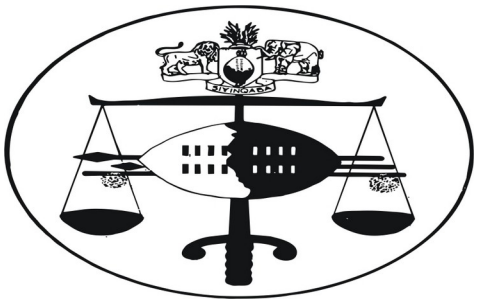

IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE **CIVIL APPEAL NO. 20/2010**
CITATION: [2010] SZSC 9

In the matter between:

ORION HOTELS (PTY) LIMITED
t/a PIGGS PEAK HOTEL & CASINO **APPELLANT**

and

MAG AIR CC **RESPONDENT**

CORAM	:	J.G. FOXCROFT J.A. A.M. EBRAHIM J.A. DR. S. TWUM J.A.
FOR THE APPELLANT	:	ADV. P. FLYNN
FOR THE RESPONDENT	:	A.J. LAMPLOUGH
HEARD	:	15 NOVEMBER 2010

SUMMARY

Civil Appeal – Contractual Dispute – Whether existence of oral agreements – Credibility of factual witnesses - Their reliability – Augmented by probabilities.

JUDGMENT

Ebrahim J.A.

In this case Mag Air CC ("the respondent") instituted an action by way of summons against Pigg's Peak Hotel & Casino (Pty) Ltd. ("the appellant") seeking the following relief:

1. **Payment of the sum of E125 881.21;**

2. **Interest on this sum at the rate of 9% per annum from the date of issuance of summons to the date of final payment;**

3. **Costs of suit; and**

4. **Further and alternative relief.**

I deal firstly with the point ***in limine*** taken by the appellant.

The main thrust of the appellant's complaint in relation to the conclusion reached by the learned judge ***a quo*** is that she refused the appellant a postponement in order that it could call an expert witness. I believe this criticism is without foundation. It is apparent from the record that the appellant was afforded a number of postponements and despite this failed to produce this so called "expert witness". Mr. Flynn representing the appellant in this court was clearly circumspect on whether it could be said that this witness could properly be described as an "expert witness" regard being had to his report which was available to the parties. Had this witness been called he was expected to depose of events which had taken place in 2005 and give his opinion of what may have been the position in that year ***ex post facto*** in 2009. This is hardly satisfactory. It is also of significance that no satisfactory explanation has been given on why this witness was not available on one of the dates of the hearing of this matter. The appellant called two witnesses and as I

will show later in this judgment these witnesses were in fact supportive of the respondent's case.

It was the respondent's case that in 2005 an agreement was entered into at Pigg's Peak Hotel between themselves and the appellant. The work to be done was outlined by way of a written quotation Exhibit B which was listed in the following terms:

> **"ATTENTION: STEPHEN KWINT**
> **RE: QUOTATION CARRIER ROOF TOP PACKAGE UNITS**
> **Flush system with flushing agent. Fit compressor and connect.**
>
> **Replace filter dryer, and check for leaks.**
> **Evacuate and charge with F22.**
> **Supply and fit 1 x 90 amp triple pole circuit breaker.**
> **Supply and fit 1 x Contactor and overload.**
> **Supply and fit Multi range timer.**
> **Check and replace if required.**
> **Phase failure protection over and under voltage relays.**
> **Supply and fit 6m Pipe insulation.**
> **Supply and fit 4 x Thermometers.**
> **Trace duct for dire dampers to check for blown fusible links.**

R97,836.79

This quote is based on a 21 days labour.
3 x Trips from Nelspruit to Swaziland.
Any savings to be passed back to client.
Client has undertaken to get the entire fan coil units in proper
Working order".

It was also the respondent's case that a written acceptance of their offer to carry out the work to be carried out was completed by the appellant on 3 November 2005 and furnished to the respondent. This was in the following terms:

"It gives me great pleasure in confirming the discussed work on the Orion Piggs Peak Hotel and Casino Air-Conditioning plant. My sincere apologies for the 'State of Panic' that this situation has caused. I could have been more proactive in getting Government to agree to the work that needs to be done. It would have been a perfect Winter Job.

Please take this as an official order to confirm quote (30 August 2005) valued at R97,836.79.

I trust that the above meets with your approval and I look forward to getting this project started as soon as possible.

Please contact me directly should you require any further information.

Yours sincerely

Stephen Kwint
General Manager
Orion Piggs peak Hotel and Casino”

It was the respondent’s assertion that it agreed to carry out the maintenance/repair work set out in its document, Annexure A supra. This was work to be done on the appellant’s air conditioning plant. The respondent undertook to ensure that the fan cool unit would be in proper working order, after the completion of the contract agreed between the parties, and that on the completion of the work done an amount of E97 836.79 would be paid to it. In concluding this initial agreement the respondent was represented by J.L. de Castro (“Castro Senior”) and the appellant by S Kwint. Subsequently two further agreements were entered into

between the parties. These were for a sum of E34 033.00 for the repair of the air handling units and E44 101.62 for repairs to the compressor.

As regards these two further agreements, the parties were represented by Castro Senior for the respondent and S Kwint for the appellant. The second agreement is termed “the further agreement” and the third agreement “the final agreement”.

The respondent pleaded in its declaration that it completed the initial work (the initial agreement), the further work (the second agreement) and the final work (the final agreement) and that the appellant became indebted to it in an amount of R175 881.25. In reduction of the appellant’s alleged indebtedness to the respondent, the appellant paid an amount of R50 000.00 to the respondent on 17 August 2006. The respondent stated that the appellant has since refused or failed to pay the remaining balance due of E125 881.21

and this has led to the institution of the action against the appellant.

The appellant filed a plea resisting the respondent's claim. It was its case that S Kwint was not authorized to enter into the alleged agreements with the respondent and that, in any event, the work undertaken was substandard, in that the plant worked briefly after the repairs had been undertaken but by the time of the filing of the plea the air conditioning unit was not functioning. The appellant also denied that the two further agreements had been entered into, alleging that only the initial agreement had been agreed upon. The respondent was put to the proof that it had entered into these two further agreements and that it had completed the work in terms of the initial agreement in a satisfactory manner.

In her judgment the learned Judge ***a quo*** listed the following matters as being common cause:

1. The respondent is a company registered in South Africa and carries on a business of sale, repair and installation of air conditioners and refrigeration equipment.

2. The appellant carries on a business of an hoteller in Swaziland.

3. The respondent, through its representative, attended a meeting at the Pigg's Peak Hotel in Swaziland in August 2005. Also attending this meeting was Stephen Kwint and a Mr. Mundu.

4. The meeting was to discuss the installation and repair of a chiller in the air conditioning unit of the appellant.

5. The work to be done was offered to one Peter Emery, who is a Director of a company know as Cool Point Limited (hereinafter referred to as "Cool Point"). The said company, not being in a position to undertake the work on offer, introduced J.L. de Castro of the respondent's company to the appellant for it to complete the work required.

Castro Senior gave evidence on behalf of the respondent. He deposed that he attended a meeting convened by the appellant to acquaint himself with the problems in respect of

the air conditioning equipment of the appellant. Also present at the meeting were Peter Emery and Stephen Kwint. He subsequently prepared a quote outlining the work to be undertaken and this is reflected in Exhibit A, which he tendered in evidence. This document is referred to earlier in this judgment. This quote was given to Stephen Kwint in the presence of Mr. Mundu, the appellant's Engineering Consultant. Stephen Kwint, describing himself as the General Manager of the appellant, confirmed in writing the acceptance of the quote made by Castro Senior. This confirmation letter was tendered in evidence as Exhibit B (see supra).

Castro Senior deposed that the work commenced and was carried out by his workers, including his son G. de Castro ("Castro Junior"). It became apparent after all the equipment had been installed that the compressor supplied by the appellant was faulty. This necessitated a second agreement being entered into by the parties for the repair of

the compressor. Stephen Kwint agreed to this and as a result an oral agreement (the second agreement) was reached with him for this work to be done. The repair work on the compressor was completed in Johannesburg, South Africa, and then returned for installation. Castro Senior also deposed that during the process of the work being carried out it emerged that the “fan coil” units, which the appellant had taken responsibility for to have them in proper working order in terms of the agreement, reached as per Exhibit A, had not been done. This then resulted in a further oral agreement being reached (the final agreement) for the respondent to complete this requirement. Castro Senior stated his company completed the work undertaken and the air conditioner was operational by December 2005, although the respondent was subsequently called by the appellant to attend to a gas leak.

It was Castro Senior’s evidence that the appellant accepted the work done by the respondent and conveyed this fact to it

at a meeting held in December 2005. The appellant's Engineering Consultant, Mr. Mundu, was present at this meeting and he made no complaint about the quality of the work carried out. In August 2006 the appellant once again commissioned the respondent to work on another compressor. It was then that the respondent demanded that it be paid for the earlier work it had done for the appellant. It was paid E50 000.00. The respondent suggested to the appellant that they should enter into a maintenance agreement, as it was its view that as the machines were old it was essential that an agreement be reached in this regard in order to keep the machine in good working order. No response was received from the appellant to this suggestion. An amount of E125 88.21 still remains to be paid.

It was the evidence of Castro Junior that he is a co-director and shareholder of the respondent. It was he and his other co-workers who carried out the work commissioned by the appellant. He corroborated the evidence of Castro Senior in

detail, deposing that all the work agreed to be done was completed in December 2005. He confirmed that the compressor supplied by the appellant was faulty and because of this it was sent to Johannesburg for it to be repaired. It was also his evidence that whilst he and his team carried out the commissioned work they were in constant contact with a Sipho Dlamini ("Dlamini"), the appellant's Maintenance Manager.

In December 2005 the work undertaken was completed and a meeting took place with the senior management of the appellant. They were represented by Stephen Kwint, Mr. Mundu and Dlamini. At this meeting this group was informed that although the work had been completed the air conditioner handling units which the appellant had undertaken to have repaired (see Annexure A) were not in working order. Castro Junior was then tasked to undertake the repair of these units. This gave rise to the third agreement, that is, the final oral contract. It was also the

evidence of this witness that he considered it necessary that regular maintenance be carried out on the chiller and he suggested this to the appellant's representatives, but no response was forthcoming. Finally, he deposed that the indebtedness of the appellant to the respondent is in the sum of E125 881.21.

Mr. Mundu, the appellant's Engineering Consultant, also gave evidence in relation to the rehabilitation works to be carried out at the Orion Pigg's Peak Hotel. He corroborated the evidence of the Castros by deposing that the work commissioned as reflected in Exhibit A was carried out by December 2005. He also deposed that the compressor was repaired by the respondent, as were the handling units at the Hotel. He confirmed that the quotation given for the initial work to be done was to be just over E97 000.00. He attended a meeting held in December 2005. He carried out an inspection and was satisfied that the respondent "had done what they were supposed to do". He never received

any reports from the appellant of any defects in the respondent's work. He also said that he could not rule out the existence of the two further agreements (the oral agreements) between the parties, but he deposed "I can confirm that if there was a contract regarding the air handling units and the additional compressor, I had no knowledge or part in it".

Finally, as part of the respondent's case, a representative Mr. Robert ("Robert") of a company called Robertec gave evidence. In 2003 the company secured a contract to do some work for the appellant relating to the air conditioning systems. It was the evidence of Robert that the company could not complete the contracts as the cooling valves which would control the cooling in various areas of the Hotel were not fitted and thus Robertec left its work unfinished until the respondent called them up to commission the controls and give a report on the works. It was Castro Junior who made this call to him. Robert returned to the Orion Pigg's Peak

Hotel and accepted the quotation as contained in Exhibit L to do the work. Exhibit L provides as follows:

"To : Mag Air
Att : Graham
From : Louis Robert
Date : January 31, 2006
Re : Piggs Peak Hotel
Ref : 006/028

Quotation to check the complete control system at above project.
The offer is based on the following:-

A) Technician (Mark Robert) to drive to Piggs Peak Hotel on Wednesday (8/02/06) morning and return on Friday (10/02/06).

B) Time allowed for two days:-

16 Hours @ R280.00 per hour	**=**	**R4 480.00**
Travel expense	**=**	**R2 000.00**
Total	**=**	**R6 480.00**

C) Above prices based on the assumption that a room will be provided for two nights by the client.

Please give us an order number soonest if above is in order.

Regards,
L Robert".

In March 2006 Robert conducted an inspection of the works carried out and concluded that the chillers were running and the air conditioning operational. It was his evidence "that at the time I was leaving, the system was working at the Orion Hotel and we had control of the required temperatures".

It was on the basis of this evidence outlined above that the respondent brought an action against the appellant for payment for the work done for the appellant.

It was the appellant's case initially that the respondent had not been paid for the works carried out in accordance with the quotation in Exhibit A because:

1. Stephen Kwint, the Managing Director, had no authority to give out the contract;

2. the work done by the respondent fell short of the acceptable standard, being of poor quality; and

3. that there were no additional oral contracts.

The first defence was abandoned by the appellant.

The appellant called Dlamini and Julius Mkhatshwa (”Mkhatshwa”) in support of its defence in respect of its assertions in respect of defences 2 and 3.

Dlamini has been the Maintenance Manager of the Hotel since 2002. He deposed that because the air conditioning system of the Hotel was not functioning the respondent was contracted to repair the same. He accepted that the respondent completed the work but deposed that the work had not been done well enough. He did not dispute that the work listed to be done in terms of the quotation, Exhibit A, was carried out, but was of the view that it was not up to the standard agreed to and that is why the respondent had not been paid the amount demanded. He said the compressor

fitted by the respondent had worked for less than a month and that all four compressors did not have enough oil in them. He deposed that the compressor installed by the respondent tripped when switched on. He also stated that the work done by Robertac was not properly done. He complained, in general, of shoddy work.

The learned Judge ***a quo***, however, made the following observations as regard Dlamini's evidence:

> **"During cross-examination, the evidence of this witness did not stand up to scrutiny ….**
>
> **After hiding behind an alleged lack of personal involvement with, and loss of memory regarding most of the principal matters relating to the execution by the plaintiff of the contract commenced by exhibit A and the two oral contracts alleged by the plaintiff, it was not surprising that in a volte-face, the witness stated later that the plaintiff had done its work, all that was quoted in exhibit A and further work on a compressor, and was thus entitled to payment.**

> **Regarding the quality of the works, he acknowledged that in December 2005, when the plaintiff finished the work quoted in exhibit A, it ran perfectly. He added that from the commissioning of the controls by Robertec in March 2006 until the call-out of the plaintiff in August 2006, there were no problems with Chiller One in respect of which the works had been done. In the end, the witness limited his critical stance regarding the works, to the control system installed by Robertec which he said gave (an incorrect reading) while he asserted that he could not deny that when the plaintiff finished its work, (the)defendant was happy with the work done."**

In my view, these observations are entirely supported by a reading of his evidence and is supportive of the evidence for the respondent.

Mkhatshwa, the appellant's Deputy General Manager, was the second witness called for the defence. He deposed that Peter Emery introduced Castro Senior to him. It was also his evidence that he had a working relationship with Stephen Kwint, who was the General Manager of the appellant at the time pertaining to the events related to this matter. The purpose of the introduction of the respondent was for the

parties to enter into a contract for the performance of certain works by the respondent for the appellant, as Peter Emery's company, which was initially approached to carry out the necessary work, was unable to carry out the work required. Mkhatshwa said that there was a need to get the main air conditioning unit functional as the unit was not pumping cold air. An amount of E97 000.00 was agreed to for the completion of the work. Initially the work to be done was to be carried out by another company, Sandton Air, but they went bankrupt. It was then that Peter Emery brought in the respondent to do the work.

This witness, too, was found to be an unsatisfactory witness. The learned Judge ***a quo*** made the following observations in relation to him:

> **"Like the testimony of DW1 (Sipho Dlamini), this witness's testimony also seemed to crumble as it was tested during cross-examination. The witness made a number of admissions, a few of which are set out hereafter. In spite of his bold assertion that the plaintiff**

had failed to do its work as per its contract with the defendant (which included previous discussions) he admitted that he had not known what the plaintiff had undertaken to do prior to the production of the quotation exhibit A. This was because he had not been present when the plaintiff's representative went on site to conduct an inspection before exhibit A was produced. The witness further acknowledged that at the meeting of December 2005 with Mr. Mundu, held after the plaintiff concluded its works, he had not been present as he went on leave. With that admission, he conceded that, contrary to his evidence, he did not know if the system had 'hiccups' at the conclusion of the plaintiff's work. Another admission of the witness was with regard to the fact that between the time of the commissioning of the plant by Robertec in March 2006 and August 2006 when the plaintiff was tasked to do work on another compressor, there were no reports from the defendant relating to problems with the plaintiff's work … .

Regarding the further works not contained in exhibit A which the defendant had denied flatly in pleading, the witness, after acknowledging that he did not know the state in which the compressor was at the time it was handed to the plaintiff for installation, admitted that the plaintiff had done work on the compressor and that the said work was outside the quotation exhibit A. He also admitted that the plaintiff had repaired the air handling units also outside exhibit A.

After many such admissions including his acknowledgement that he was not in a position to say that the plaintiff did not do its work well at the point of the conclusion of its work in 2005, the witness conceded that he was not in a position to contradict Mr. Mundu's evidence, or that of the defendant's Maintenance Engineer DW1 (Dlamini), that the plaintiff did all that it was required to do per the quotation exhibit A.

In the end, the witness acknowledged that although the plaintiff did work for the defendant, which work was: the works in exhibit A, to be settled with the retention money aforesaid, and the two additional works, being the repair work on the compressor and the air handling units, it had not been paid therefore, save for E50,000.00 the defendant paid for the compressor."

In my view, these findings by the learned trial Judge are in accordance with the evidence which evolved during the course of the hearing and correctly reflect the inadequacies of Mkhatshwa's evidence.

Against the background of the satisfactory evidence led by the respondent, supported as this evidence was by the

documentary evidence such as Exhibit A and Exhibit B, and other documents pitted against the unsatisfactory evidence led by the appellant, the conclusion reached by the trial Judge ***a quo*** cannot be faulted.

In my view, the documentary evidence tendered in evidence in this matter bolsters the respondent's case in a telling manner.

Exhibit A reflects the undisputed quotation given to the appellant. It contains a statement in the final sentence of that quotation that "Client had undertaken to get the entire fan coil units in proper working order".

This quotation was accepted by Stephen Kwint, the General Manager of the appellant. See Exhibit B.

Exhibit C is the Statement of account sent to the appellant. It reflects the two extra charges for the additional work done

by the respondent. It seems to me improbable in the extreme that the respondent would have carried out this extra work without discussing it with the representatives of the appellant. It is also improbable that it would have fabricated the assertion that two additional oral agreements were reached for this extra work to be completed. Contained in the documentary evidence are three tax invoices reflecting the cost of the initial work to be done as E97 936.79, E34 033.80 for the additional repairs to the air handling units and E44 010.62 for the overhaul of the compressor. It would be stretching credulity too far to hold that a professional organization such as the respondent would have completed the additional work without the approval of the appellant.

In addition Exhibit D was tendered by the respondent as part of the evidence. This was a letter containing the following: “We wish to advise that we have completed the remedial works as per our quotation, as well as the additional works

required …" (my underlining). This letter was dated 12 May 2006 and is consistent with the probabilities that additional work was needed to be done and an agreement was reached that this be carried out.

There was also a letter produced dated 15 August 2008 addressed to the appellant relating to the repair of the compressor and in addition a letter tendered addressed to the appellant on completion of the works, stating that the machinery relating to the air conditioning unit at the appellant's Hotel was in excess of twenty years old and containing a suggestion that a maintenance agreement be entered into between the parties in order to keep the unit in good working order. No reply was received. Here again, it seems to me that the probabilities of what transpired between the parties is more consistent with the version proffered by the respondent. It is supported by the documentary exhibits placed before the court.

Finally, there was a letter from Robertec dated 31 January 2006, which contained a quotation for a checking of the complete control system at the appellant's premises. This too is supportive of the respondent's version of events.

The trial court faced as it was with the two irreconcilable versions looked at the credibility and reliability of the witnesses heard as well as the probabilities of the matter and found in favour of the respondent see Stellenbosch Farmers' Winery Group Ltd and Anor v Martell et Cie and Others 2003 (1) S.A. at page 15.

In my view, the evidence proffered by the respondent was overwhelming and was properly accepted by the learned Judge ***a quo*** in preference to the evidence of the appellant. Consequently the appeal is without merit.

Accordingly, the appeal is dismissed with costs including the certified costs of Counsel as provided for in Rule 39 of the Court of Appeal Rules.

A.M. EBRAHIM J.A.
JUSTICE OF APPEAL

I agree

J. FOXCROFT J.A.
JUSTICE OF APPEAL

I agree

DR. S. TWUM J.A.
JUSTICE OF APPEAL

Delivered this 30th day of November 2010.