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ATTORNEYS

CONSTRUCTION LAW BULLETIN

ENGINEERS BEWARE

INTRODUCTION

The Supreme Court of Appeal (SCA)[1] has provided helpful guidance, albeit costly for the engineer concerned, relating to what will suffice as a notice by a Contractor of unforeseen adverse conditions.

THE FACTS

In 1996 Enviroserve decided to expand its waste disposal site in an area known as Aloes in Port Elizabeth by adding a second waste disposal pit. It engaged a consulting engineering company by the name of Hawkins & Osborn (South) (Pty) Ltd ("the Engineer") to design the pit and to administer and supervise the construction of the works.

The schedule of quantities issued with the tender documents indicated 23 826m³ of intermediate material and 47 652m³ of hard rock. These were provisional quantities.

The successful tenderer, the Blasting and Excavation/Grassmaster Joint Venture, provided a single rate for excavation both in the intermediate material and hard rock. This is commonly known as a "through rate".

The conditions of contract were the GCC 1990 conditions.

Clause 50 of the GCC provides as follows:

> *(1) If during the execution of the Works the Contractor shall encounter adverse physical conditions … which conditions … could not have been reasonably foreseen by an experienced contractor at the time of submitting his tender, and the Contractor is of the opinion that additional work will be necessary … he shall give notice to the Engineer in writing as soon as*

[1] Hawkins & Osborn (South) (Pty) Ltd v Enviroserve Waste Management [2009] 2 All SA 319 SCA.

he becomes aware of the conditions aforesaid stating:

(a) the nature and extent of the physical conditions …; and

(b) the additional work which will be necessary by reason thereof.

(2) ….

(3) ….

(4) If the Contractor has duly given the notice referred to … he shall be entitled, in respect of any delay or additional Cost, to make a claim in accordance with clause 51. ….

As a result of difficulties experienced in constructing the pit relating to the steepness of the sides, Enviroserve authorised the Engineer to issue a variation order in July 1997 to change the gradient of the side slopes. This design change resulted in the pit losing 35 000m³ of volume. To counter this, the variation order instructed the Contractor to take its excavation down a further 3m in depth beyond the original design depth of 30m.

At the beginning of September the engineer noticed a slowdown in the progress of the excavation and wrote a letter to the Contractor querying this.

The Contractor responded by way of a letter dated 8 September 1997 dealing with the state of progress of various aspects of the works, which letter closed with the following paragraph:

> *In order to catch up with the load and haul we increased our dozing capacity by adding a D85 dozer to our team as from the 2 September and plan to start drilling and blasting a large portion of the estimated 103000m³ of hard shale as from tomorrow.*

The Contractor followed up with a further two letters in September pointing out that the extra hard rock was not foreseen and noting its intention to claim for the additional cost and delays consequent on encountering hard rock below 30m.

Subsequently the Contractor submitted a claim for approximately R1,5m relating to extra cost and expense incurred in hard rock excavation below the original design level of 30m.

THE ARBITRATION

The Contractor's claim was rejected by the Engineer, on the grounds that the Contractor had not given a proper notice as required in accordance with clause 50 of the GCC, and the dispute was referred to arbitration.

The arbitrator had to decide whether the Contractor's letter of 8 September 1997 constituted a proper notice in compliance with clause 50 of the GCC. He found that it did and awarded the Contractor its claim.

THE COURT CASE

Enviroserve blamed the Engineer for this unhappy outcome and sued the Engineer for damages for breach of contract.

Enviroserve's complaint was that the Engineer should have construed the Contractor's letter of 8 September 1997 as a notice in terms of clause 50 and had he done so other measures could have been considered to avoid the additional expense which Enviroserve had been put to in respect of the Contractor's successful claim.

It was accepted by all concerned that the purpose of clause 50 is principally meant for the benefit and protection of the employer with the notice being designed to afford the employer an opportunity to consider other, less costly, alternatives to deal with adverse physical conditions encountered by a Contractor.

The dispute between Enviroserve and the Engineer had a rather tortuous journey to the SCA. The case was first dealt with by a single judge in the High Court in Grahamstown. The judge found that the Contractor's 8 September 1997 letter was not a proper notice and dismissed the claim by Enviroserve. Enviroserve was given leave to appeal to the full bench[2] of the Eastern Cape Court sitting in Grahamstown. The Full Court held that the letter did constitute a proper notice and held that the Engineer had breached its contract with

[2] The Provincial Appeal Court usually comprising three judges.

Enviroserve in not treating it as such and advising Enviroserve on how to avoid the additional costs.

The Full Court held that a notice in terms of clause 50 simply had to convey to the engineer the fact of the adverse physical conditions without any need to be formalistic or legalistic. It held that the information conveyed by the Contractor in the letter was sufficient to convey:

- the nature and extent of the physical conditions concerned; and
- the additional work which would be necessary.

THE APPEAL

The Engineer was naturally dissatisfied with the Full Court's decision and obtained leave to appeal that decision to the SCA.

The SCA agreed with the Full Court. It also stated that a notice under clause 50 does not have to make any reference to the physical conditions having been unforeseen. It also found that a delay in giving the notice does not render the notice ineffective.

The SCA said that it would have been obvious to the engineer that:

- the hard rock below 30m could not have been foreseen because the excavation below 30m had only been added during the course of the contract; and
- excavating hard rock below 30m would cause the Contractor to be delayed and to incur extra cost.

The fact that the original tender only allowed for 47 652m³ of hard rock and the extra hard rock below 30m amounted to 103 000m³ spoke for itself as far as the impact on time and cost for the Contractor was concerned.

The SCA held that the Engineer ought to have construed and treated the Contractor's letter of 8 September 1997 as a proper notice and should have acted accordingly. Its failure to do so was a breach of contract.

SUMMARY

An engineer who fails to deal with a notice by a Contractor under clause 50 and to explore ways and means to avoid the additional cost which will be caused to his client will have breached his contractual obligations to his client and may thereby render himself liable in damages to his client.

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