61/87

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

AMALGAMATED CONSTRUCTION COMPANY (PROPRIETARY) LIMITED ..... appellant

and

THE CITY COUNCIL OF THE CITY OF DURBAN ..... respondent

Coram: Corbett, Hoexter, Grosskopf, JJA, Nicholas et Boshoff AJJA.

Date of appeal: 18 May 1987

Date of judgment: 27 May 1987

J U D G M E N T

CORBETT JA:

During the period April 1979 to February 1981

/ appellant, ...

appellant, Amalgamated Construction Company (Pty) Ltd ("Amalgamated"), entered into a series of eight building contracts with the respondent, the City Council of the City of Durban ("the Council"). In terms of each of these contracts Amalgamated undertook to construct a specified number of dwelling units on land provided by the Council. The contract in each case comprised a number of documents, including one called "General Conditions of Contract" and another named "Special Conditions of Contract". At a certain stage in the execution of these contracts a dispute arose between the parties in regard to the proper interpretation to be placed upon the provisions in the Special Conditions of Contract relating to the payment of liquidated damages by the contractor (Amalgamated) for delay in the completion of the contract work. Amalgamated accordingly launched an application on notice of motion in the Durban and Coast

Local Division for a declaratory order setting forth its (i.e. Amalgamated's) interpretation of the relevant provisions of the eight contracts. The application was opposed by the Council and in an opposing affidavit by the City Engineer, filed by the Council, the latter's interpretation is set forth. The matter came before WILSON J who held that the Council's interpretation was the correct one and dismissed the application with costs. WILSON J thereafter granted Amalgamated leave to appeal to this Court against the whole of his judgment and order. That appeal is now before us.

Since the relevant contractual provisions are the same in all eight contracts, the appropriate contract documents relating to only one contract (numbered B.5778) were put before the Court a quo. The parties accepted that an interpretation placed on these documents would hold good for the other seven contracts as well.

/Contract.....

Contract B.5778 provides for the construction of 352 dwelling units. The dispute hinges on clauses 1 and 2 of the Special Conditions of Contract. I quote these in full:-

"1. (a) TIME FOR COMPLETION:

Time is the essence of this contract and the Contractor will be required to complete the buildings and site works and hand over to the Corporation progressively in batches.

For this purpose the 352 dwellings comprising this contract will be subdivided as follows:-

12 (twelve) batches of 21 dwelling units each.

5 (five) batches of 20 dwelling units.

Whilst the Engineer reserves the right to change and direct where such batches shall be erected in various periods of the Contract, the following shall be adhered to:-

(i) The first batch comprising a total of 21 dwellings shall be handed over complete

/ within .....

within 45 (forty-five) weeks from a date which shall be specified in a letter from the City Engineer instructing the Contractor to take over the site on such specified date.

(ii) The remaining 16 (sixteen) batches comprising 331 dwellings shall be handed over at a rate of one batch per week from the due date for completion of the first batch.

(iii) The total of 352 dwellings is then handed over complete within 61 (sixty-one) weeks.

Extension of this time will not be permitted by virtue of any holidays other than Building Industry Holidays whether statutory or recognised generally as customary in the industry, which intervene between the date specified in the letter and the due date for completion.

(b) MAINTENANCE PERIOD

The period for which the Contractor shall be responsible for maintaining the works after practical completion in terms of Clause 10 of the General Conditions of Contract shall be six months after the completion certificate has been issued except

/ that.....

that in the case of electrical work the period shall be twelve months from the date of completion.

2. LIQUIDATED DAMAGES FOR DELAY:

(a) If the Contractor fails to proceed with and complete the Works in the manner required by the contract within the period fixed by Clause 1 (a) (or within any extended time granted in terms of Clause 9 of the General Conditions of Contract) the Council shall be entitled to require payment from the Contractor of the amounts shown in Clause (c) below as liquidated damages for each and every day by which the completion of the Works is delayed beyond the date fixed as aforesaid, and such damages may be deducted by the Council from any monies due to the Contractor; provided that nothing contained in the Clause shall prevent the Council from exercising against the Contractor any other remedies which may be available to it either in terms of this contract or at common law, or from electing to recover from the Contractor any damage or loss sustained by it in consequence of any breach of contract in lieu of enforcing its rights to liquidated damages in terms of this Clause.

/ (b) If.....

(b) If before the completion of the whole of the Works, any part of the Works has been certified by the Engineer as completed in terms of Clause 10 of the General Conditions of Contract and occupied or used by the Council, the liquidated damages for delay shall for any period of delay after such certification be reduced in the proportion which the value of the part so certified bears to the value of the whole of the Works.

(c) The following are the amounts of liquidated damages applicable:-

(i) In the case of the Terraced House Type T5 R2,22 per Dwelling Unit per day

(ii) In the case of the Terraced House Type T5A R1,82 per Dwelling Unit per day

(iii) In the case of the Terraced House Type T6A R2,56 per Dwelling Unit per day

(iv) In the case of the Semi-Detached House Type SD4A R1,45 per Dwelling Unit per day

(v) In the case of the Semi-Detached House Type SD5B R1,85 per Dwelling Unit per day

/(vi) In.....

(vi) In the case of the Semi-Detached House Type SD5D R1,60 per Dwelling Unit per day

(vii) In the case of the Duplex Housing Unit Type DP4A R1,38 per Dwelling Unit per day

(viii) In the case of the Duplex Housing Unit Type DP5A1 R1,65 per Dwelling Unit per day

(ix) In the case of the Flats Type F3A R0,88 per Dwelling Unit per day

(x) In the case of the Flats Type F3C R0,86 per Dwelling Unit per day

(xi) In the case of the Flats Type F4A R1,05 per Dwelling Unit per day

(xii) In the case of the Flats Type F4B R1,21 per Dwelling Unit per day

For each day on which the building remains incomplete after its stipulated date of completion:

R25,96 in addition for each day on which the whole of the Works remains incomplete after the stipulated date of completion."

/The .....

The declaratory order asked for by Amalgamated, as set forth in the notice of motion, reads:

> "It is hereby declared that upon a proper construction of the contracts concluded between the parties hereto and numbered B.5767, B.5778, B.5948, B.5949, B6065, B6066, B6070, B5766 liquidated damages are payable in terms of clause 2 of the Special Conditions of Contract only if the completion of the total number of dwelling units included in the contract is delayed beyond the due date for the completion of the works, as defined in the contract, and the quantum of such liquidated damages must be calculated in the prescribed manner from that date."

The Council's viewpoint is summed up in the following paragraph in the affidavit of the City Engineer:

> "It is the Respondent's contention that, on a proper construction of Clauses 1 and 2 of the Special Conditions of Contract (read in their / context).....

context), the Respondent is entitled to deduct penalties in respect of failure by the Applicant to complete any specific batch of dwellings by the date stipulated therefor under Clause 1(a)."

In my opinion the Court a quo correctly rejected the interpretation contained in the declaratory order and correctly accepted the contrary interpretation put forward by the Council. My reasons for reaching this conclusion are the following:

A reading of clauses 1 and 2 of the Special Conditions of Contract reveals certain prominent features of the contract. The first is that time is of the essence of the contract: this is expressly stated in the opening words of clause 1; and what is obviously referred to is the time of completion by the contractor of the building work. The second feature is the sanction imposed where the contractor delays and fails to complete the work in the stipulated time, viz. liquidated damages. And the third prominent feature

/ is.....

is the fact that, in terms of clause 1, the contractor is required to complete the buildings and site works and hand over to the Council "progressively in batches". To this end the 352 dwellings are divided into 17 batches, 12 batches of 21 dwelling units each and 5 batches of 20 dwelling units each and a completion date (to be calculated from a date specified by the City Engineer) is designated for each batch (see clause 1(a)(i) and (ii). In addition, a completion date for all 352 dwellings is stated. This is within 61 weeks of (inferentially) the specified date, this period of 61 weeks representing the total of the periods allocated for the completion of each of the batches (see clause 1(a) (iii)). This is all perfectly clear.

Clause 2(a), which creates the obligation to pay liquidated damages for delay is, however, less happily worded. It commences by postulating the contractor's

failure to proceed with and complete the works "within the period fixed by clause 1(a)" and then imposes upon the contractor a liability to pay liquidated damages in the amounts shown in clause 1(c) for every day by which the completion is delayed "beyond the date fixed as aforesaid". The words which I have quoted, particularly "period" and "date" (in the singular), would seem to suggest that there is only one date from which liquidated damages may run; and it was upon the strength of this, inter alia, that it was argued on behalf of Amalgamated that in terms of clause 2 liquidated damages were payable only if the completion of all 352 dwellings was delayed beyond the period fixed in clause 1(a)(iii) of the Special Conditions of Contract. Counsel for Amalgamated, Mr Welsh, also laid stress upon the use of the word "Works" in clause 2(a). "Works" is defined in clause 1(j) of the General Conditions of Contract and it is clear from the

/ opening.....

opening words of clause 1 that this definition applies to the use of the word in all the contract documents. The first (and relevant) portion of the definition reads:

> "The term 'Works' shall mean the works described and shown in the Contract Documents and any such further Drawings, Directions and Explanations as may from time to time be given to the Contractor by the Engineer....."

Relying upon this definition, counsel argued that where the word "Works" is used in clause 2(a) of the Special Conditions of Contract it means the whole of the works, i.e. all 352 dwellings, and nothing less.

In my view, these arguments cannot prevail. In clause 2(a) the liquidated damages to be paid are described by reference to clause 2(c). Clause 2(c) clearly provides for two sets of liquidated damages: (1) damages in various stipulated amounts (depending on type of building) for each day on which an individual dwelling

/ (or.....

(or building) remains incomplete after "its stipulated date of completion" (my emphasis); and (2) "in addition" damages in a globular amount for each day on which the whole of the works remains incomplete after "the stipulated date of completion". The stipulated date of completion under (1) above clearly refers to the date by which the batch of dwellings, of which the individual dwelling forms part, is required to be completed in terms of clause 1(a)(i) and (ii) - for convenience I shall call this date "the batch date"; and the stipulated date of completion under (2) above equally clearly refers to the completion date stipulated in clause 1(a)(iii). These are the dominant provisions in regard to the payment of liquidated damages and they specifically and unambiguously express the intention of the parties in regard thereto. In my opinion, they override whatever inconsistency there might be in the general words used in clause 2(a). Mani-

/ festly.....

festly they contradict the interpretation which Amalgamated seeks to place upon the contract in relation to the obligation to pay liquidated damages and support the interpretation advanced on behalf of the Council.

In addition, there are, in my opinion, a number of other considerations which reinforce the view that liquidated damages were intended to be paid in respect of both delays beyond the batch date in the completion of individual dwellings and delays in the completion of the whole of the works beyond the date fixed for the hand over of all 352 dwellings.

It is clear from the context that the purpose of dividing the work up into batches and of providing for the progressive hand over of completed batches by specified dates was to enable the Council to arrange for the allocation and occupation of the dwellings as the batches were completed. This appears from the

/ express.....

express wording of clause 9 of the Special Conditions of Contract which is headed "BATCHING SCHEDULES" and commences with the words -

> "In order to allow the Corporation to arrange for the allocation and occupation of the dwellings as the batches are completed, the Contractor will be required, at the commencement of the Contract, to furnish a batching schedule in terms of Clause 1 (a) ....."

From this it is to be inferred that time was to be of the essence both as to the completion of batches and as to the completion of the work as a whole. In the circumstances it seems very probable that the sanction of liquidated damages would have been intended to apply not only to delays in the completion of the work as a whole, but also to delays in the completion of batches; and per contra it seems unlikely that the intention was to confine the sanction to delays in the completion of the work as a whole.

/ By .....

By reason of the aforegoing the reference to "period" (singular) in clause 2(a) must be read as meaning any one of the periods fixed by clause 1(a); and similarly the word "date" in the same clause must be read as the date representing the terminal day of the particular period under consideration. Thus interpreted, these words are not inconsistent with the construction which I have placed on clause 2 as a whole. Nor do I think that the word "Works" in clause 2(a) presents any real problem. In terms of the definition the word "Works" can, in my view, be used to denote the whole of the contract works or a specific portion thereof, such as a batch of dwellings. And it is of some significance that in certain clauses of both the General Conditions of Contract (see e.g. clauses 4(a) and (10) and the Special Conditions of Contract (see e.g. clauses 2(b) and 2(c)), where the whole contract works are referred to, expressions such as

/"all .....

"all the works", "all works", and "whole of the works" are used.

Mr Welsh also placed some reliance on clause 10 of the General Conditions of Contract, headed "Completion and Maintenance", the relevant portion of which reads:

> "The Contractor shall deliver the works to the Engineer in a clean state and complete in every particular. When the works are practically completed the Engineer will give a Completion Certificate and the date of such completion certificate will denote the commencement of the Maintenance Period. The Contractor shall maintain and keep in good order and repair all works under the Contract for the period stipulated in the Special Conditions of Contract, after Completion Certificates have been issued....."

His argument was that this clause indicates a single completion date when a completion certificate is issued viz., when the whole works are complete, and that, therefore, there could be no liquidated damages payable

/ before.....

before this. This argument is partially refuted by clause 10 itself, which, as the concluding words of the quoted portion show, seems to contemplate the issue of more than one completion certificate. It is fully refuted, to my mind, by the terms of clause 2(b) of the Special Conditions of Contract, which provides for the certification by the Engineer as complete of "any part of the Works" in terms of clause 10 of the General Conditions of Contract (see also clause 24 of the Special Conditions of Contract, which contemplates a final inspection by the Engineer of the buildings in a batch or section of the works).

Mr Welsh furthermore referred to two amending agreements entered into between the parties. The first of these ("the first amending agreement") was entered into on 4 December 1980 and it amended the Special Conditions of Contract in relation to two of the

contracts by the substitution of a new clause 1(a).

The relevant portion of the new sub-clause reads:

> "Time is of the essence of this contract and the contractor will be required to complete the buildings and site works and hand them over to the Corporation progressively in batches in accordance with a programme annexed hereto marked "A". The said programme shall relate to a co-ordinated progression of work under this contract and also under contract B6065 or B6066 (as the case may be), it being a condition of this contract that any failure on the part of the contractor to complete the buildings and site works and hand over the same to the Corporation progressively in batches in accordance with the said programme as extended from time to time by the Engineer in accordance with the other provisions of this contract shall, if the Engineer in his sole discretion so directs, be deemed to constitute a delay in respect of this contract for the purposes of clause 2 hereof."

The second ("the second amending agreement") was entered into on 1 December 1982. It, inter alia, varied the original agreements in the following way —

/ "The .....

> "The respective periods stipulated in terms of Clause 1(a) of the Special Conditions of Contract read with Clause 4(a) of the General Conditions of Contract of each of the said Contracts for the completion and hand-over of the total number of dwellings under the said Contracts, shall, for the sole purpose of the determination of liquidated damages in terms of Clause 2 of the Special Conditions of Contract of each of the said Contracts, be amended so as to expire on the following dates, respectively:"

(then follow stipulated dates for each of the contracts).

Amalgamated's introduction of these amending agreements as part of the record was initially unenthusiastic. In the founding affidavit Mr Goodson, Amalgamated's managing director, stated that in his opinion they were not relevant for the purpose of interpreting clause 2 of the Special Conditions of Contract, but were included because he believed that the Council did not subscribe to this view. In his opposing affidavit the

/ City .....

City Engineer did not dispute this, but added that he had been informed that it was a question of law as to whether the contents of either amending agreement were relevant to the interpretation of the original contracts. In his replying affidavit Mr Goodson was non-committal on this topic, but shortly before the hearing in the Court a quo he deposed to a supplementary affidavit, the material portion of which reads:

> "In paragraph 11 of the founding affidavit I expressed the opinion that neither the first nor the second amending agreement is relevant for the purpose of determining the meaning and effect of clause 2 of Respondent's Special Conditions of Contract. I am now advised and respectfully submit that both the first, and more especially the second amending agreements are so relevant. At the hearing of this application submissions will be made to this effect on behalf of the Applicant."

It was submitted by Mr Welsh that the portion of the first amending agreement quoted above showed that the

/ parties.....

parties placed a common interpretation on clause 2 of the Special Conditions of Contract in the original contracts consistent with the construction advanced by him and that accordingly on the basis of the principle set forth, for example, in MTK Saagmeule (Pty) Ltd v Killyman Estates (Pty) Ltd 1980 (3) SA 1 (A), at p 12 F-H, this fact could be used in the interpretation of clause 2. It is clear from the authorities, including the one just cited, that this aid to construction may be invoked only in the case of ambiguous documents. In my view, there is no such ambiguity in clause 2 and consequently reference to the first amending agreement is neither necessary nor justifiable. I might add that, in any event, I am unable to discern in the quoted portion of the first amending agreement any such common interpretation as was suggested by counsel.

As to the second amending agreement, Mr Welsh's

/ argument.....

argument, as I understood it, was that this agreement was relied upon not in order to show a common interpretation (as in the case of the first amending agreement) but in order to establish that the parties amended clause 2 of the Special Conditions of Contract in such a way as to eliminate the payment of any liquidated damages for delay in the completion of batches of dwellings and to confine the payment of such damages for delay in the completion of the contract as a whole. This argument was advanced in the alternative and on the basis that Amalmated's interpretation of the original contract was incorrect.

I do not think that it is open to Amalgamated to advance this argument. As I have shown, it initially regarded this amending agreement as irrelevant and only at the eleventh hour relied upon it as being relevant "for the purpose of determining the meaning and effect"

of clause 2 of the Special Conditions of Contract. Had Amalgamated timeously made the averment that the second amending agreement changed the effect of clause 2 in the manner suggested, I have no doubt that evidence would have been placed before the Court a quo of the circumstances under which the second amending agreement came to be entered into. And such evidence might well have been relevant to the interpretation of the second amending agreement. In any event, I am quite unpersuaded that the second amending agreement did alter clause 2 in the manner suggested. When pressed, Mr Welsh conceded that the alteration came about by way of necessary implication. I fail to see any such implication; and furthermore it is to be noted that in the preamble to the second amending agreement it is stated -

> "AND WHEREAS the parties have now agreed to conclude further contracts relating to the aforesaid works, such further contracts to incorporate all of the

/ respective.....

respective terms and conditions of the said Contracts, mutatis mutandis save as hereinafter expressly varied."

(My emphasis.)

For these reasons I hold that the Court a quo rightly dismissed the application.

The appeal is dismissed with costs, including the costs of two counsel.

M M CORBETT

HOEXTER JA)
GROSSKOPF JA)
NICHOLAS AJA) CONCUR.
BOSHOFF AJA)