



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

Case Number: 35920/2019

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 25 MARCH 2021

SIGNATURE:

DIPALOPALO CONCESSION (PTY) LTD

Plaintiff

And

THE DEPARTMENT OF STATISTICS SOUTH AFRICA

Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] The plaintiff instituted action against the defendant based on a written Public Private Partnership Agreement (the “PPP agreement”) in respect of certain building work that had to be executed by the plaintiff at the offices of the defendant.
- [2] The defendant has filed an exception to the plaintiff’s particulars of claim on the grounds that the particulars are vague and embarrassing *alternatively* that it lacks averments necessary to sustain a cause of action.
- [3] In order to properly adjudicate the exception it is apposite to have regard to the structure of allegations in the particulars of claim.

Particulars of claim

- [4] The main body of the particulars of claim is divided into six sections, to wit:
- [4.1] The **PPP agreement**, which set out the relevant terms of the agreement [paragraphs 4 to 8];
- [4.2] **Implementation of the agreement**, in which allegations in respect of the fulfilment of the agreement is set out [paragraph 9];
- [4.3] **Variation**, which contains factual allegations in respect of a variation of the deliverables in terms of the agreement [paragraphs 10 to 24];

- [4.4] **Amendment to the PPP Agreement alternatively agreement of waiver**, which embodies the plaintiff's first cause of action and contains allegations in support of the amendment of the PPA agreement *alternatively* a waiver of the agreement [paragraphs 25 to 29];
- [4.5] **Alternative claim: Breach of the PPP Agreement**, which contains factual allegations in support of the claim for breach of contract [paragraphs 30 to 37];
- [4.6] **Further alternative claim: Good faith and public policy**, which will be dealt with *infra* [paragraphs 38 to 46].
- [5] The allegations, in a nutshell, refer to the relevant clauses in the PPP agreement governing variations to the project deliverables and refer to the non-variation clause in the agreement.
- [6] The plaintiff then avers that there were several variations to the project deliverables requested by the defendant, which variations were executed by the plaintiff. The allegations in this regard are detailed and refer to correspondence between the parties, which correspondence is attached to the particulars of claim.
- [7] The plaintiff avers that the variations of the project deliverables were orally requested and was accompanied by written sketches and organograms detailing

the variations. The sketches and organograms are also attached to the particulars of claim.

- [8] It is common cause between the parties that the plaintiff, at the end of the contract period, had to do further work. This appears from the correspondence between the parties and was conceded, to his credit, by Mr Shozi SC, counsel for the defendant. The plaintiff claims payment for the further work and sets out a basis in its particulars for the claim.

Exception

- [9] The defendant relies on ten grounds in its notice of exception. I propose to first deal with the grounds in respect of the allegation that the particulars of claim are vague and embarrassing.

Vague and embarrassing

Legal principles

- [10] In order for the defendant to succeed with the allegation that the particulars of claim are vague and embarrassing, it must establish that:

10.1 the particulars lacks particularity to the extent that it is vague; and

10.2 that the vagueness causes embarrassment of such a nature that the defendant is prejudiced.

[See: *Trope v South African Reserve Bank* 1992 (3) SA 208 T]

[11] In *Jowell v Bramwell-Jones* 1998 (1) SA 836 W at 989, the test in respect of an allegation that particulars are vague and embarrassing was set out as follows:

- "(a) Minor blemishes are irrelevant;*
- (b) Pleadings must be read as a whole; no paragraph can be read in isolation;*
- (c) A distinction must be drawn between the facta probanda or primary factual obligations which every plaintiff must make, and the facta probantia which are the secondary allegations upon which the plaintiff will rely in support of his primary factual allegations. Generally speaking, the latter are matters for particulars for trial and even then limited. For the rest they are matters of evidence;*
- (d) Only facts need be pleaded; conclusions of law need not be pleaded;*
- (e) Bound up with the last mentioned consideration is that certain allegations expressly made may carry with them implied allegations and the pleadings must be so read;"*

[12] Furthermore, and in *Absa Bank v Boksburg Transitional Local Council (Government of the Republic of South Africa, third party)* 1997 (2) SA 415 W at 418, it was stated that:

"A pleading will not be excipiable on the grounds of being vague and embarrassing if a party adequately knows what the plaintiff's case is and its attorneys are able to take instructions and record a meaningful response to such pleadings."

First to fifth grounds of exception

- [13] The first to fifth grounds of the exception is directed at paragraphs 10 to 22, which, as set out aforesaid contains factual averments in support of the different causes of action.

First ground

- [14] The first exception pertains to paragraph 10 of the particulars which reads as follows:

"VARIATION

During the subsistence of the PPP agreement and during the course of carrying out the Works in terms thereof, during or about February 2016 alternatively 14 February 2016, at Salvokop, the Defendant, represented by Akthary Henning ("Henning"), advised the Plaintiff's representatives, Thabatha Qaba ("Qaba") alternatively Derek Wallace ("Wallace"), that it was necessary for the Project Deliverables under the PPP agreement to be varied in the following respects:"

- [15] A list of the proposed amendments is set out in subparagraphs 10.1 to 10.2.15 and the paragraph concludes with the following:

"("the Proposed Variation") (not to be confused with a Department Variation Proposal as defined in the PPP agreement)."

- [16] The defendant's exception to paragraph 10 is firstly that the title "*Variation*" is at odds with the definition of variation in the PPP agreement. The title in the particulars

of claim does not change the *facta probanda* that has been alleged. A defendant pleads to the allegations in the particulars and not to the title. The exception to the title is ill-conceived and dismissed.

[17] The next objection is against the term "*proposed variation*" and the allegation that the term is "*not to be confused with a Department Variation Proposal as defined in the PPP agreement*". The objection is based on the fact that the PPP agreement provides in clause 44 for a certain procedure to be followed should the defendant wish to vary the project deliverables. According to the defendant, it is not in a position to determine the clause the plaintiff is relying on as the allegations pertained to a proposed variation and can, as a result not plead to the paragraph.

[18] This objection is firstly raised against a single paragraph in the particulars and secondly, if paragraph 10 is read in context, it is clear that the allegations provide factual background pertaining to the variation of the deliverables in the PPP Agreement. The allegations are, furthermore, set out in detail and it is possible for the defendant to instruct its attorneys in respect of the allegations.

[19] Next the defendant objects to the allegation that Henning "*advised*" the representatives of the plaintiff of the proposed variation whereas the PPP agreement entails that a variation should be done in writing.

[20] The defendant submits that insofar as the plaintiff relies on an oral agreement, clause 69.1 of the PPP agreement provides, *inter alia*, that *"no provision of this PPP agreement may be amended...or otherwise varied, except by an agreement in writing signed by the duly authorised representatives of the Parties"*.

[21] Bearing in mind that the factual allegations are pleaded in order to sustain the causes of action set out from paragraph 25 onwards. This objection should be directed at the various causes of action and not the factual averments.

[22] Lastly, the defendant contends that the allegation in paragraph 10 that the proposed variation is not to be confused with a department variation proposal is in conflict with:

[22.1] the allegation in paragraph 15 that in a letter by the plaintiff dated 4 April 2016 addressed to the defendant's attorneys, the plaintiff stated that the variation constituted a variation in terms of the PPP agreement; and

[22.2] the allegation in paragraph 16 that it provided the defendant with a provisional estimate, which allegation is in line with the provisions of clause 44 of the PPP agreement.

[23] As set out *supra* paragraph 15 and 16 contain the factual allegations pertaining to the variation.

[24] The plaintiff's main cause of action and the alternative thereto is contained under the heading ***"AMENDMENT TO THE PPP AGREEMENT ALTERNATIVELY AGREEMENT OF WAIVER"***.

[25] The factual allegations contained in paragraphs 15 and 16 are in respect of this cause of action.

[26] Having regard to the pleading in totality and the alternative causes of action relied upon by the plaintiff, the allegations are not vague and embarrassing and the defendant is in a position to plead thereto.

Second ground

[27] The exception is directed at the following allegations in paragraph 11:

"The advice given by Henning as discussed in paragraph 10 above, was partly oral and partly written. The written portion of the advice entailed Henning providing Qaba and/or Wallace with an organogram reflecting the headcount of personnel required to be provided for by the plaintiff in its space planning drawings. A copy of the organogram is attached hereto marked "POC2A"."

[28] The first objection is, once again, directed at the partly oral agreement that does not comply with clause 69.1. I have dealt with the point *supra*.

[29] Secondly, the defendant states that the wording of the paragraph is inherently vague and embarrassing, because it does not indicate whether the organogram was the written agreement or whether the organogram was accompanied by a written agreement.

[30] The meaning of the allegations in this paragraph is on a simple reading clear. The written portion of the agreement is the organogram provided by Henning and attached to the particulars of claim.

[31] In the result, this ground of exception cannot succeed.

Third ground

[32] This ground of the exception pertains to paragraph 20 of the particulars of claim and more particularly to the following allegations:

[32.1] paragraph 20.1:

"On or about 4 May 2016, the defendant, represented by Henning, provided the plaintiff, represented by Qaba and/or Wallace, with an amended organogram, which reflected an amended headcount of personnel required to be provided for by the plaintiff in its space planning. A copy of this amended organogram is annexed marked "POC6A". The accommodation of the personnel reflected in the amended organogram necessitated a variation of the space planning drawings to cater for the adjusted space planning requirements of the defendant."

[32.2] paragraph 20.2:

"The amended organogram required the addition of new offices with associated charges, modifications and service additions as recorded in paragraph 10.2.1-10.2.15 above to be effected."

[32.3] paragraph 20.3:

"The amended organogram constitutes an amendment to the initial Proposed Variation (hereinafter referred to as the "Final Proposed Variation")."

[33] The complaint pertains to the failure by the plaintiff to specifically allege in which respects the organogram attached as "POC6A" amended the organogram attached as "POC2A". A mere comparison between the annexures resolves the defendant's problem. Henning would, furthermore, be able to give instructions on the amendments, insofar as the defendant might not be able to ascertain same from a comparison between the two organograms.

[34] The provisions of clause 69.1 providing that amendments that must be in writing and signed by both parties is also raised and had been dealt with *infra*.

[35] The third ground of the exception stands to be dismissed.

Fourth ground

[36] This ground pertains to paragraph 22 and more specifically to the following allegations:

[36.1] paragraph 22.1:

"On or about 27 May 2016, and at Salvokop, Qaba and/or Wallace, acting on behalf of the plaintiff, presented Henning, acting on behalf of the defendant, with a varied space planning drawing which catered for the Varied Facilities as required by the defendant and as reflected in the Final Proposed Variation. A copy of the varied space planning drawing is annexed hereto marked "POC8"."

[36.2] paragraph 22.2:

The additional work would have required to be carried out to give effect to the revised space planning drawing (being the changes recorded in paragraph 10.2.1 to 10.1.5 above) was not provided for in the Project Deliverables under the PPP agreement and required a variation of the Project Deliverables thereunder."

[36.3] paragraph 22.3:

"Henning, acting on behalf of the defendant, appended her signature to the revised space planning drawing (annexure POC8) thus confirming her acceptance of the Final Proposed Variation to the space planning as reflected therein. The revised space planning drawing catered for the amended headcount of personnel and accorded the Final Proposed Variation."

[37] The defendant contends that paragraph 22.2 is vague and embarrassing because it is not clear whether the plaintiff or the defendant required the variation as provided in clause 44.2 and 45.1 of the PPP Agreement. The allegation has all along been that the defendant requested the variation and that it was done partly oral and partly in

writing. The drawings provided to Henning were in accordance with her request for a variation.

[38] The allegations viewed in its totality make this clear and the defendant is able to take instructions from Henning in respect of the allegations contained in paragraph 22.2.

[39] The complaint to the allegations in paragraph 22.3 is in the same vein, save that the defendant also states that it is *“unable to discern whether the Variation being referred to and is alleged to have been accepted by Henning is the same variation which is referred to in paragraph 22.2”*.

[40] On a mere reading of the three paragraphs, it is clear that the variation mentioned in paragraph 22.3 refers to the variation in paragraph 22.1.

[41] This ground of exception stands to be dismissed.

Fifth ground

[42] This ground pertains to the allegations contained in paragraph 25 which read as follows:

“25. The letters and document annexed as annexures POC3-POC9 constitute a written agreement concluded at Sandton alternatively, Salvokop, on or about 27 May 2016 alternatively 24 June 2016 between the defendant, represented by ENS Africa

Attorneys alternatively Nikita Lala, further alternatively Khaya Mantengu, further alternatively Adriaan Hoeben, further alternatively Akthary Henning and the plaintiff, represented by Werksmans Attorneys alternatively Chris Moriatis, further alternatively, Qaba, in terms of which the parties agreed to amend the PPP agreement, alternatively agreed to waive the provisions of clause 44 thereof, in respect of the Final Proposed Variation on the following express, alternatively implied further alternatively tacit terms-"

[43] The defendant contends that the allegations in paragraph 25 are completely vague and embarrassing as no particularity is pleaded as to how the letters and documents annexed to the particulars of claim could constitute "*a written agreement*".

[44] In raising the objection, the defendant failed to have regard to subparagraphs 25.1 to 25.3.9, which set out in detail the terms of the agreement between the parties. On a mere reading of the letters in their totality, the intention of the parties is clearly discernible and the attorney for the defendant is in a position to take instructions from the various role-players referred to in the letters. Furthermore, the defendant is in a position to admit or deny the allegations and to plead its version of events.

[45] The factual allegations contained in the whole paragraph 25 causes no embarrassment to the defendant.

[46] The defendant also contends that annexure “POC8” which is headed “Space Planning Proposal on New Departmental Headcounts”, was only signed by Henning and therefore does not comply with clause 69.1 of the PPP agreement.

[47] Annexure “POC8”, should not be considered on its own. “POC8” is one of the documents that according to the plaintiff represents the written agreement between the parties in respect of the variation of the deliverables. In view of the plaintiff’s allegation that the parties agreed in writing through the various letters and documents to vary the written agreement, the allegation is not in conflict with clause 69.1.

Sixth ground

[48] The plaintiff alleges in paragraph 27 that it incurred in the amount of R 20 803 280, 53 as a result of the execution of the works.

[49] The defendant complains that the amount is not detailed nor substantiated by documents as proof of the expenses.

[50] Paragraph 27, however, specifies with reference to specific items, how the amount was arrived at. Documents proving the costs are evidence and can be obtained by the defendant prior to the trial in terms of the provisions of rule 35 of the Uniform Rules of Court.

[51] This ground can similarly not succeed.

Seventh ground

[52] This ground pertains to paragraph 30, which reads as follows:

"30. On or about 15 April 2016, alternatively 26 April 2016, and at Sandton, the defendant, represented by ENS Africa alternatively Nikita Lala, further alternatively Adriaan Hoeben, and the plaintiff, represented by Werksmans Attorneys alternatively Chris Moriatis, entered into a written agreement in terms of which the parties agreed that the time period for the delivery of an estimate in terms of clause 44.4 of the PPP agreement would be extended in respect of the Final Proposed Variation to a reasonable period after the completion of the Works. A copy of the written agreement comprises of annexure POC5 read with POC7".

[53] "POC5" is dated 14 April 2016 and contains the following proposal from the defendant's attorneys:

"19. ... We appreciate that there is a difference in opinion between the parties as to the liability for the cost of the additional offices but suggest that this dispute be held over for present purposes and be resolved in the fullness of time."

[54] "POC6", although not referred to in this paragraph, is a letter from the plaintiff's attorney dated 15 April 2016 and states in paragraph 1:

"1. I refer to your letter of 14 April 2016. ..."

[55] In paragraph 5.6 of the letter the following is stated:

"5.6 The Private Party would therefore propose that, subject to agreement on the changes to space planning, the Department will be responsible for and will pay the cost of procuring the materials for purposes of these changes. The other costs, including abortive work costs to date, can be held over and resolved later."

[56] "POC7" is another letter from the plaintiff's attorney dated 26 April 2016 and is in response to a letter by the defendant's attorney dated 21 April 2016.

[57] Paragraph 7.4 of the letter reads as follows:

"7.4 The issue of costs relating to this work must still be addressed and our clients repeat that set forth in our previous letter in this regard. In the alternative, the Private Party may be prepared to agree to fund these costs, on an interim basis, on the understanding that the entire matter relating to space planning be resolved by Fast-Track dispute resolution. A written agreement reflecting this will need to be entered into in this regard."

[58] The defendant submits that allegations in this paragraph are vague and embarrassing, in that the letters referred to do not constitute a written agreement in terms of which the parties agreed that the time period for the delivery of an estimate in terms of clause 44.4 of the PPP agreement would be extended in respect of the Final Proposed Variation to a reasonable period after the completion of the works.

[59] I agree. Paragraph 30 falls under the alternative claim for breach of the PPP agreement.

[60] The defendant's exception against the alternative claim stands to be upheld.

Eighth ground

[61] This ground relates to paragraph 38 of the particulars of claim, which reads as follows:

"[On] or about 27 May 2016, and at Salvokop, the defendant, represented by Henning, and the plaintiff represented by Qaba and/or Wallace, entered into an oral agreement alternatively a partly written, partly oral agreement (the written portion being annexure POC8) in terms of which the parties agreed to the plaintiff carrying out the additional work in accordance with the Final Proposed Variation."

[62] Firstly, the defendant raises, once again, the objection that the oral agreement and for that matter annexure "POC 8", which was only signed by Henning, does not accord with clause 69.1. The allegations contained in paragraph 38 are factual and in support of a further alternative claim that compliance with the provisions of clause 69.1 would be *mala fide*, unconscionable, an abuse of the process of law in terms of section 34 of the Constitution and contrary to public policy. Without the factual allegation that the agreement was partly oral, the plaintiff would not have any factual foundation to claim the relief set out under this further alternative cause of action.

[63] Secondly, the defendant submits that the allegations in respect of the oral agreement are vague and embarrassing because it is lacking particularity. This objection can be taken care of by utilising the provisions of rule 21 of the Uniform Rules of Court. The allegations are for purposes of pleading sufficient.

[64] Lastly, the defendant contends that the plaintiff alleges in paragraphs 22.1 and 22.3, that "POC8" is a "*varied space plan drawing*" which was presented by the plaintiff to the defendant on 27 May 2016 and which catered for the Varied Facilities as required by the defendant and as reflected in the Final Proposed Variation. Paragraph 38, however, refers to "POC8" as "*the written portion of the agreement*", which allegation confuses the defendant.

[65] Once the proposal contained in "POC8" was signed by Henning it became a written portion of an agreement. On a mere reading of the paragraphs in their totality, this is perfectly clear and the objection stands to be dismissed.

Tenth ground

[66] This ground of exception pertains to clause 32.1.1 of the PPP agreement that provides that the plaintiff is not entitled to receive any "*Unitary Payment*" until the *Service Commencement Date*", which is defined in clause 1.109 to mean "*the first Business Day following the date on which the Availability Certificate is issued and delivered to the [Defendant] in accordance with clause 19.*"

[67] In terms of clause 19, an Availability Certificate can only be issued after receipt of the "*Completion Certificate*" from the Independent Certifier. Accordingly, the plaintiff is not entitled to a Unitary Payment at any time before the issuing of the Completion Certificate.

[68] In view of the aforesaid, the defendant submits that the particulars of claim are vague and embarrassing insofar as the plaintiff alleges in paragraph 26.4 that a Completion Certificate was issued on 19 August 2016, yet the plaintiff claims in paragraph 28 for Unitary Payments for June 2016, July 2016 and August 2016.

[69] The plaintiff, however, contends that its claim is for damages which includes a claim for loss of revenue being an amount equal to the unitary payments which it would have received but for the defendant's conduct.

[70] In the result, the particulars of claim are sufficiently and properly pleaded to enable the defendant to plead.

[71] I agree and this ground of exception stands to be dismissed.

No cause of action

Legal principles

- [72] In *McKenzie v Farmers' Co-Operative Meat Industries Limited* 1922 AD 16 the Appellate Division defined the necessity to plead a cause of action as follows at 23:
- "...every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court."*

Ninth ground

- [73] This ground pertains to the allegation that the particulars of claim lack the necessary averments to sustain a cause of action.
- [74] The defendant avers that regulation 16.8.1 of the Treasury Regulations published in GN R225 in GG 27388 on 15 March 2005 applies to the PPP Agreement. Regulation 16.8.1 reads as follows:
- "The prior written approval of the relevant treasury is required for any material amendments to a PPP agreement including any material variations to the outputs therein, or any waivers contemplated or provided for in the PPP agreement."*
- [75] In the result, the plaintiff should have pleaded that the alleged variations, amendments and/or waivers of some of the provisions of the PPP agreement were made with the prior written approval of National Treasury.

[76] The plaintiff failed to do so and as a result, the particulars of claim lacks the necessary facts to sustain a cause of action.

[77] The plaintiff, in answer, submitted that only "*material amendments*" requires prior written approval and as the amendments to the PPP agreement were not material, regulation 16.8.1 does not apply. In the result, failure to plead compliance regulation 16.8.1 is not a fact that needs to be pleaded in order to sustain a cause of action. I agree.

[78] It is, naturally, still open to the defendant, to plead that the amendments were material as envisaged in regulation 16.8.1. The issue will in such an event be fully ventilated during the trial.

Costs

[79] The plaintiff has been substantially successful in opposing the exception and a cost order in favour of the plaintiff should follow.

ORDER

[80] In the premises, I grant the following order:

1. Grounds 1, 2, 3, 4, 5, 6, 8, 9 and 10 of the exception are dismissed with costs.

2. Ground 7 is upheld and the plaintiff is afforded ten days from the date of this order to amend its alternative claim in respect of breach of the Public Private Partnership Agreement.

A handwritten signature in black ink, appearing to read 'N. Janse van Nieuwenhuizen', is written over a horizontal line. To the left of the signature is a large, stylized circular mark.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES: 1 February 2021

(Virtual hearing.)

DATE DELIVERED PER COVID19 DIRECTIVES: 25 March 2021

APPEARANCES

Counsel for the Plaintiff:

Advocate N. Redman SC

Instructed by:

C De Villiers Attorneys

c/o Wiese and Wiese Attorneys

Counsel for the Defendant:

Advocate H. Shoji SC and

Advocate J. Mitchell

Instructed by:

Ledwaba Mazwai Attorneys