/CCC CASE NO 180/92

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

LTA CONSTRUCTION LIMITED APPELLANT

and

MINISTER OF PUBLIC WORKS AND LAND AFFAIRS RESPONDENT

CORAM: HOEXTER, NESTADT, MILNE JJA et NICHOLAS, KRIEGLER AJJA

DATE HEARD: 31 AUGUST 1993

DATE DELIVERED: 29 SEPTEMBER 1993

J U D G M E N T

NESTADT, JA:

The appellant carries on business as a building contractor. On 31 August 1983 it submitted a

written tender to erect certain additional accommodation for the South African Museum in Cape Town at the price of R15 736 933,00. On 6 October 1983 the respondent accepted the tender. The work was to be completed by 5 July 1986, ie over a period of 33 months. On 14 November 1983 the site was handed over to the appellant. During the course of building operations the respondent issued a number of variation orders requiring the appellant to carry out certain additional work. This the appellant in due course did and there is no dispute that the respondent is, besides the contract price, obliged to pay the appellant for such work. The variations, however, caused the completion of the contract to be delayed. This resulted, so the appellant alleged, in an increase in certain of its costs (called "time-related costs"). Alleging that it was entitled to be remunerated for these increases as well and that they

total the sum of R371 945,32, it sued the respondent in the Cape Provincial Division for payment of this amount. The trial came before Cooper J who dismissed the appellant's claim and in fact granted judgment for the respondent. This appeal is against such decision. It is brought with the leave of the court a quo.

An issue preliminary to the merits of the dispute arises. There is before us a petition by the appellant to condone its failure to timeously lodge its notice of appeal, a power of attorney and the record. They were respectively lodged 21 days, close to three months, and nine days late. The explanation for these breaches of the relevant provisions of AD Rule 5 is profferred by the appellant's attorney. His affidavit calls for critical comment. The prospects of success on appeal are usually an important factor in assessing whether applications for condonation of this kind should

be granted (Finbro Furnishers (Pty) Ltd vs Registrar of Deeds, Bloemfontein, and Others 1985(4) SA 773(A) at 789 D). Yet nothing is said about the appellant's prospects of success. For the most part no dates when the attorney took the various steps which he describes are given. Only vague expressions such as "thereafter", "thereupon" and "subsequently" are used. Typical is the explanation for the late filing of the power of attorney, viz;

> "I thereupon prepared the necessary draft Power of Attorney and took steps to have the preparation of the record expedited. Unfortunately, the original Power of Attorney sent to me by the Petitioner was mislaid and I had to obtain a replacement thereof subsequently which caused a further delay. The replacement was signed on facsimile machine paper and, as this is not acceptable to the Registrar, again had to be replaced."

There follows an averment that the power of attorney was signed "simultaneously with this Petition". What is not disclosed is that it was only lodged 18 days later.

But above all there is the following criticism. Central to the attorney's excuse for what happened is the allegation that he received a copy of the order granting leave to appeal "late". He does not, however, say exactly when he did receive it or why, in any event, he took no timeous steps to obtain it. Despite an assertion that he had been told by counsel that "leave to appeal would be granted" it is apparent that he was all along aware that leave had been granted and when this took place. In these circumstances, it is difficult to understand why the non-receipt of the order delayed the procedural steps which the attorney obviously knew" had to be taken. The notice of appeal and the power of attorney could still have been lodged in time; and so too could the record (seeing that the order was apparently received well before the date by which the record had to be lodged). The impression that

one gains is that the appellant's attorney was simply, though seriously, neglectful of his duties. If this is an unfair conclusion, it is due to his failure to be more candid with the court. Certainly there is little warrant for the assertion in the attorney's affidavit that "every possible step to make (the delay) as short as possible was taken once I became aware that a delay was inevitable".

In cases of flagrant breaches of the Rules, especially where there is no acceptable explanation, the indulgence of condonation may be refused whatever the merits of the appeal are; and this applies even where the blame lies solely with the attorney (Tshivhase Royal Council and Another vs Tshivhase and Another 1992(4) SA 852 (A) at 859 E - F). At the conclusion of the argument in support of the application for condonation we gave consideration to the question

whether this was not such a case. We felt, however, that we should hear argument on the merits. The delays were not inordinately long. The respondent did not oppose the application and was obviously not prejudiced. The petition was promptly launched. The amount involved in the appeal is substantial and the subject-matter is of importance to the parties. It is clear that the appellant was at all relevant stages desirous of prosecuting the appeal.

As I have indicated, the appellant's claim concerns its time-related costs. The term "time-related costs" does not appear in any of the contractual documents. It pertains, however, to certain items to be found in Bill No 1 of the bills of quantities. Bill No 1 deals with "General Regulations and Preliminary Works" (known as "preliminary and generals" or "P and Gs"). These comprise items of generalised expenditure relating to the project as a whole. Certain, or

perhaps most of them are time-related, ie they are calculated on the basis of and may be affected by the length of time taken to execute the works. I do not propose to describe them in any detail. They are particularised in the summons. In general terms they are the cost of employing an agent; effecting insurance; enclosing the site; providing guarantees, plant, scaffolding, latrines, sheds, water, lighting, electricity and an office; removing rubbish; controlling traffic; and minimising noise and dust. Each of these items is priced in Bill No 1. They total the sum of R1 150 362,71. These are the time-related costs for the original completion period of 33 months. The appellant's case was that by reason of the delay in the completion of the contract, the services referred to had to be maintained for an extended period; and that it was entitled, as part of the cost of the variations, to

the additional expenditure that this resulted in. The amount claimed (R371 945,32) represents a pro rata increase of the total amount calculated according to the extra time (some 10 months) that it took to perform the contract as varied.

By the time the matter came to trial, the parties had agreed to remove the actual manner of calculation of the appellant's claim and the amount thereof as an issue which the court was required to decide. Instead, COOPER J was asked to deal with the matter as a question of principle. In particular, the appellant in effect sought a declaratory order that the variations having delayed the completion of the contract, it was entitled to additional remuneration in respect of the time-related items referred to measured and valued at the rates and prices contained in the schedule of quantities. In the event of such an order

being granted, the issue of quantum would be referred for enquiry and report to a named referee in terms of sec 19 bis of the Supreme Court Act 59 of 1959. The need to do so, however, never arose. Judgment for the respondent was granted on the basis that the appellant was not entitled to the declaratory order in question.

The appellant relies on clause 3 (iii) of the conditions of contract. It provides:

> "Without invalidating the Contract, the Engineer shall have the right by means of an Order in Writing, by varying the Drawings, Specification and Bills of Quantities, to increase or decrease the quantities of any item or items or to omit any item or items or to insert any additional item or items, provided the total Contract amount be not thereby decreased or increased in value more than 20 per cent. Such variations shall be measured and valued at the rates and prices contained in the Schedule of Quantities and added to, or deducted from the Contract amount..."

This clause, which appears under the heading "Quantities of Work", gives the engineer the qualified right to order variations. This he may do by (i)

increasing or decreasing the quantities of any item; or (ii) omitting any item; or (iii) inserting any item. It also provides for the measurement and valuation of variations at the rates and prices contained in the schedule of quantities.

Whilst it is clear that the variations which the appellant was required to execute were ordered by the engineer in terms of clause 3(iii), their nature is not specified in any detail. All we know (from the summons) is that they relate to "certain additional work(s)" in "Block C, Level 5" and "phase 2" and to "certain additional work which resulted in increases in the scope of the electrical and fire service sub-contracts". It does, however, appear that in each case the works were delayed by the variation and that on the application of the appellant an extension of the completion date was granted. As I have indicated, the

extensions came to a little over ten months. They were applied for and granted in terms of clause 17 of the conditions of contract. Sub-paragraph (ii) thereof provides that if the works be delayed by inter alia "any omissions, additions, substitutions or variations of the Works, or of any item of work, labour or material", the contractor shall have the right to apply to extend the (33 month) date of completion of the contract. Sub-paragraph (iii) empowers the Director-General: Community Development in his discretion and by "order in writing" to grant an extension for a period to be determined by him.

Against this background, I turn to the appellant's argument. In summary, it was the following: (i) on a proper construction of clause 3(iii) the reference to "Schedule of Quantities" includes the items contained in Bill No 1; (ii)

accordingly, in valuing the variations and whatever their nature, regard should have been had (on the basis of the prices of the time-related items) to the additional period during which they had to be provided; (iii) this should in any event have been done seeing that the extensions of time in themselves constituted a variation of Bill No 1 and therefore of the time-related items.

Now there can be no quarrel with the initial submission ((i) above) that "Schedule of Quantities" includes Bill No 1. The phrase "Schedule of Quantities" is stated in clause l(ix) of the conditions of contract to mean the priced bills of quantities. And in its turn "Bills of Quantities" is defined as "the document attached to this Contract in which are entered the quantities of work, labour, materials, and articles required for the execution of this Contract". Such

document consists of five bills one of which is Bill No 1.

It does not, however, follow that the second proposition ((ii) above) is sound. In my opinion it is not. The appellant's reasoning amounts to this: the variations need not have been of any item of Bill No 1; so long as there was a variation (which resulted in a delay in completion of the works), the appellant was entitled to have its time-related costs increased. The language of clause 3(iii) does not allow of such a wide interpretation. One must examine what in terms of clause 3(iii) is to be measured and valued. It is "(s)uch variations". Plainly this is a reference back to those variations which the engineer has the right to order (and has ordered). Those variations and those alone fall to be measured and valued. Unless therefore a time-related item was varied pursuant to a

variation order, there is nothing that can be valued. The premise on which the argument under consideration is based presupposes that the time-related items were not so varied. True, they were (despite many of them having a fixed cost element) probably affected by the variations. As I have said, the appellant contends that because of the resultant delay, the period for which such items had to be provided was, at additional cost to itself, extended. But that does not suffice. Clause 3(iii) deals with the valuation of variations. It cannot be used to compensate the contractor for additional costs and expenses incurred as an indirect result of a variation but which do not affect the value of the works. In the 10th edition of Hudson's Building and Engineering Contracts 555 what may be taken to be a contrary view is expressed. But it is a generalised statement unrelated to the exact wording

of any particular contract. As such it does not support the argument.

This brings me to the proposition that there was indeed a variation of the time-related items (3) (iii) above). The submission here was that the extensions of time granted in terms of clause 17(iii) in themselves amounted to a variation of Bill No 1. This was because item 17 thereof, like the conditions of contract, specifies the time for completion as being 33 months. Accordingly, so it was said, there had been a variation for the purposes of clause 3(iii) of Bill No 1. I am unable to agree. There are a number of reasons for saying this. They are:

(i) To begin with, there would still not have been any variation of any of the time-related items themselves. Nor was there any variation of even the completion date of the contract. An extension of time granted under clause 17(iii)

does not amount to a variation of the contract within the meaning of clause 3(iii). It is in the nature of an indulgence or concession to the contractor. And an order in writing by the Director-General in terms of clause 17(iii) cannot be equated with an order in writing by the engineer in terms of clause 3(iii). The respective definitions of "Director-General" and "Engineer" show that they are not necessarily the same person. (ii) A more basic consideration is that on a linguistic analysis of clause 3(iii), the word "variations" as there used is not capable of including variations of time-related items at all. The variations relate to "quantities". It was argued by Mr Hodes, for the appellant, that this concept includes time. I disagree. This is a forced, unwarranted meaning of

"quantities". As used in clause 3(iii), the word refers to the physical components of the works. It is variations of this kind that are "measured". This is a word that primarily signifies the determination of "the spatial magnitude or quantity (of something)" (OED sv "measure"). Moreover, the valuation of the variations takes place at the "rates and prices" contained in the schedule of quantities. The time-related items, however, do not have a rate; only a price. There is thus no contractual basis in clause 3(iii) for valuing the alleged variation of the time-related items. Such valuation is therefore rendered problematic. And its quantification would not be in accordance with what clause 3(iii) enjoins.

(iii) There is nothing in any of the other clauses of the conditions of contract that supports the appellant's interpretation of clause 3(iii). Clause 3(v) regulates the valuation of variations for which there are no rates or prices in the schedule of quantities. Such variations (which I shall assume could include time-related items) have to be adjusted by "mutual consent" (on certain prescribed bases). But this is not inconsistent with the exclusion of such items from the ambit of clause 3(iii). This clause presupposes that there is already provision for remuneration for time-related items, ie those specified in Bill No 1. Clause 3(v) provides (on the assumption made) for payment for other time-related items, ie items not so specified.

Similarly, clause 4 does not assist the appellant. Its effect. is that where variations are carried out on the basis of daywork, the contractor will be entitled to be paid for a restricted class of time-related items, namely "supervision...and the use of all plant, tools, machinery and scaffolding". But it does not follow that clause 3 (iii) is for this reason to be given an unjustifiably wide meaning to also include payment for time-related items. The method of paying by daywork is normally used when the work is of its nature not capable of assessment on an ordinary pricing basis (Hudson op cit 571). So clause 4 deals with a special situation. Furthermore, it is wrong to assume that when payment for variations is regulated by clause

3(iii), the contractor will not be compensated for an increase in his time-related costs.

(iv) Such compensation may be due in terms of clause 49 of Bill No 1. It reads:

> "In the event of a variation in the Contract amount caused by additions or omissions... the total for 'General Regulations and Preliminary Works' in the Contract amount will be increased or decreased in the direct ratio of such additions or omissions to the Contract amount."

The "additions or omissions" of this clause are the equivalent of the "variations" of clause 3(iii). The effect of clause 49 is therefore that where there has been a variation in terms of clause 3(iii) which results in the contract amount being altered, the total reflected in Bill No 1, including the time-related items, falls to be increased or decreased in accordance with the stated

ratio. I agree with Mr van Schalkwyk who appeared for - the respondent that it is a rough and ready measure which recognises the difficulty of calculating increases of time-related costs on a quantitative basis (as clause 3(iii) envisages). Clause 49 will, of course, not always afford a remedy to the contractor whose time-related costs have increased in consequence of a variation. It may be that this occurs and yet the contract amount remains the same. Here no adjustment to the total of Bill No 1 takes place. On the other hand where there has been an increase in the contract amount, clause 49 will operate to entitle the contractor to an increase of his time-related costs (irrespective of whether a delay resulted).

Clause 3(iii) must be interpreted with this in mind. The fact that claims of the kind now advanced are governed by clause 49 reinforces the conclusion that clause 3(iii) does not apply to time-related items. The appellant's time-related costs were in fact adjusted in terms of clause 49 and payment was made pursuant to such adjustment. The appellant's contention is that this notwithstanding, variations involving extensions of time must be priced in accordance with clause 3(iii) as well. This would mean that the appellant is paid twice for its increased time-related items; once in terms of clause 3(iii) and once in terms of clause 49. This is untenable. The parties could not have contemplated such a result. Nor does the

language of their contract, properly construed, leave any room for such a result. In his full reasons for judgment. Cooper J refers to other factors in support of his rejection of the appellant's claims. I do not propose to deal with them. I am satisfied that the learned judge's conclusion was correct. This being so, the appellant has no prospects of success on appeal and the application for condonation must be refused. Seeing that the merits of the appeal were debated, costs will be ordered in accordance with decisions such as Reinecke en 'n Ander vs Nel en 'n Ander 1984(1) SA 820(A) at 836 F and Louw vs W P Kooperasie Bpk 1991(3) SA 593(A) at 605B.

The following order is made: (1) The application for condonation is dismissed with costs.

(2) The appellant is also to pay the respondent's costs of appeal.

(3) In both cases the costs incurred in the employment of two counsel are allowed.

NESTADT, JA

HOEXTER, JA )
MILNE, JA ) CONCUR
NICHOLAS, AJA )
KRIEGLER, AJA )