

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)**

CASE NO. 1613/09

In the matter between:

AVENG (AFRICA) LIMITED

Plaintiff

and

**VARICOR SIX (PTY) LIMITED
t/a SIGMA CONSULTING**

Defendant

J U D G M E N T

SANGONI J:

[1] This judgment concerns an exception by the defendant to the plaintiff's summons. On 17 June 2009 the plaintiff issued summons against the defendant, claiming damages in the sum of R785 151.00 arising from an alleged breach of agreement entered into on or about 07 February 2001 by and between the parties.

[2] In terms of the agreement the plaintiff appointed the defendant as a civil and structural engineer for the building of a certain factory and warehouse.

[3] The alleged breach is set out as follows:

“6.1 The defendant failed to perform its obligations with the required skill, care and diligence.

6.2 In particular, the defendant failed to adequately design and/or monitor the fastening of two longitudinal adjacent crane rails forming part of the structure, so as to achieve a frictionless connection between them, in that:

6.2.1 The surge girders that were used to fasten the crane rails were “stepped” due to the support girders for the crane rails being at different heights.

6.2.2 The friction grip bolts were inadequately positioned.

6.2.3 Slotted holes for the friction bolts were used along the length of the “stepped” surge girders.”

[4] The basis of the claim is that the plaintiff allegedly remedied the defects at a cost of R785 151.00, broken down as follows:

“8.1 Project manager	R 5,560.00
8.2 Detailing of drawing	R 30,408.00

8.3	Fabrication (labour)	R 56,921.00
8.4	Fabrication (material; at cost)	R 30,941.00
8.5	Uitenhage Supersteel (gantry work; at cost)	R429,020.00
8.6	Shop paint (material; at cost)	R 22,714.00
8.7	Shop paint (labour)	R 10,258.00
8.8	Shop bolts (at cost)	R 31,941.00
8.9	Travel and accommodation	R 17,388.00
8.10	Transport of fabricated items to site, disruption of production	R150,000.00
TOTAL		R785,151.00”

[5] In terms of the proviso to Rule 23 of the Uniform Rules of Court the defendant delivered a notice calling on the plaintiff to remove the causes of complaint referred to in the said notice. They are formulated as follows:

- “2. Whilst, in paragraph 8 of the Particulars of Claim, the sum claimed is broken down into various categories, there are no allegations set forth in the Particulars of Claim indicating what steps were taken, and what work was performed by, or on behalf of the Plaintiff, to remedy the defects.
3. In the abovementioned circumstances, the information set forth in paragraph 8 of the Particulars of Claim is rendered meaningless as the Defendant is unable reasonably to assess on what basis the various sums referred to in clause 8 of the Particulars of Claim are

arrived at and relate to the nature and amount of work undertaken by the Plaintiff to remedy the alleged defects.”

[6] The plaintiff did not respond to the said notice. On 11 August 2009 the defendant filed a notice of exception grounded on what is reproduced hereunder:

“Although the alleged breaches of contract are detailed in the Particulars of Claim and although the manner in which the sum claimed is arrived at is set forth in the Particulars of Claim, there is no nexus, in the Particulars of Claim, between the sum claimed and the alleged breaches of contract such that the Defendant would be enabled to assess the quantum thereof for the purposes of pleading.”

[7] In the same notice the defendant amplified the particulars of complaint by referring specifically to the following:

[7.1] No indication of what drawings were prepared (clause 8.2 of the Particulars of claim).

[7.2] No indication of what was fabricated (clause 8.3).

[7.3] No indication of what material was purchased (clause 8.4).

[7.4] No indication of why gantry work was necessary.

[8] Before dealing with the merits and de-merits of the exception it is appropriate to address the issue raised by Mr Wickins, counsel for the

plaintiff, which is that the notice given by the defendant, purportedly in terms of the proviso to Rule 23(1) of the Rules of Court, was not a proper notice. It follows, according to that argument, that the exception to the summons on the basis that it is vague and embarrassing can therefore not stand as the plaintiff has not been given an opportunity to remove the causes of complaint¹.

[9] Mr Wickins contends that the exception is at variance with the notice that precedes it. In the exception reference is made to drawings, fabrication material and gantry work whereas in the notice there is no such reference. If there is any error on the part of the excipient, it is, in my view, the unpacking or giving of explanatory details of the cause of complaint. The phrase used to describe the cause of complaint in the preceding notice is “there are no allegations set forth in the Particulars of Claim indicating what steps were taken, and what work was performed by, or on behalf of the Plaintiff to remedy the defects”. That encompasses the details subsequently appearing in the notice of exception. The plaintiff was not in any way prejudiced.

[10] In *Venter & Others NNO*² Potgieter AJ painted a clear picture around the issue as to when a declaration or particulars of claim may be excepted

¹ *NKP Kunsmisverspreiders v Sentrale Kunsmis Korp.* 1973 (2) SA 680 (CPD) at 688C-D.

² *Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* SA 2008 (4) 639 (CPD)

to on the basis of it being vague and embarrassing. The following is an extract from the judgment he wrote:

“Generally the information in a declaration or particulars of claim need only be sufficient for the defendant to plead thereto. The exception stage is not the time for the defendant to complain that he does not have enough information to prepare for trial or may be taken by surprise at the trial. That comes later in the (often long and cumbersome) journey to the doors of the court, after, *inter alia*, discovery of documents and requests for trial particulars had been made.”

[11] The law is quite clear as to what degree of vagueness in the pleading justifies an exception. During argument counsel were *ad idem* as to the legal requirements that make an exception taken fail or succeed. Consensus seemed lacking on the question of what facts need be presented so as to comply with Rule 18(4) which requires 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, as the case may be, with sufficient particularity to enable the opposite party to reply thereto”.

[12] It is an issue of fact whether a pleading contains sufficient particularity and accordingly not vague and embarrassing. As a starting point, I should indicate that I accept, as a guideline, the principle

reiterated in *Nasionale Aartappel Koöperasie Bpk*³ when it was held that “a pleading contained sufficient particularity if it identified and defined the issues in such a way that it enabled the opposite party to know what they were.”

[13] In *casu* the defendant contends that the plaintiff has supplied particulars that failed to give the defendant any guidance in respect of assessment of damages. One of the requirements to prove in a claim for damages arising out of a breach of contract, is a causal link between the breach and damages⁴. Another element is that the loss must not be too remote. The breach must be *causa sine qua non* for the loss. In *casu* Mr Beyleveld SC, for the defendant, contends that there is no such nexus between the sum claimed in every item and the alleged breach of contract.

[14] It has been contended on behalf of the plaintiff that the nexus is clear from the use of the words “as a result” of the breach and that the defendant “incurred ... expenses” to remedy the defects. In my view there is no magic in those words. The litigant remains obliged to show that the remedial steps taken, where there is such allegation, have in turn

³ *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing en Andere 2001 (2) SA 790 (T) at 798F/G – 799J paraphrased*

⁴ Amlers Precedents of Pleadings 6th Edition (Harms) P101

a nexus with the alleged defects complained of. To simply put words and accompanying figures leaving the defendant without a clue as to the nature of the steps taken is not enough. The defendant needs to be informed of the remedial work performed and costs' details. A close look at each of the steps taken will reveal that the defendant is in no position to know the nature and amount of the remedial work. As an illustration, a question arises whether such nexus exist between the alleged breach of agreement as set out in paragraph 3 above, and the "project manager" and "detailing of drawing" referred to in 8.1 and 8.2 of the particulars of claim. In my view it does not. To simply say the cost of the remedial work done is R5560 for the item referred to as "project manager", for instance, does not help establish what was done and the relevance thereof to the alleged breach of agreement.

- [15] Mr Beyleveld also contended that the plaintiff has not complied with the provisions of Rule 18(10). The damages claimed are not set out in such a manner as will enable the defendant reasonably to assess the quantum thereof. The issue of non-compliance with the provisions of the Rule provides per se no ground to render a pleading excipiable. Such non-compliance may provide a good reason for attacking the pleading as

an irregular proceeding in terms of Rule 30. For purposes of an Exception, the relevant element of vagueness of the pleading is essential⁵.

[16] Even though there appears to be non-compliance with Rule 18(10) as well which could be dealt with in terms of Rule 30 as envisaged in Rule 18(12), the defendant is not precluded from excepting thereto via Rule 23 if non-compliance renders the pleading vague and embarrassing⁶.

[17] In my judgment the complaint raised by the defendants strikes at the formulation of the cause of action. The averments set out in the particulars of claim are not in sufficient detail for defendant to plead thereto⁷. The summons is thus vague and embarrassing. The Exception must therefore be upheld.

In the result the following order is made:

1. The Exception is allowed.
2. The plaintiff is given leave to amend its particulars of claim, if so desired, within 14 days from the date of this Order.

⁵ *ABSA Bank Ltd v Boksburg Transitional Local Council (Government of the Republic of South Africa, Third Party)*, 1997 (2) SA 415 at 418F-G, (WLD); *Grindrod (Pty) Ltd v Delpont and Others* 1997 (1) SA 342 (WLD)

⁶ *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen....* [1992] 4 All SA 505 (W) at P3.

⁷ *Venter and Others supra*.

3. The plaintiff is ordered to pay costs of this Exception.

C T SANGONI
JUDGE OF THE HIGH COURT

Counsel for the Plaintiff : Adv G Wickins

Attorneys for the Plaintiff : Rushmere Noach Inc
Port Elizabeth

Counsel for the Defendant : Adv A Beyleveld SC

Attorneys for the Defendant: Boqwana Loon & Connellan
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Date heard : 04 March 2010

Date Judgment delivered : 09 April 2010