REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO THE JUDGES: YES/~~NO~~
(3) REVISED.

Signature [redacted]

Date 02/02/2021

CASE NO: 393/2018

In the matter between:

BRAVOSPAN 252 CC **PLAINTIFF**

and

GREATER TZANEEN MUNICIPALITY **DEFENDANT**

JUDGMENT

MAKGOBA JP

[1] The Plaintiff instituted a claim against the Defendant based on various causes of action for payment of money, arising out of rendering security services by the Plaintiff.

The dispute arises from a Service Level Agreement (SLA) entered into between the parties on the 28 August 2014.

[2] The said SLA was declared null and void by this Court in a judgment handed down on 19 August 2016. The SLA was declared null and void on the grounds that the parties did not comply with the provisions of section 217(1) of the Constitution Republic of South Africa, 1996, as well as the Defendant's Supply Chain Management Policy, in that the Defendant failed to invite the Plaintiff and other entities in an open bid process, to submit bids and be involved in a fair, equitable, transparent, competitive and costs effective process.

[3] The Plaintiff's claims are based on four different causes of action, namely a delictual claim, alternatively fraudulent misrepresentation, further alternatively enrichment, further alternatively constitutional damages. The Plaintiff's standpoint is that it needs to succeed on any one of the four causes of action. Therefore, in the event that the Court finds that any one of the causes of action was proved, it will not be necessary to decide the others.

[4] The Defendant raised special pleas on the following legal issues:

4.1. *Res judicata*;

4.2. Non-compliance with the provisions of section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act No. 40 of 2002;

4.3. Plaintiff's fourth cause of action (i.e constitutional damages) not appropriate remedy;

4.4. Prescription.

[5] In the pre-trial minutes dated the 21 September 2020 the parties agreed to separation of the merits and quantum. Only in the event that the merits become decided / settled in favour of the Plaintiff, the parties agreed to refer the issue of quantum to mediation.

Accordingly, the trial proceeded before me on the issue of merits or liability.

[6] The Plaintiff called only one witness to testify on its behalf, namely Mr Matimba MacKay (Matimba) the sole member of the Plaintiff close corporation.

At the end of the Plaintiff's case, Defendant closed its case without presenting any evidence. The Court is then left with only the Plaintiff's version.

The Plaintiff's version

[7] What actually happened between the parties, as testified by Matimba, for the Plaintiff, is as follows.

The Plaintiff, represented by Matimba, successfully applied for a tender with the Defendant for the supply of the security services. The Tender, SCMU 20/2013 was awarded legally after a competitive bid process.

[8] The advertisement calling for the Tender did not set out the term of the contract. For perfectly sound commercial reasons, this was a problem for Plaintiff. The services required by the Defendant needed a service provider to invest substantial funds in the form of equipment and other input costs. According to Matimba, a term of less than three years would not be economically viable and the contract had to be valid for at least 3 years. Matimba, in responding to the advertisement, attended a compulsory briefing session with the Defendant. At this briefing Matimba, as well as other contractors, expressed concern over the lack of clarity over the term of the contract. The concern was that a contract of less than 3 years was not viable. The Defendant informed all the parties that the initial term will be for 12 months but an extension will be negotiated, depending on price. All the potential bidders were left with the impression that the contract will be extended by the Defendant Municipality at the end of the first 12 months. Matimba's uncontested evidence is that if anything less than 3 years was on offer; he would have walked away and not entered into the SLA.

Therefore, the SLA contained a term that at the end of the first 12 months the contract will be extended, subject to pricing.

[9] Plaintiff was awarded the contract and signed a service level agreement (SLA) with the Defendant on the 20 November 2013. Plaintiff set up a fully equipped control room in the Civic Centre and installed monitoring equipment in various sites on the instructions of the Defendant. Plaintiff provided the required services for an initial period of 12 months. An invoice for such services was delivered to the Defendant on a monthly basis and they were paid in full.

[10] At the end of the 12 month period and at least two months before the period ended, Plaintiff and Defendant entered into negotiations to extend the SLA, as was initially agreed.

On the 18 August 2014 Defendant obtained Municipal Council authorization to extend that SLA by two more years and also to extend the service to further sites within the Municipality.

In order to satisfy themselves that they could legally extend the SLA, Defendant obtained a legal opinion, dated 29 August 2014, which advised that in the circumstances and bearing in mind the terms of the SLA, the Defendant can legally extend the SLA.

[11] Defendant drafted an addendum to the SLA which the parties signed on the 28 August 2014. Defendant extended the term by a further 24 months and extended the number of sites to be monitored by Plaintiff. Plaintiff continued to provide services in all the sites and Defendant continued to accept and benefit from Plaintiff's services. Matimba gave a complete description of all the equipment and human resources deployed by Plaintiff.

Plaintiff continued to deliver monthly invoices for payment, but, for unexplained reasons the Defendant failed to make payment. Promises of payment were made by Defendant and at the same time Plaintiff was requested to continue providing services as agreed in the SLA addendum.

[12] On the 9 February 2015 Defendant unexpectedly launched an application to set aside the addendum (the application). Even after launching the application, Defendant continued to accept and enjoy the services rendered by Plaintiff. However, no payment for such services was forthcoming.

The Court granted an order declaring the addendum null and void on 19 August 2016. The Court refused an application for leave to appeal on 9 November 2016 and the Supreme Court of Appeal dismissed the application for leave to appeal the order of the High Court on 27 February 2017.

Significantly and on the 10 July 2015, Defendant wrote to Plaintiff, through their attorneys, requesting Plaintiff to continue to provide services "*until a new* *service provider is secured".* Plaintiff continued to provide the services, but inexplicably, defendant refused to pay.

[13] The Defendant obtained a second legal opinion which advised that Defendant was being enriched at the expense of Plaintiff. The opinion is dated **4 June 2015**. The opinion advised Defendant to make payment to Plaintiff. Defendant ignored the opinion without tendering any explanation. It is undisputed that for a period of 24 months, Plaintiff provided the services and Defendant enjoyed the benefit thereof. It is also not disputed that throughout the 24-month period, Defendant did not engage another service provider.

Plaintiff continued to provide services in terms of the contract, at the request of the Defendant who continued to accept and benefit from such services. Plaintiff stopped providing services on the 31 October 2016, by which time no other service provider had been appointed and no payments were made to Plaintiff.

Common Cause Facts

[14] At the risk of repeating myself, I find it appropriate to set out the following facts which are common cause or not in dispute:

14.1. The parties concluded an SLA and at the expiry thereof after 12 (twelve) months, concluded an addendum to the SLA which effectively extended the contract by a further period of 24 Months.

14.2. After concluding the SLA and thereafter the addendum, Plaintiff performed its obligations in terms of the addendum and did so for the entire period of 24 (twenty-four) months.

14.3. On 9 February 2015 the Defendant launched an application before this Court in order to set aside the addendum as illegal due to its own failure to comply with its own supply chain procedures. The application was successful and the addendum was declared null and void on 19 August 2016. The SCA dismissed an application for leave to appeal on 27 February 2017.

14.4. Even after the Defendant launched the application to declare the addendum null and void, Plaintiff continued to perform in terms of the addendum and continued to do so upon the written request of the Defendant . (as per letter dated 10 July 2015).

14.5. The Plaintiff continued to provide services until the 31 October 2016 and which services were accepted by Defendant who enjoyed the benefit thereof but refused to pay.

14.6. Defendant even obtained a legal opinion from its own attorneys which stated that it had been enriched at the expense of Plaintiff and that Defendant should pay.

Claim based on Unjust Enrichment

[15] When dealing with the Plaintiff's claim based on unjust enrichment it is important to note as stated above that the Defendant did obtain a legal opinion from its attorneys that the Defendant had been enriched at the expenses of the Plaintiff and that the Defendant should pay. Despite the legal advice, the Defendant failed to pay.

[16] In its particulars of claim, paragraphs 33 to 38, the Plaintiff pleaded the material facts relied upon to establish that the Defendant has been enriched at the expense of the Plaintiff[1].

The entire cause of action was proved on the undisputed evidence of Matimba. Matimba was unaware that the addendum was illegal. He was persuaded by the Defendant that the addendum was legal, moreso that the Defendant obtained a legal opinion and drafted the addendum for signature.

After signing the addendum, Plaintiff continued to provide services to Defendant in respect of additional sites for a period of 24 (twenty-four) months.

[17] Even after launching an application to set aside the addendum, Defendant continued to persuade Plaintiff to continue to provide services. Defendant even requested Plaintiff, in writing, to continue to provide services until a replacement service provider was appointed. On the 10 July 2015, after the application to

[1] See pages 100 to 101 of pleadings bundle

set aside was launched, Defendant through its attorneys, wrote to Plaintiff as follows:

> *"The service level agreement will continue until such time that a new service provided is secured"*

It is also not in dispute that during the 24-month extension of the SLA Defendant did not engage any other service providers.

It is not disputed that the Defendant benefited from Plaintiff's services to the full value of the addendum.

The Plaintiff had a contract and was obliged to perform in terms of it and accepted Defendant's word that he will be paid. At some stage Defendant even sent Plaintiff a copy of the cheque requisition to pay Plaintiff. The letter is dated 8 July 2015 wherein Defendant even undertook to pay the amount into Court[2].

[18] In my view the Defendant was unjustifiably enriched to the full value of the addendum. There was no plea of non-enrichment or loss of enrichment and above all no evidence on the part of the Defendant. The Plaintiff performed, on Defendants instructions and the Defendant accepted performance. In the circumstances the Plaintiff is entitled to get paid[3].

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[2] See page 168 of Bundle B of application to set aside the addendum

[3] See STV CT 2018 (5) SCA at paragraphs 115 to 116; Encon Construction (Pty) ltd and Another v Palm Sixteen (Pty) Ltd 1972 (4) SA 511 (T); Wolmarans and Another v Tuckers Land & Development Corporation (Pty) Ltd 1979 (1) SA 663 (T)

[19] The present case is not distinguishable from the case of **MEC for Health Gauteng v 3P Consulting (Pty) Ltd**[4].

In the latter case a service agreement between the parties was assailed on the grounds that the purported renewal of the three years (one year longer than previously agreed and at increased contract value) occurred without following a public bidding process and in a manner which could not be said to be fair, equitable, transparent, competitive and cost-effective as contemplated in section 217(1) of the Constitution read with section 38(1)(a)(iii) of the Public Finance Management Act 1 of 1999. The Supreme Court of Appeal held that the renewal of the service agreement did not give rise to a new service agreement: it simply extended the duration of the services agreement for a period of three years. That as there was no new service agreement, there was no new procurement of goods or services and it was therefore not necessary to have followed a competitive public bidding process in this regard.

[20] In the present case the Plaintiff is entitled to payment for services rendered irrespective of the Court ruling that the SLA addendum is null and void. In the case of **Albertyn v Khumalo and Others 1946 Vol 2 WLD** it was said:

> *"The Court will come to the relief of one of the parties to an illegal contract where such a course is necessary to prevent injustice or to satisfy the requirements of public policy".*

[4] 2012 (2) SA 542 (SCA)

[21] It is common cause that in the application to set aside the addendum the Court found against the Plaintiff and decided that the addendum was null and void. However, in the circumstance of this case Plaintiff should nevertheless have received payment for services rendered.

The case of **Department of Transport and Others v Tasima (Pty) Ltd**[5] is applicable where it was said:

> *"For these reasons I would have declared that the extension with effect from 1 May 2010 to April 2015 was inconsistent with section 217 of the Constitution and section 38 of the Public Finance Management Act and as a result the extension was void ab initio. However in the exercise of remedial power on justice and equity, I would have preserved what had already been done in terms of the invalid extention and order Tasima to transfer the eNaTis systems to the Corporation within 30 calendar days"*

See also **State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd 2018 SA 23(CC)**

Defendant's defence on the Merits

[5] 2017 (2) SA 622 (CC)

[22] The Defendant's plea to paragraphs 33 to 38 of Plaintiff's particulars of claim which constitute the cause of action on unjust enrichment is a bare denial and without stating its specific defence.

There was no plea of non-enrichment or loss of enrichment and as stated earlier in this judgment the Defendant did not present any evidence but closed its case at the end of Plaintiff's case.

[23] The greater part of Defendant's heads of argument as well as the oral submission by Counsel dealt with the application, as a defence, of two legal principles:

Firstly, the principle of *ex turpi causa non oritur actio*; and

Secondly, the relaxation of the principle of *in pari delicto potior est condicio defendentis.*

- (When the parties are equally at fault, the defendant's position is more compelling).

The Defendant argued that the Plaintiff has no enforceable claim against it in that the extended SLA is invalid, null and void, unenforceable and unconstitutional, and was found as such by this Court in a review application. That this extended SLA was tainted with illegality and is thus unenforceable.

[24] Plaintiff's Counsel argued that Defendant may not rely on these defences and that the Court must dismiss them out of hand for not being pleaded.

For the reasons that follow hereunder, I agree with Counsel for the Plaintiff.

[25] The Defendant's plea does not comply with Rule 22(2). The Rule provides that *"(2) The defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies."*

There is absolutely no mention of these defences in Defendant's plea. If it was intended that these principles provide a defence in answer to Plaintiff's claims, the uniform rules compel Defendant to plead it is so that Plaintiff knows the case it has to meet.

The defendant is duty bound to set forth his defence with sufficient precision to enable the plaintiff to ascertain what the defence is[6] .

A pleader cannot be allowed to direct the attention of the other party to one issue, and then at the trial attempt to canvass another[7].

[26] I am of the view that the two defences raised by Defendant in their heads of argument and oral submissions, for the first time, do not form part of the issues before me as they were not pleaded as issues in their plea.

In the result the two defences raised by the Defendant are rejected.

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[6] See FPS Ltd v Trident Construction (Pty) Ltd 1989 (3) SA 537 (SCA) at pages 541H to 542D

[7] See Kali v Incorporated General Insurance Ltd 1976 (2) SA 179 (D) at 182A

[27] In any event on the peculiar facts of this case the *ex turpi causa* defence cannot assist Defendant. The illegality of the addendum to the SLA came only when the Court pronounced on the validity of the addendum. At all material times Plaintiff provided services in the belief that the agreement was valid. Plaintiff also provided services on the written instructions of Defendant. It therefore cannot be said that Plaintiff knowingly acted illegally.

It is common cause that Plaintiff performed its obligations in terms of the contract and Defendant benefited from the performance. On the facts of this case, this Court is inclined to relax the application of the *pari delicto* in favour of Plaintiff.

It is trite that the Court will not enforce rigidly the general rule in *in pari delicto potior est conditio defendentis*, but will come to the relief of one of the parties where such a course is necessary in order to prevent injustice or to satisfy the requirements of public policy[8].

Defendant's Special Pleas

[28] The Defendant raised special pleas on the following legal issues: res judicata, non-compliance with section 3(2) of the Institution of Legal Proceedings against Certain Organs of State Act No. 40 of 2002 and prescription.

Res judicata

[8] Jaybhay v Cassim 1939 AD 537

[29] The requirements of *res judicata* are that the cause of action, relief and parties be the same in the earlier proceedings. When the Defendant in the present proceedings brought an application to set aside the addendum on 9 February 2015 under case number 238/2015, the present Plaintiff instituted a counter application claiming damages and payment of debt in the sum of R 2 005 000.00 for services rendered from November 2014 to March 2015 and Plaintiff's counter claim was dismissed with costs. In the present proceedings Plaintiff issued its summons for payment of the amount of R 9 624 000.00 under various causes of action referred to in paragraph [3] above. It is against this backdrop that the Defendant raised a special plea of *res judicata*.

[30] The cause of action in Plaintiff's claim for the amount of R 2 005 000.00 in case number 238/2015 was for the enforcement of the contract (addendum) which was declared null and void by the Court in its judgment of the 19 August 2016. In the present case (case number 393/2018) the Plaintiff claims the amount of R 9 624 000.00 based on unjust enrichment.

The question is whether the causes of action are the same in both cases.

[31] The requirements of same cause of action and same relief can be dispensed with where the same issue has been finally decided in the previous proceedings. This is the form of *res judicata* known as issue estoppel. A plea

of issue estoppel can only be permitted if it would not cause unfairness in the later proceedings.

I am of the view that to uphold the special plea in the circumstances of this case will lead to unfairness in this case. This is so because this Court was in a better position to hear the undisputed evidence of Plaintiff which evidence clearly establishes a case of unjust enrichment.

In **Prinsloo NO and Another v Goldex 15 (Pty) Ltd and Another**[9] it was held that the gist of the plea is that the matter or question raised by the other side had been finally adjudicated upon in proceedings between the parties and that it therefore cannot be raised again. However, the Court held that in time the requirements were, relaxed in situations which gave rise to what became known as issue estoppel.

[32] The relaxation of the common law requirement of the plea of *res judicata* was explained as follows by Scott JA in **Smith v Porrit and Others**[10].

"Following the decision in Boshoff v Union Government 1932 TPD 345 the ambit of the exceptio rei judicata has over the years been extended by the relaxation in appropriate cases of the common law requirements that the relief claimed and the cause of action be the same (eadem res and eadem petendi causa) in both the case in question and the earlier judgment. Where the

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[9] 2014 (50)SA 297 (SCA)

[10] 2008 (6) SA 303 (SCA) para 10

circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (idem actor) and that the same issue (eadem quaestio) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of res judicata is raised in the absence of a commonality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in Kommissaris van Binnelandse Inkomste v Absa Bank BPK 1995 (1) SA 653 (A) at 669D, 670J-671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of res judicata. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case by case basis. (KBI v Absa Bank supra at 670E-F.)".

[33] I come to the conclusion that the causes of action are not the same in the two proceedings between the parties. There is a claim for enforcement of the illegal contract as against the claim for unjust enrichment. In any event the circumstances of the present case are such that the requirement for the special plea of *res judicata* should be relaxed.

The Defendant's special plea of *res judicata* is accordingly dismissed.

Non-Compliance with Section 3(2) of Act No. 40 of 2002

[34] The Defendant alleges that the Plaintiff notice in terms of section 3(2) of Act 40 of 2002 does not comply with all the requirements set out in section 3(2) of the Act in that the said notice was not served on the Defendant within a period of six (6) months from the date on which the debt became due in accordance with section 4(1) of the Act. That the Plaintiff has failed to apply for condonation for non-compliance with the provisions of this Act.

[35] There is no merit in the special plea raised by the Defendant.

On the facts of this case it is clear that Plaintiff did comply with section 3(2)(a) of the Act. Plaintiff continued to render service until end October 2016. This Court gave judgment setting aside the addendum on 19 August 2016 and refused leave to appeal on 9 November 2016. The SCA refused leave to appeal on the 27 February 2017. The requisite notice in terms of section 3(2) of the Act was served on 8 September 2017.

Clearly, Plaintiff was unable to institute this action including the issue of the notice in terms of the Act until the SCA pronounced on the application for leave to appeal. The debt became due after the SCA had pronounced on the application for leave to appeal.

Accordingly, the requisite notice was given within six months and therefore a proper notice was given in terms of section 3(2)(a) of the Act. The special plea raised by the Defendant in this regard must fail.

Prescription

[36] The Defendant alleges that Plaintiff acquired the knowledge of facts from which the debt arose when the invoices became due for payment and also when the Defendant disputed the legality of the extension of the SLA in terms of the addendum. That the Plaintiff instituted this action after a period of three (3) years after the debt became due and therefore the Plaintiff should be nonsuited on the ground of section 11(d) of the Prescription Act No. 58 of 1969.

This is based on the assertion that the Plaintiff's cause of action arose on 9 February 2015 when Defendant launched the application to set aside the addendum against the Plaintiff.

[37] The facts in this case show that Plaintiff opposed the said application and prescription was interrupted until the 27 February 2017 when the SCA refused leave to appeal.

Only after the SCA decision, did Matimba became aware or had knowledge that the Defendant's conduct giving rise to the debt was actionable. The Plaintiff could not have been aware of this cause of action herein until the litigation in the application to set aside the addendum and the appeal process were completed.

[38] Prescription begins to run when the debt in question is due, that is, when it is owing and payable.

Section 12(3) of the Prescription Act 68 of 1969 provides:

"*A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care*".

See: **MEC for Health, Western Cape v MC (1087/2019) [2020] ZASCA 165 (10 December 2020)**

and

Bester and Others NNO v Gouws and Others (851/2019) [2020] ZASCA 174 (17 December 2020).

[39] The Plaintiff's claim against the Defendant has therefore not prescribed in terms of section 11(d) of the Prescription Act 68 of 1969.

Conclusion

[40] Having upheld the Plaintiff's claim against the Defendant based on unjust enrichment as a cause of action it is not necessary to consider the other causes of action as stated in paragraph [3] of this judgment.

[41] The following order is granted:

41.1 The Plaintiff has made out a case against the Defendant based on unjust enrichment.

41.2. The Defendant is ordered to pay Plaintiff an amount determined under the disputed quantum.

41.3. The Defendant to pay the costs of this action on party and party scale.

[redacted]

E M MAKGOBA
JUDGE PRESIDENT OF THE HIGH COURT, LIMPOPO DIVISION, POLOKWANE

<u>APPEARANCES</u>

Heard on	:	**26 & 27 November 2020, 11 December 2020**
Judgment delivered on	:	**02 February 2021**
For Plaintiff	:	**Adv. I Hussain SC**
Instructed by	:	**MED Attorneys**
		c/o CJ Ntsoane Attorneys
For Defendant	:	**Adv. Adv. A T Ncongwane SC**
		Adv. L Mboweni
Instructed by	:	**Talane & Associates Attorneys**
		c/o Reneilwe Mathekga Attorneys