

SOUTH AFRICA / JUDGMENT

Hillary Construction (Pty) Ltd and Another v Roads Agency Limpopo (Pty) Ltd (44632/2008) [2011] ZAGPPHC 161 (18 August 2011)

[2011] ZAGPPHC 161

COURT

North Gauteng High Court, Pretoria

BEFORE

Prinsloo

CASE / FILE NUMBER

44632/2008

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UNREPORTABLE

IN THE NORTH GAUTENG HIGH COURT. PRETORIA

/ES (REPUBLIC OF SOUTH AFRICA)

CASE NO: 44632/2008

DATE:18/08/2011

IN THE MATTER BETWEEN

HILLARY CONSTRUCTION (PTY) LTD.....1ST APPLICANT

TSWELOPELE ROADS AND EARTHWORKS (PTY) LTD.....2nd APPLICANT

AND

ROADS AGENCY LIMPOPO (PTY) LTD.....RESPONDENT

JUDGMENT

PRINSLOO. J

[1] The disputes underlying this application flow from a contract entered into between the applicants as contractors and the respondent as employer in September 2005 in terms of which the applicants would execute certain road works on behalf of the respondent.

[2] The works were completed by the applicants some time ago, but a number of disputes linger on.

- [3] Before me, Mr Raath SC assisted by Mr Van Rhyn. appeared for the applicants, and Mr Preis SC assisted by Mr Gouws, appeared for the respondent.

The nature of the relief sought, and some provisions of the General Conditions of Contract ("the GCC") governing the contractual relationship between the parties

- [4] The full title of the GCC is "General Conditions of Contract for Road and Bridge Works for State Road Authorities".

- [5] The GCC applies to the present contract as the respondent, a provincial government organ, functions in terms of the provisions of the South African National Roads Agency and National Roads Act 7 of 1998 read together with the Limpopo Roads Agency and Provincial Roads Act 398 of 1999.

- [6] The applicants functioned together in terms of a written pre-bid joint venture agreement for purposes of tendering for the execution

of the works ("the Works").

- [7] The Works to be executed by the applicants comprised the construction of a new, eight meter wide, 10,8 kilometres long, surfaced single carriage way road mainly on virgin ground. It included three major in-situ culverts, with a total of three minor pre-cast culverts and associated drainage structures. It further included two major T-junctions as well as one major intersection.

- [8] The value of the works came to some R35 million.

- [9] The engineer employed to manage the operation was one Mr Kobus van der Merwe of the firm Mmabatho Consulting CC ("the engineer").

There was also a resident engineer ("RE"), Mr Potgieter.

- [10] Apart from the GCC, there are other contract documents including the Standard Specifications for Road and Bridge Works 1998 for state authorities issued by the Committee of Land Transport Officials ("COLTO"), project documents, Works drawings and other documents, which were also applicable to the contractual relationship between the parties. During the proceedings before me, the GCC received the bulk of the attention.

- [11] Numbering amongst the many clauses of the GCC, are those prescribing the dispute resolution mechanisms in the event of disagreements

arising between the contractor and the engineer and/or the employer. These are, notably, clauses 45, 51, 60 and 61. Amongst the provisions in these clauses, are those which stipulate that failure by an aggrieved party to lodge an objection within a prescribed time, will result in that party becoming time-barred, so that the objection cannot go forward along the dispute resolution process and ultimately be dealt with by way of mediation or arbitration.

- [12] In the case of the bulk of the claims listed in the notice of motion, disputes have arisen between the parties as to whether or not the applicants are time-barred as described. The applicants, by and large, seek declaratory relief aimed at confirming their rights to proceed with the mediation or arbitration processes. As a final resort, the applicants, in all the claims, also, in the alternative, seek relief in terms of section 8 of the Arbitration Act, 25 of 1965, which authorises a court, in a proper case, to grant relief to a time-barred contractor by extending the prescribed period whether or not it had already expired at the time when the application for the relief is made.
- [13] Because the provisions of the clauses in the GCC which I singled out, which deal with the dispute resolution mechanisms, go to the heart of the applicants' claims. I deem it necessary to quote the contents for the sake of easy reference and for illustrative purposes, lengthy and somewhat cumbersome as they are:

"45(1) Subject to any requirement in the Specifications as to the completion of any portion of the Permanent Works before completion of the whole, the whole of the Works shall be completed within the time stated in the Appendix calculated from the Commencement Date

- (2) If circumstances of any kind whatsoever which may occur be such as fairly to entitle the Contractor to an extension of time for the completion of the Works or any portion thereof, the Engineer shall grant the Contractor, on a claim in accordance with Clause 51, such extension of time as is appropriate. Such extension of time shall take into account any special non-working days and all relevant circumstances, including concurrent delays or savings of time which might apply in respect of such claim; Provided that, in respect of such claim, the period of 56 days referred to in Subclauses 51(5) and 51(6) shall be reduced to 28 days.
- (3) Without limiting the generality of Subclause (2), the circumstances referred to in that Subclause include
- (a) the amount and nature of additional work,
 - (b) abnormal climatic conditions;
 - (c) any failure or delay on the part of the Employer or his agents, employees or other contractors (not being employed by the Contractor)

in the due performance of any obligations as are reasonably necessary to enable the Works to proceed,

- (d) any provision of these Conditions which allows for an extension of time.
- (e) any delay occasioned by the replacement of a Selected Subcontractor in terms of Clause 9, and
- (f) any disruption of labour which is entirely beyond the Contractor's

control.

- (4) If an extension of time is granted, the Contractor shall be paid such additional time-related Preliminary and General allowances as are appropriate having regard to any other compensation which may already have been granted in respect of the circumstances concerned."

"51(1) The following provision shall apply to any claim by the Contractor in terms of the Contract for an extension of time for the completion of the Permanent Works, or for additional payment or compensation:

- (a) the Contractor shall within 28 days after the circumstance, event, act or omission giving rise to such a claim has arisen or occurred, deliver to the Engineer a written claim, referring to this Clause and setting out
 - (i) the particulars of the circumstance, event, act or omission giving rise to the claim concerned.
 - (ii) the provisions of the contract on which he relies in making the claim;
 - (iii) the length of the extension of time, if any, claimed and the basis of calculation thereof, and
 - (iv) the amount of money, if any, claimed and the basis of calculation thereof.
 - (b) If, by reason of the nature and circumstances of the claim, the Contractor cannot reasonably comply with all or any of the provisions of paragraph (a) within the said period of 28 days, he shall
 - (i) within the said period notify the Engineer in writing of his intention to make the claim and comply with such of the requirements of paragraph (a) as he reasonably can,
 - (ii) deliver to the Engineer in writing such additional information as the Engineer shall, in writing reasonably require, and
 - (iii) comply as soon as is practicable with such of the requirements of paragraph (a) as have not been complied with.
 - (c) If the events or circumstances relating to the claim are of an ongoing nature, the Contractor shall, each month, deliver to the Engineer in writing updated particulars required in terms of paragraphs (a) and (b).
- (2) If, in respect of any claim, the Contractor did not comply with the provisions of Subclause (1) because he was not and could not reasonably have been aware of the implications of the facts or circumstances concerned, the period of 28 days referred to in

Subclause (1) shall commence to run from the date when he should reasonably have become so aware.

- (3) In order that the extent and validity of claims in terms of this Clause may be properly assessed when they are submitted, the

following provisions shall apply:

- (a) all facts and circumstances relating to the claims shall be investigated as and when they occur or arise. For this purpose the

Contractor shall deliver to the Engineer records, in a form approved by the Engineer, of all the facts and circumstances which the Contractor considers relevant and wishes to rely upon in support of his claims, including details of all Constructional Plant, labour and material relevant to each claim. Such records shall be delivered promptly after the occurrence of the event giving rise to the claim concerned.

- (b) The Engineer may record such facts and circumstances, additional to those recorded by the Contractor, as he considers relevant and the Contractor shall, for this purpose, supply the Engineer with all the information which he may require.
- (c) The Engineer and the Contractor shall, at the time of making the record in terms of paragraphs (a) and (b), set out in writing, signed by each of them and deliver to the other of them, their respective agreement or disagreement as to the correctness of the matters recorded.
- (d) Each record of an agreed fact in terms of paragraph (c) shall in any dispute be conclusive evidence of the fact concerned.
- (e) For the purpose of this Clause, information arising from a technical investigation or analysis undertaken after the events giving rise to the claim have occurred shall not be regarded as facts or circumstances required to be recorded in terms of this Clause.
- (f) The Employer, the Engineer and the Contractor shall not in any proceedings in accordance with Clause 61 be entitled to give or lead evidence of or rely on any fact or circumstance not recorded in terms of this Clause.
- (4) If in respect of any claim to which this Clause refers, the Contractor shall fail to comply with the provisions of Subclause (1), as read with Subclause (2), he shall have no further right to make the claim concerned.
- (5) Unless otherwise provided in the contract, the Engineer shall, within 56 days after the Contractor has complied with his obligations in terms of Subclause (1) as read with Subclause (2) and paragraphs (a),

- (b) and (c) of Subclause (3) deliver to the Contractor and the Employer his written ruling on the claim (referring specifically to this Clause) and the amount, if any, thereof allowed by the Engineer shall be included to the credit of the Contractor in the next payment certificate:

Provided that

- (a) the said period of 56 days may be extended if so agreed between the Contractor and the Engineer, and
- (b) If, before the Engineer's ruling on the whole claim, any amount thereof shall have been established to his satisfaction, that amount shall be included to the credit of the Contractor in the next payment certificate.
- (6) If the Engineer fails to give his ruling within the period referred to in Subclause (5) he shall be deemed to have given a ruling

dismissing the claim."

"60(1) In respect of any matter not required to be dealt with in terms of Clauses 51 or 61(6), the Contractor shall have the right by written notice to the Engineer to require him to consider any disagreement which he raises with the Engineer provided that the said written notice shall be given within 21 days after the cause of disagreement has arisen. (2) The Engineer shall give a ruling on the disagreement in writing to the Employer and the Contractor, referring specifically to this Clause, which ruling he may give at any time after his receipt of the written notice referred to in Subclause (1), but he shall do so by not later than fourteen days after his receipt of a written request from the Contractor requiring him to do so. failing which he shall be deemed to have given a ruling dismissing all the Contractor's contentions."

"61(l)(a) The Contractor shall have the right to dispute any ruling given or deemed to have been given by the Engineer in terms of Clause 51 or Clause 60;

Provided that, unless the Contractor shall, within 42 days after his receipt of a ruling or after a ruling shall have been deemed to have been given, give written notice (hereinafter referred to as a 'Dispute Notice') to the Engineer, referring to this Clause, disputing the validity or correctness of the whole or a specified part of the ruling, he shall have no further right to dispute that ruling or the part thereof not disputed in the said notice.

- (b) All further references herein to a ruling shall relate to the ruling, or part thereof, specified in the Dispute Notice, as varied or added to by agreement between the Contractor and the Engineer or by the Engineer's decision in terms of paragraph (c) or by the Mediator's opinion to the extent that it has become binding in terms of Subclause (2)(f).
- (c) The Engineer
- (i) shall, before giving his decision on the dispute, consult the employer thereon and give the Contractor a reasonable opportunity to present written or oral submissions thereon;

- (ii) shall deliver his decision in writing to the Employer and to the Contractor;
- (iii) may give decision at any time after his receipt of the Dispute Notice but shall do so by not later than 42 days after his receipt of a further written notice from the Contractor requiring him to do so, failing which, he shall be deemed to have given a decision affirming, without amendment, the ruling concerned.
- (d) Unless either the Employer or the Contractor, hereinafter referred to as 'the parties', shall, within 28 days after his receipt of notice of the decision in terms of paragraph
- (c)(ii) or after the decision is deemed to have been given in terms of paragraph
- (c)(iii), have given notice in writing to the Engineer, with a copy to the other party, disputing the Engineer's decision or a specific part thereof, he shall have no further right to dispute any part of the ruling not specified in his said notice.
- (e) If either party shall have given notice in compliance with paragraph (d), the dispute shall be referred immediately to mediation in terms of Subclause (2).
- (f) Notwithstanding that the Contractor may, in respect of a ruling, have given a Dispute Notice, the ruling shall be of full force and carried into effect unless and until otherwise agreed by both parties in terms of Subclause (2)(f) or as determined in an arbitration award or a Court judgment.

2.

- (a) The mediation referred to in Subclause (1)(e) shall be conducted by a Mediator selected by agreement between the parties or, failing such agreement within seven days after a written request by either party for such agreement, nominated on the application of either party by the President for the time being of the South African Institution of Civil Engineers.
- (b) Neither party shall be entitled to be represented at any hearing before or at any meeting or in any discussion with the Mediator

except by

- (i) the party himself, if a natural person,
- (ii) a partner in the case of a partnership,
- (iii) an executive director in the case of a company,
- (iv) a member in the case of a close corporation,
- (v) the Engineer,
- (vi) a bona fide employee of the party concerned,
- (vii) a professional Engineer appointed for the purpose by the party concerned.

Such limitation shall not be construed as preventing any person from giving evidence as a witness.

- (c) The Mediator shall, as he deems fit, follow formal or informal procedure and receive evidence or submissions orally or in writing

... (here follows stipulations as to how the Mediator may conduct his proceedings).

- (d) The Mediator shall have the power to propose to the parties compromise settlements of or agreements in disposal of the whole or portion of the dispute.
 - (e) The Mediator shall, as soon as reasonably practical, give to each of the parties his written opinion on the dispute, setting out the facts and the provisions of the contract on which the opinion is based and recording the details of any agreement reached between the parties during the mediation.
 - (f) The Mediator's opinion shall become binding on the parties only to the extent correctly recorded as being agreed by the parties in the Mediator's written opinion or otherwise as recorded as being agreed in writing by both parties subsequent to the receipt of the Mediator's opinion.
 - (g) The dispute on any matter still unresolved after the application of the provisions of paragraph (f) shall be resolved by arbitration or Court proceedings, whichever is applicable in terms of the contract. (My note: it is common cause that for present purposes, arbitration proceedings are applicable.)
 - (h) Save for reference to any portion of the Mediator's opinion which has become binding in terms of paragraph (f), no reference shall be made by or on behalf of either party, in any proceedings subsequent to mediation, to the Mediator's opinion, or to the fact that any particular evidence was given, or to any submission, statement or admission made in the course of the mediation.
 - (i) Irrespective of the nature of the Mediator's opinion.
 - (i) each party shall bear his own costs arising from the mediation, and
 - (ii) the parties shall in equal shares pay the Mediator the amount of his expenses and the amount of his fee based on a scale of fees as agreed between the Mediator and the parties before the commencement of the mediation.
3. If the Contract provides for determination of disputes by arbitration and if a dispute is still unresolved as provided in Subclause (2)(g) or the dispute is one to which Subclause (6) refers,

- (a) the matter shall be referred to a single Arbitrator to be agreed on between the parties or, failing such agreement within 28 days after delivery to the parties of the Mediator's opinion, nominated on the application of either party by the President for the time being of the South African Institute of Civil Engineers, and any such reference shall be deemed to be a submission to the arbitration of a single Arbitrator in terms of the Arbitration Act (Act 42 of 1965, as amended), or any legislation passed in substitution therefor;
- (b) in the absence of any other agreed procedure, the arbitration shall take place in accordance with the Rules for the Conduct of Arbitrations issued by the Association of Arbitrators which are current at the time of the arbitration;
- (c) the Arbitrator shall, in his award, set out the facts and the provisions of the Contract on which his award is based.
- (4) If the Contract does not provide for the determination of disputes by arbitration and if a dispute is still unresolved as provided in Subclause (2)(g) or the dispute is one described in Subclause (6), the dispute shall be determined by Court proceedings.
- (5)
 - (a) Nothing herein contained shall deprive the Contractor of the right to institute immediate Court proceedings in respect of failure by the employer to pay the amount of a payment certificate on its due date or to refund any amount of retention money on its due date for refund.
 - (b) No ruling or decision given by the Engineer in accordance with the provisions of the Contract shall disqualify him from being called as a witness and giving evidence before the Arbitrator or the Court on any matter whatsoever relevant to the dispute concerned.
 - (c) The Arbitrator and the Court shall have full power to open up, review and revise any ruling, decision, order, instruction, certificate or valuation of the Engineer relevant to the matter in dispute.
 - (d) The following provisions shall apply in respect of the appointment of a Mediator or Arbitrator in terms of this Clause:
 - (i) if, for any reason, the person appointed fails to assume or to continue in the office concerned, the provisions of this Clause shall apply mutatis mutandis in the appointment of a successor, and
 - (ii) in making his nomination in terms of Subclause (2)(a) or Subclause (3)(a), the President for the time being ...
 - (iii) if the President required to make a nomination in terms of this Clause shall have a direct or indirect interest in the subject-matter of the dispute, ...

- (6) Notwithstanding anything elsewhere provided in this Clause, any dispute between the Contractor and the Employer
- (a) not relating to a ruling, decision, order, instruction or certificate by the Engineer, or
- (b) arising after the completion of the Contract or if a Defects Liability Period is provided, after the termination of that period,

shall be determined, without the application of the provisions of Subclauses (1) and (2), by arbitration or Court proceedings,

whichever is applicable in terms of the Contract, and which may be initiated by either party, in which event the provisions of

Subclauses (3), (4) and (5) shall apply mutatis mutandis.

- (7) This clause is a separate, divisible Agreement from the rest of the Contract and shall remain valid and applicable notwithstanding that the Works may have been completed or that the rest of the Contract may be void or voidable or may have been cancelled for any reason."

[14] So much for a brief description of the nature of the relief sought in the notice of motion, and a reference to some of the important clauses to be found in the GCC.

[15] However, before these aspects can be considered in greater detail, attention must be given to an argument raised on behalf of the applicants which, during the proceedings before me, became known as "the main point".

This argument is aimed at achieving a result whereby the five claims (or those which I may allow) are referred directly to arbitration in terms of the provisions of clause 61(6) of the GCC, thereby leap-frogging any difficulties which may arise, such as issues of

time-barring, from a more careful analysis of claims 1 to 5.

I therefore turn to the main point.

The main point

[16] Before describing the essence of the main point, and dealing with the merits thereof, it must immediately be observed that the main point was not pleaded in either the founding affidavit or the replying affidavit.

[17] There is no prayer in the notice of motion to accommodate the relief sought to be achieved through the main point. There was no attempt to amend the notice of motion to make provision for such relief.

[18] Moreover, and to their credit, counsel for the applicants, in their argument, paid due regard to the pitfalls which may confront an applicant, electing to litigate on affidavit, when genuine disputes of fact become apparent. Counsel duly considered the principles laid down in the well-known case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 3 SA 623 (A).

[19] Counsel for the applicants also carefully considered, and dealt with, the possible difficulties flowing from the failure by an applicant to apply, at the outset of the proceedings, for a referral to evidence or trial of certain issues in the spirit of Uniform Rule of Court 6(5)(g). No such application was forthcoming.

[20] At the commencement of the proceedings, Mr Preis specifically invited my attention to all these aspects. With reference to the fact that the main point was not pleaded in either the founding affidavit or the replying affidavit, nor catered for in the notice of motion, Mr Preis argued that the applicants ought to be precluded altogether from arguing the main point at all.

After hearing submissions on this argument, I made a ruling that counsel would be allowed to present argument on the main point, and that I would deal with the issue in the final judgment.

[21] I turn to a brief outline of what the main point is about.

The applicants allege with some force, more particularly in the replying affidavit, that there was a measure of "connivance" between the respondent and the engineer in the sense that the respondent coerced the engineer to foist a different payment procedure upon the applicants, namely a procedure which was not in line with the provisions of clause 52 of the GCC.

Briefly put, the clause 52 procedure amounts to the following:

The applicants submit a monthly statement for payment to the Engineer of all amounts which the applicants consider due to them. The Engineer must then certify an amount which he considers to be due to the Contractor (applicants). This lesser amount (it would generally be less than the amount claimed) is then payable within 35 days.

Any difference between the contractor and the engineer would then in the ordinary course be dealt with by way of the dispute resolution

process described in clauses 60 and 61, *supra*.

It is common cause that all went well, and according to the mentioned guidelines, until the Works had reached an advanced stage of completion and up to a point where thirteen certificates had been issued. At that stage, so the applicants contend, the engineer was obliged by the respondent not to submit a certificate for payment before "a common understanding" had been reached between the engineer and the applicants. The applicants then had to submit repeated "revisions" with quantities reduced to the level where the engineer was willing to accept them. In the absence of such compliance, no payment would be certified. The applicants contend that this change of stance came about because of financial difficulties on the part of the respondent particularly when it came to obtaining funding from the relevant department. According to the

applicants, these financial difficulties were exacerbated by the engineer's initial under-estimation of quantities.

[22] Another alleged example of the "connivance" between the engineer and the respondent, has its origin in alleged inconsistent

responses by the engineer and the respondent to a demand from the applicants for the issue of a variation order (the term used by the applicants) authorising the expenditure of a further R8.4 million to complete the project. After some time, an amount of R4,9 million was initially authorised and, thereafter, this was reduced to an amount of some R4,7 million. In a somewhat complicated argument (bearing in mind that the applicants are litigating on affidavit) they illustrate that part of the difference between the R4,7 million and the R4,9 million is an amount of some R181 000,00 which was allowed for accommodation of traffic (something which resorts under claim 2) and thereafter, rather mysteriously, left out of the equation.

These perceived inconsistencies are attributed by the applicants to a "lack of honesty" and a lack of objectivity on the part of the engineer when it comes to the dealings between the applicants and the respondent.

Armed with these conclusions of a lack of honesty and "connivance" the applicants rely on authority for the proposition that the legal consequences of this "connivance" between the engineer and the respondent are as follows: as the engineer has placed himself under the influence and control of the respondent, the result was that he could not properly carry out the functions vested in him; his decisions and certificates were of no force and effect, void and worthless, as were any rulings, or decisions, issued, or which could be issued, by him in terms of clauses 60 and 61(1) of the GCC. I assume the same would apply to clause 51 of the GCC. Counsel argued that the principle is that the actions of the engineer will be legally ineffectual if it was induced, *inter alia*, in collusion with or under the domination of either of the parties. I was referred to the cases of *Uitenhage Municipality v Schuddingh* 1936 CPD 506 and *Universiteit van Stellenbosch v J A Louw* 1983 4 SA 321 (A) at 337D-F. In the last-mentioned case, dealing with the conduct of an architect, there was also a dispute between the building owner and the contractor and it was held that "whether an architect acts as certifier or quas-/arbitrator he must maintain a fair and judicial view". It was also observed about the architect that "his duty as certifier must in respect of fairness and impartiality be the same as that of an arbitrator".

Heavy reliance was also placed by the applicants on an old English case of *Hickman & Co v Roberts* 1913 AC 229 at 234. It was argued that the position of an engineer is akin to that of an architect for these purposes.

In reaching the climax of their argument on the main point, counsel for the applicants deliver their coup de grace in the following terms (1 paraphrase from their heads of argument): by his conduct in conniving with the respondent, the engineer has disqualified himself totally to function at all as such. In conducting itself thus the respondent was not only an accomplice: it was the main actor, compelling the engineer so to act.

Legally, there was therefore no engineer who could make any ruling whether for extension of time in terms of clause 45 read with clause 51, any claims for additional compensation in terms of clause 51, or in regard to disagreements as intended in clauses 60 and 61. Any claims made by the applicants in terms of those clauses would accordingly have been legally futile. Accordingly, this dispute does not relate to any of the actions of the engineer listed in clause 61 (6)(a), rendering the dispute directly susceptible to arbitration. These principles apply to all five the claims mentioned in the notice of motion and in regard to any rulings and/or decisions which the engineer may have issued, or may have failed or refused to issue.

It is convenient to revisit the relevant portions of clause 61(6), already quoted above:

"Notwithstanding anything elsewhere provided in this Clause, any dispute between the Contractor and the Employer:

(a) not relating to a ruling, decision, order, instruction or certificate by the Engineer ...

shall be determined, without the application of the provisions of Subclauses (1) and (2) by arbitration or Court proceedings, whichever

is applicable in terms of the contract, and may be initiated by either party in which event the provisions of Sub-clauses (3), (4) and (5) shall apply *mutatis mutandis*"

One of the beneficial spin-offs of the main point, if upheld, would be that the provisions of clauses 45, 51, 60 and 61, are leap-frogged

out of the equation, and, in the process, there will be no necessity to consider uncomfortable suggestions that the applicants may be time-barred in respect of all or any of the five claims. There will also be no need to seek the protection of section 8 of the Arbitration Act, *supra*, in the form of extension of expired time periods leading to time-barring. In short, the clause 61(6) relief will overtake the relief prayed for in the notice of motion even though the notice of motion is silent in respect of the clause 61(6) relief. Finally, as I already indicated, the clause 61(6) relief and the main point are not mentioned anywhere in the founding or replying

affidavits.

[23] So much for the brief description of the main point.

[24] In developing the argument around the main point, counsel for the applicants referred to, *inter alia*, extracts from the lengthy

answering affidavit offered by the respondent to illustrate what the applicants submitted to be clear signs of connivance between the engineer and the respondent to the extent that the actions of the engineer would be rendered *pro non scripto* on the authority of the aforementioned cases of *Uitenhage Municipality, Hickman & Co v Roberts* and others.

[25] Passages on which particularly heavy reliance were placed in support of this argument, are those to be found in paragraph 78.10 of the opposing affidavit, under the heading "requirements of the respondent relating to certificates". These are the passages:

"78.10.2.6 The respondent requires any interim payment certificates to be signed by the Contractor, the Engineer and the Resident Engineer.

78.10.2.7 This requirement provides the respondent with confirmation that, when a payment is made, all parties involved have reached a common understanding as to the value of the Works executed and certified for payment.

78.10.2.8 The respondent further requires the Contractor to submit an invoice in the amount of the certified value subsequent to the issuing of the certificate and pursuant to payment.

78.10.2.9 It accordingly follows that the Engineer does not submit certificates for payment to the respondent unless the Contractor has signed the certificate and submitted an invoice for the value of the certified amount."

[26] The argument, if I understood it correctly, was that this procedure illustrated a conspiracy between the engineer and the respondent to force the applicant to agree to more modest payments in order to relieve pressure on the tight budget on which the respondent had to operate. It was argued that this conduct by the engineer flew in the face of the provisions of section 52(1) of the GCC which, essentially, provides that monthly payments are to be made on the following basis: the applicant must deliver to the engineer a monthly statement for payment of all amounts he considers to be due to him (taking certain factors into account) whereupon the engineer shall, by signed payment certificates issued to the respondent and the applicant, certify the amount which he considers to be due to the applicant, again taking into account certain prescribed values, amounts, adjustments and other factors listed in section 52(l)(a) to (f).

[27] On a general reading of the papers, I find it difficult to read anything sinister into the passages quoted from paragraph 78.10 of the answering affidavit. I add that, although the main point was not raised in the founding affidavit or the replying affidavit, so that the respondent and the engineer would not have been alerted thereto, the respondent is at pains to refer to, inter alia, the requirements of section 52(1) in, for example, paragraph 79 of the answering affidavit. I deem it convenient to quote a few extracts from paragraph 79:

"79.1 In accordance with the provisions of Clauses 47 and 52(1) of the GCC, it is required that the Engineer adjust quantities claimed for, but not agreed to, to quantities the Engineer deems to be correct.

(Note, this, as I have illustrated, is a correct interpretation of the requirements of section 52(1).)

79.2 As is dealt with above, also in terms of Clause 52(8) of the GCC, the Engineer has the right to make corrections to previous payment certificates.

79.3 These corrections may be in favour of either of the parties. The purpose of the corrections is thus to afford the Engineer the opportunity to address any mistakes or re-assess the value of the work should a re-measurement or new information so require.

79.4 This procedure is not meant to be restrictive and corrections are made in the discretion of the Engineer after consideration of all available information.

79.5 Given the applicants' contention that the Engineer certified and manipulated quantities for purposes of keeping any prospective

payments within the confines of an under-estimated budget. I deem it pertinent to address this issue with reference to individual payment certificates ..."

The respondent then continues, in compelling fashion, to deal with certificates 14 to 18 which are really the only contentious ones. It should be remembered that the first thirteen certificates were issued, as I understand the papers, without any serious disputes

flowing therefrom.

[28] In his address, Mr Preis, in dealing with the suggestion that the respondent may have unduly interfered with the preparation of the payment certificates, reminded me of the provisions of section 2(8) of the GCC which reads as follows:

"Notwithstanding any provisions to the contrary in the Contract, the Employer shall have the right to reverse and, should he deem it necessary, to amend any certificate, direction, decision or valuation of the Engineer and to issue a new one, and such certificate, direction, decision or valuation shall for the purposes of the Contract be deemed to be issued by the Engineer, provided that the Contractor shall be remunerated in the normal manner for work executed in good faith in terms of an instruction issued by the Engineer and which has subsequently been rescinded."

This sub-section clearly authorises the employer (respondent) to play an active part in the preparation of payment certificates. Indeed, the employer is authorised to take drastic measures such as to even reverse a certificate.

On a general reading of the papers, and given the compelling fashion in which the respondent deals with the issue of certificates in, for example, paragraphs 78 and 79 of the opposing affidavit, I find no basis whatsoever to establish on these affidavits, that perceived interference by the respondent in the preparation of the certificates amounted to improper conduct as intended by Uitenhage Municipality and other cases, rather than duly authorised conduct as provided for in section 2(8).

[29] In attempting to determine on affidavit, whether a case has been made out for this rather drastic final relief, and whether the applicant has succeeded in proving the alleged improper conduct or "connivance" on the part of the respondent and the engineer, one must also constantly bear the well-known principles in mind which were laid down in *Plascon-Evans Paints v Van Riebeeck Paints* [1984] ZASCA 51; 1984 3 SA 623 (AD) at 634C-635E. In considering the opposing affidavit which, generally, leaves me with a favourable impression,

I see no allegations or denials on the part of the respondent which "are so far-fetched or clearly untenable" (see Plascon- Evans at 635C) which would leave me with a decision that the version presented by the respondent falls to be rejected on the papers.

On this subject, it is interesting to observe that in Uitenhage Municipality, relied upon by the applicant, the learned judge-president also found himself unable to decide whether or not the alleged irregular conduct had been established in the application, and decreed that the issue would have to be decided at the trial. He did so in the following terms at p514:

"That would on the authority of Roberts v Hickman be a sound contention, if at the trial evidence should be produced establishing an influence and control by the applicant over the Engineer which the respondent was ignorant of when he acted as he did in regard to the certificate of 31 October, 1933. That, however, is not a matter which can be decided at this stage. It will have to wait for decision until the allegations set out in paragraph 5 of the declaration have been gone into at the trial."

[30] I add that I have been quite unable, either on reading the papers or from my debate with Mr Raath, to establish a convincing reason for the applicants' failure to simply employ the dispute resolution mechanisms provided for in sections 60 and 61 of the GCC to address their dissatisfaction with the manner in which the payment certificates were prepared by the engineer and the respondent, rather than to embark on this cumbersome exercise to attempt to prove untoward conduct on affidavit. The respondent puts it as follows in paragraph 78.5 of the opposing affidavit:

"... it is respectfully contended that any difficulty a Contractor experiences in connection with the Engineer's approval or failure to approve claimed quantities in respect of alleged work performed, can be addressed by utilising the dispute resolution mechanisms contained in the GCC."

Before me, it was common cause that with regard to many other disputes between the parties these mechanisms were duly employed and the resultant arbitrations took place. Some of those arbitrations are still pending. Indeed, counsel before me were in general agreement, that a decision to uphold the main point, namely that the actions of the engineer were of no force and effect, would inevitably have an impact, perhaps dramatically so in certain instances, on these pending arbitrations.

[31] In the result, I have come to the conclusion that the applicants have failed to prove, on affidavit, that the respondent and the engineer were guilty of conduct which would place this matter inside the ambit of Uitenhage Municipality, Hickman and other decisions. For this reason alone, I am of the view that the main point cannot be upheld.

[32] I have also come to the conclusion that there is another, equally compelling, reason why the argument on the main point should fail. In their heads of argument, counsel for the applicants, in urging me to uphold the main point, contend for far-reaching final declaratory relief on affidavit. The declarator should state that none of the functions of the engineer

purportedly performed by him in terms of the contract had any legal effect vis-a-vis the applicants. They argue that legally, there was "therefore no Engineer" who could make any ruling whether for extension of time in terms of clause 45 read with clause 51 of the GCC, any claims for additional compensation in terms of clause 51 or in regard to disagreements as intended in clause 60. These are all subjects carefully pleaded in support of claims 1 to 5 to which I will shortly turn. Counsel argue that "any claims made by the applicants in terms of those clauses would accordingly have been legally futile".

[33] I have pointed out repeatedly that no case whatsoever for such relief was pleaded either in the founding affidavit or the replying

affidavit. No such relief is prayed for in the notice of motion either. A case that the engineer's actions, and also those of the

respondent, were unlawful, and that the engineer's decisions were void or of no force and effect, should have been pleaded - see,

generally, *Yannakou v Apollo Club* 1974 1 SA 614 (A) at 623G-H and *Pratt v First Rand Bank Ltd* [2008] ZASCA 92; 2009 2 SA 119(SCA) at 123F-H.

[34] It was also argued on behalf of the applicants that the far-reaching relief now sought could have been granted under the prayer "further and/or alternative relief appearing in the notice of motion. With this submission I disagree. In my opinion, the nature of the relief to be sought must, at the very least, be set out in the affidavits in such a fashion that the opposing party can be left in no doubt as to what such relief amounts to. This is not the case in the present instance. Moreover, the respondent was not even in a position to file a rejoinder because the relief was not identified in the replying affidavit either - see, generally, the remarks of the learned judge in the full court decision of *City of Cape Town v Mgoqi & Another* 2006 4 SA 355 (CPD) at 362F-363C.

[35] The flaw in the case as presented by the applicants without an appropriate amendment of the notice of motion is highlighted by the fact that much of the relief presently claimed stands in stark contrast to the suggested relief of a declarator that the actions by the engineer were of no force and effect. For example, in respect of the fourth claim, declaratory relief is sought to the effect that "the Engineer is still to issue a ruling on this claim in terms of Clause 60(2) of the GCC". Such relief, not abandoned, can in no way be reconciled with the relief contended for in support of the main point, in the absence of an appropriate amendment. The same difficulty presents itself with regard to other relief presently sought in the notice of motion.

[36] In all the circumstances, and to avoid uncertainty, I order that the arguments in support of the main point are dismissed.

[37] I now turn to the first to fifth claims as they are formulated in the notice of motion and dealt with in the papers.

Brief remarks about the first to fifth claims

[38] These claims are all for declaratory relief.

[39] All the claims contain, as a last resort, in terms of a final alternative prayer, a request for relief in terms of section 8 of the Arbitration Act 25 of 1965. Such relief is aimed at obtaining an extension of the period within which claims were to be filed in the event of a finding that the claims are presently time-barred.

[40] It is convenient to quote the wording of section 8 of the Arbitration Act:

[41] I now turn to the individual claims. The first claim

[42] The first claim is aimed at a declarator that the period 2 April 2007 to 24 June 2007 does not qualify for the computation of penalties.

[43] The claim has its origin in a telephonic conversation between Mr Sam Phupheli ("Phupheli"), the General Manager: Operations of the respondent, and Mr Ed Hillary ("Hillary"), the then Executive Chairperson of the first applicant, which took place on 2 April 2007.

[44] The case of the applicants is that during that telephonic conversation, Phupheli instructed the applicants not to proceed with

the execution of the Works, as a cessation of operations would assist the respondent to apply pressure on the provincial Department of Roads and Transport ("the department") to provide funds to the respondent in order to meet its financial obligations to the applicants.

Phupheli, in an affidavit, admits the telephonic conversation, but denies the alleged contents thereof. He also denies that he had any authority to order a cessation of operations.

[45] According to the applicants, the communication conveyed during the telephone discussion resulted in a suspension of the execution of the Works by the applicants from 2 April 2007 to 24 June 2007. The applicants contend that this period should not qualify for the computation of any penalties that may be applicable. Penalties, in terms of the agreement, are calculated to amount to R2 800,00 per day and the total value of the claim comes to R232 400,00.

[46] It was argued on behalf of the applicants that the communication of Phupheli to Hillary amounted to a repudiation of the agreement so that the obligations of the applicants to perform in terms of the agreement were suspended during the relevant period of the

repudiation namely 2 April to 24 June 2007.

[47] With regard to this claim, as with the others, the applicants are confronted with the ongoing problem of having to prove their case on affidavit in the face of clear factual disputes. In this case the main dispute is the contents of the discussion between Phupheli and Hillary on 2 April 2007. The test in *Plascon-Evans*, supra, is constantly under consideration.

"... it is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order ..." at 634G-I. As I already recorded earlier, I find nothing in the version presented by the respondent in the answering affidavit, "so far-fetched or clearly untenable" (Plascon-Evans at 635C) that I feel justified in rejecting them merely on the papers.

[48] Against this background, the applicants are forced to constantly rely on certain other events, communications and correspondence which they submit would militate in favour of a finding against the respondent on the probabilities.

One such "event" is a lengthy letter written by an official of the first applicant to the engineer on 11 April 2007. The letter first deals with a host of other disputes, pre-dating 2 April, in which, *inter alia*, the dispute resolution mechanisms prescribed by clause 61 of the GCC are invoked. Later in the letter the purported cessation of Works on 2 April 2007 is mentioned and the following is said about the alleged phone-call:

"On Monday 2 April 2007 Mr Ed Hillary received a phone-call from Mr S Phupheli of RAL asking him why we were continuing with the work on site at there was no funds available." Nothing is stated about the alleged invitation by Phupheli for the cessation of Works in order to facilitate pressure on the department to make payment. I find no convincing explanation for this lacuna in the summary of the phone-call of 2 April.

The applicants then contend for an adverse inference to be drawn against the respondent for the latter's perceived delay in reacting to the cessation of the

Works. From the papers, it appears that there was no unreasonable delay on the part of the respondent to deal with the alleged cessation.

According to the minutes of a site meeting held on 24 April 2007 (site meeting no 19) the "purported" suspension of the

Works was already on that occasion discussed between the applicants and the engineer. This was shortly after the letter of 11 April. The engineer also uses the word "purported" because there is a dispute as to whether or not there was a complete cessation of the Works. The version of the respondent is that the applicants carried on with the Works, albeit at a slower rate. There are clear indications that there was a continuation, at least, of repairs which the applicants had to effect to the seal of one of the roads which had not been properly applied resulting in poor binding between the seal and the base. These repairs were commenced by the applicants before 2 April and were only completed on 6 June 2007.

It also appears from the respondent's version as contained in the answering affidavit (which I have to accept) that the applicants were warned about their unilateral cessation of the Works. The respondent puts it as follows:

"105.2 It is reiterated that the aspect of the cessation of the Works was not only discussed but that the Engineer personally warned the Contractor that its conduct of unilateral cessation of the contract works had been in breach of the GCC.

105.3 As was also dealt with above, it is reiterated that the Contractor had been so warned as early as 20 March 2007, at the time when there had been only threats of a cessation."

[49] I now turn to the affidavit of Phupheli. I find the contents thereof, and the version of Phupheli, convincing enough and certainly not "so far-fetched or clearly untenable" that I would be justified in rejecting his version. It is convenient to quote the relevant extract from his affidavit:

"The alleged instruction to cease contract works

5. Having regard to the affidavit of Daly aforementioned, it is alleged that, during April 2007, I issued a direct instruction to Mr Ed Hillary ('Hillary') the Executive Chairperson of the first applicant to cease the operations on the contract site seeing as, so it is alleged, 'cessation of operations would assist the respondent in applying pressure to the provincial Department of Roads and Transport in procuring the additional funds needed by the respondent in order to have the project completed'.
6. Although the conversation with Hillary is admitted, the nature and import of the conversation as alleged are denied.
7. The events which gave rise to this conversation are briefly dealt with hereunder.
8. For some months preceding the conversation I was informed by the project manager of the respondent, Mr Robert Nemavhola, that the execution of contract works was at that stage being frustrated by protracted disagreement between the Engineer and the Contractor regarding various issues which included disputes regarding quantities, extensions of time for Works to be completed and other ancillary aspects.
9. I proceeded to contact Hillary. At that stage my intention was to have a conversation with him in an attempt to address and possibly resolving the qualms of the applicants.
10. During the conversation Hillary complained that the respondent apparently had no funds available and that the applicants were not being paid monies which were due to them. There were also insinuations that the Contractor would stop working, given the respondent's alleged non-payment.
11. In answer to these insinuations I enquired from Hillary why, if he says that there are no funds available in respect of the contract works, was he continuing with the work.
12. I never conveyed, directly or indirectly, to Mr Hillary that the contract works should be ceased, as he now alleges.

13. The conversation was very much interrogation by me in attempting to get to the gist of the alleged problem the applicants were

experiencing.

14. During the conversation it was never conceded that there were no funds available in respect of the project, it was never stated that cessation of Works could serve to apply pressure on the department as is alleged or that the applicants were at all entitled to cease operations on the contract site,

15. It is respectfully contended that the meaning the applicants attempt to attach to the aforesaid conversation is wholly contrived and misstated.

16. Aside from the fact that I never instructed Hillary to cease the contract works, such an instruction would, in any event, fall outside the purview of my specific authority as General Manager: Operations of the respondent ..."

[50] On this version, which I must accept, and also on the version that the engineer warned the applicants about the unilateral cessation of Works even before 2 April, which I must also accept, I have to conclude, as I do, that the applicants have failed to prove, on these papers, that Hillary was instructed by Phupheli to suspend the Works on 2 April 2007.

[51] There is another issue which requires attention, namely whether this claim is subject to the procedures provided for in clauses 45 and 51 of the GCC or whether the mechanisms prescribed in clauses 60 and 61 are to be applied. It is convenient to quote prayers 2.1 to 2.4 of the notice of motion which relate to the first claim: "2.1 It is declared that this claim is not subject to the procedures provided for in clauses 45 and 51 of the GCC.

2.2 It is declared that the period between 2 April 2007 and 24 June 2007 does not qualify for the computation of penalties in terms of clause 46 of the GCC.

2.3 Alternatively to 2.2 it is declared that this claim is not subject to the provisions of clauses 60, 61(1) or 61(2) of the GCC, and is to be treated in accordance with clause 61(6) of the GCC.

2.4 Alternatively to prayers 2.2 and 2.3 above:

2.4.1 it is declared that the applicants and the respondent have by agreement dispensed with the ruling and decision phases provided for in clause 60 and 61(1) of the GCC in consequence whereof the matter is to proceed directly to mediation and, if applicable, arbitration in accordance with the provisions of clause 61(2) and (3) of the GCC.

2.4.2 It is declared that the appointment of Mr Nilen as mediator is valid for purposes of the treatment of this claim ..."

Prayer 2.5 deals with the protection in terms of section 8 of the Arbitration Act, which I shall consider at a later stage.

[52] It was conceded on behalf of the applicants that, in the event of a finding that the claim is subject to clauses 45 and 51, the relief sought in prayers 2.3 and 2.4 cannot succeed.

[53] Clause 45(2), quoted in full earlier, provides that:

"If circumstances of any kind whatsoever which may occur be such as fairly to entitle the Contractor to an extension of time for the completion of the Works or any portion thereof, the Engineer shall grant the Contractor, on a claim in accordance with Clause 51, such extension of time as is appropriate ..."

[54] Clause 45(3) provides a list of circumstances intended by clause 45(2) which includes:

"(c) any failure or delay on the part of the employer or his agents, employees or other contractors (not being employed by the Contractor) in the due performance of any obligations as are reasonably necessary to enable the Works to proceed ..."

[55] In terms of clause 51(l)(a):

"The Contractor shall, within 28 days after the circumstance, event, act or omission giving rise to such a claim as arisen or occurred, deliver to the Engineer a written claim, referring to this clause and setting out ... (the required particulars are listed)."

[56] Clause 51(4) provides:

"If, in respect of any claim to which this clause refers, the Contractor shall fail to comply with the provisions of Subclause (1), as read with Subclause (2), he shall have no further right to make the claim concerned."

[57] It is common cause that the applicants did not file a claim as intended by clauses 45 and 51, within the twenty eight day period.

[58] In my view it is clear, given the wide wording of clause 45(2) with the reference "circumstances of any kind whatsoever" that this clause applies to the present situation. I am fortified in this conclusion by the wording of clause 45(3)(c) which deals with "any failure or delay on the part of the employer or his agents, employees or other contractors ... in the due performance of any obligations as are reasonably necessary to enable the Works to proceed ..." This would, in my view, include an instruction from Phupheli, if it ever occurred which I have found it did not, which would have led to a delay in the continuance of the Works.

[59] As submitted by Mr Preis for the respondent, a finding that clauses 45 and 51, and the mechanisms therein provided, are applicable to cases of alleged unilateral instructions for a cessation of the Works, is fortified by reference to other provisions of the GCC, such as clauses 13 and 44.

Clause 13 imposes a duty on the employer to, from time to time as the Works proceed, give to the contractor possession of such further portions of the site as may be required to enable the contractor to proceed with the constructions of the Works with due dispatch in accordance with the program. If the contractor suffers any delay or additional cost from failure of the employer to give possession in accordance with the terms of this clause, the contractor shall be entitled to make a claim in accordance with clause 51.

Similarly, clause 44 provides that, if the contractor suffers delay or additional cost for failure or delay on the part of the employer, his agents, employees or other contractors in the due performance of any obligations which are necessary in order to enable the Works to proceed in accordance with the contract, the contractor shall be entitled to make a claim in accordance with clause 51.

[60] In the result, I have come to the conclusion that, if Phupheli had instructed the applicants to cease their operations, they should have employed the mechanisms provided for in clauses 45 and 51 in order to get relief or compensation. Their failure to do so, renders their claims, if any, time-barred as intended by the provisions of clause 51(4).

[61] It follows that the relief claimed in prayers 2.1, 2.2, 2.3 and 2.4 of the notice of motion cannot be granted. As to the relief claimed in prayer 2.3, where a declarator is sought to the effect that the dispute should be dealt with in terms of clause 61(6), which contemplates a situation not relating to a ruling, decision, order, instruction or certificate by the engineer, this also cannot be upheld in view of my earlier finding that clauses 45 and 51 apply to the present situation, always, of course, on the assumption that Phupheli gave the instruction for the operations to be suspended.

[62] What is left of the first claim, is the final alternative prayer for relief in terms of section 8 of the Arbitration Act, *supra*. Where all the claims contain such a final alternative prayer, I shall deal with the subject after having considered all the individual claims.

The second claim

[63] The claim relates to the accommodation of traffic that has to be diverted and directed through temporary lanes and detours during the execution of the Works, and amounts payable to the applicants in respect of these operations.

[64] As described in the heads of argument presented by counsel for the applicants, the case of the applicants is that this claim does not emanate from a dispute concerning the proper measurement of the quantities according to which payment is to be made but "that it sprung from the Engineer's manipulation of the amounts payable to the applicants (at the behest of the respondent) purportedly justified by a belated misinterpretation of the relevant provisions of the contract documents".

[65] The value of the claim comes to R1 252 952,80.

[66] The relief claimed in respect of the second claim is the following:

"3.1 It is declared that the applicants and the respondent have by agreement dispensed with the ruling and decision phases provided for in clause 60 and 61(1) of the GCC in consequence whereof the matter is to proceed directly to mediation and, if applicable, arbitration in accordance with the provisions of clause 61(2) and (3) of the GCC.

3.2 It is declared that the appointment of Mr Nilen as mediator is valid for purposes of the treatment of this claim."

3.3 This is again the final resort alternative claim for protection under section 8 of the Arbitration Act.

[83] As to prayers 4.1 and 4.2, the case of the applicants, that the parties by agreement dispensed with the "ruling and decision

phases" provided for in clauses 60 and 61 of the GCC, is the same as it is in respect of claim two. I have already dealt with the argument when considering claim two, and my finding in that regard need not be repeated for purposes of claim three.

[84] I turn to the relief sought in prayer 4.3 of the notice of motion.

[85] On a general reading of the papers, it appears to me as if the claim forming the subject of the third claim for declaratory relief, namely the claim involving a dispute between the parties regarding the measurement and calculation of earth works quantities has become time-barred.

[86] Although I must confess to finding the allegations and counter-allegations in the founding and answering affidavits somewhat

confusing, it appears to me that the stance adopted by the respondent amounts to the following: on 15 March 2007 the engineer wrote to the first applicant referring to a meeting held earlier the same day and illustrating, on a general reading of this letter, a dispute which had arisen between the parties with regard to the calculation of the mass earth works quantities. By way of illustration, it is convenient to quote a portion of this letter: "4. There is a discrepancy of volumes of undercut from two pages of

information supplied. We have used the initial page indicating undercut volumes.

5. The quantities for layer works used by you in calculating haul is different from the quantities you have claimed under 3400.
6. Kindly peruse the document regarding the logic in terms of source/destination of material as well as the overhaul on such. You

should indicate to us where you find differences with your quantities in terms of this.

7. We are of the opinion that your method of determining quantities differ from documents submitted, and especially the basis of your calculation of overhaul."

On 19 March 2007 the engineer wrote another letter to the first applicant under the heading "mass earth works" in which he appears to embark on a very detailed discussion relating to the calculation of these quantities. In the end, in paragraph 10 of the letter, he says the following:

"We thus consider the mass earth works agreed as per appendix A1."

According to the respondent, this amounts to a ruling in the form of a determination as intended by the provisions of clause 47 of the GCC. This, according to the engineer, amounted to a clear indication of a disagreement between the parties. If the applicants wanted to pursue the matter further, they would have the right, in terms of clause 60(1) of the GCC, by written notice to the engineer to require him to consider this disagreement provided that the written notice shall be given within twenty days after the cause of disagreement had arisen.

On 21 June 2007, the applicants, referring, inter alia, to the letter of 15 March 2007, purported to give this notice as intended by clause 60(1) requesting the engineer to consider the disagreement.

The respondent deals with this issue as follows in the answering affidavit:

"211.2 It is reiterated that the ruling/cause of disagreement concerning this aspect existed as early as 19 March 2007. As was dealt with in the letter dated 14 December 2007 (annexure C3FA83) notice of disagreement, as contemplated in clause 60(1) under the COLTO GCC should have been given within 21 days from this date.

211.3 As the Contractor disregarded the applicable provisions of the GCC in this regard, the applicants' claim cannot advance beyond clause 60(1).

211.4 It is contended that, seeing as any request for a ruling in terms of clause 60(1) was made after expiration of the prescribed time periods in terms of the GCC, any reference to clause 60(2) is ill-conceived and irrelevant."

[87] It was argued before me that the determination to be found in the lengthy letter of 19 March 2007 is not a "ruling". The respondent insists that it is. It was also argued on behalf of the applicants that "the matter had only hardened into a disagreement by the very notice given by the applicants by way of their letter of 21 June 2007". This is an argument similar to the one raised with regard to the second claim, *supra*. Again, the respondent insists that the dispute had already "hardened into a disagreement" well before 21 June 2007 and, at least, by 19 March 2007. I cannot see how these disputes can be resolved on affidavit. I have to accept the version presented by the respondent. In any event, as indicated, it seems to me that a disagreement or "a difference of opinion" as argued by Mr Preis with reference to the Concise Oxford Dictionary, is clearly evident from the letters of 15 March and 19 March 2007.

[88] It follows that I have to find, as I do, that the applicants had failed to give the engineer written notice to consider the

disagreement within twenty one days after

"the cause of disagreement had arisen" as intended by the peremptory requirements of clause 60(1) of the GCC. This, as alleged by the respondent in the answering affidavit, supra, brought an end to the process so that it is no longer open to the applicants to request a ruling within fourteen days in terms of the provisions of clause 60(2) of the GCC. The result of all this is that the relief sought in prayer 4.3 of the notice of motion cannot be granted.

[89] I add that the applicants appeared to make an attempt at remedying the situation by issuing a so-called "blanket Dispute Notice all in terms of clause 60 and 61" as late as 3 December 2007. This issue was already dealt with when I considered the relief sought under the second claim, as was the response thereto given at the time, on 17 December 2007. by the engineer. With regard to the third claim, for "additional quantities" the engineer gave the same answer in the same letter of 17 December 2007 along the following lines:

"Concerning these disputed items, we record as follows: • On 19 March 2007 we issued our ruling in respect of your claims for such additional quantities.

On 21 June 2007 you gave written notice of disagreement in respect of this ruling.

However, you failed to give such written notice within the 21 day period stated in clause 60(1) of the General Conditions. Therefore, your right to raise a disagreement and/or a dispute in respect of this ruling became and remains time-barred. Your attempt to try to circumvent the consequences of such failure, by issuing a 'blanket Dispute Notice' is disingenuous and invalid."

This argument was also repeated by the respondent in the answering affidavit.

[90] In the result, the relief sought in prayers 4.1, 4.2 and 4.3 of the notice of motion falls to be dismissed.

[91] What is left, is the further alternative prayer (prayer 4.4 of the notice of motion) for relief in terms of section 8 of the Arbitration Act, which I will deal with shortly.

The fourth claim

[92] This claim relates to alleged negative adjustments to the applicants' quantities in respect of a wide ranging series of items, apart from those dealt with in the second and third claims, allegedly payable to the applicants in accordance with the rates specified in the Schedule of Quantities, allegedly first allowed but then refused by the engineer in the course of his approval of the payment certificates.

The total value of this claim is said to amount to R1 056 252,73.

[93] The relief prayed for is to be found in prayer 5 of the notice of motion and it is the following:

"5.1 It is declared that

5.1.1 the applicants gave due and timeous notice of disagreement as intended in Clause 60(1) of the GCC on 3 December 2007;

5.1.2 the Engineer is still to issue a ruling on this claim in terms of Clause 60(2) of the GCC."

Point 5.2 is the usual alternative prayer for protection in terms of section 8 of the Arbitration Act.

[95] The main thrust of the applicants' case appears to be the following: on 28 November 2007 the engineer referred to the disputed quantities as "our final measurement on all items". According to the applicants, this was the first manifestation of a disagreement as intended by the provisions of clause 60(1) of the GCC which triggered the by now well-known "blanket Dispute Notice" dated 3 December 2007, and therefore well within the peremptory twenty one day notice period.

The respondent, in the answering affidavit, denies that the letter of 28 November 2007 refers to "negotiations on the part of the Contractor for purposes of settlement of any disputes". On a general reading of this letter, I see no indication that it is couched in the form of a settlement offer.

It is argued on behalf of the respondent that the applicants had been aware, as early as 27 July 2007, of the dispute in respect of quantities. It is pointed out that this is confirmed in the minutes of a site meeting of the same date. This is annexure "C2FA60".

A submission in this regard is made in the answering affidavit.

[96] In the answering affidavit, the respondent pleads that in terms of the GCC, it is not incumbent upon the engineer to negotiate, resolve or settle any possible disputes which may exist in respect of payment issues. Under the GCC, the engineer is required to make a ruling. Subsequent to such a ruling it is incumbent upon the contractor to exercise any remedies available in terms of the GCC. The respondent refers to other correspondence from which it is clear, according to the respondent that no negotiations were contemplated. In the answering affidavit the respondent puts it as follows:

"As has been extensively been dealt with above, the applicants had many remedies available to it other than simply capitulating and accepting the engineer's measurements and quantities. The applicants elected not to avail themselves of these alternative remedies."

The respondent points out that throughout the course of the administration of the contract various disputes arose. Some of these

were properly noted and administered in terms of the dispute resolution mechanisms contained in the GCC.

Some of these disputes, as I also pointed out earlier, currently form the subject-matter of mediation or arbitration and fall outside the purview of this application. The respondent points out, correctly in my view, that the applicants appear to have selectively chosen not to abide by the dispute resolution mechanisms in certain instances and now attempt so the respondent alleges, in bringing this application, to lay this default squarely at the feet of the respondent and the engineer.

[97] It was argued before me on behalf of the respondent that, even on the applicants' own version, there was never any express waiver of the respondent's contractual rights during the course of the execution of the contract. What appears to be the applicants' case, is that they had unilaterally interpreted the engineer's alleged conduct to mean that they did not have to adhere to the relevant time clauses contained in the GCC. It was argued on behalf of the respondent, correctly in my view, that there exists no legal basis upon which the applicant, on the facts as preferred by the applicants, can attribute its unilateral interpretation in respect of the engineer's alleged conduct to the engineer or can obtain recourse for its non-compliance with the contract at the expense of the respondent.

[98] It was also contended on behalf of the respondent, as a general proposition, that a so-called "blanket Dispute Notice" is inconsistent with the dispute resolution mechanisms contained in the GCC. In any event, the applicants failed to issue a notice of disagreement as a compulsory condition precedent to the issuing of a

Dispute Notice. Compliance with clause 60 (the issuing of a written notice of disagreement) is a jurisdictional requirement for the invocation of clause 61. In my view, this argument is correct. The requirement for the contractor to give a written notice to the engineer to require him to consider the disagreement within twenty one days after the cause of disagreement had arisen is couched in mandatory terms in clause 60(1).

[99] Where the issue is to be decided on affidavit, I am not justified in rejecting the version of the respondent. According to this, the applicants had been aware, as early as 27 July 2007, of the dispute and there was no attempt on the part of the engineer to embark upon settlement negotiations or to lull the applicants into a false sense of security. The applicants failed to exercise their remedies in terms of the GCC, as they did in respect of other matters now pending on arbitration. I see nothing so "far-fetched or clearly untenable" in the version presented by the respondent to justify a rejection thereof in the spirit of *Plascon-Evans*. From the foregoing it follows, that the claim is time-barred, and that the relief prayed for in prayer 5.1.1 falls to be dismissed. That being the case, the relief prayed for in 5.1.2 cannot be granted either.

[100] What is left is a consideration of the prayer for relief under section 8 of the Arbitration Act, which I will shortly deal with.

The fifth claim

[101] This claim relates to a dispute regarding the date upon which the applicants became entitled to a so-called certificate of practical completion. The applicants contend that they were entitled to a certificate of practical completion being issued on 15 August 2007 and the engineer only issued a certificate on 26 October 2007. The value of the claim amounts to approximately R139 200.00.

[102] The relief prayed for in the notice of motion in respect of this claim is the following:

"6.1 It is declared that the applicants have duly and timeously:

6.1.1 given notice of disagreement in terms of Clause 60(1) of the GCC on 29 October 2007;

6.1.2 delivered a Dispute Notice in terms of Clause 61 (1)(a) on 4 March 2008."

This prayer is followed by the usual alternative prayer for protection under section 8 of the Arbitration Act.

[104] I add that, with regard to the fifth claim, there was a further prayer in the notice of motion, prayer 7, dealing with the provisions of the Conventional Penalties Act 15 of 1962. Both counsel, at the end of the hearing before me, urged me to postpone the relief claimed in prayer 7 sine die irrespective of the outcome of this application. I will do so in due course.

[105] I turn to the combined prayers for relief under section 8 of the Arbitration Act.

[106] The text of section 8 has already been quoted.

[107] In the proceedings before me, I was referred to the case of *Administrateur, Kaap v ASIA Konstruksie (Edms) Bpk* 1989 4 SA 458 (CPD). In this judgment, the application of section 8 was carefully and extensively considered by the learned judge, *TEBBUTT, J.* The English law on the subject was also carefully scrutinised and taken into account. The learned judge pointed out, at 467H-I, that the provisions of section 27 of the English "Arbitration Act of 1950" were adopted in identical terms into section 8 of the South African Arbitration Act ("section 8").

[108] It appears from the judgment that the approach of the English courts developed over the years from a stricter one to a more generous one. In *Liherian Shipping Corporation v A King & Sons Ltd* [1967] 1 All ER 934 (CA) Lord DENNING says the following at 93 8B:

"It does appear in the past the Courts have been inclined to emphasise the word 'undue', and to say that if a man does not read the contract and is a day or two late, it is a 'hardship'; but it is not an 'undue hardship', because it is his own fault. I cannot accept this narrow interpretation of the statute. These time-limit clauses used to operate most unjustly. Claimants used to find their claims barred when, by some oversight, they were only a day or two late. In order to avoid that injustice, the Legislature intervened so as to enable the Courts to extend the time whenever 'in the circumstances of the case undue hardship would otherwise be caused'. 'Undue' there simply means excessive. It means greater hardship than the circumstances warrant. Even though a claimant has been at fault himself, it is an undue hardship on him if the consequences are out of

proportion to his fault."

See, in general, the discussion on the subject by the learned judge at 467I-469J.

[109] It appears from the judgment, at 469E-J, that the approach in *Liberian Shipping*, also known as "the Pegasus case" was generally followed by the English courts and in *The Jocelyne* [1977] 2 LI LR 121 at 129 BRANDON, J proposed the following guidelines to be considered when confronted with an application in terms of section 8 (the English section 27):

"The guidelines laid down in the majority judgments in the Pegasus case can, in my view, be summarised as follows: (1) the words 'undue hardship' in section 27 should not be construed too narrowly;

(2) undue hardship means excessive hardship and, where the hardship is due to the fault of the claimant, it means hardship the consequences

of which are put out of proportion to such a fault;

(3) in deciding whether to extend time or not, the Court should look at all the relevant circumstances of the particular case;

(4) in particular, the following matters should be considered:

(a) the length of the delay;

(b) the amount at stake;

(c) whether the delay was due to the fault of the claimant or to circumstances outside his control;

(d) if it was due to the fault of the claimant, the degree of such fault;

(e) whether the claimant was misled by the other party;

(f) whether the other party has been prejudiced by the delay, and, if so, the degree of such prejudice."

[110] These guidelines were endorsed by TEBBUTT, J at 469I-J.

[III] I add that the learned judge also concluded, in clear and unequivocal terms, that the officials of the applicant were at fault and to blame for the delay in timeously

taking the necessary steps in terms of that particular contract. Nevertheless, the learned judge, referring to the *Jocelyne* case, then went on to say, at 473A-B:

"Al is die versuim aan die skuld van die applikant te wyte moet die Hof nogtans oorweeg, om vas te stel of daar oormatige ontbering was, of die gevolge van daardie skuld vir die applikant sodanig is dat dit buite verhouding staan tot sy skuld."

In the end, at 474B-E, the learned judge answered this question in the affirmative and granted the application for relief in terms of section 8.

[112] There was some debate before me, although not pursued with much force by either side, involving the phrase "unless some step to commence arbitration proceedings is taken within a time fixed by the agreement ..." found in the first portion of section 8.

The debate, if I understood it correctly, was whether or not the applicants had taken such a step (as intended by section 8) to bring the dispute within the ambit of section 8 so as to render it applicable to the present case.

On behalf of the applicants T was referred to *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 1 SA 571 (AD). This case did not involve section 8. The appellant had sought an order declaring that a claim for damages by the respondent

municipality against the appellant contractor arising out of the alleged breach by the appellant of an engineering contract concluded

between the two parties had become prescribed in terms of the Prescription Act 68 of 1969. The respondent, in opposing the grant of the order, had alleged that the completion of the running of prescription had been delayed in terms of section 13(l)(f) of the Act by the submission of the dispute between the parties to the engineer for his decision in terms of clause 69 of the engineering contract. Clause 69 prescribed a procedure for the subjection of disputes to arbitration which required the dispute to be first submitted to the engineer for decision. It was held that the procedure laid down in clause 69 taken as a whole had to be considered one of arbitration and that the dispute in that case had been subjected to arbitration

when it was submitted to the engineer. This stayed the running of prescription until the arbitration proceedings came to an end

- see the judgment at 582E-F.

On behalf of the respondent I was referred to *Wilmington (Pty) Ltd v Short & McDonald (Pty) Ltd* 1966 4 SA 33 (D&CLD) where it was held that section 8 deals with a step which must be taken in terms of an agreement to commence arbitration proceedings after a dispute has arisen between the parties to the agreement and not a step which must be taken before it can be said that a dispute has arisen which in terms of the agreement may form the subject-matter of arbitration proceedings. It was held that section 8 accordingly does not entitle the court to grant an extension of the time fixed by a clause in a contract within which the employer must notify the contractor of any complaints or objections he may have to the final account delivered by the contractor. The following was said at 35A-C:

"Clause 22(h) of the conditions of contract fixes the time within which the employer must advise the Contractor of any complaints or objections he may have to the final statement of account delivered by the Contractor. It does not fix the time within which some step must be taken to commence arbitration proceedings in the event of the employer advising the Contractor of any

such complaints or objections. The giving of notice by the employer under that clause is not a step which, in the technical sense, is taken to commence arbitration proceedings. It does not advance the proceedings a stage nearer completion. It is merely an act done with the object of qualifying the employer to put forward his defence to the Contractor's claim in the event of arbitration proceedings being instituted."

It was not clear to me, on considering the heads of argument presented on behalf of the respondent, how the circumstances in the present case can be said to bear any resemblance to those in *Wilmington*. In any event, it appears that *Wilmington* is not in harmony with *Murray & Roberts* which appears to prescribe, although it did not deal with section 8, that the arbitration process is set in motion as soon as the issue is submitted to the engineer.

[113] In my view, the phrase "unless some step to commence arbitration proceedings is taken ..." cannot be read in isolation. One must at least consider the whole of the first phrase of section 8 which reads as follows:

"Where an arbitration agreement to refer future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitration proceedings is taken within a time fixed by the agreement..."

In my view, clauses 45, 51, 60 and 61 of the GCC, prescribing dispute resolution mechanisms leading to mediation and arbitration, if necessary, are clauses such as those intended by section 8 and defined in the first portion thereof: clause 51(1)(a) dictates that the contractor shall within twenty eight days after the event (giving rise to a claim for an extension of time) deliver the claim to the engineer. If the contractor fails to do so, clause 51(4) prescribes that he shall have no further right to make the claim concerned. If the contractor complied with these requirements the dispute gets channeled towards mediation and perhaps arbitration in terms of clauses 60 and 61. I have held that, as far as the first claim is concerned, the contractor fell foul of the mandatory requirements of clause 51(1) read with 51(4). These are clearly clauses as intended by section 8. The same applies to clauses 60 and 61 where I have found the applicants to be in default of delivering the written notice within twenty one days as intended by the provisions of clause 60(1).

[114] Against this background, I consider the debate which was presented to me with reference to *Murray & Roberts* and *Wilmington*, *supra*, not to be directly relevant to the circumstances of this particular case.

[115] I turn briefly to the guidelines to be considered when deciding whether or not section 8 relief ought to be granted as prescribed in the *Jocelyne* and adopted by *TEBBUTT, J* in *Administrates, Kaap*.

[116] Each case must be treated on its own merits.

[117] On a wide and more generous interpretation, I consider that undue hardship would be caused to the applicants if the relief is not granted in terms of section 8. The amount involved is a substantial one. According to my calculations it exceeds R5 million. There would, presumably, also be an interest factor to be taken into account. On a general reading of the papers, I am of the view that, if arbitration proceedings were to take place, the applicants have a reasonable prospect of success.

The length of the delay, in respect of all the claims, was not inordinate or excessive. In most instances the disagreement occurred earlier in 2007 and notices of disagreement were delivered, generally speaking, in June and/or in December of the same year. This very complex and lengthy application was launched in September 2008.

As to the degree of fault on the part of the applicants, it has to be said that there is some indication that the applicants may have been lulled into a false sense of security in believing, albeit unreasonably so, that they did not have to strictly comply with the conditions of the GCC to avoid being time-barred in their prospective claims. One of the factors which played a role in this regard was the proposal by the engineer to appoint an independent third party or facilitator.

As to the question of prejudice, it seems to me that the prejudice that will be suffered by the applicants if the relief is not granted, will exceed any prejudice to be suffered by the respondent. It is common cause that the road has been built and has been in use for some time. The respondent, therefore, is enjoying the benefit of the completed Works. Moreover, I was told, as already mentioned, that there are still other arbitrations pending flowing from the same project. On the other hand, the loss to be suffered by the applicants, if the relief is not granted will be substantial in monetary terms.

[118] In all the circumstances, I have come to the conclusion that a proper case has been made out for section 8 relief. As far as the first claim is concerned, it can perhaps be reasoned that, where I have found that it has not been established that Phuphcli ordered a cessation of the works, there was no basis for the applicants to apply in terms of clause 45 read with clause 51 of the GCC for an extension of time, so that claim 1 should be dismissed altogether. Nevertheless, in the general scheme of things, I have come to the conclusion that justice will be better served if all the claims are treated equally for purposes of the section 8 relief.

Costs

1119] TEBBUTT, J, although he granted the relief in *Administrates, Kaap*, had no hesitation in ordering the successful applicant to pay the costs (see the judgment at 474E-F).

[120] In the present case, a great deal of the argument during the five day hearing before me was absorbed by the submissions relating to the main point, in respect of which the applicants were unsuccessful. Large portions of the heads of argument were also devoted to the main point. Moreover, the five claims were also dismissed, barring the alternative relief sought in terms of section 8. The section 8 arguments before me occupied a minute portion of the total time devoted to this hearing.

Moreover, an application for section 8 relief is in the form of a request for an indulgence, as was also pointed out by TEBBUTT, J. Generally, an applicant is ordered to pay the costs under such circumstances. I am also of the view that the opposition presented by the respondent was not unreasonable, particularly with regard to the main point and the main arguments involving the five claims where the respondent was successful.

[121] For all these reasons. I am of the view that the applicants ought to be ordered to pay the costs of these proceedings.

The order

[122] The following order is made:

1. In respect of the first, second, third, fourth and fifth claims it is ordered in terms of section 8 of the Arbitration Act 25 of 1965 as amended, that the date available to the applicants to give notice of disagreement or to apply for an extension of time, whichever is applicable, in terms of sections 45, 51 and/or 60 of the GCC alternatively to deliver a Dispute Notice as intended in clause 61(1)(a) thereof is hereby extended to a date being ten business days calculated from the date of this order, and it is declared that upon such notice having been given, the further proceedings and requirements of clauses 60 and 61 of the GCC shall continue to apply on the basis that the said notice of disagreement and/or application for extension of time shall be deemed to have been given in due course and in compliance with all requirements of the Contract.
2. The relief claimed in prayer 7 of the notice of motion is postponed sine die.
3. The applicants, jointly and severally, are ordered to pay the costs of the respondent, which will include the cost of two counsel.

W R C PRINSLOO

JUDGE OF THE NORTH GAUTENG HIGH COURT

44632-2008

HEARD ON: 16 MAY 2011 TO 23 MAY 2011

FOR THE APPLICANTS: R J RAATH SC ASSISTED BY G P VAN RHYN

INSTRUCTED BY: BOTHA BRESLER ATTORNEYS

FOR THE RESPONDENT: D A PREIS SC ASSISTED BY S GOUWS

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Prepared on 11 October 2026 · Esheria