CASE NO 258/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

LTA MITEC LIMITED APPELLANT

and

GENREC STEEL STRUCTURES
(PTY) LIMITED RESPONDENT

CORAM: VAN HEERDEN, F H GROSSKOPF, et
MARAIS JJA

HEARD: 3 November 1995

DELIVERED: 29 November 1995

J U D G M E N T

MARAIS JA/

MARAIS JA

During 1989 the Matimba electric power station was being constructed at Ellisras in what was then Transvaal. Certain steel gantries required to be erected and that necessitated using a sophisticated and powerful crawler crane. A crane owned by Genrec Steel Structures (Pty) Ltd. ("Genrec") was used for that purpose by Orbit Engineering (Pty) Ltd. ("Orbit"). LTA Mitec Limited ("Mitec") had been instrumental in procuring from Genrec the use of the crane for Orbit. How that was achieved lies at the heart of the dispute in this litigation. On 26 August 1989 the crane capsized while it was being used and was badly damaged. The reasonable and necessary cost of repair is alleged to be R2 042 726,87.

On 17 August 1992 Genrec issued summons in the

Witwatersrand Local Division against three defendants. First defendant was LTA Process Engineering (Pty) Ltd ("Process Engineering"); second defendant was Mitec; and third defendant was Orbit. Genrec's claim was for the cost of repairing the crane. The manner in which Genrec initially pleaded the causes of action upon which it relied is of considerable significance in deciding the factual issues which arise. In paragraphs 6, 7 and 8 of its particulars of claim it alleged that it was orally agreed between itself, Mitec and Orbit that it would hire the crane to Orbit for the erection of the steel gantries by Orbit on its (Genrec's) standard terms and conditions of hire and on condition that Mitec or another company in the LTA group of companies "place(d) an order with (Genrec) for such hire"; that Process Engineering or Mitec placed an order with Genrec "for the hire of the crane"; that "in the premises" Genrec, Process Engineering Mitec and Orbit

"concluded an oral agreement in terms whereof (Genrec) agreed to hire the said crane for reward to (Orbit) on (Genrec's) standard terms and conditions of hire" a copy of which was annexed; that it was "a tacit, alternatively implied term" of the agreement of hire that Process Engineering "and/or" Mitec would cause the crane to be returned to Genrec in the same condition in which it was when delivered to Orbit; that the crane was delivered in good order and condition to Orbit "pursuant to the said agreement of hire"; that whilst being used by Orbit for the erection of the steel gantries and whilst under its control and in its possession "pursuant to the said agreement of hire" extensive damage was caused to the crane; that the fair, reasonable and necessary cost of repair was R2 042 726,87; and that "in the premises and by virtue of the provisions of the aforestated agreement" Process Engineering and/or Mitec and/or Orbit is liable to Genrec for that sum.

The standard terms and conditions of hire contained inter alia the following provisions:

"21 a The HIRER shall be responsible for all expenses including the cost of repairs to the CRANE arising from the breakdown of the CRANE or from accidental damage to the CRANE, occurring through the HIRER'S negligence, misdirection or misuse and shall include the travelling time and costs of the OWNER or his/its nominee and expenses incurred through the CRANE being immobilised or bogged in wet ground, rockfall, subsidence, inundation or the like. INDEMNITY DAMAGE TO CRANES.

21 b Save for fair wear and tear and where the provisions of Clause 21 a apply, whilst the CRANE is on SITE, the HIRER shall be responsible for and indemnifies the OWNER against any loss of or damage to the CRANE howsoever caused."

I shall refer to this cause of action as the first cause of action. I emphasise that the case pleaded at this juncture is that the crane was hired to Orbit and not to Mite and that liability for the damage to the crane was founded upon Genrec's standard terms and conditions.

In paragraph 10 of the particulars of claim an alternative cause of action was pleaded. It was alleged that Genrec and Orbit "concluded an oral agreement in terms whereof (Genrec) agreed to hire the said crane for reward to (Orbit), and that it was "an express, alternatively tacit, alternatively implied term" that Orbit would return the crane to Genrec in the same condition in which it was when delivered to Orbit. For the rest, the same allegations regarding the occurrence of damage to the crane and the cost of repairing it were made and Orbit was alleged to be liable to Genrec "in the premises and by virtue of the provisions of the said agreement". I shall refer to this cause of action as the second cause of action. Again, there is no suggestion that the crane was to be hired by Mitec. Liability for the damage is now (as an alternative) founded upon a breach of a term that the crane would be returned in good order and condition.

On 6 November 1992 Genrec gave notice of its intention to amend its first cause of action. All that the amendment entailed was the insertion of the names of the particular persons who were alleged to have represented Genrec, Mitec and Orbit in concluding the oral agreement pleaded.

On 6 August 1993 Genrec set about amending its pleadings again. It sought to introduce in the first cause of action the allegation that at all material times one Campbell was employed by Mitec and acting in the course and scope of his employment and that he, alternatively Mitec, was duly authorized to represent Orbit. It was also sought to allege, as a further alternative, that Campbell, alternatively Mitec, represented to Genrec that they were authorized to represent Orbit. It sought to eliminate the second cause of action altogether. However, it sought further to amend the first cause of

action by introducing for the first time an allegation that it was orally agreed on 15 August 1989 that Genrec would for reward hire the crane to Mitec on Genrec's standard terms and conditions of hire. The allegation originally made, namely, that it was orally agreed that Orbit would hire the crane was persisted in but only as an alternative allegation. The date upon which it was allegedly so agreed was altered from 9 August 1989 to 15 August 1989. The allegation that Process Engineering was liable either singly or jointly was sought to be withdrawn.

On 11 August 1993 Genrec gave notice yet again of its intention to amend its particulars of claim. This notice appears to have been intended to supersede the notice of 6 August 1993 for it incorporated all the amendments of which notice had been given in the notice of 6 August 1993. In addition it was sought to make it plain

that the allegation that it was orally agreed that Genrec would hire for reward the crane to Mitec, alternatively Orbit, was an alternative allegation to the allegation that it was orally agreed that Genrec would hire the crane to Mitec, alternatively Orbit, on Genrec's standard terms and conditions of hire. However, the attempt to make that plain was undermined to some extent because in yet another paragraph (6.3) the allegation that in the premises Genrec hired the crane for reward to Mitec, alternatively Orbit, was retained as the primary allegation and the allegation that the crane had been hired by Genrec to Mitec, alternatively Orbit, on Genrec's standard terms and conditions of hire appeared as a secondary allegation made as an alternative. Be that as it may, the parties appear to have understood that Genrec's primary allegation was that its standard terms and conditions applied and that the allegation that it was a case of hire for reward was put forward

only as an alternative. That became clear because Genrec continued to allege that, if it should be found that the agreement of hire was not on Genrec's standard terms and conditions, it was a tacit, alternatively an implied, term of the agreement (i.e. of hire for reward) that Mitec, alternatively Orbit, would ensure the return of the crane to Genrec in the same condition in which it had been delivered by Genrec. It was also alleged for the first time and in the alternative that Mitec had represented Orbit when the agreement was concluded.

Orbit's attitude was to deny that it had entered into an agreement to hire the crane from Genrec and to allege that it was Mitec, represented by Campbell, which had done so. It also raised other defences but I need not set them out. Mitec's stance was fundamentally the same. It denied having entered into any agreement of hire with Genrec either on Genrec's standard terms and conditions

or at all. It pleaded the circumstances which gave rise to Orbit's need for the crane and alleged that Genrec was prepared to hire the crane to Orbit on condition that Mitec undertook to pay the hire charges to Genrec if they were not paid by Orbit, that Campbell conveyed to one Ahlers who was acting on behalf of Genrec that Mitec undertook to pay if Orbit did not, and that Campbell had no authority to hire the crane on behalf of Mitec. Other alternative defences were pleaded but again it is unnecessary to recite them.

Genrec responded by filing a replication in which estoppel was raised as an answer to Mitec's denial that Campbell was authorised by it to conclude a contract of hire between Genrec and Mitec and also as an answer to Mitec's allegation that it "only intended to guarantee the payment of the hire charges by (Orbit)".

An order was granted in terms of Rule of Court 33 (4)

directing that certain of the issues be decided separately from the remainder of the issues between the parties. The former issues were whether the contract of hire was concluded by Genrec with Mitec or with Orbit and what the terms of the contract of hire were. The Court a quo (Flemming D J P) heard evidence relevant to those issues and, in the result, absolved Orbit from the instance at the close of Genrec's case and, after hearing the evidence adduced by Mitec and the arguments of counsel, and after allowing Genrec to amend its particulars of claim during such argument, it concluded that Genrec had proved that it hired the crane to Mitec and that Genrec's standard terms and conditions governed the lease. Consequential costs orders were also made. It is against those findings and costs orders that Mitec appeals with leave granted by the Court a quo.

There was much which was either common cause or not

disputed. The power station had been under construction for some years. Mitec was the main contractor to Escom for the construction of certain parts of the power station. An associated company, Steeldale (Pty) Ltd ("Steeldale"), was a sub-contractor to erect the steel gantry beams to which I referred earlier. Genrec was a sub-contractor to one of the other main contractors. Genrec also carried on the business of hiring out cranes and during the first two phases of the erection of the gantry beams Orbit had hired a crane from Genrec to carry out the work. Mitec had no knowledge of those arrangements and played no role in making them.

When phase 3 of the gantry beam erection programme was about to commence Orbit had in mind to hire a crane again from Genrec. There was some concern about delays in the construction programme and it was in the interests of all concerned to expedite the

erection of the gantries. Genrec had a crane available for hire but there had been some dissension between Genrec and Orbit arising out of a previous hire transaction and Genrec let it be known that it lacked confidence in Orbit's ability to pay the hire charges and was therefore unwilling to make the crane available to Orbit unless Mitec placed an order for it. In the result, an order number was given to Genrec by Mitec. Mitec had no stationery of its own so it used a letterhead of another company in the LTA group, namely, Process Engineering, in order to send a facsimile to Genrec which read "order number for hire of crane for Orbit Engineering 156255/1978". It was the use of this letterhead which led to Process Engineering being cited as one of the defendants in the summons which Genrec issued. As I have said, Genrec later withdrew the action against Process Engineering.

Given the virtually absolute liability for damage to the

crane which, if applicable, Genrec's standard terms and conditions of hire imposed upon the hirer, it is not surprising that neither Mitec not Orbit was willing to be dubbed the hirer of the crane after the accident occurred. Ascertaining ex post facto which company had in fact hired the crane (assuming for the moment that one or other had done so) was no easy task. Almost all involved in the making of the arrangements which led to Orbit having the use of the crane were more concerned about achieving their primary objective of procuring the use of the crane for Orbit as expeditiously as possible so as not to hold up the construction programme, than about spelling out in precise terms and recording in appropriate documentation exactly what the legal relationship inter se of the actors was to be. There was the risk that subsequently given oral evidence might consciously or unconsciously be coloured to favour the party in whose interest it was

given. Such contemporaneous or nearly contemporaneous written documentation as there was, was largely inconclusive as we shall see. The probabilities and improbabilities inherent in the situation were not so plain or obvious that they assisted greatly in resolving the issues.

The court a quo found that it had been proved on a balance of probabilities that Mitec had hired the crane on Genrec's standard terms and conditions. The learned deputy judge president based his conclusion upon an accumulation of factors. The witnesses called by Genrec impressed him as responsible people who "tried to act responsibly and honestly when giving evidence" and were willing to make concessions and to admit to uncertainty. Mitec's witnesses he found to be "unpersuasive" with the consequence that he "mistrusted the evidence on (Mitec's) side". He regarded the unqualified telefax in which Mitec furnished Genrec with an order number as playing a

"pivotal role". In the context in which it was sent, it signified, so he thought, contracting for the hire of the crane and not the undertaking of liability as a surety for Orbit. He drew attention to the inability of either Metcalfe (Mitec's project manager) or Campbell to point to any document in which it was made clear that Mitec was not hiring the crane but merely undertaking to pay the hire charges if Orbit did not, and to their concession that the telefax failed to set out explicitly what they claimed the agreement to have been. He regarded it as improbable that an order number would have been issued if Mitec had merely undertaken to pay if Orbit did not in view of the ease with which an appropriate letter or telefax to that effect admittedly could have been drawn. He considered that the mere furnishing by Mitec of an order number which was not in fact intended to reflect that an actual order had been placed by Mitec would have been an empty

gesture so devoid of any practical significance and value to Genrec, that Genrec would never have accepted it as sufficient reason to let Orbit have the use of the crane. He considered that the absence from the meetings at which the contractual arrangements were made of any of Orbit's management or staff indicated that it could not have been intended by either Genrec or Mitec that Orbit would become the hirer as a consequence of their arrangements. He pointed to the absence of any subsequent dealings between Orbit and Genrec to give effect to a contract of hire between Genrec and Orbit. He said that Venter (Genrec's maintenance foreman) would have behaved very differently if he had considered Orbit to be the hirer and Mitec to be a surety. Although he recognised that there was some vagueness and uncertainty in the evidence of Genrec's witnesses, he thought it to be too remote a possibility that all of them would have failed to recollect a

discussion the thrust of which was that Mitec should undertake the liability of a surety if such a discussion had taken place. He did not think that the "suretyship solution" to the impasse which had arisen was any more likely to have been favoured by Mitec than the solution provided by Mitec hiring the crane itself because Orbit, Mitec and Steeldale were so situated vis-à-vis one another that hire charges paid by Mitec as hirer could be recouped equally effectively from Orbit.

The court a quo also concluded that Campbell had Mitec's authority to bind it to such a contract and that although there was no evidence to support a finding that it had been expressly orally agreed that Genrec's standard terms and conditions would apply, it was open to Genrec on the pleadings to contend that it was tacitly agreed that those terms would apply. The court found that such tacit agreement had been proved. Its reasoning was essentially this:

application of the well-known officious bystander test to the question of what rates were to apply yields the answer "Genrec's applicable rate". Mitec's representatives "knew that they were hiring where Orbit wanted to hire but could not". The fact that they had made no enquiries regarding rates evidenced "an attitude of blanket 'taking over' of what Orbit wanted to achieve". Even were there no such "blanket approach", the absence of any queries about tariffs and any attempt to negotiate levels acceptable to Mitec tended to signify acceptance of Genrec's usual rates. By parity of reasoning the "most plausible and acceptable inference is that (Mitec) was hiring the specific crane on (Genrec's) terms which usually apply to the letting thereof". For reasons which I need not detail he rejected a submission that the inference that the hiring was to take place on Mitec's standard terms and conditions was no less plausible and acceptable. He regarded the

situation as one analogous to that in which a person hires a motor car or travels on an airline; in the absence of any stipulation to the contrary by such person, he or she is taken to accept that the usual terms of the car hire firm and the airline apply. Those, stripped of elaboration, were the reasons why the learned deputy judge president reached his conclusions.

The appeal is therefore concerned principally with questions of fact. It is trite that the findings of fact of a trial court are not lightly disturbed and the grounds upon which an appellate court may be obliged nonetheless to disregard them either wholly or partially and reach its own conclusions on the record are too well known to merit repetition. In the instant case I have come to the reluctant conclusion that the primary finding of fact of the court a quo namely, that Mitec hired the crane is vitiated by a failure to weigh

certain factors which, in my view, should have been taken into account. In saying this I appreciate that it cannot reasonably be expected of a trial court to set out each and every factor, however peripheral, to which it has given attention in reaching its conclusions. But when a judgment is entirely silent on factors of such importance that they manifestly needed to be weighed, one cannot simply assume that proper attention was given to them. Even the most experienced and conscientious of judges are but human and may sometimes fail to take account of something of which account should have been taken. I turn now to the factors which do not appear to have received the consideration they should have received.

Firstly, there is the belatedness of Genrec's allegation that it was to Mitec, and not to Orbit, that it hired out the crane. No such allegation was made prior to the issue of summons in August 1992

and even then no such allegation was made in the particulars of claim. On the contrary, while Genrec did allege a tripartite oral agreement to which Genrec, Mitec and Orbit were parties, it alleged plainly and unambiguously that it was to Orbit that it was hiring out the crane on its (Genrec's) standard terms and conditions. What is more, it pleaded that the hiring out of the crane to Orbit was conditional upon Mitec or another company in the LTA group placing an order for such hire. If there was any ambiguity in those allegations they were set at rest by the distinction that was drawn by the pleader between the source of Process Engineering's or Mitec's obligation to return the crane in the same condition in which it was when delivered to Orbit and the source of Orbit's obligation to do so. In paragraph 6.3 it was alleged that the hiring out of the crane to Orbit was on Genrec's standard terms and conditions a copy of which was annexed. In paragraph 6.4 it was

alleged that it was by virtue of a tacit, alternatively implied, term that Process Engineering and/or Mitec were obliged to return the crane to Genrec in the same condition in which it was when delivered to Orbit. In other words, Orbit's liability arose from the standard terms and conditions. The liability of Process Engineering and/or Mitec arose from the tacit, alternatively implied, term pleaded. Indeed, an alternative cause of action was pleaded against Orbit alone. That cause of action was an oral contract of hire for reward which did not incorporate any standard terms or conditions but did incorporate an express, alternatively tacit, alternatively implied, term that Orbit would return the crane in the same condition as it was when Orbit received it.

It was only in August 1993 (a year later) that Genrec sought to allege, as its first cause of action, that it was orally agreed

that Genrec would hire for reward on its standard terms and conditions the crane to Mitec. The earlier allegation that it was hired to Orbit on those terms and conditions was relegated in status to an alternative allegation.

Secondly, there is the failure of Kriedemann (Genrec's projects manager) in a written report prepared on 14 September 1989 soon after the accident to spell out as clearly as he did when giving evidence that it was not to Orbit but to Mitec that Genrec had agreed to hire the crane.

Thirdly, there are the answers given in cross-examination by Kriedemann in regard to hiring to Orbit. He conceded that his only concern was whether Genrec would be paid by Orbit and that once that concern had been met, whether by payment in advance, or the provision of a bank guarantee, or a guarantee of payment by LTA, his

objection to hiring to Orbit would fall away. He said that he sought to overcome the difficulty by asking for an LTA order. The following ensued:

> "And if LTA had given an order number Genrec would have hired to Orbit? ----------Yes." [He was then read what had been said in Genrec's pleadings at one time; it was put to him in the following manner. I have used the actual names of the companies for clarity's sake].
>
> "Genrec and Mitec and Orbit orally agreed that Genrec would for reward hire the said crane to Orbit for the erection of certain steel gantries by Orbit on Genrec's standard terms and conditions of hire and on condition furthermore that Mitec, alternatively another company in the LTA group places an order with Genrec for such hire. Do you agree with all that?" [The Court intervened and rephrased the lengthy question.] "Court: The first point is, was there an agreement to hire the crane to Orbit? ---------- There was.
>
> And there were two conditions to that agreement, that it had to be on your standard conditions and that you had to get an LTA order number, order? ---------- That is correct."

After he had agreed that in this case an actual order never followed the furnishing of the order number and that Genrec had never asked for "an order proper, an order form", it was put to him that Genrec was "in these circumstances happy with an order number". He replied:

"We were happy to contract with LTA. We were not happy to contract with Orbit Engineering."

Later it was put to him:

"Mr Campbell never used the words to you that LTA Mitec will hire the crane from Genrec?"

His reply was "I do not recall".

In re-examination the following passage occurs:

"In response to a question by my learned friend Mr Burman whether in your opinion an agreement of hire of the crane took
place to Orbit, you said yes? ---------- That is correct.
Now what do you understand by that? ---------- That Orbit Engineering were going to make use of the crane."

This illustrates the imprecision and ambiguity with which Kriedemann used language in the witness-box. There is little reason to suppose that he was any less imprecise and ambiguous when dealing with Mitec. It may also explain why Genrec's pleadings were initially drafted in the way I have described. It was he who had furnished Genrec's attorney with the information required for the purpose of issuing summons and drafting the particulars of claim.

Nowhere in the judgment of the trial court can I find any recognition of the relevance of these factors to the factual enquiry unless they are to be regarded as embraced in a generalisation reading:

> "Then there is the fact that plaintiff's version comes from the mouth of witnesses who despite some contradictions of their own evidence and of the evidence of others, despite vagueness and lackness (sic) of memory, and despite other deficiencies, came across as honest and very convinced on the crucial issue."

Certainly there is no acknowledgement of their significance and importance and no attempt to explain how they were fully reconcilable with the evidence on the "crucial issue" being given by witnesses who were "honest and very convinced". At face value these considerations constituted serious obstacles to a positive acceptance of Genrec's allegation that it was to Mitec that it hired the crane and if they were not considered to be so by the trial court, it was incumbent on it to say why. The recital which the trial court gave of

factors regarded by it as being inimical to Mitec's version of the agreement provides no assurance that in evaluating them and concluding that they were indeed fatally inimical to Mitec's version, the trial court gave consideration and assigned appropriate weight to those apparent obstacles.

This Court is therefore obliged to assess the recorded evidence afresh and as best it can without having had the advantage of seeing and hearing the witnesses testify. If, notwithstanding its best efforts, it finds itself unable to come to firm conclusions upon a balance of probability the result is that the decision must go against the bearer of the onus of proof. Cf Van Aswegen v De Clercq 1960 (4) SA 875 (A) at 882 B-E. There is undoubtedly a good deal to be said for Genrec's contention that it is more probable that Mitec hired the crane for the use of Orbit than that Orbit hired the crane and Mitec

undertook to pay the hire charges if Orbit did not. But, in my view, the respective merits and demerits of the witnesses who testified on either side are not so manifest ex facie the record and the probabilities are not so patent that it can be said that Genrec has discharged the onus of establishing upon a balance of probability that there was indeed either real or apparent consensus between it and Mitec that Mitec would hire the crane.

I do not intend to discuss this aspect of the case in any greater detail because I consider that there is in any event yet another ground upon which Genrec's claim against Mitec must fail. For the same reason I find it unnecessary to discuss the questions of authority which were debated before us. Even if it be assumed in Genrec's favour that it did indeed prove that Mitec hired the crane, in order to succeed in establishing that Mitec is liable for the damage to the crane,

Genrec had to prove on a balance of probability either that Genrec's standard terms and conditions of hire were applicable, or that there was a tacit or implied term that Mitec would cause the crane to be returned to Genrec in the same condition as it was upon delivery.

I turn first to Genrec's case in regard to the applicability of its standard terms and conditions. From the inception of the litigation right up to the stage of closing arguments Genrec had relied primarily upon an oral agreement that the hire was to be on its standard terms and conditions of hire. That plainly negatived any reliance upon either a tacit or implied agreement or terms to that effect. An allegation that parties have orally agreed upon something is incompatible with their having tacitly or impliedly agreed upon it. See the comments on Rule of Court 18 (6) of Erasmus, Superior Court Practice, at page B 1-132. Any doubt about the intention of the

pleader is entirely eliminated when one sees the manner in which the alternative cause of action was pleaded. There it was specifically alleged that it was "a tacit, alternatively an implied term" that Mitec, alternatively, Orbit would cause the crane to be returned to Genrec in the same condition as it was when delivered. The contrasting ways in which these two alternative aspects of the pleadings were pleaded are striking. As a fact there was no evidence upon which a finding could have been based that an express agreed term that the standard terms and conditions would apply had been proved and counsel for Genrec did not contend otherwise. Indeed, despite the state of the pleadings, he asserted that it had never been expressly agreed that Genrec's standard terms and conditions would apply and that its case was always that it was a tacitly agreed term of an orally agreed contract of hire. At the stage of final argument, the trial judge seems to have

regarded the state of Genrec's pleadings as an obstacle to the raising of such a contention for, largely at his urging so we were told, Genrec applied for and, despite Mitec's opposition, was granted leave to amend its pleadings by inserting the words "alternatively tacitly" between the words "orally" and "agreed" in paragraph 6 of the particulars of claim. The effect of that was the making of an alternative allegation that the entire agreement to hire (as opposed to any particular term of it) was tacit. That too was obviously not borne out by the evidence and again counsel for Genrec disavowed any intention of contending that it was. As I have said, he maintained that Genrec's case had always been, and remained, that there was an express oral agreement of hire one of the tacit terms of which was that Genrec's standard terms and conditions would apply, alternatively that the crane would be returned to Genrec in the same condition as it was

when delivered by Genrec.

Assuming, without deciding, that it was open to Genrec on either its original or amended pleadings to raise that contention, the question is whether the existence of either of those tacit terms has been established. I return to the question of whether the standard terms and conditions were proved to be applicable. In my judgment they were not. Mitec had not hired cranes from Genrec on previous occasions so that there was no antecedent history of dealing with Genrec with knowledge of the particular terms and conditions upon which it did business. The fact that other companies in the LTA group had hired cranes from Genrec in the past does not serve to fix Mitec with such knowledge. No written documents purporting to reflect or incorporate any standard terms and conditions were placed by Genrec before Mitec for signature or other acknowledgement by

Mitec nor were any such documents issued to Mitec. Merely because there often are standard terms and conditions upon which those who hire out cranes do so does not oblige a prospective hirer of a crane to assume that the particular firm from which he proposes to hire a crane will necessarily have such standard terms and conditions or, even if it does have such terms and conditions,that it will seek to impose them silently in every case irrespective of the circumstances. There is no analogy whatsoever to be drawn between this class of case and the well-known "ticket" class of cases. Genrec did nothing whatsoever to alert Mitec to the existence of its standard terms and conditions of hire. Generalised concessions by Campbell about the practices followed by car hire firms and the tacit acceptance by clients of standard terms and conditions take Genrec's case no further. It was contended that Campbell had made specific admissions relating to

crane hire. Despite the fact that he had said that he had not hired a car for 10 years and that he did not know what "the system" was "at the moment", it was put to him that "most of" the crane hiring firms use "forms" of a "similar type" to the car hire firms. His reply was "That is possible." Having assented to the proposition that the type of forms used are normally forms which contain a time sheet on the front and the conditions on the back "very much like car hiring", he was required to respond to a series of propositions put to him by the Court.

The relevant passages read:

> "COURT: If you phoned Avis today by phone and say look, I want the car in Cape Town for three days tomorrow, you will expect that you will have to pay their tariff, whatever their tariff is normally for that car. ---------- Yes.
> You will expect that before they give the car to you, you will have to accept their conditions, you will not be able to bargain,
> you must accept their conditions. ---------- Yes.
> Now, in the case of a crane hire, would the same apply? You know that they have terms and conditions on which they hire.

----- Correct.

So if you just say I want to hire the crane and nothing more,

you are accepting their tariff and their terms. ---------- No, no, no.

Why not? ---------- When I normally hire a crane, when the crane

arrives on site or arrives in my yard, or whatever, the first thing they do, they produce you with the

acceptance of the crane on site in good order and you accept the conditions. If you do not accept the

conditions, they take the crane back.

It is easy. ---------- Yes, of course.

Of course. That is why I said, if you say nothing more, you

expect that you are accepting their terms. ---------- Yes.

Is that not so? ---------- That is correct.

Now in the cases where you say you hired a crane, did that

happen more than once? ---------- I very seldom - it is normally

the sub-contractor that hires.

So in these cases you conclude contracts. ---------- Conclude

contracts?

You hire them. ---------- No, that is wrong. I would, if I was to -

I want to hire a crane, I would go the normal procedure."

In my view these answers fall far short of unequivocal

admissions that in this instance Genrec's standard terms and conditions

were to apply. The entire exchange postulates that at some stage the

crane hire firm requires an acknowledgment of acceptance of the crane

in good order and on the crane hire firm's conditions. But that is precisely what did not occur in this instance. Mitec was never asked to do anything of the kind prior to the accident.

Nor does the fact, if fact it be, that Mitec had agreed to hire the crane in lieu of Orbit strengthen Genrec's case. It does not follow that because Orbit would have been bound by the standard terms and conditions because of its previous dealings with Genrec and its knowledge of the standard terms and conditions, Mitec would be similarly bound. Orbit's knowledge and readiness to contract on those terms and conditions cannot arbitrarily be imputed to Mitec simply because Mitec hired the crane in lieu of Orbit. Cf Micor Shipping (Pty) Ltd v Treger Golf and Sports (Pty) Ltd and Another 1977 (2) SA 709 (W) at 712 H - 718 A. Nor does the fact that there was no discussion of the tariff and other matters relevant to the use of the

crane advance Genrec's case. In the particular circumstances of the transaction these were matters to which Mitec was indifferent because Orbit was to use the crane and would ultimately be debited one way or another with the cost of hiring the crane. Moreover, silence on Mitec's side as to tariff would imply at worst for Mitec that it was content to pay either Genrec's usual tariff or a reasonable rate. It would not imply that Mitec was tacitly accepting whatever other uncommunicated terms and conditions, however onerous, Genrec might wish to impose. In short there is no adequate basis for inferring that Mitec had tacitly agreed that Genrec's standard terms and conditions of hire would apply.

I turn to the question of whether Genrec succeeded in proving the existence of the alternative tacit term which it pleaded, namely, that the crane would be returned to it in the same good order

and condition. The test to be applied is of course not whether such a term might have been reasonable or even appropriate but whether it can safely be said that the parties to the contract of hire either thought it to be so obvious that it was unnecessary to mention it or, if they did not advert to the question at all in their own minds, that if they had been asked whether such a term should exist, they would have concurred in an affirmative answer. In my judgment, it cannot be said that both parties would have assented to such a term It is reasonably conceivable that Mitec might have responded "But surely only if any damage to the crane is attributable to our actions or those of our employees." I cannot accept that it would undoubtedly have assented to so absolute an imposition of liability.

The appeal succeeds and is upheld with costs including the costs of two counsel. The judgment of the trial court is altered to

one of absolution from the instance with costs, including the costs of two counsel.

R M MARAIS

VAN HEERDEN)

CONCUR F

H GROSSKOPF)