

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 3372/2006

In the case between:

C MOKITLANE: MEMBER OF THE EXECUTIVE 1ST Excipient
COUNCIL, DEPARTMENT OF EDUCATION,
FREE STATE PROVINCE
(in his representative capacity as such)

M S RAKOMETSI: SUPT. GENERAL FOR THE 2ND
Excipient
DEPARTMENT OF EDUCATION, FREE STATE
PROVINCE
(in his aforesaid representative capacity as such)

and

KARABO ANSWER BAHUMI Respondent

JUDGMENT: HANCKE, J

HEARD ON: 23 MAY 2008

DELIVERED ON: 12 JUNE 2008

- [1] This is an exception to the particulars of claim as being vague and embarrassing or lacking averments which are necessary to sustain an action. The exception states that, in so far as the particulars of claim are vague and

embarrassing, the respondent (herein later referred to as “plaintiff”) is afforded an opportunity of removing the cause of complaint, failing which the excipients (herein later referred as the “defendants”) shall within the time period prescribed, deliver their exception thereto.

[2] In its heads of argument the plaintiff submitted that insofar as the court finds that the defendants have a valid complaint that the particulars of claim are vague and embarrassing, the defendants embarked upon an improper procedure and directly contrary to the provisions of Rule 23(1). The defendants should have given a prior and separate notice in terms of the provisions of Rule 23(1) to enable the plaintiff to comply therewith, failing which exception could be taken at a later stage. Mr. Daffue, on behalf of the plaintiff, abandoned this point when he appeared in this matter and consequently I do not propose to deal with the merits of this submission.

[3] In its amended particulars of claim, the plaintiff pleads as

follows:

4.1 On **4 June 2004** the Department of Education, Free State Province in writing invited suppliers to tender for the carrying out services in respect of the distribution of Learner Support Material ("**LSM**") / Test and Prescribed books and school stationery to various schools situate in the different districts of the Free State Province. A copy of the Free State Tender Bulletin dated **4 June 2004** is annexed hereto as annexure "**A**".

4.2 In terms of annexure "**A**", suppliers were invited to tender in respect of *inter alia* the following:

4.2.1 Tender no E6/2004/2005 – 2007 in respect of the distribution of the aforesaid material, books and stationery to various schools in the Xhariep District of the Free State Province for the academic year 2005 up to academic year 2007.

4.2.2 Tender E8/2004/2005 – 2007 in respect of the distribution of the aforesaid material, books and stationery to various schools in the Motheo District of the Free State Province for the academic year 2005 up to academic year 2007.

4.2.3 Tender E9/2004/2005 – 2007 in respect of the distribution of the aforesaid material, books and stationery to various schools in the Lejweleputswa District of the Free State Province for the academic year 2005 up to academic year 2007.

4.2.4 Tender E11/2004/2005 – 2007 in respect of the distribution of the aforesaid material, books and stationery to various schools in the Northern Free State District of the Free State Province for the academic year 2005 up to academic year 2007.

4.3 Plaintiff accepted the invitation to tender and on **1 July 2004** and at Bloemfontein in writing tendered in respect of four tender contract numbers, i.e. E6/2004/2005 – 2007, E8/2004/2005 – 2007, E9/2004/2005 – 2007 and E11/2004/2005 – 2007. The applicable tender forms for the rendering of services were duly filled out and signed by plaintiff. Such signed documents, together with plaintiff's pricing schedules in respect of each and every tender is annexed hereto as annexures "**B1**" to "**B4**" in respect of tender numbers E6/2004/2005 – 2007, E8/2004/2005 – 2007, E9/2004/2005 – 2007 and E11/2004/2005 – 2007 respectively.

4.4 On **8 October 2004** and at Bloemfontein Dr **MC NWAILA**, in his capacity as Head: Education, he duly authorised by the Department of Education, in writing accepted plaintiff's tenders on behalf of the Department in respect of E6/2004/2005 - 2007 E8/2004/2005 – 2007, E9/2004/2005 – 2007 and E11/2004/2005 – 2007. Copies of such written acceptances, set out on Form FSBD 7.2 (part 2), are attached hereto as annexures "**C1**" to "**C4**" respectively.

4.5 On **28 October 2004** and at Bloemfontein plaintiff signed the applicable documents referred to as "Contract Form – Rendering of Services", being Form FSBD 7.2 (part 1) in respect of E6/2004/2005 - 2007

E8/2004/2005 – 2007, E9/2004/2005 – 2007 and E11/2004/2005 - 2007. Copies thereof are attached hereto as annexures “**D1**” to “**D1**” to “**D4**” respectively. The general conditions of contract applicable and referred to in annexures “**D1**” to “**D4**” is attached hereto as annexure “**E**”.

4.6 Consequently written contracts were entered into between plaintiff and the Department of Education of the Free State Province in terms whereof plaintiff became entitled to the rendering of services set out in the tender bulletin, read with the acceptances of the tenders, annexures “**C1**” to “**C4**”, subject to official orders indicating service delivery instructions being forthcoming. The Department of Education published in the Tender bulletin of **5 November 2004** that the tenders referred to above were awarded to plaintiff. A copy thereof is annexed is annexed hereto as annexure “**E1**”.

[4] In their exception, the defendants under the heading LACK OF AVERMENTS state the following:

“1.1.1 In paragraph 4.1 Plaintiff pleads a written invitation. Plaintiff annexed annexure “A” to her pleading.

1.1.2 In paragraph 4.2 Plaintiff pleads that annexure “A” *inter alia* invited tenders for certain tenders and for the

period **2004/2005 – 2007**, the relevant tenders being tender number “E6”, “E8”, “E9”, and “E11”. Annexure “A”, attached to the pleadings, does not provide as Plaintiff has pleaded. On the contrary, it only refers to the period **2004/2005** in the first document marked “A”, and the further documents only refer to tender “E8”.

1.1.3 In the premises, Plaintiff’s allegations is not a valid allegation of fact as based on the pleadings and annexures thereto and accordingly no cause of action is disclosed.

1.2.1 In paragraph 4.3 Plaintiff pleads a written acceptance of the invitation to tender. Plaintiff relies on annexure “B1” to “B4” for the said four tenders.

1.2.2 “B1” to “B4” stated that the acceptance of the tender *“shall be subject to the terms and conditions contained in the General Conditions and Procedure (FST36) and Preference Points Claims Form (FST11, FST11.1 and FST11.2) to which Plaintiff are fully acquainted”*. The said FST11, FST11.1 and FST11.2 are not annexed to Plaintiff’s Particulars of Claim.

1.2.3 The said annexures “B1” to “B4” further refers to a declaration of interest (FST6) to being duly completed and included with the tender forms. No such declaration of interest has been attached.

1.2.4 This alleged acceptance of the invitation is not a valid allegation of fact as based on the pleadings and annexures thereto and accordingly no cause of action is disclosed.”

[5] As far as paragraphs 1.1.1 – 1.1.3 of the exception are concerned it is necessary to have regard to the legal effect of a call for a tender. In **R H Christie, The Law of Contract in South Africa** (5th Edition), the following is stated on page 42:

°A call for tenders may be addressed to the public generally or to members of a group such as Master Builders or to selected individuals. Theoretically the call could amount to an offer, by stating that the highest tender (for instance for the purchase of property), or for the lowest tender (for instance for the performance of work or the supply of goods or services) would be accepted. But such cases will be rare, because a person calling for tenders will be unlikely to wish to commit himself in advance to a contract with a tenderer in whom he may have no confidence...

A call for tenders, then, is normally no more than a request to submit offers, and each tender is an offer which an employer calling for tenders may accept or reject at will. It follows that he is not obliged to accept the highest, lowest or any tender. It also follows that, in the absence of wording to the contrary in the call for tenders, any tender documents such as plans, specifications and bills of quantities supplied by the person calling for tenders are supplied simply for the information of the tenderer, to enable him to work out the terms of his offer, but without any promise of their correctness." (my underlining)

COOLCAT RESTAURANTE BK h/a DIE KAFETERIA,

UOVS v VRYSTAATSE REGERING EN ANDERE 1999 (2) SA 635 (O) at 642B – D.

[6] It follows therefore that it was not necessary for the plaintiff to annex the defendant's invitation to tender to its particulars of claim. Therefore an incomplete annexure neither affected nor made its particulars of claim vague and embarrassing.

[7] As far as paragraphs 1.2.1 – 1.2.4 are concerned it is necessary to keep in mind what an excipient must establish before it can succeed with an exception:

;°The test on exception

[6] (i) In order for an exception to succeed, the excipient must establish that the pleading is excipiable on every interpretation that can reasonably be attached to it.

FIRST NATIONAL BANK SOUTHERN AFRICA v

PERRY NO AND OTHERS 2001 (3) SA 960 (SCA) at

965D; **THEUNISSEN EN ANDERE v**

TRANSVAALSE LEWENDEHAWE KOöP BPK 1988

(2) SA 493 (A) at 500 E – F.

(ii) A charitable test is used on exception, especially in deciding whether a cause of action is established, and the pleader is entitled to a benevolent interpretation. **PERRY'S CASE** *supra* at 972 I – J.

(iii) The court should not look at a pleading “with a magnifying glass of too high power.”

KAHN v STUART AND OTHERS 1942 CPD 386 at 391; **PURDON v MULLER** 1961 (2) SA 211 (A) at 214 e – 215 F. In the latter case it was stated:

‘...minor blemishes in, and unradical embarrassments caused by, a pleading can, and should be, cured by further particulars.’

(iv) The pleadings must be read as a whole; no paragraph can be read in isolation.”

SOUTHERNPORT DEVELOPMENTS (PTY)

LTD v TRANSNET LTD 2003 (5) SA 665 (W)

at 669 A – B.

[8] The said document refers *inter alia* to “general conditions and procedures”. Mr. Daffue on behalf of the plaintiff submitted that the said documents are irrelevant and have no bearing on the plaintiff’s cause of action. If a “benevolent interpretation” is applied I agree with Mr. Daffue’s submission because it does not appear from the papers that the said documents are relevant at all. The same applies to the so called “declaration of interest”

(paragraph 1.2.3).

[9] Under the heading “VAGUE AND EMBARRASSING” defendant pleads as follows:

“2.1.1 In paragraph 4.4, Plaintiff pleads a written acceptance of Plaintiff’s tenders. Copies of such written acceptance being annexures “C1” to “C4”.

2.1.2 In each of the annexures “C1” to “C4”, reference is made to an attached list which is not attached to annexures “C1” to “C4”.

2.1.3 Failure to attach the said documentation referred to makes it vague and embarrassing to properly plead thereto.

2.2.1 In paragraph 4.5 Plaintiff pleads a written contract from documents. They are attached as annexures “D1” tot “D4”.

2.2.2 Reference is made to schools as per attached list and certain bidding documents such as “*invitation to bid*”; “*tax clearance certificate*”; “*pricing schedules*”; “*filled in task directive – proposal*”; “*preference certificates in terms of the preferential procurement regulation 2001*”; “*declaration of interest*”; “*special conditions of*

contract” and “*general conditions of contract*”. Plaintiff only attached a document “*general conditions of contract*”.

2.2.3 Failure to attach the necessary documentation relied on makes the pleading vague and embarrassing to plead thereto.

2.2.4 In terms of paragraph 4.6, Plaintiff pleads consequently written contracts were entered into without the proper identification and annexing all the written documentation on which Plaintiff relies.”

[10] As far as paragraphs 2.1.1 – 2.1.3 are concerned it is the defendant’s argument that the “list” referred to is not attached. Paragraph 5 of annexure “C” reads as follows:

5.1 It is possible that not all schools allocated to you have placed orders. Therefore you should rely on the distribution list that will be supplied by the warehouse manager.

5.2 The number of schools allocated to you will not necessarily remain the same for the period of 3 years.”

It is therefore clear that the said list can change from time to time; therefore I can see no necessity for the plaintiff in

the circumstances to annex the said list to its pleadings. The plaintiff's omission to attach it does not make the pleading vague and embarrassing.

- [11] As far as paragraphs 2.2.1 – 2.2.3 are concerned it is the defendant's case that the plaintiff's failure to attach the documentation referred to in annexure "D" makes the particulars of claim vague and embarrassing. The said documentation includes bidding documents, invitation to bid, tax clearance certificate as well as general conditions of contract, of which the first-mentioned documents are clearly not relevant to the plaintiff's cause of action. Although general conditions of contract should as a rule be annexed to the pleadings, it is not clear from the context in which it was used whether the said document is relevant at all, especially where it was used in the same sentence as e.g. a tax clearance certificate. **STERN NO v STANDARD TRADING CO (PTY) LTD** 1955 (3) SA 423 (A) AT 429 G – H. The defendant's objection can therefore not be sustained.

[13] Accordingly the exception is dismissed with costs.

S. P. B. HANCKE, J

On behalf of the plaintiff: Adv. J. P. Daffue
Instructed by:
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On behalf of the defendants: Adv. J. Y. Claasen
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