

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO. 380/2023

In the matter between:

JG AFRIKA (PTY) LIMITED

Plaintiff/Respondent

and

INTSIKA YETHU MUNICIPALITY

Defendant/Excipient

JUDGMENT

Rugunanan J

[1] The dispute between the parties arises from an exception noted by the excipient (the defendant) against the amended particulars of claim of the respondent (the plaintiff).

[2] The complaint is that the pleading lacks averments to sustain a cause of action.

[3] In arriving at the conclusion at the end of this judgment, I have had recourse to the following legal principles in evaluating the defendant's exception.¹

[4] In considering an exception that a pleading does not sustain a cause of action the court will accept as correct the allegations pleaded by the plaintiff. Upon any construction of the particulars of claim it must be established by the excipient that no cause of action is disclosed². Put otherwise, *ex facie* the allegations made by a plaintiff and any document upon which his or her cause of action may be based, it must be shown that the claim is bad in law.³ Failing this the exception ought not to be upheld.⁴

¹ See generally Erasmus, *Superior Court Practice* at D1-294 [Service 20, 2022].

² *Fairoaks Investment Holdings (Pty) Ltd and Another v Olivier and Others* 2008 (4) SA 302 (SCA) at para 12.

³ *Callender-Easby v Grahamstown Municipality* 1981 (2) SA 810 (E) at 813A.

⁴ *Sanan v Eskom Holdings Ltd* 2010 (6) SA 638 (GSJ) at 645G, and *Van Baalen and Another v ABSA Bank* [2024] ZAGPPHC 26 para 15.

[5] An over technical approach should be avoided for the reason that it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.⁵

[6] Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.⁶

[7] Minor blemishes and uncritical embarrassments caused by a pleading can and should be cured by further particulars.

[8] The expression cause of action has been held to mean, '[E]very fact which it 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 of every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'⁷

[9] This definition postulates that facts should be pleaded, not evidence, and only the material facts should be pleaded with clarity and conciseness. This requires of a party to formulate its case according to the basic rules of pleading. A general rule is that pleadings must be lucid, logical and intelligible⁸. Pleadings serve the purpose of bringing clarity, to the notice of the court and to the parties in an action, the issues upon which reliance is to be placed. This objective can only be attained when parties state their cases with precision, the degree of which depends on the circumstances of each case⁹.

[10] Rule 18 of the Uniform Rules of Court provides guidance for pleading. Quoting in relevant part, it reads:

- '(3) Every paragraph shall be divided into paragraphs (indicating sub-paragraphs) which shall be consecutively numbered and shall, as nearly as possible, each contain a distinct averment.
- (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.
- (5) ...

⁵ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) para 3.

⁶ *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 902J.

⁷ *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838 D-H.

⁸ *Trope v South African Reserve Bank and Another* 1992 (3) SA 208 (T) at 210H.

⁹ *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (AD) at 107C-E.

- (6) A party who in his pleading relies 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.’

[11] Rule 18(4) serves as a guideline for the careful drafting of a pleading. In brief, the rule requires that every pleading shall contain a clear and concise statement of the material facts upon which a pleader relies and that such facts be set out with sufficient particularity to enable the opposite party to reply thereto. The clarity and precision required of a pleading is explained in *Jowell v Bramwell-Jones and Others*¹⁰:

‘[T]he plaintiff is required to furnish an outline of its case. That does not mean that the defendant is entitled to a framework like a crossword puzzle in which every gap can be filled by logical deduction. The outline may be asymmetrical and possess rough edges not obvious until actually explored by evidence. Provided the defendant is given a clear idea of the material facts which are necessary to make the cause of action intelligible, the plaintiff will have satisfied the requirements [of the rule].’¹¹

[12] In that regard it is of importance to be mindful of the distinction between *facta probanda* or primary factual allegations (i.e. material facts) which a pleader must make and *facta probantia* which are secondary allegations or evidence upon which the pleader will rely to prove the primary allegations.¹² To sum up, although the rule serves as a guideline, a pleading should not be read pedantically nor should a court overemphasise precise formalistic requirements – it is the substance of the allegations that should properly be considered.¹³

[13] In summary, the particulars of claim indicate that the action instituted by the plaintiff is for payment by the defendant of final invoices for fixed amounts in the sums of R924 355.37 and R63 402.49 owing to the plaintiff and is based on a contract for the provision of engineering services.

¹⁰ 1998 (1) SA 836 (W).

¹¹ at 913F-G.

¹² *Nasionale Aartappel Korporasie Beperk v Price Waterhouse Coopers Ing en andere* 2001 (2) SA 790 (T) at 797G-I and 798C-E; *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 903A-B; and *Makgae v SentraBoer (Koöperatief) Bpk* 1981 (4) SA 239 (T) at 245D-E.

¹³ *MN v AJ* 2013 (3) SA 26 (WCC), para 24 and *Suid Afrikaans Onderlinge Brand en Algemene Versekerings Maatskappy Bpk v Van der Berg en Andere* 1976 (1) SA 602 (AD) at 607E.

[14] The plaintiff alleges that the parties concluded a written contract (Annexure C to the particulars of claim) during August 2013 in which the provisions and conditions¹⁴ regulating the defendant's appointment of the plaintiff are alleged to be set out. The agreement was preceded by a tender process. By letter dated 28 June 2010 (Annexure A) the defendant appointed the plaintiff as a consulting engineer. The plaintiff pleads that the heading of the letter makes reference to its appointment on the project for '*Engineering Services for Tsomo Town Roads and Stormwater*', albeit in the first paragraph thereof erroneous reference is made to the installation of a telemetry system at the water treatment works and town reservoir. The acceptance of the appointment on the project was conveyed to the defendant by the plaintiff in writing on 15 July 2010 (Annexure B).

[15] It is pleaded that on 11 April 2016 the plaintiff underwent a name change from '*Jeffares & Green (Pty) Ltd*' to '*JG Afrika (Pty) Ltd*'.

[16] Due to the defendant only being resourced in funds for part of the project, the plaintiff alleges that it was agreed that the works on the project would be separated into two parts and undertaken on that basis with the second part to be undertaken once sufficient funds were secured. Following completion of the first part (phase 1) the plaintiff pleads that the defendant extended the plaintiff's instruction upon the same terms of the contract per Annexure C to include the second part (phase 2). The extension was communicated to the plaintiff in writing on 11 June 2018 (Annexure D). On 25 June 2018 the plaintiff's acceptance was endorsed thereon with a signature by its representative.

[17] The plaintiff further sets out the material terms of the contract and having asserted that it discharged all its obligations it pleads that on 6 July 2020 it rendered its final invoices to the defendant for the amounts claimed which notwithstanding demand the defendant has failed, refused or neglected to pay.

[18] I turn to the grounds of exception. The parties have competently presented argument and are aware of the issues that require determination. Hence it is not intended to burden this judgment by repeating the full scope of the exceptions, except for traversing their material components.

[19] The first point taken by the defendant is its assertion that notwithstanding having pleaded that the letter of appointment makes erroneous reference to the

¹⁴ See Harms, *Amler's Precedents of Pleadings* 9th edition at p111 for the distinction between these terms.

installation of a telemetry system at the water treatment works and town reservoir, the plaintiff has made no claim for the rectification of the alleged error. I understand the defendant to be suggesting that the alleged error in Annexure A does not reflect the common intention of the parties (In law rectification is directed at having a written contract conform with the common intention of the parties¹⁵). The defendant's assertion is made despite the fact that the heading of the letter, and its subject matter, is identified as '*Appointment for Engineering services for Tsomo Town Roads and Stormwater*'. A reading of the particulars of claim unambiguously indicates that the plaintiff's cause of action is not premised on the letter. It is advanced on a signed written contract identified as Annexure C to which Annexure A¹⁶ was the precursor. The letter Annexure A is not a written contract susceptible to rectification. On the plaintiff's argument, which I accept, the letter is not relied upon as the contract between the parties for the advancement of the claims pleaded.

[20] The first ground of exception is further advanced with a complaint that the plaintiff has not made the allegation as to who – either of the plaintiff or the defendant – made the error and the circumstances thereof, and for that reason the defendant is left to speculate. The contents of the letter (Annexure A) are recorded on a letterhead of the defendant. The letter is signed by the municipal manager and it further discloses the contact details by email of an official identified as '*A Silinga*'. The complaint has no merit - the letter plainly emanates from the defendant. *Prima facie* those identified therein may allay any speculation.

[21] It is trite that compliance with a valid tender process is mandated by legislation (i.e. the Local Government: Municipal Systems Act¹⁷ the Constitution and the applicable Supply Chain Management Policy of an organ of state).¹⁸ Proceeding from the premise that the alleged extension of the plaintiff's contract (communicated per Annexure D) to include the second part (phase 2) constitutes a new contract with a value in excess of R200 000 which obliged the defendant (an organ of state) to have acted in accordance with a fair, equitable, transparent, competitive and cost-

¹⁵ *Tesven CC v SA Bank of Athens* 2000 (1) SA 268 (SCA); also Harms *op cit* at p310.

¹⁶ And Annexure B.

¹⁷ Act 32 of 2000.

¹⁸ See generally *Allpay Consolidated Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC) para 40; *Municipal Manager: Quakeni Local Municipality and Another v FV General Trading CC* 2010 (1) SA 356 (SCA); *Ferrostaal GMBH and Another v Transnet SOC Ltd and Another* 2021 (5) SA 493 (SCA) para 31; *Valor IT v Premier, North West Province and Others* 2021 (1) SA 42 (SCA) para 41.

effective bidding process, the second ground of exception is that in order to sustain a cause of action a necessary averment in the particulars of claim ought to have been that there was compliance with the legislated procurement process. The argument is that unless a procurement process complies with legislative prescripts the purported extension is unlawful and the particulars of claim deficient of a cause of action.

[22] The particulars of claim do not plead a new contract. Had this been the case there may well be merit in the defendant's ground of exception. The defendant overlooks what the plaintiff has specifically pleaded in paragraph 8:

'[T]he defendant extended the plaintiff's instruction in terms of the original appointment upon the same terms of the agreement annexure C to include phase 2 ...'

[23] The particulars of claim clearly indicate that the contract Annexure C was preceded by a tender process. I am not persuaded that there is any basis for the complaint that the plaintiff does not plead compliance with procurement legislation in respect of the extension of the contract. As indicated in plaintiff's heads of argument, this is not a ground of exception – it may found a defence but does not sustain the defendant's contention.

[24] The particulars of claim suggests that the plaintiff's name change to '*JG Afrika (Pty) Ltd*' interceded at a stage prior to the extension of the contract on 11 June 2018 by letter Annexure D. The letter emanates from the office of the defendant's municipal manager and is addressed to an entity indicated as '*Jeffares and Green Afrika Consultant*'.

[25] On the third ground of exception the defendant's complaint is that the purported extension which bears relation to the entity indicated in the letter as '*Jeffares and Green Afrika Consultant*', renders the particulars of claim uncertain where it pleads reliance on the letter which *ex facie* is the contract of another entity and does not sustain a cause of action for the plaintiff. The exception is also advanced with an assertion that the letter is an extension of an appointment that occurred in the period three financial years prior to June 2018 but the particulars of claim make no allegation that the plaintiff was appointed to render services in that period.

[26] The short shrift approach to the latter part of this complaint is that the defendant overlooks paragraph 8 of the particulars of claim where it is averred that

the defendant extended the plaintiff's instruction. In that regard what is detailed in paragraph [22] of this judgment is repeated. As for the defendant's uncertainty about the entity with whom the contract was extended, Annexure C indicates that the contract was concluded with '*Jeffares & Green (Pty) Ltd*' prior to the name change in 2016 to '*JG Afrika (Pty) Ltd*'. The letter of extension (Annexure D) interceded after the name change and was communicated on the defendant's own letterhead. The defendant raises the complaint despite it being obvious, on any reasonable interpretation of that letter, that the defendant muddled up the plaintiff's name. The plaintiff's submission that the defendant is at liberty to plead that the letter was not intended to be addressed to the plaintiff and that the complaint is ill-founded on exception, is not without merit.

[27] Attached to the particulars of claim as Annexure E is a document dated 24 June 2020 entitled '*Final Approval Certificate of Works*'. The certificate is issued on a letterhead of an entity '*Jeffares & Green Engineering & Environmental Consulting*'. The defendant's concluding complaint is that the entity is different from the plaintiff and since it does not appear from the particulars of claim the basis upon which the plaintiff relies on a certificate rendered by another entity, there is no nexus between the plaintiff and the certificate upon which it purports to rely. The point taken is misdirected. As a matter of fact the certificate indicates that it was issued by '*Jeffares & Green (Pty) Ltd*', that it was signed on behalf of the plaintiff, accepted by the contractor and approved by the defendant. Whilst noting that the certificate was issued in 2020, after the plaintiff's name change, any uncertainty attaching to the pleader's intention can, in my view, be addressed in a request for trial particulars¹⁹.

[28] As has been said, pleadings are the written statements of the parties setting out the material facts on which each party relies in support of their claim or defence as the case may be. The object of pleading is to define the issues so as to enable the other party, and the court, to know what case has to be met. The defendant is not entitled to a framework of detail in which every interval can be filled by logical deduction (*Jowell v Bramwell-Jones and Others supra*). It is indeed a basic principle that a pleading should be so phrased that the other party may reasonably and fairly be required to required to plead thereto. Equally so, I am of the view that the terms of

¹⁹ Callender-Easby v Grahamstown Municipality 1981 (2) SA 810 (E) at 812H.

the agreement as pleaded in the particulars of claim are sufficient to enable the defendant to plead thereto.

[29] The exception is not well taken and is based on an overly technical approach which is unsustainable.

Order:

[30] The exception is dismissed with costs.

M S RUGUNANAN
JUDGE OF THE HIGH COURT

Appearances:

For the Excipient/ Defendant: *M Gwala SC*, Instructed by Zilwa Attorneys Makhanda (Ref: MP0312).

For the Respondent/Plaintiff: *D H De La Harpe SC*, Instructed by Drake Flemmer & Orsmond Inc., c/o De Jager & Lordan Inc., Makhanda (Ref: S Tarr).

Date heard: 29 February 2024.

Date delivered: 19 March 2024.