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**IN THE HIGH COURT OF SOUTH AFRICA;  
LIMPOPO DIVISION; POLOKWANE.**

**CASE NO: 8159/2021**

(1) REPORTABLE: YES/NO

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

(3). REVISED.

DATE: 09 MARCH 2023

In the matter between:

**PHENYO IN MEDIA CONSULTANCY CC:  
(t/a PIMC DEVELOPMENT COMMUNICATION  
(REGISTRATION NUMBER 20[....]23 )**

**PLAINTIFF**

And

**POLOKWANE LOCAL MUNICIPALITY:**

**FIRST DEFENDANT**

**MUNICIPAL MANAGER: POLOKWANE:  
LOCAL MUNICIPALITY**

**SECOND DEFENDANT**

**JUDGMENT**

**SEMENYA AJP:**

[1] Plaintiff issued summons, consisting of two claims, against the defendants for payment of a total amount of R23 354 319.94 together with interest. The claims arise out of breach of a written contract entered into by the plaintiff and the first defendant in terms of which the plaintiff was to render service to the first defendant in relation to the planning and implementation of Polokwane Municipality Integrated Transport Network (IRPTN).

[2] In claim 1, the plaintiff alleges that the defendants unlawfully breached the contract in that they refused to appoint and/or stopped the plaintiff from executing work as per the Service Level Agreement (SLA). Plaintiff was obligated to do marketing and communication work as agreed between the parties. It is alleged that the defendants appointed a third party in its stead. Claim 2 is for a penalty fee for the harm caused on the plaintiff due to unlawful appointment of another company to perform services the plaintiff was contracted to perform. It is further alleged that the second defendant, as the accounting officer of the first defendant, is vicariously liable for the conduct of the first defendant.

[3] The defendants filed a Rule 23(1) exception to the plaintiff's particulars of claim on the ground that they do not disclose a course of action. The exception is opposed.

[4] The facts of this case as pleaded by the plaintiff are common cause and are as follows:

The defendant issued a tender under contract number PM[....]8 for the appointment of an Integrated Polokwane Transport Network (IRPTN) project for a period of three (3) years. The tender was advertised on the defendant's network during 2018. Potential bidders were invited to participate in a competitive bid for the provision of services. Proven expertise was required in nine (9) areas, including marketing and communications. A compulsory briefing meeting was held on the 27 July 2018 at Peter Mokaba stadium. The Managing Director of the plaintiff attended the meeting. The closing date of the bids was set as the 23 August 2018. The plaintiff submitted its completed bid documents on the stipulated time and terms as required by the first defendant. On the 11 January 2019, the plaintiff received a letter of acceptance of its

bid to be a service provider of Marketing Communications to the defendant's IRPTN project. The letter was dated the 21 November 2018. This letter is attached to the particulars of claim as PIMC03.

[5] On the 12 February 2019 the parties, the plaintiff represented by Phenyo Lekoma and the defendant by Dikgape Herskovitz Makobe, entered into a written contract and signed a Service Level Agreement (SLA). Paragraphs 1, 2, 4 and 7 of the PIMC03 are of relevance to the determination of the issues in this exception and they read as follows:

*"1 You are hereby informed that Polokwane Municipality has on 21 November 2018 approved the appointment of your company on the Panel of Professionals for the Provision of Services for the Implementation of Polokwane Municipality Integrated Transport Network (IRPTN) Projects for the Period of Three (3) Years under the Marketing and Communications work stream in terms of Chapter 8 & 11 of the Municipal Finance Management Act (MFMA) (Act No. 56 of 2003) as follows:*

*2 That your company will be allocated scope of works as and when required- on a rotational basis with other service providers on the panel.*

*4 That this letter serves as an instruction to start with the preparation for rendering of services as and when the scope of work is allocated. You will be required to enter into the Service Level Agreement with the Municipality.*

*7 That the availability of financial resources cannot be guaranteed by Polokwane Municipality and is also a condition for the continuation of the contract despite above being acceded to."*

[6] Plaintiff alleges that it commenced with the preparations for the implementation of the project as instructed in paragraph 4.

[7] SLA referred to in paragraph 4 of PIMC03 was entered into by the parties with the effective date of the 12 February 2019. Clause 26 of the SLA reads as follows:

**"ENTIRE AGREEMENT**

*“This Agreement constitutes the sole record of the Agreement between the parties in relation to the subject matter hereof. No party shall be bound by any express or implied term, representation, warranty- promise or the like recorded herein. This agreement supersedes and replaces all prior commitments, or representations, whether oral or written, between the parties in respect of the subject matter hereof.”*

[8] The agreement that the plaintiff is appointed on a panel of professionals and that the continuation of the contract was dependent on the availability of budget is repeated in the SLA (clause 1 and 5.3).

[9] The crux of the issues between the parties rests, among others, on what the plaintiff has alleged in paragraph 15 of the particulars of claim. It is alleged in that paragraph that on the 19 March 2019 a Mr Mantlako Sebaka of the defendants instructed the plaintiff to desist from implementing its obligations in terms of the SLA. According to the plaintiff the ostensible reason for the instruction was that no budget has been allocated for the project it was contracted for.

[10] The facts as set out by the plaintiff in its particulars of claim are not disputed. In the assessment of the issues between the parties, this court will be guided by the decisions of various courts on Rule 23(1) exception that particulars of claim do not disclose a cause of action. The authorities were summarised in **Living Hands (Pty) Ltd NO and Another v Ditz and Others 2013 (2) SA 368 (GSJ) at [15]** (Ditz) where the following was stated:

*“15] Before I consider the exceptions, an overview of the applicable general principles distilled from case law is necessary:*

*(a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.*

*(b) The object of an exception is not to embarrass one’s opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an*

*expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception<sup>1</sup>.*

*(c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.<sup>2</sup>*

*(d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.<sup>3</sup>*

*(e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.<sup>4</sup>*

*(f) Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.<sup>5</sup>*

*(g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars.<sup>6</sup>*

**(1. Barclays Bank International Ltd v African Diamonds Exporters (Pty) Ltd (2) 1976(1) SA 100 (W); 2. Van der Westhuizen v Le Roux 1947 (3) SA 385 (C) at 390; 3. Fairoaks Investments Holdings (Pty) td v Oliver [2008] ZASCA 41; 2008(4) SA 302 SCA at par [12]; 4. Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) at par 3; 5. Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W) at 902 J)**

[11] The point of law raised by the defendant, which, according to the defendants, will have the effect of settling the dispute between the parties is that the plaintiff's performance in terms of the contract was subject to a suspensive condition. With reference to PIMC03, it was argued that performance depended on, firstly, that it should be allocated work and, secondly, the availability of the necessary financial resources. Defendants argue that a suspensive condition could suspend the operation of obligations flowing from a contract, in whole or in part, pending the occurrence of a particular specified event. It is submitted that the instruction to stop the implementation of the contract, in that there were no funds as pleaded, was in accordance with the terms of the contract.

[12] Counsel for the defendants contends that a proper reading of particulars of claim makes it clear that claim 1 is based on PIMC03. On the other hand, counsel for the plaintiff contends that the argument is a misinterpretation of the particulars of claim. It was submitted that the correct interpretation of the particulars of claim, in particular, the word “ostensibly” as it appears in paragraph 15, is that the plaintiff is not stating the unavailability of funds as the reason given to it by the defendants as a matter of fact. It is stated as the purported reason. It was submitted that this paragraph is meant to establish wrongful conduct on the part of the defendants.

[13] Counsel for the plaintiff further contends that the defendants’ submission that the claim is based on PIMC03 is untenable in that the parties agreed in clause 26 of the SLA that the SLA supersedes PIMC03.

[14] As stated in *Jowell v Bramwell-Jones* referred in paragraph [10] above, pleadings in exceptions must be read as a whole. Furthermore, the test for the exception raised by the defendants is whether, on any reasonable construction of the pleadings, the plaintiff has made out a case to sustain a cause of action-**Leopont 471 (Pty) Ltd v Business School Support Services (Pty) Ltd and Others (23953/12) [2015] ZAWCHC 88**. In this case, more specifically in paragraph 20,21 and 22 of the particulars of claim, plaintiff makes it clear that it relies on SLA to establish breach of contract by the defendants. It is further clear that, despite the agreement that the plaintiff will be appointed as part of a panel of professionals, it is the plaintiff’s claim that another contractor has been appointed and given work in its stead. Counsel for the plaintiff submitted that the plaintiff will produce evidence during trial to prove that the work the plaintiff was contracted to do was budgeted for.

[15] It is this court’s view that the defendants cannot be allowed to rely on minor blemishes and unradical embarrassments in the plaintiff’s particulars of claim -Ditz at [15] (g), when, on a proper reading of the whole of it, it becomes evident that it is relying on the SLA and not on PIMC03. It cannot be said that upon every interpretation which the particulars of claim could reasonably bear, no cause of action in claim 1 is disclosed-**Klokow v Sullivan 2006 91) SA 295 (SCA)**.

[16] The plaintiff relies on a contract entered into with the defendants. In this regard, I agree with counsel for the defendants' contention that claim 2 is untenable. The second defendant cannot be said to be vicariously liable for the breach occasioned by the first defendant. Similarly, although clause 10 the SLA deals with penalties, same does not cover the penalty relied upon by the plaintiff in paragraph 34 of the particulars of claim. I therefore agree with the defendants that claim 2 fails to establish a cause of action. In the circumstances of this case, I do not deem it necessary to give the plaintiff an opportunity to rectify the defect in claim 2.

[17] In the result the following order is made:

- i. The exception raised in respect of claim 1 is dismissed;
- ii. an exception in respect of claim 2 is upheld; and
- iii. costs to be costs in the cause.

**M V SEMENYA**

**ACTING JUDGE PRESIDENT OF THE HIGH COURT; LIMPOPO DIVISION.**

**APPEARANCES:**

<b>Counsel for the Plaintiff</b>	<b>: Adv. M Makoti</b>
<b>Instructed by</b>	<b>: Tebogo Dikhuba Inc.</b>
<b>Counsel for the Defendant</b>	<b>: Adv. AB Rossouw SC &amp; Adv. JAL Pretorius</b>
<b>Instructed by</b>	<b>: Mohale Inc.</b>
<b>Date of hearing</b>	<b>: 16 FEBRURARY 2023</b>
<b>Date of judgment</b>	<b>: 08 MARCH 2023</b>