GRAND MINES (PTY) LTD v GIDDEY NO 1999 (1) SA 960 (SCA)

Importance	This case deals with compliance with contractual obligations, and the applicability of the *exceptio non adimpleti contractus*. The court was required to interpret the contract to determine whether the respondent's failure to comply with its contractual obligation to rehabilitate the site was reciprocal to the other parties obligation to pay for coal delivered. The majority found that the obligations were not reciprocal. From a sociological perspective the case is interesting, first, for showing how environmental obligations can be 'outsourced' to other companies; and second, for demonstrating the laxness of the authorities at the time in failing to lay down an appropriate rehabilitation plan.
Parties	**Appellant:** Grand Mines (Pty) Ltd (owner of a colliery) **Respondent:** Giddey NO (liquidator of Bercon Mines (Pty) Ltd)
Facts	Grand Mines (Pty) Ltd Bercon Mines had concluded a contract with Bercon Mines (Pty) Ltd. In terms of the contract Bercon Mines mined coal from a site owned by Grand Mines and delivered the coal to same. The amount owing to Bercon Mines was calculated on the 25th of each month and paid the following month. It was a term of the contract that Bercon Mines was obliged to rehabilitate the site (an opencast mine) during the course of mining. The law applicable at the time (Reg. 5.12.2 made under the Mines and Works Act 27 of 1956, which remained in force by virtue of s 68(2) of the Minerals Act 50 of 1991) provided that rehabilitation of the surface at any opencast mine formed an integral part of the mining operations and should – as far as was practicable – be conducted concurrently with mining operations and in accordance with a programme laid down by the Inspector of Mines after consultation with the manager of the mine and with the approval of the Government Mining Engineer. The obligation to rehabilitate rested with Grand Mines, but operationally it had thus been contractually assigned to Bercon Mines. No programme of rehabilitation had however been agreed between the parties, nor had one been laid down by the Inspector of Mines. Prior to its liquidation Bercon Mines had fallen behind in its obligation to rehabilitate. Bercon Mines was subsequently liquidated. The liquidator initiated an action against Grand Mines for payment for coal already mined and delivered to it by Bercon Mines. Grand Mines raised the *exceptio non adimpleti contractus* to this, arguing that Bercon's obligation to rehabilitate the site was reciprocal to its obligation to pay. The court *a quo* (per MacArthur J in the Witwatersrand Local Division) found that Grand Mines owed Bercon R290 000 for coal delivered in terms of the agreement. Grand Mines subsequently appealed to the Supreme Court of Appeal against this decision.

Relief Sought	Appeal against a High Court decision affirming that Grand Mines owed Bercon R290 000 for coal delivered notwithstanding Bercon's failure to rehabilitate the site.
Legal Issues & Judgment	***Issue 1:*** The defence raised by Grand Mines to Bercon's claim (the *exceptio non adimpleti contractus*) basically requires that the parties to a contract must have intended certain mutual obligations to be *reciprocal*. With such intention as the background the non-performance of an obligation by one party (in this instance Bercon's failure to rehabilitate the site) justifies non-performance on the part of the other party (Grand Mines' obligation to pay for coal already delivered). The first issue was thus whether Bercon's obligation to rehabilitate was in fact reciprocal to Grand Mines' obligation to pay for the coal delivered. ***Judgment:*** (Majority decision *per* Smalberger JA) The court found that the obligations were not reciprocal (at 967D). The overriding consideration in the determination of this issue was the intention of the parties as evident from the terms of their agreement, seen in conjunction against relevant background circumstances (at 966C – D). In this regard the court noted that the agreement stipulated that the formula for payment of the coal was calculated purely on the basis of the tonnage of coal delivered – the extent to which rehabilitation had taken place did not enter into the equation for purposes of determining payment (at 966J). On a practical note, the court observed that rehabilitation is an ongoing process permitting of a degree of flexibility and latitude, and therefore it could not always have preceded or occurred simultaneously with the time fixed for payment (at 967B). The minority judgment (per Schultz JA) however, found that there was a link in time between payment dates for particular coal, which comes first, and reclamation dates for the spaces from which such coal was mined (at 1999E). The obligations were thus reciprocal in nature.
	Issue 2: Whether it was a tacit term of the contract that 'no pillars of coal' were to be left behind by Bercon and, if so, whether this constituted a reciprocal obligation? ***Judgment:*** The court decided that an obligation on the part of Bercon to ensure that no pillars of coal were left behind did *not* constitute a tacit term of the contract (at 968E). A tacit term is an unexpressed provision of a contract which derives from the common intention of the parties as inferred by the court (at 968B). The absence of any express term in the contract in this regard, together with Bercon's failure to raise the issue in its letter of demand to Grand Mines suggested that it was not a tacit term of the contract.
Outcome	The appeal brought by Grand Mines was dismissed.

Obiter	The court made the following passing comments regarding rehabilitation: ‘Rehabilitation is a normal concomitant of mining. To rehabilitate in this sense is 'to restore to a previous condition; to set up again in proper condition' (*The Shorter Oxford English Dictionary* vol II at 1784 *sv* 'rehabilitate')’ (at 964C).