

SOUTH AFRICA / JUDGMENT

Sekhukhune District Municipality v Betram (Pty) Ltd and Another (1249/2021) [2025] ZALMPPHC 29 (25 February 2025) [2025] ZALMPPHC 29

COURT

Limpopo High Court, Polokwane

BEFORE

Kganyago

CASE / FILE NUMBER

1249/2021

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
LIMPOPO DIVISION,
POLOKWANE
CASE
NO: 1249/2021
(1)
REPORTABLE: YES/NO
(2) OF INTEREST TO THE
JUDGES: YES/NO
(3) REVISED.

DATE:

SIGNATURE

In

the matter between:

SEKHUKHUNE
DISTRICT MUNICIPALITY
PLAINTIFF
And
BETRAM
(PTY) LTD
FIRST DEFENDANT
STANDARD
BANK OF SOUTH AFRICA LTD
SECOND DEFENDANT

JUDGEMENT**KGANYAGO J**

- [1] The plaintiff has instituted an action against the defendants jointly and severally in the form of claim A and B. In claim A the plaintiff is claiming the sum of R22 210 224.00, and in claim B payment of bank's interest which is still to be determined and calculated. According to the plaintiff's lengthy particulars of claim, during July 2013 the first defendant was a customer of the second defendant. During April 2013 the plaintiff invited tenders from potential tenderers for the supply of approximately 38 000 precast VIP toilets to structures in certain areas within the area of jurisdiction of the plaintiff. The first defendant submitted a tender to the plaintiff for the tender amount of R188 894 071.95. Hexagon Technologies CC (Hexagon) which is not a party to the proceedings submitted a tender to the plaintiff in the amount of R168 298 642.89.
- [2] The plaintiff awarded the first defendant the tender to supply 14 517 precast VIP toilets titled section A for R55 911 585.00. Hexagon was awarded 16 920 precast VIP top structures for R59 368 190.40 titled section B. The plaintiff alleges that after the award of the tender to both the first defendant and Hexagon, it entered into a partly written, partly oral agreement with both parties for the supply and delivery of precast VIP toilets. It alleged that in terms of the bill of quantities the first defendant was supposed to supply 5 806 double pit toilet top structures and 8 711 single pit top structures. The plaintiff, first defendant and Hexagon entered into a written cession agreement. In terms of the cession agreement, Hexagon has ceded to the first defendant its right, title and interest in and to its claims against the defendant for goods sold or services rendered to the plaintiff.
- [3] The plaintiff alleges that it had concluded an agreement with the first and second defendant. In terms of the agreement, plaintiff would pay the first defendant upon issue of an invoice by the first defendant to the plaintiff all amounts due to the first defendant upon completion of a payment certificate by the consulting engineers, responsible for both section A and B of the projects, certifying that the quality of goods supplied and delivered and prices are correct.
- [4] On 27th June 2013 the plaintiff and defendants entered into a partly written and partly oral agreement. The terms of the said agreement were that the first defendant would open a bank account into which plaintiff would pay R59 368 189.80 as advance payment for the section B project which has been ceded by Hexagon to the first defendant, and also R55 911 585.00 as advance payment for project A. The second defendant undertook not to allow any transaction to be effected on the account without prior written consent of the plaintiff's municipal manager. In the event of default by the first defendant, the plaintiff would be entitled to issue an instruction to the second defendant to pay back to plaintiff the full amount held in the account.

- [5] Plaintiff paid the sum of R115 279 775.40 on the 23rd July 2013 into the bank account of the first defendant held at the second defendant. The plaintiff alleges that in breach of the agreement, the first defendant withdrew or electronically transferred the sum of R100 000 000.00 from the account to an unknown destination. Plaintiff makes no claim to the remaining balance of R15 279 775.40 against the defendants, but went on to state that fundamentally the revised savings/balance claim of R22 210 224.00 includes the R15 279 775.40. As per the particulars of claim, the plaintiff's claim against the second defendant is based on alleged breach of mandate.
- [6] According to the plaintiff, for the period October 2013 to June 2015, the first defendant supplied and delivered 14 237 precast VIP toilets top structures consisting only of single pit toilet top structures at a rate of R2 500.00 per unit, to the value of R35 592 500.00 in respect of section A. The plaintiff alleges that the first defendant had breached the agreement as it had delivered 14 237 single pit toilet structures instead of 14 517, and had also failed to deliver the required quantity of the double pit toilet structures. The plaintiff alleges that for the period 17th October 2013 and 25th June 2015 payment certificates totalling an amount of R38 531 988.60 were issued in respect of the amount due to the first defendant. According to the plaintiff in terms of the payment certificates in respect of section A of the project, a retention amount of R3 379 000.00 was due and payable. The plaintiff state that the consulting engineer had certified that from the total bid amount of R55 911 585.00 a savings and/or a balance of R17 379 596.40 remained, which balance was due and payable to the plaintiff.
- [7] In relation to section B project, the plaintiff alleges the first defendant during the period October 2013 and June 2014 supplied 11570 precast VIP toilets top structures consisting only of single pit toilets top structures at the rate of R2 500.00 per unit to the total value of R28 925 000.00. The plaintiff alleges that the first defendant had breached the agreement by delivering 5 350 single pit toilets structures less than what was required in respect of section B, and also that the plaintiff has failed to deliver the required quantity of double pit toilet structures. According to the plaintiff, in respect of section B of the project, there were payment certificates issued between 17 October 2013 and 26 July 2014 totalling R54 537 742.38. The plaintiff alleges that a retention totalling R2 870 398.02 which is reflected on payment certificate 2, was credited to the first defendant. According to the plaintiff, the total balances and/or savings in respect of section A and B of the projects total to an amount of R22 210 224.02.
- [8] The plaintiff alleges that it had authorised and consented to the release of funds from the second defendant on the strength of the invoices issued by the first defendant which were accompanied by the consulting engineer's payment certificates to plaintiff. According to the plaintiff, when it gave such authorisation and consent it was unaware of the fact that the amount of R100 000 000.00 was allegedly already transferred from the account.

- [19] The alleged discrepancy in relation to projects A and B was picked up by the Auditor General of South Africa (AG) during 2018 and it questioned the plaintiff why the balances/savings were not recovered. The AG insisted on the plaintiff recovering the balances/savings. The plaintiff's claim A against both first and second defendants is for payment of a refund of R25 080 622.05. According to plaintiff, the contract price adjustment escalation was inapplicable. In the alternative to the claim of R25 080 622.05 the plaintiff alleges that the first defendant is retaining the sum of R22 210 224 without any valid cause. In claim B the plaintiff is claiming interest against the defendants.
- [20] The second defendant had pleaded to the plaintiff's particulars of claim, whilst the first defendant had raised an exception to the plaintiff's particulars of claim on several grounds. However, at the hearing of the exception the first defendant limited its exception to 5 grounds which are: (i) the tender contract 1 and 2 precludes the conclusion of a tripartite agreement; (ii) the cession agreement was pleaded erroneously by the plaintiff as the plaintiff seek erroneously against the first defendant contractual obligations of Hexagon; (iii) the cession agreement precluded the conclusion of a tripartite agreement with the defendants (it would not have precluded that with the bank); (iv) the tripartite agreement which according to the plaintiff's heads of argument is the only agreement relied upon as the cause of action and has not been pleaded by the plaintiff that the first defendant had towards the plaintiff contractual obligations not to transfer; (v) and the plaintiff conflates contractual obligations of the first defendant and Hexagon, and this is the fundamental flaws that runs through the whole particulars of claim.
- [21] The plaintiff had submitted that in its pleadings it had stated that there was an oral transfer of obligations, and that will be cleared by oral evidence during trial. The cession agreement does not provide for transfer of obligations, and they are not relying on the cession agreement only, but also on the oral agreement. The non-variation clause does not apply to oral agreements, and that the court must have the benefit of all the evidence at trial.
- [22] In order to succeed an excipient has a duty to persuade the court that upon every interpretation which the pleading in question can reasonably bear, no cause of action is disclosed, failing which the exception ought not to be upheld. In *Living Hands v Ditz*[1] Makgoka J said:
- "Before I consider the exceptions, an over view of the applicable general principles distilled from case law is necessary:*
- (a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.

- (b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs of an exception.
 - (c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.
 - (d) An excipient who alleges that summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.
 - (e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.
 - (f) Pleadings must be read as a whole and an exception cannot be taken to a paragraph or part of a pleading that is not self-contained.
 - (g) Minor blemishes and unradical embarrassment caused by a pleading can be cured by further particulars".
- [23] There are more than one agreement which are involved in this matter, which are the general conditions of contract for construction works (GCCC) (which contains the alleged non-variation clause); cession agreement; and alleged partly written and partly oral (so-called tripartite agreement). The alleged non-variation clause in the GCCC read as follows:
- "Deviations from and amendments to the documents listed in the Tender Data and any addenda thereto listed in the Tender Schedules as well as any changes to the terms of the Offer agreed by the Tenderer and Employer during this process of the offer and acceptance are contained in the Schedule of Deviations attached to and forming part of this Agreement. No amendments to or deviations from said documents are valid unless contained in this Schedule, which must be duly signed by the authorised representative(s) of both parties".*
- [24] The GCCC further provides that the terms of the contract are contained in agreements and contract data (which includes this agreement). This agreement will refer to the GCCC. Clause 1 of the definitions defines contract as a means the subject of the agreement made in terms of the form of offer and acceptance and such amendments or additions to the contract as may be agreed in writing between the parties. Tender data has not been defined, but what has been defined is contract data, which as been defined as means the specific data, which together with these general conditions of contract, collectively describe the risks, liabilities and obligations of the contracting parties and the procedures for the administration of the contract. It is not clear whether contract data and tender data refers to one and the same thing.

- [25] The purpose of non-variation clauses is to guard against the disputes and evidentiary difficulties that may arise from oral agreements. To protect both parties against these, they expressly agree that oral amendments will be null and void as between them. (See *Brisley v Drosky*[2]). The parties did not state which documents are listed in the tender data. The GCCC which form part of the plaintiff's pleadings is unsigned, and the non-variation clause refers to offer and acceptance contained in the schedule of deviations attached to and forming part of this agreement. The offer and acceptance contained in the GCCC is unsigned. Both parties did not raise any issue about the unsigned GCCC and are relying on it even though it is unsigned.
- [26] According to the first defendant, the non-variation clause in the GCCC do not permit the first defendant to enter into the cession agreement or tripartite agreement. The non-variation agreement refers to tender data which has not been defined in the GCCC. The GCCC refers contract data, and it is not clear whether the contract data and tender data refers to one and the same thing. From the non-variation clause, it is clear that no amendment or deviation of any document will be valid unless reduced to writing and signed by both parties or their authorised representatives. Beside the contract data there is another agreement which forms part of the GCCC which is in the form of offer and acceptance. On the offer and acceptance agreement, amendments or additions to the contract may be agreed in writing between the parties. For offer and acceptance agreement it seems that it is not peremptory for the amendments or additions to the contract to be in writing. If that is the case, this clause is in conflict with the amendments or deviations which might be effected in terms of the tender data. The two clauses will need a proper interpretation in order to harmonize them. It must also be determined whether contract data and tender data refers to one and the same thing.
- [27] The defendant's exception is based on the interpretation of the non-variation clause in the GCCC. In *Sun Packing (Pty) Ltd v Vreulink*[3] it was held that as a general rule, courts are reluctant to decide upon exception questions concerning the interpretation of a contract. The GCCC contract regarding the non-variation clause read together with the relaxation clause in the offer and acceptance agreement regarding amendments and deviations, and whether tender data and contract data refers to one and the same thing will need evidence to be presented in order to put them in a proper perspective. That can be done if full evidence is led at trial.
- [28] It is not in dispute that the first defendant was awarded section A of the contract, whilst Hexagon was awarded section B. The plaintiff on its cause of action relies on the alleged tripartite agreement which the plaintiff refers as partly written and partly oral. If the GCCC does not permit the conclusion of the tripartite and cession agreement, the first defendant will be able to plead to that, and it is not dependant on Hexagon been a party to the proceedings. If it is found that Hexagon is the one liable, it will be the plaintiff which will be prejudiced out of its own making. The first defendant can still plead a special plea of non-joinder. It can therefore not be said that upon every interpretation which the pleading in

question can reasonably bear, no cause of action is disclosed. It follows that the first defendant's exception stands to fail.

[29] In the result the following order is made:

29.1 The first defendant's exception is dismissed with costs.

KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

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Instructed by

: Schoombee attorneys

Date heard :

23rd January 2025

Electronically circulated on

: 25th February 2025

[1] 2013

(2) SA 368 (GS) at para 15

[2] 2002

(4) SA 1 (SCA)

[3]

[1996] ZASCA 73; 1996

(4) SA 176 (A)

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