

SOUTH AFRICA / JUDGMENT

NTSU Building (Pty) Ltd v Member of the Executive Council of the Department of Human Settlements, Free State Province (4946/2013) [2023] ZAFSHC 179 (16 May 2023)

[2023] ZAFSHC 179**COURT**

Free State High Court, Bloemfontein

BEFORE

M E Mahlangu

CASE / FILE NUMBER

4946/2013

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA,****FREE****STATE DIVISION, BLOEMFONTEIN****Case****number: 4946/2013****REPORTABLE: YES/NO****OF****INTEREST TO OTHER JUDGES: YES/NO****CIRCULATE****TO MAGISTRATES: YES/NO****In****the matter between:**

NTSU
BUILDING
(PTY)LTD
Excipient
and
THE
MEMBER OF THE EXECUTIVE
COUNCIL
OF THE DEPARTMENT OF
HUMAN
SETTLEMENTS,
FREE
STATE PROVINCE

re:

Respondent
In

THE
MEMBER OF THE EXECUTIVE
COUNCIL
OF THE DEPARTMENT OF
HUMAN
SETTLEMENTS,
FREE
STATE PROVINCE
Plaintiff
and
NTSU
BUILDING (PTY)LTD
1st
Defendant
CITRA
SHINE TRADING 606 CC
2nd
Defendant
SABELE
BUILDING
CONSTRUCTION
CC
3rd
Defendant
MAHLAHLELI
CONSTRUCTION CC
4th
Defendant
CLASSICAL
ORIENTAL TRADING 500 CC
5th
Defendant
TSHENOLELO
BUSINESS ENTERPRISE CC
6th
Defendant
NTLOLANE
CONSTRUCTION CC
7th
Defendant
DILEMOPUMO
CONSTRUCTION
& TRAINING
CC
8th
Defendant

CORAM: M
E
MAHLANGU, AJ

JUDGMENT

BY: M E MAHLANGU, AJ

HEARD ON: 5 MAY 2023

DELIVERED ON: 16 MAY 2023

INTRODUCTION

[1] This is an exception. On 20 January 2023, the first defendant delivered a notice of exception to take exception to the plaintiff's amended particulars of claim in terms of Rule 23(1) of the Uniform Rules of Court. For purposes of this judgement the parties will be referred to as the main action.

FACTS

[2] The plaintiffs allege the following against the first defendant in its amended particulars:

2.1 That the plaintiff had concluded a contract of construction with the other defendants in terms of which inter alia the contractors are to keep relevant information pertaining to the progress made on the construction endeavours.

2.2 That the defendants had breached the terms of the agreement by failing to not only keep proper records, but also by failing to perform in terms of the agreement.

2.3 That the 'various agreements' and decisions related thereto, which included the 'erstwhile building contracts' were reviewed and set aside on 26 August 2019. That the decisions made by the plaintiff to make advance payments to the defendants were declared unlawful.

2.4 That the plaintiff had made payments to the amount of R34,089, 179.20 to the first defendant. That there was no legal, moral or natural obligation to make such payments to the defendant.

2.5 That the payments are made to the defendant is for the building material that the defendant would supply to the second and further defendants for use during the construction process and for low cost housing.

2.6 That the defendants were unjustifiably enriched and that the plaintiff is impoverished.

[3] The first defendant contends that, there is no contractual relationship pleaded between itself and the plaintiff in the whole of the particulars of claim (POC).

THAT THE PLAINTIFF'S CLAIMS LACKS AVERMENTS TO SUSTAIN A CAUSE OF ACTION

[4] The grounds raised by the defendant are formulated as follows:

- "1. The Plaintiff ("the Department" alleges that it concluded written Building Agreements at the dates and places set out annexure '1', and with the parties set out in column 3 to Annexure "A" (appended to the Particulars of Claim- "the POC";.
2. The parties set on in column 3 of annexure "A" are purportedly the Second and further Defendants to this action.
3. The Plaintiff does not allege that it concluded such an Agreement with the First Defendant ("Ntsu").
4. The Plaintiff has failed to append - in substantial compliance with the Uniform Rules of Court - the written agreements upon which it relies.
5. The Plaintiff sets out - in paragraph 12 - the salient terms of these written agreements it had with the Second and further Defendants, without incorporating any reference to any obligation or right bestowed upon or befalling Ntsu.
6. In paragraph 13, the Department then alleges that the Second and further Defendants had breached the terms of the agreement and the grounds mentioned therein.
7. Paragraphs 14 and 15 of the POC also does not incorporate any reference to Ntsu.
8. The Plaintiff the alleges that this court had set aside "various agreements" (without particularising and specially stating that it was the agreements mentioned in paragraph 11 of the POC) and "decisions related thereto, which included the erstwhile building contracts"
9. The plaintiff then pleads that the payments referred to in paragraphs 18 and 19 "formed part of the various agreements and/or decisions which were reviewed and set aside."
10. Paragraph 17 then records that the building contracts concluded between the Department and the Second and further Defendants "were thus invalid ab origine".
11. The first reference to Ntsu is made in paragraphs 18 to 22. Paragraph 18 records that the whole amount claimed in this action was paid to Ntsu on 17 December 2010 and that Ntsu had made payment of an amount of R500,000.00, on behalf of the Department, to the Fifth Defendant.
12. Paragraphs 18 and 19 do not record any vinculum juris between the Department and Ntsu as serving the basis for such payments. This of course must be read with the preceding paragraphs of the POC, and where the Department had failed to plead any nexud between it and the First Defendant as far as the contracts there pleaded are concerned.
13. Paragraph 21 records that the payments had apparently been made upon the factual existence of certain assumptions. The closest approximation

to the pleading of any original (later declared invalid) nexus between the making of the payments on the part of the Department to Ntsu, is made in paragraph 21.1. There the Department pleads that the amount therein mentioned was paid to the First Defendant "... in that building material to the value of R34,089,179.20 will (sic) be supplied by the first defendant on behalf of the DHS to the second, third, fourth, fifth, sixth, seventh and eighth defendants for the construction of low cost housing" and, in paragraph 21.2, that "The payment in respect of building material would be legally payable by the DHS to Ntsu, and/or", in paragraph 21.3, that "The payments made to the fifth defendant would be legally payable by the DHS."

19. It would seem thus a fortiori for the Department that it pleads it had made payment to Ntsu for building material that Ntsu would supply to the Second and further Defendants for use during the construction process and for the low-cost housing for which the Second and further Defendants were appointed to construct.
20. In paragraphs 22 and 23, the Department simply pleads that "The assumptions" (set out in para 21) "proved to have been incorrect and false thereafter " Without any further elaboration. And in paragraph 23, it is pleaded that the Department's decision (and not any underlying contract) to make advance payments were declared as unlawful, reviewed and set aside. it is pleaded that these payments were those referred to in paragraph 18 and 19.
21. On the basis that the Department then claims from Ntsu in enrichment, this is done on the back of the apparent declaration by the court of the decision as being unlawful. But nowhere is it pleaded that the building material for which Ntsu was liable had in fact not been delivered or that the executive action following upon the administrative one (which was the decision) and in terms of which the Department made such payments to Ntsu had also been declared unlawful and set aside, *ex tune* or otherwise.
22. Absent such averments, the Plaintiff cannot make a case against Ntsu on the basis of enrichment, nor can it properly quantify a claim in enrichment as being the whole of the amount that was apparently paid out and that is now claimed. Cardinal to this is an allegation - Ntsu contends - that Ntsu had failed to either deliver the building material to the Second or further Defendants or had failed to deliver all material.
23. The Plaintiff also cannot, in law, base a claim upon enrichment on the back of an allegation that payments that were made were fruitless and wasteful, and unauthorised."

DISCUSSIONS

- [5] The exception test is whether a pleading is vague and embarrassing or an intelligible cause of action can be ascertained. If the answer is in the negative, the plaintiff's claim need to be dismissed and if the answer is in the positive, the defendants' exception need to be dismissed. It should further be determined whether the plaintiff's particulars of claim have been formulated with the necessary clarity to enable the first defendant to know what case to meet. In this matter the first defendant contends that, the plaintiff's particulars of claim do not disclose a cause of action against it.

- [6] Pleadings must be read as a whole and no paragraph can be read in isolation. An exception is procedural means to avoid the leading of unnecessary evidence at the trial.
- [7] From the consideration of the particulars of claim and the exception, the crisp issues for determination are whether there was a concluded agreement between first defendant and the plaintiff, whether the first defendant failed to deliver according to the terms of the agreement, and whether the first defendant was enriched due to the payment made to it by the plaintiff.
- [8] The plaintiff alleged in paragraph 18 of the particulars of claim that, an amount of R34 089 1799.20 was paid to the first defendant. The plaintiff further alleged that the first defendant made a payment of R500 000.00 to the fifth defendant. The first defendant argued that, the first reference to the first defendant in the POC was mentioned in paragraph 18. That there is nothing pleaded by the plaintiff indicating what had either caused these payments or from what these payments had truly stemmed. Paragraph 26 states that, the payments referred to in 'Paragraph 18 and 19 formed part of the various agreements and/o decisions which were reviewed and set aside'. It is my view that the attachment of the order granted on 26 August 2019 would make it clear for the first defendant to plead to the POC. The first defendant should also be clarified on the content of the order relating to the payment made to it. To mention that the agreement/decisions were set aside is not sufficient.
- [10] The plaintiff further alleges that as a result of the payments made to the first defendant, the first defendant has been unjustifiably enriched and the plaintiff has been impoverished. It is the first defendant's contention that, the defendant was not impoverished because in the plaintiff's own POC there is no allegation that the defendant had not supplied the building materials to the other defendants.
- [11] The plaintiff contends that, the payments were made to the defendant without valid cause and they therefore need to be repaid back to the plaintiff. The plaintiff referred to the following four requirements to satisfy a claim of enrichment being:
- 11.1 That the defendant must be enriched;
- 11.2 That the plaintiff must be impoverished;
- 11.3 That the enrichment must be at the expense of the plaintiff;
- 11.4 That the enrichment must be justified
- [12] The defendant submitted that, the enrichment claim by the plaintiff is based on a vacuum because there are no allegations in the POC that the defendant had not supplied the building materials.

LEGAL PRINCIPLES

- [13] The following are two major grounds of exception:

13.1 The pleading fails to disclose a cause of action or defence;

13.2 The pleading is vague and embarrassing.

[14] 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... with sufficient particularity to enable the opposite party to reply thereto."

[15] The object of a pleading is to define issues between the parties. It is to enable each side to come to trial prepared to meet the case of the other and not to be taken by surprise.

Pleadings must therefore be lucid and logical and in an intelligible form and the cause of action or defence must clearly appear from the factual allegations made.

[16] In *Troppe*[1] McCreath J said the following in respect of pleadings:

"Rule 18(4) of the Uniform Rules of Court provides that 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, with sufficient particularity to enable the opposite party to reply thereto. 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 requirements that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not to 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." (my emphasis).

[17] In *Buchner*[2] De Klerk J stated as follows:

"... It is fundamental to the judicial process that the facts have to be established. The Court, on the established facts, then applies the rule of law and draws conclusions as regards the rights and obligations of the parties and gives judgement. A summons which propounds the plaintiff's own conclusions and opinions instead of the material facts is defective. Such a summons does not set out a cause of action. It would be wrong if a Court were to endorse a plaintiff's opinion by elevating it to a judgement without first scrutinising the facts upon which the opinion is based." (my emphasis)

[18] The onus of showing that a pleading is excipiable rests upon the excipient.

[19] The excipient has a duty to persuade the court that upon every interpretation which the pleading can reasonably relies, no cause of action is disclosed.

[20] In *Jowell*[3] Heher J summarized the general principles to be borne in mind when considering exception:

- "(a) minor blemishes are irrelevant;
- (b) pleadings must be read as a whole; no paragraph can be read in isolation;
- (c) a distinction must be drawn between the fact probanda, or primary factual allegations which every plaintiff must make, and the facta probantia, which are the secondary allegations upon which the plaintiff will rely in support of his primary factual allegations. Generally speaking, the latter are matters for particulars for trial and even then are limited. For the rest, they are matters for evidence.
- (d) only facts need be pleaded; conclusions of law need not be pleaded;
- (e) bound up with the last-mentioned consideration is that certain allegations expressly made may carry with them implied allegations and the pleading must be so read."

[21] In Mosothokazi[4] Van Der Linde J similarly and very succinctly set out the principles applicable to exceptions, as follows:

"[4]The first principle is that exceptions are there to weed out unmeritorious causes, whether claims or defences. They are not there to exact perfection in pleading.

[5] The second principle is that in considering whether a pleading is excipiable, the pleading must be viewed from the perspective of every reasonable interpretation that it can bear. Unless thus viewed the pleading remains vague and embarrassing, the exception cannot succeed.

[6] The third principle is that an exception on the basis that the pleading is vague and embarrassing needs to strike at the pleadings as a whole, and not only certain paragraphs, before it will succeed.

[7] The fourth principle is that a plaintiff need only set out the framework of its cause of action in its particulars of claim; evidence is not required to be pleaded."

[22] Finally, in Ocean[5] Ponnann JA restated the duty of an excipient:

"Since these are proceedings on exception, Old Mutual has the duty as excipient to persuade the court that upon every interpretation which the plea can reasonably bear, no defence is disclosed. The main purpose of an exception is to avoid the leading of unnecessary evidence. By the nature of exception proceedings, the correctness of the facts averred in the plea must be assumed. Because Old Mutual chose the exception procedure -instead of having the matter decided after the hearing of evidence at the trial- it had to show that the plea is (not may be) bad in law." (my emphasis)

[23] The aforesaid authorities set out the general principles applicable to pleadings. Counsel for both parties have also referred me to several authorities that enabled me to come to make a decision in this matter. In the present matter, the excipient's complainant is that the particulars of claim do not set out a cause of action. In McKenzie[6] the Appellant Division defined "cause of action" as follows:

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

[24] In Jowell supra at page 9138-G it was stated that:

"(T)he plaintiff is required to furnish an outline of its case. This does not mean that the defendant is entitled to a framework like a crossword puzzle in which every gap can be filled by logical deduction. The outline may be asymmetrical and possess rough edges not obvious until actually explored by evidence. Provided the defendant is given a clear idea of the material facts which are necessary to make the cause of action intelligible, the plaintiff will have satisfied the requirements."

[25] In Luke M Thembani[7] it was stated that:

"Whilst exception provide a useful mechanism 'to weed out cases without legal merits', it is nonetheless necessary that they be dealt with sensibly. It is where pleadings are so vague that it is impossible to determine the nature of the claim or where pleadings are bad in law in that their contents do not support a discernible and legally recognized cause of action, that an exception is competent. The burden rests on an excipient, who must establish that on every interpretation that can reasonably be attached to it, the pleading is excipiable. The test is whether on all possible readings of the facts no cause of action may be made out, it being for the excipient to satisfy the Court that the conclusion of law for which the Plaintiff contends cannot be supported on every interpretation that can be put upon the facts."

[26] It is stated in Mckelvey[8] that:

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

[27] In Vermeulen[9] it was stated that:

"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 plaintiff and any document upon which his or her cause of action maybe based, the claim is (not maybe) bad in law".

[28] The prejudice which justifies an exception is if the allegations in the particulars of claim are such that the defendant is unable to plead properly.

[29] Returning to this matter, no specific facts have been pleaded to substantiate the allegations of the payments made in paragraph 18 and 19. As it has been alluded to above, the fact that the decisions to make the payments have been reviewed and set aside does not make the clarity of the claim to go away, especially because the court order is not also attached to the POC.

[30] I am also of a view that, the plaintiff could have attached the agreements entered into between the defendants even though it is

alleged that they were reviewed and set aside to enable the first defendant to plead to it.

[31] I am also of a view that the claim of unjustified enrichment is not sufficiently pleaded to enable the first defendant to plead to it. It is not clearly quantified. It is not clear if the whole amount paid to the first defendant should be repaid to the plaintiff. It is not clear from the POC if the first defendant has ever delivered the building material to other contractors or not. I am not convinced that the plaintiff had complied with the requirements of enrichment

as mentioned herein above.

ORDER

[32] In the result I make the following order is made:

1. The exception of the first defendant is upheld;
2. The plaintiff is granted leave to amend the particulars of claim, if so advised, within 30 days of this order.
3. The plaintiff shall pay costs of the exception.

E MAHLANGU, AJ

Counsel for Plaintiff: Adv Snellenburg SC Adv I Macakati Attorneys for Plaintiff: Phatshoane Henney Inc LE Companie PHI Building 35 Markgraaf Street WESTDENE BLOEMFONTEIN Ref: DEP52-PH/0006/LEC/evc Counsel for the 1st Defendant: Adv S Grabler SC Coetzees Inc c/o Honey Attorneys Honey Chambers Kenneth Kaunda Road Northridge Mall Bloemfontein Tel: 051 403 6600 Email: bianca@honeyinc.co.za Ref: 134185/BM JONES/mj

[1] Trappe v South African Reserve Bank and Another and Two Other Cases 1992(3) SA 208 (T) at 210F-H

[2] Buchner v Johannesburg Consolidated Investments Company Limited 1995 (1) SA 215 (T) at 216H-J.

[3] Jowell v Bramnell Jones and others 1998 (1) SA 836 (W) at 903A-B

[4] Mosothokazi Share Trust & others v Broll Auctions and Sale (Pty) Ltd & Another, In re: v Broll auctions and Sale (Pty) Ltd & Another v Mosothokazi Share Trust & Others (29772/2015) [2016] ZAPGPJHC 111 (13 May 2016) at paras [4] to [7].

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- [5] Ocean Echo Properties 327 CC and another v Old Mutual life Assurance Company (South Africa) Limited 2018(3) SA 405 (SCA) at para [9]
- [6] McKenzie⁶ v Farmers' Co-operative Meat Industries LTD 1922 AD 16 at 23.
- [7] Luke M Thembani and others v President of the Republic of South Africa (case no 167/2021) [2020] ZASCA 70 at para 14
- [8] Mckelvey v Cowan NO 1980(4) SA 525(2) at 526D-E
- [9] Vermeulen v Jooste Valley Investments (Pty) ltd 2001 (3) SA 986 (SCA) at 997
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