IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 4873 / 2022

In the matter between:

JVZ JV	First Excipient
JVZ CONSTRUCTION (PTY) LTD	Second Excipient
SR CIVIL CONTRACTORS (PTY) LTD	Third Excipient

and

THE CITY OF CAPE TOWN	Respondent

Coram: Wille, J

Heard: 15 March 2023

Delivered: 13 April 2023

JUDGMENT

WILLE, J:

Introduction:

[1] This is an exception at the instance of the excipient applicants. The parties will be referred to as the plaintiff and the defendants as they were referenced in the particulars of the claim as formulated by the plaintiff. The plaintiff instituted an action against the defendants for the repayment of monies paid by the plaintiff to the defendants according to a decision made by an adjudicator in respect of claims by the defendants arising from a written construction agreement.[1]

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[1] The agreement.

[2] The plaintiff alleged that it breached the agreement with the defendants by giving them written notice to cease work and vacate the construction site.[2] This work on the site had commenced about a month before the notice to cease the work and exit the site. The plaintiff's case is that their later conduct amounted to a repudiation of the agreement, alternatively, a breach of the agreement with the defendants.

[3] This is where the defendants differ. The plaintiff avers that the defendants then submitted a claim to the plaintiff on account of the plaintiff's breach and the delays attributable thereto under the agreement for an extension of time, payment of additional time related items and payment of proven additional costs due to delays attributable to the plaintiff. The defendants' position is that they made an election to enforce the agreement. These two opposing positions result in a material difference in the compensation awarded to the defendants. This is what this exception is all about.

[4] The plaintiff says the defendants are only entitled to financial compensation because of a breach of the agreement by the plaintiff on account of the delay caused by the plaintiff's breach and that this compensation translates into the form of a penalty. Put in another way, the defendants are to be financially recompensed only regarding damages suffered on account of delays attributable to a breach of the agreement by the plaintiff calculated regarding a prescribed formula related to the actual damages suffered.

[5] The argument is that billed rates do not represent actual costs. When a claim is activated according to an extension of time regarding a delay attributable to a breach of the agreement, this operates as a penalty stipulation. Thus, the defendants are consequently prohibited by legislative intervention from receiving both the penalty and damages or the latter instead of the penalty.[3] By elaboration, the plaintiff avers that the court is empowered to reduce the penalty and accordingly seeks a reduction.

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[2] This on the 6 August 2019.
[3] Section 1(1) and 2(1) of Act 15 of 1962 (the "Act").

[6] The defendants say that on a proper construction of the agreement read with the correct application of our jurisprudence on contract law, the defendants are entitled to pursue a claim where a failure or delay on the part of the plaintiff (in fulfilling any necessary obligation to enable the works to proceed following the agreement) takes place. This is then the defendants' case and claim.

[7] Further, it is submitted on behalf of the defendants that it cannot be seriously contended that there was a breach of the agreement by the plaintiff in fulfilling a necessary obligation to which the plaintiff is in any event contractually bound. In simple terms, the question is raised about the precise identity of the alleged breach of the agreement by the plaintiff.

Context:

[8] The plaintiff notified the defendants in writing that, according to them, the agreement was void and unenforceable and that the defendants were instructed to cease all work and vacate the construction site.[4] This was because an 'appeal authority' had concluded that the underlying basis for the agreement with the defendants was absent and the agreement was set aside.

[9] Thus, this 'appeal authority' concluded that the agreement between the plaintiff and the defendants was at an end and had no force or effect. The defendants disputed the validity of this finding. This finding was subsequently overturned by way of a court order. The court declared the tender awarded to the defendants and the agreement to be of full force and effect.

[10] In summary, the appeal authority's decision was reviewed and set aside. Thus, the plaintiff averred that the notice issued to the defendants to cease work and vacate the site represented a repudiation, alternatively, a material breach of the agreement. It is positively pleaded by the plaintiff that: (a) the defendants suffered a delay in practical completion (b) the defendants incurred proven additional costs from a failure or delay on the part of the plaintiff, and (c) that the defendants are, therefore contractually entitled to make claims only following a specified clause in the

[4] This on 6 August 2019.

agreement.[5] The defendants say they are entitled to an extension of time for circumstances of any kind whatsoever, that they extended the date of practical completion and, are therefore entitled to claims following an extension of time as defined in a different clause in the agreement.[6]

[11] On the pleadings, it is a matter of common cause that the defendants were entitled to an extension of time and that the plaintiff granted the same to the defendants. Because of this, the defendants say that on a proper construction of the agreement, they are entitled to be paid such additional time-related general items, including for non-working days, if applicable, as are appropriate with any other compensation which may already have been granted in respect of the circumstances concerned.

[12] Thus they argue that the clause relied upon by the plaintiff must be read together with the clauses upon which they depend. This, in effect, means that a claim is permitted where practical completion is delayed due to a failure or delay on the part of the plaintiff in the fulfilling of the necessary obligations to enable the works to proceed (an extension of time for practical completion) together with any additional proven costs in terms of the agreement.

[13] The defendants' case is that, as a matter of pure logic, they are entitled to claim for an extension of time for circumstances of any kind whatsoever which may occur, and they may claim an extension in terms of the clause in the agreement relied upon by the plaintiff.

[14] Herein lies the rub. The difference is that on the plaintiff's version, any claim is limited to an extension of time and recovery of *proven costs* incurred due to a failure of or delay by the plaintiff. On the contrary, the defendants aver that their claims are not limited to a claim for extension of time (and not additional proven incurred costs) but for any circumstances whatsoever. They argue that, undoubtedly, it is so that a prerequisite for their claim is the application for an

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[5] Clause 10.1 of the agreement.
[6] In terms of clause 5.12.1 of the agreement.

extension of time and not a failure or delay by the plaintiff. This is the very issue that bears further scrutiny.

Consideration:

[15] It is submitted on behalf of the defendants that when an extension of time is granted, they are entitled not only to recover proven actual incurred costs but rather to be paid for additional time-related general items. The submission is made that this is not a claim for damages. Instead, the agreement provides a mechanism that is employed to pay the defendants for time-related items as the contract period has been extended.

[16] Put another way, the defendants were paid for the extended period and not because of a breach or the damages that may have been caused. Thus, this does not involve a penalty stipulation as the defendants are paid for a longer time, employed for a longer time, and paid at a pre-agreed rate. The claim by the defendants against the plaintiff was never to recover a penalty and damages. Thus, they say the provisions of the Act find no application. The plaintiff argues that only proven additional costs incurred can be claimed, and because of this, the provisions of the Act find application.

Jurisprudence:

[17] Our jurisprudence indicates that a clause in a civil engineering contract placing an obligation on an employer to hand over the construction site to a contractor cannot be invoked to render a subsequent deprivation of possession to be a breach of contract.[7] This is because, among other things, an obligation to hand over the site has reference to the inception of a contract and initial access to the site. Once this possession is given, this duty is discharged, and the said clause has no other function in the execution of the contract. Therefore, any subsequent deprivation, if wrongful, would give rise to an action in terms of the contract. On this, I agree.

[18] Further, it is well-established law that a contractor who is vested with contractual remedies, in addition, retains all common law remedies, especially in any

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[7] *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 104 E-G.

claim for damages, unless this is expressly excluded.[8] In these circumstances, the plaintiff delayed in fulfilling a necessary obligation to enable the works to proceed, which (in my view) was sufficient on its own, together with the agreed extension of time for the plaintiff's claims. No breach of contract is established or even required.

[19] The case for the plaintiff is that because of the application of the Act, the defendants are not entitled to claim a penalty as well as damages or claim damages in place of the penalty as there is no provision for this species of claim. This is the core exception raised by the defendants. They say the pleadings by the plaintiff on this score amount to a penalty stipulation in terms of the Act.

[20] A penalty stipulation essentially means that any person, in respect of an act or omission in conflict with a contractual obligation, who is liable to pay a sum of money for the benefit of any other person, either by way of penalty or as liquidated damages, shall (subject to specific provisions) be liable to pay an amount of money, called a penalty. If, upon hearing a claim for a penalty, it appears to the court that such a penalty is out of proportion to the prejudice suffered by the creditor because of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty. This has been interpreted to mean a claim for a penalty or the return of a penalty.[9]

[22] It is a prerequisite that the claim be based on a penalty stipulation unless the clause in question constitutes a penalty.[10] Most significantly, the liability to pay must derive from a breach of contract. Otherwise, the stipulation relied on would not qualify as a penalty. I say this because it is impermissible to regard as a penalty stipulation, a contractual term which provides for payment in the event of the premature termination of the contract and which became enforceable incidentally due to a breach of contract.[11]

[23] It is against this canvass that I am enjoined to look at the pleading excepted to as it stands. No facts outside those stated in the pleadings may be considered. No

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[8] *Group Five Building Ltd v Minister of Community Development* 1993 (3) SA 629 (AD) at 651 D-E.
[9] *Portwig v Deputation Street Investments (Pty) Ltd 1985* (1) SA 83 (D) at 88 E-F.
[10] *Sun Packaginng (Pty) Ltd v Vreulink* 1996 (4) SA 176 (AD) at 182 H-I.
[11] *De Pinto and Another v Rensea Investments (Pty) Ltd* 1977 (2) SA 1000 (A)

reference may be made to any other document.[12] To disclose a cause of action, a plaintiff must plead every material fact that would be necessary for the plaintiff to prove to obtain a judgment.[13]

[24] Put in another way, it is impermissible to plead a conclusion of law in the absence of the material facts giving rise to it having been pleaded. This goes to the principle of the question of whether, as a matter of law, the allegations in the particulars of the claim, adequately interpreted, make out a cause of action.[14] This principle applies only to material allegations of fact. It does not extend to inferences and conclusions not warranted by the material allegations of fact.[15]

[25] At the outset of the argument, I raised with counsel for the defendants if the exception contended for did not essentially concern questions about the interpretation of the agreement between the plaintiff and the defendants. In response, it was emphasized that the exception raised to the claims by the plaintiff were, in essence, fact-bound and concerned facts which were not in dispute. On this, I agree.

[26] I say this, among other things, because of the following penchant remarks made when dealing with 'fact-bound' exceptions:

'…*the response to an exception should be like a sword that cuts through the tissue of which the exception is compounded and exposes its vulnerability*…'[16]

Conclusion:

[27] For all these reasons, the claims currently formulated by the plaintiff are subject to exception. I also accept that some of the averments made by the plaintiff in the particulars of the lawsuit could have (and should have) been pleaded with more clarity and precision. This is considering the multiple provisions in the agreement between the plaintiff and the defendants.

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[12] *Baliso v FirstRand Bank Ltd t/a Wesbank* 2017 (1) SA 292 (CC) at 303 E.
[13] *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 273 A-C.
[14] *Amalgamated Footwear and Leather Industries v Jordan & Co Ltd* 1948 (2) SA 891 (C) at 893.
[15] *Natal Fresh Produce Growers' Association v Agroserve (Pty Ltd* 1990 (4) SA 749 (N) at 755 A.
[16] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* at 466 A.

[28] The following order is granted, namely that:

1. The exceptions are upheld at the instance of the defendants.

2 The plaintiff is afforded leave to amend its claims within a period of twenty (20) court days from the date hereof.

3. The costs of and incidental to the exception proceedings shall stand over for determination by the trial court.

E. D. WILLE

Cape Town