



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)**

CASE NO: 49772/2008

DATE: 14 AUGUST 2009

In the matter between:

KIMIAD GASTEHUIS (EDMS) BEPERK

First Plaintiff

MICHAEL MEYER

Second Plaintiff

and

ZWARTKLOOF MINING (EDMS) BEPERK

First Defendant

ZWARTKLOOF WILDERESERVAAT VERENINGING

Second Defendant

JUDGMENT

LEDWABA, J

[1] The excipient, the first defendant, filed an exception to the plaintiffs' particulars of claim and an application to strike out paragraphs 9.3 and 9.5 of the plaintiffs' particulars of claim.

[2] It is common cause that in a written agreement, the first defendant agreed to deliver three hundred thousand (300 000) litres of water to the plaintiffs' and the second defendant.

[3] According to the plaintiffs' the first defendant did not comply with the terms of the agreement in that it failed to deliver the water. An application was made to the court by the plaintiffs' in terms whereof Mynhardt J, *inter alia*, ordered the first defendant to comply with the court order of Shongwe DJP dated 8 February 2007 and the first defendant was to join a pipe to a pipe laid by the plaintiff to effect the delivery of water, failing which the sheriff was to act accordingly. See annexures Z and Y respectively.

[4] There was a dispute between the parties regarding how the water was to be delivered and from which borehole. Another application to court was filed by the plaintiff and Legodi J on 28 March 2008 ordered , *inter alia*, that:

"1. THAT the order made on the 8th February 2007 is hereby confirmed.

2. THAT the water source from which the first respondent is to supply 300 000 litres of water per month to Plot 8, a portion of Portion 1 of the farm Zwartkloof 707 KR located within the second respondent shall be the borehole indicated as No 3 on Annexure "X" referred to earlier in this judgment.

3. THAT the first respondent to see to the installation of an electrical pump together with a water meter and necessary cabling on the said borehole and to connect same with a pipe to the pipeline already installed by the deputy Sheriff in pursuance of the order of Mr Justice Mynhardt referred to above within 14 days of payment of the costs for the pump, the meter, the pie and the installation thereof as provided for in paragraph 4. ”

[5] The first defendant's counsel Advocate Davis SC informed the court that the plaintiffs' filed an application for leave to appeal against the order of Legodi J which application was dismissed. He submitted that the day upon which the dispute between the parties began from which borehole the water was to be drawn was sorted out on the 1st April 2009. The plaintiffs', he submitted, were therefore not entitled to water from the borehole that they assumed they were entitled to draw water from. As a result any action for the delivery of water before the 1st April 2009 is premature and does not disclose the cause of action.

[6] The aforesaid ground of exception to the plaintiffs' particulars of claim was not mentioned in the notice of exception. As far as the first, second and third grounds of exception in the notice of exception are concrete, there is a standing court order of the 8 February 2007 ordering the first defendant to deliver three hundred thousand (300 000) litres of water to the applicant. Whether the plaintiffs were entitled to the water before the 1st April 2009 it is an issue which could be decided by the trial court.

[7] The plaintiffs' in paragraphs 12.1, 12.2 and 12.3 of the particulars of claim made the following allegations:

"12.1. As gevolg van Eerste Verweerder se nie-lowering van die ooreengekome hoeveelheid water (300 000 liter per maand) ly Eisers skade.

12.2. Eiser se skade is geiyk aan die waarde van die water wat Eerste verweerder moes iewer.

12.3. Die kontraktueie hoeveelheid water wat gelewer moes word, is:

300 000 liter per maand x 29 maande= 8 700 000 liter water

Die 39 maande behels die periode 1 Mei 2006 tot 30 September 2008.

[8] Plaintiffs' further alleged in the period 28 August 2008-26 September 2008 plaintiff received 137 893 litres. Paragraph 12.6 of the plaintiffs' particulars of claim reads as follows:

"12.6 In die vooropstelling is Eisers se skade R84 121, 07 wat soos volg bereken word:

Kontraktueie verpligting van 1 Mei 2006

Tot 30 September 2008 (12.3 hierbo) 8 700 000 liters

Min water gelewer soos in 12.4 en 12.5

1 50 000 liter + 137 893 liter 287 893 liters

Balans (liters) verskuldig *8 412 107 liters*

8 412 107 liters is gelyk aan 8 412,107 kiloliter

Koste van 1 kiloliter is R 10,00

Skade is 8 412,107 kiloliter x R10,00

Per kiloliter *R 84 121,07"*

[9] The plaintiffs' did not, in my view, properly allege and explain the damages they allege to have suffered. It is not known if the plaintiffs' purchased water from another source and if the costs of R10, 00 for a kilolitre is fair and reasonable.

APPLICATION TO STRIKE OUT

[10] The plaintiffs' counsel challenged to the application was that the applicant was not supported by an affidavit. In terms of Rule 6 (11) interlocutory applications may be brought on notice supported by such affidavits as the case may require. In my view, an affidavit is not required in this interlocutory application.

[11] I think that the allegations in paragraph 9.3 and 9.5 are irrelevant scandalous and vexation. The plaintiff will not be prejudiced if they are struck out.

[12] I therefore, make the following order:

(i) The first defendant's exception in respect of prayers one and two of the notice is dismissed.

(ii) The first defendant's exception in respect of prayer 4 is upheld.

(iii) Plaintiff is granted leave to amend the particulars of claim within 20 days from the day of this order.

(iv) Paragraphs 9.3 and 9.4 of the plaintiffs' particulars of claim are struck out.

(v) Plaintiffs are jointly and severally liable to pay the costs.

**A.P. LEDWABA
JUDGE OF THE HIGH COURT**