

SOUTH AFRICA / JUDGMENT

Iqhayiya Design Workshop (Pty) Ltd v Inxuba Yethemba Local Municipality (1219/18) [2019] ZAECGHC 92 (19 September 2019) [2019] ZAECGHC 92

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.E. Smith

CASE / FILE NUMBER

1219/18

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE NO. 1219/18

Date heard: 5 September
2019

Date Delivered: 19

September/2019

In

the matter between:

IQHAYIYA
DESIGN WORKSHOP (PTY) LTD
Plaintiff
and
INXUBA
YETHEMBA LOCAL MUNICIPALITY
Defendant

JUDGMENT**SMITH J.E:**

- 1) The plaintiff, a firm of consulting engineers, issued summons against the defendant (the Inxuba Local Municipality) for damages in respect of services rendered in term of written agreements. After entering appearance to defend, the defendant filed a notice to remove a cause of complaint in terms of Uniform Court Rule 23 (1), in consequence of which the plaintiff delivered amended particulars of claim on 17 August 2018.
- 2) The defendant subsequently filed another notice to remove a cause of complaint on 1 November 2018. On this occasion the plaintiff, however, elected not to effect further amendments to its particulars of claim, and the defendant filed its exception on 11 January 2019.
- 3) The exception is based on six grounds on which it is asserted that the particulars of claim are vague and embarrassing and fail to disclose a cause of action. The grounds overlap considerably, and I accordingly do not intend to traverse each of them individually.
- 4) The contention that the particulars of claim are vague and embarrassing is founded on the following assertions. The plaintiff pleads in paragraphs 5 and 6 thereof that a written agreement was concluded by the parties, consisting of the terms of letters of appointment and acceptance, which had been transmitted by way of email.
- 5) The plaintiff has, however, failed to plead where the contract was concluded and who represented the parties, as is required in terms of Uniform Court Rule 18(6). The plaintiff furthermore also appears to rely on the terms of a Service Level Agreement, a copy of which was annexed to the particulars of claim, but similarly failed to plead where and by whom that agreement was concluded.
- 6) The contention that the particulars of claim do not disclose a cause of action is based on the following assertions. The plaintiff relies on the terms of the Service Level Agreement, has pleaded that the agreement was signed by the parties, but averred that it never received a signed copy thereof. The terms of that agreement, however, inter alia, provide that the agreement would only come into operation once the plaintiff has received “a fully completed original copy” thereof. The plaintiff has pleaded that he did not receive such a copy of the agreement, and has failed to plead any other factual basis on which the agreement would have become operational. The agreement has thus, on the basis of the plaintiff’s own pleadings, never become effective; or so the argument went.
- 7) Mr Nzuzo, who appeared for the plaintiff, correctly argued that the mere fact that a pleading does not comply with the provisions of Rule 18(6), does not necessarily mean that it is excepiable. It may well be that in those circumstances it would be appropriate for a defendant to apply for the impugned pleading to be set aside as an irregular proceeding.

- 8) However, the particulars of claim, in its current form, plead reliance on the terms of both the letter of appointment, as well as the Service Level Agreement. One of those agreements, namely the latter, has, on the basis of the plaintiff's own pleaded facts, never become operational. They are not relied upon in the alternative. Thus even if, as has been argued by Mr Nzuzo, the reliance on the terms of the letter of appointment is not affected by the assertions relating to the coming into operation of the SLA, the fact of the matter is that the plaintiff has placed reliance on the latter agreement as well. And it would not be proper for the court simply to ignore the terms of that agreement and adjudicate the exception only on the averments contained in the particulars of claim. The plaintiff has elected to plead *facta probantia*, namely the averment that the plaintiff "never received a fully signed copy of the SLA". That averment, when read in the context of the contract which it has annexed to the particulars of claim, means that on its own version one of the contracts on which it has placed reliance for its damages claim, has never come into existence. This is a fundamental and insurmountable problem for the plaintiff.
- 9) In addition, as Mr Knott has correctly argued, in these circumstances the non-compliance with Rule 18 (6) becomes more significant, and the failure to plead the relevant facts renders the pleading vague and embarrassing.
- 10) While it is conceivable that there well may be another factual matrix which, whether by implied or express agreement rendered the contract operational, those facts have not been pleaded. The prejudice to the defendant if the pleading is allowed to stand is in my view manifest. In its current form therefore the particulars of claim are both vague and embarrassing, and fail to disclose a cause of action. The exception must accordingly be upheld.
- 11) In the result the following order issues:
- (a) The exception is upheld, with costs.
- (b) The plaintiff's amended particulars of claim, dated 17 August 2018, are set aside and the plaintiff is given leave, if so advised, to deliver further amended particulars of claim within 10 (ten) days from the date of this order.

J.E. SMITH

JUDGE OF THE HIGH COURT

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