94/96

Case No 681/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE MINISTER OF PUBLIC WORKS AND LAND AFFAIRS Appellant

and

GROUP FIVE BUILDING LIMITED Respondent

CORAM: E M GROSSKOPF, EKSTEEN, HARMS, OLIVIER, JJA et ZULMAN, AJA

HEARD: 22 AUGUST 1996

DELIVERD: 17 SEPTEMBER 1996

J U D G M E N T

E M GROSSKOPF, JA

This appeal concerns the interpretation of a building contract between the parties for the erection by the respondent of the archive building in Cape Town on the site of the old Roeland Street gaol. As is usual the contract consists of a number of documents including the Conditions of Contract, the Bills of Quantities and the Drawings. In terms of clause 6 (1) of the Conditions of Contract,

> "[all] material and work shall be as described on the Drawings and in the .... Bills of Quantities."

The dispute arises from one item in the Bills of Quantities, relating to the roofing of the building. Under the heading "Dakbedekkings" the Bills of Quantities prescribe the use of "'Cordova' of ander goedgekeurde groen geglasuurde klei dakteëls ... soos vervaardig deur 'Corobrick (Edms) Bpk.'" Then follows the disputed provision, viz., item 157A. It reads as follows, with the critical words underlined:

"Klei dakteëls tot plat helling op dakhoutwerk gelê, en bevestig soos beskryf alles streng ooreenkomstig die vervaardiger se voorskrifte".

An area of 4312 square metres is specified for this item. The Bills of Quantities do not indicate how many tiles would be required to cover this area. The number of tiles could be determined from the area given, the size of the tiles and the extent of their overlap. The sole information regarding the size of the tiles and their overlap was to be found in the "vervaardiger se voorskrifte" mentioned in the Item. These "voorskrifte", it was common cause, were embodied in a brochure issued by Corobrik. According to this brochure the size of the Cordova tiles was 406 by 203 mm. However, two ways of fixing the tiles were set out in the brochure. The one (described as method A) was for tiles laid under normal conditions. Here a 102 mm headlap was considered adequate. The second (method B) was for tiles "laid on a very low pitched roof and where extreme windy conditions prevail".

Here a headlap of 203 mm was suggested. By requiring a greater overlap, method B would use more tiles than method A in covering the same area. This forms the crux of the dispute between the parties. The respondent sued in the Cape Provincial Division for an order declaring that method A was prescribed by the contract. The appellant opposed the claim, and counterclaimed for an order declaring that method B was the chosen one. The court a quo (Van Niekerk J) held in favour of the respondent. With leave granted pursuant to a petition to the Chief Justice the appellant now appeals against this judgment.

Strictly speaking the brochure does not contain any "voorskrifte" (directions or instructions). It is more in the nature of an informative document, giving details of the product and suggesting how it is to be used in particular circumstances. Its contemplation clearly is that the person

using the tiles would have to decide which of the suggested methods would be appropriate. In the present case it was the architect's duty to stipulate how the tiles were to be laid. Save for the reference to the manufacturer's instructions, item 157A of the Bills of Quantities does not reflect any stipulation as to the overlap required by the contract. I shall consider later whether any of the other contractual provisions casts light on this matter.

The respondent's argument, which was accepted by the court **a quo**, was essentially that the court should look no further than item 157A read with the brochure, and that this limited perspective provides an answer to the problem. This argument was developed as follows.

Clause B1.6 of the Bills of Quantities provides:

"Hierdie Hoeveelheidslyste is opgestel ooreenkomstig die jongste Standaardstelsel vir die Opname van Bouerswerk uitgereik deur die Vereniging van Suid-Afrikaanse Bourekenaars. Waar van hierdie stelsel afgewyk is, sal dit duidelik aangedui wees en voorrang

geniet."

The Standard System of Measuring Builders' Work, to which reference is made in the above clause, and to which I shall refer as the Standard System, provides **inter alia** as follows:

"3 Scope of bills of quantities

The bills of quantities shall set out all the work to be done in sufficient detail to give a clear idea of the character and cost. Everything of consequence in respect of costs, shown on the drawings or described in the specifications, shall be embodied and nothing shall be left to assumption. The bills of quantities shall be as simple as possible provided that they fully describe the materials and workmanship and accurately represent the work to be executed.

4 Descriptions

Descriptions shall be clear and complete, leaving no reasonable doubt as to their intent and meaning and containing all the essential information necessary for pricing.....

5 Separation of items

Items shall be separated in accordance with the detailed instructions laid down in the various trades, based on the following rules:

a) The recognised and customary trades shall be separated and a combination of such trades in the same item shall be avoided ...."

Item 157A of the Bills of Quantities falls within the section dealing with roofing. By reason of the above provisions of the Standard System a tenderer is entitled to assume, so it is contended, that every provision relating to roofing is contained clearly and unambiguously in that section. He could accordingly not be expected to have regard to any other part of the contract to determine what the roofing requirements are. And, for present purposes, the only relevant part of the roofing section is contained in Item 157A read with the brochure. If the enquiry is limited to these provisions, the argument concluded, the only reasonable inference is that method A was prescribed, since it is the normal method to be employed - if the exceptional method B was intended, the person drawing the Bills of Quantities would, pursuant to the Standard System, have expressly so provided.

This argument rests heavily on the Standard System, and there was some debate before us as to its legal effect. The parties specifically incorporated it in their contract and must, in my view, have intended that the Bills of Quantities should be read in the light of the Standard System. It is difficult to generalise on how such an approach would affect the process of interpretation. One thing is clear, however. If an item in Bills of Quantities is ambiguous the Standard System cannot render it unambiguous. In such a case one can only infer that the quantity surveyor who drew the Bills did not achieve the high standards prescribed by the Standard System. And the ambiguity would, in my view, have to be resolved by applying ordinary contractual principles.

I turn now to the interpretation of item 157A read with the brochure. As already stated, the brochure suggests two alternative methods of fixing

the tiles. The one is said to be appropriate "under normal conditions". The other is suggested for "a very low pitched roof and where extreme windy conditions prevail". Does this mean, as the respondent contended, that, in the absence of any indication to the contrary, the normal method, i e method A, should be employed? In my view this does not follow. Item 157A itself mentions that the tiles are to be fixed on a "plat helling". The evidence discloses that this expression served only to indicate to a tenderer that work on the roof would not be rendered difficult by a steep pitch, and I accept that it casts no real light on which method would be appropriate. Nevertheless, putting it at its lowest, there is no indication in the Item that the roof is anything other than "a very low pitched roof". And it was common cause on the evidence that Roeland Street, Cape Town, may well be considered a locality "where extreme windy conditions prevail". What

reason therefore is there to assume, by looking only at the Item and the brochure, that the architect who drew the plans and the quantity surveyor who drew the Bills intended method A to be employed rather than method B?

The appellant's contention is that this ambiguity may be resolved by having regard to other provisions of the contract. In this regard it is important to note that the method of fixing the tiles influences other aspects of the building work, and in particular the carpentry. The tiles are fixed to wooden battens, and the distance between the battens depends on the method to be used in laying the tiles. Thus the brochure stipulates that, for method A, the battens are generally to be spaced at 305 mm centres, whereas for method B the spacing was to be, generally, at 203 mm centres. The section of the Bills of Quantities dealing with the trade of carpenters

and joiners lays down that the battens are to be spaced at 203 mm, which is a clear indication that method B is to be applied. But, the respondent argues, by reason of the Standard System, the item dealing with work to be performed by the roofer must be read by itself and not in conjunction with items relating to other "recognised and customary trades" (clause 5 of the Standard System) such as carpenters and joiners. It is not necessary to deal with this argument for reasons which follow.

In the introduction to the Bills of Quantities the tenderer is informed that the building plans issued together with the tender documents do not comprise a complete set "maar dien slegs om 'n gids vir tenderdoeleindes te wees, om die omvang van die werk aan te dui en om die Tenderaar in staat te stel om bekend te raak met die aard en omvang van die Werke en die wyse waarop dit uitgevoer word." Quite clearly these plans are intended

to be read together with the Bills of Quantities. See also the specific reference to "the Drawings" in clause 6(1) of the conditions of Contract, quoted above. I cannot imagine that a roofing specialist or other tenderer would make a tender before ascertaining from the plans exactly how the roof is to be constructed. Among these drawings (which, it must be emphasized, form a part of the contract) is one showing a section of the building and another which is described as a "dakplan". Both these plans contain a description of the method to be employed in fixing the tiles. This description corresponds closely with Item 157A, except that it stipulates also that the tiles are to be fixed on battens at 203 mm centres. This is the distance prescribed for Method B. In fact it would be physically impossible to apply Method A where battens are spaced in this way.

The respondent's counsel brushed aside the references to the batten

spaces in the drawings and in other items of the Bills of Quantities as merely pointing to a discrepancy between item 157A and the information contained in these documents. Such a discrepancy, it was contended, was provided for in the contractual documents. Clause 6(2) of the Conditions of Contract lays down that, if a contractor were to detect a difference or discrepancy between or in the drawings, specification and/or bills of quantities, it shall be his duty to seek in writing a decision of the owner's representative on the true intent and meaning of the contract. I do not think this provision is really relevant. Obviously an apparent difference or discrepancy in the documents must be resolved in some way, and the contract makes provision for this. It is common cause, however, that all attempts to resolve the dispute between the parties have failed and that, pursuant to clause 27(2) of the Conditions of Contract, the matter has been

placed before the courts. We now have to interpret the contract. In accordance with ordinary principles of interpretation, a court will, where possible, interpret a contract so as to avoid discrepancies. This can be done in the present case by reading the ambiguous provisions of item 157A and the brochure with the descriptions set out on the drawings. If this is done, it seems clear that the contract between the parties required method B to be applied.

In the result the appeal succeeds with costs including the costs of two counsel. The order of the court **a quo** is set aside and the following substituted:

1. An order is made declaring that on a proper construction of item 157A of "Lys no 8" of the Bills of Quantities, being part of Contract no. 860109, the applicable method of fixing roof

tiles was that described as the "B" method of fixing tiles for a 203 mm headlap in annexure PPC3 to the plaintiff's particulars of claim.

2. Claim A of the plaintiff's particulars of claim is dismissed.

3. The plaintiff is ordered to pay the costs of this action, which are to include the costs of two counsel.

E M GROSSKOPF, JA

EKSTEEN, JA
HARMS, JA
OLIVIER, JA
ZULMAN, AJA Concur