



FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

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

Case No. : 6254/2018

In the matter between:-

SWIMMING SOUTH AFRICA

Applicant

And

MEMBERS OF THE EXECUTIVE COUNSEL
DEPARTMENT OF SPORT, ARTS, CULTURE
AND RECREATION OF THE FREE STATE

1st Respondent

HEAD OF DEPARTMENT OF SPORT, ARTS,
CULTURE AND RECREATION OF THE FS

2nd Respondent

CORAM: MOLITSOANE, J

HEARD: 16 MAY 2019

JUDGMENT BY MOLITSOANE, J

DELIVERED: 23 MAY 2019

- [1] This is an application for summary judgment in which the plaintiff claims payment of the amount of R5 469 576.55 for alleged money the defendants undertook to donate to the plaintiff in order for the plaintiff to host the 12th African Swimming Championship 2016 in Mangaung.
- [2] This application is opposed on the basis that there was no oral agreement for the alleged donation of the money and further that the request for the funding had not been approved by the Executive Committee(EXCCO) and the Provincial Treasury.
- [3] Adv, Sibeko SC submitted as a preliminary argument that the particulars of claim of the plaintiff were excipiable and on the papers before me summary judgment could not be granted. I deal with this point first.
- [4] In its particular of claim the plaintiff makes the following allegations:

AD PARAGRAPH 8.

During the period June 2015 to May 2016, the Plaintiff applied to the Department to host the 13th Cana Senior Africa Swimming Championships in Mangaung, during October 2016(the event) ,which application included inter alia an application for 'Political support for the event' as well as 'Financial assistance in the sum of R8.5 million'(the application).

AD PARAGRAPH 9.

On or about 7 September 2015 the Department replied to Plaintiff's application wherein they recorded part of the Agreement in writing, and recorded their undertaking to:

9.1 partner with Plaintiff to host the event

9.2 endeavour to make financial contribution (pending approval by EXCO) towards the hosting of the event.

AD PARAGRAPHS 11 AND 12

Further, during September 2015, the Plaintiff, duly represented by its chief executive officer, Shaun Leslie Adriaanse, and the Department, duly represented by the Head of Department, Adv TH Malakoane concluded a verbal agreement.

The material terms of the oral agreement were, inter alia, the following, that:

12.1 The Department would provide funding for the event;

12.2 The funding would be in the amount of approximately R8 500 000.00;

12.3 The payment of such funding would be due by the Department on receipt of a tax invoice from Plaintiff once all the cost had been calculated.

AD PARAGRAPH 15

On or about 24 May 2016 Plaintiff presented the application to the Departments, there and then represented by its Executive Committee as well as approximately 30 additional

representatives of the Departments. Immediately after the meeting, Plaintiff was advised that its application, including the application for a financial contribution (the “contribution”) as outlined hereinabove, was approved.

- [5] As a starting point it is perhaps important to note that this court is not seized with the merits of an exception. In my view I am called upon to adjudicate whether the plaintiff has made up a case to sustain summary judgment.

- [6] Rule 32 requires the plaintiff in an application for summary judgment to verify the cause of action and the amount claimed and also to aver that in his opinion the defendant does not have a bona fide defence to the claim and lastly that the notice of intention to defend was delivered solely for the purposes of delay.

- [7] The court in *Arend v Astra Furnishers (Pty) Ltd*¹ said that the excipiability of a claim was a matter which fell to be considered in the context of weighing a plaintiff’s compliance with Rule 32(1) and (2). In terms of Annexure POC2 the respondent undertook to endeavour to make a financial contribution towards the hosting of the event. This undertaking was made subject to the approval of the EXCO. There are no allegations that the EXCO gave the said approval which was the subject of the undertaking to make a donation. It is unclear on the particulars of claim when such approval was made by the EXCO.

¹ 1974(1) SA 296 (C) at 314

- [8] It also appears that the plaintiff and the first respondent, represented by the second respondent entered into a verbal agreement in September 2015 in terms of which the first respondent undertook to provide funding in the approximate amount of R8 500 000 for the hosting of the event to the plaintiff the payment of which would become due upon receipt of a tax invoice from the Plaintiff. This appears to be the verbal agreement the plaintiff seeks to rely on.
- [9] In paragraph 15 of its particulars of claim the plaintiff further alleges that on or about May 2016 the plaintiff presented the application to the First respondent, then and there represented by the Executive Committee and other representatives of the first respondent. He further alleges that immediately after the meeting Plaintiff was advised that its application for financial contribution was approved.

Proper reading of the particulars of claim appears to be that the plaintiff entered into the agreement to donate funds for the event with the first respondent in September 2015. This is the verbal agreement in which the first respondent was represented by Adv. Malakoane. Again the particulars of claim seems to suggest that an undertaking to make a financial contribution was only made after the presentation on the 24th May 2016. This appears to be the second agreement.

- [10] Rule 18(6) provides as follows:

“A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when,

where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.”

[11] The applicant's particulars of claim in respect of the undertaking allegedly made on the 24th May 2016 do not disclose "*where and by whom*" the alleged undertaking was made nor does it disclose "*where and by whom*" the undertaking was given and accepted on behalf of the plaintiff and defendants.

[12] It is not clear whether the respondent relies on the undertaking of September 2015 or one of September 2016. Adv. Sander submits that the crucial thing is that the defendants do not deny the existence of the agreement. In my view the agreement is denied by necessary implication. If I were to grant judgment in favour of the plaintiff the first question to ask oneself would be on what purported agreement judgment should be granted herein. Would it be on the original verbal agreement of September 2015 or on the agreement of the 24th May 2016?

[13] It is not the case for the plaintiff that the agreement of the 24th May 2016 novated the one of September 2015. Novation has not been pleaded either expressly or by necessary implication. An intention to novate is not presumed and must be proved either by an express declaration of the parties or by way of necessary inference from all the circumstances of the

case² I am unable to infer on the circumstances of this case that the agreement of the 24th May 2016 novated the alleged agreement of September 2015. It has to be borne in mind that the agreement of novation presupposes the existence of a valid agreement between the parties. The defendants deny the existence of a valid contract. It is unclear if the cause of action is premised on the agreement of September 2015 or one of the 24th May 2016 or both. On this point alone I am unable to find that the plaintiff has made necessary allegations to sustain a cause of action and I find that it has failed to comply with Uniform Rules 32(1) and (2). In my view it is unnecessary to go into the merits of the defendants' defence in view of the fact that the plaintiff failed to verify its cause of action. Accordingly an application for summary judgment must fail. I make the following order.

ORDER:

1. The application for summary judgment is dismissed
2. The defendants are granted leave to defend;
3. Costs shall be costs in the cause.

P.E. MOLITSOANE, J

² Amler's Precedents of Pleadings 9th ed by LTC Harms on page 277

On behalf of applicant:	Adv. A Sander Instructed by: Matsepes Inc Bloemfontein
On behalf of respondents	Adv. T Sibeko SC With Adv Nhlapo Instructed by: State Attorney BLOEMFONTEIN