

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)**

CASE NO: 7355/20

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED: YES/NO

SIGNATURE:

DATE: 23 MARCH 2023

In the matter between:

LEOPIET ONTWIKKELING (PTY) LTD

PLAINTIFF/RESPONDENT

And

LEPHALALE MUNICIPALITY

DEFENDANT/EXCIPIENT

JUDGMENT

MDHLULI AJ

[1] This is an opposed exception against the Plaintiff/Respondent's (Plaintiff) particulars of claim on the basis that it does not disclose a cause of action wherein the Excipient/Defendant (Defendant) seeks the exception to be upheld with costs.

[2] The Plaintiff is LEOPIET ONTWIKKELING (PTY) LTD [Registration No. 1[...]], being the registered owner of a property known as Portion [...] of the Farm S[...]

5[...], Registration Division L.Q., Limpopo Province ("the immovable property"), which immovable property is situated within the Defendant's municipal area.

[3] The Defendant is LEPHALALE LOCAL MUNICIPALITY, a municipality duly established in terms of the Local Government Municipal Structures Act No. 117 of '1998 and with principal place of business at corner of J[...] S[...] and D[...] Roads, Onverwacht, Lephalale.

[4] The Plaintiff claims damages in the amount of R174,650,031.00 plus VAT (if applicable), interest thereon per annum a tempore morae and costs of suit.

4.1 The Plaintiff alleges that the damages suffered by it result from the Municipality's breach of an alleged legal duty ("legal duty").

4.2 The legal duty relied upon by the Plaintiff is that of the Municipality to:

4.2.1 Provide democratic and accountable Government for local communities,

4.2.2 Ensure the provision of services to communities in a sustainable manner,

4.2.3 Promote a safe and healthy environment, and

4.2.4 Develop and maintain infrastructure within the Municipality's jurisdiction in respect of roads, stormwater pipes and sewage.

[5] The Plaintiff alleges that the Municipality's legal duty is derived from:

5.1 Chapter 4 of the Local Government: Municipal Structures Act 117 of '1998 ("Structures Act")

5.2 Section 28 of the National Environmental Management Act 107 Of 1998 ("NEMA"); and

5.3 Chapter 7 of the Constitution of the Republic of South Africa Act No.108 of 1996.

[6] The Plaintiff claims that the Municipality has since approximately 2010 continuously breached its alleged legal duty in that the Municipality has failed to maintain or upgrade its sewage infrastructure within its area of jurisdiction, leading to the consequential overflow of contaminated water, wastage and effluent material onto the immovable property and onto the agricultural development, grazing and natural water sources situated upon the immovable property. The Plaintiff alleges 13 omissions by the Defendant, elevating same to breach of the alleged legal duty.

[7] The Plaintiff then claims that the Municipality's breach aforesaid resulted in material erosion and contamination of the surface and the sub-surface water sources of the immovable property, rendering the immovable property destroyed, materially unsafe and not suitable for agricultural purposes.

[8] Plaintiff consequently alleges to have suffered damages which it expressed as the reasonable rehabilitation costs in respect of the surface and sub-surface water resources of the immovable property and mitigation actions.

[9] The Defendant filed a notice of exception informing that the Plaintiff's particulars of claim disclosed no cause of action. Further submitted that the essential requirements for delictual liability are trite¹. They are:

9.1 Conduct on the part of the Defendant, which is wrongful,

9.2 Harm sustained by the Plaintiff,

9.3 A casual connection between the conduct and the Plaintiff's harm; and

¹ Elvins v Shile Insurance Co Ltd 1980 (2) SA 814 (A) at 838H-839A-C.

9.4 Fault or blameworthiness in the sense of *culpa* or *dolus* on the part of the Defendant. Submits further that a claim in delict must contain all of the above essential requirements, failing which no cause of action exists. I agree.

[10] The Plaintiff's particulars of claim disclosed no cause of action for the following reasons Defendant submitted:

10.1 The essential requirements mentioned above to sustain a cause of action in delict, or some of them, are omitted from the particulars of claim. Neither wrongfulness nor negligence has been alleged;

10.2 The legal duty relied upon by the Plaintiff is not recognised in our law. No wrongfulness can be established in circumstances where the Municipality is statutorily indemnified against claims of the kind intended by the Plaintiff;

10.3 It is not alleged that the legal duty is owed to the Plaintiff Since no such legal duty exists, no such duty is owed to the Plaintiff; and

10.4 Tho Plaintiff conflates the concepts of "duty to care", "legal duty" and "breach of statutory duty". The Plaintiff further conflates a cause of action based on an omission with breach of a legal duty.

[11] Uniform Rule 23 provides 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. (2) Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent

pleading, apply for the striking out of the matter aforesaid, and may set such application down for hearing in terms of paragraph (f) of subrule (5) of rule (6), but the court shall not grant the same unless it is satisfied that the applicant will be prejudiced in the conduct of his claim or defence if it be not granted. (3) Wherever an exception is taken to any pleading, the grounds upon which the exception is founded shall be clearly and concisely stated. (4) Wherever any exception is taken to any pleading or an application to strike out is made, no plea, replication or other pleading over shall be necessary.

[12] The issues are first, does the Plaintiff's particulars disclose a cause of action for the relief sought and secondly, whether the statutes relied upon by the Plaintiff provide delictual liability.

[13] The approach to an exception that a pleading does not disclose a cause of action was reiterated by Marais JA in *Vermeulen v Goose Valley Investments (Pty) Ltd*: "It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that ex facie the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim is (not may be) bad in law"². "An exception sets out why the excipient says that the facts pleaded by a plaintiff are insufficient. Only if the facts pleaded by a plaintiff could not, on any basis, as a matter of law, result in a judgment being granted against the cited defendant, can an exception succeed. Only those facts alleged in the particulars of claim and any other facts agreed to by the parties can be taken into account"³.

In my view the Plaintiff's particulars of claim as a result of the above, need to be pleaded in a clear way which affords the Defendant an opportunity to respond thereto and would be a subject of proof before the court. Evidence that would subsequently be led should be in support of the claim as pleaded. The chapter 4 of the Municipal Structures and chapter 7 of the Constitution plaintiff relies on amongst

² [2001] 3 ALL SA 350 (A) para 7. See also *Vermeulen v Goose Valley Investment (Pty) Ltd* 2001 (3) SA 986 (SCA) at 997.

³ *First National Bank of Southern Africa Ltd v Perry NO and Others* 12001] 3 ALL SA 331 para 6.

others have not been clearly pleaded save for their mention. Plaintiff has to an extent dealt with NEMA and I shall return to this hereunder.

Finally, on this point, Rule '18(4) provides that "every pleading shall contain a **clear and concise statement** of the material facts upon which the pleader relies for his claim, defense or answer to any pleading as the case may be, with **sufficient particularity to enable the opposite party to reply thereto**". I find this lacking on the particularity in terms of the conduct complained of, the causal link between conduct and the defendant, wrongfulness and negligence therein.

[14] And in *Cook v Gill*⁴, referred to with approval by the SCA in *McKenzie v Farmers' Co-Operative Meat Industries Ltd*, it was held that a cause of action is disclosed when the pleading contains: "Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."⁵ Put another way, judgment could be granted if the averments in those particulars of claim were proved⁶.

[15] The Plaintiff argues that the exception raised is just a delaying tactic to frustrate the prosecution of the claim. Further that an exception is generally not the appropriate procedure to settle questions of interpretation because, in cases of doubt, evidence may be admissible at the trial stage relating to surrounding circumstances which evidence may clear up the difficulties⁷. Before me there is no issue with interpretation of any kind between the parties, the argument is misplaced as the complaints by the defendant relates to omissions by the plaintiff which without a cause of action has not been made out as well as the "non-existent legal duty". It is not enough to lay out statutory provisions, a litigant must show how they relate to the Defendant to warrant the relief sought.

⁴ L.R. 8. C. P.107.

⁵ 1922 AD at 23.

⁶ *Jugwanth v MTN* (Case no 529/2020) [2021] ZASCA 114 (9 September 2021)

⁷ *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 (1) SA 508 (A).

[16] Section 28 of NEIVIA provides as follows: (1) Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.

(2) Without limiting the generality of the duty in subsection (1), the persons on whom subsection (1) imposes an obligation to take reasonable measures include an owner of land or premises, a person in control of land or premises or a person who has a right to use the land or premises on which or in which-

(a) any activity or process is or was performed or undertaken; or

(b) any other situation exists, which causes, has caused or is likely to causes significant pollution or degradation of the environment.

(3) The measures required in terms of subsection (1) may include measures to-

(a) investigate, assess and evaluate the impact on the environment:

(b) inform and educate employees about the environmental risk of their work and the manner in which their tasks must be performed in order to avoid causing significant pollution or degradation of the environment:

(c) cease, modify or control any act, activity or process causing the pollution or degradation;

(d) contain or prevent the movement of pollutants or the causant of degradation:

(e) eliminate any source of the pollution or degradation: or

(f) remedy the effects of the pollution or degradation.

(4) The Director-General or a provincial head of department may, after consultation with any other organ of state concerned and after having given adequate opportunity to affected persons to inform him or her of their relevant interests. direct any person who fails to take the measures required under subsection (1) to-

(a) investigate, evaluate and assess the impact of specific activities and report thereon:

(b) commence taking specific reasonable measures before a given date;

(c) diligently continue with those measures; and

(d) complete them before a specified reasonable date:

Provided that the Director-General or a provincial head of department may. if urgent action is necessary for the protection of the environment. issue such directive. and consult and give such opportunity to inform as soon thereafter as is reasonable.

(5) The Director-General or a provincial head of department, when considering any measure or time period envisaged in subsection (4), must have regard to the following:

(a) the principles set out in section 2:

(b) the provisions of any adopted environmental management plan or environmental implementation plan:

(c) the severity of any impact on the environment and tile costs of the measures being considered:

(d) any measures proposed by the person on whom measures are to be imposed:

(e) the desirability of the State fulfilling its role as custodian holding the environment in public trust for the people:

(f) any other relevant factors.

(6) If a person required under this Act to undertake rehabilitation or other remedial work on the land of another, reasonably requires access to, use of or a limitation on use of that land in order to effect rehabilitation or remedial work. but is unable to acquire it on reasonable terms. the Minister may-

(a) expropriate the necessary rights in respect of that land for the benefit of the person undertaking the rehabilitation or remedial work. who will then be vested with the expropriated rights: and

(b) recover from the person for whose benefit the expropriation was effected all costs incurred.

(7) Should a person fail to comply, or inadequately comply. with a directive under subsection (4), the Director-General or provincial head of department may take reasonable measures to remedy the situation.

(8) Subject to subsection (9), the Director-General or provincial head of department may recover all costs incurred as a result of it acting under subsection (7) from any or all of the following persons-

(a) any person who is or was responsible for or who directly or indirectly contributed to, the pollution or degradation or the potential pollution or degradation:

(b) the owner of the land at the time when the pollution or degradation or the potential for pollution or degradation occurred. or that owner's successor in title;

(c) the person in control of the land or any person who has or had a right to use the land at the time when-

(i) the activity or the process is or was performed or undertaken: or

(ii) the situation came about: or

(d) any person who negligently failed to prevent-

(i) the activity or the process being performed or undertaken: or

(ii) the situation from coming about:

Provided that such person failed to take the measures required of him or her under subsection (1).

(9) The Director-General or provincial head of department may in respect of the recovery of costs under subsection (8) claim proportionally from any other person who benefited from the measures undertaken under subsection (7).

(10) The costs claimed under subsections (6), (8) and (9) must be reasonable and may include without being limited to labour, administrative and overhead costs.

(11) If more than one person is liable under subsection (8) the liability must be apportioned among the persons concerned according to the degree to which each was responsible for the harm to the environment resulting from their respective failures to take the measures required under subsections (1) and (4).

(12) Any person may, after giving the Director-General or provincial head of department 30 days' notice apply to a competent court for an order directing the Director-General or any provincial head of department to take

any of the steps listed in subsection (4) if the Director-General or provincial head of department fails to inform such person in writing that he or she has directed a person contemplated in subsection (8) to take one of those steps, and the provisions of section 32(2) and (3) shall apply to such proceedings with the necessary changes.

(13) When considering any application in terms of subsection (12). the court must take into account the factors set out in subsection (5).

I elected to outline the above provisions of NEMA only as I believe for the purposes of now are the only consideration for this court. The other statutes relied on has no basis whatsoever for this case now and as far as damages are concerned.

Even with consideration on NEMA which provides for relief in the event of breach of duty to care and not legal duty, it is the Director General who upon failure can approach the court to give effect to the provisions. The Plaintiff has not taken this court into confidence about steps it engaged in for compliance herein. Moreover, nothing has been pleaded about the wrongfulness and/or negligence of the defendant save for the alleged failure.

[17] It is trite that a court should endeavour to look benevolently instead of over-critically at a pleading, and it must be looked at as a whole. If there is any uncertainty in regard to a pleader's intention an excipient cannot avail himself thereof unless he shows that upon any construction of the pleadings the claim is excipiable, in this regard see: *Amalgamated Footwear & Leather Industries Jordan & Co Ltd*.⁸

Plaintiff argues that relied on MN v AJ⁹ relying on *Suid Afrikaans Oderlinge Brand-en Algemene Versekeringsmaatskappy Bpk v Van der Berg en n Ander*¹⁰, where the court held that "while pleadings must be drafted carefully, a court should not read them pedantically nor should it over emphasize precise formalistic requirements, the

⁸ 1948 (2) SA 891 (C) at 893

⁹ 2013 (3) SA 26 (WCC)

¹⁰ (123/75) [1975] ZASCA 104 (20 November 1975)

substance of the allegations should be properly considered". Although I agree with the dicta therein and subscribe thereto, some averments are basic for example jurisdiction, without which the court may not adjudicate over a matter unless it is averred. It is thus not only a matter of proper consideration and over emphasis only but a foundation upon which one's claim is derived from. Both parties have gone into great length in their heads of argument to support their respective arguments, same is appreciated and has been considered herein. However, I will limit myself to the issues I found to be for this court's determination based on the particulars of claim.

The Plaintiff insists that in terms of its paragraph 7.2.13 of the particulars of claim which provides that "the defendant has failed to take any reasonable measures in relation to the breach of its duty of care as pleaded" has pleaded wrongfulness. Reliance was on the definition of negligence as per Amler's¹¹ in the sense of breach of duty as follows: "negligence means, in this context, the failure to exercise due and reasonable care in the performance of the duty imposed and not negligence in relation to the loss suffered".

Even on its own argument, plaintiff confirms that wrongfulness was not pleaded. I say this because failure is not always wrongfulness. Moreover, the definition itself does not assist plaintiff as far as the loss allegedly suffered is concerned, it has to do with breach only as far as context therein is concerned.

As repeatedly stated by the SCA, a negligent omission, unless wrongful will not give rise to delictual liability, see *McIntosh v Premier Kwazulu Natal*¹². More recently in *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd*¹³, explained the requirement of wrongfulness as follows: "Negligent conduct manifesting itself in the form of a positive act causing physical damage to the property or person of another is prima facie wrongful. In those cases, wrongfulness is therefore seldom contentious. Where the element of wrongfulness becomes less straightforward is with reference to liability for negligent omissions and for negligently caused pure economic loss (see eg

¹¹ Precedents of pleading, 8th edition, Pp 353.

¹² (632/07) (2008) ZASCA 62 (29 May 2008).

¹³ 2006 (3) SA 138 (SCA) Brand JA, at 144A-C, para 10.

Minister of Safety and Security v Van Duivenboden 2002 (6) SA 43' 1 (SCA) ([2002] 3 All SA 741) in para [12]; *Gouda Boerdery BK v Transnet* 2005 (5) SA 490 (SCA) ([2004] 4 All SA 500) in para [12)). In these instances, it is said, wrongfulness depends on the existence of a legal duty not to act negligently. The imposition of such a legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms." The learned judge continued at 1441, para 12;

'... when we say that negligent conduct ... consisting of an omission is not wrongful, we intend to convey that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages, his or her negligence notwithstanding. In such event, the question of fault does not even arise. The defendant enjoys immunity against liability for such conduct, whether negligent or not '

Having said that, the Plaintiff's particulars of claim are excipiable for lack of essential averment relating to wrongfulness and/or negligence. These are critical averments ordinarily when a litigant requires relief based on delict. How much more when there are statutory challenges that a litigant has to outline for the relief sought based on the statutes relied on herein and the indemnification from liability assigned to the defendant.

[18] It is important to mention that Plaintiff alleges the dispute between it and the Defendant emanates from 2010 to date. Having regard to section 28 of NEMA which regulates everyone the Plaintiff included, this court has not been placed with averments with regard to the role the Plaintiff has played to avert the loss so alleged from then to date. The plaintiff is not absolved from NEMA's provisions in anyway. It is trite that the Plaintiff always has a duty to mitigate their damages, thus if you fail to prevent the accumulation of loss the Defendant will not be held liable for such loss, see *Maja v SA Eagle Ins Co Ltd*¹⁴

¹⁴ 1990 (2) SA 701(A).

[19] I am not persuaded that the particulars of claim make a case for which relief is sought. Neither do I believe that the action should be dismissed. It is trite that amendments will always be allowed unless the allowance to amend is *mala fide*, or unless such an amendment would cause an injustice to the other side which cannot be compensated by costs. Having perused the papers and heard counsel on behalf of the Plaintiff I find no *mala fide* in the Plaintiff's conduct. It is expected that the Defendant would require justice given the circumstance of this case. I am of the view that there will not be any injustice inflicted upon the Defendant should I allow the Plaintiff to amend its particulars. Even if the Defendant thinks I am wrong in my finding on the injustice part, I believe the cost order will serve as an appropriate compensation taking into regard the circumstances of this case.

[20] As far as to whether the statutes relied upon offer the relief sought for, I have dealt with herein above. For emphasis' sake, only NEMA can be a consideration for the trial court's determination should the Plaintiff be able to amend the particulars of claim to support the claim for the relief sought. The Structures Act and the Constitution does not assist Plaintiff in its pursuit.

[21] Both parties have requested for dismissal of the exception and/or the upholding of the exception with costs respectively. However, the Plaintiff applied for punitive costs. Given my finding herein, I will not engage the punitive costs order request further herein. Anyway, costs are discretionary matter for this court. However, equally the general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See *Myers v Abramson*.¹⁵ I have no finding of misconduct in the matter before me.

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

22.1. The exception is upheld that the particulars of claim does not disclose the cause of action in re: wrongfulness and/or negligence.

¹⁵ 1959 (3) SA 438 (C) at 455.

22.2 The Plaintiff is granted 10 days from date of this order to amend its particulars of claim, failing which the Defendant/Excipient is granted leave to approach court on same papers and/or amended ones for dismissal of the action.

22.3 Plaintiff/Respondent shall pay cost applicable.

R.P MDHLULI
ACTING JUDGE OF THE HIGH
COURT, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on: 19 January 2023

Judgment circulated on: 23 March 2023

For the Defendant/ Excipient: Adv A Liversage SC

Instructed by: Mmakola Matsimela Inc Attorneys

For the Plaintiff/Respondent: Adv A.A Basson

Instructed by: Thomas & Swanepoel Inc Attorneys