REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 4320/2020

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
DATE…………	SIGNATURE:………….

In the matter between:

JFE ELECTRONIC ENGINEERING (PTY)
LTD t/a JFE SECURITY **PLAINTIFF**

And

BUILDCOST QUANTITY SURVEYORS **FIRST DEFENDANT**
GERRIT CHRISTIAAN NAUTA **SECOND DEFENDANT**

JUDGEMENT

KGANYAGO J

[1] The plaintiff has issued summons against the defendant for payment of R13 941 339.00, for work done and material supplied in connection with a construction project at the Tzaneen Correctional Centre. Keren Kula Construction (KKC) was appointed by the Department of Public Works (DPW) as the principal contractor on the project for the development and construction of a prison facility at Tzaneen Correctional Centre. Both KKC and DPW have concluded a written agreement (principal building agreement). KKC in turn appointed the plaintiff as a selected subcontractor to carry out certain security installation works on the project. Seyffert Steenkamp and Nauta (now known as Buildcost Quantity Surveyors CC, the first defendant) were appointed as professional quantity surveyor on the project by DPW. Mashilo Lambrechts Architects and Ichtus Studio Architects were appointed as principal agents of the project. The second defendant is a member of the first defendant.

[2] As the project was progressing, KKC experienced financial difficulties and on 10th December 2013, a triparte agreement was concluded between DPW, KKC and the plaintiff to the effect that KKC ceded the contract to the plaintiff, in terms of which the plaintiff took over the remainder of project in order to complete it. The defendants were not parties to the cession agreement. The involvement of the defendants in the project was that of a quantity surveyor, an agent of the DPW, who would survey the works on a monthly basis, and recommend an amount to be certified for payment by the principal agent.

[3] After entering an appearance to defend the plaintiff's action, the defendants served the plaintiff with a Rule 30A notice complaining that the plaintiff's particulars of claim did comply with the provisions of Rule 18 of the Uniform

Rules of Court (Rules). That led to the plaintiff amending its particulars of claim. On receipt of the plaintiff's amended particulars of claim, the defendants served the plaintiff with a Rule 23(1) notice in which it gave the plaintiff notice to remove the cause of complaint. In that notice the defendants were alleging that the plaintiff's amended particulars of claim were vague and embarrassing, alternatively did not disclose a cause of action.

[4] The first complaint was that there was no contractual nexus between the plaintiff and defendant entitling it to payment, in that the plaintiff has failed to plead the relevant terms of the principal building contract which would, in terms of the cession, entitle the plaintiff to payment. The second complaint was that there was no breach of contract, in that the cession agreement did not create obligations, but only ceded and transferred rights from KKC to the plaintiff, which arose from the principal building agreement. Further that without an allegation that the defendants owed KKC an obligation to certify an amount for payment, the amendment are unsustainable to find a contractual claim. The third complaint was that there was no delictual claim, in that the plaintiff was attempting to support a delictual claim for pure economic loss, but failed to plead facts from which a legal duty to prevent economic harm from befalling can be inferred.

[5] With regard to the first complaint, the defendants had submitted that in law only rights may be ceded, and that the only right that could legally have been ceded to the plaintiff, was KKC's right to receive payment from the DPW for the execution of subcontract works. Further that those rights accrued to KKC in terms of the principal agreement, and not in terms of the subcontract agreement because in terms of the subcontract agreement, KKC was obliged

to pay plaintiff, and the plaintiff was obliged to execute the subcontract work. The defendant further submitted that the subcontract came to an end when the cession was effected. Further that nobody can transfer to another more rights than he or she has, that KKC could not transfer or cede to the plaintiff more rights that it itself had in terms of the principal contract.

[6] With regard to the second complaint, the defendants had submitted that the plaintiff had pleaded that the defendants had breached their obligation under the cession agreement. It is the defendants' contention that the said statement is, in law unsustainable because the cession agreement did not create obligations, but only ceded and transferred rights from KKC to the plaintiff, which arose from the principal building agreement. Further that the plaintiff has failed to allege that any of the defendants was a party to the principal agreement.

[7] Regarding the third complaint, the defendants have submitted that it was not only incumbent on the plaintiff to allege a duty to take care, but it must also allege that the duty was wrongly and negligently breached. Further that it was incumbent on the plaintiff to allege facts which, if proved, would justify the inference that such duty existed, and that that duty was wrongly and negligently breached.

[8] The defendants have raised a further ground of complaint, that it is not clear whether the plaintiff's claim is for delictual or contractual damages. It is the defendant's contention that plaintiff's particulars of claim as amended are vague and embarrassing, alternatively disclose no cause of action against the defendants, and that they should be struck out.

[9] The plaintiff with regard to the first ground of complaint has submitted that the agreement did not entail a mere cession of rights, but that it entailed the cession, assignment and transfer of rights and obligations, and the creation of rights and obligations. That the defendants' exception on the basis that, because it was termed or named a "cession" agreement, it could effect not more than a cession of rights under the principal agreement, is premised upon failure to have a proper regard to the terms and import of the agreement and the aforesaid allegations in the plaintiff's particulars of claim. That the mere fact the defendants were not parties or signatories to the agreement does not mean that they could not be appointed to the project.

[10] Regarding the second complaint, the plaintiff has submitted that the exception was premised on the assumption that because the agreement was headed or termed "cession" agreement it did not assign, transfer or create obligations. It is the plaintiff's contention that its case does not rest only on a cession of rights under the principal building agreement, but that it also rest on the rights and obligations ceded/assigned/transferred and created under the new agreement and in particular, the obligations which the plaintiff avers the defendants have incurred thereunder, alternatively tacitly undertook.

[11] Regarding the third complaint, the plaintiff submitted that it had pleaded in its particulars of claim, that the first defendant was appointed as the professional quantity surveyor on the project under the principal building agreement, and that indeed the defendants have performed the role of quantity surveyor. That in their capacity as quantity surveyor, they bear a duty to the plaintiff to carry out their function with reasonable skill and care and independently, exercising reasonable professional judgment.

[12] With regard to the fourth complaint, the plaintiff has submitted that it had pleaded the damages as being the difference between the amount certified by the defendants and that to which the plaintiff would have been entitled had the defendant performed their contractual obligations. Further that the distinction between contractual and delictual damages is clearly and separately made and pleaded.

[13] The defendants have delivered an exception to the plaintiff's amended particulars of claim on the grounds that they are vague and embarrassing alternatively, lacks averments necessary to sustain the cause of action. What this entails is that the plaintiff had failed to plead material facts in its particulars of claim on which it relied on for a particular averment, and therefore the defendant was embarrassed by the vagueness or insufficiency of the facts averred. An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity. (See *Trope and Others v South African Reserve Bank*[1]).

[14] In order to succeed an excipient has a duty to persuade the court that upon every interpretation which the pleading in question can reasonably bear, no cause of action is disclosed, failing which the exception ought not to be upheld. In *Living Hands v Ditz*[2] Makgoka J said:

"Before I consider the exceptions, an overview of the applicable general principles distilled from case law is necessary:

(a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.

[1] 1993 (3) SA 264 (A) at 269I
[2] 2013 (2) SA 368 (GSJ) at para 15

(b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs of an exception.

(c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.

(d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.

(e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.

(f) Pleadings must be read as a whole and an exception cannot be taken to a paragraph or part of a pleading that is not self-contained.

(g) Minor blemishes and unradical embarrassment caused by a pleading can be cured by further particulars."

[15] The defendant's first complaint to the plaintiff's amended particulars of claim is that there is no contractual nexus between plaintiff and defendant entitling it to payment. It is common cause that in the beginning, the principal building contract was between DPW and KKC. KKC has in turn appointed the plaintiff as a subcontractor to execute certain works of the project. When KKC experiences financial difficulties it ceded the remaining portion of its work to the plaintiff for the plaintiff to complete it. Even though in the amended particulars of claim the plaintiff has amended the heading of the "cession agreement" to "the agreement" it does not change the content of the agreement that was concluded between KKC, plaintiff and DPW from being a cession agreement to another kind of an agreement.

[16] In *Lynn & Main Inc v Brits Community Sandworks CC*[3] Mpati P said:

"It is trite that a cession is a method by which incorporeal rights are transferred from one party to another. It is an act of transfer from a creditor; as cedent, to the cessionary, a right to recover a debt from the debtor…The transfer of the right is effected by the mere agreement between the transferor (cedent) and the transferee (cessionary)."

[17] Generally the right that is being transferred to the cessionary by the cedent, is the right to recover a debt from the debtor. In the case at hand at the time of the conclusion of the cession agreement, the plaintiff was already a subcontractor of KKC the cedent. On conclusion of the cession agreement, the subcontract agreement ceased to exist. In terms of clause 1 of the cession agreement, the parties have agreed that the cedent will cedes, assigned and transferred the remaining portion of the Tzaneen agreement, as described in annexure "A". Annexure "A" read as follows:

"The total value of the final account for the security installation measured works including variations plus the total value of the CPA applicable to the security installation plus the P&G less the previous certified amount, all JFE's agreed rates:

I.E all work that has been completed but not yet certified and/or in accordance with terms of the contract and specifications."

[18] The Tzaneen agreement referred in the cession agreement refers to the principal building agreement which was between DPW and KKC. In the preamble of the cession agreement it has been specifically recorded that that the cedent is agreeing to transfer the remaining portions of work as described in annexure "A"in respect of the Tzaneen work agreement to the cessionary. Annexure "A" refers to all work which still need to be completed in accordance with the <u>terms of the contract and project specification.</u> The

[3] 2009 (1) SA 308 (SCA) at 311C-D

cession agreement did not contain the project specifications but only described the portion of the work of the Tzaneen agreement that has been ceded to the plaintiff. In my view, the specifications of the project will be contained in the principal building agreement including the total estimated costs of the project even though the cession agreement made provision for price variation at JFE's agreed rates.

[19] In my view, since the subcontract agreement between KKC and the plaintiff has ceased to exists, and the cession agreement did not contain all the specified terms of the project, the principal building agreement will not be treated as if it does not exist. The plaintiff has stepped into the shoes of KKC in relation to the remaining portion of the Tzaneen agreement. That relationship was regulated by the cession agreement and the principal building agreement since the rights of the project accrued to KKC in terms of the principal building agreement. The plaintiff in its particulars of claim has stated it is not in possession of a copy of the principal agreement and has not attached it to its particulars of claim or referred to any portion of it. The plaintiff has treated the principal building agreement as if it did not regulate its relationship with DPW.

[20] The plaintiff's claim can therefore not be solely based on the cession agreement, but it must be read in conjunction with the principal building agreement. Therefore, the plaintiff will have to plead the relevant terms of the principal building contract which would in terms of the cession agreement entitle it to claim payment. Without the relevant terms of the principal agreement which will be read in conjunction with cession agreement, the plaintiff's particulars of claim lack the necessary averments to sustain its cause of action.

[21] The second complaint to the plaintiff's particulars of claim is that of no breach of contract. The defendant has submitted that the plaintiff has pleaded that the defendants have breached their obligation under the cession agreement, whilst the cession agreement did not create obligations, but only ceded and transferred rights from KKC to the plaintiff, which arose from the principal building agreement.

[22] It is common cause that the defendants were the agent of DPW, and were not a party or signatory to the cession agreement. Generally, an agent act for the principal, and that authority to act does not impose on an agent liability in damages to third parties. The agent warrant its own authority to act as an agent for the principal for which it purports to act. Absent any agreement between the agent and the third that creates liability in the agent, the agent's liability if any, must be sought in delict in an action based on negligence or fraud. (See *Road Accident Fund v Shabangu and Another*[4]).

[23] Clause 5 of the cession agreement provides that the cessionary agrees to submit its monthly payment claims to the Project Quantity Surveyor and the Employer undertakes to ensure that the claims are assessed, certified and paid as expeditiously as possible. Even though the plaintiff must submit claims to the defendants for assessment, it is DPW that undertakes to ensure that the plaintiff's claims are assessed by the defendants. Should the plaintiff's claims not be assessed and certified as agreed in terms of the cession agreement, it will be DPW which will be in breach even though the actual assessment and certification is been done by the defendants. The mere fact that the cession agreement provides that defendants are required to assess and certify does

[4] [2004] ZASCA 23 (30 March 2004) at para 9

not and create agent liability to third parties without the defendants been the parties signatories to the cession agreement. More will be required to create agent liability in damages to third parties, and in my view the cession agreement as it stand does not create agent's liability.

[24] The third complaint to the plaintiff's particulars is that of no dilictual claim. The defendant submitted that the plaintiff seeks to rely on a duty of care giving rise to a claim in delict, whilst the plaintiff's claim is one for pure economic loss. The plaintiff has submitted that the defendant's duty to certify payments was a function which DPW will not perform, partly due to lack of expertise, and therefore the defendants bears a duty to the plaintiff to carry out that function with reasonable skill and care and independently, exercising reasonable professional judgment.

[25] The question is whether the act or omission which the plaintiff is relying upon was wrongful. For that to be determined it must be established whether the defendants owed a legal duty to the plaintiff for them to held liable. In *Municipality of Cape Town v Bakkerud*[5] the court in dealing with an omission held that the existence of culpa only becomes relevant sequentially after the situation has been identified as one in which the law of delict requires action. As per the cession agreement it is the DPW which undertakes to the plaintiff to ensure that claims are assessed and certified. The agent relationship which the defendants had with DPW imposes a duty on the defendants to advance the interest of DPW. Therefore, it will be DPW which will give the defendants instructions, whilst at same time DPW will ensure that the monthly payment claims submitted to defendants by the plaintiff are assessed and certified.

---

[5] [2000] ZASCA 174 (29 May 2000) at par 9

Generally speaking, it is not the function of the agent to protect the interest of a third party by doing, or refraining from doing something that might injure that party. Something more is required. (See *Road Accident Fund v Shabangu* above). In my view, the defendants did not owe any legal duty to the plaintiff whilst carrying out the instructions of DPW.

[26] The fourth complaint to the plaintiff's particulars of claim is that of contractual or delictual damages. The defendant in their exception has stated that it is not clear whether the amount which the plaintiff is claiming constitute positive or negative interest. The plaintiff in its particulars of claim in the main prayer, is claiming the difference between the amount certified by the defendants, and that to which the plaintiff would have been entitled had the defendants performed their contractual obligations. In the alternative, the plaintiff is claiming the alleged loss which would not have arisen had the defendants not been in breach of their duty. In my view, that is sufficient to make a distinction between contractual and delictual damages. The plaintiff has also set out the amount it would have been paid had the defendants allegedly performed their duty properly, and has set out the alleged loss arising out of the alleged delict by the defendants.

[27] In my view, on the first, second and third complaint, the plaintiff's particulars of claim as amended discloses no cause of action against defendants, whilst there is no merit on the fourth complaint. The defendants' is seeking that the plaintiff's particulars of claim be struck out. In *Group Five Building LTD v Government of the RSA*[6] Corbett CJ said:

[6] 1993 (2) SA 593 (A) at 602J-603B

> "An order dismissing an action puts an end to the proceedings and means that if the plaintiff wishes to pursue his claim on a different pleading he must start de novo. This may have drastic consequences for the plaintiff, particularly where it results in the prescription of the claim. In my opinion, it would be contrary to the general policy of the law to attach such drastic consequences to a finding that the plaintiff's pleading discloses no cause of action. Here the analogy of a defective summons springs to mind. And the cases of *Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A)* and *Prudential Assurance Co Ltd v Crombie 1957 (4) SA 699 (C)* illustrate the reluctance of the Courts to deny the plaintiff the opportunity to amend his summons, even if fatally defective by reason of its failure to state a cause of action."

[28] In my view, the proper order will be to uphold the exception on the defendant's three complaints, set aside the plaintiff's particulars of claim, and the plaintiff be given leave to amend.

[29] In the result I make the following order:

29.1 The defendants' exception on the three complaints is upheld with costs, which shall include the costs of a senior counsel.

29.2 The plaintiff's particulars of claim are set aside.

29.3 The plaintiff is given leave, if so advised, to file amended particulars of claim within fifteen days of this order.

KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the plaintiff	**: Adv IC Bremridge SC**
Instructed by	**: C&F Friedlander attorneys**
Counsel for the defendant	**: Adv P Ellis SC**
Instructed by	**: Joubert & May attorneys**
Date heard	**: 13th September 2021**
Electronically delivered on	**: 19th October 2021**