



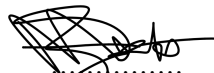
**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: ~~YES~~/NO

Case no. 2021/18762

16 January 2023

.....
DATE


.....
SIGNATURE

In the matter between:

MOGALE CITY LOCAL MUNICIPALITY

First Excipient

**MUNICIPAL MANAGER OF THE MOGALE CITY
LOCAL MUNICIPALITY**

Second Excipient

And

GELITA SA (PTY) LTD

Respondent

JUDGMENT

MAZIBUKO AJ

Introduction

1. The excipients raised several exceptions against the respondent's particulars of claim in which it claims payment of various amounts under five claims in respect of payments the respondent made to the first excipient.

2. The excipients are defendants in the main action, whilst the respondent is the plaintiff. For the purposes of this judgment, the parties shall be referred to as in the main action.
3. The plaintiff extracts gelatine from cow hides at its facility in the municipal area of the first defendant. It discharges its water effluent and other industrial effluents as an industrial client into the Percy Stewart Waste Water Treatment Works of the first defendant.
4. The first defendant is the municipality in terms of section 1¹ of the Structures Act, read with section 151(1)² of the Constitution.
5. The second defendant was cited as the administrative head and accounting officer of the municipality.
6. The dispute is about payments made by the plaintiff to the first defendant. The plaintiff claims payment of various amounts under five claims: (a) claim 1: R762 800, (b) claim 2: R3 474 601.28, alternatively R10 855 606.81, (c) claim 3: R6 228 642.50, alternatively R9 660 518.63, (d) claim 4: R2 882 004.16, alternatively R8 899 826.83; alternatively R7 268 558.30, (e) claim 5: R22 051 149.25, and (f) Interest and costs.

Factual background

7. In April 2000, the plaintiff (then known as Leiner Davis Gelatin SA (Pty) Ltd and the defendants concluded various agreements, as amended, in relation to the design and construction, maintenance, and other related matters for the pre-treatment facility to be used exclusively for the handling and treatment of the plaintiff's industrial effluent.
8. In 2006, the parties concluded an amended agreement to update the names of the parties and to incorporate charging the plaintiff for additional operations

¹ of the Local Government: Municipal Structures Act, Act 117 of 1998 (The Structures Act)

² Act 108 of 1996

and maintenance relating to the UASB Upgrade roof and burner. After the construction, the municipality did not operate the inflatable roof and burner as required. In December 2006, the plaintiff attempted to resolve the issues with the municipal management but was unsuccessful.

9. On 29 March 2021, the plaintiff dispatched what it referred to as its notice in terms of the Structures Act³ and section 3⁴ of the Legal Proceedings Act.
10. In April 2021, the summons was issued and served upon the defendants.
11. On 4 May 2021, the defendants filed their notice of intention to defend. On 2 June 2021, a notice of bar was served on the defendants. On 7 June 2021, the defendant's notice of exception was served on the plaintiff.

Issue

12. Whether the particulars of claim set out a complete cause of action that the defendants can answer. Alternatively, whether any of the grounds of exception have merit.

Law

13. *Erasmus, Superior Court Practice*,⁵ discussed exceptions: "An exception is a legal objection to the opponent's pleading. It complains of a defect inherent in the pleading: admitting for the moment that all the allegations in a summons or plea are true, it asserts that even with such admission, the pleading does not disclose either a cause of action or a defence, as the case may be. It follows that where an exception is taken, the court must look at the pleading excepted to as it stands: no facts outside those stated in the pleading can be brought into issue – except in the case of inconsistency – and no reference may be made to any other document. ... In order to succeed an excipient has the duty to persuade the court that upon every interpretation which the pleading in

³ Number 1, *supra*

⁴ The Institution of Legal Proceedings against certain Organs of State Act, Act 40 of 2002 (The Legal Proceedings Act)

⁵ Erasmus, *Superior Court Practice* Volume 2 D1-293-294 (Service 13, 2020)

question, and in particular, the document on which it is based, can reasonably bear, no cause of action or defence is disclosed; failing this, the exception ought not to be upheld."

14. Exceptions are regulated by Rule 23⁶.

Rule 23(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:..."

Rule 23(3) "Wherever an exception is taken to any pleading, the grounds upon which the exception is founded shall be clearly and concisely stated."

15. *Herbstein and Van Winsen*⁷ deal with the difference between a special plea and an exception as follows: *"The essential difference between a special plea and an exception is that in the case of the latter, the excipient is confined to the four corners of the pleading. The defence raised on exception must appear from the pleading itself; the excipient must accept as correct the factual allegations contained in it and may not introduce any fresh matter.*

Special pleas, on the other hand, do not appear ex facie the pleading. If they did, then the exception procedure would have to be followed. Special pleas have to be established by the introduction of fresh facts from outside the circumference of the pleading, and those facts have to be established by evidence in the usual way. Thus, as a general rule, the exception procedure is appropriate when the defect appears ex facie the pleading, whereas a special plea is appropriate when it is necessary to place facts before the court to show that there is a defect. The defence of prescription appears to be an exception to this rule, for it has been held that that defence should be raised by way of special plea even when it appears ex facie the plaintiff's particulars of claim

⁶ of the Uniform Rules of Court

⁷ The Civil Practice of the Superior Courts of South Africa, pages 599 to 600

that the claim has prescribed, apparently because the plaintiff may wish to replicate a defence to the claim of prescription, for example, an interruption".

16. In the matter of *Jowell v Bramwell-Jones and Others*⁸, the court laid out the following general principles regarding exceptions:

"(a) minor blemishes are irrelevant;
(b) pleadings must be read as a whole; no paragraph can be read in isolation;
(c) 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. Generally speaking, the latter are matters for particulars for trial and, even then, are limited. For the rest, they are matters for evidence;
(d) only facts need be pleaded; conclusions of law need not be pleaded;
(e) bound up with the last-mentioned consideration is that certain allegations expressly made may carry with them implied allegations, and the pleading must be so read."

Discussion

17. The defendants raised the following as their grounds of exception to the plaintiff's particulars of claim: Jurisdiction, misjoinder / non-joinder of parties, prescription, non-compliance with Section 3 Notice of the State Liability Act and that the particulars of claim lack averments which are necessary to sustain a cause of action.

Jurisdiction

18. The first exception raised referred to this court's jurisdiction. It was submitted on behalf of the defendant that this court does not have jurisdiction to adjudicate the issues raised by the plaintiff as the parties contractually agreed to refer any disputes arising from the agreements or interpretation of same to arbitration.

⁸ (543/97)(2000) ZASCA;(2000)2 ALL SA 161(A)(28 March 2000) at 899F-G

19. The relevant clause the defendants complain about is in the Finance agreement (Annexure "A" to the particulars of claim) in paragraph 8.1. which reads:
"Any dispute arising out of this agreement or the interpretation thereof, both while in force and after its termination, shall be submitted to and determined by arbitration. Such arbitration shall be held in Krugersdorp unless otherwise agreed to and shall be held in summary manner with a view to it being completed as soon as possible."
20. The plaintiff, through its counsel, argued that the issue of jurisdiction is for pleading, not exception, as exception is a procedural matter.
21. In *Zhongji Development Construction Engineering Company Limited vs Kamoto Copper Company SARL*⁹, it was held that *"when a party raises a challenge to the jurisdiction of a court, this issue must necessarily be resolved before any other issues in the proceedings. This was so that if the court lacked jurisdiction, it is precluded from dealing with the merits of the matter brought to it."*
22. The defendants had correctly pointed out that the plaintiff failed to plead the basis upon which this court had the requisite jurisdiction to adjudicate the matter or that the parties have agreed to side-step the explicit provisions of the agreements, which reflects their common intentions on entering same. However, jurisdiction is determined by the court and not the parties. Once this issue is raised, whether based on it not being pleaded or lack thereof, as a preliminary point, it is for the court to make a determination..... See *Foize Africa (Pty) Ltd v Foize Beheer BV and Others*.¹⁰
23. Friedman J held as follows in *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd*:¹¹ *"As an arbitration clause in a contract does not preclude the jurisdiction of the court, it is incumbent on a defendant, who seeks to rely on such a clause, to file a special plea and ask that the action instituted by the*

⁹ 421/13) [2014] ZASCA 160 (1 October 2014); (2014) JOL 32421 (SCA), at para 50

¹⁰ 752/2011) [2012] ZASCA 123; [2012] 4 All SA 387 (SCA); 2013 (3) SA 91 (SCA)

¹¹ 1977(4) SA 682(C) at 692H

plaintiff be stayed pending the determination of the dispute by arbitration. What this court has to decide is whether any grounds exist upon which the court's jurisdiction is ousted. The fact that grounds exist on which a trial court would probably order a stay of proceedings does not mean that the court has no jurisdiction in the action which Nissho has instituted."

24. In the matter of *PCL Consulting (PTY) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd*,¹² the Supreme Court of Appeal reiterated that: *"The mere existence of an arbitration agreement does not mean that the court proceedings are incompetent. Instead, if court proceedings are instituted despite the existence of the arbitration agreement, the other party may either apply for a stay of proceedings under the Arbitration Act or raise a special plea for stay of the proceedings."*
25. The defendant's argument that this court has no jurisdiction to adjudicate the matter due to the arbitration clause in the finance agreement concluded between the parties lacks merit. The existence of the arbitration clause in the agreement does not mean this court's jurisdiction is ousted. This ground for an exception relating to jurisdiction cannot be upheld due to lack of merit.

Misjoinder / Non-joinder of parties

26. The defendant contended that the plaintiff had failed to cite the Minister or the member of the executive council responsible for the department concerned, and that amounted to a non-joinder of a party in the proceedings.
27. The plaintiff's particulars of claim concerning this complaint reads:
 - "4. The second defendant is the MUNICIPAL MANAGER OF THE MOGALE CITY LOCAL MUNICIPALITY in his official capacity as the head of administration of the municipality in accordance with section 55 of the Municipal Systems Act, 32 of 2000, with his principal place of business

¹² 2009 (4) SA 68 (SCA)

situated at the Civic Centre, corner Commissioner and Market Streets, Krugersdorp."

28. This exception refers to the plaintiff's citation of the second defendant as a misjoinder of the party in that no proper factual or legal basis has been set out for the citation of the second defendant in a nominal or official capacity.
29. The plaintiff, through its counsel, argued that non-joinder is not a matter of exception. It is a substantive matter that has to be raised in a plea or *mero motu* by a court. Further, the misjoinder contended for by the defendants constitutes a joinder of convenience. Also, the applicable Act is not the State Liability Act but section 55(2) of the Local Government: Municipal Systems Act, 32 of 2000. The State Liability Act applies to national and provincial spheres of government and not to municipal spheres of government.
30. Section 2,¹³ of the "Municipal Systems Act expressly states:
"A municipality is an organ of state within the local sphere of government exercising legislative and executive authority within an area determined in terms of the Local Government: Municipal Demarcation Act, 1998."

Section 55(2),¹⁴ provides:

"As accounting officer of the municipality, the municipal manager is responsible and accountable for-

- (a) all income and expenditure of the municipality.*
- (b) all assets and the discharge of all liabilities of the municipality; and*
- (c) proper and diligent compliance with the Municipal Finance Management Act".*

31. Section 151¹⁵ of the Constitution provides:
"(1) The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.

¹³ of the Local Government: Municipal Systems Act, Act 32 of 2000 (The Municipal Systems Act)

¹⁴ Number 13, *supra*

(2) The executive and legislative authority of a municipality is vested in its Municipal Council."

Section 239¹⁶ defines an 'organ of state' as follows:

"(a) Any department of state or administration in the national, provincial or local sphere of government; or

(b) Any other functionary or institution -

(i) Exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) Exercising a public power or performing a public function in terms of any legislation,

but does not include a court or a judicial officer."

32. Section 82¹⁷ of the Structures Act provides: *"A municipal council must appoint—*

(a) a municipal manager who is the head of administration and also the accounting officer for the municipality; and

(b) when necessary, an acting municipal manager."

33. Section 1¹⁸ of the Legal Proceedings Act defines an 'organ of state' to mean the following:

"(a) any national or provincial department.

(b) a municipality contemplated in section 151 of the Constitution."

34. Section 2¹⁹ of the State Liability Act provides: *"(1) In any action or other proceedings instituted against a department, the executive authority of the department concerned must be cited as nominal defendant or respondent."*

35. Before I make a determination whether there is merit on the non-joinder ground, I will briefly look at the status of the municipality in terms of the Constitution to determine which office of government needs to be nominally cited in the proceedings against the municipality.

¹⁵ Number 2, supra

¹⁶ Number 2, supra

¹⁷ Number 1, supra

¹⁸ Number 4, supra

¹⁹ of the State Liability Act, Act 20 of 1957

36. In terms of Section 151²⁰ of the Constitution, the legislative and executive authority of a municipality is vested in its own Municipal Council. The Municipal Council appoints the Municipal Manager, an accounting officer and the head of administration. In other organs of state, the accounting officer is appointed by the Minister responsible for that public entity through the recommendation of the Board of Directors or such controlling body.
37. The Board of Directors or such controlling body is the accounting authority to regulate financial management in the national and provincial government and public entities. Where the public entity does not have a controlling body, the chief executive officer or the person in charge of the public entity is the accounting authority for that public entity unless specific legislation applicable to that public entity designates another person as the accounting authority. See section 49²¹ of the PFMA.
38. The position differs from the municipalities due to their status as envisaged in the Constitution. In terms of the Constitution, the municipality's executive and legislative authority are vested in its Municipal Council. The Municipal Council has executive and legislative authority over the matters set out in Part B of Schedules 4 and 5 of the Constitution, subject to national and provincial legislation, as provided for in the Constitution.
39. In terms of sections 60 and 93²² of the MFMA read with the Municipal Systems Act²², the municipal manager is an accounting officer and not an accounting authority, as there exists a controlling body for the municipality. Nor is he the executive authority in terms of the State Liability Act, as the executive and legislative authority is vested in the Municipal Council, unlike other organs of state where such authority is vested in the Minister.
40. In *Municipal Manager: OR Tambo District Municipality and Another v Ndabeni*²³,

²⁰ Number 2, *supra*

²¹ the Public Finance Management Act, Act 1 of 1999 (The PFMA)

²² of the Local Government: Municipal Finance Management Act, Act 56 of 2003

though the misjoinder and non-joinder were not an issue for the Constitutional court to determine, the Constitutional court confirmed that Ms Ndabeni had a claim against the municipality and the municipal manager. In *casu*, the municipal manager, the accounting officer, was cited as a nominal defendant, not the executive authority of the municipality.

41. In determining whether there is merit in the non-joinder ground. The Supreme Court of Appeal sets out the test for non-joinder in *Absa Bank Ltd v Naude NO*,²⁴ as follows: "[10] *The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined.*"
42. In *Judicial Service Commission and Another v Cape Bar Council and another*²⁵, the court held that: "[12] It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see, e.g. *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings has thus been held to be a limited one."
43. Applying the above test, in the present matter, I believe that the point raised by the respondent bears no merit. There are no facts supporting the contention that it was necessary to join the Minister, the executive Council member, or the municipal council as the party in these proceedings. Except for the fact that the State Liability Act provides that the executive authority must be cited as a

²³ (CCT 45/21) (2022) ZACC 3; (2022) 5 BLLR 393 (CC); (2022) 43 ILJ 1019 (CC); 2022(10) BCLR 1254 (CC) (14 February 2022)

²⁴ (20264/2014) [2015] ZASCA 97 (1 June 2015).

²⁵ 2013 (1) SA 170 (SCA) at paragraph 12

nominal defendant. Whereas with the municipalities, the executive authority lies with the municipal council, as already discussed above.

44. Though the Municipal Council might have an interest in the outcome of the matter. No cogent facts were placed before this court that due to the plaintiff's omission, *if any*, of not citing the executive authority as a nominal defendant, the council will be prejudiced by the court's judgment as a result of its non-participation in the proceedings. In my respectful view, the joinder of the executive authority will be a matter of convenience as opposed to necessity. Therefore, the defendant's ground of exception on non-joinder and misjoinder cannot succeed due to lack of merit.

Prescription

45. The defendant argues that the plaintiff's alleged claims have prescribed in terms of Section 11 of the Prescription Act and, accordingly, should be dismissed.
46. The evidence is that the written contract was concluded in April 2000 and subsequently amended on 22 June 2006 and 11 August 2006. The plaintiff's summons was delivered on 15 April 2021.
47. An exception is a complaint concerning the manner in which a pleading is drafted, not its legal validity. The prescription defence should be raised by way of a special plea even when it appears *ex facie* the plaintiff's particulars of claim that the claim has prescribed, as the plaintiff may wish to replicate a defence to the claim of prescription, for example, an interruption. See *Herbstein and Van Winsen*.²⁶ This ground for prescription exceptions cannot be upheld due to lack of merit.

Section 3 Notice

48. The defendant raised an exception that the plaintiff's Section 3 of the Legal

²⁶ Number 7, *supra*

Proceedings Act notice was defective and that the plaintiff's claim against the defendants is unenforceable and falls to be dismissed.

49. The defendant argued, through its counsel, that the plaintiff has failed to serve the defendants the statutory notice timeously and to serve the notice upon the Minister or the member of the executive council responsible for the municipality. The defendants have not consented to the institution of such legal proceedings without the requisite proper notice being served on them timeously or at all. Also, it failed to launch any application to condone its non-compliance with the notice requirements of the Legal Proceedings Act, nor has the above Honourable Court granted the plaintiff leave to institute these legal proceedings against the defendants.
50. The evidence is that the notice was delivered on 29 March 2021, and the plaintiff launched legal proceedings against the defendants on 15 April 2021.
51. Section 3²⁷ of the Legal Proceedings Act provides:
"(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless-
- (a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question.
 - (b) the organ of state in question has consented in writing to the institution of that legal proceedings-
 - (i) without such notice; or
 - ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2)."
- "(2) A notice must -
- (a) *within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4(1); and*
 - (b) *briefly set out-*
 - (i) *the facts giving rise to the debt; and*

²⁷ Number 4, supra

(il) such particulars of such debt as are within the knowledge of the creditor."

52. Section 5(2) of the Legal Proceedings Act provides that *"litigation may not commence against an organ of state before the expiry of 30 days after the section 3 notice was served. In casu, the plaintiff commenced legal proceedings within 13 court days of delivering the Section 3 Notice on the Defendants."*
53. Section 3(4) of the Legal Proceedings Act provides as follows:
"(4) (a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure. The court may grant an application referred to in paragraph (a) if it is satisfied that- the debt has not been extinguished by prescription. (b) good cause exists for the failure by the creditor, and the organ of state was not unreasonably prejudiced by the failure. (c) If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question on such conditions regarding notice to the organ of state as the court may deem appropriate."
54. Non-compliance with section 3 of the Legal Proceedings Act should be raised by way of a special plea like prescription. Where the plaintiff meets certain requirements; for instance, that the claim is not extinguished, condonation may be sought even after the institution of proceedings. This ground is a matter which should be raised in a plea and does not form the basis of an exception. This ground of exception is not justified to succeed due to a lack of merit.

Cause of action

55. The defendant argues that the plaintiff's particulars of claim are excipiable for not properly setting out a cause of action; alternatively, it lacks essential elements necessary to sustain any cause of action, as it is unclear what case the defendants must meet.
56. It was argued on behalf of the defendant that the plaintiff could not quantify or qualify the amounts for the alleged overcharges it claims. The plaintiff seeks to

employ a unique method of calculating its damages. However, it has failed to allege any facts upon which it may be concluded that the method of computing is appropriate in this instance and that the plaintiff has suffered actual and quantifiable damage. The plaintiff has failed to allege any facts upon which it may be concluded that the defendant's alleged conduct factually and legally caused the alleged damages.

57. The plaintiff, through its counsel, contended that the information required to determine the amounts owing to the plaintiff finally falls within the knowledge of the first defendant. During the discovery process, such information will come to the fore and will enable the plaintiff to verify its claims in respect of the amounts owed to it and to make an amendment to such amounts if necessary to correctly and accurately quantify its quantum.
58. The plaintiff argued that its claims are for overpayments and unnecessary payments, which are damages flowing naturally and generally from the breach committed by the first defendant.
59. I agree with the submission that the proof of payment will be discovered during the discovery and the trial stage of the proceedings. It is not necessary for purposes of pleading. If evidence can be led to disclose a cause of action alleged in the pleadings, that particular pleading is not excipiable. A pleading will be excipiable where no possible evidence shown on the pleadings can disclose a cause of action. *Pleadings must be lucid, logical, and intelligible; the cause of action must appear clearly from the factual allegations.* See Harms Civil Procedure in the Supreme Court at 263-4. No basis was laid or referenced by the defendant that the particulars of claim contain mutually destructive and contradictory pleadings.
60. It is true that the plaintiff did not plead where the contract was concluded. Rule 18(6) of the Uniform Rules of Court provides that a plaintiff who relies on a contract has to allege where such contract was concluded. Rule 18(12) provides: *"If a party fails to comply with any of the provisions of this rule, such pleading shall be deemed to be an irregular step, and the opposite party shall*

be entitled to act in accordance with rule 30." In my view, the procedure to be followed is that contained in rule 30. It is not a ground of exception but that of an irregular step.

61. In my view, the allegations in the paragraphs referred to by the defendants do not amount to grounds for an exception. There is no merit in the exceptions, and the exceptions ought to be dismissed with costs.

62. Accordingly, the following order is granted.

Order:

1. The exceptions are dismissed.
2. The defendants are to bear the costs of this application.



N. Mazibuko

Acting Judge of the High Court of South Africa
Gauteng, Pretoria

This judgment is digitally submitted by uploading it onto Caselines and emailing it to the parties.

Representation

Plaintiff's Counsel:

Mr J W Steyn

Instructed by:

Swart Redelinghuys Nel Attorneys

Defendant's Counsel:

Mr J Govender

Instructed by:

Smith van der Watt Inc

Date of hearing:

26 October 2022

Judgment delivered on:

16 January 2023