IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 5612//2019

Reportable: YES/NO
Of Interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO

In the matter between:

NTIYISO CONSULTING CC Applicant/Plaintiff

and

MAFUBE LOCAL MUNICIPALITY Respondent/Defendant

CORAM: AFRICA, AJ

HEARD ON: 02 JUNE 2022

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to have been at 11h00 on 22 JULY 2022.

JUDGMENT

INTRODUCTION

[1] In this interlocutory application the applicant seeks an order in the following terms:

> 1. That the respondent be ordered to properly and fully reply to questions numbered 1 to 5 of the Applicant's Request for Further Particulars for purposes of trial[1], within 10 days from the date on which this order is granted;
> 2. That should the Respondent fail to comply with prayer 1 *supra*, the applicant be given leave to approach the above Honourable Court, on the same papers, duly supplemented, for an order that the respondent's defence as contained in the plea and the claim as contained in its counterclaim be struck out;
> 3. That the respondent is ordered to pay costs of this application on an attorney and client scale;

[2] This application was launched subsequent to defendant's responds to applicant's request for further particulars for the purposes of trial, stating that:

> "The particulars requested herein are not necessarily for the purposes of trial, does not relate to the defendant's plea and are accordingly refused."

[3] The applicant contends that the particulars so requested from the respondent is not only required for purposes of trial preparation but that such particulars will limit the evidence which is to be led at trial and shorten the legal proceedings. Further, that the respondent's reply as aforesaid and its refusal to provide the particulars requested severely prejudices the applicant in its preparation for trial.[2]

[4] The applicant's claim in the main action is premised on the respondent's breach of a partly written, partly verbal Service Level Agreement ("SLA") in terms of which the applicant was to provide financial and project management advisory services to the respondent. Applicant contends that the respondent is in breach of the SLA and has failed and/or refused to pay the total amount of R1 074, 464.00, to the applicant.

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[1] A copy of which is annexed to the founding affidavit marked "N1".
[2] Paragraph 28 of applicants heads of argument.

[5] The respondent denies that an agreement was entered into between the parties as pleaded by the applicant and accordingly that the applicant have the *onus* to prove this agreement.[3]

[6] The applicant contends that the purported defences raised by the respondent are mutually exclusive of one another and further that the defences so raised constitutes legal conclusions which cannot co-exist. It is argued that the respondent fails to plead any facts in order to substantiate the legal conclusions of non-compliance with the statutory requirements and Regulations relied upon.

[7] Save for the baseless allegation that no procurement system was followed and that Mr Hlubi ("respondent's representative") was not authorised to procure the applicant's services and that there was non-compliance with section 110 of the Municipal Finance Management Act 56 of 2003 ("MFMA") and Regulation 32 of the Municipal Supply Chain Management Regulations ("the Regulations"), the respondent did not advance any factual allegations required to sustain such purported defence in the Application for Rescission of judgment and the respondent's plea is even more devoid of any facts in support of the legal conclusions, which the respondent relies on.[4] Therefore, the submission by the applicant is that the respondent bears the *onus* of proving the alleged unlawfulness of the SLA.

[8] The respondent in denying that an agreement was entered to, submits that should the trial court finds that an agreement was in fact entered into between the parties, such agreement is unlawful and invalid for want of compliance with the statutory requirements which provide clear requirements for a valid and lawful agreement to be concluded between organs of state and private entities. These requirements were simply not met and respondent's plea is clear in this regard.[5]

[9] A further submission made by applicant is that what the respondent seeks to do in *casu* is a declaration of invalidity of the agreement in the form of a defence at a juncture when respondent's contractual counterpart (applicant) moves for the

[3] Record, page 24 paragraph 7.
[4] Paragraph 12 of applicants written heads of argument.
[5] Paragraph 8.3 of respondent's heads of argument.

enforcement of the contract, constitutes what has been referred to as a 'reactive challenge' or 'collateral challenge'.[6]

LEGAL PRINCIPLES APPLICABLE

[10] The purpose of permitting a party to call for further particulars for trial is:

a) To prevent surprise;

b) That the parties should be told with greater precision what the other party is going to prove in order to enable his opponent to prepare his case to combat counter allegations;

c) Having regard to the aforegoing, nevertheless not tie the other party down and limit his case unfairly at the trial.[7]

[11] Rule 21(4) provides essentially that if the party is called upon to furnish any particulars, fails to deliver same timeously or sufficiently, the requesting party may apply to court for an order for the delivery or for the dismissal of the action or the striking out of the defence of the defaulting party, whereupon the court may make such order as it deems meet.

[12] A court will only strike out the defence or claim if it is found that the party has deliberately and contemptuously disobeyed the order.

<u>The following three (3) points warrant mention with regards to the ambit of rule 21(4):</u>

[12.1] the rule applies not only where there has been a complete failure to furnish particulars, but also in the ostensibly less serious instances namely, failing to comply timeously or sufficiently;

[12.2] secondly, it is clear that the ultimate remedy for the dismissal of an action or the striking out of a defence is a drastic remedy;

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[6] Paragraph 17 of applicant's heads of argument.
[7] Schmidt Plant Hire (Pty) Ltd v Pedrelli 1990 (1) SA 398 (D) at 402.

[12.3] thirdly, it is clear that the power to grant such a remedy is discretionary and that the discretion must be exercised judicially.

[13] The respondent argues that in general, however, the purpose of particulars for trial is not to elicit evidence or information which will emerge on cross-examination.[8]

[14] The applicant however holds the view that even if the particulars requested may at times involve the disclosure of evidence, this does not disentitle the party requesting such particulars from obtaining them, if on the grounds of embarrassment or prejudice in preparation of his case, he would otherwise be entitled to know what case he has to meet.[9]

[15] The applicant holds the view that the contention that the statutory provisions and Regulations relied on by the respondent are sufficiently clear so as to enable the applicant to ascertain what case it is required to meet, is respectfully, without merit.

[16] In opposing this argument, counsel for the respondent submits that respondent's plea read with its counterclaim is clear in this respect. In fact, the respondent has dealt with its defence to applicant's claim in the action fully in the Rescission proceedings to which the applicant had referred to in its heads of argument.[10] Therefore it can neither be said that the applicant does not know what the case of the respondent will be, nor can there be any surprise. Respondent submits that this application brought by applicant is misplaced as it amounts to nothing more than an attempt to solicit evidence or tie the respondent down and limit its case unfairly.

[17] The respondent submits that what is being sought by applicant, he is not entitled to and that the statutory provisions referred to are clear because it sets out what requirements must be met. Applicant as the plaintiff in the main action is *dominus litis* and should know how to prepare for trial.

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[8] Von Gordon v Von Gordon 1961 (4) SA 211 (T) at 213.
[9] Annandale v Bates 1956 (3) SA 549 (W) at 551.
[10] Paragraph 14 of respondents heads of argument.

[18] This court is indeed mindful that with reference to the case of *Schmidt*[11], it was held:

> "that the court was entitled in an enquiry such as the present to go beyond the pleadings and to look at matter forming part of the record…since the pleadings alone did not necessarily contain sufficient information to determine whether or not a party may be taken by surprise and what the other party intended to prove."

[19] The respondent argues that having regard to the Rescission of Judgment, and the fact that the POC[12] does not indicate how the SLA was concluded, for example by way of procurement; the respondent under these circumstances are therefore necessitated to formulate its plea as wide as possible and if the plaintiff was in any manner embarrassed to plea, then an Exception should have been filed. Counsel for the respondent argues that section 217[13] can be deemed as an "umbrella provision" and that the defences raised is not mutually exclusive.

[20] The applicant states[14] that the respondent's plea raises a bare denial in respect of the conclusion of the SLA, save for specious allegations that no procurement system was followed. Further, that respondent failed to advance any other factual allegations required to sustain such purported defence in the application for Rescission of Judgement; the plea being more devoid of any facts in support of the legal conclusions which the respondent relies on.

[21] This court having regard to the "*bona fide*" defence raised in the Application for Rescission; Respondent's plea and Counterclaim, is of the considered view that it cannot be argued that, the pleadings lack sufficient clarity to enable the applicant to determine, which case it has to meet. Therefore, the applicant is not entitled to call for such further particulars, which in the view of this court is not necessary to enable applicant to prepare for trial.

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[11] 1990 (1) SA 398.
[12] Particulars of claim
[13] Of the Constitution
[14] Paragraph 11 of applicant's heads of argument.

[22] In the result the following order is made:

[22.1] The Application that the Respondent be ordered to properly and fully reply to Applicant's request for further particulars, is dismissed with costs.

AFRICA, AJ

APPEARANCES:

COUNSEL FOR THE APPLICANT:	Adv. Van der Merwe
Instructed by:	Honey Attorneys
COUNSEL FOR THE RESPONDENT:	Adv. Roux
Instructed by:	Peyper Attorneys