

SOUTH AFRICA / JUDGMENT

Qubeka v Anglogold Ashanti Limited (37336/12) [2014] ZAGPJHC 70 (4 April 2014) [2014] ZAGPJHC 70

COURT

South Gauteng High Court, Johannesburg

BEFORE

Francis

CASE / FILE NUMBER

37336/12

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IN

**THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
LOCAL DIVISION, JOHANNESBURG)****Case****No:37336/12**

Date:

4 April 2014

In

the matter between:

BIYANA

BENSON

QUBEKA.....Plaintiff/Respondent

and

ANGLOGOLD

ASHANTI

LIMITED.....Defendant/Excipient

JUDGMENT

FRANCIS J

Introduction

1. The plaintiff has instituted an action for damages against the defendant - AngloGold Ashanti Limited a gold mining company

after he had contracted silicosis whilst employed by the defendant. The claim is founded on a breach by the defendant of a legal duty to ensure that he would not be exposed to conditions in the mine owned by the defendant at which he was employed that might unduly endanger his health and/or constitute a contravention of the Mines and Works Act 27 of 1956 (the MWA) and the Occupational Diseases in Mines and Works Act 78 of 1973 (ODIMWA) regulations. The plaintiff alleges that the defendant is liable for the damages suffered as a result of the silicosis.

2. The defendant has delivered an exception to the plaintiff's particulars of claim in terms of rule 23(1) of the Uniform Court Rules (the Rules) on the basis that they are vague and embarrassing, alternatively lack averments necessary to sustain a cause of action. The defendant has also delivered an application in terms of rule 30(1) to set aside the plaintiff's particulars of claim on the basis that it is an irregular step because it lacks the particularity required by rule 18(4). Certain of the grounds of exceptions overlap with the complainants under the rule 30(1) notice.
3. The defendant had initially raised 9 exceptions and 5 complaints under rule 30(1). However it is only persisting with the

second, third, fifth, sixth and eight exceptions and with the third and fourth rule 30(1) complaints. The third complaint is similar to the fifth exception and the fourth complaint is similar to the sixth exception.

The relevant legal principles

4. It is trite that there is often a substantial overlap between exceptions based on a vague and embarrassing complaint, and those

applicable to an application under rule 30(1) relating to the lack of particularity required by rule 18(4). The principles applicable to the two procedures are different. The two procedures are not mutually exclusive. Where a plaintiff's pleadings do not comply with the requirements of rule 18 in that, for instance, the specific particulars are not set out therein, and are also vague and embarrassing, the defendant will have a choice whether to proceed in terms of rule 30 read with rule 18 or in terms of the rule 23 exception procedure. A defendant is entitled to bring both procedures in the alternative.

5. 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, defence or answer to any pleading, with sufficient particularity to enable the opposite party to reply thereto.
6. It is 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 abolition of requests for further particulars of pleading and 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; and the cause of action or defence must appear clearly from the factual allegations made.
7. The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed and this fundamental principle can only be achieved when each party states his case with precision.
8. The principles applicable to an exception based on no cause of action differ from one based on a vague and embarrassing complaint.

Similarly, the principles applicable to an exception based on a vague and embarrassing complaint differ from those relevant to an application under rule 30(2)(b) relating to the particularity as required by rule 18(4).

9. A party may except to a pleading on the grounds that it is vague and embarrassing. Where an exception to a pleading is brought on the ground that it is vague and embarrassing, it involves a two-fold consideration, the first being whether the pleading lacks particularity to the extent that it is vague and the second whether the vagueness causes embarrassment of such a nature that one is prejudiced. This prejudice lies in the excipient's inability properly to prepare to meet the opponent's case.
10. Where a pleading lacks particularity, it is either meaningless or capable of more than one meaning or can be read in any one of a number of ways. Where a court upholds an exception which alleges that the pleading is vague and embarrassing, leave to amend is generally granted to the party which produced the excipiable pleading.
11. The approach to be adopted where a matter involves a complaint that a pleading is vague or embarrassing and hence is excipiable or in non-compliance with rule 18(4) was identified in *Jowell v Bramwell – Jones & Others* 1998(1) SA 836 (W) at 905 H - I as follows:

11.1 the question must firstly be asked whether the exception goes to the heart of the claim, and

11.2 if so, whether it is vague and embarrassing to the extent that the defendant does not know the claim he has to meet, and

11.3 should he find that an exception on any ground fails, to then ascertain in the second place whether the particulars identified by the defendant are strictly necessary in order to plead and, if so, whether the material facts are unequivocally set out.

12. The purpose of an exception that a pleading does not disclose a cause of action is to dispose of the case, as pleaded, in whole or in part. In order to disclose a cause of action, a pleading must set out every fact (material fact) which it would be necessary for the party to prove, if traversed, in order to support his right to judgment of the court. A pleading which fails to meet this standard is therefore excipiable. The excipient has the duty to persuade the court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed.

The exceptions and complaints

The second exception

13. In paragraph 1.2 of the plaintiff's particulars of claim, the plaintiff alleges that he was employed by the Vaal Reefs Mine (the mine) from 1992 to 2002, which is a period of 10 years. Thereafter, and throughout the plaintiff's particulars of claim, the plaintiff adopts the phrase 'at material times' with reference either to the knowledge of the defendant or of events that may have occurred and in respect of which the plaintiff relies on. Examples thereof are to be found in paragraphs 2.1.3, 3.2, 5.1, 5.2, 6.1, and 6.3 of the particulars of claim. The plaintiff's use of the phrase 'at all material times' encompasses an extensive period of at least 10 years. The defendant contended that the employment of such a phrase throughout the plaintiff's particulars of claim renders the particulars vague and embarrassing as it is unclear when during this extensive period the defendant had the knowledge alleged by the plaintiff or when the events alleged to have taken place by the plaintiff in fact occurred.
14. The plaintiff's claim is in delict arising from the duties of the defendant as employer to the plaintiff as employee. The plaintiff has pleaded a period of ten years of employment. The use of the phrase 'at all material times' is an unambiguous reference to the entire ten year period of employment. There is nothing vague or embarrassing and this exception is ill-founded.

The third exception

15. In paragraphs 4.1, 4.2, 4.3, and 4.6 of the particulars of claim, the plaintiff alleges that the defendant knew or ought to have knowledge of certain facts during the plaintiff's employment at the mine. The facts relied upon by the plaintiff range in knowledge in relation to the risks of contracting silicosis to the employment of measures to reduce the contracting silicosis to certain discriminatory practises allegedly employed by the defendant. It is contended that once again the plaintiff's employment ranged a period of some 10 years and in the absence of greater particularity as to when the defendant acquired such knowledge during this period or when it embarked upon such discriminatory practices, the plaintiff's particulars of claim are vague and embarrassing.

16. The complainant is that the plaintiff has failed to specify when during the period of ten years of employment the defendant acquired knowledge or embarked on discriminatory practices. The allegations in paragraphs 4.1, 4.2, and 4.6 of the particulars of claim is that it was during the period the plaintiff's employment. This is a clear and an unambiguous reference to knowledge held and discriminatory practices conducted throughout the entire period of the plaintiff's employment. There is no reference in the particulars of claim to the acquisition of such knowledge or commencement of such practices during the period. The particulars of claim are neither vague nor embarrassing and this exception is also ill-founded.

The fifth exception and third complaint

17. In paragraphs 4.4 of the plaintiff's particulars of claim, the plaintiff alleges that during his employment at the mine which was over the period 1992 to 2002, the defendant was required by law to comply with a number of regulations promulgated under the MWA regulations. In paragraph 4.5 of the plaintiff's particulars of claim, the plaintiff alleges that during his employment at the mine the defendant was required by law to comply with regulation 4.1 of the regulations promulgated under the ODIMWA Regulations. In paragraph 5.4.1 of the plaintiff's particulars of claim, the plaintiff alleges that the defendant owed the plaintiff a legal duty to ensure that he would not be exposed to conditions on or in the mine that might constituted a contravention of the MWA and/or ODIMWA Regulations. In paragraph 6.3. of the plaintiff's particulars of claim, the plaintiff alleges that in breach of the legal duty, the defendant wrongfully failed to comply, alternatively to ensure compliance with the standards embodied in the MWA and/or ODIMWA Regulations. It is stated that the plaintiff has failed to specify precisely in what respects the MWA and/or ODIMWA Regulations were not complied with by the defendant; when these regulations were not complied with and who on behalf of the defendant failed to comply with these regulations.
18. It was contended that the plaintiff's particulars of claim are vague and embarrassing alternatively they are irregular in terms of rule 30(1) on the basis that they lack the requisite particulars required by rule 18(4).
19. This exception is directed at allegations of wrongfulness. This is directed at allegations in paragraph 4.4 and 4.5 of the duty to comply with regulations, not to expose the plaintiff to conditions contrary to the regulations and an allegation of the failure to ensure compliance with the standards embodied in the regulations. The complaint is a failure to specify the respects on which the regulations are not complied with, when the regulations were not complied with and the identities of personnel of the plaintiff who did not comply with the regulations. Paragraph 6.3 clearly identifies the factual averments detailing respects upon which the plaintiff relies for its conclusion of a failure on the part of the defendant. It is further clear from reading the particulars of claim as a whole that the plaintiff is alleging con-compliance throughout the entire period of his employment. The identity of the personnel, managers or board of the defendant, whether known or identified by the

plaintiff, are irrelevant to the pleaded cause of action and furthermore do not prevent the defendant from pleading sensibly thereto.

20. This exception does not meet the test for vague and embarrassing and should fail. The same applies to the complaint which is not irregular and it does not lack the requisite particulars required by rule 18(4).

The sixth exception and fourth complaint

21. The defendant stated that in paragraphs 5.1 and 5.2 of the plaintiff's particulars of claim, the plaintiff alleges that

the defendant inter alia performed routine medical examinations and x-rays on the plaintiff, monitored the health of the plaintiff, designed and implemented systems relating to the control of dust at the mine, established dust control policies for the mine and monitored dust levels extant on the mine. In paragraph 6.3.2 of the plaintiff's particulars of claim, the plaintiff alleges that the defendant failed to implement the measures described in paragraph 4.2 of his particulars of claim. However, in paragraph 4.2 of the plaintiff's of claim, the plaintiff alleges that the risks of contracting inter alia silicosis, could be materially reduced by inter alia: monitoring the levels of respirable free silica dust on the mine by using methods and systems that produced reliable and valid results and reacting appropriately to such results; providing for medical examination of all miners, using suitable methods, equipment and x-ray materials to detect emerging lung impairment. It was stated that having regard to paragraph 4.2, read with paragraph 6.3.2, of the particulars of claim, it is unclear whether the plaintiff alleges that the steps taken by the defendant in paragraphs 5.1 to 5.3 were not adequate and, if so, in what respects. The plaintiff moreover does not allege the dust control policies allegedly established by the defendant for the mine were deficient or were not complied with by the defendant and what the dust levels monitored on the mine reveal. It was contended that the plaintiff's particulars of claim vague and embarrassing and excipiable. They are confusing and uncertain and they lack particularity and are irregular on the basis that they lack the requisite particulars.

22. The complaint in this exception and objection is that the particulars are unclear whether or not the steps pleaded in paragraphs 5.1 to 5.3, taken by the defendant were adequate and if inadequate in what respects. Paragraphs 5.1 to 5.3 contain the allegations of the steps taken by the plaintiff. The allegations in paragraphs 4.2.2 and 4.2.9 allege what amounts to the reasonable standards of being employed by the defendant which conduct is to be judged as a wrongful breach of a duty in delict. None of the allegations of the defendant's conduct alleged in paragraphs 5.1 to 5.3 of the particulars of claim go so far as to allege full compliance with the standards pleaded in paragraphs 4.2.3 and 4.2.9.
23. The particulars of claim allege in paragraph 6.3.2, a failure to implement the measures described in 4.2 of the particulars of claim is quite clearly an allegation that notwithstanding the conduct pleaded in 5.2 to 5.3, this conduct falls short of the standard pleaded in 4.2.3 and 4.2.9. The allegations in paragraph 5.1 to 5.3 are not a contradiction of paragraph 6.3.2. All these paragraphs are capable of being read together as consistent. The import of paragraph

6.3.2 of the particulars of claim is that the defendant failed to meet the standards alleged in paragraphs 4.2.3 and 4.2.9.

24. In my view, there is sufficient information pleaded for the defendant to plead sensibly thereto. The defendant can either dispute the standards alleged in 4.2.3 and 4.2.9 or raise an issue that its conduct, either as alleged in paragraphs 5.1 to 5.3 or supplemented by further allegations, met the standard alleged in 4.2.3 and 4.2.9 or met some other alternative standard put forward by the defendant as the minimum standard for duty of care. The exception similarly fails to meet the test for vague and embarrassing and should fail. The complaint suffers the same fate.

The eight exception

25. The defendant stated that the plaintiff has in paragraph 5.4 of the particulars of claim alleged inter alia that in the light of section 39(2) of the Constitution, the defendant owed the plaintiff a legal duty to ensure that he would not be exposed to conditions on the mine that might unduly endanger or imperil his health and/or constitute a contravention of the MWA and/or ODIMWA regulations and to perform the functions set out in paragraphs 5.1 and 5.2 with reasonable skill and care. The Constitution took effect on 4 February 1997. The plaintiff was employed by the mine between the period 1992 to 2002. In the result, the plaintiff's reliance on the provisions of the Constitution so it was contended in respect of the period prior to 4 February 1997 is bad in law.
26. In this exception, the defendant draws attention to the allegation in paragraph 5.4 of the particulars of claim alleging that there exists a duty, in the light of section 39(2) of the Constitution not to endanger or impair the health of the plaintiff. The complaint draws attention to the fact that the plaintiff's period of employment terminated prior to the enactment of the Constitution. The complaint overlooks that paragraph 5.4 relies, for the standard of care pleaded in paragraphs 5.4.1 and 5.4.2, on the facts alleged in paragraph 4 as read with paragraphs 5.1 to 5.3, in addition to the constitutional injunction to develop the common law. The various provisions in the Bill of Rights being a right against unfair discrimination, right to human dignity, a right to life, a right to bodily integrity and a right to an environment not harmful to health and wellbeing are not values alien to the common law of delict. These values are not introduced by the Constitution into South African jurisprudence for the first time in 1997. The Constitution merely entrenched these common law values against future legislation that might permit their erosion. The interpretation of wrongfulness according to such values in relation to conduct prior to the enactment of the Constitution is not impermissible. Even if the

allegations in paragraph 5.4 were to be read without any reference to the Constitution and such references pro non scripto the paragraphs alleged nonetheless disclose a cause of action in delict. Absent any reference to the Constitution, this is sufficient allegations to support a duty not to endanger or impair the health of the plaintiff. This exception does not meet the requirement that, upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed.

27. The exceptions and complaints stand to be dismissed. There is no reason why costs should not follow the result.

28. In the circumstances I make the following order:

28.1 The exceptions and the rule 30 application are dismissed with costs, including the costs of two counsel.

HIGH COURT JUDGE

FOR PLAINTIFF: J PETER SC WITH G GOEDHART

INSTRUCTED BY GARRAT MBUYIS

NEALE ATTORNEYS

FOR DEFENDANT : DM FINE SC WITH AWT ROWAN

INSTRUCTED BY EDWARD NATHAN

SONNENBERGS INC

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