

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: 2311/2019

In the matter between:

TSHENOLO RESOURCES (PTY) LTD

Applicant

and

**NGAKA MODIRI MOLEMA
DISTRICT MUNICIPALITY**

Respondent

DATE OF HEARING	:	30 OCTOBER 2020
DATE OF JUDGMENT	:	06 NOVEMBER 2020
FOR THE APPLICANT	:	ADV. SCHOLTZ
FOR THE RESPONDENT	:	ADV. ZWIEGELAAR

ORDER

- (i) The exception is dismissed.**
- (ii) The defendant is ordered to pay the costs of the exception on a party-and-party basis on the High Court scale.**
- (iii) The defendant must file its plea to the plaintiff's particulars of claim within ten (10) days from date of this order.**

JUDGMENT

HENDRICKS DJP

- [1] The plaintiff and the defendant entered into a contract for water supply and the equipment of boreholes and reticulation. The plaintiff allege that it duly complied with the terms of the agreement and submitted tax invoices for the work done. The defendant failed to pay. A letter of demand was issued followed by a summons. The defendant filed a notice of intention to oppose and an exception to the plaintiff's particulars of claim. In its exception, the defendant raise six (6) grounds of complaint and allege that the plaintiff's particulars of claim fails to establish a cause of action.

[2] Rule 23 (1) of the Rules of Court stipulate

“23 (1) Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms or paragraph (f) of sub rule (4/5) of rule 6: Provided that where a party intends to take an exception that a pleading is vague, and embarrassing he 'shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within 10 days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception.

(2)...

(3)...

(4) Wherever any exception is taken to any pleading or an application to strike out is made, no plea, replication or other pleading over shall be necessary.”

[3] In **Barclays National Bank Ltd v Thompson** 1989 (1) SA 547 (A), at 553 F – H the following is stated:

“It seems clear that the function of a well-founded exception that a plea, or part thereof, does not disclose a defence to the plaintiff's cause of action is to dispose of the case in whole or in part. It is for this reason that exception cannot be taken to part of a plea unless it is self-contained, amounts to a separate defence, and can therefore

be struck out without affecting the remainder of the plea (cf Salzmänn v Holmes 1914 AD 152 at 156; Barrett v Rewi Bulawayo-Development Syndicate Ltd 1922 AD 457 at 459; Miller and Others v Bellville Municipality 1971 (4) SA 544 (C) at 546). It has also been said that the main purpose of an exception that a declaration does not disclose a cause of action is to avoid the leading of unnecessary evidence at the trial: Dharumpal Transport (Pty) Ltd v Dharumpal 1956 (1) SA 700 (A) at 706. Save for exceptional cases, such as those where a defendant admits the plaintiff's allegations but pleads that as a matter of law the plaintiff is not entitled to the relief claimed by him (cf Welgemoed en Andere v Sauer 1974 (4) SA 1 (A)) an exception to a plea should consequently also not be allowed unless, if upheld, it would obviate the leading of 'unnecessary' evidence."

- [4] In order to disclose a cause of action, the plaintiff's pleading must set out 'every fact (material fact) which it would be necessary for the plaintiff to prove, if v traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.

- [5] In **Nel and Others NNO v M^c Arthur and Others** 2003 (4) SA 142 (T) the following is stated on page 149- F:

"Other general principles that apply (and it appears to be common cause between the parties that these principles would apply), is

that, in order for an exception to succeed, it must be excipiable on every interpretation that can reasonably be attached to it. See First National Bank of Southern Africa Ltd v Perry NO and Others 2001 (3) SA 960 (SCA) at 965D. Further, that a charitable test is used on exception, especially in deciding whether a cause of action is established. The pleader is also entitled to a benevolent interpretation. The pleadings must be read as a whole, no paragraph can be read in isolation. First National Bank of Southern Africa Ltd v Perry NO and Others (supra at 972 I – J). Conclusions of law need not to be pleaded. Bound up with the last-mentioned consideration, is the fact that certain allegations expressly made may carry with them implied allegations, and the pleading must then be so read.”

See: The Civil Practice of the High Court of South Africa, Fifth Edition, by Cilliers *et al*/ page 638 – 641.

[6] The six (6) grounds as bases for the exception are:

- (i) no proof has been attached to the particulars of claim that the plaintiff is in business rescue;
- (ii) the plaintiff has not alleged that it duly complied with the further contractual conditions of the contract;
- (iii) the plaintiff does not specify whether the agreement to retain 10% of the monies was a written or oral agreement;
- (iv) no final completion certificate had been issued and the claim will only become due and payable 14 days after the expiry of the defects liability period of the contract;

- (v) the plaintiff charges Value Added Tax (VAT) at 15% whilst the correct applicable rate of VAT, during the execution of the contract, was 14%
- (vi) the tax invoices were issued to a wrong entity namely Ngaka Modiri Molema Makgokgwane instead of Ngaka Modiri Molema District Municipality.

Not all of these grounds for exception were persisted with. Emphasis were placed on grounds (iv) and (v) during oral submissions by counsel who acted on behalf of the excipient (defendant).

[7] In the particulars of claim, the plaintiff specifically state that the relationship between the parties, as per paragraph 2 of the Letter of Acceptance, is governed by the General Conditions of Contract for Construction Work (Second Edition) (2010) (the GCC), of which a copy is attached. The contents thereof must be read into the particulars of claim as if specifically pleaded. This, together with the Letter of Acceptance constitute the contract between the parties. The attachment of a copy of the GCC and the Letter of Acceptance to the particulars of claim is what is required of a plaintiff, whose claim is based on contract.

[8] Where an exception is raised based upon the fact that no cause of action is disclosed, the particulars of claim has to be looked at

holistically. It must be clear that on every possible interpretation, the averments made does not disclose any cause of action for it to be alleged in the particulars of claim.

[9] The particulars of claim are in my view very detailed. It is detailed to such an extent that some of the most important terms of the contract are specifically mentioned although reference is made to the contract itself and it is pleaded that it be specifically read into the particulars of claim. The most important averments are contained in the particulars of claim and it does disclose a cause of action.

[10] With regard to the six (6) grounds as basis for the exception, the defendant (excipient) can plead thereto. The fact that the plaintiff is under business rescue can be pleaded or even a special plea can be raised in this regard. So too, can it be pleaded that there is no compliance with the further contractual conditions of the agreement. If it is denied that there was any agreement that 10% of the monies be retained as retention money, same can be pleaded. So too, can it be pleaded whether or not such an agreement, if it is admitted that it exist, was verbal or in writing.

[11] The submission of a final completion certificate is a matter of evidence. If the defects liability period has not expired, and the 14-day period is still running, same can be pleaded. It can easily be

pleaded that the claim had not become due and payable as the period has not lapsed. The issue with regard to the applicable rate of VAT to be charged, can also be pleaded. Lastly, if so much is made of a correct name, it can also be pleaded that the incorrect name and entity is addressed on the tax invoices. This perhaps despite the fact that other invoices may well have been paid although the name is different. This is a matter for evidence.

[12] I am not convinced that the particulars of claim, as pleaded, does not disclose a cause of action. I am of the view that it does and that it is not excipiable. To reiterate, it is not necessary that evidence be pleaded in the particulars of claim. In my view the exception must be dismissed. There is no plausible reason why costs should not follow the result and be awarded in favour of the plaintiff. In order to expedite the matter, it must be ordered that the defendant file its plea within ten (10) days from the date of this order.

Order

[13] Consequently, the following order is made:

- (i) The exception is dismissed.**
- (ii) The defendant is ordered to pay the costs of the exception on a party-and-party basis on the High Court scale.**

- (iii) The defendant must file its plea to the plaintiff's particulars of claim within ten (10) days from date of this order.**

**R D HENDRICKS
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG**