

IN THE NORTH GAUTENG HIGH COURT, PRETORIA  
(REPUBLIC OF SOUTH AFRICA)

12/3/14

CASE NO: 32630/13

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO.
(2)	OF INTEREST TO OTHER JUDGES: NO.
(3)	REVISED.
6/03/2014	<i>Mahidi</i>
DATE	SIGNATURE

In the matter between:

**FIGO PUTSO CONSTRUCTION CC**  
(Registration Number: 2006/154073/23)

Plaintiff

and

**LEREKO MINING SUPPLIES (PTY) LIMITED**  
(Registration Number: 2004/007096/07)

Defendant

DATE OF HEARING: 27 JANUARY 2014

DATE OF JUDGMENT: 12 March 2014

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JUDGMENT

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MALINDI AJ

## **INTRODUCTION**

- [1] The plaintiff filed summons on 23 October 2013.
- [2] On 22 July 2013 the defendant delivered its notice in terms of Rule 23(1) calling upon the plaintiff to remove certain causes of complaint within 15 days. The plaintiff failed to remove the causes of complaint.
- [3] On 22 August 2013 the defendant delivered its notice of exception to the plaintiff's particulars of claim on the grounds that they are vague and embarrassing.
- [4] The plaintiff's claim against the defendant arises out of a partly written partly oral agreement entered into between the plaintiff and the defendant on 12 December 2012. The plaintiff attaches what it contends are the written parts of the agreement to its particulars of claim as annexures "A" and "B".
- [5] The plaintiff alleges that the defendant repudiated the agreement by way of a written communication to the plaintiff which constituted a "*material breach*" of the agreement which entitled the plaintiff to cancel the agreement. The plaintiff duly cancelled the agreement and conveyed such election to the defendant on 22 May 2013. The plaintiff pleads in the alternative that it accepted the defendant's repudiation and communicated such acceptance to the defendant on 22 May 2013.

- [6] The plaintiff makes allegations that it and the defendant were aware of certain facts, *inter alia* that time was of the essence regarding delivery of the drill, when the agreement was entered into and claim damages in an amount in excess of R1,8 million, the amount of R1 122 564,38 being payment the plaintiff made to the defendant, and claims "*special damages*" in the amount of R500 000,00 and R200 000,00 allegedly in respect of expenses incurred as a result of the lease of an alternative drill and wages allegedly expended as a result of "*standing time*".

### **THE GROUNDS OF EXCEPTION**

#### **First Ground of Complaint**

- [7] In paragraph 4 of its particulars of claim the plaintiff sets out what it alleges were the express, alternatively tacit further alternatively implied terms of the partly written partly oral agreement. It pleads that the written parts of the agreement are attached as annexures "A" and "B" to the plaintiff's particulars of claim.
- [8] It is however apparent from annexure "A" itself that it contains contractual terms relating to the dates when stages of manufacture of the drill would be completed, when the drill would be delivered by the defendant and when payment would be made by the plaintiff to the defendant.

[9] Annexure "B" to the particulars of claim is an order addressed by the plaintiff to the defendant and is dated 12 December 2012. Annexure "B" also contains contractual terms pertaining to the price of the drill and the date of delivery of the drill.

[10] In the circumstances, the defendant contends, the difficulty is that the order dated 12 December 2012 (annexures "B") postulates an offer to purchase the drill whereas the pro forma invoice dated 11 December 2012 (annexure "A") postulates acceptance of an offer to purchase the drill. In other words, the offer to purchase the drill comes after the invoice. Therefore the offer was purportedly accepted before it had been made. This is not explained.

[11] The defendant has further complaints in this regard that:

11.1. Annexure "A" (part of the same written agreement as annexure "B") contemplates the main assemblies of the drill being completed by 15 March 2013 and the drill itself being ready on 15 April 2013. In contradistinction, annexure "B" suggests that the date of delivery would be 8 March 2013.

11.2. There is thus a material inconsistency between annexure "A" and "B" and a *fortiori*, a material inconsistency with what the plaintiff pleads the material terms of the agreement are.

- [12] These discrepancies and inconsistencies are not explained by the plaintiff at all. The plaintiff does not explain why or plead any allegations as to why the offer post-dates acceptance of the offer, why the express terms of annexures "A" and "B" (both parts of the written agreement) are inconsistent with each other and in conflict with what the plaintiff alleges the terms of the agreement were.
- [13] The failure to plead any explanation for the inconsistency in the written terms and in particular the delivery dates has a knock-on effect in that there is no proper explanation as to why the defendant was in breach of the agreement and why it failed to deliver the drill to the plaintiff on or before 8 March 2013. For example annexure "A" contemplates the drill only being ready for dispatch on 15 April 2013; consequently, the defendant's alleged failure to deliver the drill by 8 March 2013 would not constitute a breach.
- [14] The defendant submits that having regard to the difficulties highlighted above, the defendant is left guessing as to the terms of the agreement. Therefore plaintiff's particulars of claim do not have the degree of detail necessary to properly inform the defendant of the case that is being advanced.
- [15] The defendant submits that it is prejudiced thereby as it is unable to plead properly thereto and objects to pleading to the particulars in such form.

## The Second Ground of Complaint

- [16] The defendant submits that over and above the alleged breaches of the agreement the plaintiff alleges that the defendant repudiated the agreement *“by informing the plaintiff, in writing, on 18 March 2013 that the defendant would not be able to complete the drill for the purchase price”*. The plaintiff refers to the email communication and attaches it as annexure “C” to the particulars of claim.
- [17] However, annexure “C” does not say, in so many words, that the defendant would not be able to complete the drill for the purchase price. Since the allegations attributed to annexure “C” do not appear therefrom, the particulars of claim do not contain any averments or make any allegations that support the conclusion that annexure “C” was a repudiation of the agreement.
- [18] The criticism of the plaintiff’s particulars, read with annexure “C”, is thus that the particulars fail to comply with the basic tenet of pleading. They do not clearly and concisely state the material facts upon which the plaintiff relies for its claim.
- [19] It is submitted that the plaintiff must, in the particulars of claim, explain precisely what the repudiation was with reference to the actual content of the written communication relied upon, not propound the plaintiff’s own conclusion as to what it says the annexure says.

### **The Third Ground of Complaint**

- [20] The third complaint is that the plaintiff ought to have specified with some particularity as to how the globular amounts of R500 000,00 and R200 000,00 are made up.
- [21] Rule 18(10) provides that a plaintiff suing for damages shall set them out in a manner as will enable the defendant reasonably to assess the quantum thereof, in other words enable the defendant to know why the particular amount being claimed as damages is in fact being claimed. The defendant complains that the plaintiff has not done so and this is required.
- [22] In paragraph 3.3 and 3.4 of the exception the defendant excepts on the basis that the plaintiff has failed to plead any fact that explains or sets out when the expenses as a result of the alleged lease of the drill were incurred, when it leased the alternative drill, from whom it leased the drill, for how long it leased the drill, precisely what standing time is, when the wages in respect of standing time were expended, why it incurred those wages, to whom they were incurred, for what period it expended the wages and salaries and for how long the standing time endured.
- [23] The defendant submits that as in the case of the second ground of exception, the failure to specify the details set out above renders the

pleading vague and imprecise and makes it impossible to plead thereto with the resulting prejudice and embarrassment to the defendant. It submits that the missing details highlighted in paragraphs 3.3 and 3.4 constitute *facta probanda* relevant to the claim for “consequential damages” and without such particulars the pleadings fail to comply with Rule 18(4) of this Honourable Court.

- [24] The court is to decide whether the defendant cannot understand the basis of the case against it unless and until the plaintiff explains the facts referred to above.

#### **THE LAW**

- [25] The parties rely on more or less the same authorities to advance their contentions. The leading case of *Trope v South African Reserve Bank*<sup>1</sup> is referred to by both parties. Essentially, the case states that an exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration, first, whether the pleading lacks particularity to the extent that it is vague, and secondly, whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced<sup>2</sup>.

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<sup>1</sup> 1992 (3) SA 208 (T)

<sup>2</sup> At 210 G – 211 E



[26] A defendant is not permitted to take exception by using Rule 23 as a means of complaining about a lack of sufficient information for purposes of trial.<sup>3</sup>

[27] Rule 18 (4) requires that:

*“Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for its claim, defence or answer to any pleading, as the case maybe, with sufficient particularity to enable the opposite party to reply thereto.”*

[28] Therefore the enquiry will be into whether the plaintiff has provided sufficient particularity in its particulars of claim to enable the defendant to reply thereto without being embarrassed and prejudiced.

[29] It has also been stated that whether a pleading contained sufficient particularity was an issue of fact. A pleading contained sufficient particularity if it identified and defined the issues in such a way that it enabled the opposite party to know what they were.<sup>4</sup>

[30] It has also been said, and this is also what the plaintiff argues, that Rule 30 may be invoked to strike out the claim pleaded when the individual averments do not contain sufficient particularity and it is not necessary

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<sup>3</sup> *Venter and Others NNO v Barritt; Venter and Others NNO v Wolfberg; Arch Investments 2 (Pty) Ltd 2008 (4) SA 639 (C)*

<sup>4</sup> *Nasionale Aartappel Koöperasie Bpk v PriceWaterhouseCoopers 2001 (2) SA 790 (T) at 799I-J*

that the failure to plead material facts goes to the root of the cause of action.<sup>5</sup>

[31] With that in mind I now proceed to analyse the grounds of exception as pleaded.

### **First Ground of Complaint**

[32] The plaintiff pleads a part written part verbal agreement and attaches two annexures as constituting the written part thereof. Annexures to pleadings constitute pleadings themselves.

[33] Whilst the plaintiff pleads that the defendant failed to deliver the drill on or before a date (8 March 2013) which appears in the plaintiff's order of certain equipment, another date appears (15 April 2013) on the invoice issued by the defendant to the plaintiff as a date of delivery. The defendant complains that this inconsistency has caused it embarrassment and would be prejudiced if forced to plead thereto.

[34] The plaintiff correctly argues that the defendant cannot assume which of the two documents constitutes an offer and which constitutes an acceptance. The defendant is similarly entitled to know which of the two dates the plaintiff contends is the date upon which it relies in view of the inconsistency contained in the pleadings. The plaintiff, must in view of this

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<sup>5</sup> See *Harms: Civil procedure in the Supreme Court (issue 49)* LexisNexis at B-168

inconsistency, make a selection. The defendant is not expected to plead what it believes the plaintiff intends.

[35] The defendant submits further that the inconsistencies should be explained so that the defendant knows why the plaintiff relies on the date of 8 March 2013 and not 15 April 2013.

[36] In argument it was submitted on behalf of the plaintiff that such explanations are a matter for evidence as a part-written and part-verbal agreement has been pleaded. The plaintiff has failed to plead any part of the verbal agreement. As a result of being left totally in the dark regarding the verbal part of the agreement and the terms and conditions thereof, the defendant is left to anticipate in its plea what the plaintiff's case would be, especially regarding why the plaintiff contends that the breach is failure to deliver on 8 March 2013.

[37] The shortcomings in pleading the necessary degree of particularity in this regard is material. The defendant would be prejudiced were it to plead in these circumstances.

### **The Second Ground of Complaint**

[38] The plaintiff attaches annexure "C", dated 18 March 2013, and pleads that the defendant repudiated the agreement by informing the plaintiff in

terms of this annexure that *"the defendant would not be able to complete the drill for the purchase price."*

- [39] The defendant complains that since the allegations attributed to annexure "C" do not appear therefrom, the particulars of claim do not contain any averments or make any allegations that support the conclusion that annexure "C" was a repudiation of the agreement.
- [40] The plaintiff submitted in this regard that the defendant can simply deny repudiation and that the parts of annexure "C" upon which the plaintiff relies would be a matter for ventilation in the trial. This submission was made in respect of the other grounds of complaint.
- [41] As stated above, annexures form part of the pleadings. The purpose of pleadings is to ensure that a party knows what case it has to meet. In the face of a document that a party relies upon where on a passing glance the allegation upon which a cause of action is founded does not appear, it is incumbent on the plaintiff to refer to the portion of the document that it relies upon for such allegation.
- [42] This pleading is vague and embarrassing, and the defendant would be prejudiced where it to be compelled to plead thereto. It is not enough to say that a bare denial would be adequate because the meaning or meanings of the document would be traversed on trial. The defendant should not be put to the task of anticipating the plaintiff's evidence and

thereby prepare on aspects that would not have been necessary. As was stated in the Trope case:

*“Thus it may be possible to plead to particulars of claim which can be read in any one of a number of ways by simply denying the allegations made; likewise to a pleading which leaves one guessing as to its actual meaning. Yet there can be no doubt that such a pleading is excipiable as being vague and embarrassing – see *Parow Lands (Pty) Ltd v Schneider* 1952 (1) SA 150 (SWA) at 152F-G and the authorities there cited.*

*It follows that averments in the pleading which are contradictory and which are not pleaded in the alternative are patently vague and embarrassing; one can but be left guessing as to the actual meaning (if any) conveyed by the pleading.” (My emphasis)*

### **Third Ground of Complaint**

[43] The plaintiff pleads that as a result of the defendant’s breach or repudiation of the agreement the plaintiff suffered damages, including damages in the amount of R500 000,00 incurred as a result of the plaintiff having to lease an alternative drill, and R200 000,00 incurred as a result of paying wages and salaries as a result of “*standing time*.”

[44] The defendant complains that the plaintiff ought to have specified with some particularity as to how the globular amounts of R500 000,00 and R200 000,00 are made up.

- [45] The plaintiff argued that this is a matter for evidence. It submitted that the plaintiff's quantum of its damages have been more than adequately particularised and that it is self-evident that the plaintiff had to lease a drill and to pay wages and salaries expended as a result of standing time.
- [46] Rule 18(10) requires a plaintiff suing for damages to set such damages out in a manner "*as will enable the defendant reasonably to assess the quantum thereof.*"
- [47] The setting out of these two globular amounts does not meet the requirements of sub-rule (10). For example, the plaintiff does not state for what period these damages were incurred or why they had to be incurred. Although the inadequacies complained of in this regard could be remedied by resort to Rule 30 as provided for in Rule 18(12), this ground of complaint is best dealt with together with the other two.
- [48] The plaintiff submitted that on the authority of *Doyle v Sentra Boer (Corporative) Ltd*<sup>6</sup> the requirements of Rule 18(10) have to be read in similar tone to the requirements of Rule 18(4) which requires a "*clear and concise statement of the material facts.*" In *Grindrod (Pty) Ltd v Delport and Others*<sup>7</sup> Blieden J in reference to the Doyle case stated the following:

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<sup>6</sup> 1993 (3) SA 176 (SE)

<sup>7</sup> 1997 (1) SA 342 at 346 F

*"However, in as much as the learned judge appears to have coupled the provisions of Rule 18(4) with those of Rule 18(10), I must respectfully disagree with him. It seems to me that these two sub-rules have entirely different functions and are not in any way related."*

*Rule 18(4) relates to the pleading of facts which make up either a claim, defence or answer. Here the requirement is that such facts be pleaded with "sufficient particularity to enable the opposite party to reply thereto."*  
(italics original)

[49] It is clear therefore that Rule 18(10) requires particularity for the damages claimed as opposed to the particularity of the material facts required for pleading a cause of action, defence or answer to any pleading.

[50] Accordingly, I find that the plaintiff has failed to provide the particularity as required by Rule 18(10).

[51] The plaintiff submitted also that on the authority of *Absa Bank Ltd v Borksburg Transitional Local Council*<sup>8</sup> *"in light of the relationship between the parties, the defendant cannot be disadvantaged or prejudiced by the plaintiff's pleadings."*

[52] In the case of *Deane v Deane*<sup>9</sup> it was said that:

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<sup>8</sup> 1997 (2) SA 415 (W)

<sup>9</sup> 1955 (3) SA 86 (N) at 87E-G

*"It may well be that in the present case there are circumstances in the light of which the allegations in the declaration are not sufficiently precise. But the court knows nothing of those circumstances because they do not appear from the declaration itself. There is this fundamental difference between a question of insufficient particularity raised on exception in such a question raised on an application to court for particulars that in the former case the party aggrieved must make out a case of embarrassment by reference to the pleadings alone, whereas in the latter case he may allege in his affidavit this special circumstances, outside the pleadings, which cause him embarrassment. If the present defendant is truly embarrassed he has his remedy in an application to the court for an order on plaintiff to give further particulars. Such application would have to be supported by an affidavit setting out the special circumstances in the light of which the allegations in the declaration are insufficient." (My emphasis)*

- [53] Although this case was before the abolishment of the right to request further particulars for the purpose of pleading from 1 January 1988, this statement is an answer to the plaintiff's contention that because of the relationship between the parties the defendant cannot be disadvantaged or prejudiced by the plaintiff's pleadings. It seems to me that reliance on such a relationship which has not been pleaded, will require the plaintiff to ask the court to go outside of the bounds of the pleadings by filing an affidavit that, in addition to the pleadings, sets out such a special relationship. This has not been done and I cannot have regard to any special relationship that may exist between the parties.



[54] I therefore make the following order:

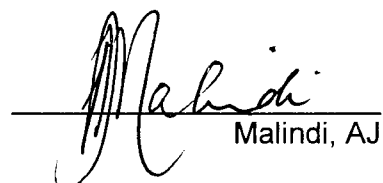
54.1. The exception is upheld;

54.2. The particulars of claim are struck out;

54.3. The plaintiff is granted leave to amend its particulars of claim within  
20 days of date of delivery of this order.

54.4. The plaintiff is ordered to pay the costs of this application.

**SIGNED AT PRETORIA ON THIS 12<sup>th</sup> DAY OF MARCH 2014**

  
Malindi, AJ

Acting Judge of the High Court of South Africa

Appearances:

For Applicant/Defendant: Adv T Dalrymple

Instructed by: Read Hope Phillips

For Respondent/Plaintiff: Adv R. Raubenheimer

Instructed by: Magda Kets Incorporated