IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO.: 2684/2022

Reportable	**YES/NO**

In the matter between:

EMALAHLENI LOCAL MUNICIPALITY **PLAINTIFF**

And

DR SITEMBELE WISEMAN VATALA **FIRST DEFENDANT**

GERALD PATRIC DE JAGER **SECOND DEFENDANT**

JUDGMENT

CENGANI-MBAKAZA AJ:

Introduction

[1] The plaintiff ('the municipality') instituted a civil action against the defendants suing them for damages in the amount of R7 567 503, allegedly suffered as a result of the defendants' negligence.

[2] On 25 October 2022, the first defendant's attorney, through a correspondence raised an exception requesting the plaintiff's attorney to remove the cause of complainant. The plaintiff failed to heed to the request.

[3] The first defendant approached this court alleging that the plaintiff's particulars of claim lack the necessary averment to sustain a cause of action; and the allegations are vague and embarrassing.

[4] The exception is opposed by the plaintiff.

The summary of the plaintiff's particulars of claim

[5] On or about 26 June 2013, the first defendant was appointed by the plaintiff as a Municipal Manager and Accounting Officer. In terms of his contract of employment, he was statutorily bound not to incur unauthorised, irregular or fruitless and wasteful expenditure as defined in the Municipal Finance Management Act 56 of 2003 (MFMA). In terms of section 1 of the MFMA, fruitless and wasteful expenditure would mean the expenditure that had been made in vain, the kind of expenditure that would have been avoided had reasonable care been exercised.

[6] On or about 12 August 2017 Ms Xolelwa Mangayi (Ms Mangayi) instituted a civil action against the municipality suing it for the claim consequent to electrocution at the municipality's sub-station. Ms Mangayi claimed an amount of R3 420 000. The municipality's attorney presented an offer to the first defendant advising him to settle the matter. The first defendant without any reasonable explanation or expert advice delayed and/or refused to settle the claim and thus acted deliberately or negligently. As a consequence of the delay, the matter proceeded to trial and the municipality was ordered to pay

Ms Mangayi an amount of R10 567 503 plus an additional amount of R7 567 503.

[7] The municipality avers that the first defendant had no reason to actively or passively delay the process of settling the matter which delay culminated to a court order for a higher amount than the one offered by the municipality. At paragraph 5.4 of the particulars of claim, the municipality asserts that:

> '5.4 Even the findings of the Forensic Investigation into this matter conducted on 4 January 2021 found that there was a fruitless and wasteful expenditure negligently caused by the First and Second Defendants.'

The applicable law

[8] An exception is governed by Uniform Rule 23 of the Uniform Rules of Court[1]. Generally, a pleading must comply with the provisions of Uniform Rule 18[2], failing which such pleading may be considered vague and embarrassing. In

[1] Uniform Rule 23 of the Uniform Rule of court provides, '(1) Where any pleading is vague and embarrassing, or lacks averments which are necessary to sustain an action or defence, as the case maybe, the opposing party may within the period allowed for filing any subsequent pleading, deliver an exception thereto and may apply to the registrar to set it down for hearing within 15 days after the delivery of such exception: Provided that:

> *(a)* **where a party intends to take an exception that the pleading is vague and embarrassing such party shall, by notice, within 10 days of the receipt of the pleading afford the party delivering the pleading, an opportunity to remove the cause of complainant within 15 days of such notice; and**
>
> *(b)* **the party excepting shall, within 10 days from the day on which the reply to the notice referred to in paragraph *(a)* is received, or within 15 days of such reply is due, deliver the exception'.**

Minister of Police v Kati[3], Tokota ADJP, in relation to the drafting of the pleadings remarked as follows:

> 'Drafting of pleadings is a matter of style. However, whatever style one adopts, the pleadings must be clear and concise with a measure of brevity to enable the opposite side and the court to understand what case, if any, calls for an answer. Allegations of a repetitive and contradictory nature can be swept aside in a whirlwind of anarchy and often obfuscate rather than clarify issues and may result in erratic judgments. Brevity lubricates the wheels of justice.'

[9] The Appellate Division in *McKenzie v Farmers' Co-operative Meat Industries Ltd*[4] *adopted* the following definition of "cause of action':

> '. . . every fact which it would be necessary for the plaintiff to prove, if 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.'

[10] The test applicable in deciding exceptions based on vagueness and embarrassment arising out of lack of particularity can be summed up as follows[5]:

> '(a) In each case the court is obliged to consider whether the pleading does lack particularity to an extent amounting to vagueness. If a statement is vague, it can either be meaningless or capable of having more than one meaning. To simplify: the reader must be unable to distil from the statement a clear, single meaning[6].

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[2] Rule 18(4) 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, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.

(6) A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.

[3] *Minister of Police v Kati* (CA 15/2024) [2024] ZAECMHC 26 (15 May 2024) at para 1.

[4] 1922 AD 16 at 23.

[5] Erasmus Uniform Rules of Court October 2023 RSD 21,2023, D1-305.

(b) If there is vagueness in this sense the court is then obligated to conduct a quantitative analysis of such embarrassment caused to the excipient by the vagueness complained of.

(c) In each case an ad hoc ruling must be made to determine whether the embarrassment is so serious as to cause prejudice to the excipients if they are compelled to plead to the pleading in the form to which they object. A point 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.

(d) The ultimate test as to whether the exception should be upheld is whether the excipient is prejudiced.

(e) The onus is on the excipient to demonstrate both vagueness amounting to embarrassment and embarrassment amounting to prejudice.

(f) The excipient must make out his case for embarrassment by reference to the pleadings alone[7]…..'

The parties' legal submissions and the analysis by the court

[11] Regarding embarrassment and vagueness of the pleadings, the first defendant argued that the municipality does not specify the time period when its attorneys presented the first defendant with a settlement proposal of R3 000 000 for a claim made by Ms Mangayi. The particulars of claim do not disclose a cause of action, in that the municipality does not specify when the court order was made in the case between it and Ms Mangayi. The times that are relevant to the alleged losses are not specified. Furthermore, the municipality, so it was argued, alleges the existence of a forensic report in paragraph 5.4 of its particulars of claim but fails to annex same. The first defendant prayed that the exception be upheld, and that the municipality's claim be dismissed with costs.

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[6] *Venter and Others NNO v Barritt Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) paras [14] and [15] at 644G-645.

[7] *Deane v Deane* 1955 (3) SA 86 (N) at 86F.

[12] To oppose the exception, the municipality referred to the provisions of Section 176 (2) of the MFMA which provides,

> '(2) Without limiting liability in terms of the common law or other legislation, a municipality may recover from a political office bearer or official of the municipality, any loss or damage suffered by it because of the deliberate or negligent unlawful actions of that political office bearer or official when performing a function of office.'

[13] The first defendant was appointed as an Accounting Officer during the period 2013 to 2019, so it was argued, he failed to prevent the wasteful expenditure; and the municipality suffered harm as a direct result of the first defendant's failure to fulfil his statutory obligations.

[14] The question pertains to whether the first defendant have discharged the onus to demonstrate vagueness and embarrassment as well as whether the embarrassment (if any) amounts to prejudice[8]. I am also tasked to ascertain whether the first defendant has established that no cause of action was disclosed. In order to fully assess these issues, I will accept as true the allegations pleaded by the plaintiff in the particulars of claim. In this regard, I am encouraged by the remarks made by Navsa JA in *Hlumisa Investment Holding RF ltd and Another v Kirkins and Others*[9], where he held as follows:

> '[22] In deciding an exception a court must take the facts alleged in the pleading as being correct. It is for the recipient to satisfy the court that the conclusion of law set out in the particulars of claim is unsustainable. The court may uphold the exception if it is satisfied that the cause of action or conclusion of law cannot be sustained on every interpretation that can be put on those facts. As Harms JA

[8] *Venter* fn2 (supra); see also *Barnard and Another v De Klerk* (2015)/2019) [2020] ZAECPEHC 38 (22 October 2020).

[9] 2020 (5) SA 419 (SCA) at 432 para 22.

> noted in Telamatrix, exceptions are a useful tool to 'weed out' bad claims at an early stage and an unnecessary technical approach is to be avoided. The facts are what must be accepted as correct, not the conclusion of law.' (my underlining)

[15] The fact that the first defendant was employed as a Municipal Manager between the years 2013 to 2019 is uncontroverted. The substance of the allegation is such that the first defendant is able to know whether during the period in question he was negligent or not. In my considered view, the issue of dates is a minor obscurity that can be cleared up by way of further particulars. I find that the particulars of claim contain a clear and concise statement of the material facts upon which the municipality relies for its claim. For the reasons set out above, the first defendant is able to plead to the plaintiff's particulars of claim and no prejudice could be identified. Resultantly, the first defendant has failed to make out a case for the relief sought.

Order

[16] The exception is dismissed with costs.

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N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES:

For the Plaintiff : Adv: Tshabalala

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Date heard	:	**18 April 2024**
Delivered on	:	**24 May 2024**