IN THE HIGH COURT OF LESOTHO

(COMMERCIAL DIVISION)

HELD AT MASERU **CCT/0218/2024**

In the matter between:

P T RATALANE CONSTRUCTION (PTY) LTD **PLAINTIFF**

AND

MINISTRY OF AGRICULTURE AND F FOOD SECURITY **1ST DEFENDANT**

THE ATTORNEY GENERAL **2ND DEFRENDANT**

Neutral Citation: P T Ratalane Construction (Pty) Ltd v Ministry of Agriculture and Food Security [2024] LSHC 251 Comm. (11 DECEMBER 2024)

CORAM: **MOKHESI J**

HEARD: **11 SEPTEMBER 2024**

DELIVERED: **11 DECEMBER 2024**

SUMMARY

CIVIL PRACTICE: *Application for summary judgment- The defendant having succeeded in disclosing the material facts on which it relies for its defence, the application dismissed.*

ANNOTATIONS

LEGISLATION

High Court Litigation Rules, 2024

CASES

Lesotho

Leen v First National Bank (Pty) Ltd LAC (2015-2016

South Africa

Joob Joob Investments (Pty) Ltd v Stock Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA)

Morris v Autoquip (Pty) Ltd 1985 (4) SA 398 (W) at 400

Muller and Others v Botswana Development Corporation 2003 (1) SA 561 (SCA

JUDGMENT

[1] **Introduction**

This is an application for a summary judgment for payment of outstanding sum of money which the plaintiff claims it is owed by the 1st defendant consequent to it engaging in construction work at Mafura in the district of Quthing. The parties will be referred to as in the main action.

[2] On the day of hearing the 1st defendant had only filed its opposing affidavit, there was no heads of argument filed, and the reason which was advanced for such remissness by Adv. Mphoso for the defendants was that she thought it was enough that the 1st defendant filed its opposing affidavit, without the need to file its of heads of arguments. This is quite a bizarre explanation to make and one which exposes disturbing inexperience on the part of counsel in civil procedure. A worrying fact given the seriousness of the matters which are dealt with by the office of the Attorney General. For this remissness of the part of the 1st defendant's counsel, the court made it plain that should it succeed in resisting the application it will be deprived of its costs. Given that the matter had been set down for hearing, I proceeded to hear the matter, as even in the absence of the defendant's counsel I would have been obliged to consider the opposing affidavit filed of record, and not to disregard it (**Morris v Autoquip (Pty) Ltd 1985 (4) SA 398 (W)** at 400).

[3] **Background**

The 1st defendant had issued an invitation to prospective tenderers to bid for construction of a new shearing shed at Mafura in the district of Quthing. The initial value of the bid was M1,343,024.28 but was later varied by M255,330.00 to be M1,598, 354.28. The plaintiff became a successful tenderer, and consequently, a contract was concluded between the parties on 16 September 2019. It should be stated that the contract incorporated bills of quantities. The plaintiff was duly paid for the work done but for the last invoice which it issued on 02 August 2023. The non-payment of this last invoice catalysed the institution of the main action.

Respective Parties' cases

[4] The plaintiff's case is that it carried out the work in terms of the specifications and issued the invoice which the 1st defendant failed to honour for no reason despite several demands, hence the institution of the main action. The summons was issued before the advent of the Civil Litigation Rules 2024, and so the case had been pleaded in the manner which was permissible in terms of the now-repealed High Court Rules. I deal with this aspect in paragraphs [6] to [8] below.

[5] The 1st defendant's opposing affidavit was deposed to by Mr Thabiso Motsoasele who identifies himself as the former project supervisor whose duties included inspection of works done by the contractors and advising the Clerk of Works on the status of the work done for payment certification. He avers that in terms of the agreement the plaintiff was to be paid for the work done according to specifications agreed upon by the parties after the project manager would have determined the value of the work done. The deponent avers that upon inspection of the work it was discovered that the work done was not of the agreed standard as the doors could not open and close properly

and had leakages; the raised floor lack horizontality as the specified number of lipped channels was not used. These defects were brought to the attention of the plaintiff and was instructed to remedy the defects. The plaintiff did not remedy the defects, and therefore payment certificate could not be issued.

[6] **The Law and discussion**

As already stated, this application was lodged before the commencement of the High Court Litigation Rules, 2024. Rule 195 of the same rules provides the following dictates with regard to dealing with matters such as the present:

> *"(1) Despite the repeal of the rules listed under rule 196*
>
> *(a) Anything done under the repealed rules which could have been done under the corresponding rule of these rules, is deemed to have been done under such corresponding rule;*
>
> *(b) a case that has been filed in the registry or has been allocated to a presiding Judge under the repealed rules continues under these rules, but if there is any uncertainty in this regard, the presiding Judge may direct the appropriate procedure to be followed after considering representations from the parties; and*
>
> *(c) …."*

[7] The current application having been lodged in terms of the old rules, present a challenge when it is determined in terms of the new rules because of the new developments added thereto. For example, in terms of the old rule the plaintiff was merely required in the affidavit accompanying the application to "swear

positively to the facts verifying the cause of action and the amount, if any claimed and such affidavit must state –

(a) that in the opinion of the deponent the defendant has no bona fide defence to the action and

(b) that entry of appearance has been entered merely for the persons of delay."

[8] The application would have been lodged after the defendant entered appearance to defend. In terms of the new rules, application for a summary judgment is lodged after the defendant would have filed or delivered an answer – an equivalent of the plea. Apart from swearing positively to the facts, verifying the cause of action and identifying any point of law relied upon and the facts forming the basis of the claim, the plaintiff, importantly, now, is required to "explain briefly why the answer does not raise any issue for trial" not merely to make a formulaic averment that in his/her opinion the respondent has no *bona fide* defence. This formulaic expression of opinion for purposes of judgment was based on the facts alleged in the summons not on evidence. The mischief that was sought to be addressed by this new development was so that the defendant may not raise defences in the application for a summary judgment that are not pleaded in the answer hence the requirement in terms of Rule 137(3) (b) that the defendant who resist the application must "disclose fully the nature and grounds of the defence." What is stated in the opposing affidavit must be consistent with what is pleaded in the answer, so that the plaintiff may be able to comply with rule 137 (2)(b) by explaining why the answer does not raise any issue for trial. In the present matter, as already stated the application was lodged before the plea could be delivered and for this reason the applicant did not explain but merely stated

its opinion that the defendant does not have a *bona fide* defence. These are the difficulties of complying this savings and transitional rule in the present matter. For present purposes I am going to assume that the rules have been complied with.

[9] The rational for a summary judgment procedure is trite. It is meant to ensure that the plaintiff can attain an expedited justice against the defendant who does not have a triable issue or defence. It is however, not meant to shut the door in the face of the defendant who has a triable issue or a defence which is good in law. The court must first determine whether the defendant has disclosed the nature and grounds of its defence and the facts on which it is based, and secondly whether the defence is *bona fide (***Joob Joob Investments (Pty) Ltd v Stock Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA)** at 11G – 12D): **Leen v First National Bank (Pty) Ltd LAC (2015-2016)** para. 22.

[10] The plaintiff's cause of action is the work done for which the 1st defendant allegedly refuses to pay. On the one hand the 1st defendant avers that the plaintiff did a shoddy work in respect of which it was notified to correct but failed to do so. Reference was made to leakages, door not opening and closing properly, and raised floor not being horizontal. I am satisfied that the 1st defendant has disclosed fully the nature and grounds of defence, and the material facts relied upon. It should be recalled that in this type of application the court is not required to find that the defendant's defence is likely to succeed or fail. What is required is that it must be *bona fide*. (**Muller and Others v Botswana Development Corporation 2003 (1) SA 561 (SCA)** at para. 12.

[11] In the result the following order is made:

(1) The application is dismissed with no order as to costs.

MOKHESI J

For the Plaintiff: **Ms Chabana**

For the 1st and 2nd Defendants: **Adv. Mphoso**