IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

Case No: 441/2019

Date heard: 17 October 2019

Date delivered: 21 November 2019

NOT REPORTABLE

In the matter between:

STEVE'S WROUGHT IRON WORKS	**First Plaintiff**
SOVUKA TRADING CC	**Second Plaintiff**
BRAVOPLEX 531 CC	**Third Plaintiff**
IMBOLA TRADING CC	**Fourth Plaintiff**
GRANDEL'S WELDING CC	**Fifth Plaintiff**
KANNEMEYER	**Sixth Plaintiff**

And

NELSON MANDELA METROPOLITAN MUNICIPALITY **Excipient**

JUDGMENT

Goosen J:

[1] The plaintiffs jointly instituted action against the defendant alleging the conclusion of agreements to render services to the defendant and the breach of each such agreement. In consequence of the alleged breach the plaintiff's each claim payment of the sum of R3 000 000. 00 as damages.

[2] Summons was issued on 25 February 2019. On 3 May 2019 the plaintiffs' attorney delivered a notice of bar requiring the defendant to file its plea. On 6 May 2019 the defendant filed a notice in terms of Rule 23 asserting that the particulars of claim are vague and embarrassing or lack averments to sustain a cause of action. The plaintiffs did not, within the stipulated period, remove the causes of the

complaints. Accordingly, on 30 May 2019, the defendant filed its exception to the plaintiffs' particulars of claim. It is this exception which is to be decided.

[3] The plaintiffs oppose the exception on three grounds. Firstly, it is contended that the exception was filed late and only after the notice of bar was filed. Accordingly, so it is submitted, in the absence of an application for condonation the exception should be struck out.

[4] The second point raised is that the exception does not comply with Rule 6(5) inasmuch as no notice of motion and supporting affidavit has been filed. For this reason, it is contended, the exception ought to be struck out. The third point deals in part with the merits of the exception. It is to the effect that the complaints are themselves vague and embarrassing and that they could have been dealt with in a plea. On this basis, it is submitted that the filing of an exception amounts to an abuse of the court process.

[5] Before dealing with these "*defences*" to the exception it is necessary to set out briefly the principal allegations contained in the particulars of claim to which exception is taken. As indicated the plaintiffs instituted action jointly albeit that each plaintiff apparently relies upon a separate agreement. The cause of action is set out as follows:

"This is an action brought by the Plaintiffs against the defendant in that in or about the 1st December 2017 and at Port Elizabeth the plaintiffs entered into written contracts with the defendant to render various services to the defendant for a duration of three (3) years commencing on the 1st December 2017 and expiring on the 1st December 2020. Subsequent to the conclusion of the agreements and on the 20th March 2018, the defendant verbally advised the plaintiffs that the written contracts have been terminated. The plaintiffs are aggrieved that the defendant had unilaterally cancelled valid and binding contracts and seek redress before the court for a declaratory order in that the said agreements are still valid and binding between the parties, or alternatively; where the defendant fails to perform in terms of the contracts the plaintiff prays for payment of damages suffered as a result of the unilateral and invalid breach of the contracts and other ancillary orders."

[6] What follows this is pleaded as background facts:

"3.1 In or about August of September 2016 and in Port Elizabeth, the defendant published an **INVITATION TO BID** (hereinafter referred to as a "tender") calling upon all interested parties to bid

for the tender and the tender closed on the 15th September 2016 at 11:00 AM.

3.2 The Plaintiffs together with other bidders tendered to render services as per invitation and submitted all the relevant documentation in terms of the tender document.

3.3 The plaintiffs were awarded contracts to render services to the defendant for a period of three (3) years from the 1st December 2017 to 1st December 2020.

3.4 It should be mentioned at this stage that although the services from each of the service providers were to be provided on ad-hoc basis i.e. (as an when services were needed); the general norm was that these services were rendered on regular basis on behalf of the defendant and the plaintiffs has rendered similar services to the defendant before and received payments to that effect.

3.5 As can be seen from the attached proofs of payment received from the defendant, a legitimate expectation to continue receiving the above amounts; in view of the fact that these contracts were advertised as starting from R1 000 000.00 and above; the plaintiffs expected to receive work value from R1 000 000.00 per annum for the period of the contracts.

4.1 On or about 20th March 2018 the defendant called a meeting for all the successful bidders of the tenders referred to in paragraph 3.1 supra and in that meeting the defendant verbally advised that

all the contracts have been terminated. No reasons were advanced for the unilateral and verbal termination of valid and binding agreements.

4.2 On further engagements between the plaintiffs and the defendant regarding reasons to the unilateral terminations of valid and binding contracts through its City Manager, Mr Mettler addressed a correspondence dated 29 April 2018 which purportedly gave "reasons" for the unilateral and verbal termination of the contracts.

4.3 Various engagements followed from both sides with plaintiffs demanding reasons for the unilateral and verbal termination of written and legally binding agreements to no avail.

4.4 Plaintiffs then consulted with their present attorneys of record and a letter of demand was addressed to the defendant's representatives Mr Bobani (the "Mayor"), Mr Feni (Corporate Services) and Miss Nqwazi (the then Acting City Manager), to date no official response has been received from the defendant, and accordingly; the plaintiffs submit that the defendant is in breach of the written contracts and is liable for damages calculated at R1 000 000.00 per annum from the 1st January 2018 to 1 December 2020 per plaintiff. This constitutes the minimum value of the contracts that would have been received from the

> defendant for the duration of the terms of the contracts which is three years."

[7] In its notice of exception, the defendant alleges that whereas reference is made to certain annexed service level agreements only two such numbered annexures are attached. No agreement is annexed in respect of the sixth plaintiff who is cited only as Kannemeyer without identifying whether the party is a natural or juristic person.

[8] The defendant further points out that the particulars of claim contain no averments as to when the agreements were concluded, where they were concluded and by whom they were concluded. At least four of the plaintiffs are incorporated entities. There is no allegation as to who represented the plaintiffs and the defendant in the conclusion of the agreements

[9] Inasmuch as the plaintiffs rely upon an alleged "general norm" that services were to be rendered on a regular basis the defendant alleges that the annexed service level agreements relied upon, do not contain any such term. Nor do the annexed agreements contain terms upon which may be founded an expectation that each plaintiff would receive service requests valued at R1 million per annum as alleged.

[10] Premised upon these complaints the defendant submits that the particulars are vague and embarrassing, alternatively lack averments to sustain a cause of action. I shall return to this hereunder. I deal first with the "defences" raised by the plaintiffs.

[11] The first point is, upon a reading of the clear and unambiguous language of Rules 26 and 23(1), without any merit.

[12] Rule 26 provides that:

> "Any party who fails to deliver a replication or subsequent pleading within the time stated in rule 25 shall be *ipso facto* barred. If any party fails to deliver any other pleading within the time laid down in these Rules or within any extended time allowed in terms thereof, any other party may by notice served upon him require him to deliver such pleading within five days after the day upon which the notice is delivered. Any party failing to deliver the pleading referred to in the notice within the time therein required or within such further period as may be agreed between the parties, shall be in default of filing such pleading, and ipso facto barred: Provided that for the purposes of this rule the days between 16 December and 15 January, both inclusive

> shall not be counted in the time allowed for the delivery of any pleading."

[13] It is plain that a party is only *ipso facto* barred upon failure to deliver a replication or subsequent pleading within the time period stipulated in the Rules. In the case of all other pleadings the bar occurs upon lapse of the notice period provided for in Rule 26 i.e. within five days after receipt of the notice. If within the five day period a pleading which the party is entitled to file is filed, there is no bar.

[14] Rule 23(1) provides that an exception may be filed "*within the period allowed for filing any subsequent pleading*". It requires however, the peremptory filing of a notice if it is contended that the pleading is vague and embarrassing. A party is only barred from filing an exception (which is a pleading) if that party is time-barred in accordance with Rule 26. This principle is well established as is to be seen from the finding in ***Tyulu and Others v Southern Insurance Association Limited***[1] where Eksteen J (as he then was) held[2]

> "Rule 26 provides for an automatic bar on failure to file a replication or subsequent pleading within the time laid down in the Rules, but in the case of all other pleadings, a notice of bar is required before the parties

[1] 1974 (3) SA 726 (E)
[2] At 729C-E. See also Felix and Another v Nortier N.O and Others (2) 1994 (4) SA 502 (SE) at 506E where Leach J specifically held that a defendant is entitled to file a notice of exception upon receipt of a notice of bar.

> seeking to file such pleadings can be precluded from doing so. This provision to my mind applies also in the case of the exception in the present case. The decision in Stockdale Motors v Mostert, supra, is distinguishable from the present case in that there the exception was taken to the plea and was only filed after the time allowed for the filing of a replication had elapsed and an automatic bar had come into effect. The pleadings had therefore in terms of the Rule been closed and no further pleadings could properly be delivered. In the present case no such automatic bar exists."

[15] In this instance the notice of exception was delivered within the five day period provided in the notice of bar. That is permitted in accordance with the authorities referred to and the plain wording of the rules.

[16] Plaintiffs' counsel relied upon the judgment in ***McNally N.O v Codrun and Others***[3] where Yekiso J held that that the filing of a notice of exception constitutes a procedural step which would not preclude a bar being imposed by notice of bar. The learned judge took the view that the notice itself is not a plea whereas the exception is a plea. He, however, expressed the view that the filing of an exception is a proper response to the filing of a notice of bar. Since only a notice to except was filed it was set aside as an irregular step in terms of Rule 30.

[3] 2012 JDR 0385 (WCC) [2012] ZAWCHC17 (19 March 2012)

[17] The finding of Yekiso J runs counter to the authority of this Division. It bears emphasis that it was specifically held in ***Felix***[4] that a party is entitled to proceed to except in response to a notice of bar. Thus, the filing of a notice of exception, which is a peremptory requirement where it is alleged the pleading is vague and embarrassing, is permitted. This was followed in ***Landmark Mthatha (Pty) Ltd v King Sabata Dalinyebo Municipality et al: In re African Bulk Earthworks (Pty) Ltd v Landmark Mthatha (Pty) Ltd et al***[5].

[18] I am bound by the decisions of this Division unless I am persuaded that they are wrong. I am not so persuaded. To the contrary, they are, in my view, correctly decided. The decision in ***McNally N.O.*** in effect precludes a party who intends to object to a pleading on the basis that it is vague and embarrassing from taking such exception upon receipt of a notice of bar unless that party had filed such notice of intention to except within the initial period allowed for the filing of a plea. Such construction of rule 23(1), in my view, would defeat the purpose to be served by the process of excepting to a pleading.

[19] I am supported in this by the judgment of ***Tuffsan Investments 1088 (Pty) Ltd v Sethole and Another***[6]where Van der Westhuizen AJ held:

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[4] See fn 2 above
[5] 2010 (3) SA 81 (CCM) at par [13]
[6] (22826/2015) [2016] ZAGPPHC 653 (4 August 2016) at par 25 -26

> "25. I am in respectful agreement with the findings in this regard of Felix, supra, and Landmark Mthatha, supra. To hold the contrary, as in McNally, supra, would disentitle a party after the initial period of 20 days within which to file an exception where the pleading is vague and embarrassing to thereafter take such an exception. Such party would have difficulty in pleading to the vague and embarrassing allegations. It is trite that the very purpose of pleadings is to crystallize the issues in dispute.
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> 26. It follows that the defendants were entitled to serve a notice in terms of Rule 23(1) within the period allotted in the notice of bar."

[20] In the circumstances, the plaintiffs' first objection falls to be rejected.

[21] In regard to the second objection viz. that the defendant had failed to file a notice of motion and supporting affidavit as required by Rule 6(5), there is no merit to the objection. Rule 23 prescribes the form of the exception as a pleading. An exception is not an application to which the provisions of Rule 6 apply.

[22] Finally, there is the plaintiffs' answer to the merits of the exception. In its notice of opposition the assertion is made that the exception itself is vague and embarrassing. This is simply not so. The complaints raised are quite specific. Those

that relate to the discrepancy between the pleaded cause of action and the supporting contracts point not only to the failure to plead the terms of the agreements but also the absence of necessary averments to sustain the broad "terms" relied upon. The defendant, in these circumstances, is correct when it states that it does not know to what it must plead.

[23] In the heads of argument filed on behalf of the plaintiffs, as also in argument before me, counsel was content to submit merely that the objections "are baseless" without addressing either the substance of the complaints or the prejudice suffered by the defendant in having to discern for itself the foundation of the plaintiffs' cause of action.

[24] An exception on the ground that a pleading is vague and embarrassing involves consideration in the first instance whether it lacks particularity to the extent that it is vague. Secondly, whether the vagueness causes embarrassment to the extent that the excipient is prejudiced.

[25] A reading of the pleaded cause of action evidences its vagueness. It is necessary to highlight only one of several aspects raised by the defendant to demonstrate the embarrassment and prejudice which flows from the manner in

which the particulars are framed. The allegation is made that the agreements concluded with the defendant[7] contemplated that services be

> "rendered on regular basis on behalf of the Defendant and the Plaintiffs has rendered similar services to the Defendant be and received payments to that effect."

[26] However, paragraph 1 of the agreement annexed to the particulars record that the appointment is "*on an ad hoc (as and when) required basis*." It is elsewhere recorded that no work is to be performed "*unless requested by the representative of the [defendant] with a valid order number.*"

[27] These terms contradict the assertion of a "*norm*" suggesting "*regular*" services. As pointed out by counsel for the defendant if the "*norm*" relied upon is to be treated as a tacit term it would of necessity need to be pleaded as such. In any event, such tacit term would be in conflict with the express terms of the agreement relied upon and would be unsustainable. The prejudice which flows from the pleading in its present form is self-evident.

[28] One other example suffices. The sixth plaintiff is cited as "*Kannemeyer*". An agreement purporting to have been concluded between the defendant and

[7] In this regard it should be noted that the plaintiffs have failed to comply with the provisions of Rule 18(6).

Kannemeyer Property Developers (Pty) Ltd is annexed to the particulars of claim. When asked what this had to do with the matter Mr Notyawa, for the plaintiffs, submitted that this referred to the sixth plaintiff. He could, however, offer no explanation for the defective citation nor why an amendment of the particulars of claim would not be required before the defendant pleaded thereto.

[29] There are several other respects in which it is submitted that the particulars are vague and embarrassing. It is not necessary to traverse them all. It is also not necessary to consider whether the particulars contain sufficient particularity to sustain a cause of action. That is so because upon the examples outlined above the defendant's exception must be upheld.

[30] Mr Beyleveld SC, for the defendant, indicated that whereas his heads of argument seek an order striking out the plaintiffs' claims the proper order in the circumstances will be to uphold the exception and grant the plaintiffs' leave to amend their particulars of claim. I agree.

[31] In the result I make the following order:

1. The defendant's exception is upheld.

2. The plaintiffs are ordered, jointly and severally, to pay the costs of the exception.
3. The plaintiffs are granted leave to amend their particulars of claim in accordance with the Rules within 20 (twenty) days of the date of this order.

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G.G GOOSEN

JUDGE OF THE HIGH COURT

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