IN THE HIGH COURT OF SWAZILAND

Civil case No: 472/2013

In the matter between:

NICO KRIEK CONSTRUCTION (Pty) Ltd **PLAINTIFF**

AND

THEO HLOPHE **DEFENDANT**

Neutral citation: *Nico Kriek Construction (Pty) Ltd v Theo Hlophe (472/2013) [2014] SZHC 76 (3 February 2014)*

Coram: **M.C.B. MAPHALALA, J**

Summary

Building contract – action by Contractor to recover payment in respect of the Penultimate as well as Final Certificate – works not completed as required by the Contract – relevant documents not furnished to the Architects by the Contractor – certificate of completion of Works not issued by Architect – a 'defects' list not prepared and implemented by contractor – notwithstanding the foregoing Retention Fund released by the Architect – Principles governing building contracts explained – held that the defendant has a bona fide defence to the claim – held further that triable issues have been shown to exist – Summary Judgement dismissed with costs and defendant given leave to defend the main action.

JUDGMENT
3rd FEBRUARY 2014

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[1] The parties concluded a written contract on the 3rd October 2011 in Mbabane; the plaintiff was represented by Nico Kriek and the Defendant acted in person. In the contract the plaintiff is referred to as the Contractor and the defendant is referred to as the Employer. A certain firm of Architects by the name of Architects International is appointed and defined as the Architect.

[2] In terms of the contract the plaintiff is obliged to execute, carry out and complete the Works, being the completion of a new ground and lower ground floor extension to the existing residence at portion 651 (a portion of portion 170) Farm 188 Dalriach, in accordance with the directions and reasonable satisfaction of the Architect. The defendant is obliged to make payment to the plaintiff of E1 292 161.28 (one million two hundred and ninety two thousand one hundred and sixty one emalangeni twenty eight cents) or such sum as shall become payable under the contract.

[3] Clause 25.1 of the Conditions provides that the plaintiff is entitled to receive from the Architect interim certificates at intervals not greater than one calendar month, a Penultimate Certificate and a Final Certificate. Each certificate should state the amounts due by the defendant to the plaintiff, which amounts are payable within fourteen (14) days after the date of the certificate. The contract further provides that if payment is not made

within the period of fourteen days, the defendant would be liable to pay the plaintiff interest on the amount due at the rate of 2% greater than the minimum lending rate charged by commercial banks to their clients.

[4] Clause 25.4.4 provides that pursuant to the issue of the Penultimate Certificate, such sum as the Architect shall determine, but not exceeding the amount retained, and that the balance of the Retention Fund shall be included for payment in the Architect's Final Certificate to the extent to which it does not exceed the balance still due on the value of the Works stated in that certificate.

[5] Clause 25.6 provides that where a Penultimate Certificate has been issued and within one month of the issue and provided the Architect has received the documents including a Certificate of Completion of the Works as well as documents relating to the accounts of nominated Sub-Contractors, he shall issue a Final Certificate of the value of the Works executed by the plaintiff.

[6] Clause 25.7 provides that a Final Certificate issued save as regards all defects and insufficiencies in the Works or Material which a reasonable examination would not have disclosed shall be conclusive evidence as to the sufficiency of the said Works and Material and the value thereof.

[7] The Plaintiff alleges that during June 2012, the parties extended the said contract to include an additional sum of E815 231.84 (eight hundred and fifteen thousand two hundred and thirty-one emalangeni eighty four cents). Certificates were issued by the Architect including additional works, which certificates were paid by the defendant (also referred to as the Employer) save for the Penultimate Certificate as well as the Final Certificate. The plaintiff further argues, for purposes of interest, that the minimum lending rate charged by commercial banks in Swaziland is 8.5 percent per annum.

[8] The plaintiff contends, in respect of the first claim, that on the 14th February 2013, the Architect issued the Penultimate Certificate for Works in the sum of E544 331.92 (five hundred and forty four thousand three hundred and thirty-one emalangeni ninety two cents) payable by the defendant to the plaintiff; the certificate reflects on the face thereof, that it is an acknowledgement of debt by the defendant and an undertaking to pay within seven days of the certificate. The Architect duly notified the defendant of the date and amount of the Penultimate Certificate, and, the plaintiff duly presented the said certificate to the defendant for payment prior to the expiry of the fourteen days.

[9] The plaintiff further contends, in respect of the second claim, that on the 7th March 2013, the Architect issued a Final Certificate in respect of the

Works amounting to E27 861.93 (twenty seven thousand eight hundred and sixty one emalangeni ninety three cents); and, that the Architect duly notified the defendant. The plaintiff also contends that it subsequently presented the certificate to the defendant for payment within fourteen days, and that despite demand, the defendant has failed to make payment.

[10] The defendant has filed a notice to defend the action; and, the plaintiff has lodged an Application for Summary Judgment in respect of both claims of E544 331.92 (five hundred and forty four thousand three hundred and thirty-one emalangeni ninety two cents) at an interest of 10.5% per annum calculated from 21st February 2013 to date of payment as well as the claim of E27 861.93 (twenty seven thousand eight hundred and sixty one emalangeni ninety three cents) with interest of 10.5% per annum calculated from 22 March 2013 to date of payment. The plaintiff further seeks an order for costs of suit. The director of the plaintiff Nicolaas Petrus Jacubus Kriek has deposed to an affidavit in support of the application for Summary Judgment, and verifying the cause of action and the amount claimed against the defendant in the Particulars of Claim; he further states that the defendant has no *bona fide* defence to the claim, and, that the defendant has entered appearance to defend solely for the purpose of delaying the action.

[11] The defendant has filed an Affidavit Resisting Summary Judgment. In *limine* he raises an Exception, arguing that the Summons is excipiable on the basis that it is vague and embarrassing as lacking the necessary averments to sustain an action. However, the alleged averments which are lacking have not been specified; hence, this objection falls away.

[12] The defendant further argues, in *limine,* that the deponent to the affidavit in support of the Application for Summary Judgment has no corporate authority from the plaintiff to depose to the affidavit and further substantiate or verify the facts.

[13] The defendant also argues in *limine,* that *ex facie* the papers before Court, it is not certain what amount is claimed. Again, no details appear from the affidavit as to the basis of the preliminary objection.

[14] The defendant argues, in *limine,* that the Application for Summary Judgment is defective in two respects: that no cause of action has been set out in the Summons, and, that the deponent to the affidavit in support of Summary Judgment cannot in law verify the precise amount claimed by the plaintiff on the basis that the amount reflected in the application differs from the amount stated in the summons. It would appear that this preliminary objection is a repetition to those mentioned above.

[15] Lastly, the defendant argues in *limine*, that Clause 26 of the contract provides for a dispute resolution mechanism between the parties relating to work done and calculations of certificates; and, that despite this, the plaintiff has deliberately ignored the agreed forum for dispute resolution.

[16] On the background of the matter, the defendant argues that the contract sum for completion of the Works is E1 292 161.28 (one million two hundred and ninety two thousand one hundred and sixty one emalangeni twenty eight cents), and, that the agreed date of practical completion is the 11th May 2012. He contends that the plaintiff has failed to carry out the work in a professional and workmanlike manner, and, in particular that the Works are characterised by numerous delays, abandonment of the work-site, and, a complete failure to carry out the work in the manner that a reasonable professional construction company would do.

[17] The defendant further contends that the delay in the completion of the house has been occasioned by the plaintiff on the basis that during July 2012, without his consent or that of the Architect, Richard Magnus, the plaintiff deliberately abandoned the contract by removing its workers and tools from the construction site. According to the defendant, he was informed by the Architect that the reason for abandoning the Works is that the plaintiff was working on its construction project called "Ramblers

Restaurant" at the Golf Course in Mbabane; and, that the plaintiff returned to the site after four months on completion of its project in November 2012.

[18] He also argues that despite the plaintiff's return to the site, the Works remain incomplete; and, that notwithstanding this, the Architect has issued a Penultimate Certificate followed by a Final Certificate. He argues that the Architect was not entitled to release the certificates before the Works have been completed. He further argues that the Architect was not entitled to authorise the release of the Retention Amount until a snag list had been successfully attended by the Contractor. Generally, a Retention Amount is the security held by the owner of the project with a view to ensure that the Contractor completes the Works fully and that any problems, which are discovered subsequent to the completion of the project, can be fully attended by the Contractor; and, thereafter, the Retention Fund is released.

[19] The defendant contends that he is saddled with costs necessary to remedy the plaintiff's shoddy workmanship; and, that the release of the Retention Fund is a financial drain to him. He considers the release of Retention Fund as an indication of bias and unfair treatment at the instance of the Architect. However, he does not dispute being indebted to the plaintiff, but he disputes the amount stated in the Summons as well as the certificates signed by the Architect.

[20] On the merits the defendant has argued that the Architect was making a lot of arithmetic errors when issuing the certificates; and, that he has advised him that he has lost all faith and confidence in his ability to manage the project; and, that consequently, he is not acting in his best interest. He further contends that the Architect is over-generous and brazenly unfair in his award for items such as P & G and extension of time awards in favour of the plaintiff. The defendant also contends that in light of the plethora of errors, this Court should not rely on the plaintiff's certificates as well as annexure "NKC2". Similarly, he argues that the plaintiff has deliberately avoided providing this Court with a reconciliation statement accompanying Annexure "NKC2" demonstrating how the amount of E544 331.92 (five hundred and forty four thousand three hundred and thirty-one emalangeni ninety two cents) is made up.

[21] The defendant concedes that he is indebted to the plaintiff in an amount of E275 830.45 (two hundred and seventy five thousand eight hundred and thirty emalangeni forty five cents) being his estimations based on deductions from the amount of E481 905.55 (four hundred and eighty one thousand nine hundred and five emalangeni fifty five cents) for overpayment of P & G in the sum of E143 220.00 (one hundred and forty three thousand two hundred and twenty emalangeni), payment of gas installation in an amount of E11 243.77 (eleven thousand two hundred and

forty-three emalangeni seventy seven cents), reversal for overstatement of payment for painting in an amount of E25 000.00 (twenty five thousand emalangeni), reversal for overstatement of payment of ceiling in an amount of E2 711.66 (two thousand seven hundred and eleven emalangeni sixty six cents) as well as a reversal for the VAT component in an amount of E23 899.63 (twenty three thousand eight hundred and ninety nine emalangeni sixty three cents). He denies any indebtedness for the amount claimed by the plaintiff in the Summons as reflected in the Penultimate Certificate described as annexure "NKC2".

[22] The defendant also argues that the Architect has failed to explain to him why he awarded hefty amounts as P & G for a project that was badly supervised and for a period when the plaintiff was not on site to justify the award. He argues that the plaintiff has failed to explain why he did not proceed with the arbitration procedure knowing that there was a dispute existing between the Contractor and Employer. He concedes that the Architect did prepare a report acknowledging a dispute but he did not take the matter further. He refers the Court to annexure "NKC9" which sets out the nature of his complaints.

[23] The plaintiff has filed a replying affidavit in which it acknowledges the concession made by the defendant that it is indebted to the plaintiff in the

sum of E275 840.34 (two hundred and seventy five thousand eight hundred and forty emalangeni thirty four cents). It is common cause that on the 5th July 2013 Justice Mamba granted Summary Judgment for the admitted amount inclusive of interest at the rate of 10.5% per annum a *tempore morae*; the defendant was ordered to bear wasted costs for the day, and, the matter was postponed to the 26th July 2013 in respect of the balance of the claim.

[24] The plaintiff denies that the Summons is excipiable and argues that the defendant has made a mere bald averment of denial without evidence in support thereof. It further argues that the deponent has been duly authorised by the plaintiff company to depose to the founding affidavit by means of a written resolution made by the plaintiff marked as annexure "NKR". The plaintiff further denies that the amount claimed by the plaintiff is uncertain, and, argues that the amount claimed is based on the two certificates attached to the Summons.

[25] The plaintiff concedes that paragraph 26 of the contract provides for an alternative dispute resolution mechanism; and that such a decision is final and binding upon the parties unless the Contractor, in writing, contest the determination of the Architect or unless the Architect within fourteen days of a written request by the Contractor or Employer fails to give a written

decision, in which case, the matter is referred to arbitration. The plaintiff contents that as the Contractor, it does not contest such a decision nor is it alleged that the defendant as the Employer has requested in writing, a written decision which was not given. The plaintiff argues that the arbitration procedure does not come into operation in the present circumstances; and, that arbitration does not oust the jurisdiction of the High Court.

[26] The plaintiff contends that the Architect's Certificates contain clear statements at the conclusion thereof that: "...and accordingly this Certificate is an Acknowledgement of Debt by the Employer to the Contractor and promise by the Employer to pay the amount of this Certificate to the Contractor, at the Contractor's address as set out above, within seven days of the issue of this Certificate, unless otherwise stated in the contract." To that extent the plaintiff argues that the Architect acts as the agent of the defendant as Employer and that the Certificates constitute unequivocal written Acknowledgments of Debt by the defendant.

[27] With regard to the Penultimate Certificate, the plaintiff concedes that the Certificate cannot be regarded as conclusive evidence of the sufficiency of the Works and Materials or of the correctness of their value; and, that it creates a debt due and affords the Contractor a distinct cause of action in

respect of which he could sue immediately without going beyond the Certificate.

[28] With regard to the alleged defective workmanship and undue delays, the plaintiff contends that these factors do not constitute a defence to a Certificate, and, that the Employer's remedy would be a claim or counter-claim for damages against the Architect. The plaintiff argues that the defendant has failed to raise a counter-claim in this regard but has merely alleged that he is entitled to deductions from the amounts stated in the certificates. The plaintiff argues that this does not constitute a valid defence to an Architect's certificate.

[28] The plaintiff contends that a Final Certificate is not open to attack on the basis of erroneous reports by the agents of an Employer or the negligence of his Architect. Similarly, the plaintiff argues that a failure by the Employer's Architect to properly scrutinize the claims put forward by the Contractor and to rectify any errors or his negligence in this regard before issuing the certificate does not constitute a defence to an action based on the certificates; and, that such certificates can only be attacked on the basis of fraud, collusion or undue influence.

[29] The plaintiff contends that the Scope of Works was extended significantly in excess of 40% which necessitated and justified the extension of time; and, that the defendant has failed to disclose this fact which is material. The plaintiff contends that the defendant has previously honoured the Architect's Certificates and was satisfied with both quality and progress during the majority of the execution of the Works until the Penultimate and Final Certificates were issued on the 14 February 2013 and 7 March 2013 respectively that the defendant refused to pay.

[30] The plaintiff argues that the defendant has failed to disclose the instruction it gave to the plaintiff in November 2012 not to complete the Works. It further contends that it was penalised for delays even though the delays were caused by the extension of the Scope of Works; and, that it considered the Architect's assessment of the extension of time with costs (P & G's) as too low, and the penalties too high, but that it accepted the Architect's opinion as well as his calculations and certificates.

[31] The plaintiff denies having abandoned the contract or the site as alleged; however, it admits involvement in the construction of Ramblers Restaurant. In the absence of an affidavit deposed by the Architect, the plaintiff argues that any reference by the defendant to what he is alleged to have been told by the Architect constitutes hearsay evidence. The plaintiff reiterates that

it was instructed by the defendant that the Works should not be continued; and, further denies that its workmanship was shoddy or defective and challenges him to produce evidence to the contrary.

[32] The plaintiff reiterates that the Architect is the Agent of the defendant and that the defendant is bound by the certificates and the release of retention money. The plaintiff contends that if the defendant is dissatisfied with the performance of the Architect, his remedy is to institute legal proceedings against him for damages. However, the plaintiff insists that any wrongdoing committed by the Architect is not a defence to the claim. It concedes that there was one arithmetic error in an early valuation which was carried forward to a certificate but argues that it was rectified by the Architect after the defendant had raised the error.

[33] With regard to arbitration, the plaintiff contends that the defendant has no right in terms of the arbitration clause to request arbitration, and, that a referral to arbitration would only come into operation once the plaintiff as the Contractor, and not the defendant as Employer, disputes the decision of the Architect, or where either party has in writing, requested a decision which has not been forthcoming. The defendant contends, however, that there has been no formal dispute raised by the plaintiff concerning the Architect's decision, or any written request by either party for a decision.

[34] The plaintiff emphasises that allegations of error or negligence or defective workmanship or disputes as to the exact amount do not constitute valid defences to a claim based on the certificates. However, the plaintiff concedes that there is a substantial breakdown in the working relationship between the defendant and the Architect. The plaintiff attributes the cause of the breakdown to the defendant by effecting constant changes to the Works such that the power point had to be moved three times, and, the gas points move regularly. The plaintiff further argues that the defendant wanted a sound system once the walls had been plastered, and, that delays arose due to non-availability of fixtures and fittings. The plaintiff further complained that the defendant directed that no work should be done before 9 am on the basis that his privacy was being compromised by having people on site at that time.

[35] The respondent in his Affidavit Resisting Summary Judgment has argued that the Application for Summary Judgment is defective on the basis that the Summons does not disclose a cause of action. Furthermore, that there is uncertainty as to the precise amount being claimed whether it is the amount reflected in the Summons or in the Application. The amount claimed for the Penultimate Certificate is reflected in the Summons as being E544 331.92 (five hundred and forty four thousand three hundred and thirty-one emalangeni ninety two cents); and, the amount claimed for the

Final Certificate is reflected in the Summons as being E27 861.93 (twenty seven thousand eight hundred and sixty one emalangeni ninety three cents). In the circumstances there is certainty as to the amount claimed; clearly, the amount reflected in the Application for Summary Judgment under claim 'A' is a typographical error; however, this error should not render the Summary Judgment Application defective.

[36] The respondent further argues, in *limine,* that the Summons is excipiable on the basis that it is vague and embarrassing as lacking the necessary averments to sustain an action. However, it is apparent from the Summons that the cause of action is based on a written contract in which the rights and obligations of the parties are enshrined. In addition the plaintiff has pleaded that it is suing the defendant on the basis of the certificates issued by the Architect pursuant to the performance of its obligations in terms of the contract. The Summons also discloses that the defendant has acted in breach of the contract by failing to make payment of the amounts reflected on the certificates. The amounts claimed are clearly set out in the Summons and corresponds with the amounts in the certificates. For these reasons, this point of law cannot succeed.

[37] The defendant further argues, in *limine,* that the deponent in the affidavit in support of an Application for Summary Judgment, Nicolaas Petrus Jacobus

Kriek, in so far as he was acting on behalf of a juristic entity did not have corporate authority authorising him to depose to the affidavit and substantiate or verify the facts in the affidavit. However, this defect has since been rectified on the basis of the resolution of the Board of Directors of the plaintiff taken at a meeting held in Mbabane on the 11th March 2013. In that meeting it was resolved that the plaintiff company institutes legal proceedings against the defendant arising from the building agreement between the parties. It was further resolved that the deponent Nicolaas Petrus Jacobus Kriek is authorised to sign any documentation and depose to any affidavit in order to give effect to the said resolution. The said deponent is the Managing Director of the plaintiff.

[38] The defendant also argued, in *limine,* that Clause 26 of the contract provides for a dispute resolution mechanism which the plaintiff has failed to invoke. He contends that prior to the enrolment of this application, there existed a dispute between the parties relating to work done and calculation of certificates. Clause 26 provides, inter alia, that if any dispute arises between the Employer or the Architect on his behalf and the Contractor, then the Architect shall determine such disputes by a written decision given to the Contractor and that such decision shall be final and binding on the parties unless the Contractor within fourteen days of receipt thereof by written notice to the Architect disputes the decision, 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, such dispute shall be referred to arbitration. It is common cause that the plaintiff as Contractor did not contest the Architect's decision and neither of the parties made a written request for the written decision of the Architect which was not given.

[39] The dispute which is envisaged may have arisen either during the progress or after completion of the Works or after the determination of the employment of the Contractor, abandonment or breach of the contract, as to the construction of the contract, or as to withholding by the Architect of any certificate to which the Contractor may claim to be entitled or as to any matter arising under the contract.

[40] The plaintiff is applying for Summary Judgment on the basis that the defendant has no *bona fide* defence to the action; it has further alleged that the defendant has entered appearance to defend solely for the purpose of delaying the action. Incidentally the plaintiff alleges and relies on a statement appearing at the bottom of each certificate to the effect that "the certificate is an Acknowledgment of Debt by the Employer to the Contractor and promise by the Employer to pay the amount of this

certificate to the Contractor, at the Contractor's address as set out above, within 7 days of the issue of this certificate".

[41] Rule 32 (2) of the High Court Rules provides that Summary Judgment is competent to such claims in the Summons based on a liquid document, for a liquidated amount in money, for delivery of specified movable property, or ejectment together with any other claims for interest and costs.

[42] In the case of *Fathoos Investments (Pty) Ltd v. Misi Adam Ali* Civil Appeal Case No. 49/2012, I had occasion to state the following at para 31 and 32:

> **"31. A liquid document is one in which the debtor acknowledges in writing over his signature, or that of his authorised agent, his indebtedness in a fixed and certain sum of money. A claim is considered to be for a liquidated amount in money if it is based on an obligation to pay an agreed sum of money or is so expressed that the ascertainment of the amount is a matter of mere calculation. See *Herbstein & Van Winsen*, The Civil Practice of the Supreme Court of South Africa, 4th edition, *Van Winsen et al*, Juta publishers, 1997 at pages 435-436.**
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> **32. The purpose of the summary judgment procedure is to enable a plaintiff with a clear case to obtain swift enforcement of his claim against a defendant who has no real defence to that claim. See *Herbstein & Van Winsen* (supra) at page 434-435."**

[43] Summary judgment is not competent where the defendant can show by affidavit that he has a *bona fide* defence to the claim or that there is an issue or question in dispute which ought to be tried. Rule 32 (4) of the High Court Rules provides the following:

> **"32. (4) (a) Unless on the hearing of an application under sub-rule (1) either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of the claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.**
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> **(b) The Court may order, and subject to such conditions, if any as may be just, stay execution of any judgment given against a defendant under this rule until after the trial of any claim in reconvention made or raised by the defendant in the action.**
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> **(5) (a) A defendant may show cause against an application under sub-rule (1) by an affidavit or otherwise to the satisfaction of the Court and, with the leave of the Court the defendant may deliver an affidavit in reply.**
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> **(b) Sub-rule (3) (b) applies for the purpose of this sub-rule as it applies for the purposes of that sub-rule.**

(c) The Court may give a defendant against whom such an application is made leave to defend the action with respect to the claim, or the part of a claim, to which the application relates either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit."

[44] The Supreme Court in the case of *Fathoos Investments (Pty) Ltd and Two Others v. Mini Adams Ali* (supra) at para 34-37 approved and applied the cases of *Bank of Credit and Commerce International (Swaziland) Ltd v. Swaziland Investment Corporation Ltd and Another* 1982-1986 SLR 406 (HC) at 407, *Maharaj v. Barclays bank* 1976 (1) SA 418 (A) at 426 as well as *Joob Joob Investments (Pty) Ltd v. Stocks Mavundla Zek Joint Venture* 2009 (5) SA (1) SCA at para 32-33, as reflecting the law in this country.

[45] *Justice Dunn* in the case of the *Bank of Credit and Commerce International (Swaziland) Ltd v. Swaziland Consolidated Investment Corporation Ltd and Another* (supra) at 407 said the following:

" ... it is not enough for a defendant to simply allege that he has a *bona fide* defence to the plaintiff's action. He must allege the facts upon which he relies to establish his defence. When this had been done, it is for the Court to decide whether such facts, if proved, would in law constitute a defence to the plaintiff's claim, and also whether they

satisfy the Court that the defendant in alleging such facts is acting *bona fide*."

[46] *Cobert JA* in the case of *Maharaj v Barclays National Bank* 1976 (1) SA 418 (A) at 426 stated the following:

> **"Accordingly, one of the ways in which a defence may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is (a) whether the defendant has fully disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters, the Court must refuse summary judgment, either wholly or in part, as the case may be. The word 'fully'... connotes, in my view, that while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence."**

[46.1] The decision in the case of *Maharaj v. Barclays National Bank* (supra) was further approved and applied by the Supreme Court of Swaziland in the

case of *Variety Investments (Pty) Ltd v. Motsa* 1982-1986 SLR 77 (CA) at 80, as reflecting the law in this country.

[47] In the case of *Fathoos Investments (Pty) Ltd and Two Others v. Misi Adam Ali* (supra) at para 36 and 37, I had this to say:

> **"36. Over a long period of time, our Courts have consistently regarded the summary judgment procedure as stringent and extraordinary since it allegedly closes the doors of the Court to the defendant and permits a judgment to be given without a trial. However, the Supreme Court of Appeal of South Africa has shifted from that original position for the better and limited its focus in ensuring that a defendant with a triable issue is not shut out; in addition, whether or not the defendant has a *bona fide* defence to the action. This development is welcome since it has the capacity to nourish, enhance and improve our jurisprudence for the better.**
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> **37. This trend is apparent in the case of *Maharaj* (supra) as well as that of *Joob Joob Investments (PTY) Ltd v. Stocks Mavundla Zek Joint Venture* 2009 (5) SA (1) SCA at para 32-33. In the latter case *Navsa JA* stated the following:**
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> > **"The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of his/her day in Court. After almost a century of successful applications in our Courts, summary**

> **judgment proceedings can hardly continue to be described as extraordinary. Our Courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out....**
>
> **Having regard to its purpose and its proper application, summary judgment proceedings only hold terror and are drastic for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule as set out with customary clarity and elegance by *Corbett JA* in the *Mahara*j case at 425 G- 426 E.”**

[48] Clause 25.3 provides, *inter alia*, that the Architect shall, concurrently, with each certificate issue to the Contractor, a detailed statement in support of the certificate. It is apparent from the evidence that Claim A relating to the Penultimate Certificate is based on certificate No. 8 which is for the amount of E544 331.92 (five hundred and forty-four thousand three hundred and thirty-one emalangeni ninety two cents). The detailed statement in support of Certificate No.8 reflects that the Architect has made deductions in favour of the defendant for E99 000.00 (ninety nine thousand emalangeni) as well as deductions for an overpayment made by the defendant to the plaintiff of E19 000.00 (nineteen thousand emalangeni). The Architect concludes that the amount payable by the defendant is E426 331.92 (four hundred and twenty six thousand three hundred and thirty-one emalangeni ninety two

cents). It is further apparent from the evidence that the Architect has certified two amounts as being due, namely, the amount of E544 331.92 (five hundred and forty-four thousand three hundred and thirty-one emalangeni ninety two cents) appearing in the Penultimate Certificate and the amount of E426 331.92 (four hundred and twenty six thousand three hundred and thirty-one emalangeni ninety two cents) appearing in the Reconciliation Statement.

[49] Legally, and in terms of Clause 25 (3), the amount reflected in the Certificate should be similar to the amount reflected in the Reconciliation Statement. A failure to do this creates a dispute which renders the Certificate an illiquid document; and, ultimately Summary Judgment becomes not competent. The plaintiff does not deny the existence of arithmetic errors in the calculations of the Certificates but argues that same does not constitute a defence.

[50] The contract between the parties provides that its object is "the construction to successful completion of the Works in accordance with the drawings and specification describing the Work to be done and prepared by the Architect". The plaintiff does not deny that the Works were not completed as required by the contract. It is against this background that the defendant argues that the Architect was not entitled in the circumstances to submit the

Final Certificate and further release the Retention amount. On the other had the plaintiff argues that it was instructed by the defendant in November 2002 not to complete the Works; however, when considering that the contract between the parties is written, no oral variation of the contract is permissible.

[51] Clause 10.2 of the contract provides that the adjustment and valuation of the Works shall be completed on or before the expiry of three months after practical completion of the Works, and, that all relevant documents shall be furnished to the Architect by the Contractor. Once the Works are completed, a 'defects list' is prepared, and, Clause 13.4 provides that when, in the opinion of the Architect, the work specified in the defects list has been completed, he shall issue a Certificate of Completion of Works. Thereafter, the Architect shall issue a Final Certificate of the value of the Works executed by the Contractor.

[52] The defendant argues that the plaintiff was not entitled to an award of E143 000.00 (one hundred and forty three thousand emalangeni) for preliminaries and generals (P & G's) on the basis that these items are management fees paid to a Contractor as the construction progresses. To that extent, the defendant argues that the plaintiff is not entitled to such payment on the basis that the plaintiff abandoned the construction site for a

period of four months with all workers and equipment removed from site. The plaintiff denies this; however, it concedes that during the alleged period, it was involved in the construction of Rambler Restaurant as alleged by the defendant. In the circumstances there is a dispute not only whether or not the plaintiff was entitled to the amount of E143 000.00 (one hundred and forty three thousand emalangeni) but also whether the plaintiff abandoned the site causing a delay in the construction of the Works.

[53] The plaintiff contends that the defendant should not complain about the arithmetic accuracy of the Certificates, the delays in the completion of the Works or its workmanship or certain payments authorised by the Architect to the plaintiff which the defendant had not claimed on the ground that the Architect is the agent of the defendant. However, it is trite that an agent has to act in the best interest of his principal. Furthermore, it is common cause that the relationship between the plaintiff and the Architect was subsequently not good; and, the defendant had advised the Architect on the 21st February 2013 in terms of annexure "NKC6" as follows:

> **"….**
>
> **The best thing to do for me now, is nothing. I therefore will do nothing, until sometime that I am forced to defend myself. There are other errors that I can harp on about (the 148 K is the most recent), but I will not. I fail to see why you insist on the certificate's rigor**

under the circumstances. I have made my objections and have clearly articulated what I dispute (your generosity on the EOT claims and time). Your failure to capture the true picture of this joke of a project, to the extent that you are granting moneys not claimed is most puzzling. So let's stop this pointless exchange until such time that a different, fairer process is afoot. I do not believe you are acting in my best interests at this time.

As I told you before I have had enough, if it takes a lawsuit to show that I am not prepared to reward the Contractor for their atrocious behaviour then so be it…."

[54] Similarly, the Architect prepared a report, being annexure "NKC9" acknowledging a dispute, and, in that report, the nature of the dispute is stated as follows: Firstly, the arithmetic accuracy of the valuation of Certificate No. 8 and the challenge of the said Certificate; secondly, the query of the application of what is considered to be excessive profit and attendance on some items; the lack of a formal extension of time award by Architects International for the Contractor for the extended Scope of Works; the lack of application of penalties due to the subsequent damages experienced by him caused by what he believes to be an excessively late completion; the general lack of completion; the lack at the quality of workmanship with specific reference to waterproofing and electrical installations, and that the Standard Defects Liability Period may not be sufficient to bring these possible latent defects to light.

[55] The defendant further argues that the Architect was biased towards him in the following respects: firstly, the numerous and constant mathematical errors made by the Architect in preparing payment certificates which had the tendency to reward the plaintiff to his prejudice as he had to pay all these amounts; secondly, the release of the retention prior to the Completion of the Works and prior to the expiry of the 'defects liability period' in terms of Clause 13.3, 25.4.3 and 25.4.4; thirdly, the contents of plaintiff's replying affidavit have been sourced from the Architect.

[56] Clause 25.9 of the contract provides that no certificate of the Architect shall of itself be conclusive evidence that any Works or Materials to which it relates are in accordance with this contract. It is against this background that both the Penultimate and Final Certificates cannot be conclusive evidence that any Works or Materials to which it relates are in accordance with the contract in circumstances where a dispute arises.

[57] It is apparent from the evidence that the Penultimate Certificate was issued contrary to the provisions of Clause 25.3 which provides that "the Architect shall concurrently with the issue of each Certificate, issue to the Contractor, a detailed statement in support thereof. It is common cause that the Statement issued does not support the Certificate. In the case of the *Portuguese Plastering Contractors (Pty) Ltd v. Bystenski* 1956 (4) SA 812

(W), the Court stated that where an Architect's Certificate has been issued contrary to the provisions of the contract, it is invalid and not binding on the Employer. The contract provides that after completion of the Works, any defects, shrinkage or other faults due to materials or workmanship not in accordance with the contract has to be made good by the applicant at its own costs, the work to be done in accordance with the written instruction of the Architect.

[58] At page 815 of the judgment, *Kuper J* states the following:

> **"…on 8 February 1956 the parties signed an agreed list of work to be completed by the applicant. A perusal of this list reveals *prima facie* that several items related to work which still had to be completed in terms of the contract and that others had to be done in order to make good defects referred to in Clause 13 (a) of the contract. It would therefore appear that the contract was not completed by the applicant…. If this view is correct it would follow that it was incompetent for the architect to issue a Final Certificate …. Any certificate issued by the Architect before that date would not be conclusive evidence against the respondent that any Works or Materials to which it related were in accordance with the contract and that therefore the respondent would be entitled to raise his claim in reconvention either wholly or in part."**

[59] *McEwan J* in the case of *Smith v. Mouton* 1977 (3) SA 9 (W) at 12-113 states the following:

> **"It should be stated first that there is no special law different from the law relating generally to contracts and their interpretation that applies to building contracts and to Architects' Certificates issued under them. In each case the primary consideration… is the proper interpretation of the particular contract before the Court….**
>
> **The relevant principles are the following:**
>
> **1. The Architect is nominated by the Employer and acts as the Employer's agent for various purposes. These include issuing of "Architect's instructions" in connection with the work, supervising the work and the issuing of Certificates….**
>
> **2. The Employer should be bound by the act of his agent in issuing a Certificate. The position is the same as if the employer himself had signed an acknowledgement of debt…. The exceptions are those that apply generally in the law of agency. For example, the Employer will not be bound if there has been fraud or the Architect has acted in collusion with the Contractor to the detriment of the employer…. The Employer will also not be bound if the agent has exceeded his mandate…. In *Rudland and Son v. Gwelo Municipality* 1933 S.R. 119 at pp 130-131 the engineer issued certificates that were not drawn up in accordance with the terms of the written contract between the parties, but in terms of an oral variation made by the engineer, which he was not authorised to make. The relevant Certificates were therefore held to be invalid…**

3. **The employer is not entitled to dispute the validity of a Final Certificate *vis-à-vis* the Contractor merely because he alleges that the Certificate was given negligently or that the Architect exercised his discretion wrongly. This principle would include cases where the Architect has issued Final Certificates for work which the Employer considers to be defective or which are based on faulty measures or faulty calculations…. Subject to what is said below the same principle would appear to apply in the case of an Interim or Progress Certificate.**

4. **In the absence of any factors referred to in para 2, the Employer is bound to pay the sum certified. This is why in the cases an Architect's Certificate has been said to create a debt due and has been said to be regarded as the equivalent of cash."**

[60] *His Lordship McEwan J* proceed to deal with the legal status of an Interim Certificate; he quoted *Lord Denning M.R. in Dawnays Ltd v. F.G. Minter Ltd* (1971) 2 ALL ER 1389 (CA) at p 1393 where he said:

> **"An Interim Certificate is to be regarded virtually as cash, like a bill of exchange. It must be honoured. 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 by making all sorts of unfounded cross-claims."**

[61] His Lordship then referred to a further principle at pp 13-14 as follows:

> **"5. The fact that the amount of the Certificate is so payable does not mean that the Employer in any case is left without a remedy if the Architect in an Interim Certificate has certified in respect of defective work or has certified too large an amount….**
>
> **…it seems to me that an Interim or Penultimate Certificate, although it must be honoured by payment because it is intended to keep the Contractor in funds so that he can continue the contract, is not intended to deprive the Employer of any rights that he may have arising from defective work or even a temporary overpayment. Primarily therefore it appears that the intention is that all questions as to the making good of defective work and of possible over-evaluation of work done and materials supplied in Interim Certificates should be adjusted before or when a Final Certificate is issued."**

[62] It is apparent from the evidence that the Certificates were not drawn in accordance with the terms of the written contract between the parties. The Penultimate Certificate, I have already demonstrated, is not in accordance with Clause 25.3 of the contract which provides, inter alia, that the Architect shall, concurrently with each certificate, issue to the Contractor, a detailed statement in support thereof; and, this entails that the amount reflected in the Certificate would be the same as the amount reflected in the

Statement. It is common cause that this is not the case in the present matter.

[63] Furthermore, I have demonstrated that the Final Certificate was not issued in terms of the contract in so far as it contravenes Clauses 10.2, 13.4, 25.5 and 25.6. It is common cause that the Works were not completed by the plaintiff. Similarly, there was no adjustment and valuation of the Works "on or before the expiry of three months after practical Completion of the Works"; and all relevant documents were not furnished to the Architect to enable him to effect the adjustment and valuation of the Works.

[64] In addition, once the Works are complete, a 'defects list' is prepared; and, this was not done. Clause 13.4 provides the following:

> **"When, in the opinion of the Architect, the Work specified in the defects list has been completed, he shall issue a Certificate of Completion of Works. The completion of making good defects shall be deemed for all purposes of this contract to have taken place on the day named in the Certificate.**

[65] The Final Certificate was issued contrary to Clause 25.5 which provides as follows:

> **"Upon the issue of the Certificate of Completion of the Works in terms of Clause 13.4 and provided that the Architect has timeously received the documents referred to in Clause 10.2, the Architect shall issue a Final Certificate of the value of the Works executed by the Contractor. Where, however, a Final Certificate cannot be issued because of non-compliance by the Contractor relative to the furnishing of the documents referred to in Clause 10.2, the Architect shall issue a Penultimate Certificate for such amount as he shall determine, which amount shall include the final amounts due to all nominated sub-contractors whose final accounts have been accepted by the Architect."**

[66] Clause 25.6 has also not been complied with. Despite the issue of a Penultimate Certificate, the Architect never received the documents as envisaged by Clauses 10.2 and 25.5. Clause 25.6 provides as follows:

> **"Where a Penultimate Certificate has been issued in terms of Clause 25.5 then, within one month of the issue of such a Penultimate Certificate and provided the Architect had timeously received the documents referred to in Clause 25.5, he shall issue a Final Certificate of the value of the Works executed by the Contractor."**

[67] Clause 25.7 further provides that a Final Certificate should be issued after all defects and insufficiencies had been attended to by the Contractor, but

this was not done. At any rate the plaintiff concedes that the Works were not completed. The defendant further concedes that notwithstanding the non-completion of the Works, the Architect released the Retention Funds. Clause 25.7 provides as follows:

> **"A Final Certificate issued in terms of clauses 25.5 and 25.6, save as regards all defects and insufficiencies in the works or materials which a reasonable examination would not have disclosed, shall be conclusive evidence as to the sufficiency of the said Works, and Materials, and of the value thereof."**

[68] Clause 25.9 provides that no Certificate of the Architect shall of itself be conclusive evidence that any Works or Materials to which it relates are in accordance with the contract. It is for this reason that Clause 25.3 requires the Architect to issue a detailed statement to the Contractor concurrently with the Certificate in support thereof.

[69] I should mention that the judgment of *McEwan J* in *Smith v. Mouton* has been adopted and applied by *His Lordship Justice Mamba* in the case of *Construction Associates (Pty) Ltd v. C.S. Group of Companies (Pty) Ltd* High Court Civil Case No. 3026/2006.

[70] In the circumstances I am satisfied that the defendant has shown on a balance of probabilities that he has a *bona fide* defence to the claim and that triable issues have been shown to exist.

[71] Accordingly, I make the following order:

(a) The application for Summary Judgment is dismissed with costs.

(b) The defendant is given leave to defend the main action.

_____

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

For Plaintiff	Attorney J. Warring
For Defendant	Advocate Flynn
	Instructed by Attorney J. Currie