REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

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

01 July 2013 .....

Date Signature

Case no: 2013/2686

In the matter between:

BLAKES MPHANGA INCORPORATED Applicant/Defendant

and

EAGLE CANYON GOLF ESTATE HOMEOWNERS ASSOCIATION Respondent/Plaintiff

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JUDGMENT

WEINER J:

[1] The Plaintiff/respondent is a homeowners association. (For purposes of convenience the parties will be referred to as the plaintiff and defendant). Plaintiff's claim is a delictual one for damages. It alleges that the Plaintiff has been deprived of the right to recover a penalty from one of its members/homeowners, the Bellomo Trust ("the trust"), which it would have been entitled to impose in terms of its articles of association. Plaintiff alleges that as a result of the defendant unlawfully altering the condition B.(d) in the title deed, it breached its duty of care to the plaintiff and the latter has suffered damages. The condition, so altered, has deprived the plaintiff of the right to impose the penalty against the Trust.

[2] The present matter concerns three interlocutory applications brought by the defendant. They relate to:

2.1 an application in terms of Rule 30 that the Plaintiff's summons and particulars of claim be set aside as an irregular proceeding.

2.2 an application in terms of Rule 30A compelling the Plaintiff to comply with its notice in terms of rule 7 to prove that it has

authorised its attorney of record to act on its behalf; (only costs remain in issue)

2.3 an application for security for costs;

I THE APPLICATION IN TERMS OF RULE 30

[3] The Defendant contends that the Plaintiff "relies upon a contract" by pleading that its members are subject to its Memorandum and Articles of Association ("the Memorandum"). The Defendant's objection is that the Plaintiff has not complied with Rule 18(6) in that it has not pleaded:

3.1 whether such contracts are oral or in writing (if written, the rules, regulations and resolutions relied upon by the plaintiff should, according to the defendant, have been annexed to the particulars of claim);

3.2 where and upon which the date they were concluded or adopted and;

3.3 who acted on behalf of the plaintiff in concluding or adopting the memorandum and articles of association;

[4] The same objections are raised in regard to the builder's code of conduct ("the builder's code") and resolutions passed at the Plaintiff's various Annual General Meetings.

[5] Rule 18(6) provides as follows:

> *"A party who in his pleading* ***relies upon a contract*** *shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading."* [emphasis added]

[6] In order to determine whether the Plaintiff has fallen foul of the provisions of Rule 18(6), it is necessary to determine whether the Memorandum, the builder's code and the resolutions passed at AGMs are indeed "a *contract relied upon*" by the Plaintiff as contemplated in Rule 18(6). The plaintiff has attached copies of the Memorandum and the builder's code to its particulars of claim.

[7] The defendant alleges that the plaintiff, in pleading its cause of action, refers to its Memorandum and annexes what appears to be an incomplete and unsigned copy of same and one which is not in accordance with other versions available on the plaintiff's website.

[8] Furthermore, it fails to plead any of the particulars required in terms of Rule 18(6). It submits that the articles constitute a contract[1] and that the plaintiff relies upon such contract. It contends that the obligations of the trust to pay the fine arises from the articles and form the foundation of the Plaintiff's claim.

[9] Plaintiff submits that the purpose of Rule 18(6) is that where the contract forms the foundation of the cause of action, full details of the contract "relied on" must be pleaded so that the defendant can take proper instructions and consult with the persons who represented the parties in order to properly plead to the contract.

[10] Plaintiff submits that upon a proper interpretation of Rule 18(6), the contract relied upon must be relied upon as an essential element of the cause of action, such as for example, a claim based on breach of contract. In such a case, the contract is a central issue and it is necessary that the details of the persons, time and place be pleaded to enable the defendant to properly plead to the contract alleged.

[11] In *Moosa and Others NNO v Hassam and Others NNO* [2] it was held that:

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[1] Villiers v Jacobsdal Salt Works (Michaelis & de Villiers) (Pty) Ltd 1959 (3) SA 873 at 876-7;

[2] 2010 (2) SA 410 (KZP) para 17

> *"Rule 18(6) speaks of a party who in his pleading 'relies' on a contract or 'part' thereof. A party clearly 'relies upon a contract' when he uses it as a 'link in the chain of his cause of action."*

and in *South African Railways and Harbours v Deal Enterprises (Pty) Limited*[3]

> "*A link in the chain of the cause of action*" refers to the situation *"where the contract forms a part of the cause of action put forward by him, irrespective of whether the contract can aptly be described as the "basis" of the claim or not."*[4]

[12] The facts forming part of the cause of action are often referred to as "*facta probanda*" of the claim. Plaintiff submits that a distinction must be drawn between the facts needed to prove the cause of action i.e. the "*facta probantia*" and the facts forming part of the cause of action i.e. the "*facta probanda*".

[13] The plaintiff submits that the references to the Memorandum, the builder's code and the resolutions are facts needed to prove the cause of action i.e. the *facta probantia* and are not contracts which "form part of the cause of action".

[14] The plaintiff, in fact, relies upon the amendment to the title deed (and in particular Clause B(d) thereof) as part of its claim. Such title deed has been annexed to the Particulars of claim and it does not appear to be this document that the defendant has objected to.

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[3] 1975 (3) SA 944 (W)
[4] *Ibid* at 953A-B

[15] In *Jowell v Bramwell-Jones and Others*[5] , the following was stated:

> *"A distinction must be drawn between the facta probanda, or primary factual allegations which every plaintiff must make, and the facta probantia, which are the secondary allegations upon which the plaintiff will rely in support of his primary factual allegations."*[6]

[16] In the present matter, the cause of action is delictual and is based on the *actio legis Aquiliae*, which enables a plaintiff to recover patrimonial loss suffered through a wrongful and negligent (or intentional) act of the defendant.

[17] The essential elements of a delictual claim are; an act or omission, which is wrongful and negligent or intentional and which causes damages.

[18] The Plaintiff's claim is that, but for the Defendant's conduct in unlawfully altering the condition B.(d) in the title deed, it would have been able to claim penalty levies from the trust. Since it can no longer do so, it has suffered damages and such damages are caused by the Defendant's conduct.

[19] In order to prove those elements (i.e. the *facta probanda*) of the claim, the Plaintiff will have to prove that, but for the conduct of the Defendant

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[5] 1998 (1) SA 836 (W)
[6] *Ibid* at 903A-B

in changing the title deed, it would have been entitled to claim such penalty levies from the owner.

[20] In order to allege that the wrongful act has caused them damages, the plaintiff needs to refer to the memorandum, the builder's code, the title deed and the resolutions as background facts to show that it had a claim against the owner, but for the defendant's act.

[21] The present case differs from a situation where the details of the contract (as required by Rule 18(6)) are necessary in order for defendant to be able to plead. Such situation arose in *African Bank Ltd v Sterkstroom Transitional Council*[7]. *In casu,* the plaintiff has set out the necessary details of the contracts relied upon and has attached the documents necessary. The details relating to the date, place, time and persons involved are, in my view, not part of the *facta probanda* and do not fall within the purview of Rule 18(6).

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[7] [2006] JOL 18208 E The case concerned a delictual claim by a Local Authority against an engineer. The Local authority had concluded an oral agreement with the contractor to pay the latter's suppliers upon receipt of certificates from the engineer. In pleading the terms of the written agreement, the Local Authority pleaded a term which was contradicted by the terms of the written agreement. It also failed to set out the terms of the oral agreement, contending it was irrelevant. Froneman J found that that although the plaintiff had sued in delict, it had failed to set out the oral terms of the agreement between it and the contractor which may have had a bearing on how the contractor would be paid by the plaintiff for work done on the building project. There were contradictory allegations in the pleadings and the second defendant could not know which of the contradictory allegations it would have had to meet at the trial. Certain other factual links were needed to bring the plaintiff in as a non-contractual beneficiary of the obligation which the second defendant owed to the first defendant

[22] In regard to the resolutions, it was held as follows in *Nxumalo v First Link Insurance Brokers (Pty) Ltd*[8] by Moseneke J:

> *... the defendant has several procedural remedies. The first such remedy is that whilst the defendant may not rely on the provisions of Rule 18(6) because such documents are not characterised as a contract, the defendant could indeed rely on the provisions of Rule 35(12) and Rule 35(14) both of which entitle a litigant to call for such documents as may be referred to in a pleading, before pleading.*[9]

[23] The plaintiff submits further that, even if the Memorandum is a contract relied upon and subject to the provisions of Rule 18(6), proof of prejudice is a prerequisite to success in an application in terms of Rule 30. The defendant chose to pursue the application in terms of that Rule.

[24] It was held in *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a LH Marthinusen*[10] that if the irregularity amounted to non-compliance with Rule 18, the prejudice was *prima facie* established. Plaintiff submits that the corollary of this is that such prejudice can be rebutted:

> *"In my view, if a pleading does not comply with the subrules of Rule 18 requiring specified particulars to be set out, prejudice has, prima facie, been established. Cases may well arise where a party would not be prejudiced by the failure to comply with these*

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[8] 2003 (2) SA 620 (T)
[9] *Ibid* para 9.
[10] 1992 (4) SA 466 (W)

> *subrules, or where a pleader would be excused from providing the prescribed particularity because he is unable to do so. But in such cases the onus would in my view be on him to establish the facts excusing his non-compliance. The law reports abound with cases which lay down this principle in respect of other Rules of Court, and the same principle applies in my view in relation to non-compliance with Rule 18."*[11]

[25] In the present matter, it is submitted that the Plaintiff has established that, having regard to the fact that the memorandum, builder's code and resolutions are not part of the *facta probanda* but only secondary facts i.e. *facta probantia*, the Defendant is not prejudiced. It can, if necessary, obtain the relevant documentation prior to pleading and in a request for further particulars prior to trial. In such an instance, the Defendant will be well informed of the evidence which the Plaintiff intends to establish to prove the secondary facts whereas the primary material facts of its cause of action have been properly and adequately pleaded.

[26] In regard to prejudice and based upon the principles referred to above, non compliance with Rule 18(6), if applicable, can be condoned. In Dass and Others NNO v Lowewest Trading (Pty) Ltd[12] it was held:

> *"This court is empowered to condone the non-compliance with rule 18(6). The defendant could have relied on the provisions of rule 35(12) and rule 35(14), both of which entitle a litigant to call for such documents, as may be referred to in a pleading, before*

[11] *Ibid* at 470H-I.
[12] 2011 (1) SA 48 (KZD)

> *pleading (see Nxumalo v First Link Insurance Brokers (Pty) Ltd 2003 (2) SA 620 (T) para 9). The defendant has not shown that it has suffered any prejudice by the non-compliance. Plaintiffs' non-compliance with rule 18(6) is therefore condoned."*[13]

[27] The Defendant, in this matter, has not suggested what prejudice there would be to pleading to the particulars of claim as they stand, even if it was entitled to compliance with the provisions of Rule 18(6).

[28] Accordingly, even if I am wrong in my interpretation of Rule 18(6) and its applicability to the contracts in question, in the absence of prejudice to the Defendant, the application in terms of Rule 30 should be dismissed with costs.

II THE RULE 30A APPLICATION

[29] Rule 30A provides as follows:

> *"(1) Where a party fails to comply with these Rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.*

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[13] *Ibid* para 16

(2) Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet."

[30] The Defendant's application in terms of Rule 30A was based on the Plaintiff's alleged non-compliance with the provisions of Rule 7(1) regarding the power of attorney.

[31] After service of the summons, the Defendant delivered a notice in terms of rule 7(1) disputing and challenging the authority of Eugene Marais Attorneys to act on behalf of the Plaintiff.

[32] In response to the Defendant's rule 7(1) notice, the Plaintiff filed a resolution and power of attorney by the Plaintiff mandating Eugene Marais Attorneys (now Marais Stephens Attorneys) to act on its behalf. It also attached a resolution of the Board of Directors of the Plaintiff (which is a section 21 company) to institute action against the Defendant, which was signed by the Chairman of the Board of Directors.

[33] The Defendant was not satisfied with such response and delivered a notice in terms of Rule 30A indicating that it intended to apply for the striking out of the summons and particulars of claim on the basis that the resolution:

33.1 was not dated;

33.2 did not show who, when or where such resolution was adopted and that;

33.3 it was unclear who the signatory designated as "Chairman" was.

[34] The Defendant alleged that the resolution was, therefore, improperly executed and irregular.

[35] The plaintiff submitted that the resolution indicated, in express terms, that the Chairman of the Board of Directors confirmed that the Board of Directors of the Plaintiff had mandated Eugene Marais attorneys to institute action against the Defendant and was therefore sufficient evidence that the attorneys had a power of attorney[14].

[36] The Plaintiff was therefore compelled to deliver an answering affidavit in which it confirmed that the resolution and mandate were indeed proper and correct, and resolved by round robin, and, in addition, it ratified and confirmed such in a subsequent meeting of the board of directors.

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[14] Gainsford and Others NNO v Hiab Ab 2000 (3) SA 635 (W) 639J-641A

[37] Plaintiff submitted that the Defendant should not have applied in terms of Rule 30A since the reply to the notice in terms of Rule 7(1), attaching what appeared to be a valid resolution and power of attorney, should have been accepted without raising spurious technical objections. The application was therefore an abuse of the court process.

[38] The Defendant filed a replying affidavit. It indicated that it accepted the power of attorney and did not intend to proceed with the relief sought in Rule 30A, but that the alleged flaws and defects in the power of attorney had only been rectified in the answering affidavit and, therefore, it did not tender any costs of the application and suggested that such be reserved and argued in due course.

[39] The defendant's conduct in this regard seems to me to be unwarranted. Plaintiff contends, and I agree, that Defendant could not have seriously believed that the attorneys were not properly authorised by the Plaintiff[15].

[40] Accordingly, the defendant should pay the costs of this application incurred after the plaintiff responded to the Defendant's rule 7(1) notice. Each party should pay their own costs in relation to the remaining costs attaching to this application

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[15] Unlawful Occupiers, School Site v City of Johannesburg 2005 (4) SA 199 (SCA) 206F-H

III THE SECURITY FOR COSTS APPLICATION

[41] The Defendant seeks security for its costs, although it acts on its own behalf and would not incur any costs. It could, however, incur costs for disbursements.

[42] However, even if the Defendant is entitled to recover its disbursements, such as costs of counsel, since the repeal of section 13 of the Companies Act 1973, the position now prevailing is determined in accordance with the common law.

[43] This issue has recently been dealt with in *Haitas and Others v Port Wild Props 12 (Pty) Ltd*[16] by Tsoka J:

> *"[4] The omission in the Companies Act of a similar provision such as s 13 of the previous Act is for the common law to prevail, that is to say, an impecunious or even an insolvent company or other corporate entity which is an incola of South Africa cannot be required to give security for costs for proceedings instituted by it. That being the case the mere fact that an incola plaintiff is insolvent, as is the case in the present matter, does not justify that such a plaintiff should be ordered to furnish security for costs..."*
>
> *[15] In my view the interests of justice, in circumstances such as in the present case, demand of the incola insolvent plaintiff to furnish security for costs in terms of rule 47."*[17]

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[16] 2011 (5) SA 562 (GSJ)
[17] Followed in *Hennie Lambrechts Architects v Bombenero Investments (Pty) Ltd* 2013 (2) SA

[44] This decision was criticised and rejected by Fabricius J in *Siemens Telecommunications (Pty) Ltd v Datagenics (Pty) Ltd*[18]:

> *"I am also of the view in that context that the common law prevails as regards incola companies. In the magistrates' courts therefore, in civil proceedings an incola company cannot be compelled to give security for costs. The void left by the omission of s 13 in the new Companies Act of 2008, according to the aforementioned authors, ought to be addressed by way of legislative invention…*
>
> *…Under the common law, as I have said, an incola plaintiff company has an unimpaired substantive right to pursue legal proceedings…*
>
> *…In common law an incola company could not be compelled to give security for costs, and no exception to this rule existed. Thus, even if a company embarked upon vexatious and/or speculative action, it could not be ordered to provide security for costs."*[19]

[45] The difference in the two decisions revolves around whether there is an exception to the common law rule that a company is not obliged to provide security for costs. The *Haitas* decision says that an exception exists when the litigation is vexatious and speculative and, therefore, an abuse, whereas the *Datagenics* decision states that there is no exception and a company is, in terms of the common law, under no circumstances obliged to provide security.

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477 (FB)
[18] 2013 (1) SA 65 (GNP)
[19] *Ibid* para 9.

[46] In the *Haitas* matter, it was common cause that; the company had been liquidated; was insolvent and impecunious; could not pay any adverse costs order and, as a result; it was held that the action was vexatious and without prospects. That is not the case in this matter. The Defendant states that the Plaintiff's annual financial statements reveal that, in that year, it ran at a loss. The Plaintiff explains this by stating that the loss was due to under-budgeting when imposing the annual levies and that this would be rectified in the budget for the next year. Furthermore, the Plaintiff is entitled in terms of its memorandum to impose levies to recover any litigation costs. Plaintiff also dealt with its assets and liabilities showing that it is not insolvent.

[47] In the circumstances, and whether one applies *Haitas* or *Datagenics*, on the facts in this matter, the Plaintiff cannot be compelled to give security for costs.

As a result the following order is made:

1. The Rule 30 application is dismissed with costs.

2. The Rule 30 A application is dismissed. The defendant is to pay the costs of this application incurred after the plaintiff responded to the Defendant's rule 7(1) notice. Each party should pay their own costs in relation to the remaining costs attaching to this application

3. The application for security for costs is dismissed with costs.

WEINER J

Date of hearing: 2 May 2013

Date of judgment: 01 July 2013

Counsel for Respondent/Plaintiff: Adv G. Kairinos

Attorneys for Respondent/Plaintiff: Marais Stephens Attorneys

Counsel for Applicant/Defendant: Adv. D. Fisher SC

Attorneys for Applicant/Defendant: Blakes Mphanga Inc.