

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 079559/2023

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
9 May 2025	
DATE	SIGNATURE

In the matter between:

IPC PLUMBING SA (PTY) LTD

Plaintiff

and

AZRAPART (PTY) LTD

First Defendant

MOTA-ENGIL CONSTRUCTION (PTY) LTD

Second Defendant

FOURWAYS PRECINCT (PTY) LTD

Third Defendant

JUDGMENT

DOMINGO, AJ

Introduction

[1] This is an application brought by the plaintiff under Uniform Court Rule 28(4) for leave to amend its particulars of claim after the first defendant noted an exception to the formulation of the plaintiff's claim.

- [2] The first defendant has objected to the plaintiff's proposed amendment and opposes this application for leave to amend on the stated grounds that the proposed amendment does not address the grounds of exception it raised, asserting that even after amendments, the particulars of claim would remain excipiable on the same grounds.

Background

- [3] Having read the particulars of claim (amended and unamended version), the plaintiff seeks to be paid an amount of R13 970 320.85 in respect of what it terms as contractual damages for the alleged breach of a subcontract agreement. In the alternative the plaintiff seeks the debatement of an account and order that the first defendant pay the amount found to be due to the plaintiff. This alternative relief is premised on an oral agreement entered into in September 2021, where it is submitted by the plaintiff that the first defendant would pay the plaintiff the amount found to be due to it consequent upon the debatement process.
- [4] The plaintiff refers to itself as the "the sub-contractor", to the second defendant as "the contractor" and to the first defendant as "the employer."
- [5] On the 23 June 2022 the plaintiff instituted action under case number 33677/2022 against the second and third defendant for the same relief that it now seeks in the present matter. One of the defences raised in the action under case number 33677/2022 is that the second defendant in that action, which is the third defendant in this action, ceded and assigned its rights and obligation under the contract relied on by the plaintiff to the first defendant in this action. Instead of applying to join the first defendant in the action to the proceedings under case number 33677/2022, the plaintiff issued a new summons wherein it cites all three defendants and set out the same cause of action but its claim against the first defendant is conditional on the success of the plea of misjoinder under case number 33677/2022.
- [6] The plaintiff in this case, submitted in its particular of claims that any reference to the third defendant "FP" and/or the "the Employer" should be read as referring to the first defendant (Azrapart) as if specifically pleaded by way of reference.

Issues

- [7] The issue to be determined in this matter is whether the plaintiff's particulars of claim disclose a cause of action against the first defendant, whether in their unamended or amended form. In other words, in determining the two matters before the court, i.e the Rule 28(4) application for leave to amend and the first defendant's exception, the issue to be determined is whether the plaintiff's particulars of claim would remain excipiable after the intended amendments was effected, if allowed.

Grounds of exception raised

- [8] The first defendant noted an exception to the plaintiff's particulars of claim on three grounds, namely:
- 8.1 that there is no contractual nexus between the plaintiff and the first defendant;
 - 8.2 that Mr Swanepoel had no authority to conclude agreements on behalf on the first defendant. There is no allegation that Mr Swanepoel was authorised to represent the first defendant and there is no allegation that linked Mr Swanepoel to the principal agent of the first defendant;
 - 8.3 that a non-variation clause in the subcontract results in any oral agreement concluded between the plaintiff and the first defendant being null and void.

Legal framework

- [9] The primary object of allowing an amendment is to obtain proper ventilation of the disputes between the parties and to determine the real issues between them so that justice may be done.¹ Whether to grant or refuse leave to amend, is a matter that falls in the court's discretion, which is to be exercised judicially.²

¹ See *Nedbank Limited v Ouderajh* (11969/2015) [2022] ZAKZDHC 8 (29 April 2022); *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC); and *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others* 2020 (1) SA 327 (CC).

² *Embling and Another v Two Oceans Aquarium CC* 2000 (3) SA 691 (C) at 694G-H.

[10] An amendment should generally not be permitted if its introduction would render the pleading excipiable.³ In other words, the issue proposed to be introduced by the amendment must be a triable issue.⁴

[11] Counsel on behalf of the plaintiff has directed the court to the case of *R M van de Ghinste & Co (Pty) Ltd v Van de Ghinste*⁵ where the court explained that where an objection is raised to a proposed amendment of a pleading on the ground that the pleading would be excipiable after amendment, the proper approach is not to consider whether the pleading might be excipiable, or excipiability is arguable, but instead decide whether the amended pleading would be excipiable. The court must thus decide the issue of excipiability.

[12] This view was based on the judgment in *Crawford-Brunt v Kavnat and Another*⁶ where the court states:

“If the pleading would appear to be possibly open to exception or even if the Court is of the opinion that the question of whether or not the pleading is excipiable is arguable, it would seem to be the more correct course to allow the amendment.

This approach is also, in my view, consistent with the general principle that amendments should normally be allowed unless the application to amend is *mala fide*, or unless such amendment would cause an injustice to the other side which cannot be compensated by costs.”

[13] Later, in *YB v SB and Others NNO*⁷ the court formulated the test applicable to such circumstances as follows:

“It is accepted law that a court will not allow amendments where their effect would render such a pleading excipiable or where it does not cure an excipiable pleading.

The court must accept as correct the allegations contained in the particulars of claim, incorporating the proposed amendment, and determine whether those allegation are

³ *AC/DC Dynamics (Pty) Ltd v Shrinik Retailing (Pty) Ltd and Another* 2022 JDR (GJ) at para 12.

⁴ *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 641A.

⁵ 1980 (1) SA 250 (C) at 258H-259A.

⁶ 1967 (4) SA 308 (C) at 310D-311A.

⁷ 2016 (1) SA 47 (WCC) at para 11 to 12.

capable of supporting a cause of action in respect of the assets of the Ruby Trust (*Stewart and Another v Botha and Another* 2008 (6) SA 310 (SCA) para 4).

The defect in the pleading must appear *ex facie* the pleading and no extraneous facts may be adduced to show that the pleading is excipiable (*Barbara v Barnard* 2000 (3) SA 741 (C) para 10).

It is for the excipient (ie the trustees) to satisfy the court that the conclusion of law pleaded by the plaintiff cannot be supported by any reasonable interpretation of the particulars of claim.”

[14] The test on exception is whether, on all possible readings of the facts, no cause of action may be made out. It is for the excipient, that is the first defendant in this matter 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.

[15] Our courts have consistently held that if an amendment rectifies the defects complained of the exception falls away.⁸ The reason being that once a pleading is amended the original pleading falls away, and any exception to the original pleading becomes moot.⁹

Contractual Nexus

[16] It is contended by the plaintiff that the first defendant breached its obligations under an oral agreement (9 September 2021) between the plaintiff and the first defendant. On this basis the plaintiff submitted that it claims firstly, payment of the damages that flows from this breach, alternatively specific performance in the form of a statement and debatement of the account.

[17] The plaintiff submitted that under the oral agreement, the parties agreed that:

17.1 the Principal Agent (who represent the employer in the Principal Building Agreement) previously incorrectly certified payments due to the plaintiff under the subcontract;

⁸ See *Trope v South African Reserve Bank* 1993 (3) SA 264 (A).

⁹ See *Madiro v Madibeng Local Municipality* 2021 JDR 2631 (GP) and *supra*.

17.2 the first defendant, through its appointed agent, would debate the plaintiff's account dated 17 April 2020; and

17.3 following the debatement, the first defendant would pay the plaintiff what the contractor (second defendant) owed the plaintiff under the subcontract, notwithstanding the first defendant not being a party to the subcontract.

[18] The plaintiff submitted that the first defendant's agent did not debate the plaintiff's account of 17 April 2020 nor did the first defendant pay the plaintiff what is due under the subcontract as undertaken.

[19] It is averred by the plaintiff that the contractual nexus that the plaintiff relies on is the nexus created by the oral agreement; not those emanating from either the Principal Building Agreement or the subcontract. Thus, the plaintiff submitted that its cause of action (after amendment) is founded on the first defendant's breach of the oral agreement concluded between the plaintiff and the first defendant on 9 September 2021.

[20] It is contended by the plaintiff that by accepting the allegations pleaded in the particulars of claim as true, the first defendant's contention that no privity of contract exists between the plaintiff and the first defendant is misguided and the first ground of exception must therefore fail.

[21] The first defendant contends that the plaintiff's main cause of action is encapsulated in paragraph 43 of the plaintiff's particulars of claim, which sets out that the plaintiff is to be paid the amount of R13 970 320.85 as damages arising from the alleged breach of contract of a subcontract agreement.

[22] It is submitted by the first defendant that the subcontract is identified and defined in paragraph 15.2 of the plaintiff's particulars of claim as an agreement in writing concluded between the plaintiff and the second defendant. The agreement filed on record by the plaintiff contains the letter in terms of which the plaintiff was appointed, as well as the express terms of the subcontract. The first defendant is not identified or referred to as a party to the subcontract agreement.

[23] In regard to the above, the defendant's counsel has succinctly summarised the pertinent aspects of the subcontract as follows:

23.1 The letter of appointment was issued and signed by the second defendant.

23.2 The cover page of the subcontract agreement identifies the second defendant as "the Contractor" and the plaintiff as "the Sub-Contractor."

23.3 The entity referred to as "the Employer" is identified in clause 1.1 as "the party contracting with the contractor."

23.4 Clause 15.8 of the subcontract states that "there shall be no privity of contract between the employer and a subcontractor appointed by the contractor."

23.5 Clause 25.7 (as amended) obliges the second defendant, and not the first defendant, to pay the plaintiff.

[24] It is submitted by the first defendant that the facts alleged by the plaintiff establishes that two contracts exist between the parties. The main contract was concluded between the first defendant, as the employer, and the second defendant, as the contractor. The subcontract agreement was concluded between the second defendant, as the contractor, and the plaintiff as the sub-contractor.

[25] It is therefore averred by the first defendant that the plaintiff is not party to the main contract, and the first defendant is not a party to the subcontract agreement. Given that the first defendant was not a party to the subcontract agreement it has no rights in terms of that contract and, more importantly, it had no obligations arising from the contract. It is contended by the first defendant that it follows that the first defendant could not have breached a contract to which it was not a party and in respect of which it had no obligations that it could have failed to perform. The alleged breaches set out in paragraph 33 of the plaintiff's particulars of claim are not supported by the the express terms of the subcontract or the facts alleged by the plaintiff.

[26] In the premises, it is clear that the first defendant's exception on the first ground that there is no contractual nexus between the plaintiff and the defendant pertains to the subcontract agreement (main claim) and is not aimed at the oral agreement. The plaintiff does not address the the first defendant's contention that no privity of contract exists between the plaintiff and the first defendant, because the plaintiff relies on the contractual nexus created by the oral agreement. The plaintiff does not deal with the contractual nexus set out in paragraph 43 of its particular of claims, where I am in agreement with the first defendant's counsel, the main cause of action is encapsulated which is the claim for damages arising from the alleged breach of a subcontract agreement.

[27] The particulars of claim, in its amended and unamended form does not remedy the first defendant's exception on the ground that there is no contractual nexus in terms of the cause of action for the main relief claimed by the plaintiff as set out in paragraph 43 of the the plaintiff's particulars of claim. I therefore find that in this respect the particulars of claim, accordingly, fails to disclose a cause of actions against the first defendant.

Lack of authority

[28] The second ground of exception by the first defendant contests Mr Swanepoel's authority to bind the first defendant in concluding the oral agreement. It is also contended by the first defendant that there is no allegation that Mr Swanepoel was authorised to represent the first defendant and there is no allegation that linked Mr Swanepoel to the principal agent of the first defendant.

[29] The plaintiff in its amended particulars of claim pleads the following regarding the first defendants second ground of exception:

"On or about the 9 September 2021 and at or near Fourways the plaintiff, there and then represented by Jason van Wyk and FP, there and then represented by Dawie Swanepoel (of the quantity surveyor of FP) orally agreed that the dispute about the incorrect payment certification would be resolved as follows ("the September 2021 agreement"):

- 41.1 The previous payment certifications by FP of what is the plaintiff in terms of the sub-contract is incorrect;

- 41.2 The plaintiff and FP would debate the account dated 17 April 2020 of the plaintiff; and
- 41.3 Upon conclusion of the debate account of the plaintiff, FP would make payment to the plaintiff of what is due to the plaintiff in terms of the sub-contract.
- 44.B After the dispatch of Annexure “POC7” and leading up to as well as after the dispatch of Annexure “POC9”, various virtual meeting and meetings in person were held between the plaintiff, duly represented, and *inter alia* the defendants, duly represented, in order to resolve the dissatisfaction with the certification of the plaintiff’s work in terms of the subcontract as well as the quantification of the value thereof *inter alia*:
- 44.B.1 On 15 October 2020 at Boogertman & Partners at approximately 12h00, which meeting was *inter alia* attended by Mr Nico Rivetti of the Project Manager, Mr Dawie Swanepoel of the Quantity Surveyor, Messrs Jury Wickham and Brent Jachs of MECSA as well as Mr Opperman and Mr Janna van Wyk of the plaintiff;
- 44.B.2 A meeting on 17 June 2021 attended by the aforementioned individuals in their representative capacities.
- 44.B.3 In any one and or all of the aforementioned meetings, the first, alternatively third defendant, duly represented by an authorised representative and/or the principal agent, duly represented by Mr Nico Rivetti, duly authorised the Quantity Surveyor to enter into negotiations with and settle with the plaintiff, the dispute relating to the dissatisfaction with the certification of the plaintiff’s subcontract works and the quantification thereof.
- 44.C.1 By virtue of the authority granted by the first, alternatively, third defendant and/or the principal agent to the Quantity Surveyor, Mr Dawie Swanepoel was duly authorised to enter into negotiations with the plaintiff as well as the September 2021 agreement.
- 44.C.2 The Plaintiff is not in possession of written authority granted by the first, alternatively third defendant and/or principal agent to the Quantity Surveyor, which document, alternatively documents constituting such authority, ought to be in possession of the first, alternatively third defendant and/or principal agent.”

[30] It is contended by the plaintiff that by accepting the factual statements above as true for the purpose of deciding the exception, the claim is properly pleaded. Whether or not Mr Swanepoel had the authority to represent the first defendant is a question of fact to be determined at trial.

[31] It is my finding that the amended particulars of claim addresses the first defendant's exception in regard to the allegations that it was not alleged that Mr Swanepoel was authorised to represent the first defendant in the plaintiff's unamended particulars of claims. In addition, the plaintiff in the particulars of claims has also referenced the clause 6.1.1 of the subcontract agreement and alleges that the "principal agent has full authority and is obligated to act and bind the employer" which deals with the delegation of authority to act on behalf of the employer. Furthermore, the full text of clause 6.1.1 reads as follows:

"The employer warrants that the principal agent has full authority and obligation to act and bind the employer. The principal agent has no authority to amend the JBCC Principal Building Agreement or the JBCC N/S Subcontract Agreement.

[32] The first defendant submitted that according to clause A5 of the contract data to the subcontract agreement Mr Nico Rivetti of SIP Project Managers is identified as the principal agent.

[33] The first defendant contends, in any event, if it is assumed that Mr Swanepoel was the principal agent of the Employer, clause 6.1.1 of the subcontract agreement clearly states that the principal agent is not authorised to amend the terms of the main contract or the subcontract.

Non-variation clause

[34] The plaintiff submitted that a term of the September 2021 oral agreement was that the first defendant would pay the plaintiff the amount found due to it consequent upon the debatement process.

[35] The first defendant raises the exception that clause 25.7 (as amended) of the subcontract agreement obliged the second defendant, and not the first defendant, to pay the plaintiff. Consequently, the first defendant contended that the terms of the September 2021 agreement purport to amend the terms of the

subcontract agreement in material respects, and even if Mr Swanepoel was the principal agent, which the first defendant has not conceded, Mr Swanepoel did not have the authority to amend the terms of the subcontract agreement. The first defendant therefore submits that it follows that the September 2021 agreement is not binding on the first defendant nor is it enforceable against the first defendant. Thus, it is contended by the first defendant that the oral agreement amends the terms of the subcontract agreement; and is therefore barred by the non-variation clause rendering the oral agreement null and void.

[36] However, the plaintiff pleaded that the parties to the oral agreement are the plaintiff and the first defendant. The first defendant is not a party to the subcontract and the plaintiff is not a party to the Principal Building Agreement. On this basis, the plaintiff averred that there is no non-variation clause agreed to between the plaintiff and the first defendant on the pleadings. An oral agreement between the plaintiff and the first defendant is thus not barred by agreement between them and the third ground of exception must fail.

[37] From the submission made by the plaintiff they are pleading that the September 2021 oral agreement is a new contract and that there is no prohibition that precludes the employer, the first defendant from entering into a contract with the subcontractor, the plaintiff. However, in my opinion this cause of action is not clear from the amended and unamended particulars of claim.

Evaluation and Discussion

[38] Counsel for the plaintiff has asked the court to look at the plaintiff's particulars of claim as whole and not for the court to take an overly technical approach. Having heard the arguments made by the counsels and having examined the particulars of claim as a whole, particularly in regard to the amendments made to the particulars of claim, I am of the opinion that the plaintiff only addressed the second ground of exception (lack of authority) raised by the first defendant.

[39] The plaintiff's amendments in the particular of claims set out in paragraphs 44A, 44B, and 44C addresses the issues raised by the first defendant in its second ground of exception regarding the allegation of the delegation of authority to Mr Swanepoel and lack of authority of Mr Swanepoel.

[40] Regarding the first defendant's first and second ground of exception to the particulars of claim, from a reading of the plaintiff's Heads of Argument and having heard the plaintiff's counsel, the main cause of action against the first defendant is based on the September 2021 oral agreement which the plaintiff alleges is a new agreement which does not fall within the purview of the subcontract's non-variation clause. All of this is not clear from the particulars of claim read as a whole. For example, paragraph 43 of the particular of claims deals with the claim of damages arising from the subcontract and not the alleged 22 September new oral contract. Paragraph 43 of the particulars of claims state:

"As a direct consequence of the afore stated breaches by MECSA and FP of the sub-contract, the plaintiff suffered contractual damages in the amount of R13 970 320.85, being the balance due for the sub-contract works and site instructions which were performed by and as reflected in the plaintiff's account dated 17 April 2020, amounting to R37 086 498, less payment received in the amount of R23 086 498.39."

[41] Paragraphs 8 to 43 of the particulars of claim sets out the entire background of the first action (case number 33677/2022) brought by the plaintiff against the second and third defendant arising from the subcontract. It is this background that forms the foundation of the plaintiff's main claim against the respondent arising from the subcontract as set out in paragraph 43 of the particulars of claim. It is only from paragraph 44 onwards that the alternative claim under the oral agreement is set out in terms of which it is alleged that payment would be made to the plaintiff upon the conclusion of the debatement. Paragraph 44 states:

"In the alternative to the claim of the plaintiff against MECSA and FP for contractual damages, the plaintiff is entitled to the debatement of the account dated 17 April 2020 of the plaintiff, with FP, in terms of the September 2021 agreement and to payment of what is found to be due to the plaintiff upon the conclusion of of such debatement."

[42] Thus, the agreements by the plaintiff that the main cause of action against the plaintiff is based on the September 2021 oral agreement, which is pleaded as a new agreement by the plaintiff is not concisely and clearly articulated as the main cause of action against the defendant in the particulars of claim, both in its amended and unamended form.

[43] I am in agreement with plaintiff's counsel that there is no prohibition that precludes the first defendant (employer) from entering into a new contract with the plaintiff (the subcontractor). However, on a reading of the unamended and amended particulars of claim, the relief sought in terms of the September 2021 oral agreement is founded and flows from the performance of services rendered in terms of the subcontract. For example, paragraph 40 of the particulars of claims, it is stated:

"In terms of the notice of disagreement the plaintiff demanded from FP that a meeting be held between the plaintiff and the quantity surveyor of FP to resolve the dispute about the incorrect payment certification."

[44] What followed from this demand for a meeting by the plaintiff was the 9 September 2021 meeting as set out in paragraph 41 of the particulars of claim. The pleading that the oral contract is a new contract being pleaded is unclear and ambiguous from a reading of the particulars of claim.

[45] Furthermore, in paragraph 5 of the particulars of claim the plaintiff alleges that:

"the second and third defendants are cited herein insofar as they may have a real and substantial interest in the relief claimed by the plaintiff and no substantive relief and/or cost order is sought against the second and third defendants herein save in the event of opposition hereto."

[46] I am in agreement with the first defendant's counsel that if no relief is sought against the second and third defendant, then by default the relief sought must be directed against the first defendant. But that is not what is sought in the first prayer of the particulars of claim in its unamended and amended form.

[47] Looking at the totality of evidence provided, the amended particulars of claim appears to be a "patchwork of claims" cobbled together; taken from the 33677/2022 case and imported in this case and added thereto is the partial amendments made to address the first defendant's exception. As a whole the particulars of claim is not clear and concise in articulating that the plaintiff's main cause of action is founded on the first defendant's breach of an oral agreement concluded between the plaintiff and defendant on 9 September 2021, as averred by the Plaintiff's counsel.

[48] In the premises, I find that the plaintiff's particulars of claim even after amendment remains excipiable, the Rule 28(4) application is not granted, and the first defendant's exception is upheld.

Order

[49] I hereby make the following order:

49.1 The plaintiff's application brought against the defendants under Uniform Court Rule 28(4) to amend its particulars of claim is dismissed and the first defendant's exception is upheld.

49.2 The plaintiff is ordered to pay the costs of this application.



W DOMINGO
ACTING JUDGE OF THE HIGH COURT
PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. This matter was heard in open court on the 10 February 2025. The date for hand-down is deemed to be 9 May 2025.

APPEARANCES

For the Plaintiff:

ADVOCATE BH STEYN instructed by
TINTINGERS INCORPORATED

For the First and Third Defendant:

ADVOCATE CJ Mc ASLIN SC
instructed by PINSENT MASONS
SOUTH AFRICA INC.

Second Defendant:

NO APPEARANCE

