THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2022/21904

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

_____
DATE

_____
SIGNATURE

In the matter between:

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	First Plaintiff/Respondent
TREVOR GEORGE FOWLER N.O.	Second Plaintiff/Respondent
FELICIA MSIZA N.O.	Third Plaintiff/Respondent
ELIA LOUW NEL N.O.	Fourth Plaintiff/Respondent
TEBOGO SOLOMON STEPHEN MALATJI N.O.	Fifth Plaintiff/Respondent
CHARLES JOHN WRIGHT N.O.	Sixth Plaintiff/Respondent
MAHOMED ABDOOL KHALEK VAWDA N.O.	Seventh Plaintiff/Respondent
MTHAWELANGA WEBSTER MFEBE N.O.	Eighth Plaintiff/Respondent
RICHARD CHRISTOPHER DAVIES N.O.	Ninth Plaintiff/Respondent

and

AVENG (AFRICA) PROPRIETARY LIMITED First Defendant

GRINAKER-LTA BUILDING AND CIVIL ENGINEERING PROPRIETARY LIMITED Second Defendant/Excipient

LAULA ENGINEERING AND INFRASTRUCTURE GROUP PROPRIETARY LIMITED Third Defendant

---

JUDGMENT

VAN EEDEN, AJ

1. The first plaintiff is the Government of South Africa and the remaining plaintiffs are trustees of a trust. On 21 June 2022 the plaintiffs instituted action proceedings for payment of a large amount against the first defendant (**"Aveng"**), alternatively the second defendant (**"Grinaker"**) and third defendant (**"Laula"**). Grinaker has taken an exception against the plaintiffs' particulars of claim as amended.

2. The Competition Commission received complaints of collusion and initiated investigations into the construction industry in 2009. These investigations culminated in a written settlement agreement concluded between the government and Aveng during 2016. The settlement agreement placed an obligation upon Aveng to annually contribute an amount of R21 250 000,00 to an aggregate contribution of R255 000 000,00. It made payment of the first three instalments but thereafter failed to make payment. The last payment was made during 2018.

3. During 2019 Aveng announced that its wholly owned subsidiary had entered into a binding sale of business agreement with the Laula Consortium for the sale of the Grinaker-LTA Building and Civil Engineering business. This transaction became effective during November 2019. Pursuant to this transaction, Aveng purported to assign its obligations to make payment in terms of the settlement agreement to Grinaker-LTA which, in turn, purported to assign such obligations to Laula Engineering and Infrastructure. Aveng consequently disputes its liability to make further payments in terms of the settlement agreement.

4. The plaintiffs face a position where Aveng contends that it had validly assigned its obligations in terms of the settlement agreement to Grinaker, the second defendant. The pleadings reveal that a second assignment from Grinaker to Laura, the third defendant, took place. In its plea the latter admits that the assignment to it took place. The plaintiffs dispute the validity of the first assignment. The validity of the second assignment is consequently also in dispute. Thus, in the first claim the plaintiffs seek to hold Aveng liable in terms of the settlement agreement. The plaintiffs also seek to hold the second and third defendants liable in the alternative to the first claim for their purported indebtedness under the settlement agreement on the grounds of the two assignments already referred to.

5. In formulating the claim against Grinaker and Laula, the plaintiffs make *inter alia* the following allegation:

"49A The plaintiffs deny that validity of the purported assignment of the obligations under the Settlement Agreement from Aveng to Grinaker-LTA and/or from Grinaker-LTA to Laula Engineering and Infrastructure. However, given the express reliance of the defendants upon the validity of such assignment(s), the plaintiffs cannot disregard the possibility that this Court may find that the first assignment is, or both assignments are, valid and enforceable."

6. Grinaker excepts to the particulars of claim as amended. There are three separate but interlinked exceptions, which may be summarised as follows:

6.1. The plaintiffs' entire pleading cause of action and claim is based upon allegations that there had not been a valid assignment of Aveng's obligations in terms of the settlement agreement and that Aveng consequently remains liable thereunder. The plaintiffs' claim against Aveng is predicated upon a finding by the court that there has not been a valid assignment by Aveng to Grinaker of its future payment obligations and/or to Laula. However, it complains that there are no or insufficient allegations upon which the plaintiff may contend that there is even a possibility of such a finding being made by the court. Grinaker claims that it is embarrassed thereby and that it does not know on what basis the plaintiffs contend it may have become liable to them by virtue of any form of unparticularised valid assignment.

6.2. The second exception is that the first exception is compounded and exacerbated by the phrase *"purported to assign"* in paragraph 49.2

of the amended particulars of claim. In paragraph 49A the plaintiffs expressly deny the validity of the purported assignment of the obligations under the settlement agreement from Aveng to Grinaker and/or from Grinaker to Laula. The complaint is that the plaintiffs then contradictorily allege that they *"cannot disregard the possibility that this Court may find that the first assignment is or both assignments are, valid and enforceable."* Grinaker complains that the allegation is *"simply insufficient to found or sustain an action"* against it and that it is *"in any event embarrassed thereby and does not know whether the plaintiffs' case is that such 'purported assignment' was valid or not"*. If it was valid, there are insufficient allegations in the particulars of claim upon which such a finding of validity could be made. If it was not valid, then the plaintiffs have no cause of action or claim against the second defendant.

6.3. The third exception repeats that paragraph 49.2 of the particulars of claim refers to a *"purported assignment"* to Laula. Again Grinaker claims embarrassment and states it does not understand the basis upon which the plaintiffs may seek to hold it liable and points out that the various items of correspondence attached to the amended particulars of claim reflect an acceptance of an assignment to Laula. It claims that it is embarrassed by the aforegoing and that it does not understand on what basis the plaintiffs have joined it to the action.

7. Grinaker's grounds for complaint are located in the plaintiffs' manner of pleading the alternative claim against the second and third defendants. It does not accept that this manner of pleading constitutes positive averments leading to potential liability on the part of the second and third defendants in the alternative to the main claim, as the validity of the assignments is still denied.

8. The obligation to effect payment in terms of the settlement is hidden in the assignments concluded by the three defendants. That is so, because the settlement agreement was concluded by the first defendant, who claims that it is no longer liable to effect payment in terms of the settlement agreement following a valid assignment to the second defendant. This is what makes the second defendant possibly liable if the court should find that the first claim is not good. Aveng has not provided the contract between it and Grinaker to the plaintiffs and whether the assignment relied upon is good, remains a question. The correspondence referred to reflect a contention that the second defendant effected a valid assignment to the third defendant and the third defendant admitted the validity of that assignment in its plea. This is what makes the third defendant potentially liable to the plaintiffs. It is clear to me that if the plaintiffs are not successful against the first defendant, they may be successful against the second defendant if the first assignment was valid, but the second assignment invalid. In this regard it should be kept in mind that the third defendant admits that the first assignment could not and did not discharge any past liability legally and validly accrued to Avenge under the settlement agreement, meaning that it denies liability for same in terms of the second assignment.

9. The validity or otherwise of the two assignments can only be determined in the trial. It was submitted that the plaintiffs must allege as a fact that the second assignment did not take place and that the plaintiffs cannot do so in the face of the pleadings of the first and third defendants. It was also submitted that the plaintiffs cannot lead evidence to contradict the admission that the second assignment validly took place. The complaint is also based on the plaintiffs' failure to make the positive averment in the alternative that a valid assignment took place from the first to the second defendant, but not from the second to the third defendant.

10. On my reading of the particulars of claim, the cause of action against the second defendant is an alternative claim which will only become relevant if the first claim against the first defendant is not upheld. If it should then transpire that there was no valid second assignment, the obligation to effect payment in terms of the settlement agreement will rest with the second defendant. It does not seem to me that this manner of pleading is prejudicial to the second defendant. The fact that it will be required to go through a trial where the payment obligation may still be with the first defendant, or where it may have validly been assigned to the third defendant, is not prejudice in my view. The three defendants have a privity of interest in the two assignments, with the second defendant being in the middle. I agree with counsel for the plaintiffs that all three defendants should consequently be before court. The complaint that the amended particulars of claim are vague and embarrassing and/or lack averments necessary to sustain an action against the second defendant cannot be sustained.

11. In the premises I make the following order:

11.1. The exception is dismissed.

11.2. The excipient is ordered to pay the costs, including costs of two counsel.

_____

H VAN EEDEN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Counsel for Respondents/Plaintiffs: Adv Michael van der Nest SC and Adv Danie J Smit
Instructed by: Werksmans Attorneys

Counsel for Excipient/Second Defendant: Adv Bruce Berridge SC
Instructed by: Herbert Smith Freehills

Date of hearing: 17 July 2023

Date of judgment: