

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 2215/2022

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

PROZEL 105 CC

Plaintiff

[Registration Number: [...]]

And

FREEGOLD (HARMONY) (PTY) LTD

Defendant

[Registration Number: [...]]

HEARD ON:

11 NOVEMBER 2022

JUDGMENT BY:

DANISO, J

DELIVERED ON:

This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 05 April 2023.

[1] This is an opposed exception application launched by the defendant against the plaintiff's particulars of claim on the grounds that they do not disclose a cause of action.

[2] The plaintiff is the owner of the farm A[....] [....] in Welkom and conducts commercial farming activities including cultivation of crops mainly maize and sunflowers on the said farm. The defendant owns the farms V[....] [....] , B[....] R[....] [....] and M[....] [....] in Welkom situated adjacent to and in the vicinity of the plaintiff's farm.

[3] On 13 May 2022 the plaintiff issued summons against the defendant claiming damages on the basis that the defendant was conducting mining activities ("the tailing dams") on its farms which produced runoff water and seepage into the plaintiff's farm thereby contaminating and polluting the plaintiff's water and soil with the result that the plaintiff's farm was rendered unsuitable for crop farming consequently, the plaintiff sustained a loss of income occasioned by the decline in crop production and loss of yields for the period 2020 to 2022 in the amount of R2 482 402.91, a loss in future production for at least six years at an amount of R9 762 306.66 while the defendant remedies the damage, alternatively and in the event that the defendant fails to remedy the damage, the plaintiff will suffer a loss of R6 900 000.00 constituting the value of the plaintiff's farm as it will be rendered obsolete for farming purposes.

[4] It is common cause that the defendant is a holder of a mining right as contemplated in section 7 of schedule 2 of Mineral and Petroleum Resources Development Act¹ ("the MPRDA") which permits the defendant to conduct tailing dams on its farms.

[5] In the particulars of claim, the plaintiff bases its claim on its constitutional right not to be subjected to a harmful environment² alternatively, the defendant's breach of its legal duty to prevent the contamination and pollution of the plaintiff's water and soil alternatively, the defendant's contravention of the National Environmental

¹ Act No, 28 of 2002.

² S24 of the Constitution of the Republic of South Africa Act No, 108 of 1996.

Management Act³ (“NEMA”) which requires the plaintiff to take reasonable steps to prevent the contamination and the pollution of the plaintiff’s water and soil, further alternatively, the plaintiff accuses the defendant of committing a nuisance by allowing the runoff water and seepage from its tailing dams to contaminate the plaintiff’s water and soil or creating a state of affairs whereby the plaintiff’s farming business is interfered with.

[6] Six grounds of exceptions are raised by the defendant namely: failure to invoke the MPRDA; direct reliance on the Constitution; breach of a statutory duty; common law claim; nuisance claim; and no causal link between the defendant’s conduct and the damages claimed.

[7] Rule 23(1) of the Uniform Rules provides that an exception may be taken against a pleading on the grounds that it is vague and embarrassing or lacks averments which are necessary to sustain an action or defence. Such an exception strikes at the formulation of the cause of action and not its legal validity. See *Trope v South African Reserve Bank*.⁴

[8] In dealing with exceptions that a pleading lacks averments which are necessary to sustain an action, courts have held that such an exception

*“cannot succeed unless it can be shown that ex facie the allegations made by the plaintiff and any other document upon which his cause of action may be based, the claim is (not may be) bad in law.”*⁵

[9] The onus is on the excipient, the defendant *in casu* to persuade the court that, even if the factual allegations averred in the plaintiff’s particulars of claim were to be accepted as correct, the particulars of claim are excipiable on every interpretation that can reasonably be attached to them thus not justifying the relief the plaintiff intends to obtain consequently, the defendant cannot plead a defence to a non-

³ Act No, 107 of 1998.

⁴ **1993 (3) SA 264** (A) at 269I.

⁵ *Vermeulen v Goose Valley Investments (PTY)Ltd* **2001 (3) SA 986** (SCA) at para 7.

existent cause of action and the defendant would be seriously prejudiced in the event that the exception should not be upheld.⁶

[10] To arrive at an appropriate determination of this issue I must have regard to the principles laid down in *Southernport Developments*⁷ where the court held that when considering exceptions “the court should not look at a pleading with a magnifying glass of too high power and the pleadings must be read as a whole, no paragraph can be read in isolation.”

[11] In terms of Rule 18 (4), “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] According to the defendant, the plaintiff’s suit consists of four claims namely:

- 12.1 Damages claim based on a constitutional violation;
- 12.2. Claim for the breach of a statutory duty imposed by the NEMA;
- 12.3. Common law aquilian action claim; and
- 12.4. Nuisance claim.

Exception 1

[13] This ground is essentially directed at this court’s jurisdiction to entertain the plaintiff’s claim alternatively, the prematurity of the claim. The defendant complains that in paragraphs 3.1, 3.4 to 3.5, 3.11 and 11 of the plaintiff’s particulars of claim it is averred that the plaintiff’s alleged loss or damage was caused by the defendant’s mining activities as a mining permit holder issued in terms of the MPRDA. Therefore, instead of instituting a claim for damages the plaintiff should have invoked the provisions of the MPRDA and referred its claim to the Regional Manager of the

⁶ *Southernport Developments (Pty) Ltd (previously known as Tsogo Sun Ebhayi (Pty) Ltd v Transnet Ltd* **2003 (5)**

SA 665 (W); *Frank v Premier Hangers CC* **2008 (3) SA 594** (C).

⁷ Supra at fn 6. See page 669 at para 6.

Department of Minerals and Energy in terms of s54(7) of the MPRDA⁸ to facilitate an agreement between the parties with regard to the amount of compensation to be paid to the plaintiff. Furthermore, in terms of s45 of the MPRDA,⁹ the defendant may also be directed by the Minister of Mineral Resources and Energy to remedy the harm caused to the plaintiff's farm or to pay for the remedial costs incurred where the defendant fails to comply with the Minister's directions. The defendant contends that the plaintiff has failed to plead its compliance with the provisions of s54(7) consequently, the particulars of claim fail to make the averments necessary to sustain the cause of action pursued. The defendant is accordingly prejudiced in pleading to the particulars of claim.

[14] On the other side, it was submitted on behalf of the plaintiff that the plaintiff's claim is predicated on the damages caused to its farm and the loss of production of

⁸ S 54(7) provides: "**Compensation payable under certain circumstances**

The owner or lawful occupier of land on which reconnaissance, prospecting or mining operations will be conducted must notify the relevant Regional Manager if that owner or occupier has suffered or is likely to suffer any loss or damage as a result of the prospecting or mining operation, in which case this section applies with the changes required by the context."

⁹ This provision refers to the

"Minister's power to recover costs in event of urgent remedial measures

(1) If any prospecting, mining, reconnaissance, exploration or production operations or activities incidental thereto cause or results [sic] in ecological degradation, pollution or environmental damage, or is in contravention of the conditions of the environmental authorisation, or which

may be harmful to health, safety or well-being of anyone and requires urgent remedial measures, the Minister, in consultation with the Minister of Environmental Affairs and Tourism, may direct the holder of the relevant right or permit in terms of this Act or the holder of an environmental

authorisation in terms of National Environmental Management Act, 1998, to

(a) investigate, evaluate, assess and report on the impact of any pollution or ecological degradation or any contravention of the conditions of the environmental authorisation;

(b) take such measures as may be specified in such directive in terms of this Act or the National Environmental Management Act, 1998; and

(c) complete such measures before a date specified in the directive. [Sub-

s. (1) substituted by s. 36 (a) of Act 49 of 2008 (wef 8 December 2014).]

(2) (a) If the holder fails to comply with the directive, the Minister may take such measures as may be necessary to protect the health and well-being of any affected person or to remedy ecological degradation and to stop pollution of the environment.

(b) Before the Minister implements any measure, he or she must afford the holder an opportunity to make representations to him or her.

(c) In order to implement the measures contemplated in paragraph (a), the Minister may by way of an ex parte application apply to a High Court for an order to seize and sell such property of the holder as may be necessary to cover the expenses of implementing such measures.

(d) In addition to the application in terms of paragraph (c), the Minister may use funds appropriated for that purpose by Parliament to fully implement such measures.

(e) The Minister may recover an amount equal to the funds necessary to fully implement the measures from the holder concerned.

crops due to the contamination and pollution of its water and soil, the plaintiff does not rely on the fact that it is the owner or lawful occupier of a land on which reconnaissance, prospecting or mining operations will be conducted therefore s54(7) does not apply. S45 is also irrelevant as it deals with the Minister's power to recover costs incurred in providing urgent remedial measures to address the contamination of land resulting from mining operations.

[15] It is the plaintiff's case that MPRDA does not exclude reliance on NEMA or a claim for damages pursuant to environmental contamination. The defendant's contentions in this regard are legally untenable and flawed this ground of exception must be dismissed with costs on the scale as between attorney and client.

[16] I am in agreement with the plaintiff's contentions that the defendant's reliance on ss45 and 54(7) of the MPRDA is misplaced. MPRDA regulates the rights of land occupiers previously excluded from participating in the exploitation of the country's mineral and petroleum resources and the entities who retain the mineral rights over that land. Its primary object is the transformation of the sector and the empowerment of the country's previously excluded by setting out the procedure that must be followed and the requirements that must be satisfied when an application for a prospecting or mining right is made under it.¹⁰

[17] It was long established by the SCA in *Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others*¹¹ that:

“Both the MPRDA and NEMA are statutes that give effect to the right to have the environment protected for the benefit of present and future generations, enshrined in s 24 of the Constitution. It is a settled principle that courts are required to interpret statutes purposively, in conformity with the Constitution and in a manner that gives effect to the rights in the Bill of Rights.”

¹⁰ *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* [2018] ZACC 41, para 50 to 51.

¹¹ (1105/2019) [2021] ZASCA 13 (09 February 2021) para 31.

[18] Quoting with approval *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*¹² the SCA went further and explained that:

“The role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself.”

[19] Based on the above factors, I am unable to perceive how the defendant arrives at the conclusion that the MPRDA or any other Statute for that matter is a precondition to legal proceedings in the context of claims resulting from a delict perpetrated against a landowner’s property (as in the present matter). The exception is without merit, it is accordingly dismissed.

Exception 2, 3, 4 and 5

[20] The defendant contends that each of these claims are flawed, incompetent and cannot be pursued on the basis of the particulars of claim as they stand.

[21] The defendant complains that in paragraph 4 of the particulars of claim consists of the plaintiff’s primary claim in terms of which the plaintiff impermissibly, seeks constitutional damages which are alleged to be arising from strict liability imposed by s24 of the Constitution read with NEMA whereas constitutional damages are only available as a last resort and only when no common law claim is available as a result, the plaintiff’s second (breach of statutory duty) and third (common law) claims are destructive of the primary claim. The plaintiff is also in breach of the principle of subsidiary in that the claim is based on direct reliance on the Constitution and NEMA where there are bespoke remedial regimes created by both the MPRDA and NEMA.

¹² **2007 (6) SA 4 (CC)** para 102.

[22] The defendant further complains that with regard to the second claim (paragraph 5 of the particulars of claim) the plaintiff has again directly relied on the provisions of the Constitution and also alleged that the defendant has breached the statutory legal duty imposed by NEMA without averring the specific provision which creates the statutory duty breached by the defendant.

[23] The defendant submits that s28(1) of NEMA imposes a duty on any person responsible for pollution and degradation of the environment to take reasonable measures to prevent that pollution or degradation from continuing however, the plaintiff's particulars of claim do not allege that there were reasonable measures available to the defendant to prevent the pollution and degradation, what were those measures and that the defendant failed to take those measures.

[24] Regarding the alternate common law claim, the defendant complains that except to allege in paragraphs 7 and 8 that the defendant breached its legal duty to prevent the contamination and pollution of the environment including the plaintiff's farm there are no allegations that the defendant has breached any provisions of the MPRDA or its approved Environmental Management Programme which sets out the reasonable measures the defendant is required to take to manage the environmental impact of its mining activities.

[25] With regard to the nuisance claim, the defendant contends that in paragraph 10 of the plaintiff's particulars of claim it is alleged that the defendant commits a nuisance by allowing the runoff water and seepage from its tailing dams to contaminate the plaintiff's farm, alternatively creating a state of affairs whereby the plaintiff's use of his farm to conduct commercial farming is unfairly and materially disturbed and this is despite the fact that on the plaintiff's own submission the defendant is a holder of a mining permit issued in terms of the MPRDA which authorises the defendant to operate the tailing dams. The particulars of claim do not allege that the operation of the tailing dams is unlawful or at odds with the MPRDA and/or that it constitutes an undue and unreasonable exercise of its property rights.

[26] For these reasons so it was argued, the particulars of claim fail to make averments necessary to the cause of action pursued in these claims, the defendant is consequently prejudiced in pleading thereto.

[27] As rightly pointed out by counsel for the plaintiff, the plaintiff's claim comprises of the main claim in terms of which the plaintiff avers that the defendant's liability for the damages arises from the provisions of s24 read with s8 of the Constitution and s28 of NEMA which respectively, afford the plaintiff a right not be subjected to a harmful environment and also impose strict or absolute liability to the defendant as a holder of the mining permit to exercise a duty of care to prevent pollution or degradation of land from occurring. The remaining claims are in the alternative and they are premised on the breach of a statutory duty imposed by the NEMA or the common law or nuisance. They have been pleaded clearly and in compliance with rule 18(4) and 18(10), the exceptions are foredoomed to failure they ought to be dismissed with costs on the scale as between attorney and client.

[28] Having regard to the whole particulars of claim, it is clear that the plaintiff's claim consists of a main and alternative claims and not separate and distinct claims as proffered by the defendant. The examination of the particulars of claim as a whole also reveals that the *facta probanda* which is every fact which would be necessary for the plaintiff to prove has been sufficiently averred namely, the alleged wrongful or culpable conduct of the defendant attributable to the plaintiff's alleged loss. (See paras 3 to 10 of the particulars of claim).

[29] The evidence which is necessary to prove those alleged facts, the *facta probantia* is not necessary at this stage of the proceedings. I am thus satisfied that a proper cause of action in the particulars of claim relating to the main and also the alternative claims has been established. These exceptions are also dismissed.

Exception 6

[30] This ground of exception is directed at paragraph 11 of the plaintiff's particulars of claim. According to the defendant, the particulars of claim do not plead and/or identify what proportion of the farm is contaminated and/or oversaturated to the

extent that it is “*not reasonably possible*” to cultivate and what proportion is not “*viable*” to cultivate and these allegations are necessary as they entail a claim for damage to property and a claim for pure economic loss respectively. Consequently, the particulars of claim fail to make averments necessary to establish a causal *nexus* between the alleged runoff water and seepage from the tailing dams and the loss suffered by the plaintiff including the quantum claimed.

[31] The plaintiff countered that the defendant’s complaint does not correspond with the ground of exception the defendant has labelled as “*no causal link between the defendant’s conduct and the damages claimed*” in any event, in the particulars of claim the plaintiff has not only alleged the cause of damages and the loss sustained. The specific proportion and size of the portion of the farm adversely affected by the runoff water and seepage from the tailing dams has also been identified. The amount claimed is also sufficiently quantified, likewise this exception has no merit it must also be dismissed with costs on the scale as between attorney and client.

[32] I find the defendant’s complaint not to have been elegantly pleaded because whilst the ground of exception refers to the absence of the causal link between the defendant’s conduct and the damages claimed, the submissions proffered in both the notice of exception and in argument seems to be directed at the lack of particulars relating to the extent of the alleged damages and the quantification of the amount claimed. Nevertheless, I am of the view that the damages claimed by the plaintiff have been amply set out to enable the defendant to assess the quantum thereof.¹³ This exception is also decided in favour of the plaintiff.

[33] I have subsequently arrived at the conclusion that the exceptions raised by the defendant are unmeritorious and that a cause of action relied upon by the plaintiff in the main and in the alternative claims is sufficiently disclosed in the plaintiff’s particulars of claim. The particulars of claim are legally competent and good in law.

[34] As regards the issue of costs, there is no reason why the costs should not follow the result. I am not persuaded by the plaintiff’s contention that the defendant should be ordered to pay the costs on the scale as between attorney and client as I

¹³ See Uniform Rule 18(10).

do not think that the defendant's conduct is so reprehensible to warrant a punitive cost order.

[35] In the premises, I make the following order:

- (1) The exceptions are dismissed with costs on a party and party scale.

N.S. DANISO, J

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