



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: Yes
Date: <u>27/09/2021</u> Signature: <u>[Signature]</u>	

CASE NO: 69167/2017

In the matter between:

EH HASSIM HARDWARE (PTY) LTD

First Plaintiff

TAURUS GARDEN TRADING 500 CC

Second Plaintiff

- and -

SEGABOKENG BUILDING CONSTRUCTION CC

First Defendant

KGALEMO CONSTRUCTION (PTY) LTD

Second Defendant

SCHALK JACOBUS BOLTMAN

Third Defendant

THE TRUSTEES FOR THE TIME BEING

OF THE INDEPENDENT DEVELOPMENT TRUST

Fourth Defendant

(This judgment is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 27 September 2021.)

JUDGMENT

Khumalo AJ:

- [1]. This is an application by First and Second Plaintiffs for an order to struck out First and Second Defendants' defence due to their allegedly failure to deliver further particulars and so ordered by this Court on 14 October 2019.
- [2]. On 09 October 2017, Plaintiffs instituted action against First to Fourth Defendants for certain relief on the grounds set out in their particulars of claim annexed thereto. There is no relief sought against Third and Fourth Defendants.
- [3]. First and Second Plaintiffs are claiming from the First Defendant payment of the amount of R4 745 581.02 (Mamamhlola Project) and R1 932 119.50 (Matshumane Project). Further, they seek an order that First defendant be ordered to take all steps and/or sign all documents required to ensure that the works done by the Second Plaintiff in respect of these projects are certified by the Fourth Defendant.
- [4]. A similar order is sought against the Second Defendant. Plaintiffs further seek an order that the Second Defendant be ordered to take all necessary steps and/or sign all documents required to ensure that the works done by the Second Plaintiff in respect of the Luckau, Nyaane and Moriti Projects are certified by the Fourth

Defndant. Further Plaintiffs seek payment of R222 041.43 for the Luckau Project, R147 865.58 for the Nyaane Project and lastly R3 163 327.86 for the Moriti Projects.

- [5]. It appears from the Plaintiffs' papers that the First Plaintiff engaged the services of the Second Plaintiff to deliver and/or complete the projects that are the subject of this matter before this Court.
- [6]. At some stage the parties namely, the First and Second Plaintiff on the one hand and the First, Second and Third defendant on the other entered into a settlement agreement which agreement is part of the issues brought before Court.
- [7]. First and Second Defendant pleaded to the Plaintiffs' particulars of claim referred to above in paragraph 2.
- [8]. On or about 9 September 2019, Plaintiffs filed a request for further particulars in terms of rule 21 of this Court's uniform rules.
- [9]. The request for further particulars relates specifically to paragraphs 11, 15.1, 16, 17, 19, 22, 24 and 29 of Defendants' plea.
- [10]. It is common cause that Defendants failed to respond to the request resulting in the matter being postponed *sine die* and a cost order awarded against them on 14 October 2019.
- [11]. The Court further ordered Defendants to reply to Plaintiffs' request for further particulars and file their discovery affidavit on or before 29 October 2019.

- [12]. On 29 October 2019, First and Second Defendants served and filed their discovery affidavit together with their response to plaintiffs' request for further particulars.
- [13]. Subsequent thereto, First and Second Plaintiffs launched this application to struck out defendants' defence alternatively that they be compelled to provide further particulars as sought.
- [14]. It is perhaps apposite to refer verbatim to the provisions of Rule 21 that are most relevant. they provide as follows;

"21 Further Particulars

- (1) *Subject to the provisions of subrules (2) to (4) further particulars shall not be requested.*
- (2) *After the close of pleadings any party may, not less than twenty days before trial, deliver a notice requesting only such further particulars as are strictly necessary to enable him to prepare for trial (my emphasis). Such request shall be complied with within ten days after receipt thereof.*
- (3) *...*
- (4) *If the party requested to furnish any particulars as aforesaid fails to deliver them timeously or sufficiently, the party requesting the same may apply to court for an order for their delivery or for the dismissal of the action or the striking out of the defence, whereupon the court may make such order as to it seems meet.*
- (5) *..."*

[15]. It is clear that Rule 21(2) in its presently relevant part makes provision for the request of further particulars but such particulars that **are strictly necessary to enable the requesting party to prepare for trial (own emphasis).**

[16]. Erasmus Superior Court Practice at D1-252 states that-

*'[t]he purpose of permitting a party to call for further particulars for trial is (a) to prevent surprise; (b) that the parties should be told with greater precision what the other party is going to prove in order to enable his opponent to prepare his case to combat counter allegations; and (c) having regard to the foregoing nevertheless not to tie the other party down and limit his case unfairly at the trial.'*¹

[17]. In paragraph 1 of the request for further particulars, First and Second Plaintiffs enquired whether First and Second Defendants deny that the Settlement Agreement which clearly is a bone of contention was concluded on 2 February 2015, whether they deny that it was concluded at Makopane and whether it is denied that it was in writing.

[18]. These particulars requested relate to paragraph 11 of First and Second Defendants' plea that was a response to paragraph 11 of First and Second Plaintiffs' particulars of claim wherein Plaintiffs made the following averment:

"On or about 2 February 2015 and at Makopane, alternatively Polokwane, the First and Second Plaintiffs and the First to Third Defendants concluded a written Agreement of Settlement ("the Agreement of Settlement") in settlement of certain claims of the First Plaintiff against the First and Second Defendants."

¹ See also *Thompson v Barclays Bank* 1965 (1) SA 365(W); *Lotzoff v Connel* 1968 (2) SA 127 (W); *De Polo v Dreyer* 1991 (2) SA 164 (W)

- [19]. In response to the above, First and Second Defendants admit that a Settlement Agreement was entered into settling claims between EH Hassim Hardware (Pty) Ltd and Tuarus Gardens Trading 500 CC (the Plaintiffs in this matter) and the First to Third Defendants. The remainder thereof is denied.
- [20]. Further, in their response to the above request for further particulars, they confirmed that the agreement in writing and concluded on 2 February 2015. However, they denied that it was concluded at Makopane or Polokwane but allege that it was concluded in Centurion, Gauteng Province.
- [21]. It is my view that the Defendants' response in this regard is clear and sufficient for the purpose and nothing more need be said in this regard.
- [22]. The other bone of contention between the parties relate to paragraphs 15, 16, 17, 19, 22, 24 and 29 of First and Second Defendants' plea which were response to First and Second Plaintiffs' particulars of claim paragraphs of similar numbering to the above-mentioned paragraphs.
- [23]. First and Second Plaintiffs averments in paragraph 15 of their particulars of claim read as follows:

"It was further an implied, alternatively tacit term of the Agreement of Settlement that the First and Second Defendants would do all things necessary and sign all required documents, including certificates to be lodged with the IDT, to ensure that payment is made by the IDT, as pleaded in paragraphs 9.1 to 9.12 above, to the First and Second Defendants in respect of works completed by the First and/or Second Plaintiffs."

- [24]. Defendants denied the content of this paragraph and specifically pleaded the provisions of clauses 20, 22.1 and 22.2, which they allege excludes any implied and/or tacit terms as alleged by plaintiffs in their pleadings and further alleged that the Settlement Agreement constitutes the whole and entire agreement between the parties.
- [25]. Plaintiffs in their request for further particulars sought a number of concessions that the Defendants refused in their response.
- [26]. I am of the view that the further particulars requested and/or concessions in this regard are not strictly for the purposes of preparing for trial. Further, it is this Court's view that the Defendants' plea is clear enough to inform the Plaintiffs what case they have to meet against the Defendants. The concessions sought may be necessary to advance plaintiffs case but they certainly are not necessary for their trial preparation.
- [27]. Plaintiffs in their heads of argument submitted that defendants on 14 October 2019 agreed to the Court Order in terms of which they were to reply to Plaintiffs' request for further particulars and argue that it is disingenuous to later object to providing the further particulars requested.
- [28]. I cannot agree with Plaintiffs' summation of the order. The order granted was to the effect that defendants must respond to plaintiffs' request for further particulars, no more and no less. It did not prescribe how their response should be or what it should state.

[29]. It is elementary, a plaintiff or claimant in civil litigation bears the onus of proving its case. Subject to rule 18 of the uniform rules of this court, a claimant has full freedom to frame his own case as he/she sees fit. Likewise, and subject to rule 22 of the above-mentioned rules, a defendant enjoys the right to frame his or her defences as s/he considers best.

[30]. The above I believe applies equally with requests for further particulars and or responses thereto.

[31]. First and Second Plaintiffs in their pleading and specifically at paragraphs 16 and 17 of its particulars of claim avers the following;

"16 The First and Second Plaintiffs duly performed their obligations in terms of the Agreement of Settlement and, specifically, the First Plaintiff duly appointed the Second Plaintiff to complete the remainder of the projects subject to the terms and conditions in the main agreements with the IDT, being the Fourth Defendant.

17 The Second Plaintiff proceeded to complete the projects as required in terms of the main contracts and the First and Second Plaintiffs incurred all costs necessary to complete the works."

[32]. First and Second Defendants denied the above allegations and put Plaintiffs to the proof thereof. The further particulars requested are in my view not strictly necessary for preparation of the trial. In so far as paragraph 17 is concerned, defendants further referred the Plaintiffs to paragraphs 4.3 and 4.6 of the Settlement Agreement and the said paragraphs deal with what one can summaries as the Defendants limitation of their liability.

- [33]. It is First and Second Plaintiffs' case that they incurred costs necessary to complete the works and First and Second Defendants denied this allegation and put them to proof thereof. Put differently, they bear the onus to prove that allegation in any event and therefore do not need strictly need the information they seeking from Defendants to prepare for trial.
- [34]. In so far as paragraphs 19, 22, 24 and 29 of the Plaintiffs' particulars of claim are concerned, defendants denied the allegations and put the Plaintiffs to the proof thereof.
- [35]. By filing a plea of a bare denial, defendants are to be regarded to have joined issues on the merits, requiring the plaintiffs to prove their cause of action.²
- [36]. In so far as the allegation whether or not defendants took steps and/or signed documents for the Mamamhlola and Matshumane projects, they deny and further state they did not receive any document and again referred the plaintiffs to paragraph 4.3 of the Settlement Agreement.
- [37]. Paragraphs 19, 22, 24 and 29 of First and Second Plaintiffs' pleading were given similar response to that of paragraph 17 and my remarks in paragraph [33] above are equally applicable here.
- [38]. First and Second Plaintiffs averred in their papers that Second Plaintiff:

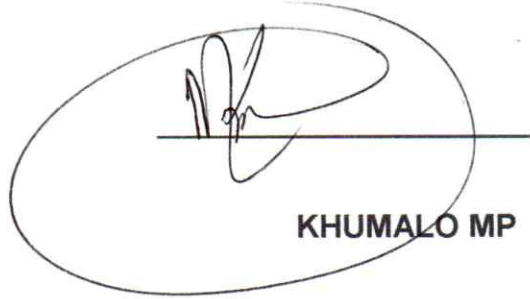
² See *Munters (Pty) Ltd v Monene Mahlatsi Serote and Another* 4004/2014 at para [6]

- (i) duly completed the Mamamhlola and Matshumane Projects and prepared final statements in respect of the works completed; (paragraph 19);
- (ii) that despite the fact that Second Plaintiff duly completed the works, First Defendant neglected and/or failed and/or refused to take the required steps and sign and/or sign the documents required in terms of the two projects in order to obtain final payment from the Fourth Defendant; (paragraph 22)
- (iii) Paragraph 24 averments are similar to those of paragraph 19 but for the fact that they relate to the Lackau, Nyaane and Moriti projects; and
- (iv) Paragraph 29 is the replica of paragraph 24 but only that it relates to the projects mentioned in paragraph 24.

[39]. First and Second Defendants have denied the averments and have put the First and Second Plaintiffs to the proof thereof. I am in agreement with the First and Second Defendants that the particulars requested in this regard are not strictly required for purposes of preparing for trial. As I have stated in paragraph [33] above, First and second Defendants have joined issues and First and Second Plaintiffs are required to prove their case by leading evidence.

[40]. In the result, I grant the following order:

[40.1] The First and Second Plaintiffs application to struck out the First and Second Defendants plea is dismissed with costs.



KHUMALO MP

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Judgment Reserved: 20 April 2021

Judgment Delivered: 27 September 2021

Appearances: -

Counsel for the Plaintiffs : Adv M Jacobs

Instructed by : Shaheed Dollie Inc

Counsel for First Defendant : Adv HP Wessels

Instructed by : Waldick Janse Van Rensburg Inc.