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IN THE SUPREME COURT OF SOUTH AFRICA.

APPELLATE DIVISION.

In the matter between:

H. ALERS HANKEY LIMITED — Appellant

and

THE MINISTER OF TRANSPORT — Respondent

Coram: Botha, Holmes, Trollip, Corbett et Galgut, JJ.A.

Heard: 20 November 1975.

Delivered: 2 March 1976.

J U D G M E N T

GALGUT, J.A.:

Before proceeding with this matter I wish to place on record that BOTHA, J.A., whose recent death has caused deep sorrow to his colleagues, played a significant role in its adjudication. I wish also to associate myself with what is

said...../2

said, about my late Brother, by TROLLIP, J.A. in Shatz Investments (Pty.) Limited v. Kalovyras. (Delivered 2 March 1976). The views in the following judgment are in substantial agreement with those expressed by our late Brother before his death.

The appellant carries on business as a manufacturer and importer of fire protection equipment. Pursuant to a contract concluded on 23 December 1969, it undertook to deliver to the Department of Transport four airfield foam crash tenders and one airfield water tender. The vehicles had to be delivered by the 22nd March 1971 but were in fact delivered on dates ranging from October 1971 to May 1972. By agreement the order for the water tender was on the 8th October 1971 changed to a foam tender. The contract provided that if, during the period of the contract which, as we shall see, extended from September 1969 to March 1971, an alteration in freight charges or a variation in rates of exchange occurred, the contract prices affected by such alterations or variations would be adjusted accordingly. Appellant, to whom I will refer as plaintiff, maintained that the period of the contract

had...../3

had been extended and that alterations and variations had taken place not only during the original contract period but also during the extension thereof. It claimed, from the Department, R7 463-64 in respect of alterations in freight charges and R52 831-41 in respect of variations in the rates of exchange. The Department, for reasons which will appear later, conceded that the period of the contract had been extended to 30 June 1971. Plaintiff's claim was dismissed with costs by HIEMSTRA, J., sitting in the Transvaal Provincial Division. The appeal is against that order.

The contract was constituted by a tender, dated 12 September 1969, submitted to the State Tender Board (the Board) and an acceptance thereof by the latter on 23 December 1969. The Board is a statutory body and its powers are set out in section 4 of the State Tender Board Act 86 of 1968. The Board has a series of forms which are used when tenders are submitted. These forms are designated "S.T." followed by a figure. S.T. is,

presumably,...../4

presumably, an abbreviation for State Tender. Some of these forms have to be completed and signed by the tenderer whereas other forms contain the conditions which govern all tenders. I will, where the context so requires, refer to the forms which have to be completed by a tenderer, as the tender documents. The plaintiff in this case duly completed and signed all the necessary documents.

An important form is S.T.6. It is headed:

"INSTRUCTIONS to TENDERERS REGARDING COMPLETION of TENDER FORMS".

In this form special attention is drawn to the fact that the tender is subject to the conditions contained inter alia in forms S.T.8 and S.T.36 and that the questionaire, form S.T.10, must be completed. Form S.T.8 contains the following paragraph:

> "THIS TENDER IS SUBJECT TO THE STATE TENDER BOARD REGULATIONS AS PUBLISHED IN GOVERNMENT GAZETTE EXTRAORDINARY 2174 OF 27 SEPTEMBER 1968, UNDER GOVERNMENT NOTICE No. R. 1733 OF THE SAME DATE, AND THE CONDITIONS OF TENDER CONTRACT AND ORDER (form S.T.36) AND CODE OF PROCEDURE (form S.T.37) AS PUBLISHED IN STATE TENDER BULLETIN 232 OF 4 OCTOBER 1968, SUBSEQUENT AMENDMENTS THERETO AND REISSUES THEREOF".

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The tender documents, completed and signed by plaintiff, as read with the aforementioned form S.T.36 thus constitute the contract. The relevant terms are:

i. The price. The cost of each of the foam tenders exceeded R99 000-00 and the cost of the water tender was R94 340-00;

ii. Date of delivery. The delivery period stated in the tender was 13/14 months after receipt of the order from the Board, viz., after 23 December 1969. This delivery period was stated to be firm.

iii. The rate of exchange. The rate of exchange on which the tender price was based was £1.00 = R1,72.

iv. Cancellations and penalties. Paragraph 22 of S.T.36 provides that the State had the right to cancel the contract and enforce penalties in the case of delay beyond the period of the contract.

v. Variations in freight charges. Paragraph 30(2) of S.T.36 reads:

> "If during the period of the contract any alterations of railage, freight or port rates or marine insurance...../6

insurance were specified affecting supplies delivered 'railage/freight paid' by the contractor, are brought into force, the contract prices affected by such alterations shall be adjusted accordingly in respect of all supplies and all raw materials used in the production of such supplies, railed or shipped as from the date fixed for the taking effect of the said alterations and in respect of which the contractor shall have paid or received the benefit of the difference in such rates."

The parties accepted (I shall assume correctly) that, provided the alterations in freight rates occurred during "the period of the contract", this provision applies even if the supplies were delivered and accepted after the expiry date of that period.

vi. Variations in exchange rates. Paragraphs 32(1) & (2) of S.T.36 read:

"32.(1) Where the whole or a portion of the tendered prices is liable to be affected by variations in rates of exchange - including devaluation of currencies - the tenderer shall state in his tender the amount, in foreign currency which is to be paid or remitted overseas and the rate of exchange applied in the conversion of this amount into South African Currency.

(2)...../7

(2) Provided this information is furnished in the tender and the contract is completed within the period of the contract, the State will accept for its account in respect of the amount involved, any variations between the rate of exchange stated in the tender and the rate of exchange ruling at the time of payment." .....

This provision clearly only applies if the supplies are delivered within the "period of the contract".

vii. Extension of delivery date. Paragraph 33 of S.T. 36 reads:

"For the purpose of paragraphs 29, 30, 31 and 32 'period of the contract' shall mean the period between the due date of the tender and the final contract delivery date or such extended delivery date as might be approved by the Board."

We are in this appeal concerned with paragraphs 30(2) and 32 which are the relevant escalation paragraphs.

viii. Variation of the contract. Paragraph 43 of S.T.36 reads:

"Except where it is implicit in the General Conditions of Tender, Contract or Order or special conditions, stipulations or provisions incorporated

in...../8

in the tender and the acceptance thereof, no agreement to amend or vary the contract or such special conditions, stipulations or provisions respectively, shall be valid and of any force or effect unless such agreement is entered into in writing and signed by the parties."

ix. Period of the contract. The due date of the tender for the purposes of paragraph 33 of S.T.36 (see paragraph vii. above) was 15 September 1969 and the final contract delivery date was approximately 22 March 1971, i.e. 14 months after receipt of the order, which was dated 23 December 1969. Accordingly, if no extended delivery dates were approved by the Board, the contract period would have terminated on 22 March 1971.

As stated earlier, all the crash tenders were delivered after the 22nd March 1971, viz., on dates ranging from October 1971 to May 1972. The plaintiff maintains that there was a valid extension of the period of the contract and that it is entitled to receive from the Department the increased cost, occasioned by the relevant variations in freight charges and rates of exchange. The

Department...../9

Department maintains that there was no such extension. This dispute as to the extension has at all times been the main issue between the parties.

At the pre-trial conference the parties agreed that:

> "The quantum of Plaintiff's claim, the dates on which increases in freight took place and the amounts of such increases, the dates of variations in rates of exchange and on which remittances were made by Plaintiff to its English suppliers and the amounts thereof and the exchange rates applicable to such remittances, amounts originally quoted in respect of freight and amounts actually paid in respect of freight, are admitted by the Defendant and Defendant accepts all the calculations made by Plaintiff and the amounts claimed by Plaintiff in its summons as amplified by the Further Particulars filed herein, as being correct."

In view of the fact that the quantum of plaintiff's claim and the manner in which it was calculated were admitted as being correct at the pre-trial conference it is only necessary at this stage to set out the dates of the relevant variations in freight charges and rates of exchange.

These...../10

These are:

Freight	Rates of Exchange
15 September 1969	6 and 20 October 1971
1 January 1970	30 December 1971
1 October 1 1970	10 January 1972
15 March 1971	10 March 1972
23 August 1971	15 May 1972

It will be noticed that the first four freight changes occurred during the original contract period and that all the variations in the rates of exchange took place after that period. None of the dates of the variations in the rates of exchange occurred within the original contract period but they become relevant if that period was duly extended as plaintiff alleged.

Later in this judgment reference is made to a Board circular No. 1335/1966. This circular advises all departments that the Government has the right (see paragraph 22 of S.T.36) "to impose penalties or claim damages on deliveries which are not made within the stipulated period" and that the Government has decided that this must not be done in three cases. These are set out in paragraphs lettered (a), (b) and (c). Circular 1335/1966 was replaced by circular 1315/1971 dated 13 April 1971. The.../11

The latter circular is in wider terms than the earlier one. As it was in force when the extensions of the contract period were allegedly granted I deal with its terms. Paragraphs (a) and (b) are not relevant. Paragraph (c) provides that where the State has "suffered damages, loss or serious inconvenience on account of late delivery" the penalties or damages are to be claimed. However, the circular contains the following paragraph:

> "In the case of (c), departments are hereby authorised to grant extension of delivery periods if such action will not result in damages, loss or serious inconvenience to the State. Where, however, it is anticipated that late delivery will result in damages, loss or serious inconvenience to the State, it is the responsibility of departments to warn contractors timeously that they will be penalised for late delivery and to impose such penalty if contractors fail to comply."

It is convenient, at this stage, to give some information about the persons whose names figure in the

events...../12

events with which this judgment is concerned. Mr. Carmichael was a director of a firm in England, viz., Carmichael and Jones (Worcester) Ltd. This firm manufactured the fire tenders in England. I will refer to it as the Manufacturer. Mr. van der Stoep was the sales manager of the plaintiff. He signed all the documents and was concerned with all the negotiations and discussions in the matter. Mr. Pretorius had been an administrative officer in the Department for some 40 years. He retired at the end of March 1971. He was thereafter employed by the Department as a temporary clerk in the buyers section of its stores. It appears that it was part of his duties to try and ensure that suppliers of goods and equipment

made...../12(a)

made timeous delivery. Van den Berg was, at the time of the trial, an under-secretary in the Department, in charge of airfield administration, but during the relevant period was a senior administrative control officer in the Department and was concerned with, and in charge of, fire control.

Before discussing the issues raised it is necessary to sketch the history. I proceed to do so.

As we have already seen plaintiff contracted to deliver the vehicles before the 22nd March 1971. They were, to the knowledge of the Department, to be manufactured on plaintiff's behalf, by the Manufacturer. In November 1970 the Manufacturer advised plaintiff that, due to certain difficulties, which it mentioned, it would not be able to deliver the vehicles within the contract period and that there would be a delay. On the 22nd December 1970 plaintiff wrote to the Board explaining the difficulties. Relevant extracts from that letter read:

.. "As you are aware we quoted a firm delivery period in our tender dated...../13

dated 12th September, 1969.

The order was placed more than 3 months later with a delivery period of 13/14 months.

Unfortunately by that time there was considerable demand for transmissions in the United States of America.

At all times we managed to keep the work on schedule but it now appears to be running 3 months late.

Enclosed are two photo copies of letters from our suppliers from which you will note the difficulties experienced by our principals due to delays from the U.S.A.

You are assured that everything possible is done to expedite the work, unfortunately the delay seems to be a matter beyond control from our end.

We understand that the transmissions used in the vehicles to be supplied are also used in heavy military equipment in the USA and they have received preference up to now.

Kindly advise the department concerned of our difficulty and assure them we will do everything possible not to inconvenience them."

On 29.12.70 the Board wrote to plaintiff advising it that its letter of 22.12.~~69~~70 had been referred to the Department for attention. Plaintiff did not receive

this...../14

this letter. The Board sent a copy of plaintiff's letter to the Department and referred it to the instructions contained in circular No. 1335. After receipt of this letter by the Department it was passed to Pretorius for attention. He discussed it with Van den Berg, who was the official mainly concerned with the due arrival of the vehicles. Van den Berg, in the circumstances, decided that it was expedient to accede to the request and said that he had no objection to the extension.

On or about 20 January 1971 Pretorius telephoned Van der Stoep. Their versions of their conversation differ. Van der Stoep's version is that Pretorius intimated that he, obviously meaning the Department, could authorise the extension of the delivery dates, if the dates could be given to him, and further intimated that the Department did not have to refer the matter back to the Board. Van der Stoep goes on to say that he then told Pretorius that he was unable to state how long the delay would be. Pretorius'

version...../15

version is that he told Van der Stoep that the Department had advised the Board that it was willing to grant the three month's extension and that he had written to the Board asking for its formal approval. He denies that he told Van der Stoep that the Board had given the Department authority to extend the contract dates. He admits that Van der Stoep had said he was unable to give definite dates of delivery.

Counsel for plaintiff urged that the probabilities favoured Van der Stoep's version. I do not find it necessary to decide which version is correct but, for reasons which will appear later, I propose dealing with the matter on the version more favourable to plaintiff, viz., Van der Stoep's version.

Despite the fact that plaintiff's letter of 22.12.1969 does not specifically ask for an extension of three months, both Van der Stoep and Pretorius regarded it as making such a request and the Department

has...../16

has accepted that the delivery date was extended to 30th June 1971. It is worthy of note that there were no variations in freight charges or exchange rates during the period 22 March 1971 and 30 June 1971.

It was not until 28 April 1971 that van der Stoep was able to give dates of delivery. On that day he advised Pretorius that the first vehicle would be shipped in September and delivered in October 1971 and the other vehicles would be delivered, at intervals from 6 to 8 weeks, thereafter. Pretorius does not deny this. It was not suggested that Pretorius expressly approved any extension on this occasion. All that is alleged is that Pretorius said he was pleased with the information and that it was not necessary for van der Stoep to do anything further.

Thereafter in September 1971 van der Stoep and van den Berg went to England to attend a demonstration of the first vehicle. There, during and after the demon-

stration...../17

stration, discussions took place as to the efficiency of the vehicle and as to delivery dates. Carmichael testified that van den Berg was very satisfied with the performance of the machine; that he explained to van den Berg that the delay had been occasioned by the fact that it had not been possible to get component parts timeously; that van den Berg stated that the vehicles were required in the Republic before the initiation of the Boeing 747 service; that he told van den Berg that the first vehicle would be shipped in September 1971; that the other vehicles (excluding the water tender) would be shipped, at intervals, by the end of March 1972; that van den Berg was satisfied with this delivery programme; that van den Berg explained that the funds for the financial year ending 31 March 1972 had been allocated and that, to avoid problems in regard to the allocation of funds after 31 March 1972, it would be advisable for plaintiff to issue *pro forma* invoices and for the Department to issue the cheques prior to that

date...../18

date; that the cheques could be retained pending delivery of each vehicle; that this was agreed to. Carmichael's evidence on this aspect concludes as follows:

> "Your understanding of that overall arrangement was what in this respect, if that were adhered to, was it in any way indicated that Plaintiff would be considered to be in breach of contract? ——No, this aspect was not discussed with us at all, we felt that at the time of Mr. van Den Berg's visit, that we had managed to satisfy him as regards the technical ability of these vehicles, and he was extremely pleased with this, we also understood that he fully realised the problems that we had had over the question of delivery of the chassis, which resulted in the late deliveries, and he therefore accepted this situation, and having agreed this new delivery programme with him, which met the two requirements as had been set down as regards the Jumbo Jet and finally the financial payment, that everything would be okay at that particular time, in other words that it was fully acceptable and that everybody was indeed happy at that time."

It was during the period of the above demonstration that it was decided to change the fifth vehicle into a

foam...../19

foam tender. This variation of the contract had to be confirmed in writing in terms of paragraph 43 of S.T. 36. This was done on 8 October 1971. It was a term of this agreement that, because of this conversion the price of the fifth vehicle would be increased from R94 340-00 to R102 910-00 i.e. an increase of R8 570-00. No date was agreed upon for the shipment or delivery of this vehicle. It is common cause that it had to be shipped within a reasonable time after 8 October 1971. The evidence as to what was a reasonable period is important because there were variations in the rates of exchange during the period October 1971 and May 1972. Carmichael said that it was a major operation; that the tank had to be cut down and rewelded, involving expense and labour; that more specialised components had to be obtained; that when the conversion was discussed and while van den Berg was there he made enquiries about obtaining these parts; that he told van den Berg that his firm had to have the

order...../20

order quickly as the shipment date at which they were aiming was 31 March 1972; that the technical aspects of the conversion were not easy; that the work could not be done without the specialised parts; that it took five to six months to obtain these specialised parts. The following extracts from Carmichael's evidence are self-explanatory:

> "Oh I would say as regards this particular vehicle, at the time in September when it was discussed, the reason we could not complete till March 31st was because these components would not be obtained on any sooner occasion to make this possible."
>
> ---
>
> "When you spoke to Mr. van den Berg with regard to the fifth vehicle, did you tell him about the components?----Yes, we underlined that we would not be able to meet this delivery date unless we had an order so that these parts could be obtained as quickly as possible. It was essential that we had his order by, if possible, return of post, so that this situation could be certain as far as the March 31st date was concerned."
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> "In fact how would you describe your

schedule...../21

for getting this fifth vehicle completed ex works by the end of March?-----It was a completely - it was a tight proposition so far as we are concerned at the time."

The fifth vehicle was in fact completed and ready for shipment before the end of March 1972. Carmichael explained why these vehicles could not travel on deck and that, because of their size, shipping difficulties arose. He detailed the difficulties which arose in regard to the shipping of the fifth vehicle. These need not be set out. It is sufficient to say that his evidence leaves no doubt that proper and adequate steps were taken to ship it as soon as possible. It was shipped in April 1972 and delivered early in May 1972.

Van den Berg had remained in court during the time that Carmichael was giving evidence. He later testified that he agreed in broad outline with the evidence given by Carmichael as to the discussions during the demonstration in early September

1971 ...../22

1971.

The first vehicle was in fact shipped in September 1971 and delivered in October 1971. The second and third vehicles were shipped in December 1971 and delivered in January 1972 and the fourth vehicle was shipped on 28 February 1972 and delivered in April 1972. The fifth vehicle, as stated above, was delivered in May 1972. Thereafter plaintiff claimed from the Department the increases in freight charges, not only in respect of those which had occurred during the original contract period, but also those which had occurred thereafter. It also claimed the increases in respect of the variations in the rates of exchange. These, as was stated earlier in this judgment, all fell in the period after the original contract period. In making this claim plaintiff stated that the delivery dates had been extended by verbal agreement.

On 9 May 1972 the Board wrote to the Department asking why it had not reacted to plaintiff's letter of 22

December...../23

December 1970 and pointed out that it, the Board, had drawn the Department's attention to the provisions of circular No. 1335. It further asked the Department to deal with the allegation by plaintiff that the delivery dates had been verbally extended and pointed out that the failure to object to the delayed deliveries might render the Department liable for the increases in freight charges and rates of exchange. On 12 June 1972 the Department wrote to the Board saying that it had offered no objection to the extension of the delivery dates till the end of June 1970 but that it had not agreed to any extension thereafter. In this letter the Department also said that it had not exercised its right to cancel the contract because time was running short and the employment of another contractor would have delayed matters further. On 23 June 1972 the Department wrote to the Treasury saying that plaintiff had early on advised that there would be delays and had kept the Department informed of further

delays...../24

delays; that in view of the fact that the causes of the delays were beyond the control of the plaintiff it had been decided not to cancel the contract. Mention was also made of the fact that the Department had at a later stage asked that the fifth tender be changed to a fáom tender. The letter concludes with a request for authority to pay the excess claimed by plaintiff. This authority was not granted and on 6 November 1972 the Department wrote to plaintiff as follows:

> "-------I now wish to advise you that your claim for increased cost as a result of variations in freight and exchange rates cannot be met as the variations did not occur during the contract delivery period or an authorised extension thereof. An extension of the contract delivery period was not applied for by you and authorised by the State Tender Board, and no agreement to amend or vary the contract in this respect has been entered into inwriting in terms of the requirements of paragraph 43 of the General Conditions of Tender, Contract and Order (S.T.36)."

A summary of the pleadings is helpful because

it...../25

it serves to emphasize the issues which must be decided.

The plaintiff's case as set out in its particulars of claim is:

(a) that the Board authorised such extensions of the contract delivery date as might be agreed upon between plaintiff and the Department; alternatively,

(b) that the Department, on whose behalf the Board had been acting, was entitled to authorise extensions of the contract delivery date; further alternatively,

(c) that the Department held itself out as having authority to grant extensions of the contract delivery date and plaintiff delivered the vehicles pursuant to such holding out; further alternatively,

(d) that the Board by its approval on 8 October 1971 of the amendment to the contract in regard to the

fifth...../26

fifth vehicle extended the contract period not only for the delivery of the fifth vehicle but also implicitly for all the vehicles; further alternatively,

(e) that in respect of the fifth vehicle the period of the contract was extended, when the contract was varied, on 8 October 1971; that the period of such extension was a reasonable time after 8 October 1971; that the fifth vehicle had been delivered within a reasonable time and it followed that plaintiff could claim all the relevant variations in freight charges and rates of exchange.

The Department denied all liability. Its case as set out in the plea and further particulars thereto was:

A. A denial that any extension of the contract period had been granted; alternatively,

B. if extensions were granted, as alleged by

plaintiff .../27

plaintiff, that they were invalidly granted in that;

i. they were granted orally whereas paragraph 43 of S.T.36 provided that any variation of the contract could only be made validly in writing;

ii. they were granted by officials who were not authorised so to do;

iii. any extension of the period of the contract could result in loss to the State and therefore, having regard to the instructions in circular No. 1335, the Department could not authorise any extension of the contract period;

iv. that the Board has not consented to any extension as required by paragraph 33 of S.T.36.

C. (I quote from the pleadings).

"(a)...../28

"(a) The variation of the order in respect of the fifth vehicle took place after the expiration of the period of the contract when Plaintiff was already in default as far as delivery was concerned.

(b) The Plaintiff was aware that it was late in effecting delivery and quoted a price for the said vehicle (which was of the same type as the four other vehicles) which was in excess of the original tender price in order to compensate itself for increased costs and freight charges.

(c) The Defendant accepted the increased figure quoted by Plaintiff for this vehicle.

(d) The variations of the specifications for the fifth vehicle did not affect the delivery dates for the other four vehicles as the contract was divisible.

(e)...../29

(e) The original delivery date in terms of the contract for the said vehicle was not varied by the parties.

ALTERNATIVELY:

Should the Honourable Court find that the delivery date for the fifth vehicle was in fact varied by the parties the Defendant pleads that this delivery date did not in any way affect the delivery dates of the other four vehicles which remained the same as stipulated in the contract."

It will be seen from plaintiff's particulars (see paragraph (e)) above and the alternative to paragraph C(e) above that, even if plaintiff fails in respect of the first four vehicles, it can, if the necessary facts have been proved, nevertheless succeed in respect of its claim relating to the fifth vehicle.

I propose dealing with the relevant issues under the following headings:

Heading 1.

Could...../30

Could the contract delivery date be extended verbally in terms of paragraph 33 of S.T.36 or did such an extension have to be in writing?

Heading 2.

Did plaintiff prove that an extension of the contract delivery date was granted by the Department or the Board?

Heading 3.

Did the written contract of 8 October, in respect of the fifth vehicle, constitute a variation of the existing contract or did it constitute a new contract?

Heading 4.

Was the fifth vehicle delivered within a reasonable time after 8 October 1971?

Heading 5.

Did the increase in the price of the fifth vehicle make provision for variations of freight charges and rates of exchange which had occurred before 8 October 1971?

Ad...../31

Ad heading 1.

Could the contract delivery date be extended verbally in terms of paragraph 33 of S.T.36 or did an extension have to be in writing in terms of paragraph 43 of S.T.36?

The learned Judge a quo came to the conclusion that:

> "An extension of the date is undoubtedly a variation of the contract and I see no legitimate means of excluding Clause 43 from the process. The variation, if any, was not in writing and was therefore null and void."

He was of course not dealing with the variation of the contract in relation to the fifth vehicle. I am in respectful disagreement with the learned Judge a quo's interpretation of the contract. Paragraph 33 of S.T.36 defines "period of the contract" for the purpose, inter alia, of the escalation paragraphs. It means the period between the due date of the tender and the contract delivery date or such extended delivery date as might be approved

by...../32

by the Board. This definition is self-explanatory. It does not require the approval to be in writing. Had this been a requirement the definition would have said so. Furthermore the discretion to approve rests with the Board. Such approval would normally follow on a request by a tenderer but this does not mean that the Board's discretion is fettered. On receipt of such a request it has the right to decide whether the period requested or a lesser period should be granted. The definition does not require that its approval shall be conveyed in any particular manner. It does not suggest that such an approval, to use the words of clause 43 of S.T.36, shall be "entered into in writing and signed by the parties". Put another way the effect of the definition is to provide that the "period of the contract" would expire on the agreed date or such other extended date as the Board may approve. The word "approved" does not in its context imply an agreement.

It follows that the approval of an extension

of...../33

of the delivery date by the Board is not a variation of this contract but something done in terms of the contract. Hence paragraph 43 of S.T.36 does not apply to such an approval. This does not, however, end the matter. The plaintiff still had to prove that an extension was in fact granted and also certain ancilliary matters.

Ad heading 2. Did plaintiff prove that an extension of the contract delivery date was granted?

The letter written by van der Stoep, on 22 December 1970 to the Board did not ask for an extension of this date. This letter was passed on to Pretorius. He spoke to van den Berg who had no objection to an extension being granted. Pretorius telephoned van der Stoep in January 1971 and (assuming that van der Stoep's version is correct) told him the Department could grant the extension and in fact had no objection to the extension. Both van der Stoep and Pretorius regarded the letter as a request for an extension of three months. The Department has accepted that an extension was granted till

30 June...../34

30 June 1971. The following events followed the telephone conversation:

(aa) In April 1971 van der Stoep advised Pretorius of the anticipated delivery dates and this information pleased Pretorius.

(bb) In September 1971 van der Stoep and van den Berg went to England for the demonstration and Carmichael advised the dates on which delivery would be made. Van den Berg raised no objection; he merely emphasized that it was essential that the vehicles be delivered before the initiation of the Boeing 747 service.

(cc) There were discussions about the conversion of the fifth vehicle. These were followed by correspondence and pursuant thereto, on 8 October 1971, the Department, having obtained the Board's authority, gave notice in writing that the order in respect of the fifth vehicle

was...../35

was "amended".

(dd) Thereafter the deliveries of the vehicles were made and they were paid for.

Save for the fact that van der Stoep and Pretorius regarded the letter of 22 December 1970 as a request for an extension of three months, and that the Department is prepared to accept that such an extension was granted, I am unable to find anything in the evidence which suggests a request for an extension of the contract period. The evidence goes no further than to prove that the Department was advised of the causes of the delays and the anticipated dates of delivery; that no objection was voiced by the Department; that no threat of cancellation or of a possible claim for damages was made by the Department. The Department had to have the vehicles for the Boeing 747 service. Cancellation would have involved new tenders and further inordinate delays. In these circumstances the Department was virtually forced into acquiescing in the

late...../36

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

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[illegible]

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[illegible]

[illegible]

[illegible]

[illegible]

late deliveries; in fact, that is the evidence of van den Berg. The more one studies the evidence of Pretorius and van der Stoep, the more apparent does it become that the most that can be said for plaintiff, is that the Department acquiesced in the delays because they were driven thereto by circumstances. There is nothing to suggest that either Pretorius or van den Berg, or even van der Stoep, contemplated the extension of "the period of the contract" or the invocation of the escalation clauses. I have not overlooked the contents of the letters which passed between the Board, the Department and the Treasury, viz. the aforementioned letters dated 9 May 1972, 12 June 1972 and 23 June 1972. It was submitted that these letters show that the Department considered itself bound to make good the relevant escalations in cost from which it followed that the Department accepted that it had granted extensions of the period of the contract. I do not read these letters as going so far. The Board's letter of

9 May...../37

9 May is one of inquiry and points out the possible dangers. The Department in its letter of 12 June 1972 in fact denies that any extension, beyond June 1971, was granted. Despite the fact that the Department, in its letter of 23 June 1972, seeks Treasury authority to pay the extra cost, the contents thereof do not suggest that the Department considers itself legally bound to pay such extra cost. The letter merely explains that the delays were not due to any fault on the part of plaintiff. In any event I am not persuaded that plaintiff can place any reliance on these inter-departmental letters.

The probabilities are that van der Stoep kept the Department advised of the delays and was anxious to avoid cancellation of the contract and that the Department merely acquiesced in the inevitable. Counsel for plaintiff conceded, correctly in my opinion, that plaintiff had to prove more than mere acquiescence. This, in my view, it failed to do. Mere acquiescence in

late...../38

late deliveries cannot, in the circumstances of the case, be said to be a consent to an extension of the contract period.

It was pleaded by plaintiff (see paragraph (d) above) that, despite the fact that the Department, in September 1971, was fully aware of the delays, the Board had nevertheless varied the order for the fifth vehicle. This, so it was suggested, showed that the Board had agreed to an extension of the delivery date in respect of all the vehicles. I find no merit in this suggestion. It is only necessary to add that at no stage was it suggested that the Board itself had intimated that it had agreed to extend the contract period.

In the result plaintiff failed to prove that either the Department or the Board consented to an extension of the contract period, i.e. other than for the fifth vehicle. It follows that in respect of the first four vehicles plaintiff's claim for the variations in freight

charges..../39

charges and rates of exchange which occurred after 30 June 1971 must fail. It was, however, entitled to the escalations in freight charges prior to March or June 1971. It is common cause that these amounted to R4 700 in respect of all five vehicles and should have been awarded to plaintiff by the Court *a quo*.

As plaintiff failed to prove the grant of any extension of the contract period in respect of the first four vehicles it is not necessary to deal with the other issues raised in the pleadings on this aspect. These issues were, whether Pretorius or van den Berg were authorised by the Board or by the Department to grant an extension; or whether the Board had authorised the Department, as such, to grant an extension; or whether the Department held out that it had authority so to do. It is also unnecessary to discuss the further issue raised by plaintiff, *viz.* that the Department was acting, not as the agent of the Board, but as principal.

Although...../40

Although not pleaded specifically, counsel for the Department submitted in this Court that in any event, as the grant of the extension would have involved the Department in a loss, it was not competent, either for the Board or the Department to grant an extension without authority from the Treasury. Reliance for this submission was placed on section 4(2) of Act 86 of 1968 (as amended). In view of the above findings of fact it is not necessary to discuss this aspect.

Ad heading 3. Did the written contract of 8 October 1971 in respect of the fifth vehicle, constitute a variation of the existing contract or did it constitute a new contract?

The discussions which took place in England in September 1971 appear from the evidence of Carmichael. This has been set out earlier in this judgment. Van der Stoep's evidence is to the same effect; van den Berg, as we have seen, agreed with Carmichael's evidence in broad outline. There is no need to repeat the evidence. As-

suming...../41

suming, without deciding, that it is admissible on this aspect, there is nothing in it which supports the Department's contention that the agreement to convert the fifth tender was a new contract. The contract to convert the fifth vehicle is constituted by a letter dated 20 September 1971 from plaintiff to the Department, a minute dated 5 October 1971 addressed to the Board by the Department, and an "order" sent by the Department to plaintiff on 8 October 1971 on which the Board's approval is stamped. The plaintiff's said letter reads (my underlining):

> "We understand that you may be interested to amend the above contract by having item 4 (i.e. the fifth vehicle) supplied as per the specification of item 3. This is possible if we have a decision within 30 days of the date of this letter.
>
> The additional cost at this stage would amount to R8 570.00 (Eight Thousand Five Hundred and Seventy Rand). The increase when conpared with your order C.766320 is due to the completion of most components which must be modified to suit the specification of the dual purpose airfield crash tender. In addition, there are increased labour and material rates which apply for the additional work involved.

Should...../42

Should our offer be acceptable it will increase your order C.766321 to R102,910 which is very reasonable if you consider that the present cost of a dual purpose crash tender to the specification of item 3, will now be almost R130 000."

The Department's minute of 5 October 1971 to the Board gives some detail of the amendments to be effected and states that, in its view, the increase in the price is reasonable. The order addressed to plaintiff is dated 8 October 1971 and reads:

"AMENDMENT TO GOVERNMENT ORDER NO. F.766321

DATED 20.1.70.

Gentlemen,

Kindly note that the abovementioned order has been amended as follows:

TOTAL AMOUNT R102,910-00."

This order is signed by the Department and the Board's approval is noted thereon. The words, underlined by me in the letter, and the words used in the order leave no doubt that this was an amendment of the existing contract which involved converting the water tender into a

foam...../43

foam tender and allowed for an increase in the original price by an amount of R8 570-00 representing the additional costs of the alteration. The agreement to convert the vehicle was not a new contract. Hence the terms and conditions of the original contract remained intact and unaltered in all other respects. However, no time was fixed for the delivery of the fifth vehicle. Hence, and this is common cause, it had to be delivered within a reasonable time after 8 October 1971. In terms of the contract, as amended, that meant delivery in South Africa.

Ad heading 4. Was the fifth vehicle delivered within a reasonable time after 8 October 1971 in South Africa?

The learned Judge a quo said the following in his judgment:

> "The amended order was dated 8 October 1971 and was approved by the State Tender Board. There was however no formal agreement as to a new date of delivery, it being understood that delivery would take place as soon as possible. None of the parties gave a thought to the escalation phrase 'period of the contract' as defined in Clause 33. It follows by necessary implication that there was some extension of the period with the approval of the Tender Board, and one must conclude that the extension

was...../44

was meant to be for a reasonable time. There was no written term in regard to a new date.

There was evidence by Mr. van den Berg that during September 1971 a new deadline for delivery was set when he and Mr. van der Stoep were in England and discussed the matter with Mr. I.L.Carmichael, the representative of the suppliers. The date was 31 March 1972. This was obviously regarded by the parties as allowing a reasonable time. In actual fact delivery took place only two months later, namely, on 31 May 1972. I find therefore that delivery did not take place within the extended delivery period and that in terms of Clause 33 the escalation clauses cannot be applied. The plaintiff's claim must accordingly fail also in regard to the fifth vehicle."

It appears from the above that the learned Judge a quo found that "a new deadline for delivery was set" and that that date was 31 March 1972. This is tantamount to a finding that the parties agreed that the deadline for delivery was 31 March 1972. But that is not the same as saying delivery had to be made within a reasonable time, which was the effect of the written amendment subsequently signed by the parties themselves. Moreover, as we saw from the evidence of Carmichael, the difficulties and delays in obtaining components and effecting modifications were explained to and discussed

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with van den Berg. Such deadline as was discussed was for shipment (not delivery in South Africa) by 31 March 1971. It will be remembered that van den Berg did not dispute Carmichael's evidence. The only real evidence on the aspect of what was a reasonable time is that of Carmichael. This evidence, as we have seen, shows that the conversion could not reasonably have been effected earlier than was in fact done. The vehicle was, in fact, ready for shipment by the end of March 1972. The delay thereafter was due to shipping difficulties beyond the control of the Manufacturer and plaintiff. This was not disputed. It follows that the fifth vehicle was delivered in South Africa within a reasonable time and that plaintiff's claim should not have been disallowed on this ground.

Ad heading 5. Did the increase in the price of the fifth vehicle make provision for variations in freight charges and rates of exchange?

As we saw from heading 4 above the learned Judge a quo disallowed plaintiff's claim for these escalations in respect of the fifth vehicle. Having done so he went

on...../46

on to say that plaintiff's claim on this heading had to fail on yet another ground. His judgment in this respect reads:

> "There is an alternative reasoning which leads to the same result. At the time when the alterations were agreed on, a new and increased total price for the vehicles was fixed. By that time freight charges and heavy lift charges had already risen and the rate of exchange between the rand and the pound sterling had changed to South Africa's disadvantage. At the time when a price is fixed, existing costs must surely be taken into account. The escalation clauses contemplate only increases which might take place subsequent to the fixing of the price."

The documents constituting the agreement in terms of which the specifications for, and the cost of, the fifth vehicle were varied are set out in the discussion on heading 3 above. These reflect inter alia an increase, in the original price, of R8 570 which according to the plaintiff's letter of 20 September 1971 was "due to the completion of most components which must be modified to suit the specification of the dual purpose airfield crash tender. In addition,

there...../47

there are increased labour and material rates which apply for the additional work involved". Plaintiff's letter was followed by the Department's minute of 5 October 1971 to the Board in which it was said that the plaintiff's quotation (notering) was reasonable. It will thus be seen that the reasons for the increase and the relevant factors are set out in the documents. They do not suggest that variations in the freight charges or rates of exchange were taken into account. The documents reflect that the original basic price of R94 340-00 was left unaltered and the only new costing which was done related exclusively to the cost of the alteration. The suggestion that the increase, in the original price, of R8 750-00 was intended by the parties to replace the escalation clauses is contradicted by the documents. Furthermore there is no evidence (assuming such evidence would be admissible) to support such a suggestion. It is also worthy of note that the letter from plaintiff was sent to the Department on 20 September 1971 and all the

relevant...../48

relevant variations in the rates of exchange took place in and after October 1971. It follows that plaintiff's claim for the escalations, in respect of the fifth vehicle, should not have been disallowed by the court a quo on the ground discussed under this heading.

It follows from the above findings -

A. that plaintiff failed to prove, in respect of the first four vehicles, that the period of the contract had been extended;

B. that plaintiff proved that the variation agreed upon on 8 October 1971 constituted an amendment of the original contract in terms whereof the fifth vehicle had to be delivered within a reasonable time from the 8th October 1971;

C. that plaintiff did deliver it within a reasonable time;

D. that plaintiff is entitled to the relevant escalations in freight charges and rates of exchange

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in respect of the fifth vehicle.

It appears from affidavits filed by the respective attorneys that, during argument at the end of the trial, the Department conceded that it was liable, in respect of all the vehicles, for the increases in freight charges which had occurred before June 1971 (or March 1971). It appears that this concession was overlooked by the learned Judge a quo. It is common cause that plaintiff is entitled to, and should have been awarded, an amount of R4 700 in respect of those charges. It was agreed by the legal advisers to the parties that, if this Court came to the conclusions set out in paragraphs B,C and D above, the plaintiff is also entitled to judgment, in respect of the fifth vehicle, in a sum of R562-29, being additional changes in freight charges, and in a sum of R12 546-54 being variations in rates of exchange which occurred during the extended period allowed for the delivery of the fifth vehicle. These sums total R17 808-83.

I turn...../50

I turn now to consider the question of costs. The trial commenced on 13 August 1974 and continued for 4 days. During argument on the fourth day counsel for the Department conceded that the Department was liable for the increase in freight charges which had occurred during the original contract period. It was then arranged that the parties would agree the figure due to plaintiff in this regard and advise the Judge thereof. Judgment was reserved and it appears that both parties were asked to submit written heads of argument on the issue of the increased rates in respect of the fifth vehicle. These heads were in due course filed. Judgment was delivered on 23 October 1974. The plaintiff's claim was dismissed with costs. This indicates that the parties failed to advise the learned Judge of the amount agreed upon, in respect of the increases in freight charges, as being admittedly due by the Department. This was apparently overlooked by the learned Judge. Had he not done so he

would...../51

would have awarded plaintiff the agreed amount, viz., R4 700. Such an award may well have affected the order for costs.

The pre-trial conference held in terms of rule 37 of the Rules of Court was held on 2 August 1974. At this conference it was agreed that a bundle of the relevant documents discovered by Plaintiff and Defendant would be prepared and handed to the Court. This was in fact done. As we have seen the Department also agreed that the quantum of plaintiff's claim as set out and calculated in its particulars of claim was correct. Despite this agreement the Department did not admit liability in any amount or make any tender. This pre-trial minute was signed on the 12th August 1974, i.e. the day before the trial started.

The record in this case is lengthy. The pleadings take up 70 pages, the evidence covers 224 pages and the documents in the "bundle" consist of 454 pages.

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An examination of the evidence shows that the main issue canvassed was whether there had been a verbal extension of the contract period. Of the 224 pages of evidence not more than twenty five pages were taken up on the issue of the Department's additional liability in respect of the fifth vehicle.

Although the question of the costs, in this Court and the Court a quo, was not fully argued counsel for the parties did make certain submissions. These need not be detailed. It is sufficient to say that counsel for the Department urged that, as the bulk of the evidence led was on the issue on which plaintiff had failed (i.e. the alleged verbal extension), the Department should not be mulcted in all the costs in the Court a quo, even if the plaintiff succeeded in its claim in respect of the fifth vehicle. He urged that the costs in both courts should be apportioned. Counsel for plaintiff argued that as it was common cause that plaintiff was entitled to

judgment...../53

judgment in the sum of R4 700 it was entitled, if not to all its costs, to a substantial proportion thereof and, if it also succeeded on its claim for increases in respect of the fifth vehicle, to all its costs.

The picture which emerges in regard to the costs in the Court a quo is that up until the pre-trial conference on 2 August 1974 the Department did not, in any way, suggest that it admitted the correctness of any of the plaintiff's figures and even after the minute was signed on 12 August 1974 no admission of liability was made. Such admission as was made, was, as stated above, only made on the fourth day of the hearing.

From all the above it is clear that plaintiff had to prepare for the trial on the basis that its claim was being resisted in its entirety. This entailed that it had to prove that it was entitled to the increases, not only in respect of the fifth vehicle, but also to the increases in freight charges, for all the vehicles, during the original contract period. This entailed having

available..../54

available for use at the trial all the documents in the "bundle of the relevant documents" handed in. It follows that the documentation was not increased by plaintiff's persistence in its contention that a verbal extension had been granted. The extra paragraphs in the pleadings, caused by such persistence, did not increase the cost of the pleadings by an appreciable extent. Hence the plaintiff is entitled to all the costs of the pleadings and the documents.

As stated earlier the bulk of the evidence dealt with the issue of the alleged verbal extension. The evidence on the question of liability in respect of the fifth vehicle and the argument thereon (had this taken place in court) may well have taken more than one day but certainly not more than two days. Thus plaintiff by persisting in its claim based on the alleged verbal extension caused the Department extra expenditure. "This Court has on several occasions laid down that if issues are distinct and

severable...../55

severable the successful party on each issue is as a rule entitled to its costs on that issue. - This is a general rule which all courts should follow, but is not a hard and fast rule and considerable discretion must be left to the trial Judge in regard to costs", (per Wessels A.C.J. in Wege v.Strauss 1932 A.D. 76 at p.86). In Nel v. Nel 1943 A.D. 280 Fischer,A.J.A., said at p. 289 :

> "It may be true as was said in Union Share Agency and Investment, Ltd v. Green (1926 C.P.D. 129) that if a successful party has not been content to rely on the successful point but has added to the expense by adding the weak issues, he should bear the additional expense to which his adversary has been put. But much must depend on the circumstances in each case--------".

If the estimate is correct that the trial would have lasted two days, on the issues on which plaintiff succeeded, it means that plaintiff by persisting in urging the issue of the alleged verbal extension made defeat unnecessarily expensive for the Department. However, the making of an award of costs for two days in favour of the

Department...../56

Department would in effect deprive plaintiff of all its trial costs and would entail the drawing of an extra Bill of Costs and the taxation thereof. In this latter regard I find the following dicta of TROLLIP, J.A., in Gentiruco A.G. v. Firestone S.A. (Pty.) Ltd 1972 (1) S.A. 589 A.D. at p. 670 apposite:

> "In due course it came to be recognised that awarding costs on separate issues often placed a heavy burden on the Taxing Master and put the parties to further, unnecessary expense in having such costs taxed and set-off."

In certain cases orders have been designed to avoid the above burden and unnecessary expense. In all the circumstances of the trial in this case I am of the view that proper justice will be done to both parties if the plaintiff is awarded all its costs up to and including the first day of trial and no order is made as to the other days of the trial.

The plaintiff has had substantial success in the appeal. The costs of the appeal were not significantly increased by the fact that plaintiff in this Court also persisted

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in urging that a verbal extension of the contract period had been granted. The plaintiff is therefore entitled to its costs on appeal.

It follows that the Court a quo should have awarded the plaintiff the abovementioned amounts of R4 700, R562-29, R12 546-54 plus (as claimed) interest a tempore morae and also all its costs up to and including the first day of trial. The plaintiff is also entitled to the costs of the appeal.

The order made herein is:

1. The appeal is allowed with costs;

2. the order of the Court a quo is set aside, and there is substituted the following order,

3.(a) judgment for plaintiff in the sum of R17 808-83, plus

(b) interest thereon at 6% per annum a tempore morae;

(c) plaintiff is awarded its costs up to and in-

cluding...../58

cluding the first day of the trial.

4. The orders for costs in paragraphs 1 and 3(c) above are to include the costs of two counsel.

O. Galgut.
O. GALGUT, J.A.

HOLMES, J.A.)
CORBETT, J.A.) Concur.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

H. ALERS HANKEY LIMITED ..... APPELLANT

AND

THE MINISTER OF TRANSPORT ..... RESPONDENT

Coram: Botha, Holmes, Trollip and Corbett, JJ.A. and Galgut A.J.A.

Heard: 20 November 1975 Delivered: 2 March 1976

J U D G M E N T

Trollip, J.A. :

I agree with the conclusions reached and the orders made by my brother GALGUT. In regard to the first four

vehicles .... /2

vehicles, however, I prefer to base the rejection of the plaintiff's claim for the increases in freight and exchange rates on a different ground.

These claims were based on paragraphs 30(2) and 32(1) and (2), read with paragraph 33, of the General Conditions of Contract (S.T. 36). These paragraphs are fully set out in my brother's judgment, so I need not repeat them here. I merely pause to observe that the escalation in the prices of supplies that they provide for can be either upwards or downwards according to the variations in the freight or exchange rates. Any such adjustments to the prices for alterations in freight rates are conditional upon the alterations occurring during "the period of the contract" (paragraph 30(2)),

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and, for variations in exchange rates, upon the completion of the contract, i.e., delivery, occurring during the same period (paragraph 32(2)). For those purposes the expression "period of the contract" is defined in paragraph 33 to mean "the period between the due date of the tender and the final contract delivery date or such extended delivery date as may be approved by the Board."

It was common cause that the due date of the tender was 15 September 1969, and, according to the parties' contract, the final delivery date was 22 March 1971. That therefore constituted the original "period of the contract" for the purposes of the above escalation paragraphs. It follows that that final delivery date was an integral,

important .... /4

important term of the parties' contract. Indeed, according to the contract it was a "firm" date, i.e., binding on the parties. Any extension of that date beyond 22 March 1971 in order to render the escalation paragraphs applicable in respect of the additional period would therefore constitute an amendment or variation of the parties' contract. For, apart from anything else, its effect would be to obligate either the State (here the Department of Transport) to pay more or the plaintiff to receive less than the contract prices, as the case may be, according to any upward or downward movement in exchange rates, if delivery was made within the extended period, or in freight rates occurring within that period. Such an amendment or variation of the contract could only be validly and effectively

achieved .... /5

achieved if it was done in the way provided in the contract. The reason is that the latter makes it quite clear that a mere agreement by the parties to amend or vary the contract is insufficient. Paragraph 43 of S.T. 36 says "no agreement to amend or vary the contract or such special conditions, stipulations or provisions respectively, shall be valid and of any force and effect unless such agreement to amend or vary is entered into in writing and signed by the parties".

According to paragraph 43 the only relevant exception to the applicability of its provisions is "except where it is implicit in the General Conditions of Tender, Contract or Order", i.e. S.T. 36. That exception is somewhat elliptically expressed. But its clear meaning is, I

think .... /6

think, that where it is implicit elsewhere in S.T. 36 that a particular amendment or variation of the contract can be made otherwise than by a signed writing, and it is so made, paragraph 43 is not applicable to it.

Now paragraph 33 of S.T. 36 says that the Board itself can extend the final contract delivery date to such date as it approves. Such an extension would not necessarily be based on an agreement between the State and the contractor. On the contrary, the Board could approve of an extension on the application of one party against the will of the other. That interpretation of paragraph 33 accords with paragraph 44. The latter provides, inter alia, that if any dispute arises out of the contract, including any dispute as to the execution of any order, the decision of the Board shall be final. Moreover

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the simple approval of the extension by the Board without anything more would suffice. No formalities for its approval are prescribed. But doubtlessly in practice its approval would be formally recorded and communicated to the parties. It is therefore implicit in paragraph 33 that where the Board approves of an extension of the final contract delivery date, paragraph 43 is not to apply. Such an extension need not thus be in writing or signed by the parties. In the absence of the Board's approval, however, any extension of the final contract delivery date, in order to be valid and effective for the purpose of the escalation paragraphs, must be in writing and signed by the parties, as required by paragraph 43. A verbal agreement between them would be ineffective

(see .... /8

(see S.A. Sentrale Ko-op. Graanmaatskappy Beperk v. Shrifren 1964 (4) S.A. 760 (A.D.)). Hence, whilst the Department's acceptance of, or agreement to accept, late deliveries of the vehicles might constitute a waiver of its right to cancel the contract or to claim penalties or damages for its breach (I express no view on that aspect), it would not by itself effectively amend or vary "the period of the contract" for the purposes of the escalation paragraphs.

The Department conceded that the final contract delivery date had been duly extended to 30 June 1971. The plaintiff, however, alleged that it was duly extended to May 1972. It is clear that the Board itself did not approve of any such extension.

And .... /9

And assuming without deciding that it could delegate its power under paragraph 33 to approve of such an extension, the delegation of that power or its exercise by anyone on behalf of the Board was not alleged or proved. Van den Berg and Pretorius, with whom plaintiff dealt, acted on behalf of the Department and not the Board. Not only does that appear from the evidence, but it was also admitted in plaintiff's further and better particulars to its summons. Indeed, the core of plaintiff's case was that the Board had merely referred or left the problem of an extension to the Department and plaintiff for them to resolve by agreement between themselves if they could. But if any such agreement was reached between them, as plaintiff alleged, it was not reduced to or contained in any writing

or .... /10

or signed by them; it was thus ineffective by reason of paragraph 43. I therefore agree that these claims by plaintiff must fail.

I do not wish to convey by the above reasoning that I disagree with the conclusion of my brother GALGUT that such an agreement was not proved. On the contrary, I fully agree with it. But I prefer to base my conclusion on the abovementioned simple ground for these reasons. Paragraphs 33 and 43 of S.T. 36 provide alternative methods whereby parties to a State contract can procure an extension of the final contract delivery date for the purpose of the escalation paragraphs. The essential postulate in each - the Board's approval in the former and the formality of writing and signatures in

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the latter - is designed, firstly, to protect the State's financial interest in any such extension (cf. for example section 4(2) of the State Tender Board Act, 1968), and secondly, to eliminate protracted disputes of the present kind, namely whether or not any such extension was granted verbally by some State official and whether or not he had authority to do so. Hence, lest plaintiff, or any other would-be litigant in a similar predicament, may be encouraged to think that, had such an agreement been proved, plaintiff would have succeeded in its claims, I prefer to base my conclusion squarely on the fatal non-compliance with the essential requirement of paragraph 33 or 43. Such non-compliance was relied on by the Board in ultimately rejecting plaintiff's claims (see its letter to

plaintiff ..../12

plaintiff on 6 November 1972) after the whole issue had been referred to the Treasury on 23 June 1972 for consideration. And the Department also relied on it, inter alia, in resisting plaintiff's claims in this litigation. In my view this defence was well-founded in respect of the first four vehicles.

W.G. Trollip, J.A.