

Case no 680/89

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

COMPAGNIE INTERAFRICAINNE DE TRAVAUX..... Appellant

and

SOUTH AFRICAN TRANSPORT SERVICES..... First respondent

THE PRESIDENT OF THE SOUTH AFRICAN
INSTITUTION OF CIVIL ENGINEERS..... Second respondent

THE RESIDENT ENGINEER OF THE
SOUTH AFRICAN TRANSPORT SERVICES
(CONSTRUCTION) BELVILLE..... Third respondent

THE CHIEF CIVIL ENGINEER SOUTH
AFRICAN TRANSPORT SERVICES..... Fourth respondent

CORAM: CORBETT CJ, HEFER, VIVIER, MILNE, et EKSTEEN
JJA.

DATES OF HEARING: 18, 19 and 20 February 1991

DATE OF JUDGMENT: 21 March 1991

J U D G M E N T

CORBETT CJ:

As this case demonstrates, tunnelling through mountains can be an unpredictable operation. For tunnelling is what this case is all about. On 15 February 1980 first respondent, South African Transport Services ("SATS") called for tenders for the construction of a railway tunnel some 13,33 km in length through the Hex River mountains in the Cape Province, together with certain ancillary works. The proposed tunnel's eastern portal was to be in the vicinity of De Doorns and the western portal near Kleinstraat. The tunnel was to be at a general depth of up to about 220 m below ground surface. The extended closing date for tenders was 16 May 1980. On that day, under cover of a letter dated 13 May 1980, a tender was submitted by a company called Spie-Batignolles S.A. Division, a division of Spie-Batignolles, which has its registered office in Paris ("Spie-Batignolles"). This

tender was accepted by SATS on 13 August 1980. Thereafter Spie-Batignolles decided that it did not wish itself to carry out the contract work. It accordingly caused the appellant, Compagnie Interafricaine De Travaux ("Comiat"), to be incorporated and it arranged for the contract to be ceded to Comiat. It is common cause that in all respects Comiat stepped into the contractual shoes of Spie-Batignolles. The tender provided for the conclusion by the parties of a formal contract. This was entered into on 29 December 1980.

The formal contract is voluminous and comprises the completed tender form, certain general conditions of contract ("the general conditions" also referred to as "the E5"), certain special conditions of contract and specifications ("the special conditions"), a schedule of prices and quantities, and drawings. The contract requires the contractor to complete the works in accordance

with the contract documents. The amount to be paid to the contractor for the due performance of the contract work is a sum to be ascertained from the quantities of work carried out at the rates tendered by the contractor in the bills of quantities and/or schedule of prices. The amount of the tender, calculated in accordance with the quantities and rates reflected in the tender, amounted to R26 770 082, but the ultimate contract figure would obviously depend upon final measurement and calculation, taking into account the actual quantities of the work performed, provisional work, price adjustment clauses, variations, etc. The date of completion is given as 12 August 1984. The contract provides for the grant of an extension of time for completion and for the payment of a penalty by the contractor for failing to complete and hand over the works by the completion date or, where applicable, the extended completion date.

One of the documents initially made available to tenderers was a geological report prepared at the request of SATS by a consulting geologist, Mr M J Mountain ("the Mountain report"). Mr Mountain conducted extensive investigations (starting in May 1974) into the feasibility of various routes for the tunnel. He studied geological maps and surveys, and surface conditions, tested subsurface conditions by means of 19 boreholes and conducted geotechnical tests upon rock cores. From these investigations two alternative routes for the tunnel were chosen. The report contains descriptions of the general geology of the area, of the engineering geology of the two alternative routes and of the geomechanical classification of the rock masses likely to be encountered in the process of tunnelling along these routes. The rock in different sections of the proposed tunnels, consisting mainly of sandstone and shale, is classified geomechanically into five

categories in accordance with a system devised by a Mr Z T Bieniawski. These are (i) very good quality, (ii) good quality, (iii) fair quality, (iv) poor quality and (v) very poor quality. As regards route 1 (which was the route chosen in the contract), Mountain estimated from his investigations that 88% of it would be through rock masses falling in classes (i) to (ii), i e very good to good, 7% in classes (ii) to (iii), i e good to fair, 3% in class (iii), i e fair, and 2% in classes (iii) to (iv), i e fair to poor. This led Mountain to conclude that in general the average rock mass of all structural regions lay within the range of Bieniawski's class (ii), viz good rock. The report nevertheless contains the caveat:-

"All information contained in this report is given with a view to providing the maximum practical information for the benefit of all involved in the project. Variations from the predicted conditions may be encountered, particularly in areas of geological contact

or fault zones, due to circumstances which could not reasonably have been foreseen."

The Mountain report is referred to in the special conditions (cl. 4.6) and it is there stated that the report contains the interpretation placed upon the information gained in the investigation. Cl. 4.6 further informs tenderers that the drilling cores are available for inspection and that representative core samples can be made available to tenderers for the purpose of further testing; and contains the warning:

"The interpretations given in no way absolve the Contractor from making his own assessment as required under Clauses 2(a) and 2(b) of the (E.5)."

I shall later refer to clauses 2(a) and 2(b) of the general conditions.

Tenderers were required to inspect the site before

tendering and to this end site inspections were arranged for 5 and 27 March 1980, but tenderers were not permitted to sink additional boreholes since this would have delayed the project.

For most of its length the tunnel is designed to carry one railtrack, but there is a section in the middle 1 447 metres in length (known as "the loop") where the tunnel is enlarged to double width in order to accommodate two tracks.

The special conditions contain detailed provisions in regard to tunnelling. These include a stipulation (in cl. 4.4) that each tenderer is to submit with his tender a comprehensive technical report describing his proposed tunnelling methods, with particular reference to such matters as the mode of attacking the rock face, proposed tunnelling cycles, the number of complete sets of tunnelling equipment to be provided, the proposed primary support

systems to be used and the proposed average daily advance rate to be achieved. In the case of the successful tenderer, his technical report is to be incorporated in the contract and he is bound to carry out the work in accordance with the report. The special conditions further provide that the tunnelling methods used by the contractor are to be subject to the approval, from the safe-working aspect, of the Resident Engineer, Construction ("the Engineer") and the competent authority under the Mines and Works Act 27 of 1956 and the Explosives Act 26 of 1956 (and the regulations made under those Acts); and that the contractor shall modify his methods in accordance with their requirements (cl. 4.11.2).

Cl 4.4 of the special conditions further provides that the contractor shall only be allowed to change his tunnelling method in the circumstances provided for in cl. 4.11.2 and with the written approval of the Engineer. Both cl. 4.4 and cl. 4.11.2 emphasize that additional costs resulting

from changes in the tunnelling methods rendering them different from those envisaged by the contractor at the time of tendering must be borne by the contractor and that no further claim, over and above the amount to be paid for work performed as calculated in terms of the relevant rates in the contract documents, will be considered.

Such an excavated tunnel requires internal support. The special conditions make provision for two types of such support - temporary support and permanent support. Cl. 4.12.1 stipulates that the contractor shall be at all times responsible for the safety and stability of the tunnel excavation and that he shall, subject to the Engineer's approval, take whatever of certain specified measures or combinations thereof he considers adequate by way of temporary support to prevent cave-ins, ground or rock falls or other failures. The measures specified in cl. 4.12.1 are rock bolts, structural steel supports, wire

netting or welded mesh fabric and shotcrete, a form of pneumatically applied concrete. The contractor is obliged to maintain the temporary support until the permanent lining is in place. It is further stipulated that temporary support shall be provided by the contractor at his own cost, the rates tendered for tunnel excavation being deemed to include full compensation for the supply, installation and maintenance of temporary support and all direct and consequential costs involved in providing the same.

Cl 4.12.2 states that permanent tunnel support shall consist of a concrete or shotcrete lining, as specified. The lining is to be reinforced where specified and where directed by the Engineer. The contractor may be required by the Engineer to incorporate temporary support systems as part of the permanent support. Where this is done such temporary support will be measured and paid for in accordance with the contract terms and rates of payment.

In the section dealing with tunnelling in the schedule of prices and quantities figures for quantities, rates or prices per cubic metre and total amounts are given for (i) excavation in shale, (ii) excavation in Quartzitic sandstone and (iii) excavation in mixed zones. In addition there is a price for "extra-over" items (i), (ii) and (iii) for excavation in "fault zones". This extra-over rate is for a provisional item relating to an additional payment over and above the rates for (i), (ii) and (iii) where fault zones are encountered. In terms of cl. 4.14.15 of the special conditions this item only applies in "highly incompetent rock" where certain further requisites, which I need not detail, are present. Apart from fault zones, no distinction is drawn in the rates between different qualities (as opposed to kinds) of rock mass. A contractor, when tendering, would, therefore, have to take cognizance of his estimation of the quality of rock to be

encountered and fix his prices accordingly.

In the technical report submitted by Spie-Batignolles together with its tender (in terms of cl. 4.4 of the special conditions) it is stated, inter alia, that the tenderer plans to excavate the tunnel from both portals simultaneously and that an average excavation rate on each heading of 350 metres per month is predicted for the concrete lined tunnel and 300 metres per month for the shotcrete lined tunnel. In its covering letter forwarding the tender Spie-Batignolles wrote that -

"The appreciation of rock conditions based on the Geological Report and observed core samples indicates excellent tunnelling conditions, with good to very good rock, very little temporary support required and no problems with care of ground water. In particular we have assumed that the installation of temporary support will not interfere with the tunnelling cycles."

The general conditions of contract further contain fairly standard clauses giving the Engineer overall superintendence of the contract works (cl. 22); providing for the ordering of alterations, extras, additions to or omissions from the contract by the Engineer (cl. 35); prescribing how remuneration for such extras, etc is to be determined (cl. 50); regulating the payment of what is due to the contractor by means of measurement certificates (cls 56 and 57); and providing for the arbitration of disputes (cl. 69). Clause 2(a) and 2(b) of the general conditions, which have previously been referred to and are of critical importance in this case, read as follows:

"2(a) The Contractor shall be held to have inspected and examined the site of the works and its surroundings and to have satisfied himself before submitting his tender as to the nature of the ground and sub-soil, the form and

nature of the site, the nature of the work, the quantities and the materials necessary for the completion of the works, the means of access to the site, the accommodation and camping sites he may require and, in general, to have obtained all requisite information as to the risks, contingencies and other circumstances including local climatic conditions which may influence or affect his tender.

- (b) The Contractor shall be held to have satisfied himself before tendering as to the correctness and sufficiency of his tender, and of the rates and prices stated in the bills of quantities and/or schedule of prices. These rates and prices shall be held to cover all his obligations under the contract and everything necessary for the proper completion and maintenance of the works. No claim by the Contractor

will be considered on account of the materials, methods of construction and/or site conditions being different from those assumed by him in tendering for the contract, except in the case of adverse sub-surface conditions which in the opinion of the engineer could not reasonably have been foreseen."

Work on the excavation for the eastern approach cut was commenced in September 1980 and on the tunnel excavation in January 1981. Comiat avers that during the ²⁻⁴ ~~next~~ ensuing year it came to realise that the quality of the rock through which the tunnel and the eastern cut had to be excavated was worse than that which had or could reasonably have been foreseen or assessed at tender stage from the data or conclusions in the Mountain report or from any other practical form of assessment; that this had resulted in the materials, methods of construction and/or site conditions

being different from those assumed by Spie-Batignolles at the time of tendering; and that this had caused additional costs to Comiat and had substantially delayed the progress of the work. On 31 March 1982 Comiat submitted to the Engineer a claim ("the 1982 claim") for additional remuneration and an application for extension of the time for the completion of the contract. This claim is clearly based upon the last sentence of cl. 2(b) of the general conditions, quoted above.

The Engineer's reaction to this claim is contained in a letter to Comiat dated 26 August 1982. In it the claim is rejected, basically on two grounds. The first ground is that the rock conditions encountered were entirely foreseeable; and the second that the slow progress of the work was due to inefficiency on the part of the contractors. With reference to the quality of the rock encountered the Engineer stated:

"In the tunnel headings completed to date, the rock can be classified generally as Class III. An average stand-up time of one week applies to this class. I am in agreement in general that the actual geomechanics class is approximately one to one and a half classes lower than that given in the Geological Report. This conclusion was reached by our Geotechnical Consultant before the start of any excavation work on site solely on the basis of the information available in the tender."

The "Geotechnical Consultant" referred to in the last sentence of this quotation was a firm called Steffen Robertson and Kirsten, which on about 25 November 1980 furnished a report to SATS on the geotechnical conditions which might be encountered in the construction of the tunnel. It is claimed that this report presents a less favourable picture than the Mountain report.

Thereafter, on 15 September 1982, in terms of

cl. 69(a) of the general conditions, which provides for the reference of disputes between the contractor and the Engineer to the Chief Civil Engineer ("CCE"), Comiat's 1982 claim was submitted to the CCE. The decision of the CCE was conveyed to Comiat in a letter dated 27 September 1982, in which he overruled the Engineer. He noted that the Engineer had conceded that so far as the work had progressed the actual geomechanical classification had proved to be approximately one to one-and-a-half classes lower than that predicted in the Mountain report; and ruled that the position was governed by cls. 2(b) and 50 of the general conditions. He further indicated that he would instruct the Engineer to issue variation orders as a basis for providing recompense to Comiat. The parties were unable to agree rates for this additional work and eventually in January 1983 the Engineer himself fixed new rates (expressed to be "provisional") and also granted a

"provisional" extension of time of 16 months for completion of the contract. In due course variation orders with an unescalated value of some R5 434 000 were issued and this amount was paid out. Comiat was dissatisfied with the Engineer's decision and the dispute was again referred to the CCE. The latter upheld the Engineer and Comiat requested arbitration in terms of cl. 69 of the general conditions. The arbitration procedure was set in motion and in August 1985 Comiat submitted its statement of claim to the arbitrator. This dealt comprehensively with the additional remuneration which Comiat claimed by reason of it having encountered unforeseen and reasonably unforeseeable adverse subsurface conditions both in the tunnel and in the eastern approach cut, and was quantified as at 30 June 1985 in an amount of some R65 million.

In the meanwhile, by August 1984 the excavation of the tunnel was complete save for some 1 150 metres in the

in the loop section. While excavating this final length of tunnel over the period August 1984 to May 1987 some of the worst rock conditions in the whole tunnel were encountered. These are referred to as "the loop fault". This situation called for a new method of excavation, altered procedures and the acquisition of new plant and equipment. There were requests by Comiat for extensions of time for completion and for variation orders to compensate the contractor for additional expenses incurred by him. The Engineer initially reacted favourably, but subsequently on the instructions of the CCE he informed Comiat on 24 April 1986 that the work in the loop section constituted excavation in "fault zones", in terms of cl. 4.14.15 of the special conditions, the quantities for which were shown as provisional, and that consequently in terms of cl. 50 of the general conditions the rates therefor were not subject to variation. The variation orders sought were accordingly

refused. Shortly thereafter the previous variation orders compensating Comiat for additional costs and allowing additional time were in effect cancelled and Comiat was notified that the resultant overpayment was to be recovered from monthly payment certificates.

In April 1987 SATS gave notice that it proposed to amend its defence to the Comiat's claim for additional remuneration, as submitted to the arbitrator in August 1985.

For reasons which need not be canvassed Comiat then decided that it would be speedier and more effective if it were to abandon the arbitration proceedings and submit to the Engineer a new comprehensive claim with a view to that becoming the basis of a new arbitration. This it did, the new claim being made under cover of a letter dated 30 September 1987 ("the 1987 claim").

The 1987 claim is a voluminous document running to some 238 pages. Separate claims (main and in the

alternative) are made in respect of the tunnel and the eastern cut. The claims are described in detail and there are numerous supporting schedules. I shall later refer to the 1987 claim in more detail. At this stage I would merely point out that both in regard to the tunnel and the eastern cut the main claim is for what is termed "reasonable remuneration" in terms of cl. 2(b) of the general conditions; and that there are alternative claims in terms of cl. 2(b) which are to be costed in terms of cl. 50. Cl. 50 (which will be quoted later) prescribes how alterations, extras, additions and omissions ordered in terms of cl. 35 shall be priced.

The 1987 claim led to a bulky and protracted correspondence between Comiat, on the one hand, and the Engineer and the CCE, on the other hand. In addition, two meetings between Comiat representatives and the Engineer (accompanied by his deputy) were held on 19 April and 10 May

1988, in order to attempt to resolve differences between the parties. In essence the attitude of the Engineer and of the CCE was that Comiat's 1987 claim could not be considered

(a) as regards the main claim, because a claim for reasonable remuneration was not "contractually based" since the contract made no provision for remuneration on this basis; and

(b) as regards the alternative claims involving cl. 50, because Comiat had failed, in its formulation of the claim, to state what assumptions, or allowances, were made by it when arriving at the unit prices for tunnelling quoted in its tender.

It would also seem that the Engineer and the CCE did not accept that any adverse subsurface conditions not reasonably foreseeable had been encountered in the excavation of the tunnel.

The CCE's final ruling on the claim was given on 13 June 1988. On 29 June Comiat wrote to SATS requesting that there be submitted to arbitration the issue as to whether, in the event of it being found that there were adverse subsurface conditions which could not reasonably have been foreseen resulting in materials, methods of construction or site conditions being different from those assumed at the time of tender, Comiat was entitled to be paid a reasonable remuneration in respect thereof, or whether it was limited in quantifying its claim by the provisions of cl. 50. SATS referred this request to the State Attorney. On 22 July the State Attorney wrote to Comiat stating that inasmuch as the Engineer had refused to consider the claim, there was no arbitrable dispute to go to arbitration in terms of cl. 69. SATS accordingly declined to go to arbitration. Thereafter Comiat attempted to have an arbitrator appointed by the authority named in cl.69, viz

the President of the South African Institution of Civil Engineers, but this was strongly opposed by SATS. In the end, in September 1988, Comiat abandoned this further attempt to go to arbitration. Shortly thereafter, on 15 October 1988, work on the tunnel was completed.

Comiat then decided upon litigation and in December 1988 it instituted motion proceedings in the Witwatersrand Local Division citing as respondents, SATS (first respondent), the President of the South African Institution of Civil Engineers (second respondent), the Engineer (third respondent) and the CCE (fourth respondent) and claiming the following relief (prayer 2 was abandoned and need not be set out):

- "1. Declaring that, on the assumption that materials, methods of construction and/or site conditions were different from those assumed by the applicant in tendering for the contract between the

applicant and the first respondent (being contract number CTNW 758), and that there were, alternatively this was due to, adverse sub-surface conditions which, in the opinion of the third respondent OR the fourth respondent OR any arbitrator(s) who might be appointed in terms of clause 69 of the General Conditions of Contract, could not reasonably have been foreseen;

(a) applicant is entitled to reasonable remuneration in respect of a claim in terms of clause 2(b) of the General Conditions of Contract, and in particular in respect of applicant's Main Tunnel Claim (as defined hereinbelow) and applicant's Main Eastern Cut Claim (as defined hereinbelow); and/or

(b) third respondent was not entitled to refuse to make a ruling on applicant's Main Tunnel Claim but that he should have either admitted or rejected it; and/or

(c) third respondent was not and is not entitled to refuse to make a ruling on applicant's Main Eastern Cut Claim but that he should either admit or reject it;

2.

3. Declaring that in the event that the applicant's claims as defined hereinafter gave rise to a dispute or difference between them as contemplated by clause 69(a) of the General Conditions of Contract the third respondent was not and is not entitled in order to admit or reject the claims to demand that the applicant furnish any information to him over and above that submitted with the applicant's claims and he is directed to consider and decide the whole of the claim referred to him by the applicant as opposed to a decision on any one issue or aspect of the claim; his decision on the whole of the claim to be conveyed to the applicant within a period of two months from the date of this order;

4. Directing the third respondent (without precluding applicant from pursuing its Main Tunnel Claim) to make a ruling on applicant's First and Second Alternative Tunnel Claims (as defined hereinbelow) and applicant's First, Second, Third, Fourth and Fifth Alternative Eastern Cut Claims (as defined hereinbelow) by either admitting or rejecting them;
5. Declaring that in the event of any matter referred to in the preceding paragraphs being referred in writing to the fourth respondent in terms of clause 69(a) of the General Conditions of Contract the fourth respondent is not entitled to demand that the applicant is obliged to furnish any information to him over and above that submitted with the applicant's claims in order to settle the matter and advise his decision in writing and he is directed to consider and decide the whole of the claim referred to him by the applicant as opposed to a decision on any one issue or aspect of the claim; his

decision on the whole of the claim to be conveyed to the applicant within a period of two months from the date of his order."

I quote prayers 3, 4 and 5 in their amended form. There were, in addition, certain alternative prayers, but it is not necessary to refer to them.

In Comiat's founding and other affidavits, together with the annexures thereto, the whole story as I have hitherto recounted it is set forth. The application was opposed by first, third and fourth respondents, who filed a mass of affidavits and documents, canvassing many issues. It is not necessary to refer to the answering affidavits in any detail. In general they put in issue the legal contentions put forward by Comiat; they deny that Comiat in fact encountered adverse subsurface conditions which were not reasonably foreseeable; they allege that Comiat under-tendered in the first place and that its claims are an

attempt to recoup the cost and consequences of such under-tendering and other inefficiencies; and they aver that Comiat's failure and refusal to give its actual tender assumptions precluded its 1987 claim being considered by the Engineer, the CCE and an arbitrator. Second respondent took no part in the proceedings.

The application was heard by Mynhardt ⁴²J, who dismissed the application with costs, including the costs of three counsel, and awarded such costs on the scale as between attorney and client. Comiat comes on appeal to this Court with leave of the Judge a quo.

I proceed now to consider whether, contrary to the finding of the Court a quo, Comiat was entitled to all, or any, of the relief claimed in its notice of motion. I commence with the declaratory order sought in prayer 1. This prayer raises the interpretation of cl. 2(b) of the general conditions and in particular the issue as to whether

the last sentence of clause 2(b) gives rise to a claim for reasonable remuneration, essentially a question of law. The prayer asks the court to assume, for the purpose of deciding this legal issue, that certain facts exist, viz that in the case of the contract under consideration materials, methods of construction and/or site conditions were different from those assumed by Comiat in tendering for the contract and that there were (or alternatively this was due to) adverse subsurface conditions which in the opinion of the Engineer (or the CCE or an arbitrator appointed under clause 69) could not reasonably have been foreseen. The question then is whether, postulating those facts, Comiat would be entitled to a reasonable remuneration, as set forth in its main tunnel and eastern cut claims.

In their heads of argument the respondents raised certain preliminary objections to the relief claimed in prayer 1. These objections were not argued before us, but

at the same time they were not abandoned. It is thus necessary to deal with them.

In the first place, it was contended that a court cannot be asked to make a declaratory order on the basis of assumptions of fact and in this connection reference was made to certain authorities which establish that the court will not exercise its power to make a declaratory order in order to answer abstract, academic or hypothetical questions. In my opinion, that principle has no application here. As I have shown, there is a real and pertinent dispute between the parties as to whether or not Comiat is entitled to reasonable remuneration where the facts assumed by prayer 1 are present, i e where a cl.2(b) type of situation occurs. Indeed, the Engineer's view on this legal issue has caused him to refuse to consider Comiat's main claim and the CCE's concurrence with this viewpoint has caused a deadlock, preventing settlement of

the issue by arbitration. In the circumstances, it seems to me that not only is the Court empowered to make the desired declaration - which will decide the legal issue one way or the other - but also that it is eminently desirable that it should do so. I might add that though the facts assumed are in dispute there is in Comiat's evidence prima facie substantiation of these assumptions. On the facts, too, the case is therefore neither abstract nor academic nor hypothetical.

Secondly, the respondents raise the objection that in terms of cl. 69 any dispute between the Engineer and Comiat "in connection with the contract", which would include a dispute as to a claim based on cl. 2(b), must be decided first by the CCE and, thereafter, at Comiat's election, by an arbitrator; and that a court will not usurp an arbitrator's functions in whole or in part. I find it strange that this argument should come from the respondents

seeing that they have done everything in their power to prevent the dispute going to arbitration and have made it clear that, in their view, the Engineer has taken no arbitrable decision. There is no substance whatever in this point. The manifest purpose of the present application is to enable arbitration to get under way.

The third objection is that there is a dispute of fact as to the basis upon which Comiat seeks relief and this was well known to Comiat when it launched these proceedings. As far as I can make out, this so-called dispute of fact relates to evidence relevant to whether or not cl. 2(b) contains an implied term providing for reasonable remuneration. This is a question of legal interpretation, not of fact. There is, in my view, no relevant dispute of fact which prevents this question being decided by the Court.

I turn now to cl. 2(b) and for convenience I re-

quote the last sentence thereof:

"No claim by the Contractor will be considered on account of the materials, methods of construction and/or site conditions being different from those assumed by him in tendering for the contract, except in the case of adverse sub-surface conditions which in the opinion of the engineer could not reasonably have been foreseen."

This is the sentence (for convenience I shall call it "the last sentence") upon which Comiat's claim is founded. It must be read in the light of, inter alia, what precedes it in cl. 2(b) and also in cl. 2(a). The latter sub-clause places the onus upon the contractor before submitting his tender to inspect the site of the works, to acquaint himself with the nature of the site, the nature of the work, the quantities and materials necessary for the completion of the works, etc, and to obtain all requisite information as to risks, contingencies and so on. The first two sentences of

cl. 2(b) oblige the contractor to satisfy himself as to the correctness and sufficiency of his tender and of his rates and prices and stipulate that these rates and prices are to cover all his obligations under the contract and all that is necessary for the completion and maintenance of the works. Then, in the last sentence, the same idea is conveyed negatively in that the contractor is denied the right to make a claim on account of the fact that materials, methods of construction and/or site conditions turn out to be different from those assumed by him in tendering for the contract. This denial is, however, made subject to a single exception, viz where there are adverse subsurface conditions which in the opinion of the Engineer could not reasonably have been foreseen.

The last sentence is very cryptically worded. In a contract running to several hundred pages it seems unfortunate that when it came to a matter which in this

particular contract was obviously of prime importance to the parties so much should have been left unsaid. (Cf the far more specific and comprehensive clause in the standard form of general conditions of contract in McKenzie, The Law of Building and Engineering Contracts and Arbitration, 4th ed at p 233.) Certain of these omissions can readily and indisputably be supplied by way of interpretation; others are more controversial. Thus there seems to be no doubt that the last sentence means that where the exception applies, i e where there are adverse subsurface conditions and the Engineer is of the opinion that they could not reasonably have been foreseen, the contractor is given a right to a claim on account of the materials, etc being different from those assumed by him when tendering. It seems to me, however, that such a claim will lie only where the adverse subsurface conditions result in the materials, etc being different from those originally assumed (that is,

there must be a causal connection); and only where the difference in materials, etc gives rise to expense or loss for which the contractor is not otherwise remunerated or compensated under the contract. Any other interpretation would be contrary to the manifest intention of the contracting parties. And, I would add, the claim is obviously for financial remuneration.

The role of the Engineer in regard to such a claim needs examination. Clearly he must, in the first place, decide whether in his opinion adverse subsurface conditions encountered by the contractor are such as could not reasonably have been foreseen. If he is of this opinion, then one of the requirements for a claim is satisfied. It seems to me, however, that before a claim can be entertained, he would also have to form the opinion that these adverse subsurface conditions caused differences in materials, etc and that this in turn caused the contractor

additional loss or expense not otherwise recoverable under the contract. If the Engineer decided against the contractor on any one or more of these issues, then the contractor would have recourse under clause 69 firstly to the CCE and then, if he were dissatisfied with the decision of the CCE, to arbitration.

The next question to be considered is how such a claim, when it arises, is to be quantified. Comiat's contention is broadly that there is no express contractual provision determining the quantification of the claim and that in the circumstances the law implies a reasonable remuneration. In this regard Comiat's counsel referred to various authorities, South African and foreign. Respondents' counsel, on the other hand, submitted (and this submission was accepted by the Court a quo) that a claim arising under cl. 2(b) had to follow the procedures prescribed by cls. 35 and 50, that is, it had to be the

Beetham

subject of an order issued under cl. 35 (I shall call this a "variation order") and be quantified in terms of cl. 50. These two clauses must now be considered more closely. They read:

"35. The Engineer may order alterations, extras, additions to or omissions from the contract, and the Contractor shall carry out or give effect to such orders on receipt of written notice from the Engineer, and in accordance with such plans as may from time to time be issued by the Engineer.

.....

50. Where the quantities in the bills of quantities and/or schedule of prices are shown as provisional, any increase or decrease in the quantities arising solely from an increase or decrease in the quantities shown in the bills of quantities and/or schedule of prices, and not arising from an order to carry out alterations, extras, additions and omissions shall be measured and paid for

at the rates quoted in the bills of quantities and/or schedule of prices.

Where alterations, extras, additions and omissions, in terms of clause 35, are similar in character and carried out under conditions similar to work which has been specified in the contract documents or drawings and for which the Contractor has tender rates in the items scheduled in the schedule of prices, such rates shall apply to the alterations, extras, additions and omissions where the final measured quantity of any item does not differ from the estimated quantity in the schedule of prices by more than twenty (20) per cent.

check 200

Where the difference is more than twenty (20) per cent, the Contractor may approach the Engineer and the Engineer may approach the Contractor with a request for an adjustment in the

scheduled rates. The Engineer shall decide on the amount of the adjustment, if any, and to what part of the final measured quantities such adjustment shall apply. Such adjustments shall be effected by means of a variation order.

Where alterations, extras, additions or omissions are not of a character similar to the work for which rates were tendered, or are not executed under conditions similar to those specified in the contract documents or drawings, or are such that the application of the scheduled rates would produce a result inequitable to either party, the alteration, extra, addition or omission shall be treated as a variation from the contract. The rates for the work involved are to be agreed upon by the Contractor and the Engineer. Any change in rates shall be effected by the issue of a variation order. In the determination of the rates for the work covered by the variation order, the rates quoted in the bills of quantities

and/or schedule of prices for work of an associated nature shall form the basis of such determination. Where the bills of quantities and/or schedule of prices do not include rates for associated work, a fair valuation shall be made and agreed upon by the Engineer and the Contractor.

Where the Engineer and the Contractor cannot reach agreement, the Engineer shall issue a variation order at the rate he considers equitable to both parties.

Should the Contractor be dissatisfied with such a decision he may declare a dispute and the matter shall then be disposed of as set out in clause 69."

The first sentence of cl. 50 deals with provisional quantities and is not pertinent here. The remainder of cl. 50 provides for three different situations:

(a) where (i) alterations, extras, etc ordered in

terms of cl. 35 are similar in character and are carried out under similar conditions to work specified in the contract and (ii) the final measured quantity does not differ from the estimated quantity by more than 20 per cent;

(b) where the circumstances are as in (i) above, but the difference under (ii) is more than 20 per cent; and

(c) where the alterations, extras etc are not of a character similar to the work for which the rates were tendered or are not executed under conditions similar to those specified in the contract.

It is clear to me that, although cl. 35 is expressly referred to only in regard to (a) above, (b) and (c) also relate exclusively to the case of alterations, extras, etc ordered in terms of cl. 35. Consequently cl. 50 does not have general application: it deals specifically with the

quantification of remuneration for variations ordered under cl. 35. I think that the respondents recognized this. Hence the contention that a claim under cl. 2(b) has to be the subject of a variation order under cl. 35.

In my opinion, it is only by resorting to procrustean methods of interpretation that cl. 35 can be made to accommodate a claim under cl. 2(b).

At the outset it may be questioned whether the situation which arises when the contractor under the contract in question finds that in terms of cl. 2(b) the subsurface conditions are sufficiently adverse for it to be said that they could not reasonably have been foreseen, is capable of being dealt with under a clause which empowers the Engineer to order "alterations, extras, additions to or omissions from the contract". In this context "the contract" must mean the work to be executed under the contract. Where a cl. 2(b) situation arises the contract

work would not seem to be altered or added to, nor would an extra appear to be involved. The same tunnel has to be excavated and built in accordance with the same design and specifications: it is only that from the contractor's point of view the execution of this work is made more difficult, more time-consuming and consequently more costly.

This is illustrated by Comiat's claim in the present case. Broadly speaking and without at this stage going into detail, the 1987 claim is based on the averment that the adverse subsurface conditions delayed the completion of the contract, necessitated the installation of additional temporary support in the form of steel arches, rock bolts, wire mesh and shotcrete (which in turn interfered to a significant extent with the tunnelling cycle), and resulted, because of excessive overbreak, in additional quantities of concrete being required. But for clause 2(b) the contractor, it would seem, would have to

bear these losses and additional expenses. It is difficult to see how these losses and expenses could be accommodated in an order by the Engineer altering or adding to the contract work or providing for extras.

A variation order under cl. 35 involving extras or additional work would normally be issued before the contractor undertook such work. In fact the order constitutes his authority to do such extra work; and in the absence of such authority he would not be entitled to depart in this way from the contract. In the case of a cl. 2(b) situation, the contractor would almost invariably not appreciate that the adverse subsurface conditions encountered by him were in excess of what was reasonably foreseeable until a substantial portion of the tunnel had been excavated. His claim would then to some extent relate to work already done; and the final quantification of his claim would probably have to wait until the completion of

the contract. This fits ill the framework of cl. 35. And one asks how would the Engineer's order define the extras or additional work?

It is common cause that, vis-à-vis the contractor, the Engineer has an unfettered discretion or power to issue a variation order. This seems to me to constitute an insuperable difficulty in trying to fit a cl. 2(b) claim into the confines of cl. 35. For, as I read cl. 2(b) it gives the contractor an unconditional right to claim additional remuneration where the requisites which I have previously spelt out are satisfied: and a right which depends upon the exercise by someone else of an unfettered discretion, if it be a right, is certainly not an unconditional right. The contrary view, viz that cl. 35 applies, would mean that even where a cl. 2(b) situation has developed, the Engineer can, in the exercise of his discretion, refuse to issue a variation order. Since the

contractor is nevertheless bound to complete the contract, this would lead to such manifest inequity that it can safely be inferred that this was not the contractual intent.

Respondent's counsel sought to meet those difficulties by submitting that when a cl. 2(b) situation arises the Engineer may elect to terminate the contract, thus obviating the need to issue a variation order. This submission found favour with the Court a quo. With respect, I am of the view that it is not well-founded. One must start from the premise that 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 (see Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration 1987 (4) SA 569 (A), at 589 C-D and the authorities cited). It would follow that the employer or other person acting on his behalf would not

normally be entitled summarily and without due cause to terminate the contract. A contrary contractual intent would have to be expressly stated or appear clearly by implication. There is no such express provision in the contract in question and I find no convincing basis for implying one. Indeed it requires little imagination to see that such a termination would normally produce very inequitable results from the contractor's point of view. I would add that I leave out of account, because they have no application here, the contingencies of impossibility of performance or contractual frustration.

Consequently, for these reasons, I am of the opinion that there is an inherent incompatibility between the final sentence of cl. 2(b) and cl. 35 and that this demonstrates convincingly that the provisions of the latter clause relating to the issue of a variation order do not apply to a claim under cl. 2(b). It follows that the

machinery for the quantification of the remuneration for work done in terms of variation orders provided by cl. 50 can also have no application to a claim under cl. 2(b).

Cl. 2(b) is by no means the only provision in the contract whereby the contractor is given a claim to additional remuneration dehors the procedure of a variation order under cl. 35 and a quantification under cl. 50. In this connection brief reference may be made, by way of example, to cl. 48 of the general conditions providing for the grant by the Engineer of extra time and extra payment for delays and extra expense caused to the contractor by various failures or delays on the part of SATS; sundry provisions in the special conditions for the payment of additional compensation in certain prescribed circumstances for excessive overbreak (cl. 4.11.7.1, read with 4.14.6.4 and 4.15.6); for rock or ground falls beyond a distance of one metre beyond the pay line (cl. 4.11.9); for dealing

with excess water (cl. 4.11.13); for the drilling of additional exploratory holes as ordered by the Engineer (cl. 4.11.14.iii) and for temporary support incorporated in the permanent support as ordered by the Engineer (cl. 4.12.2).

Postulating that, as I have held, cls. 35 and 50 do not apply to a claim under cl. 2(b), the question is: how is such a claim to be quantified? In the case of Chamotte (Pty) Ltd v Carl Coetzee (Pty) Ltd 1973 (1) SA 644 (A), which related to a contract for the mining of clay lying underneath an overburden of soil and sandstone, Jansen JA stated (at 649 B-E):

"Clause 4 (read with clause 5) of the contract clearly envisages that an increase of the ratio of overburden to clay will entail additional work on the part of the 'contractor' for which he will be compensated by an increase 'in the fixed prices of the clay'. The contract, however, does not provide for the extent of the increase should

the parties fail to arrive at "a negotiated increase". There is certainly authority for the view that where there is an agreement to do work for remuneration and the latter is not specified (expressly or tacitly), the law itself provides that it should be reasonable (cf. Wessels, Law of Contract, 2nd ed., para. 3498; De Zwaan v Nourse, *supra*; Middleton v Carr, *supra*; Angath v Muckunlal's Estate, 1954 (4) SA 283 (N) at 284 A-H), but in the present case it is unnecessary to rely on such a rule or to consider its general validity or its application to the contract. Applying well recognised tests (cf. Mullin (Pty) Ltd v Benade Ltd 1952 (1) SA 211 (AD) at pp 214C-215A; SA Mutual Society v Cape Town Chamber of Commerce, 1962 (1) SA 598 (AD)), it seems, in any event clear enough that the contract implies that if the parties do not agree on the increase in remuneration, the plaintiff will in any case be entitled to a reasonable remuneration for the additional work."

(see also Inkin v Borehole Drillers 1949 (2) SA 366 (A)).

In the present case there is no provision that the parties are to negotiate the amount of the additional remuneration to be paid in respect of a claim under cl. 2(b), nor is another basis indicated as to how the amount is to be determined. In my opinion, in such circumstances the law implies a right to receive reasonable remuneration.

Respondent's counsel pointed to the various special conditions of the contract dealing with such matters as support, overbreak, rock or ground falls, cave-ins, etc and submitted that these special conditions allocate in detail the financial responsibility or risk in regard to such matters as between the parties; and that where the risk is upon SATS the special conditions provide for the payment of compensation to the contractor. On this basis it was argued (at least so I understood the argument) that there was no room for an implied term in cl. 2(b) for the payment of reasonable remuneration. Counsel argued further that

this was illustrated by Comiat's 1987 claim, the components of which were covered by provisions for remuneration in the special conditions. In this connection counsel referred to a provision in the contract to the effect that in the event of there being any "discrepancy or difference" between the general conditions and the special conditions, the latter should prevail.

These arguments cannot succeed. I am not persuaded that the various special conditions referred to cover all the loss and expenditure likely to be incurred by a contractor in a cl. 2(b) situation or indeed the loss and expenditure upon which Comiat's 1987 claim is founded. I do not propose to go into this in any great detail. Nor do I intend to assess to what extent, if at all, the 1987 claim would be covered by provisions for payment to be found in the special conditions, for it is neither necessary nor appropriate for this Court to evaluate the claim. I

shall merely cite two examples to show that at least certain aspects of Comiat's claim under cl. 2(b) - and the same would apply to any other contractor in Comiat's position - are not covered by a special condition.

The first of these relates to temporary support. As I have already indicated, in terms of the special conditions temporary support for the tunnel must be provided by the contractor at his own cost, his rates for tunnelling being deemed to include full compensation therefor (cl 4.12.1) save in the case of temporary support incorporated in the permanent support (cl. 4.12.2). The part of the 1987 claim relating to temporary support shows in detail and compares the kinds and quantities of temporary support which, so Comiat alleges, were foreseeable by the contractor at the time of tendering and those which actually had to be used in the construction of the tunnel. The differences, as the following schedule shows, are striking:

	Bolts (m)	Shotcrete (m ³)	Mesh (m ²)	Standard Arches (no)	Loop Arches (no)	Concrete (m ³)
Actual	181 326	20 421	27 998	341	989	1 134
Foresee- able	30 693	477	4 687	78	-	20
Additional	150 633	19 944	23 311	263	989	1 114

Assuming that Comiat has a valid cl. 2(b) claim for the additional materials required for temporary support, it is clear to me, from the provisions of cl. 4.12.1 and 2, that remuneration therefor is not provided for by the special conditions. On the other hand, I am satisfied that in such a case the contractor is not precluded by the provisions of cl. 4.12.1 from including remuneration for the provision of such additional temporary support in his cl. 2(b) claim. There is no discrepancy or difference here between cl. 2(b), a general condition, and cl. 4.12.1, a special condition. Cl. 4.12.1 caters for the usual

position (which is mirrored in cl. 2(a) and the first two sentences of cl. 2(b)) and the last sentence of clause 2(b) provides for and is limited to an exceptional situation.

The other aspect of Comiat's claim to which I wish to refer is delay. It is stated in the claim that in the standard sections of the tunnel (i.e. those outside the loop) advances equivalent to 350 metres per month were achieved in certain of the relatively short lengths of good rock requiring little or no support, whereas advances of less than 50 metres per month were achieved in poor rock requiring heavy support. The overall average monthly progress in the standard sections was 171 metres, which was half the rate assumed at the time of tender. In the loop section the almost 1 km of poor or very poor rock had a drastic effect on progress, with rates as low as below 40 metres per month and average rates of approximately 50

metres being achieved, as compared with an average monthly rate of 180 metres assumed at the time of tender. The proportion of poor rock and the unexpected variability of rock conditions prevented Comiat from developing what is termed "a good tunnelling rhythm". The claim calculates, with reference to much supporting information, the extent of the delay by comparing the actual rate of progress with the rate of progress that would have been achieved had the reasonably foreseeable subsurface conditions in fact been encountered. This produces a figure of 44,5 months' delay due to adverse subsurface conditions during tunnelling and a figure of 4,5 months' delay in regard to the problems relating to the eastern cut, 49 months in all. And upon this basis a fairly complex calculation is made to assess the additional expense incurred by Comiat by reason of having to operate the contract for this extra period of 49 months. This additional expense does not appear to be

compensated in terms of any of the special conditions or other terms of the contract. It is true that in normal circumstances the contractor would be obliged to shoulder the burden of any delay in the completion of the work, but cl. 2(b) caters for an exceptional situation.

In this connection respondents' counsel made reference to the decision of this Court in Grinaker Construction (Tvl) (Pty) Ltd v Transvaal Provincial Administration 1982 (1) SA 78 (A) and in particular what is stated at p 97 B - 98 E of the judgment. I need not consider this judgment in any detail. The case is wholly distinguishable on the ground that the contract there considered does not appear to have contained any provision similar to cl. 2(b): at any rate no such provision was in issue.

My conclusion that a contractor who establishes a cl. 2(b) situation is entitled to reasonable remuneration

in respect of his claim means that Comiat was, prima facie, and subject to a minor alteration (to be mentioned later), entitled to an order in terms of prayer 1(a) of its notice of motion.

In argument respondents' counsel launched an attack upon Comiat's averment that the adverse subsurface conditions encountered by it were not reasonably foreseeable. Having regard to the assumptions predicated by prayer 1, this attack seems to have little, if any, relevance. Possibly if it appeared demonstrably from the papers that Comiat's averment in this regard was without foundation, this factor might have substantiated respondent's contention (already referred to) that prayer 1 sought a declaration concerning an academic or hypothetical question; or at any rate it might have provided grounds for the Court, in the exercise of its discretion, refusing to make a declaratory order. As I have already indicated,

however, I do not think that Comiat's averment is without foundation; on the contrary Comiat appears to me on its own papers to have made out a prima facie case in this regard. I proceed now to elaborate upon this to some extent.

It is clear that in compiling its tender Spie-Batignolles based its assumptions as to the types and classes of rock which it was likely to encounter in excavating the tunnel upon the predictions contained in the Mountain report. The difference between these predictions and the conditions actually encountered is demonstrated by the following table, compiled from the figures given in the Mountain report and figures as to actual conditions contained in the 1987 claim:

Geomechanical Class	Very good to good I - II	Good to fair II-III	Fair III	Fair to poor III-IV	Poor to very poor IV-V
Estimated length in tunnel as per Mountain report	11 601	958	448	306	0
Percentage of total length	87,1	7,2	3,4	2,3	0
Length in tunnel - actual	1 555	3 215	3 942	3 490	1 128
Percentage of total length	11,7	24,1	29,6	26,2	8,4

The differences between the geomechanical classes of rock predicted in the Mountain report and those alleged to have been encountered are so substantial that if the Mountain predictions represent approximately what was reasonably foreseeable, the actual conditions were clearly not reasonably foreseeable. On the available evidence I am of the prima facie view that Spie-Batignolles was entitled to use the Mountain predictions as the basis for calculating its tender. The Mountain report, together with the core samples, were virtually the only sources of scientific

information available to Spie-Batignolles at the time of tender and it did not have the opportunity to make an independent investigation of its own. It has not been shown on the papers that Spie-Batignolles ought to have appreciated that the conclusions drawn by Mountain were fundamentally flawed. It may be that in evaluating the Mountain report Spie-Batignolles should have made some allowance for the predictions being overly optimistic and thus built a safety margin into its tender (I make no finding in this regard), but it seems to me to be unlikely that any such allowance would have come anywhere near to bridging the gap between the Mountain predictions and actuality.

A consideration of some significance is the fact that in 1982 the CCE conceded that at that stage the geomechanical classification of the rock encountered had proved to be one to one-and-a-half classes lower than that

predicted in the Mountain report and that the position was governed by clause 2(b), i e that this difference was not reasonably foreseeable. I should perhaps add that different persons occupied the office of the CCE in 1982 and in 1987/88 when the 1987 claim was considered.

In an attempt to show that Spie-Batignolles itself did not accept the Mountain predictions at the time of tender, respondents' counsel referred to certain calculations used in the compilation of the tender (referred to as the "MMP"). These calculations, it is true, would seem to postulate somewhat less favourable geomechanical classifications than the Mountain report. Nevertheless, appellant's counsel convinced me that this difference is probably due to errors of interpretation and calculation and that otherwise the MMP faithfully followed and adopted the Mountain report classifications.

Respondent's counsel also relied upon a memorandum

and draft letter dated 18 December 1980 (annexure CTdT 6) sent by Comiat's site agent, J C David, to Comiat's office in Johannesburg which, respondents contend, shows that before excavation commenced Comiat anticipated encountering substantial quantities of poor rock. Having considered CTdT 6 in the light of the explanation given on affidavit by David I am not persuaded on the papers that the inferences which respondents seek to draw from this document are justified.

As to the wording of the assumption in prayer 1 it seems to me that, in view of the finding that cl. 2(b) postulates a causal connection between the adverse subsurface conditions and the materials, etc being different from those assumed at the time of tender, the words ".....there were, alternatively....." should be omitted.

I turn now to consider the remaining prayers in

Comiat's notice of motion. It is convenient to consider together prayers 1(b) and (c), 3, 4 and 5. Essentially the refusal of the Engineer (backed by the CCE) to entertain and make a ruling on Comiat's 1987 claim was based upon the contentions -

- (a) that the claims for reasonable remuneration, both as to the main tunnel and as to the eastern cut, were not "contractually based"; and
- (b) that Comiat had failed in the formulation of its claims to provide information as to its assumptions when arriving at the unit prices quoted in its tender.

In view of my finding that cl. 2(b) is subject to the implied term that the claim referred to therein is for a reasonable remuneration, ground (a) above for the Engineer's refusal was obviously ill-founded. As to ground (b); I have carefully studied the relevant evidence - the 1987

claim itself, the correspondence between Comiat and the Engineer (and/or the CCE) in regard to the claim and the transcripts of the meetings held on 19 April and 10 May 1988 - and I incline to the view that the Engineer was given sufficient information to deal with the 1987 claim. It is not necessary or appropriate, however, for me to pronounce finally on this point or to discuss and evaluate this evidence for I am firmly of the view that whatever the position the Engineer was obliged to give a decision. If he considered that the claim was insufficiently substantiated or that Comiat had failed to produce relevant information, then it was his duty to reject the claim. His decision to reject the claim would then have been subject to reference, in terms of cl. 69 of the general conditions, to the CCE and if Comiat was dissatisfied with the decision of the CCE then it could take the matter to arbitration. The Engineer's refusal in this case to give any form of decision

and the attitude of the respondents that his refusal to make a decision is itself not an arbitrable issue means that the whole matter is left in limbo. Comiat contends that it has supplied all the information it is obliged and able to produce: the respondents contend that Comiat can and must supply more information. It is a deadlock that must be resolved. In the circumstances the attitude adopted by the Engineer is clearly contrary to the contractual intent.

In essence the respondents' submission is that the Engineer's attitude was justified since a claim that is not properly substantiated is not a "claim" within the meaning of that word in cl. 2(b). In the circumstances of this case this appears to me to be semantic argument and one without real substance. On that basis whenever the Engineer considered (rightly or wrongly) that a claim was insufficiently substantiated or documented he could refuse to entertain it and thus frustrate any resolution of the

dispute in terms of cl. 69. In my view, that is not the effect of the contract.

For these reasons I hold that the Engineer was obliged to give a decision on Comiat's 1987 claim. He had the choice of either accepting or rejecting the claim; and a decision to reject would, in my opinion, have constituted a "dispute or difference" between the Engineer and Comiat within the meaning of cl. 69.

It follows from the foregoing that Comiat was entitled to an order in terms of prayers 1(b) and 1(c). I have difficulty in understanding the meaning and purpose of the following words appearing at the beginning of prayer 3:

"....in the event that the applicants' claims as defined hereinafter gave rise to a dispute or difference between them as contemplated by clause 69(a) of the General Conditions of Contract, the third respondent....."

The submission of Comiat's claims to the Engineer could not itself give rise to a dispute or difference in terms of cl. 69(a): before such a dispute or difference could arise the Engineer would have had to have rejected the claim. These words do not, however, appear to affect the essence of the prayer which appears to be an order that the Engineer is not entitled to demand further information from Comiat in order to take a decision to admit or reject the claim. As I have indicated, Comiat is entitled to such an order. The words quoted are, therefore, for the most part superfluous and may be omitted from the order.

Furthermore, the prayer speaks of the "applicant's claims as defined hereinafter". The definition referred to includes not only the main claims based upon reasonable remuneration but also various alternative claims advanced on other bases. These alternative claims are now no longer relevant. The prayer should consequently be amended to

cater for this. For the same reasons prayer 4 should be omitted.

As I have indicated, the trial Judge awarded attorney and client costs against Comiat. The ground for doing so was, according to the judgment, Comiat's conduct in making unjustifiable accusations of improper conduct on the part of the respondents and in imputing improper motives to them, both in the papers before the Court and in the heads of argument filed. In this Court respondents' counsel asked that in the event of the appeal succeeding a punitive costs order should for the same reasons be made against Comiat. I do not feel that any such order is called for. I would point out that though some of the language used by and on behalf of Comiat was, in this regard, intemperate and possibly unjustified, Comiat was not the sole offender. Respondents equally attacked the integrity and bona fides of Comiat and its executives and officials by suggesting inter

~~It is by no means unusual~~
 It sometimes happens that a successful litigant is deprived of all or part of his costs. ~~Because I am not allowed to pay his opponents costs, still this does not mean that~~
 to any authority where a successful party was ordered to pay his opponents costs, still this does not mean that

alia that the whole claim under cl. 2(b) was fraudulent in the sense that it had no foundation whatever and was advanced as a device to rescue Comiat from the consequences of under-tendering.

Comiat asks for the costs of three counsel on appeal. Respondents, who were represented by four counsel, did not specifically object to this in the event of the appeal succeeding. The costs of three counsel was awarded to respondents in the Court below. The appeal record, which runs to 24 volumes, is a lengthy one and the case raised a large number of difficult and complex issues of law and fact. Having regard to the relevant criteria, as conveniently collected and stated in Fisheries Development Corporation of SA Ltd v Jorgenson and Another; Fisheries Development Corporation of SA Ltd v A W J Investments (Pty) Ltd and Others 1980 (4) SA 156 (W), at p 172, I think that this is an appropriate case for allowing the costs of three

counsel.

The following order is made:

(A) The appeal is allowed with costs, such costs to include the costs of three counsel.

(B) The order of the Court a quo is altered to read:

"An order is made -

1. declaring that, on the assumption that materials, methods of construction and/or site conditions were different from those assumed by the applicant in tendering for the contract between the applicant and the first respondent (being contract number CTNW 758), and that this was due to adverse sub-surface conditions which, in the opinion of

the third respondent OR the fourth respondent
OR any arbitrator(s) who might be appointed
in terms of clause 69 of the general
conditions of contract, could not reasonably
have been foreseen;

- (a) applicant is entitled to reasonable remuneration in respect of a claim in terms of clause 2(b) of the general conditions of contract, and in particular in respect of applicant's main tunnel claim (as defined in its notice of motion) and applicant's main eastern cut claim
- (b) third respondent was not entitled to refuse to make a ruling on applicant's main tunnel claim but that he should have either admitted or rejected it;
- (c) third respondent was not and is not entitled to refuse to make a ruling on applicant's main eastern cut claim but that he should either admit or reject

it;

2. declaring that the third respondent was not and is not entitled, in order to admit or reject the claims referred to 1(a) above, to demand that the applicant furnish any information to him over and above that submitted with the applicant's claims; and directing third respondent to consider and decide the whole of the claim referred to him by the applicant, as opposed to a decision on any one issue or aspect of the claim, his decision on the whole of the claim to be conveyed to the applicant within a period of two months from the date of this order;
3. declaring that, in the event of a claim referred to in the preceding paragraphs of this order being referred in writing to the

fourth respondent in terms of cl. 69(a) of the general conditions of contract, the fourth respondent is not entitled to demand that the applicant is obliged to furnish any information to him over and above that submitted with the applicant's claims in order to settle the dispute and advise his decision in writing; and directing fourth respondent to consider and decide the whole of the claim referred to him by the applicant, as opposed to a decision on any one issue or aspect of the claim, his decision on the whole of the claim to be conveyed to the applicant within a period of two months from the date of reference to fourth respondent; and

4. ordering first, third and fourth respondents

to pay the costs of the application (which are to include the costs of three counsel) jointly and severally, the one paying the others to be absolved."

M M CORBETT

HEFER JA)

VIVIER JA)

MILNE JA)

EKSTEEN JA)

CONCUR