

SOUTH AFRICA / JUDGMENT

Millenium Waste Management (Pty) Limited v Sol Plaatje Municipality (1585/2008) [2018] ZANCHC 63 (11 September 2018) [2018] ZANCHC 63

COURT

Northern Cape High Court, Kimberley

BEFORE

Pakati, Mamosebo, Stanton

CASE / FILE NUMBER

1585/2008

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTHERN

CAPE DIVISION, KIMBERLEY)

Case

No: 1585/2008

Heard

on: 19/03/2018

Delivered

on: 11/09/2018

In

the matter between

MILLENIUM

WASTE

MANAGEMENT Appellant/Plaintiff

(PTY)

LIMITED

And

SOL

PLAATJE

MUNICIPALITY Respondent/Defendant

Coram:

Pakati ADJP et Mamosebo J et Stanton AJ

JUDGMENT**ON APPEAL****PAKATI ADJP**

[1] The appellant/plaintiff, Millennium Waste Management (Pty) Limited, a company with its principal place of business situated at 18 Dusseldorf Street, Apex, Benoni, appeals against the judgment of Lever AJ delivered on 15 April 2016 granting absolution from the instance in favour of the respondent/defendant, Sol Plaatje Municipality, which also ordered the appellant to pay the costs of the respondent.

[2] The appellant instituted action against the respondent for two payments; in respect of Claim 1, an amount of R2 208 095-90

for services rendered regarding the operation of the Kimberley and Ritchie Waste Disposal Sites and Claim 2, an amount of R2 909 515-62

for loss of profit allegedly suffered by the appellant for the balance of a three year contract amounting to thirty months of a

thirty six month contract. The court a quo refused leave to appeal to either the Full Court of this Division or the Supreme Court of Appeal. On 21 April 2017 the Supreme Court of Appeal granted leave to the Full Bench of this Division.

[3] The basic grounds of appeal relied upon by the appellant can be summarised as follows:

3.1 The court a quo erred in finding that the particulars of claim are in conflict with the contract proved, thereby dismissing its second claim. The court a quo also erred when it granted absolution from the instance though it found that the appellant concluded the agreement.

3.2 It erred in finding that the respondent was prejudiced by the manner in which the appellant formulated its claim taking into account that the respondent denied the conclusion of any contract. Its defence was that no contractual obligation existed and that the appellant had no contractual entitlement to claim payment.

3.3 The court a quo erred in finding that the respondent was prejudiced because the appellant pleaded one contract and argued another. The trial court also failed to consider that the respondent did not object to Mr Gouws' evidence and any evidence led for that matter.

3.4 The trial court absolved the respondent from the instance, despite finding that the appellant concluded the agreement as pleaded.

[4] It is not in dispute that the respondent invited tenders and that on or about 20 February 2006 the appellant submitted a written tender (Annexures “A1” – “A48”). The appellant states that on 25 July 2007 the respondent advised it in a letter referred to as the appointment letter signed by Mr TF Mashilo, the Municipal Manager, that its offer submitted in response to the tender, had been accepted.

[5] It is the appellant’s case that after receiving the said appointment letter an impression was created that the tender

documents together with the appointment letter constituted the written terms of the agreement. Consequently, the respondent handed

to it the waste disposal site. They took charge and operated the landfill sites on a continuous basis during the period October 2007 until the end of March 2008, the argument goes. However, the alleged handing over of the site is denied by the respondent. It also denies the existence of a binding contract between the parties.

[6] In its plea the respondent states that if the court finds that the appellant made an offer that its acceptance would not constitute an agreement, alternatively that such an agreement would be void because it was not in accordance with its “Voorsieningsbestuursbeleid” and did not comply with the statutory requirements applicable to Local Government tenders.

[7] The respondent contends that tenders were invited to submit proposals for the operation of the disposal sites. Notably, the heading of the alleged appointment letter records thus: “Re: INVITATION FOR PROPOSALS FOR THE OPERATION OF THE KIMBERLEY AND RITCHIE WASTE DISPOSAL SITES”. The respondent contends further that the tender procedure in terms of the Preferential Procurement Policy Framework Act[1] was not followed.

[8] The respondent denies that the appellant fulfilled its obligation in terms of the alleged agreement and that it was a successful tenderer. Its denial of the conclusion of the agreement is, according to the appellant, a repudiation of the contract which it purports to accept, hence the claim for damages suffered. The respondent further denies that Mr Mashilo made an undertaking to pay the invoices by 17 March 2008 in a meeting held on 11 March 2008 between Messrs Gouws and Schallan.

[9] Regarding the tender, the respondent alleges that it was an express, alternatively tacit alternatively, implied term of the tender that it was issued and conducted under the terms summarised as follows:

9.1 The notification of the tenderer that its tender had been accepted did not mean that it had been awarded or that an agreement resulted;

9.2 The parties had to first engage into discussions with a view to reaching an agreement. The discussions would, amongst others, deal with the contents of the tender, personal requirements, the financial arrangements and the consultant experts;

9.3 A draft agreement would then be reviewed by the parties and, if they were ad idem, it would be initialled. A written agreement would be signed which would constitute an agreement between the parties; and

9.4 If the parties would not agree, the next tenderer with the highest score would be approached to enter into the said discussions.

The respondent contends that no discussions took place between the parties and no draft agreement was reviewed or signed by the parties constituting an agreement between the parties.

[10] Two expert witnesses, Mr RJ Gouws and JH Karstens presented evidence on behalf of the appellant. Mr Karstens, the appellant's

employee as project manager, was in charge of the execution of the alleged contract. He testified that he, in the company of Mr Thabiso Taaka, Mr Marius Steyn, responsible for the landfill site, and Mr Bogacwi, a director of the respondent, attended a hand-over meeting during mid-September 2007. In that meeting it was mentioned that the appellant would start its operation on 01 October

2007. The discussions were also about the logistics pertaining to the machinery and equipment that had to be moved from Johannesburg to Kimberley. Mr Marius Steyn, a person responsible for the landfill door to door collection in Kimberley and the Surex operations also in Kimberley, showed Karstens where to put the diesel tanks on site and where the equipment was stored. To prevent spillage, the fire department's presence on site was essential to build bund walls around the diesel tanks. Mr Steyn pointed out where they would put up a security fence of 1.8 metre high around the area to protect the machinery and the diesel tanks. On site was a trash compactor.

[11] Karstens testified further that the respondent's staff members were at the gate of the landfill site and controlled access. It also determined the volume of waste that got into the site. This information was given to the appellant. Karstens alleged that he had meetings with Mr Mashilo regarding non-payment by the respondents.

[12] According to Mr Gouws he prepared the tender documents and the information relating to the tender. The appellant's business

had a landfill division which managed landfills for domestic markets. Gouws was also involved with the calculation of the fees to be charged and costing. He testified that when the appellant received no payment for the work done, he held a meeting with Mr Mashilo on 11 March 2008. Mr Mashilo requested them to furnish a report showing the work done, which was done. He thereafter indicated that payment would be made by 17 March 2008, which was not done. The evidence of Karstens and Gouws was not challenged by the respondent.

[13] Ms Cornelia Burger, an employee of the respondent, testified that on 11 May 2006 a meeting was held between Mr Jacob Kweshiwe, Lydia Mahloko and Seyathle Mitha, the respondent's line managers. The minutes of this meeting show that the line managers were directly

involved with the tender in question, but the respondent elected not to call them to testify. No explanation was given for this move. The court a quo drew a negative inference against the respondent for such a failure. The respondent also did not call Mr Mashilo, despite three affidavits that he deposed to in this matter.

- [14] The court a quo dealt with the respondent's failure to adduce 'direct evidence showing that the tenders were not considered by an evaluation committee or an adjudication committee.' The trial court accepted the following evidence as unchallenged by the respondent:

14.1 That the reason why Mr Mashilo was not called by the respondent was that it knew he would be a hostile witness. It came to light during Mr Akharwaray's testimony that the affidavit of Mr Oban Cronje, the respondent's attorney of record, conflicted with the version that the tender process was properly carried out and that no agreement was concluded because the pre-requisite of a signed service level agreement did not come into existence.

14.2 That a meeting was held between Messrs Gouws and Schallan, for the appellant, and Mr Mashilo, on behalf of the Municipality, whereat the outstanding account was discussed. The respondent did not query the invoices and admitted having received same. The report was, according to Mr Gouws, emailed to the respondent on 12 March 2008;

14.3 The evidence of Mr Karstens was that he was the project manager on site and that Mr Mashilo visited the site and expressed his appreciation for the work done. He also took possession of the landfill site on 01 October 2007, representing the appellant; and

14.4 That two employees of the respondent manned the gate of the landfill site and recorded estimates of the volume of waste brought into the site. The said estimates were provided to the appellant to calculate the mass of solid waste brought onto the site.

- [15] The amended particulars of claim do not specify which part of the written tender was submitted. Paragraph 4 of the amended particulars of claim also does not specifically mention that the tender documents consist of three parts namely, Part A dealing with the introduction and background, Part B, with the required services and Part C, the information for consultants. Paragraph 4 to 6 of the amended particulars of claim read:

"4. On or about the 20th day of February 2006 the plaintiff submitted a written tender to the defendant of which a copy is annexed "A1" to "A48".

5. It was an express term of the tender that discussions will take place between the parties regarding the content of the proposal, the proposed work plan, budget staffing and any suggestions made by the plaintiff to improve the required services, discussions will take place regarding finances, discussions will conclude with a review of the draft form of the contract and the contract will be awarded following the discussions with the successful tenderer.

6. The plaintiff was a successful tenderer where after discussions took place and after discussions and on the 25th July 2007 the defendant in terms of annexure “B” annexed hereto advised the plaintiff that:

“I have pleasure in advising you that your offer submitted in response to the abovementioned tender has been accepted. Council’s

representative for this work will be in contact with you shortly to finalise logistical arrangements for the execution of this contract.”

[16] Importantly, no date is mentioned as to when the discussions mentioned above took place. Paragraph 7 of the amended particulars of claim is based upon Clause 3.12 of the tender document as being applicable.

[17] The court a quo found that the letter of 27 July 2007 signed by Mr Mashilo advising the appellant of the acceptance of the tender created a presumption that such act was legal and valid. He considered the following as probabilities:

17.1 That the tender was advertised and the process was put in place by the respondent to deal with the tenders;

17.2 The appellant and others submitted the tenders and the initial assessment was carried out;

17.3 Certain tenderers were informed that their tenders were non-responsive; and

17.4 There was no evidence of a resolution to suspend or terminate the tender.

[18] Of significance is Clause 3.12 which deals with the finalisation of the contract and 3.13, award of the contract. These clauses are extracted from Part C of the tender documents and record:

“3.12 Finalisation of the Contract

· Discussions to reach agreement on all points and sign a contract shall be held at the following address:

Sol Plaatje Municipality

First Floor, Old Building (Civic Centre Building)

Corner Jan Smuts Boulevard & Lyndhurst Street

Kimberley

· Discussions will include the content of the proposal, the proposed work plan, budget staffing and any suggestions made by the firm to improve the Required Services. The Council and the firm will then work out an agreed final Terms of Reference and staffing. The agreed work plan and final Terms of Reference will then be incorporated into the “Required/Description of Services” and form part of the contract.

- Discussions of finances will be confined to accommodate any agreed technical modifications and their impact on the cost of services. Unless there are exceptional reasons, discussions will involve neither the remuneration rates for staff (no breakdown of fees) nor other proposed unit rates. In no event will the final cost of services exceed the original budget.
- Consultants should, in their proposals, provide assurances that the experts named will be available. The Sol Plaatje Municipality expects to conclude a contract on the basis that the experts named in the Proposal are available. Due to the urgent nature of the work required the Sol Plaatje Municipality will not consider sub situations during contract finalisation. If it is established that key staff were offered in the Proposal without confirming their availability, the firm may be disqualified.
- The discussions will conclude with a review of the draft form of the contract. The Sol Plaatje Municipality and the firm should then initial the agreed contract. If the parties fail to reach an agreement, the Sol Plaatje Municipality will invite the firm that received the second highest score to enter into discussions.”

3.13 AWARD OF CONTRACT

The contract will be awarded following the discussions with the successful firm.”

- [19] The appellant relied on Annexure “A1” to “A48” as the terms of the agreement between the parties throughout the trial as alluded to earlier. What merits attention is that although the amended particulars of claim are premised in Clause 3.12 the evidence does not show that the appellant complied with its provisions. When Mr Gouws was asked to explain what the appellant did after receiving the alleged letter of appointment he said:

“The next step kicks in. We start planning, My Lord, for a handover and taking over of the landfill site. There is, a tender document becomes a contract document and it governs this contract. As stipulated here “your offer has been accepted”. We must when we submit the tender make sure that understand the contract agreement which the whole document forms part, forms a contract, our submission plus the municipality general conditions in all their contract forms and completed document. So this means our contract that governs our tender and our execution of our work.”

- [20] When Gouws was asked whether after the letter of 25 July 2007 further documents were created or further discussions were entered into he said that the only interaction was the communication of the handover of the landfill site. He pertinently stated that he was never involved in any discussions. He stated that the meeting that took place after the appellant was awarded the alleged written tender was between Messrs Taaka, Johan Karsten and Steyn concerning the handover of the landfill site. He alleged that he was also not involved in any other ‘discussions to reach agreement on all points’ in compliance with Clause 3.12.
- [21] The court a quo correctly found, in my view that the appellant failed to establish that discussions took place before the appointment letter was written and forwarded. In trying to avoid non-compliance with Clause 3.12, the appellant insisted that the terms in the said clause relate only to the second part of the tender and not the first part. This argument loses

sight of the fact that it is the appellant who attached Annexure “A1” to “A48” to its amended particulars of claim to prove its claim against the respondent. In its amended particulars of claim the appellant expressly pleaded in terms of Clause 3.12 of the tender documents.

This brings me to the question whether the tender structure consists of two parts.

- [22] Gouws’ evidence was that the tender was made up of two legs being the operational management of the landfill site and the technical engineering services and that Part C applied exclusively to the second part. He insisted that the appellant was only awarded the operational management of the landfill site and not the second leg. During cross-examination Gouws stated: “It is not an intermingle of services, it is two distinct skills that is required to execute these two distinct services.”
- [23] It is nowhere stated in the pleadings that the structure of the tender consists of two parts, being the “Operations of the Kimberley and Ritchie Waste disposal site” and the “Professional technical services for the upgrading of the Kimberley and Ritchie waste disposal sites”. No such evidence was led.
- [24] The respondent contends that there was a single tender consisting of two legs. This submission is supported by the fact that Part C of the tender documents deals with the other most important aspect of the tender namely, discussions relating to the content of the proposal, the proposed work plan, budget, staffing and any suggestions made by the firm to improve the required services. It also includes discussions pertaining to finances to accommodate any agreed technical modifications and their impact on the cost of services.
- [25] Mr Bruwer, on behalf of the appellant, argued that the appellant tendered only for operations and that Clause 3.12 is not applicable

to it. He argued further that Part C of the tender documents refers to the consultants. According to him the contract had to be

interpreted as pleaded. Gouws’ evidence was that the appellant combined two distinct proposals into one tender submission and this was undisputed. He stated that the appellant was awarded the tender for operational management of the landfill site. He submitted further that Clause 3.12 was never intended to be part of the pleadings but part of the tender as it had two parts. Having submitted that, he requested for an amendment of the amended particulars of claim thereby deleting paragraphs 5 (see para 15 supra) and 7 as being irrelevant. Para 7 records:

“7. Annexure “A” and “B” constitute the terms of the written agreement concluded between the parties and more particularly, having regard to the plaintiff’s allegations set out in paragraphs 4, 5 and 6 above and paragraphs 9, 10, 11 and 12 hereunder, the conduct of the defendant set out in the said paragraphs, induced a reasonable belief in the plaintiff (the offeror) that the offer as contained in the tender had been accepted in accordance with the prescribed mode and consequently, having regard to the doctrine of quasi mutual consent an agreement was concluded between the plaintiff and the defendant with the express terms as is set out hereunder. “Alternatively, the defendant waived the requirements for the conclusion of an agreement, which requirements were set out by the defendant for

the defendant's benefit and/or the defendant waived and abandoned conditions

stipulated by the defendant for the defendant's benefit by advising the plaintiff on 25 July 2007 that the plaintiff's

offer that was submitted "has been accepted". Alternatively, the defendant intentionally represented to the

plaintiff that a contract was concluded between the plaintiff and the defendant relating to the waste disposal sites by providing the plaintiff with a written notice that the contract between the plaintiff and the defendant had been concluded and by handing the waste disposal sites at Kimberley and Richie over to the plaintiff and by allowing the plaintiff to operate the landfill sites on a continuous basis during the period October 2007 until the end of March 2008. By accepting the representations made by the defendant, the plaintiff took charge of the landfill sites, carried out all its obligations that it agreed to do in terms of the tender and thus acted to its prejudice. In the premises the defendant is estopped from denying that an agreement between the plaintiff and the defendant was not concluded, the agreement being the acceptance of the tender that the plaintiff submitted to the defendant".

[26] Mr Van Tonder in response objects to the said amendment and submits that the version pleaded by the appellant is mutually destructive

with the evidence led by the witnesses. It is also fatal to the appellant's claim.

[27] It is worth mentioning that the appellant did not amend its particulars of claim although Mr Bruwer was explicitly invited by the court a quo to amend it on 24 March 2015. Yet on two previous occasions namely, 27 May 2011 and 16 September 2014, its particulars of claim were amended in terms of Rule 28 (1) of the Uniform Rules of Court.

[28] Rule 28 of the Uniform Rules of Court provides that:

"28 Amendments to pleadings and documents

- (1) Any party desiring to amend any pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.
- (2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected."

[29] The test to be applied is whether the application is bona fide and whether any prejudice may be occasioned to the defendant as a result thereof.[2] Amendments applied for shortly or at the hearing are dealt with in terms of Rule 28 (10).[3] Amendments to pleadings and documents, including summonses and applications but not sworn statements, can be sought at any stage of the proceedings.[4] In his minority judgment Majiedt JA in MINISTER OF AGRICULTURE AND LAND AFFAIRS AND ANOTHER v DE KLERK AND OTHERS[5] stated:

“It is trite that parties are bound by their pleadings — the object thereof being to delineate the issues to enable the other party to know what case has to be met. It is impermissible to plead one particular issue and to then seek to pursue another at the trial. Agency, either express or implied, should be specifically pleaded and, in accordance with the general rule, that he who asserts must prove, the onus of proof rests on the party who alleges such agency.”

[30] Nienaber JA in COOPER AND OTHERS NNO V SYFRETS TRUST LTD[6] held that:

“A party whose case had unravelled before a trial court cannot stitch together a new one on appeal if it is not properly covered by the pleadings or was not properly covered in evidence. He cannot in fairness be allowed to advance a case different from the one he presented on paper - be it in the affidavits on motion (cf Administrator, Transvaal, and Others v Theletsane and Others [1990] ZASCA 156; 1991

(2) SA 192 (A) at 195J - 197D; Naude and Another v Fraser [1998] ZASCA 56; 1998

(4) SA 539 (SCA) at 563H - 564A) or in the pleadings on trial (Imprefed (Pty) Ltd v National Transport Commission 1993

(3) SA 94 (A) at 107E - I). On that ground too, the plaintiff must in my opinion fail.”

[31] If Clause 3 to 6 of the amended particulars of claim would be amended it would mean that a material portion of the appellant’s case changes drastically. Without these clauses the appellant has no cause of action. An exception would successfully be raised to the appellant’s pleadings. In my view it would be prejudicial to the respondent’s case if the amendment were to be granted to the appellant’s pleading as it is substantial to its case and would lead to the court reaching a different conclusion. As alluded to earlier, it has been the appellant’s case that Annexure “A1” to “48” which incorporates paragraph 3.12 constitutes the tender documents.

[32] At paragraph 18 of its heads of argument the appellant states that it submitted a tender which was accepted by the respondent that the appellant would operate the Kimberley and Ritchie Waste Disposal Sites as alluded to earlier. It is this acceptance that constitutes the agreement between the parties, the argument goes.

[33] Notably, the MBD 1 form consists of an invitation to bid which includes Part A to C of the invitation for proposals for the

operation of the Kimberley and Ritchie waste disposal site. The reading of the bidding document shows that the invitation to bid is a single document which is inclusive of Clause 3.12. Moreover there is no evidence supporting the appellant’s case that it did not intend to include this clause because on its own version no discussions took place. This is so because the contract would only be awarded in terms of Clause 3.13 following the said discussions in compliance with Clause 3.12.

[34] The court a quo found that the appellant's argument that the tender consists of two parts and that Clauses 3.9 and 3.12 had application to the second part of the tender was sound and should be upheld. However, it stated that that was in conflict with the appellant's case that remained on the amended particulars of claim. This is so because Clauses 3.9 and 3.12 are exclusively applicable to the second part of the tender which is inapplicable to the appellant. Clause 3.9 records:

"3.9 Proposal Validity

Proposals must remain valid for 90 days after the closing date for submissions. During this period, you are expected to keep available the professional staff proposed. The Council will make its best effort to complete negotiations within this period. If the Proposal validity period is extended, the consultants have the right not to maintain their Proposals."

[35] Significantly, the letter of acceptance relied upon by the appellant does not specify that one part of the tender and not the other was successful but that 'the tender has been successful'. Paragraph (2) of Part 1 of the contract form (Annexure "A1") reads:

"(2) The following documents shall be deemed to form and be read and construed as part of this agreement:-

(i) Bidding documents, viz

MBD 1 - invitation to bid

MBD 2 - original tax clearance certificate

MBD 3 - pricing schedule(s)

- Technical specification(s)

MBD 6 - preference claims in terms of the Preferential Procurement Regulations 2001

MBD 4 - declaration of interest

- Special conditions of contract

MBD - 7 formal contract

(ii) General conditions of contract; and

(iii) Other (specify)."

[36] The evidence does not show that any service level agreement in terms of Clause 3.12 of the tender document was entered into by the parties. The appellant failed to prove that it complied with the said clause. In the absence of this material aspect in the appellant's pleading the appellant's argument that the tender consists of two parts cannot stand. In my view the court a quo correctly took into account the way the pleadings were formulated.

[37] This brings me to the next consideration as to whether the court a quo misdirected itself when it found that the particulars of claim was in direct conflict with the appellant's argument that the tender had two parts and that Clauses 3.9 and 3.12 were exclusively applicable to the second part. During Mr Gouws' testimony it

transpired that the calculation regarding damages allegedly suffered by the appellant as a consequence of the cancellation included the second part of the tender. In its claim for contractual damages arising from the respondent's repudiation of the agreement the appellant included a portion of the professional consultant's fee as part of its loss of profit. When this came to light, the appellant amended the amounts. This flies in the face of the appellant who states that the second part of the tender was not

applicable to it. This was clearly a single tender, hence the appellant's pleading includes portions of Clause 3.12 of the

tender document.

[38] It is so that the evidence led by the appellant went unchallenged, but sight should not be lost of the fact that the appellant had to prove the terms of the agreement as alluded to earlier. The court a quo found that there was a tender process and that the appellant was awarded the tender by the respondent. The evidence led by the appellant was therefore found to be sufficient and that it fulfilled its obligations under the contract. Be that as it may, the court a quo correctly found that lack of the necessary pre-requisites relating to the discussions after the award of the tender, including the draft agreement that had to be initialled show that no service level agreement was entered into by the parties. No misdirection was committed in this regard.

[39] Ms Blight testified that one of the tenderers, EPA, only tendered for the design and planning work and had crossed out the first part. Her evidence confirmed the fact that the tender consisted of two parts. The court a quo upheld the argument that the tender consisted of two parts. However, it was not satisfied with the way the pleadings had been drawn

up.[7]

[40] In support of its assertion the appellant relied on *SHILL v MILNER*[8] where the Court held:

"While listening to him I could not but ask myself what the substantial issue was between the parties in the Court below. The importance of pleadings should not be duly magnified. The object of pleading is to define the issues and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for the pleadings. Where a party has had every facility to place all the facts before the trial Court and investigation into all the circumstances has been as thorough and as patient as in this case there is no justification for interference with an Appellate Tribunal merely because the pleading of the opponent has not been explicit as it might have been."

- [41] The Shill case is distinguishable from the instant case. In casu the pleading is in conflict with the evidence led and the argument advanced that the tender consists of two parts.
- [42] The appellant's argument ignores the fact that the amended particulars of claim do not mention two parts of the tender and paragraphs 3 to 6 of same do not refer to any other discussion except the one in Clause 3.12. These clauses cannot be referred to as irrelevant or immaterial to the appellant's case. The appellant has to plead the terms of the agreement as it appears in the particulars of claim. It is so that the respondent discovered some of the documents at a late stage but the court a quo accepted that no evidence was established that showed that the respondent deliberately concealed evidence and that the sporadic production of documents was as a result of the fact that it had no mechanism to track its records and documents. Gouws confirmed that no discussions took place before the take-over of the landfill site as pleaded in Clause 6 of the amended particulars of claim.
- [43] In my view the tender is clearly a single one and the appellant's argument that Part C of the tender document relates exclusively to the consultants and has no application to the tender dealing with the operation of the landfill sites cannot stand. This is also not supported by its pleading as illustrated supra. The appellant's failure to prove the terms of the agreement goes to the root of its claim. It failed in its duty to prove the terms of the agreement and compliance thereof. In my view the trial court misdirected itself when it upheld the appellant's

argument that the tender had two parts and that Clause 3.9 and 3.12 only had application to the second part of the tender. The trial court dismissed all the defences of the respondent, but the appellant bore the onus to prove its case as pleaded. In the circumstances the appellant cannot lead evidence which is in conflict with its pleadings.

- [44] None of the parties addressed prejudice in their heads of argument. It is worth mentioning though that the court is not at liberty to make a different case for a litigant which has not been pleaded. In my view the appeal has to fail as the appellant failed to make out a case in respect of the appeal.

COSTS

- [45] I now come to the issue of costs. A defendant who is absolved from the instance should be regarded as the successful party and the plaintiff should be ordered to pay the costs unless there are good reasons for ordering otherwise.[9] There is no reason why the same principle should not apply in the instant case.

In the circumstances I make the following order:

The appeal is dismissed with costs.

BM PAKATI

JUDGE-NORTHERN CAPE DIVISION, KIMBERLEY

MC MAMOSEBO

A STANTON

ACTING JUDGE-NORTHERN CAPE DIVISION, KIMBERLEY

On behalf of the appellant:

Adv AP Bruwer

Instructed by:

DUNCAN & ROTHMAN INC.

On behalf of the respondent: Adv AG Van Tonder

Instructed by:

VAN DE WALL INC.

[1] Act 5 of 2000

[2] Tecmed (Pty) Ltd v Nisso Iwai Corporation 2011 (1) SA 35 (SCA) at 41D-F

[3] The Civil Practice of the High Courts of South Africa, Fifth edition Vol 1 at p676 by Cilliers, Loots and Nel; Rule 28 (10) of the Uniform Rules of Court provides that the court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such terms as to costs or other matters as it deems fit.

[4] Caxton Ltd v Reeve Forman (Pty) Ltd [1990] ZASCA 47; 1990 (3) SA 547 (A) at 565F-G

[5] 2014 (1) SA 212 (SCA) at 223G para [39]

[6] 2001 (1) 122 (SCA) at 133C-D

[7] Jowell v Bramwell-Jones 1998 (1) SA 836 (WLD) at 898G where the following passage is quoted from Jacob and Goldrein on Pleadings: Principles and Practice at 8 thus:

“As parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings...For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial.”

[8] 1937 AD 101 at 105

[9] Kruger v Die Sekretaris van Binnelandse Inkomste 1970 (4) SA 687 (A) at 692A-C

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