IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 864/96

In the matter between:

A.J. Electrical (Pty) Limited Plaintiff

and

Intercon Construction SD (Pty) Ltd Defendant

CORAM: S.W. Sapire A.C.J.

FOR THE PLAINTIFF Mr. Dunseith

FOR THE DEFENDANT Mr. P. Flynn

Judgment

(5/7/96)

The plaintiff has instituted an action against the defendant claiming payment of an amount E41 686.04 together with interest at the prime bank lending rate from time to time plus 2% from the 1st January 1993 todate of payment, The plaintiff also seeks the costs of the action.

The claim is based on a written agreement in terms of which the defendant undertook to execute and complete the electrical installation for a block of flats. It is alleged that the agreed price for the installation was E653,640.60 together with such other sum as became payable by reason of any authorised deviations or other adjustments in accordance with the contract in respect of such works.

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The summons goes on to allege that the plaintiff duly completed the works and became entitled to payment by the defendant of the sum of E41,686.24 comprising the amount alleged to be due to the plaintiff in terms of the final account. Summary and final certificate of the then set out the amount which is E515,350.00 to which must be added the amount of authorised escalations: E28,302.64 less payments made by the defendant E501,966.40 leaving a balance of E41,686.24.

The plaintiff further alleges that all terms, conditions and time limits prescribed by the contract were duly fulfilled and the payment of the said E41,686.24 became due and owing.

The summons also alleges the manner in which the interests is to calculated in terms of the agreement.

The summons was duly served on the defendant which gave notice of intention to defend.

In response the plaintiff has applied for summary judgment in support of which affidavit testified to by Alan Jones was filed.

The defendant gave notice of opposition to the application for summary judgment and has filed a comprehensive affidavit attested to by one Marcus Gudgeon. In short, this affidavit alleges that the defendant has a good and bona fide defence to the claim.

The defendant admits that it entered into a written contract with the plaintiff in terms whereof the latter undertook to carry out what is referred to as "sub contract works". The terms and conditions of the contract are contained in a document referred to as the "subcontract". The subcontract is to be read in

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connection with the agreement between the contractor and the employer which is referred to as the principal contract.

In terms of the principal contract, the employer nominated Cons Com, a firm of architects, as its duly appointed agent and architect.

It is a condition of the subcontract that payments in respect of the subcontract works or any authorised variation thereon only becomes due and payable to the plaintiff by the defendant once this has been duly certified by the agent to be due from the employer to the defendant.

The defendant says that it has paid for all such works as had been in accordance with the contract save for a short fall of some E33.60.

The plaintiff with the leave of the court filed a replying affidavit and claims that the firm of Quantity Surveyors, Murdoch Green & Partners have prepared and issued a further certificate in terms of which the amount of E41, 802.64 is certified for payment by the Surveyor.

The plaintiff further alleges that the firm of architects called Cons Com ceased to operate and that the Murdoch Green Partnership was appointed to act as the nominated agent on behalf of the defendant.

If this is so, and if the document which has been referred to as a certificate is indeed such then the plaintiff would be entitled to judgment.

There is much to be said for the allegation by the plaintiff that Mike Vincent of Murdoch Green Partnership has stepped into the shoes Peter Noble. It also is clear that the defendant itself regarded the document issued by

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Vincent as a certificate authorising payment. The certificate itself however, does not purport to be one issued in terms of the agreement and is only a recommendation for the issue of the certificate. In view of this, in exercise of my discretion in the matter, I am not prepared to grant a summary judgment.

It does however appear to me that there is only a very circumscribed area of dispute and it would be wrong for any further delay in the matter to take place as the affidavits which have been filed clearly define the issues between the parties.

In giving the defendant leave to defend the action in terms of Rule 32(5)(c) I direct that it is not necessary for any further pleadings to be filed and the affidavits are to stand as pleadings. The pleadings shall be deemed to have closed with the filing of the plaintiff's affidavit on the 13th June 1996.

The parties may now act in terms of those rules providing for discovery and the other preparations for trial and the plaintiff may approach the Registrar for the allocation of the date for the hearing of the trial as soon as it is convenient.

The costs in respect of this application will be costs in the cause.

S.W. SAPIRE

ACTING CHIEF JUSTICE