IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No: 25832/2013

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

4 April 2014 **E J Francis**

In the matter between:

M RAMANNA AND ASSOCIATES CC Plaintiff

and

THE EKURHULENI DEVELOPMENT COMPANY (PTY) LTD Defendant

JUDGMENT

FRANCIS J

Introduction

1. The plaintiff instituted an action against the defendant for the payment of the sum of R2 334 520 based on unjustified enrichment as a result of the performance by it pursuant to an invalid oral agreement between the parties.

2. The defendant filed an exception in terms of rule 23(1) of the Uniform Court Rules (the Rules) contending that the plaintiff's particulars of claim lack the necessary averments to sustain an action and/or are vague and embarrassing and/or fail to comply with the rules relating to pleading and therefore such

particulars are excipiable and/or liable to be set aside, in whole or in part, and an irregular proceeding. The plaintiff was afforded an opportunity to remove the cause of complaint within 15 days.

3. The plaintiff filed an amendment to the particulars of claim. The defendant proceeded with the exception which contains nine objections. However at these proceedings, the defendant only persisted with eight objections.

The law relating to exceptions and irregular proceedings

4. It is the duty of the court, when an exception is taken to a pleading, first to ascertain if there is a point of law to be decided which will dispose of the case in whole or in part. If there is not, then it must see if there is any embarrassment which is real and such as cannot be met by the requesting of particulars, as the result of the faults in pleadings to which the exception is taken. Unless the excipient can satisfy the court that there is such a point of law or such real embarrassment, then the exception should be dismissed. In this regard see *Khan v Stuart* 1942 CPD 386 at 392.

5. It is trite that there is often a substantial overlap between exceptions based on a vague and embarrassing complaint, and those applicable to an application under rule 30(1) relating to the lack of particularity required by rule 18(4). The principles applicable to the two procedures are different. The two procedures are not mutually exclusive. Where a plaintiff's pleadings do not comply with the requirements of rule 18 in that, for instance, the specific

particulars are not set out therein, and are also vague and embarrassing, the defendant will have a choice whether to proceed in terms of rule 30 read with rule 18 or in terms of the rule 23 exception procedure. A defendant is entitled to bring both procedures in the alternative.

6. Rule 18(4) provides that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, with sufficient particularity to enable the opposite party to reply thereto.

7. It is a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the abolition of requests for further particulars of pleading and the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; and the cause of action or defence must appear clearly from the factual allegations made.

8. The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed and this fundamental principle can only be achieved when each party states his case with precision.

9. The principles applicable to an exception based on no cause of action differ from one based on a vague and embarrassing complaint. Similarly, the principles applicable to an exception based on a vague and embarrassing complaint differ from those relevant to an application under rule 30(2)(b) relating to the particularity as required by rule 18(4).

10. A party may except to a pleading on the grounds that it is vague and embarrassing. Where an exception to a pleading is brought on the ground that it is vague and embarrassing, it involves a two-fold consideration, the first being whether the pleading lacks particularity to the extent that it is vague and the second whether the vagueness causes embarrassment of such a nature that one is prejudiced. This prejudice lies in the excipient's inability properly to prepare to meet the opponent's case.

11. Where a pleading lacks particularity, it is either meaningless or capable of more than one meaning or can be read in any one of a number of ways. Where a court upholds an exception which alleges that the pleading is vague and embarrassing, leave to amend is generally granted to the party which produced the excipiable pleading.

12. The approach to be adopted where a matter involves a complaint that a pleading is vague or embarrassing and hence is excipiable or in non-compliance with rule 18(4) was identified in *Jowell v Bramwell – Jones & Others* 1998(1) SA 836 (W) at 905 H - I as follows:

12.1 the question must firstly be asked whether the exception goes to the heart of the claim, and

12.2 if so, whether it is vague and embarrassing to the extent that the defendant does not know the claim he has to meet, and

12.3 should he find that an exception on any ground fails, to then ascertain in the second place whether the particulars identified by the defendant are strictly necessary in order to plead and, if so, whether the material facts are unequivocally set out.

13. The purpose of an exception that a pleading does not disclose a cause of action is to dispose of the case, as pleaded, in whole or in part. In order to disclose a cause of action, a pleading must set out every fact (material fact) which it would be necessary for the party to prove, if traversed, in order to support his right to judgment of the court. A pleading which fails to meet this standard is therefore excipiable. The excipient has the duty to persuade the court that upon every interpretation which the pleading can reasonable bear, no cause of action is disclosed.

14. If there is vagueness the court is obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him by the vagueness complained of. See *Quinlan v MacGregor* 1960 (4) SA 383 (D) at 393E-H. In each case an *ad hoc* ruling must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient if he or she is compelled to plead to the pleading in the form to which he or she objects. A

point may be of the utmost importance in one case, and the omission thereof may give rise to vagueness and embarrassment, but the same point may in another case be only a minor detail. See *ABSA Bank Ltd v Boksburg Transitional Metropolitan Council* 1997 (2) SA 415 (W) at 421J – 422A. The ultimate test as to whether the exception should be upheld is whether the excipient is prejudiced. See *Quinlan v MacGregor supra.*

15. The court will not decide by way of exception, the validity of an agreement relied upon or whether a purported contract may be void for vagueness. See *Francis v Sharpe* 2004 (3) SA 230 (CC) at 240F-G. The court has a discretion whether or not to grant the application even if the irregularity is established. See *National Union of SA Students v Meyer* 1973 (1) SA 363 (T) at 367E-G.

The objections (exceptions)

16. As stated above, the defendant has taken various objections to the formulation of the plaintiff's claim and the court must decide whether, *ex facie* the pleadings, the particulars of claim are excipiable and/or are liable to be set aside, in whole or in part, as an irregular proceeding.

The first and second objection

17. The defendant contends in the first objection that the plaintiff's particulars of claim are bad in law and cannot sustain an action. The defendant stated that the plaintiff's cause of action is purportedly based on unjustified enrichment as a result of performance in terms of an implementation agreement between

the parties. In paragraph 5 the plaintiff alleges that the implementation agreement is invalid and unenforceable because it was concluded contrary to sections 111, 113, 115 and 116 of the Local Government: Municipal Finance Management Act 56 of 2003 (the MFMA); and contrary to the Municipal Supply Chain Management Regulations published under General Notice 868 in Government Gazette 27636 of 30 May 2005, read together with the defendant's Supply Chain Management Policy, in particular section 2,19, 32 and 37 of the aforesaid policy. In paragraph 6 the plaintiff alleges that despite the invalidity of the implementation agreement and in the reasonable but mistaken belief that the implementation agreement was enforceable, the plaintiff performed the services and provided technical documentation to the defendant. In the alternative, the plaintiff alleges that when the implementation agreement was concluded it was unaware of the statutory provisions the implementation agreement had to comply with and that it was concluded contrary to such statutory provisions. The non-compliance with the prescriptions of the MFMA and its regulations results in a nullity and performance pursuant to such void agreement has no cause of action; alternatively, cannot found a cause of action in unjustified enrichment. Ignorance of the law is not an excuse and therefore the maxim *ignorantia juris non excusat* is applicable. The defendant contends that the plaintiff's particulars of claim are bad in law and cannot sustain a cause of action.

18. It was contended that the abovementioned contraventions make the alleged contract invalid and of no force or effect. It was contended on behalf of the

defendant that there is a rule in South African Law that ignorance of the law does not excuse and therefore no cause of action can be founded on the basis of ignorance of the law; even an enrichment claim. The defendant relied on *S v De Blom 1977* (3) SA 513 (A) at 528H-530A. It was contended that the plaintiff's claim was bad in law and cannot sustain an action. Reliance was also made on *S v Oberholzer* 1971 (4) SA 602 (A).

19. The defendant contends in the second objection that the plaintiff's cause of action is purportedly based on unjustified enrichment as a result of performance in terms of an implementation agreement between the parties. In paragraph the plaintiff alleges that the implementation agreement is invalid and unenforceable because it was concluded contrary to sections 111, 113, 115 and 116 of the MFMA; and contrary to the Municipal Supply Chain Management Regulations published under General Notice 868 in Government Gazette 27636 of 30 May 2005, read together with the defendant's Supply Chain Management Policy, in particular section 2,19, 32 and 37 of the aforesaid policy. In paragraph 6 the plaintiff alleges that despite the invalidity of the implementation agreement and in the reasonable but mistaken belief that the implementation agreement was enforceable, the plaintiff performed the services and provided technical documentation to the defendant. In the alternative, the plaintiff alleges that when the implementation agreement was concluded it was unaware of the statutory provisions the implementation agreement had to comply with and that it was concluded contrary to such statutory provisions. It was contended that the plaintiff however does not

allege that the mistake which founds the *condictio* relied upon is excusable in law and/or in fact. It was contended that the particulars of claim lack the averments necessary to sustain an action and/or are vague and embarrassing.

20. In the second objection it was contended that the implementation relied upon is an agreement in contravention of legal prescriptions and not ignorance of facts or circumstances surrounding the conclusion of the alleged oral agreement. It was contended that the maxim *ignorantia juris non excusat* is applicable and reliance was made on *State vs De Blom supra.* It was further contended that there is no presumption that everyone knows the law. The rule is that ignorance of the law does not excuse a man or relieve him from the consequences of a crime or from liability of a contract. The rule so it was contended was not only expedient but also absolutely necessary. Reliance was made on *Reynold v Kinsey* 1959 (4) SA 50 (FC) at 65C – 66A. The particulars of claim so it was contended cannot sustain an action.

21. The plaintiff's cause of action against the defendant is founded on unjustified enrichment and not on contract. As such, this court is required to determine whether the plaintiff has pleaded what is required of it, for the purposes of unjustified enrichment. The plaintiff has pleaded two alternative enrichment claims namely the *condictio indebiti* and the *condictio ob turpum vel iniustam causam*. Each *condictio* is designed to cover a different factual situation and has different substantive requirements. The *condictio indebiti* can be used to reclaim performance that had been made pursuant to a contract that is rendered

invalid for failure to comply with a formality either a statutory formality or a formality agreed upon by the contracting parties. See *First National Bank of SA Ltd v Perry NO & Others* 2001 (3) ALL SA 331 (A) at paragraph 22.

22. The *condictio ob turpum vel iniustam causam* is utilised to reclaim performance pursuant to a contract that is rendered unenforceable because it is illegal i.e. because it is either expressly or impliedly prohibited by common law or statutory law. See *Afrisure v Watson* 2009 (1) ALL SA 1 (SCA) paragraph 5.

23. It is clear from a perusal of the particulars of claim that it covers both situation where the implementation agreement is unenforceable because it was expressly or impliedly prohibited by the MFMA and is thus legal; and/or where the implementation agreement is invalid because it was concluded without complying with formalities prescribed by the MFMA. Whether the implementation agreement is unenforceable because it is illegal or whether it is invalid because of the failure to comply with a statutory formality is not a question that this court need be concerned with at this point. Such a decision will be made by the trial court that ultimately decides the matter. The trial court will have to interpret the relevant provisions of the MFMA and determine which *condictio* is the appropriate enrichment claim in the circumstances of the case. At this stage this court need only consider whether the requisite allegations to sustain each of the alternative enrichment claims have been met.

24. It is not necessary for purposes of this judgment to set out the *facta probanda* of the *condictio indebiti* and of the *condictio ob turpum vel iniustam* save to point out that all the requirements have been pleaded by plaintiff.

25. The particulars of claim further reveal that the plaintiff is not seeking to enforce the implementation agreement since, if the implementation agreement is indeed illegal, the enforcement thereof would violate the *ex turp causa* rule. A claim based on the *condictio ob turpum vel iniustam* can, in principle, be resisted by the application of the *par delictum* rule. This rule is not absolute and a court may relax the rule in an appropriate case to prevent injustice or to promote public policy especially where the operation of the rule would result in a defendant being unjustly enriched at the plaintiff's expense. See *Jajbhay v Cassim* 1939 AD 537 at 544-545, 550-551 and 558. The question whether the *pari delictum* rule should be relaxed cannot be decided on the pleadings except in the clearest of cases and ought to be decided at the end of the trial in order to determine where the equities lie. See *Klokow v Sullivan* 2005 JOL 15611 (SCA) paragraphs 24 – 28.

26. The first and second objections are without any substance since it fails to recognise that the plaintiff's claim is not premised on the implementation agreement but on the *condictio indebiti* alternatively the *condictio ob turpum vel iniustam causam.* I have already pointed out that the requirements for those two enrichment claims have been pleaded. The defendant's reliance on the maxim *ignorantia juris non excusat* and particularly the decision in *State v De*

Blom supra is ill conceived. It was held in *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & Another* 1992 (4) ALL SA 62 (A) at 75 that in the context of assessing the nature of the mistake required to find the *condictio indebiti:*

> *"In the cases referred to (and many others that I did not mention) the parties' ignorance of their rights stemmed from their ignorance of the general law. These cases are thus clear indication that the ignorantia juris rule has for quite a considerable period of time not been of general application in South African civil law. Bearing in mind that since this Court's decision in S v De Blom 1977 (3) SA 513, ignorance of the law may even provide an excuse for otherwise criminal behaviour, we have to ask ourselves whether there is any reason for retaining the age-old distinction between errors of law and in fact claims for repayment of money unduly paid in error. I can perceive none."*

27. The *ignorantia juris* maxim is not applicable to the *condictio ob turpum vel iniustam causam*, since the very purpose of this *condictio* is to allow a litigant to recover that which has been performed pursuant to an illegal and thus unenforceable agreement. Only the *pari delictum* rule has any potential application but the relaxation of the rule cannot in my view be determined on the pleadings but only at the end of the trial once evidence has been led.

28. The first and second objections stand to be dismissed.

The third objection

29. The defendant states in the third objection that the plaintiff alleges, in paragraph 4, that in terms of the purported oral agreement it would be obliged to implement a regularisation plan for the defendant in order to streamline, regularise, optimise and govern the management of the defendant. It is stated that the plaintiff does not rely on the aforesaid regularisation plan, neither does

it attach it to the particulars of claim. In the result, the defendant cannot determine whether the 'implementation agreement' is in accordance to the terms of the regularisation plan. The defendant contended that the particulars of claim do not disclose a cause of action and/or are vague and embarrassing and/or are an irregular proceeding and fall to be set aside as such in terms of rule 30.

30. The third objection is without substance and stands to fail. I have pointed out that the plaintiff's cause of action is not contractual in nature and is not seeking to enforce the implementation agreement or any other relief pursuant to the implementation agreement. The plaintiff does also not rely on the 'implementation plan'. This has been acknowledged by the defendant when it stated that the plaintiff 'does not rely on the regularisation plan' and 'does not attach the regularisation plan to the particulars of claim'. The implementation agreement is alleged to be an oral agreement and not a written agreement so there is nothing to attach to the particulars of claim. Further the implementation agreement and the 'regularisation plan' are not *facta probanda* of either the *condictio indebiti* or the *condictio ob turpum vel iniustam causam* upon which the plaintiff relies. Rule 18 only requires a party to attach a copy of a contract or the portion upon which he relies if the contract or part thereof is a link in the chain (facta probanda) for his cause of action. In this instance, the implementation agreement has been pleaded only insofar as it is relevant to indicate to both the court and the defendant which particular agreement the respondent alleges became invalid and/or unenforceable

because of the relevant provisions of the MFMA .

The fourth objection

31. The defendant states in the fourth objection that the plaintiff alleges in paragraph 4 that the implementation of the regularisation plan would be for the purpose of, *inter alia,* enabling the defendant to acquire accreditation as a social housing institution in terms of the Social Housing Act 16 of 2008. It was stated that the plaintiff does not allege whether or not, consequent to the services provided, the accreditation was acquired. It was contended that in the circumstances, the particulars are lacking in particularity and/or are vague and embarrassing and the defendant cannot plead thereto.

32. I have already pointed out that the plaintiff's claim is not contractual in nature and is not seeking to enforce the implementation agreement and has only pleaded the implementation agreement to indicate that this was the particular agreement that was rendered invalid and/or unenforceable because of the relevant provisions of the MFMA. It is therefore unnecessary for the purposes of an enrichment claim to allege that the defendant accreditation in terms of the Social Housing Act. Such an allegation is not one of the *facta probanda* of either the *condiction indebiti* or the *ocondiction ob turpum vel iniustam causam.* The failure to make the allegation cannot make the particulars of claim vague and embarrassing. It follows that the fourth objection should be rejected.

The fifth and sixth objections

33. The defendant states in the fifth objection that in paragraph 6 of the particulars of claim, the plaintiff alleges that in the reasonable but mistaken belief that the implementation agreement was valid and enforceable, it performed the services and provided technical documentation to the defendant. It is stated that the plaintiff does not set out the services that were performed by it and the defendant does not know what those services entailed. It was contended that the particulars of claim are lacking in particularity, contravene the provisions of rule 18 and fall to set aside as an irregular proceedings in terms of rule 30.

34. The defendant stated in the sixth objection that in paragraph 8 of the particulars of claim, the plaintiff attached as "A" a schedule indicating the breakdown of services rendered to the defendant as well as the technical documentation submitted to the defendant. The schedule contains *inter alia* a budget section and a work completed section. The budget section is incomplete and the defendant is unable to make sense of the document. The defendant is therefore embarrassed as it does not know where the available budget amounts come from and/or how they would have been computed. The schedule is therefore vague and embarrassing. The defendant contended that the particulars of claim are vague and embarrassing and/or liable to be set aside as an irregular proceedings.

35. The fifth and sixth objections are contradictory in their respective complaints and are ill conceived. The complaint in the fifth objection is that the plaintiff

has failed to indicate services provided to the defendant. In the sixth objection the defendant complains that the plaintiff has attached an annexure indicating the services provided by the plaintiff but that the defendant cannot 'make sense of the document' attached. The respondent has identified what services were provided in terms of annexure "A" which clearly itemises the services that were provided to the excipient and the percentage of the work done in respect of each service. The budget column is complete and the total of R6 600 000.00 corresponds to the agreed contract price in terms of the implementation agreement. The defendant's confusion regarding annexure "A" is hyperbolic and unreal. Annexure 'A' serves to assist the defendant and the court in assessing the services that the plaintiff provided and to delineate the issues with more precision. It not only describes with sufficient particularity the services provided but also the percentage of completion of each service. It is neither contradictory nor does its attachment render the particulars of claim meaningless and/or capable of more than one meaning. Both objections stand to be rejected.

The seventh objection

36. The defendant stated in the seventh objection that Annexure "A" does not set out what technical documentation was/were submitted to the defendant and how the defendant benefitted from the aforesaid document(s). Further, the plaintiff does not set out the alleged benefits that have been retained by the defendant. It was contended that the particulars are therefore lacking in particularity and liable to be set aside as irregular pursuant to rule 30.

37. The seventh objection is without substance. It is not a requirement that the plaintiff particularise each and every piece of technical documentation provided to the defendant. It is sufficient that the allegation is made that the respondent provided the services listed in annexure "A" to the extent of the percentage described therein. This is sufficient particularity in order for the defendant to plead and to assess the amount by which it is alleged the defendant was enriched. It is not a requirement for an enrichment claim for any enrichment claim to state how the defendant benefitted by the services. It is sufficient to allege that the services provided in annexure "A" enriched the defendant. The defendant will be entitled for purposes of trial to request further particulars regarding the specific documentation that was provided to the defendant. There is also no prejudice to the defendant who can admit or deny those allegations as it sees fit.

The eight objection

38. The defendant stated in the eight objection that it is stated that the amount of R3 682 000.00 is not clear *ex facie* Annexure "A", which is the schedule for the services provided. Exhibit "A" does not exhibit R3 682 000.00 and the plaintiff does not state how the amount claimed as 'value for services' has been computed. It was contended that the particulars of claim are vague and embarrassing and/or should be set aside in terms of Rule 30.

39. The eight objection is also without substance. The amount of R3 682 000.00 represents the objective value of the percentage of the services provided to the

defendant. This amount will not appear *ex facie* annexure "A" nor does it have to. The importance of the value of R3 682 000.00 is its role in determining the amount by which the plaintiff alleges that the defendant was enriched namely in the sum of R2 334 520.00. The defendant is not prejudiced in pleading thereto and can admit or deny these allegations as it seems fit. The eight objection is also rejected.

40. The application stands to be dismissed.

41. There is no reason why costs should not follow the result.

42. In the circumstances I make the following order:

42.1 The exceptions are dismissed with costs.

FRANCIS J

SOUTH GAUTENG HIGH COURT JUDGE

FOR PLAINTIFF	:	E FASSER INSTRUCTED BY WERTHEIM BEKKER INC
FOR DEFENDANT	:	M HABEDI INSTRUCTED BY HOGAN LOVELLS INC
DATE OF HEARING	:	5 FEBRUARY 2014
DATE OF JUDGMENT	:	4 APRIL 2014