12/86

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

WESTINGHOUSE BRAKE AND EQUIPMENT (PROPRIETARY) LIMITED ----- Appellant

and

BILGER ENGINEERING (PROPRIETARY) LIMITED ---------- Respondent

Coram: RABIE CJ, JANSEN, CORBETT, TRENGOVE et HOEXTER, JJA.

Date of hearing: 21 November 1985.

Date of judgment: 6 March 1986

J U D G M E N T

CORBETT JA:

In this matter Westinghouse Brake and Equipment (Pty) Ltd, whom I shall call "the appellant", sued res-

/ pondent,.....

pondent, Bilger Engineering (Pty) Ltd, in the Transvaal Provincial Division for damages for breach of contract. The quantum of damages was agreed between the parties in the sum of R15 000. At the conclusion of the trial the trial Judge (MYBURGH AJ) held that appellant had failed to establish the contract sued on and ordered absolution from the instance with costs. Application was made for leave to appeal. MYBURGH AJ granted the application and directed that the appeal should be heard by the Full Court of the Transvaal Provincial Division.

The decision of the trial Court was based on a finding that the parties failed ever to reach consensus in regard to the contract they were negotiating. On appeal, the Full Court (per VAN DIJKHORST J, LE GRANGE J and BLISS AJ concurring) disagreed with this finding but held for another reason that appellant had not proved

/ that.....

that a contract came into existence between the parties. This reason was that, in the view of the Full Court, it was the common intention of the parties that unless the full contract was in writing there was to be no contract; and that on the facts relied upon by the appellant the full contract was not in writing.

Thereafter appellant petitioned the Chief Justice for leave to appeal to this Court. Acting in terms of sec 21(3) of the Supreme Court Act 59 of 1959, as amended in particular by Act 105 of 1982, three Judges of this Division made the following order on the application:

> "In this matter it is ordered that the application for leave to appeal be referred to the Appellate Division for argument in terms of s 21(3)(c)(ii) of the Supreme Court Act 59 of 1959, as amended. Counsel appearing for the parties at the hearing before the Appellate Division should be prepared to pre-

/ sent.....

sent argument in respect of the following matters:

(a) the merits of the application and in particular the following question: whether, assuming that the evidence before the Trial Judge established that the parties had concluded a contract on the basis that the 'escalation clause' contained in clause 3 of the 'General Conditions of Tender or of Sale' appearing on the reverse side of the applicant's quotation dated 29 June 1981 (see pp 75-6 of the record) formed part of the contract, such escalation clause did not result in the contract price not being in a fixed or ascertainable sum of money; and whether in the circumstances the agreement of the parties resulted in a valid and enforceable contract of sale;

(b) whether in granting the 'special leave' required in terms of s 20(4)(a) of the Supreme Court Act 59 of 1959, this Court should consider only whether reasonable prospects of success exist or whether, in addition, other criteria should be considered; and

(c) the merits of the appeal, in the event of leave being granted."

At the hearing before us both the application for leave to appeal and the merits of the appeal were

/ argued.....

argued. The merits are of course relevant to the application for leave, but the matter proceeded on the basis that if the Court should decide to grant leave it would immediately proceed to deal with the appeal itself. Judgment was reserved on both the application for leave to appeal and the appeal.

I shall deal first with the question raised in par. (b) of the above-quoted order.

The Appeals Amendment Act 105 of 1982 came into operation on 1 April 1983. Judgment in this matter was delivered by MYBURGH AJ on 27 May 1983 and leave to appeal to the Full Court was granted on 1 August 1983. Thereafter the appeal was duly noted and the appeal was heard by the Full Court in February 1984. Having regard to sec 26 of Act 105 of 1982, it is clear that the appellate procedure in this matter is governed by secs 20 and 21 of the Supreme Court Act, as amended by Act 105 of 1982.

/ Sec 7.....

Sec 7 of Act 105 of 1982 introduced into Act 59 of 1959 a completely reformulated sec 20; and sec 8 of Act 105 of 1982 substantially amended sec 21. A comparison of sec 20, as it was immediately prior to Act 105 of 1982 coming into effect ("the old sec 20"), with the new sec 20, as substituted by Act 105 of 1982 ("the new sec 20"), read together with the amendments to sec 21, reveals the following main innovations. (And in this connection I ignore for present purposes the provisions relating to appeals from the South-West Africa Division.)

Under the old sec 20, read together with sec 21 (prior to its amendment in 1982), a litigant in civil proceedings originating in a provincial or local division of the Supreme Court had in general (ie subject to the exceptions to be mentioned) an automatic right of appeal against a judgment or order of that court. In the case of a judgment or order given or made by a single judge of

/ any.....

any division on application by way of motion or petition or on summons for provisional sentence or in a trial case in which the defendant was in default or as to costs only which by law were left to the discretion of the court, the appeal lay to the full court of the division concerned or, in the case of a local division, to the provincial division exercising concurrent jurisdiction (sec 20 (1)(a)). In all other cases the appeal lay to the Appellate Division (sec 20(1)(b)). In the former classes of case, however, the appeal could come directly to the Appellate Division, without any intermediate appeal to the provincial division, where the parties lodged with the registrar their consent thereto in writing (sec 20(3)). The exceptional instances where there was no automatic right of appeal and where leave to appeal was required (to be given by the court which gave the judgment or made the order) were judgments or orders given or made

/ by.....

by consent, judgments or orders as to costs only which were left by law to the discretion of the court and interlocutory orders (sec 20(2)(b)). In addition, leave to appeal was required where the appeal was to the Appellate Division against a decision of any division "on appeal to it" (sec 21(2)(a)). The words quoted would include an appeal to the provincial division from the decision of an inferior court and also an appeal to the full court from the decision of a single judge in the matters (listed above) in respect of which such an appeal lay. The leave required was that of the court against whose decision the appeal was to be made; or, where such court had refused leave, the leave of the Appellate Division (sec 20(2)(a)).

The new sec 20, read together with the amended sec 21, has introduced an entirely new dispensation regarding appeals from a judgment or order of a provincial or local division in civil proceedings. The first main

/ innovation.....

innovation is that henceforth leave to appeal is required in all cases. And the second main innovation is that in the case of all types of judgment or order given by a court constituted before a single judge the court granting leave to appeal —

> "..... shall, if it is satisfied that the questions of law and of fact and the other considerations involved in the appeal are of such a nature that the appeal does not require the attention of the appellate division, direct that the appeal be heard by a full court." (Sec 20(2)(a), as amended.)

Otherwise, ie where the court is constituted before two or more judges or where no such direction is given, the appeal lies to the Appellate Division. A direction so given by the court of a provincial or local division may be set aside by the Appellate Division on application made to it by any interested party (sec 20(2)(b)).

/ Sec 20(4),.....

Sec 20(4), containing the new provisions in regard to the granting of leave to appeal, reads as follows:

> "4) No appeal shall lie against a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of that court given on appeal to it except —
>
> (a) in the case of a judgment or order given in any civil proceedings by the full court of such a division on appeal to it in terms of subsection (3), with the special leave of the appellate division;
>
> (b) in any other case, with the leave of the court against whose judgment or order the appeal is to be made or, where such leave has been refused, with the leave of the appellate division."

Sub-sec (3) referred to herein, deals with appeals heard by a full court in terms of a direction given in terms of sec 20(2)(a) and not set aside under sec 20(2)(b). For convenience I shall refer to this as "a full court appeal".

/ Sec 20(4).....

Sec 20(4) thus draws a clear distinction between an appeal against a judgment or order given by a provincial or local division in a full court appeal, which can proceed only with the "special leave" of the Appellate Division (the full court itself has no power to grant such leave, it is to be noted), and an appeal against a judgment or order given by the provincial or local division in any other case, including those given in the exercise of the court's original jurisdiction and those given on appeal to it (other than full court appeals), which can proceed either with the "leave" of the court against whose judgment or order the appeal is to be made or, where such leave has been refused, with the "leave" of the Appellate Division. Here the contrast between the "special leave" required under sec 20(4)(a) and the "leave" required under sec 20(4)(b) is an important textual consideration.

/ In.....

In applications for leave to appeal properly brought before the appropriate court in terms of the old sec 20, read with sec 21 as it then was, the only relevant criteria were whether the applicant had reasonable prospects of success on appeal and whether or not the case was of substantial importance to the applicant or to both him and the respondent (Odendaal v Loggerenberg en Andere NNO (2) 1961 (1) SA 724 (O) at p 727 C; Attorney-General, Transvaal v Nokwe and Others 1962 (3) SA 803 (T), at p 807 A). This was so irrespective of whether the appeal lay to the full court or to the Appellate Division.

Whether in terms of the new sec 20, particularly having regard to the provisions of sub-section 6(a) thereof, the requirement of substantial importance still obtains need not be decided in this case. Clearly this case is of substantial importance to the parties and, therefore, nothing turns on whether this is still a requirement or not. I shall accordingly not make any further reference thereto. What was argued, however, by counsel for both parties was

/ that.....

that in terms of the new sec 20 all that an applicant for special leave had to show was a reasonable prospect of success on appeal and that there were no additional criteria. I proceed to consider this argument.

The first point to note is one already stressed, viz. the distinction drawn in the new sec 20(4) between, on the one hand, an application for leave to appeal against the decision of a full court given in a full court appeal to it, wherein the "special leave" of the Appellate Division (and only the Appellate Division) is required, and, on the other hand, an application for leave to appeal against the decision of a provincial or local division in all other cases, wherein the "leave" of the court concerned, or in the event of refusal, that of the Appellate Division suffices. I have no doubt that the terms "special leave" and "leave" were chosen with deliberation by the lawgiver and that they were intended to denote different concepts. It may be accepted that the normal criterion of reasonable prospects of success

/ applies.....

applies to both the "special leave" of sec 20(4)(a) and the "leave" of sec 20(4)(a) and the "leave" of sec 20 4(b) (and in this connection I agree with ELOFF J, when he held, in the case of Van Heerden v Cronwright and Others 1985 (2) SA 342 (T), that the criterion of appealability adopted in Magnum National Life Assurance Co Ltd v South African Bank of Athens Ltd 1985 (4) SA 365 (W) was clearly wrong). In my view, however, the word "special" in the former sub-section denotes that some additional factor or criterion was to play a part in the granting of special leave. The contrary view would give no content to the word "special" and would thus run counter to the general rule in the construction of statutes —

> "..... that, if possible, a statutory provision must be construed in such a way that effect is given to every word or phrase in it.... The reason is, of course, that the lawgiver, it must be supposed, will choose its words carefully in order to express its intention correctly,

/ and.....

> and will therefore not use any words that are superfluous, meaningless or otherwise otiose....."(per TROLLIP JA in S v Weinberg 1979 (3) SA 89 (A), at p 98 E - F).

The contrary view would also not accord with another canon of construction, viz. that —

> "It is a general rule in the construction of statutes that a deliberate change of expression is prima facie taken to import a change of intention. (See Barrett, N.O. v Macquet, 1947 (2) SA 1001 (AD) at p 1012; Port Elizabeth Municipal Council v Port Elizabeth Electric Tramway Co Ltd 1947 (2) SA 1269 (AD) at p 1279.) That principle should operate particularly clearly where, as here, Parliament was dealing with two parts of a single provision and cannot be supposed to have lost sight of the one when dealing with the other."

(per SCHREINER JA in R v Sisilane 1959 (2) SA 448 (A) at p 453 F - G; see also Administrateur, Transvaal v

/ Carletonville.....

Carletonville Estates Ltd 1959 (3) SA 150 (A), at p 155 H).

The second point of importance to note is the new system of appeal introduced by secs 7 and 8 of Act 105 of 1982. The object of this new system was, in my opinion, to introduce what is in effect an intermediate court of appeal, viz. the full court, and to cause appeals from the decision of a single judge in a certain class, or certain classes, of case to be heard by the full court; the others to be heard by the Appellate Division. The type of appeal to be heard by the full court is one in which, in the view of the court granting leave —

> "the questions of law and of fact and the other considerations involved in the appeal are of such a nature that the appeal does not require the attention of the appellate division".

In other words, it was the intention of the legislature to draw a distinction between appeals which merited the

/ attention.....

attention of the Appellate Division, and would consequently go to the Appellate division, and those which did not, and would be heard by the full court. And the general aim, in my view, was to place a kind of qualitative limitation on the cases coming on appeal to the Appellate division and thereby to reduce to some extent the workload of the Appellate Division. If there be any real doubt on this score, then I would refer to the Third Interim Report of the Commission of Enquiry into the Structure and Functioning of the Courts, of which Mr Justice G G Hoexter was the chairman and which is commonly called the Hoexter Commission. This report was tabled in Parliament on 6 October 1981. It is notorious that Act 105 of 1982 was enacted in consequence of the recommendations contained in this interim report. In my view it is permissible, in

/ construing.....

construing Act 105 of 1982, to have regard to what is stated in the Third Interim Report as to the mischief aimed at. In England it has been authoratatively held that in construing a statute where the words are not clear and unambiguous the court may have regard to the report of a Royal Commission or committee appointed by the Government which shortly preceded the passing of the statute in order to ascertain the mischief aimed at and the statute in order to ascertain the mischief aimed at and the state of the law as it was then understood to be, but not to determine the meaning attached by the commission or committee to any draft bill recommended in the report which formed the basis of the statute passed by Parliament (see Black-Clawson International Ltd v Papierwerke Waldhof Aschaffenburg A.G.

/ [1975] .....

[1975] AC 591 (HL); Reg v Bloxham [1983] 1 AC 109 (HL), at p 115; see also Eastman Photographic Materials Co Ltd v Comptroller General of Patents, Designs and Trademarks [1898] AC 571 (HL); Assam Railways and Trading Co Ltd v Inland Revenue Commissioners [1935] AC 445 (HL); Halsbury 4 ed, vol 44, par 901). In Hleka v Johannesburg City Council, 1949 (1) SA 842 (A) at p 852, this Court, having referred to Eastman's case, supra, and the Assam Railways case, supra, left the point open, but in S v Mpetha 1985 (3) SA 702 (A), at pp 712 H - 713 E, GALGUT AJA, delivering a minority judgment (the majority judgment did not consider the point), held that it was permissible for this Court in construing the Internal Security Act 74 of 1982, to have regard to the report of the Commission of Enquiry into Security Legislation in order to ascertain the mischiefs aimed at. The Black-Clawson case, supra, has been followed in Zimbabwe (Hewlett v Minister

/ of .....

of Finance and Another 1982 (1) SA 490 (ZSC), at p 496-7 and in Canada (Re Urman (1981) 128 DLR (3rd) 33, at pp 37-8). In my opinion, our courts too are entitled, when construing the words of a statute which are not clear and unambiguous, to refer to the report of a judicial commission of enquiry whose investigations shortly preceded the passing of the statute in order to ascertain the mischief aimed at, provided that there is a clear connection between, on the one hand, the subject-matter of the enquiry and recommendations of the report and, on the other hand, the statutory provisions in question.

In the present case the mischief aimed at is to be found in par 2.1 and 2.2 of the report, the relevant portions of which read:

> "Die werklas van die Appèlafdeling is tans glad te swaar vir die huidige getalsterkte van veertien appèlregters. .....Die oorheersende werklikheid is dat ons appèlregters toegegooi word onder sleurwerk wat juridies onbeduidend maar desnietemin tydrowend is. Die Appèlafdeling wurg aan 'n menigte

> appèlle (sowel siviele as strafappèlle) wat wesentlik oor feitevrae gaan en van 'n soort is wat hoegenaamd nie in 'n land se hoogste hof tuis hoort nie. Dit beteken 'n onoordeelkundige en onekonomiese aanwending van skaars mannekrag. Verder doen dit afbreuk aan die status en waardigheid van die Appèlafdeling."

If it was the intention of the Legislature, when enacting Act 105 of 1982, to reduce the workload of the Appellate Division and to place a qualitative limitation on the kind of appeals heard by this Court by diverting to the full court appeals which, because of "the questions of law and of fact and the other considerations involved", did not merit the attention of the Appellate Division, then it seems to me that it would be contrary to that general intention to permit a further appeal from the decision of the full court to the Appellate Division (in terms of sec 20(4)(a)) merely on the ground that there were reasonable prospects of success on appeal. This consideration reinforces the view that the concept of "special leave" in sec 20(4)(a) imports criteria additio-

/ nal to .....

nal to those inherent in the concept of "leave" in sec 20(4)(b).

In arguing that no stricter test should be applied to the grant of "special leave" than in the case of "leave", counsel referred to the fact that, prior to its amendment by sec 8 of Act 105 of 1982, the English text of sec 21(3)(a) referred to "special leave", without any particular significance being attached to the word "special", and in this connection he cited the case of Rex v Baloi 1949 (1) SA 523 (A).

It may well be that the use of the word "special" in the unamended sec 21(3)(a) was redundant and of no particular significance. There are textual indications to this effect. Sec 21(3)(a) read as follows:

> "An application to the appellate division under sub-section (2) shall be submitted by petition addressed to the

/ Chief Justice.....

> Chief Justice within twenty-one days, or such longer period as may on good cause be allowed, after the special leave of the court against whose decision the relevant appeal is to be made was refused."

The "special leave" here referred to was that of the court against whose decision the relevant appeal was to be made. Sec 21(2)(a), which dealt generally with the need in certain cases to obtain leave to appeal, spoke of --

> ".... the leave of the court against whose decision the appeal is to be made" (my italics)

and went on to provide that in the event of this court refusing "such leave", the Appellate Division might grant "such leave". Thus "special leave" and "leave" were used in different subsections to describe the same concept. Moreover, the Afrikaans text of sec 21(3)(a) contained no word corresponding to special: it spoke merely of "verlof".

/ But.....

But the fact that "special" might have been redundant in sec 21(3)(a) prior to its amendment does not, in my opinion, carry any weight in the present enquiry. In the new sec 20 there are no such internal indications of redundancy (the Afrikaans text of sec 20(4)(a) speaks of "spesiale verlof"); there is the very significant juxtaposition of "special leave" and "leave" in sec 20(2)(a) and sec 20(4)(b); and there is the other factor discussed above, viz. the mischief aimed at by secs 7 and 8 of Act 105 of 1982.

Nor do I think that Rex v Baloi, supra, is of any real relevance in this case. Sec 105 of the South Africa Act, which dealt primarily with appeals from inferior courts to the provincial divisions of the Supreme Court, enacted that there should be no further appeal except to the Appellate Division and then only with "special leave"

/ to .....

to appeal. Baloi's case was concerned with the grounds upon which "leave to appeal" should be granted by a superior court in a criminal case in terms of sec 369 of the Criminal Procedure and Evidence Act 31 of 1917, as substituted by sec. 7 of Act 37 of 1948. Giving judgment, CENTLIVRES JA stated (at p 524):

> "In applications for special leave to appeal under sec 105 of the South Africa Act and sec 1 of Act 1 of 1911, this Court has laid down the rule that leave to appeal should not be granted unless the applicant will have a reasonable prospect of success on appeal. See Rex v Nxumalo (1939, A.D. 580 at p 581) and Rex v Ngubane and Others (1945, A.D. 185 at p 187). The statutes considered in those cases use the words 'special leave to appeal', while the section under which this appeal is brought, uses the words 'leave to appeal', but it will be found that in none of the cases in which this Court considered an

> application for special leave to appeal was any stress laid on the word 'special'. We are therefore of opinion that the test to be applied in considering an application for leave to appeal under sec 369 of Act 31 of 1917 is the test given in Rex v Ngubane (supra)".

Again the factors mentioned above, viz. the juxtaposition of "special leave" and "leave" in sec 20(4) and the mischief aimed at by secs 7 and 8 of Act 105 of 1982, did not apply in the case of sec 105 of the South Africa Act.

For these reasons I conclude that it is not sufficient for an applicant for "special leave" in terms of the new sec 20(4)(a) merely to show that there is a reasonable prospect of success on appeal. He must in addition show something else; and my next task is to endeavour to delineate this "something else".

I am of the opinion that the Legislature intended

to leave it to this Court to determine what the requisites are for the grant of special leave. In this connection I do not think that it is either necessary or desirable for this Court to endeavour to indicate with precision what these requisites are. It is sufficient, in my view, to lay down the general principle and to illustrate its application by a few (but by no means exhaustive) examples.

The general principle is that an applicant for special leave to appeal must show, in addition to the ordinary requairement of reasonable prospects of success, that there are special circumstances which merit a further appeal to the Appellate Division. This Court will be the arbiter as to whether such special circumstances exist. By way of illustration — and I stress again that these illustrations are not exhaustive of the concept of special circumstances —I would cite the following types of case as constituting special circumstances:

/ (1) Where, ...

(1) Where, in the opinion of this Court, the appeal raises a substantial point of law. Often, probably ordinarily, such a case would not have been referred to the full court in the first place, but would have been directed to the Appellate Division. Nevertheless, the court making the reference might, despite the point of law, have considered the case as one not meriting the attention of the Appellate Division; or the point of law might have arisen as a new development after leave to appeal to the full court had been granted.

(2) Where the matter, though depending mainly on factual issues, is of very great importance to the parties or of great public importance. Various concrete examples of this can be visualized.

/ (3) Where.....

(3) Where the matter turns mainly on factual issues and lacks the qualities referred to in (1) and (2) above, but the prospects of success are so strong that the refusal of leave to appeal would probably result in a manifest denial of justice. In this regard it must be appreciated that the concept "reasonable prospects of success" covers a fairly wide spectrum, ranging from the minimum needed to establish reasonable prospects to virtual certainty of success. This is particularly so in factual matters involving the evaluation of (often conflicting) evidence. Thus, while the minimum prospects in a purely factual matter might not justify the granting of special leave, very strong prospects might. While it might seem inequitable to deny an appeal where prospects of success (though

/ minimum .....

minimum) do exist, it must be remembered that there has already been one appeal and the granting of a further right to appeal will mean that this Division will be the third court to consider the matter. Interest rei publicae ut sit finis litium.

Adopting this general approach, I now proceed to consider the present application. The facts of the case, as they emerge from the evidence led at the trial, are as follows.

The appellant company carries on business principally as a distributor of air brake equipment for heavy duty vehicles. It does not itself manufacture the components for such brakes, but buys them from overseas or local suppliers and puts them together, in a box, in the form of a "kit".

/ During.....

During April 1981 Mr L D Merchant, at the time appellant's senior sales engineer, heard that the Armaments Corporation of South Africa Limited ("Armscor") was calling for tenders for the manufacture and supply of a number of 5-ton trailers and 10-ton trailers. Merchant submitted quotations for the trailer braking systems to certain trailer manufacturers, all potential contractors in respect of the Armscor contract, but initially not to the respondent (whom he had not heard of before). Some months later Merchant heard that respondent had also submitted a tender. He thereupon telephoned respondent and spoke to Mr A C Smith, respondent's production controller. He asked Smith whether appellant could submit to respondent a tender for the braking systems and Smith agreed. On 29 June 1981 Merchant delivered to Smith a written quotation, addressed to respondent and signed by himself, the body of which read as follows:

/ "5 - 10 TON .....

"5 - 10 TON TRAILERS

ARMSCOR CONTRACT NO: KA166-69-3

We have pleasure in quoting for the supply of air pressure brake equipment to Armscor specification for the above contract number, as follows:-

5 ton Trailer brake equipment R270,00 nett per kit.
10 " " " " R249,00 " " "

The first installation would be done free of charge.

Price excludes general sales tax.

Terms: 30 days nett.

The prices quoted are based on ex works costs, transport charges, customs duty and currency rates, applicable as at today's date and are subject to escalation."

This quotation is typed on a printed letterhead at the bottom of which is printed in both English and Afrikaans a notification to the effect that all offers are subject to conditions of tender or of sale "printed overleaf"; and that the tender is made subject to the terms and conditions of tender printed "on the back hereof". On the reverse side of this document there are 19 clauses con-

/stituting.....

stituting the general conditions of tender or of sale.

Two of these read as follows:

> "(1) The acceptance of our offer and conditions must be in writing and accompanied by sufficient information to enable us to proceed with the order. Acceptance does not constitute a contract unless confirmed by us in writing.
>
> .....
>
> (3) This tender is based on the rates of exchange, freight, insurance, landing and clearing charges, labour, materials, duties and railway rates ruling on the date of tender. Any alteration to these before the delivery of the goods will be for the account of the purchaser, notwithstanding our confirmation of prices in terms of Clause 1 above. "

On 1 July 1981 respondent was notified by Armscor that it had/awarded been the contract to manufacture and supply the trailers.

On 21 July 1981 Merchant, accompanied by Mr H J Hart, appellant's managing director, paid what was described

/ in.....

in evidence as "a public relations visit" to respondent's place of business, where they met and spoke to Smith and Mr J Gutmayer, a director of respondent. There is a dispute as to what was discussed at this meeting. On 27 July 1981 Hart again visited respondent's premises and spoke to Smith and a Mr A E Kestell, the works manager. (Gutmayer had three days before gone away on a short holiday.) The interview took place at Hart's request and was for the purpose of obtaining an order for the brake kits from respondent. Various matters relating to appellant's quotation were discussed: inter alia the prices quoted, the escalation clause, respondent's delivery requirements and the deletion of certain clauses in the general conditions. Pursuant to these discussions and a further telephone conversation between Hart and Kestell on 28 July 1981, Smith acting on behalf of respondent sent to appellant a telex dated 29 July 1981, in which an order was

/ placed.....

placed for "280 OFF 5 TON BRAKE KITS AT R270,00 NETT EACH" and "184 OFF 10 TON BRAKE KITS AT R242,00 NETT EACH". The telexed order gives details of the delivery times required and concludes with the following note:

> "NOTE:
>
> A. ABOVE DELIVERY DATES ARE OUR LATEST REQUIRED DATE DELIVERED TO OUR WORKS, MEYERTON.
>
> B. TRANSPORT COSTS TO BE INCLUDED.
>
> C. ORDERS ARE SUBJECT TO RELEVANT ARMSCOR INSPECTION, QUALITY REQUIREMENTS AND GENERAL CONTRACT CONDITIONS.
>
> WE TRUST THAT THIS MEETS YOUR MANUFACTURING CAPACITY AND WORK LOADING AS DELIVERY OF TRAILERS TO OUR CLIENT IS OF UTMOST IMPORTANCE.
> YOUR CONFIRMATION AND RECEIPT OF ABOVE WILL BE APPRECIATED.
>
> P.S. YOUR GENERAL CONDITIONS OF SALE: TO BE AMENDED AS FOLLOWS:
>
> CLAUSE 5: DRAWING MUST BE INCLUDED.
> CLAUSE 8, 11 AND 12 TO BE DELETED.
>
> P.P.S. PIPES : ALL PIPES WILL BE BENT BY BILGER ENGINEERING."

In response to the request contained in the note appellant on 30 July 1981 sent to respondent a telex, the material portion of which reads:

/ 1) THNK YOU.....

"1) THNK YOU FOR YR TLX RECD TODAY

2) FURTHER TO TELECON MR A C SMITH AND THE WRITER TODAY WE ACKNOWLEDG WITH THNKS YR ORDERS AT PRICES NOTED SUBJECT A) TO OUR APPROVAL OF ITEMS NOTED UNDER YR PARA C. AND B) PRICES QUOTED ABOVE ARE SUBJECT TO ESCALATION FROM DATE OF OUR QUOTATION 29TH JUNE 1981.

3) WE CONFIRM:

A) WE CAN MEET DELIVERY DATES NOTED AND WOULD SUGGEST YOU ACCEPT E DELIVERY APPROXIMATELY ONE WEEK IN ADVANCE OF REQUIRED DATE.

B) TRANSPORT COSTS TO YR MEYERTON STORES INCLUDED IN PRICE.

C) GENERAL CONDITIONS OF SALE AMENDED AS FOLLOWS:
CLAUSE 5 - DRAWINGS WILL BE INCLUDED
CLAUSES 8, 11 and 12 WILL BE DELETED

D) WE NOTE ALL PIPES WILL BE BENT BY BILGER ENGINEERING

E) PRICES EXCLUDE GENERAL SALES TAX

F) OUR PRICE INCLUDES FOR INDIVIDUALLY BOXED KITS WITH FITTINGS INSERTED INTO VALVES.

G) SETTLEMENT TERMS:
60 DAYS NETT FOR THE MONTHS SEPTEMBER, OCTOBER, NOVEMBER

NETT 30 DAYS FOR DECEMBER AND MONTHS THEREAFTER".

/ This.....

This telex thus dealt with all the matters raised in the note contained in respondent's order, but left open appellant's approval of the items in par C of the note, viz. the orders being subject to relevant Armscor inspection, quality requirements and general contract conditions. (For the sake of brevity I shall refer to these matters as "the Armscor conditions".)

On 3 August 1981 and apparently in pursuance of a prior arrangement Hart sent by hand a short note to Smith asking the latter to hand the bearer the "relevant documents which may affect us in respect of the Armscor contract". This was done and Hart received a copy of the standard conditions of Armscor contracts, which incidentally also include, in clause 40, provision for price escalation. According to Hart, who gave evidence on behalf of appellant, he thereafter telephoned Gutmayer and told him that appellant accepted the Armscor conditions. It

/ would.....

would seem that, according to Hart, this conversation took place on 7 August 1981. In his evidence for respondent Gutmayer denied this and contended that appellant at no time signified its acceptance of the Armscor conditions. This became a vital issue in the case, as I shall show.

On 7 August 1981, after this telephone conversation according to Hart, Hart and Merchant visited respondent's premises. On their arrival Gutmayer excused himself on account of being busy and their discussions were with Smith alone. Of the matters discussed the only one of relevance for present purposes is that Smith asked what the price per kit was as at Friday 7 August 1981 and Hart said that he would advise on the Monday (i.e. 10 August 1981) what the increase was under escalation. True to his word Hart telephoned Smith on 10 August 1981 and advised him that the price increases, due to escalation, since appellant's original quotation of 29 June 1981

/ were.....

were as follows:

	Original Price	Increase	Total
10 ton brake	R242,00	R17,01	R259,01
5 ton brake	R270,00	15,61	285,61

Smith was further told that these increases were the result of certain official price increases in labour, the cost of steel and overheads notified by one of appellant's suppliers. Smith informed appellant that all work on the order was to be suspended pending further discussions between "the army" and respondent. On the following day (11 August 1981) Hart sent a telex to Smith confirming the content of this telephone conversation.

On 13 August 1981 Smith telexed Hart as follows:

> "WE REGRET TO ADVISE THAT OUR ORDERS NO 24561/A3051 ARE HEREWITH CANCELLED ."

Hart sent a telex in reply on 14 August 1981 stating:

> "AS THERE IS A BINDING AGREEMENT BETWEEN US WE REGRET WE DO NOT ACCEPT YOUR PURPORTED CANCELLATION."

/To .....

To this Gutmayer telexed a reply to the effect that the cancellation of the order was confirmed "as no agreement could be reached". Thereafter appellant's attorneys took over and on 17 August 1981 sent a telex to respondent, stating inter alia that respondent's purported cancellation of the agreement amounted to an unlawful repudiation thereof and that appellant intended to claim damages for breach of contract. Respondent's attorneys replied, denying liability. On 4 November 1981 appellant issued summons.

The reason for respondent's sudden volte face in the form of the cancellation of the order is not far to seek. On 10 August respondent received another quotation from a company called M A G Brakes (Pty) Ltd. The prices quoted by M A G Brakes were lower than appellant's revised prices (to include escalation) and the quotation contained no escalation clause. Respondent later con-

/ cluded.....

cluded a contract for the supply of the required braking systems with M A G Brakes.

The pleadings in this matter are quite straightforward. Appellant alleged the conclusion of a contract for the sale of the brake kits at the prices quoted, subject to escalation, and respondent's wrongful repudiation of the contract. Respondent pleaded that no contract had been concluded. In substantiation of this respondent referred to (i) appellant's quotation of 29 June 1981, which was subject to escalation; (ii) subsequent verbal discussions, whereafter respondent placed the order dated 27 July 1981, which according to the plea was not subject to escalation, but was for a fixed price; (iii) appellant's telex of 30 July 1981, described by respondent as "a counter-offer...which offer was again subject to escalation"; and (iv) respondent's cancellation of the order "because of the fact that the (appellant's) counter-offer..... was unacceptable".

/ At.....

At the trial Hart and Merchant gave evidence on behalf of appellant and Gutmayer on behalf of respondent. Smith, who was apparently available to give evidence, was not called by the respondent and no explanation for this was given.

In his judgment the trial Judge analysed the exchanges between the parties and came to the conclusion that (1) the quotation of 29 June 1981 was no more than an invitation to trade; (2) that respondent's order of 29 July 1981 constituted a contractual offer, incorporating "two contradictory escalation clauses", viz. clause 3 of appellant's general conditions of tender and clause 40 of the Armscor general conditions of contract; (3) that appellant's telex of 30 July 1981 was not "a clear and unequivocal or unambiguous acceptance" of respondent's offer, but was in fact a counter-offer; and (4) that this counter-offer was not accepted by the respondent.

/With.....

With reference to the question of escalation the learned Judge pointed out that neither clause 3 of the appellant's general conditions of tender nor clause 40 of the Armscor general conditions of contract provided a formula which could lead to a mathematical calculation of escalation increases because there was no clarity as to what proportion of the cost price of the brake kits represented, say, the cost of labour or the cost of materials, so that a cost increase to appellant in respect of these items could objectively be converted into an escalated price for the brake kits. MYBURGH AJ also found that from the beginning Gutmayer wanted a definite formula for calculating the escalated prices and was not prepared to leave it to appellant to determine the method of calculation; and he rejected Hart's evidence that this question of a formula was never discussed between Gutmayer and himself.

/ The.....

The trial Court appears to have come to the conclusion that no consensus was reached by the parties on two grounds: (a) that there was to the end a dispute about the question of a fixed formula for the calculation of escalation; and (b) that there was no acceptance of the Armscor conditions by the appellant. With reference to (b) the Court held that —

> "The alleged verbal acceptance of the Armscor conditions was clearly after the dispute had arisen and the acceptance was no longer possible in law."

I agree that the appellant's quotation of 29 June 1981 constituted an invitation to treat or do business and respondent's order of 29 July 1981 a contractual offer. I agree too that the offer incorporates clause 3 of appellant's general conditions of tender, as also the provision concerning escalation in the body of appellant's quotation. This was conceded by Gutmayer in evidence, despite the denial thereof in respondent's plea.

/ I do.....

I do not think, however, that it is correct to say that respondent's offer also incorporated clause 40 of the Armscor conditions of contract. The offer speaks of "relevant Armscor.... general contract conditions" and, in my view, clause 40 which was intended to regulate the price of the trailers as between respondent and Armscor, would not be relevant to the contract between appellant and respondent for the supply of brake kits. And this was the view of Gutmayer himself.

The trial Judge's characterization of appellant's telex of 30 July 1981 as a counter-offer is, with respect, incorrect. In this telex appellant did not introduce any new terms or in any way modify the terms of the offer. It accepted all the terms proposed in the offer, save that it reserved its approval of the Armscor conditions. It was certainly an incomplete acceptance, in the respect that I have indicated, and as such did not bring

/ about.....

about a concluded contract, but it did not constitute a counter-offer necessitating a further acceptance by the respondent. Once appellant notified respondent of its approval of the Armscor conditions, then, provided that the offer had not in the meanwhile lapsed or been withdrawn, the acceptance would be complete and a contract concluded.

This analysis and the finding (supported by Gutmayer's admission) that respondent's offer incorporated the escalation provisions contained in appellant's quotation completely disposed of the defence pleaded by respondent; but it is evident that as the trial progressed the real, decisive issue which arose was whether or not appellant had notified respondent of its acceptance of the Armscor conditions while the offer was still open. It is to this issue that I now turn.

It will be recalled that shortly after the parties had exchanged the telex of 29 July 1981 (respondent's offer)

/ and

and the telex of 30 July 1981 (appellant's partial acceptance thereof) and on 3 August 1981 (a week-end having intervened) Hart sent for and received a copy of the Armscor conditions of contract. This fact is undisputed and there is documentary confirmation of it. Obviously Hart sent for the conditions of contract in order to study them with a view to deciding whether or not to accept them and so complete the agreement between the parties. As I have indicated, Hart stated in evidence that he telephoned Gutmayer on 7 August 1981 and notified him of appellant's acceptance of the Armscor conditions. He stated further that he also told Gutmayer in the course of the same telephone conversation that "we would like to come and discuss the matter of delivery with them"; and that a meeting was arranged for the same afternoon. It is common cause that this meeting did take place, though Gutmayer was too busy to be present and left matters to Smith. Hart, who

/ was.....

was able to refresh his memory in regard to this telephone call and the meeting from a contemporary memorandum, stated further that one of the matters discussed at the meeting was the extent to which the price had escalated by that date; and that he gave this information to Smith on the telephone on 10 August 1981. Here again he was able to refresh his memory from a contemporary note; and, of course, there was the confirmatory telex on 11 August 1981. Smith was not called and so there could be no contradiction of this evidence regarding the meeting of 7 August and the telephone call of 10 August. Gutmayer did, however, deny that Hart notified him of the approval of the Armscor conditions.

It is not clear to me what the trial Judge's finding on this issue was, save that the alleged acceptance of the Armscor conditions was after the dispute had arisen and was no longer possible in law. I have no doubt that

/ on.....

on this issue, ie whether Hart told Gutmayer of appellant's acceptance of the Armscor conditions, the trial Judge ought to have preferred the evidence of Hart. In the first place, failure to reach consensus on the ground that appellant never notified respondent of its acceptance of the Armscor conditions was never pleaded by respondent. Secondly, Gutmayer's evidence on the issue is not clear. When he was asked in examination-in-chief whether any approval was conveyed to him, he said "No" and he also denied that Hart had telephonically informed him of appellant's approval. Under cross-examination on the same point his evidence reads:

> "You see, Mr Gutmayer, I want to put it to you that what happened was that there was a telephone call before 7 August, but it was Mr Hart's telephone call to tell you that he accepted the stipulation with regard to the Armscor contract, that is all that happened in that telephone conversation?-- During that telepone
>
> / conversation.....

> conversation I made it clear to Mr Hart he cannot have my escalation formula with Armscor because this does not make sense, and I would, in view of this pending paragraph 3 which specifies his escalation, I want to have a written thing which clearly stipulates what it means, and on this basis we can go ahead."

The witness appears not to answer the question directly, but he does concede apparently that a telephone conversation took place on that date. All in all, Gutmayer's denial is not very convincing.

Moreover, in my opinion, the probabilities support Hart's version. Hart emerges from the evidence as an experienced, careful and methodical man of business, possibly as one who drives a hard bargain. Hart realized after 30 July 1981 that all that stood between appellant and a clinching of the deal was appellant's approval of the Armscor conditions. He sent for the conditions

/ in.....

in order to peruse them and he was happy to accept them. He was obviously anxious to obtain the contract. He telephoned Gutmayer on 7 August 1981. In the circumstances it seems very likely that he would then have conveyed his acceptance of the Armscor conditions. Furthermore at the meeting of 7 August 1981 and thereafter, until the cancellation on 13 August, the parties seem to have acted on the basis that a contract had been finally concluded.

As to the general credibility of the witnesses involved, the trial Judge appears to have formed a preference for Gutmayer. Conscious as I am of the advantages to be derived from hearing and seeing a witness in the witness-box and of the disadvantages suffered by a court of appeal which has before it only the inanimate record of the proceedings, I nevertheless feel constrained to differ from the learned trial Judge in his assessment of Gutmayer's credibility. The respondent's plea, which must have

/ been.....

been drafted on instructions given by Gutmayer, denies that respondent's offer was subject to escalation, yet in court Gutmayer admitted that clause 3 was incorporated. Moreover, throughout his evidence Gutmayer emphasized his dislike of an escalation clause without what he termed a "formula" and he claimed to have told Hart on three occasions, viz during the course of a telephone call after he had received appellant's quotation, at the meeting of 21 July 1981 and in the course of a telephone call on 3 August 1981, that clause 3 was "unacceptable" to him. It is strange, if this evidence be true (and it is denied by Hart and, as to the meeting of 21 July 1981, by Merchant as well), that there is no indication whatsoever of this sentiment on Gutmayer's part in any of the documents before the Court. It is strange too that appellant should have taken no steps to meet respondent in regard to this objection. And what is even stranger is that respondent did not exclude clause 3 when

/ formulating.....

formulating its order of 29 July 1981. It did after all exclude certain other general conditions. Gutmayer was cross-examined about this. He, of course, was away over the period 24 July to 3 August 1981 and the order was drafted by Smith. But, according to him, before going away he discussed the order with Smith and gave him instructions as to how it should be drawn up. He agreed that the one thing Smith had to do in his negotiation with appellant in his (Gutmayer's) absence was to exclude clause 3 and he was unable to explain why this had not been done. He agreed that it was "inexplicable". And, of course, Smith himself was not called to explain the inexplicable. I find this evidence improbable and I note that when giving it Gutmayer tended to be evasive at times.

Gutmayer claimed that on his return from holiday on 3 August 1981 and on learning what Smith had done in his absence he was very unhappy because of the non-exclusion

/ of.....

of clause 3 from the order. Yet he conceded that the only written record of his unhappiness was the telex of cancellation on 13 August 1981. Moreover, despite his alleged unpreparedness to accept clause 3, he gave the following answers under cross-examination:

> "And yet Mr Smith calls for an up to date price on 7 August on Mr Hart's formulation, is that correct?-- Yes.
>
> But that is a senseless exercise because you will not accept his formulation?-- As I said I was still prepared up to 11 August to accept his quote because we had gone such a long way it was just not true.
>
> The price was called for because you were prepared even to accept his escalation formula, is that correct?-- Yes."

It is common cause that on 7 August 1981 Hart and Merchant visited respondent's place of business. Gutmayer conceded in evidence that what he wanted to achieve at this meeting was to "get out of the contract" that had

/ been.....

been made in his absence. In the circumstances I find it strange (a) that, in spite of being busy, Gutmayer did not find time to speak to Hart and convey to the latter his feelings about the contract, and (b) that Smith should apparently have given Hart no inkling of Gutmayer's dissatisfaction with the contract: that, on the contrary Smith should have asked for revised prices in terms of the escalation clause.

Hart's evidence that Smith told him on 10 August 1981 to suspend work on the order pending further discussions between "the army" and respondent was given after he had refreshed his memory from a contemporary note. The evidence was of course not contradicted by Smith; and, in my view, it should be accepted that this happened. There was evidently no basis for alleging that further discussions between the army and respondent were taking place or were about to take place. The pro-

/bability.....

bability is that this statement was a subterfuge to induce appellant to suspend work while respondent weighed the respective merits of appellant's contract and the offer by M A G Brakes. Gutmayer was cross-examined about this. He denied all knowledge of Smith's statement and stated that he did not inspire it. I find this improbable, particularly as, according to Gutmayer, he told Smith on his return on 3 August that he (Gutmayer) would personally be handling the case. In the circumstances, it seems unlikely that Smith would have made this statement entirely on his own responsibility.

For these reasons I am of the view that the trial Judge ought to have found that Hart did communicate appellant's acceptance of the Armscor conditions during the course of a telephone conversation with Gutmayer on 7 August 1981. It would follow from this that there was then a complete acceptance by appellant of respondent's

/ offer.....

offer. The trial Judge's comment that by then "the dispute had arisen and the acceptance was no longer possible in law" is not understood. At that stage there was no dispute. The meeting on the afternoon of 7 August was non-contentious and Smith even asked for updated prices. The cancellation of the order took place nearly a week later. There is nothing in the evidence to show that on 7 August 1981 the respondent's offer was not still open for acceptance. In my judgment the parties did reach consensus. And furthermore there is no valid basis for finding that a dispute about a fixed formula prevented the parties from concluding an agreement.

The next question is whether the agreement reached by the parties brought about a valid enforceable contract. This raises two points: the point on which the case was decided in the Court a quo and the point raised in par. (a) of this Court's order (see above).

/ Briefly.....

Briefly stated, the point on which the Court a quo non-suited the appellant (which incidentally was not specifically pleaded by respondent) was to the following effect:-

(1) Respondent's order of 29 July 1981 incorporated appellant's general conditions of sale, apart from those specifically excluded.

(2) In terms of clause 1 of these general conditions (quoted above and which was not excluded), read mutatis mutandis, it was the intention that the whole agreement between the parties should be in writing and that unless the full contract was in writing there was to be no contract.

(3) Since appellant's approval of the Armscor conditions formed part of its acceptance of the offer and was not in writing, no contract came into existence.

/ The.....

The "general conditions of tender or of sale" appearing on the reverse side of appellant's written quotation are prefaced by the words —

> "The acceptance of this tender and any part thereof or extension thereto shall be subject to the following terms and conditions:-"

Clause 1 presupposes that the appellant's tender constitutes a contractual offer, acceptance of which would normally constitute a contract. What the clause does is (a) to stipulate the manner of acceptance, ie it must be in writing and accompanied by sufficient information etc., and (b) to provide that such acceptance does not constitute a contract unless confirmed by appellant in writing. An offeror may always prescribe the mode of acceptance of his offer in order that a vinculum juris should be created (see Driftwood Properties (Pty) Ltd v McLean 1971 (3) SA 591 (A)). In (a) above clause 1 does

/ merely.....

merely this. In (b) above, the clause goes further in stipulating when a contract comes into existence, a written acceptance having already been received by the offeror. This may be seen as a term of the offer which the offeror accepts when he submits his offer.

I have great difficulty in seeing how this clause can be applied to the facts of the present case, even mutatis mutandis. It is common cause that the quotation submitted by appellant was not an offer but merely an invitation to treat. It was respondent who submitted the offer. And consequently it was appellant who was required in law to accept the offer. To apply clause 1 to the facts of this case one would have to reverse roles and substitute respondent for appellant,"your" for "our" in the first sentence and, presumably, "you" for "us" in the second sentence. On the other hand, "us" in the first sentence would continue to refer to appellant. In the result the second

/ sentence.....

sentence would mean that after appellant had communicated its acceptance of respondent's order in writing there would still be no contract unless there was confirmation by respondent in writing.

I know of no authority justifying the rewriting of a contractual provision in this manner. It seems to me it would bring about a situation never contemplated by the contracting parties, certainly not the appellant. It is a clear inference that the provisions of clause 1 are stipulated for by appellant largely for its own protection in business deals. How a provision whereby no contract was concluded until confirmation by the other party would fit in with this general intent it is difficult to see.

I hold, therefore, that clause 1 is not capable of being applied to the facts of this case and that the ground upon which the Court a quo non-suited the appellant

/ is.....

is not well-founded.

Finally, I turn to the point raised in par (a) of this Court's order. It is a general rule of our law that there can be no valid contract of sale unless the parties have agreed, expressly or by implication, upon a purchase price. They may do so by fixing the amount of the price in their contract or they may agree upon some external standard by the application whereof it will be possible to determine the price without further reference to them. There can be no valid contract of sale if the parties have agreed that the price is to be fixed in the future by one of them. (See generally Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd. 1964 (1) SA 669 (W), at p 670 C-F; Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd. 1977 (2) SA 425 (A), at p 434 E; Reymond v Abdulnabi and Others 1985 (3) SA 348 (W), at p 349 G-J.) This is part of the

/ wider.....

wider general principle that contractual obligations must be defined or ascertainable, not vague and uncertain. (see De Wet & Yeats Kontraktereg en Handelsreg, 4 ed, pp 83-4, 279).

I have already alluded to the difficulties pointed out by the trial Judge in applying clause 3 of the tender conditions. This was one of the major points made by Gutmayer in his evidence. Hart in his evidence referred to what he had told Smith and Kestell about the operation of the escalation clause at the meeting of 27 July 1981. He explained that the "base price" would be fixed as the price at which appellant could purchase the components of the brake kits on 29 June 1981, ie, the date of the quotation. These prices would be lodged with their auditors. Thereafter all increases beyond those base prices would be for the customer's account. In the case of overseas goods this would include an increase in

/ ex-works.....

ex-works cost, in freight rates, customs duties, harbour clearance charges, railage charges, that is "all costs into our stores". Under cross-examination Hart conceded that there was no specific formula for the calculation of the increase per unit sold, but said that 98% of its customers accepted escalation clauses of this nature and were prepared to accept appellant's figure of increased costs.

Prima facie it seems to me that the uncertainties surrounding the ascertainment of new prices in terms of the escalation clause might well vitiate a contract of sale such as this in that the determination of the amount of escalation might in the last resort be left to the decision of appellant itself. But this point was never pleaded by respondent; nor do I think that it was fully canvassed by both sides in the sense that the trial court was expected to pronounce upon it as an issue (see

/ Director.....

Director of Hospital Services v Mistry 1979 (1) SA 626 (A), at p 636 C-D). Appellant's counsel submitted that had this point been pleaded or otherwise raised as a triable issue the appellant would have had the opportunity to lead evidence to show that an escalation clause in the form of clause 3 was capable of commercial application and would give rise to a determinable price. In my view, this is a valid argument and consequently I do not think that appellant should be non-suited because of the possible uncertainty of clause 3.

The conclusion to which I therefore come on the merits of the case is that the appellant not only has a reasonable prospect of success on appeal, but also that the appeal should be allowed. Consequently, had we been concerned merely with an application for special leave to appeal, I would hold that leave should be granted on the grounds that the appeal involved a substantial

/ point.....

point of law raised for the first time by the Court a quo, viz. that in terms of clause 1 of the tender conditions the whole of the contract had to be in writing, and also that the prospects of success were so strong that justice demanded that leave be granted.

Appellant's counsel asked that in the event of the appeal succeeding appellant should be granted, in addition to damages in the sum of R15 000 and costs, the following orders:

(a) interest on the capital amount of R15000 at the rate of 11% per annum from 27 May 1983 (the date of the judgment of MYBURGH AJ) to 7 February 1985 and at 20% per annum from 8 February 1985 to date of payment; and

(b) interest on costs at the rate of 20% per annum from date of taxation to date of payment.

/ In .....

In view of the provisions of sec. 2 of the Prescribed Rate of Interest Act 55 of 1975 I do not think that orders (a) and (b) are necessary, but inasmuch as respondent's counsel did not raise any specific objection to their inclusion, I make orders to that effect.

It is accordingly ordered as follows:

(1) The application for leave to appeal to this Court is granted with costs.

(2) The appeal is allowed with costs and the order of the Court a quo is altered to read:

"The appeal is allowed with costs and the order of the trial Court is altered to read:

'(1) Judgment for plaintiff in the sum of R15 000, together with costs of suit.

/ (2) Interest....

(2) Interest on the aforesaid amount of R15 000 at the rate of 11% per annum as from 27 May 1983 to 7 February 1985 and 20% per annum from 8 February 1985 to date of payment.

(3) Interest on costs at the rate of 20% per annum from date of taxation to date of payment.'

M.M. CORBETT

RABIE, CJ)
JANSEN, JA)
TRENGOVE, JA) CONCUR.
HOEXTER, JA)