

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – EAST LONDON**

EL: 1217/12
ECD: 2917/12
Date Heard: 18/09/14
Date Delivered: 30/09/14

In the matter between:

**EAST LONDON SPRINKLER INSTALLATIONS
t/a FIRE SPRINKLER INSTALLATIONS**

PLAINTIFF

AND

RADON PROJECTS INSTALLATIONS (Pty) Ltd

DEFENDANT

JUDGMENT

SMITH J:

[1] This application concerns an exception to the plaintiff's amended particulars of claim. The plaintiff was granted leave to amend its particulars of claim by Dambuza J during May 2014. The defendant unsuccessfully opposed the proposed amendment on the ground that it introduced a new cause of action. The plaintiff has subsequently effected the amendment, and the defendant filed an exception on the grounds that the amended particulars of claim do not disclose a cause of action, alternatively that they are vague and embarrassing.

[2] The defendant's notice of exception is quantitatively comprehensive. It comprises some six typed pages and contains some 25 separate grounds. These grounds relate mainly to: the alleged failure by the plaintiff to stipulate whether or not certain amounts certified in payment certificates include Value Added Tax; its alleged failure to attach the relevant payment certificates, and perceived

discrepancies between the amounts claimed and those which have been certified by the principle agents as being due and payable. I do not intend to deal with each and every one of these grounds separately because they are interrelated and, in any event, are demonstrably factually incorrect and misleading. These averments appear to have been based on a perfunctory reading of the particulars of claim, and evince a lamentable failure on the part of the defendant to properly apply its mind in this regard. Mr *Woods*, who appeared for the defendant, (and who I may add has not drafted the exception) has, to his credit, not seriously pursued argument in respect of most of these grounds.

[3] He did, however, argue that the payment certificates did not specify the exact nature of the work in respect of which they had been issued. He submitted that since the plaintiff has failed to plead further facts in this regard, the particulars of claim are vague and embarrassing to this extent.

[4] It is trite law that an exception on the ground that a pleading is vague and embarrassing can only be taken when the cause of the complaint goes to the root of the case pleaded. In addition, such an exception will only be allowed if the exception will be seriously prejudiced if the offending allegations are not expunged.

[5] The plaintiff's cause of action is based on a written sub-contract agreement (in accordance with the Standard JBCC series 2000 contract) in terms whereof it was appointed by the defendant as sub-contractor for the supply and installation of fire-sprinklers.

[6] In terms of that agreement the defendant became liable to pay the plaintiff the amounts certified by the principal agent, by virtue of payment certificates, as being due and payable. The plaintiff's claim is founded on the averment that the defendant failed to pay the total amounts certified as due and payable by the principal agent in various payment certificates. In this regard it has set out in detail the particulars of the relevant payment certificates on which it relied and, in addition, annexed all the relevant payment certificates to the summons. The additional facts, which Mr *Woods* submitted should have been pleaded, are therefore not part of the *facta probanda*, and it was therefore not necessary for the plaintiff to plead them.

[7] Mr *Cole*, who appeared for the plaintiff, has correctly submitted that it is clear that the defendant failed to properly analyze the certificates or to add up the totals correctly. The averments in the exception are accordingly patently wrong, reckless and misleading. The fact that they were not raised when the plaintiff sought leave to amend before Dambuza J, compels one to conclude that the exception is *mala fide*, and merely intended to delay the plaintiffs' claim.

[8] Mr *Cole* has urged me to show my displeasure by ordering the defendant to pay the costs of the exception on the highest possible punitive scale, namely the attorney and own client tariff. As I have said earlier, the averments in the exception are not only wrong and without any bases in law, but they also regrettably appear to have been calculated to mislead, and were maliciously aimed solely at delaying the plaintiffs' claim. I am accordingly satisfied that the defendant's conduct is deserving of this Court's sternest censure.

[9] In the result I make the following order:

The defendant's exception is dismissed with costs on the attorney and own client scale.

J.E SMITH
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Plaintiff	:	Advocate Cole
Attorney for the Plaintiff	:	Klagsbrun Edelstein Bosman De Vries C/O Godongwana Ngonyama Pakade Att. 280 Oxford Street Southernwood EAST LONDON Tel: 043 722 3924 Ref: Mr L Godongwana/xm/EDE3/0006
Counsel for the Defendant	:	Advocate Woods
Attorney for the Defendant	:	Gray Burmeister Inc Tecoma House 21 Tecom Street Berea EAST LONDON Tel: 043 726 4411 Ref: ZABW/EZS32/0026
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