IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, DURBAN

CASE NO: 3692 /2017

In the matter between:

UPPER HIGHWAY AIR NPC	Plaintiff
and	
ENVIROSERV WASTE MANAGEMENT (PTY) LTD	First Defendant
DEAN LEE THOMPSON	Second Defendant
ESME GOMBAULT	Third Defendant
MINISTER OF ENVIRONMENTAL AFFAIRS	Fourth Defendant
MINISTER OF WATER AND SANITATION	Fifth Defendant
THE MEC: ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS	Sixth Defendant
ETHEKWINI MUNICIPALITY	Seventh Defendant

Coram: Koen J

Heard: 26 April 2018

Delivered: 31 July 2018

O R D E R

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1. (a) Paragraph 12.8 (ii) of the plaintiff's particulars of claim is vague and embarrassing insofar as it alleges that it was a condition of the licence that the First Defendant would conduct its waste management activities also in accordance with 'other written instructions by the director and by adequate and competent staff' but does not identify and allege what these 'written instructions' entailed.

(b) Paragraph 12.4 of the particulars of claim is vague and embarrassing insofar as it fails to identify 'the further relevant statutory and regulatory provisions governing the conduct of the waste management operations, the by-laws promulgated by the Seventh Defendant from time to time, and the instructions issued by the Fourth Defendant or her delegates or her designated environmental management inspectors' with reference to the contents thereof and/or in a manner making them clearly identifiable, including the relevant provisions thereof upon which reliance would be placed.

(c) Paragraph 12.15 of the particulars of claim is vague and embarrassing insofar as it alleges that the First Defendant was directed to 'classify, treat and dispose of waste in a more restrictive manner' but without identifying the direction by the Fourth Defendant, the date thereof and the full ambit and details of any such direction.

(d) Paragraph 14.3 of the particulars of claim alleging a common law duty of care is vague and embarrassing as the extent or ambit of that duty has not been pleaded.

(e) Paragraphs 13.15 and 13.16 and prayer (v) to the particulars of claim are set aside as disclosing no valid cause of action.

(f) Paragraphs 13.15 and 13.16 and prayer (vi) to the particulars of claim are set aside as disclosing no valid cause of action.

2. The Plaintiff is given leave to cure the aforesaid defects in its particulars of claim by filing a notice of amendment delivered within 15 days of the date of this order;

3. If the Plaintiff fails to give such notice of amendment, its claims in those paragraphs of its particulars of claim and the prayers thereto are dismissed with costs, including the costs of two counsel where so employed.

4. All other exceptions are dismissed.

J U D G M E N T

Koen J

Introduction

[1] The Plaintiff has instituted action against Enviroserv Waste Mangement (Pty) Ltd.,[1] its Managing Director,[2] its Technical Director,[3] the Minister of Environmental Affairs,[4] the Minister of Water and Sanitation,[5] the Member of the Executive Council: Economic Development, Tourism and Environmental Affairs[6] and the eThekwini Municipality.[7] It contends that it does so in its own interest, the public interest, and in the interests of protecting the environment, as contemplated in terms of s 32 of the National Environmental Management Act 107 of 1998 ('NEMA'). It further institutes the action on the basis that in terms of s 24M of NEMA, the Second and Third Defendants are jointly and severally liable for any negative impact on the environment, whether advertently or inadvertently caused by the First Defendant including damage, degradation or pollution. In this regard it relies on the definition of 'environment' contained in s 1 of NEMA which includes the surroundings within which humans exist and making up the land, water and atmosphere of the earth, micro-organisms, plants and animal life, any part or combination of the above and inter-relationships among and between them and the physical, chemical, aesthetic and cultural properties and conditions thereof that influence human health and well-being.

[2] The Plaintiff further alleges that at all material times the First Defendant was in possession of:

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[1] The First Defendant.
[2] The Second Defendant.
[3] The Third Defendant.
[4] The Fourth Defendant.
[5] The Fifth Defendant.
[6] The Sixth Defendant.
[7] The Seventh Defendant.

(a) a H:h waste management licence issued on 8 April 2014[8] in terms of the provisions of the National Environmental Management: Waste Act 59 of 2008 ('NEMWA') pursuant to which it owns and operates a waste disposal facility known as the Showgweni landfill site ('the site') located at portion of the farm remainder of Kirkfalls 14227, Durban, eThekwini Municipality, KwaZulu-Natal; and

(b) a class H:H storage licence[9] pursuant to which it operates a recovery and treatment of hazardous waste and effluent plant/facility at the site on portion 36 of the Farm remainder of Kirkfalls 14227, eThekwini Metropolitan Municipality, KwaZulu-Natal.

The site is situated within the geographical area of jurisdiction of this court.

[3] The relief claimed against the First Defendant, alternatively the First to the Third Defendants, jointly and severally, *ex facie* the prayer to the particulars of claim is as follows:

'(i) In the event of the Fourth Defendant as at the date of the hearing of this matter, not having suspended or revoked the First Defendant's waste management licences, or any period of suspension, and as at the date hereof, the odour/nuisance and/or associated health impacts are still being suffered by members of the public, the First Defendant is interdicted and restrained from conducting any further waste management activities pursuant to its waste management licences (Annexures "A" and "B" hereto) other than for those activities necessary for the mitigation and remediation of the pollution, degradation, odour/ nuisance and health impacts resulting from, or possibly resulting from, the operations of the First Defendants SLS and as directed by the Fourth to Seventh Defendants;

(ii) The First Defendant is interdicted and restrained from conducting any of its Waste Management License activities at the SLS in contravention of its Waste Management Licence conditions (Both Annexures A & B) until duly varied by the Fourth Defendant in terms of s 54 of NEMWA;

(iii) The First Defendant is directed to comply with its operational practices as contained in its Site Operational Control and Plan, including those obligations as set down in paragraph 12.6 above, save as is directed otherwise by the Fourth to Seventh Defendants;

(iv) The First Defendant is directed to comply with the statutory regulatory obligations as set out in paragraph 13 above;

[8] Annexure 'A' to the particulars of claim.
[9] Annexure 'B' to the particulars of claim.

(v) It is hereby declared that the First Defendant, alternatively First to Third Defendants, are not fit and proper persons for the purposes of any licence applications, reviews or renewals thereof in respect of the operations conducted by the First Defendant at the Shongweni landfill site;

(vi) The First Defendant is obliged and directed to account in respect of the advantages received by it as a consequence of its contraventions aforesaid; and thereafter to expend such an amount in the manner and on the conditions as the above Honourable Court deems meet;

(vii) The First Defendant, and insofar as the Second and Third Defendant's oppose their relief sought the First to Third Defendant's jointly and severally, are directed to pay to the Plaintiff's costs of suite, including the reasonable costs incurred by the Plaintiff in the investigation of the matter and its preparation of these proceedings;

(viii) Further and/or alternative relief.'

[4] After the *dies* for the filing of a plea expired, the Plaintiff issued a notice of bar. During the 5 day period afforded by the notice of bar to plead, the First Defendant's filed a rule 23(1) notice in which it raised various grounds on which the Plaintiff's particulars of claim were alleged to be vague and embarrassing.

[5] On 20 June 2017 after the expiration of the 5 day period envisaged by the notice of bar but within the period allowed in this rule 23(1) notice for removing any complaint of vagueness and embarrassment the First to Third Defendants ('the Excipients') filed an 'Exception and rule 30A(2) application' in which they take exception to the Plaintiff's particulars of claim and apply for relief in terms of rule 30A(2) on the grounds that the particulars of claim are vague and embarrassing and do not comply with rule 18 in a number of respects (as contained in paragraph 2 of that notice) and that the particulars of claim do not disclose a cause of action for various reasons (set out in paragraph 3 of that notice). The contents of that notice will be referred to in more detail below.

[6] That notice gives rise to a notice which was filed by the Plaintiff in terms of rule 30(2)(b) affording the First to Third Defendants 10 days within which to withdraw, alternatively abandon the exception and its application in terms of rule 30A(2), failing which the Plaintiff would apply to have the Defendant's notice set aside in certain parts. This notice was delivered on 3 July 2017.

[7] When the notice was not withdrawn the Plaintiff followed up with an application in terms of rule 30(2)(c) ('the irregular step proceedings') for an order in the following terms:

'1. Paragraph 3 of the First to Third (Excipients) Notice of Exception delivered on 20 June 2017 be and is hereby struck out as an irregular step;

2. The First to Third (Excipients), jointly and severally, pay the costs of the application;

3. Further and/or alternative relief.'

In brief, this application was based on the following. The First Defendant was not obliged to file a rule 23(1) notice to remove causes of complaint in respect of its argument that the particulars of claim disclose no cause of action. However it could not wait until the Plaintiff had responded to the rule 23(1) notice in respect of the complaints relating to vagueness and embarrassment, before noting the exception on the grounds that the particulars did not disclose a cause of action. The exception on both grounds namely that the particulars of claim were vague and embarrassing and that did not disclose a cause of action was noted after the expiration of the 5 day period envisaged by the notice of bar. Therefore, the argument went, the exception based on the particulars of claim allegedly not disclosing the cause of action, was out of time and constituted an irregular step.

[8] In addition the Plaintiff also brought an application for early discovery ('the rule 35(12) application') in which it seeks the following order:

'1. The First (Defendant) is directed to comply with the (Plaintiff's) Notice in terms of Rule 35 (12) delivered on 18 December 2017, within 10 days of the date of this Order;

2. In the event of the First (Defendant) failing to comply with the order in para. 1 above, the (Plaintiff) is given leave to apply on the same papers, supplemented insofar as may be necessary, for an order striking out the First (Defendants) defence to the application;

3. The period provided for delivery of the (Plaintiff's) replying affidavit in the order of court of 8 May 2017 and is varied and substituted with an order that the (Plaintiff) is given leave to file its replying affidavit within 10 days of the First (Defendants) compliance with the (Plaintiffs) Rule 35(12) Notice alternatively complies with para. 1 above, further alternatively within 10 days of any order granted in terms of para. 2 above;

4. The First Respondent is directed to pay the costs of this application;

5. Further and alternative relief.'

[9] The following matters came before me as an opposed motion on 26 April 2018:

(a) The Irregular step proceedings;

(b) The rule 35(12) application; and

(c) The exception.

[10] The rule 35(12) application was disposed of in terms of a consent order granted on that day, granted in the following terms:

'1.

The period for delivery of the Applicant's replying affidavit per the court order of 8 May 2017, is varied and substituted with an order that the Applicant is given leave to file its replying affidavit or any supplementary replying affidavit, within 10 days of the 23rd of April 2018;

2.

The First Respondent is directed to pay the costs of the application, and it is further directed that the person or persons entitled to practice as advocates or attorneys in the Republic who have provided free legal assistance or representation to the Applicant in the conduct of this application be entitled to recover such costs on the party and party scale.'

[11] The irregular step proceedings to have paragraph 3 of the notice of exception struck out as an irregular step, were abandoned.

[12] All that remained was the exception. This judgment deals with the exception.

The exception

[13] The Plaintiffs particulars of claim are voluminous, not with respect, always a model of clarity, probably mainly because it at times follows a narrative form rather than containing distinct and separate averments in separate paragraphs. The particulars of claim are not repeated herein,[10] save for those portions to which exception was taken, which will be referred to below.

[14] The 'First to Third Defendants exception and rule 30A(2) application', possibly but not entirely as a result of the Plaintiff's voluminous particulars of claim, is equally

[10] The reader of this judgment is referred to the full text of the particulars of claim, which should be read with this judgment.

uncertain in many respects. The respects in which it is contended that the particulars of claim are vague and embarrassing, and do not comply with rule 18, include:

'2.1 In paragraphs 12 and 13 of the particulars of claim, the first defendant is said to be under 124 duties arising from various sources of law. However, in the case of 56 of them, advanced in paragraphs 12.6, 12.7, 12.8(i), 12.8(ii), 12.8(viii), 12.9(ii), 13.1, 13.2, 13.3, 13.4, 13.5, 13.6 and 13.7 it is not clear on what basis the first defendant is said to have been under the duties in question.

2.2 In paragraph 14 of the particulars of claim, the first defendant is said to have breached the 124 "statutory and regulatory obligations" mentioned in paragraphs 12 and 13 of the particulars of claim in 28 different respects. However, the plaintiff does not explain which of the 124 "statutory and regulatory obligations" are said to have been breached in each of the 28 instances mentioned in paragraphs 14(i) to (xxii). The first defendant is accordingly unable to discern the basis on which it is said to have breached the obligations and duties allegedly resting on it.

2.3 After paragraph 25, in an unnumbered paragraph, the plaintiff seeks seven different forms of relief. However, it does not explain which of the 28 breaches listed in paragraph 14 of the 124 obligations mentioned in paragraphs 12 and 13, are said to warrant the relief sought. The first to third defendants are unable to determine the grounds on which the plaintiff claims the relief it seeks.

2.4 The first to third defendants are unable to determine the extent of their alleged obligations because, in paragraph 12.4 of the particulars of claim, the plaintiff fails to identify:

- the "further relevant statutory and regulatory provisions governing the conduct of the aforesaid waste management operations",
- the "bylaws promulgated by the Seventh Defendant from time-to-time" and
- the "instruction[s] issued by the Fourth Defendant or her delegates or her designated environmental management inspectors".

2.5 In paragraph 12.15 of the particulars of claim, the plaintiff alleges that the fourth defendant directed the first defendant to "classify, treat and dispose of waste in a more restrictive manner". The plaintiff fails to identify the contents of the alleged direction and when and how it was made.

2.6 In paragraph 14.3, the plaintiff alleges that the first defendant, alternatively the first to third defendants, owe a common-law duty to care to members of the public "arising by virtue of the circumstances pleaded in paragraph 12 above". However, the plaintiff fails to explain how the "circumstances pleaded in paragraph 12 above". However, the plaintiff fails to explain how the "circumstances pleaded in paragraph 12 above" give rise to a common-law duty of care or the extent of that duty.

2.7 Paragraphs 12.10, 12.12., 12.13, 12.17 and 12.18 plead evidence, rather than the material facts on which the plaintiff's claim is based.

2.8 The plaintiff's reliance, in paragraphs 12.9(i), 12.13, and 12.14, on the "Minimum Requirements for Handling, Classification and Disposal of Hazardous Waste" ("the Minimum Requirements") is vague and embarrassing. The handling, classification and disposal of hazardous waste has been governed, since 23 August 2013, by the successor to the Minimum Requirements, the 2013 Waste Classification and Management Regulations, and not the Minimum Requirements.'

The claims which the First to Third Defendants maintain do not disclose a cause of action are as follows:

'3.1 The claim, in paragraph 12.6 read with paragraph 14.2 and subparagraph (iii) of the unnumbered paragraph appearing after paragraph 25, based on the first defendant's "Site Operational Control Plan".

3.2 The claim, in paragraph 12.7 read with paragraph 14, based on the first defendant's "Environmental Impact Control Report".

3.3 The claim, in paragraphs 12.9(i) 12.13, and 12.14 read with paragraph 14, based on the "Minimum Requirements for Handling, Classification and Disposal of Hazardous Waste".

3.4 The claim, in paragraph 12.15 read with paragraph 14, based on the fourth defendants "direction": to the first defendant to "classify, treat and dispose of waste in a more restrictive manner".

3.5 The claims in paragraphs 13.1, 13.2, 13.3, 13.4, 13.5, 13.6, 13.7, 13.8, and 13.9 read with paragraph 14, based on the duty of organs of state to comply with the requirements of s 2 of NEMA.

3.6 The claim in paragraphs 13.15 and 13.16, read with paragraph 14, paragraph 25 and subparagraph (v) of the unnumbered paragraph appearing after paragraph 25, to declare that the first defendant, alternatively the first to third defendants, "are not fit and proper persons for the purposes of any licence applications, reviews or renewals thereof in respect of the operations conducted by the First Defendant at the Shongweni landfill site".

3.7 The claim in paragraph 14.3, read with the remainder of paragraph 14, based on "the common law duty of care … arising by virtue of the circumstances pleaded in paragraph 12 above."

3.8 The claim in paragraph 14(xix), read with paragraph 15, based on the first defendant's misrepresentation to the plaintiff, members of the public and the fourth to seventh defendants.

3.9 The claim in paragraphs 22 and 23, read with subparagraph (vi) of the unnumbered paragraph appearing after paragraph 25, for the first defendant to "account for and disgorge the profits generated in consequence of the advantages generated by such contraventions akin to that contemplated by the provisions of s 34 of NEMA.

3.10 The claim in paragraph 24, read with subparagraph (i) of the unnumbered paragraph appearing after paragraph 25, to interdict the first defendant "from conducting any further waste management activities at the SLS other than mitigation and remedial measures as may be directed by the fourth to Seventh Defendants".

3.11 The claim in subparagraph (ii) of the unnumbered paragraph after paragraph 25 of interdict the first defendant from conducting any of its waste management licence activities "until duly varied by the Fourth Defendant in terms of s 54 of NEMWA"'.

[15] A party is required to state its case in its particulars of claim with sufficient precision to assist the parties and the court to understand the issues arising in respect thereof.[11] This entails setting out clearly and concisely the facts on which the pleader relies to enable the Defendants to know what case they are to meet.[12] It has been stated that the particulars of claim must be lucid and logical and in an intelligible form so that the causes of action appear clearly from the factual allegations made.[13] It is only if the vagueness and embarrassment strikes at the root of the particulars of claim that an exception will be upheld.[14]

[16] The First to Third Defendant's complain that the Plaintiff's failure to plead its claim clearly render the particulars of claim vague and embarrassing on the grounds in paragraph 2 of the excipients' exception as the Plaintiff has pleaded a disparate collection of facts and legal instruments and then claims relief alleged to arise therefrom, whilst it fails to explain the legal basis of the duties said to rest on the excipients, which duties have been breached and/or how the alleged breaches warrant the relief sought .

[11] *Imprefed (Pty) Limited v National Transport Commission* 1993 (3) SA 94 (A) at 107C; *MN v AJ* 2013 (3) SA 26 (WCC) para 20.

[12] *Venter and others NNO v Barrit (Pty) Ltd; Venter and others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) para 12; *General Commercial and Industrial Finance Corporation Limited* v *Pretoria Port and Cement Co Limited* 1944 AD 444 at 454.

[13] *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 210F-H.

[14] *Francis v Sharp and others* 2004 (3) SA 230 (C) at 240F-E.

Vague and embarrassing

[17] In paragraph 2.1 of the exception the excipients' complain that in paragraphs 12 and 13 of the particulars of claim the First Defendant is said to be subject to 124 duties arising from various sources of law.

[18] Paragraph 12.6 of the particulars of claim avers that the First Defendant's 'Site Operational Control Plan' compiled by Ian W Hopewell referred to in paragraph 1.2.5 of the Waste Management Licence, Annexure A, in the class H:h (waste disposal facility), which governs material aspects of the operational control measures applicable to the site on, *inter alia,* the strength of which the waste management licence was issued to the First Defendant, imposes various obligations on the First Defendant in conducting its waste management activities (these are then listed in sub-paragraphs (i) to (xxxii) of paragraph 12.6 of the particulars of claim. Paragraph 1.2.5 of this licence, under the heading 'documents considered', lists 'the Shongweni waste management facility site operational control plan'.

[17] Whether the site operational control plan indeed imposed the obligations is not a consideration at the exception stage. The pleadings must be taken as they stand insofar as their correctness is concerned. The objection is that the site operational control plan was a document considered when the licence was issued, but that its terms were not incorporated as terms of the licence.

[18] *Prima facie,* the manner in which the site would be operated, that is according to a required site operational control plan, would be the basis on which the First Defendant as applicant for such licence would have indicated (if it did not warrant) how it intended and would operate the site. It is not the only document relating to the First Defendant's manner of intended running of the site which was considered. So it'll be correct that it was *inter alia* on the strength thereof that the waste management licence was issued. Whether control measures according to which the site would be operated (contained in the site operational control plan) indeed imposed obligations and whether they had the parameters alleged in the various Roman numeral numbered sub-paragraphs are questions of fact and law to be decided by the trial court. There is no vagueness or embarrassment precluding the excipients from pleading thereto.

[19] In paragraph 12.7 it is alleged that in terms of the First Defendant's environmental impact control report for valley 2 in respect of the site dated 11 February 2009 the First Defendant recognised key mitigation measures necessary in respect of its operations at the site to include covered leachate sources, implementing a rehabilitation of valley 1, extracting and combusting landfill gas, establishing and maintaining the required buffer zone, and expanding the monitoring network.

[20] How the recognition of these measures in the environmental report would create legal obligations is not alleged. The preamble to paragraph 12 of the particulars of claim simply records that the recognition of these key mitigating measures applied 'at all material times'. However, being identified in the environmental impact control report as mitigation measures, and given the significance in the structure of land use of environmental impact reports, they need to be complied with by virtue of being material measures applicable to the operations at the site in terms of that report. If their inclusion in the environmental impact report does not give rise to a legal duty to take those measures, then that can simply be denied. If they are alleged not to give rise to legal obligations but simply are key mitigating measures which might be desirable, then this can be pleaded. The failure to make any further allegations in this regard, even if possibly vague and hence embarrassing (which I am not convinced they necessarily are), does not strike at the root of the particulars of claim.

[21] The complaints relating to paragraphs 12.8 (i), (ii), and (viii) can be dealt with together. The allegation in paragraph 12.8 is to the effect that the First Defendant was obliged to conduct its waste management activities at the site in accordance with the licence conditions as prescribed in the licenses, and itemised in the sub-paragraphs to paragraph 12.8. Sub-paragraph (i) alleges that the licence conditions required the waste management activities to be conducted in accordance with the documented environmental management system (EMS) that *inter alia* identified and minimised the risk of pollution including those arising from operations, maintenance, accident, incidents and non-conformance. These allegations are clear and arise by virtue of the EMS which applies to the operation of the site. If not a licence condition according to which the site had to be operated, then that can be pleaded to. Similarly

in sub-paragraph (ii) it is alleged that it was a condition of the licence that the First Defendant would conduct its waste management activities in accordance with the conditions of the licence and any other written instructions by the director and by adequate and competent staff. As a general statement that the activities had to be conducted in conditions in accordance with the conditions of the licence, no complaint can be raised. If that was the obligation, then any 'written instruction' would have to be complied with. The allegation lacks particularity and hence is vague and embarrassing insofar as it does not allege what the 'written instruction' of the director or adequate and competent staff entailed. To that limited extent the exception must succeed and the Plaintiff afforded the opportunity to remedy such vagueness by identifying and alleging the extent of any such written instruction. Regarding sub-paragraph (viii) where the licence condition required waste disposed of on site to be compacted and covered on a daily basis with a maximum of 150 millimetres of soil, ash from Mondi or any other material approved by the director and that ash may only be used on lined cells with class H:h specifications, no vagueness arises.

[22] Regarding the complaint relating to paragraph 12.9 (ii), the Plaintiff averred that in terms of the waste management activities relating to the storage, recovery or treatment of hazardous waste and effluent in terms of the licence H:H, the First Defendant is obliged to construct and maintain on a continuous basis, a drainage and containment system capable of collecting and storing all contaminated run off water arising from the site in the event of a 1:100 rain event and maintain a free board of 1 metre. No vagueness and embarrassment arises as a statement of the obligations imposed by such licences. If factually such obligation was not imposed in terms of the licence, then the obligation simply falls to be denied.

[23] Paragraph 13 of the particulars of claim contained a statement of material statutory and regulatory obligations governing the conduct of the operation of the First Defendant's waste management activities, over and above conditions imposed by the licence, alleged to include:

(a) Those in s 2(1) of NEMA (paragraph 13.1 of the particulars of claim);

(b) The general caution in s 2 of NEMA that environmental management must place people and their needs at the forefront of its concern and serve their physical, psychological, developmental, cultural and social interests equitably (paragraph 13.2 of the particulars of claim);

(c) Section 2(4)*(a)* of NEMA which provide that sustainable development requires consideration of all relevant factors, some of which are listed (paragraph 13.3 of the particulars of claim);

(d) Section 2(4)*(c)* of NEMA which requires that environmental justice must be pursued so that adverse environmental impact shall not be distributed in a manner as to unfairly discriminate any person, particularly vulnerable and disadvantaged persons (paragraph 13.4 of the particulars of claim);

(e) Section 2(2)(4)*(e)* of NEMA providing for that the responsibility for the environmental health and safety consequences of *inter alia* service or activity exists throughout its life cycle (paragraph 13.5 of the particulars of claim);

(f) Section 2(4)*(g)* of NEMA which provides that decisions must take into account the interest, needs and values of all interested and affected parties (paragraph 13.6 of the particulars of claim);

(g) Section 2(4)*(i)* of NEMA that social, economic and environmental impacts of activities including disadvantages and benefits must be considered, assessed and evaluated and decisions must be appropriate in the light of such consideration and assessment (paragraph 13.7 of the particulars of claim).

All the above obligations state ideals and objectives which at all times must be sought to be achieved. As a statement of obligations to be undertaken, they are not objectionable at the level of an exception. The only possible embarrassment which could arise might be the extent to which it is alleged that these obligations might not have been given effect to or have been breached. That however is the subject of paragraph 14 of the particulars of claim. The reference in sub-paragraph 13.5 of the particulars of claim to ‘s 2(2)(4)*(e)*’ is clearly a typographical error and should read ‘s 2(4)*(e)*’.

[24] In paragraph 2.2 of the exception the complaint is that in paragraph 14 of the particulars of claim the First Defendant is alleged to have breached 124 ‘statutory and regulatory obligations’ in 28 different respects, but that the Plaintiff does not explain which of the 124 statutory and regulatory obligations are said to have been breached in each of the 28 instances mentioned in paragraph 14(i) to (xxii). The

complaint is accordingly that the First Defendant is unable to discern the basis on which it is said to have breached the obligations and duties allegedly resting on it.

[25] The breaches alleged in paragraph 14 are in fact not only confined to "statutory and regulatory obligations", but are also allegedly breaches of constitutional rights to an environment which is 'not harmful to health or well-being', as provided in s 24 of the Constitution, breaches of the First Defendant's licence conditions and operating procedures (including the site operational control plan), and breaches of a common law duty of care owed by the First Defendant alternatively the First to Third Defendants' to members of the public residing and/or working in the vicinity of the site (arising by virtue of the circumstances pleaded in paragraph 12).

[26] The breaches, alleged to consist of omissions (failures to act), are advanced in a non-succinct and narrative form. My concern would be more with whether the breach in each instance is pleaded with sufficient particularity. That however is not the nature of the exception as I understand it. The exception is taken on the basis that the Plaintiff does not explain which of the statutory and regulatory obligations are said to have been breached in each of the 28 instances. In my view the breaches, if arising even from any one of the statutory and regulatory obligations, or the licence conditions, or the Constitutional right to an environment which is not harmful, or any common law duty, would not give rise to a legitimate complaint. The exception on this score must likewise fail.

[27] In paragraph 2.3 of the exception the objection is that the Plaintiff does not explain which of the 28 different breaches are said to warrant the relief claimed in paragraphs 1 to 7 of the prayer to the particulars of claim; accordingly, that the excipients are unable to determine the grounds on which the Plaintiff claims the relief it seeks. This complaint is likewise in my view without substance and does not strike at the root of the particulars of claim. It is sufficient if any of the forms of relief could be founded on the basis of any one breach (or possibly more than one breach) alleged.

[28] In paragraph 2.4 of the exception the excipients complain that they are unable to determine the extent of their obligations because of the Plaintiff's failure in

paragraph 12.4 of the particulars of claim to identify the further relevant statutory and regulatory provisions governing the conduct of the waste management operations, the by-laws promulgated by the Seventh Defendant from time to time, and the instructions issued by the Fourth Defendant or her delegates or her designated environmental management inspectors. This objection is well taken as the Excipients are entitled to be informed of the specific 'further relevant statutory and regulatory provisions governing the conduct of the aforesaid waste management operations' and the specific 'bylaws promulgated by the Seventh Defendant from time to time' and 'any instruction issued by the Fourth Defendant or her delegatees or her designated environmental management inspectors' with reference to the contents thereof and/or in a manner making them clearly identifiable, including the relevant provisions thereof upon which reliance would be placed.

[29] In paragraph 2.5 of the exception the complaint is that the Plaintiff fails to identify the contents of the alleged direction by the Fourth Defendant, made in paragraph 12.15 of the particulars of claim, which directed the First Defendant to 'classify, treat and dispose of waste in a more restrictive manner.' The power to direct thus is alleged to be in accordance with regulation 8(1) of the Waste Classification and Management Regulations, 2013, which allegedly prohibited the First Defendant 'including during the period August 2013 to August 2016 to simply conform to the Waste Classification and Management Regulations 2013[15] without variation of the restrictive license condition.' The form of the direction by the Fourth Defendant, identifying the document and date thereof and the full ambit and details of the direction should be pleaded.

[30] As regards paragraph 2.6 of the exception the complaint is that although the Plaintiff in paragraph 14.3 alleges a common law duty of care to members of the public by virtue of the circumstances pleaded in paragraph 12 which is averred applied 'at all material times hereto', the Plaintiff has failed to explain how those 'circumstances' give rise to a common law duty of care, and/or the extent of that duty.

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[15] Published in Notice No 614 of 2012 in *GG* 35527.

[31] Whether a common law duty exists depends on the legal convictions of the community. Such a duty arises separate and distinct from any statutory duties which may arise from the position occupied by the First Defendant as a licensee and in terms of the various statutes licence conditions and the like subject to which the First Defendant is allowed to operate the landfill site. The manner in which circumstances would give rise to a common law duty is a matter of law and legal argument within the confines of the 'circumstances' as alleged. The extent or ambit of that duty, although perhaps said to be apparent, have however not been pleaded. To that extent the averment is vague and embarrassing, and the exception hence well taken.

[32] Paragraph 2.7 of the exception complains that paragraphs 12.10, 12.12, 12.13, 12.17 and 12.18 plead evidence rather than the material facts on which the Plaintiff's claim is based. These paragraphs relate *inter alia* to what had allegedly been communicated to the First Defendant by Dr J L Schoonraadt as technical director, by Air Shed Planning Professionals (Pty) Limited regarding particulate emissions, what the Minimum Requirements published by the Fifth Defendant's department, what the September 2015 audit revealed, and what the Water Quality report of July 2015 prepared by Jones and Wagener recorded. These are all things which, according to the preamble to paragraph 12 to the particulars of claim, existed 'at all material times hereto'. Evidence has been pleaded which is undesirable. The results of these various reports to the extent relevant to the Plaintiff's cause of action should have been alleged as factual averments (as *per facta probanda)* in respect of which, if denied, the identified witnesses and their reports (the *facta probantia*) could then be adduced. As much as it is bad pleading, it does not in my view introduce vagueness and embarrassment justifying a successful exception. More has been pleaded than required, but this can be responded to meaningfully.

[33] As regards paragraph 2.8 of the exception the objection relates to the minimum requirements alleged in paragraphs 12.9(i), 12.13 and 12.14 published by the Fifth Defendants department (or any successor of such minimum requirements). Specifically in paragraph 12.14 the allegation is that despite the draft of a successor to the 'Minimum Requirements 1998', during or about 2005, those minimum requirements have not been succeeded by any new Minimum Requirements. The exception raises the point that the 'handling, classification and disposal of hazardous

waste has been governed since 23 August 2013 by the successor to the Minimum Requirements, the 2013 Waste Classification and Management Regulations, and not the minimum requirements.' This is not what the particulars allege. The Plaintiff has based its claim on the 1998 minimum requirements and not the Minimum Requirements of 2013. Whether the 2013 Waste Classification and Management Regulations have replaced or amended the minimum requirements pleaded by the Plaintiff in any way, and if so, what impact it would have, is an issue for determination which can be pleaded. It does not give rise to vagueness to found an exception.

No valid cause of action

[34] Paragraphs 3.1 and 3.2 of the exception refer to and rely on the First Defendant's 'Site Operational Control Plan' and it's 'Environmental Impact Control Report'. The complaint is that there is no reference anywhere in NEMA, NEMWA or the relevant regulations to an obligation on a licensee to prepare plans such as the Site Operational Control Plan and the Environmental Impact Control Report. The Site Operational Control Plan is referred to simply as one of the 'documents considered' by the Department of Environmental Affairs when issuing the licence. It is however contended that the licence does not incorporate the provisions of the Site Operational Control Plan into the licence and that nowhere else in the licence is any obligations arising from either document expressly imposed as a legal obligation. Accordingly, the objection is that neither the legislation nor the licence imposes an obligation on the excipients to prepare and/or comply with the Site Operational Control Plan and/or Environmental Impact Control Report (paragraph 12.6 of the particulars of claim).

[35] Paragraph 12.7 of the particulars of claim refers to the Environmental Impact Control Report in which the First Defendant allegedly recognised the key mitigating measures necessary in respect of operations at the site. It was apparently not a document considered and on the strength on which the licence was issued. As much as one would expect the recognition of necessary mitigating measures detailed in an environmental impact control report to give rise to obligations on the part of an operator of a landfill site where activities might necessitate such mitigatory measures, the particulars of claim are capable of a construction that the recognition

of such measures might be relevant only to a determination of any cause of action based on paragraph 14.3 of the particulars of claim. It is significant in that regard that paragraph 14.2 is confined to the Site Operational Control Plan and that the relief claimed in prayer (iii) is likewise confined to the Site Operational Control Plan. No specific relief in a separate prayer seems to be claimed in respect of the Environmental Impact Control Report. This exception in paragraph 3.1 accordingly cannot be sustained.

[36] Paragraph 3.3 of the exception raises, as I understand it, the same point, but now pursuant to the cause of vagueness and embarrassment not having been removed, as was raised in paragraph 2.8 of the exception. I have already dealt with that aspect above. This exception is in my view not well taken and falls to be dismissed.

[37] As regards paragraph 3.4 of the exception, this exception likewise raises the complaint first detailed in paragraph 2.5 of the exception on the basis that the cause of vagueness and embarrassment relating to any 'direction' by the Fourth Defendant on which the Plaintiff might rely, not having been removed. As indicated above, that exception is well taken and is upheld.

[38] Paragraph 3.5 of the exception also refers to some of the paragraphs dealt with at the level of vagueness and embarrassment in paragraph 2.1 of the exception, with the nuance that the Plaintiff claims these various form of relief in the mistaken belief that the Plaintiff is in a similar position as certain organs of state. This theme is the basis for the exceptions taken in paragraphs 3.6, 3.10 and 3.11 of the exception.

[39] Certain organs of state are under a duty to comply with the requirements of s 2 of NEMA. These could extend to having the First Defendant alternatively the First to Third Defendants declared to be 'not fit and proper persons for the purposes of any licence applications, reviews or renewals thereof in respect of the operations conducted by the First Defendant at the Shongweni landfill site', interdicting the First Defendant 'from conducting any further waste management activities at the Shongweni landfill site other than mitigation and remedial measures as may be directed by the Fourth to Seventh Defendants', and interdicting the First Defendant

from conducting any of its waste management licence activities until duly varied by the Fourth Defendant in terms of s 54 of NEMWA.

[40] The excipients maintain that the Plaintiff claims various forms of relief that mistake the position of the Plaintiff with the position of these organs of state. They argue, with reliance on the introductory provision to s 2(1) of NEMA and the various provisions of s 2 of NEMA alleged in paragraphs 13.1 to 13.9 read with paragraph 14 of the particulars of claim, that these remedies are only available to organs of state, not the Plaintiff, and accordingly that for that reason alone, no valid cause of action is available to the Plaintiff.

[41] Section 2 of NEMA provides:

'(1) The principles set out in this section apply throughout the Republic to the actions of *all organs of state* that may significantly affect the environment and –

. . .

(e) guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment.

(2) Environmental Management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably.' (my emphasis)

[42] The Plaintiff places particular emphasis on the wording of s 2(1)(e) and maintains that the relevance and importance of pleading these principles given reliance on express breaches by the Excipients of NEMA and NEMWA, is obvious.

[44] On a proper interpretation of s 2, appearing as it does in Chapter 1 of NEMWA which deals with the 'National Environmental Management Principles' the contention that these principles are to be invoked only at the instance or organs of state, as opposed to an entity such as the Plaintiff, appears untenable. It is also a matter of interpretation which I am loath to decide on exception where it will in any event, not be dispositive of the Plaintiff's action.

[45] As regards the relief that the excipients are not fit and proper persons for the purposes of any licence applications, reviews or renewals, regard must be had to s

48 of NEWWA read with s 32 of NEMA. Section 32 specifically deals with the legal standing to enforce environmental laws and provides:

'(1) Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific Environmental Management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources –

(a) in that person's or group of person's own interest;

(b) in the interest of, or on behalf of, a person, who is, for practical reasons, unable to institute such proceedings;

(c) in the interest of or on behalf of a group or class of persons whose interests are affected;

(d) in the public interest; and

(e) in the interest of protecting the environment.'

Section 48(f) of NEMWA provides that a licencing authority, when considering an application for a licence must take into account inter alia whether an applicant is 'a fit and proper person'. Section 59 of NEMWA lists the criteria that the licensing authority must take into account when deciding that question. Section 55 of NEMWA deals with the renewal of waste management licences. It renders s 48 applicable to renewal applications with such changes as required by the context. Accordingly, a licensing authority must consider whether an Applicant is a fit and proper person on each occasion when an application for a fresh licence is made or an application for a renewal is made.

[46] The excipients accordingly maintain that it is for the licensing authority to decide whether an applicant is fit and proper, and not for this court to make such a determination. They maintain that it is not open to the Plaintiff to have the First Defendant alternatively the First to the Third Defendants declared not fit and proper persons for the purpose of any licence applications, reviews or renewals thereof, as claimed in prayer (v) to the particulars of claim, but that such a determination is one to be made by the licensing authority, which if leaving the Plaintiff aggrieved, might then be reviewable. It is not legally competent to ask for such a finding to be made before any application for a licence or renewal has been made and before the licencing authority has been given the opportunity to consider the question.

[47] I agree, having regard to the express wording of the statutory provisions referred to above, that determinations of this nature are to be left to administrative bodies who operate and are administrative experts in those fields. The only cause of action and remedy open to the Plaintiff, at best, is for a review of such determination once made (or a failure to make such a determination) if found objectionable. This exception must accordingly succeed in regard to the claim and relief set out in prayer (v) to the prayer to the particulars of claim.

[48] Regarding the interdictory relief, the excipients claim that the Plaintiff seeks to prevent them, the First Defendant, from conducting its waste management activities in certain circumstances, but that this is not a remedy open to the Plaintiff. They refer to the provisions of s 31L of NEMA read with NEMWA which establishes a procedure to permit the Department of Environmental Affairs to police non-compliance by a licensee with its licence firstly by a compliance notice being issued. Only thereafter, if the Department of Environmental Affairs remains unsatisfied, may a licence be suspended in terms of s 56 of NEMWA. In the final stage the Department of Environmental Affairs may revoke a licence in terms of s 56 of NEMWA. Accordingly, the excipients maintain, there is no basis in NEMA or NEMWA for a third party such as the Plaintiff to seek the interdictory relief that it seeks, before the Department of Environmental Affairs has exercised its statutory powers.

[49] Although the relevant legislation envisages a procedure for enforcement, having regard to the National Environmental Management principles, which are provided in terms of the legislation, there is no provision which ousts the jurisdiction of a court to declare conduct in breach of such statutory provisions as unlawful. I am not persuaded, particularly at the exception stage, that such interdictory relief would not be available to the Plaintiff.

[50] Regarding paragraph 3.7 of the exception, the objection is that arising from paragraph 14.3 read with the remainder of paragraph 14 of the particulars of claim, the Plaintiff’s claim is based, in part, on a breach of a common law duty of care alleged to be owed by the excipients to the Plaintiff’s members and an alleged misrepresentation made by the First Defendant. The excipients point out correctly,

that a statutory provision does not *per se* give rise to a common law duty of care.[16] They argue that this applies with even greater force to the allegations made in paragraph 12 of the particulars of claim. Their complaint is specifically that the reliance on a duty of care amounts to a bald assertion that such a duty exists, without an explanation of why 'the circumstances pleaded in para 12' of the particulars of claim give rise to that duty. This, it is maintained, is insufficient to make out a cause of action.[17]

[51] Although no specific primary facts are alleged as giving rise to a duty of care at common law, the alleged breaches of environmental management in conflicts with the principles relating thereto, insofar as they fall short of any statutory duties, and with reference to the consequences had it been alleged that these 'circumstances pleaded in para 12' give rise to such a duty, are sufficient. The exception in this regard accordingly falls to be dismissed.

[52] Regarding paragraph 3.8 of the exception, the complaint is not clear. The exception reads that:

'The claim in para 14 (xix), read with paragraph 15, based on the first defendants misrepresentation to the Plaintiff, members of the public and the fourth to seventh defendants.'

Paragraph 15 refers to breaches resulting in members of the public including vulnerable and disadvantaged members residing, working and attending schools in the vicinity of the landfill site, having been severely impacted as a consequence of the fugitive gas emissions and particulates being omitted from the site, which have resulted in thousands of odour/nuisance and health related complaints during the period November 2015 to date. As a basic statement of a complaint founded on nuisance it might be terse, but not in my view excipiable as disclosing no cause of action, particularly if read with the amplification of the associated health impacts alleged in paragraph 16 of the particulars of claim. This exception must likewise be dismissed.

[16] *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 598B.
[17] See *Cilliers v Steenkamp* 2015 JDR 2564 (WCC) at para 36.

[53] The introductory relief sought is not precluded by the rights accorded to the Minister to take administrative enforcement steps.[18]

[54] I turn to paragraph 3.9 of the exception. Here the complaint relates to paragraphs 22 and 23 of the particulars of claim read with prayer (vi), which requires that the First Defendant be obliged and directed to account in respect of the advantages received by it as a consequence of its contraventions as alleged, and thereafter to expend such amount in the manner and on the conditions as this Honourable Court deems met. This has been referred to as a disgorgement. The excipients see it as the Plaintiff requiring the First Defendant to 'account for and disgorge [its] profits… akin to that contemplated by the provisions of s 34 of NEMA'. They claim that s 34 however is a specific provision dealing with orders that may be made in criminal proceedings and where the legislature has demarcated the circumstances in which disgorgement may be ordered. It is the only provision in NEMA dealing with disgorgement of profits. They contend that it may be ordered in criminal proceedings, but not in civil proceedings, and accordingly that it may not be claimed in a case such as the present one. They indicate that the Plaintiff claims that such relief is anticipated by s 32 of NEMA, but point out that s 32 is a provision dealing with standing and empowers any person to seek 'appropriate relief' in respect of breaches of NEMA, and that the specific rule in s 34 cannot be trumped by a general provision facilitating the granting of 'appropriate relief'.[19] They accordingly contend that there is no legal basis to seek disgorgement in civil proceedings under NEMA.

[55] The Plaintiff's retort simply is that what this prayer for relief contemplates, are constitutional damages. It argues that this case is one of the first of its kind, that constitutional damages ought to be awarded, and that such constitutional damages ought to be akin to that imposed in terms of s 34 of NEMA; not that it is a claim in terms of s 34 but rather a claim to be developed by this court in developing the common law given the breach of constitutional rights raised. The Plaintiff contends that this is permissible under the wide discretion to determine appropriate relief

[18] *Hichange Investments (Pty) Ltd v Cape Produce Co. (Pty) Limited t/a Pelts Products and others* 2004 (2) SA 393 (E).

[19] *Doctors for Life International v Speaker of National Assembly and others* 2008 (6) SA 416 (CC) see para 49 and *Pharmaceutical Society of SA v Tshabalala –Msimang* 2005 (3) SA 238 (SCA) para 73.

contained in s 32 of NEMA, pointing out that there is no reason why such relief cannot include an appropriate measure of damages akin to that in a criminal context in terms of s 34.

[56] Without expressing a final view on the issue, it might be that the common law must be developed to recognise a claim for damages in circumstances such as the present. It will however require allegations beyond a mere conclusion based on general ‘breaches’ referred to generically. The Plaintiff’s particulars of claim lack particularity in this regard to sustain a valid cause of action. The exception must be upheld and the Plaintiff be permitted to plead the factual basis from which any such legal obligation may be said to arise fully.

Costs

[57] In the exercise of my discretion on costs, I have taken into account that the Excipients have been partially successful and the Plaintiff partially successful. Many problems relating to the formulation of the causes of action and also the exceptions thereto have been exacerbated by the particulars of claim being drafted in narrative form and not containing separate and distinctive averments in separately, consecutively, numbered paragraphs. The exceptions have also often been formulated in the tersest terms, acquiring true meaning mainly when the points were amplified in argument. In those circumstances the fairest order would be that each party pay their own costs. I accordingly do not intend making any order as to the costs of the exception. Provision is however made, in the event of my order not being complied with and the particulars being amended in respect of those claims successfully excepted to but not remedied, for the dismissal of those claims with costs.

Conclusion

[58] In the circumstances then:

1. (a) Paragraph 12.8 (ii) of the plaintiff’s particulars of claim is vague and embarrassing insofar as it alleges that it was a condition of the licence that the First Defendant would conduct its waste management activities also in accordance with ‘other written instructions by the director and by adequate and competent staff’ but does not identify and allege what these ‘written instructions’ entailed.

(b) Paragraph 12.4 of the particulars of claim is vague and embarrassing insofar as it fails to identify ‘the further relevant statutory and regulatory provisions governing the conduct of the waste management operations, the by-laws promulgated by the Seventh Defendant from time to time, and the instructions issued by the Fourth Defendant or her delegates or her designated environmental management inspectors’ with reference to the contents thereof and/or in a manner making them clearly identifiable, including the relevant provisions thereof upon which reliance would be placed.

(c) Paragraph 12.15 of the particulars of claim is vague and embarrassing insofar as it alleges that the First Defendant was directed to ‘classify, treat and dispose of waste in a more restrictive manner’ but without identifying the direction by the Fourth Defendant, the date thereof and the full ambit and details of any such direction.

(d) Paragraph 14.3 of the particulars of claim alleging a common law duty of care is vague and embarrassing insofar as the extent or ambit of that duty has not been pleaded.

(e) Paragraphs 13.15 and 13.16 and prayer (v) to the particulars of claim are set aside as disclosing no valid cause of action.

(f) Paragraphs 13.15 and 13.16 and prayer (vi) to the particulars of claim are set aside as disclosing no valid cause of action.

2. The Plaintiff is given leave to cure the aforesaid defects in its particulars of claim by filing a notice of amendment delivered within 15 days of the date of this order;

3. If the Plaintiff fails to give such notice of amendment, its claims in those paragraphs of its particulars of claim and the prayers thereto are dismissed with costs, including the costs of two counsel where so employed.

4. All other exceptions are dismissed.

Appearances

For the Plaintiff:	Mr A Lamplough Ms C Nel
Instructed by:	Macgregor Erasmus Attorneys Ref.: UPP1/0001/C Nel/pn Tel.: 031 201 8955
For the First to Third Defendants:	Mr W Trengrove SC Mr A Coutsoudis
Instructed by:	Shepstone & Wylie Ref.: (I Sampson) Tel.: 031 575 7000