

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter of:-

CGEE ALSTHOM EQUIPEMENTS ET ENTERPRISES
ELECTRIQUES, SOUTH AFRICAN DIVISION appellant

and

GKN SANKEY (PROPRIETARY) LIMITED respondent

CORAM: CORBETT, VILJOEN, et BOTHA, JJA, NICHOLAS et
NESTADT, AJJA.

Dates of hearing: 25 and 26 August 1986.

Date of judgment: 25 September 1986

J U D G M E N T

CORBETT, JA:

The respondent in this matter sued appellant
in the Witwatersrand Local Division for damages for
breach of contract in the sum of R113 947,05. After

/ a long.....

a long and tortuous trial the trial Judge (MARGO J) gave judgment for the respondent in an amount of R86 687,60, together with costs of suit (save for the costs incurred in a certain interlocutory proceeding). With the leave of the Court a quo appellant appeals to this Court against the whole of the judgment and order of the trial Court, apart from the order as to the costs of the aforementioned interlocutory proceeding.

In broad outline the facts are as follows.

The appellant is a company incorporated in France, which carries on business in South Africa. The contract in issue is connected with the construction of the Koeberg nuclear power station near Cape Town. The main contract for the construction of the entire power station was awarded by the Electricity Supply Commission ("Escom") to a consortium of four French companies. Each member of the consortium undertook responsibility for a particular aspect

/ of.....

of the work. The company responsible for the supply of, inter alia, the electrical equipment was Alsthom Atlantique, which is a major shareholder in the appellant. By arrangement between them (apparently by way of a sub-contract) the appellant undertook to carry out the electrical work which was the responsibility of Alsthom Atlantique. Part of this work consisted of the supply and installation of about 20 000 electrical cables, totalling 1 200 kms in length, and the support system for these cables. The support system, as designed, consisted of steel cable trays which, when fitted together and installed, would provide a continuous running platform for the cables; of steel cantilever arms upon which the trays would rest; of vertical steel hangers to which the cantilever arms would be attached; and of a headplate (usually to be bolted to the ceiling of the building in which the system was situated), to which headplate the hanger was to be attached. Certain of the cable trays were to be

/ "cable ladders".....

"cable ladders", consisting of long parallel side rails joined together by rungs, similar to the normal ladder; others known as "solid base trays", were to have metal sheets instead of rungs between the side rails.

Appellant decided to employ a sub-contractor to fabricate and supply the cable trays and other components of the electrical support system for the power station. It received the names of potential suppliers, including that of the respondent, a company engaged in the manufacture of steel metal components, including supportive systems for electrical reticulation. It initially approached respondent in November 1978 for a quotation, "giving best conditions of price and time delivery", precise quantities to be defined later. Respondent was given a cable trays technical specification and a specification for a quality assurance programme and was also asked to complete and return a quality assurance questionnaire. Respondent submitted a prelimi-

/ nary quotation.....

nary quotation and returned the questionnaire duly completed.

Thereafter followed protracted negotiations.

Appellant's officials visited respondent's factory and various meetings between appellant's officials and respondent's officials took place. Many letters and telexes were exchanged. An important factor in the design and construction of the power station, in all its features, was the capacity to withstand the shock of a seismic disturbance. This applied specifically to the cable support system. Another factor which had to be considered in regard to the cable support system was its capacity to sustain the physical loads imposed by the cables themselves, which varied between 40 mm and 60 mm in thickness. All this entailed investigation and report from time to time by expert consultants. Tests had to be conducted. The investigations and tests resulted in various revisions of the specification and drawings and of the quality assurance and quality control

/ programmes.....

programmes. A further factor of importance was the fact that, since the power station was located at the coast, metal structures were particularly liable to corrosion. This placed emphasis upon the need for a suitable protective finish for the components of the cable support system.

On 31 January 1979 respondent submitted a further quotation for the cable ladders only; and this was followed by a general quotation on 15 February 1979. Thereafter there ensued lengthy negotiations and exchanges, mainly in regard to the matters described above. Eventually on 15 June 1979 respondent submitted what I shall call its "tender". This was handed to Mr J F Cohou, the deputy local manager of appellant's operation in South Africa, by Mr E A Lovell, the manager of respondent's engineering services division, on 18 June 1979. On 20 June 1979 respondent forwarded to appellant an addendum to its tender, in which it gave

/ certain.....

certain additional prices for items not included in its tender. On 25 June 1979, under circumstances which I shall detail later, appellant sent to respondent a telex on the subject of the Koeberg nuclear power station in which it was stated, inter alia —

"..... we have pleasure in informing you that the order for the above has been awarded to yourselves."

Thereafter negotiations and discussions between the parties continued into early August. Matters which figured prominently in these negotiations and discussions were the grade and quality of steel to be used on the contract, finishes, quality assurance and quality control, a delivery programme, packing specifications, the dimensions of certain of the cable ladder components and a document, referred to as Exh. 2D, which set forth at length and in considerable detail appellant's contractual requirements as to general purchasing conditions and as to commercial and

/ administrative.....

administrative conditions, and appellant's updated technical specification. The negotiations culminated in a series of meetings between representatives of appellant and respondent in the second week of August. It is common cause that the purpose of all these continued negotiations was to settle the terms of a formal contract to be signed by the parties. Certain of the terms proposed by appellant for this formal contract were not acceptable to respondent. The negotiations broke down. On 16 August appellant sent to respondent an ultimatum: unless respondent advised in writing that it was prepared to accept the terms proposed by appellant "all negotiations in connection with the proposed contract" would immediately be terminated. Respondent replied that it already had a valid contract with appellant. This in turn was denied by appellant. No acceptance of all appellant's proposed terms was eventually forthcoming. In the meantime appellant had also been negotiating with Brownbuilt Metal

Sections, a division of Dorbyl Limited ("Brownbuilt")
for the fabrication and supply of the cable support system
in question and on 22 August 1979 a contract awarding the
work to Brownbuilt was signed.

Broadly speaking, it is respondent's case that
appellant's telex of 25 June 1979 constituted an acceptance
of its tender, as modified by the addendum of 20 June 1979;
that such acceptance brought about a binding contract for
the fabrication and supply of the cable support system; and
that appellant's conduct in August 1979, including its a-
ward of the contract to Brownbuilt, amounted to a repu-
diation of its contract with respondent. Hence respondent's
claim in the Court a quo for damages for breach of contract,
such damages being computed on the basis of the profit that
respondent would have made on the contract had it been per-
mitted to execute it. Appellant's case, on the other hand,
is that the telex of 25 June 1979 did not result in the

/ conclusion.....

conclusion of a contract, mainly because at that stage there were a number of matters, vital or material to the contract, which were being negotiated by the parties and upon which no final agreement had been reached. The parties were thus still negotiating and had not arrived at a enforceable agreement. Appellant does not dispute that if a contract such as that alleged by respondent had been concluded, it was repudiated by appellant, although this was initially put in issue on the pleadings. On the pleadings appellant also put in issue whether respondent suffered damage as a result of the repudiation of the alleged contract and the quantum of damages claimed.

I have referred to the proceedings in the Court below as being lengthy and tortuous. In summary what happened was this. When the trial opened before MARGO J respondent's counsel made application in terms of Rule of Court 33(4) for an order that the issues as to

/ whether.....

whether or not the parties/^{had}concluded a contract as alleged by the respondent and the alleged repudiation, be tried first and that hearing of the issues concerning damages be stayed pending decision of the former issues. Despite strenuous resistance by appellant's counsel, the application was granted and the trial proceeded on the contractual issues. At the end of a fairly lengthy hearing, during which both parties presented evidence, MARGO J gave a ruling to the effect that respondent had succeeded in establishing a contract in terms of its tender and a repudiation thereof. In dealing with an argument that no contract had been concluded because the shape of the ladder rungs had not been finally settled at the time when appellant sent the telex of 25 June, the trial Judge stated that this point fell away —

".... because no rungs were included in the quotation. The rungs were left to be agreed upon as an extra item."

/It

It is now common cause that this finding was erroneous. While the shape of the rungs may not have been settled as at 25 June, there is no question that the tender (or quotation, as the trial Judge called it) did include rungs. Rungs are an essential component of a cable ladder: without rungs there can be no ladder. The finding nevertheless placed respondent in a dilemma when the trial was resumed on the issues relating to damages. Its claim for damages, which basically represented the difference between the contract price and the estimated cost of producing the contract goods, was founded on the premise that the tender included the rungs; i.e. that the contract price incorporated a charge for rungs and that the estimated production costs also assumed that the rungs were part of the contract. Respondent could, therefore, not proceed with its damages claim as originally formulated without risking an adverse judgment because its claim did not conform to

/ the.....

the Court's ruling as to the content of the contract. In other words, by reason of the Court's ruling the profit on the rungs could no longer be claimed as part of respondent's damages. On the other hand, the respondent believed the Court's finding in regard to the rungs to be unsound; but this could only be corrected on appeal and at that stage no appeal could be lodged. In the end respondent chose to re-formulate its damages claim by omitting the rungs. Since the tender gave no separate price for the rungs, this entailed placing a notional "price" thereon and reducing the contract price accordingly. In addition the estimate of the cost of production had to be revised so as to omit any charge for the rungs.

At the resumed hearing before MARGO J respondent applied to amend the further particulars to its particulars of claim so as to give effect to this revised basis for claiming damages and for a consequential reduction in the

/ quantum.....

quantum claimed to the sum of R86 687,60. This application for amendment was opposed by appellant, but granted by the trial Judge. Appellant asked for further particulars to the respondent's further particulars, as amended. These were furnished. Appellant then gave notice in terms of Rule of Court 23(1) that respondent's particulars of claim, read with the further particulars as amended, were vague and embarrassing and invited respondent to remove the cause of complaint. This respondent did not do and then appellant took exception to respondent's particulars of claim, as amended, on the ground that they were vague and embarrassing and disclosed no cause of action, broadly on the grounds that the claim was based upon a sale price which had not been agreed upon between the parties and that there was accordingly no valid sale. There was a concomitant application to strike out certain portions of respondent's further particulars. MARCO J dismissed both the exception and the

/ application.....

application to strike out.

After this preliminary skirmishing the trial proceeded on the damages issues. Respondent led evidence, but appellant closed its case without calling any witnesses. The trial Judge then gave judgment, holding that respondent had substantiated its claim for damages in the sum of R86 687,60. The interlocutory proceedings in respect of which a special order as to costs was made consisted of the application to amend respondent's further particulars.

As in the Court a quo, the two main issues on appeal were (i) the conclusion of the alleged contract and (ii) the damages. I shall deal first with the contract.

Before us the argument of appellant's counsel, Mr Osborn, on the contract issue was, in brief, as follows:

(a) the telex of 25 June cannot be construed as the acceptance of any contractual offer by the appellant; and (b)

/ in

in any event, having regard to all the material matters which at that stage were still being negotiated between the parties, the telex could not and did not give rise to a contract. In regard to leg (b) of this argument counsel made reference to the following cases: Margate Estates Ltd v Moore 1943 TPD 54, at pp 58-9; OK Bazaars Ltd v Bloch 1929 WLD 37; Blundell v Blom 1950 (2) SA 627 (W), at p 632; and Pitout v North Cape Livestock Co-operative Ltd. 1977 (4) SA 842 (A) at pp 850-51.

Before considering these arguments it is appropriate to take a closer look at the facts and circumstances relating to the submission of respondent's tender and the transmission of appellant's telex of 25 June.

The tender is in the form of a letter addressed to appellant and headed "Electrical Support Systems - Koeberg Nuclear Power Station". It commences with the words —

/ "We

"We have pleasure in submitting our quotation generally in accordance with CGEE Alsthom drawings KBA-AA one through thirty two dated 1.6.79."

Then follow brief clauses relating to matters such as inspection, terms of payment, the incorporation of printed terms and conditions on the back of the quotation, the period for acceptance, contract price adjustment, general sales tax, deliveries and penalties. After this are lists of prices for the components of the support system, with various alternative prices depending on the type of finish required.

15 June was a Friday and, as I have indicated, the tender was handed by Lovell to Cohou on 18 June, which was the following Monday. This took place at appellant's premises. There is some dispute between Lovell and Cohou and certain other of appellant's witnesses, as to what happened at this and other meetings which took place during the ensuing week. It is, therefore, pertinent at

/ this.....

this stage to refer to the trial Judge's credibility findings.

One grave defect in Lovell's evidence is that he had deposed to having/a brief meeting with a Mr J R M Cornillon, a director of appellant, on 25 June. It was shown conclusively that Lovell was wrong about this as Cornillon was in France at the time. In regard to this episode the trial Judge stated that his impression was not that Lovell was a deliberately dishonest witness, but that he was confusing certain events and that his recollection was faulty. He stated further —

"..... it is clear that Mr Lovell's evidence is not altogether reliable, and that it can be accepted only where it is undisputed or unrebutted, or where it is supported aliunde, or by the probabilities, or by admissions made by the defendant's witnesses."

Of appellant's three witnesses, Messrs Augonnet, Cohou and Cornillon, each of whom appeared to be a youngish man in his late twenties or early thirties, the trial judge had the following, inter alia, to say:

/ Augonnet

Augonnet:

"He was an intelligent, resourceful and articulate witness, but the criticism I have of his evidence is that his obvious purpose was not merely to testify on what he knew, but to present the defendant's case as its spokesman. He made assertions on and explained the intention behind telexes and letters to which he had not been a party and of which he could have had no direct knowledge. His evidence on these aspects was almost entirely hearsay and highly subjective."

Cohou:

"In cross-examination Mr Cohou seemed to me to be most uncomfortable, and his evidence was punctuated by much hesitation."

(And the trial Judge then proceeded to give a number of instances where he found the evidence of Cohou unsatisfactory and unacceptable.)

Cornillon:

"In cross-examination Mr Cornillon was often hesitant and evasive, and at times discursive to a degree."

(Then follows a detailed criticism of his evidence.)

/ I now

I now revert to 18 June. It is clear that after Lovell had handed over the tender to Cohou a discussion took place. Cohou appeared to be generally happy with the quotation, but wanted a $2\frac{1}{2}\%$ discount should appellant effect payment within 30 days. Lovell agreed to this and a suitable note was made on the tender document. Other clauses of the tender were also discussed and an amendment to the cost price adjustment clause was agreed to and noted. Furthermore Cohou handed to Lovell appellant's general purchasing conditions, which constitute part I of Exh. 2D, and told Lovell that these conditions would apply to any contract between appellant and respondent. Cohou also showed a document, part in type and partly handwritten, which corresponded to part II of Exh. 2D, to Lovell and Lovell read through it. There was some discussion about certain of the provisions in this document. Lovell stated that he could not commit himself on the clauses

/ relating.....

relating to penalties and to a performance bond.

Lovell again visited appellant's premises and saw Cohou on either 19 or 20 June. On this occasion Cohou gave Lovell part II of Exh 2D (which in the meanwhile had been completely typed). According to Cohou Lovell had already received a copy of part III of Exh. 2D, in the first week of June 1979. Certain details of the contract were discussed. Cohou told Lovell that a component known as "cable rises" were no longer part of the contract and that certain cable ladders were to be increased in length from 5 metres to 6 metres. The shape of the ladder rungs was also discussed. Lovell stated in evidence that at this meeting Cohou told him that respondent should go ahead with the work and congratulated him on the contract being awarded to respondent. This was denied by Cohou, though he did concede that on 18 June Augonnet told Lovell that respondent's prices were acceptable and that he saw

/ no

no reason why the contract should not be awarded to respondent. This was confirmed in evidence by Augonnet.

The trial Judge appears to have preferred the evidence of Lovell on the issue as to what Cohou told him at the meeting of 19 or 20 June. Certainly Lovell's conduct after the meeting tends to support his version. For on the afternoon of 20 June a meeting was held attended by various members of respondent's staff concerned with the Koeberg contract. At this meeting various decisions were made and points were noted indicating that respondent was gearing itself to go ahead with the execution of the contract. For example one note reads:

"Start up production on 25th July.
In order to save time and assist
commencement of programme, C. Brits
will shear strip and bend for rungs.
This will continue until rolls are
completed."

In addition there are from respondent's records three inter-office memoranda, dated either 20 or 21 June, which convey

/ the

the same impression. The meeting of 19/20 June certainly seems to have left Lovell with the impression that the contract was theirs; and this impression he immediately conveyed to his colleagues.

On 25 June 1979 Lovell again met Cohou at appellant's place of business. According to Lovell he went there to get written confirmation of the award of the contract to respondent. It is clear, however, that one of the matters discussed was the steel to be used in the fabrication of the cable tray components. The quality and availability of this steel had been under discussion for months. The original idea had been to use commercial quality steel and this was the basis of respondent's tender. Subsequently (after 25 June) it was decided to change to structural steel. Respondent had a certain amount of steel in stock, but this was not sufficient for the whole contract. It was thus necessary, if respondent was to execute the contract, that it should order additional steel from its

/ supplier,

supplier, which was the South African Iron and Steel Industrial Corporation Ltd ("Isco"). At that time Isco required three months "lead time", which apparently refers to the time taken to execute an order. On 8 June 1979 Lovell had been given a note by Cohou giving delivery dates. According to this note certain quantities of fabricated components were to be delivered on 15 August 1979, half of the remainder on 15 October 1979 and the balance on 15 January 1980. (On 20 July this was superseded by a more elaborate delivery programme in writing, in which the delivery dates were 25 August and 10 October 1979 and 10 January 1980.) It was thus evident that if the delivery date in October was to be met an order for steel from Isco had to be placed more or less immediately. It was in this context that Cohou raised the question of steel at the meeting of 25 June and, more particularly, asked Lovell to place an order for steel so as to be able to meet the October delivery. Lovell replied that he could not order steel without an

/ order.....

order in writing from appellant. Cohou asked whether a telex would do and Lovell agreed that it would. The telex was sent there and then and Lovell was given a photocopy thereof. This is the full text of the telex:

"SUBJECT: KOEBERG NUCLEAR POWER STATION/
CABLE TRAYS
FOLLOWING OUR VARIOUS MEETING(S) WE HAVE
PLEASURE IN INFORMING YOU THAT THE ORDER
FOR THE ABOVE HAS BEEN AWARDED TO YOURSELVES.
THE OFFICIALISATION OF THIS ORDER WILL BE
TRANSMITTED AT THE LATEST BY FRIDAY 29TH JUNE
1979. THEREFORE WE WOULD BE VERY GRATEFUL
IF YOU WOULD ORDER ALL THE NECESSARY STEEL
YOU MAY NEED TO START MANUFACTURE AND SO THAT
THE FIRST DELIVERY DATE MAY BE MET."

The word "officialisation", appearing in this telex, was much debated in the evidence. Lovell said that he understood it to mean a letter on appellant's official letterhead stating what was contained in the telex. Having the telex, however, he did not attach much importance to this. Cohou, on the other hand, averred that what he meant by "officialisation of the order" was the issue of an official

/ company

company order with all the necessary annexures, including the documents (Exh. 2D), which had already been handed over to Lovell and upon which agreement still had to be reached. In view of the fact that, according to the telex, the officialisation of the order was to be "transmitted" within a matter of four days, Cohou's interpretation, for what it is worth evidentially, seems improbable.

Be that as it may, no such officialisation took place by 29 June and in fact nothing really seems to turn on this portion of the telex.

The request in the telex that respondent order the steel needed to start manufacture so that the first delivery date might be met does not quite accord with the intention that respondent would commence manufacturing with its own stocks of steel, but at all events on the following day (26 June) respondent placed an official order with Iscor for various quantities of different types of steel

/ to

to a total-value of R203 324,00. And on 27 June Lovell wrote to Cohou telling him that the steel ordered from Iscor would be delivered in September.

Thereafter, as I have indicated, the parties continued to negotiate about various aspects of the contract, to meet and to exchange letters and telexes until eventually negotiations broke down in mid-August. I shall refer later to certain of these exchanges between the parties. I proceed now to the question as to whether a binding contract between appellant and respondent came into existence.

As WATERMEYER ACJ remarked in Reid Bros (South Africa) Ltd v Fischer Bearings Co Ltd, 1943 AD 232, at p 241, "....a binding contract is as a rule constituted by the acceptance of an offer". Despite Mr Osborn's submissions to the contrary, I am satisfied that the tender of 15 June, together with the written addendum of 20 June, constituted an offer made animo contrahendi by the respondent.

/It

It is true that the tender makes reference to drawings which are not annexed to the tender, but in my opinion the relevant drawings were at the time readily identifiable. Drawings marked KBA-AA, numbered 1 to 32, bearing the date-stamp 1 June 1979 and showing details of the cable trays and the components to be manufactured were brought out to South Africa from France by a Mr Pejan, appellant's designer, on 5 June 1979. These were revised by Pejan on 8 June to correct a mistake in regard to quantities and on about 11 June Cohou handed to Lovell a copy of Pejan's revised drawings. It seems obvious that these are the drawings referred to in the tender. Apart from the correspondence between the general description in the tender and the drawings, the quantities in the tender tally with Pejan's revised quantities. It is also true that at the meeting of 19/20 June it was verbally agreed that cable rises would be omitted from the contract and that the length of certain

/ ladders.....

ladders would be increased from 5 to 6 metres. The tender must accordingly be read subject to these alterations; and from here on all references by me to "the tender" must be understood as meaning the written tender as verbally altered on 19/20 June. Mr Osborn argued that these verbal amendments contradicted respondent's further particulars, which alleged a written contract. This is correct, but the evidence as to these amendments was fully canvassed in evidence by both parties and I do not think that at this stage this small and technical discrepancy between the pleadings and the evidence should be allowed to affect the position.

The next question is whether the telex of 25 June constituted an acceptance, animo contrahendi, of respondent's tender. And here I would mention in passing that it is not disputed that Cohou had the authority to contract on appellant's behalf.

/ In

In my opinion, the essential words of the telex —

".....we have pleasure in informing you that the order for the above has been awarded to yourselves" —are, in all the circumstances, susceptible only of the meaning that the respondent's tender is accepted. Admittedly, as emphasized by Mr Osborn, the telex does^{not}/say in terms that the tender is accepted, but what other meaning could it have? The circumstances were that the parties had been negotiating about this contract for months, respondent had made a final tender, and between the date of the tender and 25 June, even on the evidence of appellant's witnesses, respondent had been given a strong indication that the contract was to be awarded to it. The telex itself speaks of "the order for the above" and this clearly has reference to what is stated at the beginning of the telex, viz. "Subject Koeberg nuclear power station/cable trays". This was indeed the subject-matter of the tender.

/ The.....

The difficulty of construing the telex as anything other than an acceptance of the tender is demonstrated by the tangle Cohou, the author of the telex, got himself into when trying to explain it away. His evidence on this topic was full of contradictions and evasions. In evidence-in-chief Cohou stated that when on 25 June he asked Lovell to order the steel and Lovell told him that he could not do so without an order from appellant, he (Cohou) proposed "an intent to order". Lovell was not satisfied with this proposal. Cohou then proposed "an intent of order" together with a statement that appellant would "officialise" within a few days. This satisfied Lovell and it was on this basis that the telex was sent. Its purpose was to enable Lovell to order the steel. Under cross-examination Cohou conceded that the wording of the telex was not consistent with it being merely a telex of intent. When asked why the telex did not say "we intend to contract with you", he replied "because Mr Lovell

was not pleased with that". He agreed that Lovell wanted a firm order so as to be able to order the steel and that he agreed to "write it that way". He said that nevertheless there was a "gentleman's agreement" between himself and Lovell that the telex, although so worded, was only to enable Lovell to order the steel and that agreement had to be reached on all outstanding matters before a contract was signed. He suggested that Lovell required the order in this form in order to satisfy "internal procedures".

This evidence as to a gentleman's agreement was repeated when Cohou replied to certain questions put by the trial Judge at the end of his evidence. The averment of a gentleman's agreement was never put to Lovell in cross-examination and was clearly an afterthought on Cohou's part. The trial Judge rejected Cohou's evidence as to the meaning and intent of the telex and, in my view, he was fully justified in doing so. At the same time it is significant that

/ Cohou.....

Cohou did not regard the telex as having reference to anything other than the respondent's tender, as the following extract from his evidence under cross-examination indicates:

"You can do the following Mr Cohou... --
Yes?

You can say - 'We will accept your order in part. We will reject your order. We will accept your order subject to certain conditions.' Correct?-- Yes.

Which one did you choose to use?-- Well; the one which was chosen was 'We accept your quotation subject to the outstanding matters to be agreed'.

Where is that said?-- It is not said, but that's what Mr Lovell knew about that."

I turn now to the second leg of Mr Osborn's argument on the contract issue, viz. that because as at 25 June a number of material and important matters relating to the work to be performed under the contract were still being negotiated by the parties, the tender and the telex could not be regarded as having given rise to a binding

/ contract.

contract. There is no doubt that where in the course of negotiating a contract the parties reach an agreement by offer and acceptance, the fact that there are still a number of outstanding matters material to the contract upon which the parties have not yet agreed may well prevent the agreement from having contractual force. A good example of this kind of situation is provided by the case of OK Bazaars v Bloch, supra (see also Pitout v North Cape Livestock Co-operative Ltd, supra). Where the law denies such an agreement contractual force it is because the evidence shows that the parties contemplated that consensus on the outstanding matters would have to be reached before a binding contract could come into existence (see Pitout's case, supra, at p 851 B-C). The existence of such outstanding matters does not, however, necessarily deprive an agreement of contractual force. The parties may well intend by their agreement to conclude a binding contract, while agreeing, either expressly or by

/ implication.....

implication, to leave the outstanding matters to future negotiation with a view to a comprehensive contract.

In the event of agreement being reached on all outstanding matters the comprehensive contract would incorporate and supersede the original agreement. If, however, the parties should fail to reach agreement on the outstanding matters, then the original contract would stand.

(See generally Christie, The Law of Contract in South Africa, pp 27-8.) Whether in a particular case the initial agreement acquires contractual force or not depends upon the intention of the parties, which is to be gathered from their conduct, the terms of the agreement and the surrounding circumstances (see Pitout's case, supra, at p 851 D-G). I did not understand counsel to dispute the correctness of these general propositions.

Turning to the facts of this case, there is no doubt that as at 25 June there were still outstanding a

/ number.....

number of matters material to the contract which had been raised and discussed in the course of the negotiations and upon which the parties had not yet reached agreement.

These were -

- (a) quality assurance and quality control;
- (b) the polyurethane finish and packing specifications;
- (c) the proposed terms contained in Exh. 2D, which, as I have mentioned, related to general purchasing conditions, commercial and administrative conditions and the updated technical specification;
- (d) delivery dates of fabricated components; and
- (e) the dimensions of certain cable ladder components and the shape of the ladder rungs.

It is not necessary to consider these matters in detail, as their materiality and importance is conceded by respondent. Some matters were more important than others.

Packing specifications, for example, were of very minor importance and possibly fell outside the original ambit of the contract inasmuch as the tender made provision

/ for

number of matters material to the contract which had been raised and discussed in the course of the negotiations and upon which the parties had not yet reached agreement.

These were -

- (a) quality assurance and quality control;
- (b) the polyurethane finish and packing specifications;
- (c) the proposed terms contained in Exh. 2D, which, as I have mentioned, related to general purchasing conditions, commercial and administrative conditions and the updated technical specification;
- (d) delivery dates of fabricated components; and
- (e) the dimensions of certain cable ladder components and the shape of the ladder rungs.

It is not necessary to consider these matters in detail, as their materiality and importance is conceded by respondent. Some matters were more important than others. Packing specifications, for example, were of very minor importance and possibly fell outside the original ambit of the contract inasmuch as the tender made provision

/ for

for "delivery ex works". In many instances the parties reached agreement on these matters in the negotiations which proceeded after 25 June. But, of course, as I have shown, complete consensus was not reached and the parties did not conclude a final comprehensive contract. The question is whether in all the circumstances the agreement concluded by the acceptance of respondent's tender on 25 June gave rise to a binding contract.

The very existence of these outstanding matters and the importance attached to them by the appellant undoubtedly constitute a strong pointer in the direction of no binding contract and in the absence of cogent factors pointing in the opposite direction I would have been inclined to hold in favour of the appellant on this issue. There are, however, in my opinion, very cogent factors pointing in the opposite direction.

In the first place there is the wording of the

/ telex

telex itself. It appears on the face of it to be an unconditional acceptance of respondent's tender. There are no qualifications or reservations. There is no suggestion that it is a provisional agreement, subject to the successful conclusion of further negotiations. Cohou, the author of the telex, had at all times been at the very centre of the negotiations and knew about the matters outstanding. He had ample opportunity to word the telex in such a way as to indicate that it was not by itself a binding agreement; but he did not do so. His explanation for not having done so - the so-called gentleman's agreement between himself and Lovell - is totally unconvincing.

Secondly, there are the circumstances under which the telex was sent. These I have outlined above. There was the need to order steel soon so as to be able to adhere to the delivery programme and there was the respondent's insistence that it could not commit itself to

/ Iscor.....

Iscor without a written order from appellant. In addition, the evidence shows that, apart from the question of the steel, Cohou was under pressure from appellant's head office in Paris to "get the contract fixed up" by the end of June. In the circumstances Cohou would have felt impelled to commit his company to the respondent, the only tenderer under serious consideration by appellant at that stage. As to the outstanding matters, Cohou may well have considered that these could safely be left to subsequent negotiation. Until then the protracted negotiations between the parties appear to have been conducted on a very constructive and amicable basis and this would have provided Cohou with good grounds for thinking that the outstanding matters could be ironed out without difficulty.

Thirdly, the subsequent conduct of the parties supports the view that they both regarded the contract as

/ having.....

having been awarded to respondent. I have already described how immediately after the telex of 25 June respondent proceeded to order over R200 000 worth of steel from Iscor. On 17 July a meeting was held at Escom's premises, Megawatt Park, to discuss appellant's revised specification for the cable trays and in particular the question of finishes. Lovell and a Mr Bates, representing respondent, attended the meeting at Cohou's invitation; and Lovell took with him representatives from Monoweld Galvanisers and Polyman Powder Coating, experts on finishes, who were to apply the necessary finishes to the fabricated cable trays as respondent's sub-contractors. Lovell stated that he would not have gone to this meeting if there had been no contract. On the following day Bates wrote to Cohou thanking him for having invited respondent's representatives to the meeting with Escom. In his letter Bates refers to "the informed comment of our sub-contractors"

/ and.....

and the tenor of the letter is that of a supplier to whom a contract has been awarded. In similar vein were a telex sent by appellant to respondent on 19 July and a letter of the same date from respondent in reply thereto.

This letter concludes:

"May we now please have your instructions as to your requirements for the immediate future against this contract. We look forward to a happy association with you on this contract."

On 20 July appellant sent to respondent a telex confirming decisions taken at a meeting held on that date. These decisions included (a) changing the steel order to Iscor to structural grade steel and an agreement as to the extra cost of such steel; (b) that —

"The commercial quality steel you have already in stock (roughly 400 T) will be used until the date at which the structural steel is expected to be delivered";

and (c) that respondent would at its own expense conduct

/ tests.....

tests with reference to the steel. On 1 August a telex was sent from appellant's head office in Paris to Cornillon and Cohou in South Africa with reference to the cable trays.

It concludes —

"..... nothing will prevent the start of manufacture in such a way as to permit a delivery on site on 08/09/79.

Having regard to the above, we ask you to start manufacture."

On 2 August appellant sent to Escom a quality control plan for the cable trays in which respondent is reflected as "the supplier".

Having weighed all this evidence, I am of the opinion, as a matter of probability, that the telex did constitute an unqualified acceptance of respondent's tender and that, despite the existence of outstanding matters, this agreement was intended by the parties to constitute a binding contract. At this stage there is no dispute that this contract was repudiated. Accordingly the appeal

/ against.....

against the findings of the Court a quo on the contractual issues must fail.

I turn now to the question of damages. In the heads of argument filed by appellant's counsel the judgment of the Court a quo on the damages issue is subjected to a detailed critical analysis. As I have shown, however, the Court's judgment on this issue was founded on the premise that ladder rungs were not included in respondent's tender. It is now common cause that this premise, contained in the Court's ruling on the contractual issues, is erroneous. Obviously at this stage this Court must deal with the matter on the correct factual basis, namely that the rungs were included in the tender. The judgment of the trial Judge on damages is thus no longer relevant and it is not necessary to deal with the criticisms thereof contained in appellant's heads of argument. In the circumstances this Court must consider afresh, on the material

/ placed.....

placed before it, the question of damages.

It follows from the finding that a binding contract was concluded between the parties upon the acceptance of respondent's tender and that this contract was repudiated by appellant that respondent was entitled to be awarded damages by the Court a quo. In regard to the quantum of such damages this Court fortunately has the assistance of a formal admission made by the appellant. This formal admission was made at a pre-trial conference held on 3 September 1982. This was just a year after the delivery of the trial Court's ruling on the contract issues and about a year before the resumption of the trial on the damages issues. The full text of the admission is as follows:

- "1. The defendant admits that the profit which the plaintiff would have earned from the execution of a contract to supply to the defendant the goods referred to in schedules 1 and 2 to the

/ Further.....

Further Particulars to plaintiff's summons in the quantities set out in Column "A" thereof in commercial quality steel with a Hot Dip Galvanised finish to SABS 763/1977 is the sum of R113 947,05.

2. This admission is made without the defendant admitting that the plaintiff has proved a contract between the plaintiff to the defendant of the goods referred to in paragraph 1 hereof and without the defendant admitting that the sum of R113 947,05 is made up as set out in the abovementioned schedules 1 and 2."

This admission has reference to respondent's further particulars as originally drafted, ie prior to the amendment designed to delete rungs from the contract and the claim. Before us it was conceded by Mr Osborn (correctly in my view) that, if this Court should hold that a contract had been concluded by appellant's acceptance (per the telex of 25 June) of respondent's tender, the admission would apply and that the admission absolved the respondent from establishing its damages by way of evidence.

/ He

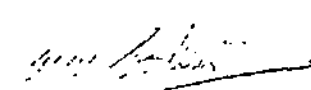
He added two riders to this concession. The first was that by reason of the amendment to respondent's pleadings respondent was now limited to damages in the sum of R86 687,60. This is unquestionably correct and was not disputed by Mr Schreiner for the respondent. The second rider was that in the light of the admission respondent should be ordered to pay all costs incurred in the Court a quo after 3 September 1982.

In support of this latter rider Mr Osborn submitted that by accepting the Court a quo's incorrect ruling in regard to the rungs and proceeding to lead evidence as to damages on this incorrect premise respondent was responsible for all the "wasted" costs incurred thereby. These costs are "wasted" because, as I have indicated, the evidence is no longer relevant. I do not agree with this submission. I have already described the dilemma in which the respondent was placed by the trial Judge's

/ erroneous.....

erroneous ruling. Asked what the respondent ought to have done in the circumstances, Mr Osborn replied that it ought to have closed its case at the resumption of the trial. Mr Osborn conceded that had respondent done this it would inevitably have been faced with an adverse judgment (probably absolution from the instance) from the trial Court, but he argued that respondent could then have relied upon setting matters right on appeal. No doubt this was an option open to respondent as an alternative to what it did, but I am not persuaded that in taking the course which it did in order to obtain a favourable, and not an adverse, judgment from the Court a quo (and incidentally in the process sacrificing over R27 000 in damages) the respondent acted so unreasonably that it should be mulcted in costs in the Court below.

For these reasons the appeal is dismissed with costs, including the costs of two counsel.


M M CORBETT.

VILJOEN JA)
BOTH A JA)
NICHOLAS AJA) CONCUR.
NESTADT AJA)