

THE REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO 70692/2014

Date: 24.11.2016

Reportable: No

Of interest to other judges: No

Revised

In the matter between:

THE MINISTER OF PUBLIC WORKS

PLAINTIFF

AND

**RESENDZAPHANDA CONSULTING
& PROJECTS MANAGEMENT**

FIRST DEFENDANT

PHINDELA JAPANI

SECOND DEFENDANT

THLEMULI SINGO

THIRD DEFENDANT

OFHINI MATSEA

FOURTH DEFENDANT

BRIAN VELDSMAN

FIFTH DEFENDANT

HEARD: 24 SEPTEMBER 2016

DELIVERED: 24 NOVEMBER 2016

JUDGMENT

Molahlehi AJ

Introduction

[1] This is an exception by the fifth defendant, Mr Veldsman, in terms of Rule 23 of the Uniforms Rules of the High Court (the Rules) against the particulars of claim issued by the plaintiff, the Minister of Public Works, (the plaintiff) against him and others on 25 September 2014. The complaint of Mr Veldman, in the exception, is that the particulars of claim are both vague and embarrassing and accordingly does not disclose a cause of action against him. He had before filing the exception called on the plaintiff to remedy the defect in the particulars of claim. The plaintiff has failed to do anything in that regard.

[2] For the purpose of this judgement, I do not deem it necessary by way of background to deal with the details of all the other parties except those of the first and the fifth respondents. The first respondent is Rosedzaphanda Consulting and Project Management, a close corporation registered in terms of the laws of this country with its head based in Polokwane, Limpopo.

[3] Mr Veldsman is an employee of the plaintiff who at the time the plaintiff's claim arose was the project director based at the Bloemfontein office of the plaintiff.

[4] The plaintiff's claim arose from a tender which had been issued for the purposes of rendering a mechanical engineering services of replacing two coal-fired steam boilers at Groenpunt.

[5] The first applicant had applied for the tender and indicated therein that it was competent to render the services required in the tender specification. Mr Veldsman was appointed the director of the project of replacing the two coal- fired steam boilers at Grunpoint.

[6] It would appear after the tender was awarded and during May 2011, the first respondent presented to the plaintiff a preliminary design report for the project including an invoice in the amount of R232 331.44

[7] The design was purportedly signed by a certain Mr Phasha who, however, on the enquiry by the electrical engineer, Mr Warden, of the plaintiff denied having prepared the design. The first respondent submitted the second report bearing the name of Mr Tugwete.

[8] It would appear arising from the above an internal audit was conducted by the plaintiff, the results of which were the following:

- (a) the First Respondent misrepresented with regards the use of the name and credentials of Mr Mafihle Phasha without his consent,
- (b) Mr Mafihle Pasha's signature on the presented preliminary design report was forged,
- (c) the Fifth Defendant disregarded Mr Henry Warden's genuine concerns about the conduct of the First Defendant and insisted that the submitted invoice be affected despite strong evidence of misrepresentation by the First Defendant and
- (d) recommended that civil proceedings be instituted to recover the money paid to the First Defendant."

[9] The finding against the fifth respondent was that he ignored the advice from Mr Warden regarding the payment of the invoice from the first defendant.

[10] The claim against the employee is based on the following:

10.1 In contravention of the provisions of the Public Finance Management Act 1 of 1999, the Plaintiffs' policy on irregular expenditure management, the Treasury Regulations on supply chain management,

10.2 against the advice of Mr Henry Warden,

10.3 with the preliminary design been approved by the Sketch Plan Committee; and

10.4 while there was pending internal investigations on the presented preliminary design(s) gave an instruction that the invoice been paid, alternatively payment of the invoice, further alternative allowed the invoice to be processed and paid.

11. The conduct of the Fifth Defendant prevented the Plaintiff to exercise the option considering the tender awarded to the First Defendant."

[11] The plaintiff contends, in the first instance, that the exception stands to be dismissed because it was not properly signed as required in terms s 4 of the Right of Appearance in Courts Act (the Act).¹ Section 4 of the Act deals with the right of an appearance of an attorney in the High Court. The right of appearance by an attorney in the High Court is granted upon application and if successful the Registrar issues the certificate in terms of s 4 (2) of the Act.

[12] Section 4 of the Act should be read with s3(4) of the Act which provides that an attorney who has been granted the right of appearance in the High Court is entitled to discharge functions of an advocate in any proceedings in the High Court.

[13] In response Ms Kirchner, the attorney who signed the exception filed the affidavit confirming that she has the right of appearance in the High Court of South Africa and for that reason, her name has been entered on the roll of attorneys, in accordance with the

¹ Act number 62 of 1995.

provisions of s 4(2) of the Act.

[14] In light of the above, I find, the point raised by the plaintiff, concerning the right of appearance in this court by Ms Kirchner, is unsustainable and accordingly stands to be dismissed.

Exception: the general principles

[15] The general principles governing exceptions in our law are well established. An application for an exception is governed by Rule 23(1) of the Uniform Rules of the Court this which reads as follows:

"(1) Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of subrule (5) of rule (6): 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 removing the cause of complaint within 15 days: Provided further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception."

[16] The trite question to answer when dealing with an exception is whether the exception goes to the heart of the plea and if so whether it is vague or embarrassing to the extent that the defendant does not know the claim he has to meet.² The vagueness of pleadings has to do with the formulation of the claim which generally results from the defect therein. As a general principle an exception stands to fail even if the claim is shown to be vague and embarrassing and thus in order to succeed the excipient has to show that not only is the cause of action vague and embarrassing but that he or she will suffer serious prejudice if compelled to plead in the face of the defect in the cause of action.

² The question is set out in *Jewel v Brawnwell-Jones* 1998 (1) SA 836 (W) at 904 F - H.

Rule 18(4) of the Rules of this court requires that:

"(4) 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 to enable the opposite party to reply thereto."

[17] The underlying purpose of the rule is stated in *Trope v South African Revenue Services*,³ as follows:

"It is, of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise.

Pleadings must, therefore, be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made (Harms Civil Procedure in the Supreme Court at 263-4). At 264 the learned author suggests that, as a general proposition, it may be assumed that, since the abolition of further particulars, and the fact that non-compliance with the provisions of Rule 18 now (in terms of Rule 18(12)) amounts to an irregular step, a greater degree of particularity of pleadings is required. 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."

³ 1993 (3) SA 264 (A).

[18] In the present matter, it is apparent from the reading of the particulars of claim upon which the cause of action is based on the misrepresentation made by the representative of the plaintiff. The basis of the plaintiffs claim is that the contract was concluded through a misrepresentation. It is for this reason that the plaintiff is seeking a refund of the amount of R202 331.44 from the defendant. The payment was made consequent to the impugned agreement.

[19] There is nothing in the particulars of claim that suggest that the fifth defendant was at the time of the conclusion of the contract part of the first defendant or played any role in the process of formulating the agreement. It is, in fact, apparent from the reading of the particulars of claim that the fifth defendant was the appointed the director of the project, as the first respondent did not have register engineering as competent in mechanical engineering. It would appear this happened after the conclusion of the contract.

[20] If it is indeed correct, that the tender awarded was due to misrepresentation, it is not clear from the particulars of claim as to in what way the fifth respondent, participated in that project so as to attract personal liability.

[21] The plaintiff argued in the heads of argument that paragraph 10 and 11 of the particulars of claim provides sufficient, clear and concise material facts upon which the claim is based on.

[22] In my view, the exception has to be evaluated in the context where the plaintiff's claim is based on the misrepresentation by the first defendant. I have already indicated that there is no averment that connects the fifth defendant to the fraudulent misrepresentation of the first defendant. It is apparent from the reading of the particulars of claim that the involvement of the fifth defendant in the project occurred after the conclusion of the contract when the alleged misrepresentation had already happened.

[23] Whilst the cause of action against the first defendant is based on the general principles of contract, it is not clear whether the same applies to the fifth defendant. It is also not clear whether the same applies to the fifth defendant. It is also not clear whether the cause of action against him is based on delict.

[24] It does appear that the claim, in some way, is based on statutory liability. In this regard, the plaintiff avers that the fifth defendant contravened the provisions of the Public Finance Management Act 1 of 1999. The approach to adopt when dealing with a pleading based on the provisions of a statute or a section of a statute received attention in *Aron Property Development (EDMS) BPK v Stad Kapstaad*,⁴ where the court in quoting with approval what was said in *Fundutrust (Pty) Ltd (in liquidation) v Van Deventer* 1997 (1) SA 710 (A) at & 25H-I said:

"It is not necessary in a pleading, even where the pleader relies on a particular statute or section of a statute, for him to refer to terms it provided that he formulates his case clearly ... or, put differently, it is sufficient if the facts are pleaded from which the conclusion can be drawn that the provisions of the statute applies..."

[25] In the present matter whilst the cause of action is based on the Act, it is not clear what liability under that Act attaches to the fifth defendant to be personally liable. This is complicated further, if I may emphasise, by the fact that the claim against the other defendants is based on a misrepresentation in obtaining the contract. This is also in the context wherein the plaintiff seeks to have the fifth defendant jointly liable with the other defendants. The same consideration applies to the averment regarding the treasury regulations and policy.

[26] It is finally, not entirely clear as to what basis the alleged conduct of the fifth defendant disentitled the plaintiff the opportunity "to cancel the contract". The plaintiff fails to provide any details as to in what way the conduct of the fifth defendant disentitles the Minister the opportunity to cancel the contract after discovering the first defendant's misrepresentation. In light of the above discussion, I find that the fifth defendant's exception stands to succeed. It cannot be said that the manner in which the plaintiff has formulated its claim is in such a way that the fifth defendant can be required to plead. I see no reason why costs should not follow the results.

⁴ 2003 (6) SA 82

Order

[27] In the premises the following order is made:

1. The fifth defendant's exception is upheld with costs.
2. The plaintiff is given leave, if so advised, to file an amendment to its particulars of claim and that should be done within 15 days of date of this order.

Molahlehi AJ
Acting Judge of the
South Gauteng High Court

APPEARANCES:

Plaintiff: Adv LG. P Ledwaba Attorney

Instructed by the State Attorney

Applicant: Adv S Glober

Instructed by Van Zyl Le Roux Inc.