

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 6043/2017

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
Signature <i>[Signature]</i>	
Date <i>30/07/2020</i>	

In the matter between:

MAGULA PROMOTIONS (PTY) LTD**PLAINTIFF**

and

DEPARTMENT OF SPORTS, ARTS AND CULTURE **FIRST DEFENDANT**
LIMPOPO PROVINCIAL GOVERNMENT

HEAD OF DEPARTMENT OF SPORTS, ARTS AND **SECOND DEFENDANT**
CULTURE, LIMPOPO PROVINCIAL GOVERNMENT

MEC SPORTS, ARTS AND CULTURE **THIRD DEFENDANT**
LIMPOPO PROVINCIAL GOVERNMENT

JUDGMENT

MAKGOBA JP

- [1] The Plaintiff instituted action against the Defendant arising out of a written service level agreement concluded between the Plaintiff and the First Defendant ("the Department") at Polokwane on 23 June 2016. The Head of the Department and the Member of the Executive Council of Sports, Arts and Culture (MEC) in the Limpopo Provincial Government are cited as Second and Third Defendants respectively, both in their nominal capacity. For the sake of convenience the Defendants will be referred to as the Department.
- [2] In concluding the agreement, the Plaintiff was represented by Mr Joseph Chakela, its managing director and the Department was represented by the erstwhile Acting Head of Department, Mr Mabakane Mangena. In terms of the agreement the Plaintiff would render to the Department services pertaining to the organisation, marketing, management and execution of a festival known as Mapungubwe Arts, Culture and Heritage Festival ("the Festival") for the years 2016, 2017 and 2018.
- [3] The agreement was terminated and the parties parted ways pursuant to the hosting of the 2016 Festival. Both parties accuse each other of having repudiated the agreement and both allege to have accepted the other's repudiation.

The Claims

- [4] The Plaintiff's first claim is for specific performance of obligations in terms of the agreement that arose prior to the termination thereof. In this regard, the Plaintiff claims an amount of R 2 948 605.86 that the Plaintiff contends remains outstanding in respect of the agreed contract price for the rendering of services for the 2016 Festival.

Furthermore, flowing from the termination of the agreement, the Plaintiff claims damages as a result of the Department's alleged repudiation of the agreement in the amount of R 3 808 372.24 comprising:

- (a) R 1 352 974.57 being profit the Plaintiff would have earned rendering services in respect of the 2017 Festival;
- (b) R 1 454 447.67 being profit the Plaintiff would have earned rendering services in respect of the 2018 Festival;
- (c) R 1 000 950.00 in respect of amounts due to sub-contractors with whom the Plaintiff had entered into fixed term agreements in respect of the 2017 and 2018 Festivals. These sub-contractors are allegedly holding the Plaintiff liable for payment of their agreed service fees.

- [5] The Department has in turn instituted a counterclaim against the Plaintiff for payment of the amount of R 2 744 193.81 for damages allegedly suffered by the Department flowing from, firstly, an alleged overpayment made to the

Plaintiff, and, secondly, an amount allegedly paid by the Department to service providers that were allegedly not paid by the Plaintiff.

Issues

[6] This Court is called upon to determine the following issues:

6.1. What the amount was of the all-inclusive contract price for rendering services in terms of the agreement for 2016, 2017 and 2018.

The Plaintiff alleges that the agreed all-inclusive contract price was R 40 947 357.76 inclusive of costs and VAT. The Department alleges that the all-inclusive contract price was R 38 972 609.76.

6.2. What the agreed contract price in respect of services pertaining to the 2016 Festival was. The Plaintiff alleges that the amount agreed in respect of the 2016 Festival was R 12 674 748.00. The Department on the other hand, alleges that the contract price for the 2016 Festival was R 10 700 000.00.

6.3. Whether the Plaintiff complied with its obligations in terms of the agreement by organizing, marketing and executing the 2016 Festival.

6.4. The extent to which the Department remains indebted to the Plaintiff following the successful conclusion of the 2016 Festival. The Plaintiff alleges that the Department remains indebted to it in the amount of R 2 948 605.86.

- 6.5. Whether the Department has established that the Plaintiff is indebted to it in the amount of R 1 543 731.41 in respect of an alleged overpayment, as well as in the amount of R 1 220 462.40 following payments allegedly made by the Department to artists whom the Plaintiff had allegedly failed to pay.
- 6.6. Which party was responsible for repudiating the agreement, and whether the Plaintiff is entitled to claim damages pursuant thereto. These damages relate to the profit that the Plaintiff would have earned in respect of the 2017 and 2018 Festivals, as well as amounts owed to sub-contractors.
- 6.7. Whether the special plea raised by the Defendants / Department is valid in law. The Department contends that the Plaintiff's technical proposal (bid) was not responsive to the Department's bid specifications, that the Plaintiff's bid did not comply with the provisions of the Preferential Procurement Policy Framework Act, 5 of 2000, and with section 217 of the Constitution and consequently the agreement is invalid and unenforceable.

The Witnesses

- [7] The following witnesses testified for the Plaintiff:

7.1. Mr Joseph Chakela who is the Plaintiff's managing director and also represented it when the service level agreement was signed;

- 7.2. Mr Reginald Zikalala who is Plaintiff's project co-ordinator for the Festival;
- 7.3. Mr Thulani Cindi, the CEO of Tidnic, a third party sub-contractor contracted by the Plaintiff for the 2016, 2017 and 2018 Festivals;
- 7.4. Mr Bongani Mahlangu, a director of Africa Ekhaya Entertainment, a third party sub-contractor contracted by the Plaintiff for the 2016, 2017 and 2018 Festivals.

[8] The Defendants / Department called the following witnesses:

- 8.1. Advocate Iloius Du Bruyn, the legal advisor in the Limpopo Premier's Office;
- 8.2. Mr John Mokonyana, the Department's Deputy Director, Legal Services;
- 8.3. Mr Mabakane Mangena, who was the Acting Head of Department at the relevant time and signed the service level agreement on behalf of the Department;
- 8.4. Mr Friday Professor Mushwana, who was the Chief Financial Officer of the Department at the relevant time;
- 8.5. Mr Mackson Mhangwana who was the Festival project co-ordinator of the Department at the relevant time.

The Defendants' Special Plea

[9] It is common cause that on 23 June 2016 a service level agreement was entered into by and between the Plaintiff and the Department.

Mr Chakela represented the Plaintiff and Mr Mangena represented the Department when the agreement was signed.

The Department contends that the said agreement had flaws which renders it to be illegal, invalid and enforceable. The reason for that is because, according to the Department, the Plaintiff's bid was found to be unresponsive, that somehow the acting HOD, Mr Mangena deemed it fit to enter into that contract with the Plaintiff.

[10] The two witnesses, Advocate Du Bruyn and Mr Mokonyana testified on the legality of the service level agreement.

Advocate Du Bruyn testified that on 22 April 2016 she penned an opinion directed to the acting Head of the Department of Sports, Arts and Culture wherein she recorded that although the Department were previously made aware of the shortcomings in the bid specifications, it went ahead to advertise the said bid specification document without addressing all the issues raised.

Furthermore, on 6 June 2016 Advocate Du Bruyn gave the Department further legal opinion which contained inter alia the following:

"It is also clear that the Department seemingly intends to award this bid to the preferred service provider and expects our office to fix up the challenges alluded to.

Unfortunately the incorrect bid specification has tainted the whole process and in our view does not comply with Section 217 of the Constitution and Procurement prescripts".

- [11] Mr Mokonyana, as an in-house legal advisor within the Department also gave his legal opinion, advising against entering into the service level agreement with the Plaintiff.

His legal opinion stated inter alia:

"I am of the opinion that the bidder did not submit an acceptable tender as a requirement under PPPFA. The Department's decision to appoint Magula Promotions (Pty) Ltd is null and void. If the bid is challenged in the Court of law it will be set aside".

- [12] It is common cause that the acting HOD, Mr Mangena disregarded the legal opinions from both the Legal Department of the Premier's Office and the Legal Service Office in the Department of Sports, Arts and Culture and went on to sign the service level agreement on 23 June 2016.

In his testimony Mr Mangena said that with benefit of hindsight he would not have acted in the manner in which he did. He also testified about the fact that

he faced consequences of his actions regarding the signing of the service level agreement in that he faced a disciplinary hearing and demoted from his position of Chief Director.

[13] Counsel for the Defendants / Department submitted that all that has been said regarding the non-responsiveness of the Plaintiff's bid, clearly point in the direction of an agreement that contravenes Section 217 of the Constitution and related Procurement Prescripts. Counsel further submitted that it is the Department's contention that such non-compliance with the Procurement prescripts tainted the contract and rendered it to be unlawful and unenforceable.

[14] This Court was taken aback when hearing from Mr Mokonyana testifying that it still happens from time to time within the Department that the Department's officials disregard legal advice. This is indeed an intriguing statement and in fact a concerning phenomenon.

The question is whether this phenomenon distracts from the fact that a binding agreement was concluded.

In my view, it does not.

Both Advocate Du Bruyn and Mr Mokonyana conceded under cross-examination that the decision to appoint the Plaintiff as a service provider, and the agreement subsequently concluded on 23 June 2016, were never reviewed or set aside.

[15] In the case of **MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd t/a Eye & Lazer Institute**¹ it was held that:

“Even where the decision was defective, government should generally not be exempted from the forms and processes of review: it should be held to the pain and duty of proper process. It must apply formally for a court to set aside the defective decision, so that the court can properly consider its effects on those subject to it.

The approval in question was, despite its vulnerability to challenge, a decision taken by the incumbent of the office empowered to take it, and remained effectual until properly set aside. It would not be ignored or withdrawn by internal administrative fiat”.

[16] In the present case the Plaintiff acted on the decision taken by the Department, through its official, Mr Mangena. The Plaintiff continued to perform in terms of the alleged unlawful contract. The 2016 Festival had come and gone without the Department raising a query about the enforceability of the contract.

¹ 2014 (3) SA 481 (CC)

This matter is akin to the case of **JFE Sapela**² and that of **Millennium Waste Management**³.

In **JFE Sapela** the contracted work was almost completed at the time judgment was delivered by the Court of first instance. The question that confronted the Court was whether the illegal tenders should be set aside in those circumstances. The Supreme Court of Appeal overturned the high Court's order setting aside the illegal tenders. The SCA held that our Courts have a discretion not to set aside administrative action where doing so will achieve no practical purpose.

- [17] It is trite that an administrative act engenders legal consequences until it is properly set aside by a Court of law.

The essential basis of **Oudekraal**⁴ is that invalid administrative action may not simply be ignored, but may be valid and effectual, and may continue to have legal consequences, until set aside by proper process.

In *casu* all the parties went ahead to perform in terms of the alleged invalid tender / bid to the extent that the 2016 Festival was organized, managed and executed. The Department paid the larger portion of the contract price to the Plaintiff.

² Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others 2008 (2) SA 638 (SCA) [2005] 4 All SA 485

³ Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others 2008 (2) SA 481 (SCA); 2008 (50 BCLR 508; [2008] 2 All SA 145; [2007] ZASCA 165.

⁴ Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) [2004] 3 All SA 1; [2004] ZASCA 48.

Consequently, the special plea regarding the illegality and unenforceability of the service level agreement raised by the Department in this case is dismissed.

Conclusion of the Agreement and the agreed Contract Price

- [18] It is common cause that the agreement between the Plaintiff and the Department was concluded on 23 June 2016. A copy of the written service level agreement is annexure POCl to the Plaintiff's particulars of claim. Clause 9 of the agreement dealt with the issue of remuneration based on the agreed contract price.
- [19] It is further common cause that the original version of the agreement made provision for an all-inclusive contract price of R 40 947 357.76 inclusive of costs and VAT for the 2016, 2017 and 2018 Festivals, and for an amount of R 12 674 748.00 in respect of the 2016 Festival, but these amounts were wrong and had to be amended as shown hereunder.
- [20] The parties are in agreement with regard to the first amendment, in terms of which the all-inclusive contract price for the three Festivals was reduced to R 38 272 609.76, and the amount in respect of the 2016 Festival was reduced to R 10 000 000.00. There was a second amendment on which the parties are in agreement. This second amendment resulted in an all-inclusive contract

price being amended to R 38 972 609.76, with the 2016 Festival amount being increased to R 10 700 000.00.

- [21] According to the Department, this second amendment is the final amendment to the agreement. However, Mr Chakela, on behalf of the Plaintiff, gave evidence of a further, third amendment to the agreement. In terms of the third amendment, the all-inclusive contract price was restored to the amount of R 40 947 357.76 and that the amount payable in respect of the 2016 Festival was similarly restored to the amount of R 12 674 748.00, as originally contained in the agreement.
- [22] The Plaintiff avers that the final amendment came about pursuant to a meeting held with the Department on 7 November 2016. Mr Chakela and Mr Zikalala testified that they held a meeting with the Department on 7 November 2016 pertaining to the challenges faced with the 2016 Festival as a result of the MEC at the time, Ms Onicca Moloi, having materially interfered with the Festival, insisting on the inclusion of a number of additional items in the Festival programme that were not budgeted for. The persons present at this meeting were Mr Chakela, Mr Zikalala, Mr Mangena, Mr Mushwana, Mr Mhangwana and the Department's Supply Chain Manager, Mr Shilowa. This meeting ran into the early hours of the next morning.

- [23] According to the Plaintiff, at this meeting it was agreed that the contract would be amended to revert back to the amounts originally contained in the agreement, namely a total contract price of R 40 947 357.76 for the 2016, 2017 and 2018 Festivals, and R 12 674 748.00 for the 2016 Festival. Mr Chakela explained in his evidence that this was after the adoption of a festival budget of R 12 788 483.86 which excluded the Festival Pre-Party and the Gospel Festival, but included the additional events requested by the MEC. The Defendants' witnesses at no point in their evidence denied that Ms Moloi's interference made life difficult and resulted in additional events being added.
- [24] As a consequence of the amendment, the Department would issue a purchase order to the Plaintiff for the remainder of the contract price. Since an amount of R 5 999 999.98 (rounded to R 6 000 000.00) was previously paid as a 60% deposit by the Department, the balance of the 2016 contract price in terms of the third amendment was R 6 674 749.00. The purchase order for this amount was indeed issued and dated 7 November 2016, being indicated on page 19 of Bundle D3 of the Defendants' bundle of documents at the trial.
- [25] The Defendants' witnesses present at the meeting of the 7 November 2016 deny that the meeting took place. They proffered a blanket or bare denial of the meeting ever having taken place, alleging that the only meeting they had with

Mr Chakela in attendance was in February 2017. On the other hand Mr Chakela and Mr Zikalala were able to give detailed evidence pertaining to the meeting in question, even recalling that Mr Zikalala and Mr Mhangwana at one stage left the meeting to go and buy food for those in attendance.

Consequently, this Court is faced with two mutually destructive versions as to whether the meeting took place on 7 November 2016 wherein an agreement was reached to effect the third amendment to the agreement pertaining to the contract price.

- [26] The guidelines for evaluating the evidence of witnesses was given in **Stellenbosch Farmers Winery Group Ltd and Another v Martell et Cie and Others**⁵ wherein it was held that “to come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities”

In **National Employers' General Insurance Co Ltd v Jagers**⁶ it was said:
“Where there are two mutually destructive stories, the plaintiff can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be

⁵ 2003 (1) SA 11 (SCA) at 14J -15D

⁶ 1984(4) SA 437 (E) at 440E-G

rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities..."

[27] On considering these conflicting versions of the Plaintiff and Defendants' witnesses in the present case, I find that the version of the Plaintiff is more probable than that of the Defendants.

[28] My findings in this regard is fortified by some key contemporaneous documentation which were processed and issued by the Department on 8 November 2016, the day after the meeting. The Defendants' witnesses, denial of the meeting having taken place is directly at odds with these undisputed documentation.

On 8 November 2016 the Department issued a purchase order in the amount of R 6 674 748-00, being the balance of the 2016 contract price of

R 12 674 748-00. Mr Mushwana, the CFO of the Department approved the purchase order and affixed his signature thereto. In cross-examination Mr Mushwana conceded that he had approved the purchase order signifying that the 2016 contract price was increased to R 12 674 748-00.

[29] Also on 8 November 2016 Mr Mushwana in his capacity as CFO, and Mr Mangena as Acting HOD, approved a requisition voucher for goods and service in which it was expressly "recommended that an amount of which

R 6 674 749-00 the balance of R 12 674 748-00 be approved to Magula Promotions so that they can continue to implement the preparations of Mapungebwe arts, culture and heritage festivals". Both Mr Mushwana's and Mr Mangena's signatures appear on the document. Furthermore on

8 November 2016 Mr Mushwana and Mr Mangena approved a further requisition voucher that sought approval for "payment of the balance of 60% of the total contract price." It was stated that an amount which is

R 1 604 848-82, the balance of 60% of R 12 674 748-00 be paid to the Plaintiff.

[30] Mr Mushwana conceded that the second requisition voucher flowed from the fact that in terms of the amended agreement a 60% deposit of the 2016 contract price was payable. A 60% of the amended contract price of R 12 674 748-00 is R 7 605 848-80. It is common cause that a deposit in the amount of

R 5 999 999-98 was previously paid. The amount of R 1 604 848-82 as stated in paragraph [29] above would therefore have brought the initial payment up to 60 % of the new contract price. The second requisition voucher therefore unavoidably points to an agreed 2016 contract price in the amount of

R 12 674 748-00.

[31] On 8 November 2016 Mr Mushwana and Mr Mangena also signed off on an internal memorandum emanating from a Mr. G.S. Mabunda, the Department's Director: Art and Culture. Under the heading "Financial Implications" the internal memorandum recorded as follows: "The Service Provider, Magula Promotions has requested R 12 674 748-00 for the implementations of Mapungubwe Activities. The Department has paid 60% of the R 10 million rand from its equitable shares of an amount of R 5 999 999-98. Magula Promotions will be paid 60% balance of the R 12 674 748-00 budget as it is stated in the Service level agreement which is R 1 604 848-82" (sic).

Under the heading "Recommendation" the memorandum stated as follows: "It is recommended that an amount of which is R 1 604 848-82 the balance of the 60% of R 12 674 748-00 be paid to Magula Promotions so that they can continue to implement the preparations of Mapungubwe arts, culture and heritage festival" (sic).

[32] Mr Chakela confirmed in his evidence that the Plaintiff issued an invoice in the amount of R 1 604 848-82 for the balance of the 60% deposit. The invoice is dated 8 November 2016 and appears in the Defendants' Bundle D3 on page 32. Mr Mushwana had to concede that all the relevant documents namely the purchase order, requisition vouchers and internal memorandum, indeed point

to a contract price of R 12 674 748-00 for the 2016 Festival. This concession was correctly made and on this basis I make a finding that the final amendment of the agreement brought the contract price to an amount of R 12 674 748-00 as alleged by the Plaintiff.

Plaintiff's Compliance with terms of the Agreement

[33] The Department contends that the Plaintiff failed to perform in terms of the agreement. That the Plaintiff failed to secure sponsorships and also failed to account to the Department satisfactorily. According to the Department the resistance by the Plaintiff to carry out certain activities of the Festival resulted in a contestation between the then MEC and the Plaintiff, as the MEC wanted the Plaintiff to perform in terms of the service level agreement, but the Plaintiff consistently advised that certain activities were not included in the service level agreement.

[34] Mr Chakela, in his evidence in chief explained to the Court the difficulties experienced by the Plaintiff as well as the Department's functionaries, as a result of the continued interference in the 2016 Festival preparations by Ms Onicca Moloi, the erstwhile MEC of the Department. None of the Department's witnesses contradicted Mr Chakela's evidence in this regard. The Department's witnesses, in particular Messrs Mangena, Mushwana and Mhangwana sought

to avoid answering questions on this topic during cross-examination. The evidence of Mr Chakela stands unchallenged in this regard.

[35] Mr Chakela testified that despite the challenges experienced as a result of Ms Moloi's interference, the 2016 Festival was a success. In cross-examination Mr Mangena confirmed that this is indeed the case, adding that "everybody had a great time" When it was put to Mr Mangena that the MEC sought to sideline the Plaintiff in the Festival preparations, Mr Mangena answered: "Probably". In re-examination by his own Counsel, Mr Mangena stated that the Department was satisfied with the final report submitted by the Plaintiff.

[36] The successful execution and conclusion of the 2016 Festival is documented in the Final Festival report⁷. This is the report which Mr Mangena has accepted and found same satisfactory. The Department was called upon to give its inputs on the draft report. Crucially, in its draft response the Department only indicated that certain paragraphs that seemed to be critical of its officials had to be removed. Mr Mostert, counsel for the Plaintiff submitted that it is telling that the Department did not insist on including in the final Festival Report, any reference

⁷ Plaintiff's Evidence Bundle P2 pages 157-226

thereto that the Plaintiff purportedly did not comply with its obligations in respect of the 2016 Festival.

I agree.

- [39] In premises the Department allegations of non-performance are to be dismissed for what they are – an *ex post facto* attempt at evading contractual obligations. In my view the Plaintiff complied with its contractual obligations in terms of the agreement pertaining to the 2016 Festival.

Outstanding Amount due to Plaintiff in respect of the 2016 Festival

- [40] Mr Chakela referred to the Plaintiff's bank statements for the period 7 May 2016 to 31 March 2017 and identified the following payments that were made to the Plaintiff towards the 2016 Festival contract price:

40.1 The amount of R 5 999 999-98 paid on 1 August 2016

40.2 The amount of R 2 600 000-00 paid on 9 December 2016

40.3 The amount of R 1 126 142- 14 paid on 15 March 2017

The total amount paid by the Department to the Plaintiff in respect of the 2016 Festival contract price is R 9 726 142-12.

The outstanding amount or shot payment based on the contract price of R 12 674 748-00 is therefore R 2 948 605-86. This is the amount due and payable to the Plaintiff in respect of the 2016 Festival.

[41] Mr Mushwana alleged that a payment made by the Department on 2 December 2016 in the amount of R 1 277 126-89 was also made towards the agreed contract price. This is not correct. Mr Chakela conclusively dealt with this allegation in his evidence, demonstrating that this payment was not made towards the contract price but in respect of other expenses incurred by the Plaintiff on behalf of the Department, and consequently reimbursed by the Department.

These amounts are the following:

41.1 R 500 000-00 paid to the Sapa Yopa motorcycle Club;

41.2 R 527 126-89 for the district auditions

41.3 R 250 000-00 paid to Sound Headquarters for a sound system.

Total R 1 277 125-89

- [42] In the premises, the Plaintiff has discharged the onus of the establishing the balance of the 2016 Festival contract price still owed to it in the amount of R 2 948 606-86.

Repudiation of the Agreement and Claim for damages

- [43] Mr Chakela testified that the Department's repudiation of the agreement came to his attention in three separate and distinct ways.

First, Mr Chakela was informed by a Mr Bruce Kgapane towards the end of January 2017 that Mr Kgapane had been informed by Ms Moloi that she was not going to proceed with the agreement and that she intended terminating the contract with the Plaintiff.

Second, Mr Chakela on 16 February 2017 gained knowledge of a newspaper article that reported on Ms Moloi's desire to cancel the agreement with the Plaintiff.

Third, Mr Chakela gained knowledge that the Plaintiff was being side lined in respect of the Mapungubwe Gospel Festival, that the Plaintiff during late February 2017 became aware that the Department intended proceeding with the Gospel Festival without the Plaintiff's assistance.

[44] Mr Chakela correctly referred or regarded the above incidents as rumours. I also regard the above incidents or allegations as rumours, inadmissible hearsay evidence and not cogent enough to constitute a repudiation of the agreement by the Department. I regard the information gathered from Mr Kgapane and from newspapers as hearsay evidence and inadmissible.

[45] In a letter to the Department dated 8 March 2017 the Plaintiff requested an update from the Department as to when the Plaintiff will be starting with the preparations for the Gospel Festival. The Plaintiff did not receive a response to this letter. Apparently the Plaintiff communicated its acceptance of the Department's repudiation, in writing on 15 March 2017. There is a dispute as to the correct date of this letter because on the face of it, the letter is dated the 16 February 2017. Whether the correct date of this letter is the 16 February 2017 or 15 March 2017 is neither here nor there. The main question is whether this letter constitutes an acceptance of the repudiation of the agreement.

A further question is whether the Department did in fact repudiate the agreement.

[46] When the Plaintiff stated in its letter of the 8 March 2017 that it was ready to start with the preparations for the Gospel Festival, it shows that the Plaintiff was desirous of enforcing the agreement. The Plaintiff should therefore, have put the Department on terms as provided for in Clause 15 of the Service Level Agreement.

[47] Clause 15 of the agreement provides for a defaulting party to be placed on terms, and for the non-defaulting party to terminate the agreement and claim damages should the other party's breach not be remedied. The Plaintiff *in casu*, failed to take this route but proceeded to write a letter to the Department dated 15 March 2017 purporting to accept repudiation of the agreement by the Department. As indicated earlier in my judgment, there are no cogent reasons to hold the Department liable for repudiation of the agreement.

[48] In **Nash v Golden Dumps (Pty) Ltd**⁸ it was held:

Where one party to a contract, without lawful grounds, indicated to the other party in words or by conduct a deliberate or unequivocal intention no longer to be bound by the contract, he is said to "repudiate" the contract. Where that happens, the other party to the contract may elect to accept the repudiation and

⁸ 1985 (3) SA 1 (AD) at 22D-G

rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of the repudiation and rescission to the party who has repudiated.

- [49] Mr Chakela on behalf of the Plaintiff on 16 February 2017, at least that is the date appearing on the letter, wrote to the Department. Mr Chakela in his evidence testified that the date of the 16 February 2017 as appearing on the letter is an error, actually the letter was written sometime in March 2017. The mistake of the date appears because the referenced to a previously written letter and that is how the wrong date cropped in.

The letter reads as follows:

"Dear Sir,

Please take note that we shall be unable to proceed with the management of the above festival for the remaining 2 years due to the toxic relationship currently existing between our company and the Office of the MEC.

It was our objective to assist in the rebranding and growth of the Mapungubwe Festival brand, but it became obvious last year that in the prevailing atmosphere that it is not possible to realize this objective.

We shall be happy if your Department can expedite the balance of our payment.

We take this opportunity to wish you all the best with Mapungubwe Festival.

Joe Chakela.”

- [50] The contents of this letter in my view, does not amount to an unambiguous or unequivocal acceptance of repudiation of the agreement. The letter communicates to the Department the Plaintiff's intention to no longer be bound by the agreement. It is the Plaintiff that actually repudiated the agreement. Mr Chakela testified that he has vast experience in event management on national, provincial and local government level. This vast experience put him at an advantage in organizing and management of events. With his experience he should be able to appreciate the contents of the letter he wrote to the Department advising the latter that the Plaintiff would no longer proceed with the organizing and management of the Festivals for 2017 and 2018.

The contents of the letter does not conform with the Plaintiff's assertions made, that the Department repudiated the agreement and the Plaintiff accepted the repudiation. See **Nash v Golden Dumps (Pty) Ltd** supra.

- [51] The Plaintiff claims a total amount of R 3 808 372-57 being in respect of damages for the profit that it would have received for hosting the Mapungubwe Festival in the years 2017 and 2018 as well as for monies payable to its sub-contractors. I am of the view that the Plaintiff has not discharged the onus of establishing that the Department has repudiated the agreement. Consequently, the Plaintiff's claim for damages falls to be rejected.

Defendants' Counterclaim

- [52] The Department / Defendants counterclaim for payment of an amount of R 1 534 731.41 in respect of an amount allegedly overpaid to the Plaintiff and for an amount of R 1 220 462.40 in respect of amounts allegedly paid by the Department to service providers whom the Plaintiff had allegedly failed to pay.
- [53] The two amounts claimed by the Department were never quantified by any of the Defendants' five witnesses who testified in this matter.
- The amount of R 1 534 731.41, being the alleged overpayment to the Plaintiff, was not canvassed in evidence, and the amount was not put to the Plaintiff's witnesses to comment on. In particular, it was never put to Mr Chakela that the Plaintiff was indebted to the Department in this amount.
- Similarly, it was never put to the Plaintiff's witnesses that the Plaintiff is indebted to the Department in the amount of R 1 220 462.41 in respect of the service

providers or artists allegedly paid by the Department upon the Plaintiff's failure to do so.

[54] In the premises the Defendants' counterclaim falls to be dismissed.

Order

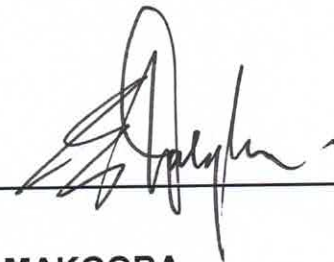
[55] In the result the following order is made:

55.1. The Defendants to pay to the Plaintiff the amount of R 2 948 605.86 plus interest thereon at the rate of 10.25% per annum from 5 June 2017 to date of final judgment.

55.2. The Plaintiff's claim in the amount of R 3 808 372.57 is dismissed.

55.3. The Defendants' counterclaim is dismissed.

55.4. The Defendants to pay the costs of the action.

A handwritten signature in black ink, appearing to read 'E M Makgoba', is written over a horizontal line.

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

APPEARANCES

Heard on	: 9, 10, 11 & 12 March 2020
	23 July 2020
Judgment delivered on	: 30 July 2020
For the Plaintiff	: Adv. M Mostert
Instructed by	: TAR Attorneys
For the Defendants	: Adv. L A Nkoana
Instructed by	: State Attorney