

**HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: No  
(2) OF INTEREST TO OTHER JUDGES: No  
(3) REVISED.

**13 April 2022**  
Date

Judge M.L. Senyatsi

Case no: 22278/2019

In the matter between:

**ABB SOUTH AFRICA (PTY) LTD**

**First Excipient**

**ESKOM HOLDINGS SOC LIMITED**

**Second Excipient**

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And

**LEAGO EPC (PTY) LTD**

**Respondent**

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**Case Summary: APPLICATION TO DETERMINE WHETHER THE PARTICULARS OF CLAIM IN THE MAIN ACTION INSTITUTED BY PLAINTIFF ARE EXCEPIABLE**

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**JUDGMENT**

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## **SENYATSI J**

### **A. INTRODUCTION**

[1] The first and second excipients are the first and second defendants in the main action. They have been sued by the respondent who is the plaintiff in the main action. For convenience sake the parties will be referred to as in the main action. This is an application to determine whether the particulars of claim in the main action instituted by Plaintiff are excepiable.

[2] Both First and Second Defendants have raised exception to the particulars of claim.

### **B. BACKGROUND**

[3] Plaintiff sued Defendants for declaratory order on the validity of a written contract concluded between First and Second Defendant as well as money judgment against First Defendant.

[4] In its particulars of claim as against First Defendant, Plaintiff avers that First Defendant submitted a bid to Eskom, Second Defendant and that the bid includes Plaintiff's contractual involvement.

[5] Plaintiff alleges that, Second Defendant accepted First Defendant's bid and states that it (Plaintiff) is not in possession of the bid documents.

[6] Plaintiff avers that pursuant to submitting the bid, Second and First Defendants concluded a written contract during 2015 in Johannesburg and restates some of the contractual terms. Plaintiff furthermore avers that it is the entity referred to between First and Second Defendants.

[7] Furthermore, so avers Plaintiff, pursuant the said written contract between First and Second Defendants, it concluded a written contract with First Defendant for the purchase site services.

[8] First Defendant placed certain orders with Plaintiff in accordance with the subcontract concluded between them. It ordered and was invoiced for services

amounting to R8 454 705.70. It was partly paid R4 028 440 by the First Defendant leaving a balance of R4 426 259.70 which is what is claimed in the particulars of claims.

[9] After First and Second Defendant gave notice to defend the claim they both gave separately Notice of Exception.

### **C. EXCEPTIONS**

#### **First Defendant's Exception**

##### **First Exception**

[10] (a) Plaintiff contends that this court has jurisdiction on the ground that the *"Defendants principal place of business is situated within the area of jurisdiction of this Honourable Court"* (paragraph 5).

(b) In pleading in this manner, so argues First Defendant, Plaintiff appears to allege that both First and Second Defendants have principal places of business within the area of jurisdiction of this Court.

(c) However the argument from First Defendant continues, Plaintiff has not pleaded First Defendant's principal place of business.

(d) In the light of the aforesaid, the basis of this Court's jurisdiction does not appear from the pleading.

##### **Second Exception**

[11] Plaintiff has not pleaded any basis upon which it is entitled to seek declaratory relief regarding a contract to which it is not a party that is, the contract between First and Second Defendants.

[12] Plaintiff has furthermore not pleaded any allegations to establish that;

(a) there is any dispute between Defendants regarding the validity of the contract which is said to subsist as between them or

(b) the basis on which that dispute is to be resolved, or



(c) the grounds on which the court is to exercise its jurisdiction for purposes of resolving that dispute or granting the declaratory relief sought by Plaintiff.

[13] Plaintiff, so continues the argument by First Defendant, not having pleaded a basis for seeking declaratory relief in respect of the contract between Defendants, has miss-joined Second Defendant to the proceedings.

[14] Plaintiff has not disclosed a valid cause of action for the declaratory relief sought by it in first instance.

### **Third Exception**

[15] Plaintiff has failed to attach the written agreement between Defendants relief upon in paragraph 10. The attachment of extracts of the alleged agreement is insufficient:

(a) First Defendant is unable to ascertain how the paginated extract which runs from page 1-7 relates to the pages which occur thereafter;

(b) The location and status of the extracts within the agreement is not particularized; and;

(c) The extracts rely on definitions and cross-references which are not apparent from the extracts themselves;

[16] Plaintiff, so continues the argument from First Defendant, has accordingly not complied with the requirements of the Uniform Rules of court and has not adduced sufficient particularity to enable First Defendant to understand the cause of action it is required to meet.

### **Fourth Exception**

[17] Plaintiff alleges in paragraph 18 that it complied with all its obligations in terms of the said contracts with First Defendant "and the attached documentation."

[18] The reference to "attached documentation" is not understood, the annexes to the particulars of claim including, as it does, documents which do not appear to impose obligations on the Plaintiff.

[19] First Defendant argues in its fourth exception that Plaintiff does not identify which of its obligations it complied with or what precise obligations it fulfilled which entitle it to payment from First Defendant.

[20] Plaintiff furthermore does not plead compliance with the payment terms set out in paragraph 16.4 of the particulars of claim.

[21] Plaintiff has not disclosed a valid cause of action for payment of the amount claimed by it.

#### **Fifth Exception**

[22] First Defendant furthermore submits that Plaintiff alleges in paragraph 19 that First Defendant failed and / or refused and / or neglected to make payment to Plaintiff and in paragraph 20 that First Defendant made payment to Plaintiff's employees for the benefit of the plaintiff.

[23] The two allegations set out in para [22] above are mutually inconsistent and are not understood and that in any event do not disclose a cause of action for the relief claimed.

#### **Sixth Exception**

[24] Plaintiff seeks an order declaring that the contract between itself and First Defendant is valid and binding.

[25] Save for disputing First Defendant's assertion that the contract is unenforceable, Plaintiff does not plead any allegation in support of the declaratory relief it seeks.

[26] Plaintiff fails to make out a case that the relevant contract is valid and binding, as contended for by it.

[27] First Defendant prays that its exceptions be upheld and that Plaintiff be afforded fifteen days from the date of the order within which to amend its particulars of claim and be struck out in the event of the Plaintiff failing to amend the particulars of claim within the time afforded and costs.

## **Second Defendant's Exceptions**

### **First Exception**

[28] Second Defendant contends that Plaintiff fails to adduce with sufficient particularity the basis that Second Defendant is a party to the proceedings:

- (a) Plaintiff cites Second Defendant as a party to the proceedings in paragraph 3 of the particulars of claim;
- (b) Plaintiff makes reference to the "Employers Requirements" in paragraph 4 of the particulars of claim;
- (c) Plaintiff makes further reference to "Annexure B" which is "Explanation of the Contractor's Local Content and Related Obligations" in paragraph 7 claiming that it was saved from Eskom.

[29] Plaintiff specifically fails to plead the legal and / or contractual relationship with respect to Second Defendant, if any. Second Defendant was not a contracting party to the subcontract.

[30] Plaintiff further fails to plead that the material facts upon which it has a right or is party to "Annexure C" (the contract between First and Second Defendant). Accordingly, paragraphs 27 and 28 of the Plaintiff's particulars of claim remain vague and embarrassing.

[31] In paragraph 9 of the particulars of claim the Plaintiff claims that First Defendant's bid which included Plaintiff's contractual involvement with First Defendant was accepted by Second Defendant. Plaintiff does so without pleading the basis for such averment.

[32] Second Defendant contends that Plaintiff has, accordingly, failed to plead its cause of action against Second Defendant.

### **Second Exception**

[33] Second Defendant contends that in paragraph 22 of the particulars of claim, Plaintiff pleads that the contract was cancelled by First Defendant but fails to plead Second Defendant's involvement in the termination of such contract. The contract



Annexures “D” and “E” was entered into between Plaintiff and First Defendant. The contract was cancelled by First Defendant and set out in Annexure “P” to the particulars of claim.

[34] Consequently, Second Defendant is unable to understand the basis of Plaintiff’s claim against it.

### **Third Exception**

[35] Plaintiff states in paragraph 19 of the particulars of claim that First Defendant failed to effect full payment in terms of the contract but fails to plead the role of second Defendant in the non –fulfillment of the alleged payment obligation.

[36] Plaintiff pleads in paragraph 23 of the particulars of claim that a request was made to mediate the dispute between the parties but fails to plead that Second Defendant was made aware of such request to mediate and / or Second Defendant’s attitude and / or involvement in this regards. Second Defendant contends that pleadings remain vague and embarrassing.

### **Fourth Exception**

[37] Plaintiff seeks declaratory relief against Second Defendant together with First Defendant for:

*”1 An order declaring the contract attached as Annexure “G” as read with paragraph 4.5 of “8” valid”.*

[38] Second Defendant contends that Plaintiff seeks declaratory relief without pleading the basis upon which it is entitled to do so.

[39] Second Defendant contends that it remains embarrassed as it is unable to understand the cause of action it is required to meet.

[40] Second Defendant prays that its exceptions be upheld with costs.

### **Plaintiff’s intentions**

[41] In opposing the exceptions, Plaintiff contends that it has pleaded sufficient averments to satisfy the requirements of section 21 of Superior Courts Act 10 of 2013 ("the Act") which empowers a court to give the declaratory relief sought by the respondent.

[42] Section 21 of the Act reads as follows:

**"21 Persons over whom and matters in relation to which divisions have jurisdiction.**

(1) *A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences liable within its area of jurisdiction and all other matters of which it may according to law take cognizance, and has the power*

(c) *in its discretion, and at the instance of any interested person to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."*

[43] Plaintiff contends that there is nothing vague and embarrassing about its particulars of claim as regards the exceptions raised.

[44] Plaintiff contends that it has an interest in both contracts between itself and First Defendant and between First Defendant and Second Defendant. It contends that if there is illegality within contract between itself and First Defendant, then that illegality originated from contract between First and Second Defendant. On that basis, so contends Plaintiff it is entitled to seek declaratory order on the validity of the contract between First and Second Defendants.

[45] Plaintiff contends that it was entitled to join Second Defendant as it only seeks the declaratory order in the validity of the contract between First and Second Defendant.

#### **Issues for determination**

[46] The issue for determination is whether the particulars of claim as amended are excipiable as being vague and embarrassing and on the grounds that the particulars fail to disclose a cause of action.



## Legal principles

[47] The principles governing the exceptions to particulars of claim are regulated at common law as well in terms of the Uniform Rules of Court.

[48] A party is embarrassed if the pleading lacks particularity which is strictly necessary to enable a defendant to plead such that the defendant does not know what case it will have to meet at trial.<sup>1</sup>

[49] A pleading is vague if it lacks particularity to the extent that it is either meaningless or capable of more than one meaning.<sup>2</sup>

[50] The defendant must show that it would be prejudiced if it were required to plead to the combined summons in its current form.<sup>3</sup>

[51] To succeed in a “no cause of action” exception the defendant must demonstrate that on every reasonable interpretation of the pleading and ensuring all the pleaded allegations to be true, no cause of action is made but upon which judgment could be granted.<sup>4</sup>

[52] It is also a fundamental principle that when considering whether an exception should be upheld the pleadings are considered as a whole and one does not read paragraphs in isolation.<sup>5</sup>

[53] In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority South Africa*<sup>6</sup> in dealing with the approach where pleadings have been excepted, the Supreme Court of Appeal held as follows:

*“[3] Exceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit. An over- technical approach destroys their utility. To borrow the imaginary employed by Miller J, the response to an exception should be like a sword that ‘cuts through the tissue of which exception is compounded and exposes its*

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<sup>1</sup> See *Jowell v Bramwell – Jones and others* 1998 (1) SA 836 (W) at 902 B-I

<sup>2</sup> See *Callender Zasby v Grahamstown Municipality* 1981 (2) SA 810 (E) at 812 H

<sup>3</sup> See *Trope v South African Reserve Bank and another* 1992(3) SA 208 (T) at 210G- 211E.

<sup>4</sup> See *Lewis v Oceanate (Pty) Ltd* 1992(4) SA 811 (4) at 817F.

<sup>5</sup> See *Nel and others NNO v McArthur* 2003(4) SA 142 (T) at 149F.

<sup>6</sup> 2006 (1) SA 461 SCA; [2006] 1 ALL SA 6 (SCA) [2005] ZASCA 72 at para 2

vulnerability.<sup>7</sup> Dealing with an interpretation issue, the added: 'Nor do I think that there were notional possibility that evidence of surrounding circumstances may influence the issue should necessarily operate to debar the Court from deciding such issue on exception. There must I think, be something more than a notional or remote possibility.' Usually that something more can be gathered from the pleadings and facts alleged or admitted therein. There may be specific allegations in the pleadings showing the relevance of extraneous facts, or there may be allegations from which it may be inferred that further facts affecting interpretation may reasonably possibly exist. A measure of conjecture is undoubtedly both permissible and proper, but the shield should not be allowed to protect the respondent where it is composed entirely of conjectural and speculative hypotheses, lacking any real foundation in pleadings or in the obvious facts.<sup>8</sup>

[54] Another important principle on exception that a pleading is vague and embarrassing may only be taken when the vagueness and embarrassment strikes at the root cause of the action.<sup>9</sup>

[55] In considering the pleadings as a whole and in context, it then becomes necessary to determine if the primary / material facts which are necessary for Plaintiff to prove, have been set out. In so doing, one must be mindful that it does not comprise of every piece of evidence which is necessary to prove each fact.<sup>10</sup>

[56] In *McKelvey v Cowan N.O.*<sup>11</sup> the court held as follows:

*"It is a first principle in dealing with matters of exception that if evidence can be led which can disclose a cause of action alleged in the pleadings, that particular pleadings is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of exception."*

[57] In *National Director of Public Prosecutions v Phillip and others*<sup>12</sup> the court held that:

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<sup>7</sup> See *Davenport Corner Tea Room (Pty) Ltd v Joubert* 1962 SA 709 (D) 715 H.

<sup>8</sup> See *Gardner v Richardt* 1974 (3) SA 768 (C) 773 D – E

<sup>9</sup> See *ABSA Bank v Boksburg Transitional Local Council* 1997 (2) SA 415 (W) at 41 B

<sup>10</sup> See *McKenzie v Farmers Co Operative Meat Industries Ltd* 1922 AD 16 at 23

<sup>11</sup> 1980 (4) SA 525Z at 526

<sup>12</sup> 2002 (4) SA 60 (W) at 106 E



"Pleadings must be lucid, logic and intelligible. A litigant must plead his cause of action or defence that has clarity and the precision as is reasonably necessary to alter his opponent to the case he has to meet."

[58] Rule 22(2) of the Uniform Rules of Court stated that:

"The Defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent and shall clearly and concisely state all material facts upon which he relies."

[59] Rule 23(1) of the Uniform Rules of Court states that:

"Where any pleading is vague and embarrassing... the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto... Provided that where a party intends to take an exception that a pleading is vague and embarrassing, he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of remaining the cause of complaint within 5 days..."

[60] It is trite that the purpose of an exception is to dispose of the case in whole or in part. In considering an exception, a court commences from the premise that the allegations contained in the particulars of claim are correct, and then considers the pleadings as a whole. It is required of the Defendant to show that the pleading is exceptable on every possible interpretation that can reasonably be attached to it.<sup>13</sup>

[61] In dealing with the principles of exception, Erasmus<sup>14</sup> states as follows:

"(a) In each case the court is obliged first of all to consider whether the pleading does lack particularity to an extent amount to vagueness. Where a statement is vague it is either meaningless or capable of more than one meaning. To put it at its simplest; the reader must be unable to distill from the statement a clear single meaning.

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<sup>13</sup> See *Theunissen en Andere v Transvaalse Lewenhawe Koöp BPK* 1988 (2) SA 493 (A) at 500 E – F; *First National Bank of Southern Africa Limited v Perry N.O and others* 2001 (3) SA 960 (SCA) at 965 C – D.

<sup>14</sup> See Erasmus Superior Court Practice at B1 154 to B1 154A.



(b) If there is vagueness in this sense the court is then obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is cause to him or her by the vagueness complained of Exception the validity of an agreement relied upon or whether a purported contract may be void for vagueness.”

[62] An exception that a pleading is vague and embarrassing, strikes at the formulation of the cause of action, and not its legal validity.<sup>15</sup> In dealing with exceptions that pleadings are vague and embarrassing, courts have held that such exception can only be taken when the vagueness and embarrassment strikes at the cause of the action as pleaded. If the Defendant cannot show serious prejudice, then an exception will not be upheld.<sup>16</sup>

[63] An exception that a pleading is vague and embarrassing should not be directed at a certain paragraph of the pleading but at the cause of action as whole, which must be demonstrated to be vague and embarrassing.<sup>17</sup>

[64] It is also a principle of our law that in pleadings, a distinction must be drawn between the *facta probantia*, which are the secondary allegations on which the Plaintiff will rely in support of his / her primary factual allegations generally speaking, the latter are matters for particulars for trial and even then are limited.<sup>18</sup>

### **Reasons for the judgment**

[65] In the instant case First Defendant excepts to Plaintiff's failure to aver the principal place of business in the initial particulars of claim. This omission has, however, been cured by the amended particulars of claim consequently, the exception on this point cannot be sustained and must fail.

[66] With regards to the second exception by First Defendant which is that the Plaintiff has failed to plead any basis in the law upon which Plaintiff is entitled to seek declaratory

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<sup>15</sup> See *Troped and Other v South African Reserve Bank* (above) at 269 I – J

<sup>16</sup> See *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298 A-B, *Gallagher Group Ltd and another v IO Tech Manufacturing (Pty) Ltd and others* 2014 (2) SA 157 (GNP) at 166 G – H.

<sup>17</sup> See *Autopack Distributors CC v Compendium Insurance Group (Pty) Ltd* (9935/2014) [2015] ZAKZDHC 60 (7 August 2015)

<sup>18</sup> J Malan, D van Loggenberg – et al. De Rebus, October 2006, p33

relief on the contract if (Plaintiff) is not a party to which is between First and Second Defendant, there is merit to this exception.

[67] I say so because on perusal of the amended particulars of claim and the annexures attached thereto, there is no averment that there is a dispute between First and Second Defendant or the validity of their contract to which Plaintiff is not a party to. This is in my considered view, an omission which opens the particulars of claim to attack on the ground of being exceptible. It follows therefore that no valid cause of action has been established.

[68] The third exception by First Defendant is that pages 1-7 attached to the amended particulars of claim are not ascertainable and do not make sufficient averment to enable First Defendant to understand the cause of action.

[69] Paragraphs 4, 5, 6, 7 and 8 of the amended particulars of claim states as follows:

*“4. During or about March 2015 Eskom formulated “Employer’s Requirements Specific to the Works” Section 3.4 Scope Kusile and a Request for proposals under PS (M) 2014 / AB / 02 (‘RFP’).*

*5. The above honourable court has jurisdiction to adjudicate this matter on the ground that the Defendants principal place of business is situated within the area of jurisdiction of this Honourable Court.*

*6. The first page of the relevant section is attached hereto as “A” for identification purposes only, as the technical requirements of Section 3.4 are not relied upon for the plaintiff’s cause of action.*

*7. At the same time Eskom formulated an “Explanation of Contractor’s Local Content and Related Obligations” document in respect of the Medupi and Kusile power stations, a true copy which is attached hereto Annexure “B”.*

*8. The relevant express term of Annexure “B” is as follows:*

**8.1 “4.5 Evaluation of Industrialization**



As set out in paragraph 2.1 above, Industrialization does not form part of the evaluation used at tender evaluation stage to measure a tenderer's local content compliance and therefore has no impact on the overall evaluation scoring and competitive ranking of tenderers. However, tenderers who would have an NIPP obligation are obliged to demonstrate their proposed commitments in respect of Industrialization and Eskom reserves the right to negotiate with tenderers regarding their Industrialization commitments will serve as a pre-condition to contract award, which Eskom may waive at its sole discretion. Once, included as a contractual obligation industrialization targets will be nominated as stipulated in section 2.2.9 [Contractor's Local Content and Related Obligation Schedule]"

9. ABB submitted a bid in respect of the RFP, which included Leago's proposed contractual involvement with ABB and which was accepted by Eskom. These documents are not in Leago's possession.

10. Pursuant to submitting the bid, Eskom and ABB both represented by duly authorized employees, concluded a written contract during 2015 in Johannesburg, the part relied upon which is attached hereto as Annexure "C".

11. The relevant express positions of Annexure "C" are:

11.1 "1.1.10 **Industrialization** means the utilization of Eskom suppliers' procurement spend to faster the establishment of new or the expansion of existing manufacturing capacity and capability to create competitive industries as elaborated on in clause 4 of the Explanatory of local Content and related Obligations and which is in fulfillment of the requirements of the Competitive Supplier Development Programme of the Department of Public Works which itself substitutes for the National Industrial Participation Programme of the Department of trade and industry.

11.2 "2. **Contractor's Undertaking**

2.1 The Contractor's Legal Content and Related Commitments pursuant to the Tender are reflected in Appendices A, B, C, D and E to this Schedule.

11.3 "9 **Mid-term Review and Final Review**



## **9.1 Local Content Related Obligations Mid-term Review**

9.1.1 *The Employer shall conduct a mid-term review of the Contractor's Local Content and Related Obligations at the stated time (and if not stated then at a time determined by the Engineer to be approximately midway through the period of execution of the works)."*

11.4. "9.1.2. *The purpose of the Mid- term is to enable the Employer to review the extent to which the Contractors has fulfilled the Contractor's Local Content and Related Obligations as required by the time of the Mid – Term Review as well as whether the Contractor is making sufficient progress in fulfilling the Contractor's Local content and related obligations by the Local Content and Related Obligations time for fulfillment."*

## **11.5 "9.2 Local Content and Related Obligations Final Review**

9.2.1 *The purpose of the Local Content and Related Obligations Final Review is for the Employer to determine whether the Contractor has fulfilled the Contract."*

*ABB approached Leago Engineering to an Industrialization and Enterprise Development Partner that will be subcontracted in order to provide certain services in the Medupi and Kusile C & I Works. The Enterprise Development Partnership enables both parties to achieve the requirements for Industrialization and the Competitive Supplier Development Programme (CSDP).*

*ABB will establish a long term partnership with Leago which will mutual be a benefit and ensure a value add to both. Building an industrial capability that will enhance local supply of C&I skills and experts. The end result of which, would be that the identified SMMI will become (sic) a sustainable supply of C&I service directly to Eskom of core engineering such as*

- Project management*
- Engineering consulting and*
- Operational capabilities and management.*

*ABB approached Leago Engineering to an Industrialization and Enterprise Development Partner that will be subcontracted in order to provide certain services in the Medupi and*

*Kusile C&I Works. The Enterprise Development Partnership enables both parties to achieve the requirements for Industrialization and the competitive Supplier Development Programme (CSDP).*

*ABB will establish a long term partnership with Leago which will mutual be a benefit and ensure a value add to both parties Building and industrial capability that will enhance local supply of C&I skills and expertise. The end result of which, would be that the identified SMME will become (sic) a sustainable supplier of C&I service directly to Eskom and the South African market.*

*The Enterprise Development partnership between ABB and Leago on the C&I project will provide an integrated solution to Eskom. ABB will be positioned to comply and meet same (sic) the essential transformations requirements. Leago Engineering will benefit exposure and skill enhancement in the C&I field.*

*The strategic rationale of the Leago proposal and the proposed scope of the service will yield three benefits:*

- Providing Eskom with integrated solutions that achieves the objectives for transformation;*
- Building an industrial capability that will enhance local supply of C&I skills and expertise. The end result of which would be that Leago becomes a future sustainable supplier of C&I services*
- ABB would have achieved the industrialization action, skills, transfer and enterprise development objectives.”*

13. The plaintiff is the entity referred to as “Leago Engineering” in Appendix C.

14. Pursuant to the conclusion of Annexure “C” between Eskom and ABB and in compliance thereof, and on or about 13 May 2015, ABB and Leago, both represented by authorized employees, concludes a written “Subcontractor for purchase of site services” contract at Johannesburg, a true copy of which is attached hereto as Annexure “D”, as well as an “ABB General Terms and Conditions for purchase of site services” contract, a true copy of which is attached hereto as Annexure “E” (“the contract”)



15. The written contracts “D” and “E” referred to ABB as “ABB Contractor” and to Leago as the “Subcontractor”.

[70] Plaintiff goes on to relate the relevant terms of Annexure “D” which I will not repeat in this judgment. Plaintiff, however fails to aver what relevance, other than there is a reference to “Leago Engineering” in the contract between First and Second Defendant. It follows that Plaintiff has failed to make an averment on what factual and legal basis the contract between it and First Defendant has anything to do with the agreement between First and Second Defendant to sustain the declaratory relief sought. Consequently, the exception on this ground is upheld.

[71] With regards to the exceptions raised by Second Defendant as regards lack of basis for sitting Second Defendant in the dispute between Plaintiff and First Defendant, Second Defendant contends that no basis has been averred by Plaintiff on the role Second Defendant is alleged to have played in the alleged cancellation of the agreement between Plaintiff and First Defendant due to the latter’s alleged non-performance of the payment obligations.

[72] Second Defendant states that because Plaintiff failed to allege on that because Plaintiff failed to allege on what basis Plaintiff claims and alleges a relationship with Second Defendant, the pleadings remain vague and embarrassing to Second Defendant to sustain a cause of action against Second Defendant.

[73] Having considered that pleadings wholly, I am in agreement that both Defendants remain embarrassed by the pleadings as they stood. It follows therefore that the exception should be upheld.

## **ORDER**


[74] The following order is made:

- (a) First and Second Defendants’ exceptions are upheld.
- (b) Plaintiff is afforded 15 (fifteen) days from the date of this order within which to amend its particulars of claim.



(c) In the event of Plaintiff failing to amend the particulars of claim within 15 (fifteen) days as set out in (b) above, the particulars of claim will be struck out.

(d) Plaintiff is ordered to pay the costs of the exception.



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**M.L. SENYATSI**  
**JUDGE OF THE HIGH COURT**

Heard:	7 October 2021
Judgment:	13 April 2022
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