CASE NO 449/91

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

GROUP FIVE BUILDING LIMITED Appellant

and

MINISTER OF COMMUNITY DEVELOPMENT Defendant

CORAM: JOUBERT, E M GROSSKOPF, GOLDSTONE,
NIENABER JJA et HARMS AJA

DATE HEARD: 13 MAY, 1993 DATE

DELIVERED: 28 MAY, 1993

J U D G M E N T

NIENABER JA:

The appellant, a building and engineering contractor, instituted six separate claims against the South African government for payment in terms of a building contract and for damages due to its breach. The court a quo (Daniels J) held that the unexpressed tacit or implied terms of the contract on which the appellant sought to rely for three of its six claims were irreconcilable with its express terms. The Court accordingly upheld the respondent's exceptions against those claims. This is an appeal, brought with leave of the court a quo, against that decision. I shall refer to the appellant as "the plaintiff" and to the respondent as "the defendant".

The contract, a comprehensive one consisting of a number of contiguous documents, was concluded in 1983. The plaintiff undertook to erect the district headquarters for the South African police, a police

station and a mortuary at Nelspruit in accordance with certain drawings, specifications, bills of quantity, conditions of contract and general conditions of tender, to the satisfaction of the director-general of the Department of Community Development for a price of R3 970 234,00 (including a contingency sum and general sales tax) or for such other sum as became payable in terms of the provisions of the contract. The contract was thus not for a lump sum but was based on a priced schedule of quantities. The ultimate contract amount would only be ascertainable once all the executed work had been finally measured and valued at the prices and rates in the schedule of quantities. The contract was thus of a kind that has been described as a "rate and measurement contract" (Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) at 510A; Minister of Public Works v WJM Construction Co (Pty) Ltd 1983 (3) SA 58 (A) at 64C; Compagnie

Interafricaine de Travaux v South African Transport Services and Others 1991 (4) SA 217 (A) at 223B-C).

The site was handed over to the plaintiff on 23 June 1983. The contractual completion date was 4 May 1985 but this date was extended, in terms of the provisions of the contract, to 15 June 1985. In the event the work was only completed some six months later on 17 December 1985.

The plaintiff attributes this delay to the defendant (or its employees or agents). But for their interventions, so it is alleged in the pleadings, the work would have been completed on 14 December 1984, the date which it programmed for completion, which was well in advance of the extended contractual completion date. Such interventions, by way of late variation orders and instructions and unauthorised suspension orders, constituted, so it is alleged, breaches of the contract by the defendant or, if not, at the very least fell

outside the ambit of clause 17(ii) of the Conditions of Contract which is the clause providing for extensions of time for completion. Either eventuality was governed, according to the plaintiff, by appropriate implied or tacit terms. The relief claimed in claims C, E and F (which were those against which the exceptions were directed) was founded on the existence of those implied or tacit terms.

Before examining the unexpressed terms on which the plaintiff relied it will be convenient, for ease of later reference, to recite the express terms of the Conditions of Contract which are relevant to this judgment.

The "Works" are defined in clause l(vi) to mean

> "all the buildings, erections or structures (including any omissions, substitutions, alterations, or variations thereto) which are to be erected, built or constructed in terms of this Contract ..."

"Engineer" is defined in clause l(iv) as the

> "'Department of Community Development' acting through the officer deputed generally or specially to control or supervise the Works."

(According to paragraph 8.2 of the Particulars of Claim the functions of the engineer were carried out by a firm of architects, Messrs Derrick Law and Lawson, of Nelspruit). The engineer's functions to control or supervise the Works are exercised, in terms of clause l(x) by means of "Orders in Writing". In terms of clause 2(i) the contractor is obliged to "conform minutely to the Drawings and Specifications and to any Order in Writing which the Engineer may supply during the progress of the Works." In terms of clause 3(1) the contractor shall receive payment "only for the Works actually executed and accepted." Clause 3(iii) then reads as follows:

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

> Quantities and added to, or deducted from the Contract amount. Should there be any dispute as to whether such Order in Writing constitutes a Variation Order in terms of this Contract, the decision of the Engineer shall be final."

Clauses 3(iv), (v), (vi) and (vii) provide for the ordering of and payment for extra and additional work and Clause 4 provides for extras and variations as daywork. Clause 9 deals generally with suspension of work. The duration of the contract is governed by clause 17.

Clause 17(i) reads:

> "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 (24) twenty-four 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."

Clause 17(ii) reads:

> "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 sub-section (i) of this clause, stating the cause of delay and period of extension applied for."

Clause 17(iii) reads:

"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."

Clause 17(iv) reads:

"Should the Contractor fail to apply in writing for an extension within the time set out above, or should the Director-General: Community Development refuse to grant any extension in writing, then the contract period provided by sub-section (i) of this clause shall not be exceeded nor the Contractor

> exonerated from liability to pay liquidated damages or from the specific performance in every respect of the said Works, including all omissions, additions, substitutions and variations whatsoever, within the time specified in sub-section (i) of this clause, notwithstanding delays from any of the causes mentioned above.

Clause 18 in so far as it is relevant reads:

> "Time shall be considered as the essence of the Contract. If, therefore, the Contractor fails to commence the Works at the dates prescribed or to proceed with and complete the Works in compliance with the preceding clause and in the manner therein stated, then the Director-General: Community Development shall have the right in his absolute discretion forthwith, and from time to time, to adopt and exercise all or any one or more of the following courses ...
> (A) To direct the Contractor, in writing, on any day named therein to suspend and discontinue the execution of the Works, and to withdraw himself and his workmen from the said site or sites ...
> (B) To allow the Contractor or his Sureties to proceed with the Works and to deduct as and for liquidated and agreed damages a sum of R500,00 (Five Hundred Rand) per day for each day on which the completion of the Works may be in arrear under Clause 17 of these conditions. Such sums may be deducted from any sums due or to become due under this or any other contract heretofore or hereafter existing between the Contractor or Sureties and the Government, or may be recovered by action in any competent Court of Law ..."

Finally, clause 28 which deals with disputes provides:

"This Contract does not exclude the rights of either party to have recourse to the Courts of Law of the Republic of South Africa in any dispute, other than is specially provided for herein."

The implied or tacit terms relied on by the plaintiff are to be found in paragraph 7 of the particulars of claim. They are pleaded as follows:

"7.1 In the event of the works being delayed beyond the specified completion date for a reason other than one of the matters referred to in Clause 17(ii)...(whether alone or in combination with one or more of such matters) -

7.1.1 The time and date for completion of the works stipulated in Clause 17(i) of annexure "C1" would no longer apply;
7.1.2 the Plaintiff would not be required to apply for an extension of time as contemplated in Clause 17(ii) in respect of such delays;
7.1.3 the provisions of Clause 18 of annexure "C1" would cease to apply;
7.1.4 the Plaintiff would be required to complete the contract within a reasonable time having regard to all relevant factors;
7.1.5 the Plaintiff would be entitled to claim damages to the extent that any were occasioned to it by a delay for which the Defendant was responsible and which amounted to a breach of contract.

7.2 The defendant was not entitled to suspend the

works or any part thereof for any reason other than one. specified in the contract viz. Sunday working or inclement weather or a cause akin to the last-mentioned reason.

7.3 The Defendant was not entitled to delay in issuing Orders in writing where such delay might reasonably have the effect of preventing the Plaintiff from completing the works within the period stipulated under Clause 17(i) or within the extended period under Clause 17(ii) or thereafter.

7.4 The Defendant was not entitled to withhold payments or to impose penalties or to exact the liquidated damages provided by the contract, in respect of delays resulting from the suspensions or delays referred to in paragraphs 7.2 and 7.3 supra.

7.5 In the event of the completion of the works being delayed by reason of variations of the works (not constituting a breach of contract on the part of the Defendant), the Plaintiff would be entitled to claim from the Defendant such additional costs as it reasonably incurred in consequence of the delay.

7.6 All variation orders and instructions would be given timeously in relation to the actual progress of the works, or at an opportune time, or in such a manner as not to disrupt the progress or momentum or method or sequence of construction of the programmed works by the Plaintiff."

Some of the implied or tacit terms pleaded, pars.

7.1 and 7.4 in particular, purported to supersede express

terms which would otherwise constitute impediments to the plaintiff's case; others, such as par. 7.5, were perceived as causes of action in themselves, whilst the remainder, pars. 7.2, 7.3 and 7.6, formed the basis of the breaches of contract on which the plaintiff relied for common law relief. (During argument any reliance on par 7.5 was abandoned, if not expressly then to all intents and purposes.)

The plaintiff identified three categories of breach of contract: (i) unauthorised suspension of the works (par. 17.1 of the particulars of claim); (ii) delayed issue of variation orders in circumstances in which the delay might reasonably have been expected to prevent the plaintiff from completing the works by the extended completion date (par. 17.2.1); (iii) disruption of the works by orders not given timeously in relation to the progress of the works or given at inopportune times or in such a manner as to disrupt the progress, momentum,

method and sequence of the construction of the works (par. 17.3).

In its particulars of claim the plaintiff also relied, in par. 18, upon acts of disruption which, while not constituting breaches of contract, "nevertheless fell outside the scope of clause 17(ii)", but in argument this averment was not pursued and, following suit, it need not be pursued in this judgment.

Claim C, the first of the three claims to which exception was taken, is a claim for additional payment based on a contract price adjustment clause (clause 50 of the Bills of Quantity, which it is not necessary to quote.) The engineer certified the sum due to the plaintiff in terms of this clause by reference to the extended contractual completion date (15 June 1985). The plaintiff's complaint is that the latter date no longer applied, due to the defendant's aforementioned breaches of contract. The amount owing to it ought, therefore, to

have been calculated, first by reference to the reasonable time for completion which coincided, according to the plaintiff, with the actual date of completion (17 December 1985) and, second without regard to any deductions in terms of clause 18 of the contract. Claim C is thus based on the dual proposition, first that the defendant committed the alleged breaches of contract (based on the implied or tacit terms formulated in pars. 7.2, 7.3 and 7.6) and, second that by virtue of the operation of the other implied or tacit terms pleaded (par. 7.1 and 7.4, alternatively par. 7.5) the duty to complete the works by the agreed completion date was superseded by the duty to do so only within a reasonable time.

Claims E and F, unlike claim C, are claims for the breach and not for the implementation of the unexpressed terms of the contract. The details of these claims are not important for present purposes. What is important is

that the alleged losses, in both instances, were computed on the basis that the plaintiff was only obliged to complete the works when it in fact did so, 52,5 weeks after its programmed date of completion and 6 months after the contractual date of completion - as if the contractual date for completion no longer mattered.

Pivotal to all three claims was therefore the proposition that the contractual completion date had ceased to be of application and that the contract instead was to have been completed within a reasonable time. Counsel for the plaintiff, at the outset of his argument, stated that if this proposition could not be maintained the exceptions taken to claims C, E and F were rightly upheld and the appeal should fail.

According to counsel the proposition was drafted into the present contract as an implied term in the sense of "a standardised one, amounting to a rule of law. . ." (per Corbett AJA in Alfred McAlpine & Son (Pty) Ltd v

Transvaal Provincial Administration supra at 532G). The rule of law, so it was submitted, is derived, from some English building cases (Home v Guppy (1838) 3 M & H 387 (150 ER 1195); Russell v Sa da Bandeira (1862) 13 C.B. (N.S.) 149; Jones v St John's College (1870) LR 6 Q.B. 115; Dodd v Churton [1897] 1 Q.B. 562; Wells v Army & Navy Co-operative Society (1902) Hudson's Building Contracts, 4th ed. 346; Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board [1973] 1 W.L.R 601 (HL); Percy Bilton Ltd v Greater London Council [1982] 1 W.L.R 794 (HL)), which have been echoed in some South African ones (Hansen and Schrader v Deare (1883) 3 EDC 36; Barker v Townsend (1903) 24 NLR 145, and noticeably Kelly and Hingle's Trustees v Union Government 1928 TPD 272).

The sense of the English cases seems to me to be this:

1. A contractor is bound to complete the work by

the date stipulated in the contract for its completion. If he fails to do so he will be liable, if so agreed, for liquidated damages to the employer.

2. The employer will not, however, be entitled to liquidated damages if by his act or omission he prevented the contractor from completing the contract by the agreed date. As it was put by Vaughan Williams LJ in Wells' case supra at 354,

> "[I]n the contract one finds the time limited within which the builder is to do this work. That means, not only that he is to do it within that time, but it means also that he is to have that time within which to do it."

Any conduct on the part of the employer or his agent, whether authorised (e.g. the issue of variation or suspension orders) or wrongful (e.g. the failure to deliver the building site or plans or instructions by an agreed date) exonerates the contractor from completing the contract by the contractual completion date. Time then becomes, as it is sometimes stated, at large. The

work must then be completed within a reasonable time.

3. The qualification of proposition 1 by proposition 2 is itself subject to the further qualification that the latter must yield to the express terms of the contract. One such express term would be the authority granted to a contractor to apply for an extension of time within which to complete the work, e.g. where variation orders are issued or extra work is ordered which delay its completion.

4. But where the extension clause lists specific grounds on which the contractor may ask for an extension of time and adds the words "or other causes beyond the contractor's control" the latter phrase must be interpreted narrowly and eiusdem generis with the preceding categories. Wrongful conduct of the employer which caused delay would in particular be excluded, at any rate when, in terms of other provisions in the contract, the decision about extra time rests with the

employer himself and is final (for otherwise, if not excluded, the employer becomes arbiter of, and gains an advantage from, his own - wrong). Proposition 3 accordingly does not apply and proposition 2 does: consequently the employer would not be entitled to enforce a claim for liquidated damages.

The plaintiff in this case is not of course facing a claim for liquidated damages. What it seeks to do is to transpose a principle of English law (that time becomes at large) which is designed to exempt a contractor from penalties, to a different situation, in order to escape clause 17(i) which is an embarrassment to its claims C, E and F. It was not contended by counsel that the ordinary principles of the law of contract do not apply to building contracts in general and to this one in particular. That being so I entertain some reservations about certain aspects of proposition 2, at least as far as South African law is concerned. When

parties agree that a contract is to be implemented by a fixed date, conduct by the employer which is authorised by the contract (e.g. issuing variation orders, ordering extra work) surely cannot alter or nullify the agreed date for completion. It is for that very reason that building contracts nowadays almost invariably contain express provisions making allowance for extensions of time. When, on the other hand, the conduct of the employer is unlawful (and constitutes a breach of contract) the position may be different, for it stands to reason that a debtor is excused from performing an obligation on time if his creditor wrongfully prevented him from doing so (cf Van der Merwe, Van Huyssteen and Others, Contract, 271). So, for example, it has been held that a building owner cannot enforce a penalty clause if the delay complained of was caused by his or his agent's default (cf Hansen and Schrader v Deare supra at 45; Cullinan v The Bettelheim Building Co. (1890) 3

SAR 235; Hendricks and Soeker v Atkins (1903) 20 SC 310). The contractor, in addition, will retain his common law remedies, especially his claim for damages, unless this is expressly excluded.

But the case does not turn on proposition 2. The real issue is whether proposition 4 is sound and overrides proposition 3.

Proposition 4 is largely based on Wells' case supra. The issue in Wells' case was whether the employer was entitled to deduct liquidated damages from the contract sum where delays in the completion of the work were, at least partly, due to the fault of the employer and the engineer respectively. It was held by the trial court and confirmed on appeal that the employer's default excused the contractor's delay and that the contractor could not be faulted for failing to apply for an extension of time within which to complete the contract. The extension clause in question, so it was held, had to

be interpreted narrowly, excluding defaults by the employer, since the employer, in terms of the contract, was, but ought not to be, the sole arbiter on the issue.

Similar reasoning prompted the court in the Kelly and Mingle's Trustees' case supra, to hold, on the authority of Wells' case, that the phrase "other causes beyond the contractor's control" in the extension clause in that contract did not include delays resulting from alterations or additions which the building owner was empowered to order in terms of clause 3; and, consequently, that the penalty clause for delays on the part of the contractor ceased to apply. Clause 17 of that contract read as follows (at 277):

> "[T]he said works shall be commenced and proceeded with, with all due diligence to the satisfaction of the engineer, and the whole shall be completed within twenty-four calendar months from the date of handing over the site. If the works should be delayed by reason of special inclement weather, combinations or strikes of workmen, or other causes beyond the contractor's control, the contractor must afford proof to the satisfaction of the engineer, whose decision as to. whether extra time shall be allowed or not is final."

Referring to Wells' case Feetham J said, at 284:

> "[I]f that decision is correct it seems to me to follow that in clause 17 of this contract, where there is no mention of 'alterations and additions' in the list of specified causes of delay, the words 'other causes beyond the contractor's control' should not be construed as including the ordering of alterations and additions.
>
> But, apart from the interpretation of these actual words adopted in Wells' case (supra), I have to take into account the rules which are recognised in, or may be deduced from, that case and the earlier decisions as governing the application of penalty clauses in building contracts; namely, (1) that where a building owner by his own act prevents performance he is not, apart from special stipulation, entitled to take advantage of his own wrong; (2) that where the terms of the contract are ambiguous, and one construction would lead to an unreasonable result the Court will be unwilling to adopt that construction: [cf. as to this point the decision in Martin v. Wilson (1911, T.P.D. 737)]; (3) that an unreasonable burden is cast upon the contractor where the work to be done in a limited time subject to a penalty clause may be increased at the will of the building owner; and (4) that, where the terms of the contract are such as in effect to make the building owner judge in his own cause on questions of delay, such provisions are to receive a restrictive interpretation.
>
> If the words 'other causes beyond the contractors' control' in clause 17 are considered in the light of these rules, I think it is clear that they should not be construed as covering the ordering of alterations or additions by the building owner under

clause 3."

Those remarks, related to the present case, are partly distinguishable and partly unconvincing. I say so for the following reasons:

1. The wording in clause 17(ii) of the present contract is wider than that of the corresponding clause in the Kelly and Hingle's Trustees' contract: "by any other causes beyond the contractor's control" as opposed to."other causes beyond the contractor's control".

2. Clause 17(ii) of the present contract specifically refers to "omissions, additions, substitutions or variations of the Works"; the Kelly and Hingle's Trustees' contract does not.

3. In both Wells' case supra and the Kelly and Hingle's Trustees' case supra the clause in question was regarded as being ambiguous. Clause 17(ii) of the present contract in my opinion is not. The three particularised instances of delay are juxtaposed with

general descriptive words which, as a matter of language, would also cover instances of delay caused by wrongful conduct for which the employer was responsible. Even if the general wording is to be interpreted eiusdem generis (as to which see Grobbelaar v Van de Vyver 1954 (1) SA 248 (A) at 254D-255B), it would lead to the identical result since the only common denominator of the specific categories mentioned, as far as I can see, is the very fact that the matters mentioned are all beyond the contractor's control.

4. The court in the Kelly and Hingle's Trustees' case supra adopted the argument raised in the Wells case supra that the words should be narrowly construed because otherwise the employer would become a judge in his own cause. In both Wells' and the Kelly and Hingle's Trustees' cases the decision of the employer on whether to grant an extension was final. Here, in the present contract, it is not. In terms of clause 28 the

contractor can refer any dispute to a court of law.

5. According to the Kelly and Hingle's Trustees' case supra the employer ought not to be allowed to take advantage "of his own wrong". The "wrong" was the ordering of extras. But the ordering of extras was expressly permitted in terms of the contract and could therefore not have been a "wrong". This is the very point made earlier in this judgment: where a contract permits, and therefore contemplates, certain conduct by the employer or the engineer, such conduct cannot be exploited by the contractor, in the absence of an extension clause, to displace an express term elsewhere in the contract that the work is to be completed within the agreed term. This criticism also holds true for certain remarks in Barker v Townsend supra.

6. Clause 17(ii) is inserted for the benefit of both parties, as counsel for the plaintiff readily conceded. But on the approach contended for by him the

plaintiff would have been deprived of the opportunity of invoking the clause in case of a breach of contract by the employer even though it might have suited the plaintiff's convenience to do so. So, too, a contractor could, on the plaintiff's approach, be denied the benefit of the clause if the engineer, as it is alleged he had done, issued an order suspending a portion of the work in terms of clause 2(i) where such a suspension order did not involve a variation order in terms of clause 3(iii) or extra or additional work in terms of clause 3(iv). The proposition is only to be stated to be refuted.

7. A contractor who does not wish to cancel the contract, and who applies for an extension of time on the grounds of the employer's breach of contract would not of course be precluded from resorting to his other common law remedies, more especially his claim for damages.

8. Finally, and in my view conclusively, the approach adopted in Wells' and the Kelly and Hingle's

Trustees' cases supra would lead to a result which, if applied to this contract, would clash with clause 17(i); it would mean that by virtue of a supposed implied term clause 17(i) is, for this purpose, simply edited out of the contract. It is axiomatic that an ex lege implied term, like an ex consensu tacit one, can never have that effect (cf. Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration supra at 531E).

In my opinion the words "or by any other causes beyond the Contractor's control" in clause 17(ii) are wide enough to embrace wrongful conduct by the employer or his agent. Such conduct would entitle the contractor to apply for an extension of time and, if the application is refused, to have the matter tested in a court of law. In addition the' contractor can recover any losses he may have suffered as a result of the owner's wrongful conduct by means of an action for damages. The express terms of the contract accordingly provide for the very

eventuality which the plaintiff alleges occurred in this instance. The plaintiff chose not to apply for an extension of time on those grounds. It now seeks to justify that omission by contending that it could not have done so since the defendant committed various breaches of contract which prevented the plaintiff from completing the contract by the agreed date. According to the plaintiff the completion date in clause 17(i) no longer applied and could be disregarded; it no longer applied because of an implied term to that effect. The plaintiff's entire case is thus founded on the premise that the express completion date was overtaken by a contrary implied term. An implied term cannot, however, co-exist with a contradictory express one. The exceptions were accordingly rightly upheld, regardless of whether the defendant committed the breaches of contract now complained of. It is accordingly not essential to determine whether the contract, in addition, contained

the implied or tacit terms pleaded in pars. 7.2, 7.3 and 7.6 of the particulars of claim. One may assume in the plaintiff's favour that it did. But even at best for the plaintiff on that point, it loses on the other.

In my opinion the court a quo was therefore right in upholding the exceptions taken to claims C, E and F. The appeal is dismissed with costs, including the costs of

P M Nienaber JA

JOUBERT JA )
E M GROSSKOPF JA) CONCUR
GOLDSTONE JA )
HARMS AJA )