IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 96735/2016

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

20-February-2018 .....

DATE SIGNATURE

20/2/18

In the matter between:

MAKALI PLANT & CONSTRUCTION (PTY) LTD Plaintiff/Respondent

and

SETHEO ENGINEERING (PTY) LTD Defendant/Excipient

Date of Hearing : 21 November 2017
Date of Judgment : 20 February 2018

JUDGMENT

MANAMELA, AJ

Introduction

[1] The plaintiff issued summons primarily for recovery of monies allegedly owing by the defendant in terms an agreement between the parties. The plaintiff was appointed by the defendant as a subcontractor in respect of a main contract between the defendant and a district municipality, for the construction of a water reservoir and associated works. The parties, subsequently, entered into what is referred to as a settlement agreement. In terms of the settlement agreement, the defendant was to pay various amounts of rand to the plaintiff. The plaintiff alleges that the defendant breached the terms of the settlement agreement, hence the summons which, in turn, led to these interlocutory proceedings.

[2] The defendant delivered a notice of exception to the plaintiff's summons in terms of Rule 23(1)[1] of the Uniform Rules of this Court. In the main, the defendant complains that the plaintiff's particulars of claim to the summons are vague and embarrassing, among others, for want of compliance with the provisions of Rule 18(6)[2] of the Uniform Rules. The defendant contends that the plaintiff ought to have annexed to the summons a copy of the main contract concluded with the municipality and pleaded its terms, including those contained in the sub-contract between the parties. The plaintiff omitted to annex to the summons, a copy of the main contract with the municipality. Despite, receiving a notice from the defendant to remove

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[1] Rule 23 reads in the material part: "(1) Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action ..., the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph *(f)* of subrule (5) of rule (6): Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception. (2) ... (3) Wherever an exception is taken to any pleading, the grounds upon which the exception is founded shall be clearly and concisely stated."

[2] Rule 18 reads in the material part: "(1) ... (4) Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim..., with sufficient particularity to enable the opposite party to reply thereto. (5)... (6) A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading."

the causes of complaint, in this regard, the plaintiff persisted in its particulars of claim and is opposing the exception on the basis that there is nothing amiss with its pleading.

[3] This matter came before me on 21 November 2017, as an opposed motion. Mr MH van Twisk, appeared on behalf of the plaintiff/respondent, whereas Mr M Halstead, appeared on behalf of the defendant/excipient. I reserved this judgment at the end of the hearing and also directed that counsel file supplementary heads of argument, specifically on Rule 18(6) with reference to case law. I am grateful to counsel in this regard.

Brief background (including relevant part of the particulars of claim and grounds of exception)

General

[4] As stated above, this matter concerns the appointment of the plaintiff by the defendant on 13 December 2012, as a subcontractor for completion of the main contract in which the defendant was retained, as the main contractor, by the Mopani District Municipality for the construction of a water reservoir and associated works.

[5] The parties, on or about 29 February 2016, entered into a settlement agreement in terms of which the defendant was to make payment of various amounts of rand to the plaintiff. The plaintiff alleges that the defendant breached the terms of the settlement agreement by failing to make full payment. Further, the plaintiff alleges that it suffered damages due to repudiation of the agreement by the defendant. On 13 December 2016, the

plaintiff issued summons against the defendant for recovery of monies based on the aforementioned causes of action or claims.

Particulars of claim and the exception

[6] In order to put context to the material issues in this matter, I consider it necessary to quote from the relevant parts of the particulars of claim, as follows:

> "
>
> 3.
>
> At all times relevant hereto the Defendant was appointed as main contractor by the Mopani District Municipality ("*Mopani*") for the construction of a 15ML Reservoir and Associated Works at the Manetja Sekororo Regional Water Scheme Phase 2 ("*the contract*").
>
> 4.
>
> On or about 13 December 2012 the Defendant appointed the Plaintiff as a sub-contractor for the completion of the contract. A copy of the letter of appointment is annexed hereto as **Annexure "A"** and a copy of a sub-contract agreement is annexed hereto as **Annexure "B"**.
>
> 5.
>
> The Plaintiff complied with its obligations in terms of the agreement whereas the Defendant fell in arrears with payments to be made to the Plaintiff or the works performed by the Plaintiff.
>
> 6.
>
> On or about 29 February 2016 and at Pretoria the Plaintiff as represented by Craig Sissing and the Defendant as represented by Tinashe Mangwane entered into a settlement agreement with the following terms:
>
> 6.1 The Defendant is to pay R1.3 million to the Plaintiff for completion of the roof slab on the reservoir. Before the Plaintiff commences with the completion of the roof slab it requires a payment of R900 000.00, which the Defendant agreed to and effect payment as follows:

6.1.1. The Defendant would pay an amount of R400 000.00 to the Plaintiff upon receiving payment in respect of payment certificate no. 9 for the Ndlambe 22 – Port Alfred…;

6.1.2 The Defendant would pay an amount of R500 000.00 to the Plaintiff upon the Defendant receiving payment in terms of payment certificate NO. 16 in respect of the Mopani project;

6.13 The Defendant would make payment in the amount of R400 000.00 to the Plaintiff upon the Defendant receiving payment in respect of payment certificate No. 10 issued in terms of the Port Alfred contract.

6.2 The Defendant undertakes to pay the claim submitted by the Plaintiff to the Defendant on 1 October 2015 in the amount of R3 077 530.82…;

6.3 In the event that Mopani approves payment of the amount of R3 077 530.82 the Plaintiff undertakes to pay an amount of R500 000.00 to the Defendant from this amount;

6.4 Should the amount approved by Mopani be less than R3 077 530.82, but more than R2 million, then the Plaintiff undertakes to pay the Defendant 15% from the amount so approved;

6.5 Should the amount approved by Mopani be less than R2 million, then the Plaintiff will pay the Defendant 5% from the amount approved.

7.

7.1…

…

CLAIM 1:

8.

Pursuant to the settlement agreement, the Defendant paid an amount of R400 000.00 to the Plaintiff. The Defendant breached the terms of the settlement agreement in that it failed to make any further payments to the Plaintiff save for the R400 000.00. In the

premises the Plaintiff cancelled the settlement agreement, *alternatively*, cancels it herewith.

9.

In the premises the Defendant owes the Plaintiff the amount of R900 000.00 in terms of Clause 1 of the settlement agreement.

CLAIM 2:

10.

Mopani approved the amount of R3 077 530.82 in respect of claim submitted by the Defendant...

11.

In terms of Clause 2 of the settlement agreement the Defendant is obliged to pay the amount so approved to the Plaintiff. The Defendant has failed to do so. This amount remains in due and owing.

CLAIM 3:

12.

For the period of 9 March 2016 to June 2016 the Plaintiff suffered the following damages in the amount of R669 822.56 due to the repudiation of the agreement by the Defendant made up as follows...

CLAIM 4:

13.

Due to the Defendant's repudiation of the agreement and Plaintiff being unable to complete the contract, it suffered a loss of profit in the amount of R2 376 178.08 in

respect of retention monies the Plaintiff would have been entitled to upon completion of the project."[3]

[7] The material part of the grounds of exception delivered by the defendant reads as follows:

"**FIRST EXCEPTION**

1. In terms of Uniform Rule 18(6), a party who, in its pleading, relies upon a contract, is required to state whether such contract is "*written or oral and when, where and by whom it was considered*".

2. In paragraph 3 of the Particulars of Claim, the Plaintiff has not stated whether the contract which it seeks to rely on therein is "*written or oral and when, where and by whom it was concluded*".

3. Uniform Rule 18(6) further requires a party seeking to rely upon a contract, where such contract is written, to annex a true copy thereof, or of the part relied on in the pleading, to the pleading.

4. Should the contract relied upon be written, the Plaintiff has failed to annex a true copy, or the part relied upon, to its Particulars of Claim.

5. The Plaintiff has, accordingly, not complied with Rule 18(6) and the Defendant is prejudiced thereby and is unable to plead thereto.

SECOND EXCEPTION

6. In paragraph 4 Particulars of Claim, the Plaintiff relies on **Annexure "B"**, yet does not state whether such contract is "*written or oral*" and "*where and by whom it was concluded*".

7. The Plaintiff has, accordingly, not complied with Rule 18(6) and the Defendant is prejudiced thereby, and unable to plead thereto.

THIRD EXCEPTION

8. In paragraph 4 of the Particulars of Claim, the Plaintiff states as follows:

[3] See particulars of claim on indexed pp 4-10.

"On or about 13 December 2012, the Defendant appointed the Plaintiff as a sub-contractor for the completion of the contract..."

9. In paragraph 5 of the Particulars of Claim, the Plaintiff alleges that it *"complied with its obligations in terms of the agreement whereas Defendant fell into arrears with payments to be made to the Plaintiff for the works performed by the Plaintiff"*.

10. The Plaintiff's reliance upon *"the agreement"*, as stated in paragraph 9, above, is ambiguous, by virtue of the fact that the Plaintiff has failed to allege exactly to which agreement it is referring in paragraph 5 its Particulars of Claim and has, furthermore, failed to plead the terms of the said agreement. The Defendant is unable to ascertain exactly with which obligations the Plaintiff allegedly complied and, further, with which payments the Defendants [sic] fell into arrears. The Defendant is, accordingly, embarrassed thereby.

FOUR EXCEPTION

11. The Plaintiff relies on **Annexure "C"** to the Particulars [of claim], which makes reference in the Preamble to the **Annexure "B"**, which, in turn, relies upon the *"Main Contract"*. However, the Plaintiff has failed to annex a true copy of the *"Main Contract"* and has, furthermore, failed to plead the terms of the sub-contract agreement, as is referred to in paragraph 10 above. The Defendant is, accordingly, embarrassed and unable to plead thereto.

FIFTH EXCEPTION

12. In paragraphs 7.1 to 7.3 Particulars of Claim, the Plaintiff alleges that 3 payments were made to the Defendant in respect of *"certificate no. 9"*, *"certificate no. 10"* and *"certificate no.16"*. However, the Plaintiff has omitted to state exactly when and by [whom] and to whom said payments were made.

13. The Defendant is, accordingly embarrassed and unable to plead thereto.

SIXTH EXCEPTION

14. In paragraph 14 of the Particulars of Claim, the Plaintiff alleges that a demand for payment has been made. However, the Plaintiff fails to state when such demand was made and, further, should said demand have been

made in writing, the Plaintiff has not annexed a copy of same to the Particulars of Claim. Accordingly, the Defendant is embarrassed thereby and unable to plead thereto.

KINDLY TAKE NOTE THAT, FURTHER, the Defendant, hereby, also excepts to the Plaintiff's Particulars of Claim, on the basis that said Particulars of Claim lack averments that are necessary to sustain a cause of action, more specifically, as follows:-

SEVENTH EXCEPTION

15. This exception is linked to and follows from the Plaintiff's election not to cure Defendant's first, third and fourth causes of complaint.

...

19. The Plaintiff has failed to aver the material terms of "*the Main Contract*" and has failed to annex a copy of same to its Particulars of Claim.

20. Accordingly, the Plaintiff's cause of action lacks a necessary premise "*the Main Contract*") and the Plaintiff's claim is, thus, rendered *non-sequitur*."[4]

[8] The parties made both written and oral submissions in advancement of their respective cases. I deal with these next against the applicable legal principles.

Submissions by the parties and the applicable legal principles (an analysis)

[9] The primary legal principles regarding the determination to be made herein are located in Uniform Rules 18(6) and 23(1).[5] The former relates to pleading relating to contracts, whereas the latter concerns exceptions. These rules have already enjoyed a great deal of attention from the Courts, as well as, textbook authors. These will be very useful in

[4] See the exception at indexed pp 39-42.
[5] For a reading of Rules 23 and 18, see footnotes 1 and 2 above, respectively.

the discussion that follows, next. However, I will avoid a lengthy detention thereby, as the issues to be determined herein are, in my view, quite straightforward.

[10] The defendant excepts, in the main, against the plaintiff's particulars of claim on the basis that they are vague and embarrassing. The exceptions are based on the grounds that the plaintiff's particulars of claim ought to have, in the first respect, stated "when, where and by whom" the main contract between the plaintiff and the municipality (the Main Contract) was concluded and, in the second respect, as the Main Contract relied upon is a written contract, to have included, as annexure, a true copy thereof. The same argument is advanced regarding the subcontracting agreement between the plaintiff and defendant (the Sub-contracting Agreement), but only in respect of the pleading of its terms, as a copy was already attached. In sum, the defendant argues that it is not sufficient for the plaintiff to have only included, as annexures to the particulars of claim, copies of the settlement agreement, without inclusion of the Main Contract and averments from the Sub-contracting Agreement. The defendant submits, under six of its grounds of exception, that it is therefore embarrassed and unable to plead to the particulars of claim, and under the seventh ground, which appears to be "a catch-all" ground, that the particulars of claim lack averments necessary to sustain a cause of action. On the other hand, the plaintiff argues that it was not necessary to include the impugned agreement or the terms from the Sub-contracting Agreement, as the plaintiff is exclusively relying upon the terms of the settlement agreement, for its claims contained in the particulars of claim. The plaintiff explains that it has simply made reference to the other two agreements to reflect the history, which led to the conclusion of the settlement agreement between the plaintiff and defendant (the Settlement Agreement). Therefore, put in general terms, the crisp issue to be determined herein is whether or not, on the basis of the grounds of

exception, the plaintiff ought to have attached the Main Contract to and pleaded the material terms of the Sub-contracting Agreement in, its particulars of claim.

[11] Before, I delve deeper into the specificity of the aforementioned issues to be determined, I deem it necessary to reflect the general legal principles relating to exceptions significantly on the basis that a pleading is vague and embarrassing. The nature and extent of exceptions based on the ground that a pleading is vague and embarrassing were considered by McCreath J in the decision of *Trope v South African Reserve Bank and Two Other Cases*,[6] cited with approval by Heher J in the decision of *Jowell v Bramwell-Jones and Others*.[7] In the latter decision the court laid out the following general principles regarding exceptions, as follows:

> "*(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: cf *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D) at 377, 379B, 379G--H."[8]

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[6] 1992 (3) SA 208 (T) at 211.
[7] 1998 (1) SA 836 (W).
[8] See *Jowell v Bramwell-Jones* at 902I-903D.

[12] It is apposite to also add that, an exception on the ground that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity.[9] Further, such an exception cannot be directed at a particular paragraph within a cause of action, but ought to be directed at the whole cause of action.[10] In other words, it must be established that the whole cause of action as contained in the pleading is vague and embarrassing.[11] And the defendant or excipient has the duty to persuade the court that upon every interpretation of the pleading it can reasonably bear, particularly the document upon which it is based, it does not disclose a cause of action or defence, for the exception to be upheld.[12]

[13] As stated above, the plaintiff's grounds of defence against the defendant's exception are that it is not relying on the Main Contract and Sub-contracting Agreement, but the Settlement Agreement. It is common cause that, for current purposes, the relationship between the parties began in terms of the Sub-contracting Agreement. On the other hand, the Sub-contracting agreement was dependant on the Main Contract. It is the plaintiff's case that its claims are exclusively given rise to by the terms of the Settlement Agreement. The defendant disputes this and contend that all three agreements are linked and relied upon by the plaintiff *ex facie* the particulars of claim and cross-references *inter se* the three agreements. Although, pleadings must be read as a whole and no paragraph ought to be read in isolation,[13] for completeness, I deal with the grounds of exception individually, next.

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[9] See *Trope and Others v South African Reserve Bank.*
[10] See *Jowell v Bramwell-Jones* at 899F-G, which quoted from the decision of *Carelsen v Fairbridge, Arderne and Lawton* 1918 TPD 306 at 309.
[11] See *Jowell v Bramwell-Jones* at 899F-G.
[12] See *Gallagher Group Ltd and Another v IO Tech Manufacturing (Pty) Ltd and Others* 2014 (2) SA 157 (GNP) at par [20], citing with approval the decisions in *Theunissen en Andere v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) at 500E -F, *et al.*
[13] See *Jowell v Bramwell-Jones* at 899F-G.

Exceptions 1 and 2

[14] The defendant's complaint, in this regard, is that there is non-compliance with Uniform Rule 18(6), as paragraphs 3 and 4 of particulars of claim refer to the Main Contract and Sub-contracting Agreement without stating whether these contracts are written or oral, the date, place and persons who concluded them, including attaching a true copy of the Main Contract, if the latter contract is in writing. On the other hand, the plaintiff contends that, it is not relying on the Main Contract and, therefore, it is not necessary to comply with Rule 18(6) in this regard. I agree. When regard is had to the particulars of claim, as a whole, and not just only these paragraphs in isolation,[14] it is clear that there is no need to annex the Main Contract or plead the terms of the Sub-contracting Agreement. The plaintiff relied on the Settlement Agreement and not the other two. A party "relies upon a contract" when the party uses the contract as a "link in the chain of his cause of action".[15] In *casu,* after the parties concluded the Settlement Agreement, it became unnecessary to rely on the terms of the other two for purposes of the claims based on the Settlement Agreement.[16] That said, nothing precludes the defendant from relying on the other two agreements for its defence, if it is so minded or advised, and in so doing the defendant would be required to comply with the provisions of Rule 18. I agree with the plaintiff that the impugned two agreements were only referred to by way of historical background, which is clearly severed from the cause of action, in this regard,[17] and their omission from the papers, subject to what I state later with regard to the seventh ground of exception, does not embarrass nor prejudice the defendant. Therefore, there is no merit in these two grounds of exceptions.

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[14] See *Jowell v Bramwell-Jones* at 899F-G.

[15] See *Moosa and Others NNO v Hassam and Others NNO* 2010 (2) SA 410 (KZP) at 413B-C, par [17], which cited with approval from the decisions of South *African Railways and Harbours v Deal Enterprises (Pty) Ltd* 1975 (3) SA 944 (W) at 953A, and *Van Tonder v Western Credit Ltd* 1966 (1) SA 189 (C) at 193H.

[16] See pars [20]-[24] below, regarding the defendant's seventh exception.

[17] See *Secretary for Finance v Esselmann* 1988 (1) SA 594 (SWA) at 594G-H. See further *Myburgh, Krone en Kompagnie, Bpkt (in Liquidation) v Ko-operatieve Wijnbouwers Vereeniging van Zuid-Afrika, Bpkt* 1923 CPD 389.

[15] The defendant heavily relied on the decision of *Da Silva Ribeiro & Another v Slip Knot Investments 777 (Pty) Ltd*,[18] in both oral and written argument. But, the facts and legal issues in *Da Silva Ribeiro* are clearly distinguishable from those in this matter. *Da Silva Ribeiro* dealt with a dispute regarding interpretation of the provisions of the National Credit Act 34 of 2005 and an agreement, which had its genesis from two previous loan agreements. The decision turned on whether or not the latest agreement is a credit agreement, as the respondent contended, or a credit guarantee, as asserted by the applicant. The history and original agreements were therefore necessary, and the court found the obligations under the loan agreements and those of the new agreement to be interdependent.[19]

Exception 3

[16] The essence of this ground of exception confirms the principle that pleadings ought to be read as a whole and not as individual paragraphs, in isolation.[20] The defendant contends that by virtue of the plaintiff's reference to the Sub-contracting Agreement in paragraph 4, whilst in paragraph 5 referring to only "the agreement", the particulars are rendered vague and embarrassing. This, with respect, is overly technical and stretched. Up to that stage in the particulars of claim, the plaintiff had only referred to the Main Contract, to which it is common cause, the plaintiff is not a party, and the Subcontracting Agreement. I agree with the plaintiff that the agreement in paragraph 5 refers to the Sub-contracting Agreement in paragraph 4 and so on. Therefore, this ground of exception will also fail.

Exception 4

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[18] [2010] JOL 26478 (SCA) unreported decision of the Supreme Court of Appeal handed down on 02 December 2010, under case number: 661/09.
[19] See *Da Silva Ribeiro & another v Slip Knot Investments* at par [13].
[20] See *Jowell v Bramwell-Jones* at 899F-G.

[17] Under this exception, the defendant submits that the Settlement Agreement relied upon by the plaintiff makes reference in its preamble to the Sub-contracting Agreement, which in turn refers to the Main Contract. As the plaintiff neither annexed a copy of the Main Contract nor pleaded the terms of the Sub-contracting Agreement, the defendant contends that it is embarrassed thereby and unable to plead thereto. The plaintiff persists that it is only relying on the Settlement Agreement and that the cross-referencing does not alter its position in this regard. I also repeat what is stated above, particularly regarding exceptions 1 and 2. A document relied upon in pleadings may make reference to other documents which do not necessarily have to accompany such document in the pleadings. Such documents may be accessed immediately in terms of Uniform Rule 35(14)[21] or later by way of the general discovery process or even a request for further particulars (if necessary), when the trial is imminent. Therefore, I also do not find this ground of exception meritorious.

Exception 5

[18] The defendant submits under this ground of exception that it is embarrassed and unable to plead to paragraphs 7.1 to 7.3 of the particulars of claim, due to allegations being made regarding payments made in respect of some certificates, whilst the plaintiff has omitted to state exactly when and by whom the said payments were made. The plaintiff explains that the impugned paragraphs relate to payments and payment certificates referred to in paragraphs 6.1.1, 6.1.2 and 6.1.3 of the particulars of claim. The plaintiff submits further, should the defendant have not received payment, the defendant can simply deny that the payments were received, should this be the defendant's case. I agree. There is nothing embarrassing about these paragraphs and the defendant will clearly be able to plead thereto.

[21] Rule 35(14) reads as follows: "After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to make available for inspection within five days a clearly specified document or tape recording in his possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof."

The rest of the particulars required by the defendant may be obtained by way of further particulars for purposes of preparation for trial, at a later stage, should this be necessary. Therefore, this ground, as well, is found to be without merit.

Exception 6

[19] Under this ground of exception, the defendant submits that the plaintiff, whilst alleging that a demand for payment was made, did not state when such demand was made and, if made in writing, annex a copy thereof. Consequently, the defendant is embarrassed thereby and unable to plead thereto, the ground concludes. The plaintiff, in response, denied that the particulars of claim are vague and embarrassing due to the absence of the particularity regarding the demand and submitted that the defendant can simply deny that demand was made, should this be the defendant's case. I agree. Nothing precludes the defendant from denying or admitting by way of pleading that the demand was made or received, whatever the defendant's case may be. I find this ground of exception, also, to be without merit.

Exception 7

[20] The defendant excepts to the particulars of claim, on this ground, on the basis that the particulars of claim lack averments necessary to sustain a cause of action. It is contended by the defendant that due to the Settlement Agreement referring to the Sub-contracting Agreement and all other agreements and arrangements, whilst, on the other hand, clause 1of the Sub-contracting Agreement states that it is "subject to the conditions of the Main Contract", therefore, it is self-evident that the Settlement Agreement upon which the plaintiff relies is intended to be read with the Main Contract, whose material terms and true copy, the plaintiff omitted from the particulars of claim.

[21] The plaintiff took issues with the fact that this ground of exception was not included in the notice, as it is not based on the ground that the particulars of claim were vague and embarrassing, but that particulars of claim do not disclose a cause of action. The plaintiff's objection did not appear to me, either during the hearing or in the written heads of argument, to be forceful, in this regard, But, even if it were, I exercised my discretion (significantly dictated upon by the interests of justice) and allowed the defendant to raise this ground of exception. It is in the nature of this ground that no prior notice or opportunity to the opponent to remove the cause of complaint is required, before it is made.[22] This is not to overlook the fact that the defendant may have been out of time in terms of the Uniform Rules of this Court. I admitted the exception to the application, finding solace in the type of order I will be making in this regard.

[22] I have stated above that this ground of exception appears to be a "catch-all" ground and, unlike the other six exceptions, it is based on consideration of the particulars of claim, as a whole, rather than the individual paragraphs contained in the particulars of claim.[23] I find merit in this ground of exception with regard to paragraphs 12 and 13 of the particulars of claim, containing claims 3 and 4, respectively. These two claims are for damages allegedly arising from the repudiation of "the agreement" by the plaintiff. In respect of claim 3, the defendant intends to, among others, recover damages or losses relating to insurance for a truck and other equipment in vehicles; rental of accommodation for site foreman; storage containers; crane hire; concrete foreman and the de-establishment of site. These expenses do

[22] See Rule 18(1), quoted in footnote 1, above.
[23] See *Jowell v Bramwell-Jones* at 899F-G.

not appear to relate to the Settlement Agreement upon which claims 1 and 2 are based, but the Sub-contracting Agreement.

[23] On the other hand, claim 4 also arises due to the alleged repudiation of the agreement by the defendant and is for recovery of loss of profit relating to retention monies the plaintiff would have been entitled to upon completion of the project. This is clearly not in terms of the Settlement Agreement and, therefore, the terms of the Sub-contracting Agreement or even the Main Contract, are relevant for purposes of the these claim. The plaintiff ought to have complied with the requirements of Uniform Rule 18(6) in this regard. In my view, this omission renders the particulars of claim to lack the averments necessary to sustain claims 3 and 4. Therefore, I will allow this ground of exception, but instead of striking out the relevant parts of the particulars of claim, I will afford the plaintiff an opportunity to remove the cause of complaint in this regard.

[24] I consider it necessary to add the following. Although, I have found against the defendant in respect of the first six exceptions, the granting of the seventh exception suggests that all is not well with the plaintiff's particulars of claim, as currently crafted. Although, an exception may only be taken when there is a defect in the pleadings which appears *ex facie* the pleadings,[24] with respect, the exceptions could have been avoided by following the beaten track, so to speak, of established precedents.

Conclusion and Costs

[24] See *Jowell v Bramwell-Jones*.

[25] Therefore, the defendant is successful only with regard to the seventh exception. The other six exceptions are dismissed. Appropriate orders as to costs will follow the particular outcomes. This is so, despite the fact that the defendant prayed for costs on a punitive scale of attorney and client. I could not find any credible basis for this type of costs order, hence the normal costs order granted herein.

Order

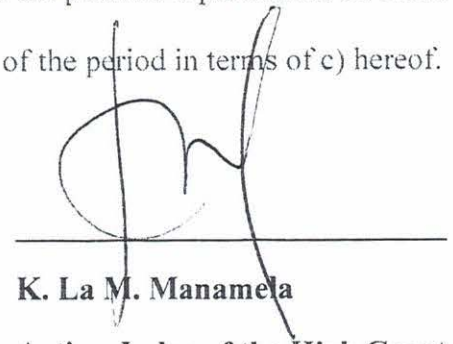
[26] In the premises, I make an order in the following terms:

a). The defendant's first to sixth exceptions dated 06 April 2017 are dismissed with costs;

b) The defendant's seventh exception dated 06 April 2017 is upheld with costs;

c) The plaintiff is afforded an opportunity to remove the causes of complaint in respect of the seventh exception within 10 (ten) days from date hereof, and

d) The defendant is directed to plead to the plaintiff's particulars of claim within 10 (ten) days after the expiry of the period in terms of c) hereof.



K. La M. Manamela

Acting Judge of the High Court

20 February 2018

Appearances:

For the Plaintiff/Respondent	:	MH van Twisk
Instructed by	:	Tim du Toit & Co Inc, Lynwood, Pretoria
For the Defendant/Excipient	:	M Halstead
Instructed by	:	Schindlers Attorneys, Melrose Arch, Pretoria, Pretoria c/o Gwanangura Singini Attorneys, Pretoria