Case no: 458/94

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

THE CAPE PROVINCIAL ADMINISTRATION : Appellant

AND

CLIFFORD HARRIS

(PROPRIETARY) LIMITED :Respondent

Coram: VAN HEERDEN, KUMLEBEN, NIENABER,

MARAISet ZULMANJJA

Date of Hearing: 9 September 1996

Date of Judgment: 27 September 1996

JUDGMENT

ZULMAN, JA:

This appeal concerns the interpretation of a clause in the General Conditions of Contract ("the GCC") which forms part of a detailed construction contract consisting of a number of other contract documents, entered into between the respondent as contractor and the appellant as employer. The contract relates to the construction of a trunk road, comprising approximately 38 kilometres of sub-grade, sub-base, basecourse bituminous surfacing, bridges and supplementary works between Rooi Els and Bot River, Cape. The clause in issue (clause 6) deals with price fluctuations in respect of petroleum based fuels and oils and bitumen, and adjustments to the contract price for the work.

The respondent issued summons in the Cape Provincial Division claiming a declaratory order, founded upon a particular interpretation of certain sub-clauses of clause 6. The appellant disputed that interpretation

and proffered another.

The court a quo (Thring J) found in favour of the respondent's contentions and granted the declaratory order sought, but granted leave to appeal to this court.

Clause 6 of the GCC, is headed:-

"PRICE FLUCTUATIONS IN RESPECT OF PETROLEUM-BASED FUELS AND OILS AND BITUMEN AND CONTRACT PRICE ADJUSTMENT",

The clause provides:-

"6. (l)(a) Subject to the provisions of paragraph (b) no adjustment of the final cost of the Works shall be made on account of variations in the price of the items employed or used in the execution of the Works. (b) Notwithstanding any provision to the contrary in the contract contained, the contract price shall be increased or decreased, as the case may be, by the net amount of any variation in the actual cost to the Contractor occurring between the date of the contractor's tender and the date contemplated by clause 43 (1) in respect of -

(i) bituminous materials which are used for the surfacing of roadways, and (ii) all grades of fuels and oils which are used for the operation of plant and for admixture with bitumens on the Works

in the cases where such variation is the result of the coming into operation of any enactment having the force of law; provided that price adjustments in terms of this paragraph shall be made only in respect of materials actually used for the execution of the Works and, in the case of bituminous materials, only in respect of such quantity of materials as has been measured and paid for under the relevant clauses in the specifications which apply to road surfacing.

(c) No adjustment shall be made in respect of price variations which take place after the date contemplated by clause 43(1) or any other authorised extension thereof, as the case may be.

2(a) Every monthly payment made to the contractor in terms of clause 53 shall be increased or decreased, as the case may be, in accordance with the formula -

$$S=(A-B-C)xf$$

in which formula -

(i) "S" represents the amount of such increase or decrease, as the case may be;

(ii) "A" represents an amount equal to the said monthly payment;

(iii) "B" represents the cost of the petroleum-derived products which were actually used during the month for which the said additional amount is payable and in respect of which adjustment is made in terms of subclause (1); provided that for the purposes of this formula such cost shall be calculated at the prices prevailing at the time of the closing of the tender;

(iv) "C" represents the amount included in the said monthly payment in respect of extra work as calculated in accordance

with clause 51(l)(c), and

(v) "f" represents the price adjustment factor contemplated by paragraph (c) for the month in respect of which the said additional amount is payable.

-"

(The remaining sub-clauses of clause 6 are not relevant to this appeal)

The court a quo described clause 6(l)(b), which caters for anticipated fluctuations in the cost of "petroleum derived products" or "all grades of fuels and oils", as the "rise and fall clause". It described clause 6(2)(a), which caters for anticipated fluctuations in the cost of labour, plant and materials, as the "escalation clause".

Chapter 3 of the GCC is the chapter which contains clause 6. The chapter is headed "PRICE FLUCTUATIONS SUBSEQUENT TO TENDERING". During the course of the execution of the contract, a dispute arose between the parties, concerning the interpretation of the escalation and price fluctuation provisions in chapter 3 and more particularly those in clause 6(l)(b) thereof. The dispute centred around the interpretation of the expression "all grades of fuels and oils which are used for the operation of plant and for admixture with bitumens on the Works" in clause 6(l)(b)(ii), read with that part of the proviso to it which reads: "provided that price adjustments in terms of this paragraph shall be made only in respect of materials actually used for the execution of the Works……". The dispute arose because the respondent used fuel and

oils in, inter alia, the operation of certain plant to produce materials for delivery to, and ultimately inclusion, in the "Works", to render raw materials so that they complied with the contract specification, and to deliver labour to the "Works". The price of such fuel and oils as at the prices prevailing at the time of the closing of tender was included in the factor "B" contained in the formula set forth in clause 6(2)(a). I will, for convenience sake, simply refer to this factor as "B". It will be recalled that "B" is defined in clause 6(2)(a)(iii).

The respondent's contentions are these:-

1. Before a cost can be included in "B" it must satisfy two requirements explicitly set out in sub-clause 6(2)(a)(iii): first, it has to be the cost of petroleum-derived products which were actually used during the relevant month; secondly, it has to be a cost which will fall to be adjusted in terms of subclause 6(l)(b). Those are the criteria which must be used to identify the particular quantity of petroleum-derived products to be taken into account. However, the cost at which they are to be taken into account is not their actual cost but their cost calculated at the prices prevailing at the time of the closing of the tender. That is what

6(2)(a)(iii) requires to be done. 2. While sub-clause 6(l)(b)(ii) would bring all grades of fuels and oils actually used during the relevant month for the operation of plant and for admixture with bitumens "on the Works" into the reckoning, if one were to ignore the proviso to that subclause, that is not the case when the proviso is taken into account. The proviso limits the fuels and oils which are to be taken into account to those "actually used for the execution of the Works". This is a narrower concept than "used for the operation of plant and for admixture of bitumens on the Works". The basis for this latter contention is that the expression "Works", when used in the context of the provisions of the contract, must bear the meaning ascribed to it in clause 1(1) of the GCC it is contained in Chapter 1 of the GCC and defines various terms used "in the contract documents or in any other document relating to the same Works", and they are to mean what they are defined to mean "unless inconsistent with the context." The word "Works" is defined as follows:-

> "Works means all or any part of the intended result of the work as set out in and envisaged by the specifications and the schedule of quantities or any such work as is explained, described or implied by the drawings and includes all extra work contemplated by clause 8 and variations and omissions ordered in accordance with the contract documents and the result of the work completed in the implementation of such specifications, schedules, drawings and contract documents."

3. "B" represents the cost of all grades of fuel and oils actually used for the operation of the plant used for the execution of the "Works", calculated at the prices of such fuels and oils prevailing at 5 July 1995. (There is no dispute between the parties that the date at which "B" is to be calculated is 5 July 1995).

4. Plant is used "for the execution of the Works" only when it is used to perform actions on "materials", as defined in clause 1(1). Clause 1(1) defines "materials" as meaning "any materials used in the execution of the Works including any stone, gravel, soil and sand." The term "plant" is not defined in the GCC.

5. Fuel and oils used in the operation of apparatus for, or in, the production of materials for the execution of the "Works", or for rendering materials so that they

comply with the contract specification, do not form

part of "B".

6. Fuel and oils used in the transportation of materials and labour to the "Works" do not form part of "B".

7. Plant is actually used for the execution of the "Works" for purposes of sub-clause 6(l)(b) when it is used to carry, place, compact, grade and shape "materials" (as defined) once such "materials" have been delivered to "the Works", and not when it is being used to manufacture "materials", or to deliver finished "materials", or to deliver labour to "the Works".

8. The appropriate method of establishing the amount of "B" is to fix it as 3/8 (three eighths) of the total cost of all petroleum derived fuels and oils delivered to the site for the duration of the "Works".

The contentions of the appellant on the other hand are these:

1. "B" refers to all petroleum-derived products actually used during the relevant month for the operation of plant, and there is no justification for drawing distinctions based upon the particular use to which

they may have been put.

2. In the interpretation and application of sub-clause 6(1)(b), the plant referred to in sub-clause (ii) means such items of equipment and vehicles used by the respondent in the construction, execution and maintenance of all "dumpsites" and in the performance of any obligations which are designated, set out and implied in the drawings, specifications and other contract documents.

3. The plant which is relevant for sub-clause 6(1)(b) is not limited to only that which is employed to perform actions on "materials" (as defined) that fall within specification, but includes the plant used to produce materials, render materials to bring them within the contract specification, and to transport materials and labour to the "Works". Hence, the fuels and oils employed in the operation of such plant fall to be included in "B".

What lead to these conflicting contentions was the fact that the price of petroleum decreased during the period of the contract.

The court a quo interpreted the subclauses in question in accordance with the contentions of the respondent and made an order in the terms sought by the respondent.

The crux of the judgment of the court a quo is to be found in the distinction which it drew between the concept of "work" or "the work", on the one hand and that of "Works" or "the Works", on the other. The court a quo considered that a narrow interpretation had to be given to the term "the Works" when interpreting clause 6. The reason for this view was that the term "Works" was a term which the parties had specifically defined in clause 1(1) in the definition section of chapter 1 of the GCC, and that it was therefore not permissible to give the word a wider or more general meaning.

It is trite law that when dealing with written contracts the golden rule of interpretation is to ascertain and give effect to the intention of the parties. This intention must be gathered from the language used by the parties. The words in which they have recorded their contract should normally be given their ordinary, grammatical meaning within their contextual setting, with the proviso that in construing the language of a provision, any special definition of particular words by the parties must obviously be given effect to, provided, of course, that such definition is not inconsistent with the context of the clause being interpreted. (See for

example D A Meyer Consultants CC v Allied Electronic Corporation Limited and Other 1996 (3) SA 370 (A) at373J- 374C and in re George and General Burglary Insurance Association, Limited (1899) 1QB 595 at 609 per Collins LJ.) As pointed out by Rumpff CJ, in Swart en 'n Ander v Cape Fabrix (Pty) Limited 1979 (1) SA 195(A) at 202 C-D:-

> "Wat natuurlik aanvaar moet word, is dat, wanneer die betekenis van woorde in 'n kontrak bepaal moet word, die woorde onmoontlik uitgeknip en op 'n skoon stuk papier geplak kan word en dan beoordeel moet word om die betekenis daarvan te bepaal. Dit is vir my vanselfsprekend dat 'n mens na die betrokke woorde moet kyk met inagneming van die aard en opset van die kontrak, en ook na die samehang van die woorde in die kontrak as geheel."

The context in which a word is used is of "prime importance" (Lisf v Jungers 1979 (3) SA 106(A) at 118D-E).

The following remarks of Kotze JA in West Rnad Estates Limited v New Zealand Insurance Company Limited 1925 AD 245 at 261 are also apposite to this matter: -

> "The parties must be regarded as having meant a business transaction; and it is the duty of the Court to construe their language in keeping with the purpose and object which they had in view, and so render that language effectual. Such is the clear principle of our law. Thus Pothier (Obligations par. 91ff), citing the lex 219 de Verborum Signif, observes: 'In agreements we

> should examine what is the common intention of the contracting parties, rather than the grammatical sense of the terms. Moreover we must construe the words in that sense which is most agreeable to the nature of the agreement.' These rules, which Van der Linde has taken over in his Manual, speak for themselves and are universally recognised."

It is also true that, whilst in construing a contract, a court "must give effect to the grammatical and ordinary and natural meaning of the words, and that cogent reasons would be required for doing violence to plain words, it is likewise settled law that a departure from such a meaning is justified where it clearly appears from the contract that the parties intended a different meaning" (per Steyn CJ in Capnorizas v Webber Road Mansions (Pty) Limited 1967 (2) SA 425(A) at 434 A -B). See also Gravenor v Dunswart Iron Works 1929 AD 299 at 303.

In my view, in seeking to interpret the sub-clause in the manner contended for by the respondent, and by having recourse almost exclusively to the definition of the word "Works" in clause 1(1) of the contract, the court a quo took too narrow and restricted a view of the matter. In so approaching the matter the court a quo appears to have overlooked the fact that the proviso contained in the latter portion of clause 6(l)(b) requires that "price adjustments" shall be made "only in respect of materials actually used for the execution of the Works ".(The emphasis is mine). The phrase "for the execution of the Works" is not

defined in the contract. Only the word "Works" is. Clearly, "for the execution of the Works" has a wider meaning than simply the "Works". As I will indicate presently, to hold otherwise would result in so narrow an interpretation of the operative portion of clause 6(l)(b) as to lead to a result which, from a practical point of view, is unworkable and incapable of realistic application. If, on the other hand, one interprets the phrase "for the execution of the Works" in its ordinary sense, and has regard to the totality of the undertaking, one would then arrive at what must have been the true intention of the parties. This would result in a consistent application of the "rise and fall" provisions not only to the bituminous materials referred to in clause 6(l)(b)(i) but also to all grades of fuels and oils referred to in clause 6(l)(b)(ii). (Cf the remarks of Rumpff JA and Holmes JA in Oerlikon South Africa(Pty) Ltd v Johannesburg City Council 1970(3) SA 579(A) at 582E - F and 590G-H respectively.)

It seems clear that although the bituminous materials used for the surfacing of roadways referred to in sub-clause 6(l)(b)(i) would include those used for the surfacing of access roads and temporary by-passes which were not part of the "Works" as defined, those materials were not excluded by the proviso to sub-clause 6(l)(b) from the price adjustment for which sub-clause 6(l)(b) made provision. On the contrary, the

proviso makes it plain that they are to be subject to price adjustment for it provides "that price adjustments in terms of this paragraph shall be made ……, in the case of bituminous materials, only in respect of such quantity of materials as has been measured and paid for under the relevant clauses in the specifications which apply to road surfacing". Provision is made in the specifications for the bitumenising of temporary roads and by-passes which are not part of the "Works" as defined. Counsel for respondent conceded that to be so he sought to account for what on his argument would be an inconsistency in approach by the parties to, on the one hand, bituminous materials used for the surfacing of roadways which would not form part of the "Works" (these to be included), and to, on the other, all grades of fuels and oils used for the operation of plant and for admixture with bitumens for purposes which would not result in what was done or produced forming part of the "Works" (these to be excluded). The suggestion was that it might be easier to keep track of how much bituminous material had been used. I do not regard that as a sufficiently plausible explanation for it would also be easier to identify the bituminous materials which had been used on roadways which were not part of the "Works" as defined and therefore easier to determine what bituminous materials should be excluded when calculating "B". Thus, far from being an inconsistency of treatment as

between the bituminous materials dealt with in sub-clause 6(l)(a)(i) and

the fuels and oils dealt with in subclause 6(l)(a)(ii), forced upon the parties by the nature of the materials dealt with in the former subclause and the use to which they would be put, it would represent an irrational and arbitrary difference in treatment for which there was no sensible explanation. What this shows, so it seems to me, is that just as no distinction was to be drawn between bituminous materials used for the surfacing of roadways which do form part of the "Works", as defined, and roadways which do not, so no distinction was to be drawn between fuels and oils used for the operation of plant engaged in those two activities.

As was accepted in the judgment of the court a quo, it is also plain if one examines other provisions of the GCC, that the parties have not consistently used the word "Works" in the narrow sense contended for by respondent. Subclause 36(l)(a) which deals with the contractor's liability for death, damage, loss, injury and claims "resulting from ... [inter alia] "the execution of the Works" can hardly be construed as having been used in the narrow sense and the same applies to subclause 19(2) (plant, tools and equipment provided by contractor to "be kept available and used solely for the execution of the Works"), clause 26 (storage of materials to ensure preservation and fitness "for use in the

execution of the Works"), and sub-clause 49(a) (consideration payable under the contract to be accepted by the contractor in full settlement of, inter alia, "the cost of all materials furnished by him and of all transports, labour, tools, plant and equipment necessary for the Works"). (Emphasis supplied by me in all instances.) I do not believe that one can justifiably dismiss these manifestly wider fields of application of the expression "for the execution of the Works" as having "crept in per incuriam", as was done by the court a quo.

If one attempts to apply the clause, in the manner contended for by the respondent, it is apparent from the evidence of the two witnesses called by the respondent, whose evidence was accepted by the court a quo, that, putting it at its lowest, the task is an extremely difficult one. Indeed, it may well be that it is not possible to apply the formula in the manner contended for by the respondent to certain situations without the need for further agreement being reached between the parties, or without at least employing other methods in order to ascertain, for example, when exactly the costs of certain fuel became covered by the clause. Thus, if fuel was used in an item of equipment both before it reached the "Works", while it was en route to the "Works", and after it reached the "Works", then it would be necessary to establish, presumably by making use of some mechanical device or a gate keeper, when exactly the

particular item of equipment entered the "Works". A further difficulty would then be to apportion what amount of fuel was used when the plant was actually used on the "Works", and what portion of fuel was not so used. Another example which comes to mind is the problem of calculating the amount of fuel used by a front end loader, when it is in use in a borrow pit which is not on the "Works", as opposed to the fuel used by it when it is in use on the "Works". Whilst it is correct that the counsel for the appellant has not contended that on the respondent's interpretation it is impossible to give effect to the clause, he has nevertheless convincingly argued that there would be serious practical difficulties in the application of the clause, and that these difficulties indicate that it could not have been the intention of the parties to give the clause the narrower meaning contended for by the respondent. If the parties had intended the clause to have such a narrow meaning, then one would hardly have expected them to have made some appropriate provision in the contract, so as to enable the many difficulties which would obviously arise in the application of the sub-clauses in issue to be resolved.

Even if it be assumed that the sub-clauses in question are theoretically capable of being interpreted in the manner contended for by the respondent, it would be proper, where the language of the provision

is not so plain as to exclude it, to prefer an interpretation of the clause which produces a result which is not "destructive of the manifest purpose" of the clause, to one which is not (Cf Meyer's case (supra) at 382I-J).

As pointed out in the appellant's argument, a practical consideration of the process of executing the "Works" shows that it includes all the work processes which form part of the contract and which are necessary to achieve performance by the respondent of its obligations in terms of the contract as a whole entitling it to the consideration payable in terms of clause 49 of the GCC. These processes would include for example, the construction, of temporary by-passes which may have a surface of bituminous material the building of which requires the use of fuel and oil. Without the temporary by-pass it would be impossible to construct the "Works" and it therefore forms part of the execution of the "Works". Similarly the transportation of workers, material and tools to the exact locality of the "Works", is part of the execution of the "Works". If one were to apply the respondent's contentions to this process, the result would be completely unrealistic. Fuels and oils used in vehicles to transport workers, material and tools up to the very perimeters of the "Works", would have to be regarded as not having been used "for the execution of the Works," because they

were not used while the vehicles were traversing the physical area which is described in the definition of "Works". Furthermore, this would militate against the meaning of the term "site" as defined in clause 1(1) of the contract. The term is there defined as meaning "the land upon which the Works are to be executed and includes all land occupied by the contractor and any subcontractor for any purpose whatsoever in connection with the Works." Respondent would have it that it is only after a vehicle or plant has arrived in the aforesaid physical area, that it can be said to be engaged in "the execution of the Works". However, once the vehicle or plant crosses the line, as it were, it ceases to be used "for the execution of the Works". There is no sensible reason conceivable why the parties would wish to have drawn such a line. As I have pointed out, it would have created a need for many burdens and tasks to be performed simply to keep track of what fell on which side of the line. The correct approach, is that because all such work is eventually done in or "for the execution of the Works", the distinction contended for by respondent should not be drawn.

I am of the view that the word "on" where it is used in clause 6(l)(b)(ii) is quite capable, in the context of the clause read as a whole, of meaning "with respect to" rather than being confined to having a meaning relating to the physical position and content of the "Works".

Indeed, respondent placed no reliance upon the use of the preposition "on" and instead nailed its colours to the mast of the words "used for the execution of the Works" in the proviso to subclause 6(l)(b).

I agree with the argument advanced on behalf of the appellant to the effect that the postulated distinction between "Works" and "work" does not stand in the way of an application of the "rise and fall" clause to the whole contract, as all the work is done "for the execution of the Works". Again I would stress that the phrase which requires to be given effect to in arriving at the true intention of the parties, is "for the execution of the Works" as opposed to simply the words "the Works".

The respondent has justifiably argued that whatever the outcome of the appeal, it should not be mulcted in any costs occasioned by the unnecessary inclusion of various items in the record. These items are set forth in paragraph 28 of the respondent's heads of argument. With few exceptions, the documentation referred to by the respondent, which comprises more than half of the record before this Court, should not have been included in the record presented on appeal. The simple expedient of the appellant's attorneys consulting with the respondent's attorneys in an endeavour to obtain agreement upon the portions of the record which should or should not have been included on appeal, was not resorted to.

In the circumstances, I consider it to be appropriate to disallow

half of the costs of the preparation and perusal of the record provided for in rules 10(B) and (C) of the Rules of this Court.

In the result the appeal is upheld with costs, such costs to include the costs of the application for leave to appeal and the costs of two counsel, subject to the proviso that the appellant shall only be entitled to payment of half of the costs of the preparation and perusal of the record before this court. The order issued by the court a quo is set aside and there is substituted for it the following order:-

"The plaintiffs claims are dismissed with costs (including the cost of two counsel)."

R H ZULMAN JA

VAN HEERDEN JA }
KUMLEBEN JA }
NIENABER JA } CONCUR
MARAISJA }