SOUTH AFRICA / JUDGMENT

EBJ Mining Construction (Pty) Ltd v Hattingh (42/17) [2017] ZANWHC 91 (23 November 2017)

[2017] ZANWHC 91

COURT
North West High Court, Mafikeng

BEFORE
Gutta

CASE / FILE NUMBER
42/17

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

Reportable:	YES / NO Circulate
to Judges:	YES / NO Circulate
to Magistrates:	YES / NO Circulate to Regional Magistrates: YES / NO “IN THE HIGH COURT OF SOUTH AFRICA” NORTH WEST DIVISION, MAHIKENG CASE NO. 42/17 In
the matter between:	EBJ MINING CONSTRUCTION (PTY) LTD Plaintiff and LEN HATTINGH Defendant

JUDGMENT

GUTTA J.

A.

INTRODUCTION

[1] The defendant filed an exception to plaintiff's particulars of claim on the grounds that the particulars of claim discloses no valid cause of action, alternatively is vague and embarrassing.

B. DEFENDANT'S CASE

[2] The reasons advanced for the exception in defendant's Notice of Exception is the following:

"1. Ad paragraph 2, the defendant is defined as Len Hatting.

2. Further, ad paragraph 4, the plaintiff avers that the sport development facility would be conducted "in a legal person" and that the plaintiff would incur labour and expenses on the aforesaid properties and would be reimbursed for same "by the legal person" in which the sport development facility would be conducted.

3. The plaintiff then further states ad paragraph 5 that:- in the expectation that a valid, binding and enforceable agreement "would come into existence" between the aforesaid parties (referring to the legal person) that the plaintiff incurred the expenses in respect of the aforesaid properties during the period 7 July 2015 to 4 November 2015 in the amount of R 943 244.32.

4. In paragraph 6 the plaintiff then states that no valid and binding agreement was subsequently entered into between any of the aforesaid parties. (Defendant's underlining)

5. The plaintiff then concludes ad paragraph 7:

"in the premise the defendant had been enriched at the plaintiff's expense in the amount of R943 244.32".

6. The plaintiff gives no explanation as to a causal link or nexus between the amounts spent on behalf of a legal person and the enrichment of the defendant.

7. The plaintiff further establishes no cause of action against the defendant.

8. As such, the above renders the particulars of claim vague and embarrassing in the extreme and results in a significant prejudice to the defendant by virtue of his inability to plead thereto".

[3] Counsel for the defendant, Mr Maree submitted that the particulars of claim lacks averments to sustain a cause of action as the particulars of claim do not establish a causal link between the defendant's enrichment and the plaintiff's impoverishment as set out more fully hereinbelow:

"3.1 the plaintiff does not set out in which manner the defendant was enriched at its expense;

3.2 the only reference to expenses are as set out in annexure "A" to the particulars of claim;

3.3 annexure "A" appears to be an untitled list of payments allegedly made;

3.4 the expenses incurred was for and on behalf of the legal entity, no causation between the expenses paid and the alleged enrichment of the defendant (as opposed to the Legal Entity) is established in the particulars of claim;

3.5 annexure "A", for example, contains reference to expenses relating to liquor and meat (See payments under heading August to Liquor City and Meatworld). The remainder of annexure "A" refers to payments to entities and/or persons. It is neither stated nor clear why the said payments enriched the defendant.

3.6 it is not evident from the papers whether or not the legal entity exist;

3.7 the mere allusion to the property of the defendant does not in itself establish causation between unspecified payments made and the defendant's enrichment".

[4] Mr Maree submitted further that the particulars of claim are vague and embarrassing for the following reasons:

"4.1 the statement made by the plaintiff in the particulars of claim that the "defendant has been enriched at the plaintiff's expenses" is vague. The defendant is not able to distill from the particulars of claim a causal link between the plaintiff's impoverishment and the defendant's alleged enrichment. It is not possible to establish why and to what extent the defendant was allegedly enriched at the plaintiff's expense. It is furthermore not clear whether or not the monies paid towards the expenses was indeed towards the defendant, in other words it is not clear whether or not the alleged expenses paid was expenses for which the defendant would have been liable and/or in respect of which he could have been enriched. Therefore the defendant is not able to distill from the particulars of claim a clear, single meaning.

4.2 the defendant is embarrassed by the vagueness of the particulars of claim, in that the defendant is not able to properly formulate and plead to the allegation of enrichment.

4.3 the embarrassment is serious and will cause the defendant prejudice if compelled to plead to the particulars of claim. The plaintiff's claim is premised on enrichment. If the defendant does not know why and to what extent he was allegedly enriched, it is not possible for the defendant to plead to the allegation of enrichment. This will furthermore prejudice the defendant's future defence in that the defendant will be bound by his plea. If the particulars of claim stands as it is, and during trial evidence is lead on behalf of the plaintiff regarding the alleged enrichment with

more specific details

thereto (which details are lacking in the pleading as it is), the defendant will be prejudiced in that he will only then know what case he has to meet. This could result in a postponement of the trial and/or the amendment of the plea. Furthermore the defendant will then have to attempt to obtain evidence in support of his amended plea at a very late stage in a litigation process. This will cause the defendant severe prejudice".

C. PLAINTIFF'S CASE

[5] Counsel for plaintiff, Mr Rossouw submitted that the particulars of claim discloses a cause of action, namely conditio causa data, causa non secuta which is aimed at the recovery of that which was transferred or spent on the defendant's property on the assumption that an agreement would materialize, which never did.

[6] Mr Rossouw relied on the case of Melamed and Another v BP Southern Africa (Pty) Ltd[1] where the court held:

"In Standard Finance Corporation of South Africa Ltd (in Liquidation) v Langeberg Ko-operasie Bpk 1967

(4) SA 686 (A) reference is made to the condictio causa data causa non secuta and to the condictio sine causa, although the name of the condictio, the Court said, was no longer important.

Modern authors seem to favour the condictio indebiti to claim that which was paid pendente condicione: Christie The Law of Contract in South Africa 3rd ed

(1996) at 163 n112; De Wet en Van Wyk Kontraktereg en Handelsreg 5th ed (1992) at 151; Van der Merwe et al Contract: General Principles 1st ed (1993) at 210; Evans-Jones 'The Claim to Recover What Was Transferred for a Lawful Purpose without Contract (Condictio Causa Data Causa Non Secuta)' 1997 Acta Juridica 139 at 146; but see Eiselen and Pienaar Unjustified Enrichment: A Casebook (1993) at

234. Indeed in D 12.6.16 it is expressly said, under the heading De condictione indebiti:

'Sub condicione debitum per errorem solutum pendente quidem condicione repetitur, condicione autem existente repeti non potest.' 'A debt subject to a condition which was paid pending fulfilment of the condition may be recovered, but if the condition has been fulfilled it cannot be recovered.'

(Rough translation by Malan J.)

'The force of a condition is thus: that pending its fulfilment nothing is owed, but when it is fulfilled it is taken as if an unconditional

debt existed from the beginning. If it is not fulfiled no obligation at all ever existed. Thus, pending the fulfilment of the condition no obligation at all is born and the consequence of this is that that which is owed subject to the condition cannot be properly paid, and if it is paid pending fulfilment of the condition, it can be recovered.'

From the above it is clear that payment made pendente condicione may be reclaimed with the condictio indebiti. When the condition is not fulfilled the agreement on which it is based is discharged with retrospective effect and the parties have to restore that which they have performed (Tuckers Land and Development Corporation case supra at 20E--24H). The claim for restoration of both which was paid pendente condicione and which was paid condicione extincta is based on enrichment whatever the nature of the condictio may be. Although it is conceivable that a claim for restoration can be based on contract the cases cited above do not expressly rely on contract. The founding affidavit does not label the remedy or remedies relied upon but contains sufficient particulars to substantiate a claim based on payment made not only pendente condicione but also condicione extincta(whereby the agreement is discharged).

[7] Mr Rossouw relied on the case of Standard Finance Corporation of South Africa Ltd (In Liquidation) v Langeberg Ko – operasie Bpk[2] to submit that if you perform in terms of an agreement that does not become binding and enforceable and the agreement does not realize then what you perform can be claimed with an enrichment action. He submitted that money and labour was spent on the expectation that a sports development facility will be conducted. Mr Rossouw submitted that the causal link does not affect the cause of action and it is not an averment necessary to sustain a cause of action.

[8] Mr Rossouw conceded that annexure “A” was vague but submitted this was not the reason why the parties were before the Court. He submitted further that, although the exception mentions in its introductory part that the pleading is vague and embarrassing, it does not mention it in the grounds of exception. Furthermore, the exception does not even make reference to annexure “A” to the particulars of claim. It simply says that no causal connection is pleaded between the monies spent on behalf of the legal person and the enrichment of the defendant and it says that the particulars of claim contain no cause of action. It does not even say what allegations are lacking to sustain a cause of action. In other words the grounds are not stated clearly and concisely as required by the rule.

[9] Mr Rossouw submitted that Rule 23 was designed to strike at vagueness and embarrassment which affects the whole cause of action pleaded. Thus an exception that the pleading is vague and embarrassing may be taken only when the vagueness and embarrassment strikes at the root of the cause of action as pleaded. If the complaint falls into the category of insufficient particularity, the remedy of the defendant is to plead to the averments made and to obtain the particularity he requires either by means of the discovery/inspection of documents procedure or by means of a request of particulars of trial[3].

D. EVALUATION

[10] In Wille's Principles of South African Law[4], the author said said the condictio causa data, causa non secuta, is aimed at the recovery of money or property which was transferred (in ownership) to another on an assumption (relating to future) which did not materialize. The assumption must relate to the future. Where the assumption is to the past or the present, the action is condictio sine causa specialis[5].

[11] In Pucjlowski v Jonnston's Executors[6], Van den Heever J described causa non secuta and causa finita as;

"The object of condiction is the recovery of property in which ownership has been transferred pursuant to a juristic act which was ab initio unenforceable or had subsequently become inoperative"

[12] In Kudu Granite Operations (Pty) Ltd v Caterna Limited[7] the SCA said the following in relation to the condictio causa data causa non secuta:

"The intention of the parties was frustrated. The situation in which the parties found themselves was analogous to impossibility of performance since they had made the fate of their contract dependant upon the conduct of a third party (KPMG) who was unable and unwilling to perform. In such circumstances the legal consequence is the extinction of the contractual nexus: see De Wet and Van Wyk, Kontraktereg en handelsreg 5 ed vol 1 172 and the authorities there cited. The law provides a remedy for that case in the form of the condictio ob causam finitam, an offshoot of the condictio sine causa specialis. According to Lotz, 9 LAWSA (1st reissue) paragraph 88, the purpose of this remedy is the recovery of property transferred under a valid causa which subsequently fell away. See De Vos, Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg 3ed 65-6, cf Holtshausen v Minnaar

(1905) 10 HGC 50; Hughes v Levy 1907 TS 276 at 279; Snyman v Pretoria Hypotheek Maatschappij 1916 OPD 263 at 270-1; Pucjlowski v Johnston's Executors, op cit. It is sometimes suggested that the condictio causa data causa non secuta is appropriate remedy. See paragraph 85 of LAWSA supra. Indeed in Cantiere San Rocco v Clyde Shipbuilding and Engineering Co. 1923 SC (HL) 105, a case of a contract frustrated by the outbreak of war which made performance legally impossible, the Judicial Committee after an exhaustive consideration found that that was the remedy".

[13] Thus a condictio causa data causa non secuta is an agreement that failed through no fault of the parties which resulted in the one party being enriched. Mr Rossouw submitted that the defendant was enriched because there was an improvement on his property. This is accordingly an enrichment claim and the particular condictio which one invokes is unimportant. The condictio sine causa and condictio indebiti are similar. The common essential allegations in the condictio sine causa, (A pays to B money which is due to C) and condictio indebiti (performance in terms of an invalid contract where invalidity is due to a failure to comply with prescribed formalities), is that the defendant was enriched at the expense of plaintiff and plaintiff was impoverished and the enrichment was unjustified or sine causa[8].

[14] Similarly the essential elements for the condictio causa data causa not secuta for plaintiff's claim is as follows:

1) an agreement failed to materialise without fault from either party;

2) monies was spent on the defendant's property;

3) defendant as owner of the property was enriched at the expense of plaintiff;

4) plaintiff was impoverished; and

5) the enrichment is unjustified or sine causa.

[15] In McKenzie v Farmers' Co-operative Meat Industries Ltd[9] the following definition of 'cause of action' was adopted by the Appellate Division:

> *"....every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to 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".*

[16] Where an exception is taken, the Court must look at the pleading excepted to as it stands: no facts outside those stated in the pleading can be brought into issue. No reference may be made to any other document[10].

[17] When looking at the facta probanda, as pleaded, I am of the view that plaintiff's particulars of claim contains all the elements referred to in paragraph 14 supra, which are necessary to sustain the condictio causa data causa non secuta cause of action. The causal link between defendant's enrichment and plaintiff's impoverishment as per Annexure "A" is relevant in the second ground of the exception dealt with hereinbelow.

[19] An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action (or plea) and not its legal validity[11].

[20] An exception that a pleading is vague and embarrassing will not be allowed unless the excipient will be seriously prejudiced if the offending allegations were not expunged. Thus the ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced. The effect of this is that the exception can be taken only if vagueness relates to the cause of action or defence[12].

[21] The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice. The onus is always on the excipient to show that the pleading in question is excipiable[13].

[22] When adjudicating an exception based on the allegations that the pleading is vague and embarrassing, the applicable test is the following[14]:

(a) In each case the Court is obliged first of all to consider whether the pleading does lack particularity to an extent amounting to vagueness. If 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.

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 caused to him by the vagueness complained of.

c) In each case an ad hoc

ruling

must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient if he is compelled to plead to the pleading in the form to which he objects. A point may be of the utmost importance in one case, and the omission thereof may give rise to vagueness and embarrassment, but the same point may in another case be only a minor detail.

d) the ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced.

[23] In Absa Bank Limited v Baugarten NO. and Others[15] the court said the following regarding claims for unjust enrichment,

"[11] It is generally accepted in our law that four requirements, at the very least, must be met for enrichment liability to arise. Firstly the defendant must be enriched; secondly the plaintiff must be impoverished; in the third place the defendant must be enriched at the expense of the plaintiff; and lastly, the defendant's enrichment must be unjustified or sine causa. (See Glenrand MIB (Pty) Ltd & Others v Van den Heever & Others [2013]1 All SA 511 (SCA).

[12] It is clear from the above requirements that a causal link between the defendant's enrichment and the plaintiff's impoverishment is a sine qua non for enrichment liability insofar as:

"The ultimate issue for the court to determine when considering the question of causation or the 'at the expense of'

requirement in the multi-party situation is whether the defendant has been unjustifiably enriched vis-à-vis the claimant' (See Glenrand MIB (Pty) Ltd supra at paragraph [18])".

[24] I am of the view that the statements made by plaintiff in the particulars of claim that "in the expectation that a valid, binding and enforceable agreement would come into existence between the aforesaid parties, the plaintiff incurred the expenses in respect of the aforesaid properties during the period 7 July 2015 to 4 November 2015 in the amount of R 943 244.32, the particulars of which are set out in Annexure "A", the contents whereof are incorporated herein as if specifically so herein alleged" and the averment that the "defendant has been enriched at the plaintiff's expenses" are vague as it cannot be gleaned from the particulars of

claim that the expenses set out in Annexure "A" were incurred in respect of defendant's properties and that the expenses incurred enriched the defendant.

[25] The fact that the plaintiff incurred expenses as per Annexure "A", in respect of defendant's properties, is insufficient to conclude that defendant was enriched as a result of their expenses. Annuxure "A" consists of several payments made to various businesses and private persons. There is no nexus between the expenses incurred and defendant's enrichment. There is clearly some defect or incompleteness in the manner in which the particulars are set out which in my view is vague and embarrassing[16]. Hence the causal link between plaintiff's impoverishment and defendant's enrichment is not defined which as stated supra, is a sine qua non for enrichment liability.

[26] The particulars of claim are accordingly vague and embarrassing. There are insufficient allegations to support enrichment which in my view strikes at the root of plaintiff's cause of action and is strictly necessary to enable defendant to plead. The embarrassment is in my view serious as to cause prejudice to defendant if he is compelled to plead because plaintiff's

claim is premised on enrichment and if there is no causal link between the expenses incurred and defendant's enrichment then

defendant would not be in a position to plead to the allegation that he was allegedly enriched.

E. ORDER

[27] In the result,

(1) Defendant's exception to plaintiff's particulars of claim on the grounds that it is vague and embarrassing is upheld.

(2) Plaintiff is afforded 10 days to amend its particulars of claim; and

(3) Plaintiff is to pay the costs of the exception.

N. GUTTA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 09 NOVEMBER 2017

DATE OF JUDGEMENT

: 23 NOVEMBER 2017

COUNSEL FOR PLAINTIFF

: ADV A.B ROSSOUW (SC)

COUNSEL FOR EXCIPIENT

: ADV G MAREE

ATTORNEYS FOR PLAINTIFF

: NIENABER & WISSING

ATTORNEYS FOR RESPONDENT

: MAREE & MAREE ATTORNEY

[1] 2000(2) SA 614 at 625 - 627

[2] 1967(4) SA AD

[3] Kalinko v Nisbet and Others 2002(5) SA 766 (WLD) at 780B – 781B

[4] 9th Edition, du Bois et al

[5] Enrichment LAWSA 2 ed vol 9 217 n 4

[6] 1946 WLD 1 at 6 [7] 2003(5) SA 193 (SCA)

[6] 1946 WLD 1 at 6

[7] 2003(5) SA 193 (SCA)

[8] McCarthy Retail Ltd v Short distance Carriers CC 2001(3) SA 482 (SCA); Ambler's Precedents of Pleadings, Sixth Edition, Harms

[9] 1922 AD 16 at 23; Evins v Shield Insurance Co Ltd 1980(2) SA 814 (A) at 838 E – F

[10] Minister of Safety and Security v Hamilton 2001(3) SA 50 (SCA) at 52 G – H

[11] Trope v South African Reserve Bank 1993(3) SA 264 (A) at 269; Venter and Others NNP v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd 2008(4) SA 639 (C) at 643 – 644A.

[12] Levitan v Newhaven Holiday Enterprises CC 1991(2) SA 297 (C) at 298A; Gallager Group Ltd V IO Tech Manufacturing (Pty) Ltd 2014(2) SA 157 (GNP) at 166G – H;Quinlan v MacGregor 1960(4) SA 383 (D) at 393G; Trope v South African Reserve Bank 1992(3) SA 208 (T) at 211B; Francis v Sharp 2004(3) SA 230 (C) at 240E – F; Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd and Another (NO 1) 2010(1) SA 627 (C) at 630B.

[13] Kennedy v Steenkamp 1936 CPD 113 at 115; City of Cape Town v National Meat Supplies Ltd 1938 CPD 59 at 63; Amalgamated Footwear & Leather Industries v Jordan & CO Ltd 1948(2) SA 891 (C) at 893; Lockhat v Minister of the Interior 1960(3) SA 765 (D) at 777A; Kotsopoulos v Bilardi 1970(2) SA 391(C) at 395D – E; Callender-Easby v Grahamstown Municipality 1981(2) SA 810 (E) at 813A; Venter and Others NNO v Barrit; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd 2008(4) SA 639(C) at 645C – D.

[14] Lockhat v Minister of Interior 1960(3) SA 765 (D) at 777A – E; Gallagher Group Ltd v 10 Tech Manufacturing (Pty)lLtd 2014(2) SA 157 GN at 166H – J

[15] A116/2015) [2017] ZAFSHC 111 (29 June 2017) at paragraph [11] and [12]

[16] Trope v South African Reserve Bank 1993(3) SA 264(A) at 268F

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://www.saflii.org/za/cases/ZANWHC/2017/91.html

CASE PAGE https://chat.esheria.ai/case-law/south-africa/ebj-mining-construction-pty-ltd-v-hattingh-unknown-topic-anwhc-2017

Prepared on 25 October 2026 · Esheria