**IN THE HIGH COURT OF SOUTH AFRICA,**

**FREE STATE DIVISION, BLOEMFONTEIN**

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

Case number: **3797/2014**

In the matter between:

**BOVICON CONSULTING ENGINEERS CC** PLAINTIFF

and

**THE MEMBER OF EXECUTIVE COUNCIL: POLICE, ROADS AND TRANSPORT (FREE STATE PROVINCIAL GOVERNMENT)** DEFENDANT

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**HEARD ON:** **14, 15 & 17 MAY 2019 & 02 AUGUST 2019**

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**JUDGMENT BY:** **S CHESIWE**

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**DELIVERED ON:** **5 DECEMBER 2019**

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[1] The plaintiff issued summons against the defendant for payment in the amount of **R1 171 774.83 (one million one hundred and seventy one thousand seven hundred and seventy four rand and eighty three cents)** for services rendered to the Department

of Police, Roads and Transport during the period May 2012 to 31 March 2013.

**THE PARTIES**

[2] The plaintiff is Bovicon Consulting Engineers CC, a close corporation duly registered in terms of the Close Corporation Act No 69 of 1984 with its principle place of business at Suite 48, Meditas Centre, Mudd Square Universitas, Bloemfontein.

[3] The defendant is the member of the Executive Council of Police Roads and Transport (Free State Provincial Government). Contemplated in section 7(2) of the Public Service Act 1994. (Promulgated under Proclamation No. 103 of 1994) read with Schedule 2 thereof (as amended) and with its principle place of business at 45 Charlotte Maxeke Street Bloemfontein Free State.

[4] The amended particulars of claim in this matter reflected the background as follows: That on or about 7 July 2011 the plaintiff duly represented by Mr H.A. Schoeman and the defendant duly represented by Mr Mokhesi concluded a Service Level Agreement (SLA) in terms of which, the plaintiff was appointed to assist the defendant in the implementation of the Contractor Development Programme (CDP). Such service would be rendered from time to time as set out in the SLA.

[5] The relevant and/or expressed terms of the SLA are that:

a) The effective date of the agreement was 18 May 2011 and the SLA would expire on the first anniversary of the effective date unless extended to a later date at the sole instance of the defendant.

b) Whereupon the plaintiff shall upon completion of any specific component services or having made progress towards completion, submit to the defendant an invoice and certificate detailing the amounts payable in respect of the services.

c) The defendant would then settle the invoice within 30 days after submission and delivery thereof.

[6] During the period between May 2012 and November 2012, the plaintiff continued to perform services that were performed prior to 18 May 2012. On the 16 August 2013 the defendant made a partial payment of the invoice for services that were rendered after the anniversary date of the SLA.

[7] The defendant pleaded that the SLA does not provide for an extension, nor does the SLA have any provision for an extension clause, whether expressly, by conduct or tacitly. The defendant further pleaded that the plaintiff is indebted to the defendant in an amount of R596 627.84, which amount was irregularly, unlawfully and fraudulently paid to the plaintiff.

[8] The common cause facts between the parties are that the parties entered into a written Service Level agreement (the SLA) on 7 July 2011, the effective date of the SLA was 18 May 2011, and it expired on the first anniversary of the effective date, unless extended to a later date at the sole instruction of the defendant.

**ISSUES IN DISPUTE**

[9] The court has to determine whether the SLA of 2011 was extended by way of conduct or necessary implication; or whether the terms of the SLA were extended by way of oral agreement in that the Head of the Department (HOD) the late Mr Msibi, gave oral instruction to Mr Werner Van Wyk to extend the SLA; and whether the defendant was unjustly enriched and the plaintiff was impoverish by the value of the services rendered.

**THE EVIDENCE**

[10] The plaintiff led the evidence of Mr Schoeman. He testified that he performed and rendered services for the department up until the conclusion of the SLA in 2011 without any other written agreement, except in terms of appointment letters. He said in January 2011 he was asked by the department to put together a program that identified new contractors. He thereafter authored the Contract Development Programme (CDP). He said the SLA was signed on 7 July 2011 and he was under the impression that the anniversary date would be 7 July 2012 and not the effective date of 18 May 2012. He Mentioned that in different meetings and presentations, Mr Msibi delegated Mr Van Wyk (Program Manager from the Department) to extend the SLA. However, he did not received the final extended SLA document. He continued to render services trusting that the extension of the SLA will be approved, but nothing came forth.

[11] Under cross-exam, Mr Schoeman, said he trusted the department will pay him as he had a long history with the department and had

no reason to doubt that the contract will be extended. He mentioned that his focus was on getting the CPD program to be a success. He said after Ms Kekana informed him the contract had expired, he stopped to work as soon he heard that there was no agreement coming forth nor an extension of the contract.

[12] Mr Van Wyk testified on behalf of the defendant that he was under the impression that the SLA was to be terminated on 7 July 2012. He mentioned that in a meeting called by the HOD on 29 June 2012, he was given instructions by the HOD to do submissions for the extension of the SLA contract. He drafted the submission and submitted it to Ms Kekana. He did not receive any feedback from Ms Kekana on whether the extension of the SLA was approved or declined.

[13] Ms Helen Kekana testified that she started to work at the department from 2012 as a Chief Director. She discovered that the department had a bad audit record and there was non-compliance with treasury regulations. The officials signed documents without authorisation. She had to put a system in place to ensure that due process was followed in respect of tender procurement. She said when she started to work at the department, she was not aware of the SLA contract between the plaintiff and the department, nor was she aware that the SLA had expired. She confirmed that she had to sort out the department procurement documents as the officials did not keep proper records and she struggled to get the documents from the officials.

[14] She had attended several meetings where the HOD (the late Mr Msibi) was present. She mentioned that the meeting of 29 June 2012, the HOD and Mr Schoeman were present. She indicated that she was not aware of any instruction that the contract of Bovicon must be extended nor was she aware that the contract of Bovicon had expired. She said Mr Van Wyk and Mr Schoeman were not supposed to have communicated with each other during the process of the extension of the contract. She said none of the meetings she attended, was there ever a discussion of the extension of the contract of Bovicon. She indicated that on the 6 December 2012, she received the submission for the extension of the SLA. She asked for the tender documents of Bovicon, but these documents could not be found. She requested Mr Schoeman to change the date on the invoices while waiting for the extension of the contract. Mr Schoeman informed her that the dates on the invoices cannot be changed.

[15] Ms Kekana said she does not dispute that Bovicon did perform the work for the department, but said, had she known the contract had expired she would have informed Bovicon, and if the contract was extended the department would have done it in writing. She said she was not aware of any oral extension of the contract, and nor was there deviation by the department. She testified that the monitoring of the contract was the responsibility of both parties that is, the department and the service provider.

[16] Under-cross examination Ms Kekana said she did not dispute that Bovicon rendered services to the department during contract term, as she was at that time not employed by the department. She said

payments made to Bovicon after the expiry of the contract, was for work that was done during the period when the contract was valid. She does not recall if she read the SLA, because if she had read it, she would have seen that the contract had expired. She said on 6 December 2012 she informed the HOD that the contract of Bovicon had expired.

[17] Adv. Botha Counsel on behalf of the plaintiff submitted in oral arguments that, in the past Bovicon on numerous occasions, worked with the department on written appointment letters by the HOD. Counsel submitted that Ms Kekana and Mr Van Wyk’s evidence was full of discrepancies to the extent that Mr Van Wyk called Ms Kekana a liar. He submitted that in all the meetings that were held, the HOD was present. He requested the court to take cognisance of the fact that the department increased the budget for the financial year of 2012 and showed no clear intention as to why the budget was increased. Counsel submitted that if there was no oral agreement of the extension of the contract then the plaintiff is entitled to claim for unjust enrichment. Counsel further, submitted that the department’s counter-claim cannot succeed based on the defence of the fraudulent conduct of the officials as the department has not shown if any disciplinary action was taken against the officials.

[18] Adv Georgiades, Senior Counsel on behalf of the defendant submitted in oral arguments that there was no extension of the contract, as Ms Kekana could not find any paper trail to show that the extension was approved by the HOD. Counsel submitted that the letter of the HOD dated 18 June 2013 showed that the HOD

referred the matter for a legal opinion and reprimanded Mr Du Pisane for approving an unauthorised payment. He submitted that the HOD had not at any occasion given an oral extension neither gave instructions to Mr Van Wyk to draft submissions for extension.

[19] Section 217 (1) of the Constitution of Republic of South Africa,[1] provides that: "When an organ of state in the national, provincial or local sphere of government or any other institution identified in national legislation, contracts for goods or services it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective."

[20] Section 51(1) (a) of the Public Finance Management Act,[2] states that: accounting authorities must ensure that public entity has and maintains –

(i) an effective and transparent system of financial and risk management and internal control;

(ii)…………………

(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective.

(iv) a system for property evaluating all major capital projects prior to a final decision.

[21] The Service Level Agreement (SLA), annexure "HS1" attached to the particulars of claim, the following clauses states that:

[1] The Constitution Act 108 of 1996.
[2] Act No. 1 of 1999 (PFMA)

"3.2.11 References to "this agreement" shall include this agreement as amended varied, novated or substituted in writing from time to time.

7.4 The department shall at all reasonable times with prior written notice have access to (including the right to reproduce) all records, and documentation required by the consultant to be kept in relation to the service for purposes of auditing quality control, and monitoring of the services by the Department."

13.3.4 If the department disputes in good faith, any amount, or the calculation, competing or supporting information evidencing any amount set out in the invoice or if the department disputes in good faith the completion of a component of the services or the significant progress made towards the completion of a component of the service, the department should be entitled to withhold payment of the amount so disputed (the disputed amount)."

[22] The plaintiff's contention is that the defendant by its conduct and implication extended the SLA during the period May 2012 and November 2012 in that the defendant continued to instruct the plaintiff to perform the same services that were performed by the plaintiff prior to 18 May 2012. The plaintiff's further contention is that the defendant on 13 August 2013 made partial payment of the services that were rendered by the plaintiff. Furthermore, the plaintiff claimed that the defendant's conduct by implication was an extension of the SLA. Alternatively, the plaintiff claimed that the defendant was unjustly enriched by the services rendered to the defendant.

[23] The defendant's contention is that the SLA was terminated by effluxion of time on the 18 May 2012 and that the defendant did not conclude any further agreement to extend the SLA, nor does the SLA have any provision for its extension by conduct and/or by implication, and that any such variation or extension would have to be reduced to writing an signed by both parties as contemplated in clause 21.1 of the SLA.

[24] The Supreme Court of Appeal in the matter of **MEC for Health**, **Gauteng v 3P Consulting (Pty) Ltd,**[3] The court with approval referred to the case of **Qaukeni** judgment and remarked as follows:

"[17] Relying on Municipal Manager : Qaukeni Local Municipality and Another v FV General Trading CC; and Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd. The department argued that failure to comply with any of the abovementioned constitutional and legislative provisions renders any contract concluded in contravention thereof void ab initio. The court does not, so the argument went, have a discretion whether or not to enforce a contract which does not comply with the prescribed procedures."

[25] With regard to the interpretation of documents, including contracts, in **Natal Joint Municipality and Pension Fund v Endumeni Municipality,**[4] Wallis JA, said "Interpretation is the process of attributing meaning to the words used in a document, be it legislative, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provision in the light of the document as a whole and the circumstances attendant upon its coming into existence.

[3] 2012 (2) SA 542 (SCA).
[4] 2012 (4) SA 593 (SCA) at para [18].

Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document."

[26] In **BP Southern Africa (Pty) Ltd v Mahmood Investments (Pty) Ltd,**[5] Lewis JA stated as follows:

"It is settled law that a contractual provision must be interpreted in its context, having regard to the relevant circumstances known to the parties at the time of entering in the contract…. It is also clear that the provision must be given a commercially sensible meaning…"

[27] The SLA between the parties is common cause. The dispute is more about the extension of the SLA and when it expired. Thus the interpretation of the SLA is not an issue. There were various correspondence between the officials of the defendant and the plaintiff. The officials of the defendant, impressed on the plaintiff that the SLA was extended. The update version of the SLA on page 47-49 Exhibit "A" recommended that: "In view of the above-mentioned, it is therefore recommended that Bovicon consulting Engineers CC's services Agreement entered into with the Department of Police Roads, and Transport be extended for a period of twelve months (one year) 07 July to 7 July 2013."

This document was send to Mr Schoeman by Mr Ntsane Moroka on July 2012. In this instance the only inference the court has is that the conduct of the department's officials had extended the

[5] [2010] 2 ALL SA 295 (SCA) at para [11].

contract. But there is no written proof that the SLA was extended, neither is there evidence that the HOD had approved the extension of the SLA.

[28] There were several meetings in which Mr Schoeman made presentations in the presence of the HOD (the late Mr Msibi). One such presentation was on the 11th of July 2012 and in this meeting according to the attendance register the HOD was present. According to Mr Van Wyk it is at one such meeting that the HOD instructed the plaintiff to continue with its work. The minutes of a meeting held on the 5 November 2012 at Kroonstad on (page 157 of Exhibit A) state:

"The mentor (Bovicon) should be hands on at all times, must improve in that area, especially at the commencement of the prospects involving the Aera Engineers……… Mentor (Mr Herman) will look at the demonstration and shall assist on site."

[29] In a letter dated 13 December 2012 (Page 182) addressed to Bovicon Consulting Engineers it reads that:

"3. The extension of Bovicon contract is still in progress."

In a follow-up correspondence dated 18 December 2012, an email was sent by Ms Kekana in which it is indicated that the contract had expired and that the dates of the invoices should be changed. A further email was sent to Mr Schoeman, dated 18 December 2012 (page 188, Exhibit A) that the dates on the invoices be revised. No mention was made in these correspondence that the extension of contract has been approved by the HOD.

[30] Instead Ms Kekana wrote an email stating that: "The invoice dates must be changed because your contract expired in May 2012. You continued

to work without a contract or approval to proceed. I requested that the invoice dates be changed in case we get an approval."

Ms Kekana followed up with another email dated 19 December 2012 which reads as follows:

"I did not approve all you invoices because your contract had expired. You will have to resubmit all the invoices if we get an approval to extend the contract.

I was not aware that your contract expired until Werner gave me a submission, requesting that your contract be extended. Your contract expired long before I joined the department. If I knew that your contract expired, I would not have given you any instructions. You should have mentioned that your contract expired."

[31] The Treasury Regulations and National Supply Chain Practice Note No SCM 3 of 2003,[6] Section 217 of the Constitution and the Public Finance Management Act of 1999 (PFMA) are in place to avoid or prevent any conduct by government officials[7], who will conduct transactions without the proper authorisation. If a party contracts with an organ of state, one would expect such a party to request that the contract must be in writing. A written contract to the benefit of all will serve as evidentiary proof that there was a contract. Mr Schoeman testified that: "In hindsight that a verbal agreement with the department is a dangerous thing because officials don't own up to it."

This should be clear to any reasonable person that contracting with a state organ, any agreement should be in writing, in order to

[6] General Procurement guidelines are issued by the Government not only as a prescription of standards of behavior, ethics and accountability, these guidelines are the five pillars; namely, value for money, open effective completion, ethics and fair dealing accountability and reporting ; equity.

[7] Robison v Randfontein Estate GM Co. Ltd 1925 A.D. 172, where the court held that in addition to the requirement of fraud o deceitful conduct, there may be circumstances under which a contract will not be enforced because it offends public policy

protect the interest of both parties. Ms Kekana testified that any agreement or contract with government must be in writing.

[32] Indeed any oral contract whether expressed, implied or by conduct is a risky action. To prevent any fraudulent contract by any party, it is for those reasons that the Supply Chain Policy, National Treasury and PFMA requires that any contract with a state organ must be in writing. Furthermore, the SLA between the parties clause 21.4 states that:"No provision of this agreement including without limitations, the provisions of this clause may be amended, substituted or otherwise varied and no provisions may be added to or incorporated in this agreement, except (in any such case) by an <u>agreement in writing signed by the duly authorised representatives of the party."</u> (Emphasis added)

[33] The various emails between the Plaintiff and the officials of the defendant was mostly to follow up on the progress of the extension of the SLA. Indeed it is such that the SLA agreement was effective from 18 May 2011 and expiry date was the first anniversary of the effective date, unless the date was at the sole instance of the department extended at a later date. The SLA has no provision that, it will be extended by an oral agreement. It is also unthinkable that an organ of state will enter into any such agreement without doing it in writing. The SLA clearly stated that the agreement will be terminated on the expiry date. It is still questionable as to how instructions were given for the extension of the SLA to the plaintiff but these instructions were not in writing. Unfortunately the HOD is deceased and no clarity can be obtained from the deceased. Except one letter dated 1 July 2010 (p. 292 of Exhibit A) in which the HOD wrote to the plaintiff that:

"… I indeed referred to your services as being satisfactory. I however need to point out to you that, this does not bar the department from investigating your claims and the work done. The investigation hereunder to include amongst others, payment in excess or otherwise."

[34] Based on the correspondence of the HOD, the officials, that is Mr Van Wyk and Du Pisane their conduct to give the plaintiff the impression that the contract was in the process of being extended, was indeed wrong. It was not their responsibility do give through information to the plaintiff without the HOD's go ahead or Ms Kekana. Ms Kekana confirmed in her testimony that the officials had no authority to discuss the progress of the extension. Even if Mr Van Wyk was the one who did the submission for the extension, they had to wait for the HOD to approve the extension. Ms Kekana specifically mentioned that she requested documents in respect of the SLA, and these were not forth coming. Mr Schoeman might have been familiar with the work of the department as he has worked with the department over a long period, he cannot be faulted for having believed that the contract will be extended. As he explained that in the past he was given an appointment letter to continue with the work.

[35] However, having perused through the file and documents filed, there is no document that indicated that the HOD gave the go ahead after the expiry of the SLA, whether it be in writing, expressed or implied. The **Shifren Principle**,[8] specifically deals with policy considerations in order to avoid disputes and/or

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[8] SA Sentrale Ko-op Graanmaatskappy BpK v Shifren 1964 (4) SA 760, the court held that where the contractual parties inserted a non-variation clause in their contract, they should be bound to the non-variation clause to which they both agreed.hm

evidential difficulties often associated with oral agreements. This principle has been affirmed in **Brisley v Drosky,**[9] that contracting parties may validly agree in writing to an enumeration of their rights, duties and powers in relation to the subject matter of a contract, which they may alter only by resorting to that it must be in writing. The principle simply binds the parties to their non-variation clause.

[36] In the matter **of Barkhuizen v Napier,**[10] the court confirmed that the general rule is that agreements must be honoured, but cannot apply to immoral agreements that violate public policy. In this instance the parties did not have a variation clause in their agreement that allowed for an oral agreement. The SLA neither had any *proviso* that the extension of the contract will be acceptable if it was oral.

[37] Indeed it is such, that the contract while it existed was valid and binding, but the crux of the matter is that it was not extended, there is neither sufficient evidence that the SLA was extended, nor can it be said it was extended by implication or orally. I am satisfied that the SLA was terminated by the expiry date, and that there was no extension whether implied, tacit or expressed.

**UNJUST ENRICHMENT**

[38] The plaintiff in the alternative avers that it complied with its obligations and rendered the services in compliance with the SLA to the defendant. According to the plaintiff it acted in the *bona fide*

[9] 2002 (4) SA 1 SCA.
[10] 2007 (5) SA 323 (CC).

and reasonable yet mistaken belief that the plaintiff was obliged to comply with its obligations. Thus the defendant was enriched at the expense of the plaintiff by the aforesaid compliance and services to the extent that the value of the services rendered being R1 171 774.83.

[39] The defendant disputed that the plaintiff was entitled to the relief sought under unjust enrichment as Mr Schoeman is well verse with the tender process in the department and that he has a long standing relationship with the department. Furthermore the plaintiff ought to have reasonably known that the agreement has not been extended orally or in writing; thus the plaintiff's actions were not *bona fide* and should not have continued to work without an approved extended SLA.

[40] Unjustified enrichment has no general enrichment in our law. The principles is simply that no person's estate must unjustifiably be increased at the expense of another. The four principles being; enrichment, impoverishment, enrichment of the defendant must be at the expense of the plaintiff and the enrichment must be unjustified. In **McCarthy Retail Ltd v ShortDistance Carriers CC,**[11] the appeal court stated that on the general action for enrichment, there must be a belief, or fear that a tide of litigation will be let loose.

[41] The questions is, was the enrichment on the part of the defendant and was the enrichment at the expense of the plaintiff and if it was unjust. The South African Law of Unjustified Enrichment, page 40

[11] *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA)

paragraph 2.2.7 states that: The burden of proof of enrichment, as with other elements of enrichment liability, rests with the plaintiff. However the burden of proof regarding the defence of loss of enrichment rests on the defendant."

[42] In spite of the SLA having terminated on the effective date of 18 May 2012. Exhibit A and B showed several correspondence and memorandum that gave continued instructions to the plaintiff to attend meetings and make presentations at some of these meeting. Mr Schoeman submitted that by using his machines, transport in the form of a bakkie and time spend on preparing for the presentations, mentoring the new contractors and time based fees. Ms Kekana in her testimony acknowledged that the department received value for money, which is one of the pillars on supply chain policy. In a correspondence dated 7 August 2013 (page 313 exhibit A) addressed to Ms Kekana and was signed by Mr Du Pisane, Mr Van Wyk and Ms Masemola, the document confirmed that: "It can be accepted that value for money was received for the contracted amount." The document in conclusion confirmed that the skills contributed by Bovicon was not and still is not available.

[43] The memorandum dated 7 August 2013 by Mr Du Pisani, paragraph 3.3 value for money, paragraph 4 reads as follows:

"Bovicon continued to deliver a service to the contractors and the department after the programme was delayed due to cash shortages. However no increase on the original Bovicon project amount was approved."

Paragraph 6 - Recommendation

"It is recommended that accounting officer authorises the payment of the project coordinator/Mentor Bovicon for time worked after the expiry of the contract in May 2012 on outstanding invoices 12, 13, 14 and a portion of certificate 15 for a total payment of R816 670, 19 not to exceed the total project appointment."

[44] It is common cause that Bovicon continued to deliver services in terms of the SLA. Bovicon and its staff members was available to mentor the learner contractors and that service was the key to the success of the program. Bovicon services were not available within the department. The value for the amount claimed was received by the defendant and thus the delivery of these services had indeed impoverished. The defendant's desperate plea for the services of the plaintiff are noted in Mr Johny Mosai's email dated 10 August 2012, page 105 Exhibit 'A':

"Mr Herman you have heard the concerns, will you please assist ASAP. This learner contractors are not working at this stage.
I need your help please Sir!"

[45] The presumption is that money was paid and goods were delivered. The plaintiff went as far as to continue to deliver the services in spite of the cash shortage of the defendant. Ms Kekana confirmed in her testimony that the defendant received value for money, and had the documents been in place, the defendant would have paid the plaintiff for the services rendered. It is fair that the plaintiff be paid for the services rendered, as the defendant does acknowledge that it received value for money. The HOD, the late Mr Msibi, in his letter dated 01 July 2010 said: "I indeed referred to your services as being satisfactory."

[45] In respect of unjust enrichment the plaintiff's claim clearly occurred *sine causa*. It has been stated by the courts that identification of the specific *conditio* is not of importance, as long as the

requirement of *sine causa* has been met. It cannot be ignored that the plaintiff rendered the service to the defendant and the defendant confirmed that value for money was received by the defendant, and the consequence thereof the plaintiff was impoverished.

[46] The plaintiff acted in a *bona fide* belief and reasonable belief, though mistaken that the plaintiff was obliged to comply with the obligation of the SLA and to render services in compliance of the SLA. The defendant was indeed enriched at the expense of the plaintiff for the services that were rendered, and thus impoverished the plaintiff.

[47] The defendant raised a counter-claim against the plaintiff that claims 13, 14 and a portion of claim 15 were payments made as a result of the fraudulent conduct of the official. However, the defendant did not lead any evidence in respect of this allegation. As correctly stated by the defendant, the department did not take any disciplinary actions against the officials. In terms of section 38 (1) (h) of the PFMA which provides that:

"38 General Responsibility of Accounting Officers

(1) The accounting officer for a department, trading entity or constitutional institution-

(a)…….

(b)…….

(h) must take effective and appropriate disciplinary steps against any official in the service of the department, trading entity or constitutional institution who-

(i) contravenes or fails to comply with a provision of this Act;

(ii) commits an act which undermines the financial management and internal control system of the department, trading entity or constitutional institution; or;

(iii) makes or permits an unauthorised expenditure, irregular expenditure or fruitless and wasteful expenditure."

[48] The defendant in its evidence made no mention that the involved officials were discipline or disciplinary action was taken in terms of section 38 (1) (h) of the PFMA. The same officials are still in the employment of the defendant. The inference drawn is that the defendant raised the counter-claim as an afterthought in order to frustrate the claim of the plaintiff. It is expected that a well-managed administration will take action against any official who does not comply with the provisions of the PFMA. As correctly stated by the plaintiff that the accounting officer who is guilty of an offence, such an officer wilfully or grossly failed to comply with the PFMA provisions.

[49] In the matter of **Free State Province v Terra Graphics (Pty) Ltd and Another,**[12] the court question the department's failure to take disciplinary action against officials who had not complied with the provisions of the PFMA. Thus in my view the counterclaim of the defendant ought to be dismissed.

[12] 2016 (3) SA 130 (SCA)

[50] It would be just and equitable that the plaintiff be paid for the work done, to the extent that the defendant acknowledged that the plaintiff is the only service provider for the CPD. Thus the plaintiff ought to succeed on the claim in respect of unjustified enrichment.

**ORDER**

[51] I accordingly grant the following order.

1. The defendant is ordered to pay the plaintiff the amount of **R1 171 774.83.**

2. Interest on the said amount at **15.5%** per annum from the due date of each invoice to date of final payment.

3. The defendant is ordered to pay the costs that stood over as per the court order dated **6 November 2014**

4. The defendant is ordered to pay the costs as per the court order dated **11 December 2014.**

5. The defendant to pay the costs that stood over as per the court order dated **21 February 2019.**

6. The defendant's counterclaim is dismissed.

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**S. CHESIWE, J**

APPEARANCES

For the Plaintiff: Adv PA Botha

Instructed by: (Schoeman Law Inc Cape Town)

C/O Hill ,McHardy & Herbst

Bloemfontein

For the Defendant: Adv. C Georgiades

Instructed by: Lebea & Associates

C/O Phatsoane Henny Inc.

BLOEMFONTEIN