

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**



Case Number: 4562/2020

In the matter between:

CENTRAL UNIVERSITY OF TECHNOLOGY

PLAINTIFF

and

**SOUTH AFRICAN MUNICIPAL WORKERS UNION
INSTITUTE(SAMWU)**

DEFENDANT

CORAM:

BOONZAAIER, AJ

REASONS FURNISHED ON: The reasons for the order were electronically circulated to the parties' representatives by way of e-mail. The date and time for the submittance is deemed to be 16H00 on 24 March 2023.

[1] The plaintiff instituted action proceedings against the defendant. The basis for the claim is founded on a written memorandum of agreement concluded between the parties on **26th July 2018** ("the agreement").

[2] It is common cause the plaintiff and defendant entered into the above-mentioned agreement and that Pule Molalenyane ("Mr. Molalenyane") signed on behalf of the plaintiff. Mr Molalenyane was at the time both President of the South African Municipal Workers Institute (SAMWU Institute) and Director

of the South African Municipal Workers Union, the trade union. (SAMWU Union).

[3] The respondent's plea includes five special pleas. The court entertained the special pleas before moving to the main action. From the onset the plaintiff objected to the fact that the defendant's counsel was giving evidence from the bar. Counsel for defendant, was adamant to proceed without witnesses to substantiate their averments. His argument was that in preliminary issues, points of law may be dealt with *mero moto* by the court. Plaintiff however argued that oral evidence will have to be led in respect of the special pleas, with witnesses having to testify about all the allegations and averments the defendant makes. Otherwise, it has no evidential value. The court proceeded to deal with the preliminary matters as suggested by defendant.

[4] The first and second special pleas are intertwined and formulated as follows:

FIRST SPECIAL PLEA

4.1. misjoinder:

4.1.1 The agreement was signed on behalf of the plaintiff by Mr. Molanenyane as Director of the ("SAMWU Institute ")

4.1.2 The SAMWU Union, is a trade union duly registered in terms of the labour Relations Act 55 of 1995 with registration number LR 2/6/2/56, with its head of office situated at 84 Fredericks Street, Marshalltown, Johannesburg, Gauteng.

4.1.3 The SAMWU Union has no affiliation with SAMWU Institute, or the business it carries on. SAMWU Institute is a separate entity and incurs liabilities for its own account.

4.1.4 The plaintiff cited SAMWU Institute as the defendant, in line with the agreement, but incorrectly uses the number of the SAMWU trade union's registration number as well as the address of the trade union. Summons was hence served on the SAMWU Institute but at the SAMWU Trade Union's address.

4.1.5 SAMWU Institute has no knowledge of this proceedings because no papers were served on them, it was served on SAMWU Union's address with their registration number.

- 4.1.6 This discrepancy was communicated to the plaintiff by way of a notice and during the pre- trial conference.
- 4.1.7 SAMWU Institute has no knowledge of these proceedings, plaintiff committed a misjoinder of the trade union.

SECOND SPECIAL PLEA:

4.2. non-joinder:

- 4.2.1 The plaintiff failed to join SAMWU Union to the dispute.
- 4.2.2 SAMWU Union has an interest in the matter, although it`s not party to the agreement.
- 4.2.3 SAMWU Union has continuously advised the plaintiff to properly join it as an interesting party.
- 4.2.4 SAMWU Union will be prejudiced because they had paid monies to the plaintiff which are not accounted for.

WHEREFORE, the defendant prays that the Plaintiff`s action against SAMWU Institute be dismissed with costs.

The third and fourth pleas are intertwined and formulated as follows:

THIRD SPECIAL PLEA:

Dispute Resolution Committee (“DRC”)

- 4.3.1 The agreement makes specific mention in clause 13, that any disputes arising between the parties or any relating matter relating to the agreement, would be referred to the DRC.
- 4.3.2 The plaintiff has bypassed its very own agreed terms in the memorandum of agreement. The Plaintiff is bound to clause 13 of the agreement.
- 4.3.3 SAMWU Union has even paid some of the monies, being R270 000 (two hundred and seventy thousand rands) and R79 000 (seventy -nine thousand rands) and the plaintiff accepted the money as payment.

FOURTH SPECIAL PLEA:

Arbitration Clause (“AC”)

4.4.1 The agreement further makes provision in clause 13.3 that if the parties are unable to resolve the dispute through the DCR, then the dispute may be referred for Arbitration.

4.4.2 Plaintiff has bypassed its own agreed terms in the agreement and instituted proceedings in court without adhering, to the dispute clause.

4.4.3 The plaintiff has taken this matter prematurely to the court, without having regard to the stipulations of the Arbitration clauses

WHEREFORE Defendant prays that the action be stayed pending the final determination of the dispute by the arbitrator in terms of the agreement.

FIFTH SPECIAL PLEA:

4.5 Pending Criminal proceedings against SAMWU Institute and Mr. Molalenyane.

4.5.1 SAMWU Union instituted criminal proceedings against its former President Mr. Molalenyane for Fraud and Corruption of SAMWU Union`s Funds. It was reported at the Johannesburg Central Police station with CAS number being: 669/5/2020.

4.5.2 SAMWU Union reported its former president`s establishment of the SAMWU Institute without any resolution of the Union`s highest governing body, the Central Executive Committee(“CEC”). SAMWU Institute misrepresented itself as the SAMWU Union and bound SAMWU to agreements.

4.5.3 The plaintiff unlawfully used SAMWU Trade Union`s accreditation number to obtain funding from the Local Government Sector Education and Training Authority (“LGSETA”) and also used SAMWU Union`s accreditation.

4.5.4 For the court to make an informed decision one would think that the Criminal matter should be disposed of first.

WHEREFORE, the defendant prays that the claim against it be dismissed with costs Alternatively the plaintiff`s action be stayed pending the outcome of the criminal proceedings.

- [5] On the 14th March 2023 this court issued the following order:
- “1. The special pleas 1 to 5 are dismissed with costs.
 2. The main action is removed from the roll,
 3. The wasted costs for 15 March 2023 and 17 March 2023 shall be argued when the matter proceeds.”
- [6] As I deemed adjudication of the matter to be dealt with immediately, due to the congested court rolls, I made the above order in terms of **R 49(1)(c)** of the **Uniform Rules of Court** (“the Rules”). I indicated that my reasons will be given if requested and necessary. The defendant requested the reasons in court directly after I made the order.
- [7] From the plaintiff’s perspective the genesis of the dispute is that the plaintiff complied and duly executed all the contractual agreement’s instructions. Defendant failed to pay the plaintiff in full as per the agreement.
- [8] It is clear that the defendant is of the opinion that due to the confusion between the SAMWU Institute and SAMWU Union the latter should be joined. They further argued that plaintiff wants to enforce the agreement and want the court to endorse its breach of the agreement. Further did the plaintiff not adhere to stipulations of the contract, because Clause 13.2 stipulates that the court may be approached to obtain any urgent relief. *In casu* the matter is not urgent.
- [9] I turn now to deal with the evidence and arguments before me in opposition of the special pleas. The plaintiff answers to the special pleas of the defendant as follows:
- 9.1 misjoinder:
- 9.1.1 After the summons was served on the defendant, it opposes the matter and pleaded. Thereafter the action proceedings followed and the defendant duly participated. Later defendant even amended its pleadings. To do that, one needs information and

knowledge of the matter. Defendant cannot now deny that they know anything about this matter.

- 9.1.2 From the defendant`s trial bundle per page 44 it is clear that the document – the “Disclosure Certificate: Companies and Close Corporations” the registration date of SAMWU Institute was 15/08/2018. The address indicated as 84 Frederick Street, Marshalltown, Johannesburg Gauteng. Also in clause 18.1 of the agreement the address was indicated as 84 Frederick Street, Marshalltown, Johannesburg Gauteng
- 9.1.3 Defendant pleaded that the SAMWU Union has an interest because some monies were paid to plaintiff and accepted by plaintiff, but there is no evidence to that effect or any reason why this monies was paid to the plaintiff for instance.
- 9.1.4 From the agreement per Clause 1.2 it is clear that the plaintiff contracted with the defendant being the correct party before the court. The Trade Union has nothing to do with the agreement. SAMWU Union has its own remedies against plaintiff if it is of the opinion that plaintiff owes them money.

9.2 non joinder:

- 9.2.1 There was a misappropriation of funds. There is however no evidence to substantiate it. The court must speculate about it. The submission was made that some delegates of SAWU Union have a direct interest in this matter. This is also a submission made by SAMWU Institute without any substance.
- 9.2.2 The plaintiff is adamant that the SAMWU Union was not part of the agreement and therefore, no need to be cited.
- 9.2.3 On the last page of the agreement, Mr. Molalenyane signed on behalf of SAMWU Institute which is undisputed.
- 9.2.4 SAMWU Union has remedies on its own, if it is of the opinion they have a direct interest it is strange that it never intervened as a party.

9.3 Alternative Dispute Resolution:

9.3.1 Clause 13.1 of the agreement stipulates that “a dispute will not be deemed to be a dispute until one of the parties has provided a written notice, conveying the nature and scope of the of the dispute to the other part”. This was never done by the defendant.

9.3.2 In clause 13.8 states that any party shall be entitled to approach any competent court of law having jurisdiction to obtain any urgent relief which may be require by such party. That is exactly what the plaintiff did.

9.4 Arbitration

9.4.1 No dispute was declared. The dispute must be formulated to inform the Arbitrator beforehand what the disputes are.¹

9.4.2 Arbitration is far from an absolute requirement even if there is a contract. This was stressed in the case of **Universiteit van Stellenbosch v JA Louw Bpk** ²

“Notwithstanding, the need to respect the sanctity of commercial contracts, it is equally acknowledged that arbitration clauses do not necessarily oust the jurisdiction of the court”.

9.5 Pending Criminal proceedings against SAMWU Institute and Mr Molalenyane.

9.5.1 Plaintiff argued that the Criminal case has nothing to do with the case before the court. *In casu, the court* can only speculate about the averments which was made without any substantive evidence in this regard.

CASE LAW:

[10.1] In the **Civil Practice of the High Courts of South Africa**,³arbitration as a condition precedent was discussed. ‘

¹

² 1983(4) ALLL SA p321A

³ Cilliers , Loots & Nel, Vol 1 Herbstein and Van Winsen, 5th Edition p.607- JUTA

“In **King v Harris**⁴ the expressed view that the statutory machinery was not intended to supersede the common law. This also represents the view of the Appellate Division as expressed in **Rhodesian Railways Ltd v Mackintosh**.⁵ Section 3(2) of the Arbitration Act ⁶ empowers a court, on good cause shown,⁷ to order that any particular dispute referred to in the arbitration agreement should not be referred to arbitration, or that the arbitration agreement will cease to have effect in regard to any dispute referred to arbitration. These provisions do not seem to interfere with the procedure under the common law to approach the court by way of a special plea to determine whether a dispute covered by an arbitration agreement should or should not be dealt with by arbitration the choice is thus by the litigant.”

[10.2] Also, on page 609, supra it is further stated that:

“when the non-joinder or misjoinder is apparent *ex facie* the pleadings the objection may be taken by way of an exception.⁸ When evidence is required the proper procedure is by way of a special plea.”

DISCUSSION:

[11] Where a special plea is taken, the *onus* rests on the defendant to prove the facts underlying the special plea.⁹ A court must look at the pleadings as it stands.¹⁰

[11] The defendant is required to place sufficient information or evidence before the court to enable it to exercise its discretion properly and meaningfully.

[12] A special plea embodies a substantive self-contained defence, dehors the allegations made in respect of the plaintiff's cause of action as it was

⁴ 1909 TS292at 296

⁵ 1932AD359

⁶ Act 1965

⁷ Metallurgical & Commercial Consultants (Pty) Ltd v Metal Sales Co. (Pty) Ltd 1971(2) SA 388(W).

⁸ Collin v Toffie 1944 AD456

⁹ Masuku v Mdlalose [1997]3 ALL SA 3339(A), 1998(1) SA 1(SCA)

¹⁰ Drummond Cable Concepts v Advancednet (Pty) Ltd 2020 (1) SA 546(GJ) at paragraph 7

explained in the case of **Mineworkers Investments Co (Pty) Ltd v Modibane**.¹¹

CONCLUSION

[13] The absence of the substantive evidence, the allegations and averments mentioned in argument by the defendant, renders the special plea on the basis that same is lacking sufficient substance to sustain a defence against the plaintiffs claim.

[14] I am not persuaded that the grounds of the special pleas (on the papers only) were of such nature that the defendant would be seriously prejudiced if the pleadings were to be allowed to stand as it is.

[15] I have considered the submissions of both counsel in respect of this issue. In the exercise of the discretion that I am allowed, I am of the view that because this is an interlocutory application, the interests of justice will best be served if the matter proceeds and be fully ventilated at the trial. It is the court's responsibility to ensure the proper administration of justice.

[16] For all of the above reasons, accordingly I made the orders as I did.

BOONZAIER, AJ

Counsel for Plaintiff: Adv I Macakati
Instructed by: Phatsoane Henney Attorneys
Bloemfontein

Counsel for Defendant: Adv Khumalo

¹¹ 2002(6) SA 512 (W)

Instructed by: Kramer Weihmann Inc