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| Reportable:                        | NO |
| Circulate to Judges:               | NO |
| Circulate to Magistrates:          | NO |
| Circulate to Regional Magistrates: | NO |

HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

CASE NO: 1585/2008

In the matter between:

**MILLENNIUM WASTE MANAGEMENT (PTY) LTD**

**Applicant**

AND

**SOL PLAATJIE MUNICIPALITY**

**Respondent**

**Coram: Lever AJ**

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JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

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L Lever AJ

1. This is an application for leave to appeal a judgment where I ordered absolution from the instance with costs in favour of the defendant. The claim arises out of a tender issued by the defendant municipality for the operation of the Kimberley and Ritchie waste disposal sites and a second component relating to the design work required for the said landfill sites to comply with the permit issued by the Department of Water Affairs and Forestry.
2. I found that despite the denials of the defendant, that the plaintiff, being the applicant herein, had established that a tender process had

taken place. That the then Municipal Manager had issued a letter in favour of the plaintiff awarding the plaintiff the tender. The relevant letter is annexure “B” to the plaintiff’s Particulars of Claim. Also, that it had established that it had done certain work in relation to such tender.

3. The difficulty arises in that ‘part C’ of the tender document contains the following provision:

“3.12 Finalisation of the Contract

- Discussions to reach agreement on all points and sign a contract shall be held at the following address...
- Discussions will include the content of the proposal, the proposed work plan, budget staffing and any suggestions made by the firm to improve the Required Services. The Council and the firm will then work out an agreed final Terms of Reference and staffing. The agreed work plan and final Terms of Reference will then be incorporated into the “Required/Description of Services” and form part of the contract.
- ...
- ...
- The discussions will conclude with a review of the draft form of the contract. The Sol Plaatjie Municipality and the firm should then initial the agreed contract. If the parties fail to reach an agreement, the Sol Plaatjie Municipality will invite the firm that received the second highest score to enter into discussions.”

4. The plaintiff in its Particulars of Claim originally pleaded to the effect that the tender was a unitary whole to the extent that it even claimed the fees of the design consultants as part of its contractual damages in its second claim. During the course of the trial the plaintiff amended its Particulars of Claim to exclude this amount.

5. The evidence led by the plaintiff established that there were two components to the tender, namely the day to day running of the Kimberley and Ritchie landfill sites on the one hand and the technical design work on the other. However, despite amendments to its Particulars of Claim, plaintiff never pleaded that 'part C' of the tender document applied exclusively to the design component of the tender. Plaintiff also never led evidence to this effect. Plaintiff also never pertinently raised this during its cross-examination of the defendant's witnesses. This argument was raised for the first time by the plaintiff in the final argument presented on its behalf at the trial.
6. Even in its pleadings as they stand today plaintiff still has components of 'part C' of the tender pleaded as the basis for its claim both under the contractual claim and in respect of the contractual damages claimed. In this regard, I refer to paragraphs 4, 5, 6 and 7 of the plaintiff's Particulars of Claim. In these circumstances the argument that 'part C' of the tender document only applies to the design component of the tender and plaintiff's Particulars of Claim are mutually destructive.
7. The fact that I found that the plaintiff had established that a tender had been awarded and that it had established that it had done certain work, taken together with the content of the plaintiff's Particulars of Claim, which includes important aspects of 'part C' of the tender document and plaintiff's argument raised for the first time at the

conclusion of the trial that 'part C' applies only to the design component of the tender, is the context within which I awarded the defendant absolution from the instance with costs.

8. Plaintiff filed a Notice of Appeal on the 9 May 2016. This document contains four grounds of appeal set out in five pages. It will serve no purpose to set out this document verbatim herein. In any event, only one substantive ground was pursued when the matter was argued. This was to the effect that the pleadings were for the court and not the other way round, that the evidence established the plaintiff's case and that there was no prejudice to the defendant. Further, that plaintiff's Particulars of Claim were open to interpretation. That in the circumstances, I ought to have found for the plaintiff.

9. In support of this argument, Mr Bruwer, who appeared for the plaintiff throughout these proceedings, referred the court to the *dicta* of Innes CJ in the case of ROBINSON v RANDFONTEIN ESTATES G.M. CO. LTD.<sup>1</sup>

"The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for the pleadings. And where a party had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of an opponent has not been as explicit as it might have been."<sup>2</sup>

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<sup>1</sup> 1925 AD 172.

<sup>2</sup> Above at p 198.

10. In similar vein Mr Bruwer referred to the case of SHILL v MILNER<sup>3</sup> and an unreported judgment of Boruchowitz J in the matter of SUBURBAN SERVICES (PTY) LTD v RODNEY WOLMER<sup>4</sup>. All of which were cited by Mr Bruwer on behalf of the plaintiff as authority for the proposition where the evidence establishes a claim and there is no prejudice to the other party the court ought to recognise and give effect to such claim.
11. Mr Bruwer argued on behalf of the plaintiff that the evidence of Mr Gouws, both in chief and under cross-examination, establishes that the tender has two parts and that the part that was awarded to the plaintiff was the part that related to the day to day management of the Kimberley and Ritchie landfill sites. This is true as far as it goes, but it can take the matter no further.
12. Mr Van Tonder, on behalf of the defendant, argued that the issue of 'part C' only being applicable to the design phase of the tender was not raised in the pleadings, it was not pertinently raised in the evidence of the plaintiff's witnesses and it was not pertinently put to the defendant's witnesses when they were cross-examined.
13. In these circumstances, Mr Van Tonder submitted that the defendant would be prejudiced if the plaintiff was not confined to its Particulars of Claim. Expanding on this argument Mr Van Tonder indicated that if the

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<sup>3</sup> 1937 AD 101 at 105.

<sup>4</sup> A judgment in case number 17201/2013 that appears to have been handed down in the Gauteng South Division, Johannesburg on the 20 February 2015.

contention that 'part C' of the tender document only applied to the design phase was pertinently pleaded by the plaintiff, the defendant would have been afforded the opportunity to prepare its case accordingly. It was further submitted that defendant was not afforded this opportunity.

14. Similarly, if this contention had come out in the evidence, the defendant may have been prejudiced but it may have been afforded an opportunity to deal with both the prejudice and the contention that 'part C' of the tender document only applied to the design phase of the tender. This contention never came out during the evidence stage of the trial. It was first introduced in the final arguments at the trial. In these circumstances, it was submitted by Mr Van Tonder that the defendant would be prejudiced if the plaintiff was not confined to its pleadings.

15. In dealing with a further contention made by Mr Bruwer that the defendant's case was that there was no agreement and did not relate to the contents of the agreement, Mr Van Tonder submitted that it made no difference, the defendant was still not afforded the opportunity of dealing with the case the plaintiff now seeks to rely on. Accordingly, defendant would be prejudiced if plaintiff were to be allowed to conduct its case in this way.

16. Mr Van Tonder, relying on the authority of *Imprefed (Pty) Ltd v National Road Commision*<sup>5</sup>, submitted that a party relying on a contractual claim or a claim for contractual damages needs to base such claim on the provisions of the contract.<sup>6</sup> That the object of pleading "...is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision."<sup>7</sup> That the degree of precision depends upon the circumstances of each case.<sup>8</sup>

17. Also on the authority of the *Imprefed* case, Mr Van Tonder argued that the plaintiff ought not to be allowed to shift the ground upon which its case was based whenever the shoe pinches.<sup>9</sup> Finally, Mr Van Tonder argued that plaintiff, in the evidence it had adduced, had not established the case that it pleaded in paragraph 6 of its Particulars of Claim, which reads as follows:

"6. The plaintiff was the successful tenderer whereafter discussions took place and after discussions and on the 25 July 2007 the defendant in terms of annexure "B" advised the plaintiff that:

'I have pleasure in advising you that your offer submitted in response to the abovementioned tender has been accepted. Council's representative for this work will be in contact with you shortly to finalise logistical arrangements for the execution of this contract.'

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<sup>5</sup> [1993] 2 All SA 179 (A) also reported at 1993 (3) SA 94 (AD).

<sup>6</sup> *Imprefed* above at p 182.

<sup>7</sup> *Imprefed* quoting 'Odgers' *"Principles of Pleading and Practice in Civil Actions in the High Court of Justice"* (22<sup>nd</sup> ed) 113' at 188.

<sup>8</sup> *Imprefed* above at p 188.

<sup>9</sup> *Imprefed* above at p 212.

18. Mr Van Tonder argued specifically that the evidence adduced by the plaintiff did not establish that discussions contemplated took place before the letter of the 25 July 2007, being annexure “B” to the Particulars of Claim, was written and sent. According to Mr Van Tonder, this is where the shoe began to pinch the plaintiff and this is what the argument that ‘part C’ only applied to the consultants in the design component of the tender, was designed to alleviate.
19. Mr Van Tonder is correct in his assertion that the plaintiff failed to establish in its evidence that the said discussions took place as pleaded by the plaintiff.
20. In assessing these arguments from both the plaintiff and the defendant, on the one hand it must be remembered that the applicability of ‘part C’ of the tender document to the design phase only, emerges from a proper reading of the tender document itself. On the other hand, the fact that the plaintiff’s Particulars of Claim, clearly and evidently relies on clauses that only appear in ‘part C’ of the relevant tender document as a basis for its claim, must have misled the defendant and focused its attention away from the fact that ‘part C’ of the said tender document only applied to the Consultants for the design phase.
21. I do not believe that plaintiff purposely set out to mislead the defendant in that way. I believe that plaintiff only came to appreciate



the relevance of how 'part C' of the tender document was drawn up after the evidence in the trial was led and before final arguments in the trial.

22. However, the fact remains that the defendant did not have an opportunity to investigate and/or consider this aspect when: taking instructions from the defendant; considering its own pleadings; consulting its own witnesses; considering what evidence would be relevant to place before the trial court; considering how to approach the cross-examination of the plaintiff's witnesses; and the actual cross-examination of the plaintiff's witnesses.

23. In regard to the final submission made by Mr Bruwer that the plaintiff's pleadings were open to interpretation and another court might reasonably interpret the plaintiff's Particulars of Claim differently, Mr Van Tonder submitted that there was simply no room for a different interpretation of paragraphs 4, 5, 6 and 7 of plaintiff's Particulars of Claim. After considering the submissions made by both Mr Bruwer and Mr Van Tonder on this aspect I do not believe that there is any reasonable prospect that another court might find the said paragraphs of the plaintiffs Particulars of Claim to be open to an alternative interpretation.

24. I found in my judgment, the subject of this application, that the plaintiff was bound by its pleadings as they stood. Having regard to the prejudice the defendant would suffer as outlined by Mr Van Tonder, I am constrained to find that there is no reasonable prospect of another court finding that the defendant was not prejudiced in the said circumstances. Accordingly, it follows that there is no reasonable prospect of another court finding that I ought to have exercised my discretion to allow the plaintiff to establish its claim by virtue of the argument raised after the evidence was closed by both plaintiff and defendant, that 'part C' of the tender document only applied to the design phase of the said tender. Further, it follows that in the circumstances, there is no reasonable prospect that another court would find for the plaintiff.

25. In these circumstances, I must dismiss the application for leave to appeal with costs.

Accordingly, the following order is made:

1) The application for leave to appeal is dismissed with costs.

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Lawrence Lever

Acting Judge

Northern Cape Provincial Division, Kimberley

On behalf of Applicant :

Mr Bruwer

Duncan & Rothman

On behalf of Respondents:

Mr Van Tonder

Van Der Wall & Partners

Date of hearing:

26 July 2016 2016

Date of Judgment:

15 December 2016