

SOUTH AFRICA / JUDGMENT

Smit v Sidepoint Trading In re Sidepoint Trading v Smit and Others (446/2017) [2022] ZAMPMBHC 73 (19 September 2022) [2022] ZAMPMBHC 73

COURT

Mbombela High Court, Mpumalanga

BEFORE

Greyling-Coetzer

CASE / FILE NUMBER

15/2021

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IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)

CASE NUMBER: 15/2021

- (1) REPORTABLE: YES / NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED.

In the matter between:-

THE SEFISO SEKUYA EMBILI AGRICULTURAL COOPERATIVE

(Registration Number: 24322A/2014/019158/24)

Plaintiff/Respondent

and

AKWANDZE AGRICULTURAL FINANCE (PTY) LTD Defendant/Excipient

JUDGMENT

GREYLING-COETZER AJ

INTRODUCTION

- [1] The plaintiff instituted action against the defendant, seeking re-instatement of the Job Fund Project for the establishment of 53 hectares of sugar cane, re-instatement of the grant of R4,3 million and the re-instatement of a loan in respect of the Job Fund Project.
- [2] The defendant filed an exception to the plaintiff's particulars of claim, setting out nine grounds of complaint founded on 3 bases:- (1) the particulars of claim is vague and embarrassing and/or (2) does not disclose a cause of action and/or (3) does not comply with Rule 18(6).

BACKGROUND

- [3] Although the run-up to the exception seems to be common cause it is necessary to briefly deal therewith.
- [4] Summons was served on the defendant on/or about 10 February 2021, whereafter the first- to fourth defendants (in the main action) entered appearances to defend the action on 23 February 2021.
- [5] On/or about 19 March 2021 the defendant caused a notice of intention to except, requiring the plaintiff to remove the causes of complaint, to be served on the plaintiff.
- [6] On 14 April 2021 the plaintiff served a reply to the defendant's notice of exception and a notice of intention to amend its particulars of claim. Eight days later, and on 26 April 2021 the plaintiff prematurely served an amended particulars of claim.
- [7] On 28 April 2021 the defendant served a notice of objection to the intended amendment by the plaintiff.
- [8] On 7 May 2021 the plaintiff served a reply to the defendant's objection in terms of Rule 28(3) in which it withdrew the intended amendment, and served a new notice of intention to amend its particulars of claim.
- [9] On/or about 20 May 2021 the defendant served a notice of objection to the plaintiff's second intended amendment. Not receiving an application to amend, nor a new notice of intention to amend, the defendant on 4 June 2021 caused its notice of exception in terms of Rule 23(1) to be served on the plaintiff. Said exception was opposed by the plaintiff on 10 June 2021, resulting in the matter before court.
- [10] After the delivery of the exception and plaintiff's notice of opposition the plaintiff delivered a further notice of intention to amend dated 8 July 2021. On 21 July 2021 the defendant again filed a notice of objection to this amendment.
- [11] No application to amend followed pursuant to said objection.

APPROACH TO EXCEPTIONS

General

- [12] The approach to exceptions is trite. A defendant in an action is entitled to be protected against having to incur expenses in defending an action which does not contain averments that could sustain a cause of action.[1]
- [13] An exception complains of a defect which is inherent in the pleading, and the purpose is to weed out cases with no legal merit. Accordingly it is directed at the disposal of a case, either in whole or in part, where no cause of action has been disclosed. An exception such is in the present matter must go to the root of the claim, and therefore dispose of the leading of evidence at trial.[2]
- [14] When an exception is taken, the court must look at the pleading excepted to as it stands.[3] No facts outside of those set out in the pleading can be considered, and the allegations of fact relied upon in the pleading must be taken to be correct.[4]
- [15] It is generally accepted and adopted by the Appellate Division that a “cause of action” is that as defined in the matter of *McKenzie v Farmers’ Cooperative Meat Industries Ltd*[5] as follows:-

“... Every fact which 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] In suitable cases legitimate inferences can be drawn as to the meaning of the particulars, and by implication the necessary averments can be supplied.[6] While the court should endeavour to look benevolently instead of over-critically at a pleading, it should not be pushed that benevolence to the length of upholding a declaration or particulars of claim, which as it stands, discloses no cause of action, by altering its language, by reading into it what is not there, and ignoring what is, and by thus making for the plaintiff a cause of action he has not himself put up.[7]

Exceptions: vague and embarrassing

- [24] Rule 23(1) provides that an exception may be taken against a pleading on the grounds that it is vague and embarrassing. Such an exception strikes at the formulation of the cause of action and not its legal validity.[8]
- [25] A pleading may be vague if it fails to provide the degree of detail necessary in a particular case to inform the other party of the case being advanced.[9] The typical prejudice which justifies an exception is if the allegations in the particulars of claim are such that the defendant is unable to plead properly.[10]

[26] The question is whether “the embarrassment is, or is not, so serious as to cause prejudice to the excipient if he is compelled to plead to the paragraph in the form to which he objects”. The evaluation of prejudice is a factual enquiry, and is a question of degree. The decision must necessarily be influenced by the nature of the allegations, their content, the nature of the claim and the relationship between the parties.[11]

Exceptions : no cause of action

[28] As stated in McKelvey v Cowan NO[12]:

“It is a first principle in dealing with matters of exception that, if evidence can be led which can disclose a cause of action alleged in the pleadings, 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.”

[30] In Vermeulen v Goose Valley Investments (Pty) Ltd[13] Marais JA it was stated that:

“[7] 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 a plaintiff and any document upon which his or her cause of action may be based, the claim is (not may be) bad in law.”[14]

PLAINTIFF’S PARTICULARS OF CLAIM

[17] Under the heading “CAUSE OF ACTION” the plaintiff pleads as follows:-

“

5.

On about 10 June 2020 an agreement between the plaintiff represented by Judith Mhlongo and the defendant, represented by Dave Thomson was entered into at Malelane the terms of which were as follow:

5.1. The defendant approved a Job Fund Grant of R4 300 000.00 and a loan of R1 378 000.00 for the establishment of 53.00 hectares of sugar cane subject to certain conditions accepted by the plaintiff;

5.2. Defendant started to implement the agreement with the appointment of the plaintiff as the main contractor in the a (sic) funds project for the establishment of 53 hectares of sugar cane and defendant invited tenders for the supply and installation of pivotal irrigation for this project;

5.3. The grant of R4.3 million was to be provided by the defendant to the plaintiff to be applied to the above purpose;

5.4. A loan of R1 378 000.00 was to be provided by the defendant to the plaintiff of which the funds were to be utilized for the purpose mentioned in 5.1 above.

6.The defendant’s written confirmation that the above was approved is annexed hereto as annexure ‘SSE1’. As shown in this annexure the material conditions to the approval were:

- 6.1. The loan was repayable in 12 monthly instalments of R285 458.00 or 20% of the proceeds from the sugar cane crops that were to be established;
- 6.2. A first cession was required to have been lodged with the mill against the plaintiff's sugar cane proceeds;
- 6.3. The loan was to be activated with the first draw down within 6 months from the 10th of June 2020;
7. The above conditions, along with all other conditions set out in 'SSE1' were accepted by the plaintiff and formed part of the agreement that came into between the parties as set out above.
8. The defendant had on the 11th of October 2020 unilaterally repudiated the agreement without good reason to do so.
9. The abrupt repudiation by the defendant has prevented the plaintiff from meeting the term to the agreement mentioned in 6.3 above.
10. Specific performance was demanded from the defendant in writing on the 7th of December 2020 as per the letter annexed hereto as annexure 'SSE2'.
11. To date hereof the plaintiff's demand has not been complied with.

WHEREFORE the plaintiff claims:

1. That the defendant re-instates the Job Fund Project for the establishment of 53 hectares of sugar cane as approved on 10 June 2020 and continues to implement it;
2. The re-instatement by the defendant of the grant of R4,3 million in respect of the above project;
3. The re-instatement by the defendant of the loan in respect of the above project;
4. That the defendant pays the cost of suit;
5. Further or alternative relief."

THE PARTIES' COMPETING CONTENTIONS

- [18] The approach and arguments by the parties is passing each other like ships in the night. The defendant contends and founds its argument thereon that the particulars of claim has never been amended. The plaintiff on the other hand seems to contend that the court should consider the exception having regard to the proposed amendment dated July 2021. In this respect the plaintiff sought that where reference is made to the amended particulars of claim, it should read the proposed amended particulars of claim.

- [19] In this respect and employing the principle set out in *Salzmann v Holmes*,^[15] a court must look at the pleading excepted to as it stands, and no facts outside those stated in the pleading can be brought into issue, except in the case of inconsistency. A court is directed to look at the pleading excepted to as it stands.^[16]
- [20] I can accordingly not head the argument by the plaintiff that consideration ought to be had to the proposed amended particulars of claim. Until such time as the amendment has been authorised by court, as envisaged in Rule 28 the only particulars before court (and the one excepted to) is the original.
- [21] No facts outside of those set out in the pleadings can be considered, and the allegations of fact relied upon in the pleadings must be taken to be correct.^[17] Similarly the facts and circumstances set out in the various documents headed “Plaintiff’s reply to Defendant’s notice of Exception” and “Plaintiff’s reply to Defendants Objection in term of Rule 28(3)” can play no role in the adjudication of the excipiablity or not of the particulars of claim.
- [22] There are no provision in either Rule 23 or Rule 28 for such replies as delivered by the plaintiff. I was also not referred to any authority in support of such replies. There content is irrelevant of the purpose of the exception.
- [23] It is on this basis that I proceed to adjudicate upon this exception.

First ground of complaint

- [24] The first ground of complaint is directed at paragraph 5 of the particulars of claim. In paragraph 5 (as quoted above) the plaintiff alleges its cause of action to be founded on an agreement. The defendant argues that in doing so, the plaintiff has materially failed to comply with the requirements of pleading an agreement as stated in Rule 18(6). More particularly that the plaintiff failed to comply with the rule as it did not plead whether the contract was written or oral, where the contract was concluded, and to the extent that the contract is written, failed to annex a copy thereof to the particulars of claim.
- [25] In this respect the defendant relied on *Moosa and Others NNO v Hassam and Others NNO* 2021 (2) SA 410 (KZP) at par [19] where it was held that the failure to annex a written agreement relied upon to the particulars of claim, causes a “link in the plaintiff’s chain of causes of action to be missing”.
- [26] It was further contended on behalf of the defendant that an exception on this basis has been previously been upheld the matter of *Roberts’ Construction Co Ltd v Dominion Earthworks (Pty) Ltd* and Another 1968 (3) SA 255 (A).
- [27] Other than referencing that paragraph 5 to 9 of the proposed amended particulars of claim reflect the agreement relied upon by the plaintiff, nothing further was argued in this respect.
- [28] Rule 18(6) which determines as follows:-

“A party who in his pleadings rely upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.”

[29] This ground of complaint is upheld.

Second ground of complaint

[30] The second ground of complaint is directed to paragraph 5.1 of the particulars of claim, wherein the plaintiff pleads that a grant and loan were approved “subject to certain conditions accepted by the plaintiff”.

[31] It was argued that the plaintiff relies on an agreement, which agreement is subject to “certain terms”, but fails to plead the nature and extent of these conditions, and also fails to plead whether they were fulfilled or complied with. With reference to the work by Harms[18] it was contended that it is trite that when a plaintiff relies on a contract which is subject to conditions, such plaintiff is obliged to allege and prove, not only the conditions, but also that the conditions had been fulfilled.

[32] In amplification the court was referred to the matter of Kate’s Hope Game Farm (Pty) Ltd Terblanche Hoek Game Farm (Pty) Ltd 1998

(1) SA 235 (SCA) at 241, where it was held as follows:-

“This means that not only must an appellant prove the agreement, but also that it is enforceable. The appellant had to prove non-fulfillment of the condition mentioned, i.e., that the remaining members of the association had not given their consent to the respondent’s

intention to press for the give and take fence now under discussion. The rule is that the litigant, whether the plaintiff or the

defendant, relying on a contract that is subject to a condition must plead and prove the condition and its fulfilment (Pillay v Krischner and Others 1947 AD 946 at 952; Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd 1963 (1) SA 632 (A) at 644G-H)”

[33] Absent a challenge in this respect, the defendant’s argument prevails and this ground of complaint is upheld.

Third ground of complaint

[34] The defendant contends that the plaintiff in paragraph 7 of the particulars of claim pleads that the conditions set out in annexure “SSE1” were accepted by the plaintiff.

[35] Annexure “SSE1”, in the introductory paragraph, states the following:-

“We have pleasure in advising you that a job’s fund grant of R4 300 000.00 and a loan of R1 378 000.000 for the establishment of 53 hectares of sugar cain, has been approved under the following conditions, read in conjunction with the loan terms and conditions pertaining to this loan:...” (own emphasis)

- [36] It was argued that the plaintiff's failure to properly plead the agreement as discussed under the first ground of complaint, and the conditions as discussed under the second ground of complaint, together with the content of annexure "SSE1", causes the particulars of claim not only to be vague and embarrassing, but not to disclose a cause of action.
- [37] Again no relevant argument was directed in rebuttal.
- [38] This ground of complaint is upheld as the acceptance of the conditions, which conditions are not specifically pleaded is similarly not pleaded with any accuracy in order to enable the defendant to plead thereto.

The fourth ground of complaint

- [39] The defendant contends that the plaintiff in paragraph 3 on page 2 of annexure "SSE2" to the particulars of claim, refers to a "Loan agreement between the borrower signed by the borrower on 7 February 2020". Said annexure "SSE2" is a letter addressed to the defendant from the plaintiff's attorneys of record, which is incorporated into the particulars of claim under paragraph 10, to be a letter of demand.
- [40] The complaint relates thereto that the particulars of claim does not disclose whether this loan is the same agreement that forms the subject matter of the third ground of complaint. If it is not, and so the argument goes, the exact same issues raised in the third ground of complaint apply in respect of this loan agreement signed on 7 February 2020. As in the previous instance, no specific argument was addressed in this regard on behalf of the plaintiff.
- [41] Consequentially its unavoidable that this causes the particulars of claim to be vague so as to cause embarrassment. This ground of complaint is upheld.

Fifth ground of complaint

- [42] It is complained that in paragraph 5.2 of the particulars of claim the plaintiff refers to a contract being an appointment of the plaintiff in the position of a main contractor in the relevant project. Again the plaintiff failed to plead a contract in compliance with Rule 18(6).
- [43] Paragraph 5.2 is a sub-paragraph of the cause of action as pleaded under paragraph 5, and states that:-

"The defendant started to implement the agreement with the appointment of the plaintiff as the main contractor in the a Funds Project for the establishment of 53 hectares of sugar cane and defendant invited tenders for the supply and installation of pivotal irrigation for this project."

- [44] From the pleading before court it is unclear if this agreement referred to is the agreement ostensibly pleaded under paragraph 5, or whether this constitutes a secondary agreement, alternatively whether the plaintiff was so appointed in terms of a different contract.
- [45] The ground of complaint is upheld.

Sixth ground of complaint

[46] Under the sixth ground of complaint the defendant contends that in paragraph 6.2 of the particulars of claim, reference is made of a cession, but no proper cession has been pleaded by the plaintiff, nor is a copy thereof annexed to the particulars of claim.

[47] Paragraph 6.2 reads as follows:-

“A first cession was required to have been lodged with the mill against the plaintiff’s sugar cane proceeds;..”

[48] From the totality of paragraph 6 it is unclear whether this condition of cession was adhered to. For as far as the plaintiff, through the pleading set out in paragraph 6.2, merely sought to set out that this cession was to be a condition, compliance therewith ought to have been pleaded in specific terms.

[49] The manner of pleading causes the particulars of claim to be vague and embarrassing, and the complaint ought to be upheld.

Seventh ground of complaint

[50] The defendant contends that in paragraph 8 of the particulars of claim the plaintiff pleads that the defendant repudiated the agreement, but fails to plead the applicable terms of the agreement, how and when, and represented by whom, the defendant committed this repudiation, any terms of the alleged agreement that deal with the breach and repudiation and compliance therewith by the plaintiff – this resulting therein that the plaintiff’s particulars of claim is vague and embarrassing, does not contain the averments which are necessary to sustain a cause of action, and is devoid of compliance with the rules of court.

[51] In the present matter it appears that the plaintiff does not rely on the repudiation for the purposes of cancellation. As such, it is not required to allege and prove the repudiation of a fundamental term of the agreement, the election by the plaintiff to terminate and communication of the election.

[52] The plaintiff does not expressly deal with its election in this respect. At first glance we would have expected said rejection to be addressed in what the plaintiff terms “demand for specific performance” as per annexure “SSE2”. However, at close scrutiny of said annexure, it appears that the content of ‘SSE2’ does not align with such a demand. That being so the plaintiff did not plead a cancellation based on repudiation.

[53] This ground of complaint cannot be sustained.

Eight ground of complaint

- [54] It is alleged that the plaintiff pleads in paragraph 9 of the particulars of claim that as a result of the repudiation, it was prevented from meeting the term of the agreement mentioned in paragraph 6.3. On this basis it was argued that the plaintiff failed to plead facts supporting the contention that performance was impossible, and importantly when and how it attempted to comply with the alleged obligation to perform.
- [55] A party relying on impossibility to perform ought to plead such reliance specifically. This ground of complaint is upheld.

Ninth ground of complaint

- [56] The last ground of complaint is directed at paragraph 2 of the annexure “SSE2” to the particulars of claim, wherein it refers to “Management agreement between TSGO Farming Services Proprietary Limited and Sifiso Sekuya Embili 2020”.
- [57] It was argued that hereby the plaintiff pleads a contract, but does not comply with Rule 18(6).
- [58] I cannot agree with the contentions on behalf of the defendant, as annexure “SSE2” is a letter from the plaintiff’s

attorneys of record to the defendant, wherein it was stated that from the following documents in place, it appears that the defendant

continued with the project and once the tender adjudication in September 2020 was challenged, the letter at 6 followed. Then reference is made to the management agreement as held by the defendant.

- [59] In my view this was nothing but a reference to a document, and not specifically incorporated into the pleading. This annexure was attached to the particulars of claim for the purpose of supporting paragraph 10, wherein the plaintiff seeks to prove that it demanded specific performance from the defendant.
- [60] Consequentially this ground is unsustainable.

EFFECT OF EXCEPTION BEING UPHELD

- [61] What remains to be considered is what the effect of the exception would be if upheld. It is usually ordered that upon an exception being upheld, the particulars of claim are set aside and the plaintiff is afforded an opportunity to amend its particulars of claim, but this is not an absolute rule. There are instances, although rare, where a departure from this normal order would be permissible.
- [62] In this respect the defendant placed reliance on the matter of *Rowe v Rowe* [1997] ZASCA 54; 1997 (4) SA 160 (A) at 167, wherein the court did not as an actual fact make a finding in this respect, save for stating that when a departure from the standard order is permissible, one would expect the reasons therefore to be explained by the court.

- [63] The defendant argued that this matter is a case where indeed there is no conceivable amendment to the particulars of claim that could cause it to contain a valid cause of action. In support of the aforesaid it was argued that the only conceivable basis for the claim would be if the agreements referred to by the plaintiff were in fact concluded, and also, if the conditions to which the agreements were subjected had been fulfilled.
- [64] Again there were attempts this time by both the parties to move me to have regard to the content of the replies dealt with above. There is no basis for these replies to have been filed as such there are irrelevant and ought not to be considered.
- [65] What can be considered is the various proposed amendments and the objections thereto. From these documents it is clear that the plaintiff does not correct or “fix” its cause of action but replaces same first with the reliance on a tacit oppose to a written agreement and later by alleging written agreement but in annexing a copy of same relies on a unsigned agreement. The latter expressly setting out in paragraph 13 that said agreement only becomes binding “once signed by both parties”.
- [66] The purpose of granting leave to amend is not to allow a party to change its cause of action but to amend the existing cause of action, if any, so as to no longer be vague and embarrassing or to comply with Rule 18(6). Where there is no cause of action an amendment should only be allowed where it is clear that a substitution or alternative cause of action can be made out. Unfortunately that is not the case in this matter. From that before court it cannot be held that granting the leave to amend will result in a valid cause of action.

CONDONATION

- [67] The plaintiff applied for condonation for its failure to comply with the court’s order, to file its heads of argument by a certain date.
- [68] In said application it is sought that the defendant pays the cost of the application for condonation. Only after the defendant caused an answering affidavit to be served and filed did the plaintiff in reaction to the answering affidavit indicate that it will no longer pray for cost in the condonation application.
- [69] It appears however that the plaintiff did, notwithstanding the aforesaid, not specifically tender the cost associated by the condonation application.
- [70] In my view the issue of the belated filing of the heads of argument has been overtaken by events such as the filing of the heads or argument. Notwithstanding it being so that only the court can condone the failure to comply with a court order ordering the filing of the heads of argument, there appears to be no prejudice to the defendant if such condonation is granted.

[71] That being said, the defendant was entitled to oppose the condonation application on the grounds that it did more particularly as the plaintiff sought costs against it. Consequentially, I am prepared to grant the condonation in respect of the heads of argument, with the plaintiff being ordered to pay the cost associated therewith.

COSTS

[72] In respect of the cost of the exception, there is no reason why the general principles that the cost should follow the event, should not apply.

ORDER

[73] Consequentially, the following order is made:-

1. The plaintiff is granted condonation for the late filing of its heads of argument.
2. The defendant's exception is upheld.
3. The plaintiff's particulars of claim attached to the summons dated 22 December 2020 is struck out and the action is dismissed.
4. The plaintiff is ordered to pay the cost.
5. The plaintiff is ordered to pay the cost of the condonation application.

DATE OF HEARING: 26 October 2021

DATE OF JUDGMENT: 26 January 2022

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[1] Jowell v Bramwell-Jones and Others 1998

(1) SA 836 (W) at 898

[2] The Trustees, Bus Industry Restructuring Fund v Break Through Investments CC and Others 2008 (1) SA 67 (SCA)

[3] Burger v Rand Water Board and Another 2007 (1) SA 30 (SCA) at 32D

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- [4] Johnston v Leal 1980 (3) SA 927 (A) at 937H and Michael v Caroline's Frozen Yogurt Parlour (Pty) Ltd 1999 (1) SA 624 (W) at 632C
- [5] 1922 AD 16 at 23
- [6] Tuckers Land and Development Corporation (Pty) Ltd v Loots 1981 (4) SA 260 (T) at 263
- [7] First National Bank of Southern Africa Ltd v Perry N.O. and Others 2001 (3) SA 960 (SCA) at 972I and General Commercial and Industrial Finance Corporation Ltd v Pretoria Portland Cement Co Ltd 1944 AD 444 at 453
- [8] Trope v South African Reserve Bank
- [1993] ZASCA 54; 1993 (3) SA 264 (A) at 269I
- [9] Lockhat v Minister of Interior 1960 (3) SA 765 (D) at 777D; Nasionale Aartappelkoöperasie Bpk v PriceWaterhouseCoopers 2001
- (2) SA 790 (T) at 797J–798A
- [10] Lockhat supra at 777E
- [11] ABSA Bank Ltd v Boksburg Transitional Local Council 1997 (2) SA 415 (W) at 422A
- [12] 1980
- (4) SA 525 (Z) at 526D-E
- [13] 2001
- (3) SA 986 (SCA)
- [14] See also Koth Property Consultants CC v Lepelle-Nkumpi Local Municipality Ltd 2006 (2) SA 25 (T) para [9] at 28, 29; FNB of SA Ltd v Perry NO 2001 (3) SA 960 (SCA) para [6] at 965; Klokow v Sullivan 2006 (1) SA 259 (SCA) para [15] at 265
- [15] 1914 AD 152 at 156. See also Minister of Safety and Security v Hamilton 2001 (3) SA 50 (SCA) at 52G – H
- [16] Burger v Rand Water Board and Another (supra) and the cases under footnote 4
- [17] Johnson v Leal (supra)
- [18] Amlers' Precedent and Pleading, Lexis Nexis, Eight Edition, 2015, p114-115

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