

CIV/T/307/90

IN THE HIGH COURT OF LESOTHO

In the matter of :

R. & T. BUILDING CONSTRUCTION
(Pty) Ltd..... Plaintiff

and

FRANK M. PHAKISI Defendant

J U D G M E N TDelivered by the Hon. Mr. Justice B.K. Molai
on the 25th day of September, 1991.

In an action wherein Plaintiff herein claims, against Defendant, payment of M16,705-51, interest a tempore morae at the rate of 20% per annum and costs of suit, the former has excepted to the latter's plea on the ground that it lacks averments which are necessary to sustain a defence.

In as far as it is relevant, it is common cause from the pleadings that Plaintiff and Defendant entered into a written agreement whereby the former was to build a residential house for the latter at the cost of M32,637 payable to Plaintiff by the Defendant in instalments upon production of interim certificates issued by the Firm of Househam, McPherson and Henderson Chartered Architects. On 9th August, 1989 the Firm of Architects did issue an interim certificate for the amount

of M16,705-51. The certificate was duly presented for payment to the Defendant who, however, refused/neglected to pay.

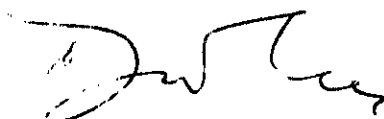
Defendant intimated his intention to defend the action and filed a plea in which he averred, inter alia, that after they had entered into the first agreement the parties concluded, on 16th March, 1989, a second written agreement which altered the first one in that the construction work was no longer to be done by the Plaintiff but by a certain subcontractor with material supplied by the Defendant himself, Sunrise Enterprise (Pty) Ltd and Federated Timber Ltd. When on 9th August, 1989 the Architects issued the interim certificate for payment of the M16,705-51, the position had, therefore, changed in that Defendant was then not indebted to Plaintiff in the amount claimed or at all. He was, presumably, indebted to the Subcontractor. Consequently, Defendant prayed for the dismissal of Plaintiff's claim, against him, with costs.

It seems to me that the gist of Defendant's contention in his plea is that by the second agreement the parties have agreed that as the construction work was to be done by the subcontractor, and not the Plaintiff, Defendant had to make payment to the former and not the latter. This is, of course, in conflict with the Plaintiff's particulars of claim according to which payment of the M16,705-51 is owed to him by

the defendant in terms of the first contract i.e. the so-called second contract has not altered the position that payment has to be made to him.

Whether or not by the so-called second contract of 16th March, 1989 the parties did, in fact, agree as contended by the Defendant is a matter to be properly established by evidence at the trial. If Defendant were to establish his contention at the trial that would, in my view, be a good defence. Plaintiff cannot, therefore, be heard, at this stage, to say the plea raised by the Defendant lacks the averments which are necessary to sustain a defence.

In the result, I am not convinced that the exception was well taken in this case. It is accordingly dismissed with costs.



B.K. MOLAI

JUDGE.

25th September, 1991.

For Plaintiff : Dr. Tsotsi

For Defendant : Mr. Pheko.