



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED:

Signature

- (4) Date of hearing: 03 March 2021

CASE NO.: 23731/2018

IN THE MATTER BETWEEN:

MMAMOLEBOGE INVESTMENTS CC

1ST PLAINTIFF

KOPANO CREATIVE CONCEPTS CC

2ND PLAINTIFF

KGONI TRADING CC T/A

3RD PLAINTIFF

KGONI CIVILS & ENGINEERING

AND

CRIMSON & PROPERTIES 351 (PTY) LTD

1ST DEFENDANT/EXCIPIENT

T/A CRIMSON KING DEVELOPMENTS

APIL & ASSOCIATES ARCHITECTS & PROJECT MANAGERS

2ND DEFENDANT

INSIKA QUANTITY SURVEYORS (PTY) LTD

3RD DEFENDANT

ONE G SERVICES (PTY) LTD

4TH DEFENDANT

THE MEC: DEPARTMENT OF HUMAN SETTLEMENTS,

5TH DEFENDANT

GAUTENG PROVINCE

HEAD OF DEPARTMENT, OF HUMAN SETTLEMENTS,

6TH DEFENDANT

GAUTENG PROVINCE

JUDGMENT

NYATHI AJ

A. INTRODUCTION

[1] This is an exception hearing wherein the First Defendant has taken exception against the Plaintiff's amended declaration on the grounds that the amended declaration is vague and embarrassing and in addition, lacks the necessary averments to sustain a cause of action

against the First Defendant. The First Defendant in its Rule 23 (1) notice has raised nine grounds of attack directed against the Plaintiff's amended declaration.

[2] The Excipient delivered a Notice of Exception in terms of Rule 23 (1) to wit the Plaintiffs were called upon to remove the cause of complaint within fifteen (15) days of delivery of the said notice. The Plaintiffs through its attorneys of record sent a letter wherein it declined to remove the causes of complaint raised by the First Defendant in its Rule 23 (1) notice.

[3] The Plaintiffs then set the matter down for argument.

B. FACTUAL BACKGROUND

[4] First, Second and Third Plaintiff ("the Plaintiffs") claim monies due, owing and payable to them arising from the following:

4.1 First Defendant (as employer) and the Plaintiffs respectively on various dates entered into a written contract to build, erect and/or construct subsidized houses at Westonaria, Gauteng. ("the Construction Project")

4.2 During 2013, whilst in the course of building, erecting, and constructing the houses the Department (through the First Defendant), instructed the Plaintiffs to cease/stop with the construction work because of certain departmental problems, The First Defendant further instructed the Plaintiff to remain on site to protect the work already done.

4.3 The above-mentioned instruction was indeed followed by the Plaintiffs, with the expectation by the Plaintiffs that the Department will have to pay the standing time fees as well as Contract Price Adjustment Provision ("CPAP"), resulting from the delay caused by this instruction.

[5] After the above instruction, the Plaintiffs resumed with the construction and completed all stages of the Construction Project in terms of the contract between the Plaintiffs and the 1st Defendant. It is common cause between the parties that the entire Construction Project was completed on 8th October 2014. The Second Defendant (Principal Agent) then issued all the Plaintiffs with certificates of final completion and drew up final accounts. After the final payments, Plaintiffs' security fund and retention monies were also released.

[6] The Plaintiffs' expectation was that the standing time fees and Contract Price Adjustment which resulted from the stoppage of work would become due and payable. Second Defendant in conjunction with Third Defendant calculated the standing time fees and the Plaintiff was supposed to accept these calculations subject to the approval of the Department.

[7] The calculations were made by the Third Defendant and amounted to total project adjustment on all three contracts in an amount of R8,033,604.59 (excluding VAT).

[8] The Department accordingly and subsequently approved of such calculations. During 2016, the Department made full payment of the said amount to the First Defendant. In the light of the foregoing the First Defendant was obliged to pay over the amount for standing time thus calculated to the three Plaintiffs, respectively.'

[9] The Plaintiffs aver that at all material times and in terms of the written agreement, the First Defendant received the said money as Agent and/or on behalf of the Plaintiff for distribution amongst the Plaintiffs.

[10] The Plaintiff aver that each of the Plaintiffs according to the said calculation and subsequent approval by principal agent and the Department, became entitled to payment of the amount of R1,419,000.00 and CPA payment in an amount of R1,258,398.74 (Excluding VAT).

[11] In the premises the First defendant received payment on behalf of the Plaintiffs and is obliged to pay to each of the Plaintiffs R2,677,868.20 (Excluding VAT).

[12] During October 2016, the First Defendant did pay the Second Plaintiff an amount of R550,000.00 and during May and September 2016. paid to the Third Plaintiff an amount of R585,000.00. No payment was made to the First Plaintiff at all.

[13] The core issue between the parties i.e., Plaintiff and First Defendant and which must be decided, is who is entitled to the money paid by the Department as standing time, as well as the Contract Price Adjustment Provision. The Plaintiffs set out the foregoing background in greater detail in its amended declaration.

C. LEGAL PRINCIPLES GOVERNING EXCEPTIONS

[14] "In deciding an exception, a court must accept all allegations of fact made in the particulars of claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts. The purpose of an exception is to protect litigants against claims that are bad in law or against an embarrassment which is so serious as to merit the costs even of an exception. It is a useful procedural tool to weed out bad claims at an early stage, but an overly technical approach must be avoided." – Froneman J in *JP Pretorius v Transnet Pension Fund* CCT 95/17 ZACC referring to *Telematrix (Pty) Ltd v Advertising Standards Authority* SA 2006 (1) SA 461 SCA; [2005] ZASCA 73

[15] Exceptions are dealt with in terms of High Court rule 23 (1). Rule 23 (1) reads as follows:

"Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing ..."

[16] Pleadings and their contents are regulated by rule 18. 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 side to reply thereto."

[17] Further on Rule 18 (6) states that "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."

[18] In response to the declaration the First Defendant has excepted to the declaration as being vague and embarrassing, setting out seven (7) grounds of complaint which are subject of this hearing. The parties allege and appear to react to nine (9) grounds in their respective heads of arguments but I could only identify seven (7) crisply set out grounds.

y

D. THE GROUNDS OF EXCEPTION

The first complaint

[19] The Plaintiffs plead the conclusion of three (3) separate written contracts with the excipient on similar terms. They further failed to plead and rely upon any specific terms and conditions contained in the Principal Building Agreement Standard JBCC edition 5 ("the PBA"). The First Defendant is prejudiced in having to guess which contractual provisions are alleged by the Plaintiffs to be relevant and applicable, inter alia the Plaintiffs' use of words such as "understanding" between the parties. and "oral agreements" are in contravention of the non-variation clause contained in clause 42.1 of the PBA. The declaration alleges the First Defendant, consequently, lacks averments necessary to sustain an action.

[20] The introductory portion of the declaration define each of the Defendants and their roles in the contract. The Second Defendant, for example, is the principal agent and has the authority to exercise such powers as are not proscribed by the PBA. The Third Defendant is the Quantity Surveyor who is authorised in terms of the PBA to exercise such powers as a Quantity Surveyor does in relation to calculating payments etc. that are due and to whom. At any rate rule 18 (7) provides that "it shall not be necessary in

any pleading to state the circumstances from which an alleged implied term can be implied." Plaintiffs have attached to the declaration a copy of the written contract, the PBA, in terms of which they have already been paid on completion of the work. Addenda such as building plans and the schedule of works were not attached since they were not relevant. What remains, is for the First Defendant to pay over the amounts paid out for standing time and the Contract Price Adjustment Provision (CPAP). This ground of exception appears contrived and cannot be sustained.

The second complaint

[21] The First Defendant takes issue with paragraph 16 of the declaration. It reads as follows:

"During the course of 2013, the Department temporarily ceased with the construction work as a result of certain departmental problems but issued an instruction to the First Defendant, who in turn requested the Plaintiffs to remain on site for protection of the work already done. This instruction was accordingly followed, and it was common cause amongst the Plaintiffs that the Department shall pay standing times fees as well as Contract Price Adjustment Provision 'CPAP'."

[22] Under this heading the Defendants allege that the Plaintiffs have not pleaded any details regarding the nature of the "departmental problems" which led to the work stoppage and why the Plaintiffs would be entitled to any amounts for "standing time" and CPAP from First Defendant in terms of the PBA. Further allegations are that the

Plaintiffs have not pleaded how it became "common cause among the parties" that the Department would pay said standing time fees and CPAP. This complaint relates to issues of substantive law of evidence. The vagueness complained of is that the amended declaration does not contain pieces of evidence necessary to prove the pleaded "material facts".

- [23] This complaint has the effect of offending against Rule 18 (4) and the requirement to plead only "material facts." Should the Plaintiffs be required to plead the nature of the "departmental problems", and "how and when it became common cause..." the amended declaration would be excipiable as it would contain 'facta probantia', which would have been offensive to the object of Rule 18 (4), alternatively Rule 18(7), which does not make it mandatory for a pleader to state the circumstances from which an implied term can be inferred in a pleading. This ground of exception cannot succeed.

The third complaint

- [24] The First Defendant takes issue with paragraph 18 of the declaration which reads as follows:

"Despite the foregoing it was common cause amongst all parties that the Principal Agent, i.e. the Second Defendant, in conjunction with the Third Defendant, would calculate the outstanding amounts for all standing time claims in terms of the written

was agreed amongst the parties that this calculation will be done by the Third Defendant and as for the factual history of standing time, and CPAC and that the Plaintiffs will abide by the calculations made by the quantity surveyor, as aforesaid, subject to the approval of the Second Defendant and the Department."

[25] No allegations are made pertaining to:

23.1 When the standing time claims were submitted to the First Defendant, the amounts of such standing time claims, and why they are alleged to be outstanding.

23.2 How it came to be "common cause between all the parties" that the Second and Third Defendants would calculate the outstanding amounts for the standing time claims.

23.3 Which provisions in the PBA are relied upon by the Plaintiffs in support of the allegation that the calculation of standing time claims would be done "in terms of the agreement". and

23.4 No particulars are provided of any alleged agreement, be it oral or in writing, where the agreement was concluded, who represented each of the parties, etc.

[26] The Plaintiffs' claim is for payment of monies due, owing, and payable by the First Defendant to the Plaintiffs, the amount of which is simply ascertainable from the pleaded facts. The Excipient seeks details relating to when, how and why the amounts were arrived at. Yet these were clearly pleaded in the amended declaration. The answers to the First Defendant are laid out in Paragraphs 22 and 23 of the declaration. The calculations were done by the Quantity Surveyor (Third Defendant) and approved by the Principal Agent (Second Defendant) and the Department (Fifth and Sixth Defendants).

[27] It has been submitted on behalf of the Plaintiffs that the questions of 'how', 'when', and 'what amounts' were claimed have been overtaken by events in that payment of the aforesaid monies has already been made by the Department to the First Defendant as specifically due to all the Plaintiffs. It follows that if payment is already made there was proper compliance with the terms of the PBA and claims were submitted in accordance with the written agreement for the Department to have effected payment. This ground of exception has no merit.

The fourth complaint

[28] The First Defendant takes issue with paragraph 19 of the declaration which reads as follows:

"In terms of the JBCC Agreement a calculation was accordingly made by the Third Defendant and amounted to a total project adjustment on all three contracts pertaining to the Plaintiff in an amount of R8,033,604.59 (excl. VAT)."

[29] The First Defendant queries the Plaintiffs on the method and particulars used in arriving at the amount of R8,033,604.59 which (has already been paid to it) The Plaintiffs submitted that this ground of complaint is irrelevant to the Plaintiffs' pleaded case. It is the Plaintiffs' assertion that calculations were done by the Third Defendant, the Plaintiffs as contractors cannot comment and/or advance any case on the method used by the Third Defendant but can only abide by such calculations done by the Quantity Surveyor, the Third Defendant has exclusive knowledge on the 'method' and 'particulars of the calculations'. Thus, this ground of attack is bad in law when regard is had to the pleaded case.

The fifth complaint

[30] The First Defendant takes issue with paragraph 20 of the declaration which reads as follows:

"In terms of the JBCC Agreement a calculation was accordingly made by the Third Defendant and amounted to a total project adjustment on all three contracts pertaining to the Plaintiffs in an amount of R8,033,604.59 (Excl. VAT)."

[31] The First Defendant then alleges that no allegations are pleaded as to in terms of which "agreement" the Department is alleged to have made payment to the First Defendant, and, on what factual or legal basis, specifically, the First Defendant was obliged to have made payment to the First Defendant and on what "factual" or "legal" basis, specifically, the First Defendant was obliged to pay the funds received to the 3 plaintiffs. Any reference to an 'agreement' in the amended declaration refers to the annexed PBA agreement and should there have been any other tacit and/or oral agreement extraneous to the main contract the pleader would have specifically referred to its particulars and/or terms thereof, including annexing it to the declaration where applicable. The complaint is inconsistent with the pleaded facts and is bad in law.

The sixth complaint

[32] The First Defendant challenges paragraph 21 of the declaration which reads as follows:

"The Plaintiffs aver that at all material times and in terms of the written agreements the First Defendant received the said money as agent and for on behalf of the Plaintiffs for distribution amongst the Plaintiffs."

[33] The First Defendant Attacks Plaintiffs averment that at all material times and in terms of the PBA the First Defendant received monies as agent and on behalf of the Plaintiffs and for distribution amongst the Plaintiffs. The Plaintiffs, he contends have failed to plead any contract of agency. Plaintiffs submits that it has always been the actual practice throughout this contractual relationship that all monies payable to Plaintiffs by the Department, were not paid directly into Plaintiffs' accounts, instead such payments were made via the account of the First Defendant, who in turn paid same to the Plaintiffs. It is thus disingenuous of the First Defendant to claim ignorance of such "relationship of agency".

The seventh complaint

[34] The First Defendant takes issue with paragraph 22 of the declaration which reads as follows:

"The Plaintiffs aver that each of the Plaintiffs, according to the said calculation and subsequent approval by the Principal Agent and the Department became entitled to payment of an amount of R1 419 000 00 for standing time and CPAP payment in an amount of R1,258,398.74 (excl. VAT)."

[35] First Defendant alleges that no calculation in respect of standing time or CPAP has been pleaded. Further no particulars, facts or legal conclusions were pleaded to

substantiate the allegation that each of the Plaintiffs would be entitled to 1/3 (a third) of the total amount (R8,033,604.59) paid. It was submitted on behalf of the First Defendant that this ground is no different to those already dealt with above. And that the Plaintiffs' amended declaration contains material facts with sufficient particularity to enable the excipient to know what case it has to meet. Accordingly, this ground of complaint ought to fail as it lacks merit.

[36] With these seven clearly tabulated complains, the First Defendant submits that the issues complained of singularly and collectively renders the whole amended declaration is vague and embarrassing.

E. CONCLUSION

[37] I have carefully considered the amended declaration and its contents as well as the PBA annexed thereto as a whole. (*Nel & others NNO v McArthur* 2003 (4) SA 142 (T) at 149F. I also considered the detailed grounds of exception raised in this matter painstakingly.

[38] Counsel for both sides presented thorough heads of argument and argued at length. The reality is that "...the excipient has the duty to persuade the court that the pleading is excipiable on every interpretation that can reasonably be attached to it." (*Amalgamated*

Footwear & Leather Industries v Jordan & Co Ltd 1948 (2) SA 891 (C) at 893; *H v Fetal assessment Centre* 2015 (2) SA 193 (CC) at 199B.

[39] I am not in any way persuaded that the declaration does not disclose a cause of action or that it is vague and embarrassing.

F. ORDER

The defendant's exception is dismissed with costs.



J.S. NYATHI
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of Judgment: 11 May 2021

On behalf of the 1st Defendant/Excipient: Adv CA Boonzaaier
Instructed by: Venter & Von Abo Inc
Van Erkom Building
c/o Macintosh Cross & Farquharson

834 Pretorius street
Arcadia, Pretoria
Tel: (012) 342 4855
Fax: (012) 342 5113
Email: cn@macintoshcross.co.za
Ref: C Erasmus/cn/B78/2019

On behalf of the Plaintiffs: Adv PJJ de Jager SC with Adv Ngoepe
Instructed by: Nkondo Attorneys Inc
Email: admin@letselankondoinc.co.za
c/o MABASA SK Attorneys
23 Bureau Lane Street
Pretoria Central
Office 112
Centenary Building
Tel: (012) 021 5545
Fax: (086) 459 1524