REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

31/03/2017.

CASE NO: 86873/2014

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

SIGNATURE DATE 31/3/2017

In the matter between:

THE CITY OF CAPE TOWN Plaintiff / Applicant

and

WBHO CONSTRUCTION (PTY) LTD First Defendant / Respondent

STEFANUTTI STOCKS HOLDINGS LIMITED Second Defendant / Respondent

AVENG AFRICA (PTY) LTD Third Defendant / Respondent

JUDGMENT

<u>AC BASSON, J</u>

[1] The plaintiff (the applicant in this application - the City of Cape Town) instituted an action in December 2014 claiming damages jointly and severally from the defendants (the respondents in this application) in an amount of R429 474 878 as at 2010, alternatively R428 757 001 as at 2010.

[2] The plaintiff is a metropolitan municipality which is the local authority responsible for the metro city of Cape Town. In 2010 the plaintiff was the contracting authority for the Green Point Stadium in Cape Town which was to host soccer matches, including a semi-final, for the 2010 FIFA World Cup. To that end, the plaintiff in 2006 invited tenders, in terms of a two-stage bidding process, for the design and construction of the Green Point Stadium.

[3] The defendants are construction companies which were involved in the construction of stadiums in South Africa for the 2010 FIFA World Cup. The first defendant/respondent is WBHO Construction (Pty) Ltd, the second defendant/respondent is Stefanutti Stocks Holdings Limited and the third defendant/respondent is Aveng Africa (Pty) Ltd.

[4] The first and second defendants (in joint ventures with respectively, Murray & Roberts (Pty) Ltd ("M & R") and Constructora do Tâmega (SA) were selected from the short list of bidders eligible to be considered for the second stage of the tender process. The third short-listed bidder was Group Five Building (Pty) Ltd ("Group Five").

[5] The joint venture between WBHO and M & R (the "WBHO joint venture") was successful. On 23 March 2007 the plaintiff concluded the principal contract for the construction of the Green Point Stadium with the WBHO joint venture.

[6] It is stated in the papers that it subsequently transpired that there had been collusive tendering (so-called "bid rigging") between the construction companies with regard to the stadia built for the 2010 FIFA World Cup. This collusion included so-called "cover pricing" – which involves a firm that wishes to win a tender submitting a price to one or more competitors to enable the competitor(s) to submit a higher price than the firm intended to submit. Collusive tendering (including rigging bids or providing a cover price) is a prohibited practice in terms of section 4(1)(b)(iii) of the Competition Act, 89 of 1998 (the "Competition Act").

[7] The Competition Tribunal and the Competition Appeal Court have exclusive jurisdiction to the exclusion of the civil courts to hear and determine all complaints of prohibited practices including those committed in contravention of section 4 of the Competition Act. Sections 65(6) to (10) recognise and regulate claims for damages for loss or damage suffered as a result of a prohibited practice.

[8] The collusive tendering was investigated by the Competition Commission (the "Commission"). Various construction companies thereafter decided to settle with the Commission. Agreements between the Commission and those companies were made consent orders by the Competition Tribunal (the "Tribunal") in terms of section 49D read with section 58(1)(b) of the Competition Act.

[9] On 22 July 2013 the Tribunal confirmed an order agreed to between the Commission and WBHO, in which WBHO admitted that it had colluded *inter alia* in respect of the Green Point Stadium. According to the consent order between the Commission and WBHO the following was agreed to:

> "WBHO reached an agreement with Group Five on or about 13 December 2006 in respect of the Green Point Stadium in Cape Town, in that WBHO provided a cover price to Group Five, on the basis that Group Five would not win the tender. This conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act.
>
> The project was the construction for Green Point Stadium including its surrounding infrastructure. The client for the project was City of Cape Town. The tender was awarded to the Murray & Roberts/WBHO joint venture and the project was completed in December 2009."

[10] On 22 July 2013 the Tribunal confirmed an order agreed to between the Commission and Stefanutti in which Stefanutti admitted that it had also colluded *inter alia* in respect of the Green Point Stadium. The following appears from that order:

> "Stefanutti reached agreement with WBHO on or about December 2006, in that they agreed on a cover price in respect of this project. In terms of the agreement WBHO provided a cover price to Stefanutti so that Stefanutti could submit a non-competitive bid to ensure that WBHO won the tender. WBHO was in joint venture with Murray & Roberts when bidding for the tender, and won the tender in line with the collusive arrangement. This conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act.
>
> This project was for the construction of Green Point Stadium in Cape Town, for the City of Cape. The project was completed on 10 November 2009."

[11] On 23 July 2013 the Tribunal confirmed an order agreed to between the Commission and Aveng in which Aveng admitted that it too had colluded (when trading under the name Grinaker LTA) in respect of World Cup stadia, including the Green Point Stadium. The following appears from the consent order between the Commission and Aveng:

> "During or about 2006, Grinaker LTA, WBHO, Murray & Roberts, Group Five, Concor and Basil Read met twice and reached an agreement in respect of the construction of the 2010 FIFA World Cup Stadia, in terms of which these firms agreed to allocate the Mbombela, Peter Mokaba, Moses Mabhida, Soccer City,

Nelson Mandela Bay and the Greenpoint Stadia tenders among themselves and to exchange cover prices. They further agreed that they should all aim to obtain 17,5% profit margin in all the 2010 FIFA World Cup Stadia projects. This conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act."

[12] On 8 August 2013, the Chairperson of the Tribunal issued certificates in terms of section 65(6)(b) of the Competition Act certifying that:

(i) "WBHO had been found guilty of engaging in a prohibited practice contrary to section 4(1)(b)(iii) of the Competition Act on 22 July 2013, in that there was "Collusive tendering as per clause 5.1 of the consent order between Commission and WBHO"." [WBHO consent order PL11 and WBHO Certificate PL14.]

(ii) "Stefanutti had been found guilty of engaging in a prohibited practice contrary to section 4(1)(b)(iii) of the Competition Act on 22 July 2013, in that there was "Collusive tendering as per clause 5.5 of the consent order between Commission and Stefanutti"." [Stefanutti consent order PL12 and Stefanutti Certificate PL15.]

(iii) Aveng had been found guilty of engaging in a prohibited practice contrary to section 4(1)(b)(iii) of the Competition Act on 23 July 2013, in that there was "Collusive tendering by ... Grinaker LTA as per clause 6.1 of the consent order between the Commission and Aveng". [Aveng consent order PL13 and aveng Certificate PL16.]

[12] In terms of section 65(6)(b) of the Competition Act, a person who has suffered loss or damage as a result of a prohibited practice, if entitled to commence an action in a civil court for the assessment of the amount or awarding of damages -

"must file with the Registrar or Clerk of the Court a notice from the Chairperson of the Competition Tribunal ...in the prescribed form –

(i) certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of this Act;

(ii) stating the date of the Tribunal ... finding; and

(iii) setting out the section of this Act in terms of which the Tribunal ... made its finding."

[13] In brief section 65(6)(b) of the Competition Act requires says that anybody who institutes such an action for damages must file a notice issued by the Chairperson of the Competition Tribunal certifying that "the conduct constituting the basis for the action has been found to be a prohibited practice in terms of this Act". The notice must in other words certify that the defendant's conduct on which the plaintiff's claim is based has been found by the Tribunal to be a prohibited practice. In terms of section 65(7) -

> "A certificate referred to in subsection (6)(b) is conclusive proof of its contents, and is binding on a civil court."

[14] The plaintiff alleges in its Particulars of Claim on the strength of those certificates, read with the consent orders to which they refer, that they had suffered the damages claimed. In this regard the following is alleged in the Particulars of Claim in relation to "*Damages*":

> "As a direct result of the prohibited practices of the first, second and third defendants referred to above:
>
> 34.1 and unbeknown to the plaintiff at the time, no competitive tender was submitted for the design and construction of the Stadium by either the joint venture, the joint venture of which the second defendant was part, or Group Five Building (Pty) Ltd;
>
> 34.2 the contract sum tendered by the first defendant was wrongfully and unlawfully inflated due to the collusive behaviour of the defendants and the prohibited practices (as defined in the Act) perpetrated by the defendants;
>
> 34.3 the plaintiff suffered damages."

[15] The plaintiff now applies for leave to amend its Particulars of Claim in accordance with its further revised Notice of Intention to Amend. WHBO opposes the application on the ground that the amended Particulars of Claim will be excipiable in that they will not disclose a cause of action for the respondent's claim against WHBO.

[16] This application follows upon a Rule 23(1) Notice on 19 February 2015 in terms of which Aveng alleged that the Particulars of Claim lacked averments necessary to sustain a cause against Grinaker alternatively, that the averments are vague and embarrassing. In brief the objection was that there was no allegation that Grinaker ever implemented the collusive agreement to which it had confessed or facilitated its implementation by the other defendants and that it was also not pleaded how Grinaker had caused the harm alleged to the plaintiff through its wrongful conduct.

[17] The plaintiff then delivered a Notice of Intention to amend (in terms of Rule 28(1)) dated 13 March 2015 in an attempt to remove any possible cause of complaint.

[18] WBHO then objected and on 26 March 2015 delivered a notice in terms of Rule 28(3) objecting to the proposed amendment.

[19] The plaintiff, in an attempt to avoid an interlocutory dispute, delivered a revised Notice of Intention to Amend in terms of Rule 28(1) dated 24 April 2015.

[20] WBHO was again not satisfied with the revised Notice of Intention to Amend and delivered a further Rule 28(3) notice on 7 May 2015 opposing all of the proposed amendments. The basis of the objection is that the proposed amendments would, if allowed, result in the Particulars of Claim not disclosing a cause of action against WBHO relating to the "Grinaker collusive agreement" and, alternatively would be vague and embarrassing.

[21] The plaintiff has now concluded that the only way in which it would be able to effect the amendments is to bring a Rule 28(4) application to effect the amendments. In doing so certain inadvertent and obvious errors contained in the Rule 28(1) notice of 24 April 2015 have also been corrected.

[22] A revised Rule 28(1) notice was accordingly prepared (referred to as the "further revised Rule 28(1) Notice"). This document reflects the amendments that the plaintiff seeks leave to introduce and for which an order is sought in

these proceedings.

[23] WHBO is the only defendant (respondent) who has objected to the plaintiff's latest proposed amendment and has done so on the basis that the Particulars of Claim (as proposed by the amendments) will render the Particulars of Claim excipiable in that no cause of action will be disclosed as well as by virtue that the Particulars of Claim will be rendered vague and embarrassing.

[24] The plaintiff proposes ten amendments. Five of these proposed amendments merely involve the insertion of definitions into existing paragraphs of the Particulars of Claim. A further proposed amendment involves the insertion of words in paragraph [33] of the Particulars of Claim for the sake of clarification.

[25] The remaining four amendments involve more substantive amendments:

(i) The insertion of a paragraph 30A after paragraph 30, reading as follows:

> "Had it not been for the WBHO / Group 5 collusive agreement, Group 5 would have responded to the invitation with a competitive bid.";

(ii) The insertion of a paragraph 31A after paragraph 31, reading as follows:

> "Had it not been for the Stefanutti / WBHO collusive agreement the second defendant would have responded to the invitation with a competitive bid.";
>
> (iii) the insertion of a new paragraph 32A after paragraph 32, containing the following subparagraphs:
>
> "32A. The Grinaker collusive agreement was honoured and implemented by the third defendant, as the first defendant was

aware.

32B. The implementation by the third defendant of the Grinaker collusive involved the allocation of the Stadium to the first defendant and M & R, the third defendant refraining from responding to the invitation for pre-qualification ('PL1' hereto), and the third defendant, by so refraining creating the false impression with the plaintiff that only a limited number of major construction firms were interested in prequalification.

32C Had it not been for the Grinaker collusive agreement the third defendant would have responded to the invitation, would have prequalified and would submitted a competitive bid.

32D As a consequence and as a direct result of the WBHO / Group 5 collusive agreement, the Stefanutti / WHBO collusive agreement and the third defendant (to the knowledge of the first defendant) having concluded and given effect to the Grinaker collusive agreement, the defendants:

32D.1 permitted the first defendant's joint venture to bid successfully for the design and construction of the Stadium with a profit margin of above 17.5% in the knowledge that there would be no competitive bids based on a reasonable overhead and profit margin of not more than 6.19% for the design, development and financial sustainability planning and the construction of the Stadium;

32D.2 facilitated an initiated tender by the first defendant's joint venture ('PL3' hereto), an inflated final offer ('PL4' hereto) and an inflated adjusted contract sum ('PL5' hereto);

32D.3 facilitated the submission by the first defendant's joint venture of a tender with an overhead and profit margin of 18.61%, instead of a reasonable overhead and profit margin of not more than 6.19%, thereby causing the plaintiff the loss more fully addressed in calculations 1 and 2 hereunder;

32D.4 caused the professionals to eventually be paid an inflated amount in respect of professional fees, as pleaded in paragraph 20 above.";

(iv) The deletion of the last three words of subparagraph 34.1 (to accord with the earlier definition of "*Group Five*") and the addition of the following thereafter:

> "while the first defendant also knew that no competitive bid for the design and construction of the Stadium would be forthcoming from the third defendant, and that the other attendees at the meeting referred to in the third certificate ('PL16'), other than the first defendant and M & R, would either not submit bids or would submit uncompetitive ones".

[25] According to the plaintiff these additions were designed to include allegations that the various collusive agreements were implemented and to indicate what resulted from the implementation thereof (and thus what prejudice was sustained by the plaintiff in consequence thereof).

[26] The law applicable to amendments and exceptions need no elaboration. Suffice to point out that an application to amend requires a court to exercise a judicial discretion with due regard to all the facts before it. The general rule is that a court will allow *bona fide* amendments unless the other party will be prejudiced thereby in a manner which cannot be compensated by a costs. See in this regard *Moolman v Estate Moolman*:[1]

> "the practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when pleadings which is sought to amend was filed."

See also: *Euroshipping Corporation of Monrovia v Minister of Agriculture and Others*:[2]

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[1] 1927 CPD 27 at 29.
[2] 1979 (2) SA 1072 (C).

"It is as well at this stage to state in broad general terms the approach to be adopted in an application of this kind. In deciding whether to grant or refuse an application for an amendment to a pleading, the Court exercises a discretion. The modern tendency is for the Court, in exercising this discretion, to lean in favour of granting an amendment, particularly so as to ensure that the real issues between the parties might be ventilated. The applicant for an amendment is, however, required to furnish a satisfactory explanation for seeking the amendment and to satisfy the Court that the original omission from the pleadings was not *mala fide*. Mere delay in making the application is not a ground for refusing the amendment provided the delay does not result in prejudice to the other party. Finally the applicant must satisfy the Court that the amendment, if granted, will not result in prejudice to the other party of a kind which cannot be overcome by a postponement and be compensated for by an order for costs. See *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (N) where most of the relevant decisions on amendments are collected and analysed."

[27] Where an amendment will render a pleading excipiable the court will not grant an amendment. It is for the excipitent to persuade a court that the proposed amendment will (not may) render the claim excipiable. See *Krischke v Road Accident*:[3]

"[9] In reviewing decisions of the Supreme Court in *Cross v Ferreira* 1950 (3) SA 443 (C), the Court concluded at 449H:

'While the practice is not entirely uniform on this point, the weight of authority seems to favour the view that if the pleading as sought to be amended would be excipiable, this affords a ground upon which the Court may, in the exercise of its discretion, refuse the application for amendment.'

Rule 23 of the Rules of this Court stipulates:

'(1) Where any pleading is vague and embarrassing or lacks averments are necessary to sustain an action or defence, as the case

[3] 2004 (4) SA 358 (W) at para 9 (363A-B); *Minister of Defence, Namibia v Mwandinghi* 1992 (2) SA 355 (NmS) at 364H-I

> may be, the opposing party may, within the period allowed for A filing any subsequent pleading, deliver an exception thereto. . . .'

> A pleading which is bad in law lacks averments which are necessary to sustain an action. It follows that an amendment should be refused on the ground of excipiability if it is clear that the amended pleading will (not may) be excipiable. (Van Winsen *et al The Civil Practice of the Supreme Court of South Africa* 4th ed; B *Minister of Defence, Namibia v Mwandinghi* 1992 (2) SA 355 (NmS) at 364H - I.) Applications for the amendment of pleadings are normally granted if *bona fide* and if prejudice that cannot be cured by a postponement or an order of costs is absent. The party seeking an amendment bears the *onus* of showing that it is made *bona fide* and that there is an absence of prejudice C *(Macduff and Co (in Liquidation) v Johannesburg Consolidated Investment Co Ltd* 1923 TPD 309; *Rosenberg v Bitcom* 1935 WLD 115; *Dumasi v Commissioner, Venda Police* 1990 (1) SA 1068 (V) at 1071B; *Brandon v Minister of Law and Order and Another* 1997 (3) SA 68 (C) at 75)."

[28] In deciding this issue the court must accept as correct the pleaded allegations and consider whether those allegations are capable of supporting a cause of action. The excipient must demonstrate that the conclusion of law pleaded by the other party cannot be supported by any reasonable interpretation of that party's pleading.[4] Where a party contends that a pleading will be rendered vague and embarrassing, such a party must make out a clear and strong case before such a party will be allowed to succeed. The alleged vagueness must affect the whole cause of action and it is generally not enough that a particular paragraph is unclear or capable of more than one meaning. Even where it is found that a pleading is vague a party will only succeed if such vagueness causes embarrassment to the extent that the opposing party is unable to plead in response thereto.

[29] The plaintiff's claims against WBHO, Stefanutti and Aveng are for damages the plaintiff it says it suffered as a result of prohibited practices committed by the defendant in contravention of s 4(1)(b) of the Competition Act 89 of 1998.

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[4] *YB v SB and Others NNO* 2016 (1) SA 47 (WCC) at paragraph [12].

[30] WBHO contends that the proposed amendment would be susceptible to a "no cause of action" exception because it would "introduce a cause of action against the first defendant based on the "Grinaker collusive agreement", without filing a section 65 certificate confirming that there was a prohibited practice of this kind to which WBHO was a party. In this regard the court was referred to the decision in *Premier Foods v Manoim*[5] where the court confirmed that, in terms of s 65(6)(b) of the Competition Act, a plaintiff may only rely on the Tribunal's findings against the defendant in a matter in which the defendant was cited as a respondent. The plaintiff cannot rely on findings of the Tribunal made in the defendant's absence in matters to which it was not a party.

[31] In light of the aforegoing it was therefore submitted that, in its claim against WBHO, the plaintiff can *only* rely on the WBHO collusive practice and cannot rely on WBHO's participation in the Stefanutti and Aveng collusive practices because the Tribunal's findings about those practices (and WBHO's participation in them) were made in proceedings against Stefanutti and Aveng in the absence of WBHO who was not a party to those proceedings. Consequently, according to WHBO, the plaintiff's particulars of claim do not disclose a cause of action against WBHO on the basis of the WBHO collusive practice alone and submitted that the Stefanutti and Aveng collusive practices are essential struts of the plaintiff's claim against WBHO. It was further submitted that if they (the Stefanutti and Aveng collusive practices) are removed, the plaintiff's claim would fail. Consequently, the Particulars of Claim do not disclose a lawful cause of action against WBHO.

[31] The plaintiff does not take issue with the legal principles as set out on behalf of WHBO and accepts unequivocally that the plaintiff cannot claim damages from a particular defendant on the basis that the defendant is guilty of a "prohibited practice" under the Competition Act unless there is a section 65 certificate certifying that the competition authorities have found that particular defendant guilty of the prohibited practice.

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[5] 2016 (1) SA 445 (SCA).

[32] It was, however, submitted on behalf of the plaintiff that it is *not* seeking damages from WBHO on the basis that WBHO was party to the collusive practice defined in the proposed amended Particulars of Claim as the "*Grinaker collusive agreement*". In this regard it was submitted that, if regard is had to the amended Particulars, it is clear that the relevance of the Grinaker collusive agreement is that WBHO was *aware* that the Grinaker collusive agreement had been concluded and would be implemented and thus that other competitors like Grinaker would not be submitting competitive bids and would moreover be expecting that a competitive bidder would be expecting to obtain a profit margin in the region of 17.5%.

[33] It was therefore argued that the Grinaker collusive agreement is not relied on by the plaintiff in order to *prove* whether WBHO acted wrongfully and culpably but is merely relied upon for the subsequent enquiries of causation and damages and thus for the determination of what prejudice or (the quantum of) loss sustained due to WBHO's deliberately wrongful conduct. The plaintiff is therefore *not* seeking damages on the basis that WBHO was guilty of the prohibited practice certified in "PL16": The plaintiff merely alleges *knowledge* by WBHO of that collusive agreement. In this regard the court was referred to the proposed clause 32D in which specific reference is made to the "knowledge" of WHBO of collusive practices other than the Group Five collusion.

[34] I have considered the submissions and the papers before me and I am not persuaded that the proposed amendment failed to advance a cognisable cause of action against WHBO and that the proposed amended Particulars of Claim would therefore be excipiable on this basis. More in particular, I am not persuaded, particularly if regard is had to the express wording used in the proposed amendment that the plaintiff seeks to introduce a cause of action in terms of which damages is sought against WHHO on the basis that WBHO was guilty of the prohibited practice certified in PL16. Again, if regard is had to the proposed amendment, the plaintiff merely alleges knowledge by WBHO of that collusive agreement.

[35] No submissions were advanced on behalf of the first defendant in respect of the objection based on a "vague and embarrassing exception". However, in so far as it is necessary to deal with this objection I am likewise not persuaded that in the event the amendment is granted that the Particulars of Claim would be rendered vague and embarrassing.

Order

[36] In the event the following order is made;

1. The applicant - the City of Cape Town - is granted leave to amend its Particulars of Claim in the above matter in accordance with the Plaintiff's Further Revised Notice in terms of Rule 28(1) (Annexure "JSM1" to the Founding affidavit and "NoM1" thereto).

2. The first respondent - WBHO Construction (Pty) Ltd - is ordered to pay the costs of this application, which costs include the costs occasioned by the employment of two counsel.

AC BASSON

JUDGE OF THE HIGH COURT

Appearances:

<u>On behalf of the applicant:</u>	SF Burger SC, PBJ Farlam SC, Adv H Slingers
<u>Instructed by:</u>	Adams & Adams
<u>On behalf of the first respondent</u>	W Trengove SC. Adv G Marriott
<u>Instructed by:</u>	Nortons Inc