

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

Case No: 1551/2019

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

.....

DATE

.....

SIGNATURE

In the matter between

GRIT BLASTING AFRICA (PTY) LTD**PLAINTIFF****AND****TARMAN HOLDINGS (PTY) LTD****DEFENDANT**

JUDGMENT

KGANYAGO J.

- [1] The plaintiff has instituted an action against the defendant claiming an amount of R1 202 548-63. The plaintiff's claim is based on a written agreement which was entered into between the plaintiff and the defendant on 29th January 2018. The agreement was for the construction of a road storm water system. The plaintiff avers that during the course of the term of the agreement, the defendant extended the scope of the work by instructing the plaintiff to do additional construction work to the main agreement. In turn the defendant was to pay the plaintiff for such work on delivery of the invoice.
- [2] According to the plaintiff it has duly fulfilled all its obligations in terms of the main agreement and as well as the variation order. As per the plaintiff's particulars of claim, the last invoice which it has submitted amounted to R1 782 685-23. Out of that amount of the last invoice, the plaintiff issued a credit note of R580 136-60 in favour of the defendant which reduced the indebtedness of the defendant to R1 202 548.63. The plaintiff alleges that the defendant has failed alternatively refused to pay this amount. That resulted in the plaintiff instituting an action against the defendant.
- [3] The defendant defended the plaintiff's action. The defendant has raised an exception in terms of Rule 23(1) of the Uniform Rules of Court (the Rules) in terms of which it complains that the plaintiff's

particulars of claim are vague and embarrassing and it cannot plead, alternatively the particulars of claim does not disclose a cause of action. The defendant's exception is based on two grounds.

[4] The defendant's two grounds of complaints upon which the exception is based read as follows:

"3. In terms of paragraph 7 of the plaintiff's particulars of claim, the plaintiff avers that the defendant furnished the plaintiff with written instructions to undertake additional work and in support of this allegation, the plaintiff attaches an e-mail and bill of quantity as annexure "NB7", to its particulars of claim.

FIRST GROUND

4. In light of the plaintiff's acknowledgment of the terms of the agreement has failed to set out the terms contained in clause 10 of the agreement with sufficient particularity in respect of:

4.1 who acted on behalf for the defendant in giving instructions?

4.2 What the scope of the additional work was, to be undertaken on behalf of the defendant;

4.3 What the time for the execution of the additional work was;

4.4 What the agreed costs for the additional work was

4.5 How and when the variation, adjustment or addition was incorporated into the agreement.

SECOND GROUND

5. In respect of the email attached to the plaintiff's particulars of claim as annexure "NB7", the plaintiff has failed to set out with sufficient particularity in the following aspects:

5.1 What scope of the additional work was, to be undertaken on behalf of the defendant?

5.2 What the time for the execution of the additional work was;

5.3 What the agreed costs of the additional work was."

- [5] The defendant has submitted that it is imperative for a litigant to plead in such a manner that the opposing party knows what case it has to meet. The defendant further submitted that although the plaintiff relies on a written contract for the alleged indebtedness of the defendant, there is no single allegation in the particulars of claim with regards to the parties' compliance with the agreement in respect of the conclusion of a valid variation order. It is the defendant's contention that the lack of particulars as stated in their exception are not only required in order for it to plead on the merits, but are also of material interest in respect of a possible joining of the Road Agency Limpopo Soc Ltd as a party to this action.

[6] The plaintiff has argued that Kobus van Zyl is the one who had sent the email marked “NB7” and therefore has acted on behalf of the defendant. With regard to the scope of work the plaintiff has submitted that the work has been clearly set out in the form detailed bill of quantities. Regarding the time for the execution of the additional work, the plaintiff has argued that in paragraph 6.7 of its particulars of claim it clearly state the time frames of the contract being that the work would commence on 29th of January 2018 and would conclude on 10th of April 2018. Regarding agreed costs for additional work, it is the plaintiff’s contention that the information is included in the bill of quantities with regard to how and when the variation, adjustment or addition was incorporated into the agreement. The plaintiff further submitted that it is clear from annexure NB7 that the date and time has been captured as Thursday, March 22,2018 08:54 PM which instruction originate from the email sent by Kobus van Zyl.

[7] Rule 18(4) of the Rules read as follows:

“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.

[8] An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity (See **Trope and Others v South African Reserve Bank**¹). A court will not uphold an exception on the ground that it is vague and embarrassing and set aside the summons unless the exception goes to the root of the action. (See **SA Motor Industry Employers' Association v SA bank of Athens**²).

[9] In order to succeed, an excipient has a duty to persuade the court that upon every interpretation which the pleading in question can reasonably bear, no cause of action is disclosed, failing which the exception ought not to be upheld.

[10] **In Living Hands v Ditz**³ **Makgoka J** as he was then said:

“Before I consider the exceptions, an overview of the applicable general principles distilled from case law is necessary:

- (a) In considering an exception that a pleading does not sustain the cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.
- (b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.

¹ 1993 (3) SA 264 (A) at 269I)

² 1980 (3) SA 91 (A)

³ 2013 (2) SA 368 GJ at 374G-375C

- (c) The purpose of an exception is to raise a substantive question of law which may have the effect at settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it could be allowed to succeed.
- (d) An excipient who alleges that a summons does not disclose, a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.
- (e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.
- (f) 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.
- (g) Minor blemishes and unradical embarrassments caused by pleading can and should be cured by further particulars”.

[11] It is common cause that the main agreement contained a non-variation clause providing that no variation, adjustment or addition to the work will be binding on the parties unless, done in writing and incorporated into the main agreement by the parties. The requirement that the agreement must be reduced to writing and incorporated into the main agreement is to prevent disputes as to whether there was a variation, adjustment or addition of the work and also to identify the parties authorised to act in that regard.

[12] A per the clause in the main agreement there is no obligation on the parties to sign the variation, adjustment or addition to the work. However, what is required of them, is to do the variation in writing and agree on the cost and additional time for execution of the work. Since signature is not a requirement for the parties, that makes room for the parties to agree electronically. In this case the plaintiff relies on an email dated 22nd March 2018 as extending the scope of work and instructing it to do additional construction work to the main contract. The plaintiff refers to this alleged extension as a variation order to the main agreement. The email was from one Kobus van Zyl, who forwarded it email address vdubruyn@yahoo.com. The email seems to originate from one Nick Muthivheli who seems to be an employee of the Road Agency Limpopo.

[13] The email read as follows:

“According to the Engineers Calculations Tarman had to do works for R4.5 Mil and absolute (unity) R1.9 mil. RAL Account on this project is sitting at R6.343 mil. Please note that the priority of works is as follows:

1. Concrete works (vd rains, wing walls, headwalls and storm water channels)
2. Installation of balustrates
3. Borrow Pits
4. Road signs and markings
5. Cleaning of road reserves”.

[14] From the plaintiff's particulars of claim, the main contractor was Unity Construction CC which sub-contracted the defendant. The defendant in turn sub-contracted the plaintiff to complete the work which was supposed to be completed by the defendant. It is not clear as to what was the relationship between Kobus van Zyl and Muthivheli. According to the plaintiff's particulars of claim, when the main contract was entered into, the plaintiff was represented by Mr Du Bruyn whilst the defendant was represented by Mr Slabbert. It is not clear from the plaintiff's particulars of claim as to how Kobus van Zyl features in this matter.

[15] The plaintiff's cause of action is based on the variation order and bills of quantity attached to it. Paragraph 7 of the plaintiff's particulars of claim which deals with the alleged extension of the scope of work read as follows:

"During the course of the contract term the scope of work was extended by the defendant, in which the plaintiff was instructed by the defendant to do additional construction work to the main contract, generally known as a variation order to the main agreement, and that the defendant would pay the plaintiff for such work on delivery of the invoice. (See annexure "NB7" being a copy of the instruction letter and bills of quantity)".

[16] The email from Kobus does not contain the names of the people who acted for the parties, the additional work agreed upon, the time for the execution of additional work, the costs agreed upon for the additional work and the relationship between Kobus and the defendant. There are no supporting facts to show that the variation order complies with the non-variation clause in the main agreement to come to the conclusion that the plaintiff's particulars of claim are clear and concise, and also contain material facts which are sufficient to enable the defendant to plead.

[17] **In Novartis SA v Maphil Trading⁴ Lewis JA said:**

“... But, as I have said the issue here is not what the parties intended their contract to mean, but whether they intended to bind themselves contractually. That inevitably requires an examination of the factual matrix-all facts proven that show what their intention was in respect of entering into a contract: the contemporaneous documents, their conduct in negotiating and communicating with each other, and importantly, the steps taken to implement the contract”.

[18] In my view, the plaintiff's alleged variation order lacks sufficient information. It does not contain a trail of emails leading to the alleged conclusion of the variation order. The emails trail would have shed more light as to what actually transpired and also gave details as to who Kobus was. It is not clear in what capacity was Kobus forwarding this email to the plaintiff.

⁴ 2016 (1) SA 518 (SCA) at 528C-E

[19] The issue whether the alleged variation order has indeed extended the term of scope of work and is compliance with the non-variation clause in the main agreement is essential to enable the defendant to plead. These particulars are essential and should be contained in the plaintiff's particulars of claim to enable the defendant to know what case it has to meet. There is no allegation in the plaintiff's particulars of claim as when the alleged variation order was concluded, who acted for the parties, what was the scope of the additional work to be undertaken by the plaintiff, what time for the execution of the work was, and what the agreed costs for the additional work was. Some pages of the bill of quantity are blank and does not contain sufficient information to enable the defendant to plead. In my view, these defects will not be cured by a request for further particulars for the purpose of trial. In this case it will be difficult for the defendant to determine as to what must be done to meet the plaintiff's case. It is not the duty of the defendant to sift through the plaintiff's particulars of claim in order to determine the plaintiff's case. The plaintiff's particulars of claim must contain a clear and concise statement of material facts upon which it relies its claim on with sufficient particularity which will enable the defendant to plead. In the case at hand the material facts of the alleged variation order are lacking. The defendant will be

prejudiced if it is expected to plead to the plaintiff's particulars of claim in its present format.

[20] **In the result I make the following order:**

20.1 The defendant's exception is upheld with costs

20.2 The plaintiff if it so wish is given 15 days from date of this order within which to amend its particulars of claim.

**MF KGANYAGO J
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA,
LIMPOPO DIVISION,
POLOKWANE**

APPEARANCES

FOR THE DEFENDANT	: MR THOMAS MINNIE
INSTRUCTED BY	: THOMAS MINNIE ATTORNEYS
FOR THE PLAINTIFF	: MR NICKY BOSMAN
INSTRUCTED BY	: BOSMAN ATTORNEYS
DATE OF ARGUMENT	: 27TH MAY 2020
DATE OF JUDGMENT	: 7TH JULY 2020

