

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: CA&R 85/08
Date heard: 2009-11-16
Date delivered: 2009-11-20

In the appeal of:

**SCHMIDTSDRIFT COMMUNAL PROPERTY
ASSOCIATION**

APPELLANT

versus

LEONARDO STEENKAMP

RESPONDENT

Coram: KGOMO JP et MAJIEDT J

JUDGMENT

MAJIEDT J:

1. The Appellant, who was the Defendant in the Court *a quo*, appeals against the dismissal of two exceptions raised by it against the Respondent's summons, as amplified by further particulars. The Respondent has filed a notice that he abides the outcome of this appeal.
2. For the sake of convenience I shall refer to the parties as they were in the Magistrate's Court. The Plaintiff claims from the Defendant payment of the sum of R38 000 plus interest thereon as

well as costs. The cause of action is set out as follows in the summons:

“This being for professional services rendered by the Plaintiff to the Defendant at the latter’s special request and/or instance between April and October 2005, which amount is due and payable and the Defendant is in default with it’s payment, alternatively refuses and/or neglects to pay same despite proper and due demand.”

3. The Defendant requested further particulars to the summons which the Plaintiff responded to. The Defendant requested, *inter alia*, details as to the date when, the place where and the person who had acted on behalf of the parties in respect of the request and the instance which were allegedly made and also asked for a copy of the request if it was in writing. The Defendant also requested full particulars of the professional services which were allegedly rendered and also the manner of calculation of the remuneration agreed upon. Finally it sought particulars of the computation of the amount of R38 000.00
4. In his reply the Plaintiff answered as follows:

“The request was made by one V Mokgoro (acting on behalf of the Defendant) to the Plaintiff (also representing the Defendant at the time) at the offices of the Defendant on 23 April 2005”.

Furthermore the Plaintiff replied that the request was in writing and attached a copy of a mandate to which I shall allude later. In response to the request for particulars regarding to the computation of the R38 000.00 and for details regarding the remuneration for services rendered, a copy of a final demand was

merely attached to the reply.

5. The mandate referred to above reads as follows:

“Mandate / Power of Attorney

Reference: Community Plant.

This is to confirm that the above association has mandated Leonardo Steenkamp to act on our behalf in all matters relating to the application of the community plant in Schmidtsdrift without revoke.”

This was written on a letterhead of Schmidtsdrift Communal Property Association and was signed by one V Mokgoro, the Chairperson.

6. The Defendant filed two notice of exception, the first in terms of Rule 17(2)(a) read with rule 17(5)(a) and (b). It was averred that the Plaintiff’s summons as amplified by the further particulars did not disclose a cause of action. The second notice of exception was filed in terms of Rule 17(2)(b) read with Rule 17(5)(c) and it averred that the Plaintiff’s summons as amplified by the further particulars is vague and embarrassing. The Plaintiff was therefore called upon to remove the cause of complaint, which the Plaintiff failed to do. After argument, the Magistrate dismissed both exceptions with costs.
7. It is readily apparent from the above exposition of the pleadings, that the Plaintiff’s summons as amplified by the further particulars suffers from extremely poor draftsmanship. But is it excipiable on either or both of the grounds advanced by the Defendant?

8. Section 83(c) of the Magistrates' Courts Act, 32 of 1944, provides for an appeal against a decision overruling an exception when the parties concerned consent to such an appeal or when it is appealed from in conjunction with the principal case or when it includes an order as to costs. In the present matter a costs order accompanied the dismissal of the exception, so that this Court is empowered to adjudicate the appeal. The Plaintiff, as I have said, abides the decision of this Court and must therefore be taken to have consented to the appeal being brought.
9. The onus to show that the summons is excipiable is on the party excepting to a pleading, i.e. the Defendant in the present matter.
See: **Jackson v SA National Institute for Crime Prevention and Rehabilitation of Offenders 1976(3) SA 1 (A)** at 14;
Minister of Law of Order v Kadir 1995(1) SA 303 (A) at 318 C-E.
10. An excipient who raises an exception on the grounds of a vague and embarrassing pleading must satisfy the Court that he or she would be prejudiced in the conduct of his or her defence if the summons were allowed to stand, whereas prejudice would naturally follow where no cause of action is set out in a summons.
See: **Brigg v Brown's Pharmacy 1958(4) SA 526 (O)** at 528.
11. Mr. Haddad on behalf of the Defendant has submitted that the summons, amplified by the further particulars, does not disclose a cause of action in the following respects:
 - (a) It is not clear exactly who the contracting parties were.

- (b) There is no allegation that V Mokgoro who signed on behalf of the Defendant had the necessary authority to do so.
- (c) That the contract is one of *locatio conductio operis* and that the summons does not disclose the *essentialiae* of such a contract, namely the specific work to be performed, the remuneration payable and the time for performance. In this regard he relied on **Smit v Workmen's Compensation Commissioner 1979(1) SA 51 (A)** at 57 C.

12. While Mr. Haddad's criticism of the summons, as amplified by the further particulars, is well-founded, I do not agree that it does not disclose a cause of action. It is trite that pleadings in the Magistrate's Court are not required to set out detail to the same extent of completeness which is required in the High Court, as long as the pleadings disclose with reasonable clarity the case which a Defendant must meet.

See: **San Sen Woodworks v Govender 1984(1) SA 486 (N)** at 487.

Where appropriate, a Court is required to draw legitimate inferences from the meaning of the particulars set forth in the summons and further particulars and the necessary averments can be supplied by implication.

See: **WD Russell (Pty) Ltd v Witwatersrand Gold Mining Co Ltd 1981(2) SA 216 (W)** at 218.

In cases where a Plaintiff's action is based on contract, it is desirable that the summons should connect the Defendant with a contract by means of a proper averment, but this is not an imperative requirement in the Magistrate's Court.

See: **Beaufort Furniture and Joinery Manufacturing Co (Pty) Ltd v De Vos 1950(1) SA 112 (C)** at 115, 117.

13. Applying the aforementioned principles, I am of the view that the summons, as amplified by the further particulars, can be interpreted as a claim based on agency, concluded by the Plaintiff and the Defendant, on whose behalf one V Mokgoro was acting at the time. The work to be performed is set out in broad terms in the written mandate to which I have referred above. While the remuneration was not specifically agreed upon, I am of the view that it can be argued that the remuneration would be what is reasonable in the circumstances. In the premises I am of the view that the first exception was correctly dismissed by the Magistrate.
14. Turning to the exception that the summons is vague and embarrassing, my view is that this exception should be upheld. It is well established in our law that one cannot contract with oneself. It is therefore not clear on the papers what the Plaintiff means when he states that he was also acting for the Defendant at the time of the conclusion of the agreement. Furthermore it is not clear by when the work must be completed and, furthermore, what exactly the work entails. It is also vaguely pleaded as to when the Plaintiff would be remunerated for what at exactly which time.
15. The prejudice emanating from this vague and embarrassing pleading is self-evident. It is quite inconceivable how the Defendant can reasonably be expected to formulate a coherent plea to the summons, as amplified by the further particulars. In my view the Defendant would indubitably be placed in an invidious

position in mounting a meaningful, coherent defence in this matter. In the premises I am of the view that the Magistrate erred in dismissing this exception.

16. Our Courts have adopted the approach in a long line of cases that a successful exception on the ground that a pleading is vague and embarrassing is a ground which strikes at the formulation of a cause of action and not its validity. It would therefore be just and equitable that in such circumstances, a litigant is provided a further opportunity to remedy the deficiency, instead of simply dismissing the action.

See in this regard: **Group Five building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs) 1993(2) SA 593 (A)** at 602 C – 604 I.

Rowe v Rowe 1997(4) SA 160 (SCA) at 167 H-I;

Trope and Another v South African Reserve Bank 1993(3) SA 264 (A) at 269 H-I.

17. In my view therefore the appeal should succeed in part and the Defendant, having been largely successful on appeal, should be awarded its costs.

18. I propose making the following order:

18.1 The appeal is upheld with costs.

18.2 The Magistrate's order is set aside and substituted with the following:

“The Defendant’s exception in terms of Rule 17(2)(b) read with Rule 17(5)(c) is upheld with costs. The Plaintiff is granted leave to remove the cause of the complaint within 10 (ten) days from date of this judgment.”

**SA MAJIEDT
JUDGE**

I concur and it is so ordered:

**F DIALE KGOMO
JUDGE-PRESIDENT**

FOR THE APPELLANT : MR VW HADDAD
INSTRUCTED BY : ELLIOT MARIS WILMANS & HAY,
KIMBERLEY

FOR THE RESPONDENT : ABIDES DECISION