

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO.1304/93

In the matter between:

SWAZI PUMP & IRRIGATION (PTY) LTD

Plaintiff

and

UDM CONSTRUCTION SWAZILAND (PTY) LTD

Defendant

C O R A M : DUNN J.

FOR THE PLAINTIFF : MISS RIBA

FOR THE DEFENDANT : MR SHILUBANE

JUDGMENT

3rd December 1993

This is an opposed application for summary judgment. The plaintiff set out two claims in the summons on which judgment is now sought. The first claim is set out as follows -

3. During or about the period November 1992 an oral agreement was concluded by the Plaintiff represented by its director WILLIAM JAMES BRAITHWAITE, and the Defendant represented by one MR MAURICE W SANDERS in terms of which the Plaintiff was to act as a sub-contractor to the Defendant in the supply, installation and replacement of temporary borehole and submersible pumps for the Sidvokodvo Electrical Work Project at Sidvokodvo, Manzini District.

4. It was inter alia an express alternatively implied terms of the aforesaid agreement that -

4.1 the standard of work to be prepared by the Plaintiff would comply with the standard required by the construction engineers duly appointed for
/the proposed...

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the proposed of the particular construction project;

4.2 the plaintiff was to receive 80% payment for materials supplied on site and 20% on commissioning by the Plaintiff in respect of the work done.

5.. The Plaintiff duly fulfilled its obligations in terms of the aforesaid agreement and completed the work in or about March/April 1993.

6. As at the 8th July 1993 the Defendant was indebted to the Plaintiff in an amount of E111 225.10 (Emalangeneni one hundred and eleven thousand, two hundred and twenty five and ten cents).

7. Notwithstanding demand the Defendant has failed and/or neglected and/or refused to make payment of the aforesaid sum which amount is now due, owing and payable.

The second claim is set out as follows -

2. During or about the period November to December 1992 the Plaintiff, represented by its director MR WILLIAM JAMES BRAITHWAITE and the Defendant represented by one MR MAURICE SANDERS entered into an oral agreement in terms of which the plaintiff was to perform certain remedial work relating to the supply and replacement of submersible pumps for a construction project at Phuzumoya.

3. It was inter alia an express alternatively implied terms of the aforesaid agreement that -

- 3.1 the standard of work to be performed by the Plaintiff would comply with the standard required by the construction engineers duly appointed for the purposes of the particular construction project;
- 3.2 the Plaintiff would receive a fair and reasonable remuneration in respect of the materials supplied and the work performed.
5. The fair and reasonable remuneration for the said works is E13 851.57 (Emalangeni thirteen thousand, eight hundred and fifty one and fifty seven cents).
6. Notwithstanding demand the Defendant has failed and/or neglected and/or refused to make payment of the aforesaid sum which amount is now due, owing and payable.

In opposing the application, the defendant avers that it was an express alternatively implied term of the agreement between the parties that -

1. the agreement would be subject to the Builders General Conditions of Contract Guide (1990 edition).
2. charges for work done by the plaintiff would first be adjusted by the consulting engineers BICON before defendant became liable to plaintiff.

The defendant contends that the amounts claimed have not been adjusted by the consulting engineers in terms of the agreement and that, in the circumstances, "no right of action has accrued to the plaintiff." The defendant further
/set out...

set out that it would be argued in limine that the 2nd claim by the plaintiff was not a liquidated amount in money within the meaning of Rule 32(2)(b) "in as much as what is fair and reasonable is a matter to be decided by the court." This point together with a counter-claim, which the defendant conceded was not properly formulate,d were abandoned by the defendant at the hearing.

The plaintiff applied for and was granted leave to file a replying affidavit (Rule 32(5)(a)). The plaintiff denied, in the replying affidavit, the terms of the agreement as set out by the defendant.

Miss Riba, for the plaintiff, dwelt at some length on the point which the defendant abandoned at the hearing regarding the nature of the second claim. There are numerous decisions of the South African Courts dealing with what amounts to a liquidated amount in money which as Hannah C.J observed in the instructive case of **JEREMIAH NKWANYANE v. THE ATTORNEY GENERAL AND MNDENI TSHABALALA** Civ. Case No. 867/89 (unreported) have not always been harmonious. The application as it stands does not, however, require the determination of this point and I do not consider it necessary to refer to the cases relied upon by Miss Riba in her argument. The fact of the matter is that the terms of the agreement between the parties have been placed in issue. The defendant contends that the plaintiff's right of action has not accrued. That issue which cannot be resolved on the papers, must first be decided before the extent of the defendant's indebtedness can be determined.

The application is refused. The defendant is to file a plea within 14 days from to-day's date. Costs to be costs in the cause.


B. DUNN
JUDGE