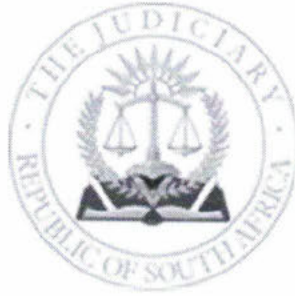



REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

CASE NO: 2023-030939

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER
(3)	JUDGES: YES / NO
	REVISED.
	<u>13 September 2024</u>
SIGNATURE	DATE

In the matter between:

COMPENSATION COMMISSIONER FOR

OCCUPATIONAL DISEASES

Commissioner / Applicant / Appellant

And

IMPALA PLATINUM LIMITED

Defendant / Respondent

JUDGMENT

THIS JUDGMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY E-MAIL. THE DATE AND TIME OF HAND DOWN IS DEEMED TO BE 11 SEPTEMBER 2024

LINGENFELDER AJ

[1] This is an exception brought by the applicant (Impala Platinum) against the Commissioner's second amended particulars of claim. The notice of exception is dated 20 March 2024 and raises an exception against the second amended particulars of claim based on 5 grounds as set out in the notice of exception.

[2] The exception is brought on the basis that the particulars are vague and embarrassing, alternatively lack averments necessary to sustain a cause of action.

GENERAL PRINCIPLES APPLICABLE TO EXCEPTIONS IN TERMS OF RULE 23

[3] In *Living Hands (Pty) v Ditz* 2013 (2) SA 368 (GJS) the general principles applicable to exceptions were set out as follows:

- (a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the Commissioner to assess whether they disclose a cause of action.
- (b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.

- (c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.
- (d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.
- (e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.
- (f) Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.
- (g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars.

BACKGROUND TO THIS APPLICATION

[4] The plaintiff instituted action against the defendant for payment of shortfalls in amounts paid by the defendant in respect of amounts due in terms of Sections 62 and 63 of the Occupational Diseases in Mines and Works Act, Act 78 of 1973. I will refer to the plaintiff as "*The Commissioner*" hereafter.

For purposes of considering the grounds of the defendant's objection to the particulars of claim, the provisions of Sec 62 and 63 of the Act are relevant.

SECTION 62 reads as follows:

“62 Amounts payable by owner of controlled mine or works

- (1) *The commissioner shall determine in respect of each controlled mine or controlled works, in such manner and on such basis as may be prescribed, an amount payable by the owner of that mine or works to the commissioner, for the benefit of the compensation fund, in respect of each shift worked by any person at or in connection with that mine or works during which such person performed risk work, in order to enable the commissioner to pay to or in respect of every person who performs risk work at or in connection with that mine or works and who is after the commencement of this Act found to be suffering from a compensatable disease, such amounts as may or are likely to become payable under this Act.*
- (2) *The commissioner may determine different amounts in respect of-*
 - (a) *controlled mines and controlled works;*
 - (b) *different categories, groups or classes of controlled mines or controlled works;*
 - (c) *different categories, groups or classes of persons;*
 - (d) *different trades, occupations or work at or in connection with controlled mines or controlled works;*
 - (e) *different sections of controlled mines or controlled works, or different working places at controlled mines or controlled works;*
 - (f) *different compensatable diseases.*
- (3) *Whenever the commissioner has made a determination under subsection (1), he or she shall in writing notify the owner of the mine or works in question thereof, and in such notice the commissioner shall set out such details and information as he or she may consider adequate for the purposes of explaining the determination, and specify the date as from which the determination takes effect.*
- (4) *.....”*

SECTION 63 reads as follows:

“63 Amounts payable by owner of controlled mine or works for research

- (1) *The owner of a controlled mine or a controlled works shall pay to the commissioner for the benefit of the compensation fund, in respect of each shift worked by a person at or*

in connection with the mine or works in question during which such person performed risk work, such amount for purposes of research contemplated in section 120 as the Minister may determine.

- (2) *The amount so determined shall not exceed two cents per shift.*
- (3) *The provisions of subsection (2) of section 62 shall mutatis mutandis apply in connection with the determination of an amount by the Minister under subsection (1) of this section, and the provisions of subsections (3) and (4) of the first-mentioned section shall mutatis mutandis apply with reference to any amount so determined."*

GROUND OF EXCEPTION

[5] The grounds of exception can be summarised as follows:

1. FIRST GROUND RE PARAGRAPH 3 OF THE POC

The objection is:

- 1.1 In paragraph 3.1 of the particulars of claim it is stated that the Commissioner had "*from time to time made determinations*" in terms of Sec 62(1) above of amounts payable by the defendant; and in paragraph 3.2 that the Commissioner "*had given notice of the determinations*" in compliance with Section 62(3).
- 1.2 The defendant's complaint is that the allegations made in paragraphs 3.1 and 3.2 are vague and embarrassing because it is not alleged when the determinations were made, and to what claim advanced by the Commissioner the determinations relate; and because it is not specified when the notice was given, to which determinations they relate or to which aspect of the Commissioner's claim they relate.

The POC must be read as a whole and the allegations in pars 3.1 and 3.2 must specifically be seen in the light of the allegations contained in par 5 and the annexures referred to therein. In par 5 the Commissioner pleads that a notice in terms of Sec 62 of the Act was published by the Minister of Health in GG 39220 of 18 September 2015. The notice is annexed as Annexure 2. The notice as annexed reads that the Minister in terms of Sec 62 increases the levies payable with immediate effect. The notice accordingly deals with levies payable under Sec 62. Sec 62 deals with levies payable in respect of compensation to workers suffering from compensatable diseases. The notice (Annexure 2) further states that the increase was recommended by inter alia the Commissioner.

I am of the view that paragraphs 3.1 and 3.2 read together with par 5 and Annexure 2, confirm that the Commissioner's case is for the levies referred to in Sec 62 of the Act; that the Commissioner determined and recommended the increase in levies, and that notice was given to the defendant by the Minister publishing the notice in the GG, which also states that the increased levies would take effect on 1 July 2015. See also below with regard to the objection ground 3 regarding the actual publication by the Minister of the notice. The particulars therefore reflect sufficient detail regarding the claim under Sec 62 to enable the defendant to plead thereto.

Whether the publication of the increased levies by the Minister in the Government Gazette complies with the requirement in Sec 62(3) of the Act that "*written notice must be given*" by the Commissioner, is something the defendant can raise in its plea and falls to be decided by the trial court.

2. **SECOND GROUND RE PARAGRAPH 5 OF POC**

The objection is:

- 2.1 Paragraph 5 of the particulars of claim refers to three determinations, as set out in paragraphs 5.1, 5.2 and 5.3.
- 2.2 The letters referred to in paragraph 5.1 are all the same letter and therefore the allegation that annexures 1.1, 1.2 and 1.3 are three different letters, is vague and embarrassing. (Counsel for the excipient did point out that the letters are not identical, but addressed to different mines and I am of the view that this clarifies this issue).
- 2.3 The particulars of claim are further vague and embarrassing as it is unclear whether the Commissioner intends to plead that the annexures constitute determinations, the Commissioner fails to plead the basis upon which the determinations are relevant to the action, fails to allege who made the determinations (the Commissioner or the Minister), the annexures do not support that the determinations were made by the Commissioner, annexures 1 and 2 are not determinations by the Minister and annexure 3 is not relied upon by the Commissioner as establishing the defendant's liability.
- 2.4 Neither one of Annexures 1 and 2 constitutes a determination by the Commissioner in terms of Sec 62(1) or by the Commissioner in terms of Sec 63(1).

The three letters annexed as Annexures 1.1, 1.2 and 1.3 are not all the same letters – the wording of the body of the letters are identical, but the letters are

addressed to three different mines, all being operated so it seems by the defendant. Reading the contents of these Annexures, the letters serve to inform the defendant of an approval of an adjustment in rates in respect of research levies, and state that the approval was done in terms of the provisions of Sec 63 of the Act.

The letters further state that the Minister has "*approved of the rates*" that were being adjusted.

Section 63(1) stipulates that the owner of a controlled mine shall pay to the Compensation Commissioner (Commissioner) such amount for research as "*determined*" by the Minister.

Upon a proper reading of Annexures 1.1, 1.2 and 1.3 together with paragraphs 4.1 and 4.2, and Sec 63 of the Act, they indicate that the Minister approved (my underlining) an adjustment in the levies, which pre-supposes a determination had been made, which was approved. However, the annexures do not support the allegation that the Minister made the determination. If the Minister made the determination, there would be no need for the Minister to approve what he/she has determined. The reference to an approval by the Minister rather indicates that another person made the determination, and that the Minister approved, but did not make, the determination. This renders the allegations made vague and embarrassing, as the annexures which are alleged to contain the determination by the Minister do not reflect a determination.

Notice is given in these annexures by the Commissioner to the defendant of the increased rate. It may be that some document and/or other information exists which would be admissible in evidence regarding the actual determination of the rates at the trial. Although the defendant can elect to plead that no determination

was made as referred to in the Act and that therefore the approval is null and void, the defendant is entitled to require the making of the determination by the Minister to be properly pleaded.

3. **THIRD GROUND**

The objection is:

- 3.1 Sec 62(3) requires the Commissioner to notify the defendant of a determination ito Sec 62(1) and not the Minister;
- 3.2 Sec 63(3) read with Sec 63(2) similarly requires the Commissioner to notify the defendant of a determination ito Sec 63(1) of the Act
- 3.3 The POC are vague and embarrassing as the Commissioner does not allege that he has given notice of the determinations ito Sec 62(1) and 63(1)
- 3.4 The Commissioner alleges in par 3.2 that he appointed the Minister to give notice to the defendant but fails to allege that he was thus empowered, and in law the Commissioner and Minister could enter into such an agreement.

The defendant alleges that accordingly the Commissioner failed to plead facts entitling it to payment from the defendant, and the defendant is prejudiced and unable to plead to the vague and embarrassing POC.

The objection in terms of the giving of notice in terms of Section 63 is overruled in view of the contents of Annexures 1.1, 1.2 and 1.3 as dealt with above. It is also clear from the letters that the author is in fact the Commissioner, so an allegation that it was the Commissioner who gave notice is superfluous having regard to the capacity in which the letters were addressed. Par 4.2 also pleads that the Commissioner had given notice to the defendant in respect of the research levies.

I am however of the view that the allegation that notice was given by publication in the GG of the amended tariffs in terms of Sec 62, is vague and embarrassing. Sec 62 clearly requires the Commissioner to give notice to the defendant and if the Commissioner wants to rely on the publication by the Minister as compliance with the requirement to give notice as per Sec 62, the Commissioner has to plead the basis upon which notice was given by the Minister on behalf of the Commissioner. The POC does not disclose a cause of action for the claim in terms of Sec 62 if the requirements of Sec 62 are not met. The Commissioner has failed to plead the factual allegations to support compliance with the requirements of Sec 62.

4. **FOURTH GROUND**

The objection is:

- 4.1 The Commissioner alleges in par 4.1 and 4.2 of the POC that the Minister had from time to time and in terms of Sec 63(1) approved of the rates at which research levies are payable; and that the Commissioner had given

notice to the defendant of the approved rates as per annexures 1.1 to 1.3;

- 4.2 The Commissioner does not allege that the Minister made the determination in terms of Sec 63(1) and does not identify in par 5 which of the Annexures referred to constitute a determination of amounts payable for research ito Sec 63(1).

The defendant objects on the basis that the Commissioner failed to plead facts establishing a liability on the defendant's part for research, and that the defendant is prejudiced and unable to plead.

In par 5.3 of the POC the Commissioner states that notice was given by the Minister in terms of Sec 63 of the determination (Sec 63 relates to research levies). Annexure 3 to the POC, at the bottom thereof, reads that the Minister adjusts the levies payable in terms of Sec 63(2) for the purposes of research.

As Adv Loxton SC on behalf of the defendant pointed out, Annexure 3 (the notice upon which the Commissioner relies for an increase in levies in respect of Sec 63), is dated 9 March 2018. In par 10.1 the Commissioner alleges that the shortfall (in respect of levies payable under Sec 62 and Sec 63) was in respect of the period June 2017 to March 2018.

Annexure 3 is not relevant with regard to the period of shortfall pleaded and accordingly does not assist regarding the tariff that was payable during the period

of shortfall in terms of the determination of tariff, and the notice thereof given to the defendant, in respect of the applicable tariff under Sec 63 during this period.

The POC accordingly misses the necessary allegations to establish what the defendant's liability was during the period complained of, and on what basis such liability exists, and how the shortfall was made up. The allegation in par 10 that full details of how the shortfall is made up (and reference to Annexures 4 and 5), does not clarify this issue. These annexures consist of a table setting out amounts of assessments and payments, without establishing the amounts due in terms of Sec 62 and Sec 63 and is of no assistance with regard to the cause of action.

The levies for research payable, and in terms of which determination and when notice was given (i.e. that the shortfall was due in terms of the requirements of Sec 63), should have been pleaded to establish the defendant's liability and in order for the defendant to be able to plead to the general allegation that there was a shortfall.

5. **FIFTH GROUND**

The Commissioner alleges that the defendant owes a shortfall of R12 604 483.26 in respect of "*mineral processes*" but fails to plead a legal basis for the allegation.

It is not clear from the POC and/or annexures what the term "*mineral processes*" relates to and on what basis the defendant is liable for such. Furthermore, there

is no definition in the Act of "*mineral processes*" to assist the defendant as to what this refers to.

This allegation is clearly vague and embarrassing and this was also conceded during argument by Adv Pelser SC on behalf of the Commissioner. The allegations made elsewhere in the POC, also fail to disclose a cause of action for payment of this amount in respect of "*mineral processes*".

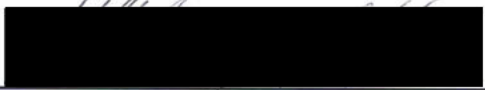
From the above it is apparent that I am of the view that the amended POC is vague and embarrassing as alluded to above, and in terms of the shortfall claimed by the Commissioner under Sec 63 and in respect of "*mineral processes*" does not disclose a cause of action.

As the defendant in my view succeeded to a large extent with the exception based on the grounds raised in the notice of exception, that means that the deficient parts of the amended particulars of claim fall to be struck out. If the deficient parts of the amended particulars of claim were to be struck out, what remains of the amended particulars of claim would fail to sustain the claims for payment made by the Commissioner. However, the Commissioner should be granted an opportunity to cure the defects in the pleading.

[6] I accordingly make the following order:

1. The Commissioner's amended particulars of claim is set aside;

2. The Commissioner is granted leave to deliver a notice in terms of rule 28 of intention to amend its particulars of claim within 20 days from date of this order.
3. The Commissioner is ordered to pay the costs of the exception including the costs of two counsel on Scale C.


M M LINGENFELDER AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of Hearing:

04 September 2024

Date of Judgment:

13 September 2024

Appearances:

Counsel for the Plaintiff / Commissioner:

Adv Q Pelser SC

Instructed by:

The State Attorney

SALU Building

216 Thabo Sehume Street

Pretoria

Counsel for the Defendant / Excipient:

Adv C.D.A Loxton SC with Adv Z Manentsa

Instructed by:

Edward Nathan Sonnesberg Inc

c/o Macintosh Cross & Farquharson

Embassy Law Chambers

834 Pretorius Street

Arcadia, Pretoria