



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: MAKHANDA]**

CASE NO.1640/2019

In the matter between:

**CNN DEVELOPMENT ENGINEERS AND
PROJECT MANAGERS CC**

Plaintiff

And

DR A.B. XUMA LOCAL MUNICIPALITY

Excipient/Defendant

JUDGMENT

JOLWANA J

[1] The plaintiff instituted action proceedings against the defendant claiming monies allegedly owed to it for engineering services rendered in respect of the construction of Maqakazima and Gengqeleka to Ekunene access roads. This judgment concerns the defendant's exception to the plaintiff's particulars of claim. There was also another similar action instituted by the plaintiff under case No. 1641/ 2024 in which a claim of a similar nature, albeit for engineering services rendered in respect of a number of other access roads is a subject of those proceedings. Because in both matters all the issues are the same and the subject matter of this judgment in this matter finds expression in that matter, the parties agreed that the judgment in this matter will be determinative of case no. 1641/2024 on the issue of the exception.

[2] After being served with summons the defendant entered a notice of intention to defend followed by a notice in terms of rule 23(1) of the Uniform Rules of Court. Rule 23 (1) provides:

“Where any pleading is vague and embarrassing, or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may apply to the registrar to set it down for hearing within 15 days after delivery of such exception: Provided that - (a) where a party intends to take an exception that a pleading is vague and embarrassing such party shall, by notice, within 10 days of receipt of the pleading afford the party delivering the pleading, an opportunity to remove the cause of complaint within 15 days of such notice; and (b) the party excepting, shall within 10 days from the date on which a reply to the notice referred to in paragraph (a) is received, or within 15 days from which such reply is due, deliver the exception.”

[3] In its RULE 23 (1) notice, the defendant brought to the attention of the plaintiff, its dissatisfaction with how the particulars of claim are framed and requested the plaintiff to remove the cause of complaint. The plaintiff did not remove the cause of complaint and therefore did not amend its particulars of claim. As a result, the defendant delivered an exception to the plaintiff's particulars of claim.

[4] The exception is based on two main grounds on the basis of which the defendant asserts that the plaintiff's particulars of claim are vague and embarrassing and/or fail to disclose a cause of action. The plaintiff relies on the written offer of appointment on which certain terms and conditions are stipulated and the written acceptance of the said offer by it which it claims, created a binding agreement between the parties. It is common cause that beyond the said written offer and the written acceptance thereof, no written contract was entered into as alluded to in the written offer. The written offer of appointment stipulated that a written contract would have to be entered into within 14 days of the acceptance of the said offer.

[5] The defendant also relies on section 116 of the Municipal Finance Management Act 56 of 2003 (the MFMA) in terms of which a contract procured through the supply chain management system of a municipality or municipal entity must be in writing stipulating the terms and conditions of the contract. These must include, *inter alia*, provisions for the termination of the contract in the event of the non or under performance and must contain dispute resolution mechanisms to settle disputes between the parties. The defendant also excepts to the particulars of claim on the basis that the plaintiff does not state whether the contract that it alleges, came into existence, was in writing or oral. If it was in writing, a true copy thereof or part thereof was required to be annexed to the particulars of claim in terms of rule 18(6) of the Uniform Rules of Court¹. It was submitted on behalf of the defendant that for all the above mentioned reasons the particulars of claim are vague and embarrassing and/or fail to make out a cause of action.

[6] It was submitted on behalf of the plaintiff that the plaintiff has specifically pleaded that what created a binding contract between the parties is the written offer of appointment as professional engineers and the written acceptance thereof both of which are annexed to the particulars of claim. It was further submitted that if the defendant wants to assail the contract for its alleged invalidity for lack of compliance with section 116 of the MFMA, it should plead that, but it cannot be heard to say that it is unable to plead. The contract between the parties is a written contract based on the offer and acceptance thereof, so went the argument. On these bases the plaintiff denies that the particulars of claim are vague and embarrassing and/or fail to disclose a cause of action.

[7] The test for exceptions is whether or not on all possible readings of the facts no cause of action can be made out. It is axiomatic that it is for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be applied to the facts².

¹ Rule 18 (6) provides: A party who in his or her pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or the part relied on in the pleading shall be annexed to the pleading.

² H v Fetal Assessment Centre 2015 (2) SA 193 (CC) at para 10.

[8] In *Pretorius*³ the legal position on exceptions was restated as follows:

“In deciding an exception a court must accept all allegations of fact made in the particulars of claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts. The purpose of an exception is to protect litigants against claims that are bad in law or against an embarrassment which is so serious as to merit the costs even of an exception. It is a useful tool to weed out bad claims at an early stage, but an overly technical approach must be avoided.”

[9] It is evident from the pleadings themselves that the binding contract relied upon by the plaintiff is the offer and acceptance. They are both annexed to the particulars of claim. As Mr Sishuba, counsel for the plaintiff correctly pointed out, if the defendant wants to plead a defence based on non-compliance with section 116 of the MFMA, it is open to it to do so. What it cannot do is to claim an impediment from pleading when it knows that the written contract referred to in the offer of appointment was never entered into. Furthermore, the defendant knows, based on the pleadings, that the binding contract on which the claim is based is the written offer and the written acceptance thereof, an allegation that has been specifically pleaded.

[10] It seems to me that the defendant has adopted an overly technical approach to the plaintiff's particulars of claim in that not only are the offer and acceptance annexed to the particulars of claim but also the relevant invoices are annexed thereto. If there is any other factual matrix known to the defendant on which it would seek to mount a challenge to the plaintiff's claim, there can be no hindrance for it doing so. The particulars of claim, while not a model of perfection, as they stand, are sufficient for the defendant to be able to plead to thereto and raise whatever defence it seeks to raise. All the documents on which the plaintiff relies for its claims are annexed to the particulars of claim and the necessary averments referred to in rule

³ *Pretorius and Another v Transport Pension Fund and Another* 2019 (2) SA 37 (CC) para 15.

18 (6) are pleaded sufficiently for the defendant to be able to plead. With all of that being said, the defendant's exception is unsustainable and accordingly falls to be dismissed.

[11] In the result the following order is issued:

1. The exception is dismissed.
2. The excipient is ordered to pay the costs of the exception on scale B referred to in rule 67A of the Uniform Rules of Court.

M.S. JOLWANA
JUDGE OF THE HIGH COURT

Appearances

For the plaintiff : M. SISHUBA
Instructed by : MBABANE & MASWAZI INC.
c/o MJENXANE ATTORNEYS' INC
Makhanda

For the defendant : F.H. SMIT
Instructed by : NOLTE SMIT INC.
Makhanda

Date head : 06 March 2025
Date Delivered : 13 March 2025