**REPUBLIC OF SOUTH AFRICA**

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

**CASE NO: 45829/18**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED ✓

12/12/2019
Date

Signature

In the matter between:

**KHUSELA SOLUTIONS (PTY) LTD** **PLAINTIFF / RESPONDENT**

and

**DERICK KNOLL TELECOMMS (PTY) LTD** **DEFENDANT / EXCIPIENT**

Heard: 21 November 2019

Judgment: 13 December 2019

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**JUDGMENT**

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**MOVSHOVICH AJ:**

**Introduction**

[1] Derick Knoll Telecomms (Pty) Ltd ("**DKT**") raises an exception in respect of the plea to DKT's counter-claim delivered by Khusela Solutions (Pty) Ltd ("**Khusela**") dated 1 July 2019 ("**the plea**").

[2] In principle, an exception may be taken to any pleading either on the basis that such pleading does not disclose a cause of action / defence, or is vague and embarrassing. In the present matter, an exception is taken on the basis that the plea does not disclose a defence in law (and in fact amounts to a contravention of the law).

**Key legal principles**

[3] The principles governing exceptions have recently been restated by the Constitutional Court:

> "*In deciding an exception a court must accept all allegations of fact made in the particulars of claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts. The purpose of an exception is to protect litigants against claims that are bad in law or against an embarrassment which is so serious as to merit the costs even of an exception. It is a useful procedural tool to weed out bad claims at an early stage, but an overly technical approach must be avoided.*"[1] (footnotes omitted)

[4] The Court, on exception, is required to assume that all the facts pleaded by the response are correct and may be established at trial. Also, while the Court should not hesitate to strike down clearly unmeritorious claims and defences, exception proceedings are not ordinarily the forum to decide a complex mix of factual and legal issues.[2]

[5] The excipient in the present matter thus bears a substantial burden to persuade the Court that on any reading of the plea and the facts pleaded therein, Khusela's defence is bad in law.

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[1] *Pretorius and another v Transport Pension Fund and Others* 2019 (2) SA 37 (CC), para [15].
[2] *Ibid*, para [42].

**Relevant background**

[6] This matter had already produced a not inconsiderable volume of pleadings. I do not propose to deal with all the pleadings and factual allegations, but shall confine this discussion principally to the pleadings pertinent to the exception: DKT's counter-claim and the plea.

[7] The counter-claim alleges that DKT and Khusela concluded a partly oral, partly written contract to supply the goods and services in respect of what are termed "*cisco components*" ("**the goods and services**"). It is also alleges that written purchase orders were issued by DKT to Khusela and DKT made payments of the full amount owing in respect of the "cisco components" in five tranches between December 2015 and February 2016, amounting to R7,385,888.16 (inclusive of 14% VAT), and that Khusela supplied the goods and services to DKT.

[8] On 15 January 2016, Khusela delivered a tax invoice in respect of the supply of the goods and services ("**the Khusela invoice**"). DKT used this invoice to claim input VAT from the South African Revenue Service.

[9] It subsequently emerged, however, that Khusela issued a credit note in respect of (the full amount of) the Khusela invoice shortly after 15 January 2016. A new invoice was issued in respect of the supply of the goods and services by Khusela Solutions Gauteng (Pty) Ltd ("**Khusela Gauteng**") on or about 19 January 2016 ("**the Khusela Gauteng invoice**").

[10] It is alleged that the credit note and re-invoicing happened ostensibly pursuant to an assignment of the rights and obligations pertaining to the supply of the goods and rendering of the services from Khusela to Khusela Gauteng in January 2016.

**The basis of DKT's exception**

[11] DKT's complaint is that the credit noting of the Khusela invoice and the issuing of the Khusela Gauteng invoice are contrary to Khusela's statutory and contractual obligations.

[12] DKT's complaint is premised on two propositions. First, it alleges that Khusela in fact supplied the goods and services. Second, it states that the Value-added Tax Act, 1991 ("**the VAT Act**") in view of the common cause facts, requires Khusela to re-issue an invoice in respect of the goods and services and to pay output VAT, and does not permit the issuing of an invoice by Khusela Gauteng.

[13] The second (legal) proposition is based on the following. The supply of goods or services is, in terms of section 9(1) of the VAT Act, "*deemed to occur at the time an invoice is issued by a supplier...or the time any payment of consideration is received by the supplier in respect of that supply, whichever time is earlier*". There is commentary by De Koker to the effect that part-payment is sufficient to trigger section 9(1).[3] In terms of section 20 of the VAT Act, a supplier making a taxable supply must within 21 days of the supply issue a tax invoice in respect of that supply.

[14] DKT's counsel argued that once a tax invoice is issued, there are only limited circumstances in which the invoice may be credit noted or adjusted. These circumstances are exhaustively set forth in section 21 of the VAT Act.

[15] DKT's counsel submitted that the facts pleaded by Khusela do not fall within any of the categories recognised by section 21 and thus the Khusela invoice could not be credit noted, and Khusela was obliged to account for output VAT.

[16] In support of this argument, DKT's counsel relied further on the judgment in *Income Tax Case No 1861* 74 SATC 383 ("**the IT judgment**"), where the Court held that liability to pay VAT arose on the part of a vendor despite the fact that, in that case, such vendor issued fictitious invoices. The liability to pay VAT, according to the IT judgment, arose when the invoice was issued.

[17] DKT thus alleges that, as the invoice was issued on 15 January 2016 and the first payments in respect of the goods and services took place in December 2015, it is Khusela and not Khusela Gauteng that was obliged to issue the invoice and account for VAT. This is, so it is contended, irrespective of whether Khusela actually supplied the goods and services.

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[3] A de Koker *Value-Added Tax in South Africa (Commentary)* (2019), para 10.3.

[18] DKT's counsel also relied on the judgment of the Constitutional Court in *Metcash Trading Ltd v Commissioner, SARS* 2001 (1) SA 1109 (CC), which stated as follows:

> "*It* would *be convenient to pause at this point to recapitulate and fill in some details before moving on to the next phase of the Act, which deals with assessments by the Commissioner and what they may set in train. The first significant point to note is that VAT, quite unlike income tax, does not give rise to a liability only once an assessment has been made. VAT is a multi-stage tax, it arises continuously. Moreover VAT vendors/taxpayers bear the ongoing obligation to keep the requisite records, to make periodic calculations of the balance of output totals over and above deductible input totals (and any other permissible deductibles) and to pay such balances over to the fisc. It is therefore a multi-stage system with both continuous self-assessment and predetermined periodic reporting/paying.*"[4]

[19] DKT's counsel submitted that the *Metcash* case illustrates that the VAT Act, given its continuous nature, sets firm rules in respect of which entity accounts for output VAT and at what time. He also submitted that the identity of the party liable, for legal purposes, does not alter once the liability arises.

[20] The plea is not a model of clarity. The overall impression arising from the plea is that Khusela contends that it is not liable to pay output VAT and that the credit noting of the Khusela invoice was justifiable because Khusela "*ceded*" its obligations to supply the goods and services to Khusela Gauteng in or around January 2006.

[21] In response to a critical allegation in paragraph 9 of the counter-claim that Khusela supplied the goods and services, Khusela baldly denied the content of the paragraph but then stated "*in amplification of the abovementioned denial*" that Khusela assigned its obligations to supply the "cisco components" (being the goods and services) and any entitlement to payment to Khusela Gauteng. The alleged "*cession*" thus appeared to be the basis of the averment that no supply took place.

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[4] At para [16].

[22] DKT's counsel submitted that, in those circumstances, Khusela remained liable to account for output VAT and to render an invoice in respect of the goods and services to Khusela. He went on to submit that, once an invoice was issued, its reversal may be countenanced in very limited circumstances which do not arise *in casu*.

**Analysis**

[23] There is much force in the submissions by DKT's counsel. It is clear from the VAT Act that it sets forth strict requirements for the purposes of accounting for output VAT, and that this imports the certainty and regularity needed for the continuous system of VAT payments envisaged by the architecture and purposes of the VAT Act. Thus, once a good or service is supplied or an invoice is delivered or any part of the payment in respect of a supply is made by a supplier, the obligation on the part of such supplier to pay output VAT arises. That obligation is irreversible except in the limited circumstances set forth in section 21 of the VAT Act. It is noteworthy, however, that the IT judgment specifically contemplates that a vendor in a "fictitious invoice" situation may potentially avoid VAT liability by passing a credit note.[5]

[24] Once the liability to account for VAT has arisen on the part of a party, a consequent assignment of rights and obligations in relation to the supply and payment therefor will usually make no difference to - and will not shift to the assignee - such party's VAT liability. In this regard, there is a long line of authority in income tax cases that once a right to receive income has accrued to a cedent, it is the cedent who retains the tax liability in respect of such income, notwithstanding the cession of such right to a cessionary.[6] I can see no principled reason why a similar approach should not apply in the case of VAT liability.

[25] It follows that the mere cession or assignment of Khusela's rights and obligations in respect of the supply of the goods and services, and payment therefor would not, in itself, alter the liability for VAT. The cession and assignment, on the pleadings, are accepted to have occurred after the Khusela invoice was issued and part-

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[5] At para [12].
[6] *Secretary for Inland Revenue v Smant* 1973 (1) SA 754 (A), 764.

payment in respect of the supply was received by Khusela from DKT. Such an assignment does not, in and of itself, change the identity of the party liable for VAT under the VAT Act, and does not ground a basis for the issue of a credit note.

[26] Counsel for Khusela, however, submitted that the plea goes further and denies, at a factual level, that the goods and services were supplied by Khusela.

[27] While this is not the thrust of what the plea conveys, I am obliged, at the exception stage, to adopt a generous approach to reading and giving meaning to Khusela's pleadings. In doing so, it is indeed possible to attribute an interpretation to the plea for which Khusela's counsel contends. While it appears from the response to paragraph 9 of the counter-claim that the denial of supply is centred on the alleged cession to Khusela Gauteng, it is possible to attribute to the plea a broader meaning. In paragraph 25 of the plea, Khusela avers as follows: "*[Khusela] reiterates that it did not render the [supply of the goods and services] to [DKT]*". I am prepared to accept, adopting a benevolent reading, that this does not simply cross-refer to Khusela's prior pleading as to the cession and assignment, but makes an averment that Khusela did not, in fact, supply the goods and services.

[28] A denial that Khusela in fact supplied the goods or services may indeed constitute a defence to the counter-claim. Without in any way making findings in respect of the complex legal and factual issues in this regard, a factual denial may have a bearing on whether a credit note could properly be issued by Khusela, and whether the supply by the registered vendor in question has been cancelled or fundamentally varied as contemplated in section 21 of the VAT Act. It might also have a bearing on whether Khusela was ever a "*supplier*" of a supply required to render a tax invoice in terms of section 20 of the VAT Act, and which incurred liability for VAT. These are all questions for the trial court to resolve, with the full benefit of evidence.

[29] As I indicated earlier, the exception was confined to the allegation that the plea did not constitute a defence in law (and evidenced a contravention of the law). It was not based on the vague and embarrassing ground for exception set forth in rule 23 of the Uniform Rules of Court. I thus need not make any findings on whether the plea is impermissibly vague.

[30] In the above circumstances, the exception falls to be dismissed.

**Costs**

[31] What remains is the issue of costs.

[32] In my view, while the exception has failed, the imprecision and ambiguity of the pleading on the part of Khusela contributed materially to the uncertainty surrounding the scope and nature of its defence. I have found above that the predominant impression created by the plea is that it denies that Khusela supplied the goods and services for the purposes of the VAT Act on the basis of a belated assignment of rights and obligations to DKT. That, as set forth above, would not, in itself, transfer liability to account for VAT to Khusela Gauteng.

[33] It was only the more imaginative (and less natural) interpretation of the pleadings advanced on behalf of Khusela at the hearing which yielded a narrative which, on the alleged facts, may conceivably constitute a defence to the counter-claim.

[34] On the other hand, I do not lose sight of the fact that, ultimately, Khusela succeeded in opposing the exception.

[35] In my view, taking account of all of the circumstances, it is appropriate that DKT bears one-half of Khusela's costs of the exception.

**Order**

[36] I thus make the following order:

[36.1] the exception is dismissed;

[36.2] the defendant / excipient shall bear one-half of the plaintiff's / respondent's costs of the exception on the scale as between party-and-party.

**VM MOVSHOVICH**
**ACTING JUDGE OF THE HIGH COURT**

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| ***EXCIPIENT'S COUNSEL*** | ***A Duvenhage*** |
| ***EXCIPIENT'S ATTORNEYS*** | ***Natalie Visagie Attorneys (N Visagie/V209) Pretoria*** |
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| ***RESPONDENT'S ATTORNEYS*** | ***Kellerman Joubert Inc (BJK/ab/BK4844) Stellenbosch*** |
| ***DATE OF HEARING*** | ***21 NOVEMBER 2019*** |
| ***DATE OF JUDGMENT*** | ***13 DECEMBER 2019*** |