CIV/T/57/95

IN THE HIGH COURT OF LESOTHO

In the matter between:

LEANYA LECTRICS (PTY) LTD **Plaintiff**

and

LESOTHO HOUSING AND LAND DEVELOPMENT CORPORATION **First Defendant**

MINISTER OF HOME AFFAIRS **Second Defendant**

ATTORNEY-GENERAL **Third Defendant**

J U D G M E N T

Delivered by the Honourable Chief Justice Mr. Justice J.L. Kheola on the 17th day of October, 1996

In this action the plaintiff claims:

(a) Payment of the sum of M94,934 - 49;

(b) Interest thereon compounded annually at commercial bank lending rates plus 2% penalty from 23rd October, 1990 to date of payment;

(c) Costs of suit;

(d) Further and/or alternative relief.

The action was instituted against the first, second and third defendants, jointly and severally, but on the 6th April, 1995 the plaintiff withdrew its claim against the second and third defendants. It was agreed that the plaintiff would pursue its claim against the first defendant only and that there be no order as to costs between plaintiff and second and third defendants.

In its declaration and particulars of claim the plaintiff alleges that it was nominated as a sub-contractor to the main contractor, namely, Lesotho Highlands Construction Consortium (L.H.C.C.) which was employed by the first defendant; and according to Clause 15(1)(b) and (c) read together with Clause 24(b) and Clause 25(3) and (6) of the Contract Agreement, there exists an irrebuttable contractual liability on the part of the first defendant to pay plaintiff. The Contract Agreement and Schedule of Conditions between the first defendant and L.H.C.C. is marked Annexure A to the declaration.

The plaintiff alleges that it was sub-contracted to supply materials and do electrical installations on 24 Executive Houses at Plot No.736 at Arrival Centre, Maseru, which it duly completed and delivered to the specifications and satisfaction of the supervising architects and consulting engineers.

It is common cause that following the completion of electrical installations and the delivery of certain materials the supervising architect issued the interim Certificates No.10

dated the 27th September, 1990 and No.11 dated the 23rd October, 1990. (See Exhibits 2 and 3 annexed to the declaration).

In its plea the first defendant specifically pleads that the plaintiff was not a party to the contract being Exhibit 1, to plaintiff's particulars of claim and that accordingly no contractual liability exists between the plaintiff and the first defendant.

The first defendant pleads that clauses 15(1), 24(b) 25(3) and 25(6) do not create any contractual relationship between the plaintiff and the first defendant and that L.H.C.C. is the liable party who employed the plaintiff.

At the hearing of this action on the 22nd February, 1996 **Mr. Fischer,** counsel for the first defendant, applied that he should be allowed to raise a point of law **in limine** because the cause of action is based on a contract between Lesotho Housing and Land Development Corporation (L.H.L.D.C.) and L.H.C.C. The plaintiff is not a party to that contract. Exhibit 1 is a contract agreement between L.H.C.C. and the first defendant. In terms of that contract it is L.H.C.C. which appointed the plaintiff as a nominated sub-contractor. The first defendant was not a party to that sub-contract.

Mr. Monyako, attorney for the plaintiff, opposed the application on the ground that **Mr. Fischer** had not complied with the provisions of Rule 32 of the High Court Rules 1980. I agreed

with **Mr. Monyako** that there had been no compliance with Rule 32; however, I was of the opinion that this was not a proper case in which the Court could waste time to hear oral evidence. It was very clear from the reading of Exhibit 1 and the pleadings that the issue was the interpretation of Exhibit 1 especially whether the first defendant was a party to the sub-contract between the plaintiff and L.H.C.C. I granted the application and postponed the case for several weeks to enable **Mr. Monyako** to prepare his heads of argument regarding the point of law raised by **Mr. Fischer**. The matter was heard on the 30th May, 1996.

That question of law was whether the contract, being Exhibit 1 to plaintiff's declaration, created a contractual relationship between the parties in terms whereof first defendant is liable for payment of the amount claimed.

I have already said that it is common cause that a contract was entered into between the first defendant and L.H.C.C. as the main contractor on the 29th September, 1989. Plaintiff was not a party and/or signatory to such contract.

Plaintiff was a nominated sub-contractor, nominated in terms of Clause 15(1)(a) of Exhibit 1, which reads as follows;

> 15(1)(a) "All Specialists and others executing any work or supplying and fixing any goods for which Provisional Sums are included in

> the Bills of Quantities who may be nominated or selected by the Architect, are hereby declared subject to the provisions of Sub-Clause (f) hereof, to be Sub-Contractors employed by the Contractor and are herein referred to as "Nominated Sub-Contractors."

In terms of Clause 25 (1) of Exhibit 1 the architect would from time to time issue interim certificates for and on behalf of the contractor stating the amounts due to the contractor. Exhibits 2 and 3 are the interim certificates Nos 10 and 11 issued by the architect in favour of L.H.C.C. It is common cause that according to Exhibits 2 and 3 certain monies were due to the plaintiff for service and goods provided by it. What is not clear is why the monies were not paid to the plaintiff and yet it seems as if the first defendant paid such monies to L.H.C.C. If it is correct that the first defendant did in fact pay the monies in Exhibits 2 and 3 to L.H.C.C., it (first defendant) has discharged its obligations towards L.H.C.C. in terms of their contract. The first defendant cannot be expected to pay the same debt twice - first to L.H.C.C. and now be expected to pay same amount of monies to the plaintiff with whom it has not entered into any contract.

The plaintiff's claim is based on clauses 15(1)(b) and (c)

read together with clause 24(b) and clause 25(3) and (6) of the contract agreement. For conviniece I shall reproduce hereunder all the above clauses.

Clause 15(1) (b) and (c)

(b) The sums directed by the Architect in terms of Clause 24(b) hereof to be paid to Nominated Sub-Contractors for work, materials or goods comprised in the Sub-Contract shall be paid by the Contractor within seven days of the date for payment by the L.H.C.C. Employer as set out in Clause 25 hereof of the Architect's certificate which includes the value of such work, materials or goods, less only the appropriate proportion, if any, of the Retention Fund, and less a cash discount of 5%.

(c) Before any such certificate is issued to the Contractor, he shall furnish reasonable proof that all Nominated Sub-Contractors' account included in previous certificates have been duly discharged, in default whereof the Employer upon a certificate of the Architect may pay the same without deduction of the cash discount and deduct

the amount so paid from any sums due to the Contractor. The exercise of this power shall not create privity of Contract as between Employer and Sub-Contractor.

Clause 24(b)

The Provisional Sums mentioned in the Bills of Quantities for materials to be supplied and fixed, or for work to be performed by Nominated Sub-Contractors shall be paid and expended at such times and in such amounts in favour of such persons as the Architect shall direct, and Sums so expended shall be payable by the Contractor without discount or deduction, except the appropriate cash discount as herein before mentioned in terms of Clause 15(b), or alternatively, and without prejudice to any rights of the Contractor under the Contract referred to in Clause 15 hereof by the Employer to the said Sub-Contractors in terms of Clause 15(c). The value of works which are executed by the Contractors in respect of Provisional Sums or in additional works shall be ascertained as provided in Clause 10 hereof. At the settlement of the accounts the amount paid by the Contractor to the said Sub-

Contractor, including a cash discount of 5%, and the said value of such works executed by the Contractor, shall be set against all such Provisional Sums or any sum provided for additional works, and the balance after allowing pro-rata for the Contractor's profits at the rates contained in the signed Bills of Quantities (vide Clause 2 hereof) shall be added to or deducted from the Contract Sum; provided that no deductions shall be made by or on behalf of the Employer in respect of any damages paid or allowed by any Sub-Contractor to the Contractor, the intention being that the Contractor and not the Employer shall have the benefit of any such damages.

Clause 25(3)

The Architect shall, concurrently with each certificate, issue to the Contractor a detailed statement in support thereof. The Architect shall also advise every Nominated Sub-Contractor of the amount included in such statement in respect of his Sub-Contract.

Clause 25(6)

> Six months after Practical completion of the Works, or upon completion of making good defects under Clause 13(a) hereof, whichever is the later, and provided that the Architect has timeously received the documents referred to in Clause 10(b) hereof, the Architect shall issue a Final Certificate of the value of the works executed by the Contractor. Where, however, a Final Certificate cannot be issued because of non-compliance by the Contractor relative to the furnishing of the documents referred to in Clause 10(b) hereof, the Architect shall issue a Penultimate Certificate for such an amount as he shall determine, which amount shall include the final amounts due or all Nominated Sub-Contractors whose final accounts have been accepted by the Architect.

The provisions of clause 15(1)(b) and (c) of the contract agreement do not create a contractual relationship between the plaintiff and the first defendant. It provides that should the main contractor default in payment of any sums to nominated sub-contractors, the first defendant may pay such monies to the nominated sub-contractor. This is permissive power, the exercise of which in no way creates privity of contract between the first defendant and the plaintiff.

In **Norman Kennedy v. Norman Kennedy Ltd.; Judicial Managers, Norman Kennedy Ltd. N.O. v. Reinforcing Steel Co., Ltd and others** 1947 (1) S.A. 790 (c) at p. 800 Ogilvie Thompson A.J. (as he then was) said:

> "It is, in my judgment, clear from the above cited provisions of the contract that - subject always to the special facts of a particular case - no privity of contract exists between the sub-contractor and the building owner. Normally, no such privity will exist (**cf. Hampton v. Glamorgan County Council** (1917, A.C.13)): and in the present case not only does the whole concept of this standard form, in my view, negative the existence of such privity, but the concluding sentence of Clause 15(b) thereof expressly provides that no such privity shall be created upon the building owner's exercising the power of direct payment conferred by the Clause. This conclusion is in entire conformity with the view expressed, in relation to the virtually identical wording of the standard Royal Institute of British Architects Form of Contract, by Asquith, J., in **Vigers Sons and Co. v. Swindell** (1939 (3) A.E.R. 590 at p. 593).The privity issue was left open in

Milestone and Sons v. Yates' Brewery (supra), cited by respondent's counsel: but it may be pointed out that the Court was there dealing with a form of contract whose provisions differed materially from those of the present case.

Since no privity between respondents and the building owner is created by the Standard Contract it follows that no such privity exists **unless** some additional circumstances can be relied upon to establish it. Some of the opposing creditors made some attempt to establish such additional circumstances by relying upon custom, upon contractual relationship directly concluded with the building owner, and upon the general assertion, - made in argument - that a fuller investigation of the facts might well establish that in some instances the building owner had actually bound himself direct to the sub-contractor."

In the present case the plaintiff has undoubtedly relied on the wrong clauses of the contract agreement which provide in clear terms that there is no contract between it and the first defendant. To make things worse the plaintiff has failed to explain to the Court why it decided to sue the first defendant

and not L.H.C.C. with whom it has a contract. If L.H.C.C. was liquidated, the question will be how were its monies distributed amongst its creditors, and why plaintiff did not receive its share. However, as I have said above, no explanation has been made in the pleadings why the plaintiff cannot sue L.H.C.C.

The plaintiff has attempted to establish that a fuller investigation of the facts might establish that in some instances the first defendant had actually bound itself direct to the plaintiff. I shall now consider such instances mentioned by the plaintiff in its supplementary heads of argument. In a letter dated the 10th December 1990 addressed to Hilcon (a sub-contractor) by the Managing Director of the first defendant the latter said:

> "Please be advised that the LHLDC guarantees payment on completion of works as agreed to by LHCC and our consultant engineer."

I do not understand that letter as covering or including all the sub-contractors. It was in answer to particular correspondence between that sub-contractor and L.H.C.C. The writer of that letter does not guarantee payment to all sub-contractors on completions of works. He guaranteed payment to that particular sub-contractor and not to the present plaintiff. It cannot be said that by that letter the first defendant actually bound itself direct to the plaintiff.

It seems to me that that letter does not take the plaintiff's case any further. It does not establish a contract between the plaintiff and the first defendant.

It was submitted on behalf of the plaintiff that another matter to be taken cognizance of is that on the 14th March, 1990, immediately after the appointment of John Woodcock Assosciates as Project Manager, certain correspondence under No. CP/PR/EHOS was addressed to plaintiff by first defendant's Consulting Engineers, Steward Selatile N.C.L. instructing plaintiff directly and independently of L.H.C.C. to do certain things which involved additional expenditure and therefore varied the original Bills of Quantities upon which first defendant's contract with L.H.C.C. was based. Despite the absence of the plaintiff's signature on the original contract document, these instructions and the manner in which they were given involved the plaintiff as a party to the contract in its own right, if they did not create a new contract altogether (See Annexure "DD5" to the supplementary heads of argument).

I do not agree with the above submission that a new contract was created between the first defendant and the plaintiff. Because of the L.E.C's instructions the installation of the electrical equipment had to be done in a particular way. The consultant engineer of the first defendant communicated the L.E.C's instructions to the plaintiff who was doing the works. It seems to me that those instructions were part of the specifications of how the installation should be done. L.E.C.

are the sole suppliers of electricity to Lesotho and it is their duty to see to it that the installation of equipment which supplies electricity to any premises is done properly.

The difficulty which the plaintiff is facing is that it has not even attached to its summons its written contract between it and L.H.C.C. The Court is, therefore, not aware of its terms and conditions.

The plaintiff has annexed to its summons and its supplementary heads of argument, a number of letters and other documents which clearly prove that L.H.C.C. owed the plaintiff the amount of money claimed in the summons. Such letters and documents do not prove that at any particular time the first defendant undertook to pay the debt owed to plaintiff by L.H.C.C. Such documents and letters do not create any new contract between the plaintiff and the first defendant.

In the result the plaintiff's claim is dismissed with costs, which include the costs of the 22nd February, 1996.

J. L. KHEOLA
CHIEF JUSTICE

17th October, 1996

For Plaintiff - Mr. Monyako
For 1st Defendant - Mr. Fischer