IN THE HIGH COURT OF SWAZILAND

PERCY THOMAS

V

SWAZILAND BUILDERS AND SUB- CONTRACTORS (PTY)LTD

Case No 910/96

Coram Sapire ACJ

JUDGMENT

23/07/97

Applicant alleges that he engaged the Respondent to construct the Iphilo Clinic at Manzini. That it is the applicant who personally contracted with the respondent is to say the least unclear on the affidavits which have been filed.

'The Respondent, it is common cause, embarked upon the works it had undertaken to perform. It had completed much of the construction, and, by way of progress payments, been paid amounts, according to the Applicant amounting to E782 002,75 on account of the contracted remuneration, when on 28th January 1995 Respondent submitted a claim for a further interim payment. The amount claimed was h E470 881,92. This was clearly not a final account, and there is a legend on the so called certificate presented for payment in which the Respondent reserved its rights and made it quite clear that there were items as yet unqualified not included in the total amount then claimed.

The certificate was not paid and the respondent did not proceed with the completion of the works.

The Respondent remained in possession of the uncompleted works, exercising its lien thereon in respect of amounts claimed to be owing to it under the contract.

The impasse thus reached remained unresolved, until in an exchange of letters between their attorneys it was agreed that the respondent would immediately be paid an amount of E203 000 and a bank guarantee for the balance of the capital amount then claimed in terms of the certificate excluding the interest would be established and delivered to the respondent. It was also agreed that the parties would submit their dispute for decision of an arbitrator. It is a dispute

as to the ambit of the arbitration which gives rise to this application.

The submission to arbitration is, as I have observed, contained in an exchange of letters between the parties' attorneys. The last of these letters, dated 17th July 1995, is addressed by Respondent's attorneys to Applicant's attorney. In it the ambit of the arbitration agreed upon is stated in these words:

"Our client's claim for the balance of its account and any counterclaim by your client will be referred to arbitration"

An arbitrator was agreed upon and a preliminary meeting of the arbitrator and the contending parties

was held on 2 November 1995. At this meeting as appears from the minute made by the arbitrator the parties agreed that the terms of the submission to arbitration were set out in the letter to which I have just referred.

The minute, reflects that he parties to the arbitration are the present respondent and "Imphilo Clinic".

This raises a question which was not touched upon in argument. What locus standi has the present applicant to make this application?. There would appear to have been a fatal non-joinder, for how can this court make an order binding on one of the parties to the arbitration, if such party namely Imphilo Clinic which on the papers is a private company is not before the court. For this reason alone no order can be made affecting the conduct of the arbitration.

There was considerable difference as to the ambit of what disputes were to be determined by the arbitrator. The crux of the matter is the meaning of the words "the balance of its account", as used in the correspondence Are these words to be interpreted restrictively so as to refer only to the difference between the amount claimed for items expressly specified and quantified in respondent's last interim claim for a progress payment and the amount paid in terms of the agreement to go to arbitration? Are they on the other hand to be interpreted so as to mean all items claimed by the respondent under the contract, payment of which has not been made, whether previously claimed or not?

The arbitrator, it is minuted ruled that the boarder interpretation would be applied in determining the ambit and extent of his mandate. On this interpretation the balance of the account would include all claims by the respondent (claimant) connected with delays and additional work.

The applicant disputes this interpretation of the submission agreement. As the respndent has in the arbitration proceedings filed a statement of claim incorporating substantial amounts said to be owing in terms of the building contract over and above the aithmetic difference between the certificate and the amount paid on account thereof, the applicant has made this application, seeking an order that the arbitration be confined to " the balance of the account dated the 28th January 1995 being a claim in the sum of E233 001,92 and any counterclaim raised by the Applicant herein"

For the respondent it was argued that by claiming this relief the Applicant was seeking to appeal against or review a decision of the arbitrator. There is no merit in this objection for clearly this court could set aside any award made by an arbitrator, to the extent that the award related to matter on which the parties had not agreed to arbitrate. There is no need for the parties

to be put to the Inconvenience and expense of making and defending claims upon which the arbitrator has no mandate to adjudicate. The court has the power at the instance of a party to an agreement the interpretation of which is in dispute, to declare the proper interpretation to be applied.

By the time the parties came to submit their dispute to arbitration, it was clear that the respondent would not be continuing with the construction of the clinic, and that the completion would be entrusted to another contractor. In these circumstances it would have been only logical for the parties to mandate an arbitrator to determine the final amount which would be paid, the one to the other.The parties were aware that the certificate was not a final account, and that respondent had explicitly reserved its right to make claims additional to those specified. There could be no reason for some claims to be adjudicated upon by the arbitrator while others would have to be made by the respondent in a separate action in another forum. This is in keeping with the provision that the applicant's counterclaims should be included in the arbitration. The object of the arbitration was to reach an all

embracing determination of the parties claims inter se.

Applicant's counsel has argued that because the guarantee which was to be provided was in the amount representing the difference between the claim submitted by respondent and the amount paid, and because there was only one account when the submission to arbitration was agreed upon the words balance of account can only have the restricted meaning. This argument however overlooks te fact that the certificate was not and was never considered to be a final account.

I am not persuaded that the arbitrators interpretation of his mandate is incorrect. The application will accordingly be dismissed with costs

S W Sapire

Acting Chief Justice