

SOUTH AFRICA / JUDGMENT

Royal Bafokeng Resources (Pty) Ltd and Others v Bambatha Engineering and Mining Services (Pty) Ltd and Others (2266/2020) [2022] ZANWHC 48 (2 June 2022)

[2022] ZANWHC 48

COURT

North West High Court, Mafikeng

BEFORE

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CASE / FILE NUMBER

2266/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION – MAHIKENG

Reportable:

YES / NO

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to Judges:

YES / NO

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to Magistrates: YES / NO

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to Regional Magistrates:

YES / NO

CASE

NO: 2266/2020

In

the matter between:

ROYAL
BAFOKENG RESOURCES (PTY) LTD 1ST
PLAINTIFF
RUSTENBURG
PLATINUM MINES LTD 2ND
PLAINTIFF
ROYAL
BAFOKENG PLATINUM MANAGEMENT 3RD
PLAINTIFF
SERVICES
(PTY) LTD
BAFOKENG
RASIMONE MANAGEMENT SERVICES 4TH
PLAINTIFF
(PTY)
LTD
AND
BAMBATHA
ENGINEERING AND MINING 1ST
DEFENDANT
POOGI
CONSULTANTS (PTY) LTD
2ND
DEFENDANT
LEKA
MONAMA
3RD
DEFENDANT
JOHANNES
PETRUS PRINSLOO 4TH
DEFENDANT
ARTHUR
RAMOLEFE DIKOLE
5TH
DEFENDANT
THORISO
JACQUELINE MODINGOANE 6TH
DEFENDANT
PAPI
WILLIAM MOTETE
7TH
DEFENDANT
OUPA
JACOB KOMANE
8TH
DEFENDANT
MICHAEL
DAVID ADONIS
9TH
DEFENDANT
RUDOLPH

CHRISTOPHER PHILLIS 10TH
DEFENDANT
NEW
SEASON CAPITAL (PTY) LTD
11TH
DEFENDANT
MOHLOLI
PROPERTY MANAGEMENT & SERVICES 12TH
DEFENDANT

Heard: 28 APRIL 2022

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses.
The date for the hand-down is deemed to be on 02 JUNE 2022
ORDER
1.
The exception by the third and fourth Defendants is dismissed.
2.
The third and fourth defendants are ordered to pay the costs of the application which costs shall include costs of two counsel.

JUDGMENT

DJAJE J

[1] In the action instituted by the plaintiffs against the defendants only the third and the fourth defendants filed exceptions against the plaintiffs' particulars of claim. For the sake of avoiding to repeat the plaintiffs' claim the two applications were heard together.

[2] The plaintiffs' claim against the defendants is stated as follows in the particulars of claim:

"5 The Mining Services Agreement and Certain Payments

5.1 On or about 13 July 2017 the First and Second Plaintiffs published a request for proposals (the invitation to tender, also called the RFP)

5.2 Six days after the tender was published Phillis was appointed a director of Bambatha (on or about 19 July 2017).

5.3 The terms of the tender requested proposals from suppliers of mining services to provide Bord and Pillar mining services on level 600 of the Stydrift Mine to the First and Second Plaintiffs with a view to concluding a mining services contract between the successful tenderer and the First and Second Plaintiffs.

5.4 The closing date for the RFP was 27 July 2017.

5.5 Bambatha paid Dikole the sum of R50 000 from its FNB account, account number 62551017835 on or about 25 October 2017.

5.6 Within a month of Bambatha having paid Dikole, Bambatha concluded the Bord and Pillar Mining Services agreement that had been contemplated in the RFP ('the mining services agreement')

5.7 The mining services agreement was concluded with Bambatha by First and Second Plaintiffs represented by the Third Plaintiff at Rustenburg on or about 20 November 2017. A copy is attached as "111113P5" from which the Identity of Bambatha's representative in concluding the agreement appears.

5.8 Within four days of Bambatha concluding the mining services agreement it made a payment of R50 000 to Mohioli Properties

on or about 24 November 2017,

5.9 Bambatha made a further payment of R200 000 to Mohioli Properties on 26 June 2018.

5.10 Bambatha made a further payment of R850 000 to Mahioli Properties on 24 July 2018

5.11 Bambatha made a further payment of R91 000 to New Season Capital (of which Adonis is the sole director) on 25 July 2018.

5.12 On the following day New Season Capital paid over R75 000 to the Modingoane, at the time she was an assistant accountant in the employ of the Plaintiffs and the romantic partner of Motete, who at the time was the Trade Union Coordinator.

5.13 The payments listed above were all bribes or gratifications intended by Bambatha to enable it to secure and/or retain the mining services agreement and the benefits flowing from that agreement to it from First and Second Plaintiffs.

5.14 Bambatha made other payments of bribes or gratifications in cash or via other payment methods to one or more of the Defendants.

5.15 The Plaintiffs reserve their rights to add to the list of payments of bribes or gratifications made when same come to light through discovery or otherwise.

6 The Conspiracy to Defraud

6.1 At a date and place to the Plaintiffs unknown prior to the conclusion of the mining services agreement, a conspiracy to defraud the Plaintiffs was formed by all the Defendants on dates and In locations to the Plaintiffs unknown when one or more of the Employee Defendants agreed with one or more of the Contractor Defendants, and/or one or more of the Bambatha Director Defendants and/or one or more of the Intermediary Defendants with Bambatha to enable Bambatha to:

6.1.1 induce the First and Second Plaintiffs to conclude and perform a

mining services agreement to be concluded with Bambatha; and/or

6.1.2 be paid by First and Second Plaintiffs pursuant to a mining

services agreement to be concluded with Bambatha; and/or

6.1.3 make payments directly or Indirectly by to the Employee Defendants as inducement or reward for enabling Bambatha as per 6. 1.1 and/or 6.1.2 above;

6.1.4 conceal from the Plaintiffs one or more of these intentions and their carrying out; In consideration for one or more of which Bambatha would from time to time pay gratification(s) (also known as bribes) as inducements or rewards directly or indirectly to one or more of the Defendants.,('the Conspiracy").

7 The Fraud Inducing the Mining Services Agreement

7.1 Prior to the conclusion of the mining services agreement the Defendants failed to disclose to the Plaintiffs that Bambatha had paid or intended to pay directly or indirectly gratifications or bribes to one or more of the Employee Defendants to secure and retain the mining services contract for Itself ('the Misrepresentations").

7.2 The misrepresentations:

7.2.1 were to the knowledge of the Defendants false;

7.2.2 were made by the Defendants' made with the intention of prejudicing the Plaintiffs; and

7.2.3 Induced the Plaintiffs to conclude the mining services agreement

whereas had Plaintiffs known they truth (that Bambatha had paid or intended to pay directly or indirectly gratifications or bribes to one or more of the Employee Defendants to secure and retain the mining services contract for itself) they, the Plaintiffs would not have allowed the mining services agreement to be concluded with Bambatha.

8 Contravention of PRECCA

8.1 By their participation in the Conspiracy and/or the fraud Inducing the

mining services agreement by menas of the misrepresentations the Defendants contravened section 3 of the Prevention and Combating of Corrupt Activities Act, 12 of 2004 ("PRECCA") because Bambatha and/or the Bambatha Directors gave or offered to give, and one or more of the other Defendants accepted or agreed to accept, a gratification In order to Influence the Employee Defendants to act to:

8.1.1 abuse their positions of authority;

8.1.2 breach their trust; and

8.1.3 breach of one or more of their legal duties owed to the Plaintiffs

to the unjustified advantage of Bambatha at the Plaintiffs' expense;

8.2 By their participation in the Conspiracy and/or the fraud inducing the mining services agreement the Defendants further contravened:

8.2.1 section 10 of PRECCA as they gave, or offered, and the Employee Defendants accepted or agreed to accepted, an unauthorised gratification for the Employee Defendants' benefit in order to influence the Employee Defendants to act as pleaded above;

8.2.2 section 12 of PRECCA as Bambatha and/or the Bambatha Director Defendants gave or offered, and the Employees Defendants accepted or agreed to accept, a gratification in order to, and as a reward for, improperly influencing the promotion, execution or procurement of the Bord and Pillar Contract and/or fixing the pricing stipulated in the contract to the advantage of Bambatha at the Plaintiffs' expense to act as pleaded above, and

8.2.3 section 13 of PRECCA as Bambatha and/or the Bambatha Director Defendants gave or offered, and the Employees Defendants accepted or agreed to accept, a gratification to induce the employees to, on behalf of the Plaintiffs, conclude the contract with Bambatha to act as pleaded above.

9 Contraventions of POCA

9.1 By their participation in the Conspiracy and/or the fraud inducing the mining services agreement the Defendants contravened:

9.1.1 sections 4, 5 and 6 of the Prevention of Organised Crime Act, 121 of 1998 ("POCA") as Bambatha and/or the Bambatha Directors, Mohloll Properties, New Season Capital and/or Poogi engaged In arrangements or transactions to conceal or disguise the source of the funds received from the First and Second Plaintiffs, such funds having been paid to the Employee Defendants by Bambatha directly or indirectly in .execution of the Conspiracy and/or the Fraud (the 'predicate offence') accordingly amounted to money laundering" and "money laundering activities" as defined in section 1 of the Financial Intelligence Centre Act, 38 of 2001."

- [3] The third defendant filed an exception on the basis that the particulars of claim fail to disclose cause of action against him. According to the third defendant the plaintiffs in the particulars of claim refer to "the employee defendants" and thus it is not clear who is being referred to. The only allegation against the third defendant or reference in the particulars of claim is that he was employed by the fourth plaintiff and that he is no longer in the employ of the fourth plaintiff.
- [4] It is the defendant's case that the plaintiff has failed to plead that he owed any duty of care nor statutory duty to the plaintiffs in the particulars of claim. The third defendant argued that the agreement was with the first defendant and he was not a party to such contract. As such there is no link between him and the plaintiffs except that he was employed by the fourth plaintiff. He therefore had no duty towards the first and second plaintiffs.

- [5] It was submitted that the plaintiffs' claim is also based on fraud that the defendants participated in a conspiracy to defraud the plaintiffs. However no sufficient allegations are set out that the third defendant agreed or made common purpose with the other participants in the conspiracy. Further that the amount claimed was as a result of any loss suffered by the plaintiffs and that the liability to pay the amount claimed was caused by the wrongful conduct of the third defendant.
- [6] The third defendant argued that there are no allegations in the particulars of claim how he induced the plaintiffs to enter into and award the tender to the first defendant. As a result there is no cause of action disclosed in the particulars of claim and the third defendant is unable to plead thereto.
- [7] The fourth defendant's exception is also on the basis that the particulars of claim fail to disclose a cause of action. The same argument as the third defendant is made by the fourth defendant. In that the only allegation made against the fourth defendant in the particulars of claim is that he was employed by the fourth plaintiff and is no longer in the employ of the fourth plaintiff. There is no allegation made against the fourth defendant except the reference to 'employee defendants' or 'all the defendants' in the particulars of claim. Both defendants argued that the mining service agreement was with first and second plaintiffs, the fourth plaintiff who was their employer is not part of the agreement. As such there is no link between them and the agreement.
- [8] In contention the plaintiffs argued that firstly this matter is about criminal activities and not a contractual matter. The plaintiffs argued that the defendants as former employees of the fourth plaintiff accepted bribes from their co-defendants or the first defendant to induce the first and second plaintiffs to conclude a mining service agreement with the first defendant, be paid by the first and second plaintiffs and make payment directly or indirectly to the employee defendants as a reward for enabling the first defendant. The plaintiffs' case is that they are unable to make all the necessary averments and require the justice system to obtain all the evidence against all the defendants including the third and fourth defendants.
- [9] The plaintiffs argued that their claim is based on the principle of aquilian liability and seek to be compensated for the loss suffered as a result of the wrongdoing by the defendants acting jointly. Therefore in the particulars of claim they have pleaded the cause of action that the conduct of the wrongdoers was intentional nor merely negligent. Again that the defendants all participated to a fraud against the plaintiffs and thus attracting delictual liability

on their part.

- [10] It is the plaintiffs' case that the fourth plaintiff is cited in this action as part of the Royal Bafokeng Platinum Ltd group of companies and engaged directly or indirectly in the mining operations of the Styldrift platinum mine. The mining service agreement concluded with the first defendant was for the Styldrift mine. The third defendant was employed by the fourth plaintiff as a Mine Manager at Styldrift. As well, the fourth defendant was employed by the

fourth plaintiff as a Production Manager at Styldrift. This is how the third and fourth defendants are cited in this action. It was argued further that the third defendant also signed the mining service agreement on behalf of the first and second plaintiffs and the fourth defendant managed the contract.

- [11] The court in *Colonial Industries Ltd v Provincial Insurance Co Ltd* 1920 CPD 627 at 630 stated as follows in relation to exception that:

“Now the form of pleading known as an exception is a valuable part of our system of procedure if legitimately employed: its principal use is to raise and obtain a speedy and economical decision of questions of law which are apparent on the face of the pleadings: it also serves as a means of taking objection to pleadings which are not sufficiently detailed or otherwise lack lucidity and are thus embarrassing.”

- [12] The onus rests on the excipient to show that the particulars of claim disclose no cause of action. See: *Amalgamated Footwear & Leather Industries v Jordan & Co Ltd* 1948 (2) SA 891 (C).
- [13] The issue in this matter is whether the plaintiffs’ particulars of claim disclose a cause of action to enable the third and fourth defendants to plead thereto.
- [14] It is alleged in the particulars of claim that the defendants conspired to defraud the plaintiffs and induced the first and second plaintiffs to conclude and perform a mining services agreement with the first defendant. Further that the defendants failed to disclose to the plaintiffs that the first defendant had paid or intended to pay directly or indirectly bribes to one or more of them in order to secure the contract. It is true as argued by the third and fourth defendants that the particulars of claim do not contain any clear allegation against them and only refer to employee defendants or defendants.
- [15] The claim by the plaintiffs in this matter is not based on contract but on delict. The plaintiffs seek to be compensated for the loss suffered as a result of the conduct of the defendants. The principle in relation to the difference between damages based on contract and delict was stated in the case of *Trotman v Edwick* 1951 (1) SA 443 (A) as follows:
- “A litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues on (sic) delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him....”*
- [16] The plaintiff correctly argued that it is settled in our law that delict of economic loss for fraudulent or negligent misstatement has crystallised. In this matter as there is no contractual relationship between the plaintiffs and the defendants, the action is purely based on the loss suffered. In the particulars of claim the plaintiffs have pleaded how the loss was suffered and that it is all the defendants who contributed to that loss. On whether there are clear allegations against the third and fourth defendants is a matter of evidence which cannot be contained in the particulars of claim. On this issue the plaintiffs referred to

the case of Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd 1992 (2) SA 608 (W) where the court held that:

“Pragmatically therefore the most expedient course would be to defer a decision on the sufficiency of the respondent’s averment until the final affidavits in this matter have been filed. No prejudice will be suffered by any of the third parties if this course is followed. If it finally appears that, notwithstanding its further investigations, the respondent is not able to make averments sufficient to sustain any claims against these third parties it will have failed against these parties in any event.”

- [17] The plaintiffs allege that there was conspiracy by the defendants that induced the plaintiffs to conclude a mining service agreement with the first defendant. The plaintiffs should be allowed to investigate the role of the third and fourth defendants, if there is no evidence against them, clearly the action will be dismissed against them and they will be entitled to costs. At this juncture in determining this exception, the issue is whether there is a cause of action which the defendants can plead to and indeed there is. The particulars of claim in this matter contain concise statement of the material facts relied upon by the plaintiffs against both the third and fourth defendants. Those facts are that the defendants, including the third and fourth, conspired to defraud the plaintiffs.

Costs

- [18] The awarding of costs is in the discretion of the court. The plaintiffs in this matter have succeeded. In my view there is no reason why a cost order should not be made against the third and fourth defendant. It was submitted that a punitive cost order be made against the said defendants on the basis that the exception was a delaying tactic and with no merit. I am not persuaded that the conduct of the defendants was vexatious and as such a cost order on a normal scale is justified. The defendants exercised their rights to try and establish if there is a case to meet. Even though they are unsuccessful I am not persuaded that they acted with malice. It was further argued by the plaintiffs that the defendants should be liable for the costs of the previous appearance, however there is no merit in that argument as the court clearly ordered that there will be no order as to costs.

Order

- [19] Consequently, I make the following order:
1. The exception by the third and fourth Defendants is dismissed.
 2. The third and fourth defendants are ordered to pay the costs of the application which costs shall include costs of two counsel.

J T DJAJE

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE OF HEARING: 28

APRIL 2022

DATE OF JUDGMENT: 02

JUNE 2022

COUNSEL FOR THE APPLICANT: ADV A SUBEL SC

COUNSEL FOR THE RESPONDENTS: ADV L MORRISON SC

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