

837

SWAZILAND HIGH COURT

Swaziland National Provident Fund
Plaintiff

v

Intercon Construction Swaziland (Pty)Ltd.
Defendant

Judgement
06/07/00

Coram

Sapire, CJ

For Plaintiff
For Defendant

Mr. P. Flynn
Mr. C. Maphanga

JUDGMENT (6/7/2000)

This is a judgment on a special plea. The plaintiff sues for payment of E420 000 with interest. The claim arises from the alleged breach of a building contract. The contract, which was in writing, and followed a standard form, provided for the Defendant to complete the erection of apartments and garages on the plaintiff's property in Mbabane. The parties also provided for payment of the contract price. A copy of the contract is attached to the summons.

The works have been completed, and the amount payable on completion has been paid.

This dispute arises from defective workmanship or materials used, which the plaintiff alleges became manifest thereafter. The amount claimed represents the cost of

reinstating tiling, which lifted. Defendant has repudiated Plaintiff's claim on the merits, but has also raised a special plea

For its special plea, the Defendant relies on the provisions of Clause 26 of the agreement. Clause 26 records the agreement of the parties to refer disputes between them relating *inter alia* to the performance of the parties of their obligations under the agreement initially to the architect for decision. If the contractor is not satisfied with the architect's ruling he may require an arbitration.

The wording of the referral to arbitration is materially the same as is to be found in other contracts of this nature, which follow the standard form. The disputes which are to be the subject matter of arbitration are those, among others, arising between the Employer (the plaintiff in this instance) and the Contractor (the Defendant). The subject matter of such disputes may be as to the construction of the contract or any matter or thing arising thereunder. This wording is clearly wide enough to include the present dispute.

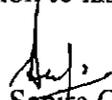
See *Stocks & Stocks (Gauteng) (Pty) Ltd V A & P Electrical Cc 1998 (4) SA 266 (W)*

The plaintiff has not replied to the special plea and no evidence has been led of circumstances which would make it proper for me to refuse the stay of proceedings sought by the Defendant. The discretion I have in the matter is one to be exercised judicially and "there should be compelling reasons for refusing to hold a party to his contract to have a dispute resolved by arbitration

See *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales (Pty) Ltd 1971 (2) SA 388(W)*

In opposing the defendant's plea, the plaintiff's counsel has argued that as the contract does not provide for a liability period for latent defects so that the present claim has to be dealt with under the common law. The defendant seeks to infer from this, that the present claim is not one arising under the contract. This is an argument, which has only to be stated for its flaw to be apparent. The plaintiff's claim is for damages for breach of the building contract in terms of which the Defendant was obliged to apply proper workmanship and appropriate material

I accordingly uphold the special plea with costs and order that the action be stayed pending the referral to the architect and defendant's reaction to his ruling.


S W Sapife CJ