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

Not reportable

Case no: 1355/2024

In the exception between:

KAYKAYSIM PROJECTS (PTY) LTD **PLAINTIFF**

and

DIHLABENG LOCAL MUNICIPALITY **DEFENDANT/EXCIPIENT**

Neutral citation: Kaykaysim Projects (Pty) Ltd v Dihlabeng Local Municipality (1355/2024) [2024] ZAFSHC (23 January 2025)

Coram: Greyling-Coetzer AJ

Heard: 1 November 2024

Delivered: 23 January 2025

Summary: Exception – whether cause of action sustained – claim for specific performance in terms of a contract

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ORDER

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1. The defendant's exception is upheld.
2. The plaintiff is granted leave to amend its particulars of claim in terms of Uniform Rule 28, within 10 (ten) days of the date of this order.

3. The plaintiff is ordered to pay party-and-party cost on Scale B.

JUDGMENT

GREYLING-COETZER AJ

[1] This is an exception in which the defendant (excipient) contends that the plaintiff's particulars of claim lack the necessary averments to sustain a cause of action.

[2] During March 2024 the plaintiff issued a combined summons in terms of which it claims payment of the amount of R1 314 764.60 together with interest and costs from the excipient. The particular of claim reveal that the plaintiff seeks payment of the amount of R1 314 764.60, on the basis that it constitutes retention moneys payable to it by the excipient.

[3] The plaintiff relies on a series of agreements which were concluded, leading up to the plaintiff rendering services to the excipient. The allegations upon which the plaintiff's cause of action is founded can conveniently be summarized as follows:

[3.1] On 16 March 2021, the plaintiff and the excipient entered into a written agreement comprising of a General Conditions of Contract for Construction Work - 3rd Edition, 2015 (GCC2015) ("GCC"), a Service Level Agreement ("SLA") and other bid-supporting documents for the reconstruction of 2km-Nkitsing Bohlokong Road, contract number PW93/2021-BHM ("the Project").;

[3.2] On 13 April 2021 the excipient issued an appointment letter to the plaintiff, appointing it to the Project. In terms of the appointment letter, the bidding price for the project was R18 144 655.73 (VAT inclusive), and the project duration was 12 (twelve) months from date of hand-over;

[3.3] In terms of the SLA, the excipient shall make payment to the plaintiff for the services rendered as set out in the Scope of Works in Annexure A, and as outlined in the Activity Schedule in Annexure A after receipt of a VAT invoice;

[3.4] The plaintiff relies on the following clauses in the GCC:

[3.4.1] Clause 5.14.1 - the plaintiff would be entitled to receive a certificate of practical completion when the works have reached a defined stage of practical completion, as set out in the Contract Data;

[3.4.2] Clause 5.14.2 - as soon as the list of outstanding issued had been completed, the excipient's agent shall deliver to the plaintiff a certificate of practical completion with a further written list of work to be completed to justify completion;

[3.4.3] Clause 5.14.4 - as soon as the work referred to in the further list issued has been completed, the excipient's agent shall deliver to the plaintiff a certificate of completion;

[3.4.4] Clause 5.14.5 - upon the issue of a certificate of completion, the retentions shall be reduced to half in terms of clause 6.10.5;

[3.4.5] Clause 6.10.5 - when a defects liability period is specified, one half of the retention money shall become due and shall be paid to the plaintiff when the excipient's agent has issued a certificate of completion in terms of clause 5.14.4. The other half shall become due and shall be paid to the plaintiff within 14 (fourteen) days of expiration of the defects liability period;

[3.5] It is alleged that the defects liability period was agreed to be a period of 52 (fifty-two) weeks;

[3.6] On 10 September 2021, the plaintiff handed the project over to the excipient, having duly performed all its duties in compliance with the specifications provided in the Scope of Word;

[3.7] On 15 October 2021, the consulting engineer issued a certificate of practical completion, incorporating a list of works to be rectified. The plaintiff duly rectified and completed all outstanding works per the aforementioned list;

[3.9] On 25 November 2021, the consulting engineer issued the plaintiff with a certificate of completion;

[3.10] On 20 May 2022, the plaintiff delivered a tax invoice to the excipient in the amount of R1 314 764.60;

[3.11] In breaching the agreement, the excipient failed to make payment of the tax invoice relating to the retention money.

[4] The excipient excepted to the plaintiff's particulars of claim on the basis that it lacks the averments to sustain a cause of action, essentially due to:

[4.1] the plaintiff's failure to plead the conclusion of a valid contract for the specific project;

[4.2] the agreements relied on, namely the GCC, SLA and letter of appointment, do not constitute the complete contract between the parties;

[4.3] the GCC, expressly records that the "Contract Data" means the document that sets out the specific data which, together with the GCC, which collectively describe the risk, liability and obligations of the contracting party, the "Contract Data" does not form part of the particulars of claim;

[4.4] the particulars of claim does not demonstrate the entitlement to payment in amount of R1 314 764.60;

[4.5] the documents relied on do not demonstrate that the conclusion of a contract for the construction of the specific road, for a bidding price of R18 144 655.73, or that retention monies are payable to the plaintiff as alleged.

[5] An exception founded upon the contention that a summons or particulars of claim discloses no cause of action, is designed to obtain a decision on a point of law which will dispose of the case in whole or in part, and avoid the leading of unnecessary evidence at the trial.[1]

[6] Where an exception is raised on the ground that a pleading lacks averments necessary to sustain a cause of action, the excipient is required to show that upon every interpretation that the pleading in question can reasonably bear, no cause of action is disclosed.[2]

[7] A pleading must contain every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment. The *facta probanda* necessary for a complete and proper cause of action importantly does not comprise of every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.

[8] In evaluating an exception, the court must look at the pleading as it stands.[3] The court will accept as true the allegations pleaded by the plaintiff to assess whether a cause of action is disclosed.[4] In assessing an exception, an overly technical approach should be avoided, because it destroys the usefulness of the exception

1 *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 706E; *Alphina Investment Ltd v Blacher* 2008 (5) SA 479 (C) at 483B

2 *Vermeulen v Goose Valley Investment (Pty) Ltd* [2001] 3 All SA 350 (A)

3 *Burger v Rand Water* 2007 (1) SA 30 (SCA) at 32D-E

4 *Living Hands (Pty) Ltd N.O. and Another v Ditz and Others* 2013 (2) SA 368 (GSJ) at 374G

proceedings, which is to weed out cases without legal merit.

[9] It is justified to briefly refer to Rule 18 of the Uniform Rules of Court in aforementioned regard. Rule 18(4) provides that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defense or answer to any pleading, as the case may be, with sufficient particularity to enable the opposing party to reply thereto. Rule 18(6) provides that a party who in his pleading relies on a contract, shall state whether the contract is written or oral, when, where and by whom it was concluded, and if the contract is written, a true copy thereof or of the part relied on in the pleading, shall be annexed to the pleading.

[10] It argument it was contended on behalf of the excipient that *ex facie* the particulars of claim, read together with the annexures, the plaintiff has not disclosed a cause of action, in particular because the agreements relied on does not demonstrate that it relates to the specific project alleged in the particulars of claim, nor do they demonstrate the appointment of the plaintiff for a specific project at a contract value of R18 144 655.73, or that the retentions claimed are payable and that the terms relied on has been complied with. The excipient contended that contrary to aforementioned, the SLA specifically refer to payment being made according to a VAT invoice for work done on an as-and-when basis.

[11] It was further contended that the GCC provided that "the contract" means the documentation of the agreement between the parties in terms of the form of offer and acceptance, and such written amendments or additions to the contract as may be agreed to between the parties. Whilst the GCC described the "Contract Data" as the documents that set out the specific data which, together with these General Conditions of Contract, collectively describe the risk, liability and obligation of the contracting parties, and the procedure for administration of the contract. The GCC further describes "the contract sum" as the accepted amount provided for in the agreement made in terms of the form of offer and acceptance, and the GCC describes the "form of offer and acceptance" as the document that formalizes the legal process of offer and acceptance, and gives rise to the contract.

[12] On behalf of the plaintiff, it was contended that the particulars of claim do disclose a cause of action, and the failure to annex certain documents does not dilute the averments pleaded in the particulars of claim, which sufficiently informs the excipient of the claim against it. It was further argued that any alleged failure to place certain annexures to the GCC before court can and will be cured through the process

of discovery.

[13] The plaintiff's claim is a claim for specific performance in terms of a contract. As such, the plaintiff was required to allege the terms of the contract which entitle it to payment of the amount of R1 314 764.60; allege compliance with any antecedent or reciprocal obligations that would come before or entitle it to the payment of the retention monies; allege non-performance by the excipient and then claim said specific performance of the retention monies founded on that alleged.

[14] Although the plaintiff pleaded and relied on certain clauses in the GCC to allege its entitlement to the retention monies, it failed to plead the terms applicable to the payment of the retention monies, as provided for in the Contract Data. In addition, the plaintiff failed to plead and place reliance on the specific term demonstrating the quantum or percentage of the retention monies alleged to owing.

[15] Having regard to *inter alia* Clause 6.10.5 and 5.14.5 of the GCC and the allegation that a defective liability period was applicable, there were more than one permutations in respect of how and in what amount retention moneys will become payable. The plaintiff failed to plead which found application and how the claim amount was thus calculated. Absent aforementioned it cannot be concluded that the plaintiff has alleged the terms of the contract relied upon for payment of the retention monies.

[16] Aforementioned goes to that which is required by a party in terms of Rule 18. The plaintiff alleges that it is entitled to payment of R1 314 764.60, but fails to plead the material facts upon which it would be entitled to such retention monies. It is necessary for a plaintiff in the position of the current plaintiff to plead the specific terms pertaining to the retention moneys and payment thereof, as well as how same is calculated in addition to the requirements of entitlement and reciprocal or antecedent requirements.

[17] Although a court should endeavor to look benevolently instead of over-critically at pleadings, it should not push that benevolence to the length of upholding a particulars of claim which, as it stands, discloses no cause of action, by altering its language, by reading into it what is not there and ignoring what is, and by thus making for the plaintiff a cause of action it had not put up itself.[5]

[18] There further appears to be a disconnect between the pleaded case and the

5 *General Commercial and Industrial Finance Corporation Ltd v Pretoria Portland Cement Co Ltd* 1944 AD 444 at 453; *Brits v Coetzee* 1967 (3) SA 570 (T) at 571

documents attached in an attempt to prove that alleged.The plaintiff alleges that an appointment letter was issued to it on 13 April 2021 for the construction of the "2km - Nkitsing Bohlokong Road". The letter of appointment appended to the particulars of claim is dated 16 March 2021 and relates to an appointment of a panel of twelve contractors for construction and maintenance of roads and storm water infrastructure on and "as and when basis" for a period of 3 (three) years, not for a specific project known as "2km-Nkitsing Bohlokong Road". The letter of appointment further does not demonstrate an appointment for the specific project at a bidding price of R18 144 655.73, nor does it contain any recording of a contract price or the amount of retention monies. The GCC makes no reference to this specific project, does not record the contract price, nor the value amount or retention monies, and there is indeed no indication that it relates to the project alleged by the plaintiff for the construction of the specific road, for a contract value of R18 144 655.73.

[19] The SLA in turn was concluded before the letter of appointment and records that the excipient appointed the plaintiff for construction and maintenance of roads and storm water infrastructure on and "as-and-when-required basis" for a period of 3 (three) years, and that payment of the amounts owing for such work would be as agreed in the Activity Schedule in Annexure A after receipt of the VAT invoices.

[20] In the circumstances, the documents relied on do not demonstrate that the conclusion of an agreement for the construction of the specific road for a bidding price of R18 144 655.73, or that retention monies are payable to the plaintiff, as alleged. Aforementioned however does not demonstrate that the particulars of claim lack the necessary averments to sustain a cause of action, but does result in the particulars of claim being vague and embarrassing. Aforesaid finding should not detract from that found in respect of the necessary allegations above.

[21] On the pleaded case as it stands, the plaintiff would only be entitled to lead evidence in establishing the existing allegations which may very well result therein that a substantial portion of the evidence may be regarded as inadmissible by the rial court.

[22] Having found as aforesaid, the plaintiff ought to enjoy an opportunity to amend its particulars of claim. Upholding the exception disposes of the pleading against which exception was taken, and not the action in totality. Although the particulars of claim do not sustain the elected cause of action, such pleading continues to exist.

[23] In respect of the issue of costs, I find no reason to deviate from the general

principle that cost should follow the event. As to the scale of cost, I am satisfied that party-and-party costs on scale B is appropriate.

[24] Consequently, the following order is made:

1. The defendant's exception is upheld.

2. The plaintiff is granted leave to amend its particulars of claim in terms of Uniform Rule 28, within 10 (ten) days of the date of this order.

3. The plaintiff is ordered to pay party-and-party cost on Scale B

[redacted]

D. GREYLING-COETZER, AJ

Appearances:

For the Plaintiff:	ADV. L. TLELAI
Instructed by:	Mhlokonya Attorneys
For the Excipient:	ADV. M.C. LOUW
Instructed by:	Peyper Attorneys