



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

Reportable:	/NO
Of Interest to other Judges:	/NO
Circulate to Magistrates:	/NO

Case number: 3447/2013

In the matter between:

RURAL MAINTENANCE (PTY) LIMITED

Plaintiff

and

MALUTI-A-PHOFUNG LOCAL MUNICIPALITY

1st Defendant

THE PREMIER: FREE STATE PROVINCE N.O.

2nd Defendant

HEARD ON: 26,27,28 AUGUST & 05 SEPTEMBER 2019

JUDGMENT BY: JORDAAN, J

DELIVERED ON: 17 OCTOBER 2019

- [1] This trial concerns the second leg of the litigation between the parties, more particularly the plaintiff's claim for payment of expenses incurred, based on section 172 of the Constitution read with section 8(1)(c)(ii)(bb) of the Promotion of Administrative Justice Act, 3 of 2000. Plaintiff alleges that the defendant was enriched to the value of R155,733,925.00 and claims payment of that amount.
- [2] In the previous trial, the validity of the Electricity Management Contract (EMC) was at stake. In my judgement on that issue I summarised the background facts. It is therefore not necessary to repeat those facts and the history of the matter. In that judgement I found the EMC to be unlawful and set it aside *ab initio*. That effectively disposed of the plaintiff's claim for contractual damages, keeping alive only the alternative claim based on enrichment.

THE PLEADINGS AND ISSUES.

- [3] In further pre-trial minutes the parties agreed on various issues; inter-alia it was agreed that the evidence tendered in the previous trial forms part of and may be used as evidentiary material in the present trial. It was agreed that the documents pertaining to the financial statements and information, on which the expert Rowan McDonald based his report, are admitted. It was also placed on record that the defendant admitted the aforesaid expert report as

well as that of the expert Mr A van der Merwe. By agreement an affidavit by Mr B Ungerer was admitted in evidence.

[4] In an addendum to the pre-trial minutes the following agreements and admissions were recorded;

“1. As at April 2011 the electricity distribution network of MAP was on the brink of collapse with major transformers suffering oil leaks, which could cause the transformers to malfunction. The oil leaks contributed to ground pollution and many circuit breakers were damaged beyond repair.

2. There were constant electricity outages occurring due to the poor state of MAP’s electricity distribution infrastructure.

3. There were many live electricity distribution points which were not secured and which points could be accessed by members of the public. This was self-evidently very dangerous and could lead to electrocution.

4. The bulk of the electricity distribution infrastructure required upgrading and replacing of conductors, isolators, etc.

Work performed by Rural prior to and after takeover date of the EMC:

5. Rural attended to the maintenance and upgrading of the electricity distribution network in all the aspects that formed part of or were referred to in the previous bids and as set out in the pleadings.

6. The parties agree that Rural performed the work and incurred the expenses (or the liabilities) as set out the Plaintiff's (sic) particulars of Claim as well as the Plaintiff's reply to the Defendant's Request for further particulars.

7. The Defendant admits the supporting vouchers in support of the expenses (or liabilities) aforesaid.

8. These admissions do not prevent the advancing of legal arguments in respect of any specific defences raised by the first defendant."

[5] The plaintiff claims, as a just and equitable remedy in terms of section 172 (1) (b) of the Constitution, amounts expended and liabilities incurred in purported compliance with its contractual obligations, based on unjustified enrichment. In the alternative the claim is based on the *negotiorum gestio utilis* for payment of amounts expended in administering the affairs of the defendant, which were necessary and useful, "to the extent that the First Defendant has been unjustly enriched".

[6] In its plea the defendant raised the following main defences namely;

1. That my previous judgement amounts to a *res iudicata*;
2. That the plaintiff prematurely implemented the EMC;

3. That the plaintiff acted recklessly, irrationally and unreasonably in implementing the EMC and should have refrained from doing so in the circumstances;
4. Plaintiff accepted the risk of non-recovery of its expenses and disbursements;
5. The plaintiff implemented and performed in terms of the EMC with full knowledge of its invalidity;
6. The defendant was not enriched and, if enriched, not unjustly. In so far as the plaintiff paid the Eskom account of the defendant, it was not the defendant but Eskom that was enriched.

THE EVIDENCE.

- [7] Apart from the extensive evidence tendered in the first trial, the plaintiff called two witnesses namely Mr C Bosch, the group chief executive of a group of companies of which the plaintiff is one and Mr A v/d Merwe, a professional electrical engineer and expert in business economics with extensive experience in the electrical supply industry and the management of turnaround projects. As aforesaid, the evidence of Mr Ungerer was tendered by means of an affidavit, by agreement.
- [8] Mr Bosch largely repeated the run of events leading up to the signing of the EMC and thereafter, up to the takeover date and

implementation of the contract. Because of the poor state of the infrastructure of the large network involved, the plaintiff started preparing and repairing infrastructure so as to be up and running on the takeover date. That included taking aerial photographs, plotting the infrastructure, locating customers, planning outlet points, obtaining and installing software and systems, training of personnel, replacing various transformers, repairing and building new lines, properly fencing substations and installing proper metering systems. A control room was installed, warehousing obtained, housing for personnel obtained and backup supplies bought and stored.

- [9] During this period about 90% of the plaintiff's workforce and management were involved in the aforesaid. He conceded that the feasibility study was done before the contract was signed and without any certainty that the contract will be awarded to the plaintiff. It was done at no cost to the defendant and the cost thereof in excess of R 2.5 million paid by plaintiff. According to him, should the plaintiff not have been awarded the contract and the business plan utilised by defendant, either itself or in the appointment of a different contractor, plaintiff would have claimed the cost thereof from the defendant. He conceded that the feasibility study was more of a business plan depicting the viability of the project, in financial terms, for the plaintiff and did not reflect the financial implications over the period for the defendant.

- [10] For the purposes of executing the EMC, various vehicles, some specialised and equipment were bought. These were ordered after conclusion of the contract and effectively delivered and bought in the period up to implementation of the agreement.
- [11] He knew that there were various statutory requirements that had to be complied with in the procurement process leading up to the signing of the agreement. He was however assured by the municipal manager and the executive mayor at the time that all the necessary requirements were complied with and that all formalities that were necessary were concluded.
- [12] The attitude of the defendant municipality towards the EMC only changed after the previous executive mayor was replaced by a new one. Only then did the allegations to the effect that the EMC was invalid start to surface. Notwithstanding all the problems experienced with the new leadership of the defendant municipality, he remained convinced that the EMC was valid and binding, inter-alia based on the assurances of the erstwhile mayor and the municipal manager. He was strengthened in his conviction, inter-alia by the fact that the defendant supported the plaintiff in the Labour Court proceedings emanating from the EMC and by the fact that the defendant did not oppose the interim interdict that was obtained by the plaintiff in late August 2013.

- [13] He concedes that, after the executive mayor alleged that no proper Council resolution authorising the EMC existed, National Treasury suggested that the problem could be laid to rest by the plaintiff submitting a new proposal to Council for approval by a new Council resolution. To put the matter beyond doubt, the plaintiff prepared such a proposal for submission to the council but nothing came of it. That was only done in an attempt to put the dispute beyond doubt and not because the plaintiff accepted that the EMC was invalid because of any non-compliance with required formalities.
- [14] At the time that the executive mayor demanded that the plaintiff refrain from implementing and executing the EMC, most of the preparatory work and investment in the project were already utilised by the defendant and, moreover, should the plaintiff adhere to the request, it would most probably have resulted in a chaotic breakdown of electricity supply to the detriment of the community.
- [15] Mr Van Der Merwe testified that, for the implementation of the EMC, extensive preparation and investment are required consisting of repairing the network and installing the necessary hardware and software to run the commercial side of the project. Those preparations and planning had to commence in the vicinity of about 200 days before implementing the takeover of the electricity supply.

- [16] He inspected the work done by the plaintiff and was satisfied that the formerly dilapidated infrastructure was properly repaired, a complete customer base, database, vending and other systems were brought up to date and put in place and customer walk in centres created. He was impressed by the remarkable improvements brought about by the plaintiff in such a short period of time.
- [17] From the affidavit of Mr Ungerer it appears that he holds various qualifications in electrical engineering as well as a MBA degree. He was employed by the defendant for many years, the last 15 years in the capacity of director of municipal infrastructure services. He was inter-alia in charge of the electrical services division. He confirms that the defendant lacked the necessary manpower, skills, employees, tools, funding and structures necessary to operate and maintain the electrical distribution network. As a result, the electricity distribution infrastructure was on the brink of collapse when the EMC was concluded.
- [18] The plaintiff performed a vast amount of work prior to the actual takeover date. The plaintiff changed the electricity distribution network to a system that was completely overhauled and functional.

[19] He was asked to provide his opinion as to the value of the improvements made and work performed by the plaintiff and concluded that the value was in the region of R 185 million.

[20] The time that the EMC was concluded, the defendant owed Eskom more than R100 million. As at present that debt escalated to more than R3 billion.

DISCUSSION: DEFENCES.

[21] The defence based on *res judicata* is founded on the contention that the plaintiff in effect claims damages and not a claim based on enrichment. This defence holds no water. My previous judgement explicitly left it open for the plaintiff to proceed with its claim based on enrichment. That is clearly the claim now advanced by the plaintiff. Whether the amounts and items included in the claim indeed constitute enrichment of the defendant, has to be decided and will be dealt with later.

[22] The alleged premature implementation of the EMC, reckless implementation thereof and the performance in terms of the EMC with full knowledge of the invalidity thereof, are all based on the events that allegedly raised red flags which should have alerted the plaintiff to the possible or actual invalidity of the EMC.

- [23] I do not intend to deal with each and every such event. I have dealt with some of those in my previous judgement. Without doubt and admittedly the change of attitude after the new Mayor was appointed and which led to the events raising the red flags, was a matter of concern for the plaintiff.
- [24] It was argued that the first red flag should have been the fact that the EMC was signed in Frankfort and not at the offices of defendant. I am not convinced that that fact should have raised any concerns. It was logically and acceptably explained in the evidence of Mr Bosch.
- [25] The attitude of the Premier following upon the meeting of the provincial coordinating committee was clearly based on the fact that the representatives of national Treasury disavowed any knowledge of the EMC. On the evidence this was patently false to the knowledge of the plaintiff and therefore no reason for real concern.
- [26] The appointment of Amber consultancy after conclusion of the EMC may have been a matter of concern. On the other hand it also conveyed some reassurance that the defendant seriously intended to give effect to the EMC and was committed to it.

[27] These red flags should be viewed in the context of the broader picture:

27.1-Firstly, the EMC was negotiated and concluded after the plaintiff has already concluded a similar agreement with the Mafube municipality successfully. The municipal manager, at the time, of the latter municipality was the same individual who became the municipal manager of the defendant when the EMC was negotiated and concluded. The plaintiff could certainly accept that he was aware of all the requirements that had to be met and complied with, drawing from his experience at Mafube.

27.2-According to the evidence, the plaintiff strongly relied on the assurances of compliance given by the municipal manager and the executive mayor the time. There is no reason why the plaintiff should have disbelieved them and rather believe the new Mayor.

The plaintiff was certainly reassured by the support of the municipality in the Labour Court matter.

27.3-The interdict application was brought at a time when the resistance against the EMC and the plaintiff reached its peak. It was however unopposed and served as further reassurance and indication that the opposition to implementation of the EMC was not factually based but rather politically motivated.

27.4-The fact that the plaintiff prepared a submission to Council for the purpose of obtaining ratification of the EMC by means of a Council resolution, has been satisfactorily explained. It was done as a result of a suggestion by Mr Hatting of National Treasury in

order to remove any doubt and make doubly sure. It certainly does not imply that the plaintiff knew or accepted that the EMC was invalid and unlawful.

27.5-The defence that the plaintiff accepted the risk of loss is largely based on the presentations to the defendant by the plaintiff during the negotiation process and on the terms of the EMC. Clearly the acceptance of risk related to normal business risk should the EMC be concluded and successfully implemented. It certainly could not imply that the plaintiff accepted the risk of loss should the EMC be invalidated. The alleged acceptance of risk is also based on the view that the plaintiff knew that the necessary requirements were not complied with and, in particular, that there was no proper Council resolution in place. With that knowledge, it is argued, plaintiff proceeded in implementing and performing in terms of the EMC, thereby accepting the risk in expending vast amounts of money in terms of an unlawful contract and persisting in doing so.

27.6-I have already shown that there is no reason to find that the plaintiff knew that the necessary requirements were not complied with. There was no reason for the plaintiff to disbelieve the assurances given by the previous Mayor and the municipal manager and rather believe the new Mayor. The acceptance of risk- defence is without substance.

27.7-The last defence raised, namely that the defendant was not enriched, is also without substance. The payments to Eskom were done on behalf of and to the credit of the defendant. Eskom was

paid for electricity sold and certainly not enriched. In any event, those payments have been effectively recovered from electricity sold and supplied to customers by the plaintiff. The amount so recovered has been taken into account in formulating and calculating the plaintiff's claim. The payments to Eskom therefore effectively do not form part of the enrichment claim. In any event, the defendant agreed to the submission of the affidavit of Mr Ungerer and accepted the contents thereof. As shown above, the witness stated that the defendant was indeed enriched.

THE LAW

[28] The applicable legal principles are uncontested and common cause. In so far as the claim is based on enrichment, the defendant contends that enrichment can only be recovered where the claimant shows that it acted as such and expended money due to an excusable error of fact or law. It is argued that, due to all the red flags, the plaintiff's proceeding with implementing the EMC and investing vast amounts of money notwithstanding the red flags, constitute inexcusable errors, preventing a claim for recovery.

[29] I am not convinced that the "just and equitable" relief envisaged in section 172(1)(b) of the Constitution read with section 8(1)(c)(ii)(bb) of PAJA is limited to a claim based on enrichment. The last mentioned section explicitly provides for an order directing

payment of compensation. The effect of the aforesaid enactments is to afford a court a wide discretion, taking into account all relevant circumstances, to structure an order which will constitute just and equitable relief.

- [30] It is common cause that the relief envisaged in the aforesaid sections as a rule is meant to be in the nature of public law relief. However, private law relief in appropriate circumstances is not excluded.

DISCUSSION

- [31] Viewed in isolation, the plaintiff's decision to proceed with implementing the EMC in the face of surmounting opposition, especially in the month preceding the takeover, is questionable. However one has to take into account all the surrounding circumstances: vast amounts of money were spent before and after conclusion of the EMC. The whole network was extensively repaired, specialised equipment and vehicles ordered and bought, employees trained and the network already utilised by the defendant. The investment in the project amounted to several hundred million rand.

- [32] As aforesaid, there were several reassuring factors which justified the belief that the opposition and interference were politically motivated and not factually founded.
- [33] In terms of the EMC, the plaintiff effectively took over the defendant's constitutional responsibility of supplying electricity in a sustainable manner. If the plaintiff acceded to the pressure and simply walked away because of the possibility of the EMC being invalid, chances were that the supply of electricity in a sustainable manner would be compromised. A huge investment would have to be abandoned, simply on the strength of the word of those opposed to the project.
- [34] In these circumstances I am convinced that the plaintiff's decision to proceed with the implementation of the EMC was justified and at least an excusable error.
- [35] In deciding whether to allow compensatory relief, I have to take into account all the relevant circumstances, including the possible effect of granting or refusing such relief on the parties and the community, especially the taxpayers.
- [36] It is beyond doubt that the defendant was enriched. The evidence of Mr Ungerer was admitted. He computed the value of enrichment

to be in excess of R 185 million. However his evidence lacks any detail as to how he arrived at that figure and how it was computed. It is therefore unsubstantiated and impossible for me to evaluate.

[37] To the extent that the defendant was enriched, either by payments and expenses incurred by the plaintiff or expenses saved which would have been payable by the defendant, it was obviously also advantageous to the community served by the defendant.

[38] The defendant was left with an upgraded and functional electricity distribution network. This was done at the expense of the plaintiff. The amount involved is huge and at the time certainly not within reach of the defendant's financial capabilities. The defendant's current Eskom account was paid for seven months, totalling more than R120 million.

[39] I am satisfied that the facts of this matter constitute exceptional circumstances, justifying an order for compensation.

THE CLAIM

[40] The plaintiff's claim is expressly based on enrichment, alternatively the *actio negotiorum gestio*. The computation of the claim consists of a list of expenses and disbursements by the plaintiff. The claim

is not based on a valuation of the actual enrichment of the defendant.

[41] Due to the divergent types of expenses and amounts included in the computation of the claim, it is difficult to classify the claim as resorting under any one of the known *condictiones*. I am of the view that it can more appropriately be classified as an *actio negotiorum gestio*.

[42] In considering the claim I keep in mind that the plaintiff proceeded with the takeover and execution of the agreement contrary to an explicit instruction by the defendant to cease operations. That would render the plaintiff, at the worst, a *mala fide* gestor.

[43] In **Standard Bank Financial Services v Taylam 1979 (2) SA 383 (CPD)** the position of such a gestor was considered and discussed.

At p391 C-D, the following appear:

“on the grounds postulated by Van der Keessel there is no justification other than Justinian’s decision - for refusing the gestor an action on the grounds of unjust enrichment. The blanket decision to deny the *mala fide* gestor an action on the grounds of unjust enrichment in all circumstances where he has acted contrary to the expressed wishes of the *dominus* smacks so much of disapproval that it can well be seen, as Groenewegen did, as a *poena legalis*.”

A *mala fide* gestor can however not claim a refund of expenses but is allowed a claim to the extent that the *dominus* is enriched.

[43] Turning to the computation of the claim I mainly rely on the report of the expert, Mr McDonald. I also keep in mind that some of the expenses claimed on the basis that the defendant would have had to incur the same expenses, would not necessarily have been incurred by the defendant, simply because the defendant would not have been in the position to incur the same expenses, due to lack of capacity and financing. I proceed to deal with a specific heads of expenses as claimed by plaintiff.

-Purchases R156 744 925.

[44] These consist of bulk electricity payments and material purchased for repairs and maintenance. The defendant was enriched by that.

-Salaries and wages R48 940 938.

[45] This amount represents salaries and wages for management and employees. It represents 92% of total salaries and wages over the period, apportioned in proportion to the number of customers. This item constitutes one of the expenses that the defendant would obviously not have incurred, at least not to that extent. Although the plaintiff took over some employees from the defendant, which would constitute a saving for the defendant, there is no evidence

as to what their salaries and wages amounted to. What is more, as far as permanent staff and management are concerned, the plaintiff would obviously have had to pay their salaries and wages, even if the EMC was not concluded. On the evidence the plaintiff had to employ more personnel to execute the contract. The exact number of such employees and their salaries are unknown due to the fact that it has not been recorded separately. Again, it is highly improbable that the defendant would have employed such employees. I am not convinced that the aforesaid claim equates to a calculable enrichment of the defendant.

-Repairs and maintenance R10 471 933.

[46] This item relates to repairs and maintenance of the distribution network. It is highly probable that the defendant would have had to incur these expenses. It therefore qualifies as enrichment.

-Bad debts R49 326 524.

[47] This amount consists of bad debts written off but allegedly transferred to the defendant. In its nature it consists of debts not recoverable. It was argued on behalf of the plaintiff that a large part of those debts are owing by government institutions and therefore recoverable. In the absence of any evidence as to the recoverability of those debts, it remains bad debts and cannot be viewed as an enrichment of the defendant.

-Transport and travel R15 209 162.

[48] This item represents actual costs of transport and travel in repairing and servicing the electricity distribution network and business. It is reasonable to accept that the defendant would most probably have had to incur the same expenses. It therefore represents a saving.

-Technology and software R13 472 611.

[49] This represents the expenses incurred in obtaining and installing the necessary technology and software needed for operating the electricity distribution network and business. I am satisfied that this item qualifies as an enrichment of the defendant.

-Depreciation R5 563 719.

[50] It is difficult to see how the defendant was enriched by the depreciation of the plaintiff's assets. The argument that the defendant would have had to buy similar assets and suffer the same depreciation is unconvincing. The probabilities that the defendant would have bought the same assets or similar assets are almost non-existent. What is more, the depreciation is only an accounting method of building up a replacement fund. In its financial statements the plaintiff is entitled to deduct depreciation from income, in effect recovering the amount from SARS. I am not convinced that this amount qualifies as enrichment of the defendant.

-Business plan costs R2 585 729.

[51] This represents the costs involved in compiling the feasibility study or business plan. It was incurred before the agreement was entered into and in the calculated risk that an agreement might not eventuate. Mr Bosch attempted to justify this part of the claim but not convincingly. His evidence in this trial is in contrast with his evidence in the first trial. I am not convinced that the defendant was enriched in this respect due to the plaintiff's performance of the invalid agreement.

-Other costs of service R18 481 233.

[52] This amount represents various items including administration and management fees, accounting fees, advertising, auditor's remuneration, bank charges, commission paid, consulting fees, insurance, lease rentals, legal fees, licenses, et cetera. I do not intend to deal with each and every one of them. These items are claimed on the basis that it represents savings for the defendant in that the defendant would have had to incur similar costs.

[53] I am not convinced that the defendant would probably have had to incur the same costs. Some of these expenses were allegedly incurred by a related company, Rural Free State and not the plaintiff. I regard the following items and costs incurred by the plaintiff as costs that the defendant would probably have had to incur, therefore constituting a saving and enrichment:

- Vendor commission R1 855 145,
- licenses and permits R13 300,
- motor vehicle expenses R52 379,
- office supplies R215 832,
- postage R50 325,
- cash in transit R741 148,
- printing and stationery R474 046,
- protective clothes R233 179 and
- Telephone and fax R1 307 873.

The total of these amounts amount to R4 943 227.

- [54] Against these amounts which I regard as representing enrichment of the defendant, an amount of R166 950 213 has to be deducted, being income received from electricity consumers by the plaintiff.

The net amount amounts to R33 891 645.

COSTS.

- [55] There is no reason that costs should not follow the result. When the matter was to commence on 23 May 2019, it was postponed by agreement, costs to stand over. The postponement was sought to enable the defendant to consider a late amendment to the

plaintiff's particulars of claim. The plaintiff should be held liable for the wasted costs occasioned by this postponement.

IN CONCLUSION THE FOLLOWING ORDERS ARE GRANTED:

- [56] 1. First defendant is ordered to pay an amount of R33 891 645,00 to plaintiff.
2. The aforesaid amount shall bear interest at the prescribed mora interest rate from date of judgement to date of payment.
3. Plaintiff is ordered to pay the wasted costs occasioned by the postponement on 23 May 2019, including the costs occasioned by the employment of two counsel, where so employed.
4. Defendant is ordered to pay the costs of suit in respect of this trial, including the costs occasioned by the employment of two counsel, where so employed, including the qualifying, reservation and attendance fees of the experts mr. R McDonald and mr. A Van der Merwe.

A.F. JORDAAN, J

On behalf of the plaintiff:

Adv. EC Labuschagne SC

Adv. SG Maritz

Instructed by: Shepstone & Wylie

C/O Attorneys: Symington & De Kok

Bloemfontein

On behalf of the 1st defendant:

Adv. C Ploos van Amstel SC

Instructed by: Majuva Inc. Attorneys.

C/O Attorneys: Rampai Attorneys.

BLOEMFONTEIN