

IN THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 74422/16

(1) REPORTABLE: YES / NO *AB*

(2) OF INTEREST TO OTHER JUDGES: YES / NO *Q*

(3) REVISED

22/02/2019

DATE

A. Anches

SIGNATURE

In the matter between:

BRONDEV DEVELOPMENTS (PTY) LTD

1st PLAINTIFF

QUADROTUND (PTY) LTD

2nd PLAINTIFF

And

CITY OF TSHWANE METROPOLITAN

DEFENDANT

MUNICIPALITY

JUDGMENT

A E ANDREWS, AJ:

[1] In this matter the plaintiffs (excipients) except to the defendant's (respondent's) special plea and plea on the basis that both are vague and embarrassing.

[2] The background to the matter is that plaintiffs were established with the sole purpose of developing two townships and eventually did so, establishing the two townships known as Bronberg Extension 6 and Bronberg Extensions 2 respectively. (Referred to in the particulars of claim as Brondev Extension 6 and Brondev Extensions 2)

[3] The plaintiffs issued summons claiming the rendering of full accounts by the defendant regarding the calculation of amounts to be reimbursed to them arising from external services installed by them for the townships Bronberg Extensions 2 and 6. Also claimed was debatement of the accounts within 45 days after the date of the order and the reimbursement of the plaintiffs of the calculated amounts within 60 days of the debatement of the accounts.

[4] The defendant filed a special plea and also a plea. The plaintiff has excepted to both.

The special plea

[5] The special plea states that the plaintiffs' claim is unenforceable on the following grounds:

- a. The plaintiffs do not have an account with the defendant;
- b. Even if they did there is no fiduciary duty on the defendant to deliver the statement of account to the plaintiffs;
- c. The defendant is not contractually bound to provide the plaintiffs with the statement of account nor to debate such statement thereof; and
- d. There is no statutory duty obliging the defendant to deliver and debate the statement of account.

[6] In addition the special plea states that the particulars of claim do not inform the defendant of the alleged agreement and there is no causal link between the relief sought and the allegation of the conclusion of an agreement. There is also no claim of a breach of the alleged agreement. There is no record of the plaintiffs having an account with the defendant or attempting to open an account. There is also no clarity as to what kind of account the plaintiffs wish to be provided with.

[7] The special plea therefore denies the factual and legal basis of the claim as well as claiming that the particulars of claim lack allegations to sustain a cause of action.

[8] The plaintiffs excepted to both the special plea and plea on the basis that said pleadings are vague and embarrassing. As stated in plaintiffs' first cause of

complaint, they cannot ascertain whether the defendant in its special plea wishes to raise an exception on the basis that the particulars of claim lack averments to sustain a cause of action, or whether it wishes to raise a denial of the factual averments therein which if proved at the trial would result in the plaintiff's case being successful. In the premises it was argued that the special plea is vague and embarrassing. Plaintiffs argued that a true special plea requires a replication and it is usually dealt with at trial. The lack of clarity in the defendant's special plea has resulted in the plaintiffs facing a quandary as they do not know whether to proceed and file a replication or to follow the procedures set out in rule 23.

[9] Secondly, the plaintiffs raised a complaint that neither an exception nor a denial of allegations can be raised in a special plea. In the premises it was argued that the special plea is irregular.

[10] The defendant failed to remove the complaints canvassed in the plaintiffs' exception and did not file heads of argument until the court appearance.

[11] At the hearing Mr Pretorius, for the plaintiffs, argued that they are prejudiced as it is impossible for the plaintiffs to react and meet the defendant's case. An exception is argued on the pleadings whereas a special plea may require the leading of evidence.

[12] Mr Vorster, for the defendant argued that the plaintiff's particulars did not set out the basis upon which they would be entitled to debate the account and therefore such pleadings lack allegations to sustain a cause of action. Reference was made to the judgment in *ABSA Bank Bpk v Janse Van Rensburg*, 2002(3) SA 701 (SCA) where the court made it clear that, in order to obtain an order to debate an account, the person seeking such an order must establish that a fiduciary relationship existed between that person and the other party, or that there was a contractual agreement between them that this would occur, or that a statutory provision created such an obligation. *Ex facie* the pleadings – and, more especially, the deceased's own particulars of claim – none of these requirements was met.

[13] Mr Vorster argued that the defendant was entitled to raise this issue by way of an exception or at trial by way of a special plea. Reference was made to the case of *Moila v City of Tshwane Metropolitan Municipality* (249/2016 [2017] ZASCA 15 (March 2017) where the municipality in effect, took a point *in limine* to the effect that on the facts as pleaded, the plaintiff had no right, in law to debate the account. In this case it was held that the municipality's point of law relates to the facts, as pleaded. In his particulars of claim, the deceased did not set out the basis upon which he would have been entitled to debate the account.

[14] In the present case, it was further argued that (notwithstanding the inelegant special plea), the plaintiffs can in fact ascertain from it what the appropriate course of action would be. They can amend their particulars of claim to address the complaint

of the failure to disclose a cause of action and they can prepare for trial on the merits.

[15] In response Mr Pretorius argued that defendant was in effect arguing an exception without having followed the rules for exceptions.

[16] For the exception to be upheld, the onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice. (*Erasmus Superior Court Practice* 2ed at D1- 300 service 4).

[17] If the contested pleading is capable of being rectified by way of an amendment by the plaintiff, then no real prejudice has been suffered by it. The defendant has made out a case that the embarrassment caused by the pleading could have been addressed by the plaintiffs through an amendment to their particulars of claim and therefore the complaint regarding the special plea is not sufficient to found a successful exception.

[18] The exception relating to the special plea is therefore dismissed.

Defendant's plea

[19] The plaintiff excepted to the defendants plea on the basis that it is contradictory therefore vague and embarrassing.

[20] Defendant's plea to paragraphs 10 and 11 of the plaintiff's particulars of claim is a denial of any agreement entered into by it, or its erstwhile predecessors, with the plaintiffs. These paragraphs of the particulars of claim deal with agreements in terms of section 117 and 121 of the Town Planning and Townships Ordinance 15 of 1986 (the Ordinance) pertaining to Bronberg Extension 6 and Bronberg Extension 2, developments mentioned in paragraphs 4 to 8 of the particulars of claim.

[21] Section 117 relates to the classification of engineering services by agreement between the local authority and an the owner of the land who is not a local authority (referred to as the applicant). Section 121 deals with the agreement for the applicant to pay a contribution for external services provided by the local authority. The plea denies that this agreement took place.

[22] Defendants plea to paragraphs 13 and 14 of the particulars of claim is it is "not aware of any agreement entered into by its erstwhile predecessor and the plaintiffs." This suggests that the said agreements might exist, the defendant is just not aware of them.

[23] The particulars of claim in paragraph 13 describe further arrangements relating to amongst others, "the issues regarding to which the first plaintiff and defendant had to come to an agreement in terms of the stipulations of section 117 and 121 of the ordinance referred to in paragraph 8 above." These arrangements are therefore averred by plaintiff to be part of or an extension of the initial agreement

described in paragraphs 10 and 11. It follows that if the arrangements described in paragraph 13 and 14 took place, the agreement described in paragraphs 10 and 11 must exist.

[24] Paragraph 13 and 14 describe arrangements for the plaintiffs to provide the external services where the local authority concerned was the Kungwini Local Municipality. In the order of this court under case number 4234/2005 dated 13 September 2007, reference is made to the first plaintiff having provided external services to Bronberg Extension 6.

[25] The defendant's denial of the existence of the agreement referred to in paragraph 10 and 11 must imply that no further agreements or arrangements such as are described in paragraphs 13 and 14 could have existed either.

[26] The defendant's averment that it has no knowledge of the subsequent developments is inconsistent with the earlier denial and is contradictory thereto. It suggests that such further agreements could exist, the defendant just does not know about them.

[27] The plaintiff complains in paragraph 11 of the exception to the plea that:

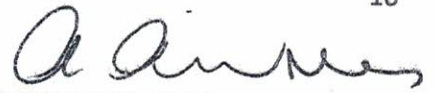
"if it is the defendant's case that the parties never entered into an agreement it would be allowed during the trial to adduce evidence to that effect. However if it is the

defendant's case that it does not have knowledge of any agreement it would not be allowed at the trial to adduce evidence that the parties never entered into an agreement. In other words, in the last scenario the defendant will not be allowed to contradict any evidence adduced by the plaintiffs of the existence of the alleged agreement. It is therefore essential for the plaintiffs to know what the defendant's case is in this regard"

[28] This argument by the plaintiff has merit. The contradictory averments made by defendant are not pleaded in the alternative and result in the plaintiff not knowing what case the defendant is advancing and hence not being in a position to meet the defendant's case. The plea is contradictory in a material respect and is therefore embarrassing, with such embarrassment striking at the root of the defence pleaded and causing the plaintiff to be prejudiced. The exception to the plea is therefore upheld.

[29] I make the following order

- e. The exception to the special plea is dismissed with costs;
- f. The exception to the plea is upheld with costs;
- g. The defendant is granted leave to amend its plea within twenty one (21) days of date of delivery of this judgment.



A E ANDREWS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

DATE HEARD : 4th FEBRUARY 2019

DATE DELIVERED : FEBRUARY 2019

For the Plaintiff : ADV PRETORIUS

Instructed by : DAWIE BEYERS ATTORNEYS INC
PRETORIA

For the Defendant : ADV VORSTER

Instructed by : MALEBYE MALEHO ATTORNEYS
PRETORIA