

(Inlexso Innovative Legal Services)gs

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 40197/2016

DATE: 2019.10.10

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED ✓

30/10/19

10 In the matter between

AFRIMINE (PTY) LTD

Plaintiff

and

TWO RIVERS PLATINUM (PTY) LTD

Defendant

J U D G M E N T

20 WEPENER, J: The plaintiff instituted action against the defendant for payment of the sum of R525 000 due to a loss suffered as a result of a breach of contract. The less I say about the alleged breach the better at this stage. More important is the establishment of the contract from which rights may flow.

The case that the defendant was required to meet was pleaded to be a tacit contract which existed between the

parties. There is no alternative claim based on oral or written agreement. A party who relies on a tacit contract is obliged to plead that the contract is tacit.

(See *EC Chenia and Sons CC v Lame and Van Blerk* 2006(4) SA574 (SCA) Paragraph 8).

10 "It is necessary to allege and prove unequivocal conduct that establishes that the parties intended and did in fact tacitly contract on the terms alleged. Regard will be had to the conduct of all the parties objectively. It must be proved that there was in fact consensus *ad idem*".

Standard Bank of South Africa Ltd v Ocean Commodities Inc.
1983(1) 276 (SCA) 292.

To avoid absolution from the instance the plaintiff must produce evidence of the parties' conduct that justifies a reasonable inference that the parties intended to and did indeed contract on the terms alleged.

Gordon Hay and Associates v Riven 2001(1) SA88 (SCA)

20 The plaintiff's pleadings are indeed such that it follows and it shows that it is aware of the legal principles. It alleged specific conduct which is then said to result in the tacit agreement.

The specific conduct is set out in paragraphs 3 and 4 of the particulars of claim. The conduct asserts the following:

During August 2014 the plaintiff's representative introduced the plaintiff to the defendant's human resources manager as a recruitment agency. The plaintiff proposed to do business with the defendant.

Then in September 2014 the human resources manager of the defendant obtain curriculum vitae's from the plaintiff of candidates suitable for placement with the defendant and the defendant thereafter paid the plaintiff certain fees when these candidates so referred by the plaintiff were indeed employed.

10 These facts are the sum total of the conduct relied upon to infer a tacit contract.

It is alleged that the terms of the tacit contract was supposed to be entered into during the period referred to before, and on 20 November 2014 the plaintiff forwarded the CV of Mr Maswosala Lethebele to the defendant for a position to be filled.

It is common cause that Mr Lethebele was not employed by the defendant at that time. The evidence of plaintiff's managing director in support of its case and for a finding of a
20 tacit agreement as alleged is that during November 2014 negotiations were entered into with the defendant regarding its services to the defendant and the payment for such services, especially in relation to the two candidates.

This in my view puts paid to the alleged conduct in August and September 2014 on which the tacit agreement is

said to be found. The importance thereof is that whilst the negotiations in relation to the payment for the two candidates head hunted by the plaintiff for the defendant were ongoing, the facts relating to Mr Lethebele commenced only on 10 November, a time when according to the plaintiff's evidence, the parties were still negotiating their relationship.

It is further to be noted that the conduct in relation to the two candidates and their appointment occurred after the head hunting of Mr Lethebele.

10 There is no doubt that a tacit agreement in this instance can only be proved as a result of prior conduct of the parties. No prior conduct was proved, despite the allegations in the particulars of claim, the latter which were contradicted by the plaintiff's evidence. Not only did the plaintiff fail to prove unequivocal prior conduct to support a tacit contract, its witness contradicted the pleaded version.

 If regard is had to the pleaded version of the alleged tacit contract it, too, is rather fanciful if compared to the evidence led before this Court. One such alleged tacit term is
20 the following:

 "The defendant would keep curriculum's vitae of candidates supplied by the plaintiff in its database and consider them for appointment when positions would be advertised in the future for which they would be found suitable."

In my view this is an extremely wide term. It allows for a fee to be paid even if the person would in the future qualify for a totally different position. In my view this would not be a good business practice to enter into such a term, and the plaintiff failed to plead or prove any facts or circumstances from which such a wide term can be inferred. I give this as an example of the alleged tacit terms.

Some of the terms alleged were said to exist at the discretion of the plaintiff and the defendant i.e. the alleged
10 duty to inform the plaintiff that a candidate was employed. That certainly cannot be a term.

Other of the pleaded terms were said not to exist or that they existed as distinct oral agreements. But the ultimate test is whether the contract as pleaded unequivocally proves the tacit contract as alleged. I have indicated that the evidence cannot support it.


In *Minister of Agriculture and Land Affairs and Another v De Klerk and Others* 2014(1) SA 212 (SCA) at paragraph 38, Majiedt JA, said:

20 "It is trite that the 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 then to seek to pursue another at the trial."

A specific oral agreement as argued was not pleaded nor canvassed at the trial and it cannot be expected of the defendant to now seek out witnesses to deal with this unpleaded proposition.

In all these circumstances the plaintiff failed to establish a contract on which it relies, even on a balance of probabilities, and there is not case for the defendant to answer. I grant absolution from the instance.

The plaintiff is ORDERED TO PAY THE COSTS OF THE
10 ACTION.


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WEPENER, J

JUDGE OF THE HIGH COURT

DATE: 30/10/19