

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN**

**CASE NO: 3642/2017
DATE HEARD: 20/09/2018
DATE DELIVERED: 09/10/2018**

In matter between

**TNSC RURAL DEVELOPMENT
(PTY) LTD**

1st PLAINTIFF/RESPONDENT

NWABISA SELLEM

2nd PLAINTIFF/RESPONDENT

and

ROADMAC SURFACING CAPE (PTY) LTD DEFENDANT/EXCIPIENT

JUDGMENT

ROBERSON J:-

[1] The defendant in this matter excepted to the plaintiffs' particulars of claim on the grounds that the particulars of claim were vague and embarrassing or lacked averments to sustain an action. The claim appeared to be one for damages for breach of a sub-contract entered into between the first plaintiff and the defendant in terms of which the plaintiffs were to re-surface a portion of the R67 road for a price of R1 826 845.19. One of the terms of the sub-contract alleged in the particulars of claim was that the quoted quantities could decrease or increase by notice and by agreement between the parties. It was alleged that the defendant unilaterally varied the rates and quantities and as a result the plaintiffs suffered damages in the sum of R1 316 056.00, being the full outstanding balance of the contract price, and/or

aggregate damages arising and occasioned by the unilateral termination by the defendant. The aggregate damages were not quantified.

[2] In terms of Rule 23 (1) notice was first given to the plaintiffs allowing them an opportunity to remove the cause of complaint. The plaintiffs utilised this opportunity and delivered a reply, purporting to remove the close of complaint. The reply did not remove the cause of complaint. The defendant thereafter delivered its notice of exception, which contained six grounds of complaint. One of the grounds was that it was not the plaintiffs' pleaded case that the second plaintiff was a party to the contract and that the particulars of claim failed to disclose a cause of action in respect of the second plaintiff. Further grounds included: that the plaintiffs had not quantified the aggregate damages; that it was unclear on what basis in law and in fact the plaintiffs claimed payment of the balance of the contract price as well as the aggregate amount of damages; and that it was impossible to discern whether the plaintiffs' claim was based on a unilateral variation of the rates and quantities or a unilateral termination.

[3] The matter was enrolled for hearing on 2 August 2018, on the opposed motion court roll. According to the notice of set down for that date, the date was agreed between the parties. On 2 August 2018 the matter was by agreement postponed to 20 September 2018, also on the opposed motion court roll, with the plaintiffs to pay the wasted costs occasioned by the postponement.

[4] On 20 July 2018 the defendant delivered a notice of intention to amend its notice of exception by the addition of the prayers that the exception be upheld and the plaintiff's plea be struck out (this is an error, it should be plaintiff's particulars of claim), that the plaintiff be afforded ten days to amend its plea (same error) and that the plaintiffs should pay the costs of the exception. A further amendment was the

addition of the signature of the defendant's attorney as an attorney with right of appearance in terms of s 4 (2) of the Right of Appearance in Courts Act 62 of 1995. There was no objection to these amendments and the amended page was delivered on 8 August 2018.

[5] On 10 September 2018 the plaintiffs delivered a notice of intention to amend their particulars of claim. One of the amendments was the removal of the second plaintiff as a plaintiff, and the joinder of the South African National Roads Agency as the second defendant. There were other extensive amendments to the particulars of claim. These amendments largely removed the causes of complaint and this was acknowledged by Ms van der Merwe who appeared for the defendant. The defendant therefore did not seek that the particulars of claim be struck out and moved only for the costs of the exception.

[6] The plaintiffs' stance was that after the notice of amendment of the particulars of claim was delivered, the defendant ought to have withdrawn the exception and tendered the costs, in terms of Uniform Rule 41. The argument was to the effect that the amendment to the exception affected the entire exception and, as I understood the argument, the plaintiffs were given a further opportunity to remove the cause of complaint. Having done so, so the argument went, the defendant should have withdrawn the exception as it was now academic. The cause of complaint had been removed. The plaintiffs therefore sought an order (according to the plaintiffs' heads of argument) that the exception be struck out with costs on the attorney and client scale.

[7] I do not agree that the amendment of the exception affected the substance of the notice of exception to the extent that the plaintiffs were allowed a further opportunity to remove the cause of complaint, as contemplated by Rule 23 (1). The

amendment of the exception merely introduced prayers which should have initially been included in the notice of exception, and a technical amendment concerning the attorney's signature. The grounds of the exception remained unchanged and although the notice of intention to amend the particulars of claim did to a large extent remove the cause of complaint, it was not a reply to the defendant's initial notice to remove the cause of complaint, as provided for in Rule 23 (1). It was not, as was submitted by Ms van der Merwe, a consequential amendment following on the Rule 23 (1) notice, but a substantive new or fresh amendment, delivered outside the 15 days allowed for a reply in Rule 23 (1). In these circumstances, the defendant was not obliged to withdraw the exception and tender costs. The costs of the exception were still a live issue.

[8] In my view, the matter was properly on the roll, if only for the issue of costs, and the defendant was entitled to the costs of the exception.

[9] I need to deal with a further submission on behalf of the plaintiffs, to the effect that the matter was not properly on the opposed roll and that the plaintiffs had never delivered a notice of intention to oppose the exception. This submission is negated by the fact that on two occasions the matter was placed on the opposed roll by agreement.

[10] The following order will issue:

The plaintiffs are to pay the costs of the defendant's exception.

J M ROBERSON
JUDGE OF THE HIGH COURT

Appearances:

For Plaintiffs/Respondents: Adv T Sellem, instructed by B Macingwane Attorneys, c/o Yokwana Attorneys, Grahamstown

For Defendant/Excipient: Adv C van der Merwe, instructed by Peyper Attorneys, Bloemfontein, c/o Wheeldon Rushmere & Cole Inc., Grahamstown