



NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

CASE NO. EL 217/2021

In the matter between:

LIESEN BITUMEN HOLDINGS (PTY) LTD

Plaintiff
(Excipient)

and

**EXPERT TECH MAINTENANCE PROJECT
(PTY) LTD t/a EXPERT TECH ENG & MAINT**

Defendant
(Respondent)

**REASONS FOR RULING
IN INTERLOCUTORY APPLICATION**

HARTLE J

[1] On 24 March 2022, after hearing argument in respect of an exception pursuant to the provisions of Rule 30, alternatively Rule 23, I reserved my judgment but issued an order later on the same day in the following terms:

- “1. The defendant’s plea is struck out for want of compliance with Uniform Rule 18 (4), (5) and (6).
2. The defendant is afforded an opportunity to amend its plea within fifteen (15) days.
3. The defendant is directed to pay the costs of the application.
4. Any party requiring reasons may in writing request same within ten (10) days.”

[2] It’s instructing attorneys of Gqeberha requested reasons for my judgment by way of a letter.

[3] These are them.

[4] The parties were at odds regarding whether the defendant’s plea complied with its duty to plead in accordance with the provisions of Rule 18 (4), (5) and (6), and whether it was excipiable as contended for by the plaintiff.

[5] The latter sues on a contract, the material terms of which are set forth in its particulars of claim. These terms are the pivot on which its claim for remediation damages for defective performance rests. The defendant in its plea denied that an agreement as pleaded by the plaintiff ever existed between the parties. It went further and provided further particularity to its denial emphasizing that there was no duty on it to do so. In the process it alluded to an “actual agreement” that had been concluded between the parties (elsewhere referred to as “the real agreement”), rather than the one the plaintiff had contended for in its particulars

of claim, although withholding details of when and where that agreement had been concluded and its essential terms so as to appreciate its import in relation to the claimed defective performance.

[6] The plaintiff raised its objection in terms of Rule 30 that the plea constituted an irregular proceeding for want of compliance with Rules 18 (4), (5) and (6) and asked that it be set aside as such. In a separate objection framed in terms of Rule 23, it complained that the plea was excipiable in that it was vague and embarrassing, alternatively lacking in the necessary averments to sustain the defence pleaded.

[7] The practical complaint was that the defendant had failed to specify whether the actual agreement was written or oral, and if in writing, to annex a true copy of the part relied upon in its plea. The plaintiff's other concerns raised went to the lack of detail in the impugned passages of the plea that would firstly assist it to know what the terms were of the "actual agreement" to allow it to reply thereto; secondly, to identify which of the terms of the agreement contended for by it accorded or differed with those of the "actual agreement" and; thirdly, to indicate which of the terms *on the defendant's case* were supposedly complied with so as to give flesh to its denial that it had rendered defective or incomplete performance.

[8] The plaintiff gave the defendant the customary opportunity to remove the causes of complaint, which chance it spurned. This culminated in the delivery of both an exception and application in terms of Rule 30.

[9] The defendant opposed the matter on the pleadings as it was entitled to.¹

[10] The defendant denied that its plea was non-compliant with the provisions of Rule 18 (4), (5) and (6). Instead, so it was submitted, in its plea it had clearly set out to explain why there was a denial of the contract relied upon by the plaintiff. Mr. Marais on its behalf submitted further regarding the manner in which his client had pleaded that there was nothing lacking or vague in the plea and no premise upon which it could be suggested that the plaintiff could be embarrassed thereby. To the contrary he submitted that since the plaintiff bore the onus to allege and prove the conclusion of the contract sued upon and each of its terms, even if that might have involved the proof of a negative, its coincidental mention of the actual or real agreement (the details of which it had no obligation to expound upon since it could have simply denied the contract the plaintiff purported to rely upon) could not have caused the plaintiff (who bore the full onus to prove that agreement) any prejudice. The defendant considered that it had had no obligation to provide the further particularity which it did and that the manner in which it had pleaded did not attract any onus to prove any contract. To the contrary, so it was submitted, the defendant was doing the plaintiff a favour by pleading in a manner that would assist it at trial so that it would not be taken by surprise at the factual allegations revealed through the qualification in its plea, this in the very anticipation that it had an obligation in terms of Rule 18 (5) not to answer evasively.

¹ See *Chelsea Estates and Contractors CC v Speed-O-Rama* 1993 (1) SA 198 (E) at 202 E - F; *Scott & Another v Ninza* 1999 (4) SA 820 (E) at 823 C; and my judgment in *Z Sihleko & Z N Ngcobe v Member of the Executive Council for Health, Eastern Cape Province* (Bhisho High Court Case No's. 1016 and 1017/2018 - 6 June 2019) at paras [10] – [14]. A notice in terms of rule 30 is not required to be supported by an affidavit neither opposition thereto unless it is exceptionally justifiable for the parties to file affidavits in support of their cases. The defendant said what it wanted to from the bar, namely that it had complied adequately with the relevant sub-rules, that though its plea might be confusing, this was only by reason of the fact that the particulars of claim it was pleading to were not a model of clarity but had entailed “a strange manner of pleading on the part of the plaintiff” that required an explanation for its denial. It was explained that the other contract contended for by the defendant which it said existed did not require elaboration because *it* was not relying on that contract for its defence. It was not trying to enforce it. Prejudice was also denied.

[11] In summary it asserted that the extent and manner of denial did not cause the plaintiff any prejudice and that it remained open to it to simply deny the allegations set out in the particulars of claim aimed at establishing the alleged conclusion of the contract and the claimed terms thereof as the premise against which the claimed defective performance fell to be measured.

[12] Absent any serious prejudice in its view, it criticized the plaintiff for adopting an overly fussy and technical approach in complaining about its plea which it was submitted detracted from the utility of the exception procedure.

[13] The standard against which a litigant is required to plead is set forth in the relevant paragraphs of rule 18 as follows:

“18 Rules relating to Pleading generally

(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) When in any pleading a party denies an allegation of fact in the previous pleading of the opposite party, he shall not do so evasively but shall answer the point of substance.

(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.”

[14] Also relevant to challenges under Rule 30 and to the present scenario are the provisions of Rule 18 (12) which provide that:

“(12) If a party fails to comply with any of the provisions of this rule, such pleading shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with rule 30.”

[15] It follows that if the impugned provisions of a pleading are flawed for want of compliance with Rule 18 that this will render the pleading deemed to be an irregular step, a taint which in itself attracts prejudice.

[16] The object of pleadings and the legal principles on which an exception to a pleading may be taken are well known and need not be repeated here. Both counsel alluded to these in their submissions and had no quarrel regarding their import.

[17] One of the ways to view the standard of sufficiency of a pleading is to ask whether, under the old practice of requesting particulars in order to plead, it would have been necessary for the party complained against to supplement an incomplete or defective statement by a request for and supply of further particulars. The absence of such a procedure presently available to the complaining party to address such a request for particulars indeed enhances the prejudicial aspect of a pleader’s failure to comply strictly with the requirements set out in of Rule 18.²

[18] This appeared to me to be one of those cases.

[19] Mr. Kotze who appeared on behalf of the plaintiff submitted that the simple enquiry, in the Rule 30 application, was whether the defendant’s plea complied with the measure of rule 18 (4), (5) and (6). It was common cause that the defendant did not provide a copy of the “actual agreement” or the “real agreement” (assuming these were the same) so one was evidently in the dark as

² *Minister of Law and Order v Jacobs* 1999 (1) SA 944 (O).

to what its terms were, leaving nothing against which to measure the defendant's denial that it had delivered incomplete or defective performance.

[20] Mr Marais' submission that it was not relying on the agreement so had no obligation to provide a copy or state its terms was without merit. If the defendant needed to explain its denial, it made no sense without a reference to this other agreement. Without a point of reference, the denial was on its terms vague and could not be replied to. One simply could not know in my view upon a perusal of the plea which terms relied on by the plaintiff were in dispute, that quite apart from knowing which terms the defendant was referring to in the first place. It could therefore not have been suggested that the defendant had answered the point of substance. It had tried to, earnestly so it seems, but had come up wanting. It also withheld details of the other agreement that it was relying upon to explain its denial or give it a proper context.

[21] It was no surprise therefore that the plaintiff complained that it could not meaningfully reply to the plea, resulting in obvious prejudice to it.

[22] Mr. Kotze further correctly submitted that the question of onus is irrelevant to the enquiry whether the pleading conforms with the subrules because pleadings are based on facts in the first instance, and it is to this premise one looks to understand the conclusion of law which it is asserted flows from the pleaded facts. A party must plead the material facts upon which it relies with sufficient clarity and particularity to justify the conclusion of law it wishes a court to draw from such material facts.³ The present assessment was based on how it had actually pleaded.

³ *Mabaso v Felix* 1981 (3) SA 865 (A) at 875.

[23] Mr. Marais who appeared on behalf of the defendant argued conversely that the question of where the onus lies matters because the pleadings by their very nature will be defined by what has to be proven and by whom it has to be proven but this was not the true enquiry *in casu*. Rule 18 (6) behoved it to disclose the other agreement and disclose its term not because it relied upon the contract, but to explain on the facts why the defective or incomplete performance was being denied in relation to those claimed terms.

[24] Mr. Marais complained that it was vagueness and confusion in the manner pleaded by the plaintiff itself that had rendered it prudent for the defendant in all the circumstances to plead in the manner it had. He conceded that it would not have been proper to arrive at trial with a bare denial without an explanation as to why there is a denial.

[25] Mr. Kotze fittingly in my view retorted that if the defendant had had a quarrel with the plaintiff's particulars of claim being a model of clarity that the defendant should have elected then to except or complain of any perceived irregularity rather than having pleaded as it had. The point is that in pleading as it did it had chosen the bed it would lie on and was obliged to accept the consequence that its plea, without any detail of the real agreement which it referenced, meant that it fell short of complying with the provisions of Rule 18 (4), (5) and (6).

[26] This manner of pleading for the reasons stated above also conduced to their vagueness and the raising of a defence that was inexplicable without reference to the details of the other agreement contended for.

[27] The obvious prejudice to the plaintiff by the non-compliance with the relevant rules (*prima facie* established by the import of sub-rule (12)) could not be convincingly gainsaid by the defendant.⁴

[28] In the result and relying on the powers afforded to the court in terms of Rule 30 (3) I issued the order which I did.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING:	24 March 2022
DATE OF ORDER:	24 March 2022
DATE OF REQUEST	
FOR REASONS:	30 March 2022
DATE OF REASONS:	11 October 2022

APPEARANCES:

For the plaintiff: Mr. D Kotze instructed by Bax Kaplan Russell Inc., East London (ref. Mr. S Clarke).

For the defendant: Mr. P Marais instructed by Molenaar & Griffiths Port Elizabeth Inc. care of Bate Chubb & Dickson, East London (Mr. Strydom).

⁴ See in this respect *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing & Andere* 2001 (2) SA 790 (T) at 805 G – I.

