42/93

CASE NO : 436/91
N v H

OCEAN DINERS (PTY) LTD Appellant

and

GOLDEN HILL CONSTRUCTION CC Respondent

SMALBERGER, JA :-

Case No : 436/91
N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

OCEAN DINERS (PTY) LTD Appellant

and

GOLDEN HILL CONSTRUCTION CC Respondent

CORAM: E M GROSSKOPF, SMALBERGER, NIENABER, JJA, et NICHOLAS, HOWIE, AJJA

HEARD: 11 MARCH 1993

DELIVERED: 26 MARCH 1993

J U D G M E N T

SMALBERGER, JA :-

The respondent (as plaintiff) successfully sued the appellant (as defendant) in the Cape of Good Hope Provincial Division for the sum of R52 967-41 plus costs. The respondent's action was founded on an

architect's certificate which incorporated an acknowledgement of debt. The present appeal is directed, with the necessary leave, against the whole of the judgment of the court a quo.

On 26 May 1988 the appellant (as employer) and the respondent (as building contractor) entered into a written agreement ("the contract") for the construction of a restaurant complex at Beach Road, Gordon's Bay. The contract was in the standard form approved and recommended by the Institute of South African Architects and other related bodies. Provision was made in the contract for the appointment of an architect and a quantity surveyor to represent the appellant in all matters concerning the works and their completion.

Clause 25.1 of the contract provides, inter alia:

> "The Contractor shall be entitled to receive from the Architect, interim certificates at

> intervals not greater than one calender month, a penultimate certificate and a final certificate ....., stating the amount due to him and to payment of such amount by the Employer within the period set out in the attached schedule."

Various interim certificates, based on the progress of the works, were issued from time to time by the architect. On 17 October 1988 the penultimate certificate was issued. Upon completion of the works the architect, on 26 March 1989, issued a final certificate in terms of clause 25.5 ("the certificate"). The certificate reflected the total value of work done (including the value of work done by nominated sub-contractors) as R519 115-83. From this was deducted the amount of R453 097-63 previously certified, as well as certain retention monies, leaving a balance of R52 967-41. The certificate contained an acknowledgement of the appellant's indebtedness to the respondent in that amount, and included a promise to pay

such amount within seven days.

In his heads of argument Mr Duminy, for the appellant, sought to challenge the status of the certificate despite admissions made both in the plea and the agreed statement of facts incorporated in the record, that it was a final certificate. However, at the hearing of the appeal he accepted that the certificate was a final one in terms of the contract.

Clause 25.7 of the contract (omitting what is not relevant to the present appeal) provides:-

> "A final certificate issued in terms of clauses 25.5 and 25.6 ..... shall be conclusive evidence as to the sufficiency of the said works and materials, and of the value thereof."

The certificate was issued by the appellant's agent (the architect) acting within the scope of his authority. The issuing of a final certificate carries with it certain legal consequences. Their nature depends in the first instance on the proper

interpretation of the relevant provisions of the governing agreement. In the present matter the effect of the certificate was to determine the respective rights and obligations of the parties in relation to matters covered by the certificate. It constituted (in the absence of a valid defence) conclusive evidence of the value of the works and the amount due to the respondent. It embodied a binding obligation on the part of the appellant to pay that amount. It gave rise to a new cause of action subject to the terms of the contract. The appellant's failure to pay within the time stipulated entitled the respondent to sue on the certificate (cf. Mouton v Smith 1977(3) SA 1(A) at 5 C - E). However, the certificate is not indefeasible. It is subject to the various defences that may be raised in an action based on a final certificate. For examples of such defences see Smith v Mouton 1977(3) SA 9(W) at 13 A - D. Any defence

available to the employer, or on which the employer seeks to rely, ought ordinarily to be pleaded (Mouton v Smith (supra) at 5 F - G).

It is necessary to analyse the pleadings in order to determine what defences were raised in respect of the respondent's action. The validity of such defences can then be considered. Mr Duminy did not contend that there were issues at the trial which went beyond those pleaded, but had been canvassed sufficiently fully for them to be considered. He specifically disavowed any reliance by him on an unpleaded defence.

The only defences raised in the appellant's amended plea (which is dated 27 September 1990), the day after the conclusion of the evidence at the trial, and which incorporated all amendments sought and granted during the trial) were:

1) The architect's lack of authority to issue the

certificate - a defence subsequently abandoned;

2) That the certificate had been validly cancelled by the architect (and was therefore not enforceable) as a consequence of:

(a) Mr Acavalos, representing the appellant, having disputed the correctness of certain amounts reflected in the certificate, which contentions were upheld by the architect, alternatively,

(b) Errors made in the valuation of the works by the quantity surveyor which were induced by the respondent negligently, alternatively, innocently duplicating its claims in respect of two items;

3) A special plea that the respondent's claim arose from a dispute between the parties relating to the contract which should have been referred to arbitration in terms of clause 26 of the contract - a defence which

has also been abandoned;

4) Although not specifically pleaded, the appellant's right to argue that the provisions of clause 25.7 of the contract are contrary to public policy, alternatively, that because the certificate did not accurately reflect the amount due by the appellant it would be against public policy to enforce it, was not challenged. I therefore propose to treat it as if it were a pleaded defence.

It is common cause that after the certificate was issued Mr Acavalos questioned the correctness of certain amounts included in the final valuation. His dissatisfaction appears to have been directed at the architect rather than the respondent. Be that as it may, no formal dispute was ever declared with the respondent in respect of such amounts, nor was any dispute referred by the appellant to the architect for his decision in terms of clause 26 of the contract.

(I assume that the provisions of that clause would have permitted him to entertain such a dispute.) Instead the architect, without any prior referral to the respondent, purported to cancel unilaterally the certificate and on 21 April 1989 issued what was described as an interim certificate reflecting an indebtedness of R35 895-43.

It is further common cause that:

1) The (final) certificate erroneously included certain amounts which were either not due, or constituted overpayments, and which, if properly accounted for, would have reduced the appellant's overall liability to the respondent by slightly more than 1% of the total valuation of the works. I shall refer to these as "the accounting errors". (Also included were certain amounts paid directly by the appellant to certain nominated sub-contractors. These were, however, correctly included in terms of the

contract as it was the respondent's responsibility to pay nominated sub-contractors. The appellant therefore has no valid complaint against their inclusion.)

2) The respondent negligently duplicated two items in its accounts submitted to the quantity surveyor. The amounts involved were R2 025-00 for one item (ceiling insulation material) and either R2 196-00 or R933-70 for the other (fill material), depending upon the correct basis for its calculation. I shall refer to these as "the duplications".

I proceed to consider the two remaining defences raised in the plea. The first of these is based on the purported cancellation of the certificate by the architect. There is in my view no substance in this defence. If the effect of a contract is to confer finality upon a certificate (which clause 25.7, assuming its validity, does), a certificate validly issued (such as the one we are dealing with) cannot, in

the absence of a contractual provision to the contrary, or agreement or waiver by the parties (neither of which is suggested), be withdrawn or cancelled by an architect in order to correct mistakes of fact or value in it (Hudson's Building & Engineering Contracts, 10th Ed, 484). The contract does not provide to the contrary; clause 26, if anything, confirms that there was to be finality as far as the architect was concerned. The only person empowered by clause 26 "to open up, review or reverse any certificate" is an arbitrator if a dispute concerning a certificate is submitted to arbitration (which was not the case here). Once therefore the architect had issued the certificate he was functus officio in so far as the certificate and matters pertaining thereto were concerned (Halsbury's Laws of England, 4th Ed, Vol 4(2), para 432). That being so, he was not entitled unilaterally to withdraw or cancel it.

The matter may also be viewed from a different perspective. A final certificate is not open to attack because it was based on erroneous reports of the agent of an employer or the negligence of his architect (Hudson op cit at 483; Hoffman v Meyer 1956(2) SA 752(C) at 757 F - G). The failure of the quantity surveyor properly to scrutinize the claims put forward and to rectify any errors, and the possible negligence of the architect in failing to satisfy himself as to the correctness of the claims and valuations before issuing the certificate, would accordingly not have provided a defence to an action on the certificate. A fortiori it cannot provide a basis for cancellation or withdrawal of the certificate by the architect.

The remaining defence pleaded relates to the validity and enforceability of clause 25.7. Mr Duminy argued that if the words "conclusive evidence" in clause 25.7 meant (as they obviously do) "finally

decisive of the matter in issue" (i e the value of the works), the provision was contrary to public policy as it ousted the courts' jurisdiction to enquire into the accuracy and validity of the matter. This argument was founded on passages in the judgments of this Court in Sasfin (Pty) Ltd v Beukes 1989(1) SA 1 (A) at 14 I - 15 B and 23 C - D. The remarks there made must be seen in their proper context. What rendered the particular provision under consideration in the passages referred to contrary to public policy was the authorship of the certificate sought to be relied upon against the debtor ("any of the directors of any of the creditors"), coupled with the conclusive nature thereof, seen in the context of the peculiar terms of the contract with which this Court was there dealing.

The present matter is a very different one. We are not dealing with the situation where a party leaves the extent of his liability to be determined, not

person they are entitled to expect will act fairly and impartially (cf. Universiteit van Stellenbosch v J A Louw (Edms) Bpk 1983(4) SA 321 (A) at 337 E - F). Its provisions can therefore not be said to be inimical to the public interest. The clause itself is one commonly found in building contracts - it is in fact a standard clause in a widely approved and used document - which has been applied for many years, apparently without objection, as the absence of reported cases on the point suggests. It would be absurd to now hold it contrary to public policy.

When we know, as we do, that the certificate is not entirely accurate in relation to either the valuation reflected therein or the amount due to the respondent, would it be contrary to public policy to enforce it? In my view not. Public policy is largely concerned with the potential for manifest unfairness or injustice within a given situation. The appellant had

a quantity surveyor and an architect acting on its behalf, on whose professional expertise it could rely and whose duty it was to protect its (the appellant's) interests. To the extent that the appellant has suffered damage through a negligent failure on their part to act in its best interests, it would (subject to prescription) have an action for damages against them. The situation is therefore not one inherently fraught with unfairness or injustice as far as the appellant is concerned. Furthermore if, as I have pointed out, errors or negligence on the part of the quantity surveyor or architect do not render a final certificate open to attack, a fortiori they cannot preclude its enforcement as being contrary to public policy.

It follows that the defences raised in the appellant's plea cannot succeed. That would normally signal the end of the appeal. Mr Duminy, however, addressed certain arguments to us on matters not covered

by the pleadings notwithstanding his specific disavowal that he sought to rely on an unpleaded defence. I do not propose to entertain those arguments save for two which, although not raised as substantive defences on the pleadings, are none the less premised on certain factual allegations contained in the plea and dealt with in evidence.

The gist of the first of these arguments, as I understand it, is as follows: The certificate, as provided for in clause 25.7, is only conclusive as to the sufficiency of the works and the materials, and the value thereof. The value is represented in the certificate by the figure R519 115-83. That figure, it is conceded, is conclusive and not open to dispute, even though it includes what I have referred to as the duplications (cf. East Ham Borough Council v Bernard Sunley & Sons Ltd [1965] 3 ALL ER 619 (HL) at 632 H). The certificate, however, is not conclusive as to the

figure of R453 097-63 previously certified. That amount includes the accounting errors, and is thus incorrect. The final figure of R52 967-41 must accordingly also be wrong and the certificate is not conclusive in that regard either. The certificate therefore cannot be sued upon.

The argument is fundamentally unsound. It proceeds on the premise that the figure of R453 097-63 is not a valuation figure. That is incorrect. A perusal of the earlier certificates issued reveals (1) that the figure of R453 097-63 appears as the valuation figure in the penultimate certificate and (2) that it represents the progressive valuation figure up to that time - only to be superseded in turn by the final figure of R519 115-83 in the (final) certificate. Both figures are therefore valuation figures. The fact that the amount of R453 097-63 includes the accounting errors makes it no less a valuation figure. All the

accounting errors (and for that matter the duplications) present in the valuation of R453 097-63 will have been carried forward to the amount of R519 115-83. The difference between these two valuation figures (less retention) represents the amount owed in terms of the contract (R52 967-41). The certificate is conclusive of that amount. To hold otherwise would be to render a final certificate vulnerable to the slightest error made earlier, something which could never have been intended and which flies in the face of the principles enunciated above.

The second argument was that the respondent's negligent misrepresentations in respect of the duplications induced an incorrect valuation of R519 115-83 and provides a valid defence to an action based on the certificate. As previously mentioned, a final certificate is not sacrosanct, although, assuming a valid and enforceable underlying contract, it is open

to challenge only on very limited grounds such as fraud and the like. Mr Duminy sought to rely on a passage in Thomas Construction (Pty) Ltd (In Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd 1988(2) SA 546 (A) at 562 H - 563 C in support of his argument. That case does not assist him. Apart from the fact that it dealt with an interim and not a final certificate (which makes it distinguishable), it provides no direct or indirect support for the proposition put forward by Mr Duminy. The Court specifically refrained from embarking upon a general consideration of defences available to an employer when sued on an interim (not to mention a final) certificate (at 562 I). We were not referred to any other authority, nor am I aware of any, that recognizes the defence raised. None of the leading writers on building and other contracts whose works I have consulted mentions negligent or innocent misrepresentation (relating to the certificate as such)

as a defence to a claim on a final certificate. In Capstick & Co Ltd v Keen 1933 NPD 556 at 567 inaccuracy in a final certificate induced by the fraudulent representations of a contractor to an architect was recognized as a defence to an action founded on the certificate. However, no mention was made of negligent or innocent misrepresentations. One is left with the clear impression that they are not available as defences. The reason could be that they are not appropriate defences having regard to the functions of an architect and the scrutinizing mechanisms available to him before issuing a final certificate, as well as the need for finality.

It is, however, not necessary to decide the point as the evidence in any event does not establish that the valuation of R519 115-83 was materially influenced by the respondent's negligent misrepresentations. Rather it was the product of a

compromise reached in the following circumstances. In December 1988 the quantity surveyor submitted to the respondent a draft final account for R487 884-47 for its approval. The respondent did not accept its accuracy, and prepared a list of items which it contended should be added to the account. The inclusion of such items would have increased the total valuation to R530 465-65. In due course the quantity surveyor submitted a further draft final account for R515 249-06 - an appreciable increase over its previous total but substantially less than the respondent's calculations. This still did not meet with the respondent's approval. There followed certain enquiries and negotiations which culminated in a telephone conversation in which agreement was reached on a compromise figure of R519 115-83, that amount having been put forward by the quantity surveyor and accepted by the respondent.

The figure finally agreed upon was the product of an investigation and assessment by the quantity surveyor, and was accepted by the architect. Both had independent means of satisfying themselves that the valuation was accurate and fair. They were not solely or even largely dependent upon information furnished by the respondent. In reaching a compromise attention was given to an overall settlement rather than a consideration of individual items. The architect, in issuing his certificate, relied upon the compromise figure. A compromise was in the interests of both parties as it avoided the need to refer disputes either to the architect or to arbitration. Mr Clark, the respondent's contracts manager, testified that he would not have compromised at a lesser figure even if he had been aware of the duplications at the time. There was no evidence to suggest that the quantity surveyor would have refused to compromise at the agreed figure, or that

the architect would have issued a final certificate for a lesser valuation, had they been aware of the duplications. In the result the appellant failed to establish a causal nexus between the respondent's negligent misrepresentations and the valuation reflected in the certificate.

For the aforegoing reasons the appeal is dismissed with costs.

J W SMALBERGER
JUDGE OF APPEAL

E M GROSSKOPF, JA)
NIENABER, JA) CONCUR
NICHOLAS, AJA)
HOWIE, AJA)