

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)

CASE NO: 60884/2012

In the matter between:

HULA V GODE PROJECTS

And

ESKOM HOLDING LTD

Respondent

DELETED WHERE NOT APPLICABLE	
(1) DEFENDANT/PLAINTIFF	Applicant
(2) COUNTERCLAIM/DEFENDANT	Respondent
(3) REPLY	
6/12/13	SIGNATURE

JUDGMENT

SWARTZ AJ

The Respondent/Plaintiff instituted action against the Excipient/Defendant during October 2012 for payment of the sum of R1 727 480.76. The action is based on a written contract dated on or about 9 November 2011.

The Defendant/excipient delivered an exception to the Plaintiff's particulars of claim on the ground that the particulars of claim disclosed no cause of action.

Although various issues were raised during argument, which I do not deem necessary to deal with for the purpose of the exception raised, the primary question to be determined is whether a cause of action is disclosed in the particulars of claim to which the defendant / excipient can plead.

The Excipient's / Defendant's first ground for its exception is that the contract has not been accepted by the Excipient / Defendant and therefore no agreement came into existence; that the contract has not been signed by either of the parties and therefore no contract came into existence; that there is no cause of action disclosed in the Particulars of claim.

A further ground raised in the Notice of Exception is that the completion of the work is on 31 May 2012. The Plaintiff / Respondent contends that the contract was repudiated and cancelled on 17 July 2012.

The Plaintiff / Respondent contends that it is clear from the wording of paragraph 7 of the Particulars of Claim that the Plaintiff / Respondent relies on the repudiation of the agreement and the acceptance of such repudiation. In order for a party to rely on repudiation, the innocent party must allege in the particulars of claim:

- Repudiation of a fundamental term of the contract – that is, conduct that exhibits objectively a party's deliberate and unequivocal intention not to be bound by the contract;
- An election by the innocent party to terminate; and Communication of the election.

All these issues raised here relates to evidence that is to be determined by the trial court.

I find that there is a cause of action disclosed in the particulars of claim and I was referred to the Supreme Court of Appeal decision of ***Pillay and Another v Shaik and Others*** that confirmed that a party can be held to a contract which was not signed in terms of the doctrine of “*quasi-mutual consent*”. It was specifically held that: -

... Where acceptance does not take place in accordance with a prescribed mode but the conduct of the offeree is such as to induce a reasonable belief on the party of the offeror that the offer has been duly accepted ...

may be held accountable in terms of the contract.

In ***Du Plessis NO and Another v Goldco Motor & Cycle Supplies (Pty) Ltd*** the Supreme Court of Appeal stated that:

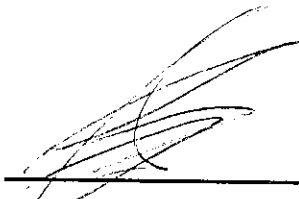
“[23] It is important to understand, however, that the drafting of a written contract to be signed by the trust and Goldco was not a condition in the true sense. A condition is an uncertain future event. On fulfilment, a contract may come into operation (in which case the condition is termed suspensive) or it may be terminated (a resolutive condition). In this case the exercise of the option was subject to one condition – the opening of the sectional title register. It was also dependent on the performance by the trust of an obligation: procuring a written contract, on the terms set out in the option itself,

drawn by Rossouws, to be signed by the parties. But this is not a true condition."

Because of these allegations contained in the particulars of claim, there is no basis for this ground of exception. All grounds of the exception brought by the Defendant / Excipient is based on *fact probantia* and not *facta probanda*.

I am in agreement with the submissions made by the plaintiff / respondent's counsel that it is not obliged, in terms of the Rules of Act 59 of 1959, to prove and/or plead *facta probantia* but only *fact probanda* which will enable the Excipient / Defendant to plead on the Particulars of Claim. This is not the trial Court and it is not necessary to place evidence before me.

A cause of action is disclosed in the particulars of claim that enables the defendant / excipient to plead. The exception is dismissed with costs and the Defendant / Excipient is ordered to pay the costs on the party-and-party scale.



E SWARTZ

ACTING JUDGE OF THE HIGH COURT