IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA

NOT REPORTABLE

Case No.: 3466/2022

In the matter between:

AFRICAN HEIGHTS (PTY) LTD	Plaintiff
and	
COEGA DEVELOPMENT CORPORATION	First Defendant
DECK STEEL AND CONCRETE CC	Second Defendant
KRISHNA RUBEN VENGADESAN NO	Third Defendant
REINETTE STEYNSBURG NO	Fourth Defendant
IN RE:	
KRISHNA RUBEN VENGADESAN NO	Third Excipient/Defendant
REINETTE STEYNSBURG NO	Fourth Excipient/Defendant

and

AFRICAN HEIGHTS (PTY) LTD Respondent/Plaintiff

JUDGMENT

EKSTEEN J:

[1] This is an exception against the particulars of the plaintiff's claim on the grounds that it lacks averments necessary to sustain a cause of action. The excipients are the liquidators of the second defendant, Deck Steel and Concrete CC (Deck Steel). The facts averred in the particulars of claim, which must be accepted for purposes of the exception, are set out below.

Background

[2] The particulars of the plaintiff's claim allege that the first defendant, the Coega Development Corporation (Coega) entered into a written agreement (the main contract) with Deck Steel during 2018, in terms of which Deck Steel undertook to fit bulk services, fire piping and other related services at the Zibi Meyer Junior Secondary School in Matatiele.

[3] Pursuant to its obligations under the main contract Deck Steel concluded a written agreement (the subcontractor agreement) with the plaintiff, African Heights (Pty) Ltd (African Heights) in February 2019, in terms of which African Heights were appointed as a domestic subcontractor to perform certain of the functions stipulated in the main contract on behalf of Deck Steel. African Heights duly performed its obligations under the subcontractor's agreement and, on 28 April 2021, Deck Steel issued a project completion certificate in respect thereof. African Heights issued an invoice in the sum of R2 254

505,99 to Deck Steel in respect of the performance of its obligations under the subcontractor's agreement. Thereafter, on 28 July 2021, Deck Steel concluded an out and out written cession agreement (the cession agreement) with African Heights wherein Deck Steel acknowledged their liability to African Heights in the total amount of R2 254 505,99 and wherein it ceded all its right, title and interest in the payment of this amount, owed to it by Coega, to African Heights. The material terms of the cession agreement, which lies at the heart of the exception, provides:

> '1. That Deck Steel hereby cedes and transfers all its rights, title and interest to African Heights in the sum of R2 254 505.99 or in whatever lesser amount owed to it by Coega at the final date of payment.
>
> …
>
> 3. Deck Steel hereby authorizes African Heights to enforce its rights hereunder against Coega.
>
> 4. Deck Steel hereby authorizes Coega to pay the aforesaid amounts to African Heights.
>
> …
>
> 6. Should African Heights fail to recover the debit amount from Coega for any reason whatsoever, then, Deck Steel or its successors in title shall be obliged to African Heights for the total debt amount.
>
> …
>
> 10. This Agreement shall be binding upon administrators, assignees or successors in title, as the case may be, of Deck Steel.'

[4] On 19 August 2021, pursuant to the cession agreement, Deck Steel submitted a 'direct payment form' wherein it requested Coega to make a direct payment, on its behalf, to African Heights, in the amount of R1 793 117,25 (one million seven hundred and ninety three thousand one hundred and seventeen rand and twenty five cents), including VAT, for the materials that were required and were installed in the construction and completion

of the main contract. The material portion of the direct payment instruction issued by Deck Steel records:

> 'I hereby request the **COEGA DEVELOPMENT CORPORATION** to make a <u>direct payment</u> on my behalf to **AFRICAN HEIGHTS (PTY) LTD** in the amount of **R1 793 117.25** <u>**ONE MILLION SEVEN HUNDRED AND NINETY THREE THOUSDAND, ONE HUNDRED AND SEVENTEEN RAND AND TWENTY FIVE CENTS**</u> including vat for the materials that was required and installed for the construction and completion of the above contract. …
>
> Note: This is the final account and retention money inclusive.
>
> I understand that should the supplier not be paid I still remain responsible and liable for the settlement of the account.'

[5] Thereafter, Deck Steel was placed under liquidation on 23 March 2022 and, accordingly, the third and fourth defendants, as liquidators of Deck Steel (in liquidation) were joined as parties to the action. On 13 October 2022 Attorneys Jafta, on behalf of African Heights, reminded Coega of the said cession and demanded payment of the said amount of R1 793 117,25. The letter of demand record, inter alia:

> '5. … [I]n terms of the said cession agreement, Deck Steel ceded and transferred all its rights, title and interests in the sum of R1 793 117,25 owed to it by Coega to our client.
>
> 6. Despite being informed of this cession, and despite you acknowledging it, to date you have failed to pay the ceded amount to our client.
>
> 7. Long after the cession, and on or about March 2022, Deck Steel was placed under liquidation.

8. Despite our client informing and reminding you and the liquidators about the cession, the liquidators determinately included the ceded amount belonging to Deck Steel such that you have to date not paid the money to our client.

9. This money remains due, owing and payable by you to client.'

[6] On the strength of these averments African Heights sought to hold Coega liable to it for payment of the said amount and it alleged:

> 'Notwithstanding demand, the first defendant (Coega) failed and/refused to pay the plaintiff the aforesaid sum of R1 793 117,25.'

[7] It proceeded to allege, in the alternative, that it holds Deck Steel (in liquidation) liable for the payment thereof, based on the subcontractor's agreement.

The exception

[8] As I have said, the essence of the exception arises from the cession agreement. The material portion of the notice of exception records:

"5. Clause 6 of the Cession Agreement reads as follows:

> *'Should African Heights fail to recover the debt amount from Coega for any reason whatsoever then, Deck Steel or its successors in title shall be obliged to African Heights for the total debt amount.'*

6. In terms of clause 6 of the Cession Agreement, the Plaintiff's right of action as against the Second Defendant only arises once it has failed to recover the '*debt amount'* from the First Defendant.

7. The particulars of claim contains no allegation that the Plaintiff has failed to recover the '*debt amount'* from the First Defendant.

8. Conversely the Plaintiff's claim against the First Defendant is an attempt to recover the *debt amount* from the First Defendant other under the main claim (being reliance on the cession), or under the Plaintiff's alternative claim ….'

9. Until the Plaintiff's action against the First Defendant has failed partly or in whole, the Plaintiff has no cause of action as against the Second Defendant.'

Discussion

[9] When an exception is brought on the basis that the particulars of claim lack averments necessary to disclose a cause of action the excipient has the duty to persuade the court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed.[1]

[10] As I have said African Heights seek payment, in the first instance, from Coega, who they allege have failed and refused to pay. The claim against the third and fourth defendants is an alternative, based on the sub-contractor agreement. As adumbrated earlier the essence of the exception is to be found in the cession agreement and in particular in paragraph 6 thereof. Mr *Cetywayo* who appeared on behalf of the excipients submitted that clause 6 effectively provides that African Heights could only look to the third and fourth defendants for payment after they had exhausted their remedies against Coega and, notwithstanding their endeavours, failed to recover. Ms *Thom-Ndamase*, on the other hand, on behalf of African Heights, argued that paragraph 3 of the cession agreement is merely an empowering provision that places no obligation on African Heights

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[1] *Theunissen en andere v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) 500; *Lewis v Onenate (Pty) Ltd and Another* 1992 (4) SA 811 (A) at 817; and *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 960 (SCA) at 965.

first to litigate against Coega. The rights of African Heights against Deck Steel arise when Coega fails to pay and paragraph 20 of the particulars of claim allege that Coega had 'failed and refused to pay', thus entitling African Heights to look, as it does, in the alternative, to Deck Steel for payment. This, she submitted, was sufficient. The difference, self-evidently, lies in the interpretation of the cession agreement, and in particular clause 6. In *Endumeni Municipality*[2] the SCA held:

> 'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.'[3]

[11] The approach necessarily calls for evidence to cast light upon the circumstances attendant upon the document coming into existence, the apparent purpose to which the provisions are directed, and the material known to those responsible for its production. Thus, in *Endumeni*, Wallis JA explained[4]:

> 'Sometimes the language of the provision, when read in its particular context, seems clear and admits of little if any ambiguity. Courts say in such cases that they adhere to the ordinary grammatical meaning of the words used. However, that too is a misnomer. … Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise. The

[2] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).
[3] Para 18.
[4] At 609C-G.

expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used.'

[12] Thus, it has been held that 'it is the first principle in dealing with matters of exception that, if evidence can be led which can disclose a cause of action alleged in the pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action.'[5]

[13] It follows from this that an exception on grounds that the pleading lacks averments necessary to disclose a cause of action cannot succeed unless it is shown that ex facie the allegations made by the plaintiff and any document upon which his cause of action may be based, the claim *is* (not maybe) bad in law.[6] For these reasons exception is not the appropriate procedure to settle questions of interpretation because evidence may always be admissible at the trial to cast light on the correct interpretation of the contract.[7]

[14] The arguments of the contending parties, as I have said, suggest that the dispute turns on the interpretation of the cession agreement. Prima facie, the interpretation that Ms *Thom-Ndamase* has placed on the agreement finds some support in the direct payment request which records that Coega will remain liable 'should the supplier not be paid'. But the interpretation turns on evidence of the factors to which I have referred earlier.[8] In the circumstances it cannot be determined on the exception.

[15] In the result, the exception is dismissed with costs.

J W EKSTEEN

[5] *McKelvey v Cowan NO* 1980 (4) SA 525 (Z) at 526D-E.
[6] *Vermeulen v Goose Valley Investments (Pty) Ltd* [2001] ZASCA 53; 2001 (3) SA 986 (SCA) at para 7.
[7] *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 (1) SA 508 (A); and *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A).
[8] *Picbel Groep Voorsorgfonds (in liquidation) v Somerville and other related matters* [2013] 2 All SA 692 (SCA), 2013 (5) SA 496 (SCA) para 39.

JUDGE OF THE HIGH COURT

Appearances:

For Excipients /	
3rd - 4th Defendants:	Adv Cetywayo
Instructed by:	V Chetty Inc c/o
	Goldberg & De Villiers Inc
	GQEBERHA
For Plaintiff:	Adv Thom-Ndamase
Instructed by:	Jafta Z Attorneys c/o
	Qhamani Sinefu Attorneys Inc
	GQEBERHA
Date Heard:	2 May 2025
Date Delivered:	13 May 2025