REPORTABLE:

CASE NO: SA 23/2006

IN THE SUPREME COURT OF NAMIBIA

IN THE MATTER BETWEEN:

SERENITY MANUFACTURING **APPELLANT**

And

MINISTER OF HEALTH AND SOCIAL SERVICES **FIRST RESPONDENT**

THE CHAIRMAN OF THE TENDER BOARD OF NAMIBIA **SECOND RESPONDENT**

Coram:	Maritz, JA, Strydom, AJA *et* Chomba, AJA
Heard on:	2007/04/05
Delivered on:	2007/11/19

APPEAL JUDGMENT

CHOMBA, AJA :

[1] **INTRODUCTION** – We heard this appeal in the April 2007 session and after the submissions made by Messrs Heathcote and N. Marcus, counsel for the appellant and the respondents respectively, we reserved our judgment. Prior to the substantive appeal being heard, the appellant, through its counsel, made an application for condonation to be exercised in its favour in respect of its failure to comply with the procedural rules of this court. At issue was the appellant's failure

to timeously file in the court the fourth volume of evidence recorded during the proceedings in the court *a quo*. Mr. Marcus did not oppose the application and therefore we granted it. We accordingly received the fourth volume as one of the documents in this appeal.

[2] The ensuing is the reserved judgement.

[3] Serenity Manufacturing (Pty) Ltd (Serenity) is a registered company with limited liability and was incorporated under the laws applicable in Namibia. It is the appellant herein while in the court below it was the plaintiff. The Minister of Health and Social Services (the Minister) and the Chairman of the Tender Board of Namibia are the first and second respondents herein, but in the court of trial they were the first and second defendants respectively. The Tender Board of Namibia (the Board) was established under the Tender Board of Namibia Act, No. 16 of 1996 (the Act).

[4] By section 7(1) of the Act the main function of the Board is stated as follows:

> "Unless otherwise provided in this Act or any other law, the Board shall be responsible for the procurement of goods and services for the Government, and, subject to the provisions of any other Act of Parliament, for the arrangement of the letting or hiring of anything or the acquisition or granting of any right for or on behalf of the Government, and for the disposal of Government property and may for that purpose –
>
> (a) on behalf of the Government conclude an agreement with

> any person within or outside Namibia for furnishing of goods or services to the Government or for letting or hiring of anything or the acquisition or granting of any right for or on behalf of the Government or for the disposal of Government property.
>
> (b) with a view to conclude an agreement contemplated in paragraph (a), invite tenders and determine the manner in which and conditions subject to which such tenders shall be submitted."

[5] The subsection lists many other things which the Board is empowered to do, but for the purpose of this appeal it is unnecessary to refer to them all.

[6] In summary, the dispute which led to the present appeal arose from a transaction of sale and purchase which resulted from a tender submitted by Serenity in response to an invitation extended by the Board on behalf of the Minister. Details of that transaction will emerge from a review of the trial proceedings which is to follow. For now, it suffices to state that Serenity sued the above named defendants for loss of profits which it alleged it could have earned from a sale of the goods specified in the tender which it had submitted to the defendants, had such goods been ordered. The claim was partially successful and, therefore, the appeal which Serenity launched against the judgement of the court *a quo* relates only to part of that judgement. This is evident from the notice of appeal which in the main states:

> "Please take further notice that the part of the judgement and/or order appealed against reads as follows:
>
> > '[47](1) The plaintiff 's claim based on the premise that the defendant is in breach of the agreement awarded by the second defendant to the plaintiff in respect of tender A13-4/2000 in

failing, during the contract period, to order at least 90% or 80%, as the case may be, of the estimated quantities of napkins, is dismissed with costs.'"

ISSUES TO BE RESOLVED IN THE APPEAL

[7] In his heads of argument Mr. Heathcote has stated that the only issue to be determined in the present appeal is whether clause 26 of the tender document, namely the one headed "MOHSS Special Conditions" is in conflict with the provisions of regulation 7(1)(b) of the Tender Board of Namibia Code of Procedure (the Code). In my view, however, the sole issue that calls for resolution in this appeal is whether or not the core of Serenity's claim, as encapsulated in paragraphs 6 and 7 as read with paragraph 9.1 of the Particulars of Claim, was admitted by the defence. In considering the sole issue, a number of related issues will be examined including that of the inter relationship of clause 26 with regulation 7(1)(b) above. Under the umbrella of that sole issue I shall highlight a number of contentions relied on by Mr. Heathcote and comment thereon.

[8] Regarding the issue whether the claim was admitted or not, it is apposite to reproduce the said paragraphs 6 and 7, together with the responses thereto:

"6. The agreement --- so entered into between the parties were for an estimated quantity of goods subject to an increase or decrease as provided in the Act, read with the Regulations and the Code. The goods and quantities which were awarded to the plaintiff were:

6.1 Large baby napkins – an estimated quantity of 6 million at a price of N$160.00 per pack of 200 for the first year of the agreement, and N$170.00 per pack of 200 for the second year

of the agreement;

6.2 (not relevant)

7. It was an implied term of the agreement that:

7.1 The estimated quantities set out above, could increase or decrease as provided for in the Code;"

[9] The remaining particulars in the foregoing paragraphs are not critical and therefore are left out. The Minister's corresponding pleas to those paragraphs were as follows:

"AD PARAGRAPH 6 THEREOF:

4.1 Defendants admit the contents thereof and in amplification refer, to paragraphs 6 (sic) of the Ministry's terms and condition of contract which states:

'The quantities indicated in the attached contract schedule are an estimate based on usage statistics of the past, and as such can vary. The purchaser reserves the right at the time of the award of the Contract and/or during the period of the contract to increase or decrease the quantities specified in the schedule without any change of price or other terms and conditions as specified in this contract.'

4.2 The Ministry's special tender conditions are also to the same effect.

AD PARAGRAPH 7.1 THEREOF

5.1 The contents hereof are admitted and paragraphs 4.1 and 4.2 hereof are repeated"

[10] Paragraph 9 of the Particulars of Claim puts the sole issue in an even sharper focus. I quote hereunder only the critical part of this paragraph:

> "9. In breach of the agreement:
>
> 9.1 the first defendant (i.e. the Minister) did not order at least 90% alternatively 80% of the napkins from the plaintiff over the entire period, which period has already lapsed, alternatively and in the event of it being found that the first defendant did not have to order any napkins from the plaintiff despite the terms of the agreement.
>
> 9.2 (not applicable)"

[11] It is common cause that the special condition which the Minister relied upon in the court below as well as in this court is the one set out at clause 26 to be found at page 014 of Exhibit Bundle "A" of the record of appeal. It is that clause which was quoted in paragraph 4 of the plea in relation to paragraph 6 of the Particulars of Claim. Therefore the reference in the said paragraph 4 of the plea to "paragraph 6 of the Ministry's terms…" was an inadvertent error.

[12] Mr. Heathcote has contended on behalf of Serenity that it does not lie in the mouth of the Minister to deny the claim encapsulated in paragraphs 6 and 7 set out above because he admitted both of them in his plea. In paragraph 6 of his heads of arguments he therefore states as follows:

> "6. Hence, appellant prepared for and went to court on the basis of the admissions made by the respondents. It is in this context submitted that it is important to understand the statutory regime of the admitted agreement that was entered into between the appellant and the Tender Board."

[13] He then referred to the Act and in particular to section 7, which, as I have

already shown, provides for the powers and functions of the Board, section 16, dealing with acceptance of tenders and entry into force of agreements, and section 20, which empowers the Minister to make regulations which constitute the Code which was promulgated as Government Notice No. 19 of 1997.

[14] Regulation 7 of the Code aforesaid provides as follows:

> "7(1) where the Board considers it desirable, the Board may enter into a general agreement for –
>
> (a) a specified quantity of goods which may not be varied without mutual consent of the parties to such agreement;
>
> (b) an estimated quantity of goods subject to an increase or decrease of 10 per cent;
>
> (c) a maximum quantity of goods where the minimum quantity ordered cannot be guaranteed but where the maximum quantity may not be exceeded without mutual consent of the parties to such an agreement; or
>
> (d) an unspecified quantity or unguaranteed estimated quantity of goods.
>
> (2) The Board shall indicate in a title of tender the terms and conditions of a general agreement."

[15] Mr. Heathcote contended that the agreement subsisting between the parties *in casu* fell within the square walls of regulation 7(1)(b) of the Code. Hence the claim by Serenity that the Minister was in breach of the Contract by not ordering at least 90% of the estimated quantities of the large napkins.

[16] According to Mr. Heathcote, clause 26 aforesaid which, as I have stated

hereinbefore, the Minister has consistently relied upon, was not in itself objectionable, but only as long as it does not provide the Minister with an unfettered discretion such as would amount to an abuse of it. He further contended that there was an external standard enshrined in the clause and that the Minister had to adhere to it. That standard was based on historical data, and the conduct and *arbitrio bono viri* of the Minister in performing his part of the bargain had to be measured against that standard. By way of reinforcing this argument Mr. Heathcote quoted a passage from the book "Contract – General Principles" by Van Der Merwe, Van Huyssteen, Reinecke and Lubbe, which states, *inter alia*, as follows at page 220 -

> "At the very least, however, the regard for the interests of a fellow contractant required by the norm of good faith entails that the exercise of a power ought not to be allowed to reduce what was intended as a mutually beneficial exchange of performances to a transaction serving the interests of one party only."

[17] The footnote to the foregoing quotation states that "(m)arket conditions are an important indicator of the adequacy of the balancing of interests between the parties." The case **of NEDBANK LTD v. CAPITAL REFRIGERATED TRUCK BODIES (PTY) LTD 1988 (4) SA 73 (N) 74** is annexed to the footnote.

[18] Seen in the aforestated context, Mr. Heathcote argued, regulation 7 of the Code and Clause 26 of the MOHSS Special Conditions were not mutually destructive but complementary. It was his further submission that regulation 7 reinforces the principle of contractual *bona fides* and ensures compliance with

article 18 of the Namibian Constitution.

[19] I shall later on in this judgment deal with the question whether or not regulation 7 of the Code and clause 26 aforesaid are mutually destructive or they complement each other. As regards the reference to article 18 of the Namibian Constitution, it is my well considered view that it is inapposite to apply it to the present case.

[20] Mr. Heathcote criticised the trial judge for upholding Mr. Marcus's submission that the Minister's admission that the Code of Procedure was applicable to the agreement under review was not properly made. Mr. Heathcote contended that the admission was not only properly made and valid, but that it was not even retracted. Asserting the consequence of an admission in civil proceedings, he cited a passage from the 6th edition of "Beck's Theory and Principles of Pleading in Civil Actions" which reads as follows:

> "An admission puts no point in issue at all, but operates to eliminate the admitted facts from issues to be tried. Its effect is to bind the party making it and he or she is bound to the extent of its inevitable consequences or necessary implication unless these are specifically stated to be denied."

[21] Mr. Heathcote elaborated that the fact remained that "the respondents admitted that the tender which was awarded to the appellant was subject to the Code and that the 10% decrease was implied by the law." He bemoaned the fact that the change of stance by the respondents to the appeal came after his client,

relying on the unrevoked admission, had not asked for further discovery of the Tender Board minutes; had not called further witnesses to explain exactly why such an admission was indeed correctly made; and had not conducted its cross-examination completely differently. It was his further complaint that by ignoring the said admission the learned trial judge had denied Serenity a fair hearing.

[22] In the light of all the foregoing considerations, I must now provide an answer to the sole issue whether or not the core claim as contained in paragraphs 6 and 7 of the particulars of claim was admitted by the Minister. It has been noted already that the so-called admission was qualified in response to both paragraphs by the addition of the words "in amplification (the defendants) refer to paragraph 6 of the Ministry's terms and conditions of contract which states ……" As earlier noted again the foregoing quote was followed up with a recitation of the contents of clause 26 of the document entitled "MOHSS Specified Conditions.".

[23] Clause 26 of the MOHSS Special Conditions aforesaid expressly stated that the quantities required for the purpose of the contract were an estimate based on usage statistics of the past, and as such could vary. It went on to state that the purchaser reserved the right at all material times of the Contract, namely at the time of the award of the contract and/or during the period of the contract, to increase or decrease the quantities specified in the awarded schedule of tender specifications and requirements……" No specific levels of increase or decrease were stated; it was open – ended.

[24] I do not, therefore, agree with Mr. Heathcote's contention that clause 26 and regulation 7(1)(b) of the Code are complementary. The difference between them lies in the fact that the latter limits the level of increase or decrease to 10%. On the other hand the former does not prescribe any limit to the level of increase or decrease; the levels in clause 26 are open-ended on either side.

[25] Mr. Heathcote also argued that there existed an external standard embodied in clause 26. To that end, his contention continued, the conduct and *arbitrio bono viri* of the Minister in performing his part of the contract had to be measured against that standard. I regret that again I find myself in disagreement with that contention. I reaffirm my view that clause 26 provides for an open-ended variation. As such it does not, in my opinion, set any firm standard, if the standard advocated for is a standard that prescribes a fixed level of variation. In particular, since Mr. Heathcote's argument is that the standard is to be inferred from regulation 7(1)(b) of the Code, I cannot see how the standard of 10% variation can be concordant with the limitless standard provided by clause 26. To my understanding there is a clear incompatibility between the clause and the regulation aforesaid.

[26] Mr. Heathcote further bemoaned the fact that Serenity prepared for and went to court on the basis that the respondents hereto had made an unequivocal admission to the pith of his client's claim. The truth of the matter, as I discern it from the point of view of the pleadings reproduced hereinbefore, is that the so-called admission amounted to what is termed in the art of pleading as a confession

and avoidance. *In casu*, therefore, all the defence plea was calculated to achieve was to concede that the provisions of the Code (which was generally pleaded in the Particulars of Claim) were applicable, but thereafter to put up a defence that the pleader, as purchaser, had reserved his right to increase or decrease his requirements of orders to any level dictated by the historical usage statistics which contained no prescribed levels.

[27] In stressing my understanding of the so-called admission, which was in reality a confession and avoidance, it is necessary to underscore that regulation 7 contains four types of agreements. The type relied on by Mr. Heathcote on behalf of his client is that prescribed by sub-regulation 7(1)(b) providing for a 10% variation either way. Since I have held that in denying liability the Minister relied on clause 26 which, unlike regulation 7(1)(b), is open-ended as regards levels of variation, the regulation 7(1)(b) type is eliminated. Now we have to closely scrutinize the remaining three types.

[28] Sub-regulation 7(1)(a) provides for a contract entailing specified quantities of goods which may be varied only with the consent of both parties. This type can be discounted right away because although the contract entered into in this case specified the quantities of napkins as being six million, the agreement contained no term requiring variation of quantities by mutual consent of the parties to the agreement. Sub-regulation 7(1)(c) describes a type of agreement which may be entered into by the parties as being an agreement for a maximum quantity of goods in which the minimum quantity ordered cannot be guaranteed, but where

the maximum quantity may not be exceeded without the mutual consent of the parties to the agreement. Again this type of contract does not accord with the agreement which the parties in the present case signed. This is because there was no term in that agreement about, for instance, exceeding the maximum quantities by mutual consent of the parties. Therefore, sub-regulation 7(1)(c) is equally eliminated. The last type under the regulation is an agreement for an unspecified quantity or unguaranteed estimated quantity of goods. This sub-regulation provides for two alternative types of agreements: the first is for unspecified quantities, but *in casu*, the quantities were specified as six million large napkins. So this type is out. The alternative is for unguaranteed estimated quantities. This type does, in my view accord with the agreement which subsisted between the parties in this case. The quantities were estimated at six million but there was no guarantee that that number would be ordered. Under clause 26, any quantities to be ordered were to be determined having regard to the historical usage statistics.

[29] The sixth edition of "Benjamin's Sale of Goods" deals aptly with the situation where a contract of sale relates to unguaranteed estimated quantities of goods. The following passages occur at paragraph 8-058 and 8-059 on pages 386 and 387 thereof. I reproduced the same hereunder:

> "8-058. Secondly, the terms of the agreement must be examined in order to determine the extent of the buyer's liability. The word "required" or any similar word, may be equivalent to "ordered" or "demanded" so that the buyer will only be liable if he actually places an order for goods, <u>but will not be bound to purchase any goods at all.</u>

> Where there is a standing offer by the seller, for example, the buyer will not normally incur any liability by accepting such an offer, his acceptance being merely a recognition that the offer has been made; in the absence of an express stipulation, he will be under no obligation to give any order. On the other hand, the true construction of the agreement may be that the buyer binds himself to purchase such goods as he may 'require' in the sense that he undertakes to procure all that he may need from the seller and from no other source. In such a case, he is under a contractual obligation to purchase his requirements from the seller. (underlining is mine)
>
> 8-059 Where there is bilateral contract to supply and purchase the 'requirements' of the buyer, the seller cannot force upon the buyer the estimated quantity of his requirements where the goods are *bona fide* not required, as, for instance, where the buyer has discontinued the business for which the goods are required. Conversely, the buyer cannot force delivery of a greater quantity of goods than are *bona fide* required. If the buyer brings an action for damages against the seller for failure to satisfy his requirements, it is essential for him to prove that there was a need on his part for the goods of which delivery was required."

[30] The evidence in this case showed quite clearly that the Ministry was required to place specific orders for napkins at any given time. A case in point was in relation to the small napkins where a specific order for 1215 bales was made. Serenity had that requisite number available, and was, therefore, ready and willing to deliver them. The Ministry unfortunately refused to take delivery during the contract period. The court *a quo,* quite correctly, held the Ministry liable in damages for the failure to accept delivery.

[31] To the contrary, the evidence is quite clearly that in regard to the large napkins, Serenity was pressuring the Ministry into placing additional orders for such napkins. The latter made it categoric that at the time of such endeavour there was lack of consumer demand and that there were enough stocks already

available at the Central Medical Stores. The fact that the Ministry did not place orders as requested is vindicated by Serenity's own pleading in paragraph 9 of the Particulars of Claim, *viz*:

> "9. In breach of the agreement:
>
> 9.1 the first defendant <u>did not order</u> at least 90%, alternatively at least 80% of the napkins from the plaintiff over the entire period ……." (emphasis supplied)

[32] Some of the correspondence exchanged between the parties also underscored the preceding point. This is depicted by the letter from Serenity dated 15th August 2001 and the reply thereto dated September 6, 2001 as shown hereunder:

[33] Serenity's letter to the Ministry:

"15 August 2001

The Permanent Secretary
Ministry of Health and Social Services
Private Bag 13198
Windhoek
Namibia

<u>Attention: Dr. Shangula</u>

Cc: Mrs. M. Onesmus
Cc: Mrs. F. Simataa

<u>RE: Tender orders for disposable nappies</u>

Dr. Shangula

Serenity Manufacturing (Pty) was awarded the tender being No. A13-04/2000 for disposable napkins on the 08th of September 2000. The tender quantities indicated on the tender document were as follows:

- Small napkins an amount of 1,200,000 million
- Large napkins an amount of 6,000,000 million

To date we have delivered on orders from the M.O.H.S.S:

- Small – 55,200 and
- Large – 1,218,000.
-

There is approximately 13 months remaining in the tender period and the outstanding order quantities should be:

- Small – 1,144,800
- Large - 4,782,000

We have received a preliminary order schedule from the M.O.H.S.S., please see attached document. (Annexure 1) According to the document the orders to be placed are 360,000 large napkins per two-month period (which calculates to 2,160,000 Large napkins for the remaining tender period.)

There are also no projected orders for small. One of the orders we had already started delivering on was also cancelled.

We calculate the deviation to be:

- Small – 1,144,800
- Large – 2,622,000

We attach a document that indicates all deliveries to date and includes the remaining orders outstanding to reach the tender quantities according to tender agreement.

Due to the above-mentioned factors Serenity Manufacturing (Pty) Ltd is facing a number of problems.

- Firstly we have not received any orders since 08 June 2001 and have raw materials and finished goods to the value of more than N$250,000 in stock.

- This is causing cash flow problems as we have to pay our suppliers (in advance) for raw materials and there is no revenue from sales to the M.O.H.S.S.

- The specific disposable napkin is made only for the

M.O.H.S.S. according to the tender agreement's specifications and is not suitable to sell in the retail market. (Mainly because of packaging requirements and product construction)

- The tender accounts for 95% of the turnover for Serenity Manufacturing (Pty) Ltd.

- We have employed over 30 workers to manufacture and maintain the supply of disposable napkins to the M.O.H.S.S.
- Substantial investments was also made in plant, machinery and training.

Should the situation not change within the next week or two, we will have no choice but to reduce staff to fewer than fifteen employees. Although we see this as a last resort, we need to look at the best interest of the company and its chances of survival.

We will also have to re-visit our original cost calculations, as the cost per unit increases dramatically when production quantities reduce with more than 50%.

We sincerely hope you will assist us in resolving the situation, as we desperately want to maintain full production with the necessary staff compliment.

Looking forward to your reply,
Yours faithfully,
S. Salt"

[34] The reply from the Ministry:

"September 6, 2001

The Serenity Manufacturing (Pty) Ltd
P.O. Box 2551
Windhoek
Namibia

RE: TENDER ORDERS FOR DISPOSABLE NAPPIES

We thank you very much for your letter dated August 15, 2001 in respect to the above matter of which we wish to respond as below.

The supply contracts with the Ministry are term contracts rather than fixed quantity contracts; meaning that the Ministry, within the period of the contract, <u>may</u> purchase the contracted item(s) from the contracted supplier as needed. This condition has been categorically stated in the MoHSS Tender Special Conditions Clause 26, which is quoted below:

> "**26. The right to vary Quantities at the time of award and/or during contract**
>
> *The quantities required for the contract period are an estimate based on usage statistics of the past, and as such can vary. The purchaser reserves the right at the time of the award of Contract and/or during the period of contract to increase or decrease the quantities specified in the awarded Schedule of Tender Specifications and Requirements without any change in price or other terms and conditions of the tender."*
>
> Your participation in this tender and consequently your acceptance of the award of contract to supply these items signified your agreement to this condition. Further, I am informed that, the CMS has large quantities of the nappies at the moment and is unable to take any more of the items because its usage has apparently dropped to lower level than formerly estimated. This is not uncommon for pharmaceutical products and its related supplies purchased by the Ministry, hence the option for the Government preference for estimated quantity contracts rather than fixed quantity contracts.

Nevertheless, I would like to take this opportunity to assure you that, order for the items will be placed with your company as soon as the need for the items arise.

Thank you.

Sincerely,

> **Dr. K. Shangula**
> **PERMANENT SECRETARY"**

[35] In the instance stated above where the Ministry placed an order for the small napkins and in response Serenity made them available and then communicated its readiness to supply, the reason why the court held the Ministry to its order and found it liable in damages for failing to accept delivery, was that here there was an ancillary contract within the over-all standing contract executed in February 2001. In terms of the ancillary contract, there was an offer by the Ministry to buy or order the napkins. Serenity accepted the offer through its expression of the intention to

deliver. The elementary ingredients of offer and acceptance therefore, constituted the ancillary contract.

[36] On the other hand, as regards the large napkins, the above quoted letters show that Serenity offered to supply, but the Ministry through its Permanent Secretary, did not accept the offer as the letter of September 6, 2001 shows. Therefore, in the absence of acceptance, no ancillary contract could be created. However, Mr. Heathcote cried foul because the refusal to accept the offer was based on clause 26 aforesaid. Two points were raised by Mr. Heathcote in resisting reliance on clause 26 by the Minister.

[37] The first one was based on the quotation he made from the book "Contract General Principles" supra. For the second point he relied on the *ratio decidendi* in the Supreme Court of Appeal case of NBS BOLAND BANK LTD v. ONE BERG RIVER DRIVE CC AND OTHERS, DEEB AND ANOTHER v. ABSA BANK LTD, FRIEDMAN v. STANDARD BANK OF SA LTD 1999 (4) SA 928

[38] The first point is to the effect that regard for the interests of a fellow contractant required that the norm of good faith entails that the exercise of a power which was intended as a mutually beneficial exchange of performances in a transaction ought not to be reduced to serving the interests of one party only. In arguing this point, Mr. Heathcote, as I understood him, meant that clause 26, which in his view, was complementary to regulation 7(1)(b) of the Code and intended to be normally beneficial to both parties, had been reduced to serving the

interests of the Minister only. Was that the case in fact?

[39] In the document headed "MOHSS Special Condition" the following occurs at clause 1.5, *viz:*

> "Where Tender Conditions differ, MOHSS Special Conditions and the Tender Board Special Conditions (TB339) shall prevail"

In addition, the Contract which was executed by both the Permanent Secretary of the Ministry and by Mr. Salt on behalf of Serenity in February 2001, reads in paragraph 2 as follows-

> "The following documents shall be deemed to form and be read and construed as part of the agreement; the Tender Document comprised of the following documents:"

Those documents were listed as (a) – (f) and at (d) was the document referring to MOHSS Special Conditions. Needless to recapitulate that clause 26 was an integral part of the said MOHSS Special Conditions.

[40] It is assumed that Mr. Salt, as the person who acted on behalf of Serenity in submitting a tender, must have noticed all the foregoing before making up his mind to tender. In the light of the construction I have placed on clause 26 in terms of its open-endedness regarding variations of quantities, Mr. Salt must have opted to tender with his eyes open. It should, therefore, not lie in his mouth at this stage to complain that clause 26 was reduced to serving the interests of the other party

only. Moreover, the statement of the law quoted earlier from the book “Contract – General Principles,” supra, is underpinned by the case of NEDBANK LTD v. CAPITAL REFRIGERATED TRUCK BODIES (PTY) 1988 (4) SA 73 (N) 74 which is cited as the authority for the statement that the “(m) arket conditions are important as an indicator of adequacy of the balancing of interests between the parties.” In the current case, the refusal to accept demands by Serenity that the Ministry should order at least 90% alternatively 80% of the large napkins was said to be based on historical usage statistics and the fact that at the material time the stocks of large napkins available at the Central Medical Stores were adequate and the consumer demand was low. I accept that that underlying reason for the refusal was a sufficient indicator of market conditions which were prevailing at that time.

[41] Adverting to the NBS Boland Bank Ltd case, supra, the cardinal question which fell to be determined was whether a clause in a mortgage bond conferring upon the mortgagee the right to unilaterally increase the original rate of interest payable by the mortgagor was valid. The case was a consolidation of three appeals arising from three different trial courts. The three trial courts had come up with conflicting decisions. In one case the trial court held that such a clause conferred upon the mortgagee an unfettered power to vary the interest rate and therefore concluded that the clause was invalid. That court held the view that a term of a contract leaving it to the will of one of the parties to determine the extent of his or the other party’s prestation was void for vagueness. Another court held that such a clause was valid. That court held the view that the mortgagee would be entitled to raise the interest rate of the mortgage bond “whenever and to the

extent that it would, in the usual and ordinary course of its business as a financial institution, and as a general increase in interest rates in the market, raise the interest rate charged by it on new mortgage loans of the same nature and category as the one to which the loan in question belongs. In the third trial court the judge held that the mortgagee's power was not unfettered since he could increase the interest rate only in accordance with the prevailing banking practices.

[42] Owing to the intricate nature of the legal issue raised in the consolidated appeal, the appellate court was composed of five eminent judges who included Mahomed CJ and Van Heerden DCJ. The latter delivered the unanimous judgment of the court. After considering a wide legal research field covering the historical background of Roman, Dutch, English, Scottish, German as well as the law of the United States of America, the court came to the conclusion that such a clause was not invalid for vagueness. Van Heerden, DCJ pronounced the following dictum at paragraphs (24) and (25) namely:

> "(24) In sum, I am of the view that, save, perhaps where a party is given the power to fix his own prestation, or to fix a purchase price or rental, a stipulation conferring upon a contractual party the right to determine a prestation is unobjectionable. Secondly, as has been said above, there is an additional reason for holding that the clause under discussion is valid. Of course, in some cases providing for discretional determinations there may be no enforceable contract until the determination is made. But when made an unconditional contract comes into being.
>
> (25) All this does not mean that an exercise of such a contractual discretion is necessarily unassailable. It may be voidable at the instance of the other party. It is, I think, a rule of our common law that unless a contractual discretionary power was clearly intended to be completely unfettered, an exercise of such a discretion must be made *arbitrio bono viri."*

[43] The learned judge followed the foregoing passage with a number of decided cases which underpin the principle of law covered in the above quoted paragraphs. It is unnecessary for me to quote those cases for the present purpose. Suffice it to state that the appellate court held that a term which gave to a contractual party a discretion to determine a prestation was not necessarily invalid and that in any event such a term – if prima facie unfettered – was assailable by the other party.

[44] The logical question which arises in the present case is whether clause 26 herein was, or was not, used *arbitrio bono viri*. Put in other words, was the refusal by the Ministry to order any large napkins at all made in good faith? Two explanations were put forward to account for the refusal: first, that there were ample stocks of large napkins in the Central Medical Stores, and secondly, that there was a slump in the market. This is made plain by the letter earlier quoted dated September 6, 2001, from the Ministry's Permanent Secretary to the Serenity Manufacturing (Pty) Ltd. The penultimate paragraph needs special emphasis. It states in part as follows:

> "Further, I am informed that the CMS has large quantities of napkins at the moment and is unable to take anymore of the items because usage has apparently dropped to lower level than formerly estimated. This is not uncommon for pharmaceutical products and its related supplies purchased by the Ministry, hence the option for the Government preference for estimated quantity contracts rather than fixed quantity contracts."

[45] There, in the foregoing quoted paragraph, lies the answer to the question posed in the preceding paragraph of this judgment. The paragraph's answer is two pronged : In considering whether or not to order the large napkins, the market conditions were taken into account – the stocks available were ample and there was in any event a slump in the demand for them; secondly, and by necessary implication, the exercise of the discretion provided by clause 26 was not unfettered as it might have been assumed to be if, for example, the stocks were low or non-existent and the demand for the napkins was high, but nonetheless the Ministry refused to place orders.

[46] An unfettered discretion is a discretion which a party can capriciously wield whether or not circumstances are in the party's favour. That was not the case in the current appeal. I am, therefore, satisfied that the decision not to order any more napkins was made *arbitrio bono viri*. In the event I find Mr. Heathcote's contention in this connection unpersuasive. I do not accept it.

Conclusion :

[47] This appeal was hotly fought and in the process a number of legal issues were canvassed. The clarity of thought with which counsel on both sides presented their arguments assisted in alleviating the burden I bore of resolving the divergent contentions espoused on behalf of the parties to the appeal. I, therefore hereby place on record the appreciation of the Court for the intellectual industry infused into both the preparation of the heads of argument and the oral

submissions before us.

[48] As for the appeal, I am satisfied and feel sure that it lacks merit. There was every logic in the Ministry, as the Permanent Secretary stated in his letter of September 6, 2001, opting for estimated quantity contracts rather than fixed contracts when procuring pharmaceutical and related products. That policy, if one can give it that tag, was adopted for *a bona fide* purpose. It was designed to ensure that the Ministry reserved its right of placing orders commensurate with any short-fall in the stocks available in the Central Medical Stores. In addition the economics rule of supply and demand cannot be over-stressed in such a situation. It would have been a waste of tax payers' money to order goods knowing that there was no demand for them.

[49] The appeal not having merit, is hereby dismissed with costs and I so order.

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CHOMBA, AJA

I agree

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MARITZ, JA

I agree.

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STRYDOM, AJA

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