

WITHINSHAW PROPERTIES (PTY) LIMITED

AND

DURA CONSTRUCTION COMPANY (SA)(PTY) LIMITED

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

WITHINSHAW PROPERTIES (PTY) LIMITED

Appellant

AND

DURA CONSTRUCTION COMPANY (SA) (PTY)

LIMITED

Respondent

CORAM: Jansen, Trengove, Viljoen, Nicholas, JJA,
Galgut, AJA

HEARD: 15 May 1984

DELIVERED: 29 May 1984

J U D G M E N T

NICHOLAS, JA

This appeal arises out of a building contract

which

which was concluded in July 1973. The parties were the employer, WITHINSHAW PROPERTIES (PTY) LTD ("WITHINSHAW") and the contractor, DURA CONSTRUCTION CO.(SA)(PTY) LTD ("DURA"). The contract, which was in the standard form approved and recommended inter alia by the Institute of S A Architects, was for the erection of a shopping centre and cinema complex in Main Road, Wynberg, Cape, at a cost of 1,25 million rands.

Shortly after the conclusion of the contract, DURA formed a wholly owned subsidiary named DURA CONSTRUCTION CAPE (PTY) LTD ("DURA CAPE"), which, with the knowledge and consent of WITHINSHAW, performed all the contractual obligations of DURA as its agent.

The

The building work was started in July/August 1973, and was substantially completed by March 1975.

In about July 1974 a problem arose.

The building specification provided for the laying, in accordance with the manufacturer's instructions, of a waterproofing membrane called Hyload 75 on the parking deck which formed the roof of the complex.

A company named HAEFELE AND SONS (PTY) LTD ("HAEFELE") was appointed as sub-contractor to perform this work, which it guaranteed against defects in labour and materials.

The manufacturer's instructions were not clear in regard to the method of bonding the membrane to the deck. WITHINSHAW's consultants, a firm of consulting engineers named HILL KAPLAN SCOTT AND PARTNERS ("HILL KAPLAN") instructed that

spot

spot bonding should be used, and about 20% of the total area involved was bonded by this method. It was urged, however, by Mr HAFAELE, who was an expert in waterproofing with more than 25 years experience, that a fully bonded method be used, and indicated that, if it were not the work could not be guaranteed. HILL KAPLAN bowed to Mr HAFAELE's opinion and issued a written instruction that the full bonding method be adopted for the area remaining.

This decision was unfortunate. Shortly after the laying was completed, there occurred blistering or bubbling of the membrane in the fully bonded area. As a result vehicles travelling over it tore the membrane, with the consequence that leaking occurred into the premises

below

below. The cost of repairing the waterproofing was estimated to be about R30 000,00.

There arose a question as to the responsibility for the repair work. DURA CAPE disclaimed responsibility, contending that the work had been performed in accordance with the specification and HILL KAPLAN's written instructions. HAFAELE too disclaimed responsibility, claiming that the defect was due not to deficiency in labour or materials, but to a faulty design. And HILL KAPLAN disclaimed responsibility, contending that the fully bonded method had been insisted upon by HAFAELE.

The question of responsibility had not been resolved by 25 November 1977, when the architects referred

to

to in the building contract (THE MEYER, LOUW PARTNERSHIP),

issued a final certificate for the sum of R110 721,09.

WITHINSHAW made no payment under the certificate, and

on 20 April 1978 DURA issued summons against it out of the

Cape Provincial Division for a total of R110 721,09, in-

terest and costs. At the end of the trial, which began

on 4 August 1982, judgment was granted in favour of the

plaintiff for the sum of R67 517,67, plus interest and costs

including the costs of two counsel. (It had become

common cause during the trial that an amount of R36 599,00

and further amounts totalling R6 604,42 had been paid to

DURA without prejudice).

WITHINSHAW now appeals to this Court against the

whole

whole of the judgment and order.

It was contended on its behalf that DURA's claims should have been dismissed on any one of three grounds:

- (a) DURA had no title to sue on the architects' certificate;
- (b) The certificate was not a final certificate within the meaning of the building contract, because it was qualified by a letter written by the architects dated 25 November 1977, which accompanied it; and
- (c) The architects were not legally entitled to issue the certificate in the face of the dispute as to responsibility for the defective waterproofing.

- (a) DURA's title to sue

The certificate reads as follows:

"Certificate"

The point made on behalf of WITHINSHAW is that this document did not certify the amount of R110 721,09 as being due to DURA; it certified it as being due to DURA CAPE, a different persona. Consequently it conferred no rights on DURA CAPE, which was not a party to the building contract, and no rights on DURA, which was not the person to whom the certificate was issued.

The point is without merit. "DURA CAPE" was a misnomer. That is clear from the certificate itself, read with the building contract under which it was issued and to which it refers. It recites at the head that it is "to be presented by the contractor to the employer for payment". The architects certify that under the terms

of

of the contract, the payment detailed below is due from the employer to the contractor. The intention was clearly to issue the certificate to the contractor, which was DURA, and the insertion of the name of DURA CAPE was a mistake.

How the mistake arose, is also clear. It is common cause that DURA CAPE executed the contract works as agent for DURA; the architects gave instructions to DURA CAPE and addressed correspondence to DURA CAPE; they issued monthly certificates to DURA CAPE; and WITHINSHAW paid such certificates to DURA CAPE without any objection. It is not surprising in the circumstances that the architects came to think, wrongly, that the name of the contractor was DURA CAPE.

(b)

(b) Certificate not a final certificate

On 25 November 1977 (being the date of issue of the final certificate), the architects wrote a letter to WITHINSHAW, a copy of which was Annexure "X" to the defendant's plea and which will be referred to as such.

It was in the following terms:

" THE MEYER, LOUW PARTNERSHIP

BP Centre	25 November 1977
Thibault Square	Our Ref: 5202/518
Cape Town	GM/mjb

Withinshaw Properties(Pty) Limited,
P.O.Box 30,
WYNBERG
7824

Dear Sirs,

re: FINAL CERTIFICATE - Erection of New
Withinshaw Centre

In

In accordance with the attached final statement issued by the Quantity Surveyors, Hudson Caietta and Gess, we have issued the Certificate No. 21 and FINAL for the above contract amounting to R110 721,09 (ONE HUNDRED AND TEN THOUSAND, SEVEN HUNDRED AND TWENTY ONE RAND and NINE CENTS).

This will be the final payment to be made on this contract and we beg to remind you that the matter of the defective surfacing and waterproofing to the parking deck on the first floor level is still unresolved. We, as your Architects, have indicated to the Main Contractor that in our opinion the onus for the defect rests with the Sub-contractor who maintained that his guarantee was dependent on a fixing specification other than that detailed by the Civil Consultants, Hill Kaplan Scott and Partners. The Sub-Contractor refuses to accept our decision and it would appear therefore that this matter will eventually have to go to arbitration for settlement. Since this

may

may take some time before finality is reached, it would be unfair to ask the Main Contractor and his other Sub-Contractors to wait for payment until that time. We suggest that an amount of R30 000,00 (THIRTY THOUSAND RAND) be withheld pending the final decision in the matter.

Yours faithfully

THE MEYER LOUW PARTNERSHIP

(sgd)

GERARD MEYER

c.c. Dura Construction Cape (Pty) Limited

Hudson Caietta and Gess

Hill Caplan Scott and Partners"

The contention on behalf of WITHINSHAW was that the final certificate must be read together with Annexure "X" which accompanied it and that, when so read, it is no longer clear and unambiguous and does not unequivocally amount to a final certificate within the meaning of the

building

building contract.

The certificate was issued to the contractor in terms of paragraph (a) of clause 25 of the building contract which provided:

"25(a) The Contractor shall be entitled to receive from the Architect a monthly certificate, a penultimate certificate and a final certificate of the amount due to him from the Employer ..."

Paragraph (f) provided:

"(f) As soon as practicable the Architect shall issue a final certificate of the value of the Works extended by the Contractor"

It was stated at the head of the certificate that it was to be presented by the contractor to the employer for payment.

It was certified that "under the terms of the contract"

"payment

"payment as detailed below"(i.e. for the sum of R110 721,09)

"is due from the employer to the contractor".

Annexure "X", on the other hand, was addressed not to the contractor but to the employer, although, in accordance with the architects' usual practice, copies were sent to DURA CAPE, the quantity surveyors, and HILL KAPLAN. It did not purport to vary the amount due from the employer to the contractor. It merely made a suggestion to the employer, for him to act upon or not as he thought fit, that an amount of R30 000,00"be withheld pending the final decision in the matter". That suggestion could not derogate in any way from the clear and explicit statement in the certificate that the nett retention was "NIL".

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In my view, therefore, there is no substance in the contention.

(c) Architects not entitled to issue certificate

Counsel for WITHINSHAW submitted that the issue of the final certificate was ultra vires of the architects because "where a dispute has arisen to the knowledge of the architect before he issues his final certificate, his power to issue a final certificate is ousted and the dispute falls to be decided by the arbitrator."

For this submission reliance was placed on two English cases: Lloyd Bros. v Milward (1895) which is referred to in Hudson's Building and Engineering Contracts, 10th ed, pp 438-9; and J A Milstone and Sons Ltd (in Liquid-

ation)

dation) v Yates Castle Breweries Co., 1938(2) All ER 439.

Neither of those cases, however, laid down any principle of law. Each of them was concerned with the application of the building contract concerned to the facts of the particular case.

Here the Court would be concerned with a different contract and the facts of the present matter. It is not clear what those facts are, because this defence was not adumbrated in the plea, and the facts were not fully canvassed in the evidence.

The relevant portions of the arbitration clause in the building contract (clause 26) read:

"26. Provided always that in case any dispute of difference shall arise between

the

the employer or the Architect on his behalf, and the Contractor, then the Architect shall determine such dispute or difference by a written decision given to the Contractor. The decision shall be final and binding on the parties, unless the Contractor within fourteen days of the receipt thereof by written notice to the Architect, disputes the same, in which case or in case the Architect for fourteen days after a written request to him by the Employer or the Contractor fails to give a decision as aforesaid, such dispute of difference shall be and is hereby referred to the arbitration and final decision of an Arbitrator..."

There was, in regard to responsibility for the waterproofing, an exchange of letters and frequent discussions over many months between the Architects, HILL KAPLAN, HAFAELE and DURA CAPE, during which they engaged in mutual recreations

minations. It does not appear, however, that there crystal-
lized "a dispute of difference between the Employer or
the Architect on his behalf, and the Contractor" within
the meaning of clause 26. On the contrary, the architects
informed the employer in Annexure "X" -

"We, as your Architects, have indicated
to the Main Contractor that in our
opinion the onus for the defect rests
with the Sub-Contractor who maintained
that his guarantee was dependent on a
fixing specification other than that
detailed by the Civil Consultants,
Hill Kaplan Scott and Partners. The
Sub-Contractor refuses to accept our
decision and it would appear therefore
that this matter will eventually have to
go to arbitration for settlement."

There was no evidence that the architects gave a "decision" or
that WITHINSHAW or DURA at any stage requested the archi-
tects to give a decision in writing in terms of

clause

clause 26.

The factual basis for the third submission was accordingly absent, and this defence fails like the others.

The appeal is dismissed with costs, including the costs of two counsel.

H C NICHOLAS, JA

JANSEN, JA
TRENGOVE, JA
VILJOEN, JS
GALGUT, AJA

} Concur