

IN THE HIGH COURT OF SOUTH AFRICA

(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 746/2004

In the case between:

MAXIM PROGRAMME DEVELOPMENT CC

Plaintiff

and

THE MUNICIPALITY OF MALUTI-a-PHOFUNG

1st Defendant

THE DISTRICT COUNCIL FOR THABO

2nd Defendant

MOFOTUSANYANA

MEMBER OF THE EXECUTIVE COUNCIL FOR

3rd Defendant

LOCAL GOVERNMENT – FREE STATE PROVINCE

PREMIER OF THE FREE STATE PROVINCE

4th Defendant

JUDGMENT:

VAN DER MERWE, J

HEARD ON:

5 SEPTEMBER 2006

DELIVERED ON:

7 DECEMBER 2006

[1] The plaintiff instituted action against the defendants by combined summons issued on 2 March 2004. A combined summons was served on the first defendant and the second defendant on 11 March 2004. In the particulars of claim the plaintiff relies on a written contract entered into on 20 November 2001 between the plaintiff and the first and second defendant's ("the contract"). The claims of the plaintiff are for payment by the first and second defendants, jointly and severally, of the amount of R37 129,00 in respect of services rendered by the plaintiff before the cancellation of the contract and the amount of R749 223,53 in respect of damages resulting on the alleged breach of the contract by the defendants.

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[2] The first defendant is a local municipality and accordingly as such a legal person. The first defendant is a local municipality within the district municipality of Thabo Mofutsanyana. Despite the fact that this district municipality is a statutory legal *persona* “the district council” was sited as the second defendant. I accept however, as all the parties did at the hearing before me, that the said district municipality is duly the second defendant. It is quite unclear why the third and fourth defendants were sited in this action, as no relief is claimed against them. The third and fourth defendants however did not enter appearance to defend and they took no part in the proceedings before me. In the contract the first and second defendants are correctively referred to as “The Municipality”. Whenever reference is made in this judgment to the defendants, it must be understood as a reference to the first and second defendants.

[3] The defendants each filed a special plea to the effect that the plaintiff failed to institute the present action within time limits set in the contract and that in the result the plaintiff’s claims are

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unenforceable. The second defendant also filed a special plea, in which it was averred, in the alternative the aforesaid special plea, that the plaintiff failed to comply with pre-conditions to the institution of legal proceedings contained in the contract and that in the result the action is barred and actually instituted prematurely. This latter special plea was expressly abundant by second by defendant during proceedings in terms of rule 37(4). In the particulars of claim the plaintiff alleged, that it duly gave notice of its intention to institute this action in terms of the provisions of the institution of legal proceedings against certain organs of State Act, nr. 40 of 2002. The plaintiff was obliged to give such notice as the definition of “organ of state” in Act nr. 40 of 2002 includes a municipality such as the third and second defendants. The defendants in paragraphs 11.2 and 12 of their respective pleas denied the plaintiff’s averment. In the result and by agreement between the parties I ruled in terms of rule 33(4) at the commencement of the proceedings that the special pleas of the defendants as well as the pleas contained in paragraphs 11.2 and 12 of the first and second defendant’s respective pleas, we adjudicated upon initially and separate from all other issues in the action and that all such other issues stand over for later determination, if necessary.

[4] The provisions of the contract relevant to the adjudication of the special pleas, are the following:

“18. Settlement of Disputes

The parties shall negotiate in good faith the view to settling any dispute or claim arising out of or relating to this agreement and may not initiate any further proceedings until either party has, by written notice to the other, indicated that such negotiations have failed.

19. Mediation

Any dispute or claim which cannot to settled between the parties may be referred by the party concerned, without legal representation, to mediation by a single mediator.

The mediator shall be elected by agreement between the

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parties or, failing such agreement shall be nominated by the President of the Law Society of South Africa. The cost of the mediation shall be borne equally between the parties.

20. Arbitration/Litigation

If either party be unwilling to agree to mediation or be dissatisfied with the opinion expressed by the mediator or should the mediation fail then such party may:-

20.1 serve process instituting action arising out of such dispute or difference in a civil court; or

20.2 with the consent of the other party refer the dispute to arbitration by a single arbitrator to be mutually agreed upon; or

20.3 If the parties fail to agree on an arbitrator they will use an arbitrator to be nominated by the President of the Law Society of South Africa.

20.4 The arbitration shall be in accordance with the provisions of the arbitration laws of South Africa and shall be conducted in accordance with such procedure as may be agreed between the parties; or

20.5 Failing such agreement, in accordance with the rules for the conduct of arbitrations published by the Association of Arbitrators current rules at the date the arbitrator is appointed.

20.6 Service of process in terms of this clause or referral to arbitration under this clause shall take place within three calendar months of the date of notice from either party declaring that the settlement negotiations under paragraph have failed; or

20.7 If mediation is agreed upon within three calendar months of the date of the mediator's opinion on the date on which the mediator declares that the mediation has failed. Claims not brought within the time periods as set out herein will be deemed to be waived."

[5] Put in a nutshell, the defendants say that the plaintiff failed to serve process in terms of clause 22.6 of the contract within three calendar months of the other party declaring that settlement negotiations have failed and that therefore the plaintiff's claims are

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deemed to have been waived in terms of clause 20.7.

[6] In its application of the plaintiff stage that both defendants waived the right to rely on these provisions of the contract. The onus therefore is on the plaintiff to prove on a balance of primer probabilities that each defendant, with full knowledge of its rights, evinced a clear and unequivocal intention to abundant them. I need to say no more than on the evidence put before me by the plaintiff, no such finding can be made. The plaintiff also pleaded that clause 20.6 of the contract, (presumably read with clause 20.7 thereof) is against public policy and unenforceable as allegedly limits the right to access to court contained in section 34 of the Constitution. Counsel for the plaintiff however expressly have framed from adducing any evidence or making any argument in substantiation of this allegation, _____ so in my view, in the light of the decision of **NAPIER v BARKHUIZEN** 2006 (4) SA 1 (SCA), particularly at pagina 12 para 27.

[7] It is clear that mediation in terms of clause 19 of the contract is not obligatory. It is also common cause that at least the plaintiff was unwilling to agree to mediation and refused to do so and that therefore the introductory paragraph of clause 20 was complied

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with. All the parties before me accepted therefore, that relevant provisions of clauses 20.1 to 20.7 of the contract are applicable.

[8] The special pleas in question bring two questions to the fore, namely first, when notice declaring that the settlement negotiations have failed was given. Second, where the service of process in terms of this clause took place within three calendar months of the date of such notice. The _____ is accepted, correctly in my view, that clause 20.6 of the contract refers to settlement negotiations in terms of clause 18 thereof having failed. It seems probable that the number 18 was by mistake omitted after the word paragraph ("endorse 20.6"). The case for the first defendant is that such notice was given on either 27 January 2003, 3 March 2003, 26 March 2003 or 30 April 2003. The second defendant similarly says that the date of notice declaring that settlement negotiations have failed is 27 January 2003. The case with the plaintiff is that the notice was given on 6 November 2003 and that service of process in terms of clause 20 took place during November 2003, when notice of intention to institute an action in terms of section 3(1) of Act 40 of 2002 was given to the first defendant. The defendants in turn argued that service of process in terms of clause 20 took place only on 11 March 2004, when the combined summons was served.

[9] In my judgment the onus rests on the defendants to show that as the result of the time-clause, the plaintiff's claims are unenforceable. The special pleas are special contractual defences, in my view falling within the second principle stated in **PILLAY v KRISHAN AND ANOTHER** 1946 AD 946 at 951 to 952. Of course, if the defendants are correct on a question of service of process, the plaintiff must fail even though it is correct that the said notice was only dated 6 November 2003. However, as I have clarity in my own

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mind in respect of both questions, I regard it in the interest of the parties to deal with both.

- [10] Three witnesses testified at the trial, namely the attorneys of the plaintiff, the first defendant and the second defendant. I find it unnecessary to summarise the evidence of these witnesses or to decide the conflict in evidence between the attorney for the plaintiff and the first defendant. I should add only that it was in the end either common cause or undisputed that attorneys Balden, Vogel and Partners could never acted for the second defendant and the notice of intention to institute an action in terms of section 3 of Act nr. 40 of 2002 directed to the second defendant, was actually send per registered post on 17 November 2003 to the address of the first defendant, namely Private Bag X805, Phuthaditjhaba. Second defendant's address is Private Bag X810, Phuthaditjhaba and it did not receive this notice. The first defendant admitted receipt of the notice dated 14 November 2003 and send on 17 November 2003 on 27 November 2003.

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[11] The relevant part of the a letter dated 27 January 2003 directed by the plaintiff's attorneys to the executive mayor of both the first defendant and the second defendant, has the following:

“We refer to the above as well as contract entered into by yourself and our client on 20 November 2001 and wish to inform that we now act on behalf of Maxim.

We are in possession of a letter from our client's previous legal representatives directed to you dated 15 October 2002, in terms of which you were requested to enter into mediation procedure with our client regarding various issues of your non-compliance with certain aspects of the said contract.

It is our instructions that despite numerous efforts from our client to resolve any of these issues you have failed to show any response.

This is further our instructions that you are also in default of payments due to our client and that you in a serious and deliberate manner contravene your obligations in terms of section 6 (six) of the said contract.

In light of the above our client now elects to cancel the said contract and to institute the said contract due to your non-compliance with the terms and conditions of the contract.

Furthermore our client demand payment of the full contract amount less payment already received for damages as follows:

Contract amount:	R1,237,566,01
Less payment received:	
	MA P0002 <u>R 51,553,29</u>
	R1,186,102,90

Payments of the above amount is demanded within **10** days from date hereof, failure to do so will result in further legal action without any further notice to you in which event you will

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also to be liable for all legal costs.”

[12] In my judgment this letter does not constitute notice declaring that settlement negotiations have failed as envisaged by the contract. It is clear that in terms of clause 18 of the contract the parties are obliged to negotiate in good faith with a view of settling any dispute or claim buzzing out of or relating to the contract and that therefore proceedings may not be initiated until such negotiations have failed. It is clear from the evidence of the attorneys for the plaintiff and the first defendant that no settlement negotiations took place prior to 27 January 2003. It follows that the letter of 27 January 2003 can by no means be regarded as a notification or a declaration that settlement negotiations have in fact failed. Also, the alleged claim for damages contained in the particulars of claim could in the circumstances of this case only arise as a result of the cancellation of the contract. As the plaintiff perjured to cancel the contract only by the letter of 27 January 2003, could be no negotiation in respect of this claim before that date. In my view this conclusion is borne out by a reply of the attorneys for the first defendant to

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this letter, dated 7 February 2003, where it was *inter alia* stated:

“As our client is not only obliged to, but also willing to negotiate in good faith to settling any dispute of claims, we look forward to receive full and detailed information and alleged facts regarding this matter in order to prepare for such negotiations. We can then soon thereafter arrange a date and venue for such negotiations to take place. Should such negotiations not succeed, our client is willing to co-operate in mediation.”

Such settlement negotiations in fact took place on 30 April 2003 at Harrismith. Both the letters of the plaintiff's attorneys dated 3 March 2003 and 26 March 2003 to the first defendant's attorneys, express reference is made to a proposed conference or meeting in order to discuss settlement. By no stretch of imagination could these two letters be regarded as a notification or declaration that settlement negotiations have failed. It is clear that such notification must in terms of clause 18 of the contract be in writing. Even on the first respondent's version of a note on which the meeting of 30 April 2003 was concluded, it does in any way constituted a written notice.

[13] The letter of the plaintiff's attorney to the first defendant's attorneys dated the 6th November 2003 merely constitutes a notice in terms of which the plaintiff declared that settlement negotiations have failed. As mentioned above, this letter

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was directed to attorneys acting for the first defendant only and therefore not to the second defendant. I do not think that that matters. Clause 18 of contract mentions written notice by either party to the other. In terms of the contract the “other” party is the first and second defendant’s collectively. The first and second defendants collectively acquired all rights and undertook all obligations in terms of the contract. I do not think therefore that in terms of the contract is envisaged that third and second defendants would enter into settlement negotiations separately or on different basis. In my view therefore, in terms of the contract, notification of the indication or declaration that settlement negotiations have failed to either the first or the second defendant suffices.

[14] The question then is whether “service of processing in terms of this clause” in terms of clause 20.6 of the contract took place within three calendar months from 6 November 2003. It will be remembered that in this regard the plaintiff relies on the service of the plaintiff’s intention to institute the legal

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proceedings in question in terms of section 3 of Act nr. 40 of 2002. The plaintiff argues that such notice is a first necessary step in litigation and in this regard it particularly relies on the judgment in **IGI INSURANCE CO LTD v MADASA** 1995 (1) SA 144 (T, AD).

[15] It is trite that in interpreting a contractual provision, the words used must be ascribed their ordinary grammatical meaning within the context in which they were used or unless the context indicates otherwise. The context includes not only the wording or the whole of the contract but also the background facts in respect of the contract, such as the genesis and purpose of the contract. See for instance **BLACKSHAW'S (PTY) LTD v CONSTANTIA INSURANCE CO LTD** 1983 (1) SA 120 (AD) at 127 A – C and **SUN PACKAGING (PTY) LTD v VREULINK** 1996 (4) SA 176 (AD) at 184 A – D. In my judgment there is no reason to deviate from the normal grammatical meaning of the words used in the provisions under consideration. In context the phrase “service of process in terms of this clause” in clause

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20.6, refers to clause 20.1. Clause 20.1 provides for service of process instituting action in a civil court even according to its widest meaning “action” or the narrowly in notes legal proceedings initiated by summons or notice of motion to enforce a claim for a declaration of rights or payment of money or an order compelling the defendant or respondent to do or refrain from doing something. See **INRY PENNINGTON HEALTH COMMITTEE** 1984 SA 243 (N) at 247 A – B. Moreover, the word “processed”, also according to its widest meaning at least in the first two documents employed in a process of litigation, such as a pleading or notice of amendment. The word is defined in the new shorter Oxford Dictionary, 1993 edition as (The proceedings in) an action at law, spec. a mandate, summons or writ by which a person or thing is brought to court for litigation.” See also **MIAS DE KLERK BOERDERY (EMDS) BPK v COLE** 1986 (2) SA 284 (N) at 286 D – 287 B. Section 3(1) of Act nr. 40 of 2002 in turn provides that no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the creditor has given the organ of state in

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question notice in writing of his or her intention to institute the legal proceedings in question or unless the organ of state consented in writing to the institution of that legal proceedings without such notice or despite defective notice.

[16] In summary, in my judgment and notice in terms of section 3 of Act nr. 40 of 2002 does not constitute “process” and certainly does not constitute process instituting action in a civil court. In **IGI INSURANCE CO LTD v MADASA**, *supra* the question was whether in terms of a time-clause in an insurance contract, an action or suit was commenced within the stated period. The court held that the action or sued had been commenced by an application for leave to sue the insurance company, a company outside the Transkei, by edictal citation. It is held that unlike an application to sue *in forma pauperies*, the application for edictal citation was a necessary step in the proceedings provided by the Rules and the Practice Court for the commencement of proceedings and not an ancillary to the commencement of an action. In my judgment this reasoning is not applicable to

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a statutory notice of intention to instituted legal proceedings which may incidentally, may as a result of settlement or otherwise never be instituted. Put differently. Action on sued is not commenced by a notice in terms of section 3(1) of the Act.

[17] I have therefore reached the conclusion that the service of process required by the contract did not take place within three calendar months of the date of notice declaring that the settlement negotiations have failed and accordingly that the defendants have proved that the plaintiff's claims have been rendered unenforceable as they are deemed to have been waived in terms of clause 20.7 of the contract.

[18] In the result it is not necessary to enquire whether there was in any event service of process on the second defendant nor is it necessary to determine whether the plaintiff complied or is entitled to condonation in terms of the provisions of section 3 of Act nr. 40 of 2002.

[19] In the result, the following orders are made:

1. The special pleas of the first defendant and the second defendant are upheld.
2. The plaintiff's claims are dismissed.
3. The plaintiff is ordered to pay the costs of sued.

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C.H.G. VAN DER MERWE, J

On behalf of the plaintiff:

Adv. F. du Toit SC
with him
Adv. G. Jacobs
Instructed by:
Andries Spangenberg Inc.
BLOEMFONTEIN

On behalf of the first defendant:

Adv. B. Knoetze SC
Instructed by:
Symington & De Kok
BLOEMFONTEIN

On behalf of the second defendant:

Adv. C. Ploos van Amstel SC
Instructed by:
Honey Attorneys
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