

Short notes on:

ENAC: Can a party withhold their own performance where the other party has failed to perform?

Introduction

It is a well-established principle in South African Law of contract that a party's obligations are reciprocal, in the majority of contracts concluded. The question is, can a party refuse to perform their contractual obligations on the basis that the other party has not performed properly? To illustrate, by way of a simple example, if A and B conclude a sale of goods where seller B delivers defective goods, may A withhold his performance?

Exceptio Doli Non-adempti contractus (ENAC)

South African law has long recognized a unique common law remedy known as the Exceptio Doli Non-Adempti Contractus (ENAC). Simply defined, ENAC is a self-help remedy wherein an innocent party is entitled to simply refuse to perform (withhold his performance) until such time that the other party has performed in full or tendered full performance in accordance with his obligations under the contract. As will be seen, however, the instances in which ENAC may be used as a remedy have very specific requirements.

ENAC requirements:

The ENAC remedy has several key requirements, namely:

1. The parties obligations must be reciprocal
2. The parties must be required to perform simultaneously, or the Plaintiff must be required to tender performance first.
3. ENAC as a defence can only succeed where the Plaintiff has failed to perform properly or refuses to tender proper performance.

In terms of the first requirement, the courts in *BK Tooling v Scope Precision Engineering 1979 (1) SA 391 (A)* (Hereinafter the "BK Tooling") have stated that the intention of the parties must be used to determine whether the party's reciprocal obligations are so closely linked that the principle of reciprocity would apply¹. The principle of reciprocity means that both parties must perform

¹ *BK Tooling v Scope Precision Engineering 1979 (1) SA 391 (A) 393.*

simultaneously. However, there is a general presumption that where the party's intentions are not recorded, certain well-known contracts will apply the principle of reciprocity. However, certain contracts create an exception to the general rule where one party must perform first. These include:

1. Lease contracts
2. Contracts of employment
3. Contracts for an independent contractor

It is clear that ENAC can be used only as a defence against an action, and cannot be used by a Plaintiff to institute proceedings. ENAC constitutes an absolute, but temporary defence, insofar as a defendant need not do anything else, after raising ENAC as a defence. However, ENAC is also only a temporary defence and cannot be used indefinitely; a Defendant must perform if the Plaintiff performs or cures his defective performance.

Relaxation of ENAC and the principle of reciprocity

Due to the absolute nature of the defence, it has been recognized that ENAC can be very prejudicial to a party. The courts in the *BK Tooling* case adopted a relaxed approach of ENAC. The Plaintiff in the *BK Tooling* case acknowledged that while they were not entitled to the full performance, they argued that the Defendant should at least pay them a reduced price. The Court rejected the English law doctrine of substantial performance, which stated that as long as a plaintiff has performed substantially, a defendant must be satisfied with the damages and must pay the full contract price.

The Court in the *BK Tooling* case concluded that it has the discretion to relax ENAC and award a reduced contract price where it would be equitable, in spite of breach of contract by the Plaintiff.

The case held that such an onus is on the Plaintiff to prove that it is entitled to a reduced contract price by showing that:

- (i) The Defendant utilised the defective/incomplete performance
- (ii) Provide evidence (regarding the circumstances as a whole) that the Court ought to exercise discretion in favour of the Plaintiff
 - Prove it is equitable
 - The Court will consider inter alia:
 - 1) The seriousness of the breach of contract
 - 2) Bona fide of the guilty party/plaintiff
 - 3) The willingness of the Plaintiff to repair or complete the defective

performance

4) The degree to which the Defendant actually made the defective performance available

(iii) Prove scope/quantum of the reduced contract price

- Usually determined by considering the cost of repairing the performance
- Plaintiff proves the cost of repair, those costs are then subtracted from the contract price and the remainder is what the Plaintiff gets as the reduced contract price.²

Conclusion:

In conclusion, ENAC is a fast and effective temporary contractual remedy for a party where the other party has not fully performed. However, the remedy cannot be used to withhold performance indefinitely. Furthermore, it is important to bear in mind that ENAC is a defence, to an action and cannot be used to institute proceedings. Finally, as our courts have shown, the remedy may be watered down.

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² *BK Tooling v Scope Precision Engineering* 1979 (1) SA 391 (A) 393-395.