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Case No. 375/1982

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the appeal of:

MELMOTH TOWN BOARD — Appellant

and

MARIUS MOSTERT (PTY) LIMITED — Respondent

CORAM: JANSEN, MILLER, VILJOEN, VAN HEERDEN, JJA *et* GALGUT AJA

HEARD: 7 MAY 1984

DELIVERED: 30 MAY 1984

JUDGMENT

/VAN HEERDEN, JA...

VAN HEERDEN, JA:

This is an appeal against a judgment given by Friedman, J, in the Durban and Coast Local Division in a matter which came before him by way of a special case stated in terms of Rule 33 of the Rules of Court. The salient facts set out in and incorporated by the special case are as follows.

During 1977 the parties entered into a written agreement in terms of which the respondent, a civil engineering construction contractor, was to carry out construction works in regard to a certain dam. The tender price was the sum of R110 396, which amount fell to be adjusted inter alia if variations were ordered by

/the ...

the engineer in terms of clause 52 of the printed "general conditions of contract" (issued by the S.A. Institution of Civil Engineers for use in connection with works of civil engineering construction, and to which I shall refer as "the contract"). The respondent carried out a substantial part of the works and also gave effect to a number of variations duly ordered by the engineer. Eventually, however, the engineer certified that the respondent was in default of its obligations, and the appellant then gave the respondent written notice, as it was entitled to do in terms of clause 65 (1) of the contract, of its intention to enter upon the site and to expel the respondent from the works. Pursuant

thereto the appellant took over the site and caused the works to be completed partly by its own employees and partly by another contractor.

One of the variations related to excavation in the so-called spillway channel. As a result of the variation the quantity of material which had to be excavated was increased from 14 000 m^3 (the figure contained in the Schedule of Quantities) to more than 35 000 m^3. Prior to his expulsion from the site the respondent had excavated a portion of the additional material by blasting. A dispute then arose between the appellant and the engineer on the one hand and the respondent on the other hand. The dispute related to

the quantities of "hard rock excavated" and of "hard rock excavated by blasting where authorised", for which categories different rates were provided under items B.5 and B.6 of the Schedule of Quantities. A mediator, to whom the dispute was eventually referred in terms of clause 69 (2) of the contract, decided that 75% of the material blasted was to be paid for under item B.6 and the balance under item B.5. Thereafter the parties agreed that the total quantity blasted was 20 000 m^3. (The appellant required the decision to be referred to arbitration but later abandoned its rights in this regard. Consequently the decision of the mediator became binding upon the parties by virtue of clause 69 (2)

of the contract.)

After completion of the works the engineer issued a final certificate which reflected that an amount of R17 962,51 was payable by the respondent to the appellant. That was done in accordance with the provisions of clause 65 (3) which read as follows:

> "(3) If the Employer shall enter and expel the Contractor under this Clause, he shall not be liable to pay to the Contractor any money on account of the Contract until completion of the entire Works or the expiration of the Period of Maintenance, as the case may be, and thereafter until the costs of completion and (where specified) maintenance, penalty (if any) and all other expenses incurred by the Employer have been ascertained and the amount thereof certified by the Engineer. The Contractor shall then be entitled to receive only such sum or sums (if any) as the Engineer may certify would have been due to him upon due completion by him after

deducting the said amount. But if such amount shall exceed the sum which would have been payable to the Contractor on due completion by him then the Contractor shall upon demand pay to the Employer the amount of such excess and it shall be deemed a debt due by the Contractor to the Employer and shall be recoverable accordingly."

In the certificate the respondent was initially credited with more than R100 000 in respect of the aforesaid excavation by blasting. In so doing the engineer gave effect to the decision of the mediator and the parties' agreement. Had that valuation not been altered, the hypothetical sum which would have been due to the respondent had he duly completed the works (minus amounts already paid) would have exceeded by a substantial amount the costs etc. which fell to be subtracted

in terms of clause 65 (3). However, purporting to apply the provisions of clause 54 the engineer deducted from the valuation an amount of R57 724,12. I shall revert to the grounds upon which the engineer sought to justify that deduction.

On the strength of the certificate the appellant instituted action against the respondent for payment of the sum of R17 962,51. The respondent filed a plea and a counterclaim, alleging that the engineer had not been entitled to make the deduction. Consequently the respondent sought an order setting aside the final certificate.

In the special case stated by the parties two

questions were formulated for decision by the court a quo. During argument it became common cause, however, that only the first question required an answer since it was wide enough to cover the contentions of the parties. That question was stated as follows:

> "Was the engineer entitled, in terms of clause 54 of the contract, to adjust the contract price in the manner, and on the basis, reflected in the final certificate read with the appendix to Variation Order No 8?"

(The appendix to variation order No. 8 contains the engineer's reasons for deducting the sum of R57 724,13.)

The parties agreed that in the event of the court a quo answering the question in the affirmative

there should be judgment for the appellant as prayed in the summons, and that in the event of a negative answer there should be judgment for the respondent. Friedman, J, answered the question in the negative. Hence he gave judgment for the respondent with costs on the main claim and counterclaim, which resulted in the final certificate being set aside.

It is convenient at this stage to refer to the material provisions of clauses 51 and 52 of the contract. Clause 51 (1) empowers the engineer to make any variation of the form, quality or quantity of the works or any part thereof that may in his opinion be necessary. Clause 52 (1) provides that the amount (if any) to be

added to or deducted from the sum named in the tender in respect of any extra or additional work done or work omitted by a variation order has to be determined by the engineer. All such work must be valued at the rates set out in the contract if in the engineer's opinion they are applicable. (Since the Schedule of Quantities did contain rates which were applicable to the additional excavation done by the respondent, the further provisions of clause 52 (1) are not material.)

Clause 52 (2) reads as follows:

> "Provided that if the nature or amount of any omission, addition, increase or decrease in quantity ... relative to the nature or amount of the whole contract or part thereof, shall be such that it results in a change in method or scale of operation, process of construction

or source of supply, such as in the opinion of the Engineer renders the rate or price contained in the Contract for any item of the Works by reason of such ommission, addition, increase or decrease of quantity unreasonable or inapplicable, the Engineer in agreement with the Contractor shall fix such other rate or price so far as possible consistent with the rates or prices set out in the Contract as in the circumstances he shall think reasonable and proper.

Provided also that no increase of the Contract Price under Sub-Clause (1) of this Clause or variation of rate or price under Sub-Clause (2) of this Clause shall be made unless, as soon as is practicable, and in the case of extra or additional work before the commencement of the work or as soon thereafter as is practicable, notice shall have been given in writing:

(a) by the Contractor to the Engineer of his intention to claim extra payment or a varied rate or

(b) by the Engineer to the Contractor of his intention to vary a rate or price

/as ...

as the case may be."

Clause 52 (3) provides that in the absence of agreement the rate or price proposed by the engineer shall apply without prejudice to the contractor's right "to obtain settlement of the disagreement in accordance with Clause 69 hereof", i.e., the right to refer the dispute to a mediator and, if necessary, to arbitration. The engineer's powers to fix a new rate or price are therefore regulated by clause 52 (2), read with clause 52 (3), but in order to avoid repetition I shall, when referring to such powers, only mention the former subsection.

It can be inferred from the final certificate

/that ...

that the respondent did notify the engineer of his intention to claim extra payment for the additional excavation in the spillway. The appellant failed to allege, however, that the engineer gave notice in writing to the respondent of his intention to vary the rates applicable to such excavation, and it is indeed common cause that he did not do so. Nor did the engineer purport to invoke clause 52 (2) when making the aforesaid deduction in his final certificate. It is indeed clear that he relied solely on clause 54 which, in so far as it is material, provides:

> "Unless otherwise provided, if the nett effect of all variations as valued in accordance with Sub-Clauses 52 (1) and 52 (2) hereof ... shall be found on completion of the whole of the

Works to have resulted in a reduction or an addition greater than 15 per cent of the sum named in the Tender, such variation shall not in any way vitiate or invalidate the contract but the amount of the Contract Price shall be further increased or decreased by such sum (if any) as in the opinion of the Engineer shall be reasonable, regard being had to all material and relevant factors directly consequent upon or directly affected by such reduction or addition including the Contractor's oncosts and overheads."

In terms of clause 1 (f) "contract price" means the sum named in the tender subject to such additions thereto or deductions therefrom as may be made from time to time under the provisions of the contract.

The sum named in the respondent's tender was in fact increased by more than 100% as a result of all the variations duly valued by the engineer in accordance

with subclauses 52 (1) and 52 (2), and in the special case the appellant accordingly contended that the engineer had been entitled to invoke the power conferred upon him by the provisions of clause 54. The respondent's main contentions were that the engineer could only increase, and not reduce, the contract price, made up of the tender price plus the valuation of all additional work brought about by variation orders, and alternatively that the engineer could not deduct an amount on the basis reflected in the final certificate.

Before dealing with the reasoning of the court a quo it is necessary to dispose of a question which

/was ...

was raised during argument before this Court. In the appellant's declaration it was alleged that by the written notice (already referred to) given in terms of clause 65 (1) the respondent terminated the contract, and in the special case it was stated that the appellant was entitled to, and did, act in terms of that subclause with the result, inter alia, that the appellant terminated the contract. All that created the impression that the contract had been duly cancelled and the question arose whether clause 54 could find application after termination of the contract. However, the notice in question was attached to the declaration, and it is quite clear that the appellant did not purport

to cancel the contract. Indeed, in the material portion of the document the respondent was merely given notice of the appellant's intention "to enter upon the site and the works and to expel you [the respondent] therefrom after seven days of receipt of this notice." In so doing the appellant was invoking the competence conferred by clause 65 (1) which provides that in certain contingencies, including breach of contract by the respondent, "the Employer [the appellant] may, after giving 7 days notice in writing to the contractor [the respondent], enter upon the Site and the Works and expel the Contractor therefrom without thereby avoiding the contract or releasing the Contractor from any of

/his ...

his obligations or liabilities under the Contract or affecting the rights and powers conferred on the Employer or the Engineer by the Contract." It is apparent, therefore, that in neither the declaration nor the special case was the word "terminated" used in the sense of "cancelled" but rather to convey the notion that the respondent's right to complete the works had been brought to an end.

It will be recalled that under clause 65 (3) the engineer had to calculate the hypothetical sum which would have been due to the respondent had he duly completed the works. In order to make the calculation the engineer had to take into account his valuation of

/variations ...

variations of the works. Had the respondent actually completed the works, and had the nett effect of all variations valued in accordance with subclauses 52 (1) and 52 (2) resulted in a reduction or addition greater than 15% of the tender price, clause 54 would have been applicable. Since, notwitstanding the expulsion of the respondent, the engineer retained the rights and powers conferred upon him by the contract, it seems clear that in calculating the hypothetical amount the engineer remained entitled to invoke the provisions of that clause.

It is apparent from the judgment of the court *a quo* that there was some debate as to the scope of the

introductory phrase of clause 54, viz., "Unless otherwise provided". It does not appear, however, that the court attached any real significance to the use of the phrase and before this Court it became common cause, rightly, in my view, that it is of no assistance in answering the question posed in the special case.

I turn now to the trial court's reasons for answering the question in the negative. In the first place the court found that the use of the word "further", which precedes the words "increased or decreased" in clause 54, militates against a construction according to which the engineer may "further" increase the contract price if there has been a nett reduction of the

tender price as a result of variations, or may "further" decrease the contract price if there has been a nett increase of the tender price. In this regard the court said:

> "... it seems to me that the normal and natural meaning of the word 'further' in the context in which it appears in clause 54 is such as to render it apposite to the earlier reference to the contract being reduced or made greater. In my view the language of clause 54, looked at simply at a linguistic level, indicates that where there has been more than a 15% addition to the contract price there can be "a further increase" and where there has been a more than 15% reduction in the purchase price there can be "a further decrease". In my view to suggest that where the contract price has by reason of the variations been increased by more than 15% there can be "a further decrease" is linguistic nonsense and, at lowest, strains the ordinary meaning to be attached to the words used. Mr. Hurt's argument involves having regard to the

/words ...

> words "increased or decreased" following the word "further" as meaning no more nor less than "adjusted". If this is what the parties had intended it would have been very simple for them to have said so."

It follows, as was pointed out by counsel for the appellant, that according to the construction adopted by the court a quo the word "further" must be regarded as accentuating, separately, the preceding words "reduction" and "addition". In the process of arriving at that construction the fact that the words following on "further" have been transposed to read "increased or decreased" and not "decreased or increased" (compared with the previous order of "a reduction or an addition") was in effect ignored; the learned judge remarking that

/the ...

the transposition was perhaps a little bit strange but not attaching any significance thereto.

It must be conceded that the phraseology of clause 54 is capable of bearing the construction placed upon it by the court _a quo_. But in my opinion it is also open to a different interpretation. As in the case of statutes, the contextual approach to the interpretation of a word or a phrase in a contract requires that regard must be had not only to the language of the rest of the provision concerned or of the contract as a whole, but also to considerations such as the apparent scope and purpose of the provision (cf _Jaga v Dönges, N O and Another_, 1950 (4) S A 653 (A) 662).

Now, it is difficult to think of a reason why the draftsman of clause 54 would have intended the engineer to have the power to increase the contract price only if there had been an initial <u>increase</u> (of more than 15%) of the tender price as a result of variations, or why he would have intended the power to reduce the contract price to be exercised only if there had been an initial <u>decrease</u> of the tender price. The clause enjoins the engineer to have regard to all material and relevant factors directly consequent upon or directly affected by the initial reduction or addition, including the contractor's oncosts and overheads, and such factors may call for an increase of the contract price even if

there has been an initial reduction of the tender price, and *vice versa*. For example, a substantial omission of part of the works and a resultant reduction of, say, 40%, of the tender price may well have a deleterious effect on costs built into the tender price, such as the rental of machinery leased for a period calculated with reference to the scope of the original works. In the postulated case the increased ratio between costs and the reduced contract price would probably be a material factor directly consequent upon the reduction, but on the trial court's construction of clause 54 the engineer would be powerless to increase the reduced tender price.

/Having ...

Having regard to the manifest purpose of clause 54, i.e., to enable the engineer to adjust the contract price either upwards or downwards provided the tender price has been altered by more than 15% as a result of variations valued in accordance with clauses 52 (1) and 52 (2), it seems clear to me that the word "further" was used in the sense of "furthermore" or "in addition". That being so, it was a matter of indifference to the draftsman whether he employed the phrase "increased or decreased" rather than the phrase "decreased or increased". All that he intended, and that the parties must be taken to have intended, was that the engineer should have a residual power to adjust the contract price under the

circumstances set out in clause 54. In casu the engineer was therefore not precluded from reducing the contract price merely because the nett effect of all relevant variations had resulted in an initial increase of the tender price.

In order to appreciate the trial court's second reason for answering the question in the negative it is necessary to refer to the grounds upon which the engineer justified his invocation of clause 54. They may be summarised as follows. Subsequent to the conclusion of the contract the quantity of excavation required to be done in the spillway channel was increased from the scheduled provisional quantity of 14 000 m^3 to more than

35 000 m^3. That included some 20 000 m^3 of hard rock which was much more than the provisional quantity of 2 600 m^3. The respondent succeeded in negotiating a favourable price with a blasting subcontractor who carried out the necessary drilling and blasting for a charge of R28 624,40. Allowing for "oncosts" of 35% and a profit of 15% a reasonable compensation for the excavation in hard rock was therefore R44 439,38. However, a valuation of the excavation under the relevant items of the Schedule of Quantities yielded a price of R102 163,50, i.e., R57 724,12 in excess of a reasonable compensation.

The engineer concluded as follows:

/"From ...

> "From the above it is clear that the increase in quantity of work required to be done enabled the Contractor to obtain a more favourable price for blasting than he could have done on the basis of the relatively small quantities provided for in the Tender. Therefore as the increase in quantities arose directly from the orders of the Employer, it is fair and reasonable to require that the assessed 'excess' be for the benefit of the Employer.
>
> Whence the amount of R57 724-12 is to be deducted from the Scheduled valuation of work done."

It will be seen that the engineer first of all increased that portion of the tender price relating to excavation by blasting in the spillway channel to allow for the additional work, and then deducted a very substantial amount from his initial valuation of the excavated quantities. In the judgment of the court *a quo*

clause 54 did not empower the engineer to make that deduction. The reasoning of the court ran along these lines. The power of the engineer to invoke clause 54 is qualified inter alia by the words "regard being had to all material and relevant factors directly consequent upon or directly affected by such reduction or addition including the contractor's oncosts and overheads." (My underlining.) The underlined words refer to items in the contract other than those the extent of which have been increased or decreased, but which have been affected by the increase or decrease, e.g., the contractor's oncosts and overheads. The provisions of clause 54 and clause 52 therefore deal with two complementary

matters. Whilst clause 52 makes provision for alteration in the rates of the very items involved in the additional or reduced work, clause 54 provides for "consequential" adjustment flowing from such work. Therefore "the concluding words of clause 54 are entirely inconsistent with the notion that acting under clause 54 the engineer can further increase or decrease the amount payable in respect of those very items which have caused the contract price to be increased or decreased by the 15% provided for by the clause."

It appears to me that the court *a quo* took a somewhat narrow view of the scope of clauses 54 and 52 (2). Firstly, clause 52 (2) empowers the

/engineer ...

engineer to fix another rate or price if in his opinion "the rate or price contained in the contract for any item of the works" (my underlining) is rendered unreasonable or inapplicable by reason of an omission, addition, increase or decrease of quantity having the effect set out in that subclause. The underlined words make it quite clear that if, e.g., a portion of item A is omitted, a different rate may be fixed for the remainder of that item or for any other item in the Schedule of Quantities. Hence I cannot agree with the trial court's view that clause 52 provides only for an alteration in the rates of the "very items" involved in the additional or reduced work.

/Secondly ...

Secondly, the learned judge erred, in my view, in regarding the contractor's "oncosts and overheads" (specifically mentioned in clause 54) as separate items which may be affected by a variation increasing or decreasing the extent of other items. From experience one knows that, apart from preliminary expenses, the contractor's profit and overheads are not usually separately priced in the Schedule of Quantities. They are, in fact, built into the rates for the various concrete components of the works. <u>In casu</u> the Schedule of Quantities was not attached to the pleadings or the special case, but it can be inferred from the engineer's final certificate that the rates under items

B.5 and B.6 included oncosts and profit in respect of excavation by blasting. Consequently, a valuation of the increased quantities of excavated hard rock in accordance with the said rates would automatically have affected the oncosts and profit built into those rates.

But although the reasoning of the court a quo cannot be fully supported, I am nevertheless of the view that clauses 54 and 52 (2) were designed to cover different situations, and that the engineer may not under the guise of applying the provisions of clause 54 in effect invoke the powers conferred upon him by clause 52 (2). Counsel for the appellant submitted

that one of the "material and relevant factors directly consequent upon or directly affected by such reduction or addition" (clause 54) would be the result that the contractor is deriving an excessive profit from the contract as a result of the overall variation of the tender price. There can be no quarrel with that submission provided that the word "overall" is accentuated. I say so because it is clear that the words "such reduction or addition" refers back to a "reduction or ... addition greater than 15 per cent of the sum named in the Tender" resulting from the nett effect of <u>all</u> variations as valued in accordance with clause 52 (1) and (2). Hence the engineer is enjoined

to have regard to the effect of the overall reduction or addition, and not merely the effect of an increase or decrease in the tender price brought about by a particular variation. By contrast, when considering whether clause 52 (2) falls to be applied, the engineer has to determine the effect of a particular variation on the reasonableness (or applicability) of the rate or price for a specific item or items of the works.

In the present case the engineer, whilst purporting to apply the provisions of clause 54, in fact sought to invoke clause 52 (2). It is apparent that he had regard to the effect of only one of the variation orders on the reasonableness of the rates for two items

in the Schedule of Quantities. He considered that the valuation of the additional excavation according to those rates resulted in the respondent making an excessive profit in respect of the quantities excavated by blasting, and therefore sought to substitute a valuation which in his view made provision for a reasonable profit. Since those quantities were fixed, the result was that the engineer determined lesser rates than those provided for under items B.5 and B.6. That he was not entitled to do. In the first place, and as already pointed out, clause 54 requires a consideration of the effect of the overall increase or decrease of the tender price, and not of the effect of an increase

and on the basis, reflected in the final certificate and that the question for decision was therefore correctly answered by the court a quo.

The appeal is dismissed with costs.

H.J.O. VAN HEERDEN JA

JANSEN JA

MILLER JA

VILJOEN JA

GALGUT AJA

CONCUR