255/54

G.P.-S.918—1950-1--2,000. U.D.J. 219.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE Provincial Division).
(Provinsiale Afdeling).

Appeal in Civil Case. W.L.D.
Appèl in Siviele Saak.

SIEDMAN & CO. (PTY) LTD ...Appellant,

versus

CONCRETE CONSTRUCTION (PTY) LTD ...Respondent.

Appellant's Attorney / Prokureur vir Appellant Kreindorff
Respondent's Attorney / Prokureur vir Respondent [illegible]

Appellant's Advocate / Advokaat vir Appellant N.E. Rosenberg Q.C. with him G. Colman
Respondent's Advocate / Advokaat vir Respondent J.H. Snyman Q.C. with him G. Leveson

Set down for hearing on / Op die rol geplaas vir verhoor op THURSDAY 25th AUG. 1955

~~Appeal withdrawn~~ [illegible] 26/8/55

Respondent will proceed with cross-appeal.

J.H. Snyman Q.C. with him G. Leveson for Cross Appellant
N.E. Rosenberg Q.C. with him G. Colman for Cross Respondent

25/8/55. Before v.d. Heever, Hoexter, JJA. et Brink, AJA.
9/45 am — 12.50 P.M.
2.15 pm — 4.30 P.M.

26/8/55.
9/45 am — 12.55 }
2.15 — 2.45 } — CAV

— Judgment.
Appeal allowed. [illegible] in X-appeal to pay costs of appeal [illegible] and of the X-appeal.
— ([illegible] [illegible] Pltff's [illegible] on the [illegible] that not more than 2 [illegible] employed at any one time).

v.d. Heever
Hoexter
Brink (Ag.)

[illegible]
Regt
14/9/55

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION).

In the matter between:-

CONCRETE CONSTRUCTION (PROPRIETARY) LIMITED

Appellant

and

S. KEIDAN AND COMPANY (PROPRIETARY) LIMITED

Respondent

Coram:- Van den Heever, Hoexter, JJ.A. et Brink, A.J.A.

Heard:- 25th August, 1955. Delivered:- 14/9/1955.

VAN DEN HEEVER, J.A. JUDGMENT

In an action in the Witwatersrand Local Division before Roper, J., Concrete Construction (Proprietary) Limited, to which I henceforth refer as "the Company" obtained a judgment against S. Keidan and Company (Proprietary) Limited, which is virtually, and to whom I henceforth refer as "Keidan". Against that judgment an appeal and cross-appeal were noted but the appeal was abandoned. Consequently I henceforth deal with the matter on the basis that the cross-appeal is an appeal.

The salient facts out of which this dispute arose may be stated briefly. A company known

2/ as .....

as Atid Investment (Pty.) Limited, which for brevity I henceforth call "Atid", intended to erect a building in Johannesburg costing some £127,500. Keidan secured the building contract and the Company secured a contract to supply and bend steel for reinforcement for the building. The question is with whom did the Company contract.

Before the building was finished Atid got into financial difficulties and was forced into liquidation. The Company had not been paid for all the steel supplied and fitted in the building or steel prepared for that purpose but not so used. It sought to recover payment from Keidan on several alternative bases.

It is alleged in the declaration that on the 26th of February the Company represented by a certain Deutsch entered into an oral agreement with Keidan in terms of which the Company was to supply 288 tons of steel for concrete reinforced for the abovementioned building, for which Keidan was to pay £70 per ton less a discount of 5%, Keidan to pay £3,000 cash in advance. The Company supplied steel in terms of the contract for which it became entitled to payment of £19,557.18.5.

3/ Keidan .....

Keidan paid only £7,879.7.7, leaving a balance due of £11,678.10.10. Keidan ordered a further supply of steel on the same terms. When this steel was prepared and bent Keidan in breach of his contract refused to accept delivery of the steel when tendered, in consequence whereof, it is alleged, the Company suffered damages in the amount of £391.16.4. The Company claimed these amounts.

The alternative claim is based on a different version of the contract of the 26th February, 1951. A tripartite agreement is alleged between Atid, the Company and Keidan. The contract for the delivery of the steel was with Atid, but it was agreed that any payments due to the Company would be included by the architect, Stokesby-Lewis, in certificates issued by him from time to time in respect of payments due and to be made to Keidan, that Keidan would receive such payments on behalf of the Company and pay it over on receipt less a discount of 5% which Keidan was to retain for himself. On this basis the Company claimed £11,677.10.10, being monies received by Keidan on behalf of the Company and not

4/ paid .....,

paid over and the damages referred to above.

Roper, J., came to the conclusion that the contract alleged between the Company and Keidan was not proved. On the alternative basis, however, he gave judgment in favour of the Company for £4,742.13.6 with costs.

On appeal it was contended for the Company that the learned Judge erred in holding that the contract alleged in the main declaration had not been established and or alternatively, that he erred in deducting the amount of £3,000 twice from the amount due to the Company.

Contracts in the building trade have very peculiar characteristics which it is necessary to touch upon in order to understand the issues in this case. That applies also to the circumstances of the parties and the trade at the time when the alleged contract was concluded.

Keidan was a building contractor on a

5/ large .....

large scale. During February, 1951, he had on hand various works the estimated cost of which ran to about half a million pounds. On the 15th of February, 1951, he entered into articles of agreement with Atid for the erection of a building for £127,500. The agreement was couched in a stock form approved and recommended by the Institute of South African Architects, the Chapter of South African Quantity Surveyors and the National Federation of Building Trade Employers in South Africa. I henceforth refer to this contract as "the main contract". In the main contract it was stipulated that a firm of which Mr. Stakesby-Lewis was a member shall be "the Architect" and that Messrs. Hickman, Bjorkman and Hope-Jones shall be "the Quantity Surveyor". At the time there were three directors of Atid: Kessley, Arbiter and Greenberg. The evidence is that they acted informally very much like the members of a partnership.

In order to discharge a bond of the building site and to finance the building Atid arranged to borrow £100,000 from the African Life Assurance Society. The balance it had to furnish itself or find

elsewhere.

The main contract contains the following clause:

"15 (a) All specialists and others executing any work or supplying and fixing any goods for which provisional sums are included in the Bill of Quantities who may be nominated or selected by the Architect are hereby declared to be sub-contractors and are herein referred to as 'nominated Sub-Contractors'.

No nominated Sub-Contractor shall be employed upon or in connection with the works against whom the Contractor shall make reasonable objection or (save where the Architect and Contractor shall otherwise agree) who will not enter into a sub-contract providing:-

(1) That the nominated Sub-Contractor shall indemnify the Contractor against the same obligation in respect of the Sub-Contract as the Contractor is liable for in respect of this contract.

(2) That the nominated Sub-Contractor shall indemnify the Contractor against claims in respect of any negligence by the Sub-Contractor his servants or agents or any misuse by him or them of any scaffolding or other plant the property of the Contractor or any Workmen's Compensation Act in force.

(3) That payment less only cash discount of 5 per cent shall be made to the nominated Sub-Contractor by the Contractor within seven days of his receipt of

the Architect's Certificate under Clause 25 hereof which includes the value of such Sub-Contractor's work.

(b) Before any such certificate is issued to the Contractor he shall if requested by the Architect furnish to him reasonable proof that all nominated Sub-Contractor's accounts included in previous certificates have been duly discharged in default whereof the Employer may pay the same upon a certificate of the Architect and deduct the amount thereof from any sums due to the Contractor. The exercise of this power shall not create privity of contract as between Employer and Sub-Contractor."

These terms are anomalous. They virtually permit the Architect, who is the agent of the building owner, to conclude a contract between the contractor and the sub-contractor. The contractor can of course object, but Keidan admitted in evidence that no contractor would object if a reputable firm is nominated. Then, too, the contractor can insist upon the sub-contractor agreeing to the terms set out in Clause 13 (a) (1) and (2) of the main contract. But there is no reason why he cannot waive this right. Paragraph (3) and sub-clause (b) on the other hand seem to have been conceived in the interests of the building owner, in order to enable him to keep sub-contractors content and avoid stoppages of work

or supply by specialists because of the contractors default (Ex parte Fowler, 1905 2 K.B. p. 713). Again, there is no reason in law why a building owner should not waive his right to have such powers expressly incorporated in the sub-contract, especially as, it would seem, he is sufficiently protected by the provision in the main contract.

It appears that Arbiter, a director of Atid, wished to have no collateral contracts at the time. He desired Atid to look to one contractor responsible for the building and wished to have no direct business dealings with sub-contractors.

When the main contract was entered into steel was in short supply and its price was, as the witnesses say, rocketing. No contractor would therefore tender for the construction of the building on the basis that the steel work was a measured quantity.

The bills of quantity were accordingly amended so that the steel reinforcement figured as a "p.c." item, that is a "prime cost" or a "provisional sum" item. The witnesses use both expressions indiscriminately. For

the purposes of this case there is no difference in the meaning of the expressions. That was the basis upon which Kaiden's tender was accepted.

Before discussing the judgment of the Court a quo and the evidence I think it would be expedient to refer to the case of Hampton v. Glamorgan County Council, (84. L.J., K.B. 1506) in which a problem somewhat similar to ours arose. In the Court of Appeal Buckley, L.J. observed that the mere fact that a building owner is ultimately to have the property does not make the contract to buy that property his contract, or make him the principal. At the same time he deprecated the notion that in the case of provisional items the contract made to procure them is in point of fact a contract in which the building owner is the real principal. In each case the question is, who assumed obligations under the sub-contract. Lord Justice Pickford remarked "In this case I find that there was a negotiation between the plaintiff" - i.e. the sub-contractor - "and the architect. I do not think anyone would say that the architect would be acting for himself. The architect may be acting for the building owner in this sense, that he is looking to see whether the contract is a satisfactory one

mention in this introductory approach to the problem. When the Company secured the contract to supply the prepared steel its managing director was one P. Deutsch. He represented the Company in its negotiations and in the formation of the contract. But he died in July 1952 before Atid failed. As the Company had to do without his guidance in the preparation of its case and without his evidence at the trial, it was naturally at a disadvantage.

The principal witness for the Company was the architect, Stakesby-Lewis. He explained that owing to difficulties relating to steel the steel reinforcement was made a "prime cost" item at £65 per ton. He made inquiries and discovered that the Company was willing to supply the metal at £70 a ton, the lowest quotation received. He reported this to Kessley of Atid and to Keidan. It was then arranged that Stakesby-Lewis, Kessley and Keidan would interview Deutsch in order to try and reduce his price. This interview took place in Deutsch's office on the 26th February, 1951. Deutsch refused to reduce

the price and advised his interviewers to clinch the deal promptly or he would dispose of the steel to others. He required a deposit of £3,000. Deutsch complained that Keidan was a slow payer and he did not want to wait for his money. Kessley then reassured Deutsch, explaining that arrangements had been made for a loan of £100,000 and that the Company would be paid out of Monthly certificates which would be issued to Keidan by the architect. Deutsch thereupon agreed and the interview was at an end.

After the interview, Stakesby-Lewis says, he asked Keidan to confirm the order immediately because of the urgency of the matter and Keidan undertook to do so. Later in the day Deutsch telephoned him asking for confirmation. He tried to get into touch with Keidan but failed. He therefore wrote a letter, dated on the same day and had it delivered to Deutsch. I cite only the relevant portions:-

> "On behalf of our clients Messrs. Atid Investment (Pty.) Ltd, we accept your tender for the supplying, lending and fixing into position 286 tons of steel reinforcement... for the sum of £70 per ton ..... We agree to

13/ pay .....

pay any gazetted labour increases only. All other increases if any are to be born by your firm. The above price is subject to 5 per cent builders discount.

It is understood that your firm will supply the steel in various quantities as required from time to time as the work progresses. The sum of £3,000 to be paid by Messrs. S. Keidan & Co., the builders, on acceptance of this order by you, and the balance as the steel is delivered from time to time."

On the 28th February Deutsch replied. He first set out Stakesby-Lewis' letter in full and added in so far as is relevant as follows:-

"The following clauses verbally discussed with and accepted by you, also form part of the contract:-

(a) The steel .....

(b) The contractor is to take delivery of the steel, hoist to required levels and be responsible for maintaining in position after placing and during concreting.

(c) Payment of amounts due to us shall be made within 30 days after submission by us of our invoices. The sum of £3,000.0.0 to be paid as mentioned above.

(d) We cannot be held responsible for delays due to strikes, etc.

Our acceptance of your order is hereby confirmed."

14/ On .....

On the 28th February, 1951, Keidan wrote the following letter addressed to Atid, care of their architect:

"Re proposed new buildings on stands 1618 9/20 Johannesburg; Reinforcing steel.

"We hereby authorise you to pay to Messrs. Concrete Construction Company (pty.) Limited the sum of £3,000 being deposit on 288 tons of Reinforcing Steel required for the erection of the above job. Please debit our account accordingly."

I return to this correspondence later. As to what happened at the interview with Deutsch on the 28th February Stakesby-Lewis was corroborated by Kessley whose evidence the learned trial Judge summarises as follows:-

"According to Kessley not only was Keidan present at this meeting but he took an active part in the discussion of the price of the steel, and joined with Stakesby-Lewis and Kessley in agreeing to Deutsch's terms. Both Stakesby-Lewis and Kessley told the Court that the result of the discussions was that the Plaintiff Company was ~~the~~ to look for payment to Keidan and that the contract which was entered into was one between the Plaintiff and Keidan and not between the Plaintiff and the building owner. In other words, that the Plaintiff company became a sub-contractor to the contractor and had no privity

15/ of .....

of contract with the building owner."

Keidan's evidence is summarised by the learned trial Judge as follows:-

> "Keidan flatly denied that he attended any interview with Deutsch such as was described by Stakesby-Lewis and Kessley. He told the Court that in February, 1951, he was on holiday in the Cape Peninsula, that he came up to Johannesburg in order to sign the contract on the 15th February, returning at once to Cape Town, and that he returned to Johannesburg on Sunday the 25th February, attending his office the following day. He was then informed that Atid Investments had contracted for steel at £70 per ton. In regard to his letter of 28th February he explained that on that date Stakesby-Lewis had told him (apparently by telephone) that they had secured the steel, and must pay a deposit of £3,000 for it in advance, and requested him for purposes of record to write a letter to the effect that the £3,000 was to be paid against the contract. Stakesby-Lewis then dictated the letter to the witness's clerk, the witness approved of it, and it was sent off."

As to Keidan's presence at that interview the two witnesses I have mentioned are supported by one Sanderson who at the time was assistant to Deutsch. He does not remember the date and was not present, though on the premisses, and saw Keidan coming and going to the meetingplace. He identifies the occasion by associating

it with the day Deutsch secured the contract.

Keidan did not make a favourable impression on the learned trial Judge, who came to the conclusion on the evidence "that Stakesby-Lewis and Kessley spoke the truth when they told the Court that Keidan was present at the meeting in Deutsch's office, and was a party to the arrangement there entered into." The learned Judge found Kessley to be a truthful witness.

The learned Judge found Stakesby-Lewis to be a poor witness who came badly out of cross-examination. The Court considered however that he was speaking of events which took place three- and-a- half years ago. He had in the meantime moved from Johannesburg to Salisbury; he had not the advantage of access to all his files and he admitted that his recollection was somewhat uncertain. He was easily confused and did not reveal an acute intelligence. Nevertheless the learned Judge remarked: "He did not give me the impression of being a dishonest witness". An attempt was made to discredit him by suggesting that his evidence was motivated by malice towards Keidan, but the

17/ attempt .....

attempt failed hopelessly. Kessley's credibility was attached at the trial and on appeal on the ground that in an affidavit filed ~~xx~~ in connection with the application for the liquidation of Atid he alleged that the Company was a creditor Atid. In the light of Deutsch's death and the Company's uncertainty as to what Deutsch had done and in the light of legal advice received by Kessley, the learned Judge rightly, I think, dismissed this criticism as being without substance.

Roper, J., had the advantage of seeing and hearing the witnesses and assessing their credibility. His judgment in this regard has been attacked, but I am not persuaded that he was wrong. Consequently I defer to his judgment in this respect. But he did not and could not decide on credibility alone. As far as inference is concerned I think this Court, after fully accepting his assessment of the credibility of the witnesses, is in as good a position to decide where the balance of probabilities preponderates in the light of the circumstances, the documentary evidence and the conduct of the parties.

The main reason why the learned Judge

considered that the alleged contract between Keidan and the Company was not proved is stated in these terms in the judgment:-

"Although Stakesby-Lewis told the Court that as a result of the interview the plaintiff company became a sub-contractor to Keidan (and I have no doubt that he believed that to be the position) there is nothing in his own account of the conversation which clearly establishes that that was so. In order that the plaintiff should be put in that position the consensus of Deutsch was essential. Stakesby-Lewis, as architect, was the agent of the building owner and not of the contractor when he approached Deutsch in regard to the supply of steel, and Deutsch would naturally regard the negotiation as one primarily between himself and Atid Investment Ltd. In these circumstances, if the plaintiff company was to be in the position of a sub-contractor directly responsible to the building owner and to him alone, it would be natural to expect that this would be expressly mentioned, either by Stakesby-Lewis or by Kessley or by both of them. Yet neither of these witnesses, in the account of the discussion, says a word on the point, and the clear inference is that nothing was said about it. Stakesby-Lewis' account is consistent with the position that the contract for the supply of the steel was to be one between the plaintiff company and Atid Investments, but that payment was to

be made through Keidan; and Deutsch may well have considered, at the end of the discussion, that he was contracting with Atid Investments, and not with Keidan save in respect of payment."

With respect, there seems to me to be no room for such an inference. If Deutsch thought that he was contracting direct with Atid, why should he be concerned about Keidan being a slow payer. Similarly it is inconceivable that his fears should have been allayed by the assurance that Keidan would be kept in funds. He would have had no recourse against Keidan. The very suggestion that the cost of his deliveries would figure in Keidan's monthly certificates would make it clear to him that he was a sub-contractor. If he was not a sub-contractor, it is inconceivable that he should have agreed to his prices being subject to a 5 per cent builder's discount. If his contract was direct with Atid there was no reason why he should have stipulated for or received a deposit of £3,000 from Keidan, or why Keidan should pay the balance as the steel was delivered from time to time.

That Deutsch should not have expressly mentioned what was selfevident is not surprising. Moreover it is clear that the witness could not or did not

20/ try .....

try to give a verbatim account of everything that was said at the interview. The inference is inescapable that Deutsch must have had a good idea of the enterprise and the surrounding circumstances. He must have known the types, sizes and shapes of steel that would be required and what for; he could not have tendered blindly. Keidan, the architect and Kesslav all three went there knowing that they could not get the steel elsewhere. The only matter still in debate was the price. When this matter was settled there was no necessity for verbiage. Consent could be signalled by an "all-right" or a ~~xxxxx~~ nod. In the circumstances I would expect express mention of the fact only if the Company was not to be a sub-contractor.

To my mind the probabilities weigh heavily against the suggestion that Deutsch contracted with Atid direct. In the main contract the steel was a "P.C." item. Financially it was immaterial to Keidan what the cost was. If the Company's contract to supply steel was an independent contract with Atid, he could not

21/ gain .....

gain or lose, whether it was a bad contract or a good. If it was a contract between himself and the sub-contractor he would get no more if the steel could be obtained at a lower price. In the latter event he would be interested only on two grounds: his builder's commission and the fact that steel was supplied, for without steel he could not build. Consequently it would be to his advantage to have the Company as a sub-contractor rather than as a direct contractor with Atid. At the time Stakesby-Lewis was empowered by the main contract to nominate the Company as a sub-contractor. If he had done so, Keidan admits, he could not and would not have objected. I think there is force in Mr. Snyman's contention that this obvious probability of Deutsch having contracted as a sub-contractor is the reason why Keidan lied in maintaining that he was not present at the interview.

I come now to the correspondence. Whoever drafted it, I cannot imagine a shrewd business man like Keidan approving, signing and despatching the letter of the 28th February, 1951, which committed him to a debit

22/ of .....

of £3,000, without first having a full explanation. His explanation that it was done merely for purposes of record is puerile. The letter is absolutely inconsistent with the Company being an independent contractor. One does not authorise a stranger to pay his own debt and one certainly does not ask him to debit one's account with the sum paid.

Prima facie Stakesby-Lewis' letter of the 26th February, 1951, to Deutsch and Deutsch's reply seem to reflect an independent contract. The circumstances should be kept in mind, however. The correspondence relates to oral negotiations that had taken place. Deutsch wanted confirmation, a deposit of £3,000 and an order. Stakesby-Lewis was the architect authorised to nominate sub-contractors subject to objection by Keidan. He knew, if his evidence and that of Kessley is to be believed, that Keidan had accepted. The relationship was therefore a curious one. Keidan could have no objection to the steel costing £70 instead of £65 a ton - in fact the higher price would increase his commission. On the other hand Keidan could not independently contract

with Deutsch for the enhanced price. But apart from this everybody knew that Stakesby-Lewis was acting in his capacity as architect, not as an estate or financial agent.

In Leslie and Company Limited v. Metropolitan Asylums District Managers, (1901 - 68 J.P. p.86) a situation very like the one we have to deal with arose. The full report is not available. There is a digested report, however, in the English and Empire Digest, Vol. 7 p. 421, which reads:-

"By a contract made between builders and building owners the builders undertook to erect and complete the "works" of a hospital, including chimney-stacks and heating apparatus, in two years for £210,688, with penalties for delay. The chimney-stacks and heating apparatus were to be provided by specialists or sub-contractors. The building owners reserved to themselves the option to employ these specialists. Certain specialists for the work of the chimney-stacks and heating apparatus were appointed by the architect under the contract and he made terms with them as to the works they were to execute and the prices they were to charge. These prices were subsequently paid by the builders out of the whole sum paid to them

24/ under .....

under the contract. The architect sent the builders orders to give to the specialists and the builders made no objection, and gave them to the specialists. In the execution of these works there was delay on the part of the specialists whereby, as the builders alleged, they suffered damage.
Held: (1) the builders, and not the building owners, contracted with the specialists and there was nothing in the contract inconsistent with such sub-contracts; (2) the builders had no right of action against the building owners for the delay of the specialists."

Keidan had great difficulty in explaining why he ~~had~~ was entitled to a 5 per cent discount on this alleged independent contract. He said in ~~his~~ evidence "The builder has to pay out the money - he has to lift the steel and provide shuttering", which is obvious nonsense. On a P.C. item, in fact generally, the builder only pays out after he has drawn money on the architects certificate. The shuttering was no concern of the supplier of steel.

During the building operations the quantity surveyors made out statements for assessing the value of the work done. One copy was sent to the architect and another to Keidan. Some of these statements say that the amounts included for steel are payable by the contractor. The statements were never queried or repudiated.

Keidan had even greater difficulty in explaining why, if the Company was an independent contractor, he did not pay out amounts due to the Company which he had drawn on the certificates. It would plainly have been his duty to pay over such amounts promptly, for their retention would have suggested theft by conversion. His excuse that he did not pay because the Company sent him no invoices is very lame. He had both the certificates and the money; what more could he want?

If I have to deal with every argument advanced this judgment, which has already assumed unconscionable proportions, would burgeon into a book. I may conclude by touching upon three factors which might be said to weigh in Keidan's favour. The first is that Appellant Company issued its invoices to Atid. In view of the manner in which and the data upon which the architect's certificates were drawn up, this factor loses much of its weight. What little force it could have retained is dispelled by proof that there is no uniform practice; some sub-contractors send their invoices to the contractor

26/ while .....

while others send them to the building owner or the architect.

The second is the fact that Afid was debited with the price of steel supplied in the Company's ledgers. It was explained, however, that the ledgers were merely written up from the invoices.

The third, of which much was made in argument, is the unsatisfactory nature of Stakesby-Lewis' evidence on the question whether or not he had sent Keidan copies of the letters between himself and Deutsch written on the 26th and 28th February, 1951. Stakesby-Lewis was undoubtedly confused about the sequence of events that happened years ago, but the trial Court found him to be an honest witness. The probability is that, knowing that Keidan was a party to the oral contract and took a part in settling the conditions set out in those letters, he either did not take the trouble to send Keidan copies, or sent copies without the fact making much or an impression on his mind. However that be, it is clear from Keidan's conduct that he was perfectly aware of the matters contained in those letters.

Against these factors there is, on the other hand, one which weighs very heavily against Keiden. There is no reason to think nor was it suggested that Bjorkman, the quantity surveyor, was not a disinterested and truthful witness. I quote the question asked him and his reply, which I think is conclusive:

> "Why did you make separate provision for steel as payable by the contractor?
>
> Because we were informed by the contractor that this was a nominated sub-contractor."

28/ In .....

In my judgment the appeal is allowed. The judgment of the Court a quo is set aside and the following substituted.

"Judgment in favour of plaintiff for the amounts of £11,677.10.10 and £391.16.4 with costs, except the costs on the third June 1954 as to which a special order was made. The Taxing Master is directed to tax the plaintiff's bill on the basis that not more than two Counsel were employed at any one time."

Respondent in the cross-appeal is ordered to pay the costs of appeal (if any) and of the cross-appeal.

J.H.D.v/Leeuw.

Hoexter, J.A.
Brink, A.J.A. } Concurred.