



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

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

Case number: 2870/2013

In the matter between:

RUDNAT PROJECTS CC

Plaintiff

and

NKETOANA LOCAL MUNICIPALITY

1st Defendant

PHUMELELA LOCAL MUNICIPALITY

2nd Defendant

SETSOTO LOCAL MUNICIPALITY

3rd Defendant

DIHLABENG LOCAL MUNICIPALITY

4th Defendant

JUDGMENT BY:

MHLAMBI, J

HEARD ON:

07 MAY 2019

DELIVERED ON:

23 MAY 2019

MHLAMBI, J

- [1] This matter served before me to determine the third defendant's special pleas, which were raised against the plaintiff's claim in the amount of R 5 287 036.43 based on agreements to perform certain professional services for the Bulk Water Supply Scheme on behalf of the four defendants; who are all municipalities established in terms of section 12 of the Municipal Structures Act 117 of 1998.
- [2] Before the inception of the hearing, the third defendant presented written heads of argument in respect of its special pleas. During argument, Mr Ponoane, on behalf of the third defendant, handed in a document styled the notice for application for leave to reinstate a special plea in terms section 3 Act 40 of 2002, in terms which the third defendant made known his intention to apply for leave for the reinstatement of its special plea in terms of section 3 of Act 40 of 2002. The plaintiff did not file heads of argument.
- [3] The three special pleas are summarised as follows:
- 3.1 The plaintiff failed to show that the second defendant had authority to enter into a contract on behalf of the third defendant in line with the provisions of section 11 (2) of the Municipal Systems Act, 32 of 2000. The plaintiff failed to show that there was an agreement between the two defendants in this regard.
- 3.2 The plaintiff failed to join the Department of Water and Sanitation which seemed to have a direct and substantial

interest as it would appear from the particulars of claim that it was a party to the alleged contract;

3.3 The plaintiff failed to give the third defendant a notice in terms of section 3 of Act 40 of 2000 before instituting legal proceedings.

- [4] As brief background, it would appear that, by way of a letter dated 18 March 2009, the municipal manager of second defendant appointed the plaintiff to develop a water services feasibility study and the consolidation of the feasibility studies of the four municipalities represented by the four defendants. The said instruction was accepted by the plaintiff in writing on 27 March 2009.
- [5] On or about 13 November 2010, the second defendant instructed the plaintiff to render professional services for the Bulk Water Supply Scheme based on the implementation readiness report submitted. The plaintiff duly performed the first three phases of the total works that were to be carried out. The preliminary design for the project was provided to the first defendant on 19 October 2011. On 13 March 2013, the plaintiff rendered an invoice to the first defendant for the payment of R 5 287 036.43. The first, second, third and fourth defendants failed to effect payment as claimed.
- [6] Mr Ponoane argued in respect of the first special plea that the plaintiff failed to comply with the provisions of Uniform Rule 18 (4) and (6) and that neither a contract was annexed to the particulars of claim nor was such a contract alleged therein. The third defendant was therefore not “implicated”. To bolster his argument for the plaintiff’s non-compliance with the provisions of section 11

(2) of the Municipal Structures Act, 32 of 2000 he referred me to paragraph 16 of **Vhembe District Municipality vs. Stewards and Lloyds Trading (Booyens) (Pty) Limited and another**¹ which reads as follows:

“As correctly observed by Rall AJ in Thabani Zulu², the evidence in damages cases is more likely to depend on the memory of people than on documents, and it is accordingly desirable that the defendant be given timeous notice of the proceedings in order for it to be able to investigate the contemplated claim, and to secure the necessary evidence. By contrast as Lever AJ put it in Nicor Consulting (para 26) ‘a claim for payment in terms of a contract is more likely to rely on documentary evidence, such as contracts, delivery notes and correspondence, as well as possible legal issues, such as whether or not the relevant functionary had the necessary authority to enter into the contract or not³. I accordingly hold, as the high court did, that as the first respondent’s claim is not a damages claim the Act does not apply to it. It was therefore unnecessary for the first respondent to have complied with s 3 of the Act.” As will be shown below, this reference does not assist the third respondent’s argument in any manner whatsoever. On the contrary, it annihilates it.

[7] The third defendant’s argument on non-joinder was based on the established principles relating to joinder as set out in **Amalgamated Engineering Union vs. Minister of Labour**⁴. The argument on the third special plea is couched as follows in the heads of argument:

*“4.1 The third defendant erroneously withdrew this special plea upon the engagements made and between the counsel for the third defendant and counsel for the plaintiff allegedly on the basis of the case law of **Thabani Zulu and Co. (Pty) Ltd vs Minister of Water Affairs** 2012(4)*

¹ 397/13 [2014] ZASCA 193; [2014] 3 All SA 675 (SCA) (26 June 2014)

² Para 17

³ Lever AJ in Nicor Consulting para 26.

⁴ 1946 (3) SA 637 (A).

SA 91(KZD, is applicable because the “claim is based in contract”. The Third Defendant is persuading the honourable court to reinstate this special plea in line with other special pleas raised by the Third Defendant.

4.2 The Third Defendant persuade this honourable court that it was a mistake in law perhaps due to error of judgment as the facts before Court in particular the Plaintiff’s particulars of claim read with a plea of defense of the Second Defendant and as more fully elucidated by the Third Defendant special pleas, it is apparent that there is no existence of the contract be it written and/or partly oral as alleged by the plaintiff ever concluded. For this reason the provisions of section 3 of Act 40 of 2000 is applicable and as such the plaintiff ought to have given a notice to the Third Defendant before instituting these legal proceedings against the Third Defendant”.

I was requested to reinstate this special plea.

- [8] Mr Grobler argued that in terms of Uniform Rule of Court 33 (4), no evidence was required in the argument of the special pleas and that reliance on section 11 (2) of the Municipal Systems Act was bad in law as the perusal of that section would reveal that an administrative action was not envisaged in that section as reference was made to the exercise of an executive authority. On the issue of non-joinder, he based his argument on the **City of Cape Town vs. Khaya Projects (Pty) Ltd and Others**⁵ and **Tlouamma and others vs. Mbethe, Speaker of the National Assembly of the Parliament of the Republic of South Africa and another**⁶ and submitted that the test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation, which may be prejudicially

⁵ (2016/12) [2014] ZAWCHC 167; 2015 (1) SA 421 (WCC); [2015] 1 ALL SA 81 (WCC) (11 November 2014)

⁶ 2016 (1) SA 534 (WCC)

affected by the judgment or order. The Department of Water Affairs was therefore not affected by the action instituted.

- [9] He submitted further, in respect of the third special plea, that the defendant had abandoned and conceded that the special plea was not applicable to the plaintiff's claim⁷. Even though the third defendant had a change of heart in this regard, the parties were bound to the agreements they made. He submitted that the third defendant had misread the definition of "debt" in the definition section of Act 40 of 2002. The special pleas should therefore be struck out or dismissed with costs. Should the court find that the National Department of Water Affairs should have been joined, the court could make such an order.
- [10] Section 11 (2) of the Municipal Systems Act 32 of 2000 provides that the municipality may exercise executive and legislative authority within its boundaries only, but may, by written agreement with another municipality and subject to Chapter 5 of the Municipal Structures Act and other National legislation, exercise executive authority in the area of that other municipality. A special plea is a plea that raises some special defence that does not flow from allegations in the claim and destroys or postpones the operation of the cause of action. It embodies a substantive, self-contained defence outside the allegations made in respect of the plaintiff's cause of action⁸. I agree with plaintiff's counsel that the objection raised by way of reliance on the particular provision of the Municipal Systems Act, does not render such defence as substantive and self-contained to such an extent

⁷ 3rd Defendant's reply to the Plaintiffs request for Trial Particulars: Page 208 of the indexed papers dated 11 May 2015

⁸ Amler's Precedents of Pleading page 5, 9th Ed.

that it may destroy the plaintiff's claim without further ado. On its own, it is not dispositive and determinative of the entire case.

- [11] The objection of a non-joinder may be raised where the point is taken that a party who should be before the court, has not been joined or given judicial notice of the proceedings. The substantial test is whether the party that is alleged to be a necessary party for purposes of joinder, has a legal interest in the subject matter of the litigation, which may be affected prejudicially by the judgment of the court in the proceedings concerned⁹. In **Judicial Service Commisison and another vs. Cape Bar Council and Another**¹⁰, Brand JA dealt with the question of non-joinder in the following terms:

“It has now become settled law that the joinder of a party is only required as a matter of necessity — as opposed to a matter of convenience — if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg Bowring NO v Vrededorp Properties CC 2007(5) SA 391(SCA) para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one”

- [12] In the given circumstances, it is difficult to see which direct and substantial interest of the Department of Water Affairs would be prejudicially affected were the court to grant the relief sought, as the plaintiff has not sought relief from the department.

⁹ Bowring NO v Vrededorp Property CC 2007 (5) SA 391 (SCA) para 21; Transvaal Agricultural Union vs. Minister of Agriculture and Land Affairs 2005 (4) SA 212 (SCA) para 64-66

¹⁰ (818/2011)[2012] ZASCA 115;2012(11)BCLR 1239(SCA); 2013(1) SA 170(SCA);[2013] 1 All SA 40(SCA)(24 September 2012)

- [13] In Nicor IT Consulting (Pty) Ltd vs. North West Housing Corporation¹¹ the court struck out the defendants' special plea based on a failure to give notice in terms of section 3 (1) of Act 40 of 2002. The court was agreeable with the argument that, for the payment of the balance due in terms of a contract where the plaintiff alleged that it had fulfilled its contractual obligations, was not a claim for damages. As such it fell outside the definition of debt contained in the Act and, consequently, the provisions of the Act were not applicable to the plaintiff's claim. It followed that the defendants' special plea did not disclose a defence. The court found that paragraph (b) of the definition of "debt" in the Act¹² qualified paragraph (a) of such definition, and consequently, a "debt" for the purposes of the Act was confined to a claim for damages, howsoever such claim arose¹³.
- [14] The court in Thabani Zulu and Company (Pty) Ltd vs. Minister of Water Affairs and Another¹⁴ agreed with this decision and found that the ordinary meaning of the definition of debt is the correct one. It found furthermore that the applicant's claims were not damages claims, the Act did not apply to them and it was unnecessary for the applicant to apply for condonation in terms of section 3 of the Act¹⁵.

¹¹ 2010 (3) SA 90 (NWM)

¹² '**debt**' means any debt arising from any cause of action-

- (a) which arises from delictual, contractual or any other liability, including a cause of action which relates to or arises from any-
 - (i) act performed under or in terms of any law; or
 - (ii) omission to do anything which should have been done under or in terms of any law; and
- (b) for which an organ of state is liable for payment of damages, whether such debt became due before or after the fixed date;

¹³ Nicor, supra para 30

¹⁴ 2012 (4) SA 91 (KZD) para 33

¹⁵ Thabani, supra, para 34

[15] In the light of the above, I am persuaded that the third defendant is not entitled to the relief sought and that the special pleas raised should fail.

[16] In the result, the costs should follow the event.

[17] I accordingly make the following order:

Order

- (a) The special pleas are struck out;
- (b) The third defendant must pay the costs which shall include the costs of 7 May 2019.

MHLAMBI, J

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