

SOUTH AFRICA / JUDGMENT

Masibuyisane Services (Pty) Ltd v Cliffside Trading 62 (Pty) Ltd t/a Nova Plant Services (1757/2017) [2019] ZAMPMHC 28 (18 June 2019)

[2019] ZAMPMHC 28

COURT

Middelburg High Court, Mpumalanga

BEFORE

HF Brauckmann

CASE / FILE NUMBER

1757/2017

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IN

THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA

DIVISION, MIDDELBURG

(LOCAL

SEAT)

CASE

NO: 1757/2017

In

the matter between:

MASIBUYISANE

SERVICES (PTY) LTD EXCIPIENT

/ DEFENDANT

and

CLIFFSIDE

TRADING 62 (PTY) LTD T/A

NOVA

PLANT

SERVICES RESPONDENT

/ PLAINTIFF

JUDGMENT

BRAUCKMANN AJ

INTRODUCTION

- [1] This is an exception taken by the defendant (“the excipient”) against only claim two of the plaintiff’s amended particulars of claim. The excipient alleges that the defendant’s particulars of claim does not disclose a cause of action, alternatively is vague and embarrassing and seeks an order from this court that the exception be upheld, the particulars of claim be set aside and that the plaintiff be ordered to pay the costs of exception. The exception is basically only in respect of claim two and I can therefore not understand why the excipient insists that plaintiff’s particulars of claim be set aside.
- [2] I also pause to mention that this is not the first exception launched by the defendant in this matter. On 29 May 2018 an exception launched by the defendant was upheld. Subsequent to the said order the plaintiff amended its particulars of claim and it is now this amended particulars of claim that is the subject of this exception.
- [3] The excipient’s first ground for exception is that Annexure A5[1] to plaintiff’s particulars of claim is not incorporated by reference as a whole, but only in respect of the pricing contained in Annexure A5. Annexure A5 is described as a quotation and contains a reference number NPS-105 Rev 1. The said document contains various other conditions as well, including, amongst others, a clause dealing with scaffold material[2]:
- “Sale by loss to be charged for all damaged and/or lost scaffold material. (Current material on hire 331,06 Ton)”*
- [4] The exception states that the plaintiff’s second claim based on sale by loss cannot be sustained as page 359 (of Annexure A5) does not form part of the agreement referred to in Annexure A1 which is a letter from the defendant to the plaintiff, appointing the plaintiff as contractor, which states:
- “You are hereby appointed to supply ad erect scaffolding as per the requirements of the Main Contract, on the abovementioned project. Price as per the Quotation referenced NPS-105 Rev 1.(Annexure A5)*
- [5] Annexure A5, the excipient states, is not included by incorporation into the contract that starts on page 367 of the agreement.

According to the excipient, it is only included to the extent that it deals with the price of material. That was the only submission before this court, and it seems as if it was the only exception plaintiff had to deal with in argument.

- [6] The excipient then states that due to the fact Annexure A1 and A5 does not form part of the agreement the plaintiff, relying on the contract for its cause of action, does not disclose a cause of action.

THE LAW

- [7] The whole purpose of pleading is to bring clearly to the notice of a court and the parties to an action the issues upon which reliance is to be placed.[3]

- [8] Whether the parties intended to contract on terms as alleged would be established by evidence and at trial and is not necessary to be established at this stage.[4]

- [9] A written agreement can consist of more than one document, and documents can be incorporated by way of reference into a written

document. The plaintiff, with precise particularity and with reference to all the clauses upon which it relies for his cause of action, must set out the terms it relies in founding a claim against the defendant and it cannot be held to be excipiable if he does so.[5] An exception can only be granted by a court where no cause of action is made out on every interpretation emanating from the pleading being excepted against. It has been held that:

“It is for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported upon every interpretation that can be put upon the facts.”[6]

- [10] Exception procedures is not appropriate procedure to settle questions of interpretation of contracts when the entire contract is not before the court or whether it appears from the contract or the pleadings that there may be admissible evidence which, if placed before the court, could influence the court’s decision as to the meaning of the contract, provided that this possibility is more than a notional remote one.[7]

- [11] It is however not for a court, at the exception stage to decide whether a contract is void for vagueness and that is only to be done and decided after evidence is lead on trial. An exception can further not be used to attack the vagueness of a contract relied upon by a party, but is only concerned with pleadings.[8] If any interpretation other than the one raised by the excipient is evident from the pleading as it is the exception will not succeed and should be dismissed. An exception that a pleading is ambiguous cannot succeed unless, on every interpretation possible, no cause of action or defence is disclosed. [9]

- [12] The excipient must also show that there is either a real point of law of real embarrassment and not be a mere conjecture of vague and embarrassment. Unless the excipient can satisfy the court that there is a real point of law or real embarrassment the exception should be dismissed.[10]

- [13] The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice.[11] The court should not follow an over technical approach because it destroys the usefulness of the exception procedure which is the weed out cases without legal merit.[12]

DISCUSSION

- [14] plaintiff bases its cause of action on an agreement contained in Annexures A1 to Annexure A5 to particulars of claim, which are various written documents, for its claim against the defendant. The appointment letter (Annexure A1) states that the plaintiff would be appointed as a sub-contractor and the form of sub-contract will be NEC 3 Terms Service Contract (Annexure A2). The terms of the contract are expressly contained in Part C 1, Part C 2, Part C and the drawings and documents. Part C 1.1, the form of the offer and acceptance, under the heading "Acceptance" is clear and unambiguous and is referenced to the documents in which the terms of the contract are contained. Part C 1.2 b of Annexure A2 is the contract data that relates to the contractor, the plaintiff, and is therein recorded that:
- [14.1] the direct fee percentage is 12%;
- [14.2] The service information of the contractor's plan is contained in the quotation (Annexure A5);
- [14.3] The plan identified in the contract data is to be supplied by the contractor;
- [14.4] The pricelist for the services as per the quotation NPS -105 Rev 1
- [15] particulars of claim C 1.2 b of Annexure A2 is therefore clear that the quotation NPS -105 Rev 1 (Annexure A5), were incorporated in the agreement by reference and as such. It is contended by excipient that the provision of Annexure A2 do not incorporate the terms of Annexure A5 as, inter alia, alleged in paragraph 6.8 of the particulars of claim. Based on the above, it is alleged no cause of action is disclosed in respect of claim 2, alternatively the particulars of claim is vague and embarrassing.
- [16] If one considers paragraph 6.8 and 15 of the particulars of claim in conjunction and considering conjunction with the documents relied on, it is clear that a cause of action was disclosed by the plaintiff. The excipient relies on its own interpretation / construction of the documents annexed in contending the particulars of claim does not disclose a cause of action or is vague and embarrassing. The interpretation or construction of the excipient is incorrect and unfounded. The plaintiff clearly, and in no uncertain terms, in its particulars of claim connects the various documents in paragraph 6.1 to 6.11 of the particulars of claim and in no uncertain terms indicates how Annexure A2 incorporated the various terms as contained in Annexure A5. Clause C 1.1 of Annexure A2 makes express provision that the terms of the contract are contained in, inter alia, "Parts C1 Agreements and Contract Data (which includes the form of offer and acceptance) as well as final offer for attached data as well as final offer for attached dated 28 Oct 2014"[13]

[17] The appointment letter of the defendant, directed to the plaintiff, marked Annexure A1, clearly states that the price of services

rendered would be as per the quotation reference in NPS-105 Rev 1. The excipient can therefore be under no misunderstanding that the quotation was not the document with reference number NPS – 105 Rev 1 as is evidenced by the appointment letter for which it is the source. One must remember that the appointment letter is a letter from the defendant to the plaintiff and not plaintiff's document. As is correctly stated by the defendant, C 1.2 b, at paragraph 11.2 (15) clearly states that:

“The services information for the contractors plan is as per the quotation.”

The quotation is in fact Annexure A5 and the services information for the contractors plan, not only refers to pricing, but to all terms as contained in Annexure A5.

[18] The construction of the excipient only relies on part of the quotation and states that only the pricing is included in the

agreement whilst the remainder of the quotation is not incorporated and should be ignored. This is not logical and does not make proper sense. Documents must be read as a whole and not piecemeal.

[19] The plaintiff clearly and unambiguously pleads in paragraph 6.1 of the particulars of claim the reason why the whole of the quotation, Annexure A5, is incorporated in the agreement. On any reading of the plaintiff's particulars of claim it is clear that, with reference to the annexures thereto, the plaintiff did disclose a cause of action.

[20] It can also not be said that the plaintiff's particulars of claim is vague and embarrassing.

[21] I accordingly find that there are no grounds for this court to uphold the exception. The exception is accordingly dismissed with costs.

HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

REPRESENTATIVE FOR THE EXCIPIENT:

INSTRUCTED BY: KRUGEL HEINSEN INC

C/O BRANDMULLERS INC

REPRESENTATIVE FOR THE RESPONDENT:

INSTRUCTED BY: VOS VILJOEN & BECKER INC

C/O KRUGER & BEKKER ATTORNEYS

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DATE OF JUDGMENT: 18 JUNE 2019

- [1] Bundle, page 387
- [2] Bundle, page 389
- [3] Durbach
- v. Fairway Hotel Ltd. 1949 (3) SA 1081 (SR) at 1082
- [4] Gordon Lloyd Page and Associates v. Riviera & Another 2001 (1) SA 88 (SCA) at 95 J
- [5] Imprefed (Pty) Ltd v. National Transport Commission 1993 (3) SA 94 (A) at 107 B-H
- [6] Trustees for the time being of the Childrens' Resource Centre Trust & Others v. Pioneer Food (Pty) Ltd & Others (Legal Resources Centre as Amicus Curiae)
- [2013] (1) All SA 648 (SCA) at paragraph 36
- [7] Picbel Groepvoorsorgfonds (In liquidation) v. Somerville & Other related matters 2013 (5) SA 496 (SCA) at 511, paragraph 39
- [8] Screening and Earthworks (Pty) Ltd v. Capital Outsourcing Group (Pty) Ltd; Capital Outsourcing Group (Pty) Ltd v. Screening and Earthworks (Pty) Ltd
- [2008] (1) All SA 611
- [9] South African National Parks v. Ras 2002 (2) SA 537 (C) at 540
- [10] South African National Parks supra, page 542
- [11] Erasmus Superior Court Practice, 2nd Edition, Volume 2 by Van Loggenberg, Page D1 /300
- [12] Telematrix (Pty) Ltd v. Advertising Standards Authority SA 2006 (1) SA 461 (SCA) at page 465, paragraph 3
- [13] Page 23 of Bundle

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