IN THE HIGH COURT OF SOUTH AFRICA .

(GAUTENG DIVISION, PRETORIA)

CASE NO 33867/2017

REPORTRABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED

23 August 2022

In the matter between:

ODENDAAL ERASMUS & THULARE INC.	First Applicant
ANDRE ODENDAAL	Second Applicant
VAUGHN SUMMERTON	Third Applicant
MEYERTON OPSPOORDERS CC	Fourth Applicant

and

SPECIAL INVESTIGATION UNIT	Respondent

JUDGMENT

D S FOURIE J:

[1] This is an application for an order declaring that the respondent's amended particulars of claim dated 21 April 2021 do not remove the excipiability of the original particulars of claim which were found excipiable by this Court on 20 March 2021. In addition thereto, the applicants also apply for the striking out of the respondent's amended particulars of claim together with an order granting the applicants absolution from the instance in the main proceedings.The application is opposed by the respondent.

[2] In the main proceedings the respondent is the plaintiff and the applicants are the defendants. I shall refer to them as they have been cited in the main proceedings.

BACKGROUND

[3] According to the amended particulars of claim the plaintiff was in terms of Proclamation R33 of 2011 requested to investigate matters relating to the alleged maladministration regarding the affairs of the Midvaal Local Municipality, including the alleged improper or unlawful conduct by councillors, officials and agents of the municipality with regard to the appropriation or expenditure of public money or property.

[4] The first defendant is cited as a firm of attorneys which was appointed to provide general legal services, debt collection and auctioneering services to the Municipality. The second and third defendants are cited in their capacities as partners or directors of the first defendant. The fourth defendant is cited in its capacity as the entity that provided auctioneering services to the municipality.

[5] During the course of its investigation the plaintiff concluded that the conduct of the defendants, as agents of the municipality, amounted to

unlawful or improper conduct. It is alleged that in some instances the disposal of certain properties, including the profits made, was unlawful and also in breach of the system of procurement contemplated in section 217 of the Constitution. In the result, the plaintiff claims payment from the defendants, jointly and severally, in the amount of R2 365 000.00.

THE EXCEPTION PROCEDURE

[6] During August 2017 the defendants filed an exception to the plaintiff's particulars of claim dated 14 February 2017 (before the amendment thereof). The exception was heard by Janse Van Nieuwenhuizen J on 15 March 2021. On 29 March 2021 the exception was upheld with costs and the plaintiff was afforded a period of 15 days within which to file an amended particulars of claim.

[7] In her judgment Janse Van Nieuwenhuizen J considered the grounds of exception with regard to the terms of appointment as well as the allegations referring to a number of immovable properties. The learned Judge then concluded that the averments with regard to the terms of appointment do not comply with the provisions of Rule 18(6) and are therefore vague and embarrassing. She also found that the allegations regarding the immovable properties, as identified in the judgment, do not disclose a cause of action or are vague and embarrassing for the reasons set out in the judgment.

[8] During April 2021 the plaintiff filed an amended particulars of claim. The main complaint by the defendants is that the amended particulars of claim do not address the findings of Janse Van Nieuwenhuizen J as these amendments constitute only superficial and cosmetic changes to the previous particulars of claim. This complaint caused the defendants to launch the present application in which they apply for an order declaring that the respondents' amended particulars of claim do not remove the excipiability of the original particulars of claim and should therefore be struck out.

[9] The plaintiff supports the opposite view. It contends that the amended particulars of claim address all the issues raised and had indeed removed the excipiability of the original particulars of claim as determined previously by this Court. It is also contended that the defendants have not established a case for a Rule 23(2) remedy and are merely repeating their argument for the concluded Rule 23(1) application.

THE MAIN ISSUES

[10] The parties prepared a joint practice note for the benefit of the Court. They identified the following issues to be determined:

> (a) whether the plaintiff's amended particulars of claim removed the excipiability of the original particulars of claim. If not, whether they should be struck out or not, and if so, whether absolution from the instance should be granted in favour of the defendants;
>
> (b) the regularity and correctness of the process followed by the defendants in the proceedings now before Court.

DISCUSSION

[11] I shall first consider the issue whether the plaintiff's amended particulars of claim removed the excipiability of the original particulars of claim. I shall thereafter, if necessary, consider the regularity and correctness of the process followed by the defendants in the proceedings now before Court.

THE AMENDED PARTICULARS OF CLAIM

[12] The first issue relates to the question whether or not there is compliance with the provisions of Rule 18(6) in the amended particulars of claim. The previous complaint was that the plaintiff failed to allege whether the conditions (agreement) were oral or in writing and when, where and by

whom it was concluded. The plaintiff also failed to annex a copy of the agreement, or that part thereof upon which the plaintiff relies, to the particulars of claim. It was then found that the averments in paragraph 12 of the particulars of claim are vague and embarrassing.

[13] In paragraph 12 of the amended particulars of claim the plaintiff now refers to the *"written agreements of the defendants' appointment"* as attorneys of record for the municipality. This paragraph should be read with the amended paragraphs 8 and 10. Amended paragraph 8 now includes a reference to *"copies of the appointment letter of 10 August 2006 and selected copies of the terms and conditions of the written agreement are annexed hereto marked 'SIU2' and 'SIU3', respectively".* In the amended paragraph 10 reference is also made to *"copies of the resolution of 23 June 2009 and selected copies of the terms and conditions of the written agreement thereby concluded for 2009 to 2012 are annexed hereto marked 'SIU4' and 'SIU5', respectively".*

[14] It therefore appears that there was at least substantial compliance with the provisions of Rule 18(6). Although it is not alleged where and by whom the written agreements were concluded, no real prejudice is caused to the defendants as they can later request further particulars in this regard, if necessary. I am therefore of the view that the complaint by the defendants with regard to this issue, has now been sufficiently addressed.

CLAIM 1

[15] The next issue relates to paragraph 13 under claim one. In her judgment the learned Judge points out that the plaintiff, in accordance with the appointment of the first defendant, instructed the *"defendants"* to render certain services. Bearing in mind that the municipality *"only had a contract with the first defendant",* it was found that *"it is unclear on what basis the (municipality) gave instructions to the second to fourth defendants".*

[16] In its answering affidavit it is alleged by the plaintiff that the defendants never raised this issue in their notice of exception and as a result it was also never argued before Janse van Nieuwenhuizen J. This is not denied by the defendants in their replying affidavit and these allegations appear to be correct.

[17] Furthermore, the plaintiff points out that in the particulars of claim the defendants, including the second and third defendants, were partners and directors of the first defendant. They practised under the name and style of the first defendant and as such they are jointly and severally liable, together with the first defendant (paragraphs 3 and 4 of the particulars of claim).

[18] It is also argued that the particulars of claim makes it clear that the auctioneering services for which the defendants were also appointed to provide, were provided through the fourth defendant, who is also a necessary and relevant party to be joined in these proceedings (paragraph 5 of the particulars of claim). Taking into account the allegation that the second defendant is also a member of the fourth defendant, the reference to *"defendants"* in paragraph 13 is, so it is contended, appropriate.

[19] I agree with these submissions made by the plaintiff. It seems to me that perhaps Janse Van Nieuwenhuizen J did not realise that this issue was never raised in the notice of exception. The allegations made in the particulars of claim, as pointed out by the plaintiff, makes it clear on what basis the municipality also instructed the second to fourth defendants. I am therefore of the view that there is not sufficient reason to conclude that the particulars of claim is for this reason only vague or embarrassing. I am also not convinced that the defendants will be seriously prejudiced even if I have misdirected myself in this regard. I am of the view that, if the particulars of claim is considered in its entirety, the position of each of the defendants have been made clear.

[20] The next complaint raised by the defendants relates to the conclusion

drawn in the first part of paragraph 16 as pleaded in the first particulars of claim. It was concluded by Janse Van Nieuwenhuizen J, if one has regard to the factual allegations in respect of the transactions, *"the conclusion drawn in paragraph 16 is perplexing".*

[21] In the amended particulars of claim a new paragraph 17 has been introduced. It is alleged that during the performance of their duties the defendants used their position or data that they obtained from the municipality, not only for the purposes of performing their contracted services, *"but for personal gain or to create another business for themselves, out of the same public tender process, without the employment of procurement* processes *contemplated in section 217 of the Constitution".*

[22] After having made these allegations, it is then concluded in paragraph 18 of the amended particulars of claim that, in the circumstances, the disposal of the described properties in the manner described, including the profits made, *"was unlawful, violated the principle of legality and is also in breach of* a *system of procurement contemplated in section 217 of the Constitution".* To make it even more clear, further reasons are provided in paragraph 18.1 to 18.8 why this conclusion has been drawn. Some of these reasons include allegations such as the defendants sold some of the surrendered properties *"either to themselves or others"* as well as that the defendants sold or disposed of the properties to themselves *"at below market value (and) subsequently resold them for* a *profit, for themselves."*

[23] Having considered the amended particulars of claim, I am of the view that the conclusion drawn in paragraph 18 thereof (paragraph 16 of the first particulars of claim) has been properly pleaded and motivated. These allegations are clear and there is nothing perplexing about them as now pleaded in the amended particulars of claim. Put differently, the cause of complaint has been properly addressed in the amended particulars of claim.

[24] I now move on to the next issue. In paragraphs 22 to 30 of the

judgment Janse van Nieuwenhuizen J discussed the 11 properties initially mentioned in the original particulars of claim. In each instance it is found that the allegations were either vague and embarrassing or did not disclose a cause of action. In the amended particulars of claim, two of the properties were deleted, being the properties mentioned in paragraphs [22] and [[....]] of the judgment. I shall now consider the complaints with regard to the remaining properties.

Henly-on-Klip, Erf [....]

[25] In paragraph 23.5 of the judgment it is pointed out that, having regard to the instructions to the first defendant to recover debts owed to the municipality, it is not clear whether the properties had to be disposed of *"solely to settle the debt"* owed by the ratepayer to the municipality, or whether the properties that were donated *"should have been sold for* a *profit"* to the benefit of the municipality. It was therefore concluded that the allegations pertaining to the sale of the donated property at auction is vague and embarrassing.

[26] I do not think that I am bound by this conclusion if I do not agree with it. It has been pointed out in the answering affidavit that one should read the particulars of claim as a whole, also taking into account the amendments which were made. In paragraphs 7 to 10 of the amended particulars of claim it is alleged that the first defendant was appointed, together with the other defendants, to render certain services to the municipality, including debt collection and auctioneering services. In paragraph 12 it is pleaded with reference to the written agreements of the defendants' appointment, that confidential information may not be used *"for personal gain by the defendants"* or their business or for any employee or subcontractor. Paragraph 13 makes it clear that in accordance with their appointment, the municipality instructed the defendants to make disposals of properties or recoveries, which included those surrendered or donated, *"for outstanding debts by ratepayers".* It is also pleaded that it was not part of the defendants'

appointment to purchase these properties or to use these properties for disposal to themselves.

[27] In paragraph 14 it is pleaded that a list of the affected properties for outstanding debts was prepared and furnished to the defendants to *"recover or dispose by sale at their correct and current values".* There appears to be no indication that these properties should be sold for a profit to the benefit of the municipality.

[28] Taking into account all these allegations in the amended particulars of claim, it appears to me that the purpose for the disposal of properties was to recover outstanding debts owed to the municipality by means of a disposal of these properties at their current values. It was not part of the defendants' appointment to dispose of these properties to themselves for personal gain.

[29] It is alleged in paragraph 15.1 of the amended particulars of claim that this particular property (Erf [....]) was surrendered by the owner thereof for *"outstanding debts for rates and taxes".* Again, there is no allegation that it should have been sold for a profit to the benefit of the municipality. I therefore conclude that the allegations pertaining to the sale of this particular property, are not vague and embarrassing and the complaint in this regard has been properly addressed.

Henly-on-Klip, Erf [....]

[30] In paragraph 25 of the judgment it was concluded that the allegations in respect of this property are also vague and embarrassing *"for the* reasons *set out in paragraph 20 supra".* However, I think the reference to *"paragraph 20 supra"* is perhaps a mistake as paragraph 20 of the judgment does not deal specifically with this property. It appears that the intention was to refer to paragraph 23 of the judgment as the circumstances relating to the sale of Erf [....] are similar to those pertaining to Erf [....]

[31] I have already dealt with a similar issue in paragraphs 25 to 29 above. The same reasoning is therefore also applicable to Erf [....]. In addition thereto, it is specifically pleaded in paragraph 15.2 of the amended particulars of claim that the owner of this property (Erf [....]) *"donated or surrendered"* this property due to *"an inability-to pay for the outstanding debts for rates and taxes".* Again, there is no indication that this property was intended to be sold for a profit to the benefit of the municipality. Taking into account the allegations made in the amended particulars of claim, I am therefore satisfied that the allegations pertaining to the sale of this particular property, are not vague and embarrassing.

Henly-on-Klip, Erf [....]

[32] In paragraph 26 of the judgment it is pointed out that this property was owned by the municipality and it is not clear whether the sale had to be by public auction or private treaty. It is then stated that if the property was to be sold at an auction, then the averments with regard to this property do not sustain a cause of action.

[33] Again, the amended particulars of claim must be read and considered in its entirety. In paragraph 13 of the amended particulars of claim it is clearly stated that it was not part of the defendants' appointment as agents of the municipality, to *"include purchasing these properties or for use their position to dispose these properties to themselves".* Paragraph 14 also makes it clear that these properties included *"those which it owned",* i.e. owned by the municipality.

[34] In paragraph 15.3 of the amended particulars of claim it is pleaded that this property became the property of the municipality by operation of law and that it was sold *"through* a *purported public auction ... to the fourth defendant"* for R85 000.00 instead of its current value. It is then alleged that the fourth defendant sold the property for a profit at R585 000.00.

[35] There is, in my view, nothing uncertain or vague and embarrassing about the allegations regarding the sale of this property. The point is clear, the affected properties included properties owned by the municipality and the defendants were not allowed to purQhase these properties themselves or to use their position to dispose of these properties to themselves. It is therefore irrelevant whether the sale took place by private treaty or public auction, as the property was allegedly sold to the fourth defendant, who resold it for a profit, which was not allowed. I am therefore satisfied that the complaint about this property is without any merit.

The Balmoral Estates, Erf [....]

[36] It is pointed out in the judgment that this property was sold to the fourth defendant for R800 000.00 who later resold the property for the same amount. No profit was made by the fourth defendant and therefore it was concluded that this paragraph lacks averments to sustain a cause of action.

[37] In the amended particulars of claim it is alleged that this property (which was the property of the municipality) was sold to the fourth defendant, without stating for which amount, who in turn resold it during the same year at R800 000.00. In paragraph 20 of the amended particulars of claim it is indicated in the schedule (columns A and B) that the market value of this property was R840 000.00. Taking into account all the relevant allegations, the implication is clear. The property was sold to the fourth defendant who resold it for R800 000.00 whereas the market value was R840 000.00.

[38] Again, the point is clear. It is alleged that the defendants were not allowed to purchase the affected properties themselves or to use their position to dispose of these properties to themselves. It is therefore, in my view, irrelevant whether this property was resold at a profit or not. The property was sold below its market value, whereas it is alleged in paragraph 14 of the amended particulars of claim that the properties should be disposed of *"at their correct and current values".* This the defendants allegedly failed to do.

Taking into account the amended particulars of claim in its entirety, I do not think that the complaint with regard to this property has any merit.

Bronkhorstspruit Farm No [....], Portion [....]

[39] In paragraph 28 of the judgment it is concluded that the averments in respect of this property are vague and embarrassing as it is not clear whether the previous owner owed the municipality any amount or whether the property was sold by private treaty or at an auction.

[40] The same answer is applicable to this property. According to the amended particulars of claim it is alleged that it was not part of the defendant's appointment, as agents of the municipality, to purchase the affected properties or to use their position to dispose of these properties to themselves. It is alleged that this property was sold, with no involvement by the Sheriff, to the second defendant for R10.00 who resold it for R200 000.00. The complaint is further that in paragraph 15.5 of the amended particulars of claim there is no allegation whether default judgment was obtained, whether the property was sold by private treaty or an auction and whether the property was donated to the municipality or not.

[41] In paragraph 15 (the introduction) of the amended particulars of claim it is alleged that *"during the currency of the defendants' appointment as agents"* of the municipality, the defendants proceeded to deal with some of the *"listed and described properties herein, in the following manner".* This property (Bronkhorstspruit Farm [....]) is then included in the list of properties described *"herein".* It is therefore clear that the defendants dealt with this property in their capacities as agents of the municipality and not in their private capacity with the owner thereof. It is further alleged that this property was sold by the defendants, with no involvement by the Sheriff, to the second defendant for R10.00 who resold it later for an amount of R200 000.00. The implication is clear. This property was part of the affected properties which had to be dealt with by the defendants in their capacities as agents of the municipality. It was

sold to one of

the defendants without the involvement of the Sheriff who later resold it for a profit, contrary to their mandate. In my view there is nothing vague and embarrassing about these allegations. A proper cause of action has been disclosed.

Bronkhorstspruit Farm No [....]. Portion [....]; Ironsyde [....]. Portion [....]; De Deur

Estates. Erf [....], Portion [….] and De Deur Estates [….], Portion [….]

[42] In paragraph 29 of the judgment it is stated that the averments in respect of these properties are, save for the amounts, the same as the averments in respect of the property in paragraph 25 of the judgment and are likewise vague and embarrassing. The property dealt with in paragraph 25 of the judgment is Henly-on-Klip, Erf [....] and as I understand the position, the same reasons set out in paragraph 23 of the judgment should also be regarded as applicable to these properties (see the explanation in paragraph 30 above).

[43] The essence of the complaint, as I understand it, is that the allegations are vague and embarrassing as it is not clear whether these properties had to be disposed of solely to settle the debt owed by the ratepayer or whether the properties that were donated should have been sold for a profit to the benefit of the municipality. The answer to this complaint is in substance the same as set out in paragraphs 25 to 29 above as well as the answer given in paragraphs 39 to 41 above (insofar as those explanations are *mutatis mutandis* applicable here). Furthermore, all these properties (mentioned in the subheading above) were allegedly sold by the defendants to the second defendant, without any involvement by the Sheriff, only to be resold for an enormous profit.

[44] Taking into account all the relevant allegations in the amended particulars of claim, it appears to me that the purpose for the disposal of these properties was to recover outstanding debts owed to the municipality by means of a disposal of these properties at their *"correct and current values".* It was not part of the defendants' terms of appointment to dispose of these properties to themselves for personal gain. I therefore conclude that the allegations pertaining to the sale of these properties, are not vague and embarrassing and that the complaint in this regard has been properly addressed.

CLAIM 2

[45] In paragraph 31 of the judgment it was concluded that Claim 2 in itself causes an embarrassment as the same amount is claimed in claim 2, but Claim 2 is not formulated in the alternative.

[46] In paragraph 21 of the amended particulars of claim it is now clearly indicated that Claim 2 is in the alternative to Claim 1. There is therefore no longer any uncertainty about the status of Claim 2 as this complaint has been properly taken care of.

[47] In paragraph 32 of the judgment it is pointed out that the contents of paragraphs 1 to 15 are repeated under Claim 2 (in the alternative) and therefore the same complaints referred to above, also apply in respect of paragraphs 13, 14 and 15. This complaint is, as I understand it, a repeat of what has been stated with regard to the same paragraphs under Claim 1.

[48] The short answer to this complaint is also a repeat, *mutatis mutandis,* of what has been stated *above* with regard to these paragraphs without repeating the contents thereof.

[49] Finally, in paragraph 33 of the judgment it is pointed out that the plaintiff's cause of action is based on the *"breach of a fiduciary duty the*

defendants allegedly owed" to the municipality and without averring in which manner the defendants breached their fiduciary duty in respect of each of the transactions listed in paragraph 15, it is difficult to grasp on what basis the defendants are liable to pay the amount as claimed to the plaintiff.

[50] In paragraphs 22.1 to 22.4 the manner in which the defendants breached their fiduciary duty is clearly pleaded. In this regard it is alleged that the defendants:

> (a) sold to themselves the listed properties described in paragraph 15 at below market-related values;
>
> (b) resold the said properties from which they secretly made a profit for themselves;
>
> (c) unlawfully disposed of the properties in contravention of the applicable legislation;
>
> (d) unlawfully acquired and sold, at below market-related values, these properties and thereby deprived the municipality of the opportunity to dispose of the properties at the correct market value.

[51] Taking into account these. allegations, I am satisfied that the manner in which the defendants allegedly breached their fiduciary duty has been property pleaded. I am therefore of the view that there is no merit in this complaint. In the result the application should be dismissed with costs. In view of my conclusion, it is no longer necessity to consider and decide the second main issue referred to in paragraph 10(b) above.

ORDER

I make the following order: the application is dismissed with costs to be paid by the defendants (applicants in the application) jointly and severally.

D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA

Application heard:	2 June 2022
Judgment delivered:	23 August 2022
Counsel for applicant$:	Adv SO Maritz
instructed by	Sanet de Lange Inc
Counsel for respondent:	Adv VP Ngutshana
Instructed by	State Attorney

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