their agreement in 1966 should be governed by French law, they must be taken to have intended their contract of 1977 also to be so governed. It may even be argued, with equal lack of cogency, that their failure to include a reference to French law in their 1977 agreement indicated a change of intention on their parts. However, the only conclusion which can in my view legitimately be drawn is that in 1966 the parties adverted to the choice of a legal system whereas in 1977 they did not.

Then much was made of the manner in which the contract of 1977 was drafted, and in particular that Mr Rigaut copied it from French precedents which were governed by French law. In my view this argument has no substance. Rigaut was an engineer who used parts of previous contracts which he considered appropriate. There is no real reason to suppose that he ever adverted to choice of laws, which was in any event not in issue in the domestic contracts which he used as precedents. And even if he did advert to matters such as jurisdiction and choice of laws there are indications that he deliberately deleted references thereto. Moreover, Mr Forgeois, who signed the final contract on behalf of the defendant, did not give thought to the choice of laws, and there is no reason to suppose that Mr King, who signed on behalf of the plaintiff, ever considered this aspect. Objection was taken to the admissibility of evidence concerning Mr Rigaut's use of previous contracts. I provisionally allowed the evidence to be led. It seems to me however that it was inadmissible, if for no other reason than that it was completely irrelevant.

Then emphasis was placed on the fact that the contract was signed in France. By itself this seems unimportant. It will be recalled that Mr Gould took a draft back to South Africa when he returned in November 1977. As appears from the covering letter, the defendant contemplated that the contract would be concluded by correspondence. At that stage it was not foreseeable whether the plaintiff would make counter-proposals or not, nor when or where the respective parties would sign the ultimate agreement. As it happened, the plaintiff was prepared to accept the draft as it stood, and Mr King decided to visit France early in December. The result was that the contract was concluded in France. If circumstances had

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been different, the contract might have been concluded by correspondence and the final signature affixed to it in South Africa. The parties clearly attached no significance to the place where the contract was to be concluded and there was no reason why they should. The fact that it was drafted in France and signed there *inter praesentes* in my view has no significance except as an illustration of the fact that, at that stage at any rate, the affairs of the association between the parties were conducted mainly in France.

The next aspect to which I turn is one which Mr *Grbich* specifically requested me to mention in my judgment. Article IX of the 1977 contract is an arbitration clause. The plaintiff, in its replication, contends

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(in the alternative) that art IX was void for vagueness according to, as appears from the context, South African law. The defendant did not file a rejoinder and must accordingly be taken to have denied this - see Rule of Court 25. In argument, however, Mr *Grbich* stated that he was then admitting that the clause is void in South African law (without however arguing the point). This admission of his, he said, created an agreement between the parties that the clause was void in South African law, and, he contended, the Court was bound by this agreement. However, he said, it is common cause that the clause is valid in French law. Therefore, he argued, the maxim *ut res magis valeat quam pereat* favoured French law. Mr *Aaron*, who appeared for the plaintiff, conceded in argument that the attack in the replication on the validity of the arbitration clause was without substance, with which concession I am in complete agreement. All that need therefore be said about Mr *Gbrich's* argument on this aspect is that, even if the parties had been agreed on some point of law, which in fact they were not, I would not have been bound by such agreement.

I turn now to matters of greater substance, and in particular the nature and purpose of the transaction between the parties. The background to the transaction was the proposed erection of a power station at Koeberg, and the contracts which had been concluded for that purpose between Escom, on the one hand, and the French consortium, on the other. These contracts were to be performed in South Africa and it seems likely that South African law would have been the proper law of the contracts, even if this had not been expressly agreed upon. The present contract is, however, somewhat further removed from South Africa and creates different relationships. When the present contract was concluded the parties were in the process of tendering for certain specialized work to be performed in the construction of the power station. There was no certainty that these tenders would be accepted. Other international consortia were in the field. In December 1977 the parties were consequently by no means sure that they would be doing any work in South Africa, save in so far as the plaintiff performed some preparatory work in South Africa for the purpose of tendering. And, if the tenders were successful, the parties knew that contracts would be concluded with one or more of the members of the consortium to regulate the work to be done by the plaintiff and defendant. By December 1977 the parties had no certainty as to the form which such contracts would take, except that they had received indications that some of the members of the consortium would prefer to contract with the defendant which would in turn subcontract with the plaintiff. It was also possible that separate contracts would be entered into with the plaintiff and the defendant, as indeed happened with CGEE Alsthom. These were matters for the future. In December 1977 the parties were concerned to establish the basis upon which their joint venture would be built - how they would divide their responsibilities for the

tenders and for the work to be done if the tenders were successful. As far as the latter aspect was concerned, the form in which contracts with the members of the consortium might be cast would not affect the relationship between the parties, although it might affect the procedures of accounting, etc.

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In argument before me there was considerable debate about who was the dominant member of the association between plaintiff and the defendant. Dominance might of course manifest itself in various ways. The defendant was required to have a South African associate, and there could not have been many which were as suitable as the plaintiff. The plaintiff, on the other hand, could not tender without the assistance of an expert in the air-conditioning of nuclear power stations. The defendant was probably the most suitable expert in this field in view of its previous association with the members of the French consortium. In the sense that each needed the other I do not think that any question of dominance arises. Where I do, however, think that dominance is relevant and important is in the nature of the duties assigned to each member of the association and the role played by it. Article III of the contract records that the defendant "is responsible for directing the operations". Towards this end it would represent the association in dealings with the members of the consortium and ensure a liaison with them concerning all administrative, financial and technical problems (with possible minor exceptions). It would also bear the main responsibility for planning, keeping accounts, and coordination. The plaintiff was to be mainly responsible for the work on site, but even in that respect, in terms of the technical appendix to the contract, the defendant was under a duty to make

"official requests to the customers for: end of assembly verifications, putting into industrial operation, temporary acceptance, permanent acceptance"

and was responsible for "establishing the operating instructions". It is therefore not surprising that the preparation of the tenders took place mainly in France and the negotiating of the contracts with the members of the consortium was done solely there. At that stage the defendant was certainly the dominant member of the association, and France was the main *locus solutionis*. If no tenders had been awarded to the parties, no part of the contract would have been performed in South Africa save for the relatively limited work done here by the plaintiff towards preparing the tender documents. If a dispute had arisen between the parties before tenders had been granted, or if tenders had been granted to somebody else, one could hardly have contended that South African law would have applied to such a dispute. The parties' connection with work to be done in South Africa would then have been either a matter of future uncertainty or one of unrealized hope. In either event the connection seems to me too tenuous to justify a conclusion that South African law was the proper law. If the proper law of the contract was French law at that stage, it would not have changed merely because the tenders were in fact awarded to the plaintiff and the defendant.

Indeed, the fact that the tenders were successful and that work was done at Koeberg did not change the essential nature of the 1977 contract and the relationship which it created between the parties. The work actually done at Koeberg was governed by different contracts having their own systems of proper law. I take the Framatome contract as an example since the disputes which exist between the parties arose in respect of that contract. Framatome

entered into a contract

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with the defendant, which in turn subcontracted with the plaintiff. These contracts were in express terms governed by French law. The plaintiff's performance was guaranteed by another company in its group, Associated Buildings Ltd. This guarantee was expressly stated to be governed by South African law. If the plaintiff ordered equipment from the defendant, a contract of sale would have ensued with a proper law of its own.

I may sum up by saying that the work physically performed at Koeberg by the parties was the *raison d'être* of the 1977 contract, but was itself governed by different contracts. If a dispute had arisen between the parties about the work on site, it seems unlikely that the 1977 contract would have been invoked. The 1977 contract established the association between the parties, and would become relevant only if disputes arose concerning this relationship.

The nature of the disputes now existing between the parties provides an illustration of the type of obligations encompassed by the contract. The plaintiff alleges that Framatome varied the nature and extent of the work to be done by the plaintiff, thereby entitling the plaintiff to higher remuneration than provided in the contract with Framatome. The plaintiff's claim against the defendant under the 1977 contract is, however, not for payment of the higher remuneration allegedly due. What the plaintiff contends is that the defendant wrongfully concluded, on the plaintiff's behalf, an unfavourable settlement agreement with Framatome in respect of the plaintiff's claim for higher remuneration. In the alternative, the plaintiff contends that the defendant committed a breach of the 1977 contract by concluding the original contract with Framatome on terms unfavourable to the plaintiff without keeping the plaintiff fully informed of the proposed terms. It will be seen that the plaintiff is in effect holding the defendant responsible for allegedly abusing its dominant position in their relationship.

I return now to the legal principles according to which the proper law of the contract is to be determined. I have mentioned Mr *Gbrich's* submission that a tacit agreement was concluded that French law would apply. I do not agree. If the officious bystander mentioned in the *Reigate* case had asked which law was to govern the parties' contract he would probably have set in motion a negotiating process of which the outcome can only be a matter of speculation. I must therefore impute an intention to the parties. In the transaction between the parties there are two opposing forces. On the one hand there is the country where the defendant, "responsible for directing the operations" (art III of the agreement), is domiciled and where the main administration of the joint enterprise was conducted. On the other hand there is the country where the income-producing activity was to be performed and where the plaintiff is domiciled. Although these forces are fairly evenly matched, I consider that French law must prevail. I do so by reason of the relationship which existed between the parties at all times, even after the tenders had been awarded to the parties, but this conclusion is in my view strengthened by the consideration mentioned above, viz that at the time of contracting the parties were by no

means sure that any income-producing work would ever be done in South Africa. I consider therefore that French law has the closest and most real connection with the transaction between the parties and that they must be taken to have intended French law to apply.

In the result, the special plea is upheld with costs, such costs to include the qualifying expenses of Prof B Oppetit, whose expert testimony on French law was ultimately rendered unnecessary by agreement between the parties.

Plaintiff's Attorneys: *Findlay & Tait Inc*. Defendant's Attorneys: *Stuart & Millward*, Johannesburg; *Francis Thompson & Aspden*, Cape Town.
