

IN THE HIGH COURT OF LESOTHO

In the Application of :

Jacques Juan Franken Applicant

v

The Ministry of Works of the
Government of the Kingdom of Lesotho Respondent

REASONS FOR JUDGMENT

Filed by the Hon. Justice F.X. Rooney
9th day of September, 1981.

For the Appellant : Mr. Fick
For the Respondent: Mr. Tempa

On the 31st July on the ex parte application of the provisional liquidator of the Yundar Construction Company (Proprietary) Ltd. I granted an order in the following terms :

- "(a) THAT a Rule Nisi do hereby issue calling upon the RESPONDENT to show cause on or before MONDAY the 10th day of AUGUST 1981 at 9.30 a.m. why it should not be interdicted and restrained from dispossessing the APPLICANT of the Road Works on the St Michael's Molimo Nthusi Road and why it should not be interdicted and restrained from jeopardizing the Builders' lien which the APPLICANT has over the said Road Works by dispossession, interference or otherwise until payment in full of all amounts owing by the APPLICANT to the RESPONDENT in terms of a contract entered into by the APPLICANT with the RESPONDENT for the surfacing of the said road or until the final adjudication of a dispute between the parties as to the cancellation of the said contract and payment due in respect thereof subject, however, that leave is granted to the RESPONDENT to anticipate the return day on TWENTY FOUR (24) HOURS' notice to the APPLICANT.
- (b) THE Rule Nisi together with a copy of the Application shall be served upon the RESPONDENT at the office of the Ministry of Works, Maseru, Lesotho and upon the Solicitor-General.

- (c) THE Rule Nisi shall operate as an interim interdict pending the final adjudication of this matter.
- (d) THE APPLICANT shall commence proceedings for such claims as it may have against the RESPONDENT within THREE (3) WEEKS of this date, failing which the interim interdict under (c) above shall lapse.
- (e) THE RESPONDENT is hereby called upon to show cause why it shall not pay the costs of this Application."

On the 31st August after hearing counsel for both parties I discharged the rule nisi with costs to the respondent and I directed that all costs incurred in these proceedings should be payable from the assets of the company in provisional liquidation.

The applicant was appointed provisional liquidator of the Yundar Construction Company (Proprietary) Ltd. which I shall henceforth refer to as the Company. At the time that the liquidation order was made, the Company was engaged under contract with the respondent in the construction of certain road works on the St. Michael - Molimo Nthuse road. Although the respondents became entitled under Clause 63 of the contract to terminate it and expel the Company as contractor from the work site it was agreed between the applicant and the respondents that the former would continue to perform the contract as if the company had not gone into liquidation.

On the 9th July 1981, Messrs. Roughton & Partners who were the appointed Engineers in terms of the contract issued a certificate to the effect that in their opinion the applicant as contractor had flagrantly neglected to carry out his obligations under the contract. In terms of Clause 63 of the contract, this entitled the respondent "after giving 14 days's notice in writing to the contractor to enter upon the site and the works and expel the contractor therefrom". Notice of this intention having been given to the applicant the rule nisi was obtained as a matter of urgency in order to prevent the respondents from depriving the applicant of his lien over the road works which the applicant claimed existed independently of the terms of the contract between the parties.

In former times under the common law a tacit hypothec existed in favour of persons by whom houses had been built or repaired for the costs and charges thereby incurred. This hypothec was abolished in the Cape Colony by the Tacit Hypothec Act (5 of 1861). However, this statute did not affect the jus retentionis which is the right to retain possession of a thing until the owner has paid to the possessor what is due to him in respect of it. It differs from a tacit hypothec in that it is based on possession whereas the tacit hypothec was not. One form of jus retentionis is a builders' lien which is given to a person who builds or repairs a house or a ship, and entitles him to the right to retain possession until he has been paid for his labour and material. ("S.A. Judicial Dictionary" Sisson at 416). Mr. Fick for the applicant argued that this right extends by analogy to road works and that the applicant is in consequences entitled to retain possession of these works until payment is either effected or secured.

Mr. Tempi for the respondents submitted that if any such right existed, it was expressly waived in terms of the contract between the parties. In this connection he relied upon the terms of Clause 63 of the contract which read as follows :

"63 (1) If the Contractor shall become bankrupt or have a receiving order made against him or shall present his petition in bankruptcy or shall make an arrangement with or assignment in favour of his creditors or shall agree to carry out the Contract under a committee of inspection of his creditors or (being a corporation) shall go into liquidation (other than a voluntary liquidation for the purposes of amalgamation or reconstruction) or if the Contractor shall assign the Contract without the consent in writing of the Employer first obtained or shall have an execution levied on his goods or if the Engineer shall certify in writing to the Employer that in his opinion the Contractor :-

- (a) has abandoned the Contract or
- (b) without reasonable excuse has failed to commence the Works or has suspended the progress of the Works for 28 days after receiving from the Engineer written notice to proceed or
- (c) has failed to remove materials from the Site or to pull down and replace work for 28 days after receiving from the Engineer written notice that the said materials or work had been condemned and rejected by the Engineer under these conditions or

- (d) is not executing the Works in accordance with the Contract or is persistently or flagrantly neglecting to carry out his obligations under the Contract or
- (e) has to the detriment of good workmanship or in defiance of the Engineer's instructions to the contrary sub-let any part of the Contract.

then the Employer may after giving 14 days' notice in writing to the Contractor enter upon the Site and the Works and expel the Contractor therefrom without thereby avoiding the Contract or releasing the Contractor from any of his obligations or liabilities under the Contract or affecting the rights and powers conferred on the Employer or the Engineer by the Contract and may himself complete the Works or may employ any other contractor to complete the Works and the Employer or such other contractor may use for such completion so much of the Constructional Plant Temporary Works and materials which have been deemed to be reserved exclusively for the construction and completion of of the Works under the provisions of the Contract as he or they may think proper and the Employer may at any time sell any of the said Constructional Plant Temporary Works and unused materials and apply the proceeds of sale in or towards the satisfaction of any sums due or which may become due to him from the Contractor under the Contract.

(2) The Engineer shall as soon as may be practicable after any such entry and expulsion by the Employer fix and determine ex parte or by or after reference to the parties or after such investigation or enquiries as he may think fit to make or institute and shall certify what amount (if any) had at the time of such entry and expulsion been reasonably earned by or would reasonably accrue to the Contractor in respect of work then actually done by him under the Contract and what was the value of any of the said unused or partially used materials any Constructional Plant and any Temporary Works.

(3) If the Employer shall enter and expel the Contractor under this clause he shall not be liable to pay to the Contractor any money on account of the Contract until the expiration of the Period of Maintenance and thereafter until the costs of completion and maintenance damages for delay in completion (if any) and all other expenses incurred by the Employer have been ascertained and the amount thereof certified by the Engineer. The Contractor shall then be entitled to receive only such sum or sums (if any) as the Engineer may certify would have been due to him upon due completion by him after deducting the said amount. But if such amount shall exceed the sum which would have been payable to the Contractor on due completion by him then the Contractor shall upon demand pay to the Employer the amount of such excess and it shall be deemed a debt due by the Contractor to the Employer and shall be recoverable accordingly".

It is well established that in an ordinary case of waiver it must be proved on a balance of probabilities that there was full knowledge of the rights in question and express waiver or waiver by clearly inconsistent conduct (Hepner v. Roodepoort-Maraisburg Town Council 1962 (4) S.A. 772). Because the contract has been worded in a manner which suggests, that it was intended to operate in countries where the Roman Dutch Law is not extant, it is possible to argue that Clause 63 as worded does not amount to an express waiver under our law. However, it is not necessary for me to decide this point. The rule was discharged not because I took the view that the applicant's jus retentionis was not available to him but because the basis for issuing an interdict against the respondents did not exist in this case.

To obtain an interdict it must be shown that the failure to grant it would occasion irreparable harm to the applicant which could not be compensated by an award of damages. As I said in the case of Coaling High Landers v. Lesotho Sports Council & Another (CIV/APN/92/79 nreported)

"This Court will not in general, grant an interdict when the applicant can obtain adequate redress by way of damages. (Fourie v. UYS 1957 (3) S.A. 125, Cristo Machines v. Adfeling Speuroffisier S.A. Polisie 1970 (4) S.A. 350, and Lubbe v. Die Administrateur Orange Vrystaat 1968 (1) S.A. III). As was said by Rose-Innes C.J. in the leading case of Setlogelo v. Setlogelo 1914 A.D. 221 at 227, it is one of the essential requisites to the granting of an interdict that "no similar protection by other ordinary remedy" is available to an applicant. Nor should an interdict be granted unless the applicant establishes that if it is not granted he will suffer irreparable loss (Braham v. Wood 1956 (1) S.A. 651)."

Furthermore this Court must consider the inconvenience which may result from the granting or withholding of this relief. In the judgment I have referred to I went on to say

"That this is an aspect of the matter which must be of concern to the courts as stated by Clayden J. (As he then was) in Neville and Another v. Matthews 1949 (3) S.A. 1107 at 1109 as follows :-

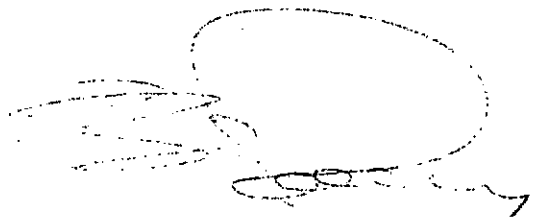
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'In Hillman Bros. (West Rand)(Pty) Ltd. v. van den Heuvel (1937, W.L.D. 41) GREENBERG, J. dealt with the regard which the Court will have to the respective prejudice in the grant or refusal of an interim interdict. And in Ndauti v. Kgami & Others (1948 (3), S.A.L.R. 27 at p. 37) ETTLINGER, A.J. says:

'It may be proper to refuse the application even where the probabilities are in favour of the applicant if the balance of convenience is against the grant of interim relief'.

A case very like the present one in which interim relief was refused because the prejudice to the respondent by the grant of the interdict outweighed any prejudice to the applicant by refusal of it, was Crossfield & Son, Ltd. v. Crystallizers, Ltd. (1925, W.L.D. 216). There was in that case the additional reason for refusal of interim relief that the applicant had been slow to claim it. But the main consideration seems to have been the dislocation of the trade of the respondent which would have followed from the grant of the interdict - see p.233."

It is quite clear from a perusal of Clause 63 of the contract that ample provision has been made for securing the rights of the applicant to whatever may be found due to him for the work done and the material supplied in the performance of the contract up to the time of his expulsion from the work. On the other hand if this Court were to interdict the respondents they would be unable to make proper arrangements for the completion of the work specified in the contract. This would occasion great inconvenience if not expense, to the respondents which would not be justified in the circumstances presently obtaining.



F.X. ROONEY
JUDGE

9th September, 1981.

Attorney for the Appellant : Messrs. E.H. Cooper & Sons
Attorney for the Respondent. Law Office.