

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 50224/2021

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: YES

DATE: 23/05/2023

SIGNATURE OF JUDGE:

In the matter between:

**DEZ CIVIL CONSTRUCTION (PTY) LTD
[Registration Number: 2016/145803/07]**

Plaintiff

and

**CS PULE CONTRACTORS
[Registration Number: B1999/035700/23]**

**First Defendant/
First Excipient**

COLLIN SELLO PULE

**Second Defendant/
Second Excipient**

EKHURULENI LOCAL MUNICIPALITY

Third Defendant

JUDGMENT

DELIVERED:

This judgment was handed down electronically by circulation to the parties' legal representatives via email and publication on CaseLines. The date and time of hand-down is deemed to be on 23 May 2023.

L. Meintjes AJ:

Introduction

1. The plaintiff instituted action proceedings by way of Combined Summons against the first defendant and second defendant seeking an order against them jointly and severally, the one to pay the other to be absolved, for payment of the sum of R5,722,700.00, interest and cost on the attorney and own client scale. The Particulars of Claim was subsequently amended.
2. The first defendant and second defendant except to the Amended Particulars of Claim on seven grounds. Each of these grounds were either based thereon that the Amended Particulars of Claim lacks the necessary averments to sustain a cause of action and/or is vague and embarrassing.
3. When this matter was called in open court, there was no appearance for the plaintiff. Mr K Naidoo¹ properly drew my attention to an email from the plaintiff's attorney that was dated 4 April 2023, but only sent on 17 April 2023. In terms thereof the plaintiff's attorney advised that their MS Sidu is on sick leave and will not be able to attend the hearing of the opposed exception on the following day. As a result, a request was made to the defendants' attorney that the matter be postponed, alternatively that the matter be decided on the basis of the papers filed by the parties. The defendant's attorney promptly responded by denying the request that was again followed by a letter

¹ Counsel for both defendants.

from the plaintiff's attorney on the morning of the hearing² confirming that the plaintiff's attorney was "*long aware of the fact that the matter was set down for hearing, but it is an unfortunate circumstance, and we could not find someone to stand in for us*". In addition, a doctor's note was attached. The doctor's note is in fact a "*medical certificate*" indicating that SM Sidu is unfit for work for a period of 3 (three) days and also identifying the nature the illness³.

4. Notwithstanding the above, I directed that the matter proceeded to argument in the absence of the plaintiff's attorney on the basis that:
 - 4.1 The matter was properly enrolled and properly before me;
 - 4.2 There was no substantive application seeking a postponement; and
 - 4.3 Having regard thereto that the matter was set down as far back as 13 March 2023 – and even assuming in favour of plaintiff's attorney that she could not attend the hearing due to illness – there was nothing before me to show that the services of another attorney and/or counsel could not be obtained⁴.
5. As stated, the defendants excepted to the amended Particulars of Claim on seven grounds. During Mr Naidoo's submissions to me it became patently clear that there was no merit in any of the exceptions based on grounds 2, 3, 4 and 5. As a result, Mr Naidoo, and correctly so in my view, expressly abandoned these grounds of exception. In the result, I need only concern myself with grounds 1, 6 and 7.

Amended Particulars of Claim

² 18 April 2023 and sent at 08h34 am.

³ Unfortunately, I was unable to decipher the nature of the illness stated.

⁴ *Pangankar v Botha* 2015 (1) SA 503 (SCA).

6. The Amended Particulars of Claim consists of 5 pages that is made up of 9 paragraphs as well as a prayer setting out the relief sought by the plaintiff. In addition, it has 3 attachments as annexures, namely:
 - 6.1 Annexure DSM1 – A written Sub-Contract Agreement between the first defendant as contractor and the plaintiff as sub-contractor;
 - 6.2 Annexure DSM2 – A copy of a Letter of Appointment and dated 1 July 2020; and
 - 6.3 Annexure DSM3 – A copy of a demand dated 2 September 2021 by the plaintiff's attorney and directed to the first defendant.

7. Germane to these proceedings are the following allegations appearing in the Amended Particulars of Claim, namely:
 - 7.1 The first defendant is a “*private company with a juristic personality registered in terms of the Companies laws of South Africa and with a registered address at*” [paragraph 1.2];
 - 7.2 The second defendant is an adult male and who is “*... the director of the first defendant...*” [paragraphs 1.3 and 3.1];
 - 7.3 The third defendant is the Ekurhuleni Local Municipality [hereinafter “*municipality*”]. However, no relief is sought against the Municipality as the Municipality was merely cited as an interested party as “*the tender of the contract in dispute was awarded to the first defendant by the Municipality*” [paragraph 1.5];
 - 7.4 Paragraph 3.1 (including its subparagraphs) alleges the conclusion of a written agreement between the plaintiff and the first defendant. Of importance for purposes of this matter is that it was expressly alleged that although such agreement was in writing “*... the parties omitted to*

sign same". Because of its importance, I take the liberty to quote this paragraph *verbatim*:-

"3.1 *On or about the 1st day of July 2020, the plaintiff, duly represented by one Desmond Lehakoe Mokone was awarded a sub-contract of a tender at Ekurhuleni Municipality by the first defendant who was a contractor at Ekurhuleni Municipality under Tender NO A-RS 01-2019. The first defendant was duly represented by Collin Sello Pule (second defendant) who is the director of the first defendant. The said subcontract was in writing, however the parties omitted to sign same. The terms of the contract or agreement were as follows:*

3.1.1 *The plaintiff was required to do the 40% work for the contractor as described on the appointment letter dated 1st of July 2021⁵ which was annexed to the sub-contract;*

3.1.2 *In terms of the appointment letter, the plaintiff was required to issue monthly invoices and progress certificates for the work done on the sub-contract;*

3.1.3 *The first and second defendants were required to pay the plaintiff 15% in every progress certificate and invoice furnished to the first defendant; and*

3.1.4 *The first and second defendants were required to pay the plaintiff the full outstanding final certificate after the inspection and approval by the Municipality.*

3.1.5 *A copy of the unsigned subcontract as well as the appointment letter are attached hereto as Annexure DSM1 and DSM2 respectively."*

7.5 Paragraphs 4, 5 and 6 deals with the plaintiff's compliance with the subcontract by proceeding to work on site as per such agreement and having done so "*Subsequent to being awarded the sub-contract*". In addition, it also alleges the balance outstanding and owing to the plaintiff subsequent to the first defendant having provided the plaintiff with a certificate of completion. Because these allegations become

⁵ This is an obvious error as the letter of appointment is dated 1 July 2020.

important later on, I also take the liberty to quote these paragraphs *verbatim*:-

- “4. *Subsequent to being awarded the subcontract, the plaintiff proceeded to work on site as per agreement between the two parties. The plaintiff further supplied the defendant with certificate invoice in order for the first defendant to make payments of the 15% for the progress certificate invoices as agreed. Following the plaintiff submission of certificate invoice to the first defendant, some invoices were paid, and some were omitted.*

5. *The plaintiff completed the work that he was appointed to do and as per agreement, the Municipality came and conducted their inspection and subsequently certified the work. The first defendant in addition also provided the plaintiff with a certificate invoice as agreed. Following the plaintiff's submission of the certificate invoice to the first defendant, some invoices were paid and some invoices were omitted.*

6. *The plaintiff completed the work that he was appointed to do and as per agreement, the Municipality came and conducted their inspection and subsequently certified the work. The first defendant in addition also provided the plaintiff with a certificate of completion, which had done or completed. Subsequently, the first defendant however still failed to make the requested final payment of an amount of R5,722,700.00 which were due.”*

7.6 Paragraphs 8 and 9 deals with the fact that the plaintiff (through its attorney) made demand to both the first defendant and second defendant to pay the alleged outstanding amount of R5,722,700.00 and that the defendants failed to comply therewith. In addition, it is alleged that the written agreement between the plaintiff and the first defendant does not constitute a credit agreement as envisaged in the National Credit Act, No 34 of 2005;

7.7 Paragraph 7 of the Amended Particulars of Claim is a curious paragraph. From what appears *infra*, it will become abundantly clear that grounds 6 and 7 of the exception are directed to this specific paragraph. Consequently, I also take the liberty to quote this specific paragraph *verbatim*:-

“7. When entering into the said agreement/sub-contract, the second defendant was acting in the course and scope of his employment with, or as a director of, the first defendant. As a result, the plaintiff holds the first defendant vicariously liable for the conduct of its members/employees. Plaintiff holds both the first and second defendants jointly and severally liable for the payments due to him in terms of the sub-contract”

7.8 In view of the above allegations in the Amended Particulars of Claim, same ends with a prayer seeking judgment against the first defendant and second defendant jointly and severally, with one paying and the other to be absolved, for payment of the sum of R5,722,700.00, interest and cost on the attorney and own client scale.

8. Annexure DSM1 constitutes the Sub-Contract Agreement and reveals *inter alia*, the following:-

8.1 It consists of 4 pages and on the first page thereof appears the logo, corporate details and contact numbers of the first defendant. Same is headed Sub-Contract Agreement and indicates that it is between the first defendant as Contractor and the plaintiff as Sub-Contractor. In addition, it identifies a certain tender number whereafter its conditions are set out under the heading “*Conditions of Sub-Contract*”. There are 32 such conditions and I only quote the most relevant provisions/conditions thereof. They are:-

“1. *It is hereby agreed that the sub-contractor shall perform 40% of the work for the contractor in accordance with the sub-contract agreement.*

2. *The sub-contractor shall fully familiarise himself with the requirements of the attached specification for the sub-contract works and shall, with due diligence and in a good and workmanlike manner, carry out and complete the sub-contract works as described in the attached schedule, in accordance with instructions and to the satisfaction of the contractor.*

3. *The sub-contractor hereby undertakes to supervise and control his employees at all times in such a manner that the presence of the sub-contractor or his employees does not become an embarrassment for the*

professional image and good name of the contractor. The sub-contractor undertakes to conduct himself professionally at all times, and to ensure a high standard of quality of work acceptable to the client.

4. *The sub-contractor must ensure that he achieves, as a minimum, the progress per day entered into the schedule against each item of work.*
5. *The sub-contractor is responsible to measure his own work and progress, and to submit a payment certificate to the contractor on a monthly basis. This certificate will be witnessed by the contractor's foreman on site and approved by the site agent. It must be submitted to the prime contractor on the 25th day of the month.*
6. *The contractor shall pay the sub-contractor for work completed at the rate stated in the schedule. Interim monthly payments for work done, shall be made by means of a cheque or transfer directly into the bank account of the sub-contractor on the day the client pay the prime contractor.*
7. *The contractor may deduct from any sums due to the sub-contractor the amount of any liability, which the contractor may incur by reason of the sub-contractor's failure to comply with these obligations.*
8. *The contractor may, from to time issue further instructions for work not contained in the schedule. Price adjustment should be agreed between the contractor and the sub-contractor prior to the carrying out of the any such variation, such variation should be valued on a fair and reasonable basis, using as a guide, the prices quoted in the schedule.*
14. *The sub-contractor shall be liable for the payment of all taxes, levies, etc., on behalf of himself and/or his employees and will be VAT registered. It is the sole responsibility of the sub-contractor to register as an employer with the relevant authorities with regard to PAYE and UIF. Proof of such registration must be provided before any payment is made to the sub-contractor.*
15. *The sub-contractor will provide all transport, tools and equipment needed to execute the work, unless otherwise stated in the schedule.*
16. *The sub-contractor will supply the required material, which will be delivered to the contractor's stores at the main site office. It is the responsibility of the sub-contractor to load the materials at the stores, transport to site and unload*

the materials on site. No materials are to be left on site on non-working hours.

23. *No any other contractor may be appointed by the prime contractor for similar work unless if agreed with the sub-contractor.*
24. *If the sub-contractor fails to comply with these conditions, or any obligations imposed upon him by statute or common law, the contractor may forthwith by notice terminate the employment of the sub-contractor.*
29. *The sub-contractor is responsible for the payment of his employees on a monthly basis. Should the sub-contractor not pay his employees as agreed, he will be in breach of contract. The contractor will then be entitled to withhold all payment due to the sub-contractor and to cancel this contract.*
30. *The contractor reserves the right to inspect the work of the sub-contractor at any time and to retain any monies due to the sub-contractor for substandard work, until the work had been rectified by the sub-contractor at his own cost and within a reasonable time.*
31. *Any amendments to this agreement or attached schedule of rates shall not be enforceable by any party unless such amendments is reduced to writing and signed by both parties to this contract.*
32. *On completion of this contract, both the contractor and sub-contractor shall sign the attached final certificate⁶.”;*

8.2 On page 4 appears the addresses and contact details of both the plaintiff and first defendant whereafter follows spaces provided for the contractor (or its agent on its behalf) and the sub-contractor (or its agent on its behalf) to sign. Provision was also made [by providing blank spaces] for witnesses to sign as well as where and when same is to be signed. However, these spaces were left blank and therefore not signed by either the plaintiff or the first defendant or any witnesses.

9. Annexure DSM2 constitutes the Letter of Appointment. The following is evident from this annexure, namely:-

⁶ It will be noted that reference is often made to “specification”, “schedule” and/or “final certificate”. These were not attached.

9.1 It consists of two pages and is similarly on the letterhead of the first defendant containing both its logo as well as its corporate particulars and contact details. Thereafter follows a reference number and a short description of the project. It reads: “*Ref: A-RS 01-2019 – The Upgrading and Construction of Roads and Stormwater Infrastructure on an as and when required basis, with effect from the date of award until 30 June 2021*”;

9.2 Same is directed to the plaintiff and is dated 1 July 2020 and contains the heading “*Letter of Appointment*”. Its content thereafter reads verbatim as follows:-

“1. *We have pleasure to inform you that your company (DEZ Civil Construction)*⁷ *sub-contract tender for the abovementioned project has been accepted.*

2. *The appointed sub-contractor is hereby required to do the following scope of work:*

2.1 *Construction of earthworks, stormwater culverts, gabions and paving at Tsipi Noto;*

2.2 *Construction of roads at Etwetwa (Tsavo Road);*

2.3 *Construction of paving work in Ward 70 and Ward 67;*

2.4 *Provide temporary construction safety signs;*

2.5 *Manana Project;*

2.6 *Please note that no additional work should be constructed without the approval of CS Pule Contractors CC*⁸.

2.7 *Security of site plants and materials is the responsibility of DEZ Civils Construction.*

⁷ This is the plaintiff.

⁸ This is the first defendant.

2.8 *DEZ Civils Construction will be reliable for the testing and quality assurance.*

2.9 *Payment will be as follows:*

(i) *Payment certificate No 1 – fifteen percent (15%) of every progress certificate invoice will be paid to DEZ Civils Construction, upon measurements taken by the project manager.*

(ii) *Monthly progress certificate invoice will be paid to DEZ Civils Construction upon the agreed measurements with the project manager.*

(iii) *The Final Payment Certificate will be measured and paid to DEZ Civils Construction, after the inspection and approval by the client on site.*

For further information please contact Collin Pule at [thereafter follows his cell phone number];”

9.3 After the above appears a place for the signature of the second defendant. However, it was not signed by him. In addition, and just underneath same appears the following that was left in blank, it reads:

“Received/Accepted by:

Signature

For:

Date:⁹

Grounds of exception

10. As stated, I need only concern myself with grounds 1, 6 and 7 of the exception¹⁰.

First Ground

⁹ The aforesaid receipt/acceptance was not signified in writing by the plaintiff nor signed on behalf of the plaintiff whatsoever. In fact, these particulars simply remained blank.

¹⁰ The other four having been abandoned by Mr Naidoo.

11. Owing to the fact that neither the Sub-Contract Agreement nor the Letter of Appointment were signed by either party and the plaintiff alleged that the “*parties omitted to sign*” the Sub-Contract Agreement, the defendants excepted on the basis that it is not reasonably possible for them to ascertain on what cause the plaintiff intends to rely for the relief sought and/or that the Amended Particulars of Claim lacks the averments necessary to sustain a cause of action against the first defendant. Both these conclusions are premised thereon that the plaintiff failed to plead (i) whether there is a signed version of the Letter of Appointment and, if so, why an unsigned copy thereof was attached; (ii) why the parties did not sign the Sub-Contract Agreement; (iii) how a written agreement came into existence when neither party signed either the Sub-Contract Agreement and Letter of Appointment, and (iv) whether the plaintiff relies on any alternate form of contract.

12. In his Heads of Argument, Mr Naidoo drew my attention to the judgment of Swain J (as he then was) in *Moosa SA and others v Hassam & others NNO*¹¹ for the proposition that when a party relies upon a written contract then he uses it as a “*link in the chain of his cause of action*”. Mr Naidoo consequently submitted that due to the absence of a signature on either of the Sub-Contract Agreement and Letter of Appointment “*a link in the chain of the cause of action advanced is missing*”.

Sixth Ground

13. This ground of exception is directed at paragraph 7 of the Amended Particulars of Claim. It will be recalled that it was alleged that the plaintiff and the first defendant concluded the written Sub-Contract Agreement and that the second defendant merely represented the first defendant in concluding same. However, in paragraph 7 of the Amended Particulars of Claim the plaintiff endeavours to hold the first defendant liable vicariously for the conduct of the second defendant because the second defendant “*was acting in the course and scope of his employer with, or as a director of the first defendant*”. As a result, the first defendants submitted that there is no basis for a claim of

¹¹ 2010 (2) SA 410 (KZP) at par 17 – 19.

vicarious liability made out against it and, in addition, that this particular cause of action against the first defendant is not pleaded in the alternative to the contractual claim thereby also rendering the Amended Particulars of Claim vague and embarrassing.

Seventh Ground of Exception

14. This ground is also directed to paragraph 7 of the Amended Particulars of Claim wherein the plaintiff seeks to hold the second defendant personally liable together with the first defendant on a “*joint and several*” basis. This allegation is made despite it not being alleged that the second defendant is a party to the Sub-Contract Agreement and/or Letter of Appointment. As a result, the second defendant submitted that he is unable to determine on what basis the plaintiff intends to hold him personally liable and/or he is not in a position reasonably to ascertain on what *causa* the plaintiff intends to rely for relief against him and/or the Amended Particulars of Claim lacks the averments necessary to sustain a cause of action against him.

Exceptions – Legal Principles

15. Exceptions are governed by Rule 23(1) of the Uniform Rules of Court which provides for the delivery of an exception where a pleading is either (i) vague and embarrassing, or (ii) lack averments which are necessary to sustain a cause of action or defence.

No cause of action

16. From the case law it is possible to extract the following materially relevant principles applicable to an exception on the basis that it lacks the necessary averments to sustain a cause of action:-

- 16.1 In order to disclose “*a cause of action*”, the plaintiff is required to allege only those facts that are necessary to support his right to judgment of the court. It does not comprise every piece of evidence which is

necessary to prove each of the aforementioned facts, but every fact which is necessary to be proved. Put differently, it is only necessary to allege the *facta probanda* and not the "*facta probantia*"¹²;

16.2 In considering an exception on this ground, the Court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action¹³;

16.3 The purpose of this type of exception is to weed out cases which lack merit. The ultimate goal is to set aside the pleading objected to in its entirety or in part. The exception must therefore go to the root of the entire claim or defence, as the case may be. The excipient alleges that the pleading objected to, taken as it stands, is legally invalid for its purpose¹⁴. That is to say, unless the upholding of the exception would have the effect of destroying it altogether.¹⁵ The exception must therefore have the effect of destroying a claim or defence altogether as the main function of an exception is to eliminate unnecessary evidence;¹⁶

16.4 An excipient who relies on this ground of exception must establish that upon any construction of the Particulars of Claim, no cause of action is disclosed. Put differently, the excipient is required to show that upon every interpretation that the pleading in question can reasonably bear no cause of action is disclosed¹⁷;

16.5 A charitable test is used on exception, especially in deciding whether a cause of action is established, and the pleader is entitled to a benevolent interpretation. Put differently, a Court should not look at a

¹² *McKenzies v Farmers' Cooperative Meat Industries Ltd* 1922 AD 16 at 23 and *Jowell v Bramwell-Jones* 1998 (1) SA 836 at 903 A-B.

¹³ *Living Hands (Pty) Ltd v Ditz* 2013 (2) SA 368 (GSJ) at 374 G.

¹⁴ *Saltzman v Holmes* 1914 AD 152 at 156.

¹⁵ *Dharumpal Transport v Dharumpal* 1956 (1) SA 700 AD at 706.

¹⁶ *Dharumpal* at 706.

¹⁷ *Living Hands* at 374G, *First Rand Bank of SA Ltd v Perry* NO 2001 (3) SA 960 (SCA) at 965C-D and *Sanan v Eskom Holdings (Pty) Ltd* 2010 (6) SA 638 (GSJ) at 645 D.

pleading “*with a magnifying glass of too high power*”. Similarly, the pleading must be read as a whole and no paragraph can be read in isolation. It follows further that courts are reluctant to decide exceptions on this ground in respect of fact bound issues¹⁸;

16.6 The distinction between *facta probanda*, or primary factual allegations which every plaintiff must make, and *facta probantia*, which are the secondary allegations upon which the plaintiff will rely in support of his primary factual allegations must be ever present in the mind of the Court. Generally speaking, the latter are matters for particulars for trial and even then are limited. For the rest they are matters of evidence. Accordingly, only facts need be pleaded. Conclusions of law need not be pleaded. Bound up therewith is the consideration that certain allegations of fact expressly made carry with them implied allegations and the pleading must be so read¹⁹. Insofar as there can be an *onus*, the excipient has a duty to persuade the Court that the pleading is excipiable on every interpretation that can reasonably be attached to it. The pleading must be looked at as a whole. If there is uncertainty in regard to a pleader’s intention, the excipient cannot avail himself thereof unless he shows that upon any construction of the pleading the claim is excipiable²⁰;

16.7 An excipient should make out a very clear and strong case before same should be allowed. Furthermore, a commercial document executed by the parties with the clear intention that it should have commercial operation will not likely be held to be ineffective and a similar approach should be adopted to oral agreements²¹;

¹⁸ *Living Hands* at 374G-375C, *Southern Poort Developments (Pty) Ltd v Transnet Ltd* 2003 (5) SA 665 (W) at par 6.

¹⁹ *Jowell* at 902 I - 903 E.

²⁰ *Klerck v Van Zyl* NNO 1998 (4) SA 263 (SE) at 288 E, *Perry* at 956 C-D, *Stewart v Botha* 2008 (6) SA 310 (SCA) at 313 E-F, *Brocsand (Pty) Ltd v Tip Trans Resources* 2021 (5) SA 457 (SCA) at par 14.

²¹ *South African National Parks v Ras* 2002 (2) SA 537 (C) at 541 B - 452 G, *Francis v Sharp* 2004 (3) SA 230 (C) at 237 D-I and *Erasmus Superior Court Practice* [D1-298].

- 16.8 An exception should also be dealt with sensibly and not in an over technical manner²²; and
- 16.9 It is the invariable practice of the courts in cases where an exception has successfully been taken as disclosing no cause of action to order that the pleading be set aside and that the plaintiff and/or defendant be given leave, if so advised, to file an amended pleading within a certain period of time²³.

Vague and embarrassing

17. From the case law the following materially relevant principles emerged when it comes to exceptions on the ground that the particular pleading is excipiable on the basis that it is vague and embarrassing:
- 17.1 An exception on this basis strikes at the formulation of the cause of action and not its legal validity²⁴;
- 17.2 This type of exception is not directed at a particular paragraph within a cause of action: it goes to the whole cause of action, which must be demonstrated to be vague and embarrassing²⁵;
- 17.3 This type of exception will also not be allowed unless the excipient will be seriously prejudiced if the offending allegations were not expunged. The vagueness must therefore relate to the cause of action²⁶. Accordingly, such embarrassment may occur where admission of one of two sets of contradictory allegations destroys a cause of action and/or defence. In addition, averments in a pleading that are

²² *Telematrix v Advertising Standards Authority* 2006 (1) SA 461 (SCA) at 465 H.

²³ *Group 5 Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 602 D.

²⁴ *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 269 I.

²⁵ *Jowell* at 899G – *Kontra Paulsmeier v Media 24 (Pty) Ltd* unreported, WCC Case NO 15855/21 dated 20 May 2022 and *Troupe* at 211 B-E.

²⁶ *Levingtan v New Haven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298 A, *Factory Investments Ltd v Record Industries* 1957 (2) SA 306 (T) at 310 B and *Brits v Coetzee* 1967 (2) SA 570 (T) at 572 A.

contradictory and which are not pleaded in the alternative are patently vague and embarrassing²⁷;

- 17.4 The test to be applied in this regard may be summarized as follows: (a) a Court must first consider whether the pleading does lack particularity to the extent amounting to vagueness. If a statement is vague, it is either meaningless or capable of more than one meaning. To put it at its simplest: the reader must be unable to distill from the statement a clear, single meaning²⁸; (b) if there is vagueness in this sense, the Court must then undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him by the vagueness complained of²⁹; (c) an *ad hoc* ruling must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient if he is compelled to plead to the pleading in the form to which he objects. Ultimately, the test is whether or not to the exception should be upheld is whether the excipient is prejudiced³⁰; and (e) the *onus* is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice and such must be made out by reference to the pleadings alone³¹.

Deliberation

First ground of exception

18. The type of contract under consideration is not one that is statutorily required to be reduced to writing and signed. However, it is open to the parties to agree that the contract will only come into being if certain formalities are

²⁷ *Leviton v New Haven Holiday Enterprises* CC 1991 (2) SA 297 (C) at 298 J – 299 C and 300 G and *Trope* at 211E.

²⁸ *Lockhat v Minister of the Interior* 1960 (3) SA 776 (D) at 777 A-E, *Gallagher Group Ltd v IO Tech Manufacturing (Pty) Ltd* 2014 (2) SA 157 (GNP) at 166 H-J, *Venter and others NNO v Wolfberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) at 644 A-B

²⁹ *ABSA Bank Ltd v Boksburg Transitional Local Council* 1997 (2) SA 415 (W) at 421 I – 422 A.

³⁰ *Standard Bank of South Africa Ltd v Hunky Dory Investments 194 (Pty) Ltd* 2010 (1) SA 627 (C) at 630 B and *Quinlan v MacGregor* 1960 (4) SA 383 (D) at 393 G.

³¹ *Katsopolos v Bilardi* 1970 (2) SA 391 (C) at 395 D-E and *Lockhat v Minister of Interior* 1960 (3) SA 765 (D) at 777

complied with, such as, that same be reduced to writing and signed. In practice, it often happens that during negotiations leading to the formation of a contract, or in the terms of an informal contract itself, mention is made of a written document, or of the reduction of the terms of the contract to writing. This raises the question as to whether the informal contract is binding, and the written document intended for purposes of proof only, or whether there is to be no contract until the written document has been drawn up and executed.

19. The leading judgment on this point is that of Innes CJ in *Goldblatt v Freemantle*³² where the learned Chief Justice said that the question in each case is one of construction³³. He stated, in a passage that is often referred to with approval:

*“Subject to certain exceptions, mostly statutory, any contract may be verbally entered into; writing is not essential to contractual validity. And if during negotiations mention is made of a written document, the court will assume that the object was merely to afford facility of proof of the verbal agreement, unless it is clear that the parties intended that the writing should embody the contract (Grotius 3.14.26 etc). At the same time it is always open to parties to agree that their contract shall be a written one (see foot 5.1.7.3; V.Leeuwen 4.2, Sec.2, Decker’s note); and in that case there will be no binding obligation until the terms have been reduced to writing and signed. The question in each case is one of construction”*³⁴

20. As revealed for purposes of an exception, I must accept as true the allegations pleaded by the plaintiff to assess whether a cause of action is disclosed. I must consequently accept the following allegations in the Amended Particulars of Claim as true, namely:

20.1 The first defendant tendered and was awarded a contract by the municipality³⁵;

³² 1920 AD 123.

³³ ID at 129.

³⁴ At 128 – 129, *Weinerlein v Goch Buildings Ltd* 1925 AD 282, *Sapro v Schlinkman* 1948 (2) SA 637 (A), *Morgan and another v Brittan Boustretd* 1992 (2) SA 775 (A), *Lambons Edms Bpk v BMW (SA) (Edms) Bpk* 1997 (4) SA 141 (SCA), *Pillay v Schaik* 2009 (4) SA 74 (SCA) and *Breyton Carlswold (Pty) Ltd v Brews* 2017 (5) SA 498 (SCA) at par 16.

³⁵ Paragraph 1.5 of Amended Particulars of Claim.

- 20.2 On 1 July 2020, the first defendant awarded a sub-contract to the plaintiff pertaining to the contract that was initially awarded by the municipality to the first defendant. In other words, a Sub-Contract Agreement was concluded between the plaintiff and the first defendant and which agreement took the form of the Agreement of Sub-Contract (Annexure DSM1) and the Letter of Appointment (DSM2);
- 20.3 Although the parties omitted to sign the aforesaid documents, both the plaintiff and the first defendant acted in accordance with the unsigned documentation. This is evident from the fact that the plaintiff expressly alleges that subsequent to being awarded the sub-contract, the plaintiff *“proceeded to work on site as per agreement between the two parties”* and also by alleging *“the plaintiff completed the work that he was appointed to do and as per agreement...”*. In addition, the first defendant proceeded to pay some of the invoices that the plaintiff rendered to the first defendant and these invoices (as well as the Certificate of Completion) were provided by the plaintiff to the first defendant in conformity with the terms of the unsigned documents; and
- 20.4 It is neither alleged, nor does it appear from the terms of either the unsigned Sub-Contract Agreement or Letter of Appointment that these had to be executed (in the form of both parties signing same) before legal validity would ensue.
21. From the above legal principles and allegations that I must accept as true, it follows that:
- 21.1 As the parties neither agreed or stipulated any formalities that had to be complied with before a legal binding agreement will come into being, that the default position obtains to the effect that the court will assume that the object of the written documents was merely to afford facility of proof. Put differently, for legal validity to ensure it was not required that the documents be signed;

21.2 By their conduct in implementing the terms of the documents as alleged by the plaintiff in his Amended Particulars of Claim, the Sub-Contract Agreement and Letter of Appointment constituted the written agreement between the parties even though they omitted to sign these; and

21.3 In the result, the defendants failed to discharge the *onus* that upon every interpretation that the Amended Particulars of Claim can reasonably bear no cause of action is disclosed.

22. Furthermore, this aspect of the case is also resolvable on the basis of the “ticket-cases”. The principles in this regard were conveniently restated in the judgment of Scott JA in *“Durban’s Water Wonderland (Pty) Ltd v Botha and another 1999 (1) SA 982 (SCA) at 991D – 992A:*

*“Had Mrs Botha read and accepted the terms of the notices in question there would have been actual consensus and both she and Mariska’s guardian, on whose behalf she also contracted, would have been bound by those terms. Had she seen one of the notices, realised that it contained conditions relating to the use of the amenities but not bothered to read it, there would similarly have been actual consensus on the basis that she would have agreed to be bound by those terms, whatever they may have been (Central South African Railways v James 1908 TS 221 at 226.) The evidence, however, did not go that far. Mrs Botha conceded that she was aware that there were notices of the kind in question at amusement parks but did not admit to having actually seeing any of the notices at the appellant’s park on the evening concerned, or for that matter at any other time. In these circumstances, the appellant was obliged to establish that the respondents were bound by the terms of the disclaimer on the basis of quasi-mutual assent. This involves an enquiry whether the appellant was reasonably entitled to assume from Mrs Botha’s conduct in going ahead and purchasing a ticket that she had assented to the terms of the disclaimer or was prepared to be bound by them without reading them. (see *Stretton v Union Stream Ship Co Ltd (1881) 1 EDC 315 at 330-1; Sonap Petroleum (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd v Pappadogianis 1992 (3) SA 234 (A) at 239F – 240B.*) The answer depends upon whether in all the circumstances the appellant did what was “reasonably sufficient” to give patrons notice of the terms of the disclaimer. The phrase “reasonably sufficient” was used by Innes CJ in *Central South African Railways v McClaren 1903 TS 727 at 735. Since then various phrases having different shades of meaning have from time to time been employed to describe the standard required. (see *King’s Car Hire (Pty) Ltd v Wakeling 1970 (4) SA 640 (N) at 643G –***

644A). *It is unnecessary to consider them. In substance they were all intended to convey the same thing, viz an objective test based on the reasonableness of the steps taken by the preferens to bring the terms in question to the attention of the customer or patron*".

23. Applying the above quotation to the facts as alleged in the Amended Particulars of Claim, then it should be clear that the (i) first defendant brought the documents with their terms to the notice and attention of the plaintiff; (ii) the plaintiff must have read and understood these documents as the plaintiff proceeded to comply with its obligations in terms thereof, alternatively the plaintiff must have realised that it contains conditions relating to a sub-contract but did not bother to read it. In either case there would have been actual consensus; and (iii) the defendant therefore did not discharge the *onus* to show that on every reasonable interpretation of the Amended Particulars of Claim can reasonably bear no cause of action is disclosed.
24. From the above reasons it follows that the plaintiff did annex the complete contract and not merely unsigned draft contracts thereby distinguishing this matter from *Moosa*.
25. Further to the above, I further find that the allegations in the Amended Particulars of Claim on this aspect makes it reasonably possible for the defendants to ascertain on what *causa* the plaintiff intends to rely for relief and therefore that same is not vague and embarrassing. After all, once it was alleged that the parties omitted to sign the documents, then there will surely not be a signed version and it is also not a requirement for the plaintiff to indicate why an unsigned copy was then attached. Clearly, by alleging that the parties "*omitted*" to sign the documents, the plaintiff has in actual fact already indicated why they are unsigned. It is also not required of the plaintiff to indicate whether it relies on any alternative form of contract and applying a benevolent interpretation to the Amended Particulars of Claim makes it clear that by the parties conduct in implementing the unsigned documentation that a written agreement came into being. The plaintiff therefore also demonstrated (at the very least implicitly) how the written agreement came into being when neither party signed the documents. In any event, I find nothing in the

formulation of this aspect of the plaintiff's Amended Particulars of Claim to be contradictory, meaningless or capable of more than one meaning.

Sixth ground of exception

26. The following is trite:

26.1 The plaintiff expressly alleged that the first defendant is “a *private company with a juristic personality registered in terms of the Companies laws of South Africa ...*”³⁶ As revealed, I have to accept this allegation as true for purposes of determining the exception. As a private company with juristic personality, it has the consequence that the company becomes a legal entity in its own right (such as any other individual person) with its own rights and liabilities and these rights and liabilities are its own and do not belong to its directors, shareholders and/or employees. In *Solomon v Solomon & Co Ltd*³⁷ this was explained as follows:

“Once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and ... the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are The company is at law a different person altogether from the subscribers to the memorandum. And, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers ...”.

26.2 Consequently, (i) a company's rights vest in itself and therefore belongs to it and no one else. Similarly, its obligations are its own and not the liabilities of anybody else; (ii) although a company has juristic personality, it cannot act on its own such as a human being. For this reason it requires human beings to act on its behalf. Any natural or

³⁶ Paragraph 1.2 of the Amended Particulars of Claim.

³⁷ [1897] AC22 (HL).

even another juristic entity could be authorised to act as the representative and/or agent of the company concerned and thereby allow the company concerned to obtain rights and obligations in its own right. Of particular importance, however, is that such agents or representatives act on behalf of the company (as the principal) with the consequence that the agents/representatives do not become parties to the agreements they conclude on behalf of their principal with third parties. The agreement is concluded between the company and the third party – the agent being merely the representative. In *Blower v Van Noorden 1909 TS 890 at 899* it was held:

“During the two-hundred years which have passed since Voet wrote, the doctrine of commercial agency has been developed along lines that already recognized though not fully explored, with result that an agent is now regarded as one to whom no contractual liability in respect of agreements, entered into in the name of his principal, can possibly attach. He is simply an solely the representative of another. This view of the position of a modern agent is ... firmly established, and ... generally recognized”;

26.3 The common- law principles of vicarious liability hold an employer liable for the delicts committed by its employees where the employees are acting in the course and scope of their duty as employees. The principles ascribed liability to an employer where its employees have committed a wrong but where the employer is not at fault. As such, the principles are at odds with a basic norm of our society that liability for harm should rest on fault, whether in the form of negligence or intent.³⁸ The same principles apply to analogous cases such as the liability of an owner of a vehicle for the negligence of the driver.³⁹ However, the principle applies when a delict has been committed and is of no application in the field of the law of contract.

27. Applying the above trite principles:

³⁸ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

³⁹ *Messina Associated Carriers v Kleinhaus* 2001 (3) SA 868 (SCA).

- 27.1 Simply because the second defendant was acting in within the course and scope of his employment with, or as a director of, the first defendant when entering into the Sub-Contract Agreement does not bring the principles of vicarious liability into play. Afterall, by alleging as aforesaid only means that the second defendant was acting as the agent and/or representative of his principal (to wit, the first defendant). This means that the contract was concluded between the plaintiff and the first defendant and that the second defendant was merely the agent and/or representative on whom no contractual liability will rest;
- 27.2 Furthermore, as no delict in any manner or form is alleged, it follows that the principles of vicarious liability do not arise *in casu* and that because the second defendant was merely acting as agent and/or representative (whether as an employee or director) had the consequence that the contract was concluded between the plaintiff and the first defendant (as a juristic entity with its own rights and liabilities);
- 27.3 Due to relying on vicarious liability without identifying or even alleging any facts which could underpin some or other delict committed and/or perpetrated against the plaintiff and which claim will then be for delictual damages, the plaintiff omitted further to allege such purported cause of action in the alternative thereby making such type of allegations also vague and embarrassing causing prejudice to the first defendant; and
- 27.4 In the result, I find that the sixth ground of exception should be upheld on the basis of both a failure to make the necessary allegations to disclose a cause of action and that it is vague and embarrassing.
28. In the plaintiff's Heads of Argument it was submitted that section 218(2) of the Companies Act 71 of 2008 allows the plaintiff to hold the first defendant liable for the conduct of the second defendant in contravening the provisions of the said Act. The problem with this submission is that it is neither alleged nor pleaded and, more importantly, the plaintiff has failed to allege what provision

of the said Act was purportedly contravened. I consequently find that there is no merit in this submission.

Seventh ground of exception

29. As revealed with reference to my upholding the sixth ground of exception *supra*, the second defendant is not a party to the contract and is therefore not privy thereto. The contract was concluded between the plaintiff and the first defendant. As such no question of liability arises whatsoever in relation to the second defendant – at least insofar as one has regard to what is alleged in the Amended Particulars of Claim. Even if there was some or other doubt – in the sense that the second defendant is in some manner or form a party to the contract – there is no stipulation in the contract or otherwise whereby the liability of the first defendant and second defendant towards the plaintiff would be joint and several. Even if they were co-debtors, there is a presumption that their liability would be joint and not joint and several and nothing has been pleaded to show that this presumption does not apply [such as alleging that the terms of the contract provides for joint and several liability].⁴⁰ In this instance also, I will uphold the exception on the seventh ground on the basis of both a failure to allege the necessary allegations to disclose a cause of action and that it is vague and embarrassing.⁴¹

Costs

30. Although the first and second defendants are successful with their exception, such success was limited to only two grounds of the seven that were initially raised. As indicated, four of the grounds relied upon were expressly abandoned during the hearing and ground 1 was found adverse to the first and second defendants. In the exercise of my discretion, I do not think it will be fair for the plaintiff to carry the full burden of the cost award and will

⁴⁰ *De Pass v The Colonial Government* (1886) 4 SC 383 at 390.

⁴¹ I mentioned further in passing that the plaintiff took the point in its Heads of Argument that the exception based on vague and embarrassing was out of time. However, my calculations (as well as those of Mr Naidoo) established that it was within time. Nevertheless, and even if I am wrong in this regard, the exception based on a lack of averments necessary to sustain a cause of action was clearly within time as there was no bar.

therefore only award the first and second defendant 50% of their taxed (or agreed) party and party costs incurred in relation to the exception.

31. I base this particularly thereon that even though the defendants are successful, they are only partially successful and that I look to substance and not form. Afterall, the limited success is clearly only in relation to paragraph 7 of the Amended Particulars of Claim.⁴²

ORDER

In the circumstances, I make the following order:

1. Ground 1 of the first- and second defendants' exception (dated 18 May 2022) is dismissed.
2. Ground 6 and Ground 7 of the first- and second defendants' exception (dated 18 May 2022) is upheld, and the plaintiff's Amended Particulars of Claim (dated 28 March 2022) is set aside.
3. The plaintiff is granted leave, if so advised, to file an Amended Particulars of Claim within 15 (fifteen) court days from date of this order.
4. The plaintiff is to pay 50% of the first- and second defendants' costs (either taxed or agreed).

L MEINTJES
ACTING JUDGE OF THE HIGH COURT
DATE OF HEARING:

⁴² Erasmus: Superior Court Practice 2nd Edition (Volume 2) at D5-9 to D5-10B [Service 18, 2022 and Service 20, 2022]

18 APRIL 2023

DATE OF JUDGMENT:

23 MAY 2023

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