

SOUTH AFRICA / JUDGMENT

# Phungo Incorporated v Thembisile Hani Local Municipality (4809/2019) [2023] ZAMPMHC 5 (15 February 2023) [2023] ZAMPMHC 5

## COURT

Middelburg High Court, Mpumalanga

## BEFORE

Langa

## CASE / FILE NUMBER

4809/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION (MIDDELBURG LOCAL SEAT)

CASE

NO:4809/2019

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED

Date:

15/02/2023

In

the matter between:

PHUNGO

INCORPORATED

APPLICANT

And

THEMBISILE

HANI LOCAL MUNICIPALITY

FIRST RESPONDENT

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**JUDGMENT**

LANGA J:

**Introduction**

- [1] On 01 November 2019 the defendant raised an exception in which it seeks the striking out of the plaintiff's particulars of claim on two grounds. The defendant contended that the plaintiff's particulars of claim do not disclose a cause of action in that the plaintiff did not allege that it performed the services rendered in terms of a mandate and that the amount claimed was agreed upon by the parties. The first ground of exception is therefore that the plaintiff did not plead that it completed the work in terms of the mandate and the second is that the plaintiff has failed to show that the amount claimed is as per agreement between the parties in terms of the mandate the plaintiff is relying on.

**Factual matrix**

- [2] It is common cause that on 3 May 2018 the defendant instructed the plaintiff to render legal services in respect of the investigation of alleged unauthorized, irregular or fruitless and wasteful expenditure for the financial year 2012/2013 and 2017/2018 as uncovered by the Auditor General during the audit of the defendant in respect of the above mentioned periods. The estimated cost of the investigation was R154 000.00 which did not include disbursements such as travelling expenses, printing etc. the latter costs would be paid on presentation on a monthly basis. The estimated amount was based on the assumption that the investigation will be completed in 5 working days.
- [3] The instructions to the plaintiff also provided that the acceptance of the instruction by the plaintiff was subject to the acceptance of internal fee structures/tariffs specified. On 12 June 2018 the defendant accepted the terms of the mandate letter by the plaintiff save for the caveat that

*“any additional work that may result in additional costs above the estimated figure of R154 000.00 (excluding VAT) must be authorised prior to them being incurred.”*

- [4] On 25 June 2018 the plaintiff addressed a letter to the defendant setting out the summary of their investigations carried out to date together with the estimated fees for consideration and approval. The plaintiff annexed a statement of account amounting to R534 479.06 including disbursements. This is the amount the plaintiff is claiming in the summons.
- [5] The defendant contends that it never approved the amounts estimated and sued upon by the plaintiff as in its letter dated 12 June 2018 to the plaintiff it stated that any amount above the agreed amount of R154 000.00 should be authorised before being incurred. The defendant further contended that the plaintiff has failed to allege in the particulars of claim that it had provided the defendant with a report other than the letter dated 25 June 2018 referred to above in which the plaintiff seeks approval of the estimated amount of R499 000.00 as

professional fees for the completeion of the investigation.

- [6] On 24 November 2020 the defendant filed a notice of exception as stated above. The defendant essentially contended that te plaitiff failed to allege in the particulars of claim that performance was done in terms of the mandate and thatbthe amount claimed is as per agreement between the parties. It is on this basis that the defendant seeks the dismissal of the action by the plaintiff.
- [7] The plaintiff on the other hand submitted that there exists a cause of action as the particulars of claim show that the claim if based on a contract. The plaintiff contended further that its letter of instructions from the defendant received on 15 May 2018 authorising the plaintiff to investigate the iunauthorized or fruitless expenditure. It submitted therefore that from 15 May 2018 to 12 June 2018 it performed investigations as instructed in the initial letter of instruction by the defendant. the plaintiff contended therefore that this work perofrmed was not subject to approval as stated in the signed mandate dated 13 June 2018.
- [8] Rule 23 of the Uniform Rules of Court which deals with exceptions in applications to strike out 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 apply to the registrar to set it down for hearing within 15 days after the delivery of such exception: Provided that—
    - (a) where a party intends to take an exception that a pleading is vague and embarrassing such party shall, by notice, within 10 days of receipt of the pleading, afford the party delivering the pleading, an opportunity to remove the cause of complaint within 15 days of such notice; and
    - (b) the party excepting shall, within 10 days from the date on which a reply to the notice referred to in paragraph
    - (a) is received, or within 15 days from which such reply is due, deliver the exception.
- [9] I will deal with the first leg of the defendant's argument that the plaintiff failed to plead that the claim is based on the mandate. It is not clear what the baisis of this argument is as in the particulars of claim the plaintiff clearly alleges that the investigative procedures it conducted had been undertaken in the execution of the mandate. It is therefore not correct that the particulars of claim lack the necessary averments to sustain a cause of action in this regard. Whether or not there was a proper mandate is, however, a matter of evidence. Therefore, the exception in so far as it is achored on this ground should be dismissed.
- [10] The second leg of the exception is that the palintiff fails in the particulars of claim to show that the amount of R534 479.06

claimed by the plaintiff was approved by the defendant as it constituted additional fees above the fees of R154 000.00 agreed

upon. Once again this averment is incorrect for two reasons. The first is that in the particulars of claim the plaintiff does allege

that it

*“forwarded its statement of account for all the fees and disbursements that it had incurred in attending to the defendant’s brief.*

The total amount claimed was R534, 749.06.” It cannot therefore be said that the particulars of claim are devoid of the necessary averments in respect of the amount owed. In any event the defendant does not deny that there was a mandate. Whether the plaintiff is entitled to claim R154 000.00 or R534 479.06 is a matter of evidence. On this score I also find that the defendant’s exception falls short.

[11] I must pause to mention here that it is strange that, while in the notice of exception the defendant seeks the striking out of the particulars of claim and that the plaintiff be afforded time to amend the same, however, in argument the defendant prays for the exception to be upheld and the action dismissed.

[12] It is trite that the defendant as the excipient has the duty to persuade the court that upon every interpretation which the particulars of claim can reasonably bear, no cause of action is disclosed. If the defendant fails in this regard, the exception ought not to be upheld. See *Theunissen v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) at 500E–F; *Lewis v Oneanate (Pty) Ltd* [1992] ZASCA 174; 1992 (4) SA 811 (A) at 817F; *First National Bank of Southern Africa Ltd v Perry NO* 2001 (3) SA 960 (SCA) at 965C–D.

[13] In conclusion it is my view that in the light of the above, the court has not been persuaded that the particulars of claim do not disclose a cause of action. In my view the exception should be dismissed with costs.

Order

[14] In the result I make the following order:

The exception is dismissed with costs.

MBG LANGA

JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff: Advocate Ms N Ndlovu

For the Defendant: Advocate MS Manganye

This judgment was handed down on 15 February 2023 at 10h00.

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Prepared on 13 October 2026 · Esheria