

LESOTHO / JUDGMENT

Condo Construction (PTY) LTD V
BRixs Development Company
(PTY) LTD (CCT/0379/2024)
[2025] LSHC 197 (14 August 2025)
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COURT
High Court

CASE / FILE NUMBER
CCT/0379/2024

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IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)
HELD AT MASERU
CCT/0379/2024

In the matter between: CONDO CONSTRUCTION (PTY) LTD
PLAINTIFF
AND
BRIXS DEVELOPMENT COMPANY (PTY) LTD
DEFENDANT
Neutral Citation: Condo Construction (Pty) Ltd v Brixs Development Company
(Pty) Ltd [2025] LSHC 197 Comm. (14 AUGUST 2025)

CORAM: MOKHESI J

HEARD: 12 JUNE 2025
DELIVERED: 14 AUGUST 2025

SUMMARY
CONSTRUCTION LAW AND CIVIL PRACTICE: Application for a summary
judgment where the respondent had issued a subcontractor with a certificate of
practical completion of work and later turning around to contest that it does not
owe
the plaintiff any amount due to what it describes as a substandard work done by it-
Held, that the defendant failed to disclose a bona fide defence which is also good in
law- Application for a summary judgment succeeds.

ANNOTATIONS
Legislation
High Court Civil Litigation Rules 2024
Books
Stanley H. Segal, Finsen's The Building Contract, A Commentary on the JBCC
Agreements 3rd ed. (Juta)

Cases

Lesotho

Commander Lesotho Defence Force & Another v Sekoati LAC (2007-2008) 303

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

P T Ratalane Construction (Pty) Ltd v Ministry of Agriculture and Food Security

[2024] LSHC 251 Comm (11 December 2024)

South Africa

Delfante v Delta Electrical Industries Ltd 1992 (2) SA 221 (C)

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

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

Ocean Diner (Pty) Ltd v Golden Hill Construction CC 1993 (3) SA 331 (AD)

S. A. Builders and Contractors v Langelier 1952 (3) SA 837 (N)

Smith v Mouton 1977 (3) SA 9 (W)

Ward v Sulzer 1973 (3) SA 701 (A)

England

Dawnays Ltd. v F. G. Minter Ltd., (1971) 2 All E. R. 1389 (C. A.)

JUDGMENT

[1]

Introduction

This is an application for a summary judgment. The parties will be referred to as they are in the summons. The plaintiff is claiming a sum of money which it claims it is owed to it by the defendant after successfully completing auxiliary sub-contract work in terms of the written contract between the parties. The plaintiff's cause of action is based on the certificate of final completion of work.

[2] Background On or around 21 March 2023 the plaintiff and the defendant concluded a written agreement – auxiliary sub-contract – in respect of construction of sewer line, retaining wall and storm water control channels at the Maputsoe Border Gate control on behalf of the Road Fund. The plaintiff performed in terms of the contract and was paid accordingly leaving a balance of M59,307.91 (Fifty-nine Thousand, Three Hundred and Seven Maloti Ninety- one Lisente) outstanding inclusive of the retention amount as of 01 October

2023. This is the amount that is being claimed in these proceedings, plus ancillary reliefs.

[3] After the defendant was served with the summons it filed its plea and later, on 12 September 2024, it filed its counterclaim. The current proceedings are not concerned with the counterclaim but a summary judgment in respect of the main action. After the defendant had filed its plea, the plaintiff filed the current application for a summary judgment. In its plea, the defendant raises a defence that it does not owe the plaintiff the amount it is claiming because the latter failed to complete the work it was contracted to do, and/or did a shoddy work. At paragraph 2 of the plea, it pleads that: “AD Para.3 Thereof AD para 3.1 and

3.2 Contents therein are partly admitted save to aver that the initial contract entered into was altered as a result of the plaintiff's breach of contract. AD Para. 3.3 Contents therein are outright denied as to date the plaintiff has failed to complete the work for which it was contracted to do. On several occasions the Defendant demanded from the Plaintiff to complete its task and abide by the contract but failed to do so citing financial setbacks despite the fact that when the contract was concluded it included that it had the requisite financial muscle. What further makes the situation worse is that at a later date the plaintiff maliciously requested that the defendant should issue it with a guarantee letter to submit to the bank so that it could source funds and yet still failed to complete its the (sic) job it was meant to do, despite the assistance given by the Defendant to the Plaintiff at its own request. The Defendant avers that the Plaintiff has never had bona fide intentions to complete its work but has at all times been focused only on receiving payments despite is poor workmanship." [4] I am focusing on the defence as disclosed in the plea because the new Rule 137(2) (b) of the High Court Rules 2024 ordains that in summary judgment applications, the applicant to: "(b)... verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the applicant's claim is based, and explain briefly why the answer does not raise any issue for trial;" (emphasis added) [5] In terms of the new approach ushered in by rule 137, the applicant is not allowed to speculate on the motives of the respondent for filing notice to answer – like in the old rules – without first having had sight of the answer to the claim and the defence(s), if any, which would have been disclosed therein. In *P T Ratalane Construction (Pty) Ltd v Ministry of Agriculture and Food Security* [2024] LSHC 251 Comm (11 December 2024) at para. 8, I explained the rationale for the rule thus: "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. 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." Respective Parties' Cases

- [6] The plaintiff avers that the total claim for work done and agreed upon by both parties was an amount of M159,307.91 (One Hundred and Fifty-Nine Thousand, Three Hundred and Seven Maloti, Ninety-one Lisente) as evidenced by payment certificate for the completion of works (dated 24 August 2023) on site annexed as "Annexure CC1" signed by both representatives of the plaintiff and the defendant. Of this total, the defendant paid only M100,000.00 leaving the balance of M59,307.91. The plaintiff avers that the defendant has always accepted this

amount as owing and even requested sometime to make payment. The plaintiff annexed to its papers a letter from the defendant acknowledging and making an undertaking to the plaintiff to make payment. This letter was in response to the plaintiff's attorneys' letter of demand, and in material respect, it is couched as follows: (It was written on 05 March 2024): "RE: Demand for payment of Amounts Due to Condo Construction (Pty) Ltd Sewer line and storm water drainage job Maputsoe Toll Infrastructure. We are hereby writing this letter in response to the letter dated 20th February 2024. We would like to acknowledge that we owe Condo balance of M59,000.00 as per attached work done and measured to date. It is our intention to pay Condo but at this time and moment we are awaiting our payments from different sources which are due to us and as for the abovementioned project we are still undergoing the final account process which is giving back and forth until today as we speak. We would like to propose to pay Condo on or before the end of April 2024 as to avoid this issue going to the courts of law. P. Moeletsi (signed)"

- [7] The Defendant's case on the other hand is that it does not owe the plaintiff as the payment certificate relied upon by the plaintiff is contested in the counterclaim owing to the latter's alleged shoddy work which caused the project to be unnecessarily extended resulting in penalties being levied against the defendant. The defendant avers that it made the plaintiff aware that they were facing penalties and that payment would be delayed as a result. To proof this the defendant annexed to its papers a list of three defects and the proposed corresponding remedial actions which were contained in letter which it wrote to the plaintiff in which it concluded by saying: "Please be notified that we have the defect liability period up to the end October which we allocate this period up to the end of October to allow you to work on the above-mentioned remedial actions. Subject to the default mentioned above, we are obliged to hold the retention fee at the rate of 5% of your total claim until you rectified all the defaults." [8] Issues for determination
- (i) Whether the application for a summary judgment should succeed. The law and discussion [9] For the reason that the law on summary judgment is trite, I need not spend much time explaining it. In these proceedings 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 it has a bona fide defence (*Leen v First National Bank (Pty) Ltd LAC* (2015-2016) para.22). In summary judgment applications 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).
- [10] As already stated the plaintiff is suing the defendant for the amount owing and acknowledged in The Certificate of Final Completion and acknowledgement of debt made to the plaintiff's attorneys. On 23 August 2023 the defendant wrote a letter to the plaintiff listing three defects and the proposed remedial action and, on the 24 August 2023, both parties' representatives who were the Project Manager and Managing Director of the defendant and plaintiff, respectively, co-signed the said Certificate of Final Completion of work. In terms of

this certificate the defendant bound itself that the works have been sufficiently carried out and that it owed the plaintiff the amount claimed which includes retention amount.

- [11] It should further be stated that on 05 March 2024 – seven months after issuing the certificate of Practical Final Completion – the defendant responding to the plaintiff’s letter of demand acknowledged that it owes the plaintiff the amount claimed and even posited reasons why there was a delay in paying the plaintiff. It even proposed a date on which payment would be made. That undertaking was never fulfilled. There was no mention of the plaintiff’s shoddy work or defects as being the reason for the delay in making payment.
- [12] The defendant seems to be casual with the issue of the Certificate of Practical Completion which it co-signed with the defendant. The legal import of this certificate depends on the interpretation to be placed on the relevant provisions of the contract between the parties (*Ocean Diner (Pty) Ltd v Golden Hill Construction CC* 1993 (3) SA 331 (AD) at 340D). In that case at p. 340D, the court said: “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 contract. 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 to respondent to sue on the certificate [authorities omitted]. However, the certificate is not indefeasible. It is subject to various defences that may be raised in action based on a final certificate.”
- [13] As regards the certificate of final completion, Stanley H. Segal, *Finsen’s The Building Contract, A Commentary on the JBCC Agreements* 3rd ed. (Juta) at p. 176 para. 21.2 states that: “The issuing of a certificate of final completion is an awesome responsibility for a principal agent. He is saying, categorically, that the contractor has done, and satisfactorily done, everything that he undertook to do, and having issued the certificate, he cannot withdraw it or amend it.”
- [14] In the present matter there is no query with the fact that the certificate in issue embodied an acknowledgement by the defendant that the work which the defendant undertook to do was done satisfactorily. The defendant further bound itself that it was obliged to pay the plaintiff the amounts reflected on it. The certificate is conclusive evidence that the works comply with the prescripts of the contract. It also conclusively evinces the value of works and the amount due to the plaintiff.
- [15] It will be observed that the defendant, though not in so many words, it is impugning the certificate on account of what it says is the plaintiff’s non- performance of its contractual obligations by doing sub-par work. This is contrary to the certified completion of work which the defendant signed off in terms of the final certificate. The defendant as the

employer was bound to pay the sum certified (Smith v Mouton 1977 (3) SA 9 (W) at 13 A – D). The certificate has been said to create a debt due and is regarded as the equivalent of cash. See S. A. Builders and Contractors v Langelier 1952 (3) SA 837 (N) at p.841H - 842H. In Dawnays Ltd. v F. G. Minter Ltd., (1971) 2 All E. R. 1389 (C. A.), where Lord DENNING, M. R., said at p. 1393b, when he was dealing with interim certificates- which is applicable with equal force with regard to final certificates-: "An interim certificate is to be regarded virtually as cash, like a bill of exchange. It must be honored. Payment must not be withheld on account of cross-claims, whether good or bad - except so far as the contract specifically provides. Otherwise any main contractor could always get out of payment" (i.e. to a sub-contractor) "by making all sorts of unfounded cross-claims." (see also Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA)) In my judgment the defendant has failed to disclose any bona fide defence which is also good in law.

- [16] Costs The Plaintiff has sought costs on the scale as between attorney and client. It is trite that awarding costs falls within the exercise of the court's discretion and that costs follow the event. Punitive costs on the other hand are awarded by reason of special circumstances which obtain in a particular case (Ward v Sulzer 1973 (3) SA 701 (A)). Stubbornness bordering on vexatiousness and reprehensibility of the part of the litigant may justify an award of costs on this scale (Delfante v Delta Electrical Industries Ltd 1992 (2) SA 221 (C) at 233D-F): See also Commander Lesotho Defence Force & Another v Sekoati LAC (2007-2008) 303 at 309-310).
- [17] In the present matter, historically, the defendant acknowledged that it owes the plaintiff the amount claimed. This acknowledgement was made twice in the form of a certificate of final completion and an acknowledgement of debt made to the plaintiff's attorneys. The defendant even made a proposal for paying this debt on a particular date, which undertaking it failed to meet. It is now raising a defence that it cannot pay the plaintiff because the latter did shoddy work which caused delays to completion of the project. In my view the defendant's conduct taken holistically is frivolous and vexatious justifying this court to exercise its discretion to award costs on a punitive scale.
- [18] In the result the following order is made: (i) Summary judgment is entered in favour of the plaintiff against the defendant for payment of M59,307.91. (ii) Interest on the aforesaid amount calculated at 10.65% a tempore morae from 01 October 2023 to date of final payment. (iii) Costs of suit on attorney and client scale.

MOKHESI J For the Plaintiff: Advocate K. J Selimo For the Defendant: Advocate S. Makara 13

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