



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No: 4268/2016

In the matter between

MINISTER OF WATER AND SANITATION

PLAINTIFF

AND

MAFUBE LOCAL MUNICIPALITY

DEFENDANT

CORAM: **MZANA AJ**

HEARD ON: **20 AUGUST 2021**

DELIVERED ON: **18 NOVEMBER 2021**

[1] The plaintiff-instituted action against the defendants for the water use charges and water research levies and defendant filed an exception against the Plaintiff's particulars of claim on the ground that, they are vague and embarrassing; alternatively, do not contain the necessary averments to disclose a cause of action.

[2] In the notice of exception the defendant have prayed for an order that the exception to be upheld, and that the plaintiff's particulars of claim be struck out as well as for a punitive costs order.

DEFENDANT'S GROUNDS OF EXCEPTION

[3] The grounds raised by the defendant can be summarised as follows:

3.1 The plaintiff was obliged to plead the specific legislation which imposes an obligation of the defendant to pay for water use charges and amounts claimed; water research levies arises *ex lege*;

3.2 The defendant is water service provider as contemplated by the provisions of the Water Services Act 108 of 1997 (WSA).

3.3 The defendant is a "person" within the meaning of the definition in Section 1(1) of the National Water Act 36 of 1998 (NWA) read with sections 21(1) (a) and (b), 22(1) (b) and 26(1)(c) of NWA.

3.4 Water research levies are payable by persons in terms of section 11(1) (b) of Water Research Act 34 of 1971 (WRA).

3.5 Defendant is a registered water user.

3.6 The defendant is a person within the meaning of section 21(1)(a) and 21(1)(b) of NWA, the allegation is vague and embarrassing to the extent that the said subsections refer to water use, meaning the "taking water from a water resource" and "storing water" and they do not refer to a particular person by definition.

3.7 Defendant is a person as contemplated in terms of section 26(1) (b) of NWA; this allegation is vague and embarrassing because this section refers to the competence of the minister to make regulations requiring that "any water use" be registered with the responsible authority.

[4] It is the evidence of the defendant that, both sections 21 and 26 of NWA do not refer to a particular person by definition. In addition that, section 26 refers to the competence of the Minister to make regulations requiring that "any water use" be registered with the responsible authority and makes no reference to a "person".

[5] Based on the exception raised by the defendant as detailed above, the defendant puts forward that the particulars of claim of the plaintiff are vague and embarrassing and that it is difficult to establish, what the plaintiff intends putting and in respect of which specific provision of the relevant legislation, defendant becomes liable for the various charges claimed.

THE PLAINTIFF'S CLAIM

[6] I now proceed to assess the particulars of claim in this matter. It appears that, the plaintiff pleaded that, the defendant has a constitutional obligation to pay water use charges and water research levies, which obligation is imposed under section 2 read with section 7(2), 152 and 195 of the Constitution. The plaintiff allege in its particulars of claim, that the local spheres of government are administered by municipalities, whose objectives are to, amongst other things to perform the following services:

- Provide democratic and accountable government for local communities;
- Promote social and economic development and
- Promote a safe and healthy environment as contemplated by section 152 read with section 156 of the constitution.
- The water use charges imposed in terms of section 56(3) and 57(1) of the NWA must be read with the promulgated pricing strategies under this section in terms of GNR 1353 of 12 November 1999 (*the first pricing strategy*) and GN 201 of 16 March 2007 (*the second strategy*)

[7] The plaintiff also extensively pleads that, in order to find defendant's liability plaintiff the defendant is a "*water service provider*" as contemplated by the provisions of Water Services Act 108 of 1997 (WSA).

[8] On behalf of the plaintiff, various Acts dealing with water legislation were referred to in pleadings in order to demonstrate the defendant's failure to comply with its constitutional obligations stated in paragraph 5 above

[9] THE PRINCIPLES RELATING TO EXCEPTIONS

An exception is a legal objection to the opponent's pleadings. It complains of a defect inherent in the pleadings. When a court is faced with an exception it must look at the pleading objected to as it stands and may not consider any extraneous facts- see in this regard **Minister of Safety and security Vs Hamilton 2001(3) SA 50 SCA at 52 G-H.**

[10] In other words, the defect must be apparent ex facie the pleading for exception to be an appropriate method of objection. Where facts need to be placed before the court to show that, there is a defect, then the taking of an exception is not the appropriate procedure.

[11] An **exception that a pleading is vague and embarrassing** is not directed at a particular paragraph within a cause of action but at the cause of action as a whole, which must be demonstrated to be vague and embarrassing.

[12] It is trite that, an exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not at its legal validity. It is not directed at a particular paragraph within a cause of action but at the cause of action as whole, which must be demonstrated to be vague and embarrassing. As was stated in **Jowel V Bramwell-Jones and others 1998 (1) SA 836 @ 905 E-H** where the honourable judge said “ *I must first ask whether the exception goes to the heart of the claim and if so, whether it is vague and embarrassing to the extent that the defendant does not know the claim he has to meet*”

[13] It is trite therefore; that the onus is not only to show vagueness amounting to embarrassment, but also that such embarrassment amounts/resulting to prejudice if compelled to plead to pleading against which the objection lies -see **Trope and others V South African Reserve Bank 1993 (3) SA 264 (A) At 211 B.** In other words the onus is on the excipient to show embarrassment and prejudice. In Trope, *supra* it was further held, that the ultimate test is still whether the pleading complies with the requirement of Rule 18(4). Vagueness would invariably be caused by a defect or incompleteness in the formulation and is therefore not limited to an

absence of the necessary allegations but also extends to the way in which it is formulated.

[14] There is one further requirement, namely the excipient must set out lucidly and with necessary particularity, and the grounds of complaint in its Rule 23(1) notice to cure and, if the matter remains, unresolved, thereafter in the exception. The exception is a pleading and as such also subject to the requirements of Rule 18(4) and susceptible to an exception if it lacks particularity and is vague and embarrassing. The notice to cure in terms of Rule 23(1) should be formulated with care to advise the other party properly of the nature and grounds of the complainant he is called upon to remedy.

[15] Failure to notify or properly advise the other party in the Rule 23(1) notice of the cause of complaint defeats the very purpose that Rule 23(1) seeks to achieve, namely an opportunity to remove or remedy the cause of complaint. It therefore, essential to understand the defendant's true complaint as it emerged during argument of the matter

FAILURE TO DISCLOSE A CAUSE OF ACTION OR DEFENCE

[16] When a pleading lacks an averment, which is essential to the cause of action or defence. It means one of the essential allegations of fact is missing. Every pleading must contain a complete chain of facts on which the pleader relies. If any linking fact is omitted, the sequence is broken and the conclusion is valueless or false. An exception taken on the ground that an essential averment is lacking will not normally dispose of the matter, since the court will generally grant leave to the respondent to amend his pleading. Leave is usually granted irrespective of whether the plaintiff applied for it at the hearing of the exception.

DEFINITION OF A PERSON UNDER THE NWA

[17] In terms of section 1(1) of the NWA, a "*person*" includes a natural person, juristic person, an unincorporated body, an association, an organ of the state and the Minister. It is trite as indicated by the plaintiff that, the approach to the interpretation

of any legal document, be it legislation, any statutory instrument or contract, has been affirmed in various judgments. In particular in the case of **Natal Joint Municipal Pension Fund V Endumeni Municipality 2012 (2) SA 262 par 18**, outlined the approach to the judicial interpretive exercise, as “ *the process of attributing meaning to the words used in legal documents, taking into account the context in which, they were used, by reading the particular provision or provisions, in the light of the document, as a whole, and the circumstances attendant, upon its coming into existence*”

[18] It is trite that, the definition of a “person” under the NWA should not be interpreted with the exclusion of the remainder of the sections of the NWA. It is without a doubt that the plaintiff has clearly pleaded the relevant provisions it relies upon in terms of the NWA, and the regulations promulgated there under, and the constitution for its liability to pay the water use charges and water levies

[19] Section 26(1) (c) of the NWA requires that any water use be registered with the responsible authority; section 22 (1) (b) of the NWA states that a person may only use water if the water use is authorised by a licence under this Act. Furthermore, section 21 of NWA delineates various water uses, which include taking water from a water resource and storing water.

[21] It should be noted that, the purpose of the NWA, is acknowledging national government’s overall responsibility for and authority over the nation’s water resources and their use, including the equitable allocation of water for the beneficial use, redistribution of water and international water matter(see preamble of the NWA). In the result, I am of the view that, the defendant’s exception cannot stand.

[22] I am compelled to remark that, the defendant has failed to or unable to show how the pleadings are vague and embarrassing, and silent on how pleading to the particulars of claim will seriously prejudice the defendant.


[23] Having considered all the facts alluded supra. I am satisfied that I am satisfied therefore, that the defendant will not be prejudiced if compelled to plead to the plaintiff’s claim. As it is incumbent on the defendant to treat the pleadings to some extent with “a mind willing to understand” as stated by the plaintiff’s counsel in argument. The plaintiff has provided an overview of its case above and set out the

applicability of the relevant sections of the legislation relied upon to found a cause of action.

ORDER

[24] I accordingly make the following order:

1. The exception is hereby, dismissed.
2. The defendant is ordered to pay the costs of the exception on the High Court scale between Attorney and client, including the costs of two (2) counsels.



L. MZANA AJ

On behalf of the Plaintiff

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