

IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 1667/1996

In the matter between:

Gardini & Sons (Pty) Ltd.                      Plaintiff

vs

Saxon (Pty) Ltd                                      Defendant

CORAM                                                      S.W. SAPIRE, ACJ

FOR PLAINTIFF                                              Mr. Flynn

FOR DEFENDANT                                              Mr. Dunseith

Judgment

(5/12/96)

Plaintiff carries on business as a building contractor. Defendant is apparently a property owning company. On 4th August, 1995 the parties entered into a written building contract in the standard form commonly used. A copy of the contract is attached to the summons which has been issued.

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The dispute relates to the non-payment by the defendant of a progress certificate identified as #4. The certificate required the defendant to pay to the plaintiff an amount of E241 099.24 of which the defendant has paid E1 0 416.37 and withheld payment of E130 862.37 which the plaintiff alleges is due and owing. Arithmetically this is obviously correct.

The defendant however maintains that it has unliquidated claims sounding in money which when adjudicated on will extinguish its indebtedness to the plaintiff in respect of the certificate. It is always open to a defendant to allege an unliquidated counterclaim as a defence to a liquidated claim made by a plaintiff

Herb Dyers (Pty) Ltd v Mahomed and Another 1965(1) SA 31

This case followed the earlier case of Weinkove v Botha, 1952(3) SA 178

In the present case however, the alleged counterclaim is a matter which the parties have agreed be referred to arbitration. The parties have already selected their arbitrator and although it seems that recent developments have caused the defendant to question the impartiality of the person appointed, because it is said of some ex parte conversation with the representative of the plaintiff, the reference to arbitration remains valid despite this. If necessary another arbitrator could be appointed

If indeed the defendant has a bone fide counterclaim it is entitled to have judgement on plaintiffs claim stayed pending adjudication on its counterclaim.

In this connection the case of Hilockhat (Pty) Ltd v Domingo 1979 (3) SA 696

is informative and should be followed. If that counterclaim has been referred by the parties to arbitration, then unless there are special circumstances the action on the claim in convention is to be stayed pending the conclusion of the arbitration proceedings.

The stay applied for in this case is not one under section 6 of the Arbitration Act 24/1904 as plaintiffs claim is not one which the parties have agreed should be submitted to arbitration. In effect the defendant is not disputing the validity or correctness of the certificate, but claims to be excused payment of the balance thereof because of the counterclaim. The issue of the "legitimacy" of the certificate is not one which can be decided by the arbitrator and indeed this has already been indicated here, but the remaining claims are 'still there to be decided upon.

The Plaintiff in para 10.4 of the affidavit attested by Marco Menegon who is Managing Director has admitted that a dispute has arisen regarding the validity of extensions granted to the Plaintiff and that these have properly been referred to the arbitrator. Depending on the outcome

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of this referral the defendant may or may not be entitled to penalties for non or late completion.

If this were not to be determined by the arbitrator it would fall to this court to do so.

The present application is made as a result of an application for summary judgment Defendant's alleged illiquid claim is on the authorities I have quoted sufficient defence to entitle it to leave to defend. As the counterclaim has to be heard by the arbitrator it seems the only practical means of allowing the defendant to raise its defence is to stay these proceedings pending the conclusion of the arbitration proceedings.

The action is accordingly stayed pending the determination of the arbitration proceedings.

S.W. SAPIRE

ACTING CHIEF JUSTICE