

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

Case No: 530/2014

In the matter between:-

KARPAH CONSTRUCTION CC

Plaintiff/Respondent

and

PHILLIPUS POTGIETER

1st Defendant/Excipients

PHILLIPUS POTGIETER N.O.

2nd Defendant/Excipients

ANNATHA POTGIETER N.O.

3rd Defendant/Excipients

JOHN HENRY FORD N.O.

4th Defendant/Excipients

CORAM:

KRUGER, J

HEARD ON:

12 DECEMBER 2014

DELIVERED ON:

12 DECEMBER 2014

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- [1] The defendants except to the plaintiff's particulars of claim on the basis of not disclosing a cause of action, alternatively being vague and embarrassing. The grounds of exception can be discussed under the following headings:

(1) Contract not signed

- [2] The first ground of exception is that the plaintiff relies on a written contract, yet the contract has only been signed by the contractor and not by the employer. Mr Pienaar, for the excipient, submits with reference to Christie's *Law of Contract in South Africa* 6th edition at 112 that a written contract only comes into existence when the written document has been signed by both parties. Therefore Mr Pienaar says plaintiff's claim based on the "written contract" does not disclose a cause of action.
- [3] The answer to Mr Pienaar's submission is that, except in cases where legislation prescribes formalities, such as for instance that the contract for the sale of land must be in writing, the parties are free to decide on the form of their contract. A written contract signed by the parties is one such form. Another form could be that the signatures must be witnessed. Another form could be that the terms be in writing, but need not be signed by the parties, or by both parties. The latter is the type of contract the parties agreed to here. They acted in terms of this agreement. The plaintiff alleges in the particulars of claim that the defendants have paid close to R6 million. A written document, although signed by only one party, constitutes a written agreement nonetheless, as it was received by one of the contracting parties without demur by the other and acted upon by both parties (**Mervis Brothers v Interior Acoustics and Another** 1999 (3) SA 607 (W) at 610D-G).

(2) Non-variation clause; Plaintiff not entitled to preliminary and 10% payments

[4] The second ground of exception is that in view of the non-variation clause in the written agreement on which the plaintiff relies, all variations have to be in writing and signed by both parties, therefore there could be no variations of the written contract, and the plaintiff is not entitled to claim for “additional preliminary amounts” as it has done.

[5] The answer to this ground of exception is that in the initial contract the parties did not require signature. As Mr Grobler for the plaintiff points out, this ground of exception is mutually exclusive to the first ground of exception. The exception seems to be excipiable. It could hardly have been their contemplation that although the original contract was not signed by both parties, variations had to be signed. The non-variation clause is inserted into contracts to protect them from variations. Where the parties do not clearly indicate their acceptance and incorporation of the non-variation clause into their agreement by appending their signatures to the contract, the non-variation clause in the strict terms of clause 1.5 of the standard contract prepared by the Joint Building Contract Committee cannot be deemed to be part of the agreement between the parties. At the very least, at this (exception) stage the test is whether, as a reasonable interpretation, clause 1.5 can be regarded as not forming part of the agreement (**Pete’s Warehousing and Sales CC v Bowsink Investments CC** 2000 (3) SA 833 (E) par [22], [26]).

- [6] Mr Pienaar says that the agreement, read with annexure “B” thereto makes provision for additional preliminaries of R390 133,74, not for additional preliminaries of R130 044,58 per month. Mr Grobler says the calculation is hardly unclear – $3 \times R130\,044,58 = R390\,133,74$. These were the costs for the extended period. The costs are allowed in terms of the contract if the period gets longer (Clause 14.8). It cannot be said that these allegations as to additional payment in the particulars of claim are so unclear that on any reasonable interpretation, they cannot sustain a cause of action (**Pete’s Warehousing** (*supra*) par [14]).

(3) The variation orders

- [7] This complaint falls away once one accepts, as one has to at this stage, that on one of the reasonable interpretations of the agreement between the parties, the written document was not the sole memorial of their contractual relationship. As Mr Grobler points out, the “Contract Sum” (Clause 1.1) is subject to adjustment.

(4) Further agreements

- [8] The excipient complains that the further agreement alleged by the plaintiff in paragraph 16 of the particulars of claim is not stated to have been oral or in writing, as required by the rules of court, and is therefore vague and embarrassing. Mr Grobler explains the allegations in the pleadings by pointing out that the particulars of claim do not here rely on a further agreement, but simply state that the defendants had failed to issue further payment certificates notwithstanding practical completion and had failed to make full

payment of amounts that were due and owing. The plaintiff thus pleads, so says Mr Grober, an *impasse*. Plaintiff simply states that the parties had agreed that the total value of the works done was R6 016 621,76. The plaintiff does not plead a variation of the original agreement, nor does it plead a novation. It simply states that one of the essential elements entitling it to payment is not in dispute. Thus, so Mr Grobler points out, all that plaintiff is doing is simply alleging in the particulars of claim that there is no need to rely on further payment certificates, nor does plaintiff need to indicate the specific contract value. Mr Pienaar says that the terms of the contract as pleaded do not allow for the inferences Mr Grobler contends for. That is in my view a matter for the trial court.

- [9] Courts are reluctant to decide issues on exception which are fact bound (**Dettmann v Goldfain and Another** 1975 (3) SA 385 (A) at 400A per Corbett JA; **Klokow v Sullivan** 2006 (1) SA 259 (SCA) par [24]). The main purpose of an exception is to avoid the leading of unnecessary evidence (**Dharumpal Transport (Pty) Ltd v Dharumpal** 1956 (1) SA 700 (A) at 706D-E). In order for an exception based on the allegation that it is vague and embarrassing to succeed, the excipient has to indicate prejudice **Francis v Sharp and Others** 2004 (3) SA 230 (C) at 240E-G. The excipient has not indicated how it is prejudiced.

CONCLUSION

- [10] There is no merit in any of the grounds of exception. It cannot be said that the pleadings do not disclose a cause of action or are vague and

embarrassing on every possible interpretation. Furthermore the excipient has failed to indicate prejudice.

ORDER

The exception is dismissed with costs.

A. KRUGER, J

On behalf of excipients/defendants:	Adv C.D. Pienaar Instructed by: Rossouws Attorneys BLOEMFONTEIN
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On behalf of respondent/plaintiff:	Adv S. Grobler Instructed by: Peyper Attorneys BLOEMFONTEIN
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