

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

CASE NO: 855/2021

Reportable: NO

Of Interest to other Judges: NO

Circulate to Magistrates: NO

In the matter between:

AFRI BLAZE PROJECTS (PTY) LTD

Plaintiff

and

**THE PREMIER: FREE STATE PROVINCIAL
GOVERNMENT**

1st Defendant

**THE MEC: FREE STATE PROVINCIAL GOVERNMENT:
DEPARTMENT OF PUBLIC WORKS AND INFRASTRUCTURE**

2nd Defendant

**THE HOD: FREE STATE PROVINCIAL GOVERNMENT:
DEPARTMENT OF PUBLIC WORKS AND INFRASTRUCTURE**

3rd Defendant

**THE MEC: FREE STATE PROVINCIAL GOVERNMENT:
DEPARTMENT OF EDUCATION**

4th Defendant

**THE HOD: FREE STATE PROVINCIAL GOVERNMENT:
DEPARTMENT OF EDUCATION**

5th Defendant

HEARD ON: 18 AUGUST 2022

JUDGMENT BY: MHLAMBI, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLI. The date and time for the hand-down are deemed to be at 16h30 on 19 September 2022.

Introduction

[1] The plaintiff instituted an action based on a contract against the defendants for the rectification of a written lease agreement concluded between the parties on 27 November 2019 together with interest and costs.

[2] The defendants defended the action, filed a special plea and a plea to the merits. The special plea was set down for hearing and it is couched as follows:

"Special Plea

1. *The plaintiff relies on the lease agreement, annexure "B" to its particulars of claim.*
2. *In terms of clause 32.1 thereof the parties shall try to amicably resolve any dispute.*
3. *Moreover, on **11th January 2020** contrary to what the plaintiff pleaded in paragraph 9 of its particulars of claim, public works invited tenders under **DPWFS RFP 014/2018** for the provision of office accommodation for approximately 12 500 square meters to 16 500 square metres together with minimum of 300 onsite parking bays.*

3.1 The defendants attached the aforesaid bid document as annexure "P1" between the parties as being one of a series of documents, expressly, alternatively tacit, alternatively implied terms of the agreement comprising the written agreement between the

parties. The bid document inter alia contains the following relevant provisions:

‘Government procurement general conditions of contract

3.1.1 Under the heading ‘Government Procurement General Condition of Contract July 2010’ it is expressly stated that these conditions will form part of all bid documents and may not be amended;

3.1.2 In terms of Clause 27 of the General Conditions of Contract, settlement of disputes between the parties is provided for as follows:

3.1.2.1 If any dispute or difference of any kind whatsoever arises between the purchaser and the supplier in connection with or arising out of the contract, the parties shall make every effort to resolve amicably such dispute or difference by mutual consultation (Clause 27.1);

3.1.2.2 I, after thirty (30) days, the parties have failed to resolve their dispute or differences by such mutual consultation, then either the purchaser or supplier may give notice to the other party of his intention to commence with mediation. No mediation in respect of this matter may be commenced unless such notice is given to the other party (Clause 27.2);

3.1.2.3 Mediation proceedings shall be conducted in accordance with rules of procedure specified in a South African court of law (SCC) (Clause 27.4);

3.1.2.4 Should it not be possible to settle a dispute by means of mediation, it may be settled in a South African court of law (Clause 27.3).

4. The plaintiff did not instigate the extra-curial dispute resolution method advised by the aforesaid clauses.

5. The defendants accordingly plead that the action be dismissed to enable the parties to resolve their disputes; alternatively, for the matter to be

removed from the roll, for the parties to avail themselves of this procedure and that the plaintiff be ordered to pay any costs wasted thereby.

[3] The plaintiff's response to the special plea was as follows:

“Ad Special plea:

3.

3.1 *It is denied that the plaintiff had failed to comply with any contractual provision obligating it to try and settle the dispute between the parties in an extra-curial way*

3.2 *the plaintiff moreover denies that there was any contractual provision obligating it to so and settle the dispute between the parties.*

3.3 *in any event, the plaintiff pleads that notwithstanding the present dispute ad of which the Defendants were no doubt aware, they took no steps to comply with any contractual provision governing the relationship between the parties as to alternative dispute resolution. Thus the Defendants are in breach of the agreements and are in law not entitled to rely upon such a provision for purposes of further stymieing the Plaintiff's case.*

3.4 *In any event further:*

3.4.1 *The Plaintiff records its amenability to try and settle the dispute between the parties and will, without admission of any liability and without detracting from the general of the aforesaid denial, submit to mediation.*

3.4.2 *The willingness and intra curiae undertaking should however be understood as meaning that the Plaintiff would submit to mediation that to run between the parties concomitantly with the proceeding in this court. The Defendants are invited to inform the*

Plaintiff of the steps they intend to take as for as such a mediation proceeding is concerned within 5 days.

...

3.6 Thus, the Plaintiff prays for the dismissal of the Defendants' Special Plea with costs (in the event the Defendants not taking up the invitation for concomitant mediation extended hereinabove)."

[4] Both in the written heads and oral argument, Mr Du Toit, acting for the defendants, argued that the plaintiff could not have its cake and eat it by engaging in mediation concomitantly with the litigation in this court. He emphasised that the parties are *ad idem* about the particular mediation clause incorporated into the agreement between the parties by virtue of the tender conditions. It was not included as a mere whim but it was an important mechanism expressly chosen to keep matters out of court.

[5] He submitted that the jurisdictional fact triggering the institution of an action in court was the factual impossibility of settling a dispute by means of mediation. The only route to litigation was to establish that:

- (a) a mediation was called for by the aggrieved party;
- (b) that there indeed was a mediation conducted; and
- (c) that the mediation was unsuccessful in the sense that the parties were unable to settle the matter with the aid of a mediator.

The plaintiff's claim was therefore brought prematurely as there was neither a mediation that took place nor a failed mediation entitling the plaintiff to have instituted an action at the time it did. The principle of *pacta sunt servanda* applied in full force, and the mediation clause must be adhered to.

[6] Mr Grobler, acting for the plaintiff, stated in oral address that the principle of *pacta sunt servanda* was not in dispute. The only issue in dispute, he submitted, was

the existence of the contractual obligation to mediate as set out in paragraph 3.2¹ of the plaintiff's replication which served as the answer to the defendant's special plea. As such, the answer disposed of the question of the settlement of the dispute by way of mediation.

[7] He confirmed that the parties were *ad idem* on the lease agreement², that the parties shall try to resolve any dispute amicably³ and that the General Conditions of Contract July 2020⁴ (the GCC), which may not be amended, formed part of all the bid documents. However, he submitted that clause 2.1 of the GCC precluded the defendant from insisting on mediation as the general conditions were not applicable as the clause excluded immovable property.

[8] It is clear from Mr Grobler's submissions that the plaintiff does not dispute the GCC and its contents. The purpose of the GCC was to draw special attention to certain general conditions applicable to governing bids, contracts, and orders and formed part of all bid documents and may not be amended. Consequently, clause 27 of the GCC provides for the settlement of disputes as more fully set out in the defendants' special plea. The lease agreement behoves the parties to resolve any dispute amicably⁵ and only if the matter were unresolved for a period of 14 days, was a party entitled to refer the matter to the High Court of the Free State.⁶ Inasmuch as the lease agreement contained a dispute resolution clause that facilitated and made obligatory the holding of a mediation, the provisions of the GCC set out the procedure to be followed. This the plaintiff failed to do.

[9] The only contestation remaining is the interpretation of clause 2.1 of the General Conditions of the Contract. Mr Grobler argued that the expression "*excluding immovable property*" excluded the plaintiff from following the mediation route. I taxed both parties with the meaning, status, and effect of that expression on the clause and whether it had the effect of excluding the lease agreement from the

¹ Stated above.

² Annexure "B" to the summons.

³ Paragraph 32.1 of the lease agreement.

⁴ Page 192 of the Index: Pleadings

⁵ Para 32.1 *supra*.

⁶ Para 32.2 of the lease agreement.

ambit of the GCC. Mr Grobler was of the view that it did whereas Mr Merabe, the defendants' second counsel, said that it did not.

[10] Clause 2.1 of the GCC reads as follows:

“2.1 These general conditions are to all bids, contracts, and orders including bids for functional and professional services, sales, hiring, letting and the granting or acquiring of rights, but excluding immovable property, unless otherwise indicated in the bidding documents.

[11] Mr Merabe stated in replication that the tender processes were already in place before the lease agreement was entered into. The letting, hiring, and acquiring of rights contained in the clause, included the acquisition of such rights in immovable property.

[12] The correct course that the plaintiff should have followed was, in my view, to have attempted or endeavoured to settle the matter, failing which, to refer the matter for mediation before resorting to litigation. There was a contractual obligation to mediate and settle the dispute between the parties. The plaintiff's reliance on clause 2.1 of the GCC does not come to its rescue. In my view, such an exclusion does not, within the context of the clause, refer to a bid for the provision of office accommodation or a departmental lease contract as envisaged in contract DPWFS RFB 014/2018.⁷ In the premises, I find that the provisions of the GCC are applicable to the lease agreement entered into between the parties.

[13] The special plea should succeed. It is evident that the action was premature and the plaintiff's opposition to the special plea was without substance. In the circumstances, it would serve no purpose to strike the matter from the roll and the appropriate order should be the dismissal of the action.

[14] It is trite that the successful party is entitled to the costs.

[15] I, therefore, make the following order:

⁷ See *Buglers Post (Pty) Ltd v Secretary for Inland Revenue* 1974 (3) SA 28 (AD)

Order:

The action is dismissed with costs which shall include the costs of two counsel.

MHLAMBI, J

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