1IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NUMBER: JS 1037/06

IN THE MATTER BETWEEN:

THE TOURISM, HOSPITALITY AND SPORT

EDUCATION AND TRAINING AUTHORITY **PLAINTIFF (APPLICANT)**

AND

TMS-SHEZI INDUSTRIAL SERVICES **DEFENDANT (RESPONDENT)**

JUDGMENT

MOLAHLEHI AJ

Introduction

[1] This is an exception brought by the defendant against the plaintiff's statement of case on the ground that it lacks averments necessary to sustain a cause of action. The claim, which was instituted by the plaintiff, arose from the grants, which were allocated to the respondent as an employer and a training provider by the applicant for purposes of implementing learnerships.

[2] The plaintiff, a Skills, Education and Training Authority (SETA) established in terms of s9 of the Skills Development Act 97 0f 1998 (the Act), instituted an action in the High Court of South Africa (Witwatersrand Local Division) in terms of which it claimed damages in the amount of R9 859 005-00 from the defendant.

[3] The respondent has raised an objection that the applicant's claim does not disclose cause of action.

[4] This matter was initially filed in the High Court, under case number 2004/887 but was later transferred to the Labour Court by consent of both parties, pursuant to the provisions of s31 (3) of the Act. At the time of the transfer the matter was ready for trial, pleadings having closed.

[5] In response to the exception, the plaintiff filed a "*notice of its intention to argue a preliminary point"* which was aimed at challenging the manner in which the defendant raised the exception. In this regard, the plaintiff contended that the step taken by the defendant in filing its exception was irregular, alternatively constituted an abuse of the process of court and that the defendant should be precluded from enrolling the exception for argument.

[6] In this regard I ruled that it would be both prudent and appropriate that the objection and the exception be heard simultaneously. I indicated that the approach, I would adopt in considering both issues, would be that of considering

the objection to the exception first and only consider the exception should I find that the objection was unsustainable.

Background

[7] In terms of s10 of the Act, the functions of the plaintiff are *inter alia* to implement its sector skills plan by establishing learnerships, allocating grants to training providers and workers, including promoting and registering learnership agreements.

[8] Following on its obligations set out in s16 of the Act, the plaintiff established the Tourism Learnership Project (TLP).

[9] During the periods of 2002 and 2003, the defendant as an employer and as a service provider concluded, in terms of s17 (1) of the Act, more than a 1000 learnership agreements. In terms of s17 (2)(a) of the Act, the defendant as an employer was obliged to employ employees for a given period, provide them with specified practical work experience and to release them to attend the education and training programs set out in the learnership agreements.

[10] In terms of s17 (2) (c) of the Act, the defendant in its capacity as a training provider was obliged to provide education, training and provide the learner support as set out in the learnership agreements.

[11] The learnership agreements concluded between the defendant and the individual learners were registered, in terms of s17(3) of the Act, with the

plaintiff. The learnership agreements, which took substantially the same form and formulated in line with the framework of the Act, imposed certain obligations on the defendant. These obligations included providing education and training, support, monitoring, assessing, supervising and providing adequate training facilities for the learners. The defendant was also obliged to ensure payment of the agreed learning allowances to the learners.

[12] In addition, the learnership agreements provided that the learner was entitled to receive a certificate upon successful completion of the learning towards obtaining a qualification to be registered in terms of s16(c) of the Act read with the South African Qualifications Authority Act 58 of 1995 (SAQA).

[13] During the years 2002 and 2003, the plaintiff, as required by s10 (1)(b)(iii) of the Act, allocated grants in the form of training and learner allowances in the sum of R9 859 005-00. These grants were made to the defendant in its capacity as an employer and training provider.

Plaintiff's contention

[14] The plaintiff in its statement of case firstly contended that the purpose of the grants was to enable the defendant to discharge its obligations in terms of the Act read with the terms and conditions of the learnership agreements. Secondly,

the plaintiff contended that the defendant *"breached its obligations"* in the following respects:

> *"16.1 The assessment strategies and practices of the defendant for qualifications were wholly inadequate.*
> *16.2 The defendant did not provide learners with the necessary practical work experience.*
> *16.3 The defendant's lecture rooms and alternative training facilities were not up to standard.*
> *16.4 The environment was not conducive to learning in the required outcomes based methodology.*
> *16.5 Visual aids were limited and inappropriate to the qualifications' requirements.*
> *16.6 In their evaluation of the training, learners complained about inadequate training resources and facilities.*
> *16.7 There were no quality assurance policies or procedures to indicate what and how quality was maintained.*
> *16.8 It was not possible to verify how trainers were performance managed.*
> *16.9 There was an absence of sufficient qualified trainers, facilitators and assessors.*
> *16.10 There was clearly defined registration process or learner management process.*
> *16.11 There were no clearly defined moderation practices in place.*
> *16.12 There was no formalized feedback and reporting structure.*
> *16.13 There were no trainers guides or evidence of structured, unit standard aligned learner material."*

[15] The plaintiff further contended that as a consequence of the defendant's breaches it (the plaintiff) was unable to provide any of the learners with a certificate as evidence of successful completion of the learning. Accordingly,

none of the learners have been able to obtain a qualification to be registered by SAQA.

[16] It was also submitted by the plaintiff that the defendant, failed to take material steps to remedy the breaches, despite receiving assistance according to the plaintiff. Thus, the plaintiff's claim as set out in the particulars of claim reads as follows:

> "*In the premises, and as consequence of the defendant's breaches and its conduct in failing to remedy same, the plaintiff has suffered damages in the sum of R9 859 00,00 which sum is, due and payable."*

Objection to the exception

[17] I now turn to deal with the objection to the exception, which is based on two grounds. The first ground concerns the late filing of the exception and the second, the binding effect of the pre-trial minute.

[18] The rules of the Labour Court are silent as to what recourse is there to an opposing party if the summons or the particulars of claim do not disclose a cause of action. However, a solution to this problem can be found in Rule 11(3), which provides that:

> *"If a situation for which these rules do not provide, arises in proceedings or contemplated proceedings, the court may adopt any procedure that it deems appropriate in the circumstances."*

[19] Confronted by the same issue, Mlambo J as he then was, correctly held in *Van Rooy v Nedcor Bank Limited* (1998) 5 BLLR 540 (LC), that rule 11(3) permitted the use of the procedure as set out in rule 23 of the High Court Rules. Rule 23 provides that:

> *"Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain any 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 or may set it down for hearing, provided that where a party intends to take an exception that a pleading is vague and embarrassing, he shall within the period allowed as aforesaid, by notice, afford his opponent an opportunity of removing the cause of complaint within 15 days."*

[20] As concerning the objection to the exception the plaintiff argued that it should not be entertained because of its timing and the fact that a pre-trial minute was already signed by both parties.

[21] The plaintiff argued that generally speaking the function of a pre-trial conference is to limit and circumscribe the dispute between the parties. In this regard the plaintiff referred me to the decision of *Shoprite Checkers* (1996) 17 ILJ 701 (LAC), where it was held that once the parties had limited the issues by way of a pre-trial minute, the Court was bound by that agreement.

[22] In the current case the plaintiff argued that the two issues, which the parties had agreed upon and accordingly the Court was bound to consider, are; whether

the defendant breached its obligations and whether as a result thereof the plaintiff suffered damages.

[23] It is indeed correct that a pre-trial minute constitutes an agreement, which circumscribes the dispute between the parties. However, the pre-trial minute does not resolve the issue in dispute. An exception, in my view, goes beyond the issues that parties may have agreed upon in the pre-trial minute.

[24] An exception seeks to go to the root of those issues, which the court is called upon to consider. It is a legal objection to the other party's pleadings, which does not necessarily place in dispute the allegations in the summons or a plea but asserts that because of the defect in the pleadings no cause of action is disclosed. The pre-trial minute does not therefore preclude any of the parties from raising an exception to the claim or to the defence of the other party. See *Makgae v Sentraboer Kooperaties Bpk (1981) 4 SA 239 (T)* at 244H – 245A.

[25] The second ground upon which the objection is based on relates to the timing of the exception. The plaintiff argued in this regard that the defendant should have noted the exception when the action was instituted in the High Court or at the pre-trial conference, which was held on 14 February 2006.

[26] In countering the objection in as far as the timing of the filing of its exception was concerned, the defendant relied on the case of *Edward L Bateman Ltd v CA Brand Projects (PTY) LTD 1995 (4) SA 128(T).* The summons in this case was issued in June 1991 and the matter came to trial during May 1993.

When the matter came to trial, counsel for the respondent informally raised an exception to the plaintiff's particulars of claim on the basis that it did not disclose a cause of action and requested the Court to deal with it in terms of Rule 33 (4) of the High Court Rules. The court dismissed the application. This ruling was, however, over turned by the full bench of the TPD in which De Villiers J with Spoelstra J and Daniels J, (at 140F) held that the trial Court erred in refusing to deal with the defendant's exception in terms of Rule 33(4) and that it had done so, a great deal of cost may have been saved.

[27] Rule 33(4) provides as follows:

> *"If, in any pending action, it appears to the Court mero motu that there is a question of law or fact which may conveniently be decided either before any evidence is lead or separately from any other question, the Court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of and the Court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately."*

[28] The approach adopted in the *Edward L Bateman's case* is largely informed, in my view, by the underlying purpose of an exception which was set out in *Barclays National Bank Ltd v Thompson 1989 (1) SA 547 (AD)* at 553F-J, wherein Van Heerden JA stated:

> *"It seems clear that the function of a well-founded exception that a plea, or part thereof, does not disclose a defence to the plaintiff's cause of action is to*

dispose of the case in whole or in part. It is for this reason that exception cannot be taken to be part of a plea unless it is self-contained, amounts to a separate defence, and can therefore be struck out without affecting the remainder of the plea (cf Salzma v Holmes 1914 AD 152 at 156; Barrett v Rewi Bulawayo Development Syndicate Ltd 1922 AD 457 at 459; Miller and Others v Bellville Municipality 1971 (4) SA 544 (C) at 546). It has also been said that the main purpose of an exception that a declaration does not disclose a cause of action is to avoid the leading of unnecessary evidence at the trial: Dharumpal Transport (Pty) Ltd v Dharumpal 1956 (1) SA 700 (A) at 706. Save for exceptional cases, such as those where a defendant admits the plaintiff's allegations but pleads that as a matter of law the plaintiff is not entitled to the relief claimed by him (cf Welgemoed en Andere v Sauer 1974 (4) SA 1 (A)) an exception to a plea should consequently also not be allowed unless, if upheld, it would obviate the leading of 'unnecessary' evidence."

[29] The plaintiff's contention that the exception should have been brought earlier is attractive. I am however, of the view that because of the need to determine whether or not the exception goes to the root of the claim, it is necessary to consider it, such that if it does, then it would not be necessary to hear evidence which at the end may well produce the same results.

[30] In my view any prejudice that may have been occasioned by the delay in filing the exception can be addressed through a cost order.

[31] In the light of the above, the objection raised by the plaintiff is dismissed, and accordingly, I will proceed to deal with the merit of the exception.

Grounds for the exception

[32] The defendant in its exception contended that the plaintiff's summons and particulars of claim do not disclose a cause of action in that:

> *"4.5 Nowhere in its particulars of claim does the plaintiff specify or identify any obligations of the Defendant as contained in the Act.*
>
> *4.6 The obligations of the defendant as identified by the plaintiff in its particulars of claim are contractual obligations specified in the learnership agreements. The learnership agreements are contractual agreements concluded between the defendant and each learner, they being the parties to such agreements.*
>
> *4.7 Any breach of a term of a learnership agreement would constitute a breach of contract and give rise to obligations and remedies as provided for in such agreement or in law between the contracting parties, namely the defendant and the learner.*
>
> *4.8 Nowhere in the Act are any obligations as between the plaintiff and the defendant either identified or specified nor does the Act create a tripartite nexus between plaintiff, defendant and learners.*
>
> *4.9 The plaintiff does not allege a contractual or other relationship between the plaintiff and the defendant other than as provided for in the Act. The damages claimed by the plaintiff accordingly cannot flow from any basis other than pursuant to the provisions of the Act.*
>
> *4.10 The breaches as alleged by the plaintiff in paragraph 16 of its particulars of claim constitute breaches allegedly between the defendant*

and the learner and do not constitute breaches of any provisions of the Act nor any breach vis-à-vis the plaintiff and the defendant.

4.11 In the event of there having been a breach of a learnership agreement between the defendant and a learner, the remedies arising from such breach vest in the learner. Plaintiff makes no allegation that any learner contended for a breach of contract with the defendant or that the learner (nor, for that matter, the plaintiff) placed the defendant in mora to remedy its breaches within a reasonable time. Accordingly the plaintiff fails to make out any cause of action upon which it would be entitled to claim damages against the defendant.

5. 5.1 To the extent that the plaintiff contends that grants were paid by it to the defendant in terms of the Act, the plaintiff does not contend that such monies were paid to the defendant in error or that such monies when paid to the defendant were not due to it.

5.2 Nowhere in the Act does it provide that payment of monies in terms of learnerships is recoverable by the plaintiff.

5.3 A right to recover funds paid in terms of the Act is limited solely to funds made available for a skills program and the basis for recovering any funds are specified in such provisions (Section 20(6) of the Act).

5.4 Accordingly, the plaintiff's rights to recover any monies paid by it or of damages must be provided for in the Act and Plaintiff may not seek relief outside the ambit of the Act which it is attempting to do.

6. 6.1 The plaintiff acknowledges that the defendant provided education and training in terms of the agreement albeit that it is contended that such education and training was not in accordance with its standard.

6.2 The plaintiff purportedly furnished defendant with grants in order to provide training to the learners. The plaintiff, in addition, effected payment of learner allowances which allowances were paid to the learners.

6.3 Insofar as the defendant did provide training to the learners pursuant to the learnership agreements, the defendant would be entitled to receive payments in respect thereof, which payments were, in fact, made to the defendant.

6.4 To the extent that the grants by the plaintiff were paid to the learners as learner allowances, same constitute monies received by the learners from the plaintiff.

6.5 The plaintiff does not allege that defendant provided no services or that the learners or plaintiff received no value in respect of the training allowances affected by the plaintiff.

6.6 The damages as claimed by the plaintiff constitute the entire payment by the plaintiff of training and learner allowances without specifying or establishing the basis for such repayment in the absence of any allegation of no value having been received for such training.

6.7 To the extent that the learner allowances were paid by the plaintiff and received by the learners, the plaintiff is not entitled to reclaim any such amounts from the defendant and any rights to reclaim such monies must be claimed from the learners.

7.1 On plaintiff's own case, it effected payments to the defendant of grants up until December 2003, being after suspension of the learnership programs.

7.2 The plaintiff contends that its damages flow from the defendant's breach of its obligations identified in paragraph 16 of the particulars of claim.

7.3 On its own version, plaintiff continued effecting payments to the defendant despite being aware of the defendant's alleged breaches.

7.4 In the premises, there is no basis in law upon which plaintiff can claim repayment of such monies as damages in such circumstances."

[33] As stated earlier, the plaintiff's contention is that, because of the breaches by the defendant of its obligations as set out in the Act and SAQA the plaintiff suffered damages in that it was unable to provide any of the learners who concluded the learnerships with the defendant with certificates of evidence as proof of successful completion of the learning. As a result the learners have not been able to attain qualification to be registered by SAQA.

[34] Counsel for the plaintiff argued that the Court was enjoined to consider the provisions of the Act, the SAQA and the Public Finance Management Act 1 of 1999 (PFMA) as all these three pieces of legislation are incorporated and form an integral part of the particulars of claim.

[35] Despite the particulars of claim stating that the claim arose out of the Act and the learnership contracts, counsel for the plaintiff emphasised and made it clear that the damages that the plaintiff was claiming arose out of the provisions of the legislation and not contract.

[36] The argument that the claim was based on the Act and not contract sought its support from the case of *Dilokong Chrome Mines v Director-General of Trade and Industry (1992) 4 SA 1(A).* The facts of this case are briefly: The then South African government introduced what was called a General Export Incentive Services (GEIS), in terms of which companies and enterprises were encouraged as far as possible to do beneficiation export, to bring foreign currency into the country. Initially tax concessions were granted but later companies were able to obtain actual payment of money through the Inland Revenue. When the Director-General of Trade and Industry declined payment, *Dilokong Chrome Mines* argued that the nature of the relationship between it and the Minister or the Director-General was a contractual one. The court held that the financial assistance from treasury to the companies by means of a purely beneficial disposition was peculiar to a relationship in the field of administrative law and that there was no room for a finding of a contractual liability on part of the state.

[37] It was further found that objectively considered when the minister promulgated the scheme and when the appellant registered with the scheme and submitted the claim there was no intention of bringing a contractual relationship into being, i.e. animus *contrahendi* on the part of both parties was absent.

[38] As stated earlier the plaintiff argued that in considering whether or not the plaintiff has power to recover grants, the Court should have regard to the three pieces of legislation namely the Act, SAQA and the PFMA.

[39] However, the plaintiff conceded that the Act does not expressly provide for the recovery of grants allocated to education and training providers. It however contended that such powers could be inferred from s10 (2) of the Act. In this regard the plaintiff relied on the case of GNH *Automation CC and Another v Provincial Tender Board, Eastern Cape and Another 1998 (3) SA 45 (SCA)* at 51H where the court stated:

> *"Powers may be presumed to have been impliedly conferred because they constitute a logical or necessary consequence of the powers which have been expressly conferred, because they are reasonably required in order to exercise the powers expressly conferred, or because they are ancillary in order to exercise the powers expressly conferred, or because they are ancillary or incidental to those expressly conferred."*

[40] Another case which the plaintiff relied on in support of its contention is the case of *All Man Labour Services CC v The Services Sector Education and Training Authority, unreported case number J1509/04.* In this case the court was confronted with having to determine whether the SETA could validly introduce a policy whose import was to impose additional criteria to those prescribed by the Minister. The Court held that:

> *"The imposition of the policy flows from the fact that the respondent is a public entity for the purpose of Public Financial Management Act, Act 1 of 1999, in particular section 50 thereof which stipulates that an accounting authority for a public entity must exercise the duty of utmost care to ensure reasonable protection of the asserts*

and records of the public entity; act with fidelity, honesty, integrity and in the interest of the public entity in managing its affairs."

In further inferring the powers of the SETA the court relied on the provisions of s51 (1) of the same Act, which requires:

"effective, efficient and transparent systems of financial and risk management and internal controls" and task the SETA to "prevent irregular expenditure fruitless expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity."

[41] In the *All Man Labour Services' case*, the court also had regard to the fact that the constitution of the SETA which required it to "formulate *the general policy of the SETA and to make rules relating to "financial matters."*

[42] Whilst in the *All Man Labour Services' case* the court was confronted with having to determine a dispute concerning the underpayment by the SETA to the employer, of a grant payable under the regulations of the Act and those of the SETA, in the present case the issue concerns the claim for damages caused by the alleged breaches of respondent's obligations as arising from the Act read with the learnership agreements. In the *All Man Labour Services' case* the two reasons for the refusal to pay the amount claimed was in terms of the SETA's quality assurance policy and criteria, which it (the SETA) had promulgated and implemented. The quality assurance policy and the criteria, which were introduced to prevent abuse and fraud, was challenged on the bases that the

policy and criteria introduced by the respondent were *ultra vires* the regulations under the Act.

Evaluation

[43] It is clear that the case of the plaintiff as set out in its particulars of claim is premised upon the allegation that the defendant breached its obligations under both the Act read with the learnership agreements including SAQUA and the PFMA. This resulted in it (the plaintiff) not being able to provide any learners with certificates as evidence of successful completion of the learning.

[44] The Act is silent with regard to whether the plaintiff can claim damages as it has done in this case. I need to pause at this stage and indicate that there is no reference in the Act, SQA and or the PFMA, to the concept of *"damages."* Thus the question that arises is whether or not a claim for damages can be inferred from the implied interpretation of the Act and the other pieces of legislation relied upon by the plaintiff.

[45] The concept of damages as discussed in Visser and Potgieter: Law of Damages, Chapter 1, entails either delictual or the contractual damages. If the claim was not based on either delict or contract then the other legal bases for claiming damages would be founded in terms of the provisions of a statute.

[46] Although the facts in the case of *Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121,* are distinguishable from those of this case, the principle enunciated therein is apposite to the present inquiry. In that case

Moseneke DCJ in dealing with whether the successful tenderer whose tender was set aside on review was entitled to claim for damages against the tender board, a statutory body established in terms of the Provincial Legislation said:

> *"[47] I must at the outset say that the submissions of the applicants are attractive but not sustainable. The mainstay of the applicant's case is that the controlling legislation does not expressly prohibit recourse by the successful tenderer to action for damages. That may be so. But that alone cannot be decisive. One must keep in mind that the statute does not grant a right of action for damages. I agree with the Supreme Court of Appeal that the empowering constitutional provisions read with the governing statute do not contemplate affording a disappointed tenderer the right to delictual damages."*

[47] Whilst Langa CJ et O'Ragan J, did not concur with the decision of the majority, they however agreed that there is no provision in the Act which stipulates that a damages claim would lie against the tender board for the out-of-pocket expenses incurred by a successful tenderer pursuant to the tender award where the tender is subsequently set aside on review.

[48] Both the majority and minority judgements in the *Steenkamp case* (supra), referred to the case of *Olintzki Property Holdings v State Tender Board and another 2001 (3) SA 1247 (SCA)*, wherein Cameroon JA said:

> *"In these circumstances to infer such a remedy would be to venture far beyond the field of statutory construction or constitutional interpretation."*

[49] Turning to the facts of the current case, the issue that needs to be considered is whether, in the absence of an express provision, the right to claim damages for the alleged breaches of the provisions of the Act arises from the implied interpretation of the Act and the other related legislation. In answering this question it should be born in mind that the plaintiff's claim is based on the provisions of the Act and the learnership agreements.

[50] For the purpose of implying the right or power to claim damages the plaintiff relied on the broader interpretation of the Act with particular emphasis on its purpose. In this regard Counsel for the plaintiff argued that the Court should have regard to the statute as a whole in order to ascertain what the legislation was seeking to achieve and what rights a SETA as an entity would have under the Act. The power to do so according to him is conferred by the provisions of s10 (2) of the Act.

[51] In further support of its argument the plaintiff referred to E.A Kellaway: *Principles of Legal Interpretation of Statutes, Contracts and Wills* at page 333, where the learned author in dealing with what can be implied in statutory interpretation said:

> *"where in an enabling enactment the legislature gives power for something to be done, a court must construe the enactment as meaning that by necessary implication all other powers are granted to enable that something to be done in terms of the Act."*

The learned author went further to say:

"For Instance, where a statute gives a public body power to do something, a court must construe the statute as including all necessary rights to enable the public body to exercise the power. But, something cannot be implied in relation to circumstances arising accidentally only."

[52] The established general principles of statutory interpretation were considered in *Birch v Klein Karoo Agricultural Co-operative Limited* 1993 (3) SA 403 (A) at 411E-H wherein the court said:

"it is a well established principle of construction that in constructing a statutory provision the object should be to ascertain from the language used the interpretation which the legislature meant to express. In ascertaining this intention, regard is to be had both to the language of the enactment and to the context, using this word in a wide sense."

[53] The general rule, which is often referred to in cases dealing with interpretation, is that the words and expressions used in a statute must be interpreted according to their ordinary meaning. The meaning of this principle was interpreted by Schreiner JA, in *Jaga v Donges No and another, Bhana v Donges No and another 1950 (4) SA 653G (A) at 662,* to mean that words and impression in a statute *"must be interpreted in the light of their context."*

[54] In the application of the principle Schreiner JA stressed two points which he stated as follows:

> *"The first is that "the context", as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind of the part to the interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background. The second point is that the approach to the work of interpreting may be along either of two lines. Either one may split the enquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confining a consideration of the context only to cases where language appears to admit of more than one meaning: or one may from the beginning consider the context and the language to be interpreted together."*

[55] Interpreting words according to their ordinary, literal grammatical meaning is often referred to as the golden or general rule of construction. Departure from this approach is permissible only where the ordinary or grammatical meaning would result in an absurdity so glaring that it could never have had been contemplated by the legislature or where the results in the context, would be contrary to the intention of the legislature.

[56] In discussing interpretation by implication GE Devenish; *Interpretation of Statutes* (at page 84), states that the provisions, which are not enacted in express, may, under certain circumstances, be deemed to be implied by means of the process curial interpretation. The learned author further states that the implication

must flow from the other parts of the statutes and must be reasonable and necessary one. In this regard reference is made to the judgement in the *Firs[t] Investments (PTY) Ltd v Johannesburg City Council 1967 (3) SA 549(W)* wherein the court observed that:

> *"[i]n a contract a term will not be implied where considerable uncertainty exists about its nature and scope, for it must be precise and obvious… I think the same must apply to implying a term in a statute, for the process is the same."*

[57] The learned author in further explaining the underlying principle of interpretation by implication or modification of the language of statute through interpretation quotes *Venter v R 1907 TS 910 at 915*, wherein the court said:

> *"… Where the language of a statute is unambiguous and its meaning is clear, the court may depart from such a meaning if it leads to an absurdity so glaring that it can never have been contemplated by the legislature, or if it leads to a result contrary to the intention of Parliament as shown by the context or by other circumstances as the Court is justified in taking into account."*

[58] In *Metthews v Pretorius* 1984 (3) SA 547 (T), the court held that

modification of the language of the statute was desirable in the light of a contextual interpretation and necessary to prevent the purpose of the statute being frustrated and to ensure equitable result.

[59] The starting point in considering whether the right to claim for damages exist is to consider the functions of the plaintiff as set out in s10 of the Act read with the learnership contracts.

[60] In terms of s10 (1) of the Act the plaintiff is required to develop a sector skills plan and implement it by *establishing learnerships, improving workplace skills plans, allocating grants to employees, employers, education and training providers and* monitoring education and training in the sector.

[61] Section 10(2) provides that a SETA has all such powers as are necessary to enable it to perform its duties which are set out in s10 (1) of the Act. The Act further provides the framework for promoting learnerships. In this regard the plaintiff is required by s10(c) to:

> *"identifying workplaces for practical work experience;*
>
> *supporting the development of learning materials; improving the facilitation of learning; and assisting in the conclusion of learnership agreements;(my underlining)"*

And more importantly another function of the plaintiff in terms of s10 (1)(d) is to register learnership agreements.

[62] Since the plaintiff is a public entity there is no doubt that the provisions of Chapter 6 of the PFMA govern it. Section 49 of the PFMA provides that every public entity must have an authority, which must be accountable for the purposes

of that Act. Section 50 of the PFMA imposes fiduciary duties on such accounting authority and section 51 thereof details the general responsibilities of accounting authorities such as the plaintiff**.**

[63] In my view the PFMA provides a framework within which the plaintiff as an accounting authority could put in place measure, policies and procedures to protect the interests of public entity. In this case for instance the plaintiff could have put in place policies and procedures to deal with payment of grants the consequences of failure to comply with the provisions of such policies. On the facts of this case what the PFMA would have envisaged is for the plaintiff to have had in place some form of a service level agreement between it and the defendant.

Parties to a learnership agreement

[64] It is apparent that in seeking to establish a cause of action the plaintiff incorrectly interpreted the learnership agreements as provided for in the Act, to include it as a party to such agreements. The learnership agreements create a contractual relationship between an employer and an individual learner. The Act does not contemplate the plaintiff as being a party to a learnership agreement. The intention of the legislature in this regard is crystal clear. In terms of s17 (2) a learnership agreement means an agreement entered into for a specified period between a learner, an employer or group of employers and a training provider accredited by SAQA.

[65] Furthermore section 17(2) of the Act, which sets out the framework for an employer who enters into a learnership agreement with the learner. The employer is obliged to employ the learner for a period specified in the learnership agreement. In addition to providing a learner with practical experience, the employer is obliged to release the learner to attend the education and training, which has to be specified in the learnership agreement.

[66] The view that the parties contemplated in the learnership agreement in terms of the Act do not include the plaintiff is further supported by the provisions of s18 of the Act, which provides that if a learner was in the employment of the employer when the agreement was concluded, the learner's contract of employment is not affected by the agreement. If however the learner was not in the employment of the employer party to the learnership agreement concerned when the agreement was concluded, the employer and learner must enter into a contract of employment.

[67] The Act requires that the learnership agreement should prescribe for the learner to work for the employer and attend specified education and training programmes.

[68] The role of the plaintiff is confined to assisting both the employer and the learner in the conclusion of the agreement. The purpose of this, it would appear, is to ensure a smooth and expedited registration of learnership agreements by the plaintiff.

[69] I need to emphasis that in my view, it is evidently clear that s17 (2) creates a relationship between a learner and an employer and not a tri-partite relationship as contended by the plaintiff.

Implied powers of the plaintiff to claim back the grants

[70] I now turn to the issue of the implied powers through which the plaintiff contends that it is entitled to claim back grants allocated to the defendant on the bases of damages.

[71] As indicated earlier the plaintiff relied on the decision of the Dilokong *Chrome Mines (supra) case* in support of its case. This case is, in my view, distinguishable from the current case.

[72] The nature of the scheme which was considered in *Dikolong Chrome Mines* received attention again but under the amended scheme, in the case of *Die Suid Afrikaanse Kooporatiewe Sitrusbeurs Beperk v Direkteur-General: Handel en Nywerheid and another (*1997) 2 ALL SA 321 (A) at 323I-324D. In this case Harms JA, after finding that the principle in *Dilokong Chrome Mines* was relevant to the issue before him, said:

> *"(a) the scheme creates a relationship between the exporter and the State represented by the Minister (at 14A-C);*
>
> *(b) the exporter stands in this relationship as subject vis-à-vis the State as governmental authority. It is governed by the rules of administrative law (at 18B-D);*

(c) the scheme was promulgated by virtue of a state prerogative (at 19J-201);

(d) it imposes no duties and infringes no right of the subject (at 201I-J);

(e) the Director-General of the Department, in administering the scheme, does so "as 'n funksionaris wat sy bevoelgdheid ontleen, aan die bepalings van die skema. As sodanig, en as 'n amptenaar van die Staat, is hy gebonde om op te tree binne die raamwerk van die skema. Hy tree dan op op 'n adminstratie-fregtelike vlak wat sy beslissings beregbaar maak deur 'n Hof" (at 22C-E);

(f) the scheme has pro tanto the force and effect of legislation (at 22E) and must be interpreted in the same manner (at 32A-C)."

[73] The *Dilokong Chrome Mines'* case does not support the plaintiff's argument of a tri-partite relationship or the implied interpretation that the plaintiff has the right to claim back from the defendant the grants which were issued on the bases of damages.

[74] The other case that the applicant relied on in support of its case is the unreported case of the *Wholesale and Retail Education and Training Authority v The Skill Power CC T/A Empower Skill,* Case No. J 1128/05. This case is of no assistance to the issues raised in that no reasons were furnished in that case.

[75] The language of the Act is unambiguous and there is, in my view, no need to deviate from the golden rule of interpretation. If the legislature intended to give the plaintiff the right to claim back grants issued to employers and training

providers it would, in the context of the Act, have done so. The provisions of Chapter 5 of the Act support this view. In this regard s20 (6) of the Act gives power to a *SETA* that has made funds available for a skills programme to withhold funds or recover any funds paid if it, is of the opinion that: (a) the funds are not being used for the purpose for which they were made available, (b) any term or condition of the funding is not complied with or (c) the SETA it is not satisfied that the training is up to standard.

Quantum of Damages

[76] In response to the objection that the summons do not set out a breakdown of the amount claimed, the plaintiff agued that this issue can be determined once the evidence has been heard. This argument cannot be sustained because Rule 6 of the Rules of the Labour Court requires that a plaintiff should set out in his or her statement of claim, a clear and concise statement of the material facts, in chronological order, on which he or she relies, which statement must be sufficiently particular to enable the respondent to reply to the document. The rule further requires a clear and concise statement of the legal issues that arise from the material facts, which statement must be sufficiently particular to enable the respondent to reply to the claim including the relief sought.

[77] In *Stafford v Special Investigating Unit 1999 (2) SA 130(E),* the plaintiff instituted action against the defendant, a special investigating unit having a juristic personality under s14 (1) of the Special Investigating Unit and Special Tribunals Act 74 of 1996, in which she claimed damages arising out of the

alleged malicious institution of legal proceedings against her. In dealing with the exception which was raised by the defendant that the plaintiff's claim did not disclose a cause of action (at page 131) Leach J held:

> "*Therefore, in addition to the relief claimed, the summons also had to set out the cause of action and the basis thereof along with sufficient particularity about the amount of damages claimed, if any, to enable the defendant to reasonably assess the quantum thereof.*"

The court went further to say:

> *" In casu, the plaintiff had simply claimed a global sum for general damages and sundry expenses without giving any indication which portion of those sums related to the Heath Commission proceedings and which portion related to the proceedings before the defendant. The defendant was accordingly not able to assess what was being claimed from it in each case and to that extent, the pleading was vague and embarrassing."*

Conclusion

[78] In my view, the powers to claim damages cannot be presumed to have been impliedly conferred on the plaintiff by s10 (2) of the Act. In this regard it cannot be said that the powers to claim damages constitute a logical or necessary consequence of the powers, reasonably required in order to exercise the powers

expressly conferred on the plaintiff in terms of s10 (2) read with s10 (1) of the Act. It would be stretching the construction and the interpretation of the Act, SAQA and the PFMA beyond limits to imply that the plaintiff has the right to claim damages for the alleged breaches of its obligations.

Order

[79] The plaintiff's particulars of claim do not disclose a cause of action and accordingly the exception is upheld.

[80] The plaintiff is granted leave to amend its particulars of claim if so advised.

[81] Costs are reserved for argument.

MOLAHLEHI AJ

DATE OF HEARING : 17 APRIL 2007

DATE OF JUDGMENT: 26 JULY 2007

APPEARANCES

For the Applicant: Advocate M M Antonie

Instructed by : Webber Wenzel Bowens

For the Respondent: Advocate(s) I J Zidel SC *with* **L Moreno**

Instructed by : Fluxmans Attorneys