

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 1082/2011

In the matter between:

TELKOM SA LTD

Plaintiff

and

MOQHAKA MUNICIPALITY

1st Defendant

LOHAN CIVIL (PTY) LTD

2nd Defendant

MTHOMBENI AND ASSOCIATES CC

3rd Defendant

JUDGMENT:

VAN DER MERWE, J

HEARD ON:

8 MARCH 2012

DELIVERED ON:

5 APRIL 2012

[1] This is an exception by the third defendant on the basis that the plaintiff's particulars of claim do not disclose a cause of action against it.

[2] The plaintiff's claim against all three defendants is solely based on the provisions of section 25(1) of the Electronic Communications Act 36 of 2005 (the Act). This section provides as follows:

“(1) If an electronic communications network service licensee finds it necessary to move any electronic communications facility, pipe, tunnel or tube constructed upon, in, over, along, across or under any land, railway, street, road, footpath or waterway, owing to any alteration of alignment or level or any other work on the part of any public authority or person, the cost of the alteration or removal must be borne by that local authority or person.”

[3] In terms of section 1 of the Act “person” means a natural or juristic person. The terms “public authority” and “local authority” appear to be used as synonyms, but it is not necessary to make a final determination in this regard as the first defendant, being a municipality, clearly can be both.

[4] For ease of reference the requirements for liability in terms of section 25(1) can on the allegations made by the plaintiff be broken down to the following:

- (i) if an electronic communications network licensee;
- (ii) finds its necessary to move any electronic communications facility constructed upon, across or under any road;
- (iii) owing to any alteration of alignment or level;

- (iv) on the part of any local authority or person;
- (v) the costs of the alteration or removal must be borne by that local authority or person.

[5] The particulars of claim contain allegations in accordance with (i), (ii) and (iii) above and sets out the cost of the alteration or removal. In respect of (iv) above, the following is pleaded:

“

5.

- 5.1 During or about April 2008 at Moakeng, Kroonstad the first defendant, in terms of contract number MIG/FS/0325/R/ST/07/07, upgraded its gravel road and storm water drainage in and around Dingalo Street near Phomolong School, Moakeng, Kroonstad.
- 5.2 At all relevant times thereto the third defendant acted as civil engineer and the second defendant as contractor for and in respect of the said project duly instructed and appointed by the first defendant.
- 5.3 As a direct result of the said project and work conducted by the second and third defendants the alignment and level of the road and footpath at Dingalo Street near Phomolong School, Kroonstad, Free State Province were altered.”

- [6] On the aforesaid basis the particulars of claim contain a cause of action in terms of section 25(1) against the first defendant. The exception is essentially that in terms of the particulars of claim the third defendant acted as agent of the first defendant within its authority as such and that as such the third defendant cannot in law be liable in terms of section 25(1).
- [7] In my judgement the exception is well taken. The particulars of claim must be construed as stating that the third defendant at all times acted within the scope of its authority as agent of the first defendant. This was correctly conceded by counsel for the first defendant. Conduct or behaviour on the part of a person or party means conduct or behaviour proceeding from that person or party. See the New Shorter Oxford English Dictionary, Volume 2, page 2107. At common law every act of an agent falling within the scope of the agent's actual authority, that does not constitute a delict by the agent, is the act of the principal only. See **De Villiers & Macintosh, The Law of Agency in South Africa, 3rd Edition page 438; LAWSA, Volume 1, 2nd Edition, para**

213, page 210. In such case the act of the agent proceeds from and is on the part of the principal. It is presumed that a statute does not alter the existing law more than necessary or than is clearly stated. The existing law of agency in this respect is not inconsistent with the Constitution and there is no need for its development in terms of sections 173 and 39(2) of the Constitution. There is no indication at all in the section of an intention to depart from this established common law principle. I conclude therefore that on the allegations in the particulars of claim the third defendant (and the second defendant) cannot be held liable to the plaintiff in terms of section 25(1) of the Act.

[8] It follows that the exception must succeed. Both parties before me accepted that leave should be granted to the plaintiff to amend its particulars of claim, if so advised.

[9] The following orders are issued:

1. The exception succeeds with costs.
2. The plaintiff's claim against the third defendant is struck out.
3. The plaintiff is granted leave to file amended particulars of

claim within 15 days of date hereof.

C. H. G. VAN DER MERWE, J

On behalf of the plaintiff:

Adv. S.J. Reinders
Instructed by:
Honey Attorneys
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On behalf of the third defendant:

Adv. J.J.F. Hefer
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