IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

CASE NO 06/16296

In the matter between

ANGLOGOLD ASHANTI LIMITED **PLAINTIFF**

and

FLUOR SA (PTY) LTD **DEFENDANT**

J U D G M E N T

VAN OOSTEN J

[1] "Dropping the ball" and letting it "fall through the cracks" in respect of an undertaking that was never honoured, has occasioned some intricate legal questions in this action in which the plaintiff (Anglogold) claims damages in the sum of R10, 551m from the defendant (Fluor), resulting from an alleged breach of contract. At the commencement of the trial I ordered a separation of issues in terms of Rule 33(4), in terms of a draft order, which the parties had agreed upon. The separated issue I am now called upon to decide, in essence, concerns the determination of certain terms of an agreement, which it is common cause, was concluded between Anglogold, as the employer and Fluor as the contractor, on 29 July 2002 (the agreement).

[2] The agreement was for the rendering of services by Fluor, being

engineering designs and drawings, more fully described in the agreement as "the review of metallurgical designs and engineering layouts, carrying out of all engineering designs and drawings (mechanical, structural, piping and civil) pertaining to ore reception, milling and treatment, including recommendations (if necessary) at Anglogold's No 8 Gold Plant at the Great Noligwa Mine, in the Northern Province (collectively referred to as the works)". The conclusion of the agreement, was preceded by and resulted from a tender process, which basically involved the following three steps: firstly, a tender enquiry issued by Anglogold to *inter alia* Fluor, containing a full specification of the works; secondly, Fluor's response to it in the form of a tender in respect of the services to be rendered and thirdly, a so-called kick-off meeting, which was held and aimed at finalising an agreement between the parties on all aspects.

[3] Fluor was the successful tenderer and the contract was warded to it. Both parties contemplated that a written contract recording all the agreed contractual terms would be executed. That however never happened. Prior to the kick-off meeting all material aspects in respect of the works except for a number of contractual terms, including, and relevant for purposes of this case, those relating to Fluor's liability for defective work, were agreed upon. Regarding these Anglogold, on the one hand, proposed its terms forming part of its standard terms and conditions, which were contained in its tender enquiry, while on the other Fluor insisted on its general terms and conditions normally applicable to service contracts, which formed part of the tender. Regarding the contractor's liability Anglogold's standard term (clause 36) limits the amount of damages payable to an amount equal to the Professional Indemnity Insurance cover, which the contractor was obliged to effect in terms of clause 25.4 thereof. In response hereto Fluor in its tender commented that Anglogold's clause 36 should be deleted as it was "too broad and vague", and proposed that it be substituted with a clause limiting the liability to an amount "not exceeding an amount of ten percent of the contract price". The kick-off meeting was held for the sole purpose of reaching agreement on these terms.

The meeting was attended by representatives of both parties. A minute of the meeting was prepared. The correctness thereof is not in dispute. Some of the disputed terms were agreed upon but the dispute concerning clause 36 could not be resolved. A check mate situation resulted and Anglogold's representative, Mr Coetzee undertook to refer the disputed terms to Anglogold's legal department. All other aspects having agreed upon Fluor commenced the works three days later, on 1 August 2002. A written "Notification of Award", dated 2 August 2002, confirming the award, was issued to Fluor, containing the following note:

> *"THIS CONTRACT IS SUBJECT TO AGREEMENT BEING REACHED, BY BOTH PARTIES, REGARDING THE INCLUSIONS, MODIFICATIONS AND DELETIONS OF THE PROPOSED SPECIAL/GENERAL CONDITIONS OF CONTRACT."*

The scope of the works and the contract price were subsequently amended and the works completed towards the end of 2003. Fluor was duly paid the contract price of R9 110 742, 28. But what remained unresolved were the disputed terms of the agreement, despite several attempts by Fluor, the last of which had occurred in November 2003, to finalise this issue. The reason for the failure to refer the disputed terms to the legal department was proffered by Anglogold's representative, Mr Coetzee, as being, as I have mentioned that he "dropped the ball" and that it "just fell through the cracks". Unfortunately it remained firmly embedded beneath the cracks, which is the main cause for the ensuing litigation.

[4] On 6 August 2003 the defective performance relied upon by Anglogold for its claim for damages in this matter, was discovered. That of course raised the prospect of a claim for payment of those damages against Fluor. No express agreement however existed as to Fluor's liability in such event. The present action was instituted, in which the parties have pleaded competing versions of what the contractual terms were which, as I have mentioned is the issue now before me for determination.

[5] Anglogold's pleaded case is that the agreement was concluded "expressly,

alternatively tacitly, further alternatively by conduct of the parties" and that it was "written, alternatively partly written and partly oral". I do not consider it necessary to repeat herein the terms of the agreement pleaded by Anglogold. Suffice to say that on Anglogold's version Fluor is held liable for the damages claimed (without any stated limit) based on Fluor's breach of an implied term of the agreement, based on the common law obligation that Fluor "would execute the works in a proper and workmanlike manner and with due care and skill and that it would comply with good engineering practice as applied in the engineering industry". Fluor, although admitting that the implied term in fact formed part of the agreement, denies liability on various grounds, one of which is that that it is exempted from any liability by virtue of the provisions of clause 5.1 which it recorded as part of its tender documents submitted to Anglogold.

[6] This matter turns on the question whether clause 5.1 acquired contractual force. Anglogold advanced a two tiered contention, firstly that it did not acquire contractual force and, secondly if it did, that it was of limited duration only. At the outset counsel for Anglogold, in my view rightly so, accepted that Fluor's liability would indeed be excluded should it be found that clause 5.1 formed part of the agreement between the parties. The question therefore arising is whether clause 5.1 in fact formed part of the agreement and if so, what its duration was. It having been pleaded by Fluor as a term forming part of the agreement, Anglogold as correctly pointed out by counsel for Fluor, bears the onus to prove the negative *ie* that it was not agreed upon and therefore not a term of the agreement (See *Kriegler v Minitzer and Another* 1949 (4) SA 821 (A) at 826-828; *Topaz Kitchens (Pty) Ltd v Naboom SPA (Edms) Bpk* 1976 (3) SA 470 (A); and *Stocks & Stocks (Pty) Ltd v TJ Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A) at 767C).

[7] Clause 5.1 requires closer scrutiny. Under the heading "General" it provides as follows:

> *"It is understood that, after your acceptance of this proposal, both parties will use reasonable diligence to agree upon a mutually acceptable definitive written contract with respect to the work described in the offer. In that respect, we have reviewed the Contract Conditions given in the enquiry received from yourselves, and our contractual comment/considerations are included in "Contractual Comments" at the end of this section.*
> *Your acceptance of this proposal or use of any portion of Fluor's services shall constitute your agreement that, expect (sic) as set forth in the executed definitive written contract, no warranties or guarantees, express or implied, shall apply with respect to the work and Fluor shall not be held liable for costs or damages of any nature (including but not limited to special, indirect or consequential damages) whether such costs or damages are alleged to have arisen in contract, delict (negligence), strict liability or other theory of law."*

Mr Coetzee, who was Anglogold's authorised representative dealing with the administrative aspects of this project and therefore the conclusion of the agreement, testified that he had read clause 5.1 as part of Fluor's tender documents on receipt thereof which of course was prior to the kick-off meeting being held. He added that he was fully aware of the nature and implications of the clause. At the kick-off meeting the clause was neither referred to nor discussed. The meeting progressed up to the stage it stalled which was when Coetzee made the undertaking I have referred to. Against the backdrop of these facts counsel for Anglogold submitted that it has been proved that clause 5.1 was not agreed upon. As I understand the argument, it is to the effect that the clause had actually dissolved into oblivion. For it to have acquired contractual force, counsel submitted, the Fluor representatives should at least again have focussed the attention during the meeting on the existence thereof, a contention for which he sought to find support in the judgment of Marais JA in *First National Bank of SA Ltd v Rosenblum and Another* 2001 (4) SA 189 (SCA) at 195G-196A. I do not agree. The Court in that case dealt with the "strictness in approach" to be adopted in interpreting exemption clauses. Clause 5.1 is abundantly clear in its meaning and in the absence of any ambiguity, obscurity or uncertainty no aided interpretation is called for (cf *Glyphis v Tuckers Land Holdings Ltd* 1978 (1) SA 530 (A) at

536H-537B). I did not understand counsel for Anglogold to have argued to the contrary.

[8] Before dealing any further with clause 5.1 it is necessary to consider the true nature of the legal relationship that existed between the parties. The factual situation we are here concerned with fits seamlessly within the general proposition expounded by Corbett JA in *CGEE Alsthom Equipments ET Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A) at 92A-F:

> *"There is no doubt that, where in the course of negotiating a contract, the parties reach an agreement by offer and acceptance, the fact that there are still a number of outstanding matters material to the contract upon which the parties have not yet agreed, may well prevent the agreement from having contractual force...Where the law denies such an agreement contractual force it is because the evidence shows that the parties contemplated that consensus on the outstanding matters would have to be reached before a binding contract could come into existence…The existence of such outstanding matters does not, however, necessarily deprive an agreement of contractual force. The parties may well intend by their agreement to conclude a binding contract, while agreeing, either expressly or by implication, to leave the outstanding matters to future negotiation with a view to a comprehensive contract. In the event of agreement being reached on all outstanding matters, the comprehensive contract would incorporate and supersede the original agreement. If, however, the parties should fail to reach agreement on the outstanding matters, then the original contract would stand...Whether in a particular case the initial agreement acquires contractual force or not, depends upon the intention of the parties, which is to be gathered from their conduct, the terms of the agreement and the surrounding circumstances."*

In the present matter the initial agreement reached between the parties undoubtedly acquired contractual force: it accords with their intention and their conduct in commencing with the execution almost immediately thereafter. The clause added in the official notification in the form of a note, to which I have already referred, notwithstanding the words "subject to", did not suspend the operation of the agreement but merely confirmed the requirement of finalisation of the agreement on the outstanding issues (cf *Pangbourne*

Properties Ltd v Gill & Ramsden (Pty) Ltd 1996 (1) SA 1182 (A) at 1187I-1188I). The initial agreement is clearly separable from the general provisions of the agreement relating to liability which for obvious reasons at that stage was anything but imminent. The parties, as I have mentioned, contemplated the conclusion of a firm, or in Fluor's terms definitive agreement on those terms. No time limit for the conclusion thereof was discussed or agreed upon but I think one can safely infer that the expectation was within a reasonable time. Fact of the matter is this aspect went astray through the fault of Anglogold. The only relevance hereof is that it dispels any possibility of Fluor having delayed the finalisation of the agreement while comfortably armed with an exemption in terms of clause 5.1. Fluor indeed, right from the outset "insisted" that their proposed condition should prevail (on the basis of the risk of liability to be commensurate with the reward Fluor would have received), while Coetzee adopted a somewhat more neutral attitude resulting in him, as it were, passing the buck to the legal department.

[9] Clause 5.1 undoubtedly provides for an interim period pending finalisation of the outstanding clauses, and can therefore rightly be described as a "transitional clause" as counsel for Anglogold would have it. Did it acquire contractual force? In my view the answer hereto is unequivocally in the affirmative. The clause itself provides, at least by implication, for the mode of acceptance thereof, which it will be remembered, was either "your acceptance of this proposal" or "use of any portion of Fluor's services" (See *Driftwood Properties (Pty) Ltd v McLean* 1971 (3) SA 591 (A) at 597D-E). It is true that the proposal was not accepted *in toto*, but the occurrence of the second event which is the use of Fluor's services, as I have alluded to, is beyond dispute. Coetzee, as I have alluded to, was well aware of the contents of clause 5. He was mandated by his employer to finalise the agreement. He caused the finalisation to be postponed pending the advices of the legal department. The possibility of the existence of clause 5.1 having slipped from Coetzee's memory does not avail Anglogold: the clause, which is clear in all its

provisions was before them in writing and catered exactly for the delay that was now brought about by Anglogold. In these circumstances it would be unrealistic if not fanciful to hold that a duty rested on Fluor to again bring the clause to the fore for it to acquire contractual force. On the contrary, one would have expected Anglogold, had they wanted to detach themselves from the operation of the clause to have done so in no uncertain terms. Their silence and inaction must therefore be held to be acquiescence. In any event the execution of the contract commenced, which is exactly the event foreshadowed in clause 5.1 for it to acquire contractual force.

[10] Finally, it remains to deal with the argument concerning the duration of clause 5.1. Counsel for Anglogold submitted that the operation of clause 5.1 could not have been intended to be *ad infinitum*, which I have no quarrel with. But the logical consequence of counsel's proposition became somewhat muddled when I raised with him the difficulty of identifying a time limit for its duration. Having further reflected on this aspect, counsel proposed the date of the commencement of the works as the limit of its duration. There is no substance in the argument. The proposed date is nothing but speculative and more so clearly in conflict with the unambiguous express terms of the clause (cf *South African Mutual Aid Society v Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) at 615D-E). The fundamental flaw in the argument is this: it ignores the intention of the parties at the time of the conclusion of the agreement and proceeds from the situation that had arisen *ex post facto*. When the agreement was concluded finalisation within a reasonable time must have been within the contemplation of the parties. The fact that finalisation overtook a reasonable time was due to Anglogold's fault, and could not affect of alter the agreement that had been entered into. It is accordingly my finding that clause 5.1 was of full force and effect when the alleged breach occurred.

[11] For these reasons the plaintiff's claim must fail. One final observation,

however, needs to be added: the plaintiff's reliance in this action on common law liability seems to me to be misconceived. Each party during the negotiations and in the competing documents I have referred to, contended for its terms revealing one common feature: on both versions Fluor's liability would have been limited, albeit in different amounts. Coetzee testified that it was never within the contemplation of the parties that Fluor would be saddled with a limitless liability (*ie* not subject to either limit as envisaged by the parties) which is exactly what the plaintiff is now attempting to achieve in this action. In order for Anglogold to succeed on this basis the Court would be required to re-write an agreement between the parties which is trite it cannot do (see *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 532H-533A).

[12] In the result the plaintiff's claim is dismissed with costs.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

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