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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of:

VAN STREEPEN & GERMS (PROPRIETARY LIMITED ..... appellant

and

THE TRANSVAAL PROVINCIAL ADMINISTRATION ..... respondent

CORAM: CORBETT, BOTHA, HEFER, GROSSKOPF et NESTADT JJA.

DATE OF HEARING: 15 MAY 1987

DATE OF JUDGMENT: 21 August 1987

J U D G M E N T

CORBETT JA:

Appellant, a building contractor, entered into a written contract with respondent, the Transvaal Provin-

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cial Administration, for the erection of six hostels at the Pretoria Teachers' Training College. The contract was signed on 24 August 1981. The contract price was R33 647 052. The whole works were to be completed within a period of 36 months. Thereafter appellant commenced work on the contract. In the process of doing so it engaged additional staff, entered into contracts with sub-contractors, hired plant and equipment, provided a guarantee for the due performance of its obligations under the contract, took out all risks insurance cover, set up a site establishment and started building.

On 29 January 1982 respondent's architects wrote a letter to appellant informing it that owing to a shortage of funds respondent was compelled to cancel the contract with immediate effect. Appellant replied to this letter on 1 February 1982, stating that it disputed the right of respondent to cancel the con-

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tract on the grounds alleged and that it regarded the respondent's action as a wrongful repudiation of the contract and a material breach thereof. Appellant stated further that in consequence thereof it had elected to cancel the contract and claim all damages sustained as a result of the breach.

In due course appellant instituted an action in the Transvaal Provincial Division claiming damages from respondent for breach of contract in an amount of R5 889 868,89. As appears from para 7 of the appellant's particulars of claim, this amount was made up as follows:

(a)	Expenses incurred in the execution of the contract and not covered by payments made for work done .....R	733 663,39
(b)	Liability to sub-contractors..	1 343 807,50
(c)	Loss of profit on balance of contract	3 812 398,00
		R5 889 868,89

The expenses referred to in (a) above related to the

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site establishment, the cost of insurance and the guarantee, and the leasing and erection of cranes and other equipment. According to respondent's heads of argument submitted to the Court, the total amount paid to appellant by respondent for work done on the contract prior to cancellation amounted to R3 654 800,29. This is more than the figure stated by appellant in its particulars of claim, but this is evidently accounted for by payments made subsequent to this pleading; and in any case nothing turns on this difference.

In its plea respondent referred to clause 3(6) of the Conditions of Contract, which form part of the contract between the parties, and pleaded, inter alia, that in terms of this clause it was entitled unilaterally to cancel the contract; that, in any event, in the case of any cancellation of the contract, this clause limited the appellant in its claim "for damages or otherwise"

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to "an amount not exceeding 5% of the scheduled prices on the nett value of the work omitted beyond 20% of the contract amount", and that the clause precluded appellant from claiming all damages suffered by it as a result of a wrongful repudiation of the contract by respondent.

Here I should add that appellant's particulars of claim contained a lesser, alternative claim based on the supposition that clause 3(6) applied and had the effect of entitling respondent to cancel the contract unilaterally and of limiting appellant's claim for damages. It is not necessary, however, to give details of this claim.

After the close of pleadings and on the application of the appellant (respondent apparently consenting) an order was granted in the Transvaal Provincial Division in terms of Rule 33(4) of the Uniform Rules of Court, directing that the trial of certain issues on the pleadings

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be stayed until the remaining issues (referred to as the "liability issues") had been decided. The issues stayed related to (i) the work done by appellant under the contract and the monetary value thereof; (ii) whether appellant had suffered the damages alleged in its particulars of claim and, if so, the monetary value thereof; and (iii) the monetary value of 5% of the scheduled prices on the nett value of work omitted beyond the contract amount by reason of the cancellation of the contract. In addition, the order amended prayers (a) and (b) of plaintiff's particulars of claim ((a) being the claim for damages amounting to R5 889 868,89 and (b) being the lesser alternative claim referred to above) -

> ".... as follows for the purposes of the decision of the liability issues:
>
> '(a) An Order declaring that the Plaintiff is entitled to payment of damages if any as / claimed.....

claimed in paragraph 7 (without determination of the amount of such damages) of its Particulars of Claim, whether or not such damages exceed the amount referred to in paragraph 6 of Defendant's plea;

Alternatively to prayer (a)

(b) An Order declaring that the Plaintiff is entitled to

(i) Payment of the damages referred to in paragraph 13 (b) of the Plaintiff's Particulars of Claim; and

(ii) Payment for work done and expenses and liabilities incurred (without determination of the amount thereof) if any, referred to in paragraph 14 of the Plaintiff's Particulars of Claim; and

(iii) Payment of interest at the rate of 11% per annum on the amount referred to in (ii) above from 27/1/82 to date of payment.' "

Although this is not expressly stated, it is clear that the amendment was to take the form of a substitution of

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the new prayers (a) and (b) "for the purposes of the decision of the liability issues". In regard to the new prayer (a), I should explain that the amount referred to in para. 6 of defendant's (respondent's) plea is the amount, as calculated by respondent, of appellant's entitlement in terms of clause 3(b), viz. R1 199 690,00. (At the stage of argument before us respondent had recalculated this entitlement in the sum of R1 163 142,07, but nothing turns on this.) I should also explain that the new prayer (b) incorporates appellant's alternative claim.

In substance the purpose of this order in terms of Rule 33(4) was to determine the issues as to (a) whether clause 3(6) entitled respondent unilaterally to cancel the contract, and (b) whether in the circumstances of this case appellant's claim for damages was limited by the provisions of clause 3(6). And it was

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on these issues that the matter went to trial before FLEMMING J. At the trial appellant adduced the evidence of two witnesses, Mr C D C Malherbe, an expert on economic conditions in the building industry, and Mr J F van Streepen (Jnr), a director of appellant.

Respondent called no evidence. The trial Judge held, in effect, (1) that respondent was not entitled unilaterally to cancel the contract and that its purported cancellation on 29 January 1982 amounted to an unlawful repudiation of the contract, which repudiation appellant accepted on 1 February 1982, thereby cancelling the contract; and (2) that appellant's claim for damages for breach of contract was governed and limited by the provisions of clause 3(6) of the Conditions of Contract.

The full order made by the Court a quo reads:

> "1. It is found and declared:
>
> (a) paragraph 5 of plaintiff's declaration has been proved;
>
> (b) plaintiff has resultantly become

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entitled to payment from defendant of damages, no part of which is excluded from the operation of clause 3(6) of the conditions of contract, which damages will include the heads of damages pleaded in paragraph 7 of the declaration, in such amounts and insofar as they constitute recoverable damages at common law, but within the limits, basically 5%, as set out in clause 3(6).

2. The alternative declaratory order is refused.

3. All questions of costs are reserved, also in regard to any special qualifying orders because of e.g. unwarranted steps in regard to discovery or in regard to particulars sought and furnished. Subject thereto, that the plaintiff is nevertheless ordered to make immediate payment of defendant's costs related to the hearing before me, which costs will include the costs of two counsel."

This was embodied in a formal order issued by the Registrar of the Court.

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An application to the trial Judge for leave to appeal was dismissed with costs. On a petition to the Chief Justice, however, leave to appeal to this Court was granted and it was ordered that the costs of the application for leave to appeal were to be costs in the appeal. Subsequently appellant filed a notice of appeal noting an appeal against the whole of the judgment and order of the Court a quo.

At the hearing before us respondent's counsel took the point in limine that the judgment of the Court a quo was not appealable. This point had not previously been raised in opposition to either of the applications for leave to appeal. Appellant's counsel, on the other hand, contended that the matter was appealable. I proceed to consider this issue.

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In terms of sec. 20(1) of the Supreme Court Act 59 of 1959, as amended ("the Act"), and subject to the necessary leave to appeal having been granted, this Court is empowered to hear an appeal from "a judgment or order" of the court of a provincial or local division. As has been explained in several cases, "judgment" in this context relates to a decision given upon relief claimed in an action, while "order" refers to a decision given upon relief claimed in an application on notice of motion or petition or on summons for provisional sentence (see Desai v Engar and Engar 1966 (4) SA 647 (A), at p 653 A-B and the cases there cited). But not every decision made by the court in the course of judicial proceedings constitutes a judgment or order. Some may amount merely to what is termed "a ruling", against which there is no appeal. The distinction between a ruling on the one hand and a judgment

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or order on the other hand was first drawn in this Court in the leading case of Dickinson and Another v Fisher's Executors 1914 AD 424, at pp 427-8. This concerned an application in a provincial division to have an arbitrator's award made a rule of court and a cross-motion to have it set aside. There was a dispute between the parties as to whether the Court should have regard to the evidence led at the arbitration. Argument was heard on this issue and the Court decided that this evidence should not be considered and gave its reasons for this decision. Instead of proceeding with the application, the applicant, against whom the decision had gone, applied for and was granted leave to appeal to the Appellate Division against the Court's decision concerning the arbitration evidence, on the basis that this amounted to an interlocutory order. This Court held, however, that this decision was a mere ruling. INNES ACJ explained the distinction thus (at pp 427-8):

/ "But.....

"But every decision or ruling of a court during the progress of a suit does not amount to an order. That term implies that there must be a distinct application by one of the parties for definite relief. The relief prayed for may be small, as in an application for a discovery order, or it may be of great importance, but the Court must be duly asked to grant some definite and distinct relief, before its decision upon the matter can properly be called an order. A trial Court is sometimes called upon to decide questions which come up during the progress of a case, but in regard to which its decisions would clearly not be orders. A dispute may arise, for instance, as to the right to begin: the Court decides it, and the hearing proceeds. But that decision, though it may be of considerable practical importance, is not an order from which an appeal could under any circumstance lie, apart from the final decision on the merits. So also in a case like the present. The parties differed as to what portion of the evidence (which was all in Court) could properly be referred to in support of the applicant's contention that the award was bad. The Court gave its ruling on the point. But that was not an order in the legal sense; it decided no definite application for relief, for none had been made; it was a mere direction to the parties with regard to the lines upon which their contention upon the merits should proceed."

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In his concurring judgment SOLOMON JA stated (at p 429):

> "The question is, whether that decision was an order. In my opinion it was not. The term "order" is a technical one, which is in common use in courts of law and which is well understood, though it may not be easy to give a precise definition of it. One thing, however, is clear, and that is that no order can be made except upon an application to the Court for relief. Such an application usually takes the form of a motion or petition, and the decision of the Court upon such motion or petition is the order, which is embodied by the Registrar in a formal document. I do not say that there can be no order of Court except upon a formal motion or petition, but what is essential is that there should be an application to the Court for some relief."

The principles laid down in Dickinson's case (supra) have been applied consistently by this Court, the most recent decision on the topic being Klep Valves (Pty) Ltd v Saunders Valve Co Ltd 1987 (2) SA 1 (A), at pp 40 H - 41 H, in which the Court followed Union Government (Minister of the Interior) and Registrar of

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Asiatics v Naidoo 1916 AD 50. Naidoo's case concerned an application made on motion in which the Court, having expressed its view on a question of law in favour of one of the parties, nevertheless directed that oral evidence be heard to resolve disputes on the affidavits. The party against whom the question of law had been decided (respondent in the Court a quo) applied for special leave to appeal direct to the Appellate Division. In his judgment, refusing leave, INNES CJ pointed out that the case under consideration was the converse of Dickinson's case. There had been an application for relief, but no decision upon it: the application had merely been postponed for further evidence. To date the judge a quo had merely given a ruling on a point of law, which he might later revise (cf. also Bell v Bell 1908 TS 887, at p 891). Only when he had given a decision on the law and the facts and granted the

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relief prayed for would the matter be appealable at the suit of the applicant for leave to appeal.

Another case in which a party endeavoured to appeal against a ruling on a point of law was Nxaba v Nxaba 1926 AD 392. In that case an action had been brought for an account. Before the trial the Court made an order by consent directing that before evidence was led a point of law be argued and decided on the pleadings as filed. Proceedings in the action were ordered to be stayed pending decision of this point of law. In due course argument took place and the Court gave its decision and awarded "costs of this issue" to the successful party. The unsuccessful party appealed to this Court. This Court held that the decision of the Court a quo was "a mere ruling on a preliminary point of law" and not a rule or order on the relief asked for in the action. It therefore fell within the principle

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laid down in Dickinson's case (supra). INNES CJ, who delivered the Court's judgment, stated (at p 394) -

> "It is said that the law point might have been raised by way of exception. But even if that were so, that was not the course which has been followed, and the order has not been made in that form. The pleadings remained unaltered and the relief asked in the declaration still remains for adjudication. Order 12, Rule 59, provides for the decision of a question of law either by way of special case or in such manner as the Court might deem expedient. By consent of parties this point was argued, not upon a special case submitted in the ordinary way, but as a mere legal proposition which it was advisable to settle before dealing with the plaintiff's claim for relief. No order concerning the matter in dispute could be drawn up by the Registrar upon the Court's ruling, save an order as to the costs of the issue; and this is not an appeal on costs."

This Court came to a similar conclusion, following the Dickinson and Nxaba cases, in Umfolozi Co-operative Sugar Planters, Limited v South African Sugar Association

1938 AD 87. In that case, an application for a declaratory order, the Court heard argument and gave its decision on certain preliminary points of law raised by respondent before considering the substance of the application itself. A favourable decision on any one of these points would have disposed of the application; but in each case the Court's decision was unfavourable. Respondent appealed against the Court's decisions on these points, seeking their reversal. It was held that these decisions were rulings against which no appeal lay. In the course of his judgment STRATFORD JA remarked (at p 90) —

> "It is important to observe that there is no rule of law or procedure which made it incumbent upon the Court to give this piecemeal consideration to the application, nor was there any right on the part of respondents to be heard except upon the whole case after the conclusion of the argument for the applicants. The course adopted was special to the circumstances and it was obviously convenient, since, if one of these three

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> contentions of the respondents were upheld, a final order on the application could have been made....."

The decision of this Court in Shacklock v Shacklock 1949 (1) SA 91 (A) appears to herald a somewhat more flexible approach to questions of appealability. In that case the plaintiff had brought an action against her former husband claiming a sum of money in terms of an agreement made an order of court at the time of their divorce. There were disputes between the parties as to the meaning and effect of the agreement. The matter went to trial and at the conclusion of the evidence the parties, by agreement, submitted certain legal issues, four in number, for decision by the Court, it being agreed that once these issues had been decided the accountants employed by the parties would settle the whole account between the parties. The trial Judge decided these issues. One party appealed against the

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Court's decision on three of these issues and the other cross-appealed against the Court's decision on the fourth. The noting of the cross-appeal was, however, without prejudice to the right of that party to contend that the decision of the trial Court was not open to appeal; and an application was made to strike the appeal off the roll. Delivering the judgment of the Court, CENT-LIVRES CJ distinguished the Dickinson, Nxaba and Umfolozi cases. He held that in casu the parties, having closed their cases, had asked the trial judge to make a declaration of rights. He added (at pp 97-8) —

> "This was obviously a convenient course to adopt, for it saved unnecessary costs which would have resulted from the Court being required to go into a mass of figures in order to settle the accounts between the parties: once the rights of the parties under the agreement are determined, it should be a comparatively simple matter for the accountants concerned to arrive at a correct account. ..... Unless an appeal lies before this account is settled, wasted costs may be incurred by the accountants in

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> the event of this Court ultimately holding that judgment of the trial court is wrong. .....In this case an order of Court was issued by the Registrar of the trial Court which declared the rights of the parties, and that part of the order appealed against had all the attributes of a final order. See Pretoria Garrison Institutes v Danish Variety Products (Pty.) Ltd. (1948 (1), S.A.L.R. 839)."

The learned Chief Justice further held that an appeal lay against an order declaring rights (see pp 98-99).

In the Pretoria Garrison Institutes case, referred to above by CENTLIVRES CJ, one of the issues was whether an order by a magistrate directing a party to furnish certain further particulars was appealable in terms of sec. 83(b) of the Magistrates' Courts Act 32 of 1944, which permitted an appeal against "any rule or order.... having the effect of a final judgment". It was held by the majority of the Court that the magistrate's order was not so appealable. SCHREINER JA,

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who delivered the majority judgment on this issue, held that in using in sec. 83(b) the words quoted the Legislature must be taken to have had in mind the distinction between what are called simple interlocutory orders and other interlocutory orders, ie those having a final and definitive effect on the main action. (In passing, the learned Judge of Appeal pointed out that under some forms of legislation simple interlocutory orders are not wholly unappealable: they may be appealed from with leave.) Enunciating the test to be applied in determining whether an order is a simple interlocutory order or one having final and definitive effect, SCHREINER JA stated (at p 870) —

> "..... a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to 'dispose of any issue or any portion of the issue in the main action or suit' or, which amounts, I think, to the same thing, unless it 'irreparably anticipates or precludes some of the relief which would or might be given at the hearing' ".

/ (See .....

(See also South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A), at pp 549 G - 551 A, where the authorities on interlocutory orders and on the distinction between simple interlocutory orders and orders having a final and definitive effect on the main action are reviewed.)

So far as I am aware, the correlation between this distinction and the distinction between judgments and orders, which in terms of sec. 20(1) are appealable, and rulings, which are not, has not hitherto been judicially investigated. I do not propose to do so in any depth. I shall confine myself to a few observations on matters which appear to be relevant in the context of the present case. An interlocutory order which has final and definitive effect on the main action must, in my view, be regarded as an appealable judgment or order. This, I think, explains the reference by CENTLIVRES JA in the

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passage quoted above from his judgment in the case of Shacklock v Shacklock to the Pretoria Garrison Institutes case. The position in regard to a "simple interlocutory order", which term would comprehend all orders pronounced by the Court upon matters incidental to the main dispute, preparatory to or during the progress of the litigation, other than those having a final and definitive effect on the main action (South Cape Corporation case, supra, at p 549 G) is not so clear. There is much to be said for the view that some such orders would constitute judgments or orders which under sec. 20(1), read with sec. 20(2)(b), of the Act before the amendments introduced by the Appeals Amendment Act 105 of 1982, would have been appealable with leave; others would constitute mere rulings, unappealable even with leave (see Dickinson's case, supra). Of course, under the new appeal system introduced by Act 105 of 1982, which requires

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that in all appeals in civil proceedings under sec. 20 of the Act (other than appeals in terms of certain particular statutes, see eg Kruger v Le Roux 1987 (1) SA 866 (A); sec. 76(3) of the Patents Act 57 of 1978) leave to appeal be obtained, the importance of the distinction between simple interlocutory orders and orders having a final and definite effect has been diminished, as far as appeals from a provincial or local division to this Court are concerned.

At this point I would digress to mention briefly two points. The first is that although a number of the cases referred to above were decided in relation to statutory provisions which were replaced by corresponding provisions in the Act, they are nevertheless relevant on the meaning of "judgment or order" in sec. 20 of the Act (Heyman v Yorkshire Insurance Co Ltd 1964 (1) SA 487 (A), at p 490 H). The second is that sec.

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21(1) of the Act confers upon this Court an additional jurisdiction to —

> ".... hear and determine an appeal from any decision of the court of a provincial or local division".

The "decision" here referred to is a decision of the same nature as the "judgment" or "order" referred to in sec. 20(1) of the Act (see Heyman v Yorkshire Insurance Co Ltd, supra, at pp 492 C - 493 B; Law Society, Transvaal v Behrman 1981 (4) SA 538 (A), at p 546 D-F).

The next case to which reference should be made is Tropical (Commercial and Industrial) Ltd. v Plywood Products Ltd 1956 (1) SA 339 (A). In that case the appellant had been sued by the respondent for damages for breach of contract. During the course of the trial it was agreed between the parties that in the event of plaintiff satisfying the Court that there had been a breach of contract, the Court should refer certain

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factual issues relating to the quantum of damages to be tried before an arbitrator. The Court found that the breach of contract had been proved and, in accordance with the agreement, the factual issues were referred to arbitration. The Court further ordered that the matter should stand down pending receipt of the arbitrator's report. The Court then gave leave to appeal and cross-appeal against its order. With evident reluctance (see p 344 B and F) CENTLIVRES CJ, who delivered the judgment of this Court, held that the order of the Court a quo was not a "judgment or order" as defined in previous decisions of this Court —

> "(a)s the order made by the trial Judge 'decided no definite application for relief' and was merely a direction as to the manner in which the case should proceed....."
> (see p 344 G).

Reference has already been made to Heyman's case (supra). That also related to a preliminary decision

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on a point of law. It was an action for payment of a sum of money alleged to be owing in terms of a deed of suretyship. One of the defendants pleaded, in the alternative, that the deed was invalid. By agreement between the parties, the validity of the deed was determined by the Court as a separate issue before trial of the action on the other issues. In terms of the agreement it was also agreed that if the Court's decision on validity went against the defendant raising this defence, she would be entitled to appeal against it. This is in fact what happened; and the defendant appealed. This Court, however, refused to entertain the appeal on the ground that the decision of the Court a quo was a ruling and not a judgment or order. In delivering the Court's judgment, STEYN CJ pointed out that the relief claimed in the action was the payment of a sum of money, alternative relief and costs; and

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that the ruling given by the Court a quo on the issue in question did not decide whether or not any such relief was to be granted in any form. It was argued by counsel that if the plea on the issue of validity had been held to be well-founded, the plaintiff could have appealed against the judgment as being, in effect, a successful exception to the declaration and that the decision holding the plea not to be well-founded was similarly appealable as being in effect a successful exception to the plea. The Court rejected this argument and in this regard made reference to the remarks of INNES CJ in Nxaba's case (supra), which have been cited above.

It is clear from the line of cases to which I have thus far referred that the main reason for this Court having given what CENTLIVRES CJ described as a "restricted meaning" to the words "judgment or order"

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has been a reluctance to allow the piecemeal decision of cases, ie numerous subsidiary appeals during the course of a single legal proceeding, with all the expense and inconvenience attached thereto. (See the remarks of INNES ACJ in Dickinson's case, supra, at p 428.) This is undoubtedly a very cogent consideration, particularly where the decision in question relates, for instance, to a procedural matter or to the admissibility of evidence and it may in the end not have a decisive effect upon the outcome of the case. Where, however, the decision relates to a question of law or fact, which if decided in a particular way would be decisive of the case as a whole or of a substantial portion of the relief claimed, then a somewhat different position arises, and indeed in that event the advantages of expense and convenience may favour a final determination of the question on appeal, even though the proceedings in the court a quo

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may not have been concluded. The advantages of having such a question of law or fact determined by the court of first instance as a separate, preliminary issue are recognized by the provisions of Rule 33(4) (see/remarks the of HOLMES JA in Botha v A A Mutual Insurance Association Ltd and Another 1968 (4) SA 485 (A) at p 489 A-E); and under the present system of appeal, which requires leave to appeal in all cases falling under secs. 20 and 21 of the Act, there is much to be said for the application of a more flexible approach (of which there was some evidence in Shacklock's case, supra) to the question of the appealability of such decisions taken by the court of first instance.

To conclude this review of the decisions of this Court on the question of appealability, I must make brief reference to certain cases decided since Heyman's case (supra). In my view, they also evidence a more

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flexible and relaxed approach. Thus, in Botha v A A Mutual Insurance Association Ltd and Another, supra, which concerned an action for damages arising from a motor accident, the parties had agreed that the trial Court determine first the issue of liability, apart from the question of damages. This the Court did, holding in favour of the defendant and entering a judgment for it with costs. The plaintiff appealed to this Court and it was held that the decision of the trial Court was appealable. It was pointed out that this was the converse of the situation in Heyman's case; but the Court cautioned that had the plaintiff succeeded on the issue of liability the decision would have been in the nature of a ruling and not appealable, as in Heyman's case.

In Labuschagne v Labuschagne; Labuschagne v Minister van Justisie 1967 (2) SA 575 (A) the pro-

cess of relaxation was taken a step further. In that case the defendant in an action for damages raised by way of a special plea the defence that the action was barred by a special statutory limitation. The case was set down for trial on the issues raised by the special plea only. The trial Judge, having heard evidence and argument, dismissed the special plea with costs. On an appeal to this Court against the dismissal of the special plea, it was held at p 583 F (the question of appealability having been raised) that the decision of the trial Judge which was "'n finale en onherstelbare afhandeling van 'n selfstandige en afdoende verweer wat eerste verweerder geopper het as grondslag vir die regshulp wat hy in die spesiale pleit aangevra het", constituted a judgment or order in terms of sec. 20(1) of the Act and was therefore appealable. Similar decisions were reached in regard to unsuccessful special pleas of prescription,

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separately adjudicated, in Smit v Oosthuizen 1979 (3) SA 1079 (A) and Constantia Insurance Co Ltd v Nohamba 1986 (3) SA 27 (A).

With the aforegoing in mind, I turn now to the facts of the present case. The appellant's main claim, as originally formulated, was for damages in the sum of R5 889 868,89. One of the defences raised by respondent in its plea was that by reason of clause 3(6) of the Conditions of Contract appellant was in law restricted in the quantum of damages claimable to an amount to be calculated in accordance with the formula laid down in clause 3(6); and, as I have mentioned, it appears from respondent's argument before this Court that in its view the damages so calculated amounted to R1 163 142,07, ie less than one-fifth of the damages claimed. This defence was singled out for separate adjudication in terms of Rule 33(4) and indeed the plead-

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ings were amended to include an appropriately worded declaratory order, which squarely raised the issue of the applicability of clause 3(6). The Court a quo upheld the defence based on clause 3(6) and made a declaratory order embodying its decision and an order which obliged appellant to pay the costs of the hearing relating to the trial of this issue.

In all the circumstances I am of the opinion that the decision of the Court a quo, as embodied in its order, constituted a "judgment" in terms of sec. 20(1) of the Act and was therefore appealable. This decision was of a final nature: it could not have been corrected, altered or set aside by the trial Judge at a later stage of the trial. Moreover, it was definitive of the rights of the parties and had the effect, in the Court below, of disposing of portion (and a very substantial portion) of the relief claimed by appellant in the

main action, viz. the damages claimed in excess of the formula laid down by clause 3(6). It is true that the decision did not dispose of a separate or distinct claim for relief, but merely placed a limitation as to quantum on the main claim. I do not think, however, that that makes any difference. And, in accordance with the principles stated above, I hold that on these grounds the judgment of the Court a quo is a judgment and not a mere ruling.

In argument counsel for appellant laid stress on the amendment of the pleadings and the fact that the Court a quo had made a declaratory order and an order for costs, which had been embodied in a formal order issued by the Registrar (cf. the remarks of SOLOMON JA in Dickinson's case, quoted above). It would appear that this amendment was for a limited and temporary purpose and that had the matter proceeded before the trial Judge the original prayers would have been rein-

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stated or new prayers claiming damages substituted, depending on how the decision concerning clause 3(6) went. In view of this I would prefer to rest my decision on the grounds outlined in the previous paragraph (above).

It is true that, so far as I am aware, there is no direct precedent for the decision which I have reached in this case on the point in limine. Nevertheless, I believe that it is in accordance with the principles enunciated in Dickinson's case (supra) and elaborated in subsequent decisions of this Court. To the extent that the decision may have the effect of enlarging the meaning of "judgment or order", I am of the view that this is not only consistent with principle, but is also supported by considerations of practical convenience. The decision of the Court a quo on the applicability of clause 3(6) is obviously of fundamental importance

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in this case. If it is correct, then it seems to me that it might well put an end to the litigation between the parties. There should not be much dispute as to the effect in monetary terms of applying clause 3(6); or as to appellant having suffered damages at least to that extent. Finality on this issue at this stage seems, therefore, to be eminently desirable. The alternative that appellant be compelled to continue with the trial in the Court below to final judgment before being entitled to appeal could cause inconvenience and unnecessary expense. For instance, at such a resumed trial respondent might tender or pay into court the a-mount due in terms of clause 3(6) or the appellant might be precluded on grounds of relevance from leading his evidence on damages in full. If in the end this Court decided on appeal that the decision of the Court a quo on clause 3(6) was incorrect, the matter would then have

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to be referred back to the Court a quo for the issue of damages to be properly canvassed: in the result a cumbersome process.

For these reasons I hold that the appeal in this matter is properly before the Court and that the respondent's point in limine and the application, which accompanied it, that the appeal be struck off the roll, should be dismissed with costs.

I come now to the merits of the appeal. Clause 3(6) of the Conditions of Contract is to be found in a clause headed "Quantities of Works". It must be read in conjunction with sub-clauses (1) and (3) of clause 3. I quote these sub-clauses in full.

> "(1) The Contractor shall receive payment only for the Works actually executed and accepted.
>
> .....
>
> (3) The Department shall have the right by means of variation orders to require the Contractor to perform addi-
>
> / tional.....

tional work at the existing contract rates and prices up to a limit of 20% of the original contract price, calculated as a mathematical percentage of the said price, and the Department shall also have the right by means of variation orders to increase or decrease the quantities of any item or items or to omit any item or items up to the said limit of 20%. Any variation effected in terms hereof shall be measured and valued at the rates and prices contained in the schedule of quantities and shall be added to or deducted from the contract price; provided that the Contractor shall not be obliged to perform any additional work under a variation order which is indivisible in its nature and which is likely when measured and priced as aforesaid to exceed the said limit of 20% unless and until he has agreed with the Department on the rate of remuneration to be paid for work which exceeds the said limit.

.....

(6) Unless by special agreement entered into between the Architect and the Contractor and subject to the production of satisfactory evidence regarding any damages sustained by the Contractor, an amount not exceeding 5 per cent of the Schedule prices shall be paid on the net value of the work omitted beyond 20 per

/ cent .....

> cent of the Contract amount, caused either by reductions or by variations, or by cancellation of the Contract."

The issue is whether on the facts of the present case appellant's claim for damages for breach of contract is governed by clause 3(6), with the result that the damages to which it is entitled may not exceed an amount calculated in accordance with the formula laid down in clause 3(6). And, as I have indicated, the effect of the application of clause 3(6) would be to reduce appellant's claim by about 80%.

Before proceeding I would just point out that there appears to be a lacuna in the opening words of sub-clause (6); and counsel were agreed that this would be remedied by reading into the sub-clause, after the word "Unless", the words "otherwise agreed", or words of similar import.

The resolution of the above-stated issue

depends upon the proper meaning to be attached to the words "cancellation of the contract" appearing at the end of clause 3(6). Respondent contends that these words cover only a cancellation of the contract by reason of the wrongful repudiation or material breach of contract by the Department. Appellant, on the other hand, contends that they cover only a consensual cancellation and, in particular, do not apply where the cancellation arises by reason of the wrongful repudiation or breach of the contract by the Department. In the law of contract "cancellation" is a well-known term which covers both cancellation by agreement between the parties (or consensual cancellation, to use the phrase adopted by counsel in argument) and cancellation by one party on the ground that the other party has wrongfully repudiated or breached a material term of the contract (see Christie The Law of

Contract in South Africa pp 431, 520 and the cases there cited; Prof. Louise Tager in (1976) 93 SALJ at pp 430-1). These two forms of cancellation denote very different juristic concepts. The first-mentioned form, consensual cancellation, is a contract whereby another contract is terminated. The second-mentioned form, cancellation on repudiation or breach, involves the unilateral exercise by one party of the right to rescind the contract, this right having accrued to him by reason of the other party's repudiation or material breach. This form of cancellation is often termed "rescission".

As appears from my statement of the parties' contentions, it is common cause that the words "cancellation of the contract" cannot be given a full and unrestricted meaning. They clearly do not apply to a rescission of the contract by reason of the repudiation or breach thereof by the contractor. To hold otherwise

/ would.....

would lead to the absurd position of a defaulting contractor becoming entitled to damages. Once it is clear that the words cannot be given their full meaning, then the question arises as to the extent to which their meaning is to be restricted. To this question the words themselves provide no ready answer; and it is therefore necessary to look at the context.

At common law and in the absence of a contractual provision to the contrary, a building contractor is entitled to carry out the whole of the contract work as originally specified and without variation (Hudson's Building and Engineering Contracts 10th ed. by I N Duncan Wallace, at p 339, cited with approval by McEWAN J in Hydro Holdings (Edms) Bpk v Minister of Public Works and Another 1977 (2) SA 778 (T), at p 783 C-D; Halsbury 4th Ed, vol 4, para 1174; Emden's Building Contracts and Practice 8th Ed

/ by.....

by Bickford Smith and Freeth, vol 1, p 134; LAWSA, vol 2, paras 33 and 34). In view, however, of the complexity of any major building or construction project and the possibility of encountering unexpected contingencies during the work, a contract such as the one presently under consideration usually contains a clause empowering the employer to order "variations", which term includes additional work, altered or substituted work for that described in the contract and the omission of contract work. It is recognized that an unbridled power to order variations could cause great hardship to the contractor. Thus is has been held in England that a variation clause will not permit the employer to change completely the character of the works as originally contemplated (Halsbury, op cit, para 1174; Emden, p 147). In the circumstances it has become customary in major building contracts to expressly limit the

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power of the employer to order variations. Clause 3(3) of the Conditions of Contract in casu is such a provision; and it is interesting to note that a provision in this form was used in this country as far back as 1923 - see Kelly and Hingle's Trustees v Union Government (Minister of Public Works) 1928 TPD 272, at p 276. Since then the 20% limit (or some similar limit) seems to have become a more or less standard term in such contracts (see eg Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A), at pp 513 B-C, 519; the Hydro Holdings case, supra at 783 A; Grinaker Construction (Tvl) (Pty) Ltd v Transvaal Provincial Administration 1982 (1) SA 78 (A), at p 90 G; Melmoth Town Board v Marius Mostert (Pty) Ltd 1983 (1) SA 700 (D), at p 703 G-H; Minister of Public Works v W J M Construction Co (Pty) Ltd 1983 (3) SA 58 (A), at p 64 G-H).

/ Turning.....

Turning to clause 3(3) of the Conditions of Contract, this sub-clause gives the Department the right to, inter alia, omit any item or items up to a limit of 20% of the original contract price. Bearing in mind the common law background, as sketched above, it is clear to me that the Department does not have the right to order omissions in excess of 20%; and that if it should purport to do so the contractor would be within his rights if he refused to be bound by the order. And in this connection it is relevant to note that the proviso to clause 3(3) expressly states that the contractor is not obliged to do additional work which exceeds the 20% limit. If the contractor refuses to be bound by an order for the omission of work in excess of the 20% limit and the Department is adamant, then it seems to me there are various choices open to the contractor. He could rescind the contract on the

ground that the Department's insistence upon its order of omission amounted to a material breach of the contract and claim damages. Alternatively, he could possibly (I express no final opinion on this) claim the right to specifically perform the contract, disregarding the unlawful omission (see Ranch International Pipelines (Transvaal (Pty) Ltd v LMG Construction (City) (Pty) Ltd 1984 (3) SA 861 (W)). And, as a third option, he could come to an accommodation with the Department and agree to the omission of the work. In that event and in the absence of a special arrangement for compensation, as contemplated by the opening words of clause 3(6) - as interpreted above - the compensatory formula laid down by clause 3(6) would come into operation. Cf. the remarks of Rumpff CJ in the McAlpine case, supra, at p 519 F-H. Such an accommodation could be achieved either by an express agreement or tacitly by the contractor proceeding with the work without objection after an omission exceeding 20% had been ordered.

/ It .....

It follows from the aforegoing that where the omission of work in excess of 20% of the contract amount results from reduction or variation, the provisions of clause 3(6) would come into operation in the event of the contractor exercising the third option open to him, viz. an accommodation with the Department along the lines described above. This is essentially a consensual situation; and to my mind this provides a strong argument in favour of holding that the other cause for the omission of work, mentioned in clause 3(6), viz. cancellation of the contract, also refers to a consensual situation.

There are other considerations which lead me to the same conclusion. It was common cause on the pleadings that at the time the contract was entered into it was known to the parties, inter alia -

/ (a) that.....

(a) that the contract works were large and costly and that the carrying out of the contract required large expenditure by appellant, especially in regard to plant and equipment;

(b) that appellant might incur costs in respect of insurance;

(c) that appellant might commit itself contractually to sub-contractors;

(d) that appellant would in the course of the performance of the contract, recover major portions of its expenditure not as the same were incurred, but substantially after the same were incurred and over a period exceeding the whole of the period of performance of the contract; and

(e) that any profit made from the performance of

/ the.....

> the contract would be received over the latter part of the contract or after completion of the contract.

In the light of these factors, there seems to me to be substance in the submission made on appellant's behalf that it was within the contemplation of the parties that a wrongful cancellation of the contract by the Department in its early stages would be likely to cause the appellant loss substantially in excess of the scale of compensation laid down in clause 3(6). This tends to render it improbable that the parties intended clause 3(6) to apply to cases of wrongful cancellation of the contract by the Department and to displace the appellant's common law rights to damages. In this respect clause 3(6) is analogous to an exemption clause and for that reason as well it should also be narrowly construed (see Christie, op. cit., at pp 194-6). Moreover, had the parties intended

so to constrict the contractor's common law rights, it seems unlikely that this would have been done so casually and obliquely, by tacking a few words onto a sub-clause conferring certain rights. The Conditions of Contract were drawn by respondent and, if my interpretation of clause 3(6) does less than justice to what respondent intended, it has only itself to blame for not making its intention clear.

For these reasons I have come to the conclusion that appellant's submission that clause 3(6) applies only to consensual cancellations of the contract is correct; and that, accordingly, the sub-clause does not apply in the present case. This conclusion renders unnecessary a consideration of the other arguments raised by appellant's counsel, viz. that clause 3(6) conferred upon appellant rights additional to its common law rights and, in the alternative, that certain

of the damages claimed by appellant fell outside the ambit of clause 3(6).

In regard to the costs of appeal, it was argued on respondent's behalf that if the appeal succeeded on the merits appellant should not be allowed costs relating to substantial portions of the record, which, so it was said, were not necessary for a proper adjudication of the appeal. In this connection appellant placed before us, with respondent's consent, an affidavit deposed to by appellant's attorney, Mr Kruger, in regard to the preparation of the record. From this affidavit it appears that shortly after leave to appeal had been granted by the Court a quo Mr Kruger communicated with the attorney representing the respondent and requested an urgent meeting in order that the content of the appeal record could be settled by agreement. After taking instructions on this proposal, respondent's attorney advised Mr Kruger

/ telephonically.....

telephonically that his instructions were not to attend the proposed meeting; that all initiative in regard to the preparation of the record would have to come from appellant; and that on receipt of a "detailed and fully motivated" written proposal from the appellant, he would take counsel's opinion thereon and would thereafter take instructions from his client. Mr Kruger then decided that the modus operandi suggested was unduly time-consuming and that in view of the urgency of preparing the record, he would proceed with the preparation of the record without any omissions. There is also on record a letter from respondent's attorney agreeing with the correctness of this recital of the facts. Appellant was not entitled to omit any part of the record of the proceedings unless the respondent had consented thereto or this Court under Rule 13 had excused the appellant therefrom (see Omega Africa Plastics (Pty) Ltd v Swisstool Manufacturing Co

(Pty) Ltd 1978 (4) SA 675 (A), at p 681 B-C). In view of all the circumstances, and in particular the attitude adopted by respondent's attorney, I do not think that any special order is warranted in regard to portions of the record which admittedly could well have been omitted for the purposes of this appeal.

The following order is made:

(1) The application in limine is dismissed with costs, including the costs of two counsel.

(2) The appeal is allowed with costs, including the costs of two counsel, and the order of the Court a quo is altered in the following respects:

(a) Para 1(b) is deleted and there is substituted the following:

"that the plaintiff's right to claim the damages alleged in para 7 of its particulars of claim is not limited by the provisions of clause 3(6) of the Conditions of Contract".

/ (b) The.....

(b) The second sentence of para 3 is deleted and the following substituted:

> "Subject thereto, the defendant is ordered to make immediate payment of plaintiff's costs relating to the hearing before FLEMMING J, such costs to include the costs of two counsel".

(3) The order of the Court a quo, dated 6 September 1985, in regard to the costs of the application to it for leave to appeal is set aside and the respondent is ordered to pay such costs, including the costs of two counsel.

M M CORBETT.

BOTHA JA)
HEFER JA)
GROSSKOPF JA) CONCUR.
NESTADT JA)