13/91
/mb

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

IMPREFED (PROPRIETARY) LIMITED ..... APPELLANT

and

NATIONAL TRANSPORT COMMISSION ..... RESPONDENT

CORAM : JOUBERT ACJ; E M GROSSKOPF, KUMLEBEN,
NIENABER JJA et VAN COLLER AJA

HEARD : 15, 16, 17 FEBRUARY 1993

DELIVERED : 22 MARCH 1993

J U D G M E N T

KUMLEBEN et NIENABER JJA/....

KUMLEBEN et NIENABER JJA:

INTRODUCTION

This matter was heard by Botha J in the Transvaal Provincial Division. The appellant sued the respondent for monies said to be due to it. The claims, some seven of them designated A to G, are separately set out in the particulars of claim. In each case the cause of action is identified and the facts relied upon to constitute it are alleged. The appellant was partially successful in its action. At the conclusion of the evidence and argument it was awarded a reduced sum on claim A and on claim C the amount as prayed. Claims B, D, E and F were dismissed. As to claim G, no independent order was made: the decision in this regard related to the date from which escalation of the awards on claims A and C were to be

determined. With leave of the trial court, the appellant noted an appeal against the reduced award in respect of claim A and against the order of absolution from the instance on claims B, D, E and F. The respondent in turn cross-appealed against the decisions in favour of the appellant on claims A and C and, should they be sustained on appeal, against the decision regarding claim G.

At the outset of the hearing certain issues were separately dealt with and decided in terms of Rule 33(4) of the Uniform Rules of Court. By an amendment of its particulars of claim the appellant sought to introduce a further ground in support of claim D. It alleged that the breach of an implied term entitled it to the amount claimed as damages. Prescription was pleaded to this cause of action and after argument this

defence was upheld. The respondent in turn excepted to claims D, E and F as disclosing no cause of action. Though raised after the close of pleadings, the court heard argument on the exceptions, but dismissed them for reasons set out in the judgment: Imprefed (Pty) Ltd v National Transport Commission 1990(3) SA 324(T).

Those interested in the outcome of this appeal will be conversant with the factual background. It was in the first instance related in the course of the judgment by Botha J to which we have just referred. The relevant facts, which were common cause or plainly proved, are recounted in more detail, indeed comprehensively, in the final judgment. In the circumstances we propose to do no more than sketch them with amplification, where necessary, when each claim is

separately discussed.

On 4 October 1979 the parties entered into a contract in terms of which the appellant was to construct 3.5 kilometres of concrete road, part of a major dual carriage freeway. The contract required the appellant to build the necessary culverts and bridges, carry out "cut and fill" earth-work operations, prepare the road base and pave the roadway. The road runs from south (Vanderbijlpark) to north (Pretoria) and the section involved was to cross the valley of the New Canada spruit and a four track railway line system (the "railway line") both of which ran east-west, that is, more or less at right angles to the road. It also traversed two mine slimes dumps (or "slimes dams"), one on each side of the railway line, referred to as the southern and northern slimes dumps. Thus, as one

 travels along the road as planned from south to north, one comes across, in sequence: the southern slimes dump, the sewer and culvert (still to be referred to), the New Canada spruit, the railway line and finally the northern slimes dump.

The contract envisaged that the material taken from the cuts through the two slimes dumps would be used as "fill" in the New Canada spruit valley and that the anticipated surplus would be dumped ("spoiled"), in an area described as Borrow Pit 11, which is situated south of the railway line.

On 11 October 1979 the appellant was given possession of the site apart from an area on which the New Canada bridge was to be built. The stipulated period for the completion of the contract was 28 months from this date. In fact it was completed only on 31

August 1982, a delay ("overrun") of some 6 1/2 months. There were two major reasons for this: a delay in the construction of the said bridge and a delay due to the redesigning of one of the culverts, numbered S675, in the road.

As regards the New Canada bridge, it was in the nature of things to be constructed on and over railway property. There was a delay on the part of the railway authorities in giving the necessary approval for the design of the bridge. Pending such approval they refused the appellant access to their property. This resulted in an inevitable delay before the appellant could start the construction of the bridge. According to the programme of work scheduled by the appellant, it planned to complete the New Canada bridge by August 1980, at least to the extent of

the appellant to convey fill material for the New Canada valley, taken from the cut in the northern slimes dump, over the railway line. It was also clear from the tender documents, forming part of the contract, that the surplus spoil from the construction of the road through the northern slimes dump was to be likewise transported across the railway line and dumped at Borrow Pit 11.

As things turned out it was only towards the end of June 1980 that the bridge drawings were approved by the railway authorities. During the following month the appellant for the first time gained access to the bridge site. In the result it was a year later, during July 1981, that the appellant was able to cross the railway line for the purpose of its construction work. If an alternative plan were not evolved pending the

(delayed) erection of the bridge, a shortage of fill material south of the railway line and a surplus north of it would have arisen. This led to an alternative arrangement in October 1980 in terms of which surplus material north of the railway line was to be spoiled on the northern slimes dump and on the southern side of the railway line an additional source of fill was designated from the southern slimes dump itself. This change of plan entailed more work for the appellant in two respects: first, the substituted material from the southern slimes dump was wetter than the material originally intended to serve as fill and had therefore to be processed to dry it out to the required consistency; second, spoil from the northern slimes dump intended to be used as fill, but which now became surplus, had to be dumped elsewhere.

As regards culvert S675, situated on the

proposed road south of the spruit and railway line, the appellant initially, gained access to this portion of the road when possession was given of the site as a whole in terms of the contract. At a later stage, however, the municipal sewer, S9, which ran under the road, proved to be fragile and collapsed partially when it was uncovered. The culvert had therefore to be redesigned and the sewer replaced. According to the appellant this was a further cause of delay and disruption in that this problem gave rise to conflicting instructions and extra costs. The latter were incurred, so the appellant alleged, because the redesign of the culvert, and the fact that it could not be crossed in the interim period, forced the appellant to use a roundabout and more costly route for its cut and fill operations.

Thus what may be termed the bridge problem

and the culvert problem, with one exception, gave rise to the present dispute and lie at the root of the appellant's claims.

A number of documents make up the contract as a whole, the more important ones for present purposes being the General Conditions of Contract ("GCC"), the Tender Rules Standard Special Provisions ("SP"), the Standard Specifications for Road and Bridge Works ("SSRB") and the Schedule of Quantities ("SQ"). The contract, in common with ones involving complicated and detailed construction or building work, was intended to be an all embracing one in the sense that the rights and obligations of the parties, and in particular payments to the contractor, were to be governed and regulated by its terms. To this end the contract comprehensively specifies: the nature of the work to be done as initially agreed upon by the parties and the

rate of remuneration for such work (cf GCC 3 read with the SQ and GCC 7); the manner in which any variation in the execution of the work or extra work required during the course of the contract is to be ordered, recorded and remunerated (cf GCC 49 and 50); how the "Engineer" (defined in the contract), and through him the employer, is to be notified of circumstances which might give rise to a claim on the part of the contractor (cf SP 2.7 and GCC 51); and the way in which any such disputed claim is to be presented, adjudicated upon and, if possible, resolved before the contractor is entitled to resort to court proceedings (cf GCC 51 and 59).

When dealing with the individual claims certain of the provisions of the contract documents will be considered. At this stage, having regard to the nature and terms of this contract, one need simply

draw attention to the general and incontrovertible proposition that for the appellant to succeed in a monetary claim arising out of the contract, its cause of action must be based on one or more of the terms of the contract; or be one for damages for breach of contract, based on one or more of the recognised common law grounds for such relief. As stated by G A Hughes, in "Building and Civil Engineering Claims in Perspective" (2nd ed) 21, though dealing with the establishment of claims inter partes and not with court proceedings:

> "Claims usually arise from events or circumstances where one party is alleged to have done something to the detriment of the other, or has failed to do something he has undertaken to do. The Conditions of Contract attempt to anticipate such events and circumstances in one or other of their clauses and it is one (or more) of these that needs to be quoted in support of any claim. Where no such provision covers the event or circumstances in question then one must seek some principle of common law which covers the matter."

(See too A May "Keating on Building Contracts" (5th ed) 209.)

13. At the trial a number of witnesses testified on behalf of the appellant: these included Messrs Kelly and Fasciotti who were respectively the appellant's site manager and managing director. The respondent closed its case without adducing any evidence. The issues to be resolved in this appeal can be decided with regard to the correct construction of certain provisions of the contract; the nature of the cause of action relied upon for each claim; whether such cause of action has been properly pleaded and, if not, whether it can nevertheless be relied upon; and whether such cause of action sustains the claim as computed and proved. For this reason there is no need for this judgment to record the comments of the trial court concerning the demeanour and reliability of the various witnesses called by the appellant.

We now turn to consider each claim separately.

C L A I M A

The sewer and culvert problem gave rise to claim A. The particulars of claim relied upon are thus alleged:

"8.1 Included in the work to be executed by the plaintiff was the construction of a sewer known as S9 and a culvert described as S675.

8.2 On the 18th February 1980 the engineer instructed the plaintiff, due to changes in the design thereof, to stop all work on the said structures until further notice.

8.3 Subsequently, the plaintiff completed the construction of the said structures as redesigned and in terms of the defendant's requirements.

8.4 The engineer's instructions were issued by him under and in terms of Clauses 39 and 49 of the General Conditions of Contract, in consequence whereof the plaintiff was entitled to recover from the defendant, all additional cost and expense incurred.

9.1 In consequence of the Engineer's instructions as aforementioned, the plaintiff was unable to haul fill material across the centre line of the proposed roadway from the southern slimes areas into the New Canada Spruit area and was obliged to haul the said material by means of a deviation route.

9.2 In doing so, the plaintiff incurred extra costs and expense amounting to R180 278,00 for which amount the defendant is liable.

10.1 The defendant has admitted liability to the plaintiff in an amount of R38 439,00 in respect of this claim which amount was paid to the plaintiff.

10.2 The plaintiff is accordingly entitled to payment of the sum of R141 839,00 being the difference between R180 729,00 and R38 439,00.

WHEREFORE the plaintiff prays for judgment against the defendant for:

(a) payment of the sum of R141 839,00;

(b) ...;"

In its further particulars the appellant explained that

the expense and extra costs were incurred:

> "by the continued use of the restricted deviation lying to the east and west of the subgrade, as a result of which the cycle time was extended for the cut to fill operation of material placed in the S9, S675 and Canada spruit area, the quantity of material so affected having been evaluated at 256 260 cubic metres."

The plea in reply admitted that the said instruction was given and that it was a suspension order in terms of GCC 39; denied that extra costs were incurred; and raised a number of alternative defences, one of which being:

> "that there is no basis in terms of the contract between the parties upon which Plaintiff is entitled to the amount claimed or to payment calculated in the manner alleged and adopted by Plaintiff, and Defendant denies that Plaintiff is entitled to calculate the amount claimed in the manner set out in Plaintiff's Particulars of Claim and Further Particulars."

Mr Duke appeared throughout for the appellant. In the court a quo at the stage of argument

17. he

referred for the first time to GCC 41 and relied solely on it. On appeal the approach was the same save that GCC 39 was not entirely discarded. He implicitly before Botha J, and expressly on appeal, disavowed GCC 49 as a cause of action.

GCC 39 reads as follows:

> "SUSPENSION OF WORK
> The Contractor shall on the written order of the Engineer suspend the progress of the Works or any part thereof for such time or times and in such manner as the Engineer may consider necessary, and shall during such suspension properly protect and secure the work so far as is necessary in the opinion of the Engineer. The extra cost (if any) incurred by the Contractor in giving effect to the Engineer's instruction under this Clause shall be borne and paid by the Employer unless such suspension is:

(1) Otherwise provided for in the Contract; or

(2) Necessary for the proper execution of the work, or by reason of unfavourable weather conditions, or by some default on the part of the Contractor; or

(3) Necessary for the safety of the Works or any part thereof.

> Provided that the Contractor shall not be entitled to recover any such extra cost, unless he gives notice in writing of his intention to claim to the Engineer within twenty-eight (28) days of the Engineer's order. The Engineer shall settle and determine the extra payment to be made to the Contractor in respect of such claims as the Engineer shall consider fair and reasonable."

The suspension order was in the form of a Site Instruction dated 8 February 1980 and read:

> "S675 (S9 BRICK SEWER)
>
> Due to changes in design, please stop all work to this structure, including freezing the ordering of materials until further notice."

The appellant complied with this instruction which, one notes in passing, has nothing to do with access or deprivation of possession. An earlier site instruction (SI 2953) dated 15 November 1979 had ordered the appellant "not to cross this sewer (S9) with any heavy equipment without providing protection." This instruction, unrelated to the suspension order, was

necessary for the protection of the sewer, which by definition - and as alleged by the appellant - is included in the "Works". (See GCC 1(11) read with SP 51 and SP 52.5.) Thus, whilst the appellant is correct in submitting that the situation arising from the suspension order was governed by GCC 39, it is plain on the facts of this case that proviso (3) to this clause and the first eventuality in proviso (2) are a bar to a claim for any extra cost under this clause.

This brings one to GCC 41, on which Mr Duke took his main, if not exclusive, stand. It is to the following effect:

> "41. POSSESSION OF SITE
>
> (1) Save in so far as the Contract may prescribe the extent of portions of the Site of which the Contractor is to be given possession from time to time, and the order in which such portions shall be made available to him, and subject to any requirements in the Contract as to the order in which the Works shall be

executed, the Employer will with the Engineer's written order to commence the Works give to the Contractor possession of so much of the Site as may be required to enable the Contractor to commence and proceed with the construction of the Works in accordance with the programme hereinbefore referred to (if any) and otherwise in accordance with such reasonable proposals of the Contractor as he shall by notice in writing to the Engineer make, and will from time to time as the Works proceed give to the Contractor possession of such further portions of the Site as may be required to enable the Contractor to proceed with the construction of the Works with due despatch in accordance with the said programme or proposals (as the case may be) . If the Contractor suffers delay or incurs expense from failure on the part of the Employer to give possession in accordance with the terms of this Clause, the Engineer shall grant an extension of time for the completion of the Works and certify such sum as he considers fair to cover the expense incurred, which sum shall be paid by the Employer.

(2) The Contractor shall bear all expenses and charges for special or temporary wayleaves required by him in connection with access to the Site. The Contractor

> shall also provide at his own cost any additional accommodation outside the Site required by him for the purpose of the Works." (Emphasis supplied.)

There are a number of grounds for concluding that the facts cannot sustain a cause of action based on this clause.

As appears from SI 2953 there was simply no question of deprivation of possession of that part of the site or a refusal of access. Factually the appellant was in possession; the instruction amounted merely to a qualification as regards the manner in which the appellant was permitted to conduct its operations on portion of the road.

Moreover, if the instruction were to be construed as a deprivation of possession, GCC 41 still cannot be invoked. This clause is concerned with the handing over ("giving of possession") of the site

as a whole (or portions thereof in stages). This is confirmed by sub-clause (2) which likewise has reference to the inception of the contract and initial access to the site. Once the employer has given possession of the site (or of portions successively) on due date (or due dates) this duty is discharged and the clause has no further function in the execution of the contract. A subsequent deprivation of possession by the employer, or someone acting on his behalf, does not resurrect GCC 41, though such conduct if wrongful would doubtless give rise to some other cause of action in terms of or dehors the contract. (Cf. Pretoria Racing Club v Van Pietersen 1907 T.S. 687 and Elastocrete (Pty) Ltd v Dickens 1953(2) SA 644 (SR).)

Moreover, assuming for the moment that the instruction to suspend work and the appellant's

compliance therewith can be construed as a failure to give possession of the site in terms of GCC 41, the appellant's right to recover expenses incurred is and must be governed by the provisions of that clause. The amount recoverable is that which the Engineer considers and certifies as fair. It was not pleaded, nor is there any evidence to show, that the Engineer was requested, but failed, to certify a sum in terms of this clause. Had he done so, and if the appellant was dissatisfied with such assessment, the procedure laid down in the contract for the resolution of such a dispute would have had to have been followed (see GCC 15 and 59). None of these steps was taken. Instead the appellant chose to independently compute its alleged expenses in the manner pleaded. Whether a claim on such basis can be justified on the strength of some other cause of action is, as we have indicated,

beside the point. It certainly cannot be founded on GCC 41.

We have already remarked that GCC 41 was not pleaded. In this regard Botha J said:

> "I do not think that there can be any objection against allowing Plaintiff to rely on clause 41. The mere omission to refer to clause 41 is not of so much moment in this case. The relief claimed is similar to that which is obtainable under clause 41. More important is the fact that the factual allegations underlying the claim do impart, even though not explicitly, that the Plaintiff had been deprived of possession of a portion of the site. In paragraph 9.1 of the particulars of claim it is alleged that the Plaintiff was prevented to haul fill material across the centre line of the proposed roadway and that it had to make use of a deviation route. In its further particulars Plaintiff alleged that it was unable to traverse the sewer and that it was forced to make use of a deviation route. Inherent in all these allegations is the notion that Plaintiff had been denied possession of that part of the site that surrounded the sewer.
>
> Accordingly I am of the view that the Plaintiff is entitled to argue a case under clause 41 on the pleadings. I can conceive of no other approach

> that the Defendant could have adopted if the Plaintiff had made an explicit reference to deprivation of possession and clause 41. Therefore there cannot be any prejudice to it if this claim is considered also in terms of clause 41."

It follows from what has been stated regarding the meaning of "giving possession" in GCC 41 that we have difficulty in accepting that what was pleaded embodies or conveys the "inherent notion" that the appellant had been denied possession; or in agreeing that any such notion is sufficient to serve as a substitute for proper pleading - a theme to which we advert a little later. However, since the claim cannot be sustained even if GCC 41 is taken into account, we need not decide this further ground of objection advanced by Mr Grobler, who appeared on behalf of the respondent in this court.

It is also unnecessary to discuss the

numerous other defences raised in answer to this claim. The cross-appeal on claim A is to be allowed. This conclusion disposes of the appeal of the appellant aimed at an increase in the award in his favour made in the court a quo.

C L A I M B

The particulars of claim are concisely pleaded as follows:

"11.1 In terms of the contract, all surplus mine slimes were required to be spoiled at Borrow Pit 11.

11 .2 The plaintiff was instructed by the engineer during the course of excavations to spoil slimes on top of the northern and southern slimes dumps.

11.3 The said instruction was given by the engineer in terms of Clauses 49 and 50 of the General Conditions of Contract, in consequence whereof the plaintiff became

entitled to recover all extra cost and expense incurred thereby, from the defendant.

12. In complying with the said instruction, the plaintiff incurred increased costs and expenses amounting to R362 786,62.

13. The defendant denies that the plaintiff is entitled in terms of the contract, to payment of the said amount or of any other amount in respect of this claim.

WHEREFORE the plaintiff prays for judgment against

|

the defendant in the following terms:

(a) An order declaring that the defendant is obliged to effect payment to the plaintiff of its extra costs and expenses incurred by it in complying with the engineer's instruction aforesaid;

(b) payment of the sum of R362 786,62;

(c) _____"

The further particulars explain how the R362 786,62 is made up. The sum of R103 110,62 is claimed for extra bulldozer time, being the rate charged in accordance with the day work rates for the bulldozers concerned multiplied by the,additional hours worked. The amounts

 of R81 863,00 (177194 m^3 x 44 cents) and R177 813,00 (33051 m^3 x 51 cents) are said to be the extra costs involved in placing spoil on the slimes dumps and not at Borrow Pit 11 as originally planned. The rates of 44 and 51 cents per m^3 are based on a re-evaluation of the cycle times, the direct costs as recorded in the tender documents "with an allowance for haul loads and maintenance" and a profit margin of 5%.

Further particulars also allege that the instructions referred to in paragraph 11.2 were contained in Site Instructions signed by the resident engineer dated 7 and 29 October 1980 (Annexures K and L) and in a letter of 20 March 1981 written by the consulting engineers on behalf of the respondent to the appellant.

The respondent in its plea, after admitting

paragraph 11.1 and 11.2 above, avers inter alia that on 22 October 1980 Kelly orally agreed with certain representatives of the respondent that the appellant would spoil the slimes on top of the northern and southern slimes dumps at the rate quoted by the appellant in the SQ, i e, at contract rates. (We shall refer to this agreement as the "substitution agreement".) The respondent went on to deny that the instruction was given in terms of GCC 49 or 50; or that the appellant was entitled to recover the extra cost claimed. In the alternative, in the event of it being held that the instruction was a variation in terms of GCC 49, the respondent pleaded that, by virtue of GCC 49(3) (c), GCC 50 and 51 are applicable and that the claim ought to have been calculated and established in the manner in which these clauses respectively make provision. The plea

concludes with a denial that the increased costs were incurred. In the replication there is no response to the pleading of the substitution agreement, but, in the light of the customary general denial at the end of the replication, this agreement must be taken to have been denied.

Thus on the pleadings the following issues arise:

(i) Whether the substitution agreement was concluded in the terms alleged by the respondent or at all.

(ii) Whether the instruction was a variation order or extra work order as envisaged by GCC 49 or 50.

(iii) If so, whether by virtue of either of these clauses, the appellant is entitled to the extra costs and expenses claimed - as computed by the appellant or at all.

Here too, when it came to argument, there was a shift of ground. According to the judgment of the

a quo: "in argument Mr Duke relied in the first place on clause 41 arguing that the circumstances underlying the claim flowed from the fact that the Plaintiff had been deprived of possession of the New Canada bridge site." The trial court held, in contrast to its conclusion as regards claim A, that the pleadings did not permit the introduction of this clause and cause of action to justify the claim. It held that as pleaded the claim did not purport to be, and could not be construed as being, one in terms of GCC 41 and that the respondent could be prejudiced were this clause to be taken into account as the foundation of the claim. In this court Mr Duke likewise took his stand in the first place on GCC 41 and submitted that the court a quo erred in rejecting it as a permissible cause of action.

At the outset it need hardly be stressed

that:

> "The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed."
>
> (Durbach v Fairway Hotel Ltd 1949(3) SA 108KSR)
>
> 1082.)

This fundamental principle is similarly stressed in Odgers' "Principles of Pleading and Practice in Civil Actions in the High Court of Justice" (22nd ed) 113:

> "The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision."

The degree of precision obviously depends on the circumstances of each case. More is required when claims are based upon the provisions of a detailed and complex contract, in which numerous clauses confer the right to additional payment in differing circumstances-a contract, moreover, in which such payments are to be

determined, calculated and claimed in different ways depending on which clause is relied upon. In addition, as already pointed out, the contractor may choose to base the cause of action on some common law ground (breach of contract, enrichment or delict) quite unrelated to any additional payments for which the contract provides. Particularly in this context, it goes without saying that a pleading ought not to be positively misleading by referring explicitly to certain clauses of the contract as identifying the cause of action when another is intended or will at some later stage - in this case at the last possible moment - be relied upon. As it was put by Milne J in Kali v Incorporated General Insurances Ltd 1976(2) SA 179(D) at 182A:

> "... a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another."

34. This observation, one notes, was made at the time an amendment was sought (and refused) whereas in the present case the appellant steadfastly decided against any such application. As counsel said at a time when evidence was being led: "My Lord, we do not intend to amend. The pleadings as they stand will remain as they stand."

The particulars of claim state that the claim is based on an "instruction ... given by the engineer in terms of Clauses 49 and 50". The further particulars do not amplify this allegation to indicate, or even suggest, that GCC 41 is also relied upon and as Botha J said in another context in the course of the reported judgment at 330 A - B:

> "It is quite clear from the initial formulation of the claim and the unamended further particulars that the plaintiff was very mindful of the

> particular clauses of the contract on which it wanted to rely."

Nor is there in the pleadings any reference to "a failure to give possession" of the bridge site, which may have directed attention to GCC 41 as being the basis of the claim. Moreover, in the correspondence and documentation regarding this claim there was, as Mr Duke conceded, not a single reference to GCC 41.

Nevertheless it was the appellant's submission on appeal that "it was abundantly clear from the evidence that the plaintiff relied upon Clause 41 in support of its claim"; "that the issue was fully canvassed at the trial"; and that the respondent was therefore not prejudiced by the subsequent reliance upon its terms. In support of this contention counsel referred to inter alia Shill v Milner 1937 AD 101 at 105 and Marine & Trade Insurance Co Ltd v Van der

Schyff 1972(1) SA 26(A) at 44D - 45E. Both these decisions cite an earlier one of this court, Robinson v Randfontein Estates G.M. Co., Ltd., 1925 AD 173, in which at 198 it was said:

> "The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings. And where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been."

This principle, though stated with reference to the approach of the court of appeal, is to be applied in deciding whether the conclusion of the court a quo was correct.

Mr Duke put forward a number of grounds for

37. his

submission that GCC 41 was during the trial the acknowledged basis of this claim. We briefly state these contentions (with comment in parenthesis). They are the following:

(a) In response to a request for the purposes of trial, the appellant referred to certain documents and they served to notify the respondent of the underlying cause of action for this claim. (But none of them indicated that GCC 41 was the clause in terms of which the appellant intended instituting action.)

(b) An answer given at the pre-trial conference to the respondent was that

> "... the instructions set out in paragraph 11.2 of the Particulars of Claim were consequent upon and necessitated by the

> Defendant's failure to furnish the New Canada Bridge drawings duly approved by the South African Railways timeously ...."

(This answer does not point to GCC 41 or to any failure to get possession of the bridge - on the contrary it states what was the real reason for the delay, namely, the late approval of the bridge drawings.)

(c) Certain summaries of evidence to be given by experts. These referred, as one would expect, to the appellant's inability to cross the New Canada bridge as early as envisaged, and to the fact that the drawings for it were not furnished timeously causing a change in plans for the dumping of spoil.

(But one knows that such summaries can never be a substitute for pleadings or evidence. In any event

 they did not serve to forewarn the respondent that GCC 41 would eventually be relied upon.)

(d) "The decision to spoil slimes on top of the northern and southern slimes dumps was a direct consequence of the Defendant's failure to give possession of the bridge site to the Plaintiff and the consequent need to vary the mass haul programme drastically: this is summarised in Exhibit Y." In this document, dated January 1982, the appellant sets out formally and in detail its claims for additional payments in order that the Engineer may determine them in terms of GCC 15.

(The relevant portions of this document simply do not support this submission. There is no reference in it to a "failure to give possession

 of the

bridge site". On the contrary what is said is

that:

> "In a submission dated 19th August 1980 and pursuant to the various discussions and correspondence that had been occasioned by the late approval of the drawings of the New Canada Bridge by the South African Railways, the Contractor ...."
>
> (Para 16.16: emphasis supplied.)

And elsewhere in this document there is no more than a general reference to "delay occasioned by the Canada Road bridge" and "the effect of the bridge delay".)

(e) Certain passages in the evidence of Kelly gave notice to the respondent that GCC 41 was the basis of this claim.

(It is unnecessary to refer to each extract relied upon. In dealing with the consequences of, the

in the construction of the bridge this witness inevitably referred to the inability to build the bridge. But this did not, and could not, amount to an intimation that the claim was based on GCC 41.)

(f) It was submitted that what was said in the preliminary judgment of the court a. quo, served to alert the respondent to the fact that the appellant would be invoking GCC 41. (But in that judgment the court, in considering whether the exceptions ought to be upheld, said at 332B - C that:

> "At best for defendant it can be said that plaintiff is not as it says entitled to that remuneration under clauses 49 and 50, but then it would still be entitled to relief whether under clauses 39, 41 or clause 51 which deals with claims in general."

> If this observation can be said to have any pertinence in the present enquiry, the fact that the appellant did not respond to it by amending the particulars of claim would, if anything, have reassured the respondent that GCC 41 was not being relied upon.)

In the circumstances the respondent was quite entitled to close its case without paying regard to the issues of fact which are involved in the application of GCC 41. And it can in no way be said that a cause of action based on this clause was appreciated by the respondent or fully canvassed at the trial.

In any event the evidence does not support a claim on this ground. Briefly stated, the relevant facts are these. The drawings for the New Canada bridge formed part of the contract documents. These

were handed to the appellant in October 1979 when the respondent gave it access to the site, that is, to the relevant area apart from the railway property. It was envisaged that the railway authorities would grant access to their property at the same time but, as we have pointed out, this was refused pending approval of the drawings. The appellant, making due allowance for some delay in obtaining such approval, allowed in its original programme of work for a delay of approximately 3 months whilst this approval was awaited. However, it was only in July 1980 that it was finally given and the appellant was granted complete - as opposed to some earlier partial - access to the railway property. Hence the delay of 6 1/2 months reckoned from the programmed starting time for this work.

As these facts amply demonstrate, the true

cause of the delay, and of any attendant costs incurred, was the time taken by the railway authorities to approve the drawings of the bridge and not the refusal to allow the appellant access to their property. The latter was incidental, consequential and causatively of no relevance. Had the railway authorities granted such access at an earlier stage, it would have been to no avail: the appellant would still not have been able to commence work on the building of the bridge until the plans were approved. For this reason, if one could have regard to GCC 41, it would not sustain the claim.

In the circumstances it is unnecessary to decide whether other considerations amount to further insuperable obstacles in the path that the appellant has belatedly chosen to follow: for instance, that the Engineer was not called upon to, and did not, certify a

sum which he regarded as fair for extra expense incurred; and that the method adopted to compute the claim does not correspond to the one envisaged by GCC 41.

We turn to the substitution agreement. Notwithstanding the denial on the pleadings, Mr Duke in argument did not dispute that it was concluded in the terms alleged by the respondent but sought to avoid its implications on grounds to be considered in due course. For this reason a brief account of the events leading to this agreement will suffice.

The delay in the approval of the New Canada bridge drawings was a matter of concern to the appellant. In the absence of any alternative arrangement a substantial part of its earth-moving plant would stand idle. The substitution agreement overcame this difficulty. Its terms are reflected in a

written the next day, on 23 October 1980, by the appellant to the resident engineer. It records that:

> "With reference to the meeting held in Pretoria yesterday with BNR (Messrs. Petzer, Shirley, Van der Walt, Corbot, Gnudi and Kelly). I should like to confirm that the following operations were authorised:
>
> (i) T/Soiling and Cut to Spoil - N. Slimes (ii) Cut to spoil - 5. Slimes (iii) Borrow to Fill - S of B1126 (iv) Process wet material ex S. Slimes (Processing rates to be finalised)

A site instruction (SI 5663) of 27 October 1980 likewise embodies these terms of the agreement and gives effect to them. It states even more explicitly: "Rates for processing 'wet' material still to be finalised." The reference in both these documents to the fact that the rate for the processing of the <u>wet slimes</u> was outstanding, indicates - so the respondent submits - that in terms of the oral agreement the work itemised in (i), (ii) and (iii) above was to be done at

contract rates. Kelly was referred to this letter and the cross-examination which ensued reads:

> "I want just to be quite sure you in fact agreed that items (i), (ii) and (iii) were to be done at contract rates? -- Yes, we did.
>
> Yes, that was a clear agreement because all that you did here, was refer to the processing rates which were still to be finalised? -- But it was agreed, yes, there had been a long build-up to this meeting. It was implicit, it was clear that of course it would be at contract rates, if it was a contract type of operation.
>
> Well, where does that appear from this? — It is not recorded.
>
> Well, what .. (intervenes) -- But we would hardly offer to do something at contract rates, if it was more costly to ourselves, there would seem little reason.
>
> Mr Kelly, the agreement that you referred to here, is unqualified except for the processing of wet materials, there is no reference to any other rates which have to be finalised. -- That was a new rate, that was a new operation.
>
> Yes, that processing of wet material, a new rate would have to be finalised? — Yes.
>
> And that resulted in the 80 cents extra - over processing wet material? — Yes, it did.

> That is that. The other items were to be done at contract rates? -- Yes.
>
> That was the agreement? -- It was asked, it was said during the meeting, to be done at contract rates, yes. But of course, if then we are asked to take it to the north pole, .. (intervenes)
>
> Did you have reservations then that you did not tell the parties . . (intervenes) — There were no reservations discussed or expressed, it was a meeting of principals."

There is further evidence supporting the contention that the rates were agreed upon save for the processing of the wet slimes. A letter dated 27 October 1980 from the appellant to the Engineer concerning the northern slimes, confirmed that such work could commence immediately "at contract rates". On 28 October 1980 the appellant wrote to the Engineer submitting its determination of a proposed rate for the drying of the wet slimes in the southern slimes dumps. If the rate for the other work had not been fixed by

agreement, one would have expected this letter to have included a submission as regards such rates as well. The omission to do so is not confined to this letter. In other correspondence the question of the outstanding rate for the processing of the wet slimes is exclusively discussed. Finally, and perhaps most significantly, after the agreement, and as the work envisaged in (i), (ii) and (iii) above progressed, the appellant submitted monthly statements for payment for such work at the contract rates (that is, under cut and fill item SP 34.22D for extra haulage distance ("overhaul") and under item SP 34.210(a)) and such claims were met by the Engineer.

Thus, whatever undisclosed reservations Kelly might have had at the time of the agreement, or may have subsequently entertained, we are satisfied that the substitution agreement as alleged by the respondent

was - as the court a_ quo found - satisfactorily proved. The particulars of claim, as we have indicated, refer to GCC 49 and 50. The alternative argument seeks to rely on them and they feature in certain of the other claims still to be discussed. They ought therefore at this stage be quoted:

"49. ALTERATIONS, ADDITIONS AND OMISSIONS

(1) The Engineer shall make such variation of the form, quality or quantity of the Works or part thereof as may in his opinion be necessary, and for that purpose, or if for any other reason it shall in his opinion be desirable, he may order the Contractor to do and the Contractor shall subject to the provisions of sub-clauses (2), (3), (4), (5) and (6) do any of the following:

(a) Increase or decrease the quantity of any work included in the Works;

(b) omit any such work;

(c) change the character or quality or kind of any such work;

-(d)- change the levels, lines, position

51/...

and dimensions of any part of the Works; or

(e) execute additional work of any kind for the purpose of the completion of the Works.

(2) (a) No such variation shall be made by the Contractor without an order in writing of the Engineer: Provided that if for any reason the Engineer shall consider it desirable to give any such order verbally and advises the Contractor accordingly, the Contractor shall comply with such order, and any confirmation given by the Engineer in writing of such verbal order, whether before or after the carrying out of the order, shall be deemed to be an order in writing within the meaning of this sub-clause or if the Contractor within ten days of the giving of such verbal order, confirms it in writing to the Engineer and such confirmation is not contradicted in writing by the Engineer within ten days of receipt thereof, it shall be deemed to be an order in writing by the Engineer.

(b) No order in writing shall be required for any increase or

decrease in the quantity of any work included in the Works where such increase or decrease is the result of the quantities exceeding or being less than those stated in the Schedule of Quantities.

(3) (a) The Engineer shall determine the amount, if any, to be added to or deducted from the Contract Amount in respect of every variation of the Works.

(b) All such variations shall be valued at the rates or prices set out in the Contract, if, in the opinion of the Engineer, such rates or prices shall be applicable.

(c) If the Contract does not contain any rates or prices applicable to the variation concerned, such variation shall be classed as Extra Work referred to in Clause 50.

(4) If after the completion of the Works the cumulative effect of all variations shall result in -

(a) an increase or decrease of more than 20% in the value of the Contract Amount; or

(b) an increase or decrease of more

than 25% in the total value of any sub-item whose value in the Schedule of Quantities is in excess of 7 ½% of the Contract Amount,

or both, the Engineer shall, to the extent that the work exceeds the relevant percentages of 20 or 25 as aforesaid, increase the Contract Amount by such sum, if any, as in the opinion of the Engineer shall be reasonable regard being had to all material and relevant factors directly consequent upon or directly affected by any such variation including the Contractor's overheads if, as soon after the date of the variation order as is practicable -

(i) satisfactory evidence has been produced by the Contractor that loss or damage has been sustained by him; and

(ii) notice shall have been given in writing -

(aa) by the Contractor to the Engineer of his intention to claim extra payment or a varied rate or price;

or

(bb) by the Engineer to the Contractor of his intention to vary a rate or price as the case may be: Provided that in the case of a variation order for Extra Work such notice in writing shall be given before the commencement of the work concerned or as soon thereafter as, in the opinion of the Engineer, is practicable.

(5) Any increase or decrease in the quantity of any work where such increase or decrease is not the result of an order in writing, but is the result of the quantities exceeding or being less than those stated in the Schedule of Quantities, shall be construed as variations contributing towards the percentages under sub-clause (4) of this clause.

(6) For the purposes of this Clause, "Contract Amount" means the amount fixed at the time of the entering into the Contract."

and

"50. EXTRA WORK

(1) The Engineer may, if in his opinion it is necessary or desirable, order in writing that any additional or substituted work for which no applicable rates or prices exist in the Contract, be executed as Extra Work. The Contractor shall then be paid for such Extra Work at the unit rates and prices, or a lump sum as the case may be, previously agreed upon in writing between the Engineer and the Contractor, and approved by the Director.

(2) If unit rates and prices, or a lump sum as the case may be, cannot be agreed upon between the Engineer and the Contractor for any Extra Work, the Contractor shall receive in full payment for such work the actual field cost of the work to him plus fifteen (15) per cent of the said cost. The Contractor shall furnish to the Engineer such receipts or other vouchers as may be necessary to prove the amounts paid, and he shall before ordering materials submit to the Engineer quotations for the same for the Engineer's approval.

(3) In respect of Extra Work executed in accordance with the provisions of sub clause (2) of this Clause, the Contractor shall during the continuance of such work deliver each day to the Resident Engineer an exact list in

> duplicate of the names, occupation, time and rates of pay of all workmen, employed on such work, and a statement also in duplicate showing the description and quantities of all materials and plant used thereon or therefore. One copy of each list and statement will, if correct and when agreed, be signed by the Resident Engineer and returned to the Contractor, At the end of each month the Contractor shall deliver to the Resident Engineer a priced statement of the labour, material, plant and other items (if any) involved, and the Contractor shall not be entitled to any payment unless such lists and statements have been fully and punctually rendered. The Contractor will not be paid directly for overheads or head office expenses, the additional fifteen (15) per cent being deemed to cover all such expenses as well as profit."

The appellant's alternative arguments in the face of the substitution agreement (and putting GCC 41 aside) are anything but explicit. They are to be gleaned from the legal submissions in the heads of argument interspersed as they are with a chronology of

events relating to the spoiling on the northern and southern slimes pursuant to the agreement. Thus the following submissions are to be found in the heads,and oral argument was along the same lines.

> "The underlying basis of this claim is: ... the numerous instructions by the Engineer to spoil on top of the northern and southern slimes, each instruction constituting a variation order."
>
> "The exact spoil areas were subsequently designated by the Resident Engineer to include areas on top of the northern and southern slimes dumps, and it was in consequence of these designations that the plaintiff seeks additional payment."
>
> "The said instructions and designations were given by the Engineer in terms of Clauses 49 and 50, in consequence whereof the Plaintiff became entitled to recover all extra costs and expense incurred thereby."
>
> "[T]he Engineer's conduct in instructing the Plaintiff to spoil surplus mine slimes on top of the southern and northern slimes dams constituted extra work, in which event Clause 50(1) applied. The Engineer, however, at no time regarded the instructions given by him for the spoiling of slimes as constituting extra work and as a result

he failed to initiate any negotiations with the Plaintiff with a view to agreeing upon a rate for the extra work or alternatively a lump sum. The Plaintiff found itself in the position where it was obliged to execute the extra work despite the Engineer's failure to enter into an agreement in regard to the rate or a lump sum as aforesaid."

"To the extent that the Resident Engineer's instructions to spoil on top of the north and south slimes dumps constituted a variation within the meaning of Clause 49 of the GCC, we submit that in such event no rate existed and that in consequence thereof the provisions of Clause 49(3)(c) came into operation. The net effect thereof was, once again, that it was incumbent on the Engineer to agree a rate with the Plaintiff or alternatively on a lump sum in terms of Clause 50(1) of the GCC."

"However, where the Engineer fails or refuses to recognise that the work ordered by him constitutes a variation under Clause 49.1., he would not have to consider what amount is to be added or deducted in respect of such variation within the provisions of sub-clauses 49(3) or 50(1)."

"We submit that it was incumbent on the Engineer, once the decision was taken by him to spoil in conditions which differed substantially from the originally contemplated spoil area to recognise his instruction for what it was, namely a variation or an extra works order and to call upon the . Plaintiff to agree upon a new rate, or alternatively upon a lump sum."

59. Summarised the argument, as we understand it, amounts to this:

(i) The work to be done on the northern and southern slimes dumps in terms of the instructions pursuant to the agreement falls to be classified as a variation in the form of additional work under GCC 49 or as extra work in terms of GCC 50.

(ii) The nature of the work was, or turned out to be, more onerous than, or at least substantially different from, the haulage operation on which the rates in the contract and in the substitution agreement were based. For this reason those rates, which one knows were the same, did not apply.

(iii) That being the case, and in the absence of an

60/...

 agreed rate or an agreed lump sum, in terms of GCC 50(2), the appellant would in the ordinary course have been entitled to receive in full payment for such work the actual field cost of the work to him plus 15% of the said cost.

(iv) The appellant was, however, not obliged to claim on this basis - and was entitled to claim on the basis it chose - because "it was incumbent on the Engineer to agree a rate with the Plaintiff or alternatively on a lump sum in terms of Clause 50(1) of the GCC".

One can accept that the appellant is correct in submitting that the work, or portion of the work, stipulated in the substitution agreement is to be regarded as a variation or extra work in terms of GCC

49 or 50 or both. But in that event, in terms of these clauses, the contract rates for such work, or an agreed rate, or an agreed lump sum or actual field costs for the work plus 15% are the only bases on which a contractor is entitled to extra payment. As we have seen, the appellant's claim has not been formulated to conform to any of those alternatives. To overcome this difficulty, and to justify a claim unrelated to any of the awards envisaged by these clauses, the appellant relied on, as it alleges, the more onerous conditions encountered and the failure of the Engineer to agree to a rate or a lump sum. As regards the first ground, Mr Grobler drew our attention to documents indicating that the appellant was well aware of the nature of the work to be done and where it was to take place before it agreed on 22 October 1980 to the contract rates being applicable. (Cf SI 5655 dated 7 October 1980 and

the letter dated 18 October 1980 from the appellant to the resident engineer). As Kelly said in evidence: "It was only subsequently realised that some of these claims cost a lot more than the same item in the Bill of Quantities." But be that as it may, when claiming under GCC 49 or 50, the fact that additional or extra work turned out to be more onerous, cannot warrant a departure from the claim structure and procedure for which those clauses provide. (We deal with this consideration in more detail under claim D.) Nor can any act or omission on the part of the Engineer justify any such departure. It is true that he is enjoined in terms of GCC 49 (3) (a) to determine the amount to be added. Should he refuse or fail to do so - which has not been established in this case - the contractor would be free to claim for the variation at the rate or price he considers applicable or to class such

variation as Extra Work referred to in GCC 50. That clause, as repeatedly stated, provides for agreement on a rate or lump sum or for payment of actual field cost plus 15%. There can be no question of the Engineer -or for that matter the contractor - being "obliged to agree".

The alternative argument must therefore also be rejected for the simple reason that the appellant's claim has not been formulated in accordance with the provisions of GCC 49 or 50 on which it chose in its pleadings, and to an extent in argument, to rely. And, one should finally add, had it been thus formulated, the rate in terms of those clauses would in any event have been the one agreed upon in the contract, in the substitution agreement and subsequently.

For these reasons we agree that claim B was correctly rejected.

C L A I M C

This is the one claim which is unrelated to

the redesign of the sewer (S9) and the culvert (S675) or the construction of the New Canada bridge.

The nature of the material to be encountered when cutting through southern and northern slimes dumps is described in SP52.6 in the following terms:

> "The Southern slimes dam is sliced through by the Freeway in a cut up to 18 m deep with roadway level generally still above existing ground level. The upper portion of the dam has dried out with time resulting in an average moisture content of 18% which is such that the material can be treated as normal cut to fill. However, below this upper portion the moisture content increases quite rapidly to an average of approximately 30%."
>
> And further:
>
> "The Northern slimes dam is also sliced through by the-Freeway resulting in a cut 25 m deep, 7 m of which is in the underlying ground which is expected to be intermediate material with possibly some hard material. This dam is much drier than the first one without very wet slimes and an average moisture content of 18%. Consequently all the slimes can be treated as normal cut to fill."

SP 3403(a)(vi) provides:

> "<u>Excavation of slimes with high moisture content</u>

The Southern slimes dam between km distances 70,92 and 71,21 consists of an upper stable part where the moisture content of the slimes is relatively low and a lower unstable part where the high moisture contents result in stable grades as flat as 1 in 14.

Because of its high moisture content material in the lower range of the slimes dam is not capable of supporting construction traffic and it is required that the Contractor's programme be such as to allow adequate time for this material to dry out sufficiently to be excavated."

(See too para 3.3.1 of the document entitled "Materiale Ondersoek en Ontwerp".)

The rate is in the SQ:

Item 34.01 reads as follows:

DESCRIPTION	UNIT	QUANTITY	RATE	AMOUNT
Construction of Subgrade as specified in Section 3400				
Cut and borrow to fill within a haul distance of 0,5 km:				

QUANTITY RATE AMOUNT

(b) Compaction to 98% of proof density m^3 15 000 1 ,32 19 800,00

(c) Rockfill processing and compaction m^3 57 000 1,53 87 210,00

(d) 12 Pass roller compaction m^3 51 000 1,56 79 560,00

(e) Rock toe Processing m^3 1 000 3,60 3 600,00

Item 34.01D reads:

Cut and borrow to fill within a haul distance of 0,5km:

(a) Compaction to 95% modified AASHTO density of mine slimes and compaction to 90% modified AASHTO density of other material m' 1 280 000 1,30 1 664 000,00

The extra-over rate for the excavation of slimes

between km 70,92 and 71,21 is item 34.04(e)D and reads:

DESCRIPTION	UNIT	QUANTITY	RATE	AMOUNT
Extra over Item SP 34.01 for excavation of slimes between km distances 70,92 and 71,21 below a level equal to gradeline level of Northbound carriageway plus 5,5 m	m^3	350 000	0,19	66 500,00

The extra-over rate of R0,19 m^3 expressly applies only to the area and the depth defined in item 34.04(e)D for chainages 70,92 km to 71,21 km in the southern slimes dump. That is the only rate for the removal of wet slimes.

The appellant's complaint is that it encountered, elsewhere in both the southern and the northern slimes dumps, conditions similar to those for which the special rate was stipulated, i e where the average moisture content of material to be excavated, described as "wet", was well in excess of 18%. The

excavation, transportation and treatment of 370986 m^3 of such material, so it was contended, involved the appellant in extra cost which it computed at the extra-over rate of R0,19 m^3. From the resultant sum (R70 487,00) the appellant deducted the amount of R51 537,31. This figure the respondent had allowed for and paid in respect of "wet material" in the northern slimes dump which was not suitable for normal cut to fill operations, leaving a balance of R18 949,69, which is the amount claimed.

In its particulars of claim the appellant alleged that the respondent was liable for payment of this sum "under and in terms of the said contract" and in its further particulars that "it is entitled to an additional payment as aforesaid as an extra-over, alternatively as a variation under clause 49".

The claim succeeded. The appellant was

awarded R18 949,69. The court a quo found that the appellant had to excavate and transport 370 986 m^3 of "wet" material; that payment was made by the respondent (at R0,19 m^3) for only 271249 m^3 and that, for a further quantity of 99737 m^3 (all excavated from the southern slimes dump) no payment had been made. By applying the rate of R0,19 m^3 to that volume of material the court a, quo calculated that R18 950,00 was owing to the appellant, which was fractionally more than the amount claimed and awarded.

It is against that order that the respondent has cross-appealed.

The main thrust of the respondent's attack against the finding of the court a quo was that it was not supported by any cognisable cause of action.

The approach of the court a quo is perhaps best illustrated by three quotations from its judgment.

The first is:

> "I have no doubt that the extra-over item referred to was provided in view of the higher moisture content of the slimes to be found between the two kilometre distances. See section 3400 of Book 2 of Volume IIIA of the special provisions. That being so, I cannot conceive of any reason why this rate cannot be applied in terms of clause 49(3) whenever a contractual rate is required to remunerate the contractor for the excavation of slimes that are wetter than otherwise specified."

The second is:

> "I do not think that clause 9 can relieve the Defendant from potential liability where it has chosen to specify that certain conditions were present. If one looks at the description of the slimes in the provisions cited, it is clear that all the slimes except those within the already mentioned chainages were stated to be capable of being used as normal cut and fill. For slimes in the prescribed chainages a higher rate was envisaged because a drying out process would be involved. In the circumstances the conclusion is inescapable that the Defendant intended to make a representation to prospective tenderers which it knew would have a bearing on the prices they would tender. I also agree with the contention of Plaintiff's counsel that the allowance of an

> extra-over between the two chainages suggests that it was envisaged that only in that area would abnormally wet slimes be encountered. That confirms the view that the contractor was entitled to assume that slimes encountered outside the chainages could be treated as normal cut to fill."

(We refer to GCC 9 a little later in this judgment.)

And the third quotation reads as follows:

> "Here plaintiff does not claim for an additional expense but for the application of a contractual rate which it contends should also rightfully apply outside the restricted area."

What the court a quo in effect held was that the extra-over rate would apply whenever actual conditions corresponded to the anticipated conditions between chainages km 70,92 to 71,21. In our view this conclusion is unwarranted.

The contract itself is perfectly clear. The extra-over rate of item SP 34.04(e)D is explicitly confined to the section of the freeway between

and 71,21. Elsewhere the standard rates of items SP 34.01 and 34.01D would apply. The terms of the contract thus made no allowance for the transposition of the extra-over rate to locations other than the specified chainages - which is precisely what Kelly and Fasciotti admitted they wanted to achieve. The court a, quo, in one of the passages from its judgment quoted above, refers to a representation by the respondent, justifying the assumption by the appellant, that abnormally wet slimes would be encountered only at the stated chainages. The observation is questionable. The contract documents make it plain that the conditions described in them are by no means warranted. GCC 9 specifically enjoins the contractor to inspect and examine the site and its surroundings and to make itself fully conversant with all the circumstances (such as the nature of the

ground, its surface and substrata) which may have a bearing upon its tender (cf Grinaker Construction (TvD(Pty) Ltd v Transvaal Provincial Administration 1982(1) SA 78(A) at 98 A - F). The contractor, in terms of that clause, accepts full responsibility for obtaining and assessing such information. SSRB 3402 in particular refers to the nature of materials and states that the results of site investigations were made available to tenderers in good faith without any warranty being given or implied that such results were either representative or correct. In it the contractor is referred to GCC 9, the provisions of which, so it is stated, "are in no way relieved or diminished" by the results of site investigations or "by any representations of these results made by the Engineer or his representative".

Any doubt that may have existed on the part

 of a prospective tenderer as to whether the extra-over rate applied exclusively to the stated chainages, was, moreover, pertinently removed at the first site inspection meeting. Mr Fasciotti attended it on behalf of the appellant. The minutes of the site inspection meeting read, inter alia,

> "A request was made by one of the prospective Tenderers to change the extra over payment item for excavation of 'wet' slimes. (Items Nos. SP 34.04(e)C and SP 34.04(e)D) to read as follows:
>
> > 'Extra over Item SP 34.01 for excavation of slimes with an in. situ moisture content in excess of 18%'."

The response to this request was contained in addendum No 2 and read as follows:

> "BKS, [the Engineer] after careful consideration, do not intend changing the Documents. However, additional test results on the mine slimes are included in annexure A."

An analysis of the borehole results made

available to tenderers would have served as due warning to them that the average moisture content of slimes outside the demarcated chalnages might well be in excess of the stipulated percentage.

It is therefore polemical whether the contract documents were indeed misleading in representing to potential tenderers that the wet conditions justifying the extra-over rate would only be encountered at the designated locations in the southern slimes dump, and that slimes excavated elsewhere would be suitable for normal cut to fill operations. But it is not necessary to decide the issue for a misrepresentation of this nature has not been pleaded. Nor did the appellant seek an appropriate rectification of the contract. Failing an attack on either of these two grounds the provisions of the contract remained unchallenged and, as such,

incapable of the adjustment suggested by the appellant.

That, then, leaves the alternative pleaded by the appellant in its further particulars and invoked by the court a quo in its judgment, namely that the claim was in reality one in terms of GCC 49, more particularly GCC 49(3).

The court a quo held that the data in SP 52.6 and SP 3403(a) (vi) as to the nature of the material were tantamount to specifications of the moisture content at chainages other than those specifically mentioned, more particularly, that the slimes were suitable for fill without further processing or treatment. To the extent that this proved not to be so this situation was construed, as we understand the judgment, as a variation entitling the appellant to payment in terms of GCC 49(3). And, since a rate had been agreed for wet material, that

so it was concluded - applied in terms of the clause.

We cannot agree. In the first place, as stated earlier, the conditions described in the contract document are not guaranteed to be correct. At best they are guide-lines. They cannot, therefore, be regarded as specifications in the sense of provisions of the contract susceptible of variation in terms of GCC 49.

In the second place, perhaps more to the point, a written variation order by the Engineer is a sine qua non to a valid claim under GCC 49 (1)(2)(3) (cf Grinaker Construction (Tvl) (Pty) Ltd v Transvaal Provincial Administration, supra, at 93D; Minister of Public Works v W J M Construction Co (Pty) Ltd 1983(3) SA 58(A) at 67A). No variation order has been identified in the pleadings in connection with claim C

and Kelly, in evidence, conceded that none existed.

Claim C, in short, ought not to have succeeded. It was, it would seem, an award made on grounds of fairness. But equitable grounds are too unstable a foundation on which to base an award (cf Grinaker Construction (Tvl) (Pty) Ltd v Transvaal Provincial Administration, supra, 96 G - H). That the respondent chose to pay the appellant at the extra-over rate of R0,19 m^3 for some excavation of wet material in the northern slimes dump, also does not give the appellant a title to insist on a similar rate for other similar work outside the designated area where, for reasons of its own, the respondent declined to make a similar payment.

In the result the cross-appeal against claim C must be upheld and the award be set aside.

C L A I M D

Claim D is in essence a claim for loss suffered by the appellant in the productivity of its earth-moving plant, presented as a claim in terms of the contract.

It started out as a claim in terms of GCC 49 read with 50 for compensation for extra cost and expense incurred by the appellant in the sum of R164 164,00. The alleged delays were in the issuing of drawings for the construction of the New Canada bridge, which in turn caused delays in the actual construction of the bridge and subgrade, resulting in the overrun of 6,5 months. The claim was calculated on the basis of a proportional increase in the direct cost rate of all materials.

Subsequently it was amended. Not only was the amount increased to R707 600,00 but its base was

considerably broadened: it remained a claim for extra remuneration in terms of GCC 49 and 50, with the addition of an alternative claim for damages for breach of contract, arising from delays due to a host of further factors mostly attributable to the respondent and resulting in additional work and standing time for the earthworks plant. These factors, so it was alleged, caused the construction of the subgrade (and hence the contract period) to be extended by 6,5 months.

In the amended particulars of claim the factors contributing to the delays and disruptions were listed as follows:

1. failure to issue instructions timeously;

2. instructions in regard to variations and additional work;

3. suspension of part of the work;

4. failure to give occupation of the site or portions thereof;

5. late issuing of drawings.

In the amended further particulars it was pleaded that, in addition to the delays and disruptions relating to the New Canada bridge, additional factors contributed to the delays and disruptions, namely:

1. obtaining material for the pioneer layers and the construction thereof;

2. the suspension of the works in relation to S9 and S675 (as detailed in claim A);

3. unsuitable founding material necessitating extra work relating to culvert S674 and the adjoining road area;

4. delay in obtaining permission to blast for the construction of S676;

5. the change in mass haul brought about as a

 result

of variations and extra work (as detailed in claim B);

6. the defendant's failure to provide sufficient information to establish with accuracy the dimensions of the northern slimes cut;

7. the circumstances detailed in claim C;

8. the processing of wet slimes consequent upon extra work order 10;

9. the compaction of slimes to meet the respondent's specifications;

10. inclement weather experienced by the appellant during the extended period; 11. changes to the mass haul necessitated by extra work ordered and variations instructed and the change in all distances and routes.

The amount claimed was computed in annexure N as follows:

> "... arising out of delay, disruption and change in scope the following, when expressed in hours, multiplied by the rate, represents the loss of productivity to the major items and plant utilised in the construction of subgrade."

The totality of the claim was R887 877,73. Some allowance was made for claim A, resulting in a figure of R707 600,00.

As we have pointed out, the alternative claim for damages was defeated when the special plea was upheld. The appellant also appealed against that order but addressed no argument to this court on why the decision of that court should be reversed. We have no reason to doubt its correctness. No more need accordingly be said about the claim for damages for breach of contract.

The claim for payment, as pleaded, was based on GCC 49 read with 50; in argument before the court a quo GCC 39 and 41 were relied on; in the heads of argument before this court all four clauses, 39, 41, 49

and 50, feature but in the actual argument GCC 41 predominated although some slight reliance was still placed on GCC 49 and 50; and the principal cause of the loss of productivity was now stated to be the delay in gaining access to the New Canada bridge site, which in turn gave rise to some of the other factors identified by the appellant.

The court a quo dismissed the claim. It was, the court pointed out, a general one for delay and disruption caused by diverse circumstances, some of which are unrelated to the conduct or responsibility of the respondent, e g, inclement weather and the appellant's own mistakes and misfortunes. Evidence was led on all the disparate causes for the delay but no real, and certainly no successful, attempt was made to assess how much of the loss of productivity could be attributed to each cause, e g, to the suspension of

 work on the sewer S9 (GCC 39), to the failure to give possession of the New Canada bridge site (GCC 41) , to any of the other factors selected by the appellant (GCC 49), or to other factors such as the sequestration of one of the appellant's sub-contractors. Nor could the court a quo itself do the exercise since, as it reasoned, "the claim is calculated in terms of the total number of standing hours of various items of earth-moving plant and not in terms of the duration of the contract overrun".

This criticism by the court a. quo of the appellant's approach is fully justified. Neither in the pleadings nor in the evidence did the appellant even begin to isolate, estimate or quantify the effect of each separate cause contributing to the overall delay in completing the contract. The loss of productivity was calculated in respect of each item of

by taking its total hours of availability and deducting from this figure the time actually worked. The claim, thus based on non-productive units of the plant, failed to connect the globular sum claimed to the various alleged delays and disruptions. And the appellant, in its evidence, failed to establish that the non-productive period in respect of each unit was due to a delay or disruption for which the respondent was responsible. Most, but not all of the causes mentioned, might have supported, at least notionally, a claim for payment either in terms of the contract or for damages for its breach; but then the losses related to each cause ought to have been separately pleaded, assessed and proved. That the appellant was unable to do so did not justify it in attributing the eventual delay to the combined effect of all these causes, with an adjustment, in the broadest of terms,

weather, matters not attributable to the respondent and standing time before 1 October 1980, (estimated by counsel to have been 35% of the totality). Nor did it justify the appellant in consolidating sundry causes of fact into a single composite cause of action, whereas - as stressed at the outset of this judgment - the different clauses of the contract dealing with different consequences prescribe different remedies for differing conditions. Claim D is in reality an attempted claim for damages for breach of contract masquerading as a claim ex contractu. That proposition is best illustrated by examining, as we now propose to do, the absence of a contractual foundation for each of the alleged causes of delay still relied on by the respondent in argument before this court. (Not all the causes or factors mentioned in the pleadings were relied on by the

appellant in argument. Some, such as the suspension of work in relation to S9 and S675, were abandoned. Others were relegated in importance. In this court the emphasis was placed squarely on the delay in gaining access to the New Canada bridge site. Yet the amount claimed remained the full R707 600,00. Strictly speaking it was incumbent on the appellant, having alleged that the total amount was due to the combined effect of all the causes pleaded, either to prove that the abandoned causes had no impact on the ultimate delay or to scale down its claim correspondingly.)

Ad: the delay in gaining access to the New Canada bridge site.

The appellant complained of delay on the part of the respondent. That complaint is more appropriate

to a claim for damages for mora. But damages for mora were claimed, unsuccessfully, only in the alternative. The main claim was one for payment in terms of the provisions of the contract, more particularly GCC 41. The inapplicability of that clause, in relation to this grievance, has been dealt with under claim B above. And as we have said, the appellant's true cause for complaint in this regard was not the delay in gaining access to the site but the delay of the railway authorities in approving the bridge drawings.

It was in consequence of that delay that the substitution agreement of 22 October 1980 was concluded for the express purpose of minimizing the effects of the delay in the bridge construction. During and subsequent to that meeting rates were agreed. Payment was made in accordance with such agreement.

That the conditions encountered by the appellant in implementing that agreement may have proved to be more onerous than anticipated gave it no cause, ex post facto, to avoid the rates to which it had committed itself. No provision was made in the substitution agreement, or indeed in the contract provisions, for a claim additional to the agreed rates. The contract, after all, had a rate-bound structure. The rates were designed to cater for a range of situations which might cause loss to the contractor and for which it had to make due allowance in its tender.

GCC 3 reads as follows:

> "TENDER PRICES
> 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 requirements 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." (Emphasis supplied.)

As it was stated by this court in Grinaker Construction (Tvl) (Pty) Ltd v Transvaal Provincial Administration, supra, at 97H, in dealing with clause 3 of a contract containing clauses identical to GCC 3, 49 and 50 of this contract:

"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."

And at 97E - F:

> "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."

In clause 1 of the preamble to the SQ the appellant was again warned that its rates would encompass all remuneration:

> "The cost of complying with all conditions, obligations and liabilities described in the General Conditions of Contract, Specification and Special Provisions and in the Schedule of Quantities, including all overhead charges and profit and carrying out the work as shown on the Drawings shall be deemed to be spread over and included in the prices or sums stated by the Contractor in the Schedule of Quantities."

93/...

contract itself provided - in GCC 12, 39, 41, 49 and 50 - for particular situations where additional remuneration, above the agreed rates, was claimable. And where such clauses did make provision for additional remuneration, that was then - as already stressed - the exclusive and the entire remedy provided for.

In this instance rates were agreed. And for the reasons discussed earlier none of the special clauses, in particular not GCC 41, applied.

Ad: changes to the mass haul necessitated by variations and extra work ordered by the Engineer

The contract provided for claims pursuant to variation orders and extra work orders issued. It did not cater for additional compensation above the

remuneration stipulated in the relevant clauses, GCC 49 and 50. They accordingly could not assist the appellant. And for the reasons discussed under claim B above, nor could GCC 41.

Ad: delays due to pioneer material for fill

According to the appellant the insufficiency of suitable pioneer material in Borrow Pit 11 compelled the Engineer to issue instructions to the appellant to obtain additional fill material elsewhere; the search for additional sources and the Engineer's delay in issuing the required instructions contributed to the overall delay and standing time of the appellant's plant and equipment; and since the instructions were by nature variation orders, the appellant was entitled to additional compensation in terms of GCC 49 and 50. The respondent denied both the factual and the legal

foundations of this component of the claim. Factually it was denied that there was an insufficiency of fill material at Borrow Pit 11: it was, so it was argued, the appellant which requested the Engineer to indicate alternative sources of fill material because it suited the appellant's purpose for him to do so; any delay experienced in this regard was accordingly of its own making; the Engineer, moreover, did not issue instructions, he merely gave permission to the appellant to exploit alternative sources of material. However, these disputes need not be resolved. For even if the appellant's analysis of the facts is correct, any delay suffered by the appellant cannot legally be translated, as the appellant now seeks to do, into a claim for standing time in terms of GCC 49 and 50 as computed in annexure "N". Then the claim should have been one for transposed or new rates or a lump sum, as

agreed, or for field costs plus 15%.

The appellant also complained of a substantial increase in the quantities of pioneer fill material that had to be used due, amongst other things, to the waterlogged conditions encountered at S674. Such conditions were not foreseeable at the time of tender, according to the appellant, and caused it further wasteful delays: it was "extra work" and fell to be dealt with in terms of GCC 50.

There are several answers to this contention. The conditions at S674, for one, were foreseeable and should have been taken into account when tendering. We have referred, earlier in this judgment, to GCC 9, which required the appellant to inspect the site and make itself conversant with, inter alia, the ground and substrata. The clause proceeds: "No subsequent claims by the Contractor, based on his lack of

knowledge of local conditions, will be entertained." One of the contract documents, entitled "Materiale Ondersoek en Ontwerp", moreover, contained an explicit description of the marshy conditions to be encountered and the type of work that would be required to deal with them.

Another reason is that a mere increase in quantities cannot be treated as "extra work", not for the purpose of a claim for payment in terms of GCC 50, let alone one for additional compensation not expressly catered for in the clause. It is only GCC 49(5) read with GCC 49(4) which provides for extra payment in the case of increased quantities per se. (Cf Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974(3) SA 506 (A) at 516 F - G.)

Clause 4 of the preamble to the SQ stated:

"The quantities of work and material set forth in

> the Schedule of Quantities are an estimate only and are not to be considered as limiting nor as extending the amount of work to be done and material to be supplied by the Contractor. The Works as completed in accordance with the Contract shall be measured and paid for as described in the Schedule of Quantities and in accordance with the General Conditions of Contract, Specifications and Special Provisions."

And the "Form of Agreement", signed by the parties,

reiterated that the amount to be paid

> "by the Employer to the Contractor for the due and faithful performance of the Contract Works, shall be a sum to be ascertained from the quantities of work actually carried out at the rates and prices shown in the priced Schedule of Quantities."

The contract is thus of a kind that has been described as a "rate and measurement contract" (Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration, supra, at 510A; Minister of Public Works v W J M Construction Co (Pty) Ltd, supra, 64 C -F; Compagnie Interafricaine de Travaux v South African Transport Services and Others 1991(4) SA 217 (A) at 223

- C).

An increase in the quantity of pioneer material is not "extra work": it is work to be paid for at the billed rate for such work. There is no contractual provision allowing for additional remuneration above these rates.

Ad: the spoiling of slimes on the top of the northern and southern slimes dumps

The instruction to spoil excavated material on the top of the northern and the southern slimes dumps, instead of at Borrow Pit 11, may well be said to be a variation order which justified a claim in terms of GCC 49 or, if there were no applicable rates, GCC 50. But here rates were indeed agreed at and after the meeting of 22 October 1980. Subsequent payments were made in accordance with such rates. There is no room

for a claim for additional remuneration for delays caused by such work.

Ad: the processing of wet slimes

The appellant's complaint was about delays and disruptions caused by the unanticipated additional work involved in the processing of wet slimes which the appellant: (a) encountered outside chainages 70,92 km to 71,21 km; and (b) was obliged to do pursuant to the meeting of 22 October 1980.

Category (a) forms the subject matter of claim C. As stated in this judgment when dealing with that claim, the rates for the processing of material for the excavation and processing of material outside the defined chainages remained firm. They also happened to be comprehensive. This contract, unlike some others (cf Melmoth Town Board v Marius Mostert (Pty) Ltd 1984(3) SA 718 (A) at 726 A - D, 730 D - F; Compagnie Interafricaine de Travaux v South African

Transport Services and Others, supra, 232A - F; 234H; 235 B - D) , made no provision, in GCC 41 or in any other clause, for additional remuneration should the work prove to be more onerous than the appellant anticipated. Any such claim for additional compensation, if valid, would have to be accommodated outside the terms of the contract. And that was simply not the appellant's case at the trial.

As for category (b) the effect of the agreement of 22 October 1980 has been discussed under claim B. As stated earlier, the instruction to process wet slimes for fill instead of spoiling it at Borrow Pit 11 may well constitute a variation order entitling the appellant to additional payment in terms of GCC 49 read with 50. Such additional payment would have to be agreed, failing which a formula for payment was provided. Here the rates were indeed agreed. Extra

 work order 10 recorded an agreement that an extra-over rate of R0,80 for processing of wet slimes for fill purposes was approved. The extra-over rate had to cater for the fact that the appellant' s work would be more onerous and its progress, as a result, impeded. That leaves no scope for a claim for additional remuneration for those very eventualities (cf Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration, supra, at 523E - 524B). The appellant's subsequent attempts to have the rate increased was rejected by the Engineer. The Engineer was not obliged to increase such rates once they had been agreed. There was likewise no reason why the respondent was bound to accede to the appellant's request to do so. Consequently there is no contractual provision which entitles the plaintiff to insist cm extra remuneration or a new rate once such

 rate had in fact been fixed. GCC 41, on which the appellant sought to rely in argument, cannot assist it in this regard.

Ad: compaction of slimes

In terms of the contract the appellant was obliged to achieve a specified stability (95% Mod AASHTO). At the request of the appellant this requirement was relaxed to 90% Mod AASHTO. The appellant confirmed in writing that

> "neither this relaxation nor any previous density requirement relaxation will be the basis for any claim for either extension of time or for additional compensation".

That disposed of this aspect of the matter. But even failing the concession made by the appellant, if the modification ordered constituted a variation

order, the appellant's remedy was confined to GCC 49 read with 50. In the absence of any agreed rates or an agreed lump sum, the appellant's claim should have been one for field cost plus 15%. Such a claim is not even remotely reflected in the computation of claim D.

Ad: the additional factors as pleaded

The other factors pleaded and listed above have not been pressed in argument before this court. We do not propose to deal with them, save for saying that none of them can serve to support the computation of compensation reflected in annexure N.

In paragraph 103 of the appellant's heads of argument before this court it is submitted that the sum of R707 600,00 is "a fair and reasonable sum in respect of the plaintiff's loss of productivity" which can be

claimed within the contractual provisions of the agreement and in particular GCC 39, 41, 49 and 50. The concept of fairness and reasonableness is not, however, an element or a common denominator of these clauses and cannot serve as the true criterion for an omnibus claim for a globular sum.

The claim, as formulated, accordingly lacks a legal basis, either in terms of GCC 41 or in terms of GCC 49 and 50. That being so, it becomes unnecessary to deal with its quantification and proof.

Finally, the appellant submitted that it is, at the very least, entitled to payment of R49 858,90 which the Engineer in his report to the respondent determined should be paid to the appellant "for delays in the slimes fill operation arising out of the New Canada bridge delay."

The respondent rejected the suggestion of the

Engineer. The issue is whether the respondent was bound by the Engineer's decision. The court a quo found that it was not:

> "in any event, before a decision can be regarded as an admission of a factum probandum in this case one has to look at what was submitted to the engineer, what the engineer found, and what is the case pleaded in this matter. If one does that, one finds in the case of claim D that the engineer allowed for a delay of 1 1/2 months on account of abnormally heavy rainfall. That has to be contrasted with the plaintiff's claim which is based on unproductive hours of plant. In the circumstances one cannot say that the engineer's finding constituted an admission which is binding in the context of the pleaded case."

We agree. The Engineer's decision, moreover, was not pleaded by the appellant as a separate cause of action, to the effect that the respondent was bound thereby. The Engineer's authority in terms of GCC 15(1) was to determine disputes regarding payment and to include any award in his certificate. But that was

subject to the employer's right to overrule the decision. GCC 15(2) read:

> "Notwithstanding anything to the contrary contained in this Contract, the Employer shall at any time have full power to amend any certificate issued by the Engineer or may issue any instruction in writing to the Contractor and for this purpose he may open up, review, revise, amend or cancel in writing any decision, opinion, direction, or valuation given by the Engineer and every such amended certificate or instruction shall be binding on the Contractor and shall prevail over any contrary certificate or instruction which may have been given by the Engineer."

The appellant's argument was that the respondent only had the power to override a decision of the Engineer if that decision was reflected in a certificate and since the amount in question had not yet been certified, the respondent had no right to overrule it. The argument is without substance. There is something to be said for the contention that

finality as to what is due to be paid to the appellant, as far as the Engineer is concerned, is only reached when he issues his certificate - which in this instance had not yet happened. And as far as the respondent is concerned GCC 15(2) gives the employer the right to interfere with any certificate, decision or action of the Engineer, in particular to revise or cancel any decision taken by him. It is for this court to decide, ultimately, whether the amount determined by the Engineer in his report was in fact due to the appellant, not because the Engineer said so, but because the appellant was legally entitled to it. In the instant case, and for the reasons mentioned above, the answer to the question thus posed must be in the negative.

The appeal against the dismissal of claim D fails.

C L A I M E

Claim E involves, once more, the construction of the New Canada bridge.

The basic allegations in the particulars of claim are that it was contemplated by the parties that the construction of the bridge would commence in February 1980, would be partly complete in July 1980 and would be fully completed in December 1980; and that the appellant would be able, from July 1980, to transport materials across the partly completed construction. But because the respondent failed to furnish the drawings for the bridge (duly approved by the railway authorities) until July 1980, its construction was delayed. It is then alleged that the delay caused the appellant to incur additional cost and expense in the sum of R198 197,36, from which a payment of R18 052,00 is subtracted, leaving a balance claimed

145,36. In the appellant's heads of argument a further amount of R23 498,00 is abandoned, leaving a final balance of R156 647,36.

The claim, though based on the respondent's alleged failure timeously to produce the required drawings, was not one for damages for breach of contract in the form of mora (debitoris or creditoris). In the further particulars the appellant eventually committed itself to a claim "under the contract" pursuant to GCC 49 read with 50.

The claim was dismissed by the court a quo. It correctly pointed out that this claim could not be conceived as a claim for mora ex re since there is no provision in the contract that the bridge drawings had to be delivered by a particular date, namely 11 October 1979; nor could it be a claim in terms of GCC 49 read with 50 since no variation order or extra work order

had been issued. The appellant, in argument before the court a quo, was accordingly constrained to base its claim on GCC 41. According to the court a quo it was not, however, open to the appellant to do so since such a change in the course of action was in fact a change in the cause of action which, unlike claim A, did not merely involve a substitution of labels. The appellant, the court found, should have asked for an amendment. Not having done so the respondent would be prejudiced by this volte face; and consequently the court a quo could not entertain the claim. It nevertheless expressed certain views on the merits.

We agree with the court a quo, for the reasons elaborated on earlier in this judgment, that the tenor of its pleadings precludes the appellant from diversifying its cause of action.

On this question counsel again sought to rely

on what was said in the preliminary judgment. We have already explained that the comment in that judgment cannot serve to elucidate or augment the pleadings. The court a quo was accordingly right in disallowing the claim on the simple ground that the pleadings did not cover it. Consequently it is not necessary to enter into a detailed discussion of its merits which have, in any event, been dealt with in extenso under claim B.

In the circumstances it is likewise unnecessary to deal with the quantification of the claim or the special defences raised by the respondent before the court a. quo. And what was said earlier about the right of the respondent to overrule a recommendation of the Engineer, applies with equal force to the sum which the Engineer, on this claim, awarded to the appellant in his report.

In our view the court a quo was right in dismissing claim E.

C L A I M F

This is a claim for compensation for delays due to

(i) the Engineer's failure timeously to furnish drawings and instructions for the New Canada bridge;

and (ii) additional work ordered causing a contract overrun of 6 1/2 months (of which one month is attributed to bad weather), and resulting in additional on-site costs and overheads.

The delay factor, after allowing one month for bad weather, was fixed by the appellant at 5,5 months. The admitted average monthly on-site costs and overheads sum of R246 808,00 was multiplied by this

 factor.

The total of R807 444,00 was reduced by R131 651,00, being a 21.5% allowance for extra income derived from extra work and additions. The total claimed is therefore R675 693,00.

Although the claim was pleaded as one based on GCC 43, it was sought to accommodate it, during argument before the court a quo, under GCC 41, 49 and 50. From the outset it was therefore consistently conceived as a contractual claim and not as a claim for damages for breach of contract.

The appellant's refusal to amend its pleadings to reflect the case that was eventually argued, and the prejudice it would cause the respondent if the appellant were allowed thus to shift its ground, persuaded the court a quo to disallow the claim. In any event it held that the contract provisions relied on do not support such a claim.

We agree with the court a quo on both grounds.

As for the pleadings, we refer to what was said earlier in this judgment. A party is not permitted to alter his stance whenever the shoe pinches. And as to the merits, there simply is no sustainable cause of action, either as pleaded or as argued, in the court a quo or in this court.

The reliance on GCC 43 as an independent cause of action, as pleaded, was not pursued in argument and rightly so. This deals with the extension of time for completion and makes no provision for additional remuneration. Counsel for the appellant contended, as appears from his heads of argument, that where an extension of time is justified in terms of GCC 43 a contractor is "usually entitled to payment of its loss and expense occasioned in consequence of the

overrun of the contract, albeit in terms of other clauses and conditions in the contract documents". These other clauses are then identified as GCC 15, 39, 41, 49, 50 and 51. GCC 15 deals with the authority of the engineer and employer and is of no relevance. Neither is GCC 51 which is concerned with the procedure relating to claims.

The contention was that there were delays in the earthworks and in particular in the construction of the subgrade because of, firstly, a denial of access over S9 and S675 and, secondly, a denial of access to the New Canada bridge site on the railway property.

GCC 39 of the GCC deals with a written order by the Engineer to suspend the progress of the work or any part thereof. That clause carries its own mechanism for payment. The circumstances in which a suspension order relating to S9 and S675 could give

rise to a claim in terms of GCC 39 have been discussed under claim A above. Such a claim was not really pursued under claim A for the reasons mentioned, and those same ones apply in the present context. GCC 49 presupposes a variation order and GCC 50 an extra work order. No such order is identified in the context of claim F and counsel was unable to point to one. Both clauses - we repeat once more - carry their own mechanism for additional payment which do not include a cost and profit projection over any extended period for the completion of a contract. As we have said, the same applies to GCC 41. For the reasons mentioned in reference to claims A and B, it does not assist the appellant. A fortiori it does not assist the appellant here.

Faced with these difficulties counsel, in argument before this court, sought refuge in SP 2.7.

118. That is a provision requiring the appellant to record information relating to claims for additional compensation or extension of time, and to inform the Engineer accordingly. It was raised as a defence by the respondent to various of the claims discussed above. Because these claims, for the reasons stated, were defective in themselves, it was not necessary to deal with this provision in that context. Counsel for the appellant, however, sought to turn it into a cause of action in conjunction with GCC 43. The attempt must fail. Firstly, it was not pleaded as such. Secondly, notwithstanding its somewhat confused wording, the provision is not, in our view, fairly capable of the construction counsel seeks to place on it. SP 2.7, in short, cannot assist the appellant.

It is accordingly unnecessary to deal with this claim in any greater detail. No attempt has been

119/...

 made, as pointed out by the respondent, to prove which part of the overrun has been caused by any of the causes now stressed by the appellant. Nor has any allowance been made for delays caused by the inefficiency on the part of the appellant itself. Like claim D, claim F purports to be an integrated claim based on an overrun which was caused by widely diffused and different causes. The contract itself makes no provision for a claim of this kind and no attempt has been made by the appellant to justify it on the basis of circumstances extraneous to the express provisions of the contract.

The appeal against this claim, like the others, must consequently be dismissed.

CLAIM G

Since in the light of this judgment no awards are to be made to the appellant, the question of the escalation formula and its application does not arise and need not be decided.

C O N C L U S I O N

The appeal is dismissed with costs and the cross-appeal is allowed with costs. The order of the court a quo is altered to read: "Absolution from the instance on all claims with costs." All the above references to costs are to include those occasioned by the employment of two counsel.

M E KUMLEBEN
JUDGE OF APPEAL

P M NIENABER
JUDGE OF APPEAL

JOUBERT ACJ
E M GROSSKOPF JA - Concur
VAN COLLER AJA