IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 5406/2014

In the matter between:

NICOLAS GEORGIOU N.O
GOERGIOU NICOLAS N.O.
JOSEPH REYNOLDS CHEMALY N.O
(In their capacities as trustees of the N Georgiou Trust with registration number TMP757) 1st Plaintiff
LOCH LOGAN WATERFRONT (PTY) LTD 2nd Plaintiff

And

FREYSSENET POSTEN (PTY) LTD 1st Defendant
MURRAY & ROBERTS CONSTRUCTION (PTY) LTD 2nd Defendant

CORAM: EBRAHIM, J

HEARD ON: 29 MAY 2015

JUDGMENT BY: EBRAHIM, J

DELIVERED ON: 6 AUGUST 2015

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[1] The 1st & 2nd plaintiffs have sued the 1st defendant, to whom I shall refer herein as the Excipient, for specific performance and damages, respectively, arising out of an alleged breach of contract. The excipient has taken exception to both claims in the

declarations filed by the plaintiffs on the basis that the particulars contained therein lack averments necessary to sustain a cause of action alternatively are vague and embarrassing.

[2] The first plaintiff, a trust, was the owner of a building site situated at the Loch Logan Waterfront in Bloemfontein. On 20 October 2005 the 1st plaintiff sold the property to the 2nd plaintiff which, at the time, was registered as Basfour 3213 Pty Ltd. The property was registered in the name of Basfour on 30 November 2005. On 2 December 2005 2nd plaintiff changed its name to Loch Logan Waterfront. In terms of clause 11.2.4 of the sale agreement between 1st & 2nd plaintiff it was recorded that the property would be an income earning activity and that the 2nd plaintiff would be placed in possession of a going concern on date of registration of transfer of the property into its name.

[3] On 3 July 2005 the 1st plaintiff entered into a written agreement ("the principal agreement") with 2nd defendant, a building contractor, for the construction of a new shopping mall as well as additions to the existing shopping centre situated at the Loch Logan Waterfront, Bloemfontein ("the project"). In conformity with the joint Building Contracts Committee ("J BCC") of South Africa. Nominated/Selected Sub-contract agreement and the principal agreement, second defendant appointed the Excipient as sub-contractor for the post tensioning reinforcement subcontract on 4 October 2005 and entered into a written sub-contractors agreement with the Excipient.

[4] Pursuant to purchasing the aforesaid property the 2nd plaintiff concluded a lease agreement on 1 September 2007 as Lessor with a company called Riverside Park Trading 110 t/a Nino's Loch Logan as lessee. In terms of the lease 2nd plaintiff leased to Nino's Shop No UG45 situated on the property for a period of 5 years commencing 1 September 2007 at a basic monthly rental per square metre plus VAT and a 9% escalation fee calculated annually on the anniversary date of the lease.

[5] During December 2014 the first and second plaintiffs issued summons against the second defendant and the Excipient as a result of the state of disrepair of the sub-contract work conducted by the Excipient. It was alleged in the particulars of claim that the Excipient had failed to perform the work in a proper, workmanlike and professional manner as a result of which a certain wall on the western façade of the shopping mall was unstable and in danger of collapsing thereby causing injury and loss of life to tenants and patrons of the shops in its vicinity.

[6] The 1st and 2nd plaintiffs, however, expressly disavowed any intention of pursuing any claim against the second defendant and have instituted 2 claims against the Excipient based solely on the latter's alleged breach of the sub-contract entered into with 2nd defendant. The first claim in the summons encompasses the 1st plaintiff's claim for specific performance in accordance with the Excipient's written tender document which forms the basis of the sub-contract agreement entered into bet the Excipient and 2nd defendant. The 2nd claim relates to the 2nd plaintiff's claim for payment of R6 115 183.40 as special consequential damages as

a result of the loss of rental income occasioned by its cancellation of the lease agreement with Nino's due to the dangers and risk to life posed by and inherent in the defective workmanship of the Excipient.

[7] On the 10 February 2015 the 1st defendant gave notice of its intention to except to the particulars of claim alternatively to file a motion to strike them out in terms of Rule 30 A on the grounds that they are vague and embarrassing and/or lack averments necessary to sustain a cause of action. The plaintiffs were afforded an opportunity as required by rule 23(1) of the Uniform Rules of the High Court of removing the cause of complaint and having failed to do so in the requisite time, the Excipient filed its exception on 4 March 2015. It is necessary to examine the contractual documents relied upon by the plaintiffs as well as the contractual relationships which came into existence as a result of these documents with a view to determining whether the plaintiffs averments in the particulars of claim can stand/withstand the attacks and challenges mounted against it.

[8] Aside from the two main grounds of the exception, the Excipient also took issue with the plaintiff's summons on the basis that the claims had become prescribed through the effluxion of time. During oral argument before me however Mr Van Tonder SC who argued the exception on the Excipient's behalf, abandoned this point, no doubt having reconsidered his position in the light of Mr Van Rhyn's argument on behalf of the plaintiffs that established authority makes it clear that it is not competent to raise prescription by way of exception but rather by way of special plea.

[9] An exception is an objection to a pleading on a point of law in respect of which no facts may be adduced by either party to show that the pleading is excipiable, the defect objected against appearing *ex facie* the pleading itself. It is designed to dispose of pleadings which are so vague and embarrassing that an intelligible cause of action or defence cannot be ascertained or to determine such issues between the parties as can be adjudicated upon without the leading of evidence.

(See Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa (5th ed) at 530 *et sen*)

In **Colonial Industries Ltd v Provincial Insurance Co Ltd** 1920 CPD 627 at 630 Benjamin, J said:

> "……. save in instances where an exception is taken for the purpose of raising a substantive question of law which may have the effect of settling the dispute between the parties, an excipient should make out a very clear, strong case before he should be allowed to succeed."

In **Kahn v Stuart** 1942 CPD 386 of 391-392 Davis, J opined:

> "In my opinion, the Court should not look at a pleading with a magnifying glass of too high power. If it does so, it will be almost bound to find flaws in most pleadings … In my view, it is the duty of the court, when an exception is taken to a pleading, first to see if there is a point of law to be decided which will dispose of the case in whole or in part. If there is not, then it must see if there is any embarrassment, which is real and such as cannot be met by the

> asking of particulars, as the result of the faults in pleading to which exception is taken. And, unless the excipient can satisfy the court that there is such a point of law or such real embarrassment, the exception should be dismissed."

[10] In **Salzmann v Holmes** 1914 AD 152 at 156, Innes JA (as he then was) set out the distinction between an exception and an application to strike out, succinctly as follows:

> "An exception goes to the root or 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 purpose. Whereas individual sections, which do not comprise an entire claim or defence, but are only portion of one, must, if objected to, be attacked by a motion to expunge."

The onus of showing that a pleading is excipiable rests on an excipient. In **Amalgamated Footwear & Leather Industries v Jordan & Co Ltd** 1948 (2) SA 891 at 893 Herbstein, J held:

> "It seems to me that insofar as there can be an onus on either party on a pure question of law, it rests not upon the plaintiff but upon the excipient. It is the excipient who is alleging that the summons does not disclose a cause of action and he must establish that in all its possible meanings no cause of action is disclosed."

[11] In order to succeed then, the excipient must persuade me that, on any reasonable construction or, put differently, upon every interpretation which the particulars of claim and, specifically, the document/documents on which it is based, can reasonably bear,

no cause of action is disclosed, failing which the exception cannot be upheld.

See: **Sun Packaging (Pty) Ltd v Vreulink** 1996 (4) SA 176A at 183D-F.

More especially, because the 1st and 2nd plaintiffs seek to rely on implied terms, the test is whether such terms can reasonably be implied. Thus, in effect, where the term contended for would, as a matter of law, otherwise be implied, the test is whether the agreements concerned can reasonably be interpreted as not excluding that implied term.

[12] With these legal principles in mind, I turn then to consider the arguments advanced for and against the grounds of the exception raised & will do so with reference to the following documents, described as:

(i) the Murray & Roberts agreement annexed to the summons and marked "A";
(ii) the tender documents, annexed to the summons and marked "B";
(iii) the price documentation "Annexure C1 and C2";
(iv) the *pro forma* version of the subcontract agreement entered into between the Excipient and 2nd defendant annexed to the summons and marked "E";
(v) the notice in terms of the provisions of section 12(1)(a) of the National Building Regulations and Building Standards Act 103 of 1977, annexed to the summons and marked "F".

(vi) the deed of sale entered into by 1st and 2nd plaintiffs annexed to the summons and marked "G";

(vii) the lease agreement concluded by 2nd plaintiff with Nino's and annexed to the summons and marked "H".

THE FIRST PLAINTIFF'S CLAIM

[13] With reference to the first claim, the material allegations are set out in paragraphs 6 and 7 of the particulars of claim viz:

> "6. In terms of Section 6 of annexure "**B**" and annexure "**E**" hereto the express alternatively implied, alternatively tacit terms of the Nominated/Selected Subcontract Agreement were, *inter alia* the following:
>
> 6.1 The 1st Defendant was totally liable for the design, supply and installation of the Post-Tension cables, etc. as well as additional reinforcement so that the design and installations met the requirements of the project; and
>
> 6.2 The First Defendant will perform in accordance with the intended purpose of the works and will closely liaise with the contractor in all matters concerned; and
>
> 6.3 The First Defendant will perform the said subcontract work in a proper, workmanlike and professional manner.
>
> 7. The First Defendant failed to comply with the provisions of annexure "**B**" and "**E**" hereto and failed to conduct the selected subcontract work in a proper, workmanlike and professional manner in the following respects:
>
> 7.1 the top reinforcing for the cantilever portion of the band on the gridline at the first floor level had been underprovided;
>
> 7.2 the design did not allow for the wall along the edge of the slab at the first floor;

7.3 excessive deflections occurred on the slow curve slab edge;

7.4 the design had to allow for a canopy to be attached to the cantilever, which canopy was build but not installed due to the cantilever deflections;

7.5 the reinforcing over gridline 16 is deficient and has insufficient load allowances;

7.6 the increase of moisture at the exposed top of the curve wall caused same to expand.

THE SECOND PLAINTIFF'S CLAIM

[14] In regard to the second claim the material allegations therefore are contained paragraphs of the particulars of claim viz:-

"10.4 As a result of the facts and circumstances pleaded in paragraph 9.1 above, the Second Plaintiff had to cancel the agreement of lease, annexure "**H**" hereto, with the lessee, Nino's, where after Nino's evacuated the shop in which its business was conducted in the property.

10.5 As a result of the cancellation of the agreement, annexure "**H**" hereto, the Second Plaintiff suffered damages in the amount of R6 115 183,40 due to the loss of rental for the said premises during the period **1 June 2008** to **1 May 2014**.

10.6 The amount of R6 115 183,40 is calculated and made up as set out in annexure "**I**" hereto.

10.7 It was within the contemplation of the Second Plaintiff, First and Second Defendants when the agreements, annexures "**B**", "**E**" and "**H**" hereto were entered into that the Second Plaintiff would suffer the aforesaid damages in the event of the First Defendant's aforesaid breach of contract."

[15] The primary objection of the excipient to the 2 claims of the plaintiffs is that the plaintiffs rely on an alleged breach of contract by the Excipient without having set out averments in their particulars of claim necessary to sustain a contractual basis for such breach. In fact the attitude of the excipient is that no such contractual basis exists or could come into existence in light of the absence of a factual averment of a binding agreement between the 1st and 2nd plaintiffs and the Excipient to perform the alleged design and construction work. In other words, the claims of the 1st and 2nd plaintiffs depend entirely on the existence of one or other or all of the terms expressed in paragraphs 6 and 10 of the particulars of claim, respectively. If those terms cannot be held to be part of the principal building contract then neither of the plaintiffs has a cause of action and the exception must succeed.

THE EXCEPTION TO THE 1ST CLAIM

[16]

16.1 Mr Van Tonder prefaced his objection to the first claim for specific performance and rectification of the defect by alluding to the selective manner in which the 1st plaintiff had relied on the principal building contract. He referred to the clause relating to the latent defects liability period (clause 27) which provides:

> "27.1 The latent defects liability period for the works shall commence at the start of the construction period and end (5) five years from the date of achievement of final completion in terms of 26.0. Defects that appear up to the date of final

completion shall be addressed in terms of 24.0 to 26.0." (the underlining is my own).

Clause 24 deals with practical completion of the building project and clause 25.0 with the works completion thereof. Clause 26 provides that the defects liability period for the works shall commence on the date of works completion and end at midnight 90 calendar days from such date.

Clause 25 provides:

"25.0 WORKS COMPLETION.

25.1 within 17 days of the date of practical completion the principal agents shall issue to the contractor a works completion list defining the outstanding work and defects apparent at the date of practical completion to be completed or rectified to achieve works completion.

25.2 where, in the opinion of the contractor the works completion list has been completed the contractor shall notify the principal agent who shall inspect within seven (7) calendar days of receipt of such notice where, in the opinion of the principal agent, the works completion list:

25.2.1 Has been satisfactory completed, the principal agent shall forthwith issue a certificate of works completion so the contractor with a copy to the employer.

25.2.2 Has not been satisfactorily completed the principal agent shall forthwith identify the works completion list items that are not yet complete and inform the tractor thereof. The contractor shall repeat the procedure in terms of 25.2."

16.2

16.2.1 The contract accordingly specifically provides for a 90 day defects liability period which the excipient argues has conveniently been overlooked and/or ignored by the 1st plaintiff. As I understand it, the argument is that because the principal contract expressly excludes the Excipients liability for design, (Clause 4.1), and because the 90 day defects liability period has expired, no basis exists upon which the 1st claim for rectification and specific performance can validly exist and be sustained, the only logical conclusion being that the defects complained of surfaced beyond the 90 day period.

16.2.2 The answer to this argument, off course, as Mr Van Rhyn pointed out, is that neither works completion nor final completion has been achieved, and the certificates of both works and final completion have yet to be issued in respect of the project. In addition he emphasized that all attempts by the excipient to remedy the defects complained of proved unsuccessful. To this argument Mr Van Tonder countered with the response that the excipient can only then be held to account for the defects complained of on the basis of an averment in the particulars of claim that an assignment by the 2nd defendant to the 1st plaintiff of the rights flowing from the warranty regarding the design responsibility

occurred prior to final completion and no such averment is made to sustain a cause of action for specific performance and the rectification of such defects.

[17] I do not think that it is the excipient's case that such an assignment did not take place – clause 4.2 of the principal agreement is clear:

> "All contractual or other rights the contractor shall have against such nominated or selected sub-contractor arising from any design responsibility undertaken by them are ceded to the employer. The rights flowing from a warranty regarding such design responsibility are ceded to the employer whether or not such a design warranty is referred to in the subcontract agreement."

So the cession of the design responsibility to the 1st plaintiff occurred on the date of signature of the principal agreement. That is not the issue. The issue relates to the excipient's submission that regardless of whether or not 1st plaintiffs compiled with the 90 day liability period, they have no cause of action based on design responsibility against the excipient because no facts have been alleged in the particulars of claim to give rise to such a responsibility/obligation/duty owed by the excipient to the 1st plaintiff, more particularly in light of:

(a) The absence of a contractual relationship between 1st plaintiff and the excipient; and

(b) The failure to annex to its particulars of claim the schedule of design information forming part of the sub-contractors agreement as evidenced by annexure "C2" alternatively the failure to stipulate the design information agreed between the parties to the sub-contractors agreement giving rise to the design warranty referred to in clause 4.2 of the principal agreement.

[18] Clause 4.1 expressly provides for an exclusion of the Excipient's liability for design elements in connection with the subcontract works.

> "The sub-contractor shall not be responsible for the design of the n/s works other than the sub-contractors or his sub-contractors temporary works, unless otherwise stated in the n/s schedule … design elements" (the underlining is my own).

It is the excipient's case that, because no schedule was attached to any of the documents evidencing, according to 1st plaintiff, the conclusion of the subcontract, from which any exception to the expressed absence of a design responsibility on the part of the excipient is clear, allegations relating to stipulations of design information constituting a design obligation was essential for the Excipient to attract such liability but same has not been pleaded.

[19] Mr Van Tonder's submission in regard to the design responsibility relating to the building project raises the all-important issue of to whom the obligation in respect of the design of the post tension cables was owed and when such obligation arose. The answer

advanced by Mr Van Rhyn is that this court must look at the *facta probanda* and not the *facta probantia* in deciding that issue. Such an approach he contends would lead to the conclusion that the principle of incorporation by reference was applicable since the parties (1st plaintiff, the Excipient and 2nd defendant) intended that the principal building contract (Annexure A), the tender document (Annexure B), the tender price letter (Annexure C1) and the appointment letter (Annexure C2) be read together as a written record of an agreed transaction between them. He argued that the *facta probanda* were

(a) Annexure C1 evidencing the tender price submitted by the 1st defendant on 2 August 2005

(b) Annexure D evidencing the acceptance of the design on 4 October 2005 by the principal agent of the 1st plaintiff (the quantity surveyors) and

(c) Clause 2, 6, and 13 of the tender document.

[20] All of these documents, he argued, also refer to, and are concerned with the sub contract. In terms of clause 2 tenderers (i.e. Excipient/1st defendant) are referred to the specific conditions and obligations binding the main contractor in respect of the building principal agreement. In terms of clause 6 the tenderer undertakes to acquaint himself fully with the terms of the tender documents, as well as the principal building contract and in terms of clause 13, the tenderer specifically agrees that the design and installation of the post tension cables and the additional reinforcement meets the requirement of the “works” and that he will perform in accordance with the intended purpose of the

"works", liaising closely with the main contractor in all matters concerned.

[21] As I understood it, the thrust of Mr Van Rhyn's submissions in regard to the design responsibility of the project was that, on the basis of the clauses in the tender document, the price document, and the acceptance letter, it was proper for this Court to have regard to the terms of the principal building agreement concluded between the 1st plaintiff and 2nd defendant and that, by adopting the principal of incorporation by reference, clause 4.2 of the principal agreement evidencing the assignment of the design responsibility from 2nd defendant to 1st plaintiff was incorporated into the sub-contract creating a causal contractual nexus between the 1st plaintiff and the Excipient in regard to the design and construction of the post tension cables and reinforcement for the building project. As authority for this proposition Mr Van Rhyn referred me to the decision of **FJ Mitrie (Pty) Ltd v Madgwick and Another** 1979 (1) SA 232 (D) which dealt with a deed of suretyship which had omitted the name of the debtor. The learned Judge President James J.P., after carefully reviewing the authorities, came to the conclusion that the principle applies because it had been the intention of the parties from the outset that the Deed of Suretyship and the memorandum of agreement were to be read together as a written record of an agreed transaction between them and if that were done there could be no reasonable doubt that the debtor was he in respect of whose indebtedness the plaintiff claimed the amount from the defendant under the deed of suretyship. He accordingly ruled that the deed of suretyship was valid in that case.

[22] Having acquainted myself as best I can with the law on the topic, I am at a loss to find some consistency of application of the principle of incorporation by reference with the submissions made by Mr Van Rhyn. It is trite law that a document referred to in a written contract for the sale of land may be read into such contract as part thereof. In **Coronel v Kaufmann** 1920 TPD 207 at 209 Wessels, J held:

> "But it must be clear to what the reference is …"

See also **Van Wyk v Rottchers Saw Mills Pty Ltd** 1948 (1) SA 983 (AD) at 990-991.

[23] For the purpose of deciding Mr Van Rhyn's contention, I shall assume (without deciding) in favour of the 1st plaintiff that the principle of incorporation by reference, as it has been recognized and applied in regard to contracts for sale of Land, is equally applicable to building contracts. It is a condition of the incorporation of other writing into a written document required by law to contain the terms of the contract, if such contract is to have validity, that such other writing be referred to in the written document. It is not disputed that reference to sub contract work is made in the principal agreement and specifically with regard to design and construction (clause 4.2). Moreover I do not think that there could have been any doubt (and no such argument was raised by Mr Van Rhyn) in the mind of the excipient (1st defendant) when he concluded the subcontract with 2nd defendant that the design responsibility which he undertook in terms of

clause 13 of the tender document was owed to the contractor (2nd defendant) from the date of signature of the sub contract.

[24] It is the 1st plaintiff's case that subsequent to the Excipient's appointment as selected subcontractor, the Excipient and second defendant entered into a subcontractor agreement, the originals and copies whereof are in the possession of the Excipient and 2nd defendant but not in the possession of the plaintiffs. The point of all of this is that there is no subcontract before me relating to the design responsibility, whether or not same is mentioned therein. What the excipient's case is, is that there is no indication whatsoever of when precisely 1st plaintiff alleges the design responsibility owed to it by the Excipient arose because there is no Sub contract and the design responsibility must be set out and stipulated in the particulars of claim in sufficient detail for the cession of that responsibility from 2nd Defendant to 1st Plaintiff to take effect and no such particularity is set out. But that argument is misconceived because of the provisions of clause 4.2 of the principal agreement. However on the substantive argument raised by Mr Van Rhyn, I can find no reference in the principal agreement to the Excipient's tender document, more particularly clause 13, other than formalistic writing of pre-tender and post tender information dealing exclusively with the names and addresses of role players e.g. 1st plaintiff, 2nd defendant, principal agent, quantity surveyors and engineers. The information appears in the section in the principal agreement marked "contract variables" under clause 41 and it is in no way linked to any document or writing in terms of which the Excipient was to have responsibility for design and installation of post tension cables

and reinforcement on the building project. The fact that reference is made to contract drawings under clause 41.6 by way of various commercial digits, does not achieve for the 1st plaintiff the necessary link, between the sub contract and the principal agreement.

[25] In **Coronel** *supra* Wessels, J emphasized that the reference must not depend on oral evidence of the parties and, in the present case, without evidence of the verbal agreement between the parties, it cannot be established on the pleadings as they stand, that the Excipient owed an obligation in respect of design and construction of the post tension cables to the 1st plaintiff. The absence of the annexation of a schedule of the design information to the particulars of claim and/or the failure to stipulate material allegations in connection with the design compounds the difficulty which the 1st plaintiff faces of the lack of a contractual nexus between it and the excipient. How can it be said, for the reasons already set out, that such difficulty is removed by the necessary implication in the principal contract of a tacit term as to design responsibility and warranty on the part of the excipient in conformity with the allegations pleaded in paragraph 6 of the particulars of claim that the terms of the contract relating to the design warranty were express alternatively tacit alternatively implied? There is simply no room for such an implication as no contract was entered into by the 1st plaintiff and the excipient. The contract is a necessary prerequisite to such implication and it does not exist. The inquiry is whether, at the trial, the court reasonably could imply the terms alleged in the declaration. Mr Van Rhyn's contentions in regard to the 1st claim must therefore

fail and are hereby rejected because where a declaration to a summons lacks an essential material allegation (in this case, the design warranty) without which there is no foundation in law for a claim made therein, the declaration is bad in law as disclosing no cause of action.

[26] At the end of the day when all is said and done, all parties are faced with a contractual situation where, despite cession of the design responsibility from 2nd defendant to 1st plaintiff, 2nd defendant created, by virtue of an agreement in the form of the pro-forma subcontract (Exhibit E) which it concluded with the excipient for the installation of the post tension cables and their reinforcement, the well-known chain of employer (1st Plaintiff) – contractor (2nd Defendant) – subcontractor (Excipient). On the basis of this contractual arrangement, the Excipient's obligations were owed solely to 2nd defendant and if work was not done with due diligence and was ill-performed, the 1st plaintiff's rights were to be pursued against the 2nd defendant alone. The exception to the 1st claim accordingly succeeds and is upheld.

THE EXCEPTION TO THE SECOND CLAIM.

[27] The grounds upon which the exception to the 2nd claim is founded are formulated in the following terms in the notice of exception.

1. The 2nd plaintiff is not a party to the written building contract (Annexure A) on which its claim is based.
2. The 2nd plaintiff relies on alleged breaches of contract without setting out a contractual basis for it.

3. Paragraph 8.2 of the declaration to the summons refers to an alleged notice to “The plaintiff” (Annexure F) without identifying which of the various plaintiffs it refers to.
4. Paragraph 8.3 refers to alleged delivery of the notice to the 1st defendant.
5. The alleged delivery of annexure “F” does not avail any entity other than the owner of the property, i.e. the 2nd plaintiff.
6. The matters alluded to in paragraphs 9.1 & 9.2 of the particulars of claim in the context of paragraphs 8.2 and 8.3 thereof are irrelevant to any cause of action other than that of the owner of the property.
7. The alleged agreement referred to in paragraph 10.3 of the particulars of claim was entered into approximately 2 years after the alleged obligation relied upon by 1st plaintiff in support of its claim, arose.
8. The allegation in paragraph 10.4 of the particulars of claim fails to identify when the alleged circumstances pleaded in paragraph 9.1 (the excipients alleged breach) came to the knowledge of the 2nd plaintiff.
9. The allegations in paragraph 10.4 of the particulars of claim fail to establish any legal or factual basis for any ground of cancellation of the agreement of lease in order to identify the relationship between shop UG 45 and the allegation in paragraph 9.1 (the excipient’s breach).
10. The alleged contemplation referred to in paragraph 10.7 of the particulars of claim finds no factual basis in the allegations pleaded and contradicts the allegations as 2nd plaintiff was not a party to documents B & E and in the case of H (the

agreement of lease) neither of the defendants nor 1st plaintiff were parties thereto.

11. The damages claimed are excluded because 2nd plaintiff has failed to allege any basis upon which it suffered such damage and to allege what steps it took in order to mitigate its damages.

[28] The excipient once again specifically disavowed any liability to the 2nd plaintiff on the basis of the lack of a contractual agreement between itself and the 2nd plaintiff. The 2nd plaintiff's case is that,

(a) the property was sold by 1st plaintiff to it as a going concern;

(b) the sale included the rental enterprise conducted in respect of the property;

(c) because of the excipient's defective workmanship, the property was in danger of collapsing causing harm to patrons and shop tenants and staff. Hence the notice in terms of the National Building Regulations and Building Standards Act 103 of 1977 was addressed to the 2nd plaintiff by the local municipality, which notice in turn was sent to the excipient;

(d) as a result of the excipient's breach of contract and the damages posed by the defective construction and the potential for harm to occupants of the property, the 2nd plaintiff was compelled to cancel the lease agreement (Exhibit "H"), thus suffering a loss in rental income for the unexpired period of tenure of the lease by the lessee.

(e) such loss was in the contemplation of the parties to the building contract viz 2nd plaintiff; the Excipient and 2nd

defendant at the time of its conclusion as pleaded in paragraph 10.7. of the particulars if claim.

(f) as a result of a typographical error, the allegations in paragraph 10.7 of the particulars of claim omitted to reflect the name of the 1st plaintiff so as to plead the case for the contemplation of damages from the perspective of both 1st and 2nd plaintiff.

[29] Two points need emphasising in regard to the 2nd claim and these are:

(a) as with the 1st claim, it is a prerequisite to the operation of this claim that there first be some form of contractual agreement concluded between the 2nd plaintiff and the Excipient, attracting the latter's liability to 2nd plaintiff in damages in respect of defective workmanship and no such agreement/understanding exists between these parties. No specific obligation on the part of the Excipient to 2nd plaintiff is alleged in conflict with such alleged contract in the particulars of claim; simply because none exists; neither 2nd plaintiff nor the Excipient was a party to the principal building contract.

(b) Secondly liability for the damages claimed are expressly excluded by the agreement of lease concluded by the 2nd plaintiff and Nino's (Exhibit "H") in terms of clause (8a) thereof which provides:

> "Should the leased premises be destroyed by <u>any cause whatsoever</u> to an extent which prevents the lessee from having beneficial occupation of the leased premises, then

(1) The lessee shall have no claim of any nature whatsoever against the lesser as a result thereof;

(2) The lessee will be entitled to determine within (2) calendar months after such destruction or damage whether or not the lease shall be cancelled and shall notify the lessee in writing of its decision." (the underlining is my own)

[30] Without derogating from the substance of Mr Van Rhyn's argument that it was the 1st plaintiff who initially entered into the agreement of lease as representative of 2nd plaintiff, it is apparent that the particulars of claim as pleaded, paragraph 10.7 being the relevant and offending paragraph, contains a material omission which cannot simply be ignored or explained away as, in Mr Van Rhyn's words, "a minor blemish". The allegations pleaded have an important bearing on interpretation and the purpose for which they were pleaded. As they stand, what is being conveyed is that it was 2nd plaintiff who concluded the building agreement with the 1st and 2nd defendants and the lease agreement with the lessee and that at the time of the conclusion of these contracts it had been contemplated by all these parties that the 2nd plaintiff would suffer the said damages in the event of the Excipients breach of contract. Nothing could be further from the truth as is borne out by the documentation. The 2nd plaintiff and the Excipient featured nowhere in the contractual negotiations and in the eventual conclusion of the agreements as a matter of, no doubt, commercial convenience. But that, in the context of the all important issue of whether the 2nd plaintiff has pleaded a sustainable cause of action, is not a "minor blemish" but a significant omission which cannot simply be cured by the addition,

and insertion, as urged by Mr Van Rhyn, of the words “first plaintiff” especially in light of the failure of the plaintiffs to make use of the opportunity provided them on service of the notice of exception of rectifying and addressing the complaint so as to properly plead a cause of action sustainable in law in respect of the 2nd claim - that was not done and both plaintiffs remained supine and unyielding.

[31] No liability can attach to the excipient in the absence of a breach of contract and, to boot, on the basis of terms in conflict with the express provisions of an agreement (clause 8a Exhibit “H”). I consider the allegation contained in paragraph 10.7 of the particulars of claim as constituting terms in conflict with the provisions of clause (8a) of the lease agreement (Exhibit “H”) which excludes liability for defects by 2nd plaintiff as lessor to the lessee in terms which a trial court could not reasonably imply to the contrary from all the relevant facts circumstances and documents of the case. See **Lanificio Varum SA v Masurel Fils Pty Ltd** 1952 (4) SA 655 (A). It follows therefore and I find that the allegations in paragraph 10.7 cannot stand and be sustained as the basis of the cause of action pleaded by the 2nd plaintiff in respect of the damages claimed by it in the summons because those allegations cannot be held to be part of either the principal building contract (Exhibit A) or the lease agreement, to which agreements neither the 2nd plaintiff nor the excipient were contracting parties in the first place. Baldly put, there was no contractual privity between 2nd plaintiff and excipient. It is only the parties to a contract who can be liable for the breach of that contract and without a breach of contract there can be no claim

for damages, and no talk of causation and the issue of the contemplation of damages does not therefore arise. The well known dictum of Innes, CJ about damages in **Victoria Falls & Transvaal Power Co. Ltd v Consolidated Langlaagte Mines Ltd** 1915 AD at 22 is aposite. See also **Holmdene Brickwicks v Roberts Construction Co. Ltd** 1977 (3) SA 670 (A); **Shatz Investments Pty Ltd v Kalovyrnas** 1975 (2) SA 345 (A) at 687; **Lavery & Co. Ltd v Jungheinrich** 1931 AD 156.

[32] It can hardly be argued in the case of 2nd plaintiff that it relies on facts in the summons and particulars of claim which are clear, unambiguous and unequivocal when no contract was concluded and none came into existence between the 2nd plaintiff and the excipient, in the first place. By so saying I do not intend to comment on the quality of the draftmanship of the 2nd plaintiff's claim save to record that the allegations therein contained are inconsistent with the facts due to the absence of an averment linking the 2nd plaintiff and the excipient contractually. No obligation arose and none was owed at any stage of the building works in question by the excipient to the 2nd plaintiff. This is borne out by the relevant documents - even upon the adoption, undertaken by me in pursuance of a resolution of the issues in this case, of the most benevolent construction and interpretation of the terms of the various agreements and contracts and other documents, referred to in paragraph (7) of this judgement, forming the basis of the claims pleaded in the summons. As with the first claim, the averments contained in paragraph 10.7 are extant the cause of action pleaded and sought to be relied upon by the 2nd plaintiff in support of its claim for payment of damages

by the excipient. The exception to the 2nd claim is accordingly also upheld.

[33] Under the Uniforms Rules of the High Court, a combined summons, as in the present case, is required to disclose adequate particularity and when an exception is taken to such a pleading and that exception is upheld, it is the pleading which is destroyed and not the entire action which commenced with that summons. It is only the contents of the statement of claims (i.e. the declaration – Rule 17(2) which is annexed to the summons which is struck by the exception in terms of its particularity and detail for, in drawing it up, the general rules in regard to pleadings contained in Rule 18 must be observed. The upholding of the exception does not carry with it the dismissal of the summons or of the action. It is only the particulars of claim attached which are made legally extinct. In the words of James J.P in **Santam Insurance Co Ltd v Manqele** 1975 (1) SA 607 (D) at 610, the summons remains as an empty husk until amended particulars are incorporated into/annexed to it.

[34] It is clear from the cases that once particulars of claim have been struck out it is open for the court to grant leave to the party, in respect of whose pleading the exception was successfully taken, to amend his pleading within a particular period. Leave to amend the particulars of claim in the case at hand was not sought on the papers but in oral argument before me, Mr Van Rhyn requested this indulgence in the event of the exception succeeding. Mr Van Tonder pressed on for a dismissal of the claim no doubt, on the basis of his mandate. But such an order would not be competent

as there is no proper legal authority therefor and, more particularly, in the context of the present case, the exception has not been successfully resolved as a decisive end to the litigation between the parties. In the English case of **Everett v Ribbaids** 1952 (2) QB 198 (CA) at 206 Romer LJ said:

> "The court or a Judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer and in such case …… the court or a Judge may order the action to be stayed or dismissed, or Judgment to be entered accordingly as may be just." (The underlining is my own.)

[35] The current English law rules of Practice, as contained in the 1961 text at page 574 provide:

> "Where the statement of claim …… discloses no cause of Action because some material element has been omitted, the court, while striking out the pleading, will not dismiss the action but give the plaintiff leave to amend."

Our rule 23 (1) is silent on the point:

> "Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, the opposing party may …… deliver an exception thereto."

Nothing is said about stay or dismissal of the action or entry of judgment.

As a matter of general practice the South African Courts; on the upholding of an exception, tend to grant leave to amend to the

relevant party, whether or not it is the opinion of the court that the amendment will pass muster for that is not a proper enquiry at the stage of the upholding of the exception.

[36] There will accordingly be an order in the following terms:-

1. The exception to both claims is upheld and the particulars of claim are set aside.
2. Those exceptions set out in the Notice of Exception but not pursued before me are dismissed.
3. The 1st and 2nd plaintiffs are given leave to file amended particulars of claim within 1 month of the grant of this order.
4. 1st and 2nd plaintiffs are ordered jointly and severally to pay the costs of the exception proceedings, the one paying, the other to be absolved.

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EBRAHIM, J

On behalf of plaintiffs: Adv. AJT Van Ryn SC
Instructed by:
Honey Attorneys
BLOEMFONTEIN

On behalf of 1st defendant: Adv. LJ Van Tonder SC
Instructed by:
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/PC