

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH

Case No.: 2211/2017

Date Heard: 15 February 2018

Date Delivered: 27 February 2018

In the matter between:

EAST CAPE MIDLANDS COLLEGE

Excipient/Defendant

and

GO TRAINING ACADEMY CC

Respondent/Plaintiff

JUDGMENT

EKSTEEN J:

[1] The respondent issued summons in which it claims damages in the amount of R3 674 965,17 arising from the excipient's alleged repudiation in September 2014 of a contract concluded between the parties in April of that year. The excipient has taken an exception to the respondent's particulars of claim contending that they lack averments necessary to make out a cause of action, alternatively, that they are vague and embarrassing.

[2] It is the respondent's case that it concluded a contract with the excipient for the provision of goods and services for a sum of R17 279 107,38. The excipient duly placed orders with the respondent for the provision of such goods and services to a total amount of R6 213 024,40, which sum it duly paid. The excipient, however, failed to procure the remainder of the goods and services under the contract from the respondent. In September 2014 the excipient advertised afresh for tenders in

respect of the remainder of the goods and services which the respondent contends that it had earlier contracted to provide to the excipient. This it is alleged constituted a repudiation of the contract which the respondent has accepted. The respondent alleges that it has suffered damages in the amount of R3 674 965,17, being the difference between the purchase price of the goods and the plaintiff's cost price as set out in its contract.

[3] The contract arose from a public tender process. The excipient is a public college providing education and training in terms of the Continuing Education and Training Act, 16 of 2007 and operating from various campuses in the Eastern Cape. The excipient called for tenders for the supply, delivery, installation and commissioning of certain information technology equipment at various different campuses: thirteen in all. The tender documentation set out in schedules the equipment which was required at each site and provided that the excipient reserved for itself the right to "accept all or any part of a quotation". The documentation also reserved for the excipient the right to "withdraw its decision to seek the provision of the services at any time".

[4] The respondent submitted a bid in respect of all thirteen sites. Its bid totalled the amount of R17 279 107,38. The excipient accepted the respondent's bid and awarded "the bid" to the respondent in writing on certain written terms and conditions. The exception turns on the interpretation of this agreement. It is the respondent's case as set out in its particulars of claim that the bid was awarded to it to supply the equipment set out in the tender documentation to all thirteen sites in the total sum set out earlier herein.

[5] The excipient contends, correctly, that the plaintiff's entire cause of action is premised thereon that the entire tender of R17 279 107,38 was awarded to it as the successful bidder. The exception proceeds, however, on the ground that it is plainly apparent from the annexures to the plaintiff's particulars of claim that the bid was not awarded in the total sum but only in the limited sum of R6 213 023,40.

[6] I turn to consider the respondent's particulars of claim. In paragraphs 3, 4 and 5 of the particulars of the plaintiff's claim the plaintiff alleges:

- '3. On 15 April 2014 and pursuant to a public tender process the Defendant represented by JJ Mbana awarded to the Plaintiff, represented by G Nosworthy, its bid RFB/SCM EMC 06/14 in writing, which the Plaintiff represented as aforesaid, accepted in writing.
4. The writing is contained in letters annexed hereto marked "A" and "B" respectively.
5. The Plaintiff and the Defendant represented as aforesaid duly signed the contract which is annexed hereto marked "C".'

[7] The material portions of Annexures "A" and "B" upon which the respondent relies for purposes of paragraph 3 of the particulars of claim respectively record:

"A" East Cape Midlands College wishes to thank you for your interest shown in the above- mentioned bid.

You are hereby notified that the bid, **RFB/SCM EMC 06/14** have (*sic*) been awarded to **GO TRAINING ACADEMY** and you are required to complete the attached contractual documentation and submit the completed documentation to the SCM department by not later than Tuesday, 15 April 2014.

Please acknowledge receipt of the letter promptly in writing.'

And "B":

"We hereby thank you for awarding us the abovementioned bid, RFB/SCM EMC 06/14 for the amount of R17795307,95 Inc. VAT.

This letter thereby serves as our acceptance of the above-mentioned bid, on our terms as per our submitted tender document and including all the other communiques with the college regarding said tender."

[8] I pause to record that the figure of R17 795 307,95 is not explained, however, in argument of the exception before me it was not in dispute that the total sum of the respondent's bid amounted to R17 279 107,38 as recorded earlier. The discrepancy in the figure is not a ground relied upon in the exception and it is of no relevance to the present proceedings.

[9] It is immediately apparent from annexure "A" that the contract documentation, annexure "C", was annexed to the letter of acceptance. Annexure "C" consists of two pages, Part 1 being completed and signed by the said Nosworthy on behalf of the respondent and Part 2 being completed and signed by the said Mbana on behalf of the excipient. The material portion of Part 1 of the contract documentation records:

"1. I hereby undertake to supply all or any of the goods and/or works described in the attached bidding documents to East Cape Midlands College in accordance with the requirements and specifications stipulated in the bid number RFB/SCM EMC 06/14 at the price/s quoted. My

offer/s remains binding upon me and open for acceptance by the purchaser during the validity period indicated and calculated from the closing time of bid.

2. The following documents shall be deemed to form and be read and construed as part of this agreement:

- (i) The bidding documents viz
 - Invitation to bid;
 - Tax clearance certificate;
 - Pricing Schedule(s);
 - Technical Specification(s);
 - Preference claims for Broad Based Black Economic Empowerment Status Level of Contribution in terms of the Preferential Procurement Regulations 2011;
 - Declaration of interest;
 - Declaration of bidder's past SCM practices;
 - Certificate of Independent Bid Documentation;
 - Special Conditions of Contract.
- (ii) General Conditions of Contract; and
- (iii) Other (specify)"

[10] The material portion of Part 2 completed by the said Mbana on behalf of the excipient records:

- "1. I, **Mr JJ Mbana** in my capacity of **Chief Executive Officer** accept your bid under reference number,
- 2. **RFB/SCM EMC 06/14** dated, **20 March 2014** for the supply of goods/works indicated hereby and/or further specified in the annexure (s).
- 3. An official order indicating delivery instructions is forthcoming.

4. I undertake to make payment of the goods/works delivered in accordance with the terms and conditions of the contract, within 30 (thirty) days after receipt of an invoice accompanied by the delivery note.

ITEM NUMBER	PRICE (ALL APPLICABLE TO E TAXES INCLUDED)	BRAND	DELIVERY PERIOD	B-BBEE STATUS LEVEL OF CONTRIBUTI ON	MINIMUM THRESHOLD FOR LOCAL PRODUCTIO N AND CONTENT (IF APPLICABLE)
Total	R6 213.40	As per bid RFB/SCM EMC 06/14	4-6 weeks	2	N/A
<u>Delivery</u>					
<u>sites:</u>					
Site 1:	R240 116.46				
Site 2:	R555 462.26				
Site 9:	R2 602 405.45				
Site 10:	R2 580 098.08				
Site 12:	R234 941.15				

[11] The annexures referred to in paragraph 2 of Part 2 are the documents listed in paragraph 2 of Part 1 of annexure “C”. Mr **Huisamen SC**, who appeared on behalf of the excipient, contends that the particulars of claim read together with the documents reveal unambiguously that the contract documentation, annexure “C”, relied upon by the plaintiff was annexed to the letter of acceptance, annexure “A” and accordingly qualifies the acceptance of the bid. Annexure “C”, so he argued, refers expressly to the acceptance of the bid “for the supply of goods/works indicated hereunder” and to the specific sites and value set out in Part 2 of annexure “C”.

[12] Mr **van der Linde SC** on behalf of the respondent acknowledges that the respondent’s claim is premised thereon that the entire tender of R17 279 107,38 was awarded to the respondent. He nevertheless submits that the matter is not capable

of resolution by exception. In doing so he argues that the award was not limited to the goods and works expressly listed in Part 2 of annexure “C”, but included additional goods and works as “further specified in the annexures” attached to the contract document, including the bid submitted by the respondent in respect of all thirteen sites.

[13] In order to succeed in an exception an excipient has the duty to persuade the court that upon every interpretation which the pleading in question, and in particular the document on which it is based, can reasonably bear, no cause of action or defence as disclosed (see *Erasmus: Superior Court Practice* (2nd ed) D1-294). Mr **van der Linde** submits furthermore, correctly, that an exception is generally not the appropriate procedure to settle questions of interpretation because evidence may be admissible at the trial which may cast light on the correct interpretation of the contract. (See **Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd** 1991 (1) SA 508 (A); and **Sun Packaging (Pty) Ltd v Vreulink** 1996 (4) SA 176 (SCA).)

[14] In **Coopers & Lybrand and Others v Bryant** 1995 (3) SA 761 (A) at 768A-E Joubert JA considered the question of interpretation of contracts and the extent of admissible evidence and stated:

“The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

- (1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract ...

- (2) to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted. ...
- (3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions. ...”

[15] Subsequently Wallis JA referred to this passage in **Bothma-Batho Transport (Edms) Beperk v Bothma & Seun Transport (Edms) Beperk** 2014 (2) SA 494 (SCA) at 499-500 at para [12] and stated:

“[12] That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'.”

[16] The effect is that a greater quantum of evidence may now be admissible to place the document and the words in issue in their particular context and the process of interpretation does not stop with the literal meaning of the words used. Such evidence as is admissible will necessarily facilitate the ultimate interpretation of the agreement.

[17] In respect of the contract currently under consideration annexure “A” which I have quoted earlier records that “the bid”, RFB/SCM EMC 06/14 has been awarded to Go Training Academy. Whilst this is suggestive thereof that the entire bid submitted by the respondent had been awarded to the respondent it must be read together with the contract documentation. Part 1 of Annexure “C” makes it clear that all the bidding documents and in particular the pricing schedules form part of the contract. Part 2 of the contract document, Annexure “C”, records that the bid was accepted for “the supply of goods/works indicated hereunder and/or further specified in the annexure(s)”. At face value it suggests that there may be other goods or works in respect of which the contract has been accepted as emerges from the further annexures. The respondent contends that this is indeed what emerges from the pricing schedules which it submitted and which forms part of the contract. In this regard the letter of acceptance Annexure “B” records the respondent’s acceptance of the bid “on our terms as per our submitted tender document and including all the other communiques with the college regarding the said tender”. These further communiques may conceivably have a bearing on the interpretation of the contract. For these reasons Mr **van der Linde** argues that on a proper interpretation of the contract it may be found that the reference to “goods/works indicated hereunder” may have been intended to refer only to the first phase of the contract.

[18] On a consideration of the pleading and the argument presented to me I consider that there is considerable force in the argument advanced by Mr **Huisamen** and, *prima facie*, the excipient’s interpretation of the document is probably correct. I do not, however, think that the contract concluded between the parties is free of all

ambiguity. In the circumstances the interpretation of the contract in the present matter cannot be conclusively decided on exception. In those circumstances I also do not consider that it can be found at the exception stage that annexures “B” and “C” are necessarily irreconcilable so as to render the particulars of claim vague and embarrassing.

[19] In the result, the exception is dismissed with costs.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Excipient/Defendant: Adv JD Huisamen SC instructed by Joubert
Galpin & Searle, Port Elizabeth

For Respondent/Plaintiff: Adv HJ van der Linde SC instructed by Nelson
Attorneys, Port Elizabeth