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: **3634/2016**

In the matter between:

PETER FRANCE N.O.	1st Plaintiff
GERALD JACK FRIEDMAN N.O.	2nd Plaintiff

and

MATJHABENG LOCAL MUNICIPALITY	Defendant

HEARD ON: **18 AUGUST 2017**

JUDGMENT BY: **VAN SCHALKWYK, AJ**

DELIVERED ON: **12 OCTOBER 2017**

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[1] The Defendant files for a notice of exception to the Plaintiffs' particulars of claim in that it lacks the necessary averments to sustain a cause action.

- There is no allegation contained in the particulars of claim specifying the time, terms, backgrounds and circumstances of any procurement sought by the Defendant, to which the plaintiffs' tendered and became the successful tenderer(s).

- The Plaintiffs' particulars of claim do not disclosed the allegation(s) that the Plaintiffs' submitted tender documents to procure the rendering of services in accordance with the applicable law(s) regulating procurement of services by an Organ of State like the Defendant.

- The Plaintiffs' particulars of claim do not disclose allegation(s) to the effect that the Plaintiffs' became the successful tenderer(s).

- The Plaintiffs have therefore concluded invalid, irregular, unlawful and abstract agreements with the Defendant.

- The Defendant, as an Organ of State, does not contract for services in a manner alleged by the Plaintiffs'.

[2] The Defendant, as an independant Organ of State like a private entity has a right to regulate its own procedure hence the MFMA Act. In Louw v TLC of Greater Germiston 1997 (8) BCLR at 1062 W at 1064 A, Roux J held:

> "A convenient starting in the untrammelled right of anybody, private or statutory, to regulate its own procedure".

[3] Of more significance is the Defendant's right to effectuate a policy it adopted in R v Port of London Authority, Ex Parte Kynoch Ltd (1919) 1 KB 176 at 184, the Court said:

> "there are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy ..., if the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course".

[4] The conduct of the Defendant in contracting with the Plaintiffs' is provided for and regulated by the Supply Chain Management Policy.

[5] In Municipal Manager: Qaukeni Local Municipality and Another v FV General Tracing CC 2010 (1) SA 356 (SCA) at 361, para 13 E – F, it was held that failure to implement a supply chain management policy does not mean that a municipality contracting with an external supplier is therefore relieved of the obligation to act transparently and to follow a fair, competitive and costs–effective bidding process. To the contrary: a failure to comply with these precepts renders the contract invalid and open nullification by a Court, no matter the consequential harm suffered by the external supplier. The municipality may not submit to an unlawful contract and must resist the contractor's attempt to implement it. If the contractor applies for an order enforcing performance of the contract, the municipality may ask for a declaration of unlawfulness by way of a counter-application and need not proceed by way of an application for a review.

[6] The Defendant is a Municipality established in terms of Chapter 7, ie, section 155 of the Republic of South Africa Constitutional Act 108 of 1996; "the Constitution" read with the applicable provisions of the Local Government Structures Act 117 1998 "Structures Act".

[7] The Defendant is an Organ of State as defined in section 239 of the Constitution collated with section 195 (2) of the Constitution.

[8] When an Organ of State like the Defendant contracts for goods or services, it must do so in terms of Section 217 of Constitution conflated with section 195 of the Constitution collated with the applicable provision of the Local Government: Municipal Finance Management Act 56 of 2003, "MFMA".

[9] The Plaintiff contends that a contract between an Organ of State such as the defendant and a supplier amounts to administrative action.

See: <u>Kwa Sani Municipality v Underberg-Symbol Community Watch Association (180/2014) [2015] ZASCA 24 (20 March 2015) at para 31</u>;

<u>Municipal Manager: Qaukeni Local Municipality & Another v FV General Trading CC 2010 (1) SA 356 (SCA) at para 26</u>;

<u>State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd 2017 (2) SA 63 (SCA) at para 16</u>;

[10] The First four of the agreements where concluded in 2008 and the fifth was concluded in 2009. Accordingly, the administrative action taken by the Defendant in awarding such contracts occurred either in 2008 or 2009.

[11] It is a basic principle that a pleading should be so phrased that the other party may reasonably and fairly be required to plead thereto.

See: Trope v South African Reserve Bank 1992 (3) SA 208 (T) AT 210 G;

[12] Pleadings must therefore be lucid and logical and in an intelligible form. The cause of action must plainly appear from the factual allegations made.

[13] It is incumbent upon the Plaintiff only to plead a complete cause of action which identifies the issues upon which she seeks to rely and on which evidence will be led.

See: Cilliers et al Herbstein & Van Winsen: The Civil Practice of the High Courts of South Africa (fifth edition) Volume 1 at page 635.

[14] Each cause of action which the Plaintiff seeks to rely upon should have been set out separately in such a way as to enable the Defendant to assess what was claimed from it in each case.

See: Stafford v Special Investigating Unit 1999 (2) SA 130 (E) at 138.

"Causes of action are not in the first instance dependent on questions of law. They require the application of legal principle to a particular factual matrix. The test on exception is whether on all possible readings of the facts, no cause of action is made out. It is for the Defendant to satisfy the court that the conclusion of law for which the Plaintiff contends cannot be supported upon every interpretation that can be put to the facts."

[15] In Mc Kelvey v Cowan N.O. 1980 (4) SA 525 (Z) at 5 – 6 it is stated that:

"it is a first principal in dealing with matters of exception that, if evidence can be led which can disclose a cause of action alleged in the pleadings, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action."

[16] The excipient has the duty to persuade the court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed.

See: <u>Amakhaya Construction v Nelson Mandela Metropolitan Municipality 2004 (2) ALL SA 619 (SE) at 623 F</u>

[17] Besides the fact that a party wishing to rely on illegality must, plead it, the issue as to whether or not the original agreements are irregular cannot be dealt with by way of exception.

See: <u>Harms Amlers Precedents of Pleadings 8th Edition at 123</u>

[18] It is now trite law that if a public body believes one of its administrative acts is invalid it may not simply ignore it. The rationale for this is that even invalid administrative acts are treated as valid until they are set aside.

[19] A public body such as the Defendant when contending for invalidity is thus duty bound to approach the court to have it set aside.

See: MEC for Health, Eastern Cape & Another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute 2014 (3) SA 481 (CC)

[20] In the Constitutional Court Justice Cameron stated as follows:

> "Once the subject has relied on a decision, government cannot, barring specific Statutory authority, simply ignore what it has done. The decision, despite being defective, may have consequences that make it undesirable or even impossible to set aside. That demands a proper process, in which all factors for and against are properly weighed."

[21] The Defendant would have to apply in terms of PAJA for an order setting aside the administrative action but due to the inordinate delay since the contracts were concluded it is doubtful whether any such application would ever be successful or in the unlikely event of the 180 day time period being extended, the court in all probability will exercise its discretion in refusing to grant a review application, having regard to the principle of finality, prejudice to the other contracting party and the delay.

See: Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd 2008 (2) SA 638 (SCA) at para 28

[22] In the case of Aurecon South Africa (Pty) Ltd v City of Cape Town (2038/2014) [2015] ZAQSCA 209 (9 December 2015)

The municipality launched a review application 532 days after the award of a tender. In regard to the delay and to the knowledge of the Organ of State, the following was stated by Maya ADP at para 16:

"[16] The decision challenged by the City and the reasons therefore were its own and were always within its knowledge. Section 7(1) unambiguously refers to the date on which the reasons for administrative action become known to the parties seeking its judicial review. The plain wording of these provisions simply does not support the meaning ascribed to them by the court *a quo*, ie that the application must be launched within 180 days after the party seeking review became aware that the administrative action in issue was tainted by irregularity. That interpretation would automatically entitled every aggrieved applicant to an unqualified right to institute judicial review only upon gaining knowledge that a decision (and its underlying reasons) of which he or she had been aware all along, was tainted by irregularity, whenever that might be. This result is untenable as it disregards the potential prejudice to the respondent (the appellant here) and the public interest in the finality of administrative decisions and the exercise of administrative functions. Contrary to the court *a quo's* finding in this regard the City far exceeded the time frames stipulated in s7(1) and did not launch the review proceedings within a reasonable time. In that case, it clearly needed an extension as envisaged in 9(1)(b) without which the court *a quo* was otherwise precluded from entertaining a review application."

[23] For obvious reasons the court was not prepared to condone the delay.

[24] in addition to the aforegoing, the mere fact that there has been non-compliance with Legislative and Regulatory procedures, does not in itself ineluctably lead to the conclusion that the contract is irregular, unlawful and should be set aside.

[25] I am therefore convinced that an unlawful administrative action cannot indirectly be challenged by way of an exception and, therefore the Defendant has to plead that the agreements were concluded in contravention of procurement systems.

[26] The following order is issued:

The exception is dismissed with costs.

VAN SCHALKWYK, AJ

On behalf of the 1st & 2nd Plaintiffs'	:	Adv A BEYLEVELD SC Instructed by: MATSEPES INC BLOEMFONTEIN
On behalf of the Defendant	:	Adv TK MATHOPO SC Adv SM LEBALA Instructed by: MOROKA ATTONREYS BLOEMFONTEIN