



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: 2555/2016

In the matter between:

ESKOM HOLDINGS

Excipient

and

LESOLE AGENCIES CC

Respondent

IN RE

LESOLE AGENCIES CC

Plaintiff

and

ESKOM HOLDING

Defendant

HEARD ON: 30 June 2017

DELIVERED ON: 28 September 2017

MHLAMBI, J

- [1] The defendant excepted to the plaintiff's combined summons and the particulars of claim on the basis that it cannot plead to them because the said particulars of claim were vague and embarrassing, alternatively, lacked averments to sustain a cause of action, alternatively, did not disclose a cause of action.
- [2] The following two exceptions were raised to the plaintiff's cause of action premised on the following grounds:

The first exception:

- 2.1 that the plaintiff during or about June, alternatively during July 2014, submitted a quotation and a written tender to the defendant following an invitation and/or request by the defendant to submit such a tender and quotation for construction works that the defendant named "**Complete renovations to existing buildings at Jordan**", a copy of which was annexed as annexure "A" to the particulars of claim; and
- 2.2 that on or about June 2014, the plaintiff was informed that its quotation had been accepted and that during the same period at Bloemfontein, a written, alternatively an oral, in the further alternative a partly written, partly oral contract was concluded;

- 2.3 while annexure “A” to the plaintiff’s summons and particulars of claim was not signed by or on behalf of the defendant.
- 2.4 annexure “A” to the plaintiff’s summons and particulars of claim clearly stated that “ *Notwithstanding anything contained herein, this Agreement comes into effect on the date when the tenderer receives one fully completed copy of this document, including the Schedule of Deviations (if any) together with all the terms of the contract listed above...*” and notwithstanding the plaintiff averring in its particulars of claim that “ ...Plaintiff is not in possession of a signed copy of this document and believes a signed by it copy is in the possession of the Defendant...” wished to rely on such annexure “A”, either in part or in total to set up a cause of action against the defendant in the present proceedings.

The second exception:

- 2.5 The plaintiff’s cause of action was premised on the allegations that as a result of the defendant’s alleged repudiation of the agreement as pleaded and as set out in the plaintiff’s particulars of claim, the plaintiff suffered damages in the amount of R1 580 000.00 which was allegedly due and payable.
- 2.6 Annexure “A” to the plaintiff’s particulars of claim, which seemingly constituted the agreement or at least a part of the

written agreement on which the plaintiff's cause of action is premised, stipulated in paragraph Z9.1 that the Employer's liability to the plaintiff as the contractor, for indirect or consequential loss, was limited to zero rand.

The plaintiff's contentions

- [3] With reference to the first exception, the plaintiff contended that facts were pleaded which gave rise to the contract and because of the background facts, a written, alternatively oral, in the further alternative, partly written, partly oral contract was concluded and that the contract was in writing as per annexure "A" – including parts C1, C2, C3 and C4 by reference. The second component of the complaint that annexure "A" was unsigned by ESKOM ignored the allegation in paragraph 9 of the particulars of claim that the plaintiff was not in possession of a signed copy of the document and believed that such a signed copy was in the possession of ESKOM. This, the plaintiff contended, was a perfectly permissible way of pleading a written agreement.
- [4] It was contended furthermore that the contractual clause stating that the contractor's indirect or consequential loss is limited to R0.00 (zero rand) means that there is no limit at all. The contract evidences no waiver of a right to claim consequential damages as this would mean that the plaintiff is nonsuited. The pleading cannot be vague on the basis of this contractual term. The intention of the parties is a matter of substantive law, determined after evidence is led as to the background and the surrounding circumstances.

The Short Contract (ECSC3)

- [5] Under the heading: C1 Agreements & Contract Data and the sub-heading: C1.1 Form of Offer and Acceptance, the following is stated:

“This offer may be accepted by the Employer by signing the form of Acceptance overleaf and returning one copy of this document including the Schedule of Deviations (if any) to the tenderer before the end of the period of validity stated in the Tender Data, or other period as agreed, whereupon the tenderer becomes the party named as the Contractor in the conditions of the contract identified in the Contract Data.” Under the heading Acceptance, the following is stated: “By signing this part of this Offer and Acceptance, the Employer identified below accepts the tenderer’s Offer..... Acceptance of the tenderer’s Offer shall form an Agreement between the Employer and the tenderer upon the terms and conditions contained in this Agreement and in the Contract that is the subject matter of this Agreement.”

- [6] The defendant contended that in as far as annexure “A” bars any written, oral and/ or implied terms thereto (a so-called variation clause), no reliance can be placed on tacit or implied terms to the alleged agreement on which the plaintiff’s cause of action is premised. The defendant’s prejudice is obvious as it is not only uncertain on which contradictory version the plaintiff wishes to rely at the trial to sustain a cause of action, but will be put to the effort and expense of a plea and preparation for trial if the particulars of claim remain in their present form.

Applicable principles

- [7] An exception that a pleading is vague and embarrassing will not be allowed unless the excipient will be seriously prejudiced if the offending allegations were not expunged¹. The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice. The court would not decide by way of exception the validity of an agreement relied upon or whether a purported contract may be void for vagueness.
- [8] A commercial document executed by the parties with a clear intention that it should have commercial operation, should not lightly be held to be ineffective². As a rule, courts are reluctant to decide upon exception questions concerning the interpretation of a contract³. While it is the function of the courts to resolve ambiguities and uncertainties in disputed contractual terms, the exception is generally not an appropriate vehicle for resolving such disputes⁴.

Application of the principles

- [9] The plaintiff's case depends upon the establishment of a contractual relationship between it and the defendant. The conditions set out in annexure "A", the contract document, clearly prescribe the processes to be followed in order to conclude a

¹ Erasmus: Superior Court Practice, Volume 2 at BI-154 to B1-154A

² Murray & Roberts Construction Ltd V Final Properties (Pty) 1991 (1) SA 508 (A) at 514 E-F

³ Sun Packing (Pty) Ltd v Vreulink 1996 (4) 176 (A)

⁴ Francis v Sharp and Others 2004 (3) SA 230 CPD

contract upon which one of the parties could rely to found a proper claim⁵. Where, in a proposed contract, the mode of acceptance is stipulated, it is that mode that must be followed before a contract is concluded. An offeror may always prescribe the mode of acceptance of his offer in order that a vinculum juris should be created⁶.

- [10] Conflicting interpretations may arise as to what was intended by paragraph Z9.1 of the contract, but questions which may arise in that regard are to be determined at the hearing of the matter and are not capable of being disposed of by way of exception.

Conclusion

- [11] It is clear that the conditions of the contract set out how it was to be concluded and the formalities to be followed. However, I am reluctant to decide upon the second exception concerning the interpretation of the contract and that this question will be determined at the hearing of the matter. In the premises, the first exception must succeed and the following order is therefore made:

ORDER

- 1. The first exception is upheld with costs;**
- 2. The plaintiff is granted an opportunity to remove the cause of the complaint within fifteen (15) days from the date of the**

⁵ Lepogo Construction (Pty) Ltd v Govan Mbeki Municipality [2015] 1 All SA 153 (SCA)

⁶ Westingham Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 1986 (2) SA 555 (A) at 573 F

granting of this order to amend its summons and the particulars of claim, failing which the defendant is granted leave to approach this court without further notice for the striking out of the summons and the particulars of claim.

MHLAMBI, J

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