



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2021-25745

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED

SIGNATURE

22/07/2024
DATE

In the matter between:

KUFUMA (PTY) LTD

Plaintiff

and

BIDVEST FACILITIES MANAGEMENT (PTY) LTD

First Defendant

SISHEN IRON ORE COMPANY (PTY) LTD

Second Defendant

This order was handed down electronically by circulation to the parties' legal representatives by email on 22 July 2024.

JUDGMENT

Introduction

[1] This is an exception taken by the Second Defendant (*Sishen Iron Ore*) to the amended particulars of claim of the Plaintiff (*Kufuma*).

[2] After the First Defendant (*Bidvest*) had made certain amendments to its plea, Kufuma launched an application to join Sishen Iron Ore as the Second Defendant to the action for the purpose of pleading an alternative cause of action against it. All of which occurred. It is against this alternative cause of action that Sishen Iron Ore has taken exception on the basis that it lacks averments which are necessary to sustain a cause of action.

The case as pleaded against Bidvest and Sishen Iron Ore

[3] Kufuma has pleaded that Bidvest had been selected and engaged by Kumba Iron Ore (Pty) Ltd (*Kumba*) to provide facilities management services to Kumba alternatively to Bidvest at a mine in Sishen. An entity known as Fresh Camp Management Services (*Fresh Camp*) concluded a catering and housekeeping agreement with Bidvest in order to provide the catering, housekeeping and laundry services at the Sishen Mine.

[4] Kufuma introduced an alternative cause of action against Sishen Iron Ore premised on the Court finding that Bidvest only ever acted in a representative capacity and/or agent for and on behalf of Sishen Iron Ore.

[5] Under such circumstances it pleads that the catering and housekeeping agreement¹ which would be for a fixed term 3 year period with effect from 23 April 2017 (terminating 22 April 2020) was amended to be extended for an additional 3

¹ Defined in paragraph 26 of the particulars of claim

years effective from 1 December 2017 and terminating on 1 December 2023 on condition that (a) Fresh Camp register and incorporate Kufuma and (b) Kufuma be the contracting party to prospectively provide catering and housekeeping services to Bidvest.

[6] Fresh Camp incorporated Kufuma on 13 September 2017 and during November 2017 Sishen Iron Ore ceded, delegated and assigned all its rights, title and interest and obligations in and to the catering and housekeeping agreement to Kufuma.

The first ground of exception

[7] Sishen Iron Ore argues that what Kufuma has pleaded leads to the conclusion that when Kufuma was incorporated, Fresh Camp was no longer a contracting party. The consequence of this is that Fresh Camp had no rights to cede during November 2017 and thus Kufuma has no cause of action against Sishen Iron Ore.

[8] Exception was only taken on the basis that the alternative claim fails to disclose a cause of action and not also that the alternative claim is vague and embarrassing. That being so, the excipient, Sishen Iron Ore, must show that on every reasonable interpretation², no cause of action is disclosed.

[9] In my view, the flaw in this ground of exception lies with the assumption that the particulars of claim reveal that upon incorporation of Kufuma, Fresh Camp ceases to be a party to the catering and housekeeping agreement. Although this is conceivably an interpretation, it has certainly nowhere expressly been alleged that when Kufuma is incorporated, Fresh Camp ceases to be a party. In my view, and reading the particulars of claim as a whole, the contrary appears to be the position.

² *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) 199B.

[10] What has been alleged is that the catering and housekeeping agreement between Fresh Camp and Sishen Iron Ore would be amended to provide for an extension of the term on condition that Kufuma be incorporated, and that Kufuma would provide those catering and housekeeping services in terms thereof from 1 December 2017. Until the cession and/or assignment of the catering and housekeeping agreement by Fresh Camp to Kufuma in November 2017, Fresh Camp remained a contracting party thereto, and provided the catering and housekeeping services to Sishen Iron Ore in terms thereof.

[11] Accordingly and on a reasonable interpretation of the particulars of claim, Fresh Camp was, until the alleged assignment to Kufuma in November 2017, a contracting party to the catering and housekeeping agreement and thus had contractual rights which could be ceded.

[12] This ground of exception thus falls to be dismissed.

The second ground of exception

[13] Sishen Iron Ore contends that even if Fresh Camp could cede and/or assign the catering and housekeeping agreement to Kufuma in November 2017, it is clear that it was Kufuma, once incorporated, who was to be awarded the extended catering and housekeeping agreement, and, thus, there could be no extended catering and housekeeping agreement to cede and/or assign to Kufuma in November 2017.

[14] The catering and housekeeping agreement between Fresh Camp and Sishen Iron Ore would have terminated, in the normal course, by the effluxion of time, at the end of April 2020.

[15] Once Kufuma was incorporated by Fresh Camp in September 2017, the catering and housekeeping agreement that existed between Fresh Camp and Sishen

Iron Ore was amended to provide for an extended three-year period which extension would take effect from 1 December 2017 terminable on 1 December 2023. The amended catering and housekeeping agreement is what is alleged to have been assigned by Fresh Camp to Kufuma in November 2017.

[16] Such an interpretation in my view is a reasonable one although not the only one.

[17] This ground of exception thus falls to be dismissed.

The third ground of exception

[18] Sishen Iron Ore contends further that the pleaded agreement between Fresh Camp and Sishen Iron Ore, would actually amount to a pre- incorporation contract for the benefit of Kufuma, and would thus be required to be in writing in terms of s 21 of the Companies Act 71 of 2008 as amended (*the Companies Act*).

[19] Nowhere is it alleged in the particulars of claim that the arrangement between Fresh Camp and Sishen Iron Ore was intended to be a contract concluded either on behalf of Kufuma yet to be incorporated, or in the name of Kufuma yet to be incorporated.

[20] What is alleged is that Fresh Camp and Sishen Iron Ore agreed to amend the catering and housekeeping agreement which existed between themselves. The condition to be fulfilled to trigger the variation of the catering and housekeeping agreement was the incorporation of Kufuma. This condition was fulfilled when Kufuma was incorporated on 13 September 2017.

[21] The catering and housekeeping agreement (as extended) was then subsequently assigned to Kufuma in November 2017 so that Kufuma could provide the catering and housekeeping services to Sishen Iron Ore from 1 December 2017.

While it appears that Kufuma is the entity that is alleged to have ultimately benefitted from the extended catering and housekeeping agreement, this does not entail that the agreement between Fresh Camp and Sishen Iron Ore was a pre-incorporation contract as envisioned by s 21 of the Companies Act.

[22] As the authors of Henochsburg on the Companies Act point out, there are other ways for a yet to be incorporated company to secure the benefits of a contract:

'The common law is not excluded by s 21. The alternatives namely a contract for the benefit of a third party (*stipulatio alteri*), trust, cession and delegation are therefore still possible.'³

[23] A delegation was pleaded in paragraph 30.2 of the particulars of claim which delegation occurred during November 2017.

[24] This ground of exception too, thus falls to be dismissed.

The fourth ground of exception

[25] Sishen Iron Ore contends that the purported cancellation letter relied on by Kufuma is, on its face, one that clearly purports to emanate from Bidvest *qua* principal and not in its capacity as an agent and/or representative of Sishen Iron Ore and thus Kufuma has not made out a case that it was Sishen Iron Ore that repudiated the contract.

[26] Whether Bidvest acted as principal when sending the cancellation letter, or whether it acted as an agent and/or representative of Sishen Iron Ore, is a factual issue to be determined by the trial Court after hearing all the evidence. For the purposes of determining the merits of this exception, this Court must assume that the allegations made in support of the alternative claim are correct. Accordingly, the Court

Volume I, pg 106 (9), Service Issue 16.

must, for the purpose of considering the exception, assume that Bidvest only ever acted as an agent and/or representative of Sishen Iron Ore when it sent the cancellation letter to Kufuma. If that is done, a case has been made out that Sishen Iron Ore repudiated the contract.

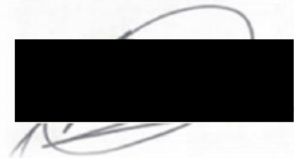
Conclusion

[27] The exception taken was on the basis that the alternative claim formulated against Sishen Iron Ore fails to disclose a cause of action. I have found that the exception falls to be dismissed. I should add that had the exception been taken on the basis that the claim is vague and embarrassing, the result might have been different.

Order

[28] I accordingly make the following order:

The exception dated 6 September 2023 is dismissed with costs.



I OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Appearances

For the Excipient (Sishen Iron Ore):

Adv M Smit instructed by Cliffe Dekker
Hofmeyer Inc

For the Plaintiff (Kufuma):

Adv E Fasser instructed by Wright, Rose-
Innes Inc

Date of hearing: 12 March 2024

Date of judgment: 22 July 2024