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

Reportable / Not reportable

Case no: **A144/2023**

In the matter between

THE MEMBER OF THE EXECUTIVE COUNCIL OF THE DEPARTMENT OF HUMAN SETTLEMENTS, FREE STATE PROVINCE	**Appellant**
and	
NTSU BUILDING MATERIALS (PTY) LTD	**Respondent**
In re:	
MEC: DEPARTMENT OF HUMAN SETTLEMENTS, FS	**Plaintiff**
and	
NTSU BUILDING MATERIALS (PTY) LTD	**First Defendant**
CITRA SHINE TRADING 606 CC	**Second Defendant**
SABELE BUILDING CONSTRUCTION CC	**Third Defendant**
MOHLAHLELI CONSTRUCTION CC	**Fourth Defendant**
CLASSIC ORIENTAL TRADING 500 CC	**Fifth Defendant**

TSHENOLELO BUSINESS ENTERPRISE CC **Sixth Defendant**

NTLOLANE CONSTRUCTION CC **Seventh Defendant**

DILEMOPUMO CONSTRUCTION AND TRADING CC **Eighth Defendant**

Coram: Chesiwe J, Daniso J *et* Cronje AJ

Heard: 26 July 2024

Delivered: 22 August 2024

Summary: Appeal against order upholding exception against amended particulars of claim not disclosing a cause of action. Court *a quo* at instances referring to wrong test. Correct test also applied. Appeal dismissed with costs.

ORDER

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1. The appeal is dismissed.
2. The Appellant pays the costs of the appeal on Scale C.

JUDGMENT

Cronje AJ (Chesiwe *et* Daniso JJ concurring)

Introduction

[1] The Appellant (referred to in the amended particulars of claim as 'the DHS') instituted action against the Respondent and the other Defendants, whereupon the Respondent filed an exception stating that the pleadings do not disclose a cause of action against it. The Appellant thereupon filed an amended particulars of claim. On 16 May 2023, the matter came before Mahlangu AJ wherein the Court upheld the exception and granted the Appellant leave to amend the particulars of claim, if so advised, within thirty (30) days of that order. The Appellant was ordered to pay the costs of the

exception. Dissatisfied with the Mahlangu AJ order, the Appellant appeals against it.

The Pleadings

[2] In the amended particulars of claim, the Appellant states that the dispute arising between each of the Defendants and itself depends on the determination of '*substantially the same questions of law and/or fact*' which, if such Defendants were sued separately, would arise in each separate action, and the Appellant is therefore, by virtue of the provisions of rule 10(3) of the Uniform Rules of Court, entitled to sue the Defendants in one action.

[3] It avers that it entered into written building contracts between the Second to Eighth Defendants with reference to annexure 'A' to the particulars of claim. It is common cause that the Respondent does not form part of the contractors, and no written contract is alleged. The Appellant, however, drew the Respondent into that matrix of facts on *inter alia* substantially the same questions of law and/or fact. The salient provisions of the amended particulars of claim for this judgment are stated in para 13 of the amended particulars of claim:

'13. The second, third, fourth, fifth, sixth, seventh and eighth defendants breached the erstwhile building contracts by, despite demand, failing or neglecting or refusing to render to the plaintiff a full, proper, complete or adequate statement of account in respect of the project(s) comprising of the following documents and/or information, including but not limited to:

. . .

13.5 Proper <u>records of all building materials supplied to it, if any, by the first defendant for the project(s);</u> and/or

13.6 All <u>orders for building materials placed by it from the supplier (the first defendant)</u>; and/or

13.7 All <u>invoices issued by the building material supplier (the first defendant)</u> regarding building materials supplied to it and the prices and/or

13.8 All invoices certified by it which prove receipt of the relevant building material; and/or

13.9 Pricelists for building material agreed upon by it and the building material supplier (the first defendant); and/or . . .' (My emphasis.)

[4] The Appellant states that the High Court set various agreements and decisions related to it aside, including the erstwhile building contracts. The payments referred to in paras 18 and 19 of the amended particulars of claim formed part of the various *agreements* and/or decisions which were reviewed and set aside. In para 18 it is stated that the Appellant, represented by its Chief Financial Officer, made payments of R34 089 179.20 to the Respondent, represented by one Lukas Meyer, and para 19 held that Lukas Meyer, '*purportedly acting on behalf of the plaintiff,*' paid the Fifth Defendant R500 000.00.

[5] The particulars of claim furthermore state that:

'20. *There had been no legal, moral or natural obligation to make such payments to the Defendants.*

21. The payments were made by the DHS to the defendants on the assumptions by the DHS that payments are made in advance in that:

21.1 the debt will become due to the first defendant in that building material to the value of R34 089 179.20 will be supplied by the first defendant on behalf of the DHS to the second, third, fourth, fifth, sixth, seventh and eighth defendants for the construction of low-cost housing; and/or

21.2 The payments in respect of building material would be legally payable by the DHS to the first defendant; and/or

21.3 The payments made by the first defendant to the fifth defendant would be legally payable by the DHS.' (My emphasis.)

[6] It concludes that the said *assumptions* prove to have been incorrect and false thereafter.[1] The link between the Appellant, the Respondent, and the other Defendants is clearly pleaded.. It is pleaded that the High Court declared the decision by the Appellant '. . . to make advance payments unlawful and was such decision accordingly reviewed and set aside". The payments referred to in paragraphs 18 and 19 form part

[1] Paragraph 22 of the Amended Particulars of Claim.

of the various agreements and/or decisions which were reviewed and set aside.[2] Paragraphs 18 and 19 specifically refer to the Respondent. It has, therefore, to be accepted that there was a *causa* for the payments at the date of the payment, as it is impossible to set something that is not in existence, aside. In para 33 of the amended particulars of claim, the averment is repeated with respect to the other Defendants.

[7] It further pleads that:

'The inherent purpose, spirit, purport and/or express and/or implied and/or tacit <u>terms and provisions</u> of the <u>erstwhile</u> building contracts and <u>material supply agreements</u>,[3] the legal incidents of the said contractual agreements and/or alternatively, the nature and <u>substance of the particular relationship</u> between the DHS, the <u>erstwhile building supplier</u> and the erstwhile contractors was premised on the DHS entrusted the first defendant with trust monies to be utilised by the second, third, fourth, fifth, sixth, seventh and eighth defendants (as erstwhile contractors) to perform and complete housing projects.' (My emphasis.)

Discussion

[8] Various paragraphs of the judgment of Mahlangu AJ refer to the pleadings being vague and embarrassing or portraying an intelligible cause of action.[4] However, the court *a quo* also refers to the claim not disclosing a cause of action. Regarding the case law and discussion of the court *a quo*, it cannot be said that the court did not appreciate the difference between the two types of exceptions.

[9] In *Luke M Tembani and Others v President of the Republic of South Africa and Another*,[5] the Supreme Court of Appeal held:

'Whilst exceptions provide a useful mechanism "to weed out cases without legal merit", it is nonetheless necessary that they be dealt with sensibly. It is where pleadings are so vague that it is impossible to determine the nature of the claim or where pleadings are bad in law in that their contents do not support a discernible and legally recognized cause of action, that an exception is competent. The burden rests on an excipient, who must establish that on every interpretation that can reasonably be attached to it, the

[2] Ibid para 23.
[3] The material supply agreement relates to the Respondent.
[4] Paragraphs 5, 13.2, 14 and 28.
[5] *Luke Tembani and Others v President of the Republic of South Africa and Another* [2022] ZASCA 70; 2023 (1) SA 432 (SCA).

pleading is excipiable. The test is whether on all possible readings of the facts no cause of action may be made out; it being for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts.[6] *(Footnotes omitted.)*

[10] In *Vermeulen v Goose Valley Investments (Pty) Ltd*[7] it was held that an exception to a cause of action that is not disclosed by a pleading, cannot succeed unless it is shown that, *ex facie* the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim is (not maybe) bad in law.[8]

[11] It is correct that a difference should be drawn between the *facta probanda* (the material facts)[9] and the *facta probantia*.[10] As I stated above, the question is whether, based on all the averments made, it can be said that facts support a *causa* of unjustified enrichment and nothing else.

[12] Concerning the grounds of appeal, it can be accepted that the court *a quo* at instances referred to the wrong test.[11] However, the court *a quo* also referred to the correct test. The Appellant submits that the matter that served before the court *a quo* for adjudication was an exception that exclusively required the court to determine whether the amended particulars of claim disclosed <u>a cause of action</u>, nothing more. I have already dealt with the difference between the cause of action pleaded and one that contradicts it – the contracts as well as the nexus apparent at the time of disbursement.

[13] The Respondent argues that the Plaintiff cannot rely on enrichment to reclaim what has been performed in contract or some understanding with the Respondent. My view of *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality*[12] *(Esorfranki)*, on which

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[6] Ibid para 14. In its subsequent appeal to the Constitutional Court in *President of the Republic of South Africa and Another v Tembani and Others* [2024] ZACC 5, the Court did not make findings on the exception in that matter. In *Pretorius and Another v Transport Pension Fund and Another* [2018] ZACC 10; [2018] 7 BLLR 633 (CC) reference was also made to the facts pleaded. See para 15 in this regard.
[7] *Vermeulen v Goose Valley Investments (Pty) Ltd* [2001] ZASCA 53; [2001] 3 All SA 350 (A)
[8] Ibid para 7.
[9] *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and Others* [2019] ZACC 41; 2020 (1) SA 327 (CC).
[10] *Deltamune (Pty) Ltd and Others v Tiger Brands Limited and Others* [2022] 2 All SA 26 (SCA); 2022 (3) SA 339 (SCA)
[11] The pleadings being vague and embarrassing
[12] *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* [2022] ZACC 41; 2023 (2) BCLR 149 (CC); 2023 (2) SA 31 (CC).

the Respondent relies, is that it is not on par with the matter before us. *Esorfranki* submitted a tender and did not perform services. It sought damages, and the debate centered around constitutional duties, private law duties enforceable by an action for damages and compensation under PAJA. The difference is aptly explained in *Afrisure CC and Another v Watson NO and Another*[13] where the Court held:

'I do not believe anyone can disagree with the concept that in a case where both parties have performed their reciprocal obligations under an illegal contract, simple justice between man and man will usually dictate that, in order to avoid an undue benefit to the plaintiff, both parties should retain whatever they received. This must particularly be so in a situation where the defendant's performance, received by the plaintiff, consisted of a factum that can no longer be returned or where such performance would, in any event, upon restoration, be of no value to the defendant.'[14]

[14] The Respondent argues that payment was premised on a *causa*. The fact that the *causa* was declared unlawful does not imply that no reciprocal obligation was created at that stage. According to it, the Appellant claims enrichment on the back of the apparent declaration by the Court of the decision being unlawful. It is not pleaded that the building material for which the Respondent was liable had, in fact, not been delivered.[15] Rather, it argues that the Plaintiff cannot make a case against the Respondent based on enrichment and that payments were made fruitless, wasteful, and unauthorized.

Conclusion

[15] A careful reading of the pleadings indicates various references that establish a *nexus* other than unjustified enrichment. The wording in formulating the claim may establish a causa, but not the one pleaded. In my view, the Appellant's amended particulars of claim do not substantiate a cause of action based on unjustified enrichment on all possible readings of the allegations. The appeal, therefore, has to fail.

Costs

[16] The costs should follow the result, and the Appellant should pay the costs of the

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[13] *Afrisure CC and Another v Watson NO and Another* [2008] ZASCA 89; [2009] 1 All SA 1 (SCA).
[14] Ibid para 46. See also: *Klokow v Sullivan* [2005] ZASCA 99; 2006 (1) SA 259 (SCA) para 18. See also *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40; 2018 (2) BCLR 240 (CC); *Sekoko Mametja Incorporated Attorneys v Fetakgomo Tubatse Local Municipality* [2022] ZASCA 28.
[15] Footnote 1 para 21.

Respondent on Scale C.

ORDER:

[17] In the result, the following order is made:

1. The appeal is dismissed.

2. The Appellant pays the costs of the appeal on Scale C.

[redacted]

CRONJE, AJ

I agree:

[redacted]

CHESIWE J

I agree:

The Honourable Justice
2024-08-20
N.S. Daniso

[redacted]

DANISO, J

I agree:

Appearances

For the Appellant:	Adv. N Snellenburg SC Adv. I Macakati
Instructed by:	Phatshoane Henney Attorneys
For the Respondents:	Adv. S Grobler SC
Instructed by:	Coetzees Inc C/O Honey Attorneys