

REPUBLIC OF SOUTH AFRICA



GRIFFIER VAN DIE HOGGEREGSHOF VAN SUID AFRIKA
35 GAUTENG AFDELING · JOHANNESBURG



2020 -06- 11



REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION - JOHANNESBURG

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
11/6/2020	<i>Vally</i>
DATE	SIGNATURE

Case No.: 139365/2015

In the matter between:

Josef Stanislan Smolka

First Defendant

Lines Smokla & Associates

Second Defendant/Excipient

and

The Body Corporate of Ondangwa

Plaintiff/Respondent

JUDGMENT

Vally J

[1] The plaintiff brought a claim in delict against the two defendants for damages of R2 500 000.00 it suffered as a result of the negligence of the first and/or the second defendant. It claims that the first and second defendants owed it a duty of care. Both defendants have yet to plead to the claim. However, the second defendant has taken ten exceptions to the particulars of claim (the particulars) on the grounds that various sections of it are vague and

pdfMachine

A pdf writer that produces quality PDF files with ease!

Produce quality PDF files in seconds and preserve the integrity of your original documents. Compatible across nearly all Windows platforms, simply open the document you want to convert, click "print", select the "Broadgun pdfMachine printer" and that's it! Get yours now!

embarrassing, and that viewed in its entirety the particulars fails to disclose a cause of action. The plaintiff maintains that the exception lacks merit.

[2] This being an exception to the particulars, it has to be adjudicated on the basis of the entire particulars as it stands¹; that each and every factual averment pleaded in the particulars is true²; and that upon every reasonable interpretation of the particulars no cause of action is disclosed.³ The particulars must contain every fact (*facta probanda*) that is necessary for the plaintiff to prove. It does not, and is not required to, contain every piece of evidence (*facta probantia*) needed to prove the fact.⁴ Should all the facts required to prove the claim be pleaded in the particulars, a cause of action would be disclosed.

[3] In paragraph 4A of its particulars the plaintiff pleads that the first defendant, acting within the course and scope of his employment with the second defendant, was a professional engineer for the building of new townhouses. In the alternative, the first defendant was an agent of the second defendant performing the duties of a professional engineer during the building of new townhouses.

[4] In paragraph 5 of the particulars the plaintiff pleads as follows:

¹ *Salzmann v Holmes* 1914 AD 152 at 156; *Minister of Safety and Security v Hamilton* 2001 (3) SA 50 (SCA) at 52G-H; *Baliso v Firststrand Ltd t/a Westbank* 2017 (1) SA 292 (CC) at [33]

² *Champion v J D Cilliers & Co Ltd* 1904 TS 788 AT 790-1; *Oceana Consolidated Co Ltd v The Government* 1907 TS 786 at 788; *Stols v Garlicke & Bousfield Inc* 2012 (4) SA 415 (KZP) at 421H

³ *Theunissen v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) at 500E-F; *Lewis v Oneanate (Pty) Ltd* 1992 (4) SA 811 (A) at 817F

⁴ *McKenzie v Farmers Co-operative Meat Industries Ltd* 1922 AD 16 at 23; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838E-F

- "5 Acting as aforesaid [as an agent for the second defendant or in the course and scope of his employment with the second defendant] the first defendant was the professional engineer for the proposed new building, i.e. new townhouses which included the walls adjoining and separating townhouse units and the boundary walls of the townhouse development on Stand 1428 Wilgeheuwel Extension 25 ("the building). As such the second defendant had to ensure that:
- 5.1 All structural work involved in the construction of the buildings had been designed by the defendant in accordance with the requirements of the National Building Regulations and Buildings Standards Act No. 103 of 1977 and documents referred to therein, including in particular provisions relating to loads, stresses and stability.
 - 5.2 All inspection(s) and supervision of and carrying out of the said structural work (i.e. erection of the buildings) was of such degree and at such intervals as is ordinary and reasonably necessary in accordance with sound professional engineering practice to ensure that the work was properly carried out and in accordance with the required professional practice statutory requirements and regulations pursuant to the profession of an engineer.
 - 5.3 Inform the Department of Housing and Urbanisation if at any time in the opinion of the defendants the work for which the second defendant was responsible, is not being carried out properly or not in accordance with the National Building Regulations and Building Standards Act 102 of 1977, or in such a manner as to endanger the strength and/or stability of any building or any structure on the site, whether forming part of the said work or otherwise, or any building or structure on adjoining land." (the quote is verbatim)

[5] The paragraph commences with an allegation that the first defendant was "*the professional engineer*" but then proceeds with an allegation that the second defendant, and only the second defendant, "*had to ensure*" that certain tasks were performed in the manner alleged in sub-paragraphs 5.1 – 5.3. There is no allegation as to how the first defendant came to be the "*professional engineer for the new building*." Then in sub-paragraph 5.1 the

plaintiff alleges that "(a) *ll the structural work involved in the construction of the buildings had been designed by the defendant*" without specifying which defendant it is referring to. There is also no allegation as to how the either the first or the second defendant came to "*design*" the structural work.

[6] Paragraphs 6 and 7 deal with the construction of buildings and walls on its property. No details are given of who undertook the construction and on what terms the construction was undertaken.

[7] Paragraph 8 alleges that:

- 8 In or during June 2013 the boundary wall between Units 7 and 8 collapsed, causing the Plaintiff to suffer damages, which collapse occurred as result of the negligence of the first defendant with the second defendant.

It is noteworthy that there is no reference to the first defendant acting as an agent of the second defendant.

[8] Paragraph 9 deals with the duty of care and the breach thereof:

- 9 On or about 11 June 2003 the first defendant acting as aforesaid [presumably this is as an employee, alternatively as an agent of the second defendant] inspected the construction of the buildings and in doing so the second defendant owed the plaintiff a duty of care In breach of the duty of care and/or alternatively its professional duties and/or further alternatively in failing to adhere to the level of skill and diligence, expected to be possessed and exercised at the time by members of the branch of the profession to which the first defendant belonged the plaintiff suffered damages as set out hereinbelow. (Quote is verbatim)

pdfMachine

A pdf writer that produces quality PDF files with ease!

Produce quality PDF files in seconds and preserve the integrity of your original documents. Compatible across nearly all Windows platforms, simply open the document you want to convert, click "print", select the "Broadgun pdfMachine printer" and that's it! Get yours now!

Pertinently, it is pleaded that only the second defendant owed the plaintiff a duty of care, which duty was breached by virtue of it failing to adhere to the "*level of skill and diligence*" applicable to a member of the first defendant's profession.

[9] Paragraph 10 combines the duty of care with negligence. It is important to note that the duty of care is attributed to both defendants here. The paragraph reads:

"10 The Defendants, owing the Plaintiff a duty of care, were negligent, *inter alia*, in the following ways:

- 10.1 By not ensuring that the construction of the boundary wall was in accordance with the National Building
- 10.2 Regulations and Building Standards Act No 103 of 1977 regarding pier size and centre to centre support distances; and
- 10.3 By not ensuring that adequate brick force was used in the construction of all boundary walls on the property;
- 10.4 Had the second defendant acting as aforesaid [it is not clear as how the second defendant was acting, as nothing is said before this paragraph about how the second acted, what is pleaded in 10.1 is how the second defendant did not act] complied with the undertakings and responsibilities implied and pleaded hereinabove [no undertakings are pleaded in the previous paragraphs], the boundary wall would not have collapsed nor, would the plaintiff had to incur costs of remedial work to the buildings as it did and as pleaded herein."

[10] Sub-paragraphs 10.1 and 10.2 were obviously meant to be one allegation. The pleader in my view, should have remedied this before signing the pleading and delivering (serving and filing) it. Sub paragraph 10.4 claims that if the second defendant acted "*as aforesaid*", then it would not have

incurred costs. Unfortunately, nothing is said in the previous paragraphs about how the second defendant conducted itself. Hence it is not clear as to what the complaint or the claim is. The sub-paragraph continues by stating that had the second defendant complied with its "*undertakings and responsibilities as implied and pleaded hereinabove*" the plaintiff would not have incurred costs. Again, no undertakings by the second defendant are pleaded in the preceding paragraph 10 and there is nothing in the preceding paragraphs that could allow for an interpretation that an undertaking is implied. Hence, it is not clear as to what the second defendant was supposed to have undertaken. The same would apply to the claim that the second respondent assumed any "*responsibilities*". There is no indication in any of the previous paragraphs as to what "*responsibilities*" it assumed.

[11] Paragraph 11 outlines the steps the plaintiff took to rebuild the boundary walls on the entire property, which steps were taken:

- "11 ... as a result of the second defendant's breach of its duty of care and negligence as pleaded herein by *inter alia*:
 - 11.1 Building up support piers to the existing boundary walls in accordance with the National Building Regulations and Building
 - 11.2 Standards Act 103 of 1977 to prevent any further accident that could occur in the event of a boundary wall collapsing."

[12] As with sub-paragraphs 10.1 and 10.2, sub-paragraphs 11.1 and 11.2 constitute a single sentence. The pleader's failure to remedy this obvious typographical error is unprofessional. This is really inexcusable. It demonstrates a basic failure to re-read the particulars before signing it.

pdfMachine

A pdf writer that produces quality PDF files with ease!

Produce quality PDF files in seconds and preserve the integrity of your original documents. Compatible across nearly all Windows platforms, simply open the document you want to convert, click "print", select the "Broadgun pdfMachine printer" and that's it! Get yours now!

[13] Paragraph 12 alleges that the plaintiff undertook repairs and remedial works and that the fair and reasonable costs of these works was R2 500 000.00. Therefore, the first and second defendants are jointly and severally liable in the sum of R2 500 000.00. No details as to how the sum of R2 500 000.00 is computed are provided by the plaintiff. As a result the pleading fails to comply with the provisions of Rule 18(10) of the Uniform Rules of Court. However, the second defendant elected to raise an exception to the entire pleadings rather than launch an application in terms of Rule 30 seeking a declaration that the failure to comply with the provisions of Rule 18(10) constitutes an irregular proceeding.

[14] One of the main exceptions taken by the second respondent is that the plaintiff failed to plead any wrongfulness on its part. In support of this complaint the second defendant contends that the claim brought against it is one for recovery of a pure economic loss on the part of the plaintiff. It contends that such a claim is legally untenable unless it is founded on a contention that the cause of a pure economic loss was wrongful. This is based on the fact that it is not generally regarded as unlawful for one person to cause another person to suffer pure economic loss.

[15] Our law accepts that it is not necessary to specifically plead that a defendant's conduct is unlawful if the unlawfulness can be inferred from the allegation that the defendant negligently caused the plaintiff's damage. Thus:

"The element of wrongfulness in the requirements for delictual liability is sometimes overlooked, because most delictual actions arise from

pdfMachine

A pdf writer that produces quality PDF files with ease!

Produce quality PDF files in seconds and preserve the integrity of your original documents. Compatible across nearly all Windows platforms, simply open the document you want to convert, click "print", select the "Broadgun pdfMachine printer" and that's it! Get yours now!

acts which are, *prima facie* clearly wrongful, such as causing of damage to property or injury to person.”⁵

[16] There must, nevertheless, be factual averments upon which the allegation of negligence is based. Here the plaintiff only says in 10.1 (see [9] above) that the second defendant did not ensure that the construction was in accordance with standards set out in the National Building Regulations and Building Standards Act No 103 of 1977. Nothing more is said of the second defendant’s negligence. But this allegation is insufficient in itself. It does not say what the second defendant was supposed to do. Simply referring in broad terms to the said Act without specifying what duties were imposed on the defendant does not assist the plaintiff. What is required for the plaintiff to allege is that the walls were supposed to be constructed in a specific manner (according to certain specification – which we could also be termed “the correct specification”), were actually constructed in another manner (according to different specifications – which we could term “the incorrect specifications”) and that they were constructed according to the incorrect specifications which constituted negligence on the part of the second defendant. And if the plaintiff has also pleaded sufficient facts to demonstrate that the second defendant owed it a duty of care, then reading the two elements together – negligence and duty of care –it may well have been possible to infer that the second defendant acted wrongfully. But unfortunately, no real facts are pleaded to establish the elements of negligence and duty of care. All that is pleaded is that the second defendant was negligent by failing to ensure that the construction was in accordance with the provisions of the said Act, and that it

⁵ *Lillicrap, Wassenaar and Partners v Pilkington Brothers* 1985 (1) SA 475 (A) at 497B

owed the plaintiff a duty of care because the first defendant inspected the construction. Both elements are not pleaded with sufficient facts, and more importantly, taken together they do not allow for an inference that the second defendant acted wrongfully.

[17] Accordingly, the particulars do not disclose a cause of action. I also find that the particulars are vague and embarrassing in many respects. These are detailed in [5], [6], [7], [8] and [10] above.

[18] Before closing, there are two general observations that need to be made.

[19] A careful consideration of the particulars show that there is no cause of action set out against the first defendant. In this regard it needs to be borne in mind that the duty of care pleaded in paragraph 9 (see [8] above) refers solely to the duty of care owed to it by the second defendant (and even that duty of care arises from the fact that the first defendant inspected the walls post their construction). There is simply no specific allegation that the first defendant owed the plaintiff a duty of care. It is not necessary to say anything more on this at the moment, since the first defendant has not elected to do anything about the claim brought against him. It is only pointed out here for the plaintiff to take note of when attending to the amendment it is required to make to its particulars.

[20] The particulars does not indicate what relationship, if any, existed between the plaintiff and the first defendant, or between the plaintiff and the second defendant. During oral submissions, its counsel was asked if he could shed any light on this. His response was that the first defendant was employed by the municipal authority to conduct an inspection on its behalf. This was done so that the municipal authority could issue the necessary certificate allowing the plaintiff to take occupation of the property. There is nothing in the particulars that would support such a submission. And, if the submission correctly reflected the factual situation then the particulars certainly discloses no cause of action against the second defendant.

[21] In conclusion, the particulars does not disclose a cause of action. In my view, the particulars is so sloppily drafted that it would be best for it to be set aside and the plaintiff be afforded an opportunity to deliver a new set of particulars.

Costs

[22] The second defendant sought its costs. There is no reason why it should not be granted its costs.

Order

[23] The following order is made.

- a. The exception is upheld.
- b. The particulars of claim is set aside.

pdfMachine

A pdf writer that produces quality PDF files with ease!

Produce quality PDF files in seconds and preserve the integrity of your original documents. Compatible across nearly all Windows platforms, simply open the document you want to convert, click "print", select the "Broadgun pdfMachine printer" and that's it! Get yours now!

- c. The plaintiff is granted leave to deliver a complete new set of particulars within 20 days of the date of this order.
- d. The plaintiff is to pay the costs of the exception.

Vally

Vally J

Dates of hearing:
 Date of judgment:
 For the plaintiff/respondent:
 Instructed by:
 For the second defendant/excipient:
 Instructed by:



pdfMachine

A pdf writer that produces quality PDF files with ease!

Produce quality PDF files in seconds and preserve the integrity of your original documents. Compatible across nearly all Windows platforms, simply open the document you want to convert, click "print", select the "Broadgun pdfMachine printer" and that's it! Get yours now!

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

CASE NO: 39365/2015

In the matter between:

THE BODY CORPORATE OF ONDANGWA

PLAINTIFF

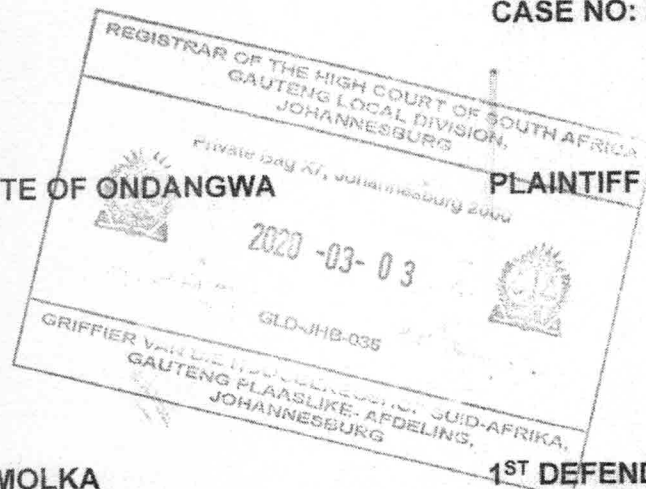
and

JOSEF STANISLAN SMOLKA

LINES SMOKLA & ASSOCIATES CC

1ST DEFENDANT

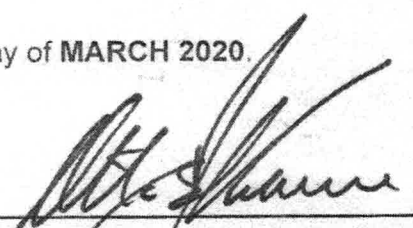
2ND DEFENDANT



INDEX TO THE PLAINTIFF/ RESPONDENT PRACTISE NOTE, HEADS OF
ARGUMENT, CHRONOLOGY AND LIST OF AUTHORITIES

ITEM	DESCRIPTION	PAGE
1.	Plaintiff's/Respondents Practise Note	1 - 2
2.	Plaintiff's/Respondent Heads of Argument	3 - 8
3.	Plaintiff's/Respondents Chronology	9 - 10
4.	Plaintiff's/Respondent List of Authorities	11
5.	Proof of Service	12 - 13

DATED at ROODEPOORT on this the 3 day of MARCH 2020.


OTTO KRAUSE INCORPORATED
ATTORNEYS FOR PLAINTIFF

UNIT C9, CLEARVIEW OFFICE PARK
77 WILHELMINA AVENUE

CNR CHRISTIAAN DE WET STREET
ALLENS NEK, ROODEPOORT
P.O. BOX 8276, WESTGATE, 1734
TEL: 011 675 2881 /FAX: 011 675 2899
DOCEX: 61 Johannesburg
REF: OTTO KRAUSE/MAT16895

TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT
JOHANNESBURG

AND TO: CLYDE & CO
2nd Defendants Attorneys
6th Floor, Katherine & West Building
114 West Street, Sandton, JHB
Tel: 010 286 0398
JOHANNESBURG
E-Mail: hiepner@clydeco.com
REF: W HIEPNER / 10021826

Clyde & Co
Registration Number 2014/107150/21
6th Floor Katherine & West building
114 West Street, Sandton
Johannesburg, 2196
Telephone: +27 10 286 0350
Facsimile: +27 10 286 0399

RECEIVED A COPY HEREOF
ON THIS THE 03 DAY OF MARCH 2020

 10:28
DEFENDANT'S ATTORNEYS