IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO. 2283/08

In the matter between:

NICO KRIEK (PTY) LTD **APPLICANT**

In Re:

NICO KRIEK (PTY) LTD **APPLICANT**

AND

NET CONSTRUCTION (PTY) LTD **1st RESPONDENT**

ROYAL SWAZILAND SUGAR

CORPORATION (MHLUME) **2nd RESPONDENT**

CORAM: MAMBA J

FOR APPLICANT: MR RODRIGUES

FOR RESPONDENT; MR MANZINI

JUDGEMENT

15th August, 2008

[1] In the beginning of this year, the second Respondent required work to

be done to clean effluent in its ponds on its estate in Mhlume. The first Respondent was hired to carry out this task. The first Respondent in turn sub-contracted the applicant to do the work or at least a portion of the work on its behalf. The contract price payable by the 1st Respondent to the Applicant for the said works was agreed at E244 423-00 and this was inclusive of the costs of transporting plant machinery and equipment to and setting up a base on the site. It was envisaged that the work would last for two months.

[2] There is a dispute of fact as to when the Applicant set up its site office and brought its machinery and equipment on the site to begin the work. This dispute is, however, not material in the determination of this application. Suffice to say that the parties agreed that the Applicant carried out part of the task it was contracted to do and on the 16th April 2008 issued an invoice to the 1st Respondent demanding to be paid a sum of E71,500-00 for work already performed. The first Respondent either ignored this altogether, as contended by the Applicant, or refused to pay saying the parties had agreed that payment would only be made once the 2nd Respondent "had received and approved a claim certificate from the 1st Respondent," as averred by the 1st Respondent. This stand-off between the parties culminated in the Applicant cancelling the contract between them for non payment and removing its equipment from site and abandoning the site. This the Applicant did after threatening to sue for the payment of the amount E71,500.00 reflected on its interim certificate or invoice.

[3] It is common cause that after the Applicant resile from the contract and abandoned the works, another sub-contractor was hired by the 1 Respondent to continue and finish the work started and abandoned by the

Applicant.

[4] On the 20th June, 2008 the Applicant filed an ex parte application and obtained a rule nisi interdicting and restraining the 2nd Respondent from paying to the 1st Respondent the sum of E71 50000 pending finalization of an action to be instituted by the Applicant against the 1st Respondent for payment of the aforesaid sum of E71 500-00. This rule was ordered to operate with immediate effect pending finalization of this application. I should mention that the sum sought to be interdicted from being released by the second Respondent to the 1st Respondent is part of the money to be paid by the former to the latter for the works in respect of which the Applicant was sub-contracted by the 1st Respondent. In effect it includes the work actually carried out by the Applicant.

[5] The Applicant has alleged that it fears that should the 1st Respondent receive the full payment from the 2nd Respondent, the 1st Respondent will not pay the Applicant for the work already carried out by it, as indeed the Applicant has denied liability towards the Applicant and has refused to pay. The Applicant alleges further that it knows of no property of any significant value that is owned by the 1st Respondent upon which it could execute in the event it is successful against the 1st Respondent in its claim against it for the payment for the services already rendered and expenses incurred in moving and removing its plant and machinery to and from the 2nd Respondent's estate. The Applicant alleges that it shall suffer irreparable harm if the interdict is refused whilst the 1 Respondent shall not suffer any irreparable harm if the amount in question is preserved or interdicted as prayed inasmuch as if the 1st Respondent is successful in the intended action, the interdict will be lifted and the money paid over to the 1st

Respondent.

[6] In summary, the 1st Respondent's defence is that the Applicant is not entitled to the money in question as it is in breach of the contract. First Respondent alleges further that it has a counter-claim against the Applicant arising from the said breach and its claim substantially exceeds the Applicant's claim. Lastly, the 1st Respondent avers that the Applicant has failed to show that it has a right to the money sought to be interdicted and consequently an interdict may not be granted.

[7] Although the 1st Respondent initially complained that the application was not urgent, this point was, wisely in my view, not pursued in argument before me. I say "wisely" because in its founding affidavit the Applicant averred that the ex parte application was urgent because the 2nd Respondent was about to pay the money to the 1st Respondent. (I note that although the grounds of urgency are stated in the affidavit, no certificate of urgency filed by an attorney accompanies the supporting affidavit. This is unacceptable.)

[8] I now examine the relevant law in this regard. In the case of **STERN & RUSKIN, N.O. v APPLESON. 1951 (3) SA 800** @ **811 MULLIN J** stated that;

"It is quite true that money, like any other species of property, may be interdicted; but then it must be shown that the money to be interdicted is identifiable with or earmarked as a particular fund to which the plaintiff claims to be entitled." In casu, the agreement between the parties was that the Applicant would be paid for the services for which it was hired to do. The 2nd Respondent, being the beneficiary of those services, was obliged to

pay the 1st Respondent for those services. There can be no doubt that the Applicant is entitled to be remunerated for its services rendered to the 2nd Respondent on behalf of the 1st Respondent. The payment that is due to be made to the 1st Respondent by the 2nd Respondent, is in part at least, for the services and expenses incurred by the Applicant. *Prima facie,* therefore the Applicant has a right to part of the payment that is to be made to the 1st Respondent. The 1st Respondent in fact avers that the agreement between them was that Applicant would be paid from the monies paid by the 2nd Respondent.

[9] In considering whether or not the essentials of an interdict had been satisfied **ROPER J,** in **SWANEPOEL v BOTHA, 1951 (3) SA 853 (T) @ 863A-F** made the following remarks with which I am in respectful agreement:

> "In considering this question of what is called the "balance of convenience" it seems to me that I must start upon the basis that the applicant was given the right to receive payment out of monies received from the Provincial Administration because, as I have said, he has made a prima facie case to that effect. If

the interdict is not granted and the applicant proves his claim he may find that the money which was earmarked by the respondent for payment to him has disappeared. He may possibly loose everything as a consequence because I do not know what the financial position of the respondent is. If the interdict is refused, therefore, he may suffer the loss of the whole of the balance of his claim. If, on the other hand, the interdict is granted and the respondent proves, in action, that the money was not due, the money interdicted will at once be released to him. The effect, therefore, of the granting of an interdict can only be that he will be kept out of his money for

a period and, if his case is a sound one, he will not loose his money; he will get if after a period. It seems to me that, when those two alternatives are considered the balance of convenience or the balance of prejudice is clearly in favour of the granting of the interdict rather than the refusal of it. It is perfectly true that the respondent may have difficulty in meeting the claims of the other creditors until this money is released but that is not as grave a prejudice, in my view, is that which might be suffered by the applicant if the interdict were refused. The respondent says that his creditors might apply for his sequestration but there is nothing to indicate that that is probable and, in any case, I do not think that that is a consideration which is sufficiently serious to outweigh the other considerations which I have mentioned." See also **FIRST INDUSTRIAL EXCAVATION LAND DEVELOPMENT ENGINEERING AND CLEARING CORPORATION OF SOUTH AFRICA LTD v DUNCKER & VLADISLAVICH (PTY) LTD & ANOTHER, 1967 (1) SA 317 (T).**

[10] Counsel for the Applicant submitted that the rule nisi should be confirmed as the interlocutory interdict sought "is to preserve an asset in issue between the Applicant and the 1st Respondent." The case of NIEUWOUDT v MASWABI & ANOTHER, 2002 (6) SA 96 was cited in support of this submission. In that case, the Applicant had been sub-contracted by the 1st Respondent to carry out work at a hospital run by the Free State Provincial Government which had hired the 1st Respondent as the main contractor. The parties had agreed that the Applicant would be paid a sum of E115,000.00 upon completion of the work he was contracted to do. Applicant completed the work and the Provincial Government duly paid the 1st Respondents for this but the respondents refused to pay the Applicant for his services. Further payments were due to the Respondents

by the Provincial Government and it is part of these payments that was sought to be interdicted. The Respondents alleged that the Applicant had failed to carry out its contractual obligations and was therefore not entitled to payment. The interdict was confirmed and RAMPAI J @ 101H-102 stated as follows:

> "The purpose of the interlocutory interdict we are here dealing with prevents the respondent and third parties who have notice of the order from dealing with the respondent's assets in a matter that is inconsistent with the terms of the court order but the interdict does not give to the applicant any priority over other creditors of the respondents. The question as to whether money could be attached by means of an interim interlocutory interdict has been discussed in a number of decisions. See the following decisions; *Gernholtz and another NNO v*

Geoghehan, 1953 (2) PH F102 (O), and Driefontein Consolidated Gold Mines Ltd v Schlochauter, 1902 TS 33.

In the case of Driefontein (supra @ 37) Innes JP, as he then was said:

> "The mere fact that a plaintiff intends to bring an action against a defendant does not warrant him in asking that the latter should be interdicted from dealing with his property. It would be different if it could be shown that the property sought to be interdicted was actually the subject of the dispute between the parties, or that it was clearly the proceeds of other property stolen from the applicants."

In those two cases the applicants for interlocutory interim interdicts were granted and money attached in the hands of the respondents on the basis that there was ample evidence before both courts that the money so attached had been derived from the proceeds of the applicant's specific original asset which had been converted into a liquid form by the respondents....

It is the applicant's case that he has properly completed the work. If the assertion or contention is correct then he is entitled to claim a final payment from the joint venture but there is a dispute. In this application he does not seek a final relief but an interlocutory relief to protect his right pending the resolution of the dispute in the main action. He is not required to prove a clear right but a *prima facie* right to payment for the work he has done. The joint venture admits the existence of the written agreement. Moreover, the joint venture also admits that the applicant in fact supplied certain materials and performed some paving on the premises of Universitas Hospital. Despite this confession, the joint venture seeks to avoid making a final payment to the applicant by

alleging defective performance. The joint venture puts up the defence that since the applicant has failed to comply with certain contractual obligations the joint venture is entitled to withhold payment.

The requirements for an interim interdict are well known. They were enunciated in the case of **Setlogelo v Setlogelo 1914 AD 221.** Such requisites are a prima facie right, an infringement of that right or fear of irreparable harm of that right, the absence of ordinary remedy and balance of convenience in favour of the applicant."

And at page 103H-104B the learned judge had this to say;

> "In certain cases enforcing a claim by way of a summons may well provide an appropriate remedy. In many cases it is the usual common procedure, all things being normal that is the way to go. But enforcing a claim by way of a summons is not always an effective procedure. The effectiveness or hopelessness of the summons proceedings depends on the circumstances of each case. Where as in this case, there is reasonable fear that the plaintiff might end with a hollow judgement then there is much to be said for the interlocutory procedure in the form of an interim interdict. The underlying idea of this quick interlocutory procedure is to preserve the asset of the respondents. Such an interim relief, if granted, ensures that the successful plaintiff in the main action would be able to execute judgement against the preserved assets should the unsuccessful defendant fail to pay for whatever reason. In the instant application the respondents or the joint venture, on its own version, has created an impression that it does not have solid financial resources. This has confirmed the applicant's fear of irreparable harm unless the interim relief sought is granted. But if the respondent or the joint venture is a materially sound business enterprise the interim relief will not have any significant disruption of its operations."

These views are apposite in this application and I am in respectful agreement with them. Whether or not the applicant's claim for payment is successful shall be determined in the impending action. This is equally true of the first respondent's counter claim arising from the alleged breach of contract. However, for purposes of this application, the applicant has satisfied the requirements of an interdict pendente lite, including the balance of fairness; for I think it is only just that the money which the applicant has earned or generated be preserved.

[11] The 1st Respondent also submitted that this application must be dismissed because the Applicant unduly delayed in filing it as the dispute between the parties started in April following the 1st Respondent's refusal to pay the amount stated in the invoice referred to above. However, although a degree of expedition in filing applications of this nature is generally required of an applicant, **(JUTA & CO LTD v LEGAL & FINANCIAL PUBLISHING CO. (PTY) LTD, 1969 (4) SA 443** (C), the want thereof can not, in itself be a reason for dismissing such application. **(HARNISCHFEGER CORPORATION & ANOTHER v APPLETON & ANOTHER, 1993 (4) SA 479 (W).** I do not consider the lapse of time herein between April and June that long as to attract an adverse finding by this court against the applicant. The documents filed herein indicate that even just five days before filing this application, the Applicant, was still being hopeful that the 1st Respondent would reconsider its stance and pay. The Applicant cannot be faltered for this belief or expectation. Going to court in haste or prematurely has its own pitfalls too.

[12] In the result the following order is made:

1. The Rule Nisi issued by the court on the 20th June, 2008 is hereby confirmed.

1.1. The Applicant is ordered to issue summons against the 1st Respondent in respect of its claim herein within 7 days of this order.

2. The costs of this application shall be the costs in the main action.

3. Within 14 days of service of this order on the 2 Respondent, the 2nd Respondent is to pay the sum of E71 500.00 due to the first Respondent to the Registrar of this court who is to deposit this amount

into a short term interest bearing account with a reputable financial institution.

MAMBA J