IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) N0.9/14

In the matter between

THE MINISTRY OF PUBLIC WORKS AND TRANSPORT	**1ST APPELLANT**
THE PRINCIPAL SECRETARY - MINISTRY OF PUBLIC WORKS AND TRANSPORT	**2ND APPELLANT**
THE ATTORNEY-GENERAL	**3RD APPELLANT**
DIRECTOR OF GENERAL-ROADS DIRECTORATE	**4TH APPELLANT**

And

LESOTHO CONSOLIDATED CIVIL CONTRACTORS (PTY) LTD.	**RESPONDENT**

CORAM: SCOTT AP
THRING JA
LOUW AJA

HEARD: 10 APRIL 2014

DELIVERED: 17 APRIL 2014

SUMMARY

Notice of termination of civil engineering contract served on contractor for disregarding instructions of the engineer inter alia to suspend work – contract permitting termination for such disregard of instructions and permitting employer to expel contractor from site and to take possession of contractor's equipment and materials – Notice of termination not shown to be contrary to public policy – notice not invalid by reason of pending arbitration in respect of other disputed items.

JUDGMENT

SCOTT AP

[1] On 18 November 2008 the first appellant, represented by one or more of the other appellants to whom I shall refer for convenience as "the appellants", entered into a written contract with the respondent in terms of which the latter was employed as the contractor to construct the upgrading of the road from Likalaneng to Thaba-Tseka. The appellants appointed a firm of engineers, WSP/IMC Worldwide Limited ("IMC") to supervise the construction of the road, including the bridges, pursuant to the

specifications set out in the contract. The contract price was M212 771 071.27.

[2] On 21 November 2012 the appellants gave notice, in terms of the contract, terminating the contract and notifying the respondent that it would be expelled from the site within 14 days of the notice. As provided for in the contract, the notice further informed the respondent that the appellants or another contractor may complete the works and for this purpose may use so much of the respondent's equipment, temporary works and materials as they may think proper.

[3] On 30 November 2012 the respondent approached the Court *ex parte* seeking an order in the following terms:

> *"1. That the Rules of Court pertaining to the periods and modes of service be dispensed with due to the urgency of this matter.*
>
> *2. That a Rule Nisi be issued returnable on the date and time to be determined by this Honourable Court calling upon the [appellants] to show cause why:*

(a) The expulsion cannot be stayed pending the outcome of this application.

(b) The completion of works [other than by the respondent] or employment of any other contractor cannot be stayed pending finalisation of this application.

(c) Stay of sale and or interference with [respondent's] plant, equipment or material on the site in any manner whatsoever [cannot be granted].

(d) The letter written by [the appellants] marked "A" cannot be declared null and void.

(e) This Honourable Court order that [the respondent] completes the work and hands it over to the Government on or before 1 April 2013."

On the same day a rule nisi was issued and an order made that prayers 1 and 2 (a) and (b) and (c) operate with immediate effect.

[4] The matter was opposed and in due course came before **Mahase J**. Notwithstanding its urgency it dragged on for almost a year until about the middle of November 2013 when judgment was finally handed down. The court confirmed the rule in terms of prayers 1, 2 (a), (b), (c), (d)

and (e). In addition, it (1) ordered the parties *"to submit to and go for a one-man arbitration process"*, and (2) ordered the appellants to pay the respondent for performance of a *"piece of work done."* There is nothing in the judgment to explain why these orders were made. They were not sought in the Notice of Motion and should not have been made. (see **Mophato oa Morija v Lesotho Evangelical Church 2000-2004 LAC 356** at 361) There is also nothing in the judgment to indicate whether the Court gave due consideration to the granting of prayer 2 (e) which in effect is an order for specific performance.

[5] The notice of appeal was lodged out of time on 24 January 2014. The appellants seek condonation. This is opposed by the respondent. The explanation for the delay is shortly the following. Subsequent to the granting of the interim order the respondent continued to forge ahead with the work, despite the engineer's order suspending the work and despite the absence of the engineer to supervise it. By the time judgment was handed down the road had been completed. The appellants were dissatisfied with the judgment but initially did not note an appeal because

counsel who had appeared in the application advised that there was no prospect of success and because the road had been completed and the matter appeared to have become academic. However, the respondents insisted on payment in terms of the "additional" order of the Court *a quo.* The appellants requested the respondent to abandon the order that they pay. The respondent refused and the appellants took advice from senior counsel who advised not only that the "additional" order was not supportable but also that there were good prospects of success on the merits of the appeal. The explanation is not unreasonable, the delay in noting the appeal is not a long one and, importantly, the appeal, in my view, has merit. In the circumstances the late noting of the appeal should be condoned.

[6] The respondent sought to have the termination notice of 21 November 2012 declared null and void on essentially two grounds. The first was that the term of the contract affording the appellants a discretion to terminate the contract in the manner they did was contrary to public policy. The second was that the notice was *"premature and defective"* because certain disputes had been referred to

arbitration and *"remain lis pendens"*, and because the works were in an advanced stage of completion. The Court *a quo* upheld the respondent's claims on both grounds.

[7] The respondent emphasised in its founding papers that the application was not intended to enter into the merits of the disputes between the parties. Nor on the limited information contained in the application could it properly have done so. Indeed, only certain portions of the contract documents were annexed to the papers. These included the amendments to the Conditions of Particular Application (Part 2 of the Conditions of Contract) but not the unamended version so as to enable one to read the amendments in context. Instead, irrelevant documents such as the respondent's Articles of Association were annexed.

[8] As far as the first ground is concerned, the Court *a quo* appears to have accepted respondent's contention that the rules of natural justice were applicable and that the appellants had terminated the contract without first

affording the respondent an opportunity of being heard, contrary to the *audi alteram partem* requirement. In this, the Court *a quo* erred. When terminating the contract the appellants were not performing a public duty or implementing legislation; they were purporting to exercise a contractual right founded on the consensus of the parties in respect of a commercial contract. The principles of natural justice accordingly had no application. (See **Cape Municipal Council v Metro Inspection Services CC 2001 (3) SA 1013 SCA** at 1023 para 18.)

[9] There remains the question whether the enforcement of the provisions of the contract permitting the appellants to terminate the contract, expelling the respondent from the site and taking possession of its equipment and materials, would be contrary to public policy. Provisions similar to these are not uncommon in contracts of this nature, but that is not the end of the inquiry. The Supreme Court of Appeal of South Africa (formerly the Appellate Division) has in the past consistently upheld the *Shifren* principle (**S.A. Sentrale Ko-op Graanmaatskappy Bpk v Shifren 1964 (4) 760 (A)**), expressed in the maxim

"pacta sunt servanda" (contracts properly entered into should be enforced without regard to perceived inequities). In adopting this approach the Court emphasised the need for commercial certainty, accepted that public policy favours the sanctity of contract and recognised *"good faith"* in contract as being no more than the abstract value that underlies the existing rules of contract. (See eg **Brisley v Drotsky 2002 (4) SA 1 (SCA)**; **Afrox Healthcare Bpk v Strydom 2002 (6) SA 21 (SCA)**.) Nonetheless, the Shifren principle has always been subject to public policy and the courts have refused to enforce a contract or a term in a contract if they considered that it would be contrary to public policy to do so. In **Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A)** the court refused to enforce a cession *in securitatem debiti* in terms of which a doctor ceded his entire future earnings to his creditor, virtually relegating himself *"to the position of a slave working for the benefit of Sasfin."* It was said in that case that the enforcement of contracts would be contrary to public policy if they were *"clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience"* (at 8 C-D). The Court warned, however, that the power to declare a contract contrary to

public policy should *"be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of power"* (at 9 B). Subsequently in **Standard Bank of SA Ltd v Wilkinson 1993 (3) SA 822 (C)** the full court declined to dismiss the claim of a creditor in terms of a suretyship contract on the grounds that its enforcement would be contrary to public policy, and repeated (at 828 B) the warning of **Lord Atkin** in **Fender v Mildmay [1938] AC1 (HL)** at 12:

> *"The doctrine should only be invoked in clear cases in which harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds."*

[10] Following criticism, particularly in academic circles, of the strict adherence to the Shifren principle, the South African Constitutional Court in **Barkhuizen v Napier 2007 (5) SA 323 (CC)** endorsed a new, far wider and seemingly more nebulous criterion for determining public policy. It held that public policy was now rooted in the (South African) Constitution and that what was public policy and whether the enforcement of a contract or a term

in a contract would be contrary to public policy had to be determined with reference to the Constitution and the values that underlie it, including *"the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law"* (at para 28). The criterion so formulated has been criticised for being too radical a departure from that formulated in the cases previously cited, but it is unnecessary for present purposes to consider that criticism. The case concerned the enforcement of a clause in a **Lloyd**'s short-term insurance contract which provided that summons had to be served within 90 days of the repudiation of the policy, which the plaintiff had failed to do. The majority, comprising eight of the justices, upheld the enforceability of the clause but did so on the basis that, because the facts were in the form of a stated case, there was insufficient information before the court on which it could decide whether it would be *"unfair or unjust"* to enforce the clause. Implicit in the reasoning of the Chief Justice, who delivered the judgment of the majority, was that the enforceability or otherwise of a clause in a contract cannot be determined by looking at the clause *in vacuo*. All the facts relating to the clause had to be placed before the court, including its

rationale, the full circumstances relating to its breach and the consequences for the respective parties of enforcing or not enforcing the clause.

[11] It seems to me that even if the wider criterion formulated in the Barkhuizen case is applied, the same difficulty arises in the present case. We do not have before us the full contract. We do not even have all the provisions of the clause in terms of which the notice of termination was issued. We have only an amendment to the clause which begins in the middle of a sentence. The breach relied upon by the appellants, to which I shall refer later, was the respondent's persistent refusal to comply with the engineer's instructions. Full details of the breach are lacking. So, too, is evidence of the consequences of the breach. One can only speculate as to the damage the appellants would have suffered (and may still suffer) in consequence of the breach. There was no evidence as to whether the contract was running on time and whether or not there was a need for urgency in completing the project. There was no evidence of the value of the respondent's equipment and materials on site when the notice was

issued, nor of the likelihood of the appellants or another contractor using same. These are all relevant considerations in determining whether the enforcement of the clause, and hence the acceptance of the validity of the notice of termination, would be contrary to public policy. It follows that in my view, despite the apparent harshness of the clause in question, insufficient evidence was placed before the court to determine whether the enforcement of the clause and the notice issued in pursuance of it would be contrary to public policy. The onus of proof was upon the respondent. It follows, too, that the first ground advanced by the respondent for having the notice declared null and void cannot be upheld.

[12] It is necessary to mention in passing that there was no onus on the appellants to establish on the facts that they were entitled to terminate the contract. In deciding that they were, the Court *a quo* was clearly wrong. The respondent's case, as stated in the Notice of Motion, was that the notice of termination was null and void. The respondent accordingly bore the onus of proving that this was so.

[13] I turn now to the second ground on which the respondent sought to have the notice of termination declared null and void, namely that the notice was premature because certain disputes had been referred to arbitration and because some 80 per cent of the work had been completed.

[14] The fact that the respondent had completed 80 per cent of the work would, no doubt, affect the consequence of the termination but it clearly would not preclude the appellants from exercising their right to terminate the contract. No more need be said regarding this ground.

[15] The reference to arbitration of certain disputes was denied in the answering affidavit, apparently because of a difference as to whether the disputes should be heard by one or three arbitrators. However, in argument in the Court *a quo* it was conceded, and rightly so, that there was indeed a pending arbitration, notwithstanding the difference referred to. It is clear from the correspondence

annexed to the respondent's replying affidavit that the disputes which were the subject of the pending arbitration were first, a dispute as to the asphalt mix design and second, a dispute as to the mass earthworks quantities and their measurement. These disputes were not, however, the grounds upon which the appellants terminated the contract. This much is apparent from the notice of termination read together with a letter of certification dated, 20 November 2012 addressed by IMC to the appellants with a copy to the respondent, both of which were annexed to the respondent's founding affidavit. The notice of termination refers expressly to the engineer's certification as to the respondent's default under sub-clauses 63 (1) (c) and (d) of the Conditions of Particular Application. The alleged default is spelt out in the certification. In short, the engineer certified that the respondent had continued in its refusal to comply with the engineer's instructions to remove improper work, material or plant following the latter's rejection of the Mantšonyane bridge central pier base and had not only so refused but had continued to execute subsequent work directly related to the construction of the Mantšonyane bridge central pier and the bridge itself. In addition, the engineer certified

that the respondent had ignored a suspension order issued by the engineer on 24 August 2012 relating to the Mantšonyane bridge central pier, a suspension order dated 19 June 2012 relating to asphalt surfacing work and an asphalt suspension order dated 14 November 2012.

[16] The ground upon which the notice of termination was issued was therefore the failure and refusal of the respondent to obey the instructions of the engineer, not the subject matter of the disputes referred to arbitration. No reference was made in the papers to a contractual provision that would have entitled the respondent to ignore the instructions of the engineer, and in particular a suspension order, simply because a dispute had been referred to arbitration. Nor could there conceivably have been such a provision. The engineer was responsible for the design and ensuring that the road and bridges were constructed in accordance with that design. In the event of a structural failure, the engineer would be held responsible. Finally, it should be noted that a termination of the contract does not put an end to an arbitration. (See **De Goede v Venter 1959 (3) SA 959 (0)**). Nothing would

have precluded the respondent from pursuing its claims in the arbitration. If successful, a monetary award could have been made in its favour.

[17] It follows that in my view the respondent failed to establish that the appellants' notice of termination was *"null and void"* and the Court a quo erred in granting the relief it did.

[18] In the result, the late noting of the appeal is condoned and the appeal is upheld with costs. The order of the Court a quo is set aside and the following substituted in its place:

"The application is dismissed with costs."

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D.G. SCOTT

ACTING PRESIDENT

I agree

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W.G. THRING

JUSTICE OF APPEAL

I agree

_____

W.J. LOUW

ACTING JUSTICE OF APPEAL

For the Appellants: M.E. Teele KC and S. Ratau

For the Respondent: H. Nathane KC and H. Selzer