

Judge copy



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 10813/2022P

In the matter between:

WBHO CONSTRUCTION (PTY) LTD

EXCIPIENT/ DEFENDANT

and

TMS PROPERTIES CC

RESPONDENT/PLAINTIFF

ORDER

The following order is issued:

The exception is dismissed with costs.

JUDGMENT

ZP Nkosi J

[1] The defendant has raised an exception to the plaintiff's particulars of claim, as amended, on the basis that it is vague and embarrassing on the following grounds:

- (a) that it is not clear what written agreement the plaintiff intends to rely on, and more so as the relevant written agreement has not been attached to the particulars of claim;
- (b) that the plaintiff has failed to aver what standard or requirement was agreed to by the parties as a measure for the installed roof sheeting to be complied with for the structure to be considered sub-standard and thereby constituting a breach of the agreement;
- (c) that the plaintiff has failed to properly quantify its damages; and
- (d) that it is not clear whether the plaintiff in fact sustained the damages as alleged and whether the claim as advanced is a complete cause of action.

[2] In its amended particulars of claim (PoC) the plaintiff seeks to claim damages from the defendant arising from a breach of contract (annexure "A"). The plaintiff alleges that the defendant did not comply with the specifications of the agreement and instead performed sub-standard work which constituted a breach of the agreement between the parties and caused it to suffer damages.

[3] It appears from the PoC that the plaintiff, acting in its capacity as the Implementing Agent on behalf of the Developer, Vulamehlo Local Municipality and the Funder, the Provincial Department of Human Settlements, KwaZulu-Natal, appointed the defendant as the Contractor for the construction of 2000 Top Structures and VIP's for the Vulamehlo Wards 5 and 7 Rural Housing Development Project under contract number K11080008. A letter of appointment (annexure A) constituted the written agreement between the parties.

[4] In so far as the first ground is concerned, it appears from annexure A that it forms part of, but does not constitute the whole agreement (clause 4). Clause 4 also refers to a final portion of the JBCC 2000 Preliminaries, Principle Building Agreement, Specific and Special Conditions of Contract which shall be prepared and finalised by the Principal Agent and /or Engineer in due course but no reference thereof is made in the PoC. The excipient contends that it is unclear whether the plaintiff, in addition, relies on the contract

documentation (i.e., Volumes 1, 2, 3 and 4), which together constituted the whole agreement but have not been attached to the PoC (clause 16).

[5] The excipient also contends that it is unclear which documents the plaintiff referred to as the contract documentation.

[6] The excipient submits that the PoC is therefore vague and embarrassing in that it is wholly unclear on which documents, and terms and conditions the plaintiff will rely upon in the pursuance of its claim. In addition, the failure to attach the referenced contractual documents, constitutes a failure to comply with Uniform rule 18(6) which constitutes an irregular step.

[7] Regarding the second ground, the plaintiff alleges that the defendant "failed and/or neglected to comply with the terms and/or specifications of the agreement, in that:

- '8.1 the roof and covering structures of the constructed and completed housing units were sub-standard; and
- 8.2 the roof sheets on the constructed and completed housing units were not made of zincalume, alternatively, did not contain the components of zincalume, namely zinc, aluminium and silicon.' (Paragraph 8 of the PoC.)

[8] In this regard, the excipient submits that it is wholly unclear what exact specifications were agreed to as this was not expressly pleaded. Furthermore, on the allegation that the roof and covering structures were sub-standard, the plaintiff has failed to allege what standard or requirement the parties had agreed to or against which standard or requirement the installed roof sheeting was measured. The excipient contends that it is prejudiced as a result of the above failures and is embarrassed to deliver a plea thereto. The aforesaid, it is submitted also constitutes a non-compliance of rule18(4) and an irregular step.

[9] On the third ground, the plaintiff alleges that it will suffer damages in the amount of R15 177 650 in respect of the replacement of the roof sheeting of 1000 housing units (para 11 of the PoC). In this regard, the plaintiff relies on annexures "B" and "C" to the

PoC which set out the breakdown of the materials required for the replacement and labour costs.

[10] The excipient argues that the plaintiff has failed to quantify its damages in terms of Uniform Rule 18(10) to such a degree that it can gainfully respond thereto as it is wholly unclear whether:

- (a) the claim advanced for the amount of R13 927 650 contains only the value of the roof sheeting or whether it contains the amount of the roof structure and covering;
- (b) the steel truss in respect of each unit must also be replaced; and
- (c) the totality of the amount is in fact reasonable and necessary in the circumstances where corrosion has taken place.

From the foregoing, the excipient claims that it is prejudiced and there was non-compliance of Uniform Rule 18(10) and an irregular step.

[11] On the fourth ground, the excipient claims that it is wholly unclear whether:

- (a) the damages in fact manifested to all units where the plaintiff has not yet replaced any sheeting; and
- (b) the plaintiff in fact sustained the damages as alleged and whether the claim as advanced is in fact a complete cause of action.

[12] The exception is opposed by the plaintiff on the basis that the exception is bereft of any merit. The plaintiff submits that the material facts upon which its cause of action is based are properly pleaded.

First ground

[13] In its heads of argument, the plaintiff contends that the term of the agreement which the defendant is alleged to be in breach of is contained in paragraph 6.9 of the PoC, in particular, paragraph 6.9.5 read together with paragraphs 8.2 and 8.3 thereof. The plaintiff also states that the averments contained in paragraph 6.9 derive from annexure A and that there was no need to attach the additional contract documentation in order to enable the defendant to plead.

Second ground

[14] The plaintiff submits that the exact specification is pleaded, in paragraph 6.9.5 of the PoC, read together with paragraph 8.2 thereof which indicates that the standard of roof sheets required had to contain zincalume. It is also averred that the defendant's failure to use zincalume caused the roof sheets to corrode.

Third ground

[15] The plaintiff considers this ground of exception to be tantamount to an abuse of the exception remedy as it is pertinent from paragraphs 8.2, 8.3, 10 and 11 of the PoC that the damages suffered by the plaintiff in the amount of R13 927 650 arise as a result of the roof sheets of the 1000 housing units which were corroded and nowhere is it alleged that the steel truss requires to be replaced.

Fourth ground

[16] The plaintiff submits that it has quantified its damages (as per annexures B and C to the PoC). It states it has pleaded that the roof sheets to the 1000 housing units have been corroded and require replacement. It has also pleaded that the damages for the costs of labour for the replacement are R1 250 000.

[17] Uniform rule 18(4) provides 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.'

The reason that it is so important to set out all the material facts in the pleadings is that it is no longer possible to request further particulars in the High Court practice at the pleading stage.

[18] To constitute sufficient grounds for an exception, the vagueness of the pleading must be such that it will result in prejudice or embarrassment to the opposing side if it is allowed to persist. (*Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298A; and *Trope and Others v South African Reserve Bank* 1993 (3) SA 264 (A) at 269I).

Generally, pleadings are vague and embarrassing if they are unclear and ambiguous to the extent that the opposing party is uncertain of the case he is required to meet (*Liquidators, Wapejo Shipping Co Ltd v Lurie Bros* 1924 AD 69 at 74; *Dusheiko v Milburn* 1964 (4) SA 648 (A) at 655; and *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 902F-G).

[19] The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced. The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice (*Quinlan v MacGregor* 1960 (4) SA 383 (D) at 393G; *Lockhat and Others v Minister of the Interior* 1960 (3) SA 765 (N) at 777A; and *Hlumisa Investment Holdings RF Ltd and Another v Kirkinis and Others* 2020 (5) SA 419 (SCA)).

[20] On the first ground, I believe that the introduction of irrelevant material, in this instance the other documents constituting the whole agreement, into the PoC might be considered superfluous and unnecessary and could on its own render the pleading vague and embarrassing (*Trope v South African Reserve Bank and Another and Two Other Cases* 1992 (3) SA 208 (T) at 210-211). I consider the PoC viewed as a whole to be raising a crisp cause of action as only manifested in annexure A. A mere mention or reference to other historical documents in the pleading was clearly intended for clarity that annexure A was only a portion of the whole agreement which does not relate to the cause of action pleaded.

[21] In any event, were the plaintiff to go beyond the cause of action manifest in annexure A in the trial such course would probably be nipped in the bud. I therefore consider the omission of the other documents neither to be embarrassing nor prejudicial to the excipient.

[22] On the second ground, sight should not be lost of the principle that the pleadings must be looked at as a whole (*Nel and Others NNO v McArthur and Others* 2003 (4) SA 142 (T) at 149F). If there is uncertainty in regard to a pleader's intention, an excipient

cannot avail himself thereof unless he shows that upon any construction of the pleadings the claim is excipiable (*Amalgamated Footwear and Leather Industries v Jordan and Co Ltd* 1948 (2) SA 891 (C) at 893).

[23] On this ground, paragraphs 6.9.5, 8.1, 8.2, 8.3 of the PoC, read with clause 3 of annexure A set out the option of the roof structure and covering material that the parties agreed must be used. A pertinent reading of the aforementioned paragraphs demonstrates that the roof sheets are claimed to be sub-standard because they have corroded since they were not, as agreed, made of zincalume, alternatively, did not contain the components of zincalume, namely, zinc, aluminium and silicon. This ground too does not show any embarrassment which leads to a prejudice.

[24] Grounds three and four are closely related to each other as they relate to the damages suffered or contingent as claimed. Obviously, a plaintiff can only claim damages already suffered and which have been fully quantified.

[25] I believe that the plaintiff's alleged damages have been clearly and sufficiently quantified in paragraphs 10, 11 and 12 of the PoC. I consider that the cause of action relied upon by the plaintiff subsisted when summons was issued.

[26] The plaintiff paid money to the defendant for installing incorrect roof sheets which did not accord with the agreed option. The said roof sheets have corroded and have to be replaced at the cost claimed. Damages herein have been calculated as the amount of money which is required to place the plaintiff in the position it would have occupied had there been proper performance. To me that does not point to the future expense but the current one which subsisted when the claim was launched.

[27] From the foregoing, I believe that the pleadings are capable of easy distillation and the purported vagueness thereof does not amount to an embarrassment and prejudice to the excipient. The exception therefore cannot be sustained.

Order

[28] Consequently, I make the following order:
The exception is dismissed with costs.


ZP Nkosi J

CASE INFORMATION

DATE OF HEARING : 07 FEBRUARY 2023

DATE JUDGMENT HANDED DOWN : 01 MARCH 2023

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