

**Aluminium & Steel Works Ltd v
Vijay Construction (Pty) Ltd & Or
(2001) SLR 272**

Philippe BOULLE for the Plaintiff
Antony DERJACQUES for the First Defendant
Ronny GOVINDEN for the Second Defendant

Order delivered on 18 December 2001 by:

PERERA J: This Court by judgment dated 20 October 2000 held that the Plaintiff was entitled to an order for alternative damages of R.2 million plus interest at the Commercial rate of 14% from 1st December 1994, and costs on a pro-rata basis.

Hence I hold that the Plaintiff is entitled to a sum of R.2 million plus interest at the Commercial rate of 14% from 1st December 1994, and costs on a pro-rata basis. However as the correspondence discloses delays in performance by the Plaintiff, the final sum to be paid to the Plaintiff will be subject to a proper assessment being made of the delays and defects by both Defendants and deducting an appropriate amount therefrom. Since the amount payable has not been definitely determined by Court, the Plaintiff will have the right under Section 223 of the Code of Civil Procedure, with due notice to the Defendants, to apply to the Court for an order fixing the amount due, if the Defendants fail to tender an acceptable amount within 2 months from the date hereof.

When the case was mentioned on 7 December 2000, Mr Boule for the Plaintiff informed Court that the Defendants had not tendered an offer for the amount in terms of the order of Court. The case was thereupon fixed for hearing on 22 June 2001. On that day Mr Frank Elizabeth stood in for Mr Derjacques who was sick. The Court was also informed that the First Defendant had gone abroad. Mr Elizabeth sought further time to consult with the First Defendant to decide whether he would testify himself or would call witnesses. The Court reminded Mr Elizabeth that although there was sufficient evidence on record, what was ordered by the Court was the tendering of an acceptable amount to the Plaintiff after deductions being made for the any delays and defects, failing which the Court would make an assessment of the amount. Mr Elizabeth made order that if such offer was not acceptable to the Plaintiff, the Court would proceed to hear evidence on 22 June 2001. On 8 June 2001, Mr Derjacques sought to tender a written offer, but Mr Boule objected to its production to Court on the ground that the offer and acceptance was a matter to be attended out of Court jointly by the First and Second Defendants and the Plaintiff. However, on perusing the written offer, Mr Boule informed Court that it was not acceptable to the Plaintiff. State Counsel appearing for the Second Defendant sought time to consider whether the Second Defendant would agree with the offer made by the First Defendant to the Plaintiff. As Counsel for the First Defendant

informed Court that Mr Vijay Patel would be out of the Country on 22 June 2001 fixed for hearing of evidence, that date was utilised for a mention to ascertain the position of the Second Defendant. Mr Boulle however excused himself from being present in Court on that day. On 28 June 2001, State counsel agreed with the quantum of the offer made by the First Defendant, and the hearing was fixed for 3 December 2001. However on that day, Mr Patel was said to have gone abroad. No other witnesses had also been summoned for the hearing. The Court however fixed the hearing for 14 December 2001 as the "final date" and also informed Counsel for the First Defendant that if by then Mr Patel was still not available in the Country, somebody else who could testify regarding the assessment should be called so that the matter could be finalised. By a letter dated 12 December 2001, Mr Derjacques informed Court, with notice to Counsel for the Plaintiff and the Second Defendant that Mr Patel and his Quantity Surveyor "(were) both out of the Country". This assertion was challenged by Mr Boulle, who summoned an Officer from the Immigration Division. The Immigration Officer testified that Mr Patel last left the country on 29 November 2001 and arrived back in Seychelles on 6 December 2001, and that he had not left the country thereafter. Mr Derjacques explained to the Court that he had acted on the instructions given to him by Mr B.Georges, Attorney at Law who is Mr Patel's lawyer, though not officially so on record in the present case. In any event I would accept that there has been some misunderstanding of instructions. Mr Derjacques questioned the Immigration Officer regarding the availability of Mr Roger Allen Quantity Surveyor of M/S Barker and Barton, who had prepared; the "statement of final invaluation no. 39" on 22 March 1996 (exhibit ID3). He stated that his last arrival date was 25 May 2000 and that he left Seychelles on 1 June 2000 and has not returned thereafter. There was therefore clear evidence that the assessment being of a technical nature, no attempt had been made by the First Defendant to contact Mr Allen or any other Quantity Surveyor from his firm ever since the judgment was delivered on 20 October 2000. Further, it is clear on record that the First Defendant has not pursued the order of the Court with reasonable diligence.

In this case, the Court has provisionally held that the Plaintiff is entitled to a sum of R274,297.72 together with interest at 14% from 1 December 1994, and costs of action. Mr Boulle moves for confirmation of that finding as the judgment of Court, in view of the delay caused by the lack of diligence on the part of the First Defendant to present necessary evidence to substantiate the offer made to the Plaintiff under Section 223 of the Code of Civil Procedure. Mr Derjacques submitted that to do so would be both unfair and unconstitutional. He therefore moves for a further adjournment, albeit, on costs. Although the doctrine of *audi alteram partem* is one of the essential ingredients of the principles of natural justice and the Constitutional Right to a fair hearing, the matter before Court arises from an ancillary issue which did not arise strictly from the pleadings.

The equivalent of Section 223 of the Code of Civil Procedure Code, in the United Kingdom, is contained in RSC Order 37. In practice, that rule is applied when the Court has decided on the liability, and either grants provisional damages, or leaves the assessment of entire damages to the master. Section 223 gives an opportunity to the parties after determination of liability, or money to be paid, and if they fail to reach such

agreement the Court would fix the amount upon hearing evidence. The sum of money payable to the Plaintiff has already been determined. An opportunity was given to the Defendants to agree on a sum of money. The Court was of the view that the correspondence evidence, disclosed delays in performance by the Plaintiff, and to be paid to the Plaintiff should be subject to a proper assessment of delays and defects to be made by both Defendants. Neither the First Defendant nor the Second Defendant have in their respective statements of defence as regards delay in performance or of any defects attributable to the Plaintiff. An opportunity was given by Court ex mero motu on equitable considerations arising from the correspondence, although the Court was not of the view that the First Defendant has not pursued this opportunity, by delaying making payment, was rejected by the Plaintiff, by failing even to contact the Quarry, who, according to evidence disclosed now had already left the country. "Delay defeats equity". In these circumstances, it would not be appropriate to grant any further adjournment to the First Defendant.

In the present case the sum of money has been provisionally determined. The sum of money deducted from that sum of money is included in the case as evidence of the final sum of money being made of any sum of money by the First Defendant nor the Second Defendant has used any averment in the Plaintiff. The Court has no jurisdiction on material to do so. The First Defendant's offer, and after it was surveyed concerned, try 1 1/2 years ago. It is not possible for the Court to

In the judgment dated 20 October 2000, this Court determined the liability of the Second Defendant as follows-

liability of the Second Defendant

The liability of the Second Defendant does not therefore vis the Plaintiff. But as the First Defendant was liable to the Plaintiff, and the Plaintiff was liable to the First Defendant, the Plaintiff would be indirectly liable to the Plaintiff in respect of which the Second Defendant alone was solely liable.

directly vis a vis the Plaintiff, the Second Defendant would be liable for payments,

The Second Defendant has averred in the defence that it had under the contract with the First Defendant and made all payments. As the averment was not proved in the case, the Court has to proceed on the basis of joint liability.

argued its obligation as due. But as that is not the basis of joint liability,

Hence the provisional award of R274,297.72 was made payable by the First and Second Defendants jointly and severally in terms of the averment in the para 9 of the plaint. Accordingly order is hereby made confirming the award of a sum of R274,297.72 to the Plaintiff, payable by the First and Second Defendants jointly and severally together with 14% interest thereon from 1 December 1994 until payment in full, and costs of action payable by the First Defendant and Second Defendants on a pro rata basis.

Record: Civil Side No 98 of 1998