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ATTERIDGEVILLE TOWN COUNCIL AND ANOTHER

versus

COSTA LIVANOS t/a LIVANOS BROTHERS ELECTRICAL

SMALBERGER, JA :-

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ATTERIDGEVILLE TOWN COUNCIL First Appellant

PRETORIA REGIONAL SERVICES COUNCIL Second Appellant

and

COSTA LIVANOS t/a

LIVANOS BROTHERS ELECTRICAL Respondent

CORAM: BOTHA, SMALBERGER, NESTADT,
FH GROSSKOPF, JJA, et
VAN DEN HEEVER, AJA

HEARD: 2 SEPTEMBER 1991

DELIVERED: 27 SEPTEMBER 1991

J U D G M E N T

SMALBERGER, JA :-

In March 1988 the respondent, Costa Livanos ("Livanos"), an electrical contractor carrying on business under the name of Livanos Brothers Electrical,

entered into a written contract ("the contract") with the first appellant, the Atteridgeville Town Council ("the Council"). The contract provided for the supply, delivery and installation of materials necessary for the rewiring of 6 500 houses belonging to the Council. The project was to be financed by the second appellant, the Pretoria Regional Services Council ("the RSC"). Clause 49 of the contract provided for the reference to arbitration of disputes between the parties arising from the execution of the works in terms of the contract.

From the outset numerous disputes arose (the details of which are not germane to the present appeal). The upshot thereof was that the Council evicted Livanos from the site of the works in August 1988. This led to an urgent application by Livanos in which he sought to have possession of the site

restored to him. Before the matter was heard an interim settlement was reached. One of the terms thereof was that the disputes between the parties would be referred to arbitration as soon as possible. However, negotiations took place between Livanos, the Council and the RSC in an attempt to resolve their differences. The negotiations culminated in a written agreement ("the agreement") being concluded between them on 10 February 1989. In terms thereof the contract between Livanos and the Council was to remain in force. The engineer originally appointed under the contract had since been replaced, and it was recorded in clause 2 of the agreement "that the firm of WEYERS, BOTHA & HUBÉE has been appointed as Engineers to the contract and that Mr J D WEYERS has been appointed as the Engineer's representative." Clause 16.1 of the agreement contained an arbitration clause ("the

arbitration clause") in the following terms:-

"It is agreed that any existing claims and/or disputes, the subject matter of the pending litigation or otherwise, or claims which may arise which the CONTRACTOR or the EMPLOYER may have against each other of whatever nature will be submitted to the decision of J D WEYERS ('the Arbitrator'), whose decision in regard to such claims and disputes shall be final."

(The references to "the Contractor" and "the Employer" are to Livanos and the Council respectively; clauses 16.2 and 16.3 dealt with procedural matters and clause 16.4 with the non-appealability of the arbitrator's decision.)

Livanos continued with the execution of the works. Further disputes arose between the parties. It was agreed that these would be referred to arbitration in terms of the arbitration clause. Arbitration proceedings duly commenced on 13 July 1989, but various issues were left unresolved. The disputes

multiplied. In about October 1989 the Council called for tenders for the upgrading of the existing low tension reticulation in Atteridgeville. The work called for related in the main to the replacement of overhead service connections. Livanos was of the view that practically all the work involved had already been awarded to him in terms of the contract. On 11 October 1989 his attorney wrote a letter to the RSC on his behalf stating, inter alia:

"In calling for tenders for the upgrading of the existing low tension reticulation in Atteridgeville our client contends that there has been a repudiation by the Employer of the contract entered into between our client and the Employer.

We have been instructed by our client to place on record that this repudiation has been accepted by our client."

(Although the letter was addressed to the RSC it appears to be common cause that it also served as notice to the Council of the acceptance by Livanos of

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the Council's alleged repudiation of the contract.)

The Council and the RSC responded by means of a .telefax from their attorney dated 13 October 1989.

The relevant portion thereof reads:

"The City Council emphatically denies that there was any wrongful repudiation on their part and in fact states that your client has now wrongfully repudiated the original contract by instructing the project manager on site, Mr Kuhn, to cease all operations and to abandon the site as indicated in your letter addressed to Mr Kuhn in this regard on the 11th instant. The City Council hereby accepts your client's repudiation of the contract and reserves its rights in this connection to claim damages from your client as a result of such wrongful repudiation."

The letter of 11 October 1989, to which I have referred, also raised the question of the recusal of Weyers as arbitrator. The allegation was made that he had by his conduct disqualified himself as such. It was suggested that Mr S A Cilliers SC be appointed as arbitrator in his place. He was to

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arbitrate on whether or not there had been a repudiation by the Council, as alleged. In their initial response the Council and the RSC agreed to this suggestion; the RSC later sought to attach a condition to its acceptance. Livanos refused to agree to such condition. An ancillary dispute then arose as to whether or not Weyers had agreed to withdraw as arbitrator. Weyers denied this to be the case. On 1 November 1989 Livanos's attorney addressed a facsimile to Weyers in which reasons were advanced why he should recuse himself as arbitrator. Weyers through his attorney (the same attorney who was acting for the Council and the RSC) refused to accede to the request that he recuse himself. The request, when later repeated, met with a like response.

On 6 March 1990 Livanos launched an application in the Transvaal Provincial Division. He

cited the Council and the RSC as the first and second respondents, Weyers as the third respondent and the firm of Weyers, Botha and Hubée ("the firm") as the fourth respondent. In the notice of motion the following order (apart from costs) was sought:

- "1. Declaring that each of the claims described in Paragraph 58 of the Founding Affidavit is arbitrable in terms of the provisions of Clause 16 of the Agreement of 10 February, 1989 concluded between the Applicant, the First Respondent and the Second Respondent, Annexure 'CL1e' to the Founding Affidavit.
2. Setting aside the appointment of the Third Respondent as arbitrator in terms of the provisions of the said Clause 16.
3. Appointing Advocate A CHASKALSON SC as arbitrator in the place of the Third Respondent."

(One of the issues referred to in paragraph 58 related to whether the contract and agreement had been repudiated by the Council or by Livanos; the

appointment of Chaskalson SC was asked for as Cilliers SC had in the meantime declined to accept an appointment as arbitrator.)

Lengthy answering affidavits were filed on 2 May 1990 on behalf of the four respondents a quo. In addition the Council filed a counter-application in which it sought the following relief:

- "1. h Bevel wat verklaar dat klousules 16.1, 16.2, 16.3 en 16.4 van die ooreenkoms tussen die Eerste Respondent, die Applikant en die Tweede Respondent, aanhangsel CL1(e) van die funderende verklaring, nie die beëindiging van die gemelde kontrak oorleef het nie en by beëindiging van die gemelde kontrak verval het.
2. Dat die koste van die teenaansoek aan die Eerste Respondent toegeken word."

The Council took up the attitude that the arbitration clause did not survive the cancellation of the contract and the agreement. It also intimated its opposition (on technical grounds) to the appointment of Chaskalson

SC as arbitrator. In his supporting affidavit Weyers gave notice of his withdrawal as arbitrator in the following terms:

"Sonder om enige verpligting in verband daarmee te erken, onttrek ek hiermee as arbiter na aanleiding van aanstelling luidens paragraaf 16 van die ooreenkoms van 10 Februarie 1989"

On 7 May 1990 Weyers and the firm filed Notices of Withdrawal intimating that they abided the decision of the Court and tendering to pay any wasted costs arising from their Notice of Opposition.

In due course Livanos filed his replying affidavit (dated 13 July 1990). In it he gave notice of his intention to amend prayer 3 and to seek an order:

"3. Directing that any senior counsel whom the applicant, the first respondent and the second respondent mutually agree to appoint, act as arbitrator in the place of the third respondent and, failing such agreement, directing that the

Chairman of the Johannesburg Bar Council appoint as an arbitrator a senior counsel in practice at the Johannesburg or Pretoria Bars."

The amendment had been foreshadowed in a letter written on 12 July 1990 by Livanos's attorney to the Council's attorney. In the letter the names of four senior counsel were submitted as prospective arbitrators.

The letter thereafter proceeded:

"If your clients are not agreeable to any one of the four being appointed as Arbitrator, would you please submit a list of names to us and we will then consider the names that are submitted by you.

Should we not be able to agree, then the Court will be asked that the Chairman of the Johannesburg Bar Council appoint as Arbitrator, a Senior Counsel in practice at the Johannesburg or Pretoria Bars."

The eventual response from the Council's attorneys on 20 July 1990 was one of disdain and displayed a complete lack of co-operation, an attitude which had

characterised previous correspondence.

The matter was heard by Van Zyl, J. The amendment foreshadowed in Livanos's answering affidavit was never sought. Prayer 3 was, however, amended at Livanos's instance during the course of argument to provide for the nomination by the Council and the RSC of any retired Judge, or of any senior counsel practising at a Bar in the Republic to perform the function of arbitrator. On 16 November 1990 the learned Judge a quo made the following order:

- "1. It is declared that the disputes and claims described in paragraph 58 of the applicant's founding affidavit are arbitrable in terms of the provisions of clause 16 of the agreement of 10 February 1989 concluded between the applicant, the first respondent and the second respondent (annexure 'CL1e' to the founding affidavit).
2. The first and second respondents are ordered to appoint an arbitrator being a retired judge of the Supreme Court or a

senior advocate practising at a Bar in South Africa, within fourteen days from the date of judgment.

3. The counter-application is dismissed.
4. The first and second respondents are ordered, jointly and severally, to pay the costs of the application and counter-application, including the costs of two counsel, but excluding all costs previously reserved in this matter, which costs shall, by agreement between the parties, be costs in the cause."

Leave to appeal to this Court was subsequently granted by the Judge a quo.

It will be convenient, in what follows, to refer to the Council and the RSC collectively as "the appellants". Likewise the contract and the agreement, taken together, will be referred to simply as "the agreements". It is hoped thereby to avoid undue prolixity without sacrificing clarity.

Against the background sketched above I now

turn to consider the arguments that were advanced on appeal by Mr Zeiss for the appellants. They were, broadly speaking: (1) that the arbitration clause did not survive the termination of the agreements; (2) that even if it did, the parties were not free to appoint another arbitrator to fill the vacancy created by Weyer's withdrawal; and (3) that in any event Livanos failed to comply with the requirements of section 12(1)(e) and (2) of the Arbitration Act 42 of 1965 ("the Act") when seeking the appointment of a substitute arbitrator. I shall deal with each of these in turn.

Did the arbitration clause survive the termination of the agreements?

Livanos claims that the appellants repudiated the agreements by calling for tenders for work already

allocated to him in terms thereof. The appellants in turn claim that Livanos repudiated the agreements by ceasing operations and abandoning the site. Each claims to have accepted the other's repudiation, thereby resiling from the agreements. Arising from this situation, Mr Zeiss contended that irrespective of which party had justifiably repudiated, the parties were ad idem that the agreements had come to an end. The legal relationship between them had accordingly been dissolved, and the arbitration clause had fallen away. The resulting situation, so it was argued, is analogous to one where a contract containing an agreement to arbitrate is terminated by mutual consent.

It is common to speak of the termination of a contract by one party's acceptance of the other's repudiation thereof. One needs, however, to define with greater precision what, juristically, this

encompasses. By repudiation, in the sense in which the word is used in the present matter, is meant the evincing of a clear intention by one party, by his acts or conduct, not to perform his obligations under a contract acknowledged to be binding. (Culverwell and Another v Brown 1990(1) SA 7 (A) at 14 B - E.) Such conduct constitutes a breach of contract in anticipando. This leaves the opposite party with the choice of keeping such contract alive and enforcing it, or of cancelling it by "accepting" the repudiation. If he chooses the latter course, he manifests an intention not to accept further performance under the contract in question from the party in default. At the same time he manifests an intention not to further perform his own obligations under that contract, thereby resiling from it. By so doing he puts an end (in the case of a contract that is executory) to the

primary obligations of the parties to perform in terms of their contract. Certain secondary obligations, e.g., the duty to compensate for damages arising from wrongful repudiation, however, remain.

(See generally in this regard Kerr: The Principles of the Law of Contract : 4th Edition : pp 549/50; Nash v Golden Dumps (Pty) Ltd 1985(3) SA 1 (A) at 22 D - G.)

Any further reference herein to "repudiation" and "acceptance" thereof must be construed in the above sense.

Where a contract is dissolved or cancelled by mutual consent, any submission to arbitration contained in the contract must, generally speaking, also be taken to have been dissolved or cancelled (Turkstra and Another v Massyn 1958(1) SA 623 (T) at 625 G; Nochinowitz v Weinrich 1921 EDL 119; Rogers v Mathews 1926 TPD 21). This is in keeping with the principle

enunciated in Heyman and Another v Darwins, Ltd [1942]

1 ALL ER 337 (HL) at 346 A (per Lord MacMillan):

"It is clear, too, that the parties to a contract may agree to bring it to an end to all intents and purposes and to treat it as if it had never existed. In such a case, if there be an arbitration clause in the contract, it perishes with the contract. If the parties substitute a new contract for the contract which they have abrogated, the arbitration clause in the abrogated contract cannot be invoked for the determination of questions under the new agreement."

The reason for this is that mutual agreement to cancel a contract (or consensual cancellation) is a contract whereby another contract is terminated (Van Streepen and Germs (Pty) Ltd v Transvaal Provincial Administration 1987(4) SA 569(A) at 588 I). This brings to an end the rights and obligations of both parties to the earlier contract, and there is no longer any debt or right of action in existence. Neither is left with any claim against the other arising from the

earlier contract (cf Van Rensburg and Another v Conradie NO and Another 1918 AD 122 at 128/9).

The above situation is a far cry from the present. Here each party accepts that the opposite party no longer has a duty to perform his or their primary obligations under the agreements. To that extent they are ad idem. At the same time each seeks to claim damages from the other arising from an alleged unlawful repudiation. There can be no question of consensual cancellation, or anything akin to it. The two situations differ toto caelo. That the parties to a contract individually hold the same view as to the consequences that will flow from a repudiation, cannot be equated with the meeting of their minds necessary for consensual cancellation. The mere stating of the proposition highlights its untenability.

The present matter is in principle on all fours with the case of Scriven Bros v Rhodesian Hides and Produce Co Ltd and Others 1943 AD 393, where it was held that the repudiation of a contract does not destroy the efficacy of an arbitration clause in such contract. In this regard the remarks of TINDALL, JA at p 401 are apposite, where he said:

"But the heads of argument of Mr de Villiers, who appeared for Scrivens in this Court, make the point that the company repudiated the contract in toto and was therefore not entitled to avail itself of the arbitration clause, the claim and the counterclaim going to the root of the contract. The fallacy underlying this contention is the assumption that a repudiation of a contract (in the sense of a refusal to continue performance under it) by one party puts the whole contract out of existence. It is true that a repudiation of a contract by one party may relieve the other party of the obligation to carry out the other terms of the contract after the date of repudiation, but the repudiation does not destroy the efficacy of the arbitration clause. The real object of that clause is to provide suitable machinery for the settlement of disputes arising out of

or in relation to the contract, and as that is its object it is reasonable to infer that both parties to the contract intended that the clause should operate even after the performance of the contract is at an end. If, for example, this contract had come to an end on a date stipulated for its termination, I do not think that it could have been contended successfully that the arbitration clause was no longer operative. So, too, it seems to me that when the contract is prematurely terminated by repudiation by one of the parties, the arbitration clause is still operative."

(See too Heyman and Another v Darwins Ltd (supra) at 343 G - H; De Goede v Venter 1959(3) SA 959 (0)).

Mr Zeiss sought to distinguish Scriven's case from the present on the facts. He argued that in Scriven's case, whether or not there had been a repudiation which had been accepted was in issue - unlike the position here. Consequently the remarks quoted were obiter. I do not agree. It is quite clear from the judgment (p 400) that the whole matter was dealt with on the assumption "that the action can

be regarded as a claim for an order rescinding the contract on the ground that the company repudiated the contract and that Scriven accepted such repudiation". The principles stated in the extract from the judgment which I quoted earlier related to that situation. As such they form the ratio of the judgment. Moreover, in my view, they correctly reflect the law. There can be no doubt that had the facts in Scriven's case been identical to the present the same conclusion would have been reached with regard to the continued efficacy of the arbitration clause. This is because of the legal consequences that flow from repudiation.

What has been said above is subject to any manifestation of a contrary intention in the arbitration clause. No such contrary intention is apparent. The arbitration clause must be interpreted, like any other contractual provision, with a view to

ascertaining the intention of the parties thereto having due regard to the words used in their proper contextual setting, and to any admissible surrounding circumstances (Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd and Another 1980(1) SA 796 (A) at 804 A- 806 A). The arbitration clause is couched in wide and general terms. It is sufficiently wide to cover disputes relating to breaches of contract and whether or not there has been a justifiable repudiation. It would stultify the whole purpose of the arbitration clause if it were otherwise. To paraphrase what was said in the quotation from Scriven's case (supra) at p 401, the real object of the arbitration clause was to provide suitable machinery for the settlement of disputes between Livanos and the Council arising from the agreements, and it is reasonable to infer that all the parties intended its

provisions to operate even after their primary obligations to perform had come to an end. The arbitration clause consequently survived the repudiation of the agreements.

Were the parties free to appoint another arbitrator to fill the vacancy created by Weyer's withdrawal?

The appellants contended that on a proper construction of the arbitration clause the parties agreed that Weyers, and Weyers alone, was to arbitrate in respect of any dispute between them arising under the agreements. As the person of the arbitrator formed the basis of the agreement to arbitrate, it was not competent for the parties to appoint anyone else in Weyers's place in terms of the Act.

There is no substance in this contention.

Section 10(1) of the Act provides that:

"Where an appointed arbitrator refuses to act, and a contrary intention is not expressed in the arbitration agreement, the party or parties who appointed him may appoint another arbitrator in his place."
(My underlining.)

The procedure to be followed to secure the appointment of a substitute arbitrator where an appointed arbitrator refuses to act is set out in section 12(1)(e) and (2) of the Act.

The arbitration clause in effect provides that claims and disputes, of whatever nature, "will be submitted to the decision of J. D. Weyers ('the arbitrator') whose decision in regard to such claims and disputes shall be final". There is nothing in the express wording of the arbitration clause, read in the context of the agreement as a whole (of which it forms part) indicative of an intention on the part of the parties to confine any arbitration between them to Weyers alone. No limiting or qualifying words are

used which reflect an intention on their part that the arbitration clause, in the event of Weyers's refusal or inability to act as arbitrator, would cease to be effective, or would preclude the appointment of another arbitrator in his stead. Nor can any such intention be inferred by necessary implication. As no contrary intention is expressed in the arbitration clause, it was open to the parties to appoint a substitute arbitrator in terms of the Act. The appellants' argument in this respect therefore also fails.

Did Livanos comply with the requirements of the Act when seeking the appointment of a substitute arbitrator?

The appellants' third submission is premised on the alleged non-compliance by Livanos with what are claimed to be certain peremptory provisions of the Act.

A statutory requirement construed as peremptory usually needs exact compliance for it to have the stipulated legal consequence, and any purported compliance falling short of that is a nullity. On the other hand, a directory statutory requirement, to the extent that it needs to be complied with at all, requires no more than substantial compliance for it to have full legal effect (Nkisisimane and Others v Santam Insurance Co Ltd 1978(2) SA 430 (A) at 434 B - E). Before adverting to the appellants' arguments on this issue, it will be convenient to quote the relevant provisions of those sections of the Act which have a bearing thereon.

Section 12(1)(1)(e) and (2):

"(1) Where -

- (a)
- (b)
- (c)
- (d)

(e) an appointed arbitrator
 refuses to act or is
 removed from office and
 the party or parties to the
 reference are at liberty
 to appoint another arbitrator
 to fill the vacancy and
 do not appoint him in any case
 where such appointment is
 necessary for the decision of
 the matters in dispute or the
 due conduct of the arbitration

(f)

any party to the reference may serve the
 other party or parties with a written
 notice requiring him or them to appoint or if
 agreement be necessary, to agree in the
 appointment of an arbitrator

(2) If the appointment referred to in the
 notice served under sub-section (1) is not
 made or agreed to, as the case may be, within
 seven days after the service of the notice,
 the party who gave the notice, may upon
 notice to the other party or parties
 as the case may be, apply to the court to
 make the necessary appointment, and thereupon
 the court may appoint an arbitrator"

Section 12(4):

"(4) Where a sole arbitrator who has entered on the reference is removed by the court, or his appointment is set aside by the court and the arbitration agreement does not provide otherwise, the court may, on the application of any party to the reference, either -

- (a) appoint an arbitrator to act in the place of the arbitrator so removed
- (b)
- (c) "

Section 13(2)(a):

"(2)(a) The court may at any time on the application of any party to the reference, on good cause shown, set aside the appointment of an arbitrator..... or remove him from office."

The arguments advanced by Mr Zeiss, as I understood them, were to the following effect: It was not competent to couple prayer 3 of the Notice of Motion with prayers 1 and 2 thereof; prayer 3 for the appointment of a substitute arbitrator was premature as

the provisions of section 12(1)(e) and (2) of the Act had not been complied with; the provisions of section 12(1)(e) and (2) are peremptory and failure to comply therewith invalidated the application in respect of prayer 3; the appellants were prejudiced as they were not given an opportunity to appoint an engineer as the substitute arbitrator.

The application was brought in terms of section 13(2)(a) of the Act. It was necessitated by Weyers's refusal to recuse himself as arbitrator. At that stage it was not possible to couch the application as one in terms of section 12(1)(e) read with section 12(2) of the Act, as none of the events giving rise to the operation of those sub-sections had yet occurred. The application could conceivably have been brought in terms of section 12(4). That section, however, only applies where an arbitrator who has "entered on the

reference" ("wat begin het om op die verwysing in te gaan") is removed, or his appointment is set aside, by the Court. It is a moot point whether Weyers, despite his earlier attempts at arbitration in relation to certain issues, had "entered on the reference" within the meaning of that phrase in section 12(4). The matter, although alluded to in argument, was neither specifically raised nor fully and properly addressed on the papers. It would be invidious to have to make a finding in regard thereto. Fortunately the need to do so is obviated by the conclusion to which I have come on the main argument.

It may well be, as argued on behalf of the appellants, that Livanos could initially have limited the relief claimed to prayers 1 and 2 of the Notice of Motion. Then, if successful in having the appointment of Weyers set aside, he could have set in

motion the events envisaged by section 12(1)(e) and (2) of the Act. However, Livanos's decision to ask simultaneously in prayer 3 for the appointment of a substitute arbitrator must be seen against the historical background to the application. The appellants had consistently taken up the attitude (a) that the arbitration clause had terminated, and (b) that, in any event, the arbitration was personal to Weyers; accordingly there was no legal basis for the appointment of a substitute arbitrator. The prospects of obtaining the appellants' agreement to the appointment of another arbitrator were therefore to all intents and purposes non-existent at that stage. In asking for prayer 3, Livanos was anticipating the probable need to seek such relief at some time in the future. Why not therefore do so in the same application, thereby obviating the need for a probable

second application and the unnecessary duplication of time and cost associated therewith? To the extent that it was premature, it was (a) occasioned by the situation then existing; (b) remedied by the events thereafter (as will appear more fully below); and (c) not in any way prejudicial to the appellants.

As has been pointed out, the first intimation to Livanos of Weyers's withdrawal (and therefore refusal to act) as arbitrator was when the appellants' answering affidavits were filed in May 1990. Section 12(1)(e) of the Act does not prescribe any time within which, once a vacancy in terms of that section exists, the written notice to agree to the appointment of a substitute arbitrator must be served by one party on the other or others as the case may be. The letter of 12 July 1990, written by Livanos's attorney to the appellants' attorney, to which I have previously

referred, called upon the appellants to agree to the appointment of one of four named senior counsel, or to nominate senior counsel of their choice from which Livanos could select one. Following as it did upon the refusal by Weyers to act it constituted written notice as required by section 12(1)(e) of the Act. That much was conceded by Mr Zeiss.

The letter written by Livanos's attorney on 12 July 1990 met with a totally negative response from the appellants. No agreement was reached on the appointment of a substitute for Weyers, either within the 7 day period laid down in section 12(2), or subsequently. The next step required by section 12(2) was an application by Livanos, upon notice to the appellants, for the necessary appointment. No time is prescribed within which such notice must be given. The purpose of such notice is presumably to ensure that

the intention of one party to apply to court for the appointment of an arbitrator is brought to the attention of the other party or parties. It is common cause that no formal notice was given by Livanos. But the applicants were fully aware of his intention because of prayer 3 in the pending application - in respect of which a Notice to Amend had been given as recently as 13 July 1990. That prayer in effect served as a continuing notice of Livanos's intention to apply for the appointment of a substitute arbitrator. The appellants would have been in no better position than they were had a formal notice been given to them after the 7 day period had lapsed. The absence of such notice did not prejudice them. It would have been futile in the circumstances to have served any further notice upon the appellants. To insist upon such a notice would smack of unwarranted

formalism. We are not here dealing with the type of case where notice is an essential prerequisite to the institution of an action, and the failure to give such notice is fatal. The Legislature could not have intended that a failure to give notice under section 12(2) would per se render the subsequent proceedings a nullity. The very facts of this case show the absurdity that would result if it were otherwise. In the circumstances the provisions of section 12(2) are not peremptory and strict compliance with regard to the giving of notice is not required; substantial compliance will suffice. On the facts of the present matter, as outlined above, substantial compliance was clearly established.

The appellants cannot claim to have been prejudiced by the failure of the Court a quo to consider the appointment of a professional engineer as

replacement for Weyers. It was always open to the appellants, by way of an alternative prayer to their counter-application, to ask for such an appointment (cf Dipenta Africa Construction (Pty) Ltd v Cape Provincial Administration 1973(1) SA 666 (C)). They never did so. The Court a quo was therefore not called upon to consider such an appointment. The third ground of appeal accordingly also fails.

Mr Zeiss indicated that if his submissions failed he did not wish to challenge the correctness of the order made by the Judge a quo. It was argued, however, that he should have made a special order disallowing portion of the costs of Livanos's replying affidavit. This is a matter to which the Judge gave due consideration before concluding that no special order was called for. I am unpersuaded that he did

not exercise a proper discretion in arriving at his conclusion. There is accordingly no room for interfering with the costs' order made.

In the result the appeal is dismissed with costs, such costs to include the costs of two counsel.

J W SMALBERGER
JUDGE OF APPEAL

BOTHA, JA)
NESTADT, JA) concur
FH GROSSKOPF, JA)
VAN DEN HEEVER, AJA)