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CASE NUMBER: 113/89

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

VAN STREEPEN & GERMS (PROPRIETARY) LIMITED Appellant

and

THE GOVERNMENT OF THE REPUBLIC OF
SOUTH AFRICA Respondent

CORAM: JOUBERT ACJ, NESTADT, F H GROSSKOPF JJA,
NICHOLAS et NIENABER AJJA

HEARD: 20 AUGUST 1990

DELIVERED: 1 OCTOBER 1990

J U D G M E N T

NIENABER AJA

The point in this appeal is whether a document, issued to a building contractor during the course of work and termed a variation order, amended the basis on which the contractor was to be paid from rates fixed in advance to a fair and reasonable remuneration to be determined afterwards.

The building contractor was the plaintiff in the court below and is the appellant in this one. The building owner was the defendant and is now the respondent. I shall continue to refer to them as the plaintiff and the defendant respectively.

The plaintiff in 1975 tendered for the construction of the no 1 military hospital complex at Voortrekkerhoogte described in the tender documents as

"... a ten storey main hospital building, a separate boiler house and workshops connected to the hospital building by a service tunnel; a separate building providing temporary accommodation for patients arriving by helicopter; and site works comprising roads, parking areas, retaining walls, access bridge

etc. The buildings are of a framed reinforced concrete construction filled in with brick walls externally and internally. Mechanical and electrical services are included in this contract."

- for a composite sum of R21 840 000,00. The plaintiff's tender, one of several, was accepted by the defendant, acting through the Department of Public Works (hereinafter referred to simply as "the department"). Contract no 25363 was thereupon formally concluded between the parties, comprising the articles of agreement and conditions of contract, a specification, the drawings ("A1-24"), and a schedule of quantities. The site was handed over to the plaintiff on 10 September 1975. The agreed period of completion was 54 months but, as sometimes happens in matters of this sort, expectations exceeded execution and execution exceeded the contract period. Although the character and scope of the work remained essentially the same, the work was only completed in 1983 at a cost, taking the priced rates but

also escalation into account, of R35 508 862,00.

One reason, at least, for this phenomenal increase was that tenderers were invited to tender on the footing of provisional (as opposed to firm) bills of quantities, which, moreover, contained a number of provisional sums (i.e. items with unpredictable quantities), all of which were in turn compiled on the strength of preliminary sketch plans (as opposed to detailed working drawings). A contract sum, calculated by applying fixed rates to imprecise quantities, was bound to differ from the sum ultimately produced once the work had been completed and the quantities finally measured. (Cf MINISTER OF PUBLIC WORKS v W J M CONSTRUCTION CO (PTY) LTD 1983 (3) SA 58 (A) at 64 B-F.)

"Bills of Quantities" are defined in the conditions of contract to mean

"the document attached to this Contract in which are entered the quantities of work, labour, materials, and articles required for

the execution of this Contract. The words 'Schedule of Quantities' shall mean the Bills of Quantities with the rates or prices of the items at which the Department of Public Works agrees to pay the contractor."

The word "provisional" was used, in relation to the bills of quantities, to convey to prospective tenderers that all quantities inserted in the bills (and not only those which by their very nature could not be assessed in advance) were imprecise and might, on eventual remeasurement, prove to have been inaccurately estimated.

This somewhat untidy procedure was adopted in an effort to regain lost time. The decision to erect a comprehensive military hospital in the vicinity of Pretoria had in fact been taken as early as 1972. A site had been selected at Verwoerdburg and the preparation of bills of quantities was well advanced when a geological report revealed that the site was not suitable for its designated purpose because of the danger of dolomitic sinkholes. A fresh site was eventually located at

Voortrekkerhoogte. The project had by now become decidedly urgent. That was the reason why it was resolved to prepare provisional bills of quantities, containing several provisional amounts, on the basis of preliminary architectural and structural sketch plans, and to call for tenders accordingly.

Tenderers were furnished with, inter alia, the set of sketch plans (A1-24), the provisional bills of quantities as well as these express warnings:

"Provisional Bills of Quantities.

All the work in these bills of quantities has been measured provisionally from the sketch plans and will be remeasured as executed and paid for according to prices in the bills of quantities and any unexpended amounts shall be deducted from the amount of the contract sum. The quantities in these provisional bills of quantities are not to be used for ordering materials.

Provisional Sums.

All provisional sums shall be expended as directed by the engineer and any balance remaining shall be deducted from the amount of the contract sum. All provisional sums are nett and do not allow for 5% cash discount.

The contractor may allow for profit if required.

Procedure for carrying out the works.

Contractors are advised that, at the date of handing over the site, only architectural and structural working drawings will be available and it is anticipated detail working drawings will not be available for at least 12 months after the date of handing over the site."

Tenderers were accordingly in effect told to discount, in the rates quoted by them, the risk of errors in the estimation of quantities.

This also appears from the contract documents which the plaintiff signed after its tender was accepted. The contract documents made it plain that the defendant was not contractually committed to the estimates of quantities contained in the provisional bills of quantities and that payment for items for which rates had been quoted would only be finalised once the work had been measured and valued, by applying the unit rates to the measured quantities.

Clause 3 of the conditions of contract, sub-clause (iii) in particular, is important. The clause reads:

"3. (i) The Contractor shall receive payment only for the Works actually executed and accepted.

(ii) ...

(iii) Without invalidating the Contract, the Engineer shall have the right by means of an Order in Writing, by varying the Drawings, Specification and Bills of Quantities, to increase or decrease the quantities of any item or items or to omit any item or items or to insert any additional item or items provided the total Contract amount be not thereby decreased or increased in value more than 20 percent. Such variations shall be measured and valued at the rates and prices contained in the Schedule of Quantities and added to, or deducted from the Contract amount. Should there be any dispute as to whether such Order in Writing constitutes a Variation Order in terms of this Contract, the decision of the Engineer shall be final.

(iv) No claim for any extra or for any addition or for any variation shall be entertained unless such extra, addition or variation was ordered in writing by the Engineer. No objection to the description or terms of an Order in Writing will be entertained unless lodged in writing with the Engineer within 21 days of the date of the

Order.

(v) The value of any additional item or items, or of any variation for which there are no rates or prices in the Schedule of Quantities will be adjusted by mutual agreement on the basis of the rates or prices for similar work appearing in the Schedule of Quantities or, where no similar work appears in the Schedule of Quantities, on the basis of the average ruling rates or prices as determined by the Engineer for similar work in the Building Industry in the area in which the Works are situated. The method by which the latter average ruling rates or prices are determined shall be in the sole discretion of the Engineer. In the event of a price for any additional item or items or any variation being inserted in the order in writing to the Contractor, it will be understood that he accepts same unless he lodges a written objection to such price within 21 days of the date of the order.

(vi) Unless by special agreement entered into between the Engineer and the Contractor, and subject to the production of satisfactory evidence regarding any damages sustained by the Contractor, an amount not exceeding five per cent of the schedule prices shall be paid on the nett value of the work omitted beyond 20 per cent of the contract amount, caused either by reductions or by variations, or by cancellation of the Contract before or after any work in pursuance of it has been done.

(vii) Should the Contractor be requested by the Engineer in any Order in Writing to

execute any work or to supply any labour or materials which, according to his interpretation of the Contract, are not provided for therein, he shall forthwith give notice, in writing, to the Engineer, that he shall require to be paid for the same as extra work. The Contractor shall, however, proceed to act upon such Order in Writing (unless or until the same be countermanded), so that neither the execution of the Works nor the supply of material or labour may be delayed by any difference or controversy on the interpretation of the Contract; and it is expressly agreed that no claim shall arise under this clause unless such notice as aforesaid shall have been given in writing to the Engineer within 21 days of the date of the Order in Writing.

4. Where the Engineer shall so decide, the Contractor will carry out extras and variations on the basis of daywork, and payment will be made on the nett value of all materials used, plus 10 per cent thereon, together with the direct labour costs incurred, which costs shall specifically exclude the cost of persons administratively employed in the Contractor's organisation, and to which labour costs shall be added $33 \frac{1}{3}$ per cent. The percentages mentioned shall be regarded as covering supervision, Contractor's profit and the use of all plant, tools, machinery and scaffolding.

In addition, all other direct costs reasonably incurred shall be allowed to the Contractor. In all such cases the Contractor will be required to deliver to the Engineer

fortnightly a full detailed account in duplicate of labour and materials. One signed copy will subsequently be returned to the Contractor and he must produce same in the adjustment or settlement of accounts. Should the Engineer query any such account the Contractor must be notified thereof within seven days of receipt of the account. In the event of such detailed accounts not being so delivered through neglect or default of the Contractor he will forfeit any right to such payment."

The plaintiff commenced work in September 1975, even before the contract documents were formally signed. Numerous working drawings were in due course issued to it, differing in detail from the sketch plans handed to tenderers. Progress payments were made, calculated on the basis of the quoted rates, for work executed in accordance with the amended drawings.

On 25 October 1976 the defendant, again acting through the department, prepared a document, termed a variation order and referred to throughout these proceedings as "variation order 4" ("VO4"), which was

handed to the plaintiff during May 1977 and which read as follows:

G.P.S.

DEPARTMENT OF PUBLIC WORKS - DEPARTEMENT VAN OPENBARE WERKE

VARIATION ORDER - WYSIGINGSOPDRAG

P.W.D.
Ref D.O.W. 5/354/20A
Verw. R.R.
S.V. P66/354/37B

No objection to this order will be entertained unless lodged in writing with the Regional Representative within 21 days from the date of this order. (Vide Clause 3 of Conditions of Contract.)

Gien beswaar teen hierdie opdrag sal in aanmerking geneem word nie, tensy dit binne 21 dae vanaf die datum van hierdie opdrag skriftelik by die Streekvertegenwoordiger ingedien word. (Sien Klausule 3 van die Kontrakvoorwaardes.)

Service	PRETORIA: VOORTREKKERHOOGTE: NO. 1 MILITARY HOSPITAL:		
Diens			
Contractor	Van Streepen & Gerns (Pty) Ltd.,		
Kontrakteur	P.O. Box 35166, Northcliff, Johannesburg, 2115.		
The following alterations are proposed/being executed:			
Onderstaande veranderinge word voorgestel/uitgevoer:			
V.O.No. W.O.No.	Description of work Beskrywing van werk	Amount Bedrag	
		R	c
4.	REMEASUREMENT OF WORK AS EXECUTED: OMIE: All work as taken on pages 92 to 359 of the Bill of Quantities. Section No. 2 Hospital Building Section No. 3 Powerhouse. Section No. 4 Patient Holding Area Section No. 5 Service Tunnel. Section No. 6 Outside Work. Total of Sections No's 2 to 5 ADD: Cost of work as executed in accordance with working drawings issued to the contractor or amended copies thereof. TO BE ADJUSTED D.O.S. 1. Your 5/354/20 refers. 2. As discussed in a meeting held in Head Office on 29.9.76 with Mr Kaufmann, R.R., Sodeleg and the various consultantants. 3. For your approval please.	R6 935 445 R 257 146 R 28 616 R 153 074 R 789 019 R8 163 363	00 66 92 94 41 63
(G.J. ERASMUS) Regional Representative/Streekvertegenwoordiger			
		25-10-1976 Date/Datum	

What was supposedly deleted, under the heading "omit", was the totality of the work save for preliminary and general items for which rates were not quoted.

It was - and still is - the plaintiff's contention that VO4 altered the basis of remuneration for the work done, from rates specified in the schedule of quantities to remuneration which was to be "fair and reasonable". The plaintiff accordingly claimed to be entitled to a further R2 500 093,00, in addition to the sum of R35 508 861,60, which (but for an amount of R285 748,48, settled after summons) had already been paid to it. The defendant resisted the claim, maintaining that the priced rates, notwithstanding VO4, remained firm throughout. On that issue the matter proceeded to trial.

During the course of inspection of discovered documents the plaintiff's representatives chanced upon certain information which caused the plaintiff to recast its entire claim. A new claim for damages was introduced

based on alleged pre-contractual misrepresentations. This became the plaintiff's main claim; the original claim based on VO4 became a mere alternative. In regard to the latter claim the court agreed to test only the principle, and to leave over its possible quantification for later consideration.

The trial commenced in the Transvaal Provincial Division before Olivier J. It was a protracted one. The record runs into 41 volumes. Eventually the main and the alternative claims were both dismissed. Leave was granted by the court *a quo* to the plaintiff to appeal to this Court on all the main issues. In their heads of arguments the plaintiff's counsel abandoned the appeal against the dismissal of the main claim based on misrepresentation, so that this Court, in the result, is only concerned with the claim founded on VO4.

This is how the claim was formulated in the particulars of claim:

- "6. On or about 25 October 1976 the defendant, acting through its duly authorised representative, issued a variation order numbered 4 which provided for the remeasurement of all work executed and to be executed by the plaintiff, for the omission of all the work (except preliminary items) described in the said bills of quantities and for the addition of the cost of work as executed in accordance with working drawings issued to the plaintiff. A copy of variation order number 4 is annexed hereto marked 'B'.
7. The plaintiff accepted the instructions contained in Annexure 'B' during or about May 1977.
8. Upon the plaintiff's acceptance of the said instructions the contract sum was impliedly or tacitly varied so as to become a fair and reasonable remuneration for the work executed by the plaintiff."

In response to the defendant's request for particulars it was stated:

"The terms of the variation are set out in the particulars of plaintiff's claim. It is not alleged that a contract came into existence."

and

"It was implied that if the amount of a fair and reasonable remuneration could not be agreed, such amount would be determined by a

court of law.

The plaintiff was also asked:

"Is it Plaintiff's case that the amount R21 840 000,00 as appears from paragraph 2 of the contract was tacitly varied and that 'a fair and reasonable remuneration' was substituted for the said amount?"

to which the plaintiff replied in the affirmative.

What emerges from this somewhat confusing exchange is that the plaintiff appears to allege:

- (a) a "tacit" variation of the "contract sum" which, although a variation, is not a contract;
- (b) an implied substitution, for the contract sum, of a new basis of remuneration viz. one which was fair and reasonable but the amount of which was yet to be fixed or, failing agreement between the parties, was to be determined by a court of law.

(The "contract sum" of R21 840 000,00 was not of course a static figure as would have been the case with a "lump sum contract". The ultimate figure would

depend on the final admeasurement of work actually executed. Such a change in the amount would not be a true variation of the contract since it would occur naturally in accordance with its terms. (Cf GRINAKER CONSTRUCTION (TVL) (PTY) LTD v TRANSVAAL PROVINCIAL ADMINISTRATION 1982 (1) SA 78 (A).) What is presumably meant by the expression "the contract sum was impliedly or tacitly varied" in paragraph 8 of the particulars of claim is a variation of the contractual provisions governing the determination of the final sum to be paid to the contractor. That provision is clause 3 (iii). And if clause 3 (iii) is to fall away the quoted rates would likewise fall away.)

The defendant in its plea admitted that the plaintiff "accepted the instructions" contained in VO4. In paragraph 8.2 of the plea it is stated:

"The effect of the variation order [i.e. VO4] was to confirm that -
8.2.1 the work was to be executed in terms of

the working drawing and not as provisionally described in the provisional bills of quantities;

8.2.2 the work as executed (according to the working drawings) was to be measured.

8.3 Every allegation in this paragraph not admitted expressly is denied as if specifically traversed."

Paragraph 10 of the plea specifically denies paragraph 8 of the plaintiff's particulars of claim.

The plea, therefore, puts in issue the plaintiff's construction of the meaning of VO4 - and in particular that the "contract sum" was "varied" in the manner suggested by the plaintiff.

Counsel for the plaintiff, in argument, expressly disavowed any reliance on a tacit agreement of variation. (Cf ALFRED McALPINE & SON (PTY) LTD v TRANSVAAL PROVINCIAL ADMINISTRATION 1974 (3) SA 506 (A) at 515 H-516D; 517A-D.) His interpretation of the plaintiff's cause of action - I trust that in paraphrasing it I am not doing his argument an injustice

- departed somewhat from its presentation in the pleadings: VO4 expressly and drastically amended ("scrapped" was the word he used) the quantities in the provisional bills of quantities; since the calculation of the rates by a tenderer (and the plaintiff in particular) was inextricably linked to such quantities, the effective deletion of all the quantities against which rates were inserted, of necessity also erased the rates; what was substituted was the "cost of work"; as a matter of interpretation that meant "cost to the employer" which, bearing in mind the close relationship between the rates and the excised quantities, could not mean the quoted rates and so must mean a fair and reasonable remuneration. Mr Van Streepen, the plaintiff's managing director, (the argument went) understood VO4 in that light and since he was agreeable to complete the work on that basis, the plaintiff did not object to VO4; and so, when the plaintiff accepted VO4

(which was common cause on the pleadings), the contract between the parties was varied by the introduction of a new basis of remuneration. VO4, according to counsel's analysis, was an express offer by the defendant to the plaintiff to alter the description of the work and hence the quantities, an offer which the plaintiff duly accepted, so that an agreement partially varying the building contract ensued which, on a proper interpretation thereof, bore the meaning contended for by counsel.

What this approach at least has in common with the pleadings is that it alleges a new agreement between the parties, founded on VO4, in terms of which a reasonable remuneration was to be substituted for the agreed rates.

The onus rested on the plaintiff to prove its case that VO4, duly accepted, constituted a variation of the contractual provisions relating to payment in respect

of the items of work referred to in VO4.

The first element of that case is that VO4 was, or could fairly be construed as, the manifestation of an intention on the part of the defendant - whether called an offer or not - to amend the provisions of the contract by substituting reasonable remuneration for rates.

This was the first of the two issues which the court *a quo* formulated when discussing this aspect of the matter. According to the court *a quo* the broad issue (whether the parties agreed to modify the contract in the respects claimed by the plaintiff) contains two subsidiary ones: (a) whether the parties had the *animus contrahendi* to "novate or modify" the existing contract and (b) whether the parties had reached *consensus* on how this was to be done.

The court *a quo* found in favour of the defendant on both issues.

Counsel for the plaintiff attacked not only the

conclusion but also the approach adopted by the court *quo*, mainly on two grounds.

It was said, firstly, that absence of *animus contrahendi* is a defence which, as such, should have been, but was not, specially pleaded. According to counsel the defendant, in its plea, only placed the interpretation of V04 in issue and not the absence of *animus contrahendi*.

I disagree. The defendant, in its plea, placed in issue every aspect of the entire edifice which the plaintiff sought to construct on the foundation of the words "cost of work" in V04. In particular, the defendant denied that the parties entered into an agreement to vary the contract. One of the elements of such an agreement is the *animus contrahendi*. The denial therefore covers that element as well.

Both parties relied on the judgment in BEATON v BALDACHIN BROS. 1920 AD 312 - the plaintiff to show that

absence of *animus contrahendi* should be specially pleaded, the defendant to confirm that evidence may be led to demonstrate that a particular document was never intended to function as a contract but was furnished for an entirely different purpose.

What was said in that case does not, in my view, support the plaintiff. There the document, on the face of it, purported to be a contract. The party seeking to evade it sought to show, appearances notwithstanding, that the document had no contractual significance. That he had to prove. Here the document, on the face of it, does not purport to be or to initiate a new contract at all: it appears to be no more than a variation order issued pursuant to clause 3 - to which, incidentally, express reference is made in the document itself. VO4 purports to be a variation not of, but in terms of, the contract. It is the plaintiff which seeks to convert it into something it does not profess to be,

namely, an offer to vary the terms of the contract. That the plaintiff should plead and prove - not the other way around.

The defendant, by its general denial of the plaintiff's specific allegations, is not in my opinion precluded from maintaining that V04 was never issued *animo contrahendi*. I do not, therefore, agree with the submission of counsel for the plaintiff that the only relevant issue on the pleadings is the interpretation of V04.

According to counsel - and this is the second point of criticism levelled against the approach of the court *a quo* - lack of *animus contrahendi* arises in one of two ways: where an offer is not intended to be taken seriously (e.g. where an offer is made in jest) or where it is understood between parties that their agreement was to have no legal status (as in the case of a so called "gentlemen's agreement"). In my view these are instances

but not a closed list of cases illustrating the proposition that the serious and deliberate intention to establish a contractual relationship is one of the prerequisites to the formation of a valid contract (cf FROMAN v ROBERTSON 1971 (1) SA 115 (A) at 121D).

Properly pleaded, it always remains open to one party to show that a document on which the other relies in substantiation of an agreement between them, was never intended (by either or both of them) to function as such. The real question in this appeal is whether this is such a case because VO4 is such a document.

VO4 on the face of it appears to be a written variation order issued by the engineer (as defined). As such it was a peremptory order which did not require acceptance by the contractor - indeed, the contractor, being obliged to comply, had no right to object to such an instruction being issued. (Cf GRINAKER CONSTRUCTION (TVL) (PTY) LTD v TRANSVAAL PROVINCIAL ADMINISTRATION,

supra, at 93A.) The contractor's right to resist the order, as the plaintiff was reminded in VO4 itself, was contained in clause 3 of the conditions of contract. The objection could be that the order in writing did not constitute a variation order as defined (clause 3 (iii)); or it could be an objection to the "description or the terms of" the order (clause 3 (iv)). The assertion in the plaintiff's particulars of claim that the defendant "accepted" VO4, coupled with the defendant's admission, in its plea, that it did so, therefore amounts to no more than this: that the plaintiff did not avail itself of its limited right of objection. From the mere admission by the defendant that VO4 was accepted by the plaintiff, it cannot be inferred, as counsel sought to do, that the defendant intended VO4 to be an offer to enter into a new contract varying the old, so that the interpretation of VO4 alone was left for consideration. "Offers" are not the only things capable of acceptance. The acceptance of

an order does not imply, by itself, that the order was an offer, capable of acceptance, to conclude a fresh contract, capable of interpretation.

According to counsel for the plaintiff VO4 was issued by the defendant "outside clause 3(iii)". He was compelled to say so since a variation in terms of a contract, which is a variation of the terms of a contract, would be a contradiction in terms. But this submission (that VO4 was *dehors* the contract) ignores not only the document itself, but also the manner in which the plaintiff pleaded its case - and to the extent that the argument adverted, albeit obliquely, to the 20% excess in value referred to in clause 3(iii), it lacked the requisite factual foundation: it had not been established how much, if any, of the eventual increase in value above the initial contract sum was attributable to VO4 (CF MINISTER OF PUBLIC WORKS v W J M CONSTRUCTION CO (PTY) LTD, *supra*, at 66 D-H; VAN STREEPEN & GERMS (PTY)

LTD v TRANSVAAL PROVINCIAL ADMINISTRATION 1987 (4) SA 569

(A) at 589G-590D). The document, one in a series of variation orders, all of them signed by the regional representative on the same day, is a standard form used by the department for variation orders, it is headed "Variation order - Wysigingsopdrag", and it expressly refers to clause 3, which is the clause in the conditions of contract governing variation orders generally. In paragraph 6 of its particulars of claim the plaintiff acknowledges that VO4 was issued by the "duly authorised representative" of the defendant and in paragraph 7 VO4 is described as "an instruction". It is implicit in these averments that there was nothing irregular about VO4. In my view there can be no doubt that VO4 was issued by the department on behalf of the defendant in terms of clause 3(iii), that it was so understood by the plaintiff in its particulars of claim, and that it derives its force, such as it is, from, and not contrary

to, the provisions of the contract.

Even so, VO4, although issued in terms of clause 3 (iii), is not a conventional variation order.

True, it omitted, and thus varied, certain specified items in the bills of quantities, and to that extent it resembled a typical variation order. But it differed from a conventional variation order in that it purported to be both retrospective and prospective. It was headed "remeasurement of work as executed" which suggests retrospectivity. It omitted certain items in the bills of quantities but immediately thereafter added the work "as executed" - which again suggests that it related to work already done. The purpose of omitting all the items in the bills of quantities for which rates were quoted (i.e. all the items except the preliminary and general sections) was plainly not to delete the work "omitted" from the contract (since this was immediately restored) or to order completed work to be demolished.

By the time V04 was handed to the plaintiff, in May 1977, a portion of the work had been executed. Such work was not done in pursuance of variation orders formally issued as such, but in terms of the amended working drawings handed to the plaintiff. V04 encompassed those instructions *ex post facto*. But it also operated *de futuro*. The bulk of the work had yet to be completed. V04 constituted an instruction, issued as a formal variation order, that all work described in the relevant sections of the bills of quantities would henceforth have to be executed in accordance with the amended working drawings. In that sense V04 was "confirmatory" of the instructions contained, and to be contained, in the amended working drawings (as the defendant pleaded) even though, strictly speaking, it was unnecessary to produce such a document since the amended working drawings were in themselves "orders in writing" for the purpose of clause 3(iii).

VO4 was not prompted by the engineer in order to effect specific changes to the

"... Drawings, Specifications and Bills of Quantities, to increase or decrease the quantities of any item or items or to omit any item or items or to insert any additional item or items" (clause 3(iii)).

What then was its purpose?

The answer to this question in my opinion appears from the minutes of two meetings, the first site meeting of 10 September 1975, and a subsequent meeting, the one immediately preceeding the drafting of VO4, of 29 September 1976.

During the first site meeting, at which the plaintiff was represented, the discussions relating to variation orders were minuted as follows:

"Variation orders

The Chairman said that variation orders should be kept to an absolute minimum and would be issued by the Department in terms of clause 3 of the Conditions of Contract - Form P.W. 54. Each proposed variation order should be accompanied by full motivation and an estimate

of cost. The actual cost should be determined in terms of clause 3 of the Conditions of Contract. Sodeteg should indicate whether the prices were based on schedule rates or negotiated rates with the contractor."

(Sodeteg SA (Pty) Ltd was the project manager and as such responsible for the supervision of the contract and the co-ordination of all consultant work.)

The proposed procedure required each variation order to be accompanied by an estimate of costs. That can only mean "costs to the defendant", being the only relevant costs i.e. rates where the variation order related to items of work for which rates were stipulated. If that procedure was adopted when V04 was issued, as was most likely the case, the words "cost of work as executed" as they appear on V04 simply meant: the costs already incurred by the defendant in respect of past work and to be expended by the defendant in terms of the contract in respect of future work.

This line of reasoning is confirmed by the

minutes of the other meeting referred to, at which various representatives of the department, Sodeteg, the quantity surveyors and the mechanical and electrical consultants were present. The meeting was not attended by the plaintiff. Nevertheless there was nothing confidential about it since the minutes are expressly referred to in V04.

The relevant portion of the minutes reads as follows:

- "1. The meeting was convened to discuss the procedure to be adopted in regard to the issue of variation orders on the above contract.
2. Mr. Kaufmann stressed the importance of maintaining a strict financial control over the service and said that any measures that might assist in this control should be adopted. He suggested that a blanket V.O. be issued omitting the service as measured in the Provisional Bills of Quantities and adding back the cost of the service as executed in accordance with working drawings issued or any amendment to these drawings.
3. Generally, variation orders need only be issued when the cost implications of the contemplated changes are such that it will

be necessary for the Department to apply to Treasury for extra funds to carry out the work. Site instructions authorising minor changes to the drawings in respect of work measured provisionally in the Provisional Bills of Quantities need not be supported by variation orders.

4. Variation orders should be issued in the following instances:-

- (a) in respect of any additional accommodation or work not shown on the working drawings, e.g. the increased site office accommodation, the diversion of the 350 mm water main across the site and the piling to certain areas of the Power House.
- (b) in respect of changes being made to any work already built - in particular, where fruitless expenditure may be involved.
- (c) any changes made in nominated sub-contractor's work which is covered by lump sum contracts or contracts based on Bills of Quantities. Such changes should only be made after the issue of a V.O. authorising the change has been prepared and issued by P.W.D. H.O.

5. In order to assist with cost control, the quantity surveyors will prepare an updated estimate of the scheme as detailed on drawings already issued."

From these minutes one can infer:

- (a) that the purpose of the meeting was to discuss

procedures to ensure better financial control;

(b) that one such method, suggested by Mr Kaufmann, at the time the chief quantity surveyor of the department, was

"that a blanket V.O. be issued omitting the service as measured in the Provisional Bills of Quantities and adding back the cost of the service as executed in accordance with working drawings issued or any amendment to these drawings".

This suggestion was obviously adopted by the meeting.

(c) that this "blanket variation order" was contrasted with regular variation orders which would only be issued when, generally speaking, extra funds would have to be applied for work not shown on existing drawings. Routine changes to the work would be effected by means of working drawings issued in terms of site instructions.

VO4, drafted immediately thereafter, was such a "blanket variation order". Its wording follows, almost precisely, the wording of paragraph 2 of these minutes;

and it refers expressly to these minutes. The probabilities, in my view, that this is so are so strong as to admit of no real doubt.

And if that is so it means that VO4 was seen by the department, and hence by the defendant, as a routine administrative measure which was designed to regularise the position where work had not been executed in accordance with the sketch plans initially issued to the plaintiff but in accordance with the replacement drawings. By May 1977, when VO4 was handed to the plaintiff, all the working drawings had already been issued to it. Such working drawings differed in detail from the description of the work in the bills of quantities and the sketch plans. Compared to that description of the work these working drawings, in effect, constituted informal variation orders which the contractor was contractually obliged to execute. The purpose of VO4 was seemingly to normalise the contractual

position by issuing a formal comprehensive variation order so as to bring the legal position in line with the factual one - for instance, by enabling the contractor, if so advised, to object when the 20% limit mentioned in clause 3 (iii) was reached. Whether it was strictly necessary to issue a formal variation order in these circumstances is not a matter which needs to be addressed in these proceedings, since it was issued in fact. The document could doubtless have been phrased less awkwardly and more symmetrically if the description of what was "added" followed the pattern of what was "omitted" and read, for instance:

"Add: work as executed in accordance with working drawings issued to the contractor or amended copies thereof, at cost."

Since the bulk of the work had not yet been done it follows that it was not possible to put a figure to such costs.

Counsel for the plaintiff argued that the

contents of this minute were inappropriate in interpreting VO4, since at best it provided evidence of what occurred "internally" which could not serve to contradict "the objective construction" of VO4. But that is to misconstrue the significance of the minutes. The minutes are not relevant as an aid in the interpretation of an admitted contract; their relevance relates to whether a contract had ever been concluded. Such evidence, on the authority of BEATON v BALDACHIN BROS., *supra*, is directly in point:

"Now the general rule is clear: a party to a written agreement cannot vary its terms by parol evidence. But a party to such a writing, which it is sought to use against him, may lead evidence to show that the document in question is not a contract at all, that it was not intended by the signatories to operate as such, but was given for another purpose." - per INNES CJ at 315.

The true significance of these minutes is that they show, in my view conclusively, that VO4 was never conceived by the department (representing the defendant) as an offer;

or, to phrase it differently, they demonstrate that the department had no *animus contrahendi* when, pursuant to the latter meeting, VO4 was drafted and subsequently issued. And if VO4 was not so intended by the reputed offeror, it could not, by a purported acceptance (and in the absence of estoppel) mature into a contract.

(The latter minute, incidentally, also refutes a theory which the plaintiff's managing director, Van Streepen, advanced, apparently in all seriousness, that VO4 was issued by the department, omitting the bills of quantities almost in their entirety, because the department was disillusioned with the poor quality of its own bills of quantities on which tenderers were invited to tender.)

That VO4 was a mere routine procedure, never intended by the defendant as an offer of sorts, let alone one to renegotiate, or litigate about, the rate of remuneration, is in line with the evidence of the

witnesses who testified on behalf of the defendant, Culligan, du Plessis and to a lesser extent, Burke. Their evidence relating to V04 was never challenged. So, for instance, Culligan, a quantity surveyor employed by the department, stated:

"Now Mr Culligan it was stated here that variation order no. 4 would have been produced because the department realised that its bill of quantities was an incompetent document. What do you say about that? -- Variation order no. 4 was purely a routine variation order, just as routine as variation order no. 1 omitting the contingency sum which it is stated in the bill of quantities is to be used at the discretion of the architect and omitted in whole or in part. To then issue a variation order omitting that after having already stated in the bill of quantities seems to me to be unnecessary. But the Department of Public Works has always insisted on any work measured provisionally being omitted by variation order and that referred to variation order no. 4, as well as to variation order no. 1. The bill of quantities quite clearly states that all work will be remeasured as built and priced at rates applicable in the bill of quantities, or words to that effect."

(Variation orders no's 1 and 2, drafted on the same date

and by the same official as VO4, provide for the omission of, respectively, the contingency sum of R1 100 000,00 and the provisional sums of R11 506 265,20 in the final summary of the bills of quantities.) Shanahan, an expert called by the plaintiff, conceded that he could not dispute that it was standard practice for the department to amplify provisional bills of quantities with a document such as VO4.

The idea that VO4 was devised as a proposal for a new formula for payment is heavily against the probabilities.

Why, as a start, would the department spontaneously assume the initiative, against its own interests, to alter the terms of the contract? There was no suggestion that either party, at the the time of VO4, was unhappy with the specified rates or that the plaintiff had approached the defendant to discuss the matter. Why, indeed, should either of the parties have

been anxious to do so? No reason has been suggested other than Van Streepen's far-fetched one that the department did so because it was embarrassed by its own incompetent schedule of quantities. Is it plausible that the department would have been prepared to discard such a vital part of its elaborately constructed contract, designed to minimise controversy, for such a loose and uncertain arrangement which, on the plaintiff's approach that it has become entitled to "costs plus a mark-up unless the rates prove to be satisfactory", could only operate to the defendant's detriment and would almost inevitably lead to dispute and most likely to litigation? Why settle on "reasonable remuneration" when clause 4 of the conditions of contract has a ready-made formula for payment where rates are inapplicable? No reason suggests itself why the defendant would have been agreeable to abandon, *ex post facto*, the fixed rates for work which the plaintiff, without protest and on the basis of such

rates, had already executed. Why, if it were indeed its intention to amend the basis of remuneration, would the department do so in such a roundabout fashion, by means of a routine variation order, signed only by a regional representative (who it was not alleged was vested with the authority to enter into contracts on behalf of the defendant), without any request from or consultation with the plaintiff, and without the requisite prior approval from the State Tender Board or the Treasury? All of this is in stark contrast to the elaborate negotiations which preceded the building of the nurses' home and the conclusion of the "additional works contract", to which I shall presently refer.

The plaintiff did not, in May 1977, when VO4 was released - or indeed until midway through 1981 - express unease or dissatisfaction with the rates even though, according to Van Streepen, it was already apparent to him that the excavation of foundations was

grossly understated in the bills of quantities and that adequate provision had not been made for stormwater drainage.

Payments after VO4 continued to be made by the defendant to the plaintiff and by the plaintiff to sub-contractors in accordance with the specified rates, and the plaintiff's representatives actively participated in measuring the work and completing the required documentation in order to ensure payment accordingly. Nowhere is it recorded that such payments were received by the plaintiff without prejudice to its belief that the quoted rates no longer applied. Van Streepen's attempt to explain this omission on the ground that these were mere interim payments, to be adjusted in the final account, and which might yet prove to be reasonable, was disingenuous. In the event no such adjustments were suggested and the final account was compiled solely on the basis of the agreed rates. The plaintiff, as it

happens, incurred a not insubstantial expense in participating in its preparation. What the plaintiff, surprisingly enough, did not do, which on its approach to VO4 one would have expected it to have done, was to submit regular accounts of its own costs in labour and material to the department to enable the latter to verify or appraise those expenses with a view to the preparation of a final account on that basis.

The plaintiff, far from being discontented with the rates, re-affirmed its willingness to execute work on that very basis. In March 1977, two months before VO4 was delivered to it, the plaintiff wrote a letter offering to build the nurses' home (which fell outside the scope of the work defined in the schedule of quantities) as a variation to the main contract, and on the same rates as those quoted in the schedule of quantities for the hospital building. The defendant accepted this offer and VO 12 was thereupon issued adding

a new nurses' home and doctors' and matron's quarters

"... at scheduled rates as negotiated with the Secretary for Public Works and your offer set out in your letters dated 15 and 21 March 1977 respectively and in accordance with site instruction no 66551 dated 9 June 1977 and all specifications, Bills of Quantities and Drawings as per attached list as amended, applicable to this service".

This work was completed and the plaintiff was paid in full. Its profit on this portion of the contract was R836 889,00.

By July 1981 the work in terms of the main contract had reached an advanced stage but certain problems had occurred and the plaintiff threatened to discontinue the work. The parties were eventually able to bridge their problems and, after due negotiations, a further contract was entered into, known as "the additional works contract". The work referred to in this contract consisted of the completion of the work due to have been done in terms of the main contract. A new

basis for payment (which was neither fixed rates nor cost plus a mark-up) was negotiated. On the plaintiff's approach to VO4 this should not of course have been necessary at all since a firm basis for payment had already been agreed to when VO4 was "accepted". Yet, contrary to what one would have expected if this had been the common understanding between the parties, not a single word of this was mentioned in the documentation or in testimony of the witnesses.

Indeed, it is a matter for comment generally that, notwithstanding the startling new contractual course which VO4 supposedly set, the subsequent documentation is entirely silent about it. Not once was it raised, either at a site meeting or in correspondence.

Such silence is not without significance. It tends to discredit Van Streepen's evidence that the plaintiff regarded VO4 as an intimation by the department that the agreed rates should henceforth be discarded.

Yet the plaintiff neither raised it, nor remonstrated with the department. To explain, as Van Streepen did, that the plaintiff did not do so because it was satisfied that "cost of work" would of necessity enure to its benefit, verges on the artless. One would have expected the plaintiff to have strenuously objected when the defendant, under the pretext of a variation order, sought to subvert the rates which the plaintiff calculated so meticulously and which, for it, were the lifeblood of its contract. That it did not do so is a strong indication, in my view, that it never regarded V04 in that light and that the entire claim, based on the averment that the rates were superseded by V04, is something of an afterthought.

(Of course, if the plaintiff had raised it before November 1982 (when, in anticipation of the final account, Exhibit K was written by the plaintiff to the department), either as a formal objection or simply to

record its contention that the contract was transformed when the plaintiff acceded to VO4, this litigation might well have taken a different course. The plaintiff's attitude might well have provoked a dispute which the engineer would then have had to determine, one way or the other, in terms of clause 3(iii). What effect that would have had, or what the issues would have been if the defendant, in its present plea, had declared a dispute along those lines, are not matters of concern in this case because that did not happen.)

These considerations, in their cumulative effect, render it unlikely that Van Streepen could ever have believed, as he asserted he did, that the department issued VO4 because it was disenchanted with its own bills of quantities and that, by doing so, it intended to discard the bulk of it; or that the plaintiff was agreeable to complete the project on an unspoken new basis of remuneration which it was confident would

outstrip the rates calculated by it on quantities which it knew to be inaccurate.

The plaintiff in my opinion failed to establish on a preponderance of probabilities that VO4 was ever intended by the defendant to function as an offer to the plaintiff to vary the terms of the contract relating to payment, which culminated in an agreement of variation when the plaintiff, by not rejecting VO4, supposedly accepted it. *Animus contrahendi*, in short, has not been proved.

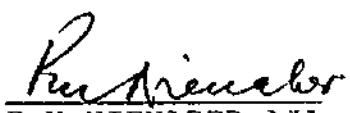
Moreover, there was no evidence whatsoever that the defendant was agreeable to abandon the advantages of prior agreed rates and to remunerate the plaintiff on the basis of a fair and reasonable remuneration, whatever that may mean. Even amongst themselves the plaintiff's witnesses were not unanimous about what this entailed. That was an aspect of **consensus** - and not of quantification, as was suggested. **Consensus** has

accordingly also not been proved.

In my view the court a quo was right in concluding that the plaintiff failed to establish either that the defendant intended to agree to alter the terms of contract or, if it did, that the parties had reached consensus on what was to happen. Since VO4 was neither the prelude to nor the basis of an agreement its "acceptance" by the plaintiff likewise had no contractual significance.

Failing any agreement to vary it, the existing structure of remuneration remained firmly in place.

It follows that the appeal is dismissed with costs, including the costs of two counsel.


P M NIENABER AJA

CONCUR:

JOUBERT ACJ)
NESTADT AJ)
F H GROSSKOPF AJ)
NICHOLAS AJA)