CIV/APN/I36/79

IN THE HIGH COURT OF LESOTHO

In the Application of :

PRE-COMPRESSED CONCRETE DEVELOPMENT COMPANY (PROPRIETARY) LIMITED — Applicant

v

P.P. MAKHOZA — Respondent

J U D G M E N T

Delivered by the Hon. Judge Mr. Justice M.P. Mofokeng on the 28th day of March, I980.

This is an application, on notice of motion, for an Order for

I. Payment by the respondent to the applicant of the sum of RI5 I40,00.

2. Interest on the aforesaid amount from the 4th January I979 to the date of payment at the rate of I% per month.

3. Costs of suit.

There is no dispute that the applicant and the respondent entered into a written contract whereby the latter undertook to pay the former a "lump sum" of RI5I40.00 (fifteen thousand one hundred and forty rand only) nett for

> "Design, supply and deliver on site Precom soffits, steel reinforcement, welded mesh fabric, hollow blocks and polystyrene void formers in accordance with our (applicant's) Drawing No. SJ 2278/I herewith and subject to the stipulations below and conditions of contract attached ....."

It was agreed that terms of payment were "strictly 30 days from date of invoice. There is no dispute that the delivery to the site in terms of the agreement commenced

/commenced .....

commenced on the 4th day of November, 1978. On the 17th day of November, 1978, there was a meeting between the parties the upshot of which was that the terms of payment under the agreement concluded were varied and the variation is confirmed in writing in a letter addressed to the respondent, marked annexure "D" dated the 20th day of November, 1978. It is significant that the respondent did not state that that letter did not confirm all the discussions which took place at the said meeting. He chose rather to remain silent, and thereby confirming that the said letter expressed all that took place at the said meeting. (Sun Radio & Furnishers v. Republic Timber & Hardware, 1969(4) S.A. 378 at 381D). The principle enunciated in that case, though applicable to recording the terms of a contract, yet I am of the view that it applies with equal force in the present case particularly in view of the respondent's allegation that at the said meeting, in addition to the question of the price being discussed, there was discussed also the allegation of the applicant's "fraud" or "swindle". If that is so, this was a glaring omission in annexure "D". However, at the end of November 1978 an invoice was duly posted to the respondent. This was met with silence. Statements requiring payment of the contract price met with the same fate. Then the matter was taken up by Credit Guarantee Insurance Corporation of Africa Limited which had insured payment by the respondent to the applicant. This was now on the 2nd February, 1979. There was apparently no response. Thus another letter was written. The second letter was dated 5th April 1979. This was a letter of demand. The copies of these letters are annexed to the papers before me marked annexures "E" and "F" respectively. It was the letter of demand which evoked a reply from the respondent. This is annexure "G" in the papers before me. In it the respondent claims to have been overcharged for the work and seeks details as to the cost of each item delivered. There is no other dispute raised nor has he in any way suggested that the work was not carried out in accordance with the agreement between the parties, in the said letter.

The respondent now contends that certain matters entitle him to have the order granted in his favour in

/dismissing .....

dismissing this application.

Firstly, he says that there was no consensus ad idem in concluding the agreement. The respondent makes this allegation because he says, in his opposing affidavit, that applicant claimed that it was supplying especially designed materials which were unavailable elsewhere and that the materials delivered were common place and were not specially designed. The applicant's answer is quite simple. The materials themselves used in the construction of the works do not require designing. It is the system as a whole which is designed and their systems are patented. In any event the fact that the respondent raises in his letter, annexure "G" only the complaint of an overcharge detracts from the genuiness of this contention.

Secondly, the respondent says that the applicant overcharged him. The answer has been concisely given by the applicant in paragraph 5(a) of the answering affidavit :

> " AD PARAGRAPH 5 THEREOF:
>
> (a) The Applicant has properly executed all the work and delivered all the materials which it was required to do in terms of the agreement between the parties".

The allegation of the overcharge, in my view, is irrelevant as the parties agreed upon a lump sum in terms of the agreement.

Thirdly, the respondent alleges that the agreement was based on a "fraud" or "swindle". He actually puts it thus in his opposing affidavit:

> " 5.
>
> (a) .....
>
> (b) I believe Applicant's want to be paid for work they never did. If the courts were to refuse to enquire into the merits salesmen with their sweet tongues would

/swindle .....

> swindle the public and expect courts to be party to their swindling merely because clients attached signatures on pieces of paper which they made them sign".

I have already pointed out that it is nowhere suggested that the work was not carried out in accordance with the agreement between the parties. It is also quite significant that the materials delivered have neither been returned or offered to be returned nor has respondent paid what he genuinely believed to be a reasonable price thereof. The respondent keeps the materials delivered and does not pay for them either. A man must not put his signature on a paper if he does not understand the contents thereof. However, as Schreiner, J.A. said in the case of National and Overseas Distributors v. Potato Board 1958(2) S.A. 473 (A.D.) at 479 G-H

> "Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (error) would have to be reasonable (justus) ....."

I, with respect, entirely agree. This is the position in our law. This is precisely the situation before me. The respondent is trying desperately to back out of a contract he has validly entered into with the applicant. The respondent has baldly raised the three allegations I have just mentioned above. However, the mere allegation of the existence of such dispute is not conclusive that in fact there is a genuine dispute of fact. The test is whether there is a real issue of fact which cannot be satisfactorily determined without oral evidence. (See Peterson v. Cuthbert & Company Limited, 1945 A.D. 420 at 428). It has clearly been demonstrated earlier in this judgment that the facts in this matter are easy of assessment and no oral evidence is necessary for this Court to arrive at a just decision. The respondent, in my view, (and this is quite clear from the papers before me) has been given every opportunity to pay what he owes

the applicant. The applicant, has performed his part of the contract but the respondent has not. It is significant that he did not even complain directly to the applicant that he suspected he had been over-charged. Many letters were to be written to him by both the applicant and the Credit Guarantee Insurance Corporation of Africa Limited before he thought of the "suspected overcharge" execuse. Respondent was later to add that he had been defrauded or swindled into entering into the contract. The applicant gives detailed account of the transactions with the respondent. The details he furnishes are well-documented. On the other hand, the respondent merely gives a bare denial of the applicant's allegations. This is insufficient. However, the whole attitude of the respondent towards the applicant is aptly put in annexure "J". Respondent's attitude is to defeat or delay the rights of the applicant.

I find no dispute that a valid contract has been entered into between the parties. I find no dispute that the applicant has fulfilled his obligations in terms of the agreement and the respondent has not. Adopting the common sense approach to the matter before me, I am of the view that there is no genuine dispute of facts. The matter can be determined on the papers before me and no oral evidence is necessary for that purpose.

(See Matjeloane v. Matjeloane, CIV/APN/329/76 (unreported) dated 31st January, 1977; Ferreira v. Maseru Diamond Cutting Works Ltd, CIV/APN/122/77 (unreported) dated 13th June 1977; Room Hire Company (Proprietary) Limited v. Jeppe Street Masions (Proprietary) Limited, 1949(3) S.A. 1155 at 1165; Soffiantini v. Mould 1956(4) S.A. 150 at 154; Damata v. Otto N.O., 1972(3) S.A. 858 (A.D.) at 882.)

There is no necessity, in my view, even to invoke Rule 11(5) of the High Court Rules. I therefore grant the order as prayed for in the papers before me.

JUDGE

For the Applicant · Adv. P.J. van Blerk
For the Respondent · Mr. C.M. Maqutu.