



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	/NO
Of Interest to other Judges:	/NO
Circulate to Magistrates:	/NO

Case number: 6006/2017

In the matter between:

JACOTI CONSTRUCTION CC
(Reg nr. 2005/061770/23)

Plaintiff

and

PHG GROUP CC
(Reg nr. 1993/024229/23)

Defendant

HEARD ON: **9 NOVEMBER 2018**

JUDGMENT BY: **OPPERMAN, J**

DELIVERED ON: **16 NOVEMBER 2018**

I INTRODUCTION

- [1] PHG GROUP CC (PHG/Defendant) excepts to the Combined Summons with the Particulars of Claim of JACOTI CONSTRUCTION CC (JACOTI/Plaintiff) as lacking averments to sustain a cause of action for the relief claimed therein. The cause of action is damages claimed from the repudiation of a contract.

[2] The allegations in the summons and which the court must adjudicate as it stands, are as follows:¹

- 2.1 On about 21 September 2015 and at Bloemfontein a partly oral and partly written agreement was entered into between JACOTI, represented by one Jannie Moolman and PHG, represented by MVD Kalahari in terms whereof JACOTI by means of horizontal drilling and installation of 160 mm sewer line around the basement of the North Cape Mall, Kimberley.
- 2.2 In terms of the agreement JACOTI was compelled to furnish PHG with a letter of acceptance. Such letter was provided and accepted.
- 2.3 As agreed between the parties the work started at the end of November 2015 and work was done by JACOTI and invoiced.
- 2.4 Due to the finding of extreme dolerite the process of drilling slowed down and the drilling process was kept on hold by agreement between the parties until further instruction from PHG.
- 2.5 On about the 30th of May 2017 PHG, through MVD Kalahari, ended the project by informing JACOTI by means of a letter dated 30 May 2017 of the repudiation of the contract.
- 2.6 JACOTI'S main claim revolves around the loss suffered for services rendered and goods sold and delivered in connection therewith, together with disbursements now due and payable and notwithstanding demand, remains unpaid. The damages suffered allegedly amounts to R456 000-00.
- 2.7 On 4 December 2017 PHG issued a Notice in terms of Rule 35(14) for inspection of documents. They are the following: A drawing referred to in paragraph 2.2, the health and safety file as referred to in paragraph 2.2.10, the General Conditions of Contract as referred to in paragraph

¹ Bundle: Exception at pages 5 to 8; the Particulars of Claim.

2.3.1, the SANS1200 document referred to in paragraph 2.3.2, the proof of insurance as referred to in paragraph 2.4.2, the set of drawings referred to in paragraph 4, proof of completion as referred to in paragraph 3, the program referred to in paragraph 5, the Telkom documentation referred to in paragraph 6. All the documents were supplied (See pages 21 to 59 of the Bundle).

- [3] The litigation culminated into the exception and the current hearing. It took 11 months and one week to get to the 9th of November 2018 and at least eight procedures. The litigation went as follows; on 20 November 2017 Combined Summons was issued by JACOTI; on 4 December 2017 a Notice in terms of Rule 35(14) was served by PHG; on 25 May 2018 an Answering of the Rule 35(14)-notice was served; on 6th of July 2018 the Notice of Exceptions was filed; hereafter followed JACOTI'S Notice of Intention to Amend on 1 August 2018; on 16 August 2018 PHG noted their objection to the proposed amendments and the matter was set down for hearing on 9 November 2018. Heads of Arguments followed on 18 October 2018 and 29 October 2018 respectively. The matter was severely delayed.

II THE DISPUTES

- [4] The disputes are encapsulated in the Notice of Exceptions and the Plaintiff's Heads of Arguments.

4.1 Exception 1

Plaintiff avers that the alleged agreement was partly oral and partly written, plaintiff then only attached the written part of the agreement. The oral part of the alleged agreement is nowhere averred or pleaded and is thus omitted from the Particulars of Claim.

Reply

The oral part of the agreement is alleged in paragraphs 4, 5 and 6 of the Particulars of Claim, not only in paragraph 3.

4.2 Exception 2

Plaintiff (as per written part of the agreement) was obliged to provide the defendant proof of plaintiff's insurance as per clause 2.4.2 of annexure A1 to A4 within seven days from 21 September 2015. Plaintiff

nowhere pleads or avers that said condition was duly met in time, nor attaches any proof in this regard.

Reply

The said condition was met in the Particulars of Claim read with the Answer in Rule 35(14) and lies in annexures C1 to C7.

4.3 Exception 3

The written part of the agreement as averred and/or suggested by the plaintiff contains no term/clause in terms of which it was agreed that the work would start at the end of November 2015. Plaintiff then relies on a further agreement in this regard, but fails to plead as to the date on which it was concluded, where said agreement was concluded, who represented the parties in concluding said agreement, if the agreement was in writing or oral and the material terms and conditions thereof. The plaintiff also gives no explanation for the contradiction as to the averment that work was to be started at the end of November 2015 (as per paragraph 5 of the Particulars of Claim) versus the start of the date of the works as 29 September 2015 (as per annexure D2 to the answering of the Notice in terms of Rule 35(14) filed by the Plaintiff and dated the 25th of March 2018) Annexure C contains no detail as to which work was done, which expenses were incurred, the breakdown of said amounts and thus does not contain a clear indication of the work allegedly done; nor the expenses incurred.

Reply

The excipient misconstrues the allegation in paragraph 5 of the Particulars of Claim. The allegations are part of the oral agreement and thus alleged.

4.4 Exception 4

The plaintiff refers to yet a further agreement between plaintiff and the defendant and yet again fails to plead/aver as to: the date on which it was concluded, where said agreement was concluded, who represented the parties in concluding said agreement, if the agreement was in writing or oral and the material terms and conditions thereof.

Reply

The defendant is confused. The contents of paragraph 6 contain the averments.

4.5 Exception 5

Plaintiff refers to annexure E containing the detail of the alleged damages in the amount of R456 000-00 but fails to annex said annexure E. The Particulars of Claim thus contain no detail of the alleged damages nor the calculations/breakdown thereof.

Reply

The reference to annexure E is a typing error and should have referred to annexure C that was already annexed on 17 August 2018.

4.6 Exception 6

The plaintiff avers that the amount as referred to in paragraph 9 of the Particulars of Claim is for services rendered, goods sold and delivered and disbursements while in paragraph 9 of the Particulars of Claim, the plaintiff avers same for damages. This is a clear contradiction.

Reply

Defendant confuses the allegations insofar the amount of R456 000-00 as appears in annexure C relates to the same cause of action, being services rendered, good sold and delivered and disbursements and the Plaintiff's reference to the same amount being damages, is a legal consequence of the excipient's failure to pay.

III THE RELEVANT LAW ON PLEADINGS AND EXCEPTIONS

[5] In order to succeed an excipient has the duty to persuade the court that upon every interpretation which the pleading in question, and in particular the document on which it is based; that no cause of action or defence is disclosed. Failing this, the exception ought not to be upheld.²

[6] An exception implies that the pleading objected to, taken as it stands, is legally invalid for its purpose.³

² Erasmus Superior Court Practise: 23 Exceptions and applications to strike out. RS 4, 2017, D1-293.

³ **Salzmann v Holmes** 1914 AD 152.

- [7] An exception is a valuable part of the system of procedure: its principal use is to raise and obtain a speedy and economical decision on questions of law which are apparent on the face of the pleadings.
- [8] The perfect pleading does not exist.⁴ The purpose of pleadings is to define the issues for the other party and the trial court and for any court of appeal. The duty of those courts is to adjudicate upon the disputes and those disputes alone.⁵
- [9] Where a clause in a contract is ambiguous and extrinsic evidence is admissible, an exception is not competent to decide the meaning.
- [10] Evidence must not be pleaded. Barry, J in **Jones v Hamilton & Haw** (1886) 5 EDC 222 at 228 explained the position:
- There is a distinction between giving evidence of a fact and stating that fact . . . Stating that a thing was done is stating a fact; giving the details of how it was done would be giving evidence of it. Sometimes it is very difficult to state a fact concisely, without in stating it, indicating the evidence of it . . . Under the present rules of pleading you may not only state the necessary facts, but you are required to state all material facts relied on. So that if a fact which, not absolutely necessary but material either in aggravation or mitigation, is within your knowledge and you intend to lay it before the court, you are invited and it is certainly your privilege to plead it.
- [11] A fair public hearing pertaining to civil litigation, would suggest due process, effective judgement, convenience and expense. The mosaic of evidence and rights and law must be weighed and the ultimate aim is the fair administration of justice. The court must be empowered to give the most effective and proper judgement.

⁴ Amler's Precedents of Pleadings: Author: L T C Harms, Last Updated: 2018 - Ninth Edition, page 1: Introduction noted that: "Pleadings and love letters have much in common: both are personal and reflect somewhat of the author's personality. Precedents in either instance are dangerous because they tend to be inapplicable to the facts under consideration. Each sets out and explains the position of the parties involved. If too much or too little is said, problems arise. They provide embarrassing evidence of the original perceptions and intentions of the author and never please successors in title."

⁵ **Molusi and others v Voges NO and others** 2016 (3) SA 370 (CC), 2016 (7) BCLR 839 (CC), **Fischer and another v Ramahlele and others** [2014] 3 All SA 395 (SCA), 2014 (4) SA 614 (SCA) par. 13 and **Barkhuizen v Napier** 2007 (7) BCLR 691 (CC), 2007 (5) SA 323 (CC) par. 39.

[12] It is a principle of our law that a party must plead its cause of action in the court of first instance so as to warn other parties of the case they have to meet and the relief sought against them. This is a fundamental principle of fairness in the conduct of litigation. It promotes the parties' rights to a fair hearing which is guaranteed by section 34 of the Constitution.⁶

IV FINDINGS

[13] The above indicates that the plaintiff might, on a balance of probabilities, not to have properly warned the other party of the case they have to meet as well as the relief sought against them. The Application for Amendment and the nature of the amendments requested, indicate that the plaintiff, to a certain extent, realised this. In order to serve the administration of justice and facilitate an expeditious, effective and constitutionally economical outcome in this matter, I will order in favour of the defendant but with the proviso that the pleadings be amended in due course.

V ORDER

1. Exceptions 1 to 6 are upheld.
2. The plaintiff is granted an opportunity to amend the said pleadings within 10 days of this order.
3. The plaintiff is ordered to pay the costs of this application.

M. OPPERMAN, J

On behalf of the plaintiff: Adv. F G Janse van Rensburg
Instructed by:
JG Kriek & Cloete
BLOEMFONTEIN

On behalf of the defendant: Adv. C. Snyman
Instructed by:

⁶ **South African Police Service v Solidarity obo Barnard** 2014 (10) BCLR 1195 (CC), [2014] 11 BLLR 1025 (CC), 2014 (6) SA 123 (CC) par. 202

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