IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/568/2012

In the matter between:-

LESOTHO CONSOLIDATED CIVIL CONTRACTORS (PTY) LTD	**PLAINTIFF**
AND	
THE MINISTRY OF PUBLIC WORKS AND TRANSPORT	**1ST RESPONDENT**
THE PRINCIPAL SECRETARY MINISTRY OF WORKS AND PUBLIC WORKS	**2ND RESPONDENT**
ATTORNEY GENERAL	**3RD RESPONDENT**
DIRECTOR-GENERAL ROADS DIRECTORATE	**4TH RESPONDENT**

JUDGMENT

Coram : Hon. Mahase J.
Date of hearing : Various Dates
Date of Judgment : 15th November, 2013

Summary

Civil Procedure – Motion proceedings – Contract – Expulsion during subsistence of contract – Interdict and other related reliefs

ANNOTATIONS

CITED CASES:

- **Plascon Evan Paints 1984 (3) S.A. 623**
- **Ancamp v. Morton 1949 (3) S.A. 611**
- **Human V. Nortje 1914 AS 293**
- **Setlogelo v. Setlogelo 1914 AD 221**
- **Moabi v. Moabi 1980(2) LLR 207**
- **Manong v. Manong 1974 – 75 LLR 282**

- **Midi Television (PTY) LTD t/a ETV v. Director Public Prosecution (Western Cape) 2007 (5) S.A. 540**
- **Breen v. Amalgamated Engineering Union and Others 1971 (1) LL E.R. 1148 (CA)**

STATUTES: - **NONE**

BOOKS:

- **C.B. Prest – The Law and Practice of interdicts SC, Juda and Co 1996, page 65**

[1] The applicant approached this Court on an urgent basis on the 30th November 2012 seeking inter alia Orders in the following terms:

a) Staying the expulsion of applicant by respondents from the construction site at Likalaneng – Thaba Tseka Road lot 2, pending determination of this application.

b) Staying completion of works or employment of any other contractor at the said site, other than the applicant pending finalization of this application.

c) Staying the sale and/or interference by respondents with applicant's equipment or material on the said site pending finalization of this application.

d) Declaring the letter marked annexure "A" written by the respondents to the applicant null and void.

e) That the Honourable Court should order that applicant should complete the works at Likalaneng to Thaba-Tseka and hand it over to the Government on or before the 1st April 2013.

f) Further and/or alternative relief.

[2] On the 30th November 2013, prayers 1, 2 (a), (b) and (c) were granted by one of my brother Judges to operate with immediate effect as interim interdicts. The respondents later filed their notice to oppose the matter, which matter was subsequently allocated to this Court.

[3] In essence the applicant is saying that the letter of expulsion; annexure "A" herein has been issued out unlawfully and it challenges its lawfulness. On the other hand, the respondents' case is that that annexure "A" is a lawful letter which had been lawfully issued in terms of the conditions embodied in the contract entered into by both parties herein. They argue that the expulsion of the applicant from that site is justified; which fact the applicant denies.

[4] Most of the facts herein are of common cause. In brief, the respondents and the applicant entered into a contract whereby the applicant is to upgrade or to construct a road from Ha-Cheche to 'Matšooana also termed Likalaneng to Thaba-Tseka lot 2, as such the respondents are the employers of the applicant.

[5] It is one of the terms of that contract; which contract is governed by the laws of Lesotho; that an engineer presumably appointed by the respondents will

supervise the works to be carried out by the applicant. Also, in terms of the conditions of that contract, the applicant has to strictly comply and adhere to/with the engineer's instructions in matters relating to the said works.

[6] It is apparent that sometime, there was a dispute or a misunderstanding between the applicant and the respondents' engineer, which dispute culminated into a referral by applicant to arbitration process provided for and or stipulated in the conditions of this contract as per contents of clause 67 of that contract; vide page 93 of the record of proceedings.

[7] However, before the arbitration process was approved by either party and or before the process had been undertaken, the respondents wrote annexure "A" to the applicant whose effect was to expel the applicant from the site in question, presumably in terms of the provisions of clause 63.1 (c) and (d) of the conditions of that contract which was entered into between them.

[8] The applicant then approached this Court as he did seeking the prayers/orders referred to above. It is clearly stated in the applicant's certificate of urgency the reasons why he approached the Court as it did subsequent to service upon it of the said letter of expulsion. The said reasons are that:

1. Unless the interim relief is granted, the applicant stands to suffer losses in the amount to over one hundred million maluti arising from the planned or contemplated sale of its assets;

2. About 15,500 Basotho stand to lose their jobs through a wrongful expulsion by the first and second respondents from the site in question.

3. There are disputes pending between the parties which are his pendens but despite this the respondents threaten to expel the applicant from the site, which decision will cause irrecoverable harm.

[9] The issue for determination by this Court is essentially whether or not the applicant has defaulted. The applicant denies that he has defaulted, while the respondents say he has. The respondents further accuse the applicant of having refused to comply with the findings of the Dispute Resolution Expert. This allegation is labelled against the applicant despite the fact that, clearly from a reading of the contents of annexure "F" paragraph 6 (last sentence) the author has stated that there is on-going dispute which has been referred to the Dispute Resolution Expert.

[10] Besides this, the respondents have not responded to the applicant's averment that at the time that they issued annexure "A" purporting to expel the applicant from the site in question, 80% of the works had already been done and that to date, it has not been paid for the said work despite demand that it be paid. Neither have the issues raised by and or on behalf of the applicant in annexure "G" been attended to in any way nor have same been denied. Refer to sub-paragraph 7.4. up to 7.8.

[11] Much as reliance is solely placed upon the findings of the Dispute Resolution Expert (DRE) which the applicant is alleged not to have complied with, the respondents have failed and or neglected to either annex

to their papers a copy of such findings nor has the DRE or any of its members filed any supporting affidavit in support of the respondents and in support of a Mr. Nigel Penfold (Director, IMF Worldwide LTD – Engineer under contract) who alleges as against the applicant in annexure "F". Neither have the respondent s been supported by way of an affidavit by the Director General – Road Directorate who were allegedly working directly with the applicant. With the greatest respect, these are the people who would be in a better position to deny or to admit the allegations in question. In the absence of their supporting affidavits, the respondents' denials are bare denials which border on inadmissible hearsay evidence. This they cannot and should not be allowed or be permitted to do in law.

[12] On the papers as they stand, the respondents have indeed failed to prove any default; let alone a justifiable default on the part of the applicant. Refer to the case of **Plascon-Evans Paints LTD v. Van Riebeeck Paints (PTY) LTD 1984 (3) S.A. 623**.

[13] Furthermore, the author of annexure "F" has alleged that the applicant/ contractor has refused to implement the recommendations of the Independent Reviewer with regard to remedial works to the central pier base and load testing of the completed bridge. This is also a bare allegation which has not been supported by any affidavit by the Independent Reviewer.

[14] In any case, the said author of annexure "F" is also contradicting himself for the simple reason that, having stated that the applicant has refused to implement the recommendations of the Independent Reviewer with regard to remedial works alluded to above, he immediately changes his story to say

that there is, in his opinion, no requirement to permit any further time to rectify the default and so on.

[15] However, as I have indicated above, all of his allegations against the applicant in this regard are not supported by any affidavit. Also even the said Independent Reviewer has not filed any affidavit in support of the above, nor have the respondents annexed to their papers a copy of the report of the said Independent Reviewer.

[16] In short, the contents of annexures "E" and "F", documents upon which the respondents rely for having issued annexure "A" against the applicant, do not on their own, without the supporting affidavit of its author, constitute evidence in motion proceedings.

[17] It is trite that, under common law, cancellation or expulsion though is one of the remedies for a breach of contract, it is a drastic remedy which should not be lightly resorted to. There should therefore be a fundamental breach of an essential or a material term of a contract before it is resorted to.

[18] There should therefore be clear convincing evidence that the other party to a contract, no longer has an intention to be bound by the terms of the contract. In the instant case, there is no such evidence provided and in fact, the applicant has itself engaged and or resorted to other lawful means to persuade the respondents not to expel (or to reverse the expulsion) it from the site in question. Refer to correspondence between the parties herein pages 144 - 150. This includes annexure "H" to which the applicant has never received a response.

[19] The applicant denies that he was in default and insists that there is no evidence in support of same. He instead says that there is, an arbitration process which is still pending and which is a local remedy agreed upon by the parties to be followed if there is a dispute. The respondents deny this and argue that the applicant's application is ill conceived as the expulsion, subject-matter in this application is per the contract.

[20] The applicant on the other hand, argues that even if there be such a clause with regard to expulsion, it is nonetheless entitled to be given a hearing before such a drastic measure which has highly adverse, far-reaching, prejudicial effects against it were embarked upon. The respondents have not at all denied that they have not afforded the applicant a hearing before they indeed had him served with a notice of expulsion from the site in question.

[21] A proper reading of the contents of annexure "A", butterresses the applicant's case that indeed it was never asked nor afforded any opportunity to make any representation before that highly adverse and prejudicial notification was issued out to him.

[22] It is trite that maxim or principle of audi alteram partem is universally recognized and applied especially in situations where one is to be condemned as well as one's property. Without venturing into the merits of this case, the fact that the provisions of sub-clause 63.1 (c) and (d) of the contract in question, which among others, give the employer/respondents power to sell the applicant's equipment, temporary works, unused plant and materials etc are without doubt very serious considerations with far reaching adverse irrecoverable consequences on the part of the applicant and as such

necessitate that applicant should have been afforded a proper hearing before being expelled from the site in question.

[23] The above is particularly so because there is nowhere where the drafters of this contract have by express or by necessary implication excluded the application of this principle. Neither have they stated that same can be dispensed with under any circumstances; exceptional or not.

[24] Indeed, it is a well established principle that the rules of natural justice, which are rules of law and which include the principle embodied in the maxim audi alteram partem, apply to the exercise of institutions or statutory powers prejudicially affecting the liberty or rights of the individual unless those rules are expressly or by necessary implication excluded by statute. The respondents have not pleaded to the issue regarding the hardship and or the irrevocable harm and prejudice which applicant has alluded to as being a direct consequence of the expulsion of it from the site in question.

[25] The above is compounded by the fact that the respondents have all along insisted that there were no pending arbitration proceedings, but in argument before this Court counsel for respondents conceded and or suggests that arbitration can be pursued even after the expulsion of the applicant from the site. A million dollar question to be asked is, what purpose would that arbitration serve if by the time it is carried out the applicant will have been expelled from the site and all of his equipment and machinery sold by the employer as contemplated and spelt out in clause 63.1?

[26] The answer to the above would be that such arbitration proceedings to be held after the expulsion of the applicant and after the sale of his equipment and machinery and after another contractor would have been appointed to complete those works would be a futile exercise since the applicant would have permanently then be already put out of business. This would indeed have caused the applicant a permanent loss of business, which occurrence the applicant has indicated as in his reasons in support of the urgency of this matter. In other words, the permanent harm or damage to him would have already materialized much to his prejudice.

[27] Indeed the prejudice and hardship which the applicant stands to suffer is immeasurable and irrecoverable due regard being had also, among other factors to the conditions therein stipulated in sub-clause 63.1 of the said contract, in particular though not limited to same, because even after expulsion it would not be freed from its obligations and rights under the contract obviously once so expelled and its equipment, machinery and so on have been sold by the employer, applicant will have been permanently paralyzed in its business operations.

[28] As has already been indicated above, the respondents do not deny that the applicant's assets likely to be sold are worth more than one hundred million maloti, neither do they deny that the applicant had, by the 21st November, 2012, when they wrote and had annexure "A" served upon it, already completed or done over eighty per cent (80%) of the said works.

[29] The respondents have been aware of this fact but they did not take further steps after the issuance of that annexure "A" to stop applicant from further

carrying on with the said works. They only contend themselves with arguing before this Court that the applicant continued to do so without supervision. This is an admission on their part that they took no further steps against the applicant but they do not even say why they did not do so. They were entitled to approach a court of law to formally have applicant interdicted from so continuing to work on the said site once they had issued annexure "A". This they allege without even indicating that even on these further works the applicant has defaulted. There is no report or any kind of assessment of this further works indicating whether or not there are any defects on this works.

[30] The inaction of the respondents in this regard as well as their none denial of the above facts render the averments of the applicant admissible. The respondents are now estopped from further denying the applicant to continue with its contractual obligations and rights under this contract.

[31] Further on this issue, the respondents do not challenge nor deny the issues raised and argued on behalf of the applicant that the said works had been eighty per cent (80%) completed when they issued and served the applicant with annexure "A" and that, as such they have been enriched at expense and to the prejudice of the applicant since that road has not only benefitted the respondents but also members of the public who are now using same.

[32] As a matter of common cause, the applicant is the only one contracted by the respondents to construct this Likalaneng – Thaba-Tseka Road Lot 2, hence why he is apprehensive that the expulsion and the likely event of employment of another contractor should this expulsion not be stayed would

cause him irrevocable loss as alluded to above and in terms of the provisions of sub-rule 63.1 (c) and (d) of the conditions of the said contract.

[33] The contents of the above sub-rule as well as the wording and contents of annexure "A" clearly highlight and explain the nature of the repercussions and or consequences which are to follow should the expulsion of applicant from that site continue. These are potentially very serious and irreversible for the reasons that should this application not be granted, the applicant will permanently be unable to function as his assets will have been sold. Furthermore, its image shall forever be tainted locally and internationally much to its prejudice. This fact or issue argued on behalf and in support of the applicant has also not been gainsaid by and or on behalf of the respondents. It therefore remains unchallenged and admitted.

[34] It is patently clear, from the facts of this case and from the surrounding circumstances that the respondents have not been swayed from pursuing the expulsion of the applicant from the site in question; in which case, they will dispose of the applicant's assets on that site by sale as well as having the applicant replaced by another contractor while the applicant will not be released from any of its obligations or liabilities under the contract.

[35] The above is butterressed by the issuance of the said expulsion notice against the applicants by the respondents. This the respondents did in total disregard of the inchoate arbitration processes and in disregard of the parties' correspondence where arbitration process was suggested. In fact and to be precise, the respondents ultimately ignored the letter of the applicant dated the 21st November 2012 through which the applicant had

raised certain concerns about the appointment of three arbitrators. It will readily be seen that the respondents then issued the expulsion notice on the next day; the 22nd November 2012, without as so much finally informing the applicant that they (respondents) have not been persuaded successfully to accede to a request or a suggestion of a one or sole arbitrator.

[36] Put differently, it is an undenied fact that the above attitude of the respondents left the applicant with no other option except that of resorting to a court of law for redress. Obviously, the respondents may have misunderstood the applicant's request that they should reconsider their demand of three arbitrators to have meant that the applicant had abandoned arbitration proceedings, whilst that was not the applicant's intention. This is clearly and undeniably demonstrated by the applicant's correspondence to the respondents on this issue at pages 144 – 145 etc of its replying affidavit.

[37] The respondents have also by or through correspondence to the applicant acknowledged the process of arbitration, hence why they suggested or proposed the appointment of three arbitrators – vide letter dated 14th November 2012 addressed to the applicant by the fourth respondent's Director General, Mrs. M.C. Pama. They cannot now deny this fact.

[38] Contrary to what was suggested on behalf of the respondents, the arbitration process does not relate to different or various stages or to certain selected aspects of the project; or does it relate to piecemeal stages of the project. The argument that arbitration does not relate to what appears under annexure "F" is untenable.

[39] As has been alluded to above, what purpose would be served by arbitration whilst and or after the expulsion notice had been enforced and or issued? In fact there is nothing indicating on the contract that arbitration processes should be invoked after expulsion of a contractor from the site. This is not supported by any of all the relevant paragraphs in this contract.

[40] That the issuance and service of annexure "A" against the applicant was premature, unlawful and flies directly opposite the arbitration process agreed upon needs no further elaboration, whilst the expulsion notice still stands.

[41] The respondents' action of expulsion of the applicant from the site in question whilst both parties had not finalized the precondition leading up to the arbitration process merely because they differed on the number of arbitrators and related costs cannot and should not have been interpreted as having been an intention on the part of the applicant to abandon its intention to have issues and or disputes between them referred to and dealt with by arbitrators. Indeed, arbitration has been provided as a prerequisite step to be taken before drastic measures or expulsion were taken against the contractor by the employer.

[42] It has been argued on behalf of the applicant that this annexure "A" is tatamount to respondents having taken the law into their hands. This has not and it cannot be faulted; so also is the applicant's submission to the effect that in case of disagreement on the number of arbitrators, parties could have approached an arbitration Board, other than one party resorting to such drastic expulsion. One may add, that if all else failed, then a Court of law should have been approached for intervention and redress.

[43] The applicant has correctly, in the mind of this Court, elected to approach a court of law for relief as a last resort after the expulsion notice was issued and served upon it, thereby fully meeting the third requisite for a grant of a final interdict since it has no other satisfactory remedy available to it. This is a matter of common cause.

[44] In the premises, regard being had to the circumstances of this case and the fact that the injury actually committed against the applicant is real because of the expulsion notice already issued against it; the rule nisi dated the 30th November 2012 is confirmed as prayed in the notice of motion and with regard to prayers 1, 2(a), (b) (c), (d) and (e). Accordingly, a final stay as prayed in the notice of motion and the declaration of annexure "A" herein as being null and void is granted as prayed, with costs to the applicant.

[45] Respondents have proposed that parties should go for arbitration, though this is late concession on their part. The applicant has equally prayed that the parties be ordered to go for arbitration if the expulsion order is declared null and void.,

[46] This is a reasonable, sensible proposal. This court so orderes parties to submit to and to go for a one man arbitration process.

[47] The respondents are further ordered to pay the applicant for performance of piece of work done. However, the issue pertaining to damages cannot be dealt with in or by motion proceedings. The applicant is at large to launch trial proceedings against the respondents to claim such or any damages which they will ultimately have quantified.

M. Mahase

Judge

For Applicant - Adv. W.T, Makemane

For Respondents - Adv. R. Motsieloa