



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO.: 1260/2023

Reportable: Yes/No

In the matter between:

KLAAS CREATIVE(PTY) LTD

Plaintiff

and

BUFFALO CITY METROPOLITAN MUNICIPALITY

Defendant

JUDGMENT

Cengani-Mbakaza AJ

Introduction

[1] In this matter, the defendant, Buffalo City Metropolitan Municipality (BCMM) excepts to the plaintiff's (Klaas Creative) amended particulars of claim on the basis that they do not disclose a cause of action. The application arises from the civil action instituted by Klaas Creative against BCMM for the alleged breach of contract. Specifically, Klaas Creative alleges that BCMM is indebted to it in the amount of R1,334,905.15 (One Million, Three Hundred and Thirty-Four Thousand, Nine Hundred and Five Rand and Fifteen Cents).

[2] Klaas Creative is a private company with limited liability, duly incorporated and registered in accordance with the Companies Act of the Republic of South Africa. BCMM is a municipality as contemplated in section 151 of the Constitution of the Republic of South Africa, 1996, and established in terms of section 2 of the Local Government: Municipal Systems Act 32 of 2000.

The pleadings

[3] It is highly relevant and fitting to summarise the amended particulars of claim which gave rise to the application before me. Pursuant to a tender process, on or about 27 November 2017, BCMM awarded a contract (the Main Agreement) to Umso/Imvusa Trading 454 t/a Civil Joint Venture (Umso Trading) for the construction of 656 top structure units for Potsdam or Ikwezi Block 1 Housing Project (the project).

[4] The Main Agreement between BCMM and Umso Trading contained express, implied and tacit terms, including the obligation to construct housing units in accordance with the Agreement's terms. The Agreement incorporated the General Conditions of Contract for Construction Workers, 3rd edition (2015), hereinafter referred to as (GCC).

[5] Umso Trading would appoint such authorities, specialist subcontractors and suppliers as may be designated by BCMM or the Engineer, being BCMM's agent duly appointed for those portions of work. Following the terms of the Main Agreement, the Engineer, acting as BCMM's agent, was not permitted to consult directly with any subcontractor, nor was the Engineer to become involved in any payment disputes, unless specifically provided for in conditions of contract governing the Main Agreement.

[6] The material express provisions of the GCC provide that Umso Trading, or its subcontractor, may subcontract part of the agreement with the prior approval of the BCMM's agent. In the event of the termination of the Main Agreement between BCMM and Umso Trading, any existing subcontractor shall be assigned to BCMM. Furthermore, the GCC does not deprive the contractor of the right to institute court

proceedings against BCMM for failure to pay amounts certified in the payment certificates or retention money on their due dates.

[7] The amended particulars of claim go further to state that on or about 2 March 2021, Klaas Creative, BCMM and Umso Trading, duly represented by their respective agents, entered into a subcontract agreement (the Cessionary Agreement). In terms of the Cessionary Agreement, Klaas Creative and Umso Trading agreed to construct 124 housing units, comprising 100 units at various stages of completion and 24 units that were complete.

[8] Umso Trading acknowledged its indebtedness to Klaas Creative in the amount of R11 394 628,90, inclusive of value-added tax (VAT, representing the value of the sub contractual obligations ceded to Klaas Creative. Concurrently, Umso Trading ceded, transferred and assigned to Klaas Creative its right, title and interest in and to any amounts due and payable by BCMM, along with associated contractual rights and duties under the main duties.

[9] Pursuant to the Main Agreement, BCMM's liability to Umso Trading was extinguished to the extent of any direct payments made by BCMM to Klaas Creative. Klaas Creative undertook to provide BCMM with regular progress reports and any requested information regarding the fulfilment of its contractual obligations.

[10] BCMM undertook to make direct payments to Klaas Creative for any approved amounts due, upon the Engineer's approval or signature on the respective invoice for work completed. The arrangement was for the sole benefit of the work done.

[11] The Addendum to the Cessionary Agreement requires Klaas Creative to perform work under Umso Trading's NHBC certification, certification of health and safety specifications and worker's compensation registration. In May or June 2021, Umso Trading abandoned the project, triggering the termination of the Main Agreement between BCMM and Umso Trading. Consequently, the subcontract held by Klaas Creative was assigned to BCMM, as stipulated in the GCC.

[12] Prior to the suspension, Klaas Creative fulfilled its obligations under the Cessionary Agreement and completed 81 walls, 26 roof coverings and 8 finishes. The resident Engineer verified and approved these works endorsing the associated documentation for payment invoices to BCMM.

[13] On 16 July 2021, BCMM waived strict compliance requirements, acknowledging liability to pay Klaas Creative an amount of R1, 334,904.15, pending invoice submissions. On or about 21 September 2021, Klass Creative submitted the invoice to BCMM accompanied by supporting documentation signed and approved by the Engineer, for payment of R1, 334, 904.15 in respect of the work completed.

[14] BCMM has failed to remit payment for the invoiced amount, which remains outstanding and due, despite demand, in breach of the Main and Cessionary Agreement.

The applicable law

[15] The opposition party may raise an exception in instances where a pleading omits essential averments to support a claim.¹ The Appellate Division in *McKenzie v Farmers' Co-operative Meat Industries Ltd*² defined 'a cause of action' as encompassing all the essential facts that the plaintiff must establish to succeed in their claim, excluding the specific evidence needed to prove each fact.

[16] In their piece of work, *Jones and Buckle*³ comment that the definition relates only to material facts and due regard must be paid to the distinction between *facta probanda* and the *facta probantia*. This distinction, so they explain, is of great importance and care must be taken in any given case to distinguish the facts which must be proved to disclose a cause of action (the *facta probanda*) from the evidence which proves those facts (the *facta probantia*).

¹ Rule 23 of the Uniform Rules of Court.

² 1922 AD page 16 at para 23.

³ 9th Edition (Volume 1), See Jones & Buckle :The Civil Practice of the Magistrates' Courts in SA I The Act 10 ed (2012) by Van Loggerenberg 106–112; Van Blerk Legal Drafting: Civil Proceedings 2 ed (2015) 19 et seq; Amler's Precedents of Pleadings 9 ed (2018) by Harms passim.

[17] The exception's governing principles, as paraphrased below, have been consistently established⁴ and reaffirmed through case law.⁵

- (a) The primary objective of an exception is to raise a fundamental legal issue that may potentially resolve the dispute between the parties. If an exception is not pursued for this purpose, the excipient must present a strong, and clear case to succeed.
- (b) When evaluating an exception that a pleading fails to disclose a cause of action. The court will assume the truth of the plaintiff's allegations to determine whether they sufficiently disclose a cause of action. The purpose of an exception is not to exploit technicalities or hinder an opponent, but rather to efficiently dispose of a case or part thereof, or to safeguard against potentially severe prejudice that justifies the costs of an exception.
- (c) In exception proceedings, the pleading must be considered in entirety, exceptions cannot only be taken to self-contained paragraphs or part of the pleadings or fragmented portions. Minor defects and non-fundamental ambiguities in a pleading can and should be rectified through the provision of further particulars.

The parties' legal submissions

[18] Mr *Notshe* SC, counsel for the BCMM, argued that the amended particulars of claim do not disclose the cause of action, as the Cessionary Agreement contains a suspensive clause that has not been alleged to have been fulfilled.

[19] Counsel drew attention to Clause 5.3 of the Cessionary Agreement, which stipulates that the defendant will only make payments to the plaintiff on invoices that

⁴ *Merb (Pty) Ltd v Matthews* Unreported, GJ case no 2020/15069 dated 16 November 2021. See also *Du Toit NO v Steinhoff International Holdings (Pty) Limited* [2020] 1 All SA 142 (WCC) at paras 27–34; *Steinhoff International Holdings Proprietary Limited v Jooste* (unreported, WCC case no 16919/2020 dated 27 October 2021) at paras 21–28; *Abb South Africa (Pty) Ltd v Leago EPC (Pty) Ltd* (unreported, GJ case no 22278/2019 dated 13 April 2022) at paras 47–63.

⁵ *Living Hands (Pty) Ltd and Another v Ditz and Others* (42728/2012) [2012] ZAGPJHC 218;2013(2) SA 368 (GSJ) (11 September 2012) at para 15.

have been certified or endorsed by Umso Trading as authentic. In this instance, he argued, in accordance with the agreement, payment to Klaas Creative is contingent upon the BCMM receiving satisfactory certification or endorsement from Umso Trading, verifying the authenticity of the invoice presented for payment. Accordingly, Mr *Notshe* SC contended that payment to Klaas Creative is not due and payable until the condition stipulated in Clause 5.3 has been fulfilled.

[20] Ms *Beard*, counsel for Klaas Creative countered that a thorough examination of the amended particulars of claim and supporting annexures reveals that Klaas Creative does not rely on Clause 5.3. of the Cessionary Agreement. Furthermore, she argued that this clause is entirely inapplicable to Klaass Creative's claim.

[21] She further contended that any argument to the contrary would necessitate an interpretation of Clause 5.3 of the Cessionary Agreement, which is inappropriate at the exception stage. She emphasised that the amended particulars of claim include an alternative claim for unjustified enrichment which was overlooked by BCMM. Consequently, Ms *Beard* argued that Klaas Creative has indeed set out a valid cause of action.

The court's analysis of the case

[22] It is trite law that a cause of action that is not disclosed by a pleading cannot succeed, unless it is shown that *ex -facie* the allegations made by the plaintiff and any document upon which his or her cause of action may be based, the claim is bad in law.⁶ An excipient bears the burden of convincing the court that, upon every interpretation of the pleadings in question, particularly the underlying document, no cause of action is disclosed, if this burden is not met, the exception should not be upheld.⁷ Therefore, the excipient bears the burden of presenting a compelling case.

[23] Upon perusal of the amended particulars of claim, the BCMM's exception does not align with the principles governing exception. The objection appears overtechnical, focusing on a specific contractual provision which does not form part of the plaintiff's case. The rules do not mandate that pleadings be drawn in perfect

⁶ Vermeulen v Goose Vally Investments (Pty) Ltd 2001 (3) SA 976 (SCA) at 997B.

⁷ Sun Packaging (Pty Ltd v Vreulink 1996 (4) SA 176 (A).

language, but the allegations of the parties should be identifiable. In the amended particulars of claim, Klaas Creative has set out the conclusive terms and conditions of the Main and Cessionary Agreements and the BCMM's breach without any ambiguity. In addition, it has submitted the underlying documents in support of its claim, thereby substantiating its case. Notably, the material facts confirm that Klass Creative received no payment for services rendered, despite submitting invoices and Engineer's reports. Furthermore, Klaas Creative has set out a clear-cut alternative claim of unjustified enrichment necessitating a response from the BCMM. Therefore, I will accept as true that because of the breach, Klass Creative has suffered damages as outlined in the amended particulars of claim.

[24] The authenticity or otherwise of the invoices, if contested, is an issue better suited for determination during trial proceedings, rather than in these exception proceedings and does not preclude the BCMM from presenting its defence. The BCMM has failed to make out a case for the relief sought.

Order

[25] In the result, the following order is issued:

1. The exception is dismissed.
2. The defendant shall pay costs on scale "B" as contemplated under Rule 67A read with Rule 69 of the Uniform Rules of Court. The costs shall include the costs of two counsel so employed.

N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Plaintiff : Adv M. Beard with Adv C. Cordell
Instructed by : Cloete & Company
Makhanda

Counsel for the Defendant : Adv V. S. Notshe SC
Instructed by : N N Dullabh & Co
Makhanda

Heard on : 17 October 2024
Judgment Delivered on : 17 December 2024