IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO: 1238/2023**

In the matter between:

CAMDEL CONSTRUCTION (PTY) LTD **PLAINTFF**

And

KWASA INVESTMENTS AND TRUST

(PTY) LTD **DEFENDANT**

Neutral citation : *Camdel Construction (Pty) Ltd v Kwasa Investments And Trust (Pty) Ltd (1238/202) [2023] SZHC 252 (21/09/2023)*

CORAM: **B.S DLAMINI J**

DATE HEARD: 31 August 2023

DATE DELIVERED 21 September 2023

Summary: *Application for summary judgment-Parties entering into written building contract- Court required to determine whether engineer or architect authorized to expand scope of the contract without prior approval from employer or client.*

Held; *The application for summary judgment is misplaced. The matter raises several triable issues which require oral evidence to substantiate claim. Application for summary judgment dismissed.*

JUDGMENT

INTRODUCTION

[1] The Plaintiff, a construction company, issued combined summons against the Defendant on or around July 2023. According to the Plaintiff, between November 2015 and December 2016, it rendered

construction services to the Defendant in accordance with the terms of the written agreement between the parties such that as at the time of issuing the summons, a sum of **E 1,719,282.96 (One Million Seven Hundred and Nineteen Thousand Two Hundred and Eighty Two Emalangeni Ninety Six Cents)** remained owing, due and payable.

[2] The Defendant, on being served with the combined summons, filed a notice of intention to defend the Plaintiff's claim. This prompted the Plaintiff to issue an application for summary judgment. The application for summary judgment is being opposed by the Defendant.

[3] The Plaintiff's cause of action is found in paragraph [8] of its particulars of claim. In this paragraph, the Plaintiff alleges that;

"The works were, on diverse occasions, extended after the scope of the works were expanded by the employer. This had the corollary effect of increasing the contract price. The Plaintiff further applied and was granted extension of time in terms of the agreement between the Parties, Instead of the initial two calendar months' duration, the works lasted for Nine (9) months."

[4] In paragraph [10] of its claim, the Plaintiff alleges that;

"The total amount certified as due to the Plaintiff in terms of the six certificates is the sum of E 5,543,333.52 (the certified sum). Of the certified sum, the Defendant paid the sum of E 3,534,776.14. The balance thereof is the sum of E 2,008,557.38. From that balance the Engineer deducted the total sum of E 289.274.42 for penalties, correction of drain and fallen wall as well as monies for materials supplied by the Defendant. The balance owing to the Plaintiff is the sum of E 1,719,282.96."

[5] In the affidavit resisting summary judgment, the Defendant, through its Director, deposed as follows;

"[3.2] The project was financed through a loan obtained from Swaziland Building Society and that payments to the Plaintiff and Engineer for works done, were made through the loan facility, and certificates were signed and approved, by the representative of the Plaintiff, the Consulting Engineer and the co-Director, Mr Mamba...

[3.4] I further, I intend [sic] disputing the items charged thereof, such as the variations, the VAT and the final certificate. In this regard, I refer this Court to the Plaintiff's annexures "C5", "C6" and "D", wherein certificate 5, 6 and the final certificate appears."

[6] The Defendant is therefore disputing that the variations on the contract or the expansion of the scope of works was authorized by the Defendant's then Director, Mr. L.R Mamba. According to the Defendant, any extension of the scope of work had to be in writing and signed-off by the Defendant or its representative. The Defendant is also disputing that the Plaintiff was authorized to charge it VAT in terms of the contract.

PLAINTIFF'S SUBMISSIONS

[7] The core of Plaintiff's argument was that in terms of the written agreement between the parties, the Engineer, as the agent of the Defendant (employer or client), was authorized to vary or expand the scope of the contract in terms of clause 39 of the written contract. In terms of Clause 39 of the contract it is provided;

"(1) **If, at any time before the issue of the Certificate of Completion, the Engineer shall require any variation of the form, quality or quantity of the Works or any part thereof that may in his opinion be necessary or for any reason appropriate, he shall have power to order the Contractor to do any of the following;**

(a) Increase or decrease the quantity of any work included in the Contract,

(b) Omit any such work,

(c) Change the levels, lines, position and dimensions of any part of the Works,

(d) Execute additional work of any kind necessary for the completion of the Works, and

(e) Change the specified or approved sequence or method of construction."

[8] According to Plaintiff, all the grounds of opposition to its summary judgment application, including on the issue of the VAT, the variations being unauthorized, the certificates not being signed and on the reference to wrong certificates are all not legal and proper grounds

upon which the Court ought to decline to grant the summary judgment application.

[9] The Plaintiff's representative strongly argued that the engineer, being permitted by the contract to unilaterally vary the scope of works, could and did in fact authorize variation of the scope of works and that such authorization can either be in writing or be given by him orally in terms of Clause 39 (2) of the written contract.

[10] The Plaintiff's counsel referred the Court to a decision of the High Court of Eswatini in the matter of **Total Construction (Pty) Ltd vs V & H Surgical and Patient Care Suppliers (Pty) Ltd (1240/2020) [2020] SZHC 230 (4th November 2020)** in which the Court referred to the case of **Joob Joob v Stocks (161/08) [2009] ZASCA 23 (27th March 2009) at para 27** where the Supreme Court of Appeal (SA) held;

"Govern AJ pointed out, with reference to Randcon (Natal) (Pty) Ltd v Florida Twin Estates Ltd 1973 (4) SA 181 (D & CLD) at 183H-184H, that a final payment certificate is treated as a liquid document since it is issued by the employer's agent, with the

consequence that the employer is in the same position it would have been in if it had signed an acknowledgment of debt in favour of the contractor. Relying further on the Randcon case (at 186-188G), the learned judge held that similar reasoning applied to interim certificates. The certificate thus embodies an obligation on the part of the employer to pay the amount contained therein and gives rise to a new cause of action subject to the terms of the contract. It is regarded as the equivalent of cash."

[11] The Court was therefore urged not to look beyond the certificates but instead to treat them (certificates) as liquid documents and grant summary judgment as prayed for. According to the Plaintiff's energetic arguments, these certificates were issued by an authorized agent of the Defendant, who, in his area of expertise and after satisfying himself that all was in order, authorized payments to be made on all the certificates issued by the Plaintiff.

[12] On the issue of the VAT not being agreed upon between the parties and yet included in all the invoices issued by the Plaintiff, it was argued on behalf of the Plaintiff that even though this item (VAT) appears in

all the invoices issued by the Plaintiff to the Defendant, this (VAT item on the invoices) was not being charged as an added item outside of the contract price but was charged within the contract price.

[13] It was further argued on behalf of the Plaintiff that there was no requirement at all for the Director of the Defendant to endorse (sign) and approve the certificates as this was a function reserved for the agent or engineer duly appointed by the Defendant's Director. According to the Plaintiff's counsel, the engineer himself issued correspondences authorizing and approving payments in respect of the invoices issued by the Plaintiff, and that, according to Plaintiff's counsel, should be the end of the matter.

DEFENDANT'S SUBMISSIONS

[14] On behalf of the Defendant, it was argued that at all material times, the agreement between the parties was that before any payment could be made on the certificates, the Plaintiff, the engineer and the Defendant himself had to sign and approve any payment to be made in terms thereof. According to the Defendant's representative, this was the case

with regards to the first three certificates issued by Plaintiff and there were no problems with regards to these certificates.

[15] The Defendant's Attorney strongly opposed any notion that the variations were authorized by the Defendant's Director or the engineer for that matter. According to the Defendant, the Plaintiff's reliance on Clause 39 of the written agreement was misdirected because Clause 39 (2) still required that a written authorization for any variation to take place had to be issued by the engineer.

[16] The matter, according to the Defendant's representative, contains disputes of fact which cannot be resolved on the papers. The argument by the Defendant was that the certificates had to be signed by the engineer and the Defendant's Director to ensure that all parties are content with the scope of work and the corresponding payment.

ANALYSIS AND FINDINGS

[17] The total price for the main contract, according to the Plaintiff, was the sum of **E 4,276,801.19 (Four Million Two Hundred and Seventy Six Thousand Eight Hundred and One Emalangeni and Nineteen**

Cents). With the added variations, the figure rose up to **E5,543.333.52 (Five Million Five Hundred and Forty Three Thousand Three Hundred and Thirty Three Emalangeni and Fifty Two Cents).** The difference between the two sums is **E1,266,532.33 (One Million Two Hundred and Sixty Six Thousand Five and Thirty Two Emalangeni and Thirty Three Cents).** This is the figure which, according to Plaintiff's counsel, the engineer was authorized to add on the main contract without even consulting the employer or client, who is the Defendant in the present proceedings.

[18] It is not clear to the Court whether the amount claimed by Plaintiff is only for the increaded scope of work or a combination of the added scope of work as well as the outstanding amounts on the main contract. Clearly, the Plaintiff ought to have separated the amounts claimed on the basis of the separate works done on the main contract and the work (if any) done on the additional scope. If according to the Plaintiff, only a sum of **E 3,534.776.14** was paid by the Defendant on the main contract, this means there was an amount outstanding, that is,

if services were rendered on the main contract. The main contract, without appearing to be repetitive, was for about **E 4.2 Million.**

[19] The failure by the Plaintiff to clearly articulate and differentiate between the two sums is, in the Court's view, sufficient ground on its own to decline summary judgment. In paragraph [9] of the particulars of claim, the Plaintiff alleges that;

"The Plaintiff carried out the works in terms of the agreement and duly issued invoices for the works carried out..."

[20] The Court is left grappling with the question of which work was carried out by the Plaintiff. Is it the work in terms of the main contract or the work in terms of the expanded scope of work or both? From the claimed figure of **E 1,719,282.96**, which part is for the main contract and which part of this figure is for the additional works? There is nothing to assist the Court in that regard.

[21] While it is true that legal authorities require that final and interim certificates be treated as liquid documents in proper and proven cases, this does not mean Courts must blindly invoke this principle without

applying its mind to the particular facts of each matter. Our Courts have emphasized time and again that each and every case must be treated on its own merits.

[22] In the Plaintiff's particulars of claim, it is alleged in paragraph [8] that **'the works were, on diverse occasions, extended after the scope of the works were <u>expanded by the Employer</u>..." [under-lined for emphasis]**. It is possible that the Plaintiff pleaded its case in this manner because according to it, the engineer stands in the shoes of the employer or the Defendant. Otherwise in the pleadings before Court, the employer made it succinctly clear that it did not authorize any such expansion of the scope of works. This was way back in the year 2017. On the 26th February 2017, the Defendant's Director, Mr. L.R Mamba issued a correspondence to the engineer of the project and wrote as follows;

> **"STCS LTD Consulting Engineers**
>
> **No.2 Mountain View Township**
>
> **EZULWINI**
>
> **Dear Sir**
>
> **RE: MVANGATI TOWNSHIP PROJECT**

We have received a bundle of letters that were sent to the Building Society by the contractor.

Amongst those documents are certain letters exchanged between yourselves and the contractor. Notably, there is correspondence emanating from your office dated 29th November, 2016 in terms of which you agreed to a time extension and also intimated a willingness to discuss increased payments in respect of the Preliminary and General items. The said letter was written without our knowledge and at a time when you were aware that we would not have agreed to same as the contractor had long abandoned the site and we were attending to the works ourselves.

We refer to our previous correspondence and reiterate our disappointment at the manner in which our interests have been handled in this project.

We advise that the letter of the 29th November, 2016 did not have our sanction, was unauthorized and will not be given effect to.

This letter should under no circumstances be construed as an exhaustive outline of the issues we have in the manner the above contract has been handled. We expressly reserve our rights in this regard.

Yours sincerely

LINDIFA MAMBA-DIRECTOR"

[23] The letter of the 29th November 2016 which the Director of the Defendant was disputing in the correspondence quoted above is the same letter relied upon by the Plaintiff as having been issued by the 'engineer' in which he authorized expansion of the scope of work to the tune of over E 1 Million.

[24] The correspondence of the 29th November 2016 is actually a response by the engineer to a request by the Plaintiff for extension of time for

the completion of certain tasks in terms of the contract. The letter, which was sent to the Director of the Plaintiff is titled '**Mvangati Township Development-Extension of Time.**' It appears that the engineer was responding to a request by the Plaintiff to be afforded more time to complete certain tasks. In responding to the request for extension of time, somewhere in the middle of the correspondence, there is mention of the time period for the completion of the added scope of works. To this, the engineer responded by writing 'no comment'.

[25] There is therefore no written correspondence presented in Court in which the engineer authorized variations or the carrying out of additional works on the project. Plaintiff's counsel submitted that the correspondence authorizing additional works was issued by the engineer but that same was not attached in the Court papers. This correspondence obviously constitutes the main ground which supports the Plaintiff's claim. It is therefore surprising that same was not annexed to the papers or availed to the Court.

[26] Faced with this challenge, the Plaintiff's counsel argued that the engineer is permitted by Clause 39 (2) to issue an oral variation order of the works to be done. Clause 39 (2) of the contract provides;

"No such variation shall be made by the Contractor without an order in writing (herein referred to as a "Variation Order") by the engineer;

Provided;

(a) If for any reason the Engineer shall consider it desirable to give such order orally, the Contractor shall comply with such order and any confirmation in writing of such oral order given by the Engineer, whether before or after carrying out of the order, shall be deemed to be a Variation Order within the meaning of this Clause..."

[27] Clause 39 (2) therefore requires that even if the scope of work is expanded orally by the engineer, still, such order or additional works must be confirmed in writing by the engineer at a later stage. It is clear on the facts of this matter that there was no written order or written authorization issued by the engineer to the contractor to carry out additional works. On the other hand, it is also not clear from the

pleadings whether or not the Plaintiff did in fact carry out the additional works in question. It has been indicated herein above that the Plaintiff was content in pleading that '*it carried out the works in accordance with the agreement between the parties.*' It cannot be ascertained whether this is in reference to the main contract or the additional works unilaterally authorized by the engineer.

[28] On the question of whether the engineer can unilaterally increase the financial scope of the contract to any amount he deems fit, this Court does not agree with the legal position articulated by Plaintiff's counsel. It would simply not be practical or logical. If the project, as in the present case, is financed through a financial institution, a question arises as to who becomes liable on the additional costs and how? It seems logical that if there is need for additional works, which would naturally attract additional costs, all the parties have to come together and specifically agree on the scope of the additional works and how these will be financed. It surely cannot be an issue exclusively reserved for the engineer simply because he is an agent of the employer. It seems to the Court that the variations referred to in

Clause 39 of the written contract can only take place within the four corners of the contract itself and not outside of same.

[29] During argument of the matter, the Court repeatedly enquired from Plaintiff's counsel if the engineer, relying on Clause 39 of the contract, can unilaterally increase the financial scope of the contract to any amount, say up to E 3 Million or more? The response by Plaintiff's counsel was in the affirmative. This, in the Court's view, is not possible and not practical.

[30] In the case of **Construction Associates (Pty) Ltd v CS Group of Companies (Pty) Ltd Civil Case No, 3026/2006 (H.C) (Unreported)**, which was heavily relied upon by Plaintiff's counsel, it was stated by the Court that;

"**2. The employer should be bound by the act of his agent in issuing a certificate. The position is the same as if the employer himself had signed an acknowledgement of debt (See the Randcon case, supra at pp 183H-184H). The exceptions are those that apply generally in the law of agency. For example, the employer will not be bound if there has been**

fraud or the architect has acted in collusion with the contractor to the detriment of the employer (Mackenzie, The Law of Building Contracts and Arbitration in South Africa, 2nd Ed, p.114). The employer will also not be bound if the agent has exceeded the mandate (Mackenzie, supra at p.113; Rudland and Son v Gwelo Municipality, 1933 SR 119 at pp 130-133; Portuguese Plastering Contractors (Pty) Ltd v Bytenski 1956 (4) SA 812 (W) at p.815 A-D)."

[31] This in the Court's view, is a case in which the agent could have exceeded his mandate as demonstrated by the Defendant's written correspondence issued in February 2017. The letter written by the Defendant's Director in February 2017 was not replied to by the engineer. This was so till summons were issued in 2023, almost five years later. Of course, the Plaintiff is entitled to argue that what took place between the employer and his appointed agent (engineer) did not concern it and that it merely relied on the instruction given by the agent. It has already been highlighted above that even the instruction allegedly given by the engineer was not reasonably proven or substantiated during the hearing of the matter.

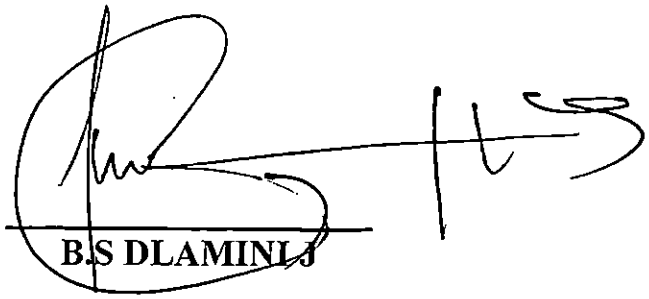
[32] In the case of **Zanele Zwane v Lewis Stores (Pty) Ltd t/a Best Electric , Civil Appeal Case No.22/2007 (CA), at para [8]** the Supreme Court of Appeal stated that;

"It is well recognized that summary judgment is an extra ordinary remedy. It is a very stringent one for that matter. This is so because it closes the door to the defendant without trial. It has the potential to become a weapon of injustice unless properly handled."

[33] The order for summary judgment cannot be granted on the facts of this matter. It is accordingly ordered that;

(a) The application for summary judgment is dismissed.

(b) Costs to be costs in the main matter.



B.S DLAMINI J

THE HIGH COURT OF ESWATINI

For Plaintiff: ***Attorney Mr. M. Tsambokhulu***

(Maseko Tsambokhulu Attorneys)

For Defendant: ***Attorney Mr. B.S Magagula***

(B.S Magagula Attorneys)