

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

17/2/15
CASE NO: 14666/2011

In the matter between:

TOLERABLE TRADING (PTY) LTD

and

RIBCA TRADING (PTY) LTD

Plaintiff/Excoipient	
DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHER JUDGES: YES/NO	
(3) REVISED. ✓	
17/2/2015	
DATE	SIGNATURE
Defendant/Respondent	

JUDGMENT

DAVIS, AJ

- [1] In this matter the Plaintiff takes exception against the Defendant's plea on the basis that it is both vague and embarrassing, alternatively does not disclose a defence. For ease of reference I shall refer to the parties hereinlater as Plaintiff and Defendant respectively.

PLAINTIFF'S DECLARATION:

- [2] The portions of the Plaintiff's declaration relevant to the exception are the following:

2.1 In paragraph 4 thereof the Plaintiff pleaded that it and the Defendant had entered into a written agreement with each

other, a copy of which is annexed to the declaration as Annexure "1" thereto.

- 2.2 The material terms of the agreement was pleaded as constituting an undertaking by the Plaintiff to install services described in the agreement in the township development known as Bethal X25 and X26. The Plaintiff would be remunerated for the work at the rates set out in the schedule of quantities contained in the agreement and the scope of work would be determined by the Defendant from time to time.
- 2.3 The value of the work awarded to the Plaintiff in terms of the agreement was in excess of R4 million, VAT and contingencies excluded.
- 2.4 In paragraph 5 of the declaration it was pleaded that, in order to obtain payment, the Plaintiff would submit payment certificates to the Defendant's agent, Siyandiza Consulting Engineers (Pty) Ltd and the amount appearing in each payment certificate would be paid by the Defendant, less early settlement discounts and retention amounts, within 30 days after having been certified by the engineer as correct.

- 2.5 In paragraph 6 the Plaintiff pleaded that it had completed the work awarded to it by the Defendant in terms of the agreement during the period 1 July 2007 to 31 December 2008.
- 2.6 In paragraph 7 the Plaintiff pleaded that it had submitted six payment certificates to the aforementioned engineer and annexes copies of the certified certificates to the declaration.
- 2.7 In paragraph 8 it is pleaded that the Defendant had made payments of the aforementioned six payment certificates dated 27 July 2007, 25 August 2007, 27 October 2007, 26 November 2007, 12 December 2007 and 22 May 2008 respectively in a total amount of R3 622 924,69.
- 2.8 In paragraphs 9 and 10 the Plaintiff pleaded that it had submitted payment certificates 7 and 8 in the amounts of R455 061,79 and R405 938,54 respectively, both of which had also been certified by the engineer as correct.
- 2.9 In paragraph 11 the Plaintiff pleaded that the Defendant has retained an amount of R340 940,93 as retention amounts in

terms of the agreement which amount is due and payable to the Plaintiff.

2.10 Paragraph 12 deals with a separate small oral agreement regarding paving in the amount of some R24 000,00, which claim plays an inconsequential role in the scope of things as well as the present exception.

DEFENDANT'S PLEA:

[3] The portions of the Defendant's plea which form the principal subject matter of the exception are the following:

3.1 There is firstly a blanket denial of paragraph 4 of the Plaintiff's declaration.

3.2 In amplification of the blanket denial the Defendant pleaded as follows:

"4.2 ... the Defendant pleads that no written agreement was entered into by and between the Plaintiff and the Defendant, as alleged by the Plaintiff, or otherwise.

4.3 *Annexure '1' attached to the Plaintiff's declaration is not a written agreement entered into by and between the parties, as pleaded by the Plaintiff."*

3.3 The contents of paragraph 5 of the declaration are similarly denied and the contents of paragraphs 4.2 and 4.3 of the plea were repeated in respect thereof.

3.4 Although the performance of the work pleaded in paragraph 6 of the declaration is denied, the plea to paragraph 7 reads as follows:

"7.1 *The contents thereof are denied.*

7.2 *In the alternative and in the event of it being found that the Plaintiff did submit 'payment certificates to the engineer' then and in that event the Defendant pleads that same did not occur in terms of a written agreement as alleged by the Plaintiff in its declaration."*

3.5 The admission of payment pleaded in response to paragraph 8 of the Plaintiff's declaration reads as follows:

“8.1 The Defendant pleads that it did make certain payments to the Plaintiff, as pleaded in the Plaintiff’s declaration in the total amount of R3 622 924,69 (Three Million Six Hundred and Twenty Two Thousand Nine Hundred and Twenty Four Rand and Sixty Nine Cents).

8.2 The Defendant pleads that these payments did not occur as a consequence of any written agreement entered into by and between the parties as pleaded by the Plaintiff or otherwise.”

3.6 Generally further the plea contains a denial of liability and an implied admission of a failure to pay.

TEST TO BE APPLIED: RE VAGUE AND EMBARRASSING PLEADINGS:

[4] 4.1 In Trope v South African Reserve Bank and Another and two other cases 1992(3) SA 208 (TPD), McCreath J stated the test as follows at 211A-D:

“An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such

a nature that the excipient is prejudiced (Quinlin v MacGregor 1960(4) SA 383 (D) at 393E-H)."

Mr Swanepoel, for the Defendant, referred to and relied on the aforesaid judgment as well as the later statement therein that the test is not to produce an "*exception proof*" plea for if this was the only test, "*... the object of pleadings to enable parties to come to trial prepared to meet each other's case and not be taken by surprise may well be defeated*".

4.2 I was also referred by both Mr Swanepoel as well as Mr De Beer who appeared for the Plaintiff to the discussion of Rule 22 in Erasmus, Superior Court Practice (at B1-46 and further).

4.3 In particular, in defence of the plea, Mr Swanepoel relied on the following comment:

"Where, however, the Plaintiff's allegation is a simple one, and the defence is merely a denial, there is no need for the Defendant to go further and to state any facts: His defence is based on a traverse or denial and not on any facts."

This also accords with Van Wyk en 'n Ander v Boedel Louw en 'n Ander 1957(3) SA 481 (KPA) where, with reference to Mordt NO v Union Government 1938 TPD 589 at 597 this court said:

"I am not prepared to hold that there is a duty on a pleader to set out facts in reinforcement of a denial."

- 4.4 Mr De Beer however relied on the following comment and the cases quoted in support thereof in Erasmus:

"Whenever a denial implies some positive allegation upon which the defence will rest, the Defendant must go on to state the material facts relied on."

This particularly related to the admission of payment having been made in an amount which accords exactly with the certificates pleaded by the Plaintiff.

**AD THE DENIAL OF ANNEXURE "1" TO THE DECLARATION
CONSTITUTING THE AGREEMENT BETWEEN THE PARTIES:**

- [5] 5.1 Annexure "1" to the declaration consists of some 267 pages. It starts with a cover sheet wherein a company name at the

heading "*Drickot Developments CC*" has had two horizontal lines drawn through it and has been substituted by the name of the Defendant. This amendment has apparently been initialled by the same persons who initialled the remainder of the agreement on behalf of the Plaintiff and the Defendant. The Plaintiff's name has been entered as tenderer on this page and the name of Siyandiza Consulting Engineers (Pty) Ltd has been printed thereon being the engineers who had prepared and issued the document.

- 5.2 Annexure "1" has been supplied of an index prepared by Siyandiza Consulting Engineers (Pty) Ltd (which appears on the next page) and in similar fashion the name of Drickot Developments CC has been substituted by the name of the Defendant and the amendment initialled. The index indicates that the document (contract 1034/01) for the installation of civil services for new township development on "*BETHAL X24, X25, X26 and X27*" comprises of Sections A to K. These sections constitute INVITATION TO TENDERERS, TENDER CONDITIONS, LIST OF DRAWINGS, CONDITIONS OF CONTRACT, SPECIAL CONDITIONS OF CONTRACT, PROJECT SPECIFICATIONS, SCHEDULE OF QUANTITIES, FORMS, SCHEDULES AND CERTIFICATES TO BE

COMPLETED BY THE TENDERER, DATA SHEETS, PRO FORMAS and ANNEXURES "K1" TO "K4". On virtually all of the sections and the respective pages thereof, save for the Bills of Quantities, each page ends with a number of blocks for initials to be inserted on behalf of the contractor (the Plaintiff), two witnesses and the "*employer*" and two witnesses. On each of the pages where "*Drickot Developments CC*" appear at the top thereof it has been replaced by the name of the Defendant and initials have been appended. On the Bill of Quantities, where the signature blocks do not appear, the pages are in any event initialled at the bottom thereof and at the top thereof where "*Drickot Developments CC*" has again been deleted.

- 5.3 After the conclusion of the 267 pages constituting Annexure "1", one finds a letter from Siyandiza Consulting Engineers (Pty) Ltd dated 22 June 2007 directed to the Plaintiff. The relevant portion of the letter reads as follows:

"Dear Sirs

BETHAL X24, 25, 26 AND 27 – CIVIL ENGINEERING SERVICES: CONTRACT 1034/01 – APPOINTMENT FOR INSTALLATION OF CIVIL SERVICES

We have pleasure in informing you that your tender on the abovementioned project has been accepted and we have been instructed by the client to appoint you. The amount for which you are appointed is R4 074 212,26 excluding VAT and contingencies. Please note that this appointment is for X25 and X26 only. A decision on the rest of the development will be taken in due course ... You are to be on site by Monday 2 July 2007."

5.4 In view of the aforesaid, it comes as no surprise that the Defendant's denial of the existence of the written agreement and the denial that Annexure "1" constituted the agreement between the parties confused the Plaintiff. No explanation is given for the denial in the plea.

5.5 In the belatedly delivered heads on behalf of the Defendant the explanation for the denial and clarification of the plea is made in paragraph 4.4 thereof as follows:

"If regard is had to the contents of Annexure "1" attached to the Plaintiff's declaration the following is evident:

4.4.1 In the special conditions of contract (Section E) the 'employer' is described as 'Drickot Developments CC'.

- 5.6 It is then further argued that the denial of paragraph 4 of the declaration to the effect that the Plaintiff and the Defendant have not concluded a written agreement and that Annexure “1” attached to the declaration does not constitute such an agreement “*is a proper denial based on the contents of the annexure*”.
- 5.7 It is indeed so that, on page 28 of the paginated papers, the first page of the special conditions of contract defines in clause 1(1)(l) the “*employer*” to mean Drickot Developments CC. The same name, where it appears at the top of this page has however been deleted and replaced with that of the Defendant (and initialled) and the page has also been initialled at the bottom on behalf of the Plaintiff and the Defendant.
- 5.8 Apart from the fact that the denial, read in context of the remainder of the document, appears to be cynical it also appears to be contradictory and accordingly lacking in the necessary particularity. The contradictions are not only vested in the remainder of the documents and the amendments thereon, but also in respect of the contents of the engineer’s letter of acceptance.

- 5.9 In my view the following comment in Erasmus, supra, at B1-148A is applicable to the Defendants' pleading:

"In some cases, even if the Defendant deals with all the allegations in the Plaintiff's combined summons or declaration, his or her defence will not properly appear. A bare denial of the Plaintiff's allegations may in certain circumstances not fully convey to the Plaintiff the nature of the case he has to meet."

- 5.10 In my view, the fact that the nature of the Defendant's case only became clear once clarified in heads of argument, constitutes sufficient indication that the pleading was vague.
- 5.11 The embarrassment caused by the vagueness not only relates to the difficulty in ascertaining the Defendant's true defence but also in the procedural difficulties of considering a possible replication referring to estoppel, the true intention of the parties or rectification or whatever else the Plaintiff may be advised to do.
- 5.12 The Defendant's argument to the effect that, had the Plaintiff properly read its own document, it would have noticed the discrepancy contained in the single reference to Drickot

Developments CC and therefore have concluded that there is no written agreement between the parties, loses sight of the positive allegation that Annexure "1" indeed constitutes an agreement between the parties, that the parties had both adjusted themselves in accordance with the terms thereof, that the work required and set out in meticulous and extensive detail in the agreement had been performed and that that which had been performed had indeed been certified by the (Defendant's) engineer. The averments by the Plaintiff was therefore not of such a simple nature that a bare denial would have sufficed.

5.13 It is difficult to conceive what the Defendant then avers the intention of the Defendant was when it signed all the various pages of Annexure "1" where its name appears and on which it is now being sued. In my view the bare denial in the present instance did not suffice and caused the plea to be vague and embarrassing and prejudicial to the Plaintiff.

AD DENIAL REGARDING PAYMENTS:

[6] 6.1 As already set out above, the Plaintiff has pleaded the delivery of six consequential payment certificates and the certification

thereof by the engineer. The Plaintiff further pleaded that all these certificates had been paid by the Defendant.

6.2 The aforesaid is not a cause of action but has been pleaded as precursor to the Plaintiff's cause of action based on the similar furnishing and certification of payment certificates 7 and 8 (pleaded in paragraphs 9 and 10 of the declaration) which have not been paid.

6.3 Once the Defendant admitted having made "*certain payments*" to the Plaintiff, the total of which accords exactly with the certified totals of the first six certificates, the denial that the payments were in accordance with Annexure "1" certainly lacks particularity.

6.4 In the absence of an alternate basis for the payments which accord with the certified certificates, the denial is certainly vague. This vagueness was again clarified by the heads delivered on behalf of the Defendant and in the debate with Mr Swanepoel whereby it was conceded that the only basis for the denial of the payments having been in accordance with the written agreement between the parties, was the same denial of the validity of said Annexure "1" due to the reference

to Drickot Developments CC not having been deleted in a single instance in Section E as it had been on all the other documents and pages.

6.5 It is clear from the copies of the paid certificates that the Defendant was the client of Siyandiza Consulting Engineers (Pty) Ltd (and would have signed the certificates on which it has been so identified in the top right-hand corner of each certificate) and was therefore also the client referred to in the document whereby the engineer had accepted the Plaintiff's tender as set out in Annexure "1" to the declaration. It must follow that all eight certificates have been signed (and certified) by the engineer of the Defendant.

6.6 Furthermore, Mr De Beer submitted on behalf of the Plaintiff that the admission of payments amounted to a positive averment which needed amplification. He *inter alia* relies on the following comment in Erasmus:

"An explanation or a qualification of a denial will, for example, be necessary where the denial is partial or where it implies some positive allegation by way of an explanation upon which the defence will rest."

6.7 Mr Swanepoel argued that the denial of the payments having been in accordance with Annexure “1” was sufficient and needed no explanation but, in view of the prior certifications and agency between the Defendant and the consulting engineer to which I have referred, the admission of the payments but the denial of Annexure “1” creates an obligation to furnish particularity in respect of what agreement or on what basis the payments had then allegedly been made. The lack of such particularity leads to a vagueness in the pleading which, in similar fashion as above, led to embarrassment and prejudice for the Plaintiff.

[7] Although eight separate grounds of exception have been raised by the Plaintiff, in view of the conclusions reached above, I do not deem it necessary to further burden this judgment with an exposition of these various grounds which all in one way or another relate to the two aspects which I have dealt with herein before.

[8] In my view the exception was properly taken on the first of the alternate grounds, being vague and embarrassing. In view of the order I propose making, I do not deem it necessary to consider the alternate grounds.

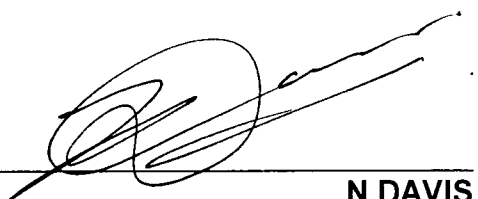
ORDER:

[9] The order which I make is the following:

9.1 The Plaintiff's exception is upheld with costs.

9.2 The Defendant's plea is hereby struck out.

9.3 The Defendant is granted 15 days from date of this order to amend its plea, if it so chooses, failing which the Plaintiff shall be entitled to approach this court on the same papers or as supplemented for an order for the striking out of the Defendant's defence.



N DAVIS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION
PRETORIA