Case no: 191/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE UNIT INSPECTION CO OF SA (PTY) LIMITED Appellant

and

HALL LONGMORE & CO (Pty) LIMITED Respondent Coram:

JOUBERT, SMALBERGER, NESTADT, F H GROSSKOPF et HOWIE JJA

Heard: 21 November 1994 Delivered: 23 February 1995

J U D G M E

N T F H GROSSKOPF JA:

Pursuant to a contract concluded in July 1989 the appellant agreed to provide certain technical inspection services and quality control to the respondent at agreed rates. These services were required by the respondent in connection with its installation of underground steel piping at Mossel Bay. It is common cause that the appellant's rates were subject to escalation as from 12 July 1989, The main dispute between the parties is whether May or July 1989 should have been used as the so-called base date in calculating the escalation.

The parties agreed at a pre-trial conference that their respective calculations of escalation were arithmetically correct, and that if May 1989 was the base date, as the appellant maintained, it would be entitled to judgment in the sum of R142 144,53. If, on the other hand, the respondent's contention was correct, and July 1989 had to be used as the base date, the appellant would only be entitled to judgment in the

sum of R40 413,03. The significant difference between these two amounts was due to the fact that between the months of May and July 1989 there had been a substantial increase in the relevant indices used in calculating the escalation.

The respondent in its plea unconditionally tendered to pay the appellant the sum of R40 413,03, together with its party and party costs to date of tender, but the appellant did not accept this tender.

The matter was heard by Hartzenberg J in the Witwatersrand Local Division. The learned Judge found that the base date was July 1989 and accordingly granted judgment for the appellant in the sum of R40 413,03, (being the amount tendered), together with costs up to 11 March 1992 (being the date of the respondent's tender). The appellant was ordered to pay the respondent's costs incurred subsequent to 11 March 1992. Leave to appeal was granted by the Court

Two aspects were raised on appeal:

1. What was the agreed base date?

2. Was the respondent's tender sufficient to avoid further costs?

The terms of the agreement concluded between the parties can be gathered primarily from contemporaneous documents, while an alleged subsequent variation of the agreement depends largely on the contents of two letters. I shall consider some of these documents.

On 17 April 1989, and in response to an invitation by the respondent, the appellant submitted a written quotation to provide quality control and other technical services to the respondent in respect of its Mossgas onshore terminal contract at Mossel Bay. Particulars of the technical services, as well as details of the respondent's quoted rates, were set out in a "schedule of rates". The rates made provision for radiographers at R2 475 per 45 hour week, magnetic particle inspectors at R2 250 per 45 hour week, specified equipment at a fixed rate per week, and consumables at a price per unit. The "schedule of rates" also contained certain "tender qualifications". Paragraph 5.7 of these

qualifications provided for escalation in the following terms:

> "5.7 Our quotation has been based on our quoted prices being subject to the agreed Mossgas escalation agreement according to the SEIFSA escalation index, with the commencement being our quotation date." (Emphasis supplied,)

The appellant's quotation of 17 April 1989 was not accepted, and the appellant submitted a similar though not identical quotation to the respondent on 26 May 1989. The "schedule of rates" now also provided for quality control inspectors and non-destructive testing technicians at R2 925,00 per 45 hour week. Paragraph 6.7 of the 26 May 1989 "tender qualifications" provided for escalation in exactly the same terms as paragraph 5.7 quoted above.

The respondent did not accept the appellant's quotation of 26 May 1989 either, but Mr Pennock of the appellant and Mr Jordi of the respondent met on site at Mossel Bay on 11 July 1989. They had a further discussion over the telephone on 12 July 1989 during which

Pennock confirmed that their tender was still valid. Pennock further agreed to certain minor changes, and consented to Jordi's proposal that the date 12 July 1989 be inserted in the escalation clause where it previously referred to "our quotation date". The appellant then resubmitted its amended quotation to the respondent on 13 July 1989 "in line with our conversation and agreements of the 12 July 1989". With the exception of one small item the appellant's quoted rates remained the same as before, but the "tender qualifications" were amended as a result of the agreement reached during the telephone discussion. The escalation clause became paragraph 6.6 and was altered to read as follows:

> "Our quotation has been based on our quoted prices being subject to the agreed Mossgas escalation agreement according to the SEIFSA escalation index, with the commencement being the 12 July 1989." (Emphasis supplied.)

It is common cause that the appellant commenced providing its technical services to the respondent in terms of their contract on about

13 July 1989.

The appellant requested the respondent on 26 July 1989 to provide them with an official order number. The respondent complied with the request and issued purchase order no C 902-61 which was unfortunately undated, but it must have been submitted to the appellant shortly after 26 July 1989. It contained the following as one of its provisions:

"SEIFSA escalation will apply as from 12.7.89. Escalation index to be agreed."

Up to that stage the parties had made no mention of any particular "base date" in their discussions or in the correspondence. According to Jordi's evidence there was no need for the parties to agree on a base date as the base date and the commencement date were the same in this case, ie 12 July 1989. Pennock did not testify at the trial, and there was no evidence on behalf of the appellant to controvert Jordi's evidence regarding their telephone discussion on 12 July 1989, or to

suggest that the parties had agreed or would still agree on some earlier base date.

The Steel and Engineering Industries Federation of South Africa ("SEIFSA") had issued certain "SEIFSA Formula Principles" which were placed before the court a quo. In the section dealing with "Escalation Dates" the document refers to a certain " Event 2" which is described as "submission of tender". The date of submission of tender is indeed the "quotation date". We know that the parties agreed that this date was 12 July 1989. The "SEIFSA Formula Principles" further provide:

> "In this connection it should be understood that a contract is formed when an offer is accepted, acceptance whatever its form starts the contract period and Event 2 above [ie submission of tender] starts the escalation period because the price tendered will have been based on costs known at the date of submission of tender." (Emphasis supplied.)

There was no direct evidence on behalf of the appellant that

its quotation of July 1989 was not based on "costs known at the date of submission of tender", or if it was not so based, why the rates were not updated when the quotation was resubmitted on 13 July 1989. In those circumstances, and in the absence of any agreement to the contrary, I fail to see why a base date earlier in time than the date of submission of tender should be used in calculating the escalation. To use any earlier date would mean that the SEIFSA indices of such earlier date would be used in calculating the escalation, which in turn would lead to an increased escalation and unfair adjustment of the contract price.

If Pennock had been concerned about an increase in the costs since the appellant's first quotation of 17 April 1989, one would have expected him either to have updated his quoted rates, or to have insisted on an earlier base date when he had the telephone conversation with Jordi on 12 July 1989. We know that the quoted rates were not updated, and there is no evidence that Jordi agreed to an earlier base date at the time. The only date which was mentioned, was 12 July 1989.

In view of all the circumstances it seems to me that the parties agreed, albeit tacitly, that 12 July 1989 would be the so-called base date to be used in calculating the escalation.

The next question is whether the respondent agreed to a variation of the contract in this respect some eleven months later. On 18 June 1990 the appellant's managing director, Mr MacDonald, signed a letter addressed to the respondent. It is common cause that the letter was drafted by Mr Pillay, who joined the appellant as its accountant in July 1989. MacDonald did not testify; Pillay did. Although Pillay did not take part in the discussions that led up to the contract in July 1989, he testified that he was the one who considered the base date to be May 1989. And that was the base date he put forward in his letter of 18 June 1990, which reads as follows:

" YOUR ORDER NO. C 902-61

We refer to recent communications with regard to escalation on the contract between our two companies and in particular

to the above order concerning the subject of escalation.

We have used the following SEIFSA escalation formula for the majority of our Mossgas contracts and would recommend that this formula be used for the work being conducted at Mossel Bay."

The letter then proceeds to set out details of the proposed formula, including the following:

" 'Base Date' = May 1989 'Commencement Date' = July 1989".

The letter concludes:

"We shall be grateful if you will kindly confirm or propose some other escalation formula in order that we can firm up on this aspect of the order."

It should be observed that the respondent was not asked to confirm Pillay's "base date", or to propose another.

Jordi's reply dated 25 July 1990 was brief, and reads as follows:

"RE: ORDER NO C 902-61

We refer to your letter 18th June 1990 and would accept
SEIFSA escalation as follows:
Fixed Portion 25%
Labour Portion 75%
Labour Index Seifsa Table C-l Statutory Labour Cost."

Jordi testified that he never agreed that the base date should be May 1989 and that he initially said so in his draft of this letter, but later decided to omit it. This is borne out by the large gap in the body of the letter between the last sentence and the name of the respondent at the end of the letter. According to Jordi the only aspect which stood over after the respondent had placed its order in July 1989 was agreement on the SEIFSA indices to be used.

The appellant emphasized the fact that Jordi in his letter of 25 July 1990 failed to record his disagreement with Pillay's proposal regarding a new base date. Jordi's reasons for failing to mention this aspect may not be all that satisfactory, but it does not follow that his

silence warrants the inference which the appellant seeks to draw, ie that Jordi agreed to a variation of an important term of their agreement of July 1989. In considering whether such inference is reasonable and justified it should be borne in mind that it is highly unlikely that the respondent would have agreed to a variation of the base date which would obviously have resulted in a substantial increase in escalation. I find it equally unlikely that the appellant could have believed that mere silence on the part of the respondent signified unqualified assent to a term which would undoubtedly have been to the latter's disadvantage.

The appellant relies on the well-known dictum in Smith v Hughes (1871) LR 6 QB 597 at 607 in support of its argument:

> "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

In applying this so-called doctrine of "quasi-mutual assent" Greenberg

J observed as follows in the case of Van Ryn Wine and Spirit Co. v

Chandos Bar 1928 TPD 417 at 423-424:

> "It is for the Court in each case to have regard to all the circumstances and to decide whether the person sought to be bound has rendered himself liable by his unreasonable conduct. And I think that in order to hold him liable on the contract, the inference that he was assenting to the terms proposed by the other party must not only be reasonable, but must also be a necessary inference. If there are a number of reasonable inferences which may be drawn, including one of assent, then the hypothetical reasonable man is not entitled to select the inference of assent and to disregard the others."

(See also Christie The Law of Contract in South Africa 2nd ed 14-16,

23-28.)

In my view this is not a case where a reasonable man would have believed that the respondent, by his mere silence, was assenting to the drastic variation which the appellant had proposed in his letter of

June 1990. Silence does not necessarily mean acceptance.

There are cases where a party's failure to reply to a letter, and therefore his silence, may be taken to constitute an admission by him of the truth of an assertion contained in such letter. (See McWilliams v First Consolidated Holdings (Pty) Ltd 1982(2) SA 1(A) at 10E-H; and see also Benefit Cycle Works v Atmore 1927 TPD 524 at 530-1; Hamilton v Van Zyl 1983(4) SA 379(E) at 388E-H; Hoffmann and Zeffertt The South African Law of Evidence 4th ed 180-1.) But this is not such a case. When Pillay wrote his letter of 18 June 1990 he never asserted that it was a term of the agreement concluded between the parties that May 1989 would be the base date. At best for the appellant Pillay recommended a formula in his letter of 18 June 1990, proposing that the base date should be May 1989. This is how Pillay himself later explained his letter of 18 June 1990 in his subsequent letter of 4 April 1991. The appellant in its particulars of claim in fact described the letter of 18 June 1990 as an offer. Inasmuch as the appellant's letter of 18

June 1990 did not contain any statement that May 1989 was the agreed base date, the respondent's silence could hardly have been interpreted as an acknowledgement by the respondent that May 1989 was indeed the agreed base date.

In my judgment the appellant has failed to show that there had been any variation of the July 1989 agreement in terms whereof May 1989, and not July 1989, was to be used as the base date in calculating escalation. The appeal on the first aspect must therefore fail.

With regard to the second aspect the appellant submitted that the Court a quo erred in ordering the appellant to pay the respondent's costs from date of tender instead of allowing the appellant its full costs. The appellant's contention was that the respondent's tender was not a proper tender and that it was accordingly ineffective to avoid an order for costs.

The respondent's tender was pleaded in the following terms in paragraph 12.5 of its plea:

"As to the balance of R40 413,03 the defendant unconditionally tenders to pay the said sum to the plaintiff together with the plaintiff's party and party costs to date of tender."

This was an unconditional tender by the respondent to pay the appellant a specified sum of money together with costs to date of tender. It was not suggested that the respondent was not able to pay forthwith on acceptance.

The main submission on behalf of the appellant was that the tender was not an "offer to settle" as provided for in Rule 34 of the Rules of the Supreme Court, and that the Court a quo should accordingly not have had any regard thereto. Whilst the offer was not in terms of Rule 34, I cannot agree that it had no effect. An offer to settle need not be made in terms of the rule, and if otherwise sufficient, it will protect a defendant from further costs. (Cf Harms Civil Procedure in the Supreme Court P at 435; Erasmus Superior Court Practice Bl-239.) It was pointed out by Trollip J in Foord v Lake and Others. NN O

1968(4) SA 395(W) at 398 F-H:

> "As no money was paid into Court in the present case, the Rule [Rule 34] clearly had no application to the defendants' offer of compromise. Mr Mostert contended, however, that the Rule provided the only way in which a valid offer of compromise could be made in a money claim. I do not agree. The procedure therein prescribed is obviously the usual and most effective one, but the Rule does not purport to be exhaustive, it does not expressly or impliedly exclude other forms of offer of compromise being made and relied upon without any payment into Court. After all, the question of costs is also an issue, and can be an important issue, in an action, in respect of which the Court has to exercise its discretion; any fact that has a bearing on that discretion is, therefore, relevant, admissible and can be relied upon; and thus any offer of compromise, whatever its form, made in order to secure complete or partial immunity from costs, would obviously fall into that category……"

Rule 34 was substantially amended in 1987 and the practice of actual payment into Court was abolished. (See Harms P1 at 435; Erasmus B1-239.)

In Odendaal v Du Plessis 1918 AD 470 this Court

considered the Roman-Dutch authorities and concluded that our practice

is based rather upon that of the Courts of Holland than of England.

Innes CJ observed as follows at 477:

> "The authorities then come to this, that though the strict rule of Dutch practice contemplated that a debtor should protect himself by judicial deposit in addition to tender, yet there were many cases in which oblatie alone afforded protection, more especially if made in judicio. And oblatie standing alone would retain the characteristics which attached to it when it formed part of the whole process and was followed by payment into Court. It would be an offer to discharge the obligation, and would be made, therefore, in full satisfaction of the claim. This is borne out by reference to the forms of pleading given in the books."

It appears from the judgment (at 477) that oblatie alone was, under certain circumstances, recognized as effective in Dutch procedure, and that "the complete machinery of consignatie ['met opene Beurse en klinkende Gelde'] seems never to have been used in our Courts." (I am not here referring to the now abolished practice of actual payment into Court in terms of the Rules of Court.)

The following further observations were made by Innes CJ at 478:

> "As already remarked, the rule that a tender should be unconditional was recognized in Holland. Tender was akin to payment, and no condition to which the creditor had a right to object could be coupled with the one any more than with the other. Strictly regarded, an offer made 'in settlement' or 'in full settlement' is conditioned upon the creditor abandoning the balance of his claim. The offer is made upon terms that he shall admit its sufficiency; it can only be accepted on such admission, and it is therefore conditional. But regarded in the light of Roman-Dutch law the condition is inherent in the very nature of the tender, and is sanctioned by the procedure of the Courts. It is not, therefore, a condition to which the creditor can object, and it does not destroy the validity or operative effect of the tender."

In Odendaal's case the plaintiff claimed a lump sum of £5 000 as damages for assault and defamation. The plea admitted the assault, but denied the slander, and tendered £ 100 in settlement of any damage sustained. The trial Court found that defamation as well as assault had been proved, but awarded £100 as compensation in respect

of both injuries. The plaintiff was awarded his costs up to date of tender, but he had to pay all costs incurred thereafter. The plea in that case alleged a tender to the plaintiff of

> "the sum of £100 with costs, in settlement of any damages he might have suffered, which sum defendant says is ample and sufficient for the purpose of meeting plaintiffs claim, and he is still prepared to pay, as he hereby offers again to do."

The decision of the trial Court in Odendaal's case was upheld on appeal. It was to the effect that the tender by the defendant protected him from liability to pay the costs incurred after the date of tender in the event of the plaintiff not recovering more than the amount tendered. In my view the tender in the present case is no different, except that it is more explicitly unconditional.

It has, however, been held that if a defendant wishes to avail himself of a tender in order to disavow liability for costs, the tender should be pleaded. This was of course done in the present case. The

offer was made in judicio. (Naude v Kennedy 1909 TS 799 at 808-9; Foord's case, supra, at 398H-399A; De Beer v Rondalia Versekeringskorporasie van SA Bpk 1971(3) SA 614(0) at 616B-C.)

Counsel for the appellant also referred us to B & R Investments (Pty) Ltd v Laubscher 1951(2) SA 567(T), and Boland Bank Bpk v Steele 1994(1) SA 259(T) at 265D-266D. The latter case dealt with a conditional offer to pay which was not made in judicio, and can therefore clearly be distinguished on the facts. To the extent that any views on the law expressed in the former case are at variance with those stated in Odendaal's case, supra, they must be regarded as incorrect.

In my judgment the respondent's tender as pleaded was a valid one, and sufficient to protect it from further costs. The appeal on the second point should therefore also fail.

The appellant applied for condonation for the late filing of a power of attorney. The application was granted, but the appellant has to pay the costs of such application.

The appeal is dismissed with costs.

F H GROSSKOPF

Judge of Appeal. Joubert JA

Smalberger JA Nestadt JA Howie JA (Concur