[zRPz] ALFRED McALPINE & SON (PTY) LTD v TRANSVAAL PROVINCIAL ADMINISTRATION 1974 (3) SA 506 (A)
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Citation 1974 (3) SA 506 (A)

Court Appèlafdeling

Judge Rumpff Wn HR , Botha AR , Jansen AR , Muller AR en Corbett Wn AR

Heard February 18, 1974 ; February 19, 1974 ; February 20, 1974 ; February 21, 1974

Judgment May 20, 1974

Annotations Link to Case Annotations

A
[zFNz] Flynote : Sleutelwoorde
Work and labour - Contract to build a portion of a national road - Exceptional number of variations introduced - Disruption as a result - Original contract not having lapsed - No new agreement in terms whereof contractor entitled to reasonable remuneration instead of contract price - No implied term that owner must introduce the variations "at reasonable times" - Contract - Implied or tacit terms - When not to be implied or presumed - Words and phrases - "At a reasonable time." - Not the same as "within a reasonable time" - Former not implied.
[zHNz] Headnote : Kopnota

A contract to do a specified work for an agreed price can from its very beginning be so altered by the owner and carried out by the contractor that it can be said that for the original contract there was tacitly substituted a new agreement in terms whereof the contractor was entitled to reasonable remuneration for the work. It will depend on the facts whether that has occurred. Also during the execution of a contract to do work for an an agreed price the contractor can receive, and also accept, instructions to do work which cannot really be regarded as part of the original contract, and the contractor is entitled to reasonable remuneration for that work on the ground of a separate tacit agreement. It will also in this case depend on the facts whether such a separate agreement came into existence.

Appellant was the plaintiff and respondent the defendant in the Court *a quo* . The parties entered into a contract in terms whereof plaintiff had undertaken to build a portion of a national road. Certain declaratory orders were applied for on the plaintiff's behalf. During the execution of the contract the contractor had received instructions to introduce an exceptionally
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large number of alterations which in certain cases had caused disruption. On plaintiff's behalf it was alleged that, although each alteration had fallen within the scope of the contract, the

cumulative effect of all the alterations was of such a nature that the original contract had lapsed and a new contract had arisen impliedly through the conduct of the parties, in terms whereof the plaintiff was entitled to reasonable remuneration for all the work done, i.e. from the commencement of the execution of the contract. The Court *a quo* had held that the variations had been envisaged in the original contract. In an appeal,

Held , as the plaintiff right up to the completion of the contract had still relied on the original contract, that it could not possibly be said that the original contract in its entirety had been regarded by the parties as having lapsed and that a new contract had been entered into in terms whereof defendant was entitled to reasonable remuneration for all the work done.

Held , further, that there was a lack of evidence that what the plaintiff had built was not substantially the road which the contract envisaged.

Held , further, as to an alternative claim for an order declaring that a certain implied term had to be assumed in terms whereof plaintiff was entitled to compensation for the disruption which had occurred because the engineer had not introduced his variations "at reasonable times", that "at a reasonable time" was not the same as "within a reasonable time" and that such claim had rightly been rejected by the Court *a quo* (JANSEN, J.A., and CORBETT, A.J.A., dissenting).

Held , further, that in the absence of a properly defined wording of an implied term which, notwithstanding the express provisions of the contract, had to be acknowledged, it was not the duty of the Appeal Court at that stage to work out what wording such a term must have in order to satisfy the plaintiff as well as comply with the stated requirements before the term could be acknowledged.

The decision in the Transvaal Provincial Division in *Alfred McAlpine & Son (Pty.) Ltd .* v *Transvaal Provincial Administration* , confirmed.
[zCIz] Case Information

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"1. During the course of the execution of work by the plaintiff in performance of its undertaking to construct the said road, the defendant so varied, altered and extended the work required as to amount to an abandonment of the original undertaking, plan or A scheme and/or a vitiation of the contract.
2. Notwithstanding the said abandonment the plaintiff continued to execute all work required by the defendant in terms of the said variations, alterations and extensions.
3. In the premises an agreement came into being between the parties, in terms of which the defendant became obliged to pay to the plaintiff a fair and reasonable B remuneration for all the work executed in the construction of the said road.
4. The plaintiff duly completed all work required by the defendant in terms of the said agreement."

C "Wherefore the plaintiff claims:

1. An order declaring that the plaintiff is entitled to be paid remuneration at a fair and reasonable rate for all work done by it or on its behalf or order in the construction of certain road between the Willows and Bronkhorstspruit."

"Schedule B.

E *Principal variations, alterations and extensions of work* .

Omission of 53 pipe culverts. } Along the Freeway alone.

Addition of 75 pipe culverts.

Repositioning or change in diameter of 35 pipe culverts.

Omission of two box culverts. } Along the Freeway alone.

Addition of give box culverts.

Repositioning of one box culvert.

F Omission of one agricultural subway.
Addition of six agricultural subways.
Omission of 12 borrow pits.
Addition of 22 borrow pits.
Cover requirements changed for more than 55 per cent of the freeway.
Road levels changed for more than 50 per cent of the freeway.
Sub-grade stabilisation introduced for more than 33 per cent of the freeway. G Over 550 tons of bituminous surfacing in experimental layers.
Increase by 100 per cent of area in the intersections between cross-roads and the pre-existing road T4/8.
Addition of two roads linking new freeway to pre-existing road T4/8.
Guard rail quantity increased by 72 per cent.
Grassed area increased by 140 per cent.
Addition of bridge 2853. H Complete re-design of bridge 2458.
Addition of bridge 2964.
Omission of bridge 2463.
The above items together with other secondary alterations resulted in the granting of an extension of the contract period by 10 months and an increase in the contract value at *schedule* rates of more than one million rand."

Hier benewens is ons ook verwys na sekere planne waarop grafies in kleure die wysigings op die padoppervlakte getoon word (bewysstukke 33A, 33B en 33C) en dreineerwerk wat nie

oorspronklik beplan of gewysig is nie (bewysstukke 2A, 2B en 2C), en na skedule C, bevattende 'n
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lys van 256 memorandums of instruksies deur die ingenieur aan die eiser gegee en skedule D wat 'n lys van wysigings bevat met verwysing na die betrokke instruksies wat daarmee in verband staan. Omdat dit nodig is, ook wat die ander eise betref, om na A verskillende bepalings van die kontrak te verwys, sal ek op hierdie stadium die klousules noem wat m.i. van belang is by die beoordeling van die onderskeie smeekbedes. Wat die algemene kontrakvoorwaardes betref (bewysstuk 4B), bepaal klousule 1 (7) die volgende:

"'*Drawings*' means the plans, sections, elevations, or exact reproductions thereof, approved by the engineer and attached to B this contract, showing the location, character, dimensions and details of the work to be done, and also any working drawings, detail drawings or sketches supplied from time to time by the engineer for the guidance of the contractor."

Klousule 1 (10) lees:

"'*Contract*' means the general conditions of contract, the special provisions, the specification, the priced schedule of quantities, the drawings, the tender, the written agreement C between the employer and the contractor for the work to be done, and also any and all supplemental agreements varying, amending, extending or reducing the work contemplated and which may be required to complete the work in a substantial and acceptable manner."

Klousule 13 wat handel oor tekeninge bepaal in subklousule (3):

"The engineer shall have full power and authority to supply to the contractor from time to time during the progress of the works such further drawings and instructions as shall be D necessary for the purpose of the proper and adequate execution and maintenance of the words, and the contractor shall carry out and be bound by the same."

Klousule 15 handel oor die gesag van die ingenieur en die werkgewer en die eerste deel van klousule 15 (1) lees:

"The contractor shall execute, complete and maintain the works in strict accordance with the contract to the E satisfaction of the engineer. The work shall be carried out under the supervision of the engineer who shall decide any and all questions which may arise as to the quality or acceptability of materials furnished and work performed, the manner of performance, the rate of progress and, if necessary, the order of procedure of the work, the acceptable fulfilment of the contract and the payment to be made and all other matters incidental to the contract, the generality of the last-mentioned provision not to be limited in any way by the earlier provisions."

F Klousule 39 bepaal dat die kontrakteur na skriftelike kennisgewing van die ingenieur die uitvoering van die werk of deel van die werk moet staak vir solank die ingenieur dit mag nodig ag en bepaal verder dat die ekstra koste wat daardeur ontstaan deur die werkgewer vergoed sal word, behalwe in sekere gevalle wat in die klousule genoem word. Wat verlenging van tyd betref, lees klousule 43:

G "Should the amount of extra or additional work of any kind, or any other special circumstances of any kind whatsoever which may occur, be such as fairly to entitle the contractor to an extension of time for the completion of the work, the engineer shall determine the amount of such extension. Provided that the engineer is not bound to take into account any extra or additional work or other special circumstances, unless the contractor has within twenty-eight (28) days after such work H has been commenced or such circumstances have arisen, or as soon thereafter as practicable, delivered to the engineer full and detailed particulars of any claim to extension of time to which he may consider himself entitled, in order that such claim may be investigated at the time."

Klousule 45 handel oor die vorderingstempo en die eerste sin van hierdie klousule lees:
"The whole of the materials, plant and labour to be provided by the contractor under this contract, and the mode, manner and speed of execution and maintenance of the works are to be of a kind, and conducted in manner approved of by the engineer."
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Dit is nodig om klousules 49, 50 en 51 volledig aan te haal. Hulle bepaal soos volg:
"49. Alterations, additions and omissions.
(1) The engineer shall make any variation of the form, quality or quantity of the works or part thereof that may in his opinion be necessary, and for that purpose, or if for any other reason it shall be in his opinion A desirable, shall have power to order the contractor to do and the contractor shall do any of the following:
(a) Increase or decrease the quantity of any work included in the contract;
(b) Omit any such work;
(c) Change the character or quality or kind of any such work;
(d) Change the levels, lines, position and B dimensions of any part of the works; and
(e) Execute additional work of any kind necessary for the completion of the works, and no such variation shall in any way vitiate or invalidate the contract, provided the total contract amount be not thereby increased or decreased in value more than twenty (20) per cent and provided further that the total quantity of any sub-item whose value in the schedule of quantities is in excess of 71/2 per cent of the total contract amount, be not thereby increased or C decreased by more than 25 per cent.
(2) No such variation shall be made by the contractor without an order in writing of the engineer. Provided that no order in writing shall be required for increase or decrease in the quantity of any work where such increase or decrease is not the result of an order given under this clause, but is the result of the quantities exceeding or being less than those stated in the schedule of quantities. Provided also D that if for any reason the engineer shall consider it desirable to give any such order verbally, the contractor shall comply with such order, and any confirmation in writing of such verbal order given by the engineer, whether before or after the carrying out of the order, shall be deemed to be an order in writing within the meaning of this clause. Provided further that if the contractor shall confirm in writing to the engineer any verbal order of the engineer, and such confirmation shall not be contradicted in writing by the engineer, it shall be E deemed to be an order in writing by the engineer.

(3) The engineer shall determine the amount (if any) to be added to or deducted from the contract amount in respect of any additional work done or work omitted by his order. All such work shall be valued at the rates set out in the contract, if in the opinion of the engineer the same shall be applicable. If the contract shall not contain any rates applicable to the additional work, the same shall be classed as extra work and payment in respect thereof shall be made as F hereinafter provided.

(4) Provided that if such variation or variations shall result in an increase or decrease of more than 20 per cent in the value of the total contract amount or an increase or decrease of more than 25 per cent in the total quantity of any sub-item whose value in the schedule of quantities is in excess of 71/2 per cent of the total contract amount and subject to the production of satisfactory evidence that loss or damage has been sustained by the contractor as a G result of such variation or variations, the engineer shall fix such other rate or price as in the circumstances he shall think reasonable and proper.

(5) Provided also that no increase of the contract amount under sub-clause (3) of this clause, or variation of rate or price under sub-clause (4) of this clause shall be made unless as soon after the date of the order as is practicable, and in the case of additional work before the commencement of the work or as soon thereafter as is practicable, notice shall have been H 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 the case may be.

50. Extra work.

(1) The engineer may, if in his opinion it is necessary or desirable, order in writing that any additional or substituted work, for which no applicable rates or prices exist in the contract, be executed as extra work. The contractor shall then be paid for such extra work at the unit rates and prices,

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or a lump sum as the case may be, previously agreed upon in writing between the engineer and the contractor, and approved by the employer.

(2) If unit rates and prices, or a lump sum as the case may be, cannot be agreed upon between the engineer and the contractor for any extra work, the contractor shall receive in full payment for such work the actual field cost of the work to him plus fifteen (15) per A cent of the said cost. The contractor shall furnish to the engineer such receipts or other vouchers as may be necessary to prove the amounts paid, and he shall before ordering materials submit to the engineer quotations for the same for the engineer's approval.

(3) In respect of extra work executed in accordance with the provisions of sub-clause (2) of this clause, the contractor shall during the continuance of such work deliver each day to the resident engineer an exact B list in duplicate of the names, occupation, time and rates of pay of all workmen employed on such work, and a statement also in duplicate showing the description and quantities of all materials and plant used thereon or therefor. One copy of each list and statement will, if correct and when agreed, be signed by the resident engineer and returned to the contractor. At the end of each month the contractor shall deliver to the resident engineer a priced statement of the labour, C material, plant and other items (if any) involved, and the contractor

shall not be entitled to any payment unless such lists and statements have been fully and punctually rendered. The contractor will not be paid directly for overheads or head office expenses, the additional fifteen (15) per cent being deemed to cover all such expenses as well as profit.

51. Claims.

The contractor shall send to the engineer once in every D month an account giving full and detailed particulars of all claims for any additional expense to which the contractor may consider himself entitled and of all extra work ordered by the engineer which he has executed during the preceding month, and no claim for payment for any such work will be considered which has not been included in such particulars. Provided always that the engineer shall be entitled to authorise payment to be made for any such work, notwithstanding the contractor's failure to comply with this condition, if the contractor has at the earliest practicable opportunity notified the engineer that he E intends to make a claim for such work."

"The contract shall not be considered as completed until a G maintenance certificate shall have been signed by the engineer and delivered to the employer stating that the works have been completed and maintained to his satisfaction."

"Carefully considered planning shall be exercised by the H contractor during construction and maintenance of the works to ensure orderly and satisfactory execution of the contract. Construction operations shall be carried out in very close co-operation with the engineer, the Department of Posts and Telegraphs, the Electricity Supply Commission, and any other authorities concerned."

"The numbers and quantities set out in the schedules of quantities are estimated only, and their accuracy or inaccuracy shall in no way affect the validity of the tender or any contract based thereon. The total amount of each item set out in the schedules of quantities at the rate or price inserted by the tenderer shall be

stated, but these figures are required solely for the purpose of assessment and shall not be deemed to be the actual sums which shall be paid to the contractor for the execution of the works. The sum to be paid to the contractor shall (subject to the provisions of the conditions of contract) be determined by measuring the work actually done in accordance with the contract and valuing it at the rates and prices inserted by the contractor in the schedule of quantities or as altered in A accordance with the last paragraph hereof."

En ook:

"The quantities of work and material stated in the schedule of quantities shall not be considered as limiting or extending the amount of work to be done or material to be supplied by the contractor."

"Except where special provision is made in the schedules of quantities the rates and prices inserted shall be the full B inclusive rates and prices for the finished work described under the respective items and shall cover all labour, materials, transport, cartage, storage, temporary work, shuttering plant and overhead charges, watching, lighting, profit and maintenance as well as the general liabilities, obligations and risks arising out of the conditions of contract, the overhead

charges and profit being spread proportionally over the rates of the relative items of the schedules of quantities. The contractor shall have no claim for further payment in respect of any work or method of execution C which may be described or implied in the contract, although apparently no corresponding item is given in the schedules of quantities."

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"Further to the correspondence which passed between us in E May of this year, we hereby give notice under clause 51 of the general conditions of contract that we intend to claim for the recovery of all our losses arising from the disruption which has prevailed throughout the whole of this contract."

"At all stages McAlpine continued to do work under the contract and in terms of instructions, is that correct? - That is correct."

"In accordance with clause 60 of the general conditions of contract we give notice of our dissatisfaction with your decision and also give notice of our intention to take the above matter in dispute to a court of law."
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kontrak aangegaan is waaronder verweerder geregtig is op billike vergoeding vir al die gedane werk.

dat twee brûe toegevoeg is, dat een weggelaat is en dat een E herontwerp is. Kyk mens na die spesiale kontrakbepalings dan word die volgende onder "major concrete structures" genoem:

"(i) One bridge at interchange with road No. 0148.
(ii) Two bridges at Pienaars River.
(iii) One bridge at chainage 471.
F (iv) One bridge at interchange with road No. 964.
(v) Two bridges (if required) at chainage 600.
(vi) One bridge at interchange with road No. 483.
(vii) Two bridges at chainage 920.
(viii) One bridge at interchange with road No. 45.
(ix) Two bridges at Honde River.
G (x) One bridge at interchange at chainage 1432."

Blykbaar is die items "two bridges" in werklikheid twee brûe op dieselfde terrein. In die lig van die omvang van die beoogde brugwerk is die veranderings in verband met hierdie item m.i. nie van 'n hoogs ongewone aard nie.

Die eiser het hom beroep op 'n beslissing in die Amerikaanse H reg en 'n beslissing in die

Engelse reg. Die Amerikaanse beslissing is dié in *Salt Lake City v Smith, et al* , Circuit Court of Appeals, October 15, 1900, bl. 457. Para. 4 van die opsomming op bl. 458 lees:

"The proviso in such a contract that the corporation or its engineer may make any necessary or desirable alterations in the work, and that the contractors shall receive the contract price, or a price fixed by the engineer, for work or material required by the alterations, is limited, by the subject-matter and the intention of the parties when it was made, to such modifications of the work contemplated

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at the time of the making of the contract as do not radically change the nature or cost of the work or materials required. For all other work and materials required by the alterations the contractors may recover the reasonable value, notwithstanding the agreement."

Die saak handel nie oor die vernietiging van die hele kontrak A nie, maar oor wanneer die werknemer geregtig is op vergoeding op 'n *quantum meruit*- basis, ten opsigte van 'n deel van die werk wat op instruksies gedoen is en radikaal verskil van die werk beoog in die oorspronklike kontrak. Uit die feite blyk dat 'n oop lekanaal ses tot agt voet diep en ses myl lank oor gelyk B grond gelê moes word. Nadat die oop kanaal oor vier myl voltooi is, is die roete van die kanaal oor die laaste myl verander

"to a course over deep ravines and through hills which required expensive tunnels, the lining of such tunnels at great expense with concrete masonry, the laying of heavy iron pipes therein and the construction of large and expensive cut-stone culverts, which would not have been necessary if the line and plan of the work had not been changed".

C Daar is beslis dat vir al die werk gedoen in verband met die laaste myl, die kontrakteur op 'n *quantum meruit* geregtig is. Dis onnodig om ales wat in die uitspraak genoem word te oorweeg. Die feite op sigself toon dat die saak van 'n gans ander aard is as die onderhawige.

Namens eiser is aangevoer dat die onderhawige saak soortgelyk D is as dié in die Engelse beslissing *Thorn v Mayor and Commonalty of London* , (1876) 1 A.C. 120. In daardie saak het 'n brugbouer ten opsigte van 'n gedeelte van die werk skadevergoeding geëis op grond van 'n beweerde garansie deur die werkgewer. Dit is bevind dat volgens die kontrak geen E garansie bestaan het nie. Dit is duidelik dat die feite van daardie saak verskil van die onderhawige. Ek sal nie uit die Engelse hofverslag self aanhaal nie maar in plaas daarvan verwys na Hudson, *Building and Engineering Contracts* , 10de uitg., op bl. 548, waar die onderwerp "ekstra werk" behandel word, en waar na aanleiding van o.a. 'n ander beslissing, nl. *Watson v O'Beirne* , 7 Up. Can. Q.B. 345, die volgende verskyn:

F "The contract work, therefore, may be so greatly altered that the work actually done cannot be regarded as done under it at all. Thus in *Thorn v London Corporation* , Lord CAIRNS said:

'If it is the kind of additional work contemplated by the contract, he (i.e. the contractor) must be paid for it and will be paid for it according to the prices regulated by the contract.... If the additional or varied work is so peculiar, so unexpected and so different from what any G person reckoned or calculated upon, it may not be within the contract at all, and he could either refuse to go on or claim to be paid upon a *quantum meruit* .'

Again, in *Pepper v Burland* Lord KENYON said:

'If a man contracts to work by a certain plan, and that plan is so entirely abandoned that it is impossible to trace the contract, and to what part of it the work shall be applied, in such a case the workman shall be permitted to charge for the whole work done by measure and H value, as if no contract at all had ever been made.'

It is seldom, however, that it is possible to contend that a contract for building or engineering work is so changed as to entitle the contractor to recover payment otherwise than in accordance with the contract, unless and until some stand is taken by the contractor in the matter. The continued execution of the works without protest under the terms of the contract, as, for example, the application for and the receipt of payment from time to time upon the certificate of the engineer or architect, will render it difficult for a contractor to contend that the contract has no application to the work executed so as to entitle him to payment on a *quantum meruit* ."
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Die Verhoorhof het bevind dat die items genoem in skedule B toevoegings en ontwerpveranderings was van werk wat in die oorspronklike kontrak beoog is en dat die aard van die veranderings nie so ingrypend was dat die partye dit nie beoog het nie. Hierdie bevinding van die Verhoorhof kan, veral in die A lig van die relevante klousules van die kontrak, m.i. nie as verkeerd beskou word nie.

Namens eiser is in die alternatief betoog dat weens die bewoording van klousule 49 die kontrak outomaties verval het toe dit na voltooiing geblyk het dat die 20 persent grens oorskry is. In hierdie verband word staat gemaak op die woorde in klousule 49 (i) *(e)* :

"The engineer shall make any variation... and shall have B power to order the contractor to do and the contractor shall do any of the following... *(e)* Execute any additional work of any kind necessary for the completion of the works, and no such variation shall in any way vitiate or invalidate the contract, provided the total contract amount be not thereby increased or decreased in value more than 20 per cent and provided further that the total quantity of any subitem whose value in the schedule of quantities is in excess of 71/2 per cent of the total contract amount, be not increased or decreased by C more than 25 per cent."

Na my mening kon dit nooit die bedoeling van die partye gewees het nie dat die hele kontrak sou verval indien die 20 persent grens oorskry word, omdat so 'n bedoeling lynreg in stryd sou wees met die bedoeling van die partye soos uitgedruk in klousule 49 (4) en (5). Klaarblyklik is klousule 49 (1) 'n D onbeholpe saamgeflansde kopieering van wat in Engelse kontrakte in twee afsonderlike bepalings gevind word. Die Engelse standaardvorm van die algemene kontrakvoorwaardes is oënskynlik nie aan die Verhoorhof voorgelê nie. maar uit verskillende Engelse gewysdes blyk dit dat die klousule daarin wat handel oor die bevoegdheid van die ingenieur om veranderings te gelas, klousule 51 (1) is. Hierdie klousule E lees (in verkorte vorm, vir doeleindes van hierdie saak):

"The engineer shall make any variation of the form quality or quantity of the works... and shall have power to order the contractor to do and the contractor shall do any of the following:... and no such variation shall in any way vitiate or invalidate the contract but the value (if any) of all such variations shall be taken into account in ascertaining the amount of the contract price."

Sien o.a. *Tersons Ltd* . v *Stevenage Development Corporation* , F (1963) 2 Lloyds List Law Reports 333 (C.A.) te bl. 353. Na my mening teken die betrokke dele van klousule 49 van die onderhawige kontrak in hierdie verband dat die ingenieur veranderings mag gelas en dat die instruksies om veranderings aan te bring nie die kontrak laat verval nie. Indien die G veranderings die 20 persent grens oorskry, of die hoeveelheid van 'n sub-item, waarvan die waarde in die hoeveelheidslys meer is as 71/2 persent van die kontrakbedrag, met meer as 25 persent vermeerder of verminder word, kan die kontrakteur miskien weier om die veranderings aan te bring of hy kan ooreenkom met die werkgewer op watter basis hy die verdere veranderings sal H aanbring of hy kan die instruksies aanvaar en voortgaan met die veranderings en hom beroep op klousule 49 (4) indien hy dit nodig ag. Daar is geen outomatiese vernietiging van die kontrak nie en die appèl teen die bevel ten opsigte van die hoofeis kan nie slaag nie.

Gerieflikheidshalwe kan die alternatiewe eis F op hierdie stadium beoordeel word. In sy besonderhede van alternatiewe eis F het eiser beweer dat die ingenieur veranderings tot die oorspronklike kontrak gelas

het wat eiser uitgevoer het en wat meer as 20 persent van die totale kontrakbedrag oorskry het. Eiser het beweer dat hy as gevolg van die veranderings verlies gely het en dat dit die plig van die ingenieur was om redelike pryse vas te stel in A plek van die gespesifiseerde pryse. In die gewysigde smeekbede word gevra:

"An order declaring that the plaintiff is entitled to have new rates and/or prices fixed for all work executed by it under contract N.F.T. No. 12/66."

In hierdie Hof is aangedui dat die woorde

"new rates and/or prices fixed for all work executed by it under contract N.F.T. No. 12/66"

in die smeekbede eintlik vervang moet word deur die volgende woorde:

B "new rates and prices fixed in terms of clause 49 (4) of the contract",

en dat die verklarende bevel beperk behoort te wees tot items ten opsigte waarvan die eiser skade gely het. Ook is in hierdie Hof aangevoer dat, in die alternatief, eiser geregtig is op 'n bevel ten opsigte van die werk uiteengesit in skedule BB, wat C al die werk insluit wat nie onder eise A, B, C, D en E gedek word nie. Verweerder het hom beroep op klousule 49 (5) en ontken dat eiser die nodige kennisgewing gegee het

"before the commencement of the work or as soon thereafter as is practicable",

soos die klousule vereis. Namens eiser is betoog dat daar nie aan klousule 49 (5) voldoen hoef te word nie, in die alternatief, dat indien aan klousule 49 (5) voldoen moet word, D daar wel die nodige kennisgewing gegee is en daar is verwys na *(a)* 'n brief van 23 Desember 1969, *(b)* 'n memorandum met 'n eis vir ekstra koste, gedateer 21 Februarie 1970, *(c)* 'n brief van eiser se prokureurs gedateer 30 April 1971 en *(d)* 'n brief gedateer 16 Julie 1969. Laasgenoemde is nie in die pleitstukke genoem nie. Namens appellant is o.a. aan die hand gedoen dat E iets anders as 'n

opdrag van die ingenieur kan lei ("shall result") tot 'n oorskryding van die 20 persent grens genoem in klousule 49 (4), bv. wanneer die oorskryding die gevolg van groter of kleiner hoeveelhede is as wat in die hoeveelheidslys aangegee word of waar 'n opdrag gegee word wat geen sigwaarde het nie. Op grond hiervan is aan die hand gedoen dat daar 'n F uitkenbare opdrag van die ingenieur moet wees waarvan afgelei kan word dat die 20 persent grens oorskry is en dat die las op respondent rus om 'n uitkenbare opdrag te bewys as gevolg waarvan die 20 persent grens oorskry is. Wesenlik kom die hele betoog hierop neer dat dit nooit vasgestel kan word wanneer daar skade gely is nie totdat daar 'n finale opmeting van die hele werk is.

G Na my mening is die bepalings van klousule 49 (3), (4) en (5) redelik duidelik. Dit is van belang vir die eiser om te weet of die 20 persent grens oorskry gaan word deur 'n opdrag van die ingenieur, want dit affekteer sy regte onder die kontrak. Klousule 49 (3) het betrekking op bykomende werk gedoen of werk H wat weggelaat is en wat die kontrakbedrag vermeerder of verminder, en klousule 49 (4) bepaal dat indien veranderings lei tot 'n vermeerdering of vermindering van meer as 20 persent in die waarde van die totale kontrakbedrag, kan verlies of skade vergoed word op die manier daarin bepaal. Klousule 49 (5) bepaal egter uitdruklik dat geen vermeerdering van die kontrakbedrag kragtens subklousule (3) of tarief - of prysverandering kragtens subklousule (4) gemaak sal word nie tensy daar so spoedig doenlik na die datum van opdrag, en in die geval van bykomende werk vóór die begin
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van die werk of so spoedig doenlik daarna, skriftelik kennis gegee word *(a)* deur die kontrakteur aan die ingenieur van sy voorneme om ekstra betaling of 'n ander tarief te eis of, *(b)* deur die ingenieur aan die kontrakteur van sy voorneme om 'n tarief of prys, na gelang van die geval, te wysig. Dit skyn duidelik te wees dat onder *(a)* dit die bedoeling van die partye A was dat die ingenieur betyds op hoogte gestel moet word van enige eis deur die kontrakteur in verband met veranderings gelas deur die ingenieur, en dit is ook duidelik dat op daardie stadium besonderhede van die vordering van die kontrakteur nie gelewer hoef te word nie. Die kontrakteur moet alleen kennis B gee van sy voorneme om 'n eis in te stel.

Dit is gemene saak dat in Oktober 1968 'n vermeerdering plaasgevind het van meer as 25 persent ten opsigte van 'n sub-item waarna in die voorbehoudsbepaling van klousule 49 (1) verwys word, en ook dat ten minste in September 1969 dit bekend was dat die 20 persent grens van die kontrakbedrag oorskry is. C Dat die kontrakteur in die praktyk deur die maandelikse betaalsertifikate kan vasstel wanneer die 20 persent grens oorskry gaan word, skyn duidelik te wees, al sou die totale kontrakbedrag op daardie stadium onderworpe wees aan latere wysiging. Die doel van klousule 49 (5) is o.a. om die ingenieur in staat te stel om so spoedig doenlik, na kennisgewing van die kontrakteur, vas te stel of daar wel oorgegaan moet word tot D verandering van tariewe en pryse of toekenning van skadevergoeding op grond van veranderings aan die werk, of dat die prosedure gevolg moet word kragtens klousule 50 ten opsigte van ekstra werk. Dit skyn van die allergrootste belang te wees, beide vir die werkgewer en vir die kontrakteur, dat die masjinerie in werking gestel word in die loop van die werk en E dat dit so spoedig doenlik moet gebeur en nie op 'n stadium wanneer die kontrak voltooi is nie. Die Verhoorregter het hom, wat die betoog namens eiser betref, soos volg uitgedruk:

"The contract amount is known from the start, and although it might require some intense accounting work when you have many variation orders, it is not so difficult to find out during the F course of the work whether the 20 per cent has been reached. In actual fact it was known in October 1968 that one portion of the excess proviso (namely the 25 per cent on a particular item) had been satisfied, and it was known in September 1969 that the 20 per cent had been reached. Even thereafter there was a breathing space afforded by the words 'as soon as practicable'. Why the claims were not put forward at that stage remains unexplained. It seems as if the plaintiff did not understand the contract."

G Ek is nie oortuig dat hierdie konklusie verkeerd is nie.

Wat die betoog betref, dat sekere briewe gedateer 16 Julie 1969, 23 Desember 1969 en 30 April 1971, en die memorandum en eis gedateer 21 Februarie 1970, 'n voldoening aandui van die vereistes van klousule 49 (5) *(a)* , hoef hierdie stukke nie volledig behandel te word nie. Die brief van 16 Julie 1969 H handel oor verlenging van tyd en nie oor 'n eis gebaseer op die oorskryding van die 20 persent grens nie. Die brief van 23 Desember 1969 bevat die volgende kennisgewing:

"Further to the correspondence which passed between us in May of this year, we hereby give notice under clause 51 of the general conditions of contract that we intend to claim for the recovery of all our losses arising from the disruption which has prevailed throughout the whole of this contract."

Die eis gaan alleen oor ontwrigting. Die memorandum, gedateer 21 Februarie 1970, bevat 'n opsomming van die werk met veranderings
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wat gedoen is en hoe die finale kontrakbedrag verhoog sal word. Daarin word o.a. beweer in verband met wat eiser gedoen het:

"That they (d.w.s. eiser) have properly notified the engineer, in writing at the earliest practicable opportunity of their intention to works would alter."

Die brief van 30 April 1971 is geskryf vyf dae voor die uitreiking van die dagvaarding. Dit bevat o.a. die volgende twee paragrawe:

B "Our client has instructed us to call upon you, as we hereby do, to fix new rates or prices in respect of all work affected by variation or variations in terms of clauses 49 (3) and 49 (4) of the general conditions of the abovementioned contract.

This request is being made without prejudice to the contentions made in the main claim of the action which is about to be instituted by our client against the Transvaal Provincial C Administration. It is our client's intention to make use of the new rates and prices requested herein only in the event of its aforesaid main claim being dismissed."

Die Verhoorhof het die stukke kortliks ontleed en bevind dat nie een daarvan 'n voldoening aan die vereistes van klousule 49 (5) van die kontrak was nie. Hierdie bevinding is m.i. korrek.

Op hierdie stadium beoog ek om kortliks alternatiewe eise D en D E te noem en om alternatiewe eis A oor te laat staan tot die laaste.

Alternatiewe eis D is 'n eis gebaseer op die feit dat in 1967 die verweerder aan die eiser opdrag gegee het dat 'n gekwalifiseerde ingenieur teenwoordig moet wees by die voorspanning van sekere betonwerk. Die opdrag is uitgevoer. Dit word deur eiser beweer dat hierdie opdrag nie van so 'n aard is E dat dit 'n werk of metode van uitvoering is wat uitdruklik of by implikasie in die kontrak behels word nie. Die smeekbede lees:

"An order declaring:

(a) That the terms of the instruction referred to in paras. 1 and 3 of alternative claim D constituted work or a method of execution not described or implied in the said contract;

F *(b)* That it was implied that the defendant would pay to the plaintiff a fair and reasonable remuneration for carrying out the said instructions."

Klousules 406A - 1.2 en 1.3 van die spesifikasies lees soos volg:

"Prestressing methods

The method of prestressing to be used shall be optional with the contractor, subject to all requirements hereinafter specified.

Prior to casting any members to be prestressed, the contractor G shall submit to the engineer for approval complete details of the method, materials and equipment he proposes to use in the prestressing operations. Such details shall outline the method and sequence of stressing, complete specifications and details of the prestressing steel and anchoring devices proposed for use, anchoring stresses, type of enclosures and all other data pertaining to the prestressing operations, including the proposed arrangement of the prestressing units in the members.

H *Technical service*

Unless otherwise ordered by the engineer, the contractor shall certify to the engineer that a technician skilled in the approved prestressing method will be available to the contractor to give such aid and instruction in the use of the prestressing equipment and installation of materials as may be necessary to obtain required results."

Die tegniese diens waarna hierdie klousule 406A - 1.3 van die spesifikasies verwys, kan m.i. nie anders beskou word nie as deel van "die wyse" waarop die werk gedoen word. Indien die ingenieur opdrag

gee dat in 'n bepaalde geval in plaas van tegnici 'n gekwalifiseerde ingenieur beskikbaar moet wees om met die voorspanning hulp te verleen, tree hy m.i. op kragtens klousule 15 (1) van die algemene kontrakvoorwaardes waarvan die eerste deel lees:

"The contractor shall execute, complete and maintain the works in strict accordance with the contract to the satisfaction of A the engineer. The work shall be carried out under the supervision of the engineer who shall decide any and all questions which may arise as to the quality or acceptability of materials furnished and work performed, the manner of performance, the rate of progress and, if necessary the order of procedure of the work, the acceptable fulfilment of the

contract and the payment to be made and all other matters incidental to the contract; the generality of the last-mentioned provision not to be limited in any way by the B earlier provisions."

'n Uitdrukking soortgelyk aan "manner of performance", nl. "manner of execution", kom ook voor in klousule 45 waarin die eerste sin lees:

"The whole of the materials, plant and labour to be provided by the contractor under this contract, and the mode, manner and speed of execution and maintenance of the works are to be of a C kind, and conducted in manner approved of by the engineer."

Dit kan dus m.i. nie gesê word nie dat in die alternatiewe eis D die inhoud van die opdrag die soort werk, of 'n metode waarop die werk gedoen word, beoog wat nie in die kontrak uitdruklik of by implikasie verskyn nie. Die Verhoorregter het bevind dat weens die bepalings van klousule 51 die eiser nie ten opsigte D van hierdie eis kan slaag nie. Weens wat hierbo gesê is, is dit onnodig om tans op hierdie geskilpunt in te gaan.

Wat die alternatiewe eis E betref, word in die gewysigde smeekbede gevra:

"An order declaring:

(a) That the terms of the instructions referred to in E paras. 1 and 3 of alternative claim E constituted a method of execution not described or implied in the said contract;

(b) That it was implied that the defendant would pay to the plaintiff a fair and reasonable remuneration for carrying out the said instructions."

Dit gaan in hierdie opsig om alternatiewe eise E.1, E.3, E.5 en E.6 en die geskilpunte word deur die Verhoorregter soos volg opgesom:

"Claim E.1 relates to an instruction which caused the F redundancy of a handrailing. It had been ordered on instructions, and after it had been ordered there was an instruction from the resident engineer that it should be scrapped. The cost had been incurred, and it is contended that it could not be brought under additional expense or extra work. It is wasted expenditure because of the withdrawal of previously existing instructions.

Claim E.2 was abandoned, but claim E.3 was persisted in. It comes to this, that the bridge contractor intended to build the G substructure of the bridges and the capping beam all in one operation. Then came the instruction that before the capping beam and the deck were put on, the approach fills should be completed. These are ramps leading up to the bridge. When they were placed, it caused the columns which were already erected, to be buried. That necessitated additional excavation by hand, and it was then impossible to cast the capping beam into preconstructed shuttering. Concrete had to be poured on the fill which was already in position. That was a more difficult H operation than originally envisaged and generally increased the cost.

Claim E.4 is no longer in issue because it has been paid by the defendant.

Claim E.5 relates to the shape of the end blocks of bridges. There were instructions to make them in a certain shape, which cost more. The same applies to claim E.6, relating to the abutment curtain wall of bridge No. 2465. A more complicated and costly structure was required, but the concrete quantities decreased with the result that the plaintiff feels he was not properly remunerated."

Die Verhoorregter het verwys na klousule 50 (1) van die algemene kontrakvoorwaardes wat handel oor ekstra werk en waarin genoem
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word dat die ingenieur, indien hy dit nodig of wenslik vind, skriftelik opdrag kan gee dat bykomende of vervangende werk waarvoor daar geen toepaslike tariewe of pryse bestaan nie, as ekstra werk uitgevoer sal word. Die werk waarop eise E.1, E.3, A E.5 en E.6 gebaseer is, is m.i. klaarblyklik bykomende en vervangende werk wat ekstra koste veroorsaak het, maar die kontrak maak voorsiening hiervoor en die weiering van die Verhoorregter om die gevraagde bevel te verleen kan m.i. nie as verkeerd beskou word nie.

Die alternatiewe eis A word soos volg in die uitspraak van die Hof *a quo* uiteengesit:

B "This is the 'disruption' claim, arising from expenditure which the plaintiff was allegedly compelled to make in consequence of several variations.

In the form in which the prayer was eventually cast, toward the end of the proceedings, the plaintiff asks for -

(a) an order declaring that the contract contained certain implied terms, to be set out below; and

(b) an order declaring that the plaintiff will be entitled C to damages or reimbursement for additional expense should there have been a breach of any of the said implied terms.

The implied terms which are meant are these:

1. *(a)* Any drawings and/or instructions issued or given for the purpose of the execution of the work under the contract would be issued or given -

(i) at reasonable times;

D (ii) at such times as would not cause the plaintiff inconvenience, loss, damage expense or delay;

(iii) at such reasonable times during the progress of the work that the plaintiff could arrange or execute the works efficiently, to the best advantage of the parties and economically; and/or

(b) any drawings and/or instructions issued or given in terms of clauses 49 (1) and/or 49 (2) and/or 50 (1) of the general conditions of contract would be issued or given:

E (i) at reasonable times;

(ii) at such times as would not cause the plaintiff inconvenience, loss, damage, expense or delay;

(iii) at such reasonable times during the progress of the work that the plaintiff could arrange and execute the works efficiently, to the best advantage of the parties and economically; and/or

2. that drawings and instructions supplied to the F plaintiff would be accurate and unambiguous; and/or

3. that the defendant would pay to the plaintiff any additional expense which the plaintiff was occasioned.

Very full further particulars were supplied to elucidate these claims.

The defendant pleads to this in effect as follows:

1. There are no such implied terms, or, in the alternative -

2. if there are such implied terms, the plaintiff is G debarred from claiming damages for breach thereof because no time for compliance was fixed and plaintiff should first have placed defendant *in mora* , which plaintiff failed to do.

The parties have agreed, and recorded, that if the Court should find that the plaintiff can only succeed if there has been a proper placing *in mora* , then the claim would not yet fall away because the factual question would still have to be investigated as to whether there had been a placing *in mora* ."

H Die bewering in para. 2 van die besonderhede van eis, nl. dat daar 'n stilswyende bepaling in die ooreenkoms was dat die planne en opdragte akkuraat en ondubbelsinnig sou wees, word nie in volhard nie en vereis dus geen verdere aandag nie.

By die aanhoor van die appèl is ons meegedeel dat dit deurgaans die bedoeling was, en ook verstaan is, dat eise 1 *(a)* (i), (ii) en (iii) en ook die eise in 1 *(b)* (i), (ii) en (iii) in die alternatief gelees moet word, alhoewel die woord "or" nie tussen die sub-paragrawe (i) en (ii)

en (iii) verskyn nie. Dit het ook geblyk dat dit by hierdie eise in 1 *(a)* en *(b)* wesenlik gaan om 'n beslissing in verband met 1 *(a)* (i) en 1 *(b)* (i), nl. die stilswyende bepaling ten opsigte van "at reasonable times" en dat wat in 1 *(a)* (ii) en (iii) verskyn eintlik faktore is wat, saam met ander, oorweging A verdien wanneer beslis moet word of tekeninge en opdragte "at reasonable times" gegee is. Hoewel verweerder se advokaat toegegee het dat (i), (ii) en (iii) van eis 1 *(a)* en *(b)* in die alternatief beskou moet word, het die Verhoorregter dit nie so opgeneem nie. Dit blyk oorvloedig uit sy uitspraak dat hy 1 *(a)* en 1 *(b)* as geheel beskou het. Ek noem enkele voorbeelde:

"What the plaintiff asks me to lay down is this: It was implied B in the contract that the engineer would be ready with his plans at all times which would suit the contractor's convenience and would to him be the most profitable."

Ook die volgende:

"If the officious bystander of the above-quoted *Reigate* case (nl. *Reigate v The Union Manufacturing Co.* , 118 L.T. 483) had asked: 'But shouldn't you say that drawings and instructions C shall be furnished by the engineer at the time most convenient and profitable to the contractor.' There is only one answer which the defendant would have given, namely: 'Not on your life. What about the convenience of the engineer? After all, he is in complete charge of the work and can fix priorities.'"

Die gevolg is dat die Verhoorregter in sy uitspraak nie van die standpunt uitgegaan het dat die alternatiewe eis A wesenlik gaan oor die vraag of daar 'n stilswyende beding was dat D instruksies en tekeninge "at reasonable times" gegee moet word nie, in die lig van alle relevante omstandighede. 'n Verdere opmerking is nodig oor die gebruik van die woorde in eis 1 *(a)* (i) en *(b)* (i), nl., "at reasonable times". Dit wil voorkom asof hierdie woorde opsetlik gekies is met die oog op wat in 1 *(a)* (ii) en (iii) en in 1 *(b)* (ii) en (iii) verskyn en op die E oog, altans, dus nie die

werklike formule is van die stilswyende beding wat in hierdie Hof betoog is nie. En dit het aanleiding gegee tot die argument deur eiser se advokaat dat die woorde dieselfde betekenis het as "within a reasonable time" wat deur verweerder se advokaat ontken is. Wat die algemene benadering ten opsigte van die stilswyende beding betref, is ons na verskillende beslissings in ons reg asook in F die Engelse reg verwys. Dit is onnodig om hulle almal te noem. Miskien kan eerste verwys word na 'n beslissing wat in latere beslissings aangehaal is, nl. dié in *Liquidator of Booysen's Race Club, Ltd* . v. *Burton* , 1910 T.P.D. 597, waar WESSELS, R., op bl. 601 o.a. sê:

"The Court must be very slow to imply a term into a contract G which the parties did not place there. It must not make contracts for people; it must only imply a term when it is quite clear that the parties intended that term to be understood in the contract, and that they would not have contracted otherwise than on the basis of the term. When the Court should and when it should not imply a term is excellently set out in the case of *Hamlyn & Co* . v *Wood & Co.* , (1891) 2 Q.B.D. 488. I read from p. 491; Lord ESHER says: 'I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, H unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned.'"

Wessels, *Law of Contract in South Africa* , 2de uitg., bl. 70, verwys o.a. na bogenoemde uitspraak en gaan verder deur te verwys na die verskil tussen die wesenlike "tacit contract", die stilswyende beding,
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wat afgelei word van omstandighede, en die "constructive or implied contract" wat nie ontstaan deur 'n stilswyende ooreenkoms nie maar wat deur die reg opgelê word. Hy verwys na *Voet* , 44.7.5, en haal aan uit die notas van *Hilliger* op A Donellus (band 3, col. 1149: *De Jure Civili* , 14.16.11, n. 3). Hierdie Hof het die verskil tussen 'n "stilswyende beding" en 'n sgn. "inbegrepe beding" beklemtoon in die meerderheidsuitspraak in *Minister van Landbou-Tegniese Dienste v Scholtz* , 1971 (3) SA 188 op bl. 197, waar verwys word na Salmond, *Principles of the Law of Contracts* , 2de uitg. (1945) op bl. 24, 36 en 37. Hierdie skrywer sê o.a. op bl. 24:

B "An implied contract is a contract fictitiously implied by the law, not a real contract which is left to be inferred from the conduct of the parties instead of from their words. A contract so manifested by conduct only may be conveniently distinguished as a *tacit* contract, thus leaving the word 'implied' free for exclusive use in its proper sense as meaning implied in law."

En op bl. 36:

C "The implied terms of a contract, meaning thereby the terms devised and implied by the law itself and imported into the contract as supplementary to the express terms which have their origin the actual intention of the parties, must be distinguished from those terms inferred as a matter of fact to have been actually, though tacitly, declared or indicated by the party or parties whose declared will constitutes the contract. These latter terms may be described as *tacit* terms. It is regrettable that the word 'implied' is ambiguous and is frequently applied not only to terms implied in law but also to D terms implied in fact, i.e., tacit terms."

Op bl. 37 verklaar hy o.a.:

"... an implied term represents an intention which they (the contracting parties) are deemed by the law to have possessed and which is added by the law to the express contract accordingly".

Die wesenlike stilswyende beding (in teenstelling met die E "inbegrepe" beding) het as grondliggende oorsaak die werklike bedoeling van die partye wat nie uitgedruk is nie of 'n veronderstelde bedoeling. Dit sou afhang van die bewysmateriaal of die stilswyende beding 'n onuitgedrukte bestaande bedoeling of 'n veronderstelde bedoeling was. In 'n eenvoudige geval, waar 'n persoon onderneem om teen bepaalde vergoeding sekere F werk te verrig en geen datum van voltooiing van die werk deur die partye bepaal word nie, sou dit as 'n inbegrepe beding aanvaar word dat die werk binne redelike tyd vanaf datum van kontraksluiting voltooi sal word. Dit is 'n verpligting deur die reg opgelê omdat, soos De Wet en Yeats in hul *Kontraktereg en Handelsreg* , 3de uitg., bl. 107, verklaar:

G "Versuim om op tyd te presteer is net soseer onbehoorlike uitvoering van 'n verpligting as die lewering van 'n gebrekkige saak of die slordige uitvoering van 'n stuk werk."

Namens eiser word aangevoer dat op hierdie grondslag, nl. die reg, en uit hoofde van die uitdruklike bepalings van die kontrak daar stilswyende bepalings, soos in die eis beskryf, in H die kontrak ingelees moet word en dat inderdaad "at a reasonable time" presies dieselfde betekenis het as "within a reasonable time".

In die algemeen moet aanvaar word dat onder die kontrak daar sekere verpligtinge rus op die ingenieur om van tyd tot tyd instruksies uit te reik en tekeninge aan eiser te lewer. Dit word nie uitdruklik in die kontrak gemeld nie maar dit blyk implisiet in die kontrak te wees weens die inhoud van sekere klousules (kyk bv. klousules 1 (7) en 1 (10) en 13 van die algemene kontrakvoorwaardes, *supra*) en ook weens die aard van

die kontrak en wat die partye voorsien het wat sou moes gebeur. Weens die aard en duur van die kontrak het die partye bv. voorsien dat daar honderde instruksies, skriftelik of mondeling, en tientalle tekeninge deur die ingenieur of resident-ingenieur aan eiser gegee sou word. 'n Situasie sou in A bepaalde omstandighede kon ontstaan waaronder daar 'n plig op die ingenieur gerus het om 'n instruksie uit te reik om die eiser in staat te stel om werk te doen ter voltooiing van die kontrak. In so 'n geval sou die reg 'n "inbegrepe beding" kon veronderstel waarvolgens die verweerder verplig sou wees om binne redelike tyd (met inagneming van moontlike *in mora*-plasing) die instruksie te gee. Dieselfde sou geld indien daar op 'n sekere tydstip 'n plig op die verweerder sou rus om B 'n tekening te lewer.

Die vraag mag ontstaan of so 'n soort beding (wat van toepassing sal wees op alle instruksies van die ingenieur en op alle tekeninge wat gelewer moet word) in die huidige kontrak as 'n alomvattende bepaling geïmpliseer kan word, gesien sekere C uitdruklike bepalings van die kontrak aangaande die magte en bevoegdhede van die ingenieur waarna ek hierna sal verwys. Maar dit is in elk geval nie die beding wat eiser beweer nie. Hy probeer die twee gelyk te stel

deur aan te voer dat in die samehang van die eis die woorde "at reasonable times" dieselfde betekenis het as "within reasonable times". Dit kan egter nie so wees nie, want hoewel hierdie submissie gedoen word, het D eiser se advokaat uitdruklik aangevoer dat "at reasonable times" beteken

"at reasonable times regard being had to the progress from time to time of the work to be performed under the contract".

Hy het ook aangevoer dat bv. planne en besonderhede aan die eiser verskaf moet word met inagneming van die posisie wat heers ten opsigte van die vordering van die werk, m.a.w. dit E gaan nie oor 'n blote versuim om 'n instruksie uit te vaardig of 'n tekening te lewer nie, maar oor die vereiste om in elke geval die vorderingstadium van die werk, vir sover dit eiser betref, in aanmerking te neem. Nog sterker word die posisie gestel wanneer namens eiser uitdruklik aangevoer is dat wanneer die woorde "at reasonable times" vertolk moet word, oorweging F o.a. aan die volgende gegee moet word -

"such times as would not cause the plaintiff inconvenience, loss, damage, expense or delay";

en

"at such... times during the progress of the works that the plaintiff could arrange or execute the works efficiently, to G the best advantage of the parties and economically".

Hieruit volg dat die eiser se saak is dat die versweë beding 'n beding is waarvolgens die ingenieur by die uitreiking van elke instruksie en elke tekening rekening moet hou met die feitlike posisie van die eiser vir sover dit sy gerief, voordeel en onkoste betref.

Hierdie soort beding sou m.i. direk in stryd wees met die H bepalings van klousule 15 (1),*supra*, waarin die partye o.a. uitdruklik ooreengekom het dat:

"... the engineer shall decide... the manner of performance, the rate of progress and, if necessary the order of procedure of the work".

Daarby word in die klousule 'n reg van appèl toegeken aan die eiser soos volg:

"The contractor may appeal to the employer against a decision given by the engineer. The contractor shall lodge such an appeal in writing with the director.

Should the contractor not lodge an appeal in writing with the director against the decision of the engineer within ten (10) days of receiving such a decision, the decision shall be final."

Hierdie bepaling dui daarop dat die partye verwag het dat eiser ontevrede mag wees met instruksies deur die ingenieur uitgereik A omdat dit hom nie mag pas nie, maar dat hy by appèl die beslissing van die direkteur as finaal aanvaar.

So 'n beding sou m.i. nie te rym wees met wat in klousule 15 (2) verskyn nie. Dit lui:

"Notwithstanding anything to the contrary contained in this contract, the employer shall at any time have full power to B amend any certificate issued by the engineer or may issue any instruction in writing to the contractor and for this purpose he may open up, review, revise,

amend or cancel in writing any decision, opinion, direction or valuation given by the engineer and every such amended certificate or instruction shall be binding on the contractor and shall prevail over any contrary certificate or instruction which may have been given by the engineer."

Ook die bepalings van klousule 49, *supra* , wat handel oor C wysigings toevoegings en weglatings ontken m.i. die bestaansreg van 'n beding soos deur eiser beweer. Dit is duidelik dat ingevolge hierdie artikel wysigings gelas kan word te eniger tyd en afgesien van die vorderingstadium van die werk. Hierby moet opgemerk word dat, wat klousules 49 en 50 betref, 'n opdrag om te wysig genoem in eis A.1 *(b)* luidens die D beskrywing van die woord "kontrak" vanself 'n opdrag sou wees onder die kontrak genoem in eis A.1 *(a)* .

Dat in die samehang van die onderhawige kontrak die woorde "at a reasonable time" 'n ander betekenis kan hê as "within a reasonable time" kan aangetoon word deur 'n voorbeeld van wat sou kon gebeur. Volgens die kontrak sou eiser twee brûe op E vasgestelde plekke bou indien die werkgewer dit verlang het. Indien die ingenieur 'n maand na die aanvang van die kontrak besluit het dat die brûe gebou moet word en die ingenieur die nodige instruksies en tekeninge kort daarna sou gegee het, sou hy die instruksies en tekeninge binne redelike tyd gegee het, maar as dit op 'n tydstip was wat ongerieflik en onekonomies F vir die eiser was, sou die instruksie, wat betref die eiser, nie "at a reasonable time" gegee gewees het nie. Daar is baie ander soortgelyke voorbeelde wat genoem kan word, en wat daarop dui dat met die oog op die bewoording van die onderhawige kontrak en die regte wat aan die ingenieur toegeken is, daar 'n verskil in betekenis is tussen die woorde "at a reasonable G time" en "within a reasonable time". Die begrip "at reasonable times" is dus ook 'n aanduiding van ander pligte wat op die ingenieur sou rus as die plig om 'n instruksie uit te reik of 'n tekening te lewer "within a reasonable time". Na my mening was die Verhoorhof korrek in sy bevinding dat wat die eiser as 'n versweë beding beweer, weens die uitdruklike bepalings van H die kontrak nie kan bestaan nie. Teen die einde van sy argument het die eiser se advokaat aan die hand gedoen dat hy geregtig is, onder die eis om alternatiewe regshulp, op 'n bevel wat 'n versweë beding erken wat anders bewoord sou kon word as wat die bestaande bewoording in die pleitstukke is, nl. deur vervanging van die woorde in 1 *(a)* (i) "at reasonable times" deur die woorde "within reasonable times". Hierdie submissie was nie gebaseer op 'n erkenning dat daar in hierdie saak 'n verskil in betekenis is tussen die twee uitdrukkings nie. Hy het ook nie die begrip "within reasonable

times" gepresiseer om die versweë beding behoorlik te formuleer nie. Die Verhoorregter het die eis getipeer as 'n

> "disruption claim arising from expenditure which the plaintiff was allegedly compelled to make in consequence of several variations".

By afwesigheid van 'n behoorlik omskrewe bewoording van 'n versweë beding wat, nieteenstaande die uitdruklike bepalings A van die kontrak, erken moet word, is dit nie die taak van hierdie Hof nie om op hierdie stadium uit te werk watter bewoording so 'n beding moet hê om sowel eiser tevrede te stel as om te voldoen aan die vereistes wat gestel word voordat die beding erken kan word.

B Weens bogenoemde redes moet die appèl afgewys word met koste, insluitende dié van twee advokate.

BOTHA, A.R. en MULLER, A.R., het met die bogemelde uitspraak saamgestem.

JANSEN, A.R.: Ek stem met die Waarnemende HOOFREGTER saam - C behalwe, met eerbied, dat ek my, wat alternatiewe eis A betref, by CORBETT, WN. A.R., skaar. Wesenlik val my beskouing oor hierdie eis met sy uiteensetting saam, maar my benadering verskil ietwat.

Die stilswyende bepalings waarop die appellant aanspraak maak D is o.a.:

" *(a)* Any drawings and/or instructions issued or given for the purpose of the execution of the work under the contract would be issued or given:

(i) at reasonable times;

.....

and/or

(b) Any drawing and/or instructions issued or given in E terms of clauses 49 (1) and/or 49 (2) and/or 50 (1) of the general conditions of contract would be issued or given:

(i) at reasonable times;

....."

(Die weglatings is alternatiewe - so moet hulle altans gelees word - wat nie nou ter sake is nie).

Die aanwesigheid van *(b)* , as bykomend of alternatief, toon F duidelik dat die tekeninge en instruksies in *(a)* bedoel, nie dié is wat neerkom op òf 'n wysiging van die werke ingevolge klousule 49 (1) of 49 (2) nie òf 'n opdrag om addisionele of vervangende werk te doen ingevolge klousule 50 (1) nie; en *(a)* slaan dus op ander tekeninge of instruksies,

"for the purpose of the execution of the work under the G contract".

Hieronder sal wel hoofsaaklik dié tekeninge en instruksies val waarvoor klousule 13 (3) voorsiening maak:

"The engineer shall have full power and authority to supply to the contractor from time to time during the progress of the works such further drawings and instructions as shall be necessary for the purpose of the proper and adequate execution H and maintenance of the works, and the contractor shall carry out and be bound by the same."

Dié subklousule voorsien duidelik die moontlikheid dat verdere tekeninge en instruksies nodig sal wees

"for the purpose of the proper and adequate execution and maintenance of the works",

en verleen derhalwe die bevoegdheid aan die ingenieur om dié te verstrek. As egter sodanige tekeninge en instruksies inderdaad nodig is, of word, vloei dit as regsgevolg voort uit die wederkerigheid van die kontrak

dat die ingenieur dan nie net bevoeg nie, maar ook verplig moet wees om sodanige tekeninge en instruksies te verskaf, ten einde die kontrakteur in staat te stel om sy deel van die kontrak behoorlik na te kom (De Wet en Yeats, *Kontraktereg* , 3de uitg., A bl. 128; en vgl. *Koenig v Johnson & Co. Ltd.* , 1935 AD 262 te bl. 274). Die aard van sodanige verpligting skep die moontlikheid van negatiewe wanprestasie; maar aangesien die vereistes vir *mora* nie nou ter sake is nie, sou volstaan kon word met die algemene stelling dat volgens regsreël sodanige verpligting binne redelike tyd nagekom moet word - bereken vanaf die tydstip waarop die verpligting ontstaan. Dit sou B beskou kon word as die oomblik waarop dit kenbaar is dat 'n bepaalde tekening of instruksie benodig sal word. Dit kan reeds die geval by ondertekening van die kontrak wees; dit kan ook eers later blyk, bv. waar die nodigheid as gevolg van 'n opdrag tot wysiging ontstaan. Hoe lank 'n "redelike" termyn sal C wees, moet noodwendig van al die omstandighede afhang: die belange van beide partye, die stand en vordering van die werk, ens.

Of mens nou die genoemde regsimplikasies as 'n "implied term" wil bestempel, skyn 'n kwessie van terminologie te wees, en ek stem met my Kollega CORBETT saam dat in die onderhawige geval, in die besondere samehang, daar wesenlik slegs 'n taalkundige verskil is tussen "within a reasonable time" en "at reasonable D times". Ek is dit dan ook met hom eens dat dit gepas sou wees om as gevolg van die versoek om alternatiewe regshulp die stilswyende beding waarop die appellant aanspraak maak, in dié lig te lees. Maar selfs dan is die omskrywing in *(a)* nie presies in ooreenstemming met die uiteensetting hierbo van die regsimplikasies nie: dit strek verder as die "as shall be E necessary" van klousule 13 (3) en moontlik kan dit ook gelees word as behelsende meer as tekeninge en instruksies ingevolge daardie klousule. Gesien egter die houding van die respondent, wat deurgaans enige verpligting hoegenaamd ontken het om enige tekeninge of instruksies binne redelike tyd te verskaf, kom dit my voor dat die appellant se omskrywing hoogstens op 'n *plus F petitio* neerkom, en dat dit nie onvanpas sou wees om 'n verklarende bevel te gee op grondslag van die regsimplikasies hierbo genoem t.o.v. klousule 13 (3) nie.

M.i. kom die formulering van die stilswyende beding deur my Kollega CORBETT wesenlik hierop neer. Weliswaar word daarin nie verwys na klousule 13 (3) nie, maar dit het noodwendig G hoofsaaklik daarop betrekking. Opdragte ter wysiging (klousule 49 (1) en (2)) of om addisionele of vervangende werk te doen (klousule 50 (1)) val self nie daaronder nie (in teenstelling met enige verdere instruksies, en tekeninge, wat nodig mag wees ten einde die kontrakteur in staat te stel om die wysiging, addisionele of vervangende werk uit te voer). Ook 'n H "beslissing" van die ingenieur, ingevolge klousule 15 (1), of 'n "instruksie" van die werkgewer ingevolge klousule 15 (2), sou nie onder die omskrywing tuisgebring kan word nie: gesien die bepalings t.o.v. moontlike appèl is hierdie hoegenaamd nie gevalle van gewone instruksies nie. So ook sou verdere gevalle waar 'n "instruksie" nie soseer deur die kontrakteur benodig word vir die behoorlike nakoming van sy kontrak nie, maar berus op 'n diskresionêre besluit van òf ingenieur òf werkgewer (vgl. o.a. klousules 18, 39), nie deur daardie formulering getref word nie.
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Wat klousule 51 betref, is ek ook van mening dat dit nie op eise om skadevergoeding op grond van wanprestasie van toepassing is nie.

Ek stem saam dat die gepaste bevel betreffende die alternatiewe eis A moet wees soos deur CORBETT, WN. A.R., gestel.

CORBETT, WN. A.R.: The salient facts of this appeal are set A forth in the judgment of the ACTING CHIEF JUSTICE. Accordingly, I shall refrain from repeating them except in so far as it may be necessary to do so in order to give completeness to my reasoning. As regards appellant's main claim and alternative claims B, C, D, E and F, I respectfully concur in the dismissal of the appeal, for the reasons stated by B RUMPFF, A.C.J. As far as alternative claim A is concerned, I have come to the conclusion, for the reasons which follow, that the appeal should be allowed and that an appropriate declaratory order should be made.

In dealing with claim A I propose to consider, firstly, whether any term as to the timeous delivery of drawings and giving of C instructions by the engineer is to be implied in the contract between the parties and, if so, what that term is; secondly, if such a terms is to be implied, whether, having regard to the formulation of claim A in appellant's particulars of claim, as amended, the appellant is entitled to the relief which it claims; and, thirdly, the general effect and relevance of D clause 51 of the general conditions of contract.

In legal parlance the expression "implied term" is an ambiguous one in that it is often used, without discrimination, to denote two, possibly three, distinct concepts. In the first place, it is used to describe an unexpressed provision of the contract which the law imports therein, generally as a matter of course, E without reference to the actual intention of the parties. The intention of the parties is not totally ignored. Such a term is not normally implied if it is in conflict with the express provisions of the contract. On the other hand, it does not originate in the contractual *consensus:* it is imposed by the law from without. Indeed, terms are often implied by law in F cases where it is by no means clear that the parties would have agreed to incorporate them in their contract. Ready examples of such terms implied by law are to be found in the law of sale, e.g. the seller's implied guarantee or warranty against defects; in the law of lease the similar implied undertakings by the lessor as to quiet enjoyment and absence of defects; and in the law of negotiable instruments the G engagements of drawer, acceptor and endorser, as imported by secs. 52 and 53 of the Bills of Exchange Act, 34 of 1964. Such implied terms may derive from the common law, trade usage or custom, or from statute. In a sense "implied term" is, in this context, a misnomer in that in content it simply represents a legal duty (giving rise to a correlative right) imposed by law, H unless excluded by the parties, in the case of certain classes of contracts. It is a *naturalium* of the contract in question.

In the second place, "implied term" is used to denote an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the Court, in truth, declares the whole contract entered into

by the parties. In this connection the concept, common intention of the parties, comprehends, it would seem, not only the actual intention but also an imputed intention. In other words, the Court implies not only terms which the parties must actually have had in mind but did not trouble to express but A also terms which the parties, whether or not they actually had them in mind, would have expressed if the question, or the situation requiring the term, had been drawn to their attention (see *Dahl v Nelson, Donkin and Co* . (1881) 6 App. Cas. 38 at p. 59; *Techni-Pak Sales (Pty.) Ltd* . v *Hall* , 1968 (3) SA 231 (W) at pp. 236 - 7; Chitty, *Contracts* , 23rd ed., p. 313; B Weeramantry, *The Law of Contracts*, p. 573; but cf. *Trollope & Colls v N.W. Hospital Board* , (1973) 2 All E.R. 260 at pp. 267 - 8). This same general concept would appear to underline the following *dictum* of VAN DEN HEEVER, J.A., in *Van der Merwe v Viljoen* , 1953 (1) SA 60 (AD) at p. 65:

"Die uitdrukking 'stilswyende beding' dui reeds daarop dat dit iets moet C wees wat die partye bedoel het, *of geag moet word te bedoel het* , maar waaraan hulle geen uiting gegee het nie."

(My underlining).

The distinction between terms implied by law and implied terms based upon the actual or imputed intention of the parties to the contract was emphasized in *Minister van Landbou-Tegniese Dienste v Scholtz* , 1971 (3) SA 188 (AD) at p. 197, and D reference was there made to Salmond and Williams, *Contracts* , 2nd ed., pp. 24, 36 and 37, in which the expression "implied term" is used to denote the former and the expression "tacit term" to describe the latter. (See also the remarks of Lord WRIGHT in *Luxor Ltd* . v *Cooper* , 1941 A.C. 108 at p. 137; and those of Lord TUCKER in *Lister v Romford Ice Co. Ltd.* , E 1957 A.C. 555 at p. 594). Other writers on the law of contract have drawn attention to the same distinction (see Chitty, *Contracts* , 23rd ed., pp. 313 - 4; Treital, *The Law of Contract* , 3rd ed., pp. 161 - 170; Weeramantry, *The Law of Contracts* , pp. 571 - 4; Kerr, *Principles of the Law of Contract* , pp. 106 - 120; Dr. Glanville Williams in 61 *L.Q.R.* , F pp. 401 - 4) and various expressions have been suggested in order to distinguish the two concepts involved. It is not a matter of great moment what terminology is adopted but in the interests of continuity I shall use the expressions "implied term" and "tacit term", as defined by *Salmond and Williams* .

The significance of this distinction is not merely academic. The implied term (in the above-defined sense) is essentially a G standardised one, amounting to a rule of law which the Court will apply unless validly excluded by the contract itself. While it may have originated partly in the contractual intention, often other factors, such as legal policy, will have contributed to its creation. The tacit term, on the other hand, is a provision which must be found, if it is to be found at H all, in the unexpressed intention of the parties. Factors which might fail to exclude an implied term might nevertheless negative the inference of a tacit term. (See *Treital* , p. 166). The Court does not readily import a tacit term. It cannot make contracts for people; nor can it supplement the agreement of the parties merely because it might be reasonable to do so. Before it can imply a tacit term the Court must be satisfied, upon a consideration in a reasonable and businesslike manner of the terms of the contract and the admissible evidence of surrounding circumstances, that

an implication necessarily arises that the parties intended to contract on the basis of the suggested term. (See *Mullin (Pty.) Ltd* . v *Benade Ltd.* , 1952 (1) SA 211 (AD) at pp. 214 - 5, and the authorities there cited; *S.A. Mutual Aid Society v Cape Town Chamber of Commerce* , 1962 (1) SA 598 (AD)). The A practical test to be applied - and one which has been consistently approved and adopted in this Court - is that formulated by SCRUTTON, L.J., in the well-known case of *Reigate v Union Manufacturing Co.* , 118 L.T. 479 at p. 483:

"You must only imply a term if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that you can be confident that if at the time the B contract was being negotiated someone had said to the parties: 'What will happen in such a case?' they would have both replied: 'Of course, so-and-so. We did not trouble to say that; it is too clear.'"

This is often referred to as the "bystander test".

Mindful of these principles I now turn to the contract in the present case. In terms thereof appellant undertook to execute and complete the work in accordance with, *inter alia* , the C drawings; and these are defined in the general conditions of contract to mean -

"the plans, sections, elevations, or exact reproductions thereof, approved by the engineer and attached to this contract, showing the location, character, dimensions and details of the work to be done, and also any working drawings, detail drawings or sketches supplied from time to time by the engineer for the guidance of the contractor".

Clause 13(3) of the general conditions of contract further D provides that -

"The engineer shall have full power and authority to supply to the contractor from time to time during the progress of the works such further drawings and instructions as shall be necessary for the purpose of the proper and adequate execution and maintenance of the works, and the contractor shall carry out and be bound by the same."

It is clear from these provisions that, in executing the works, E the appellant was obliged to adhere strictly to the drawings and instructions issued to it by the engineer appointed by the employer, i.e. respondent; and that it was contemplated that, in addition to the drawings attached to the contract at the time of signature thereof, there would also be further drawings and instructions issued to appellant by the engineer from time F to time during the progress of the work. The evidence, too, indicates that in an engineering contract of this magnitude it would normally be the practice for much of the detail and many of the working drawings to be furnished to the contractor, as and when required (in the sense of G being needed by him), during the execution of the work.

A perusal of the contractual documents fails to reveal any express obligation on the part of the employer or the engineer to furnish the necessary drawings and instructions. The closest which the contract comes to doing so are the provisions of clause 13 (3), quoted above. These confer upon the engineer a "full power and authority" to supply such drawings and H instructions; but

that is something very different from imposing upon him an obligation to do so. If there is such an obligation, then it must necessarily be an implied one.

In the case of *Mackay v Dick* , (1881) 6 App. Cas. 251, Lord BLACKBURN is reported to have said (at p. 263):

"I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of

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the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances."

With reference to this general principle it was stated by Viscount SIMON, in *Luxor Ltd* . v *Cooper* , 1941 A.C. 108 at p. 118, that -

A "And, generally speaking, where B is employed by A to do a piece of work which requires A's co-operation (e.g. to paint A's portrait), it is implied that the necessary co-operation will be forthcoming (e.g. A will give sittings to the artist)."

(See also Lord ROMER in the same case, at p. 154; *Mona Oil Equipment v Rhodesia Railways* , (1949) 2 All E.R. 1014 at p. B 1017; Chitty, *Contracts* , p. 316). It would seem, however, that this principle only applies where the party requiring the co-operation is himself under an obligation to make the performance for which the co-operation is necessary (see *Luxor Ltd* . v *Cooper, supra* , at pp. 128, 148). Although the authorities to which I have referred are decisions of the English Courts, this principle is, in my view, of general C validity (see Corbin, *Contracts* , paras. 570 and 770; Stoljar, *Prevention and Co-operation in the Law of Contract* , 31 Can. Bar Review 231; Burrows, "Contractual Co-operation and the Implied Term", (1968) 31 *Modern Law Review* , 390). In fact in our own Courts there are a number of decisions giving effect to the D general principle of contractual co-operation by way of an implied term. (See *Soeker v Colonial Government* , 3 Buch. A.C. 207 - but cf. *McIlraith v Pretoria Municipality* , 1912 T.P.D. 1027, and *Union Government (Minister of Railways)* v *Faux Ltd.* , 1916 AD 105; *Phillips v Bulawayo Market and Offices Co.* , 16 S.C. 432; *Cureton and Masters v Central South* E *African Railways* , 1904 T.H. 194; *Truter v Hancke* , 1923 CPD 43, *Adams v North* , 1933 CPD 100; cf. *Koenig v Johnson & Co. Ltd.* , 1935 AD 262; see also De Wet and Yeats, *Kontraktereg* , 3rd ed., pp. 128, 135).

It seems to me, moreover, that this principle is very pertinent in the present situation. The contractor, appellant, is under an obligation to execute the work which is the subject-matter F of the contract. Indeed, in terms of the contract it is bound to do so within a stipulated period of 30 months and in terms of clause 46 of the general conditions of contract liquidated damages are payable by appellant in the event of it failing to complete the work within the period prescribed or any extension G thereof allowed in terms of the contract. The work is required to be executed in accordance with the drawings annexed to the contract and with the drawings and instructions supplied from time to time thereafter by the engineer. As I have indicated, it was clearly

contemplated by the parties that much of the necessary information required by the appellant in order to H execute the work would be furnished by the engineer in the form of drawings and instructions thus issued from time to time during the progress of the work (see definition of "drawings" and clause 13 (3) quoted above). The co-operation of the engineer in the supply of such drawings and instructions was, therefore, necessary for the carrying out of the contract and, in my view, it follows that there was implied in the contract an obligation on the part of the engineer to furnish these drawings and instructions.

Having established the existence of the implied obligation, it is now
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necessary to give it content and in this respect the time for its performance is of primary importance. The general rule of law is that contractual obligations for the performance of which no definite time is specified are enforceable forthwith; but the rule is subject to the qualification that performance cannot be demanded unreasonably so as to defeat the objects of A the contract or to allow an insufficient time for compliance. Thus, for example, in a contract of loan the borrower is, in the absence of express provision, allowed a reasonable time for repayment to enable him to have some real benefit from the transaction. (See generally *Mackay v Naylor* , 1917 T.P.D. 533 at pp. 537 - 8; *Fluxman v Britain* , 1941 AD 273 at p. 294; B Nel v Cloete, 1972 (2) SA 150 (AD) at p. 169). Applying this general rule to the facts of this case, I am of the opinion that the obligation of the engineer to furnish drawings and instructions, though *prima facie* exigible forthwith (cf. *Mackay v Naylor, supra* at p. 539), could validly be performed within a reasonable time of the conclusion C of the contract. It was manifestly the intention of the parties that not all such drawings, etc. would be required to be furnished forthwith and an insistence upon this would tend to defeat the objects of the contract. The determination of a reasonable time in any particular instance would depend upon a number of factors such as (the list is not intended to be in any way exhaustive) the contractor's programme of work and D where the work to which the drawing or instruction related fitted into that programme; the actual progress of the work; the need of the contractor for reasonable advance knowledge of the content of the drawing or the nature of the instruction in order to make the necessary preparations and do the necessary pre-planning; the knowledge of the engineer as to the E contractor's requirements; and whether the drawing or instruction related to the work as originally planned or to a variation thereof.

It is not strictly necessary to classify this implied obligation but I am inclined to think that it is an implied term in that it represents the product of the two basic F principles of law, outlined above, which bring about the existence of the obligation and determine the time for its performance. In any event, however, I consider that all the requirements for the importation of a tacit term are also satisfied. I am convinced that such an obligation must necessarily be implied in order to give business efficacy to the contract and that the bystander test would have elicited a G unanimous and affirmative response from the contracting parties. The untenable situation which could arise were there no such implication is well illustrated, I think, by a submission made by respondent's counsel. He was referred to the schedule (exh. 27) relating to the sub-contractor's time-table for the construction of the various bridges included in the H contract work. This was made available

by appellant to the engineer in pursuance of clause 16 of the general conditions of contract which requires the contractor to submit a programme of work. The schedule indicates with precision when it is planned to commence work on each of the structures in question. In answer to a query from the Court counsel contended that there was no obligation on the engineer to furnish, for instance, bridge plans timeously and that an unjustified delay in this regard for several months would not
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constitute a breach of contract or otherwise entitle the contractor to any form of relief other than possibly an extension of the contract period in terms of clause 43 of the contract. I cannot believe that this can be the position or that it represents the intention of the contracting parties.

A An important consideration relevant to this implied obligation is the fact that in terms of the contract - as in the case of most contracts of this nature - the engineer is empowered to order variations of the work. This power is contained in clause 49 of the general conditions of contract, sub-clause (1) of which reads:

"The engineer shall make any variation of the form, quality or B quantity of the works or part thereof that may in his opinion be necessary, and for that purpose, or if for any other reason it shall be in his opinion desirable, shall have power to order the contractor to do and the contractor shall do any of the following:

(a) Increase or decrease the quantity of any work included in the contract,

(b) Omit any such work,

(c) Change the character or quality or kind of any such work,

C *(d)* Change the levels, lines, position and dimensions of any part of the works, and

(e) Execute additional work of any kind necessary for the completion of the works, and no such variation shall in any way vitiate or invalidate the contract, provided the total contract amount be not thereby increased or decreased in value more than twenty (20) per cent and provided further that the total quantity D of any sub-item whose value in the schedule of quantities is in excess of 71/2 per cent of the total contract amount, be not thereby increased or decreased by more than 25 per cent."

The power thus conferred upon the engineer is of wide ambit and no time limits are expressly set for its exercise. It was not suggested that any time limitation in regard to the ordering of variations can be read into clause 49. Any implied obligation E imposed upon the engineer in regard to the timeous delivery of drawings and instructions must, consequently, be read subject to the untrammelled power of the engineer to order variations of the work under clause 49. This does not mean, however, that the implied obligation would have no application to variations. F On the contrary, once the engineer has ordered a variation, there arises, by implication, a duty to deliver to the contractor drawings and instructions reasonably required to execute the variation or the work as varied and this must be done within a reasonable time.

It is true that under the contract, particularly in terms of clause 15 (1), the engineer is given extensive powers of supervision and control over the execution of the contract. This sub-clause reads:

G "The contractor shall execute, complete and maintain the works in strict accordance with the contract to the satisfaction of the engineer. The work shall be carried out under the supervision of the engineer who shall decide any and all questions which may arise as to the quality or acceptability of materials furnished and work performed, the manner of performance, the rate of progress and, if necessary the order of procedure of the work, the acceptable fulfilment of the contract and the payment to be made and all other H matters incidental to the contract; the generality of the lastmentioned provision not to be limited in any way by the earlier provisions. The contractor may appeal to the employer against a decision given by the engineer. The contractor shall lodge such an appeal in writing with the Director. Should the contractor not lodge an appeal in writing with the Director against the decision of the engineer within ten (10) days of receiving such a decision, the decision shall be final."

With this must be read clause 60 (A) which provides for the procedure to be followed in an appeal to the employer under clause 15 (1) and stipulates, *inter alia* , that the employer shall settle -
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"All disputes and differences of any kind whatsoever, including the interpretation of this agreement and the extent of the rights and duties of the parties thereunder, arising out of or in connection with the contract or the carrying out of the works..."

I do not read these provisions as signifying an intention to exclude or negative the implied term relating to the timeous A delivery of drawings and instructions; nor, indeed, if the obligation be regarded as a tacit term, do I discern any inconsistency between it and these provisions. While clause 15 (1) certainly does empower and oblige the engineer, *inter alia* , to decide any question which may arise as to the manner of performance, the rate of progress and, if necessary, the order of procedure of the work and other matters incidental to the B contract, in my view, this would not entitle him to delay the issue of plans and instructions beyond a reasonable time. Thus, for example, were the engineer, having for no good reason delayed in the issue of a necessary drawing to the detriment of the contractor and the progress of the work, to rely upon clause 15 (1) and contend that he had decided to delay the C drawing in accordance with his powers under this clause, then, in my opinion, he would be answered by the points: (i) that the semi-arbitral function allocated to him under this clause to decide questions was not intended to give him *carte blanche* to act in disregard of his obligations to the contractor and to his employer; and (ii) that, in any event, it would probably D not constitute a *bona fide* exercise of his powers.

In so far as clause 15 (1), read with clause 60 (4), may be construed as constituting an arbitral or quasi-arbitral procedure, I might add that it has not been contended by respondent that this in any way affects claim A or the declaration sought thereunder by appellant.

For the aforegoing reasons I am of the view that the contract E in this case must be read as being subject to an implied (possibly tacit) term in regard to the timeous supply of drawings and instructions and I would formulate the term as follows:
The engineer is obliged to issue such drawings and give such instructions to the contractor as may be reasonably F required by the contractor in order to enable him to execute the works, as

defined in the general conditions of the contract. Each such drawing and instruction shall be issued or given, as the case may be, within a reasonable time after the obligation arises.

In amplification and explanation of this formulation, I would G point out:

(1) It covers both drawings and instructions required to execute the works as originally designed and those required to execute variation orders. This follows from the contractual definition of "works", which reads -

"'works' means all the works set out in the special H provisions, the specification and the schedule of quantities, and any such work as is explained and described or implied by the drawings, including all extra work and variations and omissions ordered in accordance with these conditions".

(2) In the case of the former obligation to furnish drawings and instructions, it arose when the contract was entered into but performance thereof would have to be made only within a reasonable time thereafter. In the case of the latter, the obligation would

arise only when the variation order is given and would have to be performed within a reasonable time thereafter.

(3) The obligation relates only to drawings and instructions reasonably required by the contractor to A execute the works. In other words, looking at the matter from the contractor's point of view, it refers to drawings and instructions without which - or without the timeous delivery of which - the contractor would not be able to proceed with the work. It has no application to other instructions (or even drawings) which the engineer might issue in the exercise of his general power to supervise and control B the execution of the work or, as has been indicated, to variation orders themselves.

This conclusion appears to be broadly in conformity with decisions reached in the English and American Courts. In the early English case of *Roberts v Bury Improvement Commissioners* C (1870) L.R. 5 C.P. 310 it was stated (by BLACKBURN and MELLOR, JJ.) with reference to a building contract for the erection of certain buildings, which contract, incidentally, gave the architect the power to make variations, as follows (at pp. 325 - 6):

"The contractor also, from the nature of the works, could not begin his work until the commissioners and their architect had D supplied plans and set out the land and given the necessary particulars; and therefore, in the absence of any express stipulation on the subject, there would be implied a contract on the part of the commissioners to do their part within a reasonable time; and, if they broke that implied contract, the contractor would have a cause of action against them for any damages he might sustain..."

(See also *McAlpine v Lanarkshire and Ayrshire Railway Co*. (1889) 17R (Ct. of Sess.) 113; *Neodox Ltd*. v *Borough of* E *Swinton and Pendlebury* (1958) Q.B.D. (unreported); *Price Ltd*. v *Milner* (1968) 206 E.G., 133; Hudson, *Building and Engineering Contracts*, 10th ed., pp. 135 - 7, 322 - 6; Emden and Watson, *Building Contracts and Practice*, 6th ed., p. 108; *Halsbury*, 4th ed., para. 1156). In the *Neodox* case, *supra*, DIPLOCK, J., having referred to various provisions in the F contract relating to variations by the engineer, claims for extra work, the contract

drawings and the general authority of the engineer (many of which are similar to the corresponding provisions of the present contract), stated:

"It is clear from these clauses which I have read that to give business efficacy to the contract, details and instructions G necessary for the execution of the works must be given by the engineer from time to time in the course of the contract and must be given in a reasonable time. In giving such instructions, the engineer is acting as agent for his principals, the corporation, and if he fails to give such instructions within a reasonable time, the corporation are liable in damages for breach of contract."

Clearly, each case must to some extent depend upon its own H facts, but running clearly through these decisions is the theme that, generally speaking, where under a building contract the work is to be executed partly in accordance with drawings and instructions furnished while the work is in progress, the engineer, or architect (acting as the agent of the employer) is impliedly obliged, in the absence of express provision to that effect, to provide these drawings and instructions within a reasonable time.

In the *American Jurisprudence* , vol. 13, sec. 50, p. 53, it is stated:
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"In the absence of contractual provisions to the contrary, a building or construction contractor has a right to recover damages resulting from a delay caused by the default of the contractee."

In a footnote to this sentence the following appears:

"The owner in a building or construction contract is, in the absence of a contrary stipulation in the contract, liable on A the principle of an implied covenant if unreasonable delay, that is, delay which might reasonably have been avoided in carrying out his part of the contract, is proved."

Various references in the footnotes to the *American Law Reports* , vol. 115, pp. 70 *et seq.* , show that one of the matters covered by such an implied covenant is delay by the owner in the furnishing of drawings. Another passage in the same section B of *American Jurisprudence* is of considerable relevance:

"It has been generally held, although there is some authority to the contrary, that a contractual provision allowing a building or construction contractor an extension of time in which to complete the work, in case of delay caused by the contractee, does not preclude the contractor from recovering damages resulting from the delay caused by a default of the C contractee. Moreover, provisions of a building or construction contract authorising the contractee or its agent to suspend the work under certain conditions, without compensation to the contractor other than an extension of time in which to complete the work, have been held not to preclude the contractor from recovering damages resulting from the delay caused by a default of the contractee."

Corbin, ibid. , in dealing with implied promises not to prevent or hinder, as applied to building contracts, cites in a D footnote an extract from a judgment, which in turn quotes from a judgment of Judge ALVEY in the case of *Black v Woodrow and Richardson* , 39 Md. 215. Portion of this latter quotation reads:

"It not unfrequently occurs, that contracts on their face and by their express terms appear to be obligatory on one party only, but in such cases, if it be manifest that it was the E intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative obligation on the other party, such corresponding and correlative obligation will be implied. Thus, if the act to be done by the party binding himself can only be done upon a corresponding act being done or allowed by the other party, an obligation by the latter to do or allow to be done the act or things necessary for the completion of the F contract will be necessarily implied."

This exhibits a close correlation with the decisions of the English Courts to which reference has already been made.

Finally, on this aspect of the matter, I would emphasize that the question of *mora* , i.e., whether under our law it would be necessary for the contractor to place the engineer (and owner) G in *mora* before being entitled to claim damages for the non-timeous supply of drawings or instructions, is left open. Counsel were agreed that it was an issue which did not arise for decision at this stage of the proceedings.

Having come to the conclusion that a term in the form enunciated above is to be implied in the contract between the parties, I come now to the question as to whether the appellant H is entitled to relief under claim A. This claim underwent certain amendment but in its final form it sought a declaration that the contract contained certain implied terms and that appellant would be entitled to damages or reimbursement for additional expense should there have been a breach thereof, and alternative relief. The implied terms pleaded were as follows:

"1. The contract contained implied terms in the following respects, namely that:

(a) Any drawings and/or instructions issued or given for the purpose of the execution of the work under the contract would be issued or given:

(i) at reasonable times;

(ii) at such times as would not cause the plaintiff inconvenience, loss, damage, expense or delay;

(iii) at such reasonable times during the progress A of the work that the plaintiff could arrange and execute the works efficiently, to the best advantage of the parties and economically; and/or

(b) Any drawings and/or instructions issued or given in terms of clauses 49 (1) and/or 49 (2) and/or 50 (1) of the general conditions of contract would be issued or given:

(i) at reasonable times;

(ii) at such times as would not cause the B plaintiff inconvenience, loss, damage, expense or delay;

(iii) at such reasonable times during the progress of the work that the plaintiff could arrange and execute the works efficiently, to the best advantage of the parties and economically."

Originally there were certain other implied terms pleaded but these were not pursued on appeal. In addition appellant's counsel explained that sub-paras. (i), (ii) and (iii) of paras. C 1 *(a)* and 1

(b) were intended to be stated in the alternative (respondent accepted that this was the position); and he, appellant's counsel, further indicated that he was only pressing for a declaration in terms of 1 *(a)* (i) and 1 *(b)* (i).

The implied term, or terms, pleaded by appellant differ from that which has been found to exist in two important respects:

D (i) they speak of the drawings and instructions being issued or given "at reasonable times", as opposed to "within a reasonable time"; and

(ii) it is not clear from the formulation in para above whether it is alleged that the orders for E variations under clause 49 (1) and for extra work under clause 50 (1) are themselves included in the implied term alleged; if it is then the allegation goes beyond the implied term which has been found to exist.

It is also not clear to me precisely what the pleader intended by the phrase "at reasonable times". In their ordinary connotation and having regard to the context in which they F appear, however, I do not think that there is any substantial difference between the meaning of the words "at reasonable times" and the words "within a reasonable time", provided that the same criteria are used in each case in determining what is reasonable. The delivery of a drawing or the giving of an instruction is not a continuing transaction: it takes place G instantly and once and for all. It has been held that the engineer's obligation is to deliver or give "within a reasonable time" after the obligation arose. That, in effect, means that he must do so at any moment within that period of reasonable time. If he has done so, then he can as easily be said to have delivered "at a reasonable time". Correspondingly, H if he has delivered after the lapse of a reasonable time, he could equally be said to have delivered at a time which was not reasonable. The real enquiry in all such cases is whether there has been a timeous delivery of the drawing; and whether one expresses the obligation in terms of a duty to deliver *within a period* or *at a time* , each being reasonable in the circumstances, does not seem to make much difference, provided that identical criteria are used (as indeed they can be) for determining the reasonableness of the time or period, as the case may be.

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In view of the differences between the implied term found and that pleaded, appellant cannot be granted a declaration as the content of the implied term in the form claimed. In the course of his argument in reply, appellant's counsel did, however, submit that he was entitled to a declaration, under the prayer A for alternative relief, to the effect that drawings and instructions had to be furnished "within a reasonable time". Bearing in mind the substantial correspondence of the concepts "within a reasonable time" and "at reasonable times", I am of the opinion that an appropriate declaration can be made in terms of the prayer for alternative relief. I feel reinforced in this conclusion by the attitude adopted by the respondent on B appeal and, apparently, before the Court *a quo* . Its attitude was, primarily, that the contract is not susceptible of any such implied (or tacit) term. In the alternative, it was submitted on appeal that at the most an obligation to deliver "within a reasonable time" could be implied; that there were fundamental differences between "within a reasonable time" and C "at reasonable times"; and that, accordingly, appellant was not entitled to any relief. In substance, I have found against

respondent on these submissions and on the real issue between the parties, viz. whether or not a term is to be implied, the finding has been in favour of the appellant. In the circumstances I do not think that the Court should non-suit the D appellant merely because of the manner in which the implied term has been pleaded. As regards the further declaration claimed, viz. that appellant would be entitled to damages or reimbursement for additional expense should there have been a breach of the implied term, appellant's counsel did not appear to press for this in argument. In any event, it seems to me E that, inasmuch as such a right to damages is directly linked to the question of *mora* , which has been left open, it would not be appropriate at this stage to make any order in respect of this further declaration claimed.

Although the trial Court did not appear to appreciate that the contract did not contain any express obligation whatever in F regard to the delivery of drawings and instructions, it seems to have accepted that the engineer was under a duty to deliver his drawings within a reasonable time. The Court was under the impression, however, that the allegations contained in sub-paras. (i), (ii) and (iii) of paras. 1 *(a)* and 1 *(b)* constituted, in each instance, one, indivisible term (this is G not surprising, having regard to the form of the pleading); and upon that basis it held that no declaration in appellant's favour could be made inasmuch as sub-paras. (ii) and (iii) could not be substantiated. Since it is common cause that sub-paras. (i), (ii) and (iii) are intended to be read in the alternative, the trial Court's reasoning on this point falls H away.

The trial Court also placed some emphasis, in this connection, upon clauses 43 and 51 of the general conditions of contract. Clause 43 makes provision for the extension of the time for the completion of the work -

"should the amount of extra or additional work of any kind, or any other special circumstances of any kind whatsoever which may occur, be such as fairly to entitle the contractor (thereto)...".

Accepting that delays caused by the non-timeous delivery of drawings

or instructions by the engineer would amount to a special circumstance warranting an extension of time, I do not think that this clause derogates from, or prevents the implication of, an obligation to deliver timeously. (See in this connection the second passage from *American Jurisprudence* cited above). An A extension of time would relieve the contractor of only one of the deleterious consequences of such delays, viz. difficulties in completing the work by the original date: it would not compensate him for the many losses which he might suffer from such delay.

This brings me to the third main question to be considered: the B general effect and relevance of clause 51. This clause reads as follows:

"51. *Claims.*

The contractor shall send to the engineer once in every month an account giving full and detailed particulars of all claims for any additional expense to which the contractor may consider himself entitled and of all extra work ordered by the engineer which he has executed during the preceding month, and no claim for payment for any such work will be considered which has not

C been included in such particuars. Provided always that the engineer shall be entitled to authorise payment to be made for any such work, notwithstanding the contractor's failure to comply with this condition, if the contractor has at the earliest practicable opportunity notified the engineer that he intends to make a claim for such work."

This clause has been raised against appellant's claim A in two ways:
D *(a)* on the ground that it negatives the implied term averred by appellant; and
(b) as a condition precedent (which has not been satisfied) to any claim for a breach of the implied term averred by appellant.

As regards point *(a)* it was held by the trial Court that clause 51 gave the contractor sufficient relief for disruption costs E and losses consequential upon delays caused by the non-timeous delivery of drawings and instructions and that consequently there was no room for an implied obligation in this sphere. With respect, this reasoning appears to me to beg the question because it assumes that the non-timeous delivery of drawings F etc. would entitle the contractor to make a claim for additional expense caused thereby. Moreover, it assigns to clause 51 a role, viz. that of creating rights to payment, which, in my opinion, it was never intended to play. As I read clause 51, it merely regulates the manner in which the contractor is to lay claim to certain types of payment, the right to which is conferred elsewhere in the contract. As far as extra work is concerned, the right to payment therefor is G created by clauses 49 (3) and 50. The origin of the right to additional expense is not so obvious because the meaning of "additional expense" is not explicitly indicated but it seems probable that in this connection the following clauses, *inter alia* , are of relevance: clause 12, which provides for an H additional sum payable to the contractor, on the certificate of the engineer, in respect of unanticipated expenses incurred by reason of ambiguity or discrepancy in the contract documents; clause 19 (2) relating to compensation payable to the contractor for work done in rectifying an error in the setting out of the works due to incorrect data supplied by the engineer; clause 24, relating to the reimbursement of the contractor for certain fees, rates and taxes paid by him in respect of the site; clause 25, which provides that certain work done in the disposal of fossils, coins, articles of value or antiquity, or remains of a

geological or archaeological interest discovered on the site shall be done at the expense of the employer; clause 37 (2), which deals with expense incurred in uncovering and reinstating, for examination by the engineer, work which is found to be in accordance with the contract; clause 39, which A gives the contractor, under certain circumstances, the right to claim from the employer the extra cost incurred in giving effect to an instruction by the engineer that the work be suspended; clause 41 (1), relating to expense incurred by the contractor as a result of delay on the part of the employer in giving timeous possession of the site; and clause 48 (5), relating to the cost of work done in searching for the cause of B any defect or fault, which is not the responsibility of the contractor. My conclusion, therefore, is that clause 51 does not create any independent right to unspecified "additional expense" but merely prescribes a claims procedure in respect of expenses, the right to which is conferred elsewhere, and in respect of extra work. It is of some interest C to note that a similar conclusion was reached by SACHS, J., in the English

case of *Blackford and Sons (Calne) Ltd* . v *Borough of Christchurch* , (1962) 1 Ll. L. Rep. 349, with reference to the almost identically worded clause 52 (4) of the standard form of the Institute of Civil Engineers. It follows that clause 51 of the present contract cannot be read as giving the contractor relief, *inter alia* , for expenses or losses sustained D as a result of the non-timeous delivery of drawings or instructions, and that the clause, accordingly, does not necessarily negative the existence of the implied term averred by the appellant.

Turning to point *(b)* above, the contention that clause 51 constitutes a condition precedent to any claim by appellant for damages resulting from a breach of the alleged implied term as E to the timeous delivery of drawings and instructions rests upon three interpretative steps. These are:

(i) That the words in clause 51 - "... no claim for payment for any such work will be considered which has not been included in such particulars" - predicate the total extinction of the contractor's claim to be F remunerated for such work, subject to the power of the engineer, in certain circumstances, to relax this penalty (see proviso to clause 51).

(ii) That the words "... claim for payment for any such work" in the above-quoted passage from clause 51 refer not only to claims for extra work (as defined in G clause 50) but also to claims for additional expense.

(iii) That a claim for damages for delay in supplying drawings and instructions, in contravention of the implied term alleged by appellant, would constitute such a claim for additional expense.

I have strong reservations about steps (i) and (ii). I incline H to the view that clause 51 was intended not to create an absolute bar to the contractor's right of payment but merely a monthly claims procedure. (*Cf* . the views of WILLMER, L.J., and UPJOHN, L.J., in *Terson's Ltd* . v *Stevenage Development Corporation* , (1963) 2 Ll. L. Rep. 333 at pp. 355 - 6 and 363 - 4). Admittedly, the wording of the clause gives rise to difficulties but, on the other hand, there are strong arguments in favour of a restrictive interpretation. Thus, for example, it is provided in clause

50 that where extra work has been ordered in writing by the engineer the parties may agree upon a lump sum payment in respect thereof. This is one of certain alternative methods of payment. Clause 49 (3) requires the engineer to determine the A amount to be added to the contract amount in respect, *inter alia* , of extra work. I have some difficulty in interpreting clause 51 as resulting in the contractor being deprived of remuneration for extra work in the form of, say, a lump sum and the automatic deduction of this amount from the contract amount (it having been previously added thereto in terms of clause 49 (3)) merely because the contractor may fail to include his B claim for this in a particular monthly account. One wonders, too, what would happen if the execution of extra work, for which a lump sum payment was determined, were spread over several months?

I am equally dubious about the contention that the words "claim for payment for any such work" can be construed as referring to C claims for "additional expense". Grammatically the phrase "such work" (which, incidentally, is repeated in the proviso) would appear to refer to the only

"work" previously mentioned in the clause, viz. extra work. To hold that it also refers to "additional expense" because additional expense may sometimes D (but not always) result from additional work, involves a measure of linguistic leap-frogging, not warranted, in my view, by the language of the clause or the context generally.

It is not necessary, however, to express a final view upon these matters because I am satisfied that the third interpretative step is illfounded. Whatever the true scope of clause 51 may be, it seems to me that, reading the clause in E its context, it was intended to relate to claims by the contractor for certain amounts to which he had become entitled in terms of the contract. This is the whole scheme of the series of provisions contained in clauses 49 to 51 and 54. Damages for breach of contract, regulated essentially by the common law, fall into a very different category. Had the F parties intended to include such damages as part of the subject-matter of clause 51 one would have expected a specific mention thereof. Moreover, this interpretation would postulate the contractor sending in to the engineer a monthly account of damages for breach of contract, with full and detailed particulars thereof, including, presumably, in a case such as the present one, all the relevant allegations as to the G engineer's failure to furnish drawings and/or instructions and as to the damaging consequences thereof. It is apparently the duty of the engineer to scrutinise and check claims under clause 51. What would his function be in regard to such a claim for damages? Would he be required to decide upon the reasonableness or otherwise of his actions; whether he was H responsible for breach of contract or not? These considerations persuade me that while clause 51 might effectively operate as a control over claims for authorised additional work, it would be wholly inappropriate as a form of machinery for processing such a claim for damages. Finally, it would often be exceedingly difficult, if not impossible, for a contractor to formulate a monthly statement of a claim for damages for delay. Such a claim can be a matter of some complexity (see *Hudson, ibid.* , pp. 596 - 8) and would normally be incapable of computation until the completion of

the contract. Certainly, it would not usually be amenable to monthly statements of account.

I conclude, accordingly, that clause 51 has no application to a claim for damages for breach of contract by the employer and would, therefore, not affect appellant's alternative claim A.

For these reasons I would hold that the appeal succeeds in so A far as it relates to alternative claim A and that the judgment of the Court *a quo* on this claim be altered to one declaring, in terms of the prayer for alternative relief, that the contract between the parties contained the following implied term:

"The engineer is obliged to issue such drawings and give such B instructions to the contractor as may be reasonably required by the contractor in order to enable him to execute the works, as defined in the general conditions of contract. Each such drawing and instruction shall be issued or given, as the case may be, within a reasonable time after the obligation arises."

The effect of the granting of this limited relief upon the costs in the Court *a quo* and upon appeal are matters upon which C further argument would be required.

Appellant se Prokureurs: *Lannon en Tindall* , Pretoria; *S. & V. A. Rosendorff, Venter en Brink* , Bloemfontein. Respondent se Prokureurs: *Staatsprokureurs* , Pretoria en Bloemfontein.

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