IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA) 20/3/14

Case number: 70737/2012

In the matter between:

TUSK CONSTRUCTION SUPPORT SERVICES

(PTY) LTD (Registration No: 1999/01303/07) Plaintiff

and

JOHN REGINALD STOPFORTH First Defendant

SIMON SIPHO MKHONDO Second Defendant

CORNELIUS WILHEIM HUMAN Third Defendant

THATO MILDRED MOFOKENG Fourth Defendant

HELEENDREN THAVER Fifth Defendant

JUDGMENT

MAKHUBELE AJ

INTRODUCTION

~~DELETE WHICHEVER IS NOT APPLICABLE~~

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED.

20/03/14 .....
DATE

.....
SIGNATURE

[1] On 06 December 2012, Plaintiff issued simple summons against the defendants for payment of an amount of R508 480. 00 (Five hundred and eight thousand rand and eighty) plus interest *a temporae morae* at

15,5% per annum on the outstanding balance until the full debt is extinguished and costs.

[2] On 02 August 2012, plaintiff filed a declaration and attached certain annexures that I will refer to later in this judgment.

[3] This judgment concerns an exception taken by the defendants to plaintiff's declaration. The parties will be referred to as they were in the main action.

[4] The plaintiff's claim against the defendants arises from suretyship agreements in terms of which the latter bound themselves as sureties and co-principal debtors to plaintiff for the due and punctual performance by Mkwananzi Construction (Pty) Ltd ("the principal debtor) of all debts and obligations in terms of a Construction and Support Services Agreement ("Services Agreement") entered into between plaintiff and Mkwanazi.

[5] Save for the personal details of the defendants, the deeds of sureties signed by all defendants are identical[1] . I will only refer to the one signed by the first defendant and the corresponding allegations in the declaration.

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[1] Annexures B, E,F, G and H respectively

[6] The fact that the Service and deed of suretyship agreements were entered into is common cause between the parties. Though not expressly stated, it appears from a reading of the exception that the dispute is around proof of indebtedness of the principal debtor in terms of which the sureties' liabilities kick in.

The relevant part of the declaration for purposes of this judgment to which the exception is directed is paragraphs 14 and 15 that read as follows:

> *" 14. On or about 5 December 2011 the Principal Debtor owed Plaintiff an amount of R508 480.00 as appears from the certificate signed by Plaintiff's employee a copy of which is attached as Annexure 'D'*
>
> *15. In the premises and in terms of the suretyship agreement, First defendant is liable jointly and severally with the Principal Debtor for payment of the amount of R508, 480.00"*

[7] Although not part of the documents placed before me, it is common cause that the defendants duly caused notices to remove the cause of complaint to be served on the plaintiff before filing the exception.

THE EXCEPTION

[8] The basis of the exception is that the plaintiff's declaration is vague and embarrassing. In Paragraph 3 of the Notice of Exception, defendants stated the following:

> " *3. In paragraph 14 of the declaration, the Plaintiff alleges that on or about 15 December 2011 the principal debtor owed Plaintiff an amount of R508 480,00 as appears from the certificates signed by the Plaintiff's employee, a copy whereof is annexed as Annexure "D".*
>
> *3.1 It cannot be determined from Plaintiff's declaration on which terms of the construction support services agreement the Plaintiff relies, if proved, to show that the Plaintiff has an enforceable claim against the principal debtor;*
>
> *3.2 From the Plaintiff's declaration it cannot be determined how the amount of R508 480,00 , as certified by the Plaintiff's employees, is calculated.*

3.3 From the Plaintiff's declaration it cannot be determined whether or not the Plaintiff fulfilled its contractual obligations in terms of the construction support services agreement and that the principal debtor is indebted to the Plaintiff in the amount of R508 480,00."

DEFENDANTS' SUBMISSIONS

[9] Mr. Schoeman, on behalf of defendants made the following written and oral submissions:

(a) There is no indication as to how the amount reflected in the certificate of balance was calculated,

(b) Defendants as sureties are entitled to know whether plaintiff and principal debtor have fulfilled their respective duties and obligations,

(c) The defences available to the principal debtor are also available to the sureties,

(d) In terms of Clause 1.2 of the Service Agreement[2], *"administration and support services"* is defined as *"the services to be provided by TUSK to the Applicant in terms of this agreement and set out in clause 5 below"*,

(e) The duties of plaintiff have been enumerated in clause 5 of the Service Agreement. The defendants do not know which of those duties plaintiff performed that entitled it to payment and issuance of the certificate of balance,

(f) In terms of clause 3 titled APPOINTMENT, defendants appointed plaintiff to provide administration and support services listed in clause 5 and certain supplementary services ,

(g) Plaintiff should have pleaded the duties it has fulfilled in accordance with the certificate of balance issued,

(h) Plaintiff should have pleaded the nature of services rendered and the period thereof in order to enable defendants have ascertain whether the claim has prescribed or not,

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[2] Annexure A to plaintiff's declaration

(i) Plaintiff should not simply rely on the certificate of balance as it has done in paragraph 12.5 of the declaration wherein the following is stated :

"Any amount owing to Plaintiff by the Principal Debtor or by the First Defendant at any time, the fact that such amount is due and payable and the relevant rate and dates for working out of interest will be shown (and unless the First Defendant proves it wrong, will be accepted as being correct) by a certificate signed by any employee of Plaintiff. The appointment of the person signing the certificate will not have to be proved; ",.

(j) the declaration as it is can be read in multiple ways., and it creates confusion. This prejudices the defendants in pleading. Its terms are unclear, indistinct and vague. It is not clear whether the debtor has defaulted or not. If it has not, the claim is premature.

(k) the certificate of balance is prima facie proof of outstanding amount, it does not prove Debtor's default. It is only valid if plaintiff has complied with its obligations

[10] Mr Schoeman concluded by submitting in his written submissions that : "...*Respondent failed to plead the facta probanda necessary to establish a cause of action against excipients alternatively that excipients are correct in their assertion that the pleading is vague and embarrassing and that they are prejudiced in pleading to the Declaration.*"

DEFENDANT'S SUBMISSIONS

[11] As a starting point, Mr. Stoop referred the court to the matter of **Jowell v Brnwell-Jones 199891) SA 836 (W)** at 899 -903 and submitted that an exception on basis that pleadings are vague and embarrassing :

(a) must go to the root of the action; and

(b) the desired information can be obtained by a request for further particulars.

[12] He further submitted, with reference to the case of **Bank of Lisbon International Ltd v Venter 1990 (4) SA 463 (A)** at 481H – 482C that plaintiff's cause of action is the certificate of balance and that;

(a) reliance on the certificate of balance clause in the suretyship agreement establishes plaintiff's cause of action,

(b) liability of the sureties is founded in the certificate of balance which establishes prima facie proof and;

(c) unless evidence to the contrary is produced, it hardens into concrete proof.

[12.1] He however, hastened to add that he was aware of a subsequent decision in the matter of **Ex Parte Minister of Justice in re; Nedbank Ltd v Abstein Distributors (Pty) Ltd and Others and Donelly v Barclays National Bank Ltd 1995 93) SA 1 (A)** where the certificate of balance was declared to be contrary to public policy and void.

Mr Stoop submitted that the Bank of Lisbon case is binding on this court.

[13] It was further submitted on behalf of the plaintiff that:

(a) on proper construction, clause 21[3] of the suretyship agreement means that between plaintiff and the principal debtor proof has been submitted on how the amount owing has been worked out. The clause cannot be used against the Principal Debtor,

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[3] paragraph 12.5 of the declaration (proof of indebtedness by Certificate of balance)

(b) It was not necessary for a pleader to plead reciprocity of obligations[4]. All he has to do is to set out the cause of action. He cannot plug out every possible defence.

[14] Mr Stoop submitted further that the first ground of the exception (paragraph 3.1) cannot stand because plaintiff relies on suretyship agreements. According to him, paragraph 7[5] of the declaration is actually over pleading because even if it is taken out, the declaration would still stand. Therefore paragraph 10[6] is properly pleaded.

[15] It was also submitted that the second ground of exception (paragraph 3.2) has no merit because the agreement states that the certificate of balance will, unless proven wrong be sufficient proof. Plaintiff does not have to plead how the amount was compounded. Defendants should request further particulars if they so feel[7].

The third ground of exception overlaps with the others.

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[4] He referred to the matter of Prince v University of Pretoria 1980 (2) SA 171 (TPD)

[5] It reads as follows: *"On or about 26 August 2011 and at or near Centurion, Plaintiff duly represented by Mr HJ de Villiers concluded a written Construction Support Services Agreement with an entity known as Mkwanazi Construction (Pty) Ltd (hereinafter 'the Principal Debtor'). At all relevant times, the Principal Debtor was duly represented by the First Defendant. A copy of the Construction Support Services Agreement is attached as Annexure 'A'."*

[6] It reads as follows: *" On or about 26 August 2011 and at or near Centurion, the First Defendant acting personally signed a written suretyship agreement in terms whereof the First Defendant bound himself as surety and co-principal debtor to Plaintiff for he due and punctual performance by the Principal Debtor of all debts and obligations of any nature (without limitation of the amount) arising from any cause at all which the Principal Debtor owe or may in future owe to Plaintiff. A copy of the suretyship agreement is attached as Annexure 'B' and the contents thereof must be read herein as if specifically pleaded."*

[7] Jowell case.

[16] **In reply,** Mr. Schoeman submitted that he does not accept that the certificate of balance is a cause of action. According to him, only when the debt against the Principal Debtor is due and payable, then claim can be enforceable against a surety.

THE CERTIFICATE OF BALANCE

[17] Annexure 'D' to plaintiff's declaration , dated 5 December 2012 reads as follows:

> " *CERTIFICATE OF BALANCE"*
>
> *I, the undersigned, BAREND BESTER ROUX, in my capacity as Legal Advisor of TUSK CONSTRUCTION SUPPORT SERVICES (PTY) LTD (Registration No. 1999/001303/07), (hereinafter "TUSK") hereby certify that at date 5 December 2012 the amount of R508, 480 (Five Hundred and Eight Thousand Four Hundred and Eighty Rand) in respect of administration and support services was owing to TUSK by MKWANAZI CONSTRUCTION (PTY) LTD (Registration number 1996/005416/07)"*

[18] The signatory identified himself as the *"Legal Advisor "* of Tusk Construction Support Services (Pty) Ltd.

VAGUE AND EMBARASSING

[19] Defendants' complaint is that plaintiff has failed to plead sufficient particulars with regard to performance of its obligations that entitled it to claim payment of the amount that is allegedly in arrears.

[20] Rule 18(4) of the Uniform Rules of Court provides as follows: *"Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity*[8] *to enable the opposite party to reply thereto."*

[21] Ambiguity on its own is not sufficient. There must be evidence that the opposing party will be seriously prejudiced if the relevant portions in the declaration are allowed to stand. The vagueness must relate to the cause of action[9]

[22] In the Trope case[10], Macreath J considered the meaning of "vague and embarrassing" in the context of exceptions and the nature of the enquiry that the court should undertake.

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[8] Trope and Others v South African Reserve Bank (641/91) [1993] ZASCA 54; 1993 (3) SA 264 (AD); [1993] 2 All SA 278 (A) (31 March 1993)

[9] Carelsen v Fairbridge , Ardene & Lawton 1918 TPD 306 at 309, approved in amongst other cases; Liquidators Wapejo Shipping Co. Ltd v Lurie Bros 1924 AD 69 at 74

[10] at t 211

"No doubt, the absence of the opportunity to clarify an ambiguity or cure an apparent inconsistency, by way of further particulars, may encourage greater particularity in the initial pleading.

The ultimate test, however, must in my view still be whether the pleading complies with the general rule enunciated in Rule 18(4) and the principles laid down in our existing case law.

An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the Excipient is prejudiced (Quinlan v MacGregor 1960 (4) SA 383 (D) at 393E-H). As to whether there is prejudice, the ability of the Excipient to produce an exception-proof plea is not the only, nor indeed the most important, test - see the remarks of Conradie J in Levitan v Newhaven Holiday Enterprises CC 1991 (2) SA 297 (C) at 298G-H. If that were the only test, the object of pleadings to enable parties to come to trial prepared to meet each other's case and not be taken by surprise may well be defeated.

Thus it may be possible to plead to particulars of claim which can be read in any one of a number of ways by simply denying the allegations made; likewise to a pleading which leaves one guessing as to its actual meaning. Yet there can be no doubt that such a

pleading is excipiable as being vague and embarrassing - see Parow Lands (Pty) Ltd v Schneider 1952 (1) SA 150 (SWA) at 152F-G and the authorities there cited.

It follows that averments in the pleading which are contradictory and which are not pleaded in the alternative are patently vague and embarrassing; one can but be left guessing as to the actual meaning (if any) conveyed by the pleading."

[23] In my view, the wording of the certificate of balance clause in the Ex parte Minister of Justice case and the one under consideration are distinguishable from each other.

The issue in the latter was that the offending clause indicated that the certificate of balance was *"conclusive proof of indebtedness"* .
As stated above, the relevant clause in this matter is worded in such a way that the sureties have an opportunity to admit or deny the correctness of the certificate of balance.

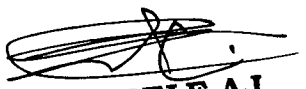
[24] I agree with counsel for the plaintiff that it is not necessary to plead the particulars that defendants allege renders the declaration vague and embarrassing.
The particulars can be obtained by way of request for further particulars for trial purposes or even in terms of the rules relating to discovery.

[25] Defendants in my view will not be prejudiced by lack of particularity relating to computation of the amount or whether there has been compliance with clauses relating to performance of the parties' respective duties and obligations.

[26] The case that defendants have to meet is clear from the certificate of balance read with the relevant paragraphs in the declaration. Whether or not the Principal Debtor is in breach and the extent thereof is a factual enquiry and a matter of evidence.

[26] In the result, I make the following order:

The exception is dismissed with costs.



MAKHUBELE AJ

Acting Judge of the High Court

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