

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

Case number: 4860/2020

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

ZAMORI ENGINEERING SERVICES:

Plaintiff / Respondent

and

**MEC FOR FREE STATE DEPARTMENT OF
PUBLIC WORKS**

First Defendant / Applicant

**TW SEOKE, HEAD OF DEPARTMENT:
DEPARTMENT OF PUBLIC WORKS**

Second Defendant / Applicant

HEARD ON: 29 APRIL 2022

CORAM: MATHEBULA, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 10 August 2022. The date and time for hand-down is deemed to be 10 August 2022 at 11H00.

Introduction

[1] The first and second defendants, excepted to the plaintiff's first claim for rectification of the particulars of claim as pleaded lacks averments necessary to support a cause of action. The plaintiff takes the opposing view. The defendants do not take issue in this exception with the alternative claim. The parties will be referred to in this judgment as in the pleadings in an effort to avoid any real or perceived confusion.

The plaintiff's particulars of claim

[2] Broadly the allegations made in the particulars of claim are to the following effect. On 26 March 2017 the first defendant published a Request for Proposal under reference number DPWFS RFP 002/2017. A voluminous copy of this document is attached and incorporated by reference marked "POC1". The main purpose was to obtain proposals for the implementation of a shared energy savings agreement with the first defendant. This was one of the many efforts by government to implement cost saving programmes in its buildings to reduce energy consumption.

[3] It is common cause that the plaintiff was named the successful bidder. A letter of appointment dated 26 February 2018 signed by the second defendant in his capacity as the accounting officer of the relevant department was dispatched to the plaintiff. On the strength of this appointment letter, the plaintiff avers that a binding agreement had come into existence.

[4] The next step is that the plaintiff received a concept Service Level Agreement on 23 July 2018 from the defendants. On proper reading, according to the plaintiff, it was found that it differs materially with the request for proposals. These are set out in detail in paragraph 5.4 of the particulars of claim. The plaintiff forwarded a request to the defendants to amend it but to no avail. The bottom line is that ultimately the parties did not sign any Service Level Agreement.

[5] This then gave rise to a claim for rectification instituted by the plaintiff. The parties part ways on whether the agreement was entered into or not. According to the plaintiff, the agreement with defendants came into existence on 26 February 2018.

The differing view of the defendants is that no agreement came into existence because nothing was reduced to writing and signed by the parties.

Arguments

[6] Counsel for the defendants advanced argument that no cause of action for rectification of a draft Service Level Agreement has been pleaded. She pointed out that a party raising rectification must satisfy its requirements to make out such a case. The requirements that must be alleged and subsequently proved were fluently explained by the court in **Propfokus 49 (Pty) Ltd and Others v Wenhandel 4 (Pty) Ltd**.¹ He argued that without a signed Service Level Agreement between the parties, there is no agreement capable of being rectified. This issue was considered in **Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office Ltd**² and the court held that in circumstances similar to the one on hand, the contract never came into existence. Similarly, the issue of common mistake was not pleaded to sustain a claim based on rectification. I agree with her.

[7] In sharp response, counsel for the defendants argued that a contract came into existence. He pointed out that there was an offer and acceptance subject to what was proposed in the request for proposal. Counsel relied on the decision of **Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd**³ that given everything else, the contract pleaded was susceptible to be interpreted that the parties intended to conclude a binding contract. Referring to the judgment of the court in **Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd**,⁴ he argued that all the facts showed that the intention of the parties was to conclude a contract. Importantly, contracts must be given their ordinary commercial meaning and that this aspect will be cleared by evidence at the appropriate time.

Legal position

[8] Both counsel agreed in their heads of argument that the onus rests with the defendants to persuade the court that the particulars of claim as they stand discloses

¹ [2007] 3 All SA 18 (SCA) at 21-22.

² 2013 (2) SA 133 (SCA).

³ [1991] 1 All SA 382 (A).

⁴ 2016 (1) SA 518 (SCA).

no cause of action. Furthermore that the court looks at the pleading excepted to as it stands.⁵ It is trite that the purpose of an exception is to dispose off the case in whole or in part so as to avoid the unnecessary leading of evidence.⁶

[9] In terms of the Uniform Rules of Court 18(4), the pleader is required to set out the material facts. These are facts that, if pursued, will disclose a cause of action. On the other hand, all the evidence should not be pleaded. The material facts must be pleaded with the necessary particularity. The principle that underpins the requirement of particularity was clearly stated in **Trope v South African Reserve Bank and Another and Two Other Cases**.⁷ The plaintiff is entitled to be told exactly which case it needs to meet.

[10] It can be accepted that there is no exhaustive test of what will constitute sufficient particularity. The requirement is that the complete cause of action must be pleaded clearly identifying the issues relied upon. Obviously a pleading will become excipiable if no admissible evidence led on the pleadings can disclose a cause of action.

Discussion

[11] What remains to be determined is whether the defendants have made out a case for the exception to be upheld. In simple terms, whether a defect appears *ex facie* the pleadings the plaintiff seeks an order for rectification of the Service Level Agreement. The clauses which needs to be rectified are tabulated in paragraph 5.4 of the particulars of claim and its sub-paragraphs therein.

[12] Nowhere in the pleadings does the plaintiff plead the requisites for the claim of rectification. Perhaps, the reason is that the plaintiff could not do so because there is no written agreement that is in existence between the parties and for a party to succeed in the claim for rectification, the requisites must be pleaded and proved. The defendants must be clear as to which case they are invited to meet. On this occasion, it is unclear on which basis is the claim for rectification made.

⁵ Minister of Safety and Security and Another v Hamilton 2001 (3) SA 50 (SCA).

⁶ Barclays National Bank Ltd v Thompson 1989 (1) SA 547 (A) at 553F-I.

⁷ 1992 (3) SA 208 (T) at 210G-H.

[13] I agree with the counsel for the defendants that the plaintiff is seeking an order that is tantamount to the court negotiating the terms of the agreement for the parties. The plaintiff has pleaded the mistake on the part of the defendants. This is not a mistake by both parties as required by law. I disagree with counsel for the defendants that this will be cured by evidence. The essential elements must be pleaded with particularity to enable the other party to plead. On this score the particulars of claim come short and are thus excipiable.

Order

[14] I make the following order: -

14.1. The exception is upheld and that the plaintiff's particulars of claim are struck out, and the plaintiff is afforded leave to amend its particulars of claim within fifteen (15) days from the date of the order.

14.2. Failing compliance with prayer 14.1 *supra* or if the particulars of claim remain excipiable pursuant thereto, that the defendant be granted leave to apply, on the same papers, fully amplified to the extent necessary, for the dismissal of the plaintiff's claim.

14.3. The plaintiff is ordered to pay the costs of both defendants.

M.A. MATHEBULA, J

On behalf of plaintiff: Adv. P.A Venter
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On behalf of defendants: Adv S. Freeze
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