(420/79)
J vd M

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:-

GRINAKER CONSTRUCTION (TRANSVAAL) (PROPRIETARY) LIMITED ..... APPELLANT

and

TRANSVAAL PROVINCIAL ADMINISTRATION ..... RESPONDENT

CORAM: JANSEN, JOUBERT, CILLIé, VILJOEN, JJA et TROLLIP, AJA
HEARD: 4 SEPTEMBER 1981
DELIVERED: 29 SEPTEMBER 1981

J U D G M E N T

VILJOEN, JA:-

The appellant appeals against the judgment and order of the Court a quo which decided a special case stated for the adjudication of the Court in terms of Rule 33 of the Uniform Supreme Court Rules in the respondent's favour.

The /.....

The litigation between the parties commenced in the Court a quo when the plaintiff (present appellant) claimed certain relief from the defendant (present respondent) under a contract for the construction of a road and appurtenant works. I shall for the sake of convenience and clarity hereinafter refer to the parties as the plaintiff and the defendant respectively. The relief sought included the following claim:-

> "An order declaring that an increase in quantities of work beyond those stated in the Schedule of Quantities and without having been ordered in writing by the Engineer as a variation as contemplated by the first proviso to clause 49(2), falls within 'such variation or variations' as contemplated by clause 49(4)."

According to the stated case there is no dispute between the parties as to the terms of the contract but there is a dispute between them in regard, inter alia, to the averments of law which have been

made by the plaintiff in support of the claim.

Paragraphs 7 - 10 of the stated case read as follows:-

"7. The dispute of law between the parties here relevant is in regard to the interpretation of clause 49 of the contract and is as follows:

(a) The Plaintiff contends that an increase or decrease in the quantity of any

work /.....

work where such increase or decrease is not the result of an order given under the aforesaid clause 49, but is the result of the quantities exceeding or being less than those stated in the Schedule of Quantities, is a variation within the meaning of clause 49(4) of the General Conditions of Contract.

(b) The Defendant denies this contention.

(c) The Defendant avers:

(i) that clause 49(4) refers only to a variation or variations of the form, quality or quantity of the works or part thereof, resulting from -

(1) orders in writing by the engineer; and/or

(2) the issue of amended plans and drawings; and/or

(3) verbal communications as referred to in clause 49(2); and

(ii) that where, in the execution of the contract, quantities were used in excess of or less than the estimated quantities referred to in the Schedule of Quantities (in circumstances not falling under (i) above), such

excess or lesser amounts used are not variations for purposes of clause 49.

8. The parties are in agreement that this dispute of law should as a matter of convenience be determined in limine as such a determination is likely to result in a substantial saving of costs.

9. The interpretation of clause 49(4) turns on the contract documents themselves and neither party desires to lead any evidence aliunde in relation to this dispute.

10. In the premises the parties respectfully request the above Honourable Court to determine the above dispute in law between them and to make such order as to costs in relation to this Stated Case as may appear to it to be just."

The final paragraph of the judgment appealed against reads as follows:-

"I accordingly determine the dispute by declaring that the correct interpretation of clause 49 of the contract of the parties is that contended for by defendant as set out in paragraph 7(c) of the stated case. I direct plaintiff to pay the

costs of the stated case including costs taxed on the basis that it was reasonable to have engaged two counsel."

The parties entered into the contract concerned, No. NFT 66 of 1970, in November 1970. Clause 1 of the General Conditions of Contract contains definitions of certain terms. The following definitions are important and relevant for the purposes of this judgment:-

"(10) 'Contract' means the General Conditions of Contract, the Special Provisions, the Specifications, the priced Schedule of Quantities, the Drawings, the Tender, the written Agreement between the Employer and the Contractor for the work to be done, and also any and all supplemental agreements varying, amending, extending or reducing the work contemplated and which may be required to complete the work in a substantial and acceptable manner."

"(11) 'Work' means all the works set out in the Special Provisions, the Specification and the Schedule of Quantities, and any such work as is explained and described or implied by the Drawings, including all extra work and variations and omissions

ordered in accordance with these Conditions."

"(8) 'Specifications' means the directions, provisions and requirements contained herein, or amendments thereof supplied by the Engineer in writing during the course of construction, pertaining to the method and manner of performing the work, or to the quantities and qualities of materials to be furnished under this contract."

"(9) 'Schedule of Quantities' means the document attached to this Contract in which are entered the approximate quantities of work, labour, materials and articles required for the execution of this Contract with the rates and prices of same which the Employer agrees to pay the Contractor."

The "Memorandum of Agreement" entered into between the parties contains the following clause:-

"The Contractor shall execute and complete the work in accordance with the said General Conditions of Contract, Specifications and Drawings and subject to the priced Schedule of Quantities, all of which shall be read and constructed (construed?) as forming part of this agreement."

The Schedule of Quantities contains six columns. In the first four the approximate quantities of work, labour, materials and articles required for the execution of the contract are set out under the headings Item, Description, Unit and Quantity. In the penultimate column the tenderer inserts a rate against each item and in the last column he inserts the amount arrived at for the quantity stated at the rate inserted by him. Finally all the amounts are added up, a sum which is allowed for contingencies is added and the total contract amount is carried to the tender form. In the present case the amount inserted for contingencies, not by the tenderer but by the employer, was R100 000 subject to the following provision:-

> "The sum provided here is under the sole control of the Engineer and may be deducted in part or as a whole."

The price or rate which is inserted by the tenderer, is subject to the following provision:-

> "A price or rate is to be entered against each item in the Schedule of Quantities, whether

quantities are stated or not. Items which are not priced shall be considered as covered by other prices or rates in this Schedule of Quantities."

Further conditions of the contract are:-

"The Quantities in this Schedule of Quantities are to be regarded as approximate and not necessarily the actual amount of work to be done.

The Contract Amount for the completed Contract shall be computed from the actual quantities of work done and valued at the unit rates and prices tendered against the respective items in the Schedule of Quantities.

The prices and rates to be inserted in the Schedule of Quantities are to be the full inclusive values of the work described under the several items, including all costs and expenses which may be required in and for the construction of the work described, together with all general risks, liabilities, and obligations set forth or implied in the documents on which the tender is based."

Subject to these provisions the plaintiff, who was the successful tenderer, tendered to do the work specified

for a sum, including the R100 000 for contingencies, of R4 880 679,04. This was described in the Schedule of Quantities as the "Total Contract Amount Carried To Tender Form."

This amount was carried to the tender form by the plaintiff completing a paragraph which reads as follows:-

> "I/We, the undersigned, hereby offer to provide all the labour, material, workmanship, machinery and everything that is or may be necessary in and for the entire completion of the work and service required in the execution of the above-mentioned service in accordance with the Drawings, Specifications, Bills of Quantities and Conditions of Contract, of which I/we made myself/ourselves fully acquainted, to the entire satisfaction of the Director, Transvaal Roads Department, for the sum of:
>
> R4 880 679,04."

The "Agreement Form" reflects this amount as "Approximate Value". That the amount appearing in the Schedule of Quantities and in the tender form is not the final amount to be paid to the contractor but that the

contractor's eventual remuneration depends upon the actual measurements involved in the execution of the works, is underscored by the following provisions appearing in the General Specifications:-

"102-8 The quantities appearing in the Schedule of Quantities are approximate only and are prepared for the comparison of tenders and award of contract. Payment will be made only for the quantities of work performed or materials furnished in accordance with the Contract and it is understood that the scheduled quantities of work to be done and materials to be furnished may each be increased or decreased as herein provided."

"102-9 The quantities listed in the Schedule of Quantities do not govern final payment. Payments to the Contractor will be made only for the actual quantities of contract items performed in accordance with the plans and Specifications and if upon completion of the construction, these actual quantities show either an increase or decrease from the quantities given in the Schedule of Quantities, the contract

prices will still prevail."

The plaintiff, relying on clause 49 of the General Conditions of Contract contends, however, that despite these contractual conditions an increase or decrease in the quantities may, even if no variation is brought about to the work to be performed under the contract, be such a deviation from the quantities appearing in the Schedule of Quantities as to render the contractor entitled to be remunerated at a rate and price higher than that tendered in the Schedule of Quantities. Clause 49 provides as follows:-

"ALTERATIONS, ADDITIONS AND OMISSIONS

(1) The Engineer shall make any variation of the form, quality or quantity of the Works or part thereof that may in his opinion be necessary, and for that purpose, or for any other reason it shall be in his opinion desirable, shall have power to order the Contractor to do and the Contractor shall

do any of the following:

(a) Increase or decrease the quantity of any work included in the Contract.

(b) Omit any such work.

(c) Change the character or quality or kind of any such work.

(d) Change the levels, lines, position and dimensions of any part of the works.

(e) Execute additional work of any kind necessary for the completion of the works;

and no such variation shall in any way vitiate or invalidate the Contract, provided the total Contract Amount be not thereby increased or decreased in value more than twenty (20) percent and provided further that the total quantity of any sub-item whose value in the Schedule of Quantities is in excess of $7\frac{1}{2}\%$ of the total Contract Amount, be not thereby increased or decreased by more than 25%.

(2) No such variation shall be made by the Contractor without an order in writing of the Engineer. Provided that no order in writing shall be required for increase or decrease in the quantity of any work where such increase or decrease is not the result of an /.....

an order given under this Clause, but is the result of the quantities exceeding or being less than those stated in the Schedule of Quantities. Provided also that if for any reason the Engineer shall consider it desirable to give any such order verbally, the Contractor shall comply with such order, and any confirmation in writing of such verbal order given by the Engineer, whether before or after the carrying out of the order, shall be deemed to be an order in writing within the meaning of this Clause. Provided further that if the Contractor shall confirm in writing to the Engineer any verbal order of the Engineer, and such confirmation shall not be contradicted in writing by the Engineer, it shall be deemed to be an order in writing by the Engineer.

(3) The Engineer shall determine the amount (if any) to be added to or deducted from the Contract Amount in respect of any additional work done or work omitted by his order. All such work shall be valued at the rates set out in the Contract, if in the opinion of the Engineer the same shall be applicable. If the Contract shall not contain any rates applicable to the additional work, the same shall be classed as

Extra Work and payment in respect thereof shall be made as hereinafter provided.

(4) Provided that if such variation or variations shall result in an increase or decrease of more than 20 percent in the value of the total Contract Amount or an increase or decrease of more than 25% in the total quantity of any sub-item whose value in the Schedule of Quantities is in excess of $7\frac{1}{2}\%$ of the total Contract Amount and subject to the production of satisfactory evidence that loss or damage has been sustained by the Contractor as a result of such variation or variations, the Engineer shall fix such other rate or price as in the circumstances he shall think reasonable and proper.

(5) Provided also that no increase of the Contract Amount under sub-clause (3) of this Clause, or variation of rate or price under sub-clause (4) of this Clause shall be made unless, as soon after the date of the order as is practicable, and in the case of additional work before the commencement of the work or as soon thereafter as is practicable, notice shall have been given in writing:

(a) by the Contractor to the Engineer of his intention to claim extra payment

for a varied rate, or

(b) by the Engineer to the Contractor of his intention to vary a rate of (or?) price, as the case may be."

In support of the plaintiff's contention as set out in paragraph 7(a) of the stated case, counsel for the appellant presented the following argument on the linguistic interpretation of clause 49:- The word "such" used in the phrase "such variation or variations" in clause 49(4) of the General Conditions of Contract indicates that what falls within the concept of a variation within the meaning of clause 49(4) is to be ascertained from what precedes that sub-clause. It is in sub-clause (1) that there occurs for the first time reference to the term "variation" in the phrase "variation of the form, quality or quantity of the Works or part thereof". For greater clarity the kind of variations which are contemplated have been defined in paragraphs (a) to (e) inclusive of sub-clause (1). The first of these listed variations is an increase or decrease in the quantity of any work included

in the contract. Sub-clause (2) introduces the general requirement of an order in writing before the contractor makes a variation. This general rule is subject to three provisos. "Such variation" referred to in the general rule would include the variation referred to in paragraph (a) of sub-clause (1), viz. increase or decrease in the quantity of any work. This is in fact the kind of variation which is dealt with in the first proviso to sub-clause (2). The first proviso makes it clear that this kind of variation falls into two categories: (a) Where the increase or decrease in the quantity of work is the result of an order given under clause 49; and (b) where the increase or decrease in the quantity of work is the result of the quantities exceeding or being less than those stated in the Schedule of Quantities (referred to by counsel for the appellant as the "authmatic increase or decrease" and by counsel for the respondent as "the difference on measurement concept"). In the case of the "automatic increase or decrease" the general rule is relaxed. For practical purposes the contractor in these

cases is in the same position as he would be if the variation had been ordered in writing. The first proviso to clause 49(2) does not purport to distinguish between what is a variation and what is not, but rather between the two categories of variations as set out in (a) and (b) above. Both the categories of variation are antecedents to clause 49(4); both fall within the meaning of variation/s as contemplated by clause 49(4); both legitimately cause it to operate. Clause 49(4) does not exclude the "automatic increase". Had it been the intention of the parties so to do, nothing could have been easier than for the clause to have said so. So much for counsel's argument on this aspect of the case.

I do not agree with this argument. I agree with counsel that sub-clause (4) should be construed in the light of the sub-clauses which precede it. When so construed clause 49(4) does not, in my view, include the so-called automatic increases and decreases. The basic flaw in counsel's argument is that he equates a variation of the quantity of the works as envisaged in sub-clause (1)

with an increase or decrease of the quantities in the Schedule of Quantities. His entire further argument on the linguistic construction to be put upon clause 49 proceeds from this fallacious premise. In the normal course of the execution of the work in accordance with the drawings and specifications, even though the quantities involved may differ from those appearing in the Schedule of Quantities, there is no cause for the engineer to intervene and to make any variation of the form, quality or quantity of the works or part thereof. From the conditions of the contract quoted above it is abundantly clear that the Schedule of Quantities contains "approximate" quantities only and that the final contract price is to be computed according to the actual quantities measured. Since the quantities therein specified are expressly stated to be "approximate", the contract itself envisages that the final computation, after due completion of the works, may result in an increase or decrease in the quantities stated in the Schedule of Quantities.

Counsel for the appellant argued, in another

context, that "approximate" means "very near" and "nearly resembling". I shall deal with this at a later stage. I do not completely ignore that argument in the present context but what I wish to emphasize now is that the plaintiff as contractor knew that there might be a difference between the quantities appearing in the Schedule of Quantities and the quantities measured for remuneration purposes.

Clause 49(1), the terms of which I iterate for the sake of easy reference, provides that the engineer shall make any variation of the form, quality or quantity of the works or part thereof that may in his opinion be necessary, and for that purpose (I think it should read: "..... if for that purpose" — see A. McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974(3) SA 506 (AD) 513 A) or for any other reason it shall be in his opinion dewirable, shall have power to order the contractor to do any of the tasks specified in paragraphs (a) - (e). It is not necessary, for purposes of this judgment, to consider under what circumstances the engineer may deem it "desirable" to order

the contractor to do the work. What is important to note in the present context is that if he makes any variation as described and, for this purpose, orders the contractor to implement it, the contractor has no option but to comply.

Sub-clause (2) commences by providing that no "such variation" shall be "made" by the contractor without an order in writing of the engineer. The words "such variation" can only be read to refer back to the variation envisaged in sub-clause (1). In my view, sub-clauses (1) and (2) read together postulate two possibilities. The first is that the engineer "makes" a variation of the form, quality or quantity of the works and orders the contractor to give effect thereto; the other is that the contractor, of his own accord, "makes" "such variation" i.e. of the form, quality or quantity of the works and carries it into effect. In either case the contractor needs a written order from the engineer which means that, in the latter case, he must procure the approval of the engineer and, in both cases, obtain a written order from him before giving effect to

"such variation".

The words "no such variation" appearing in the operative first sentence of sub-clause (2) embrace all three aspects of the variation contemplated in sub-clause (1) viz. the form, quality or quantity of the works. The first proviso deals with the aspect of quantity only. In my view this proviso was inserted for the benefit of the contractor. It was meant to dispel any uncertainty which may arise in the contractor's mind as to when exactly, in relation to the quantity of the works, he would require a written order from the engineer. This proviso clarifies the position for him. For easy reference I repeat it here:-

> "Provided that no order in writing shall be required for increase or decrease in the quantity of any work where such increase or decrease is not the result of an order given under this clause, but is the result of the quantities exceeding or being less than those stated in the Schedule of Quantities."

Upon analysis, when the order of the last two phrases is reversed /.....

reversed for greater intelligibility, the proviso amounts to this:- (a) If the increase or decrease in the quantity of any work is the result of the quantities exceeding or being less than those stated in the Schedule of Quantities, no order in writing shall be required; (b) on the other hand, if the increase or decrease is the result of an order given under this clause (i.e. clause 49) an order in writing shall be required. (I have turned the two negatives into a positive).

Thus analysed, the proviso is reasonably clear. The contractor is told that if the engineer does not intervene and it is simply a case of the quantities exceeding or being less than those stated in the Schedule of Quantities, he shall not require a written order from the engineer. The implication is clear that this is so because it is not a variation in terms of sub-clause (1). He shall only require such written order if the engineer has ordered him to give effect to a variation as contemplated in sub-clause (1).

I need not traverse the implications for the

contractor if he defies the prohibition in the first, the operative, sentence of sub-clause (2). In terms of the second and third provisos he may, without incurring any risk of prejudice to himself, act on a verbal order of the engineer, provided the formalities therein laid down, are complied with.

Sub-clause (3) provides that the engineer shall determine the amount (if any) to be added to or deducted from the contract amount in respect of any additional work done or work omitted by his order. Conceding that what, by reason of the use of the words "by his order", was contemplated in this sub-clause, is a written order by the engineer for a variation, counsel for the appellant argued that this sub-clause does not detract from his argument because it deals specifically with the categories of variation defined in paragraphs (b) and (e) of sub-clause (1) and does not refer generally to a variation which requires an order and particularly not to sub-clause (a). The learned Judge a quo therefore erred in holding that "such variations" in clause 49(4) "plainly refer to

variations referred to in clause 49(3) which were variations brought about by the order of the engineer", counsel submitted. I do not agree. It is true that paragraph (b) of sub-clause (1) contains the words "omit any such work" and that paragraph (e) reads:-

> "Execute additional work of any kind necessary for the completion of the works",

but I can hardly imagine any variation of the "form, quality or quantity" of the works of the kind set out in paragraphs (a) - (e) thereof which does not involve either additional work or the omission of certain work under the contract. Sub-clause (3) proceeds to provide that all "such work" shall be valued at the rates set out in the contract, if in the opinion of the engineer the same shall be applicable. I can see no reason why all "such work" should be limited to items (b) and (e) referred to in sub-rule (1). It is finally provided in sub-rule (3) that if the contract shall not contain any rates applicable to the additional work, the same shall be classed as extra

work and payment in respect thereof shall be made "as hereinafter provided". (Clause 50 is the clause which makes provision for remuneration for any extra work done by the contractor). It is quite logical that the final sentence in sub-clause (3) should deal with additional work only and not with work omitted because if any work for which provision has been made is omitted it is easy to effect the necessary deduction, but again, if this provision is to be construed to refer to item (e) only, at what rate must the contractor be paid in respect of the other items in sub-clause (1)? It is easily conceivable that a change in the character or quality or kind of the work in terms of paragraph (c) or changes in the levels, lines, position and dimensions of any part of the works in terms of paragraph (d) may involve extra work for which no applicable rates may be contained in the contract. Cf. McAlpine's case supra at 511 F - G. If sub-clause (3) read with clause 50, were to be held not to provide for the contractor's remuneration in this regard, it would amount to a serious omission in the contract. So glaring an

omission could not have been overlooked by the draftsman of, or the parties to, this contract which, presumably, is a standard one in frequent use, at least in the Transvaal.

Upon sub-clause (3) follows the important and crucial sub-clause (4) upon which the appellant heavily relies because it provides for the possibility of the contractor being remunerated at a rate higher than that contracted for in the Schedule of Quantities. The argument of counsel for the appellant in this regard is a two-fold one. Firstly, he extends (as, indeed, he must because it was meant to pave the way for the construction he seeks to put on sub-clause (4)) his general argument on the linguistic construction of the word "variation" in sub-clause (1) and the words "such variation" appearing in sub-clauses (1) and (2) to include an automatic increase or decrease in quantities. Secondly, he submits that the interpretation contended for by the appellant gives effect to the intention of the parties.

In my view the words "such variation or variations" in sub-clause (4) refer back to the variation or variations

made by the engineer in terms of clause 49(1) which I have construed not to include the so-called automatic increases or decreases. If such variation or variations shall result in an increase or decrease of more than 20 percent in the value of the total contract amount or an increase or decrease of more than 25% in the total quantity of any sub-item whose value in the Schedule of Quantities is in excess of $7\frac{1}{2}\%$ of the total contract amount and subject to the production of satisfactory evidence that loss or damage has been sustained by the contractor as a result of such variation or variations, the engineer shall fix such other rate or price as in the circumstances he shall think reasonable and proper.

Substantially, save for the condition relating to damage or loss, the same words are contained in the proviso to sub-clause (1). I need not, for present purposes, express any view as to the consequences which may result, for the purposes of sub-clause (1), if the percentages provided for show an increase or decrease in excess of those stated. That proviso was considered by

this Court in the McAlpine case supra at 519. Nor does a repetition in sub-clause (4) of the standards set in the proviso to sub-clause (1) have any special significance from the point of view of the interpretation of the former sub-clause. However, even though this Court considered clause 49 in another context viz. whether by reason of extensive variations to the contract, a new contract impliedly came into existence, there are certain dicta in the McAlpine judgment which to some extent appear to support my view that a variation in terms of clause 49 was not intended to include the so-called automatic increases and decreases. I refer to the passages at 516 F - H and 520 G - 521 B of the report.

There is nothing in sub-clause (5) which is inconsistent with the construction I put on the other sub-clauses. This sub-clause refers specifically to sub-clauses (3) and (4) and these sub-clauses must, therefore, be read together with sub-clause (5). The words "date of the order" clearly refer back to the order of the engineer.

For these reasons I have come to the conclusion that counsel's argument that the judgment of the learned Judge a quo on the linguistic construction of clause 49 is wrong, cannot be upheld.

In /.....

In submitting that the interpretation contended for by the appellant gives effect to the intention of the parties, counsel for the appellant, relying on Joubert v Enslin 1910 A D 6 at 37 - 38 and Cinema City v Morgenstern Family Estates and Others 1980(1) SA 796 (A D) at 804 B - C, referred to the golden rule applicable to the interpretation of contracts which is to ascertain and to follow the intention of the parties. The parties contracted on the basis that the quantities appearing in the Schedule of Quantities were "approximate", he pointed out. The word "approximate" which means, according to the Shorter Oxford Dictionary "very near, nearly resembling" itself imports some limitation into the extent of the variation from the scheduled quantities by way of increase or decrease upon measurement, he submitted. But quite apart from the word "approximate", the terms of the contract indicate unequivocally that the parties intended some limitation on the extent to which the quantities set forth in the Schedule of Quantities could vary whilst the contractor would still be obliged to execute the scheduled work at the rates

appearing therein. The limitation is to be found in the contract, he submitted.

In developing this argument, counsel illustrated, by reference to certain specifications and quantities in the Schedule of Quantities, how, in certain hypothetical circumstances and in circumstances alleged in his particulars of claim as supplemented by further particulars, the plaintiff as contractor may be prejudicially affected (to the extent even of the result creating an absurdity, he submitted) if, without an order of the engineer, he were to be held to be precluded from invoking clause 49(4).

This argument cannot prevail. Being complementary to the argument on the linguistic construction of clause 49, it loses much of its force in view of the strong finding by me that counsel's argument on that aspect of the case cannot be sustained. Of course, clause 49 should not be read in isolation. The contract, which in the present case comprises a number of documents, must be considered as a whole. But counsel for the appellant has not referred this Court to a single clause in any of the documents or a single term of the contract which militates against the purely linguistic

construction put by me on clause 49. What he has done is to present an argument that for equitable reasons the contract should be interpreted as contended for by him. Even assuming that, without the plaintiff being able to invoke clause 49(4) in his favour, the contract may operate unfairly against him under certain circumstances, that is no ground for holding that the plain words of clause 49 should be modified in the plaintiff's favour. If the plaintiff has struck a bad bargain, the Court cannot, out of sympathy with him, amend the contract in his favour. In Van Rensburg v Straughan 1914 A D 317 at 328 Innes, JA said:-

> "The position for him is no doubt hard; but those who enter into onerous or one-sided agreements have only themselves to thank. A court of law cannot assist them merely because the results are harsh."

See also Haviland Estates (Pty) Ltd and Another v McMaster 1969(2) SA 312 (A D) at 336 E - G.

In /.....

In Scottish Union and National Insurance Co. Ltd v Native Recruiting Corp. Ltd 1934 A D 458 at 465-6 Wessels, CJ said:-

> "It has been repeatedly decided in our Courts that in construing every kind of written contract the Court must give effect to the grammatical and ordinary meaning of the words used therein. In ascertaining this meaning, we must give to the words used by the parties their plain, ordinary and popular meaning, unless it appears clearly from the context that both the parties intended them to bear a different meaning. If, therefore, there is no ambiguity in the words of the contract, there is no room for a more reasonable interpretation than the words themselves convey. If, however, the ordinary sense of the words necessarily leads to some absurdity or to some repugnance or inconsistency with the rest of the contract, then the Court may modify the words just so much as to avoid that absurdity or inconsistency but no more."

It does not appear clearly from the context that both parties intended clause 49 to bear a meaning different from that which the plain words convey, nor does the ordinary sense of the words necessarily lead to some absurdity or

to some repugnance or inconsistency with the rest of the contract. On the contrary, there are numerous indicia in the contract that no such limitations as contended for were intended by the parties. I have quoted above one of the conditions of the contract which provides that the contract amount for the completed contract shall be computed from the actual quantities of work done and valued at the unit rates and prices tendered against the respective items in the Schedule of Quantities. No proviso to the effect that the contract amount may be supplemented if the measured quantities exceed the percentages stated in clause 49(4) has been added. In fact, it is further agreed that the prices and rates to be inserted in the Schedule of Quantities are to be the full inclusive values of the work described under the several items, including all costs and expenses which may be required in and for the construction of the work described, together with all general risks, liabilities, and obligations set forth or implied in the documents on which the tender is based. I agree with counsel that the

remuneration for unmeasured matter is spread through the scheduled items, but the contractor is aware of this and he is warned that he should make provision therefor in his tender. Clause 3 of the General Conditions of Contract provides:-

> "The Contractor shall be deemed to have satisfied himself before tendering as to the correctness and sufficiency of his tender for the Works and of the rates and prices stated in the Schedule of Quantities which rates and prices shall (except in so far as it is hereinafter otherwise provided) cover all his obligations under the Contract and all matter and things necessary for the proper completion and maintenance of the works.
>
> The rates and prices tendered in the Schedule of Quantities shall amongst other things include full compensation for all general preliminaries, cost of complying with the requirement of the General and Special Conditions of Contract, temporary works, transport, supervision, overheads, profit, labour, materials, plant, equipment, tools, accommodation, matters, things and requisites of any kind whatever necessary for the due and proper construction, completion and maintenance of the Works, as well as for

any loss or damage arising from the nature of the work or the action of the elements, except as hereinafter provided."

The phrase "except in so far as it is hereinafter provided" refers, in my view, to clause 49 of the General Conditions of Contract which deals with variations made by the engineer and clause 50 which makes provision for remuneration for extra work.

The definition of "Schedule of Quantities" emphasizes the fact that the quantities entered therein are approximate quantities of work. This is repeated frequently throughout the contract. In my view it simply means that the quantities are an estimate by the engineer and the fact that the contractor is required to satisfy himself as to the conditions likely to influence the work is an indication that the employer does not warrant that the engineer's estimates are correct or even nearly correct. It stands to reason that in a contract of this nature no accurate or nearly accurate assessments in respect of certain items of work can be made unless intensive and extensive exploratory

operations are embarked upon, which may be too costly from a practical point of view. It is conceivable that the engineer frequently has to assess the nature of the sub-soil, for instance, by studying the surface characteristics of the terrain. For this reason the contractor is required to satisfy himself as to the conditions and to make provision for uncertainties in his tender. Clause 9 of the General Conditions of Contract provides:-

> "Before submitting a tender, the Contractor shall inspect and examine the Site and its surroundings and make himself fully conversant with all circumstances such as the nature of the vegetation, the ground gravel and substrata, the position of and access to borrow pits, quarries and water supplies, the quantities and qualities of construction materials available, existing road and rail facilities, all levels, heights and measurements and all services, matters and things which are likely to influence or affect his tender, or have bearing upon the Contract and the Contractor shall accept full responsibility for obtaining and assessing such information. No subsequent claims by the Contractor, based on his lack of knowledge of local conditions, will be entertained."

In /.....

In the present case plaintiff completed a document bearing the title "Certificate of Tenderer's Visit to the Site" in which he certified that he visited the site on a certain date having previously studied the contract documents and that he carefully examined the site. He certified further:-

> "I have made myself familiar with all local conditions likely to influence the work and the cost thereof."

For the reasons stated I have come to the conclusion that the Court a quo did not err in deciding the stated case in favour of the defendant.

The appeal is dismissed, with costs, including the costs arising out of the employment of two counsel.

JUDGE OF APPEAL

JANSEN, JA)
JOUBERT, JA) CONCUR
CILLIé, JA)
TROLLIP, AJA)

GRINAKER CONSTRUCTION (TVL) (PTY) LTD ..... APPELLANT

and

TRANSVAAL PROVINCIAL ADMINISTRATION ..... RESPONDENT