

27/10/89

Case No 524/87

C M G M (PTY) LTD

(NOW KNOWN AS GROUP FIVE
CIVILS LIMITED)

APPELLANT

and

CITY COUNCIL OF JOHANNESBURG

RESPONDENT

J J F HEFER JA

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

C M G M (PTY) LIMITED

APPELLANT

(NOW KNOWN AS GROUP FIVE CIVILS LIMITED)

and

CITY COUNCIL OF JOHANNESBURG

RESPONDENT

CORAM : JOUBERT, VAN HEERDEN, HEFER, STEYN, JA
et F H GROSSKOPF, AJA.

HEARD : 28 FEBRUARY 1989.

DELIVERED : 14 MARCH 1989.

J U D G M E N T

HEFER JA:

In terms of a written agreement entered into during

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1983 between the parties to this appeal the appellant undertook to construct a sewerage tunnel for the respondent. Clause 55 of the agreement provided that all constructional plant and materials owned by the appellant would, upon being brought on to the construction site, be deemed to become the property of the respondent and could not be removed therefrom without the consent of the city engineer.

During November 1985, after the purported termination of the agreement by the appellant and a threat to remove the plant from the site, the respondent brought an urgent application on notice of motion to the Witwatersrand Local Division for an order in the following terms:

- "2. (a) Interdicting the respondent (i.e. the present appellant) from removing from the site specified in Contract No 3823 between the applicant and the respondent for the construction of the Bushkoppie Outfall Sewer - Phase II, any constructional plant or materials which exist on the site.
- (b) Ordering the respondent to restore to the said site any constructional plant or materials removed therefrom by the respondent without the written consent of the Engineer, as specified in clause 55 of the said contract, and in particular the items set out in annexure 'R' to the founding affidavit.
- (c) Ordering the respondent to pay the costs of this application."

The appellant opposed the application and filed a counter-application for an order -

"permitting Respondent to remove all equipment

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materials and constructional plant belonging to Respondent from the site specified in Contract No. 3823 concluded between Applicant and Respondent on 14 January 1983 in respect of the construction of the Bushkoppie Outfall Sewer - Phase II, which as at the date of the hearing of this counter-application are still on the aforementioned site;"

The matter came before KRIEGLER J who dismissed the application and granted the counter-application.

KRIEGLER J's order was, however, reversed in an appeal to the Full Bench of the Transvaal Provincial Division where the counter-application was dismissed and prayers 2(a), (b) and (c) of the notice of motion were granted.

This is the order at which the present appeal is directed.

The dispute relates entirely to the appellant's right

to remove its plant and materials from the constructional site. Respondent's case is that the appellant has no right to do so in view of the provisions of clause 55 of the agreement. The appellant, on the other hand, contends that it has lawfully terminated the agreement and is no longer affected by clause 55. The facts giving rise to these rival contentions are largely common cause and are briefly as follows:

It is common knowledge that the second half of 1985 was marked by civil unrest in certain parts of the country which eventually led to the declaration of a state of emergency. In the prevailing conditions the safety of appellant's personnel on the site where the tunnel was

under construction could not be maintained. This led to a spate of letters and a number of meetings between the appellant's directors and members of the city engineer's staff. Save to the extent that I will do so, it is unnecessary to deal with the contents of the letters and the discussions at the meetings. What should be mentioned at this stage, is that there is a provision in the agreement which was specifically designed for the situation in which the parties found themselves after the declaration of the state of emergency. It is clause 68(4) which reads as follows:

"(4) If the supply of labour or materials is disrupted for a continuous period of at least 30 (thirty) days during the currency of the Contract by the following circumstances outside the control

of the Contractor:

- (a) a state of emergency declared by the Government or riot, civil commotion or disorder; or
- (b) a disruption in the supply of petroleum-based products or limitation of supply thereof, due to action by the Government,

the Council may agree to an adjustment of the amount of the Contract Price which, in the opinion of the Engineer, is reasonable (regard being had to all material and relevant factors directly consequent upon, or directly affected by, the events referred to, including factors related to the Preliminary and General Items priced by the Contractor in the Schedule of Quantities). If the Council does not agree to such adjustment, the Contractor shall be entitled to determine the Contract. The decision as to whether a riot, civil commotion or disorder outside the control of the Contractor has occurred will be made by the Engineer."

Clause 68(4) loomed large in the correspondence and in the discussions. In a letter to the city engineer dated 26 August 1985 the appellant wrote e g that

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of the Contractor:

"(i)t is our intention, if the present situation pertains beyond 25 September 1985 , to invoke the provisions of clause 68(4) of the General Conditions of Contract -----unless we are able to negotiate new conditions of contract acceptable to both parties."

At a meeting held on 19 September 1985 it was agreed that the appellant would submit proposals on the advisability of a price adjustment on the basis that work on the tunnel would be carried out via three specified points of entry. These proposals were submitted in a letter to the city secretary dated 3 October 1985 and were considered by the respondent's management committee on 29 October 1985. On 30 October 1985 the city secretary reported the outcome to the appellant in the following terms:

"-----The City Engineer who, as you are aware, is the 'Engineer' as defined in the contract, expressed the opinion that your proposals were not reasonable. Consequently, the management Committee at its meeting on 29 October 1985 did not adopt any of your proposals-----"

The appellant was also advised in the letter that it was considered to be in breach of the agreement and was called upon to proceed with the work.

Appellant's reaction came on 31 October 1985 in a letter to the city secretary which reads as follows:

"We refer to our letter of 25 October 1985,

- (a) Receipt is acknowledged of your letter reference 23.7.14 of 30 October 1985 in which you purport to give notice that we will be in breach of the abovementioned contract on or about 6 November 1985

unless we comply with the provisions thereof. We do not accept the contents of this letter.

- (b) The Council has not agreed to such an adjustment of the contract price as is contemplated in clause 68(4) of the General Conditions of Contract which govern the abovementioned contract, resultant upon the supply of labour or materials for the contract having been disrupted for a continuous period of more than 30 days due to the state of emergency declared by Government or riot, civil commotion or disorder.
- (c) In the premises we hereby determine the abovementioned contract by reason of the breach set out in paragraph (b) hereof.

We will commence removal of our establishment, plant and equipment from the contract on Monday 4th November 1985-----"

It is this letter and particularly the threat of

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the removal of the plant and equipment which led to the application in the Wiatersrand Local Division. The termination of the agreement was challenged in the founding affidavit deposed to by the city secretary on the basis that, assuming that "the circumstances referred to in clause 68(4) have arisen", the appellant was not entitled to terminate the agreement since (a) the right to terminate it in terms of clause 68(4) would only arise in the event of the refusal by the respondent "to accept an adjustment which the engineer considers to be reasonable"; (b) the only adjustment proposed by the appellant was the one contained in the letter of 3 October 1985 which the engineer considered to be unreasonable;

and (c) the respondent had "not been called upon to agree or not to agree to any amount within the scope of clause 68(4) by which the contract price should be increased".

KRIEGLER J rejected the city secretary's contention basically because he did not agree with the latter's interpretation of clause 68(4). In his judgment the learned judge said:

"If the given state of affairs had existed for the requisite period in consequence of the stated circumstances, the applicant is put to an election. It must agree to an adjustment of the amount of the contract price, or suffer a determination of the contract by the respondent. What it has to agree to is an adjustment, not a figure. The figure is to be determined by the engineer. Thus the applicant has to take a decision in principle and the detailed

financial implications are to be calculated by the engineer in due course or even upon conclusion of the contract. That, to my mind, is the clear meaning of the sub-clause as it stands-----

I am satisfied on what is common cause, that the preconditional circumstances existed for the requisite period. I am also satisfied that upon a proper interpretation of clause 68(4) that state of affairs obliged the applicant to make up its mind whether it would agree to an adjustment of the amount of the contract price, which the Engineer could calculate in due course, or whether it would permit the respondent to withdraw from the bargain. The applicant, if demand for it to make up its mind were necessary, was called upon unequivocally, repeatedly and over a protracted period, so to make up its mind. It did not do so.

In the result, the wording of the second sentence of the relevant part of the sub-clause in question came into operation, i.e. the Council did not agree to such adjustment and the contractor became entitled to determine the contract-----"

Although the argument in this court centred mainly on the interpretation of clause 68(4) I find the correct interpretation of the provision of theoretical interest only. Appellant's counsel conceded that, even if KRIEGLER J's interpretation were to be upheld, the appeal falls to be dismissed unless we are persuaded that clause 68(4) was correctly invoked. And it is in this regard that there is an obstacle which appellant's counsel could not overcome. What the obstacle is, becomes clear when the effect of the provision and the facts of the case are examined.

The effect of clause 68(4), whichever way one interprets it, is plainly that, after the lapse of the thirty

day period mentioned therein, the council has an election either to agree or not to agree to an adjustment.

In the absence of a stipulation in the agreement as to the time within which it is to be done it is equally plain that the election must be made within a reasonable time after the expiry of the thirty days. The right to terminate the agreement only arises if this does not happen. Bearing this in mind I turn to the facts.

For purposes of the argument I accept KRIEGLER J's finding that, what he referred to as the "pre-conditional circumstances" for the operation of clause 68(4), existed continuously for thirty days. The evidence is not clear

when, as a matter of fact, the thirty day period commenced but in the letter of 26 August 1985 the respondent was advised of appellant's intention to invoke clause 68(4) "if the present situation pertains beyond 25 September 1985". Accordingly, had nothing further happened, the time for respondent's election would, at the earliest, have arrived a reasonable time after the last mentioned date. But before the arrival of that date there was the meeting of 19 September 1985 where, as I mentioned earlier, it was agreed that the appellant would submit firm proposals for respondent's consideration. By the end of September the respondent was still awaiting the proposals. They were received on 3 October 1985 and

were only considered on 29 October. On 30 October the appellant was advised that its proposals had not been accepted and the very next day the appellant terminated the agreement purportedly in terms of clause 68(4).

In these circumstances there can be no doubt that the letter of termination was written precipitately. After 19 September 1985 there was obviously no need for respondent to take the kind of decision which, on appellant's construction of clause 68(4), was required to keep the agreement alive. The need for such a decision only arose after appellant's proposals were rejected and thereafter a reasonable time had to be allowed for the respondent to make its election. This was not done. When this

difficulty was put to appellant's counsel he could only suggest that the letter of 30 October 1985 must be construed as an election in terms of clause 68(4). This is plainly not so since the letter in question deals specifically with the rejection of appellant's proposals and did not indicate that the respondent would not agree to an adjustment of the contract price in terms of clause 68(4).

It follows that the court a quo rightly dismissed the counter-application. It was also correct in granting prayers 2(a) and (c) of the notice of motion but prayer 2(b) should not have been granted in toto since there is a dispute of fact relating to some of the items listed

in annexure "R". Respondent's counsel accordingly asked for the amendment of prayer 2(b) which I am about to grant. (The amendment is such a trifling one that it cannot affect the costs).

The following order is made:

1. Prayer 2(b) of the notice of motion is amended by deleting the words "and in particular the items set out in annexure "R" to the affidavit".
2. The appeal is dismissed with costs which shall include the costs of two counsel.

J J F HEFER JA.

JOUBERT JA)
 VAN HEERDEN JA)
 STEYN JA) CONCUR.
 F H GROSSKOPF AJA)