



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: **657/2023**

In the matter between:

MENZIN (PTY) LTD

Plaintiff/Respondent

and

EDWIN CONSTRUCTION (PTY) LTD

Defendant/Excipient

CORAM: **P R CRONJÉ, AJ**

HEARD ON: **11 AUGUST 2023**

DELIVERED ON: **4 SEPTEMBER 2023**

JUDGMENT BY: **P R CRONJÉ, AJ**

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 9h30 on 04 September 2023.

- [1] The Plaintiff ("Menzin") instituted action against the Defendant ("*Edwin Construction*") and alleges that a written agreement was concluded for internal sewer and water reticulation. Edwin Construction took exception against the

particulars of claim and afforded it an opportunity to remedy the defects. Edwin Construction states that the claim is vague and embarrassing, does not disclose causes of action and that no allegations are made to bring the claim within this court's jurisdiction. Menzin did not address any of the objections and Edwin Construction thereupon filed its exception.

- [2] I pause to state that Menzin's attorneys, Siziba Attorneys, withdrew as attorneys of record and served the withdrawal on 2 August 2023. The Notice of set-down was served on Siziba Attorneys on 8 June 2023 via email. There was no appearance for Menzin when the matter was called.
- [3] Mr Francis Ntsane Menyau eventually arrived and I enquired about his intentions. He indicated that he represents Menzin and that Menzin's attorneys informed him that he must come to Court as the matter is on the roll. He indicated that he intends obtain a new lawyer. I informed him that if Edwin Construction succeeds on any of the grounds of exception, Menzin will still have an opportunity to amend its papers and the doors to Court would not be closed to it.
- [4] He informed me that I may continue to hear the matter and I requested him to provide his full details to Edwin Construction's attorney who was in Court. I thereupon continued to hear the application. Edwin Construction in any event has to convince me that there is a basis for the exception. I refer to the numbers of the grounds as they appear in the exception.
- [5] Menzin refers to four (4) types of work it had to perform in terms of a written agreement which it attaches as Annexure "M1". It alleges that it performed the works and from time to time submitted invoices for the work done.
- [6] It furthermore alleges that on 13 January 2022, it approached Edwin Construction for a contract review and that in pursuance of the review it was revealed that Menzin was underpaid. It claims an amount of **R1 472 094.56**

plus interest and costs.

- [7] Mr K Naidoo, credit to him, who appeared for Edwin Construction, abandoned the first and second grounds of exception.
- [8] The third and fifth grounds of exception can be joined together. Edwin Construction states that no cause of action is disclosed as there is no averment as to how, when and where the works were to be completed or by whom; no averment as to the obligations pertaining to invoicing and/or remuneration is alleged; who would be responsible for remuneration; how and when such remuneration would become due, owing and payable; when, where and how and by whom such works were completed; when, where and in what manner Menzin invoiced Edwin Construction for the works performed; and in what manner Edwin Construction allegedly breached the terms of the agreement.¹ Menzin also fails to plead the exact basis of damages. This has to be read with Rule 18(10) of the Uniform Rules of Court.² Mr Naidoo convincingly dealt with these in his heads and the argument.
- [9] Although it was not taken as a point of exception, paragraph 5 of the particulars of claim refers to the General Conditions of Subcontract 2010, 2nd Edition. The document attached does not carry the same wording. Paragraph 5 may only be a typographical error.
- [10] Paragraph 1 of the General Conditions of Subcontract provides that the subcontract shall be supplemental to an agreement made or deemed to have been made as defined in the Schedule to the documents and for purpose of the subcontract, such agreement shall be called the Main Contract. Clause 12 of

¹ Pleadings, page 83 - 90

² See: *Trope v South African Reserve Bank and Another* 1992 (3) SA 208 (T) at 210 H; See also *Trope and Others v South African Reserve Bank* (641/91) [1993] ZASCA 54; 1993 (3) SA 264 (AD); [1993] 2 All SA 278 (A) (31 March 1993); *Inzinger v Hofmeyr and Others* (7575/2010) [2010] ZAGPJHC 104 (4 November 2010)

the GCCS 2011 provides for valuations and payments and yet again refers to the subcontract and the provisions of the Main Contract. A careful perusal of the document does not make it apparent what exactly the Main Agreement/contract is. Clause 14 also provides that the notifications and claims procedure shall strictly follow the provisions of the Main Contract.

- [11] I am of the view that the third and fifth grounds of exception have to succeed.
- [12] In respect of the first fourth ground of the exception, Edwin Construction states that Menzin failed to plead who the employer is; the basis for the contention that Menzin has a right to a contract review with specific reference to which clause Menzin refers to for such review; and when, where, how and by whom the alleged review assessment and recalculation was conducted. Annexure "M2" is a spreadsheet and not a contract review.³
- [13] Having considered the submissions of Mr Naidoo, a perusal of the particulars of claim and the documentation referred to, I am of the view that the first fourth ground of exception has to succeed.
- [14] The second fourth ground of exception pertains to jurisdiction. It is apparent from annexure "M1" that Menzin has an address in Bloemfontein and it is trite that for the High Court to have jurisdiction, only one element of a contract (conclusion) has to be alleged and/or proven. I am satisfied that on a reading of the contract, Menzin is an *incola* of this Court, and the second fourth ground of exception cannot succeed.

³ *Inzinger v Hofmeyr and Others supra*

[15] Menzin should be afforded an opportunity to remedy the defects in its particulars of claim should it deem it necessary.⁴ I cannot force it to do so and failure to do so may eventually have its claim dismissed/struck out.

[16] Edwin Construction has been substantially successful in its exception and there is no reason Menzin should not pay the costs of the exception.

[17] I therefore make the following order:

ORDER:

1. The exception in respect of the third, first fourth, and fifth grounds of exception succeeds.
2. The Plaintiff is granted opportunity to amend its pleadings within thirty (30) days of receipt of the Order.
3. Plaintiff to pay the costs of the Defendant in respect of the exception.



P R CRONJÉ, AJ

Appearance of the Excipient/Defendant: Adv. K. Naidoo

Hattingh & Ndzabandzaba Attorneys

Bruce Blair Attorneys

Bloemfontein

⁴ See: *Trope and Others v South African Reserve Bank* (641/91) [1993] ZASCA 54; 1993 (3) SA 264 (AD); [1993] 2 All SA 278 (A) (31 March 1993) at par 26.

Appearance for the Plaintiff:

Mr Francis Ntsane Menyau
36661 Freedom Square
Bloemfontein