

IN THE HIGH COURT OF SWAZILAND

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MARBEL CONSTRUCTION (PTY) LTD

vs

CITY COUNCIL OF MBABANE

Civ. Trial No. 997/97

Coram Sapire, A C J

For Plaintiff Mr. Dunseith

For Defendant Mr. Flynn

JUDGMENT

(29/9/97)

The plaintiff is a construction company, Marbel Construction (Pty) Ltd. Defendant is the City Council of Mbabane. The claim arises out of a building contract in terms of which the plaintiff undertook to construct an abattoir for the defendant. The contract provided that the Architect, agent, or Consulting Engineer, as he was variously referred to, was to make periodic certificates reflecting the amount then to be paid as progress payments, by the defendant for work done. It appears that things went wrong with the contract and eventually in January 1997 it was agreed that a final certificate would be issued and that the contract would be terminated at that date and that the amount of the final certificate will be paid.

It is on this certificate that the plaintiff now claims provisional sentence..

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Clearly it was envisaged by the parties that a new contract would be entered into by them for the completion of the abattoir. It was also contemplated that in the amount of the final certificate above referred to, there will be included the sum of the retention monies then held by the defendant to cover any defects in the building which may later become apparent or manifest. The certificate, signed by the agent was duly issued but the defendant has refused to pay the certificate alleging that payment of the amount reflected therein is subject to preconditions agreed upon by the parties on the 29th January. The plaintiff in turn says no such conditions were agreed upon.

The law is quite clear that in these proceedings the holder of the liquid document is entitled to provisional sentence and, payment, subject to giving security de restituendo, unless a defence is raised which will succeed on the probabilities should the principle case be gone into. In this case it is for the defendant therefore to show that these conditions exist and not only to show that they exist but that their terms are sufficiently certain to enable them to constitute a contractual obligation.

The defendant says that the conditions which were imposed, (see para 6.1 of the Defendant's affidavit), are the following:

"The terms of the oral agreement of the 29th January, 1997 with the contractor and the plaintiff were as follows –

6.1 - The issue of the certificate number 15 by M & E

Consultants and payment against it by the defendant was conditional upon the following terms:-

6.1.1 The plaintiff would procure a bank guarantee acceptable to the defendant in the sum of EI 12 583.00 as security for retention money payable on the certificate. The guarantee would be provided prior to payment on the certificate by the defendant.

I pause here to consider this particular condition itself, and observe that in the first place the terms of the guarantee are not described. It is said to be a guarantee acceptable to the defendant. It is not even stated that it should be reasonably accepted to the defendant.

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This is solely in the defendant's discretion whether or not to accept the guarantee. There is a multitude of the authorities to the effect that a contract on these terms where the degree of performance is left to the sole discretion of one of the parties is in fact not a contract at all. Beyond saying that the guarantee is to be in the sum of EI 12 583 it says that a security for retention monies payable on the certificate, it does not say for how long this guarantee is to remain in force or on what conditions it becomes payable. It does not say how the amounts are to be determined and it is said that the guarantee would be provided prior to payment on the certificate by the defendant. It is difficult to see how that could have been a term of the agreement on the 29th January, 1997 because it is so vague and imprecise that in my view that in itself militates against the defendant being able to establish that such a term was agreed.

A second term is also mentioned in paragraph 6.1.2. It is said that, the second condition was that the certificate number 15 would constitute an interim final certificate. I pause here to observe that the words "interim and final" are mutually exclusive and the paragraph goes on.

"And would be issued for the purpose of bringing end to the existing contract between the parties."

Once again the wording is inappropriate as a final certificate itself did not terminate the original contract.

It is also said in the same paragraph that a final certificate would be issued on the completion of the abattoir construction project in terms of a completion contract which was envisaged by the parties for this purpose. Now this contract is nowhere described. All that the parties say here is that they are going to enter into some contract the object of which was to reengage the plaintiff to complete the abattoir but there is no mention of what consideration was to pass for this additional services or any of the other terms which could be necessary to be agreed upon were even mentioned.

The third condition was that the plaintiff would extend an insurance cover on the building until completion of the construction of the abattoir. This again is related to the second condition because if there was no contract entered into and maybe the abattoir would never be completed and the plaintiff would remain unpaid for monies which were admittedly owing.

It seems to me very unlikely that these discussions on the future relationship between the parties constituted contractual terms subject to which the certificate was issued. It is true that there are statements on affidavits that such a contract was entered into providing for such

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conditions A witness for the defendant has said this on oath and his statement is confirmed by the very person who signed the certificate. On the other hand the certificate itself makes no mention of the fact that it is conditional and in view thereof it seems to me that the person who made the certificate would be at some difficulty giving evidence at the trial to establish that these conditions existed.

I therefore find that the defendant has not at this stage, discharged the onus of showing that it has any probability of success in the principle case and I order that the provisional sentence issue as prayed in the sum of E344 626.49 together with interest calculated at the rate of 9% per annum from 30th of March, 1997 to date of payment and costs. Such payment to be made subject to the provision of security de restituendo .in terms of the rule of Court

S.W. SAPIRE

ACTING CHIEF JUSTICE