CASE NO 400/91

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

GROUP FIVE BUILDING LIMITED..... Appellant

and

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA, REPRESENTED BY THE MINISTER OF PUBLIC WORKS AND LAND AFFAIRS ....._____ Respondent

CORAM: CORBETT CJ, HEFER, VIVIER, EKSTEEN, JJA, et KRIEGLER AJA.

DATE OF HEARING: 10 November 1992. DATE OF JUDGMENT: 18 February 1993.

J U D G M E N T

CORBETT CJ...../

CORBETT CJ:

The appellant company carries on business as a building and engineering contractor. On about 5 May 1983 appellant entered into a contract with the respondent, the South African Government (represented by the Director-General: Community Development), in terms whereof appellant undertook to erect certain buildings at Walldoorn, Pretoria ("the building contract"). In July 1988 appellant instituted action in the Transvaal Provincial Division claiming payment of the sum of R632 578,95, interest and costs of suit. This claim was alleged to arise from the building contract. The respondent took exception to appellant's particulars of claim on the grounds that it disclosed no cause of action or, alternatively, was vague and embarrassing. At first instance the exception was upheld by Streicher J, who ordered that "plaintiff's action is dismissed with costs". An appeal to the Full Court of the Transvaal

was dismissed with costs (Leveson J, Joffe J and Myburgh AJ concurring) . The judgment of the Full Court has been reported: See Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs) 1991 (3) SA 787 (T). Subsequently special leave to appeal to this Court was granted.

In appellant's particulars of claim the various contract documents are referred to and the relevant ones, or relevant portions thereof, are annexed. They consist of a tender, an acceptance of tender, a bills of quantities contract, certain conditions of contract and clauses 49 and 50 of a schedule of quantities. The particulars of claim (paras 8 and 9) specifically quote clause 17(1), (ii) and (iii) and clause 18 (B)(ii)(a) and (b) of the conditions of contract. They read as follows:

"17.(i) The Contractor shall be allowed from the time the site is handed over to him 14 days for the delivery and

arrangement of his plant and material, and at the expiration of the said 14 days the said works shall be commenced and proceeded with, with all due diligence to the satisfaction of the Engineer, and the whole works shall be completed within nine (9) months from the date of the letter of acceptance of tender. The site shall be handed over to the Contractor within 14 days after he has complied with the conditions of tender relating to security and the submission of priced schedules of quantities if applicable.

(ii) If the Works shall be delayed by cessation of work by any workmen, inclement weather, or by any omissions, additions, substitutions or variations of the Works, or of any items of work, labour or material, or by any other causes beyond the Contractor's control then the Contractor shall have the right within 21 days of any such cause of delay arising,

to apply in writing to the Director-General: Community Development through the Engineer to extend the date of completion mentioned in subsection (i) of this clause, stating the cause of delay and period of extension applied for.

(iii) The Director-General: Community Development upon receipt of such written application together with the report thereon of the Engineer may by order in writing extend such date of completion by a period to be determined by him, or may refuse to extend such date of completion , or may postpone giving a decision upon such application until completion of the contract period set out in sub-section (i) of this clause; the date of completion will be extended only to the extent approved by the Director-General: Community Development, and in the assessment of the liquidated damages provided for in this Contract, no allowance shall be made to the Contractor for any delay

other than for the period of extension (if any) approved of by the Director-General: Community Development.

18 (B)(ii)(a) If the Contractor elects to

furnish a cash deposit of 10 per cent of the total amount of the Contract, or any approved guarantee for this sum, the Clause 18 as above shall apply mutatis mutandis and the Director-General: Community Development shall have the right to adopt and exercise any one or more courses as provided in the foregoing sub-section A; or to allow the Contractor to proceed with the Works and to deduct as and for liquidated and agreed damages a sum of R620-00 (Six hundred and twenty Rand) per day, for each day on which the completion of the Works may be in arrear under Clause 17 of these Conditions. Such sum may be deducted from any sum due or to become due under this or any other contract heretofore or hereafter existing between the Contractor and the Government,

> or may be recovered by action in any competent Court of Law.
>
> (b) The Director-General: Community Development is hereby authorised to deduct the said sum, and the Contractor hereby agrees and binds himself not in any way to dispute the right so to deduct or the amount deducted."

Par 10.1 of the particulars of claim proceeds to aver that on a proper interpretation of clauses 17(i), (ii) and (iii) and 18(B)(ii), inter alia -

> "The causes of delay for which the Director General: Community Development was entitled and obliged to grant extension of time extending the completion date of the Works, did not include any act and/or default and/or breach of contract on the part of the Defendant or of the Engineer, or any act or default of any person for whose act or default the Defendant or the Engineer are responsible, except those acts of the Engineer referred to in Clause 17(ii), namely "any

omissions, additions, substitutions, variations of the Works".

And in par 10.2 it is stated:

"The said causes of delay not so included are hereinafter referred to as the 'wrongful causes of delay'".

Paras 11 and 12 of the particulars of claim read as follows:

"11.

It was an express, alternatively tacit, further alternatively implied term of the contract between the parties that:-

11.1 all variations and instructions would be given timeously in relation to the actual progress of the works, alternatively at an opportune time, further alternatively in such a way and at such a time so as not to disrupt the general progress or momentum or method or sequence of construction of the works by the Plaintiff;

11.2 in the event of late or inopportune instructions or variations, Plaintiff would be entitled to extension of time

and/or additional remuneration and/or damages caused by such variations or instructions.

12. It was in the contemplation of the parties that if any delays or failure timeously to issue instructions and/or variations should occur or if Plaintiff's program of work should be altered or additional work be ordered to be done, then the execution of the works, the Plaintiff's planning thereof and the allocation by the Plaintiff of resources including labour, plant, material would be disrupted or rendered inefficient with consequent additional costs, including on-site and off-site overhead and administrative costs."

In paras 14 and 15 it is alleged that the completion of the works was delayed by various wrongful causes of delay "which constituted breaches of contract on the Defendant's part and in particular breaches of the terms set out in paragraph 11 above" (my emphasis).

Five such wrongful causes of delay are then set forth. The first of these relates to an alleged delay before the appellant took over the building site. The other four are all instances of variations of the contract which the appellant was instructed in writing to carry out, each of which is alleged to have resulted in a delay of a certain number of working days.

Par 16.1 sums it up by alleging that "by reason of the aforesaid and as a consequence of Defendant's breach of contract an overall effective delay of 161 workings days. . . . was caused". And in par 18 it is alleged that "as a result of Defendant's breach of contract as aforesaid, Plaintiff's progress, momentum, method and sequencing of construction were disrupted with resultant additional expense being incurred by the plaintiff"; and that the "said damages flow directly from the breaches of contract or alternatively were within the contemplation of the parties". A

computation of such damages is said to produce the amount of R632 578,95 claimed.

In his judgment Streicher J points to the fact that in terms of clause 3(iii) of the conditions of contract the "engineer" (defined by the building contract to mean "the Department of Community Development, acting through the officer deputed generally or specially to control or supervise the works") is given certain powers to issue variation orders. The relevant portion of clause 3(iii) reads:

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

> prices contained in the Schedule of Quantities and added to, or deducted from the Contract amount."

The learned Judge held that this power could be exercised by the engineer at any time during the progress of the work. On the strength of this and other provisions in the conditions of contract, relating to variations and extra work, and the provisions of clause 17(ii) and (iii) - quoted above - in regard to the extension of the contract period, Streicher J concluded as follows:

> "In terms of the building contract, therefore, a variation could be ordered at any time during the progress of the works. The contract furthermore expressly spelled out to what payments the contractor would be entitled in respect of variations ordered and how the contractor could get an extension of the contract period in the event of a delay caused by variations ordered by the engineer. The term alleged in paragraph 11 that variations would be ordered timeously in relation to

> the actual progress of the works or at an opportune time and that in the event of late or inopportune variations the plaintiff would not be entitled to extension of time and payment in terms of the express provisions of the contract but on another basis, conflicts with the express provisions of the contract.

> In the light of the fact that the term alleged in paragraph 11 conflicts with the express terms of the contract between the parties the parties could not have intended the term to be a term of the contract and such an intention cannot be imputed to the parties on the basis that they would have expressed the term if the question or situation had been drawn to their minds. The term could therefore not have been a tacit term of the contract between the parties."

He held further that the alleged term could not have been an implied one; and that since appellant's

claim was dependent on the term alleged in par 11 of the particulars of claim and this term was in fact not a term of the contract, the particulars did not disclose a cause of action and were excipiable.

The Full Court, for similar reasons, held that the alleged term could not be held to be part of the contract between the parties (see reported judgment at 789 B - 790 H). The Court then proceeded to consider whether Streicher J should have dismissed the action or whether he should merely have upheld the exception; and came to the conclusion that there was no ground upon which Streicher J's order could be altered.

On appeal before us two basic points were argued: (i) whether the tacit/implied term pleaded in par 11 of the particulars of claim could form part of the contract between the parties, and (ii) whether, if the particulars of claim were excipiable, Streicher J was correct in dismissing the action.

With regard to the tacit (or implied) term, it should be noted, in the first place, that although par 11 of the particulars of claim speaks, in the alternative, also of an express term to the same effect, appellant does not suggest that there is any basis for claiming that such an express term formed part of the building contract. Secondly, it should be pointed out that Hudson's Building and Engineering Contracts 10 ed by I N Duncan Wallace at 327 contains the following interesting remarks with reference to the power to order extras or alterations to the works:

> "A difficult question often arises as to whether a power to order extras or alterations must be exercised at such a time as not to affect the economic or systematic execution of the works. Normally, of course, the ordering of extras or alterations under a stipulation conferring power to vary the works is not a breach of contract: 'Authorised extras and additions are, of course (being

authorised and being contemplated by the contract), no breach of contract, and it is not a breach of contract by the employer to order something extra....' While a court would lean against an interpretation which prevented the building owner varying the work at any stage, there is, it is submitted, room for an implication that extras and alterations will be ordered at a reasonable stage in relation to the works as a whole, particularly if the provisions for payment for extras or alterations are such as to preclude the contractor from recovering the loss he suffers from the interference with the economic or systematic execution of the works in addition to the value of the work done. Whether, however, such a term can be implied in contracts similar to the modern standard forms is more doubtful, since both of these set up machinery whereby variations can be valued to take account of circumstances rendering the billed or scheduled rates for similar work inappropriate, and which presumably include among such circumstances the late-

ness of the relevant instruction."

Hudson quotes no authority cm the point and I have not been able to find any. I think that there is something to be said for the implication of such a term where the contract machinery for valuing variations would not permit of any remunerative allowance being made for the lateness or otherwise inopportune timing of the relevant instruction. This, of course, has a direct bearing on the finding by the Court a guo that no such tacit or implied term could co-exist with the express terms of the building contract. However, I do not find it necessary to pursue this aspect of the case for, in my view, the particulars of claim are in other ways fatally defective and I think that it is appropriate and preferable to decide the matter on these other grounds.

The tacit or implied term pleaded in par 11 of the particulars of claim has two legs to it. The first

leg relates to an obligation on the part of the building owner, i e respondent, to give all variation orders and instructions "timeously in relation to the actual progress of the works" or, alternatively, "at an opportune time" or, alternatively, "in such a way and at such a time so as not to disrupt the general progress or momentum or method or sequence of construction of the works" by the appellant. Pausing here for a moment, I would observe that these various alternatives hardly accord with the acknowledged principle that a term sought to be implied in a contract must be capable of clear and exact formulation (see Christie The Law of Contract in South Africa 2 ed, p 200 and the authorities there cited). The second leg relates to a right vested in the contractor, i e appellant, to be given an extension of time and/or additional remuneration and/or damages in the event of late or inopportune instructions or variations being given to him.

The kernel of appellant's cause of action is to be found in the five allegations concerning delay made in par 15 of the particulars of claim. The first of these (in par 15.1) reads as follows:

> "There was a delay from the 5th May 1983 to the 30th June 1983, the latter date being the date when Plaintiff actually took over the site and started the works and for which delay Defendant, on the 3rd February 1987, purported to grant an extension of 56 calendar days."

This delay is alleged to have been wrongful and to have constituted a breach of contract, but no foundation of factual averment for this legal conclusion is to be found in the particulars of claim or the annexed documents. The only relevant provision in the building contract is contained in par 17(i) of the conditions of contract quoted above. This is to the effect that the site shall be handed over to the contractor within 14 days after he

has complied with the conditions of tender relating to security and the submission of priced schedules of quantities, if applicable. It is stated in par 9.2 of ! the particulars of claim that appellant "elected to furnish an approved guarantee, which guarantee Defendant (respondent) accepted". Assuming this to relate to the security referred to in par 17(i), it takes the matter little further for no dates are stated. The contract documents evidently did include priced bills (schedules) of quantities, but the particulars of claim do not state when these were submitted. On the averments in the particulars of claim there is, therefore, no basis for determining when in terms of the contract the building site should have been handed over to the contractor; and consequently there is no ground for saying that it should have been prior to 30 June 1983. In any event, par 15.1 of the particulars of claim refers not to when the site was "handed over" (which is the term used in clause 17(i)

of the conditions of contract), but to when appellant "took over" the site. It cannot be assumed that they amount to the same thing or that they coincided. Furthermore, it seems extremely improbable that "the 5th May 1983" could have been the date when the site had to be handed over. That was the date of the acceptance of tender; and the contractor still had, thereafter, to comply with the conditions of tender relating to security and the submission of the priced schedules of quantities before the obligation to hand over the site could accrue. I conclude, therefore, that the particulars of claim disclose no cause of action in respect of the delay alleged in par 15.1.

The other four instances of delay relate, as I have indicated, to what are alleged to have been instructions or variations which constituted breaches of the tacit/implied term set forth in par 11 of the particulars of claim and which were, therefore, wrongful

causes of delay. That described in par 15.2 may be taken by way of example. This sub-paragraph says that whilst work was in progress on the "raft foundations" of certain portions of the building the appellant was instructed in writing on 28 September 1983 "to remove all clay appearing at the site of the raft foundations prior to casting the said raft foundations". It is alleged that as a consequence of this variation the appellant was delayed by 24 working days. And, as I have stated, the various delays (described in par 15.2, 15.3, 15.4 and 15.5) arising from "wrongful causes" are made the basis for a claim for damages for breach of contract. The breach of contract is said to relate to the tacit/implied term set forth in par 11 of the particulars of claim, but par 11.2, as I have shown, alleges that where late or inopportune instructions or variations are given the appellant has a contractual right to inter alia, "additional remuneration and/or damages caused by such

variations or instructions". The complaints described in par 15.2, 15.3, 15.4 and 15.5 clearly relate to what in par 11.2 are defined as "late or inopportune instructions or variations". Consequently, on the strength of par 11.2 appellant would have a contractual right to additional remuneration and/or damages in respect of these complaints and its remedy would be one for specific performance of the correlative obligation resting upon respondent. But the cause of action, as pleaded in paras 14 and 15, relates not to specific performance, but to breach of contract. There seems thus to be an irreconcilable contradiction between the tacit/implied term relied on by the appellant and the remedy claimed by it in respect of the aforesaid complaints. This contradiction goes to the very root of appellant's cause of action and consequently, in my opinion, in this respect the particulars of claim fail to disclose a cause of action or, at the very least, are

wholly vague and embarrassing. In the result there were good grounds for holding that the pleading was excipiable in respect of all five complaints as to delay.

I turn now to the second basic issue, viz. whether Streicher J was correct in dismissing the action.

In his judgment Streicher J stated the following:

> "The defendant asked that the action be dismissed with costs and on behalf of the plaintiff it was submitted that the exception should be dismissed with costs. The plaintiff did not ask for leave to amend its particulars of claim.
>
> In the premises and in the light of the fact that the plaintiff's particulars of claim do not contain a cause of action entitling the plaintiff to any relief I make the following order:

> The exception is upheld and the plaintiff's action is dismissed with costs."

No further reasons for the order dismissing the action are given. However, in his judgment granting leave to appeal to the Full Court Streicher J elaborated on his reasons by stating:

> "Mr Preis conceded that had I merely upheld the exception with costs and had the plaintiff thereafter failed to amend the particulars of claim the defendant would have been entitled to an order dismissing the plaintiff's claim with costs. If that is so there can in principle be no reason why a successful excipient to a plaintiff's particulars of claim on the ground that the particulars of claim contain no cause of action should not, at the exception stage, be entitled to an order dismissing the plaintiff's claim if prayed for in the exception and if the plaintiff does not indicate that he

> wishes to amend his particulars of claim or at least that he wishes to consider such an amendment."

This reasoning was, in general, accepted by the Full Court (see reported judgment at 794 C-l), but, in my view, it is fallacious. As far as I am aware, in cases where an exception has successfully been taken to a plaintiff's initial pleading, whether it be a declaration or the further particulars of a combined summons, on the ground that it discloses no cause of action, the invariable practice of our Courts has been to order that the pleading be set aside and that the plaintiff be given leave, if so advised, to file an amended pleading within a certain period of time. Such leave has been granted, in my experience, in cases where judgment has been reserved, irrespective of whether at the hearing of the argument on exception the plaintiff applied for such leave or not. No doubt this was done in anticipation of

the possibility that the plaintiff would wish to have leave to amend and in order to obviate the need for a specific application. The important point to be stressed, however, is that until the order setting aside the pleading has been granted, there is no need for the plaintiff to seek leave to amend. Where judgment is given immediately, i e at the conclusion of the hearing of argument, the appropriate time for such an application would at the earliest be at the conclusion of the judgment when the order setting aside the pleading has been made. Where on the other hand (as in this case) judgment is reserved a different situation arises. At the time of reservation there is no order setting aside the pleading and indeed there is then (at least) the possibility that the exception may fail. Of course, a plaintiff may then ask for leave to amend in the event of the exception succeeding, but I can see no reason why he should at that stage be obliged to do so. The

appropriate and obligatory time for making the application would accordingly be once judgment setting aside the pleading has been delivered. I cannot, therefore, with respect, agree with Streicher J that in the absence of an indication at the time of the hearing of the exception that plaintiff in this case (the appellant) wished to amend its particulars of claim, the successful excipient was entitled to an order dismissing the plaintiff's action. Moreover, by reserving judgment and then granting an order, as part of his reserved judgment, dismissing the action the learned Judge effectively denied the appellant its proper opportunity to apply for leave to amend.

An order dismissing an action puts an end to the proceedings and means that if the plaintiff wishes to pursue his claim on a different pleading he must start de novo. This may have drastic consequences for the plaintiff, particularly where it results in the

prescription of the claim. In my opinion, it would be contrary to the general policy of the law to attach such drastic consequences to a finding that the plaintiff's pleading discloses no cause of action. Here the analogy of a defective summons springs to mind. And the cases of Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A) and Prudential Assurance Co Ltd v Crombie 1957 (4) SA 699 (C) illustrate the reluctance of the courts to deny the plaintiff the opportunity to amend his summons, even if fatally defective by reason of its failure to state a cause of action.

Moreover, in my view, in this regard no distinction should be drawn between the case where action is initiated by way of summons, followed by a declaration, and the case where the plaintiff sues out a combined summons. In the judgment in the case of Natal Fresh Produce Growers' Association and Others v Agroserve (Pty) Ltd and Others 1991 (3) SA 795 (N) there are

certain dicta (at 800 F - 801 C) which suggest that a distinction must be drawn between these two cases; that an exception successfully taken to a declaration may leave the summons standing as an "empty husk" to sustain the action; but that in the case of a combined summons the setting aside of the particulars of claim as a consequence of a successful exception causes the whole action to fall away because the summons can have no existence independent of the particulars of claim. It would seem to be a corrollary to these propositions that when an exception is successfully taken to the particu-lars of claim in a combined summons on the ground that no cause of action is disclosed, there is no room for the grant of leave to amend the particulars. This, in my opinion, does not constitute the law and practice of our courts. As long ago as 1915 Bristowe J put the position thus:

"As was said by INNES, C.J., in Coronel v Gordon Estate Gold Mine (1902, T.S., at p. 115) 'the effect of a successful exception is that the entire declaration is quashed,' meaning as I understand that it is an absolute bar to any relief being obtained on that declaration. But it does not take the declaration off the file or place the case in the same position as though no declaration had been delivered. Otherwise the proper order when an exception is upheld would be to extend the time for filing a declaration, not to give leave to amend. Leave to amend presupposes that there is something which can be amended. Still less can it be said that a successful exception destroys the action. If this were so then the case of Currey v Germiston Municipality (1910, L.L.R. 191), where an order for absolution under rule 41 was granted after a declaration had been successfully excepted to and had not been amended, would have been wrongly decided. It seems to me therefore that the action in the present case is still on foot and that there is a declaration in existence." (Johannesburg

Municipality v Kerr 1915 WLD 35, at 37; see also Berranqe v Samuels II 1938 WLD 189; Santam Insurance Co Ltd v Manqele 1975 (1) SA 607 (D), at 608 B-D, 609 G -610 D).

And I would again refer to the cases quoted above in regard to the amendment of a defective summons. A circuit court summons is, and in the Cape previously was, similar to a combined summons. Although the point was not debated in that case, Gillespie v Toplis and Another 1951 (1) SA 290 (C) provides an instance of a circuit court summons being set aside on exception on the ground that it failed to disclose a cause of action and of leave being granted to the plaintiff to file an amended summons, if so advised.

For these reasons I hold that Streicher J erred in dismissing the action. He should have set aside the particulars of claim and given leave to amend or, at any rate, after delivery of judgment given the appellant the

opportunity to apply for leave to amend. In the result the appeal fails on one issue and succeeds on the other issue; and the question is how to allocate the costs on appeal to this Court and the costs in the Courts a quo. There are also the costs of the application for leave to appeal to the Full Court, which were ordered by Streicher J to be costs in the appeal; and the costs of the application for leave to appeal to this Court, which were also ordered to be costs in the appeal.

As far as the hearing on the exception before Streicher J is concerned, the proper order would have been one upholding the exception and setting aside the particulars of claim, but giving leave to amend. It would be appropriate for this order in respondent's favour to carry costs. Before the Full Court the appellant ought to have failed cm the issue concerning the excipiability of the particulars of claim, but succeeded on the issue as to the form of order granted by

Streicher J. This would amount to substantial success, but on the other hand it may prove to be a hollow victory should the appellant be unable or unwilling effectively to amend its particulars of claim. Furthermore, the two issues evidently assumed equal importance in argument before the Court a quo. In all the circumstances I think that justice would be served if appellant were granted half its costs of appeal to the Full Court and it were declared that this carried the costs of the application for leave to appeal to the Full Court; and if a similar order were made in regard to the appeal, and the application for leave to appeal, to this Court.

It is ordered as follows:-

(1) The appeal is allowed in part and the order of the Court a quo is altered to read:

"(a) The appeal is allowed in part and the order of Streicher J is altered to read:

'The plaintiff's particulars of claim are set aside with costs and plaintiff is given leave, if so advised, to file amended particulars of claim within one month'.

(b) Appellant (plaintiff in the Court a quo) is entitled to half his costs of appeal."

11.3 The period of one month referred to in par 1(a) above shall run from the date of delivery of this judgment.

11.4 The appellant is entitled to half his costs of appeal to this Court.

11.5 It is declared that in terms of the orders made the appellant is entitled to the costs of the application for leave to appeal to the Full

Court, as well as the costs of the application for leave to appeal to this Court.

M M CORBETT

HEFER JA)
VIVIER JA)
EKSTEEN JA) CONCUR
KRIEGLER AJA)