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Case No 650/92
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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of:

RAUBEX CONSTRUCTION (PTY) LTD APPELLANT

and

THE MINISTER OF POSTS
& TELECOMMUNICATIONS RESPONDENT

CORAM HEFER, VIVIER JJA et SCOTT AJA

HEARD: 2 NOVEMBER 1995

DELIVERED: 17 NOVEMBER 1995

J U D G M E N T

SCOTT AJA/...

SCOTT AJA:

The appellant was the successful tenderer for a civil engineering contract to lay a pipeline between Graaff-Reinet and a point 20 km north of Noupoort. The work involved the excavation of a trench 450 mm wide and one metre deep into which two pitch-fibre pipes were to be installed. The pipes were to be encased in a selected material referred to as "bedding and padding" and the trench then filled with a selected back-filling material. "Bedding" is the material placed on the floor of the trench to provide an even and stable surface on which the pipes are laid, while "padding" is the material placed around and over the pipes up to a level of at least 75 mm above the pipes. The purpose of the pipes was to accommodate telephone cables and in particular an optical fibre network linking the major cities in the country.

The appellant's tender which was dated 31 March 1987 was

accepted on 20 May 1987. On 11 June 1987 and after the work had already been commenced the appellant concluded a formal written contract with the South African Government acting through its department of Posts and Telecommunications ("the department"). The contract provided that a number of specified documents were to "be deemed to form and be read and construed as part of this Agreement". One of these was a "Specification, for Civil Engineering Works issued May 1985". Clause 11.2.2 of this document specified what material had to be used for the bedding and padding. A dispute arose between the parties as to its meaning. Recourse was first had to mediation and thereafter the appellant, being dissatisfied with the mediator's opinion, instituted action in the Eastern Cape Division for a declaratory order as to the meaning of the clause. The action was dismissed with costs by Jennett J and the appellant with the necessary leave now appeals to this court. The sole question in

issue is the proper interpretation of clause 11.2.2 of the specification.

Clause 11.2 is headed "Materials". Clause 11.2.2 reads:

> "The bedding and padding material, that is, compacted material under, around and 75 mm above the pipes shall be either crusher run or coarse river sand or material of a granular non-cohesive nature that is singularly or evenly graded between 0,6 mm and 19 mm, is free draining, has a compactability factor not exceeding 0,3 and has a plasticity index not exceeding 6, shall be provided by the Contractor over the entire length of the contract. Tests to determine the characteristics of the material are detailed in schedule 2. For marshy or waterlogged conditions see schedule 4."

The appellant contends that on a proper construction the clause permits the use of three types of bedding and padding material viz (i) crusher run or (ii) coarse river sand or (iii) material of a granular non-cohesive nature that is singularly or evenly graded between 0,6 mm and 19 mm, is free draining, has a compactability factor not exceeding 0,3 and has a plasticity index not exceeding 6. In other words, the contention is that the specifications as to size, compactability and plasticity mentioned in the

clause apply only to the third type of material and not to crusher run or coarse river sand. The respondent, on the other hand, contends that the specifications in question were intended to relate to all three types of material which were permitted for use as bedding and padding. In support of this contention counsel for the respondent relied not only on the terms of the clause itself but also on various other documents which were incorporated into the contract and to which I shall refer later in this judgment.

The dispute between the parties as to the meaning of clause 11.2.2 of the specification arose in the following circumstances. At a site meeting held on 26 May 1987 which was some 6 days after the acceptance of the tender, the engineer issued an instruction which is recorded in the minutes of the meeting as follows:

> "The Chairman will allow up to a maximum of 15% mass smaller than 0,6 mm material in bedding and padding. The specification will

be otherwise strictly enforced."

The engineer's attitude was that the instruction amounted to no more than a relaxation of the 5% tolerance permitted in terms of the specification. That tolerance appears in schedule 2 to the specification which in turn is referred to in clause 11.2.2., quoted above. The schedule which is headed "Test for suitability of material for use as bedding/padding", details tests for both grading and compactibility. The test for grading reads as follows:

> "Obtain a representative sample of the material as follows:
> Heap about 40 kg of the dry material on a clean surface, mix it thoroughly, divide it into two parts of approximately equal size, and discard one part. Repeat the mixing, division, and discarding procedure until a sample of mass about 2,5 kg is obtained. Weigh this sample.
>
> Wash the representative sample through three sieves of nominal aperture size respectively 37,5 mm, 19 mm and 0,6 mm. If
>
> (a) any particles are retained on the 37,5 mm sieve, or
>
> (b) more than 5% by mass of the sample is retained on the 19 mm sieve, or

(c) less than 95% by mass of the sample is retained on the 0,6 mm sieve, regard the material as unsuitable for use in bedding."

The effect of the instruction of 26 May 1987 was therefore to reduce the figure of 95% referred to in paragraph (c) to 85%.

The appellant subsequently took up the attitude that because it was made clear by the engineer that the specifications referred to in clause 11.2.2, subject to the amended tolerance, applied to all three types of bedding and padding material, the instruction amounted in effect to a variation of the contract entitling it to additional compensation in terms of the General Conditions of Contract. The order which was ultimately sought in the Court below was:

"(a) 'n Verklarende bevel dat ingevolge die kontrak, aanhangsel 'A', growwe riviersand nie aan die toetsingsvereistes van skedule 2 tot die spesifikasies moes voldoen ten einde aan klousule 11.2.2 van die spesifikasies te voldoen nie;

(b) 'n Verklarende bevel dat die ingenieur se opdrag dat growwe

riviersand wel moes voldoen aan die toetsingsvereistes van skedule 2 gevolglik 'n wysigingsopdrag ingevolge die bepalings van klousule 51(1) van die algemene kontraksvoorwaardes was."

The reason for the reference to coarse river sand only is that this was the material which the appellant proposed to use and did in fact use in the execution of the work. The object of seeking the order was to require the engineer thereafter to calculate the additional compensation to which the appellant would be entitled in the event of its interpretation of the contract being the correct one.

The documents incorporated into the contract included various minutes of site meetings and telexes exchanged between the appellant and the department. Several of these documents, as I shall show, served to spell out and explain what the parties had in mind with regard to the specifications for bedding and padding material. Nonetheless, a great deal of evidence was led at the trial.

The appellant called as witnesses both Mr Burger who is a civil engineer specialising in civil engineering materials and Mr Raubenheimer who is a director of the respondent and also a qualified civil engineer. The respondent in turn called Mr Tanner who is also a civil engineer as well as Mr Tee who is a senior technician and who, as Installation Liaison Officer, represented the department on site during the execution of the work. The evidence covered a wide field. Much of it was technical and related to such questions as the suitability or otherwise of various materials for use as bedding and padding in a pipe laying operation such as the one in question. Much of it went far beyond the accepted limits of surrounding or background circumstances and related to such matters as the meaning of certain provisions in the contract and in some cases even to what was intended. Mr van Riet, who appeared together with Mr van Staden for the appellant, readily conceded that there was a great deal of evidence to which

regard could not properly be had in construing clause 11.2.2 of the specification. He submitted, however, that regardless of the existence of any possible uncertainty or ambiguity in the contract it was always permissible to have regard to extrinsic evidence in order to explain and give content to words or expressions which have a technical meaning or are used in a special sense (see Richter v Bloemfontein Town Council 1922, AD 57 at 70; Rand Rietfontein Estates Ltd v Cohn 1937 AD 317 at 327) and on this basis be sought to rely on evidence relating to the meaning of the expression "crusher run" and to a lesser extent the expression "coarse river sand".

It was common cause between the two expert witnesses, Mr Burger and Mr Tanner, that crusher run is material which has passed through a crusher. Mr Burger, however, went further and testified that because most of the crusher run which is produced commercially is used for

base courses for roads, the expression is generally used in the trade to refer to aggregates produced for this purpose and conforming with the specification laid down by the South African Bureau of Standards for such aggregates (SABS 1083 - 1976). This specification makes provision for two grades of aggregates; the one varying from a maximum particle size of 37,5 mm down to dust and the other varying from 25,5 mm down to dust. Neither would conform with the grading requirements referred to in clause 11.2.2 of the specification. Nonetheless, Mr Burger conceded that the expression "crusher run" was also used, albeit infrequently, to mean any material that had been passed through a crusher. Indeed, the expression is used in this sense in a SABS specification in relation to cable trenches (SABS 1200 LC - 1981) which was put to Mr Tanner in cross-examination in another context.

The two experts were also in agreement that generally speaking

coarse river sand was readily identifiable and that by visually examining it one could get a fair idea of whether it was clean or whether it contained silt or clay material.

Mr van Riet submitted that the expression "crusher run" in clause 11.2.2 had to be given the ordinary meaning it has in the trade and that accordingly the specifications referred to in the clause could not have been intended to apply to this category of material. Similarly, and because of the readily identifiable nature of coarse river sand which according to the evidence was suitable as bedding and padding material, he contended that the specifications could not have been intended to apply to coarse river sand either. In support of the latter submission he relied, in addition, on evidence which had been led to the effect that it would have been very difficult to sieve coarse river sand so as to bring it within the specifications given in the clause. Such evidence, of course, went far

beyond the scope of evidence which was merely of an identificatory nature. With regard to the actual language of clause 11.2.2 of the specification, Mr van Riet emphasized the use of the word "or" after the expressions "crusher run" and "coarse river sand" and pointed out that a consequence of the interpretation contended for by the respondent was to render the expressions "crusher run" and "coarse river sand" unnecessary as both these materials would fall within the ambit of the third category, it being common cause that they were both materials of "a granular non-cohesive nature".

Dealing first with the language of the clause, a difficulty which is encountered with the appellant's interpretation is that it involves construing the word "material" in the second sentence as referring solely to the third category of material, whereas the repeated use of the word "material" in the first sentence in relation to all three categories suggests that it was intended to refer to all bedding and padding material in the

second sentence as well. Similarly, there is nothing in schedule 2 (which is referred to in the second sentence) that suggests that the tests detailed therein are applicable only to the third category of material. On the contrary, the schedule itself and particularly the heading (quoted above) suggest that the tests are to apply to all material used for bedding and padding.

The fact that the expression"crusher run" is commonly used in the trade to mean aggregate for base courses for roads ceases to be of significance, I think, once it is accepted that the expression is also used to describe any material that has been passed through a crusher. Furthermore, it seems most unlikely that crusher run graded from 37,5 mm or 25,5 mm to dust should be permitted while the third category of material, which was also to be of a granular non-cohesive nature, was required to be graded between 0,6 mm and 19 mm. In the light of this specification as to size it

also makes no sense that the contractor should be free to choose between a maximum particle size of 37,5 mm and 25,5 mm.

The appellant's construction, as pointed out by Mr van Riet, does indeed result in the reference to crusher run and coarse river sand being unnecessary as both these materials would fall within the ambit of the third category. This, however, is not necessarily decisive, particularly when regard is had to the nature of the document in which the clause is contained. But if there is any ambiguity, it is removed, I think, if regard is had to some of the other documents incorporated into the contract.

One such document is a minute of a pre-tender site meeting held on 16 February 1987 and attended by the appellant together with other potential tenderers. Paragraph 6.9 reads:

> "Samples of suitable bedding and padding material from various sources along the route which had been tested were on display at the pre-inspection meeting.

> Tenders should make provision for the transporting of bedding and padding material over long distances. All bedding sources will be tested regularly and material not meeting the specification (schedules 2 and 4) will be rejected. A list of possible sources appears in Appendix A to these minutes. Available quantities are unknown."

It is clear from this paragraph that "all bedding sources" were required to be subjected to the tests detailed in schedules 2 and 4 to the specification. (Schedule 4 was applicable only in the case of marshy or waterlogged conditions). The minute is therefore in direct conflict with the construction contended for by the appellant.

The appendix referred to in paragraph 6.9 is equally revealing. It reads:

> "Possible sources of bedding and padding material. These sources are not guaranteed and tenderers are advised to do qualitative and quantative tests. The onus is on the tenderer to secure sufficient bedding and padding material which meets the specification (see schedules 2 and 4).
>
> 1. Sundays River — Graaff-Reinet Municipality
> Just North of Graaff-

	Reinet OB117B - OB117C (good; may need sieving)	Tel.: 0491-22121
2.	F. P. van der Merwe farm Riversdale OB120-120A	F.P. van der Merwe Riversdale Tel.: 0491-22020
3.	Groothoek farm Middelburg (not tested)	A. Saunders Groothoek Tel.: 22018
4.	Beskuitfontein farm Middelburg (not tested)	Piet Erasmus Beskuitfontein Tel.: 22017
5.	Driefontein Middelburg (not tested)"	W.R.C. Collet Driefontein

It was common cause that the five sources referred to in the appendix were all coarse river sand sources. But there can be no doubt that the material derived therefrom was to be subjected to testing as provided for in schedules 2 and 4. Nor is there anything in the appendix to suggest that

some material would not have to conform with the tests detailed in the specification.

There is still more. On 10 April 1987, ie after the appellant had submitted its tender but before it had been accepted, the department sent a telex to the appellant seeking information. The relevant portion of the telex reads:

> "Could you as a matter of urgency indicate separately for each tender, the following information please:
>
> 1. ...
>
> 2. ....
>
> 3. ...
>
> 4. What sources of bedding and padding material have been identified?
>
> What quantities have been secured?
>
> Have all sources been tested in accordance with schedule 2 of the specification?
>
> What is the price of bedding and padding material at the source delivered?
>
> Provide a list of sources and indicate quantities and whether it passes the test outlined in shedule 2 of the specification."

The information requested was obviously required for the purpose of

deciding whether to accept the appellant's tender or not. The telex could have left the appellant in no doubt that as far as the department was concerned all bedding and padding material from whatever source would be required to meet the tests detailed in the schedules to the specification.

The appellant replied by telex dated 15 April 1987. Paragraph 4, which was headed "Sandbronne" and clearly intended to relate to paragraph 4 of the telex of 10 April 1987, detailed a number of sources and then proceeded.

> "Omdat die sandkwaliteit baie wissel is geen toetse gedoen nie. Tydens die kontrak sal 'n terreinbestuurder voltyds sandbronne soek, toetse laat doen en die nodige sifprosesse reël om geskikte sand op die terrein te voorsien. Ons sal self aflewer - sien toerustingskedule vir wipbakvragmotors."

This reply is wholly inconsistent with the attitude subsequently adopted by the appellant as to the meaning of clause 11.2.2 of the specification. Far from disputing the need for coarse river sand to be tested

in accordance with schedule 2 the appellant was here stating its intention to do tests and set up a sieve process in order to provide "geskikte sand" on site.

The telexes of 10 and 15 April 1987 as well as the minute of the site meeting held on 16 February 1987 and the appendix thereto were included in the documents incorporated into the agreement. Collectively they evince quite clearly, in my view, an intention on the part of the contracting parties that all bedding and padding material was to comply with the specifications contained in clause 11.2.2 and to meet the tests detailed in schedules 2 and 4. The only argument which Mr van Riet could advance in relation to these documents was that they should be given less weight than the specification itself. But the very object of incorporating into the contract documents such as the minutes of pre-tender site meetings and telexes exchanged between the parties was no doubt to remove any

misunderstanding that might have existed between them and to avoid the type of dispute that in fact subsequently arose. There can be no possible basis for attempting to construe the specification in isolation and without regard to these documents. Once, however, regard is had to them, any ambiguity there may be in the specification is removed.

It is now well established that where sufficient certainty as to the meaning of a contract can be gathered from its language it is impermissible to reach a different result by drawing inferences from surrounding circumstances. (See Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 A at 454 H; Total South Africa (Pty) Ltd v Bekker NO 1992 (1) SA 617 (A) at 624 I - J.) Accordingly, there was no call to have regard to extrinsic evidence as to surrounding circumstances in the present case.

It follows that in my view Jennett J was correct in dismissing the appellant's claims.

The appeal is dismissed with costs, which costs are to include the costs occasioned by the employment of two counsel.

D G SCOTT

HEFER JA)
- Concur
VIVIER JA)