IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CIVIL CASE NO. 3026/06

In the matter between:

CONSTRUCTION ASSOCIATES (PTY) LTD APPLICANT

VERSUS

C S GROUP OF COMPANIES (PTY) LTD RESPONDENT

CORAM	MAMBA J
FOR APPLICANT	Adv. R. WISE SC (Instructed by Robinson Bertram)
FOR RESPONDENT	Adv. M. Van Der Walt (Instructed by E.J. Henwood)

JUDGEMENT

13th June, 2008

[1] On or about the 6th December 2004, the Plaintiff (hereinafter called the Contractor) entered into a written agreement with the Defendant (hereinafter called the employer).

[2] The agreement comprises the

(a) Articles of the Agreement,

(b) The contract drawings, the bills of quantities and the specifications,

(c) The terms thereof (referred to in the agreement as the "conditions) and the schedule of rates thereto.

[3] This contract is in the standard form of contract for Civil Engineering Construction works used and recommended by the Swaziland Association of Architects Engineers and Surveyors, the International Federation of Consulting Engineers (FIDIC) and the Institute of South African Architects, the Association of South African Quantity Surveyors and The Building Industries Federation of South Africa. I mention this because of the near universal nature and use and interpretation of such standard form agreement.

[4] The contract documents referred to above constitute or establish or form the working relationship within which the parties herein had to carry out their respective obligations under the contract. The employer appointed Ngwenya Wonfor and Associates Chartered Surveyors as the architects and quantity surveyors for purposes of the project relevant to the agreement. The Contractor's primary obligation was to carry out and complete the works as laid out in the drawings and as described in the bill of quantities and specification and to do so in accordance with the directions and to the reasonable satisfaction of the Architect who was empowered in his discretion

from time to time to issue further drawings, details and or written instructions to the Contractor.

[5] The employer was on the other hand expected to pay to the contractor the sum of ten (10) million Emalangeni or such other sum as shall become due and payable under the said written agreement and to make such payments at the times and in the manner specified in the terms of the agreement. The contractor was further entitled to receive from the Architect interim certificates at certain specified intervals not greater than one calendar month, a penultimate and a final certificate. These certificates had to state the amount due by the employer to the contractor and such amounts were payable within a period of (14) fourteen days from date of issue of each such certificate. The Architect was further obliged to notify the employer of the date and amount stated in each certificate at the time of issue thereof and if after the expiry of the said fourteen days, the amount stated in the certificate had not been paid to the contractor, the employer would be liable to pay to the contractor interest on such amount due at the rate of two percentum (2%) greater than the minimum going lending rate charged by Commercial banks to their clients in Swaziland, which at all time material hereto the said rate was 11.5% per annum.

[6] After the Contractor started executing and or carrying out the erection of the building complex, it would from time to time receive interim certificates from the architects. These certificates, including

the penultimate one were honoured by the employer; that is to say, the employer paid the contractor all the amounts stated therein.

[7] It is perhaps opportune at this stage to state that from inception the contract price for the works as tendered by the contractor and agreed between the parties was a sum of just over 17 Million Emalangeni long before the penultimate certificate was issued by the Architect, the total amount due to the contractor for the building works had been discussed and agreed to between the employer and the contractor. This was confirmed in writing by the Architect by letter dated 17th September 2004 (page 68 of the book of pleadings). It is not necessary for me for purposes of this judgment to state the details and circumstances that led to this. Suffice to say the records of the meetings held between the employer and the contractor amply document these details and circumstances or instances.

[8] The Architect issued the final certificate and it is dated the 21st July 2006. It is certificate number 15. This certificate reflected and certified that an amount of E1, 059,875.61 was due and payable by the employer to the Contractor. The employer was duly notified of these facts (date and amount) – by the architect. The Contractor also presented this certificate to the employer for payment within the 14 day period after the 21st July 2006. The employer has failed to comply with the contractor's demand for payment of the amount stated in the final certificate. This has led to this action for payment of same.

[9] Following the filing of a notice of intention to defend the action by the employer, the contractor has applied for summary judgement. This application is opposed by the employer and the grounds for such resistance may be summarized as follows:

(a) Clause 26 of the agreement stipulates that any dispute between the parties must in the first instance be determined by the Architect and if the determination by the Architect is challenged, it must be referred to arbitration before it could be brought to a court of law.

(b) The employer has already paid a sum of 16 million Emalangeni to the Contract whilst the original contract price is a sum of 10 million Emalangeni. The Contractor has already been overpaid and is not entitled to the amount claimed in this action,

(c) The Contractor has overcharged the employer in respect of the bill of quantities and

(d) The Contractor has failed to carry out its obligations in terms of the agreement in that the quality of its workmanship has been poor and defective or incompetent and incomplete.

[10] Without any further ado, and as stated above (para 7) there is no merit on the employer's ground or defence raised under (b) herein. The contract sum as per the tender document and award was the sum of E17 896 217-35 (see Page 67 and 68 of the Book of Pleadings) and all the interim certificates after certificate number 4 stipulated the contract price as 17 million Emalangeni.

[11] I turn now to examine the relevant law applicable herein and with particular attention to the characteristics and or status of an architect's final certificate. HUDSON'S Building And Engineering Contracts (10th Edition) by I.N. Duncan Wallace @ page 498 states as follows :

> "In order for the satisfaction or certificate of an architect or engineer to be conclusive and binding on the parties, the following conditions must exist:
>
> (i) The matter in dispute must be one upon which the contract confers jurisdiction on the architect or engineer to express his satisfaction or certify.
>
> (ii) The contract must on its true construction provide that the certificate or satisfaction is intended to be binding. In most but not necessarily all building contracts this would be the case bilaterally, that is to say both parties must be bound by the certificate. There are, however, cases, apart from the obvious example of interim certificates, where the certificate will only be binding unilaterally. But in either case a provision enabling a party to go behind or question or dispute the decision will destroy the conclusiveness of the satisfaction or certificate, in particular any applicable arbitration clause.
>
> (iii) The certificate or satisfaction must be honestly given. It must be given without collusion, interference or undue influence, and the certifier must preserve his independence and not at in a way that suggest that he has lost his independence.

(iv) The provisions of a contract must be strictly adhered to, the approval or certificate must be given by the correct person at the correct time, and must not take into account any matters quite outside the stipulated requirements of the contract, though there may be a class of 'unilateral' cases where the certifier may impose a stricter standard, e.g. of quality, on the party bound than the contract documents expressly require."

[12] I, with respect can do no better than repeat what was stated by **McEWAN J in SMITH v MOUTON, 1977 (3) SA 9 @ 12D – 15C :**

"It should be stated first that there is no special law different from the law relating generally to contracts and their interpretation that applies to building contracts and to architects' certificates issued under them. In each case the primary consideration, as **BROOME, J.P.,** was at pains to point out in the case of **S.A. BUILDERS AND CONTRACTORS v LANGELER, 1952 (3) S.A. 837 (N),** is the proper interpretation of the particular contract before the Court. Nevertheless where contracts with identical or similar wording have been interpreted by the courts, previous decisions will afford valuable guidance. The common use of standard forms of contracts, such as the form used in the present two cases, means that such guidance is more readily available than might otherwise be the case. Where therefore I set out a principle derived from decided cases, it may be assumed that the wording of the contract concerned was sufficiently close to that in the present case to render the principle of application here."

The relevant principles are the following:

1. The architect is nominated by the employer and acts as the employer's agent for various purposes. These include the issuing of "architect's instructions" in connection with the work (clause 1), supervising the work, and the issuing of the certificates referred to in clause 25. There appears to have been doubt at one time as to whether the function of the architect in issuing certificates was that of an agent for the employer or that of an arbitrator or *quasi*-arbitrator between the contractor and the employer. In the case of **HOFFMAN v MEYER, 1956 (2) S.A. 752(C), OGILVIE THOMPSON, J.** (as he then was), had to consider the position under a contract similar to the present two contracts. He came to the conclusion that the architect is the agent of the employer for the purpose of issuing a final certificate. In doing so he declined to follow the English case of *Chambers v. Goldthorpe (1901) 1 K.B. 624* (see especially pp. 754G-759D). *Chambers v. Goldthorpe* has recently been overruled by the House of Lords for reasons similar to those of the learned Judge in *Hoffman's* case (see *Sutcliffe v. Thackrah,* (1974) 1 All E.R. 859). See also *Randcon (Natal) (Pty) Ltd v. Florida Twin Estates (Pty) Ltd., 1973 (4)* S.A. 181 (N) at pp. 186G-188G. where VAN HEERDEN J., said at p. 186H that, if an architect acts as the agent of the building

owner in issuing a final certificate, *a fortiori* that is the case when he issues an interim certificate.

2. The employer should be bound by the act of his agent in issuing a certificate. The position is the same as if the employer himself had signed an acknowledgement of debt (see the *Randcon* case, *supra* at pp. 183H-184H). The exceptions are those that apply generally in the law of agency. For example, the employer will not be bound if there has been fraud or the architect has acted in collusion with the contractor to the detriment of the employer (McKenzie, *The Law of Building Contracts and Arbitration in South Africa,* 2nd ed., p. 114). The employer will also not be bound if the agent has exceeded the mandate (*McKenzie, supra* at p. 113; *Rudland and Son v. Gwelo Municipality,* 1933 S.R. 119 at pp. 130-133; *Portuguese Plastering Contractors (Pty) Ltd v. Bytenski,* 1956 (4) S.A. 812 (W) at p. 815A-D). In *Rudland*'s case the engineer issued certificates that were not drawn up in accordance with the terms of the written contract between the parties, but in terms of an oral variation made by the engineer, which he was not authorized to make. The relevant certificates were therefore held to be invalid. HUDSON, J., at p. 133, drew an analogy with the case where a matter is left to the discretion or determination of a public officer as set out in *Shidiack v. Union Government, 1912* A.D. 642 at pp 651, 652. In the *Portuguese Plastering* case certificates had been issued

prematurely before the time specified in the contract and were declared to be invalid.

3. The employer is not entitled to dispute the validity of a final certificate *vis-à-vis* the contractor merely because he alleges that the certificate was given negligently or that the architect exercised his discretion wrongly. This principle would include cases where the architect has issued final certificates for work which the employer considers to be defective or which are based on faulty measurements or faulty calculations (*Hoffman v. Meyer, supra* at pp.757F; 759E-G). Subject to what is said below, the same principle would appear to apply in the case of an interim or progress certificate.

4. In the absence of any of the factors referred to in para. 2, the employer is bound to pay the sum certified. This is why in the cases an architect's certificate has been said to create a debt due and has been said to be regarded as the equivalent of cash. See *S.A. Builders and Contractors v. Langeler, supra* at pp. 841H-842H; *Randcon (Natal) (Pty) Ltd v. Florida Twin Estates (Pty) Ltd., supra* at pp. 183H-184H; *Dawnays Ltd. v. F.G. Minter Ltd., (1971)* 2 All E.R. 1389 (C.A.) where Lord DENNING, M.R., said at p. 1393 b:

"An interim certificate is to be regarded virtually as cash, like a bill of exchange. It must be honoured. Payment must not be withheld on account of cross-claims, whether good or bad – except so far as the contract specifically provides. Otherwise any main contractor could always get out of payment"(i.e. to a sub-contractor) "by making all sorts of unfounded cross-claims."

In the present cases clause 25 (a) of the contracts clearly creates a debt due for the amount of the certificate. The debt is payable within seven days of the date of issue of the certificate.

5. The fact that the amount of the certificate is so payable does not mean that the employer in any case is left without a remedy if the architect in an interim certificate has certified in respect of defective work or has certified too large an amount. Clause 25 (j) of the contract reads:

"Save as aforesaid, no certificate of the architect shall of itself be conclusive evidence that any works or materials to which it relates are in accordance with this contract."

The reservation appears to relate to clause 25 (h) which reads:

"A final certificate issued in terms of sub-clauses (f) and (g) of this clause, save as regards all defects and insufficiencies in the works or materials which a reasonable examination would not have disclosed, shall be conclusive evidence as to the sufficiency of the said works and materials, and of the value thereof."

Reading the two sub-clauses together, it seems to me that an interim or penultimate certificate, although it must be honoured by payment because it is intended to keep the contractor in funds so that he can continue the contract, is not intended to deprive the employer of any rights that he may have arising from defective work or even a temporary overpayment.

The contract itself makes provision for defective work to be made good before a final certificate is issued and before the

retention monies which have been deducted from any interim payments are paid out (see clauses13, 21, 22 (a) (iii) and (iv) and 25 (d)). Primarily therefore it appears that the intention is that all questions as to the making good of defective work and of possible over-valuation of work done and materials supplied in interim certificates should be adjusted before or when a final certificate is issued.

The second remedy available to any employer in an appropriate case is to sue the architect for damages arising from his negligence in issuing incorrect certificates, if such be the case (see *Hoffman v. Meyer* and *Sutcliffe v. Thackrah, supra).*

A more difficult question is whether or not the employer is entitled to resist a claim for payment of the sum shown in an interim certificate on the grounds that, by reason of defective work or delay in completion of the works, the employer has a claim for damages against the contractor which will extinguish or reduce the amount of the claim on the certificate. The authorities to which I have referred so far (which are the authorities upon which the plaintiff relies) seem to indicate that no such defence is available. However, in *Gilbert Ash (Northern) Ltd v. Modern Engineering (Bristol) Ltd., (1973)* 3 All E.R. 1975, the House of Lords overruled the *Dawnays* case *supra,* and a number of other cases in which the Court of Appeal had applied what had come to be known as the "rule in Dawnays case". The actual case concerned a sub-contract in

terms of which the main contractor was given very widely expressed rights to withhold payments in terms of the contract from the sub-contractor or to make deduction therefrom. Nevertheless the learned Law Lords discussed the position between the employer and a contractor in a building contract and indicated clearly in their opinions that there is nothing special or sacrosanct about an architect's certificate (cf. per Viscount DILHORNE at p. 207c-d). In English common law (from which in my opinion our law does not differ materially in this respect) a defendant who is sued for payment for work done and materials supplied is entitled to raise as a defence that the work or materials were defective and therefore that he is not liable for the whole or part of the price. Consequently it would require very clear expression in the contract concerned to show that the issue of an architect's certificate was intended to take away that right. The following passage from the opinion of Lord DIPLOCK at p. 216c, summarises the general approach of the learned Law Lords,

"So when one is concerned with a building contract one starts with the presumption that each party is to be entitled to all those remedies for its breach as would arise by operation of law, including the remedy of setting up breach of warranty in diminution or extinction of the price of material supplied or work executed under contract. To rebut that presumption one must be able to find in the contract clear unequivocal words in which the parties have expressed their agreement that this remedy shall not be available in respect of breaches of that particular contract."

At p. 211h Viscount DILHORNE quoted the passage from the judgement of Lord DENNING in the Dawnays case which I

have quoted earlier, and said: "with the greatest of respect I cannot regard these statements as correct." I should finally refer to the following passage from the opinion of Viscount DILHORNE at p. 20h:

"A great deal has been said in Dawnays case and the cases which have followed it, as well as in this case, as to the importance of a 'cash flow' in the building industry. I cannot think that the building industry is unique in this respect. It is, of course, true that the contract makes provision for payments as the work proceeds, but, it is to be observed, a fact to which I feel insufficient attention has been paid, that the contractor is only entitled to be paid for work properly executed. He is not entitled to be paid on interim certificates for work which is defective. The Architect should only value work executed properly, that is to say, to his reasonable satisfaction (clause 1); and no interim certificate is of itself conclusive evidence that the work was in accordance with the contract (clause 30 (8)."

[13] However, in casu, the issue pertains to the final certificate as distinguished from an interim certificate. The relevant clause in the agreement under consideration is 25.7 which provides that

"A final certificate issued in terms of clause 25.5 and 25.6, save as regards all defects and insufficiencies in the works or materials which a reasonable examination would not have disclosed, shall be conclusive evidence as to the sufficiency of the said works and materials, and of the value thereof."

And clause 25.9 states that

"Save as aforesaid, no certificate of the Architect shall of itself be conclusive evidence that any works or materials to which it relates are in accordance with this contract."

And finally in **OCEAN DINERS (PTY) LTD v GOLDEN HILL CONSTRUCTION CC 1993 (3) SA 331** at 340D-F the court stated that;

> "The issuing of a final certificate carries with it certain legal consequences. Their nature depends in the first instance on the proper interpretation of the relevant provisions of the governing agreement. In the present matter the effect of the certificate was to determine the respective rights and obligations of the parties in relation to matters covered by the certificate. It constituted (in the absence of a valid defence) conclusive evidence of the value of the works and the amount due to the respondent. It embodied a binding obligation on the part of the appellant to pay that amount. It gave rise to a new cause of action subject to the terms of the contract. The Appellant's failure to pay within the time stipulated entitled the respondent to sue on the certificate (compare MOUTON v SMITH, 1977 (3) SA 1 (A) @ 5C-E). However, the certificate is not indefeasible. It is subject to the various defences that may be raised in an action based on a final certificate."

[14] I now examine the defences raised in the present application for summary judgement:

(A) THE REFERRAL TO ARBITRATION

Clause 26 of the agreement provides that in the case of any dispute or difference between the parties, the dispute or difference shall be determined by the architect who shall make his decision in writing.

The Architect's decision shall be final and binding on the parties unless appealed against in writing within 14 days of receipt thereof, in which case the appeal shall be referred to arbitration.

> "The Arbitrator shall have power to open up, review and revise any certificate, opinion, decision, requisition or notice, and to determine all matters in dispute which shall be submitted to him, and of which notice shall have been given as aforesaid in the same manner as if no such certificate, opinion, decision, requisition or notice had been given. Upon every or any such reference, the costs of and incidental to the reference and award shall be in the discretion of the arbitrator, who may determine the amount thereof, or direct the same to be taxed as between attorney and client or as between party and party and shall direct by whom and to whom and in what matter the same shall be borne and paid."

From the above, it is clear that prior to an issue being referred to arbitration, there must be a dispute between the employer and contractor and this dispute must have been referred and determined by the architect. It is an appeal against the decision of the architect that is to be referred to arbitration. In the present application there was no dispute or difference between the parties that was referred to the architect for him to determine.

[15] By letter dated 18th August 2006 and addressed to the contractor, the employer informed the contractor that:

"...we hereby notify [you] that we intend referring the issue of ... to arbitration in terms of the provisions of clause 26 of the agreement... ."

There is no indication that the intention to refer the matter to arbitration was carried out. In any event, and I am making no final or firm decision on this, such may have been premature, as no dispute or difference on the relevant matters had been first referred to the architect for his determination pertaining to his own certificate even. Again, when this letter was written 14 days had elapsed since the issuing of the relevant certificate.

Thus, the employer's defence relating to a referral to arbitration fails to pass the first hurdle in the inquiry; there having been no dispute or difference between the parties referred to the architect by the employer.

[16] Referring to the effect of an arbitration clause in general **I.N. DUNCAN WALLANCE IN HUDSON'S *(supra)* at 831-832** states that:

"An arbitration agreement does not oust the jurisdiction of the courts. Either party is still at liberty to commence an action in the courts in respect of the dispute covered by the arbitration agreement. But the party against who an action is started in connection with a dispute covered by an arbitration agreement has a right to apply to the court to have the action stayed, and the court is given a discretion whether or not to stay the action in all such cases... .

Consequently, where the other party makes no application to stay the action, the arbitration agreement will have no effect (unless it is expressed to be in what is called "Scott v Avery" form, that is to say, the contract expressly provides that the obtaining of an award of an arbitrator shall be a condition precedent to bringing an action). In such circumstances, or where the court refuses to order a stay, the Arbitrator no longer has any jurisdiction to determine the matter....

Where an action is not stayed for one reason or another, any specific powers conferred on the arbitrator by the arbitration clause will, it is submitted, and notwithstanding certain obiter dicta to the contrary in the House of Lords, also be available to the courts the Commonest example is the express or implied power under many modern arbitration clauses to disregard or revise decisions or certificates of the certifier. The basis for this, it is suggested, is that the courts will not permit the parties to confer wider powers on an arbitrator than on the courts in settling disputes-to do so would be partially to oust the jurisdiction of the courts. Further, the practical anomalies and difficulties to which any other view would give rise are so serious that the courts should hesitate-long, it is submitted, before giving effect to any such presumed intention of the parties, who would not be likely to intend that one kind of tribunal, but not another, should have power to override the

certifier." (footnotes omitted). The arbitration clause in this case is not the "Scott v Avery" type.

With due respect, I fully associate myself with these views. In any event, no application for a stay of the proceedings has been made before me.

B. THE ALLEGED OVERCHARGING

[17] This is said to be in respect of the bill of quantities and is based on the calculations and or re evaluation of Ms Pieterse, a qualified quantity surveyor who states that she re measured or evaluated "the concrete form work and reinforcement and structural steelworks and found a "difference" in the amounts and this "difference" constitutes an overcharge by the contractor in a sum of more than E1.9 Million. In answer to this, the contractor has submitted that whatever changes or alterations that were made resulting in some materials being discarded or going to waste, was on the instructions of the employer's agent; the architect. The architect had the bill of quantities from inception of the contract works, and he was regularly available on site to inspect the construction works. He issued the interim certificates based on his inspections on-site.

[18] According to the **NOTES ON DOCUMENTS FOR CIVIL ENGINEERING CONTRACTS by FIDIC at page 38,**

> "Bill of Quantities means a list of items giving identifying descriptions and estimated quantities of work comprised in the execution of the works to be performed.

The objects of the Bill of Quantities are:

(i) enable tenders to be prepared efficiently and accurately and facilitate the comparison of tenders when received; and

(ii) when the contract has been awarded, to provide the basis for the valuation of work executed and to assist in the fixing of prices for varied or additional work." (my underlining)

[19] The employer's allegation of being overcharged is, to say the least a bold but bald statement. The court is mindful of the fact that this is only an answer in opposition to an application for summary judgement and as such the degree of particularity or specificity that is required of a plea in an ordinary action is not expected from the employer. It is, however, in my opinion too vague and wanting in both detail and clarity to constitute material upon which a bona fide defence or triable issue could be substained in such an application. **(See BREITENBACH FIAT SA (EDMS) BPK, 1976 (2) SA 226 @ 227)**.

[20] But, and more importantly, it is not one of those defences that are available or open to a litigant trying to be excused from liability on the terms or effect of an architect's or engineer's final certificate. That is to say, the alleged overcharging is not a matter "which a reasonable examination would not have disclosed." The same, in my view is true of the very vague and bold allegation of defective or incompetent workmanship. The defective workmanship is not disclosed or described at all. The employer contends itself on annexure CS1, with the sweeping allegation that "...your company

has been advised of our grave concern particularly with regards to both the quality of the workmanship ...[and] the need for our counter claim for defective/incornplete work as specified in the contract ...The extent of which is still to be determined by an expert." (See paragraph 12 of the affidavit resisting summary judgement).

[21] In order to defeat the effect of the conclusive nature or status of the final certificate, the employer must raise a defence that falls within the exception provided in clause 25.7 of the Agreement. In the present case, the defect in the workmanship have not been identified. The incomplete portion or part of the structure has also not been identified at all. There is no allegation that these unspecified defects are such as could not have been observed or disclosed on a reasonable examination; one would hope, by a qualified and professional competent individual such as an engineer or architect.

[22] In the **OCEAN DINERS CASE (SUPRA)** the court stated that:

> "A final certificate is not open to attack because it was based on erroneous reports of the agent of an employer or the negligence of his architect. The failure of the employer's quantity surveyor properly to scrutinize the claims put forward by the contractor and to rectify any errors, and the possible negligence of the architect in failing to satisfy himself as to the correctness of the claims and valuations before issuing the certificate, will accordingly not provide a defence to an action on the certificate. A fortiori it cannot provide a basis for the cancellation or withdrawal of the certificate by the Architect."

See EASTHAM BOROUGH COUNCIL v BERNARD SUNLEY AND SONS LTD [1965] 3 ALL E.R. 619, WITHINSHAW PROPERTIES (PTY) LTD v DURA CONSTRUCTION CO. SA (PTY) LTD 1989 (4) SA (O) 1073 (A), HUDSON'S (supra) @ 483-484.

[23] For the foregoing reasons the application for summary judgement succeeds. I am not satisfied that the nature of the Defendant's opposition herein warrants that it be visited with a punitive order for costs. Though the defences raised were bad in law and thus rejected, they were no doubt not frivolously raised. The following order is made; the defendant is ordered to pay :

1. The plaintiff the sum of E1, 059, 875.61.
2. Interest on the sum of E1, 059 875.61 at the agreed rate of 11.5% per annum with effect from the 5th August 2006 to date of payment.
3. Costs of suit, such costs to include the costs of counsel to be certified in terms of the rules of court.

MAMBA J