IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 17213/2022P

In the matter between:

DUBE TRADEPORT CORPORATION **PLAINTIFF**

and

SMEC SOUTH AFRICA PROPRIETARY LIMITED **DEFENDANT**

ORDER

The following order is granted:

1. The defendant's exception is dismissed with costs.

JUDGMENT

PIETERSEN AJ:

[1] This is an exception by the defendant[1] to the plaintiff's particulars of claim. The defendant contends that the plaintiff's particulars of claim lack averments necessary to sustain a cause of action.

[2] The plaintiff issued summons against the defendant based on the defendant's professional negligence, which caused the defendant to be in breach of its obligations in terms of a contract and its professional mandate. The plaintiff claims that this caused it to suffer damages. According to the plaintiff's particulars of claim, it issued a bid for the appointment of a professional service provider to undertake design and construction supervision for the construction of a double basement carpark and ground floor retail space at Block D of Dube City, located in the Dube Trade Port at La Mercy, north of Durban. The plaintiff's bid document contained within it part C1, which constituted the agreement and contract data. In terms of paragraph C1.2 of the contract data, the contract was based on the Standard Professional Services Contract[2] ('the standard terms'), published by the Construction Industry Development Board. The plaintiff accepted the defendant's bid offer on 18 December 2013, whereupon the defendant was appointed to undertake the professional services as set out in the defendant's bid document. Accordingly, upon acceptance of the defendant's bid, the bid became the contract between the parties ('the main agreement').

[3] Pursuant to various developments at the time of and after the conclusion of the main agreement, no less than five addenda were entered into by the parties. Construction commenced but eventually came to a complete stop during January 2018, when the main construction contractor was liquidated, which in turn resulted in the completion date of the project being delayed. Certain disputes arose between the plaintiff and the defendant regarding fee increases and outstanding payments. In settlement of the disputes, the parties concluded a termination of services and settlement agreement ('the termination agreement'), in terms of which they agreed to

[1] The parties are referred to as in the action.
[2] Standard Professional Services Contract (July 2009) (third edition of CIDB document 1014).

terminate the main agreement on the date of signature of the last party signing, being 19 September 2018.

[4] The plaintiff seeks to recover damages from the defendant under two claims. In terms of claim 1, the plaintiff seeks payment in the sum of R1 147 752, which amount was paid to the defendant as a result of the need for the modification of the design and additional works. In terms of claim 2, the plaintiff seeks payment in the sum of R5 462 151.51, which amount was paid to the construction contractor for the costs of additional civil works. As to when these claims arose, the plaintiff pleads at paragraph 45 of its particulars of claim as follows:

> '45. The claims were later determined to have arisen due to defendant's negligence as described above. Accordingly, plaintiff suffered damages in the total amount of R6 609 903.51 in settling the claims.'

[5] The plaintiff further pleads that these claims fall under clause 2.4 of the termination agreement, which reads as follow:

> 'Notwithstanding the termination of the Main Agreement SMEC will remain liable for the professional services, activities and designs undertaken by them in terms of the Main Agreement, read with the CIBD Standard Professional Services Contract (July 2009) (Third Edition of CIBD document 1014), up to the date of closure for the construction break on 15 December 2017. Such liability of SMEC shall however only be limited to an event, omission or action which can be directly attributed to the actions and/or omissions of SMEC and which occurred before 15 December 2017 and persisted despite the best reasonable efforts of Dube to prevent and/or mitigate such risk and/or liability. SMEC's liability shall furthermore be subject to it being informed immediately (in writing) by Dube of any risk, liability and/or claim (potential or otherwise) as well as any other limitation of liability as recorded in the Main Agreement.'

[6] Clause 2.6 of the termination agreement further provides as follows:

> ‘In addition to the provisions of clause 2.4 above, it is recorded that Dube’s right to institute a claim against SMEC and/or the SMEC Consortium in respect of the alleged anchor failure which occurred at the inception of the Project will survive this settlement, but it is recorded that SMEC and the members of the SMEC Consortium do not hereby concede that they were at fault and specifically record that they are not responsible in any manner whatsoever for the alleged anchor failures. SMEC and the members of the SMEC Consortium shall be entitled to raise any defence to any future claim which Dube may elect to institute against them, as they would have but for the conclusion of this agreement.’

[7] Therefore, in terms of clause 2.4 of the termination agreement, the defendant’s liability shall be subject to any other limitation of liability as recorded in the main agreement. The main agreement includes the standard terms and it provides at clause 13.4 as follows:

> ‘Duration of Liability
>
> Notwithstanding the terms of the Prescription Act No 66 of 1969 (as amended) or any other applicable statute of limitation neither the employer nor the Service Provider shall be held liable for any loss or damage resulting from any occurrence unless a claim is formally made within the period stated in the Contract Data or, where no such period is stated, within a period of three years from the date of termination or completion of the Contract.’

[8] The contract data does not stipulate a time period, as contemplated in clause 13.4. The plaintiff therefore had to ‘formally make’ its claims within a period of three years from the date of termination of the contract, being 19 September 2018.

[9] It is important to note that clause 2.4 of the termination agreement makes the defendant's liability subject to:

> (a) It (the defendant) being informed immediately in writing by the plaintiff of any risk, liability and/or claim (potential or otherwise); and
>
> (b) Any other limitation of liability as recorded in the contract.

This means, with reference to clause 13.4 of the main agreement, that a formal claim must be made within three years of the termination of the main agreement.

[10] The basis of the defendant's exception is that the plaintiff's claim is time-barred from three years after 19 September 2018 and the claim was only formally made on 11 December 2022, when the summons was served. By then, so the defendant argued, the plaintiff's claim had been extinguished through the effluxion of time.

[11] Mr Maritz, who appeared for the defendant, submitted that the plaintiff's cause of action in respect of claim 1 arose during the beginning of 2017 when the payment that forms the subject matter of claim 1 was made to the defendant. The defendant further submitted that the plaintiff failed to institute an action within a three-year period from the beginning of 2017, or even within a three-year period after the parties entered into the termination agreement.

[12] The defendant also submitted that the plaintiff failed to bring its claim, based on a contract, within the four corners of the agreement. The defendant submitted that the plaintiff failed to deal with the limitation of liability issue in its particulars of claim and the plaintiff's particulars of claim therefore lack the averments necessary to sustain a cause of action.

[13] Mr Dickson SC, who appeared for the plaintiff, submitted that the words 'a claim is formally made', on their ordinary meaning, mean a claim set out in writing. As a result,

so Mr Dickson argued, the plaintiff's letter of demand addressed to the defendant on 17 January 2020, which demand was referred to in paragraph 51 of the plaintiff's particulars of claim, meets the requirements of section 2.4 of the termination agreement.

[14] The issue that arises from the two different interpretations of the contract is thus when the time-bar period or prescription period commenced. As indicated above, the plaintiff pleads at paragraph 45 of its particulars of claim that its claims against the defendant were determined to have arisen later on an unspecified date. The plaintiff further submitted that a formal claim is not necessarily a summons. If it had been the parties' intention to attach that meaning to the words 'a claim is formally made', it would have been simple enough to say so in the agreement. Instead, so Mr Dickson argued, the words 'a claim is formally made' denote a claim which is set out formally in writing.

[15] The plaintiff further submitted that its claims were in any event formally made within the three-year period, as it was made upon a determination which took place at a later date. It was thus submitted that prescription only runs from this later, unspecified date.

[16] A further possible interpretation of the termination agreement submitted by Mr Dickson is that clause 2.4 of the termination agreement refers to 'any other limitation of liability as recorded in the main agreement'. The main agreement refers to a limitation of claims and not a limitation of liability. If clause 13 of the main agreement is considered, only clauses 13.1, 13.3, and 13.5 limit liability, whereas clause 13.4 only acts to time-bar claims. As such, so the plaintiff concluded, clause 13.4 does not act as a 'limitation of liability' as contemplated in clause 2.4.

[17] The onus of showing that a pleading is excipiable rests on the excipient.[3] In *Odendaal v Van Oudtshoorn*,[4] De Kock J remarked that there seems to be a tendency by the courts to try to uphold the validity of pleadings, if at all possible. In *Nel and others*

[3] *City of Cape Town v National Meat Suppliers Ltd* 1938 CPD 59 at 63.
[4] *Odendaal v Van Oudtshoorn* 1968 (3) SA 433 (T) at 436D-E.

NNO v McArthur and others,[5] Basson J also remarked 'that a charitable test is used on exception, especially in deciding whether a cause of action is established. The pleader is also entitled to a benevolent interpretation. The pleadings must be read as a whole, no paragraph can be read in isolation'. An excipient who alleges that a pleading lacks the averments necessary to sustain an action or defence must show that the pleading excepted to 'is (not may be) bad in law'.[6] An excipient should, therefore, 'make out a very clear, strong case before he should be allowed to succeed'.[7]

[18] The Supreme Court of Appeal in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*[8] also held that '[e]xceptions should be dealt with sensibly'. The court went on to hold that exceptions[9]

> 'provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility. To borrow the imagery employed by Miller J, the response to an exception should be like a sword that "cuts through the tissue of which the exception is compounded and exposes its vulnerability".' (Footnote omitted.)

[19] The Appellate Division, as it then was, in *Barclays National Bank Ltd v Thompson*[10] stated as follows regarding the function of an exception, when based on the ground that necessary averments are lacking, and the circumstances under which such an exception can be taken:[11]

> 'It seems clear that the function of a well-founded exception that a plea, or part thereof, does not disclose a defence to the plaintiff's cause of action is to dispose of the case in whole or in part. It is for this reason that exception cannot be taken

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[5] *Nel and others NNO v McArthur and others* 2003 (4) SA 142 (T) at 149F-G.
[6] *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986 (SCA) para 7.
[7] *Colonial Industries Ltd v Provincial Insurance Co Ltd* 1920 CPD 627 at 630.
[8] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 3.
[9] Ibid.
[10] *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A).
[11] Ibid at 553F-G.

to part of a plea unless it is self-contained, amounts to a separate defence, and can therefore be struck out without affecting the remainder of the plea…'

[20] It further held that:[12]

'It has also been said that the main purpose of an exception that a declaration does not disclose a cause of action is to avoid the leading of unnecessary evidence at the trial*: Dharumpal Transport (Pty) Ltd v Dharumpal*.[13] Save for exceptional cases, such as those where a defendant admits the plaintiff's allegations but pleads that as a matter of law the plaintiff is not entitled to the relief claimed by him… an exception to a plea should consequently also not be allowed unless, if upheld, it would obviate the leading of "unnecessary" evidence.'

[21] In an exception of this nature, the primary consideration is whether the plaintiff's particulars of claim disclose a cause of action. In *McKenzie v Farmers' Co-Operative Meat Industries Ltd*[14] the Appellate Division held that the plaintiff's pleading must set out

'every [material] fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'

[22] It has further been held that a pleading is only excipiable if 'no possible evidence led on the pleadings can disclose a cause of action'.[15] The excipient has the duty to show that upon every interpretation which the pleading can reasonably bear, no cause of action or defence is disclosed.[16]

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[12] Ibid at 553H-I
[13] *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 706E.
[14] *McKenzie v Farmers' Co-Operative Meat Industries Ltd* 1922 AD 16 at 23, quoting with approval from *Cooke v Gill* LR 8 CP 107.
[15] *McKelvey v Cowan NO* 1980 (4) SA 525 (Z) at 526D-E.
[16] *Lewis v Oneanate (Pty) Ltd and another* 1992 (4) SA 811 (A) at 817F-G.

[23] Courts are reluctant to decide, on exception, questions concerning the interpretation of a contract where its meaning is uncertain.[17] When the exception is based upon an interpretation of a contract, it is necessary for the excipient to demonstrate that the contract is unambiguous to the extent that evidence is not admissible for its interpretation and that the meaning for which the excipient contends is the correct meaning.[18] 'The possibility that evidence of surrounding circumstances may clarify any ambiguity in the contract must not be fanciful or remote.'[19] The possibility that such evidence may exist 'must be examined with care'.[20]

[24] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[21] the Supreme Court of Appeal held as follows regarding interpretation:

> '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. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.

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[17] *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) (*Sun Packaging*) at 186J-187A.
[18] *Sacks v Venter* 1954 (2) SA 427 (W) at 429D-E; see also *Standard Building Society v Cartoulis* 1939 AD 510 at 516.
[19] *Michael v Caroline's Frozen Yoghurt Parlour (Pty) Ltd* 1999 (1) SA 624 (W) at 632G-H.
[20] *Sun Packaging* at 184F-G.
[21] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' (Footnote omitted.)

[25] More recently, Unterhalter AJA also held the following in *Capitec Bank Holdings Ltd and another v Coral Lagoon Investments 194 (Pty) Ltd and others*:[22]

'… the words and concepts used in a contract and their relationship to the external world are not self-defining… the meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but also by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result.'

[26] It is possible that evidence may be admissible to contextualise the document since 'context is everything'.[23] The contextual setting for interpretation might include the subsequent conduct of the parties, indicating how they understood their agreement. Recourse to such evidence is permissible where the evidence indicates a common understanding of the terms of the agreement and does not alter the meaning of the words used, provided such evidence is used as conservatively as possible.[24]

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[22] *Capitec Bank Holdings Ltd and another v Coral Lagoon Investments 194 (Pty) Ltd and others* [2021] ZASCA 99; 2022 (1) SA 100 (SCA) (*Capitec Bank*) para 50.
[23] *University of Johannesburg v Auckland Park Theological Seminary and another* [2021] ZACC 13; 2021 (6) SA 1 (CC) para 68.
[24] *Capitec Bank* para 51.

[27] In the circumstances, considering the contrast in meaning attached to the main agreement and the termination agreement by both the plaintiff and the defendant, I am unable, in exception proceedings, to decide the question of the correct interpretation of the contract. The defendant has failed to discharge the onus to demonstrate in the circumstances that the contract is unambiguous and that evidence will not be admissible in the process of interpretation. In addition, it is not possible to decide in exception proceedings that the meaning attached to the contract by the defendant is the correct meaning.

[28] The possibility that evidence of surrounding circumstances and context may be admissible and clarify any ambiguity in the contract is not fanciful or remote. It remains that, at this stage, the possibility that such admissible evidence may exist cannot be excluded. The correct interpretation of the agreements between the parties can therefore not be decided at the exception stage and I decline to make any findings in this regard.

[29] It is further clear that prescription lies at the heart of the defendant's exception. Gorven JA remarked in *Jugwanth v Mobile Telephone Networks (Pty) Ltd*[25] that '[i]n trial proceedings, prescription is conventionally raised by way of a special plea to which there might be a replication'. The court rejected the argument that, because an exception is a pleading, the delivery of an exception is an effective way of invoking prescription under section 17(2) of the Prescription Act 68 of 1969. The court further held that where a defendant raises the issue of prescription by means of an exception, the court will have to consider whether the particulars of claim lack averments which are necessary to sustain a cause of action.[26] The answer in most cases is likely to be that the particulars of claim are not excipiable, as the plaintiff is not required to aver that his or her claim has not become prescribed.[27] As a result, an exception based on

[25] *Jugwanth v Mobile Telephone Networks (Pty) Ltd* [2021] ZASCA 114; [2021] 4 All SA 346 (SCA) para 12.
[26] Ibid.
[27] Ibid para 10; see also *Habib and another v Ethekwini Municipality* 2020 (1) SA 580 (KZD) (*Habib*) para 16.

prescription will fail if it does not appear from the particulars of claim whether or not the claim has become prescribed.[28]

[30] In the circumstances, I am unpersuaded that the plaintiff's particulars of claim do not disclose a cause of action, upon every interpretation which it can reasonably bear. The exception must therefore fail.

[31] It is a well-known principle that the award of costs is in the court's discretion, which discretion needs to be exercised judicially upon consideration of the facts in each case and a court is required to 'make such order as to costs as would be fair and just between the parties'.[29] There are no peculiar features to this exception and the general rule that the successful party is entitled to its costs shall apply.

[32] I make the following order:

1. The exception is dismissed with costs.

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PIETERSEN AJ

Date of hearing: 22 February 2024
Date of Judgment: 26 November 2024

APPEARANCES

Plaintiff/Respondent: Mr AJ Dickson SC

[28] *Habib* para 24.
[29] *Fripp v Gibbon and Co* 1913 AD 354 at 363.

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