IN THE HIGH COURT OF LESOTHO

(Commercial Division)

CCT/94/2011

In the matter between:

E.J. BAUERNSCHMITT T/A MASTER MIND **PLAINTIFF**

And

FELIX PETROLEUM (PTY) LTD t/a MALUTI

TOURS FILLING STATION **DEFENDANT**

JUDGMENT

Coram	:	Honourable Justice J.D. Lyons (a.i)
Dates of Hearing	:	7 August, 2012 & 3 September 2012
Date of Jugment	:	20 September,2012

Summary

Contract dispute – suit for non-payment of contractual debt – desputed sum paid to third party – changes to written contract by verbal agreement – court should apply common sense approach to give finality to disputes and avoid ridiculous results – estoppel neither raised nor pleaded but open on defendant's evidence.

- Bias – test for bias – requirement of full disclosure by applicant – dismissal is the consequence of failure to fully disclose.

- ***Case/Article references***: *Andrew Keogh 'Test for Bias' www.wikicrimeline.co.uk/index.php?title=Test_for_bias.*

LYONS J. (A.J)

[1] On 31 August 2010 the plaintiff and defendant entered into a written contract (Ex D5) for the installation of a service station at Nazareth. The contract price was R903,100. 50% of the contract price was required as deposit, a further R250,000 was to be paid 2 weeks after the work started and the remaining balance was to be paid within 7 days of completion.

[2] The defendant paid R450,000 (50%) on 2 September, 2010.

[3] The defendant paid R250,000 on 17 September,2010. This was paid to Petroleum and General Services (P&G) by direction from the plaintiff. P&G was the supplier of the plant and equipment needed in the service station (e.g: pumps, tanks, electrical goods etc). Some controversy surrounds the relationship between the plaintiff and P&G. As much as it is relevant to this case, this relationship will be discussed later.

[4] In or about April 2011 the plaintiff advised the defendant that the final payment was due. The defendant was not happy about this as it appeared to it that the work was not yet complete. The defendant delayed payment.

[5] On 14 June 2011 the defendant made the final payment of R150,000. It made the payment not to the plaintiff, but to P&G. The defendant says that it was directed by the plaintiff to do so. It says that this direction was included in the direction that caused the R250,000 payment (see above).

[6] The plaintiff denies it so directed that the defendant pay this final payment to P&G. He says that this final payment was to be paid to the plaintiff. The plaintiff points to a letter (ex:p1) from his solicitor directing the defendant not to pay any further money to P&G.

[7] Mathematical calculation shows that there still remained R53,100 of the contract price to be paid. The defendant held this back (or at least R27,500) as security for completion and getting the service station fully operational as was the plaintiff's obligation. I am a uncertain as to how the retention of the balance R25,600 is explained. I think it may have something to do with another arrangement between the parties for a further R60,000 work to be done. In any event the plaintiff, though originally claiming this in his suit, abandoned it on trial. I have no further need to be concerned with it.

[8] In practical terms the plaintiff is suing the defendant for the R150,000 paid to P&G on 14 June 2011. He claims this

was wrongfully paid and thus cannot be held to be a payment of the contract sum. His submission is that the court should order the defendant to pay a further R150,000 to the plaintiff in full payment of the contract sum. The defendant should then look to P&G to reimburse the defendant.

[9] The defendant claims it has made a proper payment in full on the basis that it was directed by the Plaintiff to pay P&G this amount.

[10] Evidence for the defendant came from Mr. Ntlama. He is an officer of the defendant company and was the person, primarily involved in the dealings with the plaintiff. I found Mr. Ntlama to be a truthful witness and found no reason to disbelieve him, I will more fully discuss his evidence later.

[11] The defendant also called Mr. Van der Sandt, the owner of P&G. I did not have any difficulty with this witness so far as his evidence of his dealings with the defendant and this contract were concerned. He gave evidence that he and the plaintiff had worked in tandem for many years. P&G supplied plant – equipment (some of it reconditioned) and general services and expertise for service stations. He has been in business for 37 years.

[12] Mr. Van der Sandt said that he and the plaintiff had a 50/50 handshake partnership deal on this project. He was

to provide the plant-equipment and verification (assay) expertise. The plaintiff was to organize the local needs for the project and on-site project management. The net profit, he said, was to be divided equally.

[13] The plaintiff (with 25 years experience in the business) disagreed. He claimed this was his deal alone and that P&G was merely a sub-contracter to supply the plant & equipment.

[14] My concern is the contractual relationship between the plaintiff & defendant. I need only discuss the relationship between the plaintiff and P&G so far as it impacts in this case.

[15] The plaintiff gave evidence. His evidence largely corresponded with that of the defendant except for the crucial area of the payment of the final R150,000. I was not entirely satisfied with the plaintiff's evidence. I found the evidence to be somewhat contained to the point of appearing guarded and, consequently, less than frank. It seemed as if the plaintiff had some sort of stategic agenda and was using this case to achieve an advantage over P&G. There was some evidence from the Plaintiff that just defied commercial common sense, particularly from a person of 25 years experience in this business.

[16] I also heard from the plaintiff's South Africa attorney, Mr. Vermaak. His evidence was not controversial and needs no further elaboration.

[17] On the whole I preferred the evidence of the Defendant and its witnesses to that of the plaintiff where such evidence differed.

[18] I find that the plaintiff was the person who solely negotiated and dealt with Mr. Ntlama (for the defandant) throughout the duration of the contract.

[19] I accept Mr. Ntlama's evidence that the plaintiff and he communicted by phone and verbally on site in Nazareth. I also accept that on arrangement existed that if the plaintiff wished to communicate with the defendant by fax that it was pointed out to the plaintiff that the defendant's fax machine was not working. Consequently the defendant surreptitiously used the fax of the employer of one of the shareholders of the defendant. This fax number was given to the plaintiff with the direction that, before sending a fax, the plaintiff would call Mr. Ntlama to alert him so that he (Mr. Ntlama) could tell the shareholder to stand by the fax and collect it. Obviously this was so as not to be caught out by the employer (and owner of the fax) and, importantly, so as to secure the transmission of the fax. Mr. Ntlama appeared to be somewhat reluctant when giving this evidence. His reluctance, I found, was not because of any

hiding of the truth, but rather so as to not get his shareholder in a spot of bother were it to be discovered that the boss' fax was used without authority. This was understandable.

[20] I find that the plaintiff did direct the defendant to pay the R150,000 to P&G. The plaintiff undeniably directed payment of the R250,000 and gave the P&G account details to the Defendant. I was not satisfied by the plaintiff's very vocal denial that he directed the defendant to also pay the further R150,000 to P&G. Someone certainly gave the direction. The plaintiff tried to explain this away by alleging some hypothetical conspiracy between the Defendant and P&G that was designed to protect an ongoing relationship between them. No evidence was given to support this theory nor was it put to the defendant or Mr. Van der Sandt.

[21] In my judgment the defendants' conduct was quite against any conspiritorial conduct. The defendant was a prompt and good payer. It also appeared to me that the defendant was quite justified in holding back the final payment as the project was not as yet fully complete. I found the defendant to have conducted its obligations under the contract with upmost honestly.

[22] Mr. Van der Sandt's evidence was of some help here. He had no contact with the defendant over payment. It is his evidence was that this was for the plaintiff to do. His

evidence was that the R150,000 payment to P&G. was unexpected by him. This evidence was not contested. Indeed the plaintiff relies on this evidence to support his submission.

[23] It seems to me, on balance, that the plaintiff did in fact direct the payment. Later, however, he resiled from this. It seems to me to be a compelling inference. If it was not P&G who directed it, then it only leaves the plaintiff or the defendant, who generously decided to give P&G a windfall. I discount the later and conclude the former.

[24] The evidence of the plaintiff concerning his relationship with P&G left me somewhat perplexed – to the extent that it adversely coloured his evidence of his arrangment with the defendant. He said that his relationship with P&G was of long standing and that P&G had supplied plant and equipment on similar projects. He said he had 25 years experience and had already done at least 30 similar contracts for BP service stations in Lesotho.

[25] Whilst Mr. Van der Sandt was mystified as to why the relationship between he and the Plaintiff broke down in December 2010, the Plaintiff was not. He stated that it was because 'his (P&G) prices was too high'. I found this to be a rather unusual statement. To my mind it defies the expected commercial practice of a person of such-experience.

[26] Mr. Van Der Sandt said his invoiced expenses this job were R521,000. If, as the plaintiff said, he was just a subcontractor, then this was the sum total of his invoice to the plaintiff. I am mystified as to why the plaintiff would be so upset by this invoice to say that 'his prices was too high' to the extent that he broke off a reasonably long-standing relationship. Surely a person of the plaintiff's experience would, before quoting on the contract, have got a price quote from his sub-contractor. Mr. Van der Sandt was involved in some preliminary discussions (pre-contract) with the plaintiff and defendant. He knew the requirements. He must have been asked to give a pre-contract price, or at least a price range so the plaintiff could accurately quote on the job. Given that the plaintiff's evidence is of a sub-contract relationship between he and P&G, the assertion that the plaintiff broke off the relationship with P&G (and before to job was complete) because "his pieces was too high" does not have the ring of truth.

[27] On the other hand if the relationship was not as the plaintiff described, but more in the line of some profit sharing arrangement, the plaintiffs indignation is explainable. If it were such, then P&G would be expected to supply at cost. The plaintiff's experience would allow him to fairly accurately approximate this cost. If the eventual invoice came in at such a level that caused him to recoil at the "too high prices", I could understand the plaintiff breaking off

the relationship. It would probably indicate that P&G was putting its own hidden profit loading on top of the cost and trying to cheat the plaintiff. In fact Mr. Van der Standt admitted P&G put a bit extra in. Had the plaintiff explained the reason for the breakdown in these terms, it would have had the ring of truth. I found his evidence on this to be unacceptable and it led me to reject his evidence where it differed from that of the defendant.

[28] Turning to the letter of 6 June 2011, there are some unusal aspects of it that don't quite tally with the plaintiff's evidence. The letter reads (as is relevant) :

Dear Sir/Madam,

Re: ***E.J. BAUERNSCHMITT t/a MASTERMIND/NAZARETH FILLING STATION CONTRACT***

We have been instructed by Mr Bauernschmitt to address this letter to you.

For your convenience we annex hereto the accepted quotation signed by you and our client.

Apparently you were contacted by Mr. Peet van der Sandt t/a Petroleum and General to advice you that our client alledgedly owe him +/- R200,000.00.

For the record we wish to point out that the only appliable contract is between our client and your Company.

Our client entered into a separate contract with Mr. van der Sandt.

You are blameless as to the alleged indebtedness of our client. Nobody can act against you in law as there is no nexus.

Our client did receive R714,900.00 of the contrct price of R90 3100.00 leaving a balance of R188,200.00

Please submit payment to our offices no later than the 21st of June 2011.

[29] The plaintiff said he had previously verbally conveyed to the defendant not to pay P&G the final payment. Quite apart from the obvious question of why did he have to tell him not to pay if the defendant had not previously been told to pay, the letter does not quite tally up with the plaintiff's evidence.

[30] If it was that there were prior discussions with the plaintiff and the defendant about it, why is this not reflected in the letter as a confirmation of prior verbal discussions? This use of confirmatory correspondence is widely known and its value and proper form would not be unfamiliar to an attorney as experienced as Mr. Vermaak – if he had been given those instructions.

[31] The sentences "*You are blameless as to the alleged indebtedness of our client. Nobody can act against you in law as there is no nexus"* appear to me to be designed to put the defendant's mind at rest that no liability would fall on it – presumably and inferentially because it had previously been directed in terms that may have, to the non-lawyer, suggested there was some legal nexus or duty put on the defendant to pay P&G.

[32] Perhaps I am being pedantic, but as the letter states it is the plaintiff's instructions, its form does not, to me at least,

support the plaintiffs' assertion of prior discussions and no prior directive to pay P&G the R150,000. Rather (again to my reading) it suggests the opposite and gives me a sense that it is more probably a tactical ploy in a forseen battle between the plaintiff and P&G. The intent of the letter is slanted more towards making sure that P&G is not paid what has been invoived to the plaintiff, rather than demanding payment from the defendant.

[33] That leads me to conclude that the plaintiff did direct that the defendant pay the final R150,000 to P&G and as such it is a proper payment of the contract amount.

[34] What it all now boils down to is whether or not, on balance, the letter of 6 June 2011 can be said to be adequate and proper notice. This can only be said if the court is satisfied that the letter (as notice) can be said to have, on balance, been received by the receipent/defendant.

[35] The contract does not specify any mode of service, so the court must determine this from the conduct of the parties.

[36] Other than the written quote/contract, the plaintiff and defendant conducted their relationship by verbal communication. I was not informed of any other form of written communication nor the manner in which that was conveyed (or served). I only heard of the fax.

[37] Having heard the evidence I am (as I have previously said) satisfied of the defendant's evidence on the mode of conveying any fax transmission. It was to be done to a fax number of another unrelated subscriber. The defendant was using this fax number and was not authorised to do so by its owner. It was done under the lap. Hence the pre-notification procedure described earlier was worked out so as to guarantee the effective conveyance of any fax. I am satisfied the plaintiff was told of this. There is no evidence that the plaintiff, either by himself or by his attorney, contacted the defendant beforehand (and in compliance with the accepted method of sending a fax) and gave the alert. Consequently I am not satisfied, on balance, that the fax was properly conveyed as per the conduct of the parties. I am not satisfied that it was received by the defendant so as to constitute proper and effective notice.

[38] Overall, after hearing the witness and observing their demeanor, I prefer the defendant's version where it differs from the plaintiff's. In my judgment the defendant has satisfied me that it has paid the plaintiff. The plaintiff's case is dimissed with costs to the defendant to be taxed if not agreed.

[39] I have decided the matter as it was argued, but there are some other aspects that, whilst not raised by counsel, occured to me and should be mentioned.

[40] Counsel for the plaintiff made an intriguing submission. He argued that the defendant should be made to pay a further R150,000 to the plaintiff. The defendant then could recover this from the supplier (P&G) as monies wrongfully received. That would then leave the supplier to sue the plaintiff as the R150,000 was part of its invoiced account.

[41] The invoice from the supplier (P&G) was R521,000. The supplier was paid R490,000 – R400,000 from the defendant and R90,000 by the plaintiff. As a matter of common sense and sensible commercial practice, the defendant has helped pay a debt due and owing by the plaintiff to a third party resulting out of this contract – so why should the plaintiff be permitted to use the court to effectively take back from the supplier some of that which, on the evidence, the supplier may be perfectly entitled to?

[42] If it is that the plaintiff thinks the supplier's invoice was too high, then surely he has a quote from the supplier for the quoted amount that would serve as a contract between them and on which he could sue? If he hasn't, then is he not manipulating the court process to put the supplier in a position where it has to sue the plaintiff for the R150,000 repaid to the defendant. That would then give the plaintiff the whip hand in his dispute with P&G (the supplier) over the prices that 'was too high' and arguably allow him to negotiate down the supplier's invoice to where it meets his expected 'prices'. As it presently stands, (presuming there is

no quote), the plaintiff would be battling to find a cause of action to get the supplier before the court. If he succeeds as submitted by his counsel, he would have the forum for his dispute all at the supplier's instance. It would hand the plaintiff an advantage that he presently does not have.

[43] Perhaps it is I who is being too 'conspiratorial' (or cynical), but it does look to me that this may be the plaintiff's agenda. If not, and all is entirely above board, this whole exercise descends into the ridiculous. The result would be that court orders the defendant to pay R150,000 to the plaintiff. The supplier repays R150,000 to the defendant and then the plaintiff pays R150,000 to the supplier as payment of its invoice. We are back where we started and this whole exercise was nothing but a game of monetary musical chairs – that is, of course, if all here is above board!

[44] Also, is not the question of estoppel raised here? It was neither pleaded nor raised but the evidence (particularly on the defendant's case) is capable of suggesting it.

[45] As I understood the evidence the supplier was expected to be paid up front. There appeared to be a difficulty with getting the defendant's first payment to the plaintiff's account cleared promptly – (that was unexplained given that the payment from the defendant was by direct bank transfer). This suggests that the up-front payment to the supplier (which was to be made by the plaintiff) may have

been held up. This would have adversely affected the performance of the contract between the plaintiff and the defendant. If it was not paid the suppliers would not have delivered and the defendant's project would have come to a halt.

[46] By directing the defendant to make direct payment to P&G for this up-front payment, the plaintiff was able to keep the contract rolling forward. The defendant made payment (ostensibly on behalf of the plaintiff) to its detriment. Is this evidence (if so interpreted – and the inferences are open) not capable of raising the defence of estoppel?

[47] I should conclude by mentioning an application by the defendant that I recuse myself for bias. I heard the application on 31 August. I dismissed it.

[48] The application was woefully short an obervance of the proper test for bias at law. The material was also woefully deficient in required content.

[49] The accepted test for bias adopted throughout the Commonwealth is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility (or real danger) that the tribunal was biased. There is an article by Andrew Keogh of the Office for Judicial Complaints (U.K.) to be found at http://www.wikicrimeline.co.uk/index.php?title=Test_for_bi

as. It has all the relevant authorities and some case examples. It is recommended reading for advocates and attorneys on the subject at hand.

[50] Counsel need to understand that a bias application is of its nature contemptuous. Such applications need to be carefully considered before coming to the court. A cavalier approach is quite unacceptable.

[51] The test requires that the fair-minded observer be presented with all the relevant facts. The court has to adopt the position of that fair-minded observer. As the court has no fact/evidence gathering powers, it falls on the applicant to adopt an objective and unbiased stance and, in the affidavit material, put all the facts, whether favourable or not.

[52] The material of the applicant/defendant, failed in this respect.

[53] Firstly it did not apply the correct law. It speaks of the defendant having a suspicion of bias. That is not the test.

[54] It also failed to point out that on 2 May 2012 the parties attorneys appeared at a pre-trial conference. A minute of what was agreed at this conference was prepared (Rule 36 (3), signed by the attorneys and finally filed on 20 July 2012. In that minute the attorneys undertook to discover the relevant documents in terms of the rules. Pursuant to

Rule 34(1) that required discovery by 24 May 2012. By the agreed minute the attorneys undertook to file and serve witness statements by 31 July 2012.

[55] The affidavit failed to point out that the attorney for the defendant failed to discover documents or file witness statements.

[56] The affidavit failed to point out the probable consequences of this. It failed to point out that the defendant (who had a case almost totally dependant on documents) could have been refused permission to present his documents at trial (Rule 34 (1)). It failed to point out that notwithstanding the default, the court granted unconditional leave for the defendant to present his documents.

[57] The affidavit does say that on an application for adjournment the defaulting party usually has to pay the costs of the other party that were thrown away. But it fails to offer a quantification of the likely costs. This is relevant. Also that party is usually put to terms (Commercial Court Rules rule 15). As for costs, a range of M12,000 – M15,000 is a fair guide. The terms could have been to pay within 7 days or be struck out. This is relevant and the attorney for the defendant, who drafted the affidavit, is experienced enough to know it. He should have put it in the affidavit for the consideration of the 'fair-minded observer'.

[58] The material also fails to point out that when Adv. Thibinyane received the brief and file from the attorney it was within sufficient time for the advocate to sufficiently prepare for trial had the pre-trial minute been followed and discovery and witness statements been attanded to.

[59] It also fails to alert the fair-minded observer to Practice Directive No.1 of 2005. This was issued by the Chief Justice and adopted by the Court of Appeal. It strongly discouraged the granting of adjourments. In 4.2 of the Directive it requires, where illness is advanced as a reason for the application for adjournment, that proof by evidence under oath or 'duly motivated affidavit' – presumably with cross-examination – is required. That requires sworn evidence by a doctor supporting the claim for illness. This is highly relevant to this application.

[60] It also failed to inform the fair minded observer that by the failure of attorney for the defendant to attend to what he had undertaken, the defendant (who presented a strong case) was placed in severe jeopardy of loosing his case – or at very least having to pay costs thrown away of probably R12,000 to R15,000.

[61] By reason of these glaring deficiencies, I dismissed the application for recusal. As matters turned out, it is now only of academic interest.

[62] This case raised a matter of concern – the lack of preparation of cases that, in my experience, is wide spread. Advocates and attorneys need to realize that preparation starts from the very moment a client gives you instructions. If comprehensive statements are taken from client and witnesses at the very commencement it makes things so much easier. If the documents are collected right from the beginning, that, too, is of great assistance. If possible get a fellow lawyer from within your chamber group (or an advocate) to discuss the case with you and play 'Devil's Advocate'. That helps you to sort out issues in a case. Above all, though, is to give yourself time to stand back from a case and contemplate over it. I must stress the need to follow the rules, particularly on discovery, filing of witness statements, bundles of documents and heads of argument – by doing so your mind is inevitably focussed on the issues in the case.

[63] If you prepare from when first getting instructions and focus on the job at hand, you give yourself the most vital ingredient in trial work – time! Try to avoid working in haste – you will inevitably miss something.

[64] Counsel have to realize that an unprepared case means that the court has to somehow make up for the deficiency – and this leads to compromising the integrity of the court.

[65] I have little doubt that the Lesotho Bar has the talent, but the application leaves much to be desired. Oddly enough, though, once you start fully applying your mind to a case from the very start, it is amazing how soon it becomes a habit. From then on it is plain sailing.

[66] Judges are a major part of one's practical post-graduation training – even if the judge gives you a rollocking! (We all had our share, believe you me!) – so I hope this helps.

J.D. LYONS

JUDGE (A.i)

For Plaintiff : Mr. Loubser (inst. by Messrs Webber Newdigate)

For Defendant : Mr. Thibinyane (inst. by Mr. Tsenoli)