

Reportable:	Yes/No
Circulate to Judges:	Yes/No
Circulate to Magistrates:	Yes/No

IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE HIGH COURT, KIMBERLEY

CASE NO: 1724/2011

HEARD: 25/05/2012

DELIVERED: 29/06/2012

In the matter between:

PEMBERLEY INVESTMENTS (PTY) LTD

PLAINTIFF

and

DIRECTOR-GENERAL: NORTHERN CAPE

PROVINCIAL GOVERNMENT (NO).

DEFENDANT

JUDGMENT

HUGHES-MADONDO, AJ

1] This is an application for summary judgment which was argued on 25 May 2012. The plaintiff seeks the following order:

- "1. Payment of the amount of R2 997 321.12 in respect of short-term rentals as pleaded in paragraph 10 of the Plaintiff's Particulars of claim and which amount forms part of the aggregate claim as contained in the prayers to Plaintiffs Summons;*
- 2. Interest on the aforesaid amount at the a rate of 15.5% per annum a tempore morae to date of final payment;*
- 3. Costs of suit;*
- 4. Further and/or alternative relief."*

Advocate C JBresler appeared on behalf of the plaintiff and Mr K D Job appeared for the defendant.

2] The plaintiff entered into a written services agreement ("the services agreement") with the Department of Transport and Public Works of the Northern Province ("the Department") on 31 October 2001. In terms of the services agreement the Department appointed the plaintiff to provide services according to the terms and conditions set out in the services agreement. The agreement came to an end and was terminated on 31 October 2006. On 31 July 2008 a revival agreement was concluded between the Department and the plaintiff. The plaintiff alleges that the Department breached the revival agreement in that it:

"1. Failed to return all the plaintiff's vehicles which were in the defendant's possession in terms of the agreement, on or before 31 December 2008; and

2. Failed to return all the vehicles to the plaintiff free of any damage or defects, fair wear and tear excepted."

3] The plaintiff served summons on the Department on 20 October 2011. The cause of action as set out in the summons (clause 11.1.2 and 12.2 of the revival agreement) is in essence in these terms:

3.1 Clause 11.1.2 of the revival agreement provides that those vehicles not returned to the plaintiff by 31 December 2008 would be considered as being short-term rentals and as such the Department undertook, on demand, to pay the prevailing short-term rental rates as determined by the plaintiff.

3.2 Clause 12.2 provides that those vehicles returned by the Department with damages and defects, not covered by insurance or relating to fair wear and tear, which have not been repaired by the Department prior to them being returned the Department would be liable, on demand, to pay such repair costs.

4] In the summons the plaintiff cited the defendant as follows:

*"2.1 The defendant is **THE DIRECTOR-GENERAL: NORTHERN***

CAPE PROVINCIAL GOVERNMENT N.O., in his capacity as representative of the Northern Cape Provincial Government/Administration, a provincial government/administration established in terms of section 7(2) read with the schedules thereto of the Public Service Act, 1994(proclamation 103 as published in the Government Gazette 15791 of 3 June 1994)."

- 5] It is trite that in terms of Rule 32 of the Uniform Rules of Court a court may grant summary judgment in respect of claims based on a liquid document, for a liquidated amount, for delivery of specified movable property and for ejectment together with interest and costs.
- 6] Adefendant when opposing an application for summary judgment is required to satisfy the court that he or she has a *bona fide* defence to the action.The defendant in its papers must disclose fully the nature and grounds of its defence and the material facts that it relies upon. See **MAHARAJ V BARCLAYS NATIONAL BANK LTD 1976 (1) SA 418 (A) at 426**. In essence the set of facts set out must be such that if proven at trial would constitute a defence to the claim of the plaintiff. See **BREITENBACH V FIAT SA (Edms) Bpk 1975 (2) SA 226 (T) at 228B-D and D-E; TESVEN CC AND ANOTHER V SA BANK OF ATHENS 2000(1) SA 268 (SCA)**.
- 7] If the defendant fails to set out a *bona fide* defence or to raise a triable and arguable issue and the plaintiff can establish its case clearly, then summary judgment should be granted. On the

other hand if the plaintiff has an unanswerable case and it is reasonably possible that the defendant has a good defence, then the defendant must be granted leave to defend. See **MARSH AND ANOTHER V STANDARD BANK 2000 (4) SA 947 (W) at 949-950.**

8] In the defendant's opposing papers resisting summary judgment it failed to raise the issue of *locus standi*. However it did so in its heads of argument. It was argued on behalf of the plaintiff that the defence raised by the defendant was from the bar and as such was not before this court and should therefore not be entertained. I am of the view that the *locus standi* issue is a valid one and needs to be considered in order to determine whether indeed the defendant has raised a triable issue and whether the court's order will be effective and meaningful. See **JOOB JOOB INVESTMENTS (PTY) LTD V STOCKS MAVUNDLAZEK JOINT VENTURE 2009 (5) SA 1 (SCA) at 11G-12D**. The consideration being that if the wrong party has in fact been cited the plaintiff will be in possession of a useless judgment that it could not enforce.

9] I now turn to deal with the issue of *locus standi*. The defendant representative argued that the plaintiff cited the incorrect party as defendant and places reliance on the State Liability Act 20 of 1957 ("the State Liability Act"). It conceded that two Heads of Department of Transport and Public Works, namely Patience Mokhali and Motlalepula Elias Selemela, represented the Province of the Northern Cape in concluding the services and revival agreements between the parties.

10]Even so,it was submitted on behalf of the defendant that in terms of section 125 of the Constitution the executive authority vests with the Premier and Members of the Executive Council (MEC's).Further that in terms of section 2 of the State Liability Act: "...*In any action or proceedings instituted by virtue of the provisions of section 1, the executive authority of the department concerned must be cited as nominal defendant or respondent.*" In a nutshell the argument on behalf of defendant was that the plaintiff's claim was flawed as it was instituted against the wrong defendant.

11]Lastly, the defendant's representative refer to the dicta stated in **GULF STEEL (PTY) LTD V RACK-RITE BOP (PTY) LTD AND ANOTHER 1998 (1) SA 679 (O) at 683I-J AND 684A-B**,where it was held that whendealing with a summary judgment application the following considerations are important: "...*There are accordingly two basic requirements that the plaintiff must meet, namely **a clear claim and pleadings which are technically correct before the Court. If either of these requirements is not met, the Court is obliged to refuse summary judgment.** In fact before even considering whether the defendant has established a bona fide defence, it is necessary for the Court to be satisfied that the plaintiff's claim has been clearly established and its pleadings are technically in order.*"[My emphasis]

12]Therefore before a court can consider whether the defendant has a *bona fide* defence, it has to be satisfied that the plaintiff's

pleadings were technically sound. It was submitted on behalf the defendant that in this instance this cannot be so, in light of the provisions of the State Liability Act, in that the Premier should have been cited as defendant instead.

13] Counsel for the plaintiff argued that there was no statute regulating the manner in which a provincial administration as opposed to a department, sues or has to be sued. It was further argued that even though actions have been brought against and by the Premier acting on behalf of the administration, it has also been brought against the administration itself. Reference was made to Clause 1.2.20 of the services agreement which states that: "*NCPG means the Province of the Northern Cape, acting through its Department of Transport and Public Works*". As such, counsel argued, the applicant contracted with the Northern Cape Province and not with the Department of Transport and Public Works. Finally, as regards section 125 of the Constitution, counsel conceded that whilst the section does vest executive authority of the province in the Premier, in this instance, this has no bearing on the State Liability Act, as it is only applicable to a department being sued and not the province.

14] I set out the pertinent portions of section 125 (1) and (2) of the Constitution:

- "(1) *The executive authority of a province is vested in the Premier of that province.*
- (2) *The Premier exercises authority, together with the other members of the Executive Council, by-*

- (a) implementing provincial legislation in the province;*
- (b) implementing all national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise;*
- (c) administration in the province, national legislation outside the functional areas listed in Schedule 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament;*
- (d) developing and implementing provincial policy;*
- (e) co-ordinating the functions of the provincial administration and its departments;*
- (f) preparing and initiating provincial legislation; and*
- (g) performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament”.*

15]Section 2 of the State Liability Act states that proceedings are to be instituted against the executive authority of the department concerned. Section 4A of the State Liability Act distinguishes between a national department and a provincial department and defines what executive authority means. Section 4A (a) pertains to a national department and 4A (b) makes reference to a provincial department, as in this instance. Section 4A (b) states that executive authority means the Executive Council of that province who is accountable to the provincial legislature for that department.

16]Section 132 of the Constitution, sets out that the Executive

Council of a province comprises the Premier, as head of the Council, and no fewer than five and no more than ten members appointed by the Premier from the provincial legislature. It is the Premier's duty and function to appoint the Executive Council members (MEC's), assign their powers and functions and dismiss them.

17]Section 133 of the Constitution, goes further, to state that the members of Executive Council (MEC's) are responsible for the functions of the executive assigned to them by the Premier. They are accountable collectively and individually to the legislature for the exercise of their powers and the performance of their functions.

18]As is set out in section 132 and 133, above, the Premier is head of the Executive Council. Section 2 of the State Liability Act stipulates that the Premier is the executive authority and he exercise such together with other members of the Executive Council. The Executive Council members co-ordinate the functions of the provincial administration and departments and as such they perform functions that are assigned to the provincial executive (section 125 of the Constitution). The Premier is therefore the functionary to whom the Executive Council members are all answerable to.

19]The plaintiff cited the Director-General: Northern Cape Provincial Government as a defendant. Interm of the Public Service Act 103 of 1994, section 7(3) (c) read with Schedule 1 Column's 1 and 2, there is the Office of the Premier: Northern

Cape and head of that office is the Director- General: Office of the Premier of the Northern Cape. To my mind the applicant must have intended to cite the Director-General: Office of the Premier instead of Director-General: Northern Cape Provincial Government. Section 7 (3) (c) sets out the duties of the head of the Office of the Premier, that is the Director-General. One of these duties is Secretary to the Executive Council of the province. Now as the Premier is head of the Executive Council and its members then it stands to reason that the Director-General: Office of the Premier is the "departmental" Secretary to the Premier as head of the Executive Council and its members.

20] In light of the above I find that the plaintiff who contracted with the Province of the Northern Cape, through its Department of Transport and Public Works, should have sued the head of the Executive Council through its Executive council member (MEC) responsible for the administration and functioning of that specific department as is envisaged by section 2 of the State Liability Act, and not the Premier's and Executive Councils Secretary, the Director-General.

21] It is evident that in terms of **Gulf Steel (Pty) Ltd** above, the plaintiff's citation of the Director-General: Northern Cape Provincial Government (NO) renders the plaintiff's pleadings technically defective and as such I am obliged to refuse summary judgment.

22] In summary the technical defective of the incorrect citation is not the only aspect that is fatal to this application. In addition

the claim set out in the summons read with the defence disclosed in the defendants opposing affidavit does not constitute a claim for a liquidated amount in money. The plaintiff alleges that the defendant failed to return all its vehicles however puts up documentation that indicates that some vehicles were in fact returned by the defendant. An exercise would have to be conducted to establish the total number of vehicle issued to the defendant against those returned and if returned, when exactly where they return. A comparison would have to be done against the plaintiff's documents of the vehicles returned which it had provided to the defendant. Further, it will have to be established which vehicles were outstanding or not returned, if any, as at 31 December 2008. It is evident to me that the proof of the plaintiff's claim cannot be established promptly and would require a protracted exercise to be conducted to establish what in fact constitutes the plaintiff's claim and as such I am of the view that the claim is not one that can be said to be liquidated. See **NEVES BUILDERS & DECORATORS V DE LA COUR 1985 (1) SA 540 (C) at 543C-544F; TREDoux V KELLERMAN 2010 (1) SA 160 (C) at 166G-1667C.**

23]In the circumstances I find that the plaintiff has not made out a case for summary judgment to be granted in terms of rule 32 of the Uniform Rules of Court.

I make the following order:

- a) **The application for summary judgement is refused.**
- b) **Leave is granted to the defendant to defend.**
- c) **Costs are reserved for determination by the trial court.**

W HUGHES-MADONDO

ACTING JUDGE

Northern Cape High Court, Kimberley

(i) :HgiHIghosts of such procee

(ii)

APPEARANCE

On behalf of the Applicant: **Adv. C J BRESLER**

Instructed by **VAN DER WALL & PARTNERS**

On behalf of the Respondent:**MR K D JOB**

Instructed by**JOB ATTORNEYS**