

**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**



CASE NO: 70201/2013

DATE OF HEARING: 14 MAY 2015

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| (1) | <u>REPORTABLE: YES / NO</u> |
| (2) | <u>OF INTEREST TO OTHER JUDGES: YES/NO</u> |
| (3) | <u>REVISED.</u> |

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DATE

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SIGNATURE

In the matter between:

VIP CONSULTING ENGINEERS (PTY) LTD

Excipient

and

EKURHULENI METROPOLITAN MUCIPALITY

Respondent

J U D G M E N T

AVVAKOUMIDES, AJ

1. The respondent issued summons against the excipient by way of simple summons claiming payment under five heads for professional fees in respect of services rendered and disbursements incurred by the respondent on the excipient's behalf during February 2007 to March 2013.
2. After the summary judgment proceedings in which the excipient was granted leave to defend four of the five claims were settled and paid by the excipient, the respondent filed a declaration, against which the excipient has filed an exception on two grounds:
 - 2.1 the first is that the claim disclose no cause action because the claim in contract and the contract as pleaded does not satisfy the formalities stipulated in the Municipal Finance Management Act, 2003 (the MFMA) and is thus void and unable to give rise to a right of action; and
 - 2.2 the second is that the respondent's failure to have pleaded whether the services rendered by it fall within the scope of "normal services" or "additional services" as contemplated in the Guidelines Scope of Services and Tariff of Fees (the tariff) of the Engineering Council of South Africa and as such renders the claim lacking in allegations necessary to sustain a claim for payment in terms of the tariff, alternatively vague and

embarrassing, further alternatively an affront to the provisions of the Uniform rules of court pertaining to pleading.

3. The contract is alleged to be partly oral and partly in writing, and the written portion is annexed to the declaration as "VIP-1", this being a letter dated 12 February 2012 by the excipient's Tender and Procurement Committee addressed to the respondent in terms of which the respondent was appointed to render certain services, subject to certain conditions.
4. The excipient argued that because the letter of appointment is not a contract it falls short of compliance with Chapter 11 of the MFMA, more particularly section 116 (1) thereof which provides that a contract or agreement procured through the chain supply management system of a municipality or municipal entity must be in writing and stipulate the terms and conditions of the contract or agreement, which must provide provisions providing for the termination of the contract or agreement in the case of non- or underperformance, dispute resolution mechanisms to settle disputes between the parties, a periodic review of the contract or agreement once every three years in the case of a contract or agreement for longer than three years; and any other matters that may be prescribed.
5. The excipient argued that a correct analogy of the non-compliance with MFMA is, inter alia, that of section 2 (1) of the Alienation of Land Act

1981 in terms of which the failure to comply with the formalities thereof will lead to a nullity of any contract so not complying. The excipient thus argued that “VIP-1” is not a contract as required by the MFMA.

6. Secondly the excipient argued that it is insufficient for the respondent to have pleaded that it would be remunerated for the services to be rendered in terms of the guideline scope of service and tariff of fees for persons registered in terms of the Act. The excipient relied on the judgment of Blieden J in *Grindrod (Pty) Ltd v Delport and Others* 1997 (1) SA 342 (W) in which the learned judge held that “...*any party claiming damages to provide sufficient information to enable the opposing party to know why the particular amount being claimed as damages is in fact claimed*”. I note the distinction between the monies claimed by the respondent being fees claimed in terms of guidelines and not damages referred to in the *Grindrod* case.
7. Be this as it may, the respondent argued that the excipient accepted and paid four of the five claims, which were pleaded in identical form, during and after the summary judgment proceedings. The respondent argued that the excipient is indeed in a position to plead to the declaration and that is what the court’s enquiry should be focused on. If the excipient wishes to raise any issue relating to the non-compliance with formalities of legislation it can do so in its plea. The issue is whether the excipient is in a position to plead to the declaration.

8. The respondent argued that non-compliance with the MFMA if incorporated in the plea may be dealt with by a replication, if applicable. I was referred to Erasmus: Superior Court Practice, B1-151 and the cases referred to therein, in terms of which it is stated that in order to succeed, an excipient has the duty to persuade the court that upon every interpretation which the pleading in question, and particular the document on which it is based, can reasonably bear, no case of action or defence is disclosed.
9. The respondent further argued that clause 36 of the excipient's Supply Management Policy specifically provides that in circumstances where the municipality previously engaged a service provider and procured services in terms of a written agreement, no further procurement process or anew agreement is required to regulate the rendering of further services to such municipality. The respondent alleges that further evidence may be required with regard to the alleged non-compliance with the provisions of the MFMA. Thus it is incorrect to decide this issue on exception. I am inclined to agree. The exception was not raised against the other four claims.
10. On the question that the declaration is vague and embarrassing because of the inadequate description of the tariffs and rates and nature of services, I do not believe that the failure to identify the services wither as "normal" and "additional" services renders the declaration vague and embarrassing. It is clear enough for the

excipient to plead thereto and it can do so without much difficulty. In my view the excipient has not illustrated that it will suffer serious prejudice if the offending allegations are not expunged. See *Levitan v New Haven Holiday Enterprises* CC 1991 92) SA 297 (C) at 298 A and *Lockhat v Minister of Interior* 1960 (3) 765 (D) at 777 A-E the latter in which the test applicable in deciding exceptions based on vagueness and embarrassment was set out.

11. Consequently, I make the following order:

11.1 The exception is dismissed.

11.2 The excipient is ordered to pay the respondent's costs.

AVVAKOUMIDES, AJ
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Representation for Excipient:

Counsel Adv: A. W. Pullinger

Instructed by: Poswa Incorporated

Representation for the Respondent:

Counsel Adv: J. A. Venter

Instructed by WWB Botha Attorneys