IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

JUDGMENT

Not Reportable

Case No: 2025-013676

In the matter between:

KNYSNA MUNICIPALITY **PLAINTIFF**

and

MARLENE BOYCE **DEFENDANT**

Neutral citation: *Knysna Municipality v Marlene Boyce* (Case no: 2025-013676) [2020]

Coram: **MANCA AJ**

Heard: 6 May 2026

Delivered: 12 June 2026

ORDER

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1. The defendant's exception to the plaintiff's particulars of claim is upheld.

2. The plaintiff is granted leave to amend its particulars of claim by delivering such amendment to the defendant within 15 days of this order, failing which the defendant may apply, on the same papers (duly supplemented as may be required) for an order that the plaintiff's claim be dismissed with costs.

3. The plaintiff shall pay the defendant's costs, such costs to include the costs of counsel to be taxed on Scale B.

JUDGMENT

Manca AJ:

[1] This matter comes before me on exception.

[2] It raises an interesting but not novel question: should an exception to particulars of claim on the grounds that the particulars do not disclose a cause of action be upheld if they do not disclose a cause of action but for reasons other than those advanced in the exception?

[3] The plaintiff is the Knysna municipality. The defendant is employed by the plaintiff as its director: Planning and Development.

[4] In its particulars of claim ("the particulars") the plaintiff claims an amount of R425 883.16 which it paid to the defendant on 25 August 2018. It did so pursuant to a resolution taken by its council on 13 August 2018. The

resolution provided that all senior managers be paid a scarce skills allowance of 20%.

[5] According to the plaintiff it was informed in a letter[1] from the provincial Minister of Local Government, Environmental Affairs and Development ("the Provincial Minister") dated 10 October 2018 that any policy adopted by a municipal council that provides for the payment of allowances to employees of a municipality would be unlawful to the extent that it provides for the payment of allowances to senior managers and exceeds the upper limits of remuneration published by the National Minister of Cooperative Governance and Traditional Affairs. The Provincial Minister went on to remind the plaintiff that section 1 of the Local Government: Municipal Finance Management Act, 2003 (Act 56 of 2003) ("the MFMA") defines *"irregular expenditure"* in relation to a municipality to include, amongst other things, *"expenditure incurred by the municipality… in contravention of, or that is not in accordance with, a requirement of the Municipal Systems Act, and which has not been condoned in terms of that Act"*. The Provincial Minister noted that any expenditure incurred by a municipality through the payment of allowances to senior managers in excess of the total remuneration packages determined for the senior managers concerned in terms of the relevant upper limits notices would constitute irregular expenditure to the extent that such expenditure is made in contravention of, or is not in accordance with, the requirements set out in section 57 (3) (a) of the Local Government: Municipal Systems Act, 2000 (Act 32 of 2000) and that the employment contracts of senior managers must be consistent with, amongst other things, the appointment regulations and, in turn, the applicable upper limits notices.

[1] The entire letter is quoted verbatim in the particulars.

[6] The Provincial Minister went on to state in the letter that any expenditure incurred by (the plaintiff) as a result of its implementation of its scarce skills allowance in relation to senior managers constitutes irregular expenditure to the extent that such expenditure contravenes, or is inconsistent with, the total remuneration packages determined in the applicable upper limits notices.

[7] The letter also recorded that irregular expenditure and the actions of councillors and municipal officials in relation thereto must be addressed by the plaintiff in accordance with, amongst other provisions, section 32 of the MFMA.

[8] The letter appeared to have some effect as the plaintiff alleges that the 13 August 2018 resolution was rescinded on 29 October 2018 by a resolution which resolved that all 20% scarce skills allowances paid to senior managers since 25 August 2018 be recovered within 30 days from the date of the resolution.

[9] The rescission of the 13 August 2018 resolution was however short-lived as on 11 June 2019 the plaintiff adopted a further resolution wherein it was agreed that the plaintiff reinstate the scarcity allowance for sections 54A and 56 senior managers.

[10] This was, however, not the last word on this matter by the plaintiff. On 26 February 2020 the plaintiff resolved to rescind the 11 June 2019 resolution to pay the scarce skills allowance and resolved that all scarce skills allowances paid to the municipal manager and the managers directly

accountable to the municipal manager in terms of scarce skills policy be recovered.

[11] Whether the plaintiff took any recovery steps then is not alleged. What the particulars do allege is that on 13 August 2021 the Western Cape High Court set aside the scarce skills and retention policy adopted by the plaintiff on 11 June 2019 and directed the plaintiff to recover any irregular expenditure incurred by it as a result of scarce skills allowances being paid to senior managers since the adoption of the policy, in excess of the total remuneration packages prescribed by the relevant upper limits notices published by the Minister of Cooperative Governance and Traditional Affairs from time to time ("the court order").

[12] Seemingly motivated by the court order the plaintiff addressed a letter of demand to the defendant on 26 October 2021 in which it recorded the contents of the 26 February 2020 resolution and advised the defendant that the plaintiff *"has now been ordered by the High Court to recover the said monies from yourselves."* It further alleged that *"notwithstanding demand to pay back the money that was erroneously paid to him (sic) the defendant has failed and/or refused and/or neglected to remedy the situation."*

[13] In her exception the defendant proceeded from the premise that the plaintiff sought to recover the payments to her under the provisions of section 32 of the MFMA.[2] She pleaded that in order to recover irregular expenditure under section 32 of the MFMA a municipality must investigate the circumstances of such expenditure; determine whether any person is

[2] All further references to section 32 will be references to section 32 of the MFMA.

liable for that expenditure; and take appropriate steps to recover the expenditure from the person found liable. She alleged that this was not alleged by the plaintiff and that the particulars accordingly failed to disclose a cause of action.

[14] The exception was opposed by the plaintiff on two grounds.

[15] The first ground was that its claim was not based on section 32 of the MFMA but that it was based on the court order which directed the plaintiff to recover any irregular expenditure incurred by it as a result of the scarce skills allowances being paid to senior managers.

[16] This can easily be dealt with. The court order does not confer a cause of action on the plaintiff, nor does it create one against the defendant. It is patently a direction to the plaintiff by the court to recover irregular expenditure if the plaintiff has reason to do so.

[17] I should add that the particulars of claim do not allege that the defendant was paid a scarce skills allowance which was in excess of the total remuneration packages prescribed by the relevant upper limits notice as published by the Minister of Cooperative Governance and Traditional Affairs from time to time.

[18] The second ground of opposition was that even if the defendant was correct in characterising the plaintiff's claim as one arising under section 32 of the MFMA, the exception was nevertheless defective as section 32 does not prescribe the steps which the defendant contended were necessary before any claim could be advanced under the provisions of section 32.

[19] This is so.

[20] However, sections 32(1) and (2) provide that *"without limiting liability in terms of the common law or other legislation"* the persons liable for irregular expenditure are the municipal officials responsible for causing the irregular expenditure to be made if they did so deliberately or negligently.[3]

[21] It does not create a self-standing remedy for the recovery of irregular expenditure from the recipients thereof. On the contrary, it expressly states that the remedy created by the section does not limit liability under the common law. Simply stated, the recipients may be required to repay what they received if there are grounds under the common law for such repayment.

[22] The plaintiff's counsel[4] submitted that a party who raises an exception is confined to the terms in which the exception is formulated and to the issue raised thereby. In so doing he relied on the judgment in Jowell v Bramwell- Jones and others.[5]

[23] In Jowell the court was faced with several exceptions to the plaintiff's particulars including that the particulars in that case were vague and embarrassing. In considering whether those particulars were vague and embarrassing the court emphasized that it is incumbent upon a plaintiff only to plead a complete cause of action which identifies the issues upon which

[3] Mmambisa and others v Nelson Bay Metro 2025 (3) SA 112 (SCA) at para 51
[4] The particulars were not signed by him. They were signed by his attorney.
[5] 1998(1) SA 836 (W)

the plaintiff seeks to rely, and on which evidence will be led, in intelligible and lucid form and which allows the defendant to plead to it. It held that attacks to the effect the particulars of claim were vague and embarrassing could not be founded on the mere averment that they are lacking in particularity. It restated that minor blemishes are irrelevant; pleadings must be read as a whole; no paragraph can be read in isolation; a distinction must be drawn between the facta probanda, or primary factual allegations which every plaintiff must make, and the facta probantia, which are the secondary allegations upon which the plaintiff will rely in support of his primary factual allegations and that only facts need be pleaded; conclusions of law need not be pleaded.

[24] In SA Enterprise Dev Fund Inc v Industrial Credit Corp Africa Ltd [6] the court was faced with a vague and embarrassing exception to a counter claim. It appeared that while deliberating on the exception the court came upon what it termed "a new issue" which had not been previously raised in the exception itself or in argument. After giving the parties an opportunity to address it on the new issue the court upheld the exception notwithstanding the defendant's counsel having argued that, on the authority of Jowell, the court was precluded from considering the "new issue".

[25] In upholding the exception based on the new issue the court was mindful of the dictum in Jowell to the effect that a party is bound to the terms of the exception and the issue raised thereby.

[26] In finding that it could determine the new issue, the court held that the exception already taken concerned the alleged vagueness and

[6] 2008 (6) SA 468 (W)

embarrassment of the defendant's counterclaim and that the new issue required argument only.

[27] The court went on to hold that it could not "*accept the notion of the judge merely acting as an umpire in the adjudication of disputes between parties. It is also the judge's duty to ensure that justice is done. If during the consideration of a matter a fundamental issue arises, which the parties have overlooked or have failed to recognise, and it is in the opinion of the judge in the interests of justice necessary and convenient to determine that issue, I can see no reason why this cannot be achieved through a process of fairness to all the parties concerned."*[7] It referred to the decision of the then Appellate Division in Paddock Motors (Pty) Ltd v Igesund [8] where the Court, in the context of a stated case, considered it necessary, for the proper adjudication of a stated case, not to be confined to the issues explicitly raised in the special case as to do so was to ignore the real and fundamental issue in the case.

[28] In this case the exception is not that the particulars are vague and embarrassing.

[29] The exception is a more fundamental one.

[30] It is that the particulars do not disclose a cause of action.

[7] Ibid at para 22
[8] 1976 (3) SA 16 (A) at 24A-G.

[31] Although the grounds advanced in the exception missed the mark, the heads of argument delivered by the defendant did not.

[32] In those heads, delivered well in advance of the hearing, the defendant's counsel made the point that section 32 does not, without more, make the recipient of irregular expenditure liable therefor but makes those officials who authorised the expenditure liable.

[33] In addition, and although the plaintiff's counsel persisted with the argument that, on the particulars as they stood, the plaintiffs claim is based on the court order, he did correctly concede that the court order does not find a claim against the defendant. He also conceded that wherever the phrase "*irregular expenditure"* appears in the particulars it should be understood to be a refence to *"irregular expenditure"* as defined in the MFMA.

[34] For the avoidance of any doubt, the particulars do not disclose a cause of action. No facts are pleaded to support the allegation that the amount paid to the defendant falls to be repaid to her either under the common law or section 32.

[35] To refuse the exception would be to defeat the very purpose of the exception procedure which is to dispose of a case in an expeditious manner where no case is made out.[9] I would be doing an injustice to the defendant were I to permit the case to proceed on these pleadings.[10]

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[9] Da Ribeira NO and Others v Woudberg and Others 2023 (1) SA 530 (WCC) at para 16
[10] SA Enterprise Dev Fund Inc (supra) at para 22

[36] Any prejudice which the defendant may suffer because of my upholding the imperfectly pleaded exception will be ameliorated by the fact that I intend to grant the plaintiff leave to amend its particulars of claim.

[37] What remains is the question of costs.

[38] Although the exception was imperfectly pleaded this does not, in my view, disentitle the defendant to her costs. The plaintiff was forewarned in the exception that no cause of action had been made out in its particulars. It chose not to amend.

[39] It was forewarned in the defendant's heads of argument, for the correct reasons, that section 32 was not applicable. It chose not to amend.

[40] Instead, it briefed counsel at the 11th hour to oppose the exception and deliver heads of argument on the afternoon before the hearing only to concede that no cause of action was disclosed in the particulars but that the exception should be dismissed for the reasons I have explained and rejected.

[41] In the circumstances I make the following order:

1. The defendant's exception to the plaintiff's particulars of claim is upheld.

2. The plaintiff is granted leave to amend its particulars of claim by delivering such amendment to the defendant within 15 days of this order, failing which the defendant may apply, on the same

papers (duly supplemented as may be required) for an order that the plaintiff' claim be dismissed with costs.

3. The plaintiff shall pay the defendant's costs, such costs to include the costs of counsel to be taxed on Scale B.

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B J MANCA

ACTING JUDGE OF THE HIGH COURT

Appearances:

For excipient: Adv. Jan-Hendrik Gous

Instructed by: Maartens & Le Roux Attorneys

For respondent: Adv. Mabuza

Instructed by: Thipa attorneys Inc.