



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable / Not reportable

Case no: 2269/2024

In the matter between

GLOBAL PHASHASH GROUP (PTY) LTD

PLAINTIFF

and

NGWATHE LOCAL MUNICIPALITY

DEFENDANT

Neutral citation:

Coram: MAHLATSI AJ

Heard: 08/11/2024

Delivered: 25/11/2024

Summary: Exception – Wayleave agreement – permission – cancellation thereof – administrative action or repudiation of contract .

ORDER

1. The defendant's exception is dismissed.
 2. The defendant is ordered to pay costs on attorney and client scale.
-

JUDGMENT

Mahlatsi AJ

Introduction

[1] Before this court is an exception to the plaintiff's particulars of claim. The exception relates to the cause of action for the alleged unlawful cancellation of a wayleave right granted to the plaintiff. The defendant takes exception to the plaintiff's claim on the basis that, it lacks averments necessary to sustain a valid or recognised claim in law of contract and therefore excipiable in terms of rule 23 of the Uniform Rules of Court.

[2] The plaintiff opposed the application in that the defendant is in a position to plead to the particulars of action as a cause of action is properly disclosed in those particulars of claim. The plaintiff instituted an action against the defendant as a result of the breach of obligations arising from the unlawful termination of the wayleave agreement and or the subsequent repudiation by the defendant, plaintiff has lost income and profit and has suffered damages in the amount of R43 851 000.00.

[3] The defendant, having received the summonses referred to above, noted an exception on the grounds that the particulars of claim lacks averments that sustain a cause of action, or put differently, that the particulars of claim does not disclose a cause of action.

Background

[4] The plaintiff is a registered private company with registration number 2022/531588/07. The plaintiff holds an individual electronic communications services licence issued by the Independent Communications Authority of South Africa (ICASA), attached as annexure 'A'. By virtue of this licence, the plaintiff acquired rights and obligations as set out in terms of s 22(1)(a), (b) and (c) of the Electronic Communications Act 36 of 2005 (ECTA) read with item 2.3 of the *TRH 27 South African Manual for Permitting Services in Road Reserves*.

[5] The defendant is Ngwathe Local Municipality, a local sphere of government and an organ of state as envisaged in s 239 of the Constitution of South Africa, 1996, and established as such in terms of s 12 of the Local Government: Municipal Structures Act 117 of 1998.

[6] During July 2022, the plaintiff's director made a presentation to the defendant, who was represented by its Manager for Planning and Housing. Thereafter, during August 2022, the defendant's Manager for Planning and Housing, together with the Technical Directors in a meeting. The Defendant called for written proposal in support of an application for the wayleave. The plaintiff obliged and submitted a written proposal, which is marked annexure 'B'. The plaintiff's application for a wayleave was made in accordance with the Standard Draft By-Laws for the Deployment of Electronic Communications and Facilities issued in terms of Local Government: Municipal Systems Act 32 of 2002 (Municipal Systems Act).

[7] On the 30 August 2022 the plaintiff was advised that the defendant had granted consent and issued a wayleave to the plaintiff, for the installation of optic fibre across the towns under the defendant's jurisdiction with conditions as fully evidenced in annexure 'C'. The defendant, in turn, would conduct an inspection of its infrastructure prior and after commencement of the works including digging of trenches, in order to determine compliance with the conditions associated with the wayleave agreement, as well as ensuring that the defendant's infrastructure has not suffered any damage resulting from

or associated with the plaintiff's own actions or that of its servants.

[8] During subsistence of the aforesaid wayleave agreement, on the 19 April 2023, the defendant complained about open trenches, citing safety concerns. The defendant placed the plaintiff on terms to close the trenches, and undertook to visit the site to inspect the open trenches before its closing or backfilling, however, it took several days for the defendant to actually show up. Despite the failure to actually perform the inspection, the defendant cancelled the wayleave agreement on the 18 May 2023 citing *inter alia* failure to close trenches. See in this regard annexure 'E'.

Applicable Law

[9] Rule 23 provides:

'(1) Where any pleading is vague and embarrassing, or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may apply to the registrar to set it down for hearing within 15 days after the delivery of such exception: Provided that—

(a) where a party intends to take an exception that a pleading is vague and embarrassing such party shall, by notice, within 10 days of receipt of the pleading, afford the party delivering the pleading, an opportunity to remove the cause of complaint within 15 days of such notice; and
(b) the party excepting shall, within 10 days from the date on which a reply to the notice referred to in paragraph (a) is received, or within 15 days from which such reply is due, deliver the exception.

(2) Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the aforesaid matter, and may set such application down for hearing within five days of expiry of the time limit for the delivery of an answering affidavit or, if an answering affidavit is delivered, within five days after the delivery of a replying affidavit or expiry of the time limit for delivery of a replying affidavit, referred to in rule 6(5)(f): Provided that—

(a) the party intending to make an application to strike out shall, by notice delivered within 10 days of receipt of the pleading, afford the party delivering the pleading an opportunity to remove the cause of complaint within 15 days of delivery of the notice of intention to strike out; and
(b) the court shall not grant the application unless it is satisfied that the applicant will be prejudiced

in the conduct of any claim or defence if the application is not granted.

(3) Wherever an exception is taken to any pleading, the grounds upon which the exception is founded shall be clearly and concisely stated.

(4) Wherever any exception is taken to any pleading or an application to strike out is made, no plea, replication or other pleading over shall be necessary.'

[10] In the case of *Inzinger v Hoffmeyer and Others*,¹ it was said that:

'An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and its legal validity. It is not directed at a particular paragraph within a cause of action but at the cause of action as a whole, which must be demonstrated to be vague and embarrassing. As was stated in *Jowell v Bramwell-Jones and Others* 1998 [1] SA 836 W at 905E-H: "I must first ask whether the exception goes to the heart of the claim and, if so, whether it is embarrassing to the extent that the defendant does not the claim he has to meet".'²

[11] When an exception is raised against the pleadings on the basis that it lacks averments necessary to disclose a cause of action, this implies that even if one were to accept the factual averments as set out in the pleading is correct, these factual averments do not justify the conclusion of law or the relief the pleader intends to reach. It therefore follows that the defendant cannot plead the defence to a cause of action which does not exist or otherwise precluded on any lawful ground. The same position was restated in the constitutional case in the matter of *Pretorius and Another v Transport Pension Fund and Others*:³

'In deciding an exception the court must accept all the allegations of fact made in the particulars of claim is true, and may not have regard to the extraneous facts or documents, it may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts. The purpose of an exception is to protect litigants against claims that are bad in law

¹ *Inzinger v Hofmeyr and Others* [2010] ZAGPJHC 104.

² *Ibid* para 2.

³ *Pretorius and Another v Transport Pension Fund and Others* [2018] ZACC 10; [2018] 7 BLLR 633 (CC); 2019 (2) SA 37 (CC).

or against an embarrassment which is so serious as to merits costs even those of an exception. It is useful procedural tool to weed out bad claims at an early stage, but an overly technical approach must be avoided'.⁴

[12] Furthermore, as to the pleadings which do not disclose the course of action, Griessel J stated in *Frank v Premier Hangers CC*⁵ that:

'In order to succeed in its exception, the plaintiff has the onus to persuade the court that, upon every interpretation which the defendant's plea and counter claim can reasonably bear, no defence or cause of action is disclosed. Failing which, the exception need not be upheld.'⁶

This applies with equal force to an exception raised by a defendant to the plaintiff's particulars of claim.

[13] In *Vermeulen v Goose Valley Investment (Pty) Ltd*⁷ Marais JA stated:

'It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it can be shown ex facie the allegations made by the plaintiff and any document upon which his cause of action may be based, the claim is (not may be) bad in law'.⁸

[14] Both counsels submitted their heads of arguments and supplemented their view points on the issues. The defendant's exception is based on the ground that, the particulars of claim does not disclose a cause of action on the contention that, the wayleave agreement is not contractual, but a by-product of administrative decisions. The decision to grant the plaintiff wayleave permission and withdrawal thereof, were made in terms of the enabling by-laws. Furthermore, the plaintiff's action is limited to exhausting internal remedies in terms of s 62 of the Municipal Systems Act, alternatively if s 62 is not appropriate remedy, review in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or grounds based on principle of legality.

[15] In order to properly contextualise the gravamen of the defendant's grounds in the exception. It is important to firstly look at definition of wayleave:

(i) In terms of Regulation 1 Standard Draft By-Laws,⁹ a 'wayleave' is defined as 'a

⁴ Ibid para 15.

⁵ *Frank v Premier Hangers CC* [2007] ZAWCHC 21; 2008 (3) SA 594 (C).

⁶ Ibid para 22.

⁷ *Vermeulen v Goose Valley Investment (Pty) Ltd* [2001] ZASCA 53; [2001] 3 All SA 350 (A).

⁸ Ibid para 7.

⁹ See in this regard the Local Government: Municipal Systems Act, 2002 GG46920 Notice No 2489.

document issued to a person setting out the terms and conditions upon which that person may deploy and maintain electronic communication facilities within a Road Reserve, excluding Street Furniture.' This regulation describes a wayleave document as a bilateral agreement with terms and conditions.

(ii) Davis J, in *Dark Fiber Africa (Pty) Ltd v The City of Cape Town*,¹⁰ set out the nature, description and definition of a wayleave as follows:

'In order to understand the context of the City's action, it is necessary to define a wayleave which is central to impugned decision of the City. It is "a right of way granted by the landowner, generally in exchange of payment and typically for the purpose such as the erection of telegraph wires or laying of pipes". Thus it is, in essence, a contract which reflects a landowner's agreement that a licensee may use its land for which it may specify the conditions attached to such agreement.'¹¹ This decision is relevant in this matter. I align myself with the dictum.

[16] The plaintiff's counsel referred this court to the minority judgement by Jafta J and Tshiqi AJ in *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd & Others*¹² (*City of Tshwane*):

'The legal difficulties identified in this judgement, as standing in the view of applying PAJA to the s 22 procedures, were not considered by the Supreme Court of Appeal in *MTN and Msunduzi*. That Court merely proceeded from the premise that any decision taken in terms of section 22 constitutes an administrative action, without any analysis of whether the section confers rights or public power. Not all the decisions taken in terms of the statute amount to an administrative action. Put differently, it is not the exercise of every power conferred by a statute that leads to administrative action. But in our view section 22 does not even confer power. Instead, it creates statutory rights enjoyed by licensees.

These licensees bear no administrative obligation to develop electronic communications facilities. They do so purely as a commercial business. No member of the public may demand that the licensee must build infrastructure, even on that member's property. The decision to build infrastructure and where it must be constructed is that of the licensee. That decision is informed by the licensee's internal commercial interests and nothing else. Section 22 leaves it to the whims of each licensee to determine whether it wishes to build the electronic communication

¹⁰ *Dark Fibre Africa (Pty) Ltd v City of Cape Town* [2017] ZAWCHC 151; 2018 (4) SA 185.

¹¹ *Ibid* para 23.

¹² *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others* [2015] ZACC 29; 2015 (6) SA 440 (CC).

infrastructure.’¹³

[17] The majority decision in the City of Tshwane matter above expressed doubt on the section 22 and thus left the issue opened. The minority decision is the one that dealt with the issue. I agree with the plaintiff’s counsel that the minority judgement is persuasive and, I align myself with it.

[18] Having noted the above authorities on the exception, the exception is erratically based on the ground that, the plaintiff’s particulars of claim do not disclose a cause of action. A wayleave document issued by the defendant to the plaintiff is a contract¹⁴ with terms and conditions reflecting the agreement between the parties.

[19] Furthermore, it seems from the defendant argument that, cause of action is shown by the plaintiff, but it is subject to internal remedies or review. This ground of attack is misplaced. It follows, therefore, that the defendant’s exception stands to be dismissed.

Costs

[20] I do not see the reason why the costs should not follow the result.

Order

[21] In the result, the following orders are made:

1. The defendant’s exception is dismissed.
2. The defendant is ordered to pay costs on attorney and client scale.

¹³ Ibid para 75-76.

¹⁴ Footnote 11.



MAHLATSI AJ

Appearances

For the Plaintiff:

Adv. PT Masihleho

Instructed by:

Thabo Malgas Attorneys Inc

For the Defendant:

Adv. Motebang Ramaili SC et
Adv. Ntando Dlodla Mosia

Instructed by:

Tsotetsi Mchunu Attorneys