THE SUPREME COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE Civil Appeal Case No. 41/2008

In the matter between

C S GROUP OF COMPANIES Appellant

and

CONSTRUCTION ASSOCIATES (PTY) LIMITED Respondent

Coram BANDA, CJ
FOXCROFT, JA
EBRAHIM, JA

For the Appellant J.M. Van der Walt
For the Respondent R.M. Wise, SC.

JUDGMENT

BANDA, CJ

[1] This is an appeal against the judgment of Mamba J in which he granted an application for summary judgment.

[2] The respondent had issued a combined summons claiming payment of the sum of E1,059,875.61 plus interest thereon at the rate of 11.5% per annum with effect from August 2006 to date of payment. The claim was based on the Architect's final certificate and upon the terms of the written building contract pursuant to which the certificate was issued.

[3] The contract comprised the following documents –

(a) The Articles of the Agreement

The contract drawings, the Bills of Quantities and the Specifications
The terms or conditions and the Schedules of rates thereto.

These above documents establish the working relationship within which the parties to the contract had to carry out their respective obligations under the contract. The contractor in this case is the respondent and the employer is the appellant. The contractor's primary obligation was to carry out and complete the work as laid out in the drawings and as described in the

Bill of Quantities and specification and to do so in accordance with the directions and to the reasonable satisfaction of the Architect who was empowered, in his discretion, from time to time to issue further drawings, details and or written instructions to the contractor. The appellant, as the employer, appointed Ngwenya, Wonfor and Associates Chartered Surveyors as the Architects and Quantity Surveyors for the purposes of the contract.

[4] The primary obligation of the appellant as employer was to pay to the respondent as contractor the contract sum or such other sums as shall become payable and to effect such payment at the times and in the manner specified in the conditions of the contract.

[5] It will be pertinent to observe at this point that the contract price which was initially agreed between the parties was the sum of 10 million Emalangeni or such other sum as shall become payable under the said written Agreement.

[6] Clause 25.1 of the Agreement provides for certificates and payment. It states as follows:-

"The contractor shall be entitled to receive from the

Architect certain interim certificates at intervals not greater than one calendar month, a penultimate certificate and a final certificate (as more fully set out hereunder), stating the amount due to him and to payment of such amount by the employer within the period set out in the attached schedule."

And then the clause sets out the procedure which the Architect has to follow in making out the certificate. Clause 25.3 states as follows:-

"The Architect shall concurrently with each *certificate, issue to the contractor, a detailed statement in support thereof. The Architect shall also advise every nominated sub-contractor of the amount included in such statement in respect of his sub-contract."*

Clause 25.7 states as follows:-

"A final statement issued in terms of clause 25.5 and *25.6 save as regards all defects and insufficiencies in the works or materials which a reasonable examination would not have disclosed, <u>shall be conclusive evidence as to the sufficiency of the said works and materials, and of the value of."</u>*

[7] The learned trial judge in the court *a quo* correctly set out the relevant principles with regard to the status of the Architect's final Certificate and I can do no better than refer to what he stated at page 6 of his judgment where he cited a passage from HUDSONS BUILDING AND ENGINEERING CONTRACTS 10th Ed. By I.N. Duncan Wallace at page 498 where it states as follows:-

"In order for the satisfaction or certificate of an *Architect or engineer to be conclusive and binding on the parties, the following conditions must exist:-*

(i) *The matter in dispute must be one upon which the contract confers jurisdiction on the architect or engineer to express his satisfaction and certify.*

(ii) *The contract must on its true construction provide that the certificate or satisfaction is intended to be binding. In most but not necessarily all building contracts this would be the case bilaterally, that is to say both parties must be bound by the certificate. There are, however, cases, apart from the obvious example of interim certificates, where the certificate will only be binding unilaterally. But in either case a provision*

enabling a party to go behind or question or dispute the decision will destroy the conclusiveness of the satisfaction or certificate, in particular any applicable arbitration clause.

The certificate or satisfaction must be honestly given. It must be given without collusion, interference or undue influence and the certifier must preserve his independence and not in a way that suggests that he has lost his independence.
The provisions of a contract must be strictly adhered to, the approval or certificate must be given by the correct person at the correct time, and must not take into account any matters quite outside the stipulated requirements of the contract, though there may be a class of 'unilateral' cases where the certifier may impose a stricter standard, e.g. of quality, on the party bound than the contract documents expressly require".

[8] The Architect in this case is the Agent of the appellant and he issued the final certificate in that capacity.

[9] The respondent applied for summary judgment for the sum of E1,059,875.61 as reflected on the final certificate issued by the Architect. The application was brought in terms of Rule 32 of the Rules of the High Court. Rule 32 provides as follows:-

"Where in an action to which this rule applies and a *combined summons has been served on a*

defendant

or a declaration has been delivered to him and that defendant has delivered notice of intention to defend, the plaintiff may, on the ground that the defendant has no defence to a claim included in the summons, or to a particular part of such a claim, apply to the court for summary judgment against that defendant."

Subrule 2 sets out the claims that are applicable under the rule and subrule 3 sets out the procedure that must be followed in making application under the rule. Rule 32(4)(a) provides as follows:-

> "(a) Unless on the hearing of an application under subrule (1) either the court dismisses the application or the defendant satisfies the court with respect to the claim, or the part of the claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reasons to be a trial of that claim or part, the court may give judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed."

It is important in my judgment to consider, in this regard what Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa say on summary judgment. At page 434 of the 4th Edition – the learned authors state as follows:-

"Summary judgment procedure is designed to

enable a plaintiff whose claim falls within certain defined categories to obtain judgment without the necessity of going to trial in spite of the fact that the defendant has intimated by delivering notice of intention to defend, that he intends raising a defence. By means of this procedure a defence lacking in substance can be disposed of without putting the plaintiff to the expense of a trial. The procedure is modelled on the rules by the English Supreme Court and on the Magistrate Court Rules and now prevails throughout South Africa."

[10] It is submitted that the respondent satisfied the requirements of the Rule 32 in that the application was made on Notice and was accompanied by an affidavit which verified the facts upon which the claim was based. The respondent further stated that it was his belief that the defendant had no bona fide defence to the claim.

[11] It was submitted that for the appellant to avoid summary judgment being granted against it, it had to show under Rule 32(4)(a) that there was an issue or question in dispute which ought to be tried or that there ought for some other reason be a trial of the claim. The learned judge in the court *a quo* found that he was not satisfied that the appellant had a defence to this claim or that there were any triable issues and granted

summary judgment. It is against that judgment that the appellant now appeals to this court.

[12] The appellant filed eight grounds of appeal which extend to five pages. I have summarised those grounds to five which I believe comprehensively cover all the points raised in the eight grounds of appeal. The five grounds of appeal as abridged are as follows:-

(1) That the learned judge in the court a quo erred in law in that he failed to apply the principles governing summary judgment.

(2) That the learned judge in the court a quo erred in law in that he failed to refer the dispute between the parties to arbitration in terms of clause 26 of the Agreement.

(3) That the learned judge in the court *a quo* erred in law in that he failed to find that there were triable issues in the claim.

That the learned judge in the court *a quo* failed to consider the appellant's counterclaim.

That the learned judge in the court *a quo* erred in law in that he failed to find that the conclusiveness of the Architect's final certificate had to be determined by way of arbitration as stipulated in clause 26 of the agreement.

[13] Ms Van der Walt has submitted that the appellant had

proved that he had an answer to the claim against him. She contended that this application for summary judgment was not a full trial which happens after all the processes like discovery and pleadings have been closed and where all the facts and issues had been fully and properly ventilated**.** She submitted that an application for summary judgment is for an extraordinary and stringent remedy which applies only to claimants who have unanswerable cases. She contended that summary judgment does not require a party to give a preview of her case; that all that the defendant has to show is that he has a defence. Counsel for the appellant further contended that summary judgment should not have been granted because the appellant had no opportunity to obtain the necessary witness to prove her defence. It was also the contention of the appellant's counsel that the conclusiveness of the Architect's final certificate should have been referred to arbitration in terms of clause 26 of the Agreement. It was further submitted for the appellant that the learned judge in the court *a quo* failed to consider the counterclaim of the appellant, and that the counterclaim concerned a large sum of money and it related to many defects in the finished work. Counsel has therefore, prayed that this appeal be

allowed with costs.

[14] The respondent's counsel has submitted that the respondent's application complied with the requirements of rule 32(2) in that it was made on notice and was accompanied by an affidavit which verified the facts on which the claim was based and stated the respondent's belief that there was no defence to that claim. The respondent submitted that the respondent had even gone beyond what is required under the Rule in stating his belief that the defendant had no bona fide defence to the claim. It was the contention of the respondent that the notice of intention to defend had been filed solely for purposes of delaying the action.

[15] The respondent counsel has submitted that under Rule 32(4)(a) the appellant had the obligation to satisfy the court with respect to the claim that "there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the claim".

[16] Rule 32(4)(a) is complemented by Rule 32(5)(a) which states that the defendant in an application for summary judgment must satisfy the court with regard to the claim that there is an issue or question in dispute which

ought to be tried, and to do so must show cause against the application by delivering an affidavit. Counsel for the respondent has submitted that what was raised in the appellant's opposing affidavit was a defence of no substance. In the case of BREITENBACH V FIAT SA (EDMS) BPK 1976(2) SA 226 at 227 E – F it was held that:-

"One of the things clearly required of a defendant by *Rule 32(3) is that he set out in his affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim. If he does not do that, he can hardly satisfy the court that he has a defence."*

It should be noted that this case was decided when the provisions of the local Rule 32 was the same as the South African Rule and before it was amended to the current wording. But Rule 32 as presently worded was considered in the case of NATIONAL MOTOR COMPANY LIMITED VS MOSES DLAMINI 1987-95(4) SLR 124 where DUNN J considered the meaning of the rule. Dunn J cited the passage in the White Book which states:-

"The defendant's affidavit must condescend *upon particulars and should as far as possible deal* specifically with the plaintiff's claim and affidavit *and state clearly and concisely what the defence is and what facts are relied upon to support it. It*

should also state whether the defence goes to the whole or part of the claim and in the latter case it should specify the part."

The defendant to an application for summary judgment must give sufficient statement of facts which would fully persuade the court that what he alleges if it is proved at the trial, will constitute a defence to the plaintiff's claim. It is not sufficient merely to give conclusions and inferences from those facts. It is the primary facts from which those conclusions and inferences can be drawn which should be set out in the affidavit. If, therefore, sufficient primary facts and particulars are given from which, if true, would give rise to a defence then there is a triable issue and the application for summary judgment should be denied.

[17] It has also been held that courts should be slow to close the door to the defendant if a reasonable possibility of a defence exists to avoid an injustice being occasioned. See the case of MUSA MAGONGO VS FIRST NATIONAL BANK (SWAZILAND) Appeal Case No. 38/1999 where it was stated:-

"It has been held time and again in the courts of this

country that in view of the extraordinary and stringent nature of summary judgment proceedings, the court will be slow to close the door to the defendant if a reasonable possibility exists that an injustice may be done if judgment is granted."

And in the case of MATER DOLOROSA HIGH SCHOOL VS R.M.J. STATIONERY (PTY) LTD Appeal Case No. 3/2005 where the test to apply was formulated in the following terms:-

"That it would be more accurate to say that a court will not merely "be slow" to close the door to a defendant, but will in fact refuse to do so, if a reasonable possibility exists that an injustice may be done if judgment is summarily granted. If the defendant raises an issue that is relevant to the validity of the whole or part of the plaintiff's claim the court cannot deny him the opportunity of having such an issue tried."

The respondent counsel has submitted that the opposing affidavit of the appellant contained a number of averments which did no more than indicate the nature of the defences upon which it wished to rely but that neither in its affidavit nor in its supporting documents did the appellant state any primary facts to support those defences to render them to be triable issues. It would appear that the alleged primary facts

on which the appellant sought to rely were the alleged error in measurement of the portion of the works which gave rise to the alleged overcharge and overpayment in the sum of E1.9 million. This figure was made up of the sum of E720,398.94 in respect of concrete form work and E700,000.00 in respect of structural steel work and E567,331.05 in respect of preliminary costs. The basis of these allegations is the alleged re-measurement done by a Ms Inge Pieterse. But the curious thing to observe is that there are no primary facts alleged to support these figures. The affidavits do not give the details of what was measured, what calculations were made and how the price was calculated. The respondent counsel has contended that the papers before court showed a serious lack of bona fides on the part of the appellant's Managing Director by relying on the bald and unsubstantiated allegations of Ms Pieterse. It was contended that the respondent had demonstrated this in its replying affidavit that the appellant was not only lacking in bona fides but was "being clearly disingenuous" in even suggesting that the contract price was not E17,000.000.00

[18] It is also the contention of the respondent's counsel

that the appellant had failed to show how the work had defective workmanship and to what extent it was incomplete. The appellant did not show in what respect the quality of the work was poor and did not show what was defective and how.

[19] It is respondent's counsel submission that the appellant did not contest any of the allegations of facts in the respondent's particulars of claim; there was no dispute about the Architects certificate and they did not dispute the conditions of the contract. Equally, it is contended, the appellant did not dispute the respondent's application for summary judgment which was made on notice to the appellant with an affidavit verifying the facts. Respondent counsel has further submitted that the appellant did not allege or suggest in its opposing affidavit at the hearing of the application for summary judgment that there was "some other cause" as to why summary judgment could not be granted. The respondent counsel has therefore submitted that the appellant had failed to establish any issue which is triable or which would constitute a defence.

[20] The respondent counsel has submitted that the arbitration clause in the agreement was not by itself a

defence to a claim for payment of money based on the Architect's final certificate. Arbitration is only a method of dispute resolution recognised by the law as an alternative to litigation and an arbitration clause does not have the effect of ousting the jurisdiction of the court.

[21] The respondent's counsel has submitted that the Architect's final certificate is under the terms of the agreement conclusive evidence. In the judgment of the Appellate Division of the Supreme Court of South Africa in the case of OCEAN DIVERS (PTY) LTD vs GOLDEN HILL CONSTRUCTION CC 1993(3) SA 331 the following principles were set down that –

(1) The issuing of a final certificate carries with it certain legal consequences.

The nature of these legal consequences depends in the first instance on the proper interpretation of the relevant provisions.
The effect of the certificate is to determine the respective rights and obligations of the parties in relation to matters covered by the certificate.
In the absence of a valid defence a certificate constituted conclusive evidence of the value of the works and the amount due to the contractor.

(2) The certificate embodied a binding obligation on the part of the employer to pay that amount

certified as payable.

(3) The certificate gave rise to a new cause of action subject to the terms of contract.

The employer's failure to pay the sum certified in the certificate within the time stipulated entitled the contractor to sue on the certificate.

[22] The Ocean Divers case is also authority for the following propositions that -

(1) A final certificate is not open to attack because it was based on erroneous reports of the agent of an employer or the negligence of his architect.

(2) The failure of the employer's quantity surveyor properly to scrutinize the claims put forward by the contractor and to rectify any errors, and the possible negligence of the architect in failing to satisfy himself as to the correctness of the claims and valuations before issuing the certificate, will accordingly not provide a defence to an action on the certificate.

[23] The respondent's counsel addressed the seeming conflict and contradictions between the provisions of clause 25.7 taken in conjunction with the provisions of clause 25.9 on one hand and the provisions with powers

given to the arbitrator under clause 26. Clause 25.7 has already been set out earlier in this judgment. Clause 25.9 is in the following terms:-

"Save as aforesaid no certificate shall of itself be conclusive evidence that any works or materials to which it relates are in accordance with this contract."

And Clause 26 gives power to the arbitrator "to open up, review and revise any certificate, opinion, decision requisition or notice and to determine all matters in dispute which shall be submitted to him and of which Notice shall have been given as aforesaid, in the same manner as if no such certificate, opinion, decision, requisition or notice had been given."

[24] The issue of which of the two clauses should prevail is the question which came before the House of Lords for determination in the case of EAST HAM BOROUGH COUNCIL VS BERNARD SUNLEY & SONS LTD 1965 3 ALL E.R. 619. The case involved the interpretation of terms of a Building contract whose clauses were similar to the contradicting clauses in the present appeal. The majority of the House of Lords held that the conflict between the clauses could not be reconciled but that

the arbitration clause and the powers given to the arbitrator had to be read subject to the provisions of the final certificate to the extent provided by clause 25.7 in our case.

[25] I have carefully reviewed the submissions ably made by both counsel in the appeal together with the authorities cited. There can be no doubt in my judgment that the learned judge in the court below came to the correct decision in granting summary judgment. He came to that judgment after hearing the arguments which were canvassed before him and after a detailed review of the relevant principles of law applicable. He also reviewed a number of decided authorities which included the Ocean Divers and the Breitenbach cases. He considered the principles of law applicable and reviewed the relevant authorities in great detail. I am satisfied that the respondent fully complied with the requirements of the provisions of Rule 32 of the Rules of the High Court. He demonstrated on the papers that his claim was an unanswerable claim. The averments which the appellant made in his affidavit did not provide primary facts on which an inference of a possible defence could be made. The appellant had to show if it had to avoid summary judgment that there

was a triable issue for the claim to proceed to trial. None of the grounds of appeal advanced before us had any merit to satisfy us so as to disturb the judgment of the learned judge *a quo.* I would, therefore, dismiss this appeal with costs including certified costs of counsel.

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R.A. BANDA,
CHIEF JUSTICE

I agree

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J.G. FOXCROFT
JUDGE OF APPEAL

I agree

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A.M. EBRAHIM,
JUDGE OF APPEAL

Delivered in open court at Mbabane on…….day of November 2008