



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case No: 24803/2015

In the matter between:

GAVIN CECIL GAINSFORD N.O. First Plaintiff

TSHEPO HARRY NONYANE N.O. Second Plaintiff

EBRAHIM ASVAT N.O. Third Plaintiff

STAINLESS FABRICATORS (PTY) LIMITED (in liquidation) Fourth Plaintiff

and

SASOL CHEMICAL INDUSTRIES (PTY) LIMITED Defendant/Excipient

Case Summary: Practice – Pleadings – Exception – On grounds that the particulars of claim lack averments necessary to sustain a cause of action and are vague and embarrassing – Excipiable on both grounds.

JUDGMENT

MEYER, J

[1] The defendant/excipient, Sasol Chemical Industries (Pty) Limited (SASOL), raises an exception to the summons of the three joint liquidators, Messrs GC

Gainsford, TH Nonyane and E Asvat NNO (the liquidators), of the fourth plaintiff, Stainless Fabricators (Pty) Limited (in liquidation) (Stainless Fabricators), asserting that the particulars of claim lack averments necessary to sustain a cause of action and are vague and embarrassing.

[2] To succeed with its exception that the pleading lacks averments necessary to sustain a cause of action, SASOL must show that the liquidators' 'claim is (not may be) bad in law' (*Trustees, Bus Industry Restructuring Fund v Break Through Investments CC & others* 2008 (1) SA 67 (SCA) para 11) and with its exception that it is vague and embarrassing, 'both vagueness amounting to embarrassment and embarrassment amounting to prejudice' (*Venter v Barrat; Venter v Wolfsburg Arch Investments (2) (Pty) Ltd* 2008 (4) SA 639 (C), para 17). By the nature of exception proceedings, the correctness of the facts averred in the particulars of claim must be assumed (see for example *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) paras 3-10; *Stewart & another v Botha & another* 2008 (6) SA 310 (SCA) para 4).

[3] The liquidators claim 'damages' in the amount of R18 361 477.32, interest and costs from SASOL, arising from a contract of *locatio conductio operis* concluded between Steel Fabricators and SASOL in terms of which contract Steel Fabricators manufactured and supplied components to SASOL that were used in the construction of the expansion of its hard wax production facility in Sasolburg, which facility converts natural gas into waxes. The expansion project is part of a R14 billion project known as the 'SASOL Expansion Program'.

[4] According to para 6.7 of the particulars of claim '[t]he contractual relationship between the parties was governed by the terms and conditions in the purchase

orders, a master agreement and agreement reached in respect of specified issues at the kick-off meeting' (the contract). The 'kick-off' meeting was held on 7 July 2010 and its purpose 'was to ensure the complete understanding of the technical requirements, documentation approval and approval cycles, testing and verification requirements, etc.' SASOL placed 'purchase orders' with Stainless Fabricators during the period June to July 2010. The purchase orders were subject to the terms and conditions of SASOL's 'master agreement'. They 'provided for the quality of the goods, exceptions, confirmation and additions to the master agreement'. The descriptions provided in the purchase orders 'relate in general to the design, supply of materials and the scope of supply of the respective orders.' 'The pricing of the purchase orders was based on the designs, materials and services relating to the goods as they appeared in the orders.' It is also averred that '[t]he purchase price reflected in the purchase orders was based on a basic design; in the event that design changes, modifications and amendments took place in the manufacturing and selling process it would have an effect on the pricing of the goods and Stainless Fabricators' additional costs and loss.' It is averred that '[d]esign changes, modifications and a change in the scope of work would result in "standing time" in Stainless Fabricators' manufacturing process causing it loss and damages.'

[5] It is also necessary to refer to certain of the presently relevant provisions of the master agreement. 'PURCHASE ORDER' is in terms of clause 1.4 thereof defined as-

'the agreement entered into by and between PURCHASER and SELLER for the execution of the work as described in the PURCHASE ORDER, as well as all documents to which reference may properly be made in the PURCHASE ORDER to ascertain the rights and obligations of the PARTIES under the said agreement.'

And clause 44.1 further provides that-

'[t]he PURCHASE ORDER sets forth the entire agreement between the PARTIES and supersedes all previous communications, agreements and commitments, whether written or oral, pertaining to the work in the PURCHASE ORDER. The provisions of the PURCHASE ORDER may only be changed in writing, executed by both PARTIES, and all notices in terms of the PURCHASE ORDER shall be in writing, except where expressly provided otherwise in writing.'

[6] Clause 7.4.1 provides as follows:

'7.4 Price Extras and Allowances

7.4.1 In the event of a price change due to revisions in the scope of supply by PURCHASER [SASOL], SELLER [STAINLESS FABRICATORS] shall submit to PURCHASER an itemised price breakdown for each change. PURCHASER reserves the right to refuse payment of such cost incurred without PURCHASER'S prior written approval.'

[7] Clause 19 provides as follows:

'19 CHANGE OF SCOPE OR PROVISIONS OF PURCHASE ORDER

19.1 No change to any of the provision of the PURCHASE ORDER shall be considered valid unless covered by a PURCHASE ORDER Amendment issued by PURCHASER. Invoices for amounts not stipulated in the PURCHASE ORDER or its Amendment shall not be paid by PURCHASER.

19.2 No change to any aspect of the scope of supply or the terms and conditions of PURCHASE ORDER shall be valid unless covered by a change to PURCHASE ORDER issued by the PURCHASER.'

[8] Clause 3.2 of the master agreement deals with concessions. It reads:

'3.2.1 SELLER declares himself fully conversant with the requirements of the PURCHASE ORDER and has full understanding thereof. It is agreed that PURCHASER will grant

no concessions in respect of any requirement which forms part of the PURCHASE ORDER or which has been communicated to the SELLER in writing.

3.2.2 Should circumstances arise during execution of the PURCHASE ORDER, which makes it necessary for SELLER to require a concession, the following shall apply:

- A written request in the prescribed PURCHASER format for a concession duly signed by SELLER must be addressed to PURCHASER'S Commercial Department.
- Reasons for the concession must be clearly outlined and any possible schedule impact.
- PURCHASER will evaluate at its sole discretion the request for a concession in PURCHASE ORDER to determine acceptability of such a request.
- Notification of the PURCHASER decision will be submitted to SELLER in writing, which decision will be final.

3.2.3 Should PURCHASER decide to grant a concession, SELLER will be required to compensate PURCHASER by an amount to be determined by PURCHASER, with a minimum of (R3 500.00 Currency conversion required for overseas PURCHASE ORDER's) per concession taking into consideration the following:-

- Time spent to evaluate concession.
- Time schedule impact.
- Costs to be saved by SELLER due to each concession.
- Costs incurred by PURCHASER due to the granting of the concession.'

[9] Clause 35 of the master agreement deals with consequential losses. Clause 35.1 reads as follows:

'neither of the PARTIES shall be responsible for or held liable for consequential damages, including without limitation, liability for loss of use of the work, loss of profits, loss of product or business interruption however the same be caused, including the fault or negligence of the party concerned.'

[10] And, finally, clause 28 of the master agreement deals with force majeure. Clause 28.1 provides that neither party 'shall be liable for failure to perform any obligation hereunder (except any obligation to pay monies) in the event and to the extent that such failure is caused by a condition of force majeure.' Clause 28.2 defines a condition of force majeure. Clause 8.3 sets out the procedure to be followed by a party claiming force majeure, failing which 'may cause denial of any relief for the force majeure event, at the affected PARTY's discretion'.

[11] SASOL's main objection to the particulars of claim is that, although the liquidators' claim is one for damages, it 'is not clear whether such damages arise from a breach of contract since no such breach is alleged or from some other cause of action which has not been identified.' The liquidators' claim has been categorised throughout the particulars of claim as one for damages, but no averment is made that SASOL committed a breach of contract nor is reliance placed on any particular provision of the contract that it had breached.

[12] Paragraph 40 of the particulars of claim reads as follows:

'40 Due to the facts and circumstances set out hereunder Stainless Fabricators suffered damages in the amount of R18 361 477.32-

40.1 the amendments, design changes, change of scope of purchase orders during fabrication;

40.2 the late approval and commencement timelines in placing the purchase orders;

40.3 the failure to timeously provide complete data packs which had to accompany the purchase orders were in most instances, not supplied in many cases were supplied weeks after placement of the relevant purchase orders;

40.4 data packs provided in the bidding and quoting process included E1 drawings, in contrast to data packs supplied with the purchase orders which included P1 drawings; the difference between the said drawings being substantial;

- 40.5 due to the effect of the foregoing in the fabrication process, resources had to be provided in the manufacturing process;
- 40.6 the adjustments to the designs and drawings caused an increase in the costs and time relating to the manufacturing and sale of the goods;
- 40.7 because of the on-going engineering changes, Foster Wheeler [an engineering contractor which acted for and on behalf of SASOL] failed to control the document system timeously, which caused a bottleneck in the document control system and due to the defect caused by the defendant's agent, the contractual turn-around times were generally not met by Foster Wheeler, which exacerbated the delays and bottlenecks in the manufacturing and sale process;
- 40.8 the scope changes also had a negative effect on the payment milestones. Reasonable payment milestones were based on the original scope of work and production time to complete the work;
- 40.9 as the scope of work increased, the time taken to achieve payment milestones also increased;
- 40.10 because of changes to the scope of work, the extras incurred were substantial;
- 40.11 due to the delay in the timespan of the manufacturing and sales process, the majority of work was undertaken at increased rates and higher material costs;
- 40.12 due to the national strike in the engineering sector in July 2011, the completion of the manufacturing and sales process was affected by some two weeks, which the defendant ignored; and
- 40.13 as a result of the amendment and changes of the contract work, Stainless Fabricators had to order a special mill run on the 316L high moly material from foreign mills.'

[13] The liquidators argue that, despite the use of breach terminology, SASOL has misinterpreted their claim. According to them, '[t]he "damages" claimed are not based on a breach of the contractual arrangements between the parties.' Their

claim, so they say, 'relates to Stainless Fabricators' contractual entitlement to claim for price extras and allowances, or a concession by the defendant [SASOL], which arose as a result of amendments made by the defendant to the purchase orders and variances made to the scope of the work' and 'SASOL's failure to pay for extra costs occasioned by it through amendments, design changes, change of scope of provisions of the purchase orders and late timing in placing orders.'

[14] If, as they argue, their claim is for specific performance by SASOL of its obligations, then they have dismally failed to allege the particular terms of the contract which were not performed by SASOL. The extra costs and allowances claimed by the liquidators that were occasioned through amendments, design changes, change of scope of the provisions of the purchase orders and late timing in placing orders are not alleged to be covered by purchase order amendments that were issued by SASOL in accordance with clause 19 of the master agreement or concessions that were sought and granted in terms of clause 3.2 or force majeure as envisaged in clause 35, and SASOL appears to be, in terms of clause 35, not liable for Stainless Fabricators' consequential damages. Furthermore, compliance with (or that compliance is legally excused on some or another basis) the contractual preconditions and requirements for concessions (clause 3.2), price extras and allowances (clause 7.4.1), change of scope or provisions of purchase orders (clause 19) and force majeure (clause 28) have not been pleaded. Also, non-performance by SASOL of any specific contractual obligation, which they seek SASOL to perform, has not been pleaded.

[15] Another objection to the particulars of claim with which SASOL persists relates to the averments made in para 41.4 of the particulars of claim, where it is stated:

'It was agreed when the amendments were placed and delays caused by the defendant that Stainless Fabricators would be paid for performing the additional work and damages incurred thereby, alternatively it was implied that Stainless Fabricators would be paid a fair and reasonable remuneration caused by the changes to and delays in the work. The amount claimed herein is fair and reasonable.'

[16] The objection to the averments made in this paragraph seems to me to be sound. The liquidators did not even plead whether the agreements that were allegedly concluded when the amendments were placed and the delays occurred, are written or oral, who the parties to such agreements are, who represented them in the conclusion of the agreements and when each agreement was actually concluded. Furthermore, these alleged agreements (that Stainless Fabricators would be paid for performing the additional work and the damages incurred by it) are not pleaded in the alternative to the contract (the purchase orders, master agreement and decisions taken at the kick-off meeting), which, according to the averments made in para 6.7 of the particulars of claim, governed the contractual relationship between the parties. In para 42.2 it is also averred that, on a proper interpretation of the contract, or as a tacit or implied term thereof, the parties agreed and acknowledged that the additional costs were due and payable to Stainless Fabricators. Averments in pleadings which are contradictory and not pleaded in the alternative are patently vague and embarrassing. (See: *Trope v South African Reserve Bank and another and two other cases* 1992 (3) SA 208 (T), at 211D-F.)

[17] Finally, the liquidators also argue that 'Stainless Fabricators executed the purchase orders and incurred extra costs as provided in the respective agreements. The manufacturing process has been concluded and during this process Sasol stood

by and monitored the expenditure being incurred. They obtained the benefit of these expenditures caused by the late placing of orders, amendments, and changes and refuse to make payment therefor.’ That SASOL stood by, monitored the expenditure being incurred and obtained the benefit thereof, are counsel’s contentions and not factual averments made in the particulars of claim.

[18] The liquidators found authority for these contentions in *Bank v Grusd* 1939 TPD 286 at 288. There a building contract provided that no extra work was to be done unless upon the written order of the owner and that no claim for extra payment should be entertained unless supported by the written authority of the owner. Maritz J held thus:

‘it seems to me, therefore that if the defendant [builder] proves that the plaintiff [owner] agreed that the extra work should be done or, knowing that the defendant regarded the work to be done as falling outside the contract, stood by and allowed him to do this work, well knowing that she was going to get the benefit, she ought not to be heard when she says “I refuse to pay because I had given no written authority to the defendant to supply the extras.”’

[19] There can be no doubt, as is stated in RH Christie *The Law of Contract in South Africa* 3rd Ed at 496-7, ‘that a party whose conduct is “fraudulent or unconscionable, or a manifestation of bad faith” will not be permitted to rely on a non-variation clause’ and that *Bank v Grusd* ‘is still good law’. (See *Grey v Waterfront Auctioneers (Pty) Ltd and Another* 1992 (2) SA 662 (WLD), at 668.) But the liquidators need to plead fraudulent or unconscionable conduct on the part of SASOL that legally prevents reliance on the applicable restriction clauses of the contract in each instance where price extras and allowances are claimed.

[20] I conclude, therefore, that the liquidators’ claim as presently formulated is bad in law and excipiable on the ground of vagueness and embarrassment.

[21] In the result the following order is made:

- (a) The exception is upheld with costs, such costs to include the costs of two counsel.
- (b) The plaintiffs' particulars of claim are set aside and the plaintiffs are given leave, if so advised, to file amended particulars of claim within 20 days of the date of this order.

P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing: 23 May 2016

Date of judgment: 5 August 2016
Counsel for plaintiff: LGF Putter SC
Instructed by: Werksmans Attorneys, Sandton, Johannesburg
Counsel for respondent: P Ellis SC (assisted by M Lekoane)
Instructed by: Mathopo Moshimane Mulangaphuma Inc, t/a Dm5
Incorporated, Illovo, Johannesburg