



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: **2015/2022**

In the matter between:

RIAAN LAMBERTUS VAN WYK N.O.	First Plaintiff
REALEBOGA BOSALETSE N.O.	Second Plaintiff
PUMZILE F NGXITO N.O.	Third Plaintiff
MASEHLEPHO E MOHAJANE N.O.	Fourth Plaintiff
TSIETSIE JOSEPH TAU N.O.	Fifth Plaintiff
DITABA L SEBONYANE N.O.	Sixth Plaintiff
AADIL MATHER N.O.	Seventh Plaintiff
PATRICK A MABILO N.O.	Eighth Plaintiff
YSUF KERBELKER N.O.	Ninth Plaintiff
LUCY AMMON N.O.	Tenth Plaintiff
ESIAS JEREMIAH GERBER N.O.	Eleventh Plaintiff

[In their capacities as Trustees for the time being
of the **JAGERSFONTEIN COMMUNITY TRUST –
IT 225/2009]**

and

**MINISTER OF MINERAL RESOURCES AND
ENERGY**

Defendant

CORAM: **P R CRONJÉ, AJ**

HEARD ON: **02 JUNE 2023**

DELIVERED ON: **2 AUGUST 2023**

JUDGMENT BY: **P R CRONJé, AJ**

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 14h30 on 2 August 2023.

I THE EXCEPTIONS

- [1] The Defendant raised four grounds of exception against the Plaintiffs' combined summons.
- [2] The first ground attacks the *locus standi* of the First Plaintiff ("Mr Gerber") to act as representative of all the Plaintiffs, in their capacities as Trustees of Jagersfontein Community Trust ("JCT"), alternatively to act on behalf of Wheatfields Investments No. 168 (Pty) Ltd.
- [3] In the combined summons the Plaintiffs are cited as Trustees as per Letters of Authority issued by the Master of the Northern Cape Division of the High Court in Kimberley. The Letters of Authority corresponds with the citation of the Plaintiffs, save for Mr Floyd Teu, who appears in the Letters of Authority but not in the combined summons.¹

¹ Pleadings, p. 20; p. 30

- [4] Under the heading “*LOCUS STANDI*” in the particulars of claim, Mr Gerber is cited in terms of an authority vested in him by resolution of Trustees, who has subsequently authorised the First Plaintiff (“Mr Van Wyk”) with authority to litigate on behalf of the fellow Trustees. It is apparent that none of the Trustees were specifically cited as Plaintiffs in paragraph 1 of the particulars of claim. I hasten to state that the Plaintiffs were not legally represented in the exception proceedings, but that Mr Gerber argued their case.
- [5] The first ground of exception of the Defendant is that there is no compliance with Rule 18(4) of the Uniform Rules of Court that requires that every pleading must contain a clear and concise statement of material facts on which the pleader relies. It states that the particulars of claim fails to cite and describe the parties and that the Plaintiffs therefore lack *locus standi*. It then proceeds to state that the particulars of claim lack the necessary averments to sustain a cause of action.
- [6] There is merit in the Defendant’s exception. It is trite that a Trust is represented by all the Trustees and they have to be cited, also in the particulars of claim. One gains the impression that Mr Gerber, and/or Mr Van Wyk, and/or the Trustees applied the citation in representative capacity that is used in application proceedings. This does not generally apply to actions where the parties have to be cited individually.
- [7] The deficiency, however, can be cured if paragraph 1.1 of the amended particulars of claim is amended to cite all the Trustees and paragraph 1.2 – 1.3 is deleted as it would be superfluous. Paragraph 1.1 and the heading of the summons and particulars of claim have to correspond with the Letters of Authority. The saving grace for the Trust is that the Letters of Authority was incorporated into the pleadings of the Plaintiffs but it needs to be addressed.
- [8] The second ground relates to the lack of authority. The Defendant states that a Trust is a legal *personae sui generis* and requires that all Trustees act together on behalf of the Trust. This can only be done by Resolution signed by the Trustees. The Resolution appended to the particulars of claim does not

authorize any of the Trustees to institute legal action in the name of the Trust. The Defendant therefore disputes the lack of authority to institute the claim.²

[9] The Resolution was, at face value, passed on 28 July 2012. Paragraph 3 of the Resolution states (freely translated): Floyd Tau, Esias Jeremiah Gerber and Ysuf Kerbelker are appointed as co-trustees on behalf of the Trust and is authorized to take all decisions, perform all action and instruction in respect of prospecting and mining for minerals (diamonds) on tailings and properties situated in the vicinity of Jagersfontein and to sign on behalf of the Trust. It is clear from this that it does not explicitly authorize the named Trustees to institute action against the Defendant. The second ground of exception therefore has to succeed.

[10] The third ground is that the Plaintiffs pray for damages in the amount of R30 billion for loss of earnings since 2013 to 2021.³ The Defendant, correctly, states that Rule 18(10) of the Uniform Rules of Court provides that where a Plaintiff sues for damages, it shall set it out in such a manner as will enable the Defendant to reasonably assess the quantum. The Plaintiffs failed to plead the basis on which the amount is claimed and how it is quantified or computed. It does not set out facts illustrating income previously earned or income that would potentially be earned for the period in which the amount is claimed.

[11] Paragraph 10A of the particulars of claim contains the quantification of the Plaintiffs' claim. I include them verbatim:

"10A.1 In quantifying the patrimonial loss claimed on the abovementioned basis, the following information was used:

10A1.1 included in their application for filing of pit at Jagersfontein Mine lodged by JD April 2012, is a Report by SRK Consulting in which it was stated that the tailing dams on said mine had R26 million tons earmarked for mining as diamondiferous gravel;

² Pleadings, p. 5, para 2.1 – 2.5

³ Pleadings, p. 6, para 3.1

- 10A1.2 *DBCM made a statement to the Mining Weekly reported on 18 March 2010, in which they stated that, the average grade of 12.8 carats per 100 tons;*
- 10A1.3 *The Jagersfontein Mine is famous for the largest jewel-quality diamonds with the purest colours in the world, classified as Type Two diamonds. The estimated colour per carat price projected by DeBeers in 2000 at USD 147 per carat cannot be an indication of the quality and size of the diamonds extracted. To be marginal, the average dollar per carat price of diamonds extracted can be set at USD 551.00 per carat (See: Annexure 'AOP5' – Submissions made by DBCM during the QUESTCO Process); and*
- 10A1.4 *To illustrate how reserved and reasonable the applicant's claim sounding in money is, attached hereto as Annexure 'AOP6', is a formula using the above marginal dollar per carat rate and calculating the average rand value of the diamonds extracted by JD."*

[12] In the first prayer it is stated:

"Damages in the amount of ZAR 30 billion for the loss of earnings the JCT/Wheatfields would have marginally earned since 2013 to 2021."

[13] Although thin, and not as comprehensive as it could be, there is some basis for the calculation of the claim. I am of the view that the Defendant would be able to plead and request further particulars in this respect. I therefore do not find in favour of the Defendant on the third ground of exception.

[14] The fourth ground is that the Plaintiffs rely on an approval given by the Defendant to the JCT to exercise prospecting rights over mining property. It states that Section 6(2) of the MPRD Act provides that any decision taken in terms of the provisions of the Act must be in "*writing and accompanied by reasons*". The Defendant states that it is incontrovertible that the approval relied upon by the Plaintiffs must be contained in a written document, setting out the prospecting rights and obligations of the holder of those rights, as against those of the grantor, including any other relevant terms thereof. The Defendant then states that the Plaintiffs' demand for specific performance in terms of the approval does not state the terms or attach the approval upon

which reliance is placed. It furthermore states that the Plaintiffs failed to plead a breach or a contravention of the terms of the approval for which they seek specific performance. The Plaintiffs' action therefore lacks the necessary averments to sustain a claim for specific performance.⁴

- [15] I believe that there are merits in the fourth ground. It is accepted (trite) that where a person relies on written documents and documents that are attached to those documents, they have to included. This applies to the whole chain. If a person does not have it, then s/he should state it and at least plead the terms that were recorded in that document.

II GENERAL REMARKS

- [16] Courts do not give advice. I therefore only make general comments.
- [17] The amended pleadings show that large portions of the text is struck through, apparently in an attempt to highlight what was changed. It overburdens the papers and may create confusion. Amended papers/pages are also marked "AMENDED PAGE", which makes it easier to see an amendment. Footnotes are not used in pleadings but generally in heads of argument and judgements.
- [18] Notwithstanding that the Plaintiffs claim that they are not legally represented, one gains the impression that they do have some sort of assistance in the formulation of the pleadings.
- [19] Section 34 of the Constitution of the Republic of South Africa provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, appropriate, another independent and impartial tribunal or forum.

⁴ Pleadings, p. 7, para 4.1 – 4.8

- [20] To take an overly strict approach to the pleadings may infringe section 34 and have a detrimental effect on the Trust. Yet, the Uniform Rules of Court still have to be followed by all litigants.
- [21] I am of the view that the Trust should be given an opportunity to correct the pleadings by effecting proper amendments and address the grounds of exception of the Defendant.
- [22] I therefore intend to afford the Trust the opportunity to address the deficiencies in the citing of all of the Trustees as Plaintiffs and to address the balance of the objections that the Defendant refers to. The Court normally grants the party against whom exceptions succeed thirty (30) days to remedy the defects.
- [23] Taking into consideration that the Plaintiffs are, at face value, not legally assisted/represented, I recommend to seek legal advice in addressing the deficiencies. This would be in the interest of justice.
- [24] I resolved to afford the Plaintiffs forty five (45) days from date of delivery of this judgement to rectify the deficiencies, failing which the Plaintiffs' claim may be struck out.

III CONDONATION

- [25] The Defendant filed an application for condonation and I am satisfied that a proper case is made for the relief. I therefore grant condonation.

IV COSTS

- [26] A party that asks for condonation does generally pay for the indulgence. The Plaintiffs would therefore, generally, be entitled to the costs of opposition.

[27] The Defendant, however, was substantially successful in its exception and would be entitled to its costs.

[28] Bearing in mind that the parties would both be liable for costs and taking into consideration that the Plaintiffs are not legally represented and represents a small community in the Western Free State, I exercise my discretion in ordering both parties to pay their own costs.

[29] I make the following orders.

ORDER

1. The Plaintiffs are granted leave to remedy their pleadings by addressing the first, second and fourth grounds of exception within forty five (45) calendar days from date of this order.
2. Should the Plaintiffs fail to effect the necessary amendments within forty five (45) calendar days, their claim may be struck out.
3. Each party pays its own costs.

P R CRONJé, AJ

For the Plaintiffs: Mr RL Van Wyk: Presented arguments.

Address of Plaintiffs

Esias J Gerber

22 Sea Breeze Villas

Beach Boulevard

Dias Beach, Mossel Bay

E-mail: gerberej@gmail.com;

riaanvanwyk772@gmail.com

For the Defendant: Adv. K. Moroka SC – Heads of Argument
Adv. L. Tlelai – appearance and Heads of Argument
State Attorney
Bloemfontein