

SOUTH AFRICA / JUDGMENT

Compagnie Inter Africaine De Tranvaux, South African Branch v Abercom Africa (Pty) Ltd. (60/1984) [1985] ZASCA 60 (30 May 1985) [1985] ZASCA 60

COURT

Supreme Court of Appeal

BEFORE

Botha, Kotze, Cillie, Hoexter, Grosskopf

CASE / FILE NUMBER

60/1984

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LL Case No. 60/1984

IN THE SUPREME COURT OF SOUTH AFRICA APPELLATE DIVISION

In the matter between:

COMPAGNIE INTER AFRICAINE DETRAVAUX SOUTH AFRICAN
BRANCH Appellant and ABERCOM AFRICA (PROPRIETARY) LIMITED
t/a HTC TRANSPORT SERVICES Respondent
CORAM: KOTZÉ, CILLIÉ, HOEXTER, BOTHA et
GROSSKOPF JJA
HEARD: 13 MAY 1985
DELIVERED: 30 MAY 1985

JUDGMENT

/BOTHA JA ...

2.

BOTHA JA:-

The appellant is the plaintiff and the respondent the defendant in an action brought by the former against the latter in the Witwatersrand Local Division. To the appellant's particulars of claim, as amplified by further particulars, the respondent took a number of exceptions

- eight in all. They were heard by ESSELEN J, who made an order upholding all of them, with costs. The appellant appeals against that order, leave to do so having been granted pursuant to a petition addressed to the Chief Justice.

In order to appreciate the issues raised by the exceptions it will be necessary to quote extensively from the particulars of claim, the request for further particulars, the reply thereto, the written agreement between the parties, a copy of which is annexed to the further particulars, and the exceptions themselves.

/The ...3.

The appellant's particulars of claim, from paragraph 3 onwards, read as follows:

"3. On or about 4 February 1981, the Plaintiff and the Defendant entered into a written agreement ("the Agreement") in terms of which the Defendant undertook to supply, deliver and commission, inter alia, 5 MT 20 and 4 MT 10/12 trolley locomotives ("the Locomotives") at the site of the Hex River railway tunnel, Cape Province ("the Site") for a total consideration of R824 886,04.

4. The Locomotives were delivered to the Site by the Defendant.

PLAINTIFF'S MAIN CLAIM

5.1 It was a tacit term of the Agreement that the Locomotives would be fit for the purpose for which they were intended, which was the haulage of underground muck wagons used at the Site in the construction of the Hex River railway tunnel; 5.2 In breach of the said tacit term, the Locomotives were unfit for the aforesaid purpose in that they were unsuited to tunneling conditions at the Site.

6. The Agreement was concluded on the basis, and it was within the contemplation of the parties, that if the Locomotives were unfit for the purpose for which they were intended, the Plaintiff would suffer

/damages ...

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damages arising from expenses necessarily incurred by it in redesigning components of the Locomotives, in reconstructing and in assisting the Defendant to reconstruct the Locomotives, in replacing or restructuring inadequately designed components of the Locomotives, in hiring substitute locomotives and in increased operational costs of the Locomotives on the Site.

7. As a result of the unfitness of the Locomotives

for the purpose for which they were intended, the Plaintiff -

7.1 became obliged to and did incur necessary expenses in redesigning components of the Locomotives which were unsuitable for the purpose for which they were intended, in rebuilding and in assisting the Defendant to rebuild the Locomotives, in replacing

or restructuring inadequately designed components of the Locomotives and in assisting the Defendant to do so, in hiring or purchasing substitute locomotives and in increased operational costs of the Locomotives on the site.

7.2 The said expenses are made up as follows -

7.2.1 Labour R209 513,00 7.2.2 Tools and workshop facilities 15 000,00 7.2.3 Cranes 32 415,00 7.2.4 Transport 14 507,00 7.2.5 Specialists 67 530,00 7.2.6 Parts, consumables 113 854,00 7.2.7 Rental locos 322 500,00 7.2.8 Additional employees 157 950,00

R933 269,00 /8. ...

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8. In the premises, the Defendant is indebted to the Plaintiff in the amount of R933 269,00.

PLAINTIFF'S FIRST ALTERNATIVE CLAIM

9. It was an express term of the Agreement that -

9.1 The Defendant would serve (sic) and repair the Locomotives, on Site, for a period of six months, renewable for a further period of six months; 9.2 service was defined to mean preventive maintenance according to schedules supplied by the Defendant on delivery of the Locomotives, and repairs were defined to mean the repair or replacement of parts worn out due to fair wear and tear and the repair of electrical

and mechanical breakdowns to the Locomotives.

10. On a proper interpretation of the Agreement, alternatively as a tacit term thereof, such servicing and repairs were to commence from the date of delivery, alternatively the date of commissioning of each Locomotive.

11. It was a tacit term of the Agreement that

the servicing and repairing of the Locomotives would be done by the Defendant in a workmanlike manner so as to make the keep of the Locomotives reasonably operational.

11.2 It was within the contemplation of the parties to the Agreement, and the Agreement was concluded on the basis, that if the Defendant failed to perform its aforesaid

/obligations ...

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obligations in terms of the Agreement, the Plaintiff would be obliged to incur expense in servicing and repairing the Locomotives itself.

12. The Defendant -

12.1 delivered the Locomotives to the Site, alternatively, delivered the Locomotives to the Site and commissioned each on or about the date of delivery; 12.2 from the date of delivery and/or commissioning as aforesaid, appointed and maintained a serviceman on the Site to service and repair the Locomotives.

13. In breach of the tacit term alleged in paragraph 11.1 hereof, the Defendant failed to either service or repair the Locomotives in a workmanlike manner, and the Locomotives were not made or kept reasonably operational.

14.1 As a result of the Defendant's breach of the said term, the Plaintiff has suffered the damages which are set out in paragraph 7.2 of the Plaintiff's Main Claim. 14.2 Alternatively to 14.1

14.2.1 It was a tacit term of the Agreement that if the Defendant failed to carry out its obligations to service and repair the Locomotives on Site in a workmanlike manner, the Plaintiff would be entitled itself to service and repair the Locomotives and to recover the cost of doing so from the Defendant.

/14.2.2 . . .

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14.2.2 The Defendant failed to carry out its

obligation to service and repair the Locomotives on Site in a workmanlike manner and the Plaintiff thereupon became entitled to, and did, carry out such servicing and effect such repairs itself, as a result of which it incurred the expenses set out in paragraph 7.2 of the Plaintiff's Main Claim.

15. In the premises, the Defendant is indebted to the Plaintiff in an amount of R933 269,00.

PLAINTIFF'S SECOND ALTERNATIVE CLAIM

16. The Plaintiff repeats paragraph 9 of the Plaintiff's First Alternative Claim. 17. It was a further term of the Agreement that -

17.1 repairs would be carried out with assistance

from the Plaintiff's staff where necessary;

17.1 the Plaintiff would make reasonable workshop facilities available on Site with an adequate working area plus the use of basic workshop equipment such as welding, grinding

and drilling machines, and lifting equipment.

18. The Plaintiff, in compliance with its aforesaid obligations, rendered assistance to the Defendant and made reasonable workshop facilities available, but, in addition, at the tacit request of the Defendant or with the Defendant's tacit approval rendered services, supplied goods and made facilities available over and above that contemplated

/by ...

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by the Agreement.

19. It was a term of the said request that the Plaintiff would be entitled to reasonable remuneration for the services which

it rendered as aforesaid and the facilities which it made available and to its usual price for the goods which it supplied over and above what was contemplated by the Agreement.

20. The remuneration for the services and the prices for the goods aforesaid were set out in paragraph 7.2 of the Plaintiff's Main Claim. 21. In the premises, the Defendant is indebted to the Plaintiff in an amount of R933 269,00."

The relevant portions of the respondent's request for further particulars are the following:

"1. AD PARAGRAPH 3

(a) A copy of the agreement is required

(b)

2. AD PARAGRAPH 4

(a) Precisely when is it alleged that the locomotives were delivered?

/3. ...

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3. AD PARAGRAPH 5

(a) The Plaintiff is required to State the facts (not evidence) relied upon by it for the allegation that the locomotives were unsuited to tunnelling conditions on site.

(b) In precisely what way is it alleged that the locomotives were unsuited to tunnelling conditions at the site?

4. AD PARAGRAPH 7

(a) Precisely which components is it alleged had to be re-designed?

(b) How were such components re-designed? Full particulars are required.

(c) The Plaintiff is required to state why it was necessary to re-design each component concerned.

(d) Is it intended to allege that each locomotive had to be re-built?

- (e) If sub-paragraph (d) above is answered in the negative, then the Plaintiff is required to identify precisely which locomotives had to be re-built.
- (f) In relation to each locomotive which required rebuilding, the Plaintiff is required to state precisely why it required rebuilding.
- (g) with reference to each locomotive the Plaintiff is required to state which components had to be replaced.

/(h) ...

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- (h) With reference to each locomotive the Plaintiff is required to state which component had to be restructured, the ambit of such restructuring and the effect of such restructuring.
- (i) The Plaintiff is required to state precisely on what facts (not evidence) it relies for the allegation that the components of the locomotives were inadequately designed.
- (j) When, where and from whom and for what period were substitute locomotives hired?

- (k) Pull particulars are required of the increased operational costs referred to in this paragraph.

- (l) Pull particulars are required as to how

the sum of R167 125,00 for labour is made up, such particulars to include:

- (i) To whom the amount was paid;
- (ii) When and where the amount was paid;
- (iii) Precisely what work was done.

- (m) Full particulars are required as to how the sum of R15 000,00 claimed for tools and workshop facilities is made up, such particulars to include:

- (i) When and where were such tools and workshop facilities utilized; (ii) For what reason were such tools and workshop facilities utilized? (iii) Precisely how were such tools and workshop facilities utilized as

/alleged ...

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alleged by the Plaintiff?

- (n) Pull particulars are required as to how the sum of R28 626,00 for cranes is made up, such particulars to include:

(i) When and where were the alleged cranes utilized? (ii) Precisely how were the cranes utilized in terms of the allegations contained in Plaintiff's particulars of claim? (iii) Precisely what work is it alleged was done by the cranes?

(o) Pull particulars are required as to how

the sum of R14 500,00 in respect of transport costs is made up, such particulars to include:

(i) When and where were such transport costs incurred? (ii) Precisely what transport costs were entailed? (iii) To whom was the sum of R14 500,00 paid?

(p) Full particulars are required as to how the sum of R67 500 allegedly paid to specialists is made up, such particulars to include:

(i) The name of the alleged specialists and their specialities are required; (ii) How much was paid to each alleged specialist and what function was performed by each specialist for

/such ...

12.

such amount of money;

(iii) When and where were such amounts

paid to each alleged specialist?

(q) Full particulars are required as to how

the sum of R99 237,00 in respect of parts and "consumables" is made up, such particulars to include:

(i) Pull particulars as to each part

and the cost of such part allegedly required by the Plaintiff;

(ii) Full particulars as to the alleged "consumables" utilized and the cost of such consumables; (iii) To whom was the amount of R99 237,00 paid?

(iv) Precisely when and where was the

sum of R99 237,00 disbursed by the Plaintiff.

(r) Full particulars are required as to how the sum of R135 000, for the rental of locomotives is made up, such particulars to include:

(i) When and where were the alleged rentals incurred? (ii) Precisely what locomotives were rented?

(iii) From whom were the alleged locomotives

rented and at what cost was each locomotive so rented?

(s) Full particulars are required as to how the sum of R157 950,00 in respect of additional ...

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additional employees is made up, such particulars to include:

- (i) When and where were such additional employees employed;
- (ii) The name, designations and functions of each alleged additional employee . is required;
- (iii) Pull particulars are required as to why the alleged additional employees were in fact employed.

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7. AD PARAGRAPH 13

- (a) The Defendant is required to state for precisely what period the locomotives were not kept "reasonably operational".
- (b) Is it intended to allege that all the locomotives did not work at all for any specific period? If so, the period is required in respect of each loco= motive complained of.
- (c) If sub-paragraph (b) above is answered in the negative, then in relation to each locomotive concerned, precisely when did it not work because of a failure to service it?
- (d) Particulars are required as to the rea= son for each locomotive not working for any specific period of time.

/(e) ...

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(e) Full particulars are required in re=

lation to each locomotive as to what is meant by the words "reasonably opera= tional" in the context of this para= graph.

8. AD PARAGRAPH 14.2

Full particulars are required of the facts (not evidence) relied upon by the Plaintiff for the allegation contained in paragraph 14.2.2.

9. AD PARAGRAPHS 18, 19 AND 20

- (a) The Plaintiff is required to state what assistance it rendered and what workshop facilities it made available to the Defendant in terms of its obligations, precisely when such assistance was rendered and facilities made available, by whom and to whom such assistance was rendered and facilities made available. (b) On what fact/s does the Plaintiff rely for the allegation that the services and facilities made available as stated in paragraph 7 of Plaintiff's main claim were over and above its obligations as stipulated in the agreement? "

The further particulars supplied by the appellant in reply to those parts of the respondent's request quoted above, read as follows:

/ "1. ...

15.

- (a) A copy of the agreement is Annexure "A" hereto.
- (a) The locomotives were delivered to the,, site on the following dates - X3 - 1/7/81 X4 - 6/7/81 X5 - 9/7/81 X6 - 20/7/81 X7 - 11/8/81 X8 - 9/6/81 X9 - 9/6/81 X10 - 9/6/81 X11 - 13/6/81
- (b) 3. AD PARAGRAPH 5
- (a) and (b):

The locomotives were unsuited to tunnel= ling conditions in the following respects -

- (i) the suspension of all locomotives was inadequate;
- (ii) the gearboxes on the twenty-two ton locomotives were poorly designed, manifested numerous breakdowns and exhibited major oil leaks;
- (iii) the braking system on all the
- /locomotives ...

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locomotives was not progressive and was dangerous and on the 22 ton loco= motives the brake components such as linkages and brake shoes were poorly designed;

- (iv) the air system on all the locomotives was faulty and the compressor which by a modified design of the Defendant was set in such a way that it had to run continuously instead of inter= mittently, tended to overheat and fail;

- (v) electric wiring and fuses on all

locomotives were wrongly installed and insulation was inadequate;

- (vi) all electrical motors and cubicles were unprotected against moisture and were exposed to damage as a result of moisture penetration;

(vii) all the locomotives were unsafe in operation in that electrical circuits and earth brushes were inadequately protected, speedometers gave false readings or no readings at all and the brake system was dangerous;

(viii) the mass distribution on the twenty-two ton locomotives was wrong so that traction and braking was inhibited;

(ix) the wheels of the twenty-two ton locomotives were not properly
/affixed ...

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affixed to the axles and axles were manufactured of the wrong
type of steel.

Greater detail of the respects in which the locomotives were unsuited, as alleged, is furnished in paragraph 4 below.

4. AD PARAGRAPH 7

(a) - (i):

The extent and manner in which components were redesigned and the reasons therefor are furnished hereafter together with details of what components had to be replaced or restructured and the ambit and effect thereof. It is the Plaintiff's contention that the scale of such redesign, replacement and restructuring was such that it amounted to a rebuilding of each locomotive. The word "site" in brackets where it occurs hereinafter, connotes that the replacement or restructuring referred to was done at the site by the Defendant with the assistance of the Plaintiff. Such assistance comprised the provision of cranes, and workshop facilities and the services of the Plaintiff's site mechanical engineer, site agent, mechanics, electricians and black labourers. In addition, services were rendered by the Plaintiff's general manager, its manager and mechanical engineer in attending to administrative and technical matters

/connected ...

18.

connected with such restructuring and
replacement.

The word "Trivets" in brackets where it occurs hereinafter, connotes that the restructuring and replacement of parts was carried out by that concern at its workshops in Cape Town.

Apart from services rendered in connection with the salvage of broken down locomotives and the despatch of such locomotives to Trivetts, and equipment such as cranes needed therefor, the Plaintiff's site personnel visited the Trivett's premises in Cape Town to inspect restructured and replaced components and the progress of modification works.

In respect of work done by Trivetts, also, the Plaintiff's general manager, manager and mechanical engineer were obliged to render administrative and technical services connected with the restructuring and replacement of components by Trivetts.

The words "site-Trivetts" in brackets, where they occur hereafter, connote that the restructuring and replacement of components was done partly on the site and partly at the premises of Trivetts.

The word "Defendant" in brackets, where it occurs hereafter, connotes that the restructuring and replacement of parts was carried out by the Defendant at its

/workshops ...

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workshops.

Apart from services rendered in connection with the salvage of broken down locomotives and the despatch of the components of such locomotives to the Defendant, and equipment such as cranes needed therefor, the Plaintiff's personnel visited the Defendant's premises to inspect restructured and replaced components and the progress of modification works.

In respect of work done by the Defendant, also, the Plaintiff's general manager, manager and mechanical engineer were obliged to render administrative and technical services connected with the restructuring and replacement of components by the Defendant.

Where aspects of the locomotives had to be redesigned, as hereinafter set forth, the Plaintiff, through experts engaged by it, made suggestions to the Defendant on what aspects required to be redesigned and on what redesign might best achieve the desired purpose.

(i) The Suspension

The suspension of each locomotive was completely inadequate in that it had very little shock absorbing capacity; this caused damage to

the track in the tunnel, and to each locomotive; it had an adverse effect on the braking capacity, and made it difficult for the overhead

/electric ...

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electric poles to remain in contact with the overhead electric power supply;

All suspension blocks on all loco= motives were changed several times, inter alia, in an attempt to find a more suitable material (site-Trivetts); after the Defendant's attempts at remedying the inadequate suspension on each locomotive had failed, the Defendant, at the Plaintiff's insistence, agreed to fit on all locomotives a completely newly designed and different suspension, of which fitting has been commenced on the 22nd March 1983 (site).

(ii) Gearboxes and gearbox extensions

On all twenty-two ton locomotives, the gearboxes consisted of a gear= box suitable for an eleven ton locomotive modified to embrace an extension gearbox for the twenty-two ton locomotive. These gearboxes failed with unacceptable frequency because of overstressed parts (in particular the idler gear). At first the Defendant, with the assistance of the Plaintiff, attempted to remedy the malfunctions of the gear= boxes by supporting the idler bearing on both sides, which attempt proved to be unsuccessful (Defendant). In addition, excessive oil leakages from the gearboxes occurred which

/the ...

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the Defendant attempted to rectify by using a sealing compound (Defendant). When this attempt failed, it was sought to solve the problem by the use of synthetic oil, but this too failed (site). Thereafter new oil seals were fitted between the main gearbox casing and the casing of the extension gearbox (Defendant). The modifications were not entirely successful and further modifications to the gear= boxes are required.

(iii) Braking system and brake shoes

The braking system of all the twenty-two ton locomotives was to have been designed as an electrical progressive braking system enabling the loco= motive and its load to maintain a selected speed in negotiating the downwards gradients encountered in the tunnel. However, the Defendant recommended against this, and instead all the locomotives were fitted only with a mechanical' braking system mainly designed to stop the loco= motive, but which was unsuitable for maintaining a selected speed on a downward gradient without causing excessive wheel slip on the tracks, leading to hazardous situations, resulting in a number of accidents. In order to improve the mechanical system, a new type of brake valve

/with ...

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with progressive action had to be fitted to all eleven and twenty-two ton loco= motives (site).

The brake shoes of the mechanical braking system were of such poor quality and designed to fit in such a way that a loss of adjustment occurred as frequently as twice every twenty-four hours of operation which had to be corrected (site); the brake shoes wore down unevenly because of misalignment and excessively because of the poor quality of the brake shoes on the wheels, and the brake shoes holding strips fell out.

The excessive wear on the brake shoes caused fine particles of brake shoe material to be deposited on the tracks which, together with oil deposited on the tracks from excessively leaking gearboxes, made braking erratic and consequently hazardous.

It was sought to improve the situation by fitting new brake shoes made of a better quality material (site-Trivetts) and by improving the brake lever system and alignments (site-Trivetts). A new type of brake holding strip had to be fitted (site).

On all locomotives, in addition to the above, no grease nipples were provided for lubrication of the brake linkage articulations which caused the brakes to seize and resulted in loss of braking power, as well as in bent brake connecting

/rods ...

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rods due to seized and broken linkage articulations in the eleven ton locomotives. Grease nipples had to be fitted on brake linkage articulations (site-Trivetts).

The compressor drive also drove the alternator. This drive was intermittent, as the compressor was required to operate from time to time only to maintain the pressure in the air tanks. However, following consistent battery failure, the Defendant decided to modify the compressor drive from intermittent to continuous to allow continuous use of the alternator for the purpose of charging the battery, which was done with the assistance of the Plaintiff. In consequence of the continuous instead of intermittent operation of the compressor, it was subject to overheating failures; a failure of the compressor affected the braking system and thereby immobilised the locomotive. At first, the Defendant attempted to remedy the failure of the modified design by reducing the speed of the compressor and improving the air flow (site); thereafter, a domestic shower cooling system was attempted, using the discharge side of the unloading valve to cool the compressor (site); thereafter, a car fan was fitted on the compression pulley in an attempt to combat the overheating and enlarged cowling holes were provided in the locomotive bonnet (Trivetts), but cooling to the compressor is still not according to

24.

the manufacturer's specification of 4/ms.

(iv) The air system

On all the locomotives, pipes from the compressor to the air tanks had to be increased in diameter in order to limit the overheating of the compressor (site); upon delivery of the locomotives, numerous leaks developed in the pipes due to vibrations resulting from the absence of securing brackets and the inadequate suspension; such leakages were eliminated and the pipes secured (site-Trivetts). The air filter required a bracket to be fitted to keep it from falling down (site Trivetts). The brake pressure gauge was installed in such a manner that it measured the booster pressure before instead of after the pressure reducing valve; the gauge had to be moved downstream of the pressure reducing valve (Trivetts).

On the eleven ton locomotives, the air tank and purge location had to be modified for the reason that the purge relief valve on the air tank discharged water and rust sediment onto and into the electrical motors, which facilitated the penetration of moisture into the said motors, exposing those motors to damage and malfunction (Trivetts).

In the twenty-two ton locomotives, the purge in the air circuit was inaccessible and an automatic drain purge had to be fitted (Trivetts).

/(v) ...

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(v) Electric wiring, insulation, fuses

The bottom edge of the cable way on all locomotives had to be rounded and covers fitted on the cableway to protect it against oil and grease (site-Trivetts). On all locomotives the 12 volt plastic conduits had to be secured (site) and inadequate insulation on the 12 volt circuit, which resulted in intrusion of the 500 volt current into the 12 volt circuit, had to be improved to ensure better separation of the 500 volt and 12 volt circuits (site-Trivetts). On all locomotives the 12 volt fuses, which were underrated, had to be replaced by adequate fuses (site) and the fuses which had been fitted upside down were fitted with the right side up (site) and the lighting and control circuit fuses were separated, new 12 volt fuses being fitted for the lighting circuit (Trivetts). On all locomotives rotative beacon motors and headlights were damaged by poor insulation of the 12 volt circuit and had to be changed and the said insulation improved (site-Trivetts). The main contactor on the twenty-two ton locomotives was not readily accessible for maintenance and had to be moved to the side of the locomotive (Trivetts). Clearance between the arc chute and equipment was insufficient on all locomotives and had to be increased (Trivetts).

/(vii) ...

26.

(vi) Electric motors and cubicles

No electric motor on any locomotive was totally enclosed; lack of adequate protection against moisture and mud encountered in the tunnel caused water to penetrate into the motors, exposing these components to damage and malfunction. Protective covers and splash guards had to be fitted to each motor to avoid failures caused by wet conditions (site); louvres were fitted on

all bonnet openings (site). Similarly, electrical cubicles had to be waterproofed by fitting all holes with plugs and providing glands to cables (site-Trivetts). The battery on all locomotives had to be relocated at an accessible place since it could only be reached by removing the locomotive canopy for which a crane was required (Trivetts).

(vii) Safety

All the locomotives were unsuited to running or any conditions in that they were electrically hazardous by reason of the absence of certain protective devices. Only one earth collector was fitted to one axle and contact of the earth brushes was poor, causing flashing to the frame or canopy of the locomotive, necessitating the fitting of a second earth collector to the other axle of the locomotive (Trivetts), and replacement of burnt out components (site). Earth collectors which wore down excessively were changed for a different type and protected by a

/guard ...

27.and 28

guard box (Trivetts). An earth leakage relay was designed and fitted (Trivetts). 500 volt cables which were lying on top of electrical resistances were protected (site) and protection was fitted above 500 volt cables lying exposed in the driver's cockpit (Trivetts). On/off labels which should have indicated the operation of electrical switches (which were not uniform) had to be fitted (site Trivetts).

The electrical connection to the ammeter was, for the sake of safety, moved from the 500 volt side to the earth side (Trivetts).

The chain tightening system on the eleven ton locomotives was designed in such a way that the failure of the sole retaining bolt would lead to a total brake failure. A second retaining bolt had to be fitted (Trivetts).

The speedometers on all the locomotives were either inoperative or gave false readings. In addition, the grease nipples on the twenty-two ton locomotives were inaccessible. The speedometers accordingly had to be changed from a gearbox take-off to a jockey wheel type (Trivetts).

(viii) Traction

The mass of the twenty-two ton locomotives is not properly distributed with the result that their traction and braking are

/greatly ...

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greatly impaired by imbalanced adhesion of all the wheels with the rails. All the twenty-two ton locomotives have as a consequence performed well below their design capacity, a situation which it is not possible to remedy. The resistance bank on the twenty-two ton locomotives required five

additional resistances to ensure smooth starting (Trivetts). On all the locomotives, the electrical pole swivel base was too low and had to be fitted at a higher level (site). The drive chain of the eleven ton locomotives was designed in such a way that it tended to rub on the brake adjusting rod; this involved an abnormally high risk of breakdown, and increased maintenance (site). In the twenty-two ton locomotives the wheels were not properly affixed to the axles, a situation which was remedied by fitting new axles with a larger diameter into enlarged wheel cores to extend the contact surface (Defendant).

(ix) X5 locomotive

Numerous failures occurred in the propeller shaft of the X5, a twenty-two ton locomotive. The Defendant has found no remedy for this shortcoming.

(j) Substitute locomotives were acquired by lease or purchase as follows :- The deployment of four additional locomotives

/became ...

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became necessary as a result of the unsuitability of the locomotives supplied by the Defendant and the consequent excessive down time experienced in the use of such locomotives. Details of such additional locomotives are as follows:-

(i) 25 ton Hunslett Taylor diesel locomotive

hired from Cawse and Malcolm and delivered to the site on 5 April 1982;

(ii) 16 ton Goodman locomotive purchased (designated X12) and delivered to the site on 23 April 1982;

(iii) 16 ton Goodman locomotive purchased (designated X13) and delivered to the site on 23 April 1982;

(iii) 15 ton Hunslett Taylor diesel locomotive

hired from Cawse and Malcolm and delivered to the site on 12 March 1982, which was replaced by a 17 ton CKK locomotive (designated X14) purchased by the Plaintiff and delivered to the site on 28 June 1982.

The Plaintiff's claim is based on the total number of locomotive months calculated from the date of delivery of each locomotive to 28 February 1983, that is 43, multiplied by the reasonable average monthly costs of each locomotive amounting to R7 500,00 which includes an allowance of 25% in respect of general overheads and profit which the Plaintiff could have earned had it been able to devote the money used for hiring or purchasing locomotives to a profitable purpose.

$43 \times R7\,500,00 = R322\,500,00$

(k) The Defendant is referred to sub-paragraph (s)

/below ...

31.

below.

(1) The labour costs necessarily incurred by the Plaintiff as a result of the unfitness of the locomotives for the purpose for which they were intended, is given below. In each case, an estimate of the time devoted by the named official or workman of the Plaintiff to the matters complained of in paragraph 4 above is furnished for a period of 20 months together with the reasonable cost of the particular official or workman to the Plaintiff, which includes a 25% mark-up for general overheads and for profit which it would have made had it been able to commit the resources devoted to the said difficulties with the locomotives to a profitable purpose.

(i) General Manager (Chassagnette)

at 7% (10 500 x 20 x 7%) 14 700,00

(ii) Manager (Shorland) at 7%

(9 893 x 20 x 7%) 13 850,00

(iii) Mec. Engineer JHB (Bilard) at

20% (7 500 x 20 x 20%) 30 000,00

(iv) Site Agent (Larribe) at 5%

(9 600 x 11 x 5%) 5 280,00

(v) Mec. Engineer Site (Cottin) at

25% (7 293 x 20 x 25%) 36 465,00

(vi) Mechanics (European) 8 man

months (5 408 x 8) 43 264,00

(vii) Chief Mechanic (Lopes) at 8%

(6 267 x 20 x 8%) 10 027,00

(viii) Electrician (Malivert) at 8%

(6 267 x 20 x 8%) 10 027,00

/(ix) ...

32.

(ix) Coloured Mechanics 20,5 man

months (1 200 x 20,5) 24 600,00

(x) Coloured Electricians 6,5 man

months (1 200 x 6,5) 7 800,00

(xi) Blacks 30 man months

(450 x 30) 13 500,00

R209 513,00

Save as aforesaid, the Defendant is not strictly entitled to further particulars for the purpose of pleading or tendering.

(m) Two workshops were established, one at the east portal and one at the west portal of the tunnel to perform the routine maintenance referred to in the agreement. The reasonable cost of establishing and maintaining the Plaintiff's own workshops (i.e. other than the two foreseen in the agreement) used for the modifications referred to in paragraph 4 above, including an allowance for small tools, electric power and welding gas came to R7 500,00 for each workshop for the period 30 June 1981 to 31 July 1982, and includes an allowance of 25% for general overheads and for profit which the Plaintiff could have earned if it had been able to commit the money and resources devoted to such work= shops to a profitable purpose.

(n) (i) The cranes were utilised at the site for the times indicated below.

/(ii) ...

33.

(ii) The cranes were used to lift gear= boxes and motors, to replace broken down motors, to remove and replace

wheels and to remove and replace canopies.

(iii) The times the cranes were utilised for the period 30/6/81 to 28/2/83 were :-

30 t crane 94 h x R110 R10 340,00 20 t crane 155 h x 90 13 950,00 6 t crane 325 h x 25 8 125,00

R32 415,00

The costs include a 25% allowance for general overheads and for profit which the Plaintiff would have earned had it been able to commit the money and resources devoted to cranes to a profitable purpose.

(o) (i) The transport costs were incurred

during the period 30 June 1981 to 31 July 1982.

(ii) The transport costs were incurred in respect of necessary journeys to the site or Cape Town from Johannesburg and between the site and Cape Town for the purpose of inspections, technical assessments and discussions with representatives of the Defendant.

(iii) The amount of R14 507,00 claimed represents the cost to the Plaintiff of the travelling done by its officials or employees together with a 25% allowance for general overheads (including profit which it would have made had it

/been ...

34.

been able to commit the money and resources devoted to travelling to a profitable purpose). The Plaintiff's claim is made up as follows:-

19 journeys by its general

manager and mechanical en-

gineer from JHB to Cape

Town or to the site at

R625,00 per journey R11 875,00

14 journeys by the Plaintiff

Plaintiff's site mechanical

engineer and chief mechanic

to Cape Town at R188,00 per

journey 2 632,00

R14 507,00

(p) (i) The schedule set out below indicates in the first column thereof the name of the specialist, in the second column the name of his employer and in the third column the speciality of each.

(ii) The function performed by each

specialist is indicated in the fourth column of the said schedule and the amount paid in respect of his services

in the fifth column thereof.

(iii) The approximate date of payment to each specialist is reflected in column 6 of the said schedule.

[The schedule which follows is not reproduced here.]

/(q) ...

35.

(q) (i) The Plaintiff replaced parts during the period 30/6/81 to 28/2/83 in=

cluding alternators, poles, wheels, axles, pressure switches, batteries, compressors, valves and used steel for modifications. These parts were replaced at a cost of R184 377,50 of which the Plaintiff estimates that 50% were necessitated by the design shortcomings and failures referred to in paragraph 4 above

R184 377,50 x 50% R92 188,75

(ii) The cost of the electrical consumables amounted to R7 475,33 of which it is estimated that 90% were necessitated by the aforesaid design shortcomings and failures and included main contractors, lights, spares for controller, solenoid valves, fuses, resistors, contactors and relays

R7 475,33 x 90% R6 722,80

The cost of oil which

leaked from gearboxes

and had to be replaced

amounted to R14 937,50

R113 854,00 (iii) The amounts were paid to H.A. Schippers

/(Pty) ...

36.

(Pty) Limited, Diesel Electric (Pty) Limited, Electro Diesel (Pty) Limited, the Defendant, Transcap Steel and M.A.G. Brakes. (iv) The amount of R113 854,00 was paid out by the Plaintiff during the period 30 June 1981 to 31 July 1982.

(r) The Defendant is referred to sub-paragraph (j) above.

(s) Additional employees were required over a thirteen month period for each of nine locomotives and each of three daily shifts to man each locomotive in order to manually maintain the trolley pole on the overhead power supply; such trolley pole tended

to break contact with the overhead power supply as a result of the inadequate suspension of each locomotive.

Calculation:

9 hours x 3 shifts x 13 months x 450

= R157 950,00.

The cost of such employees includes an allowance of 25% for general overheads and profit which the Plaintiff would have been able to earn had it committed the money and resources devoted to such additional employees to a profitable purpose. Save as aforesaid, the Defendant is not strictly entitled to further particulars for the purpose of pleading or tendering.

/6. ...

37.

(a) The locomotives were not reasonably operational from the delivery of each of them and are anticipated to become reasonably operational only when the modifications

to the suspension of each of them which were commenced on 22 March 1983 have been completed.

(b) Every locomotive was out of service for a time due to, inter alia, the gearbox and wheel assembly of each being sent to the Defendant's workshops for repairs, as indicated in paragraph 4 above, and the locomotives themselves being sent to Trivetts for the modifications alleged in paragraph 4. In addition, each locomotive was out of commission during breakdowns which occurred as a result of the design failures described in paragraph 4. A reasonable downtime coefficient for locomotives of the kind in question used under conditions of the kind in question, would

be 0,06 (6 per centum) or 0,5 locomotives on average. The actual downtime coefficient during the period from delivery of the locomotives to the end of March 1983 has been 0,25 (twenty-five per centum) or 2,25 locomotives on average.

(c) This request falls away. (d) The Defendant is referred to sub-paragraph (b) above.

38.

(e) The Defendant is referred to paragraph (b) above.

8, AD PARAGRAPH 14.2

The Defendant is referred to sub-paragraph (b) of paragraph 7 above. The downtime of the locomotives far exceed what could reasonably have been expected under the circumstances which would not have been the case had the Plaintiff (sic) performed its obligations. For particulars of the respects in which repairs to locomotives were attempted, but failed, the Defendant is referred to paragraph 4 above.

9. AD PARAGRAPHS 18, 19. AND 20

(a) The Defendant is referred to the allegations in paragraph 4 above. The assistance has been rendered and the workshop facilities made available from the time of delivery of each locomotive to the present by the Plaintiff to the Defendant or its subcontractor, Trivetts. (b) The Plaintiff's obligations in terms of the agreement were, on a proper construction thereof, to render assistance and make reasonable facilities available for routine

maintenance of and running repairs to, the locomotives. In addition, the Plaintiff became obliged to assist with, and make facilities available for, the major reconstruction work set out above and for attempts to repair failures resulting from design flaws."

/The ...39. The agreement, annexure "A" to the further particulars, consists of two letters. In them, the parties are referred to by the names under which they trade: "Comiat" in the case of the appellant, and "Hunslet Taylor Consolidated" or "H.T.C." in the case of the respondent. The first letter, dated 4 February 1981, is a short one from the respondent to the appellant, reading as follows:

"RE : TROLLEY ELECTRIC LOCOMOTIVES YOUR ORDER NO. HRT 00017 OUR REP. LS 1097

Thank you very much for your order above mentioned, which we hereby acknowledge and accept on the terms and conditions of the contract, copy of which is enclosed duly signed."

The second letter, bearing the date 28 November 1980, is a lengthy document. According to its heading it purports to be addressed by the appellant to the respondent, but at the foot of the last page it is signed on behalf of both parties. The relevant parts of it read as

/follows ...

40.

follows:

"Re: LOCOMOTIVES HEX RIVER TUNNEL "OFFICIAL ORDER HRT 00017

1. OBJET (sic)

The supply, delivery and commissioning of five MT20, four MT 10/12 trolley locomotives and four spring loader cable drums at the site of Hex River Tunnel, Cape Province, in accordance with the following general and specific characteristics.

' 1-1 General Characteristics

1.1.1. Electricity supply 500 DC overhead line. 1.1.2. No specific flameproofing required. 1.1.3. Rail gauge 42" 1.1.4. The equipment must comply with any South African Regulation applicable. 1.1.5. Overall height with trolley pole in the down position must not exceed 1700 mm. 1.1.6. Center line of buffers to top of the rails : 337 mm. 1.1.7. Locomotives fitted with 60 KW DC Motors.

1.2 Specific Characteristics 1.2.1. MT 20 Locomotive Summary

Locomotive type MT 20

Wheel Arrangement 0.4.0.

/Traction ...

41 .

Traction Motor: Output 60 KW (one hour rating)

Type D.C. Series Wound totally

enclosed type.

Voltage 500 V.D.C.

No of Motors Two

Insulation Class F Wheel Base 1 900 mm Wheel Diameter 725 mm Maximum height 1 500 mm Maximum Width 1 600 mm

Length over buffer beams 6 000 mm (Locomotive bolted together) Rail Gauge 1 067 mm Weight in working order 20 tonne Maximum speed 16 km/h

Frame: : The locomotive is manufactured from m.s.

place. (sic)

Driver's Well: : The driver's well is so designed to form

an integral part of the frame complete with driver's seat, controller and parking hand brake wheel.

Casing : Low profile mild steel casing with centre

hinged doors for ease of access.

Wheels & Axles : Fully machined steel wheels are pressed

onto the axles. The treads are machined to standard wheel profile. The axles are fully machined from high tensile axle steel.

Suspension : The suspension comprises a cast steel

adaptor supported on the axle by means of two Timken taper roller bearings and 'suitable seals. The adaptor is supported in a fabricated steel cradle housing special rubber blocks. The suspension used is the Timken Rub-A-Tuf unit.

/The ...

42.

The axlebox units are rigidly bolted to the frame.

Traction Motor : Output : 60 kw (one hour rating)

Type : D.C. Series wound totally en=

closed type Voltage: D.C. 500 V No of Motors : Two Insulation : Class F.

Transmission : Double reduction type with input from

the motor via Hardy Spicer Cardan Shaft to first reduction set of spur gears with final reduction to axle mounted bevel wheel and pinion. One mounted on each driving axle.

Brake System : The locomotive is fitted with a compressed air brake system operating brake block on all four driving wheels. This is a fail-safe system as the main air pressure is used for releasing the brake mechanism and should the air pressure fail the brakes are automatically applied by the heavy duty springs built into the brake boost cylinder. (a) Parking : The locomotive is fitted with a separate "Park Brake" control valve which when activated destroys air in the system thus mechanically applying the Park Brake. (b) Service (air) : An additional brake control valve is

fitted which pneumatically controls the "Service Brake" operating on all four driving wheels.

Control : Viostatic type plus series parallel Control

trol with bank of six resistances minimum = maximum.

Collector System : Pole

/ Installed ...

43.

Installed power : - 60 KW motor each

4 KW compressor 2 KW blower

1.2.2. MT/10/12

Summary

Locomotive Type MT 10 Wheel Arrangement 0-4-0 Traction Motor : Output. 60 KW (One hour rating)

Type D.C. Series Wound Totally

enclosed type

No of Motors One

Insulation Class P

Wheel Base 1 500 mm Wheel Diameter 610 mm Maximum Height 1 500 mm Maximum Width 1 600 mm

For caging

1. Drivers Well length 1 000 mm 2. Motor well length 1 100 mm 3. Locomotive mid-section length 2 500 mm

Length over buffer beams 4 600 mm

(locomotive bolted together)

Rail Gauge 1 067 mm Weight in working order 10/12 tonne Maximum speed 16 km/h

Frame : The locomotive frame is manufactured

from m.s. plate. Driver's Well : The driver's well is so designed to form

an integral part of the frame complete

with driver's seat, controller and park=

ing hand brake wheel.

/Casing ...

44.

Casing : Low profile mild steel casing with cen=

tre hinged doors for ease of access. Wheels & Axles : Fully machined steel wheel centres

complete with rolled steel tyres are pressed onto the axles. The tyres are fully machined to standard wheel profile. The axles are fully machined from high tensile axle steel.

adaptor supported on the axle by means of two Timken taper roller bearings and suitable seals.

The adaptor is supported in a fabricated steel cradle housing special rubber blocks. The suspension used is the Timken Rub-a-Tup unit. The axlebox units are rigidly bolted to the frame.

Traction motor : Output : 60 KW (one hour rating)

Type : DC Series wound totally

enclosed type. Voltage : D.C. 500V No of Motors : 1 Insulation : Class F

Transmission: : The drive from the electric motor is

via a Hardy Spicer Cardan Shaft through a double reduction frame mounted gear= box, with a duplex output chain sprocket driving single chain sprockets mounted one on each axle.

Brake System : The locomotive is fitted with a com=

pressed air brake system operating brake blocks on all four driving wheels. This is a fail-safe system as the main air pressure is used for releasing the brake mechanism and should the air pressure fail the brakes are auto= matically applied by the heavy duty

/springs ...

45.

springs built into the brake boost cylinder.

(a) Parking : The locomotive is fitted with a separate

"Park Brake" control valve which when activated destroys air in the system thus mechanically applying the Park Brake.

- (b) Service (air): An additional brake control valve is fitted which pneumatically controls the "Service Brake" operating on all four driving wheels. Control : Viostatic type control with bank of six resistances minimum. Collector System : Pole Installed Power : 60 KW Motor

4 KW Compressor 2 KW Blower

1.2.3. Spring loaded cable drum : Type K.T.B. 50/614 SP with spooling device with a capacity of 75 m of 42 mm diameter trailing cable. 1.2.4. No dynamic breaking on MT10/12 and MT20 locomotives.

2. TIME OF DELIVERY

Hunslet Taylor is committed to deliver and commission the equipment at Hex River Site at the latest as follows:

2.1. MT 20 Trolley locomotives

2.1.1. First unit - Monday 27 April 1981 2.1.2. Second unit - Monday 11 May 1981 2.1.3. Third unit - Monday 25 May 1981 2.1.4. Fourth unit - Monday 8 June 1981 2.1.5. Fifth unit - Monday 22 June 1981

/2.2. ...

46.

2.2. MT 10/12 Trolley locomotives

2.2.1. Two units - Monday 27 April 1981 2.2.2. Two units - Monday 11 May 1981

2.3. Spring load cable drums

Four units - Monday 27 April 1981

2.4. Commissioning

2.4.1. Hunslet Taylor Consolidated undertakes to have a representative on site to commission the equipment within 24 (twenty four) hours of advice by COMIAT of arrival of equipment on site.

2.4.2. Each equipment will be deemed to be commissioned when it has been placed on the track, all braking and operations systems have been tested and found to be functioning to specification and the locomotive has been driven on the track pulling the rated load for one hour.

2.4.3. A commissioning certificate per unit

will be issued and signed by a duly authorised COMIAT's representative immediately after successful commissioning of each unit.

2.5. Comiat will pay airfreight charges, against proof of invoices for two MT 20 and for four MT. 10/12 locomotives controllers.

3. PRICE 4. GUARANTEE

In lieu of any condition or warranty expressed or implied by law or otherwise Hunslet Taylor Consolidated expressly guarantee to re-supply

/any ...

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any part of the equipment supplied by them which, within a period not exceeding six months from date of commissioning may prove defective through bad material or workmanship, fair wear and tear excluded; but all orders accepted for goods to be supplied are on the condition that Hunslet Taylor Consolidated is not liable for any loss of profit, or other special damages or any consequential damages arising from any cause whatsoever.

5. PENALTY FOR LATE DELIVERY

5.1. The penalties will apply in the event of the

commissioning dates as specified in clause 2.1, 2.2 and 2.3 not being achieved, each equipment being considered separately.

5.2 The penalties will be 1% (one percent) of the Rand value of the specific unit late commissioned, per week or part thereof of late commissioning. Considering 6 days per week, penalties will apply for any uncompleted week of late delivery on

a base of 1/6 of weekly penalty per working day.

5.3 The maximum penalty per equipment late delivered is 5% of the Rand value of the specific unit late commissioned. 5.4 Bonus for early commissioning : the same terms as per under clause 5.1, 5.2 and 5.3 will apply in case of early delivery except for bonus per week will be ½% with a maximum of 2,5% of the Rand value of the specific equipment early commissioned.

6. AFTER SALE SERVICE

Hunslet Taylor Consolidated agrees to service and

/repair ...

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repair the referred 9 trolley locomotives, on site, for a period of 6 months, renewable for a further period of 6 months and to be subject to :

6.1 The presence on site for the full 6 months period of a H.T.C. technician appointed to do service and repair work, both electrical and mechanical on H.T.C. locomotives only, on the basis of a 10 hour working day, 6 days per week and subject to call out if necessary. Service meaning, preventative maintenance as per the schedules . which will be supplied by H.T.C. on delivery of the locomotive. Repairs shall mean the necessary work to be carried out with assistance from Comiat staff where necessary to repair or replace all parts, which have worn out due to fair wear

and tear, or breakdowns of the loco= motives, both electrical and mechanical.

6.2 Responsibility

He will be responsible to the Comiat Site Engineer, whilst on site, as regards immediate on site repairs and their order of priority. However, Hunslet Taylor Consolidated service manager will visit the site at least once per month to ensure that the maintenance is being done to a H.T.C. specifications and requirements, in order to protect H.T.C. from any difficulties which may arise. Daily reports will be made out by the H.T.C. serviceman, and these reports to be signed on a regular basis by the Comiat Site Engineer. If it is reported by H.T.C. Serviceman that certain items required urgent attention and that he requires the locomotive immediately, to carry out such work, if this is considered impossible by the production personnel, then it is up to the site engineer, as to whether repairs are necessary

/or ...

49.

or not, and he will then accept the consequences of his decision.

6.3 On site reasonable workshop facilities being made available by Comiat with adequate working area plus the use of basic workshop equipment such as welding (gas and arc), grinding and drilling machines, lifting equipment (i.e. crane) etc. 6.4 One full day per week (Sundays) to be reserved

for preventive maintenance work with all 9 units being available on that particular day.

6.5 Cost of the contract to be R.4 000 per month plus transport R. 590,00 per month which figures include the serviceman's hotel and living out expenses, plus periodic supervision on site by the Hunslet Taylor Service Manager.

6.6 Payment of the monthly service charge to be made 30 days after presentation of invoice.

6.7 The service contract costs will be subject to

escalation each 6 months on the following basis :

- (a) Labour - 75% of the labour contract value to be escalated using SEIFSA index table C3 - Labour costs all hourly paid.

6.8 Initially the technician will stay at the De Dooms

Hotel at H.T.C. cost when Park Homes become available, he will then establish site on Comiat Township.

7. SPARE PARTS

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The respondent's notice of exception reads as

"The Defendant excepts to the Plaintiff's particulars of claim, as amplified by further particulars thereto, as such pleading lacks averments which are necessary to sustain the causes of action therein set out. The grounds of Defendant's exceptions are as follows:

A. 1. The Plaintiff relies on a written agreement in terms of which it purchased from the Defendant 5 x MT20 and 4 x MT10/12 trolley locomotives.

2. A copy of the relevant agreement is

annexed to the Plaintiff's particulars, marked Annexure "A".

B. MAIN CLAIM

1. First Exception

(a) In terms of the agreement the Defendant was obliged to supply, deliver and commission locomotives with certain general and specific characteristics. (b) In the premises the Defendant was obliged to supply, deliver and commission and the Plaintiff was entitled to receive locomotives complying with the said specifications. (c) The Plaintiff, more particularly in paragraph 5 of the particulars of claim, seeks to rely on a tacit term of the agreement, to the effect that

51.

the locomotives would be fit for the purpose for which they were intended.

(d) The tacit term sought to be relied on by the Plaintiff -

(i) is not necessary in the business

ness sense to give efficacy to the contract;

(ii) does not arise from a necessary implication that the parties must have intended it to exist;

(iii) is in contradiction to the unambiguous terms of the contract; and

(iv) must of necessity seek to

introduce inadmissible evidence of surrounding circumstances.

2. Second Exception

(a) Clause 4 of the agreement, Annexure "A", reads as follows:

[Clause 4 has been quoted

above]

(b) The Plaintiff's claim for damages,

/as ...

52.

as set out in paragraph 7 of its particulars of claim and amplified by the further particulars thereto, is a claim for alleged damages suffered by it as a consequence of the locomotives not being fit for the purpose for which they were supplied, delivered and commissioned.

- (c) In the circumstances the basis upon which damages are claimed by the Plaintiff is inconsistent with the provisions of clause 4 of the agreement, Annexure "A", which provided for specific, circumscribed and different relief.

C. FIRST ALTERNATIVE CLAIM 1. First Exception

- (a) In terms of the agreement (Annexure "A") the Defendant was obliged to render specific after sales service and repairs. (b) Clause 6 of the agreement reads as follows:

[Clause 6 has been quoted above]

- (c) In its first alternative claim, more particularly paragraphs 11.1 and 13 thereof, the Plaintiff seeks to rely on a tacit term to the effect that the Defendant would make

/and ...

53.

and keep the locomotives reasonably operational.

- (d) The tacit term sought to be relied upon by the Plaintiff -

- (i) is not necessary in the business sense to give efficacy to the contract;
- (ii) does not arise from the necessary implication that the parties must have intended it to exist;
- (iv) must of necessity seek to introduce inadmissible evidence of surrounding circumstances.

2. Second Exception

- (a) Upon a proper analysis, the damages sought to be recovered by the Plaintiff flow from the unsuitability of the locomotives for the purpose for which they were intended and not from any breach on the part of the Defendant of its obligations to service and maintain them. (b) In the premises and more particularly by virtue of the excipiability of the Plaintiff's allegations with regard to the alleged tacit term relating to the suitability of the locomotives for the purposes for which they were intended, the formulation and basis of the alternative claim for damages are bad in law.

3. Third Exception

54.

The Plaintiff's first alternative claim is a claim for loss of profit and/or special damages and/or consequential damages and the Defendant is not liable therefor in terms of clause 4 of the agreement which provided for specific circumscribed and different relief.

D. SECOND ALTERNATIVE CLAIM

1. First Exception

(a) The Defendant repeats sub-paragraphs (a) and (b) of paragraph C 1 above. (b) The Plaintiff seeks to rely on a tacit agreement that it would supply goods and make facilities available over and above those contemplated by the agreement, Annexure "A", and a tacit term that it would be entitled to reasonable remuneration for such services and payment for such goods at its usual prices. (c) The tacit agreement and the tacit term arising therefrom sought to be relied upon by the Plaintiff -

(i) are not necessary in the business

sense to give efficacy to the contract;

(ii) do not arise from a necessary implication

that the parties must have intended it to exist;

(iii) are in contradiction to the unambiguous terms of the contract; and

(iv) must of necessity seek to introduce inadmissible evidence of surrounding circumstances.

/2. ... 55.

(a) On a proper analysis the damages sought to be recovered by the Plaintiff flow from the alleged unsuitability of the

locomotives for the purpose for which they were intended, and not from any tacit agreement or term thereof.

(b) In the premises and more particularly by virtue of the excipiability of the Plaintiff's allegations with regard to the alleged tacit term relating to the suitability of the locomotives for the purpose for which they were intended, the formulation and basis of the second alternative claim are bad in law.

The Plaintiff's second alternative claim is a claim for loss of profit and/or special damages and/or consequential damages and the Defendant is not liable therefor in terms of clause 4 of the agreement which provided for specific circumstances and different relief."

I turn now to a consideration of the arguments addressed to this Court on the individual exceptions, commencing with the first and second exceptions to the main claim.

The manner in which the two exceptions to the main

/claim ... 56.

claim were dealt with in argument requires some initial explanation. They were not argued separately, but together. Counsel for the respondent advanced two grounds of attack against the main claim, as arising from the two exceptions taken together. The two grounds relied upon may be briefly summarised as follows: (1) the tacit term alleged in paragraph 5.1 of the

appellant's particulars of claim was inconsistent with the specifications expressly laid down in clauses 1, 1.1 and 1.2 of the agreement; and (2) the tacit term alleged in paragraph 5.1 of the appellant's particulars of claim was inconsistent with the express provisions contained in the opening words of clause 4 of the agreement. The first ground is squarely covered by the terms of the first exception, but the second ground does not appear to me to be raised pertinently by the terms of either the first or the second exception, or of both of them read together. However, there is no need to pursue

/this ...

57.

this aspect of the matter, because of the attitude taken up in regard thereto by counsel for the appellant. He made it clear that he accepted that the second ground relied upon by the respondent's counsel was indeed covered by the two exceptions to the main claim and he, presented his argument upon that footing. I shall accordingly consider both grounds of attack against the main claim, as argued. They have a common target: the tacit term alleged in paragraph 5.1 of the particulars of claim. The basis upon which damages are claimed, which is referred to in paragraph (c) of the second exception to the main claim, was not relied upon by counsel for the respondent as an independent cause of complaint against the main claim, and need therefore not be considered otherwise than in the context of the second of the grounds of attack summarised above.

I turn to a consideration of the first ground of attack against the main claim. In support of it,

/counsel ...

58.

counsel for the respondent relied on the case of *Hall & Co v Kearns* (1893) 10 S C 152. In that case the plaintiff bought from the defendant a "one-horse power Purcell gas engine", for the purpose of supplying power to operate a coffee mill and roasters. The defendant supplied a sound engine corresponding exactly to the description of the one ordered. It turned out that the engine could not satisfactorily perform the function for which it was required, owing to the insufficiency of the gas pressure in Cape Town at the time. The plaintiff's claim for a refund of the purchase price and damages was rejected. In his judgment DE VILLIERS CJ said the following (at 155):

"If an article of a definite nature is

ordered, the manufacturer warrants no more than that the article supplied is as fit as any answering the description in the order."

Counsel for the respondent submitted that this passage and the decision in the case itself governed the position

/in ...

59.

in the present case, because of the detailed specifications according to which the respondent was required to manufacture the locomotives to be supplied to the appellant in terms of clause 1 of the agreement, having regard particularly to the specific characteristics enumerated in sub-clauses 1.2.1 and 1.2.2. It was pointed out that the appellant in its particulars of claim and further particulars did not allege non-compliance in any respect by the respondent with those specifications, and the latter, it was submitted, left no room for importing into the agreement a tacit term as to the fitness of the products for a particular purpose, as alleged by the appellant. In support of his argument counsel relied also upon the provisions of the agreement relating to the commissioning of the locomotives, as contained in clause 2.4 thereof.

In my view these submissions cannot be accepted. They rest on the supposition that it is possible to come

/to ...

60.

to a positive finding *ex facie* the agreement alone, by reference to the specifications contained therein, that the locomotives to be supplied were described with such a degree of exactness that they constituted articles "of a definite nature" in the same way as the Lister engine in *Hall & Co v Kearns* *supra*. That supposition I consider to be wrong. On an analysis of the specifications it appears to me to be obvious that there are numerous aspects of the construction of these locomotives on which the specifications are silent, in respect of which the respondent had a freedom of choice, and which preclude the use of the adjective "definite" in relation to them. This view is fortified by a consideration of the appellant's allegations in regard to the particular respects in which the locomotives were unsuited for the purpose for which they were required, as set forth in paragraphs 3 and 4 of its further particulars. A comparison between the allegations in sub-paragraphs (i)

61 .

to (ix) of both paragraphs 3 and 4 (in the latter case, following upon the introductory part of the sub-paragraph headed "(a) - (i)") of the further particulars, on the one hand, and, on the other, the specifications contained in clauses 1.2.1 and 1.2.2 of the agreement, demonstrates, in my view, that in many instances the matters complained of are not covered, or at least not covered pertinently, by any of the provisions of the specifications (for example: the precise design of the gear-boxes, the exact design and manner of operation of the compressors and the air systems, the manner of protecting the electrical circuits and earth brushes, the mass distribution of the locomotives, and so forth). Of course, since the matter is before the Court on exception, there is no need to express a definite opinion on the interpretation of the specifications contained in the agreement, and I refrain from doing so. Expert or technical evidence might well affect the issue as to whether or not the

/principle ...

62.

principle applied in *Hall & Co v Kearns* supra can properly be applied to the facts of this case. For the purposes of my judgment it is sufficient to say that I am satisfied that the issue ought not to be decided against the appellant on exception.

It should be observed, moreover, that in *Hall & Co v Kearns* supra the plaintiff's claim was dealt with in the judgment of DE VILLIERS CJ solely in the context of a claim for aedilician relief, flowing from the so-called warranty, implied by law, against latent defects. The possible existence of a tacit term in the agreement between the parties, arising from their unexpressed consensus, that the engine would be fit for the purpose for which the plaintiff required it, was not adverted to in that case, so that the question whether such a term would have been inconsistent with the definite description of the engine did not arise for consideration. That case is accordingly

/distinguishable ...62. B

distinguishable from the present one.

It should be mentioned also that some of the passages in the judgment of DE VILLIERS CJ in *Hall & Co v Reams* supra have been criticised as being too wide (see e.g. MacKeurtan's *Sale of Goods in South Africa*, 5th ed, at 51-2, and Norman's *Purchase and Sale in South Africa*, 4th ed, at 357-8). I do not find it necessary to discuss these criticisms, but in passing it may be of interest to note the more qualified manner in which the same topic is dealt with in a passage in Williston *On Contracts*, on which counsel for the respondent also relied (3rd ed. Vol 8, para 990, p 578). The passage reads as follows:

/"If ...

63.

"If the buyer either enters into an executory contract for the purchase of goods exactly described, or makes an executed purchase of such goods, while he may be able to assert an obligation on the part of the seller to furnish merchantable goods of that description, unless the description itself precludes merchantability, he cannot regard the seller, even though the seller be the manufacturer of the goods, as warranting that they are fit for any special purpose other than that which merchantable goods of the agreed description necessarily fulfill. By exactly defining what he wants, the buyer has exercised his own judgment instead of relying upon that of the seller."

There is, of course, a question of degree involved in the concept of "goods exactly described", or of a buyer "exactly defining what he wants". Counsel for the appellant submitted that the specifications contained in the agreement in this case were no more than guidelines for the construction of the locomotives. That I consider to be an overstatement. But, in the context of deciding the issue on exception, I cannot fault the further submission of counsel for the appellant, which

/is ...

64.

is formulated in his heads of argument as follows:

"The specifications prima facie (but this is a matter on which evidence may be required) are not sufficiently detailed to permit of the construction of a trolley locomotive without the injection of the Excipient's own judgment and expertise in the manufacture of such vehicles."

Counsel pointed out further that it was in this area of the respondent's expertise that the parties may have intended a tacit term that the locomotives would be fit for the purpose for which they were intended, and that it was

in this area, in which there was no express term, that it

could be found that the tacit term was necessary to give business efficacy to the contract. It follows, therefore, that the first ground of attack against the main claim must fail.

I come to the second ground of attack against

the main claim. It is based primarily on the opening words of clause 4 of the agreement:

"In lieu of any condition or warranty expressed or implied by law or otherwise"

The essence of the argument on behalf of the respondent was that these words clearly and unambiguously precluded

/reliance ...

65.

reliance by the appellant on the tacit term alleged in paragraph 5.1 of its particulars of claim, because that term was incompatible with the express provisions of the clause.

At first sight it might have been thought that the words in question, ostensibly being of such wide import, were intended to exclude any liability on the part of the respondent that could conceivably flow from the agreement, other than liability in respect of the limited guarantee expressly provided for in the following part of the clause. On analysis, however, I have no doubt that the words cannot be interpreted so literally, and so widely, as to give rise to such a result. Two examples will suffice to show that, on a proper construction of the agreement, the literal effect of the words must perforce be cut down. The first relates to the words "any condition

expressed otherwise"

(than by law). Literally, these words would cover any

/express ...66.express term of the agreement (other than the guarantee

which is contained in the clause itself). But assume

that the MT 20 locomotives supplied by the respondent weighed 25 tonnes and were capable of a maximum speed, of 10 km per hour only, instead of the 20 tonnes and 16km/h prescribed in clause 1.2.1, and that the deviation

from the specifications could not be cured by the replacement of (defective) parts in terms of the express

guarantee. The parties could not have intended that

in such a case clause 4 would leave the appellant without

any remedy at all, nor that a claim for damages for breach-

of contract would be hit by the last part of the clause.

The second example relates to the words "any war="

ranty implied by law". Literally, these words

would cover what is generally known in our practice as

the warranty, implied by law, against eviction. But

there can be no doubt that the parties could not have

intended clause 4 to exclude or to limit the respondent's

/liability ...67.

liability for eviction.

The examples I have given do not, of course, touch directly on the issue in the present case, but they do demonstrate that the opening words of clause 4 are not to be construed literally, in the sense of providing for an all-embracing exclusion of liability on the part of the respondent (subject only to the express guarantee). The importance of this conclusion is that it leads directly to the next enquiry, which is vital to the present issue: in what manner and to what extent is the ostensibly wide ambit of the words to be limited? The answer must be sought in the fundamental rule that the words must be construed in the context in which they appear. This context is that the conditions and war="

rancies referred to are replaced ("In lieu of ") by

a guarantee to resupply any part of the equipment which, within a period of 6 months from date of commissioning, may prove to be defective through bad material or work="

/manship ...

68.

manship, fair wear and tear excluded. In my opinion the wording and the composition of the clause point to the conclusion that the parties intended by the opening words of it to exclude the operation of such conditions and warranties as might be germane to the subject-matter of the express guarantee, and no more. As a matter of logic, that which is replaced must have been intended to be appropriate to that by which it is replaced. The subject-matter of the guarantee is the resupply of parts of the equipment which may prove to be defective through bad material or workmanship. It is in the light of that subject-matter that the opening words of the clause must be construed.

The words that require interpretation, with a

view to the appellant's main claim, are: "any

warranty implied by law or otherwise". Generally,

as to the nature of implied or tacit terms in a contract, I shall apply the approach reflected in the well-known

/passages ...

69.

passages of the judgment of CORBETT JA in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531 D to 533 B. Counsel for the respondent argued in the first place that the expression "warranty implied by law" covered the respondent's liability for defects in relation to the aedilitian remedies. This liability is in practice generally referred to as a liability arising from a so-called warranty against defects. Although, from a jurisprudential point of view, the terminology is strictly speaking incorrect (see *De Wet & Yeats, Kontraktereg en Handelsreg*, 4th ed, at 303, and *McAlpine's case*, supra at 531 F-H), I accept that in this agreement the expression "warranty implied by law", viewed by itself, is prima facie appropriate to cover the respondent's liability for defects in relation to the aedilitian remedies. Counsel for the respondent relied on the definition of "defects" in this connection, as formulated in *MacKeurtan op cit* at 134, viz '

/For ...

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"For the purposes of the aedilitian remedies,

a defect may be defined as an abnormal quality

or attribute which destroys or substantially

impairs the utility or effectiveness of the res vendita for the purpose for which it has been sold or for which it is commonly used",

and argued on that basis that each and every respect in which the appellant alleged that the locomotives were unfit for the purpose for which they were intended, as set forth in sub-paragraphs (i) to (ix) of paragraph 3 of its further particulars, constituted a "defect". Thus (so it was argued) the wording of clause 4 of the agreement precluded the appellant from claiming the relief it sought on the facts alleged. Counsel for the respondent argued in the second place that the expression "warranty implied (by law) or otherwise" covered the tacit term alleged in paragraph 5.1 of the appellant's particulars of claim, which was a term sought to be imported into the agreement as arising from the facts, i.e. as being based on the supposed consensus of the parties. It was argued that the expression was wide enough to embrace any

/term ...

71. term of that kind, whatever its content, but counsel stressed that by alleging a tacit term as to the fitness of the locomotives for a particular purpose the appellant was in effect treading the same ground as that covered by the implied warranty against defects. Counsel for the appellant, on the other hand, conceded that clause 4 excluded liability on the part of the respondent in terms of the implied warranty against defects, but argued that such liability was confined to defects that were latent, that on the allegations contained in the appellant's further particulars it was not possible to find that the appellant's claim was based on latent defects, that the tacit term alleged was not necessarily related to defects, and that accordingly it could not be found on exception that the alleged tacit term was inconsistent with the provisions of clause 4.

In my view the clue to the resolution of the issue raised by the opposing arguments outlined above is

72.

to be found in an aspect of the appellant's pleadings which was not broached pertinently by either counsel. I refer to the nature and effect of the respondent's alleged breach of contract, as formulated in the first part of paragraph 4 of the appellant's further particulars. For convenience, and because it is crucial to my reasoning, I quote the passage again:

"The extent and manner in which components were redesigned and the reasons therefor are furnished hereafter together with details of what components had to be replaced or restructured and the ambit and effect thereof. It is the Plaintiff's contention that the scale of such redesign, replacement and restructuring was such that it amounted to a rebuilding of each locomotive."

From the allegation that I have emphasised (read with paragraph 7.1 of the particulars of claim and the detailed allegations in the rest of paragraph 4 of the further particulars) it is a necessary inference, in my view, that the locomotives were incapable of being rendered fit for their intended purpose by means of the respondent's imple-

/menting ...

73.

menting its express guarantee in clause 4 to resupply defective parts. That being so, the question that arises is this: does clause 4 apply at all to the factual situation alleged in the appellant's pleadings?

As indicated above, it is my view that the parties must have intended the existence of a correlation between the terms of the express guarantee and the opening words of clause 4. The express guarantee clearly predicates a situation in which the replacement of defective parts would serve a useful purpose, i.e. to keep the locomotives in an operative condition (after their commissioning in terms of clause 2). The appellant's allegations postulate a situation in which it was impossible to achieve that purpose by merely implementing the guarantee. Accordingly there is no room for an effective application of the guarantee to the facts on which the appellant relies for its main claim. Does it follow, from the correlation that I have mentioned, that the

/opening...

74. opening words of clause 4 also have no application in the factual situation alleged by the appellant? A negative answer is conceivable, on the basis that the clause was intended to exempt the respondent from all liability in respect of defects in the locomotives, of whatever kind and whatever the circumstances, save to the extent provided for in the express guarantee, whether or not the latter could be effectively applied. In my view, however, it is extremely unlikely that the parties could have intended clause 4 to have such an effect, because the result would be that the appellant would be saddled with useless locomotives without having any remedy at all in respect thereof. It is far more likely that the parties intended the opening words of clause 4 to be operative only in circumstances in which effect could appropriately be given to the express guarantee. It follows, therefore, in my judgment, that clause 4 in its entirety does not apply to the kind of breach of

/contract....

75.

contract alleged by the appellant.

The above interpretation of clause 4 seems to me to be in consonance with the general approach of our Courts to the construction of clauses in contracts exempting the one party from liability to the other for breach of contract. Where there is ambiguity as to the ambit of the exemption, a narrow interpretation is favoured (see e.g. *South African Railways and Harbours v Lyle Shipping Co Ltd* 1958 (3) SA 416 (A), especially at 419 E, and *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A) at 804 H - 805 F). In *Hall-Thermotank Natal (Pty) Ltd v Hardman* 1968 (4) SA 818 (D) the plaintiff undertook to supply and install a refrigeration plant in the defendant's fishing vessel. After installation the plant would not function and could not be made to function by the plaintiff. An exemption clause in the contract

provided as follows:

/"The ...

76.

"The equipment, if operated in accordance with the tender's instructions, is guaranteed for a period of 12 months from the date of starting up thereof, against defective workmanship and material. Any part failing due to such causes will be replaced or repaired, free of charge. The tenderer's liability shall be limited to such replacements or repair and shall not extend to any consequential and/or damage due to any cause, or causes, whatsoever.,

HENNING J held, at 835 F-H:

"In spite of the emphatic language of the exemption clause in this case it appears to me that the parties could hardly have intended that the plaintiff would be exonerated from liability if it failed to perform its obligations at all, or if its performance proved useless, or if it committed a breach going to the root of the contract. After all the parties must have had in mind that both of them would carry out the terms of the contract. It is most unlikely that they contemplated that the plaintiff would be excused from the consequences of a fundamental breach. The clause is in my view to be construed as affording limited protection to : the plaintiff against faults or imperfections in the product of its labours, which is otherwise substantially in accordance with the contract."

/In ...

77.

In my view this reasoning, with which I agree, applies to clause 4 in the present case.

It is to be observed that on my view of the meaning and effect of clause 4 it does not matter whether the "defects" alleged in paragraph 3 of the appellant's further particulars were latent or not, for to the extent that they were, the clause is nevertheless not applicable to the facts on which the appellant's main claim is founded, as explained above. To the extent that my view runs counter to the concession made by the appellant's counsel in regard to the exclusion of liability in respect of the implied warranty against defects, I do not agree with it, and I am not, of course, bound by it.

I must now revert to a consideration of the tacit term on which the appellant's main claim is founded. In the discussion above I have dealt with the meaning and effect of clause 4 of the agreement from the point of view of the breach of contract alleged by the appellant. But

78the respondent's attack against the main claim is directed at the tacit term alleged by the appellant. The term alleged is simply that the locomotives would be fit for the purpose for which they were intended. If the appellant had alleged a breach of that term consisting of no more than, say, the presence of a number of defective parts that could be replaced in terms of the express guarantee of clause 4, the main claim would have been open to exception, for in such a

situation clause 4 would have operated to exclude liability on the part of the respondent for the relief claimed, and to that extent the tacit term could be said to be inconsistent with the express terms of the agreement. If, on the other hand, the appellant had alleged a tacit term to the effect that the locomotives would not be unfit for the purpose for which they were intended by reason of, say, design defects which could not be cured by the replacement of parts, the main claim would not, on my construction of clause 4, have been

/open ...

79. open to exception, because there would have been no inconsistency between such a term and clause 4 of the agreement. Does the form in which the appellant has couched its alleged tacit term render the main claim excipiable? In my opinion, not. I do not think that regard should be had to the tacit term as alleged in isolation; it should be considered in conjunction with the appellant's allegations regarding the respondent's breach of it, as detailed in the particulars of claim and the further particulars. The tacit term as alleged, and the allegations regarding the manner in which it was breached, taken together, are not repugnant to clause 4 and therefore do disclose a valid cause of action. The basis of the respondent's attack is that the term is in irreconcilable conflict with the express terms of clause 4; it is only on that basis that the exception can succeed. The principle on which the respondent relies is that contained in the well-known passage in the judgment

/of ...

80.

of VAN WINSEN JA in *South African Mutual Aid Society v Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) at 615 D-E:

"A term is sought to be implied in an agreement for the very reason that the parties failed to agree expressly thereon. Where the parties have expressly agreed upon a term and given expression to that agreement in the written contract in unambiguous terms no reference can be had to surrounding circumstances in order to subvert the meaning to be derived from a consideration of the language of the agreement only. See *Delmas Milling Co. Ltd.*

v. du Plessis, 1955 (3) S.A. 447 (A.D.) at p. 454."

In my view this passage does not apply to the facts in the present case. Here, the appellant has alleged a tacit term that has a field in which it can validly operate side by side with, and independently of, the express terms of clause 4, and it has alleged facts showing that it is in that field that it seeks to apply the term. There is an area in which the operation of

the tacit term is excluded by virtue of clause 4, but

/the ... 81. the appellant does not seek to apply it in that area. The respondent's exception, in order to succeed, must strike at the very root of the appellant's main claim,

so as to destroy it altogether, for the exception is based on the ground that the claim discloses no cause of action, not merely that it is vague and embarrassing.

In short, the tacit term is not wholly and necessarily irreconcilable with clause 4, and the appellant relies

upon it only to the extent to which it can be operative without impinging on the express provisions of clause

In the result, the second ground of attack against the main claim must also be rejected.

In regard to the exceptions to the first and second alternative claims, counsel for the respondent informed the Court that he was not pressing the first and third exceptions to either the first or the second alternative claim. In my view counsel was wise in

/adopting ...

82.

adopting that attitude. My reasons for saying so can be stated very briefly. The first exception to the first alternative claim rests on the basis that the tacit term alleged by the appellant, i.e. that the respondent would, in rendering its after sales service in terms of clause 6 of the agreement, make and keep the locomotives reasonably operational, contradicted the express terms of the agreement. There is no merit in

this point, for clause 6 does not define the respondent's obligations in regard to after sales service with such exactitude that there is no room for a tacit term as to the quality of the service to be rendered. Whether, as a matter of fact, the term ought to be implied, is not a question that can be decided on exception. Similarly, the first exception to the second alternative claim is not well-founded, for there is nothing in the written agreement to preclude the finding of a tacit agreement and a tacit term as alleged by the appellant. In regard

83.

to the third exception in the case of both alternative claims, counsel conceded that some of the items of damages claimed by the appellant were not of the kind covered by the terms of the exception, and that in accordance with the principles discussed in cases such as *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 706 A-H, these exceptions could not be sustained. I agree, but I would add that in my view these exceptions were in any event not well-founded, for the further reason that the provisions of clause 4 of the agreement have no application to the causes of action contained in the alternative claims.

There remains for consideration the second exception in the case of each of the alternative claims. Since these exceptions cover substantially the same 'ground', it will be convenient to deal with them together. The crux of what falls to be considered appears in each case from paragraph (a) of the second exception. The

/main ...

84. main thrust of the argument of counsel for the respondent was that the alternative claims were doomed to failure because the appellant could not create alternative causes of action by what was submitted to be mere changes in nomenclature, while its claim for damages or remuneration in each of the alternative claims remained inseparably linked to the cause of action advanced in the main claim. Counsel pointed to the fact that the damages claimed in the main claim, as specified in paragraph 7.2 of the particulars of claim, were incorporated by reference in each of the alternative claims (paragraphs 14.1, 14.2.2, and 20 of the particulars of claim), and argued that the particulars furnished in relation to paragraph 7, in paragraph 4 of the further particulars, were of necessity also incorporated in the alternative claims. It was pointed out further that in the particulars furnished in respect of both alternative claims there were specific references to the

/allegations ...

85. allegations in paragraph 4 of the further particulars (see paragraphs 7 (b), 8 and 9 (a) of the further particulars). Counsel contended that an analysis of paragraph 7 of the particulars of claim and paragraph 4 of the further particulars revealed that the damages claimed, while appropriate to the main claim, were wholly unrelated to, and indeed irreconcilable with, a claim for damages for an alleged breach of the obligation to service and repair (the first alternative claim) and a claim for reasonable remuneration for services rendered and the usual price of goods supplied (the second alternative claim). Finally, counsel made a point of the fact that the amount claimed in the main claim and in each of the alternative claims was exactly the same.

In my view the arguments outlined above do not justify the upholding of the exceptions in question. I

am not convinced that the allegations in paragraph 4 of

86. the further particulars, which were made in response to a request relating prima facie to the main claim only, must necessarily be regarded as being incorporated en bloc in the alternative claims, but I do not find it necessary to express a firm view on the point. Assuming counsel's submission to be correct, it does not follow, in my opinion, that the alternative claims are fatally defective. The substantive allegations advanced in them in support of the claims for damages and remuneration respectively do not warrant the description of being mere changes in nomenclature, in relation to the main claim; they are entirely distinct and independent causes of action and the fact that the same amount is claimed in each case is of no consequence. It is true that in many respects the allegations contained in paragraph 7 of the particulars of claim and paragraph 4 of the further particulars are inappropriate to the claims put forward in the alternative claims, but it does not

/follow ...

87.

follow that the alternative claims do not disclose valid causes of action. The inappropriate particulars are no doubt indicative of clumsiness in the appellant's pleadings, and they may well constitute a cause of embarrassment for the respondent, but that is not the latter's complaint. Its notice of exception avers that the appellant's pleading (consisting of the particulars of claim as amplified by the further particulars thereto)

"lacks averments which are necessary to sustain the causes of action therein set out."

The arguments of the respondent's counsel do not substantiate this charge. Moreover, it is possible to isolate portions of paragraphs 7.2 of the particulars of claim and paragraph 4 of the further particulars, to which no objection can be taken in relation to the alternative claims. For instance, the items of R32 415,00 and R14 507,00 in paragraphs 7.2.3 and 7.2.4 in respect of "Cranes" and "Transport" are particularised in sub-paragraphs

/(n) ... 88.

(n) and (o) of paragraph 4 of the further particulars without any express reference to the unfitness of the locomotives for their purpose; these paragraphs are accordingly perfectly consistent with the claim for damages in the first alternative claim and the claim for remuneration in the second alternative plea. In accordance with the principles discussed in Dharumpal's case *supra* this in itself is a sufficient reason for not allowing the exceptions in question.

In my judgment, therefore, the final result is that the Court *a quo* should not have upheld any of the exceptions; all of them should have been dismissed.

The appeal accordingly succeeds in toto.

The order of the Court is as follows:

1. The appeal is allowed with costs, including the costs of two counsel.
2. The order made by the Court *a quo*

/is ...

89.

is set aside and there is substituted therefor an order as follows:

"All the exceptions are dismissed with costs, including the costs of two counsel."

A.S. BOTHA JA

KOTZE JA

CILLIE JACONCUR HOEXTER JA

GROSSKOPF JA

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