



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case Number: 21521/2022

In the matter between:

CMED (PTY) LTD

Plaintiff

and

NOORD CIVILS (PTY) LTD

First Defendant

C-T-P CONSULTING ENGINEERS CC

Second Defendant

JUDGMENT

MAGARDIE AJ:

1. This is an exception by the second defendant to particulars of claim in an action where the plaintiff claims payment of damages from both defendants in the amount of R 4 948 307.15. The plaintiff's claims relate to separate breaches of contract by the defendants in respect of the construction and development of 52 residential erven on land owned by the plaintiff in Langebaan, Western Cape ('the project'). The project was to be known as the 'The Oyster Catcher Phase 1 Development, Langebaan.'

2. The plaintiff's claim against the second defendant is based on a professional services engineering contract in terms of which the second defendant was appointed as the consulting engineer for the project. The exception is advanced on two grounds. Firstly, it is contended that the plaintiff's reliance on a tacit term of the engineering contract is precluded by a so-called 'whole agreement' clause in the latter. Secondly, it is contended that the plaintiff's claim seeking to hold both defendants jointly and severally liable, is not legally sustainable. The exception so advanced does not raise a substantive question of law which may effectively settle the dispute between the parties. In such cases, an exception taken on the basis that a pleading lacks the averments necessary to sustain a cause of action, requires the excipient to make out a very clear and strong case for it to succeed. I conclude that the second defendant's exception does not meet this test. The exception accordingly fails on both grounds.

Background

3. On 24 March 2022 the plaintiff and the first defendant concluded a written agreement in terms of which the first defendant was appointed as the contractor in respect of the construction of the internal roads, engineering services and related infrastructure for the project ('the building contract'). The building contract comprised of three documents. The first was the plaintiff's written acceptance of the first defendant's tender for the project. The first defendant's tender had been prepared and submitted to the plaintiff by the second defendant on behalf of the first defendant. The second component of the building contract was the General Conditions of Contract for Construction Works (Third Edition, 2015) ('GCC'). The GCC sets out standard conditions of contract which are generally used for building contracts of this nature. The third component of the building contract were certain agreed written amendments to relevant provisions of the GCC, which were entitled 'Contract Data'. The total price for the construction of the works in terms of the building contract was R 6 480 715.70.

4. At approximately the same time that the building contract was concluded, the plaintiff and the second defendant concluded a professional services engineering contract. The engineering contract was compromised of the second defendant's Standard Terms and Conditions and its quote, submitted in October 2021, for the rendering of the services in terms of the project. The services to be provided by the second defendant were recorded to be '*...consulting engineering services pertaining to the design and construction supervision for the domestic roads and civil engineering services*' in respect of the project.
5. The GCC provided for interim payments to be made to the first defendant to finance the cost of the construction work. Interim amounts would be determined and certified by the second defendant having regard to inter-alia the estimated value of the completed construction work at that stage. The amount of these interim payments was to be determined by the second defendant in its capacity as '*Employer's Agent*' as defined in clause 1.1.1.6 of the GCC. This clause defines the term '*Employer's Agent*' as "*...the person named as the Employer's Agent in the Contract Data or any other person appointed from time to time by the Employer and of whom the Contractor is notified, in writing to act as the Employer's Agent for the purposes of the Contract as substitute for the Employer's Agent so named.*" Clause 3.2.21 of the GCC recorded that the function of the Employer's Agent was to '*...administer the Contract as agent of the Employer, in accordance with the provisions of the Contract.*'
6. The plaintiff pleads in its particulars of claim that at the time of the preparation and submission of the tender, both the first and second defendants knew that in the event of the tender being accepted by the plaintiff, the second defendant would in terms of the relevant provisions of the GCC, be appointed by the plaintiff as its agent to manage and oversee the project, particularly the execution of the building work. In this regard, clause 5 of the second defendant's Standard Terms of Agreement provided that the second defendant would carry out the services '*...with reasonable skill, care and diligence, for the use of the Client.*' Similarly, clause 4 of the second defendant's quote required

the civil engineering services to be designed in accordance with ‘...*relevant good engineering practices.*’

7. The site was made available to the first defendant on or about 17 August 2022. Construction of the works commenced immediately. This promising start to the however proved to be short-lived.
8. According to the plaintiff, the first defendant breached its obligations in terms of the building contract in numerous material respects relating to the construction of the roads in respect of the project. These included construction of the roads without adequate compaction tests having been performed in accordance with SANS1200 specifications. This defect resulted in substantial movement of the interlocker pavers in the road surface in both horizontal and vertical directions. Additional material breaches of the building contract by the first defendant are alleged to include deviation from design and material specifications in the construction of the roads, non-compliance with specification regarding manhole paving and covers, construction of defective junction draw boxes, communication ducts not being built to specification, failure of the barrier kerbs to comply with engineering design specifications and incorrect installation of the saddles on waterpipes.
9. In respect of the certification of interim payment certificates by the second defendant, the plaintiff pleads that the first defendant deliberately inflated claims and submitted claims for work allegedly executed for additional stormwater and sewerage installations outside the project site. The plaintiff’s cause of action against the second defendant is based on breach of contract by virtue of the second defendant’s failure to properly supervise the first defendant’s building work. According to the plaintiff, the second defendant was not only aware of the defective workmanship of the first defendant, but deliberately failed to intervene and stop the defective building work alternatively failed to demand that manifest defective building work by the first defendant be remedied forthwith.
10. The damages in the amount of R 4 948 307.15 claimed by the plaintiff from the first defendant represent the costs to re-build the road, the costs to repair the

defective work, the aggregate amount by which interim payment certificates are alleged to have been inflated and the amount claimed by the first defendant for work which did not form part of the project. Payment of this amount is also claimed from the second defendant on the basis that the breach of contract of each defendant caused the plaintiff to suffer damages and that consequently the first and second defendant are jointly and severally liable to pay the plaintiff the amount claimed. In the alternative, the plaintiff pleads that the first and second defendant are jointly liable for its damages as such damages arose as a direct result of the cumulative effect of each defendant's breach of contract.

11. Three grounds of exception were taken in the second defendant's notice of exception dated 12 July 2023 but only two were ultimately advanced at the hearing. Before considering these grounds, it would be useful to restate some of the salient principles which apply to an exception taken on the basis that a cause of action is legally unsustainable.

Legal principles

12. The exception procedure is by design an expeditious procedural mechanism aimed at sifting out, at an early stage, claims which lack legal merit. The bar for an exception to succeed on the basis that a claim is bad in law, is high. An exception advanced on this basis may only succeed where the excipient satisfies the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts.¹ On this score and unless they appear to be manifestly false, the factual averments by the plaintiff must be accepted as correct. It is not open to the court to question their efficacy.²
13. An overly technical approach to exceptions should not be adopted lest it destroys the benefits of the exception procedure, which itself requires a

¹ Pretorius and Another v Transport Pension Fund and others 2019 (2) SA 37 (CC) at para 15.

² .W v G.T (867/2021) [2023] ZASCA 23 (13 March 2023) at para 33 to 34.

sensible approach.³ As advised in the oft quoted words of Davis J with Sutton J concurring in *Kahn v Stuart*, in considering an exception, the evaluation of pleadings ‘..through a magnifying glass of too high power’, is to be avoided.⁴

14. To this must be added two further well established principles relating to the forensic utility of the exception procedure. The first is that an exception to a legally unsustainable cause of action is designed to dispose of the case in whole or in part by obtaining a decision on a point of law and thereby avoid the leading of unnecessary evidence at the trial.⁵ The second is that courts are reluctant to decide on exception questions relating to the interpretation of a contract or disputes concerning the terms of agreements which are disputed, ambiguous or uncertain.⁶

The first ground of exception

15. The plaintiff pleads at paragraph 45 of its particulars of claim that it was a tacit alternatively a legally implied term of the engineering contract that the second defendant would perform the functions and services of the ‘*Employer’s Agent*’ as defined and described in the GCC, in respect of the project.
16. The first ground of the exception is that the plaintiff’s reliance on the tacit term pleaded at paragraph 45 of its particulars of claim is precluded by what the second defendant describes as a ‘*whole agreement clause*’, embodied by clause 4 of the second defendant’s Standard Terms of Agreement. This clause states ‘*This would set out the entire agreement between us.*’ The second defendant contends that it is therefore not open to the contracting parties to rely on terms such as tacit terms, which are not contained in the written contractual

³ *Telematrix (Pty) Ltd v Advertising Standards Authority* SA 2001 (1) SA 461 (SCA) at para 3

⁴ *Kahn v Stuart* 1942 CPD 386.

⁵ *Marais v Steyn and Another* 1974 (3) SA 479 (T) at 486H-487G.

⁶ *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 186J ; *Francis v Sharpe & Others* 2004 (3) SA 230 (C) at 237F.

documents. Accordingly, the second defendant contends that insofar as the plaintiff pleads that it relies on a tacit term and the breach thereof, the plaintiff's cause of action is incomplete and therefore excipiable.

17. Having regard to the factual matrix set out above and in the particulars of claim, which at the exception stage must be accepted as correct, one may immediately think it obvious that it is the second defendant who falls squarely within the definition of 'Employer's Agent' as defined in the GCC. After all, who else would fulfill the functions of the '*Employer's Agent*' for the project other than the consulting engineers whose very appointment was for the purpose of construction supervision for the domestic roads and civil engineering services? Indeed, it is that very obviousness which goes to the nature of a tacit term. A tacit term in essence is a term that is so self-evident that it goes without saying and where it is an actual and not an imputed tacit term, it is one which arises '*...if both parties thought about a matter which is pertinent but did not bother to declare their assent.*'⁷
18. Mr. Coetsee, who appeared on behalf of the second defendant, however submitted that the terms of the whole agreement clause in the engineering contract were clear and unambiguous. He contended, based on *Union Government (Minister of Railways) v Faux Ltd*⁸ and *Cassim v Kadir*⁹, that reliance on a tacit term is impermissible where the contract is complete and detailed and needs no addition in the form of an implied term. The plaintiff's reliance on an alleged tacit term, so it was argued by the second defendant, was therefore not sustainable in law. The submission advanced was that whole agreement clause precluded the plaintiff from relying on tacit terms which, according to the second defendant, by their very nature were not contained in the written contract documents. The argument is without merit. An established

⁷ Wilkens NO v Voges 1994 (3) SA 130 (A) at 136H.

⁸ Union Government (Railways) v Faux Ltd 1916 AD 105 at p 112.

⁹ Cassim v Kadir 1962 (2) SA 473 (N) at 475B.

tacit term, actual or implied, forms a part of and not a conceptually separate component divorced from the written contract itself. As is apparent from *Wilkens NO v Voges*¹⁰, a tacit term once found to exist, '*...is simply read or blended into the contract: as such, it is contained in the written deed.*

19. I am in any event unpersuaded that the whole agreement clause called in aid by the second defendant, is dispositive of the tacit term relied upon in the plaintiff's cause of action against the second defendant. Firstly, the SCA has held that a '*whole agreement*' or '*sole testimonial*' clause does not necessarily, of itself, exclude the existence of a tacit term.¹¹ Secondly, I am in agreement with the submissions advanced by Mr. Vivier SC, for the plaintiff, that far from the whole agreement clause being as clear and unambiguous as contended by the second defendant, a number of other provisions of the constituent documents comprising the engineering contract, in fact suggest the opposite.
20. It is apparent in this regard that the nature and extent of the consulting engineering services to be performed by the second defendant, are not detailed and circumscribed in the component documents which constitute the engineering contract. Similarly, a determination of the standards according to which the second defendant was to perform its services, would by virtue of the second defendant's quote, have to have regard to inter-alia the requirements of the Saldanha Bay Municipality, 'relevant SANS codes' and 'relevant good engineering practices.'
21. The determination of these aspects would necessarily involve evidence and a determination by the trial court of the question whether the words used in the whole agreement clause, that the Standard Terms of Agreement '*...would set out the entire agreement between us*', ought to bear their ordinary grammatical

¹⁰ *Wilkens NO v Voges* 1994 (3) SA 130 (A) at 136H.

¹¹ *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 144, quoted with approval in *Adhu Investments CC and Others v Padayachee* (1410/2016) [2019] ZASCA 63 (24 May 2019) at para 17.

meaning. It is well established however that questions concerning the interpretation of a contract are not appropriately resolved by way of exception.¹²

22. A further submission was advanced by Mr. Vivier SC that the first ground of exception would not dispose of the case in either whole or part, as the plaintiff would still be able to rely on the same provision but on the basis that it is a legally implied term of the engineering contract. To that extent, so it was argued, the first exception, if upheld, would not achieve the purpose of an exception. That purpose is to avoid the leading of unnecessary evidence at the trial by disposing of the claim on a point of law.¹³ The submission is in my opinion well-founded. It means that upholding of the second defendant's exception would make no difference to the evidence to be led at the trial as the plaintiff would merely rely on the same provision which it has pleaded in the alternative as a term of the engineering contract implied by law. A term implied by law is not excluded by a clause stating that the written contract constitutes the sole record of the agreement between the parties.¹⁴
23. An exception which fails to expose the assailed cause of action as being bad in law and which fails to end the case advanced on that basis, does not achieve the purpose for which the procedure was designed. The first ground of exception in my view falls within this category.

The second ground of exception

24. As to its claim for joint and several liability in respect of the first and second defendants, as stated above, the plaintiff pleads that the damages which it has suffered were caused individually by the first defendant's breach of the building contract and the second defendant's breach of the engineering contract. The plaintiff pleads that although it entered into separate and individual contracts

¹² Sun Packaging (Pty) fn 6 above at 186J.

¹³ Marais v Steyn and Another 1974 (3) SA 479 (T) at 486H-487G.

¹⁴ Van Nieuwkerk v Mcrae 2007 (5) SA 21 (W) at 28H.

with each defendant, it was the breach of contract by each defendant which caused the plaintiff to suffer damages and that consequently the first and second defendants are jointly and severally liable to pay the amount of R 4 948 307.15 to the plaintiff.

25. Alternatively, the plaintiff pleads that the first and second defendants are jointly liable by virtue of its damages being resulting from the cumulative effect of each defendant's breach of contract.
26. By its second ground of exception, the second defendant contends that the claim for joint and several liability is legally unsustainable as there is no valid legal basis for holding the defendants jointly and severally liable for their respective breaches of separate contracts. The second defendant submits that absent an express contractual term to that effect or a legal principle recognizing joint and several liability, such claims against the defendants are excipiable.
27. The nature and extent of the duty of an engineer party to a professional services engineering contract was addressed by the Supreme Court of Appeal per Farlam JA in *Van Immerzeel & Pohl and Another v Samancor*.¹⁵ In that case as in the present, the employer had concluded a contract with a firm of consulting and civil engineers to render professional services required for the supervision of the installation of works in terms of a construction contract. The court held that the engineer had failed to perform its supervisory function in a proper and professional manner and that it failed to take reasonable steps to ensure that the construction work was performed in accordance with the provisions of the construction contract. In the context of this case, the following statement by Farlam JA in *Van Immerzeel* is in my view apposite with regard to joint liability of a builder and an engineer for damages caused by virtue of their independent breaches of contract:

‘...The correct position is that the engineer and the firm are independently liable for the same or similar damage. The plaintiff's causes of action against them are separate and independent based

¹⁵ *Van Immerzeel & Pohl and Another v Samancor* 2011 (2) SA 90 (SCA).

*upon two separate if inter-connected contracts.*¹⁶

28. The Court went on to quote with approval, as being a correctly reasoned principle of our law, the following passage from the judgment of the Court of Appeal in *Hutchinson v Harris*¹⁷:

‘...where the duty of a contracting party is to supervise the work of another contracting party, it seems to me there is a direct casual connexion between the supervisor’s negligent failure to prevent negligent work, and the damage represented by that negligent work. No doubt the builder is also liable. It is a case of concurrent breaches of contract producing the same damage. In my judgment the plaintiff has an action against both, although she cannot obtain damages twice over.’

29. The second defendant’s focus on the separate nature of the two contracts fails to take into account the inter-connected nature of the contracts. This includes the nature of the second defendant’s obligation in terms of the engineering contract, which was to supervise and manage the execution of the works required for the project. The joint liability of a building contractor for defective building work and a professional engineer for failing to detect or prevent such damage in accordance with his supervisory functions, has in my view been established by the principles set out by the SCA in *Van Immerzeel*. They are both liable for the same or similar damage resulting from independent breaches of separate but inter-connected contracts. This recognition of liability is in my view consistent with public policy, constitutional values and the important responsibilities and duties of professional engineers, a profession which is itself subject to statutory regulation.¹⁸

¹⁶ Van Immerzeel at para 76.

¹⁷ *Hutchinson v Harris* 1978 10 (BLR 19).

¹⁸ In terms of the Engineering Profession Act 46 of 2000.

30. The second defendant's contention that the law and the contractual setting pleaded by the plaintiff precludes a claim for joint and several liability or joint liability against the defendants, is for these reasons without merit. The second ground of exception accordingly fails as well.

Order

31. The second defendant's exception is dismissed.

32. The second defendant is ordered to pay the plaintiff's costs on scale C.

S G MAGARDIE
Acting Judge of the High
Court

APPEARANCES

For Plaintiff: P de B Vivier SC
Instructed by:
Lucas Dysel Crouse Inc

For Second Defendant: D J Coetsee
Instructed by:
Everingham's Inc

Date of hearing: 3 May 2024

Date of judgment: 13 August 2024