REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA) 16/01/2013

Case no:7209/2009

In the matter between:

FIDELITY SUPERCARE SERVICES GROUP (PTY) LTD	**APPLICANT**

(1) REPORTABLE: ~~YES~~/ NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

16/01/2013

Date

Signature

And

JOHANNESBURG METROPOLITAN POLICE DEPARTMENT	**DEFENDANT**

JUDGMENT

BAQWA J

[1] This is a trial of Part B of an action instituted by Fidelity Supercare Services Group (Pty) Ltd by way of summons issued on 10 February 2009 claiming a sum of R733 418-87 for services and labour rendered to the defendant, Johannesburg Metropolitan Police Department.

[2] Part B of the trial was preceded by Part A in which I gave judgment on 15 September 2011. Part A was also preceded by other interlocutory

applications which I propose to summarise prior to dealing with the issues in part B of the claim.

[3] The first application was heard by Hodes AJ on 13 August 2010.

[4] In that application plaintiff had previously applied to amend its Particulars of Claim to include an alternative claim based on unjust enrichment.

[5] In response defendant contended that any such claim needed to be based upon a written contract which complied with various statutory provisions and more specifically section 116 of the MFMA. Defendant further contended that the prescribed tender procedures had not been complied with and therefore no legally binding contract could have arisen.

[6] In reply plaintiff contended that the application was itself vexatious and an abuse of the court process. Plaintiff further submitted that defendant was seeking judgment in the matter without a trial of the issues.

[7] Plaintiff further sought the court's disapproval of defendant's conduct through the granting of costs on a punitive scale.

[8] In his judgment Hodes AJ expressed the view, with which I concur, that the defendant was entitled, if it deemed it appropriate, to raise an exception to plaintiff's claim which it had not done.

[9] Hodes AJ further stated that he was not prepared to shut the door to the litigation to plaintiff before the hearing of the matter. In his view, with which I agree, that would have amounted to pre-judging the matter and denying plaintiff the right to ventilate all of the issues at a trial in court.

[10] The application was dismissed with the costs reserved for determination by the trial court.

[11] I have considered the question of costs and for reasons stated above, I have come to the conclusion that the defendant could have dealt with the issues it raised by way of exception which would have been a much simpler and less tortuous procedure to adopt. I accordingly accept plaintiff's submission that the voluminous application proceedings were vexatious and as such created a situation where punitive costs are appropriate.

[12] Further plaintiff brought an application to amend its declaration in February 2010 to include an enrichment claim which was pleaded in the alternative to the contractual claim.

The application served before Willis J and was granted with costs reserved for the trial court. Plaintiff was well within its rights to introduce this amendment as the issue raised was a triable issue. Having succeeded in its application it was logical that costs should follow the result.

Plaintiff submits that costs ought to be awarded on a punitive scale due to defendant's opposition. In my view defendant was equally entitled to test the validity of plaintiff's application and I therefore do not consider costs on a punitive scale to be justifiable.

[13] Thirdly, the plaintiff lodged an application to compel defendant to reply to plaintiff's request for further particulars for trial on 20 November 2012. The matter was unopposed and was heard by Madam Justice Carelse. Defendant had filed a reply to that request by the date of hearing. Carelse J reserved the question of costs for determination by this trial court. The application was unopposed and the defendant complied even though he had caused plaintiff to incur costs of the

application by its delay. It accordingly follows that the costs ought to follow the results.

[14] In my judgment on Part A which I handed down on 15 September 2011 I reserved costs for the trial court. In that judgment, I found that the post December 2004 agreements were invalid for want of legality. Further, I found that the agreements entered into by the parties prior to December 2004 were valid and binding. The pre-December 2004 contracts encompassed horses and dogs but did not include garden and ground maintenance or office cleaning. Those agreements formed the basis of the business relationship between the parties which was extended further over time.

I found that the relationship had been initiated by the defendant and had been subsequently re-enforced through the actions of the defendant over the years.

[15] The plaintiff was successful in its action in discharging the onus of proving the existence of a valid and binding relationship prior to December 2004 and it ought therefore to succeed even with regard to costs.

[16] Reverting to claim B, this is an alternative to the original claim and it is to the effect that in the event of the court finding that claim A fails for non-compliance with the formalities contained in the Municipal Financial Management Act No 56 of 2003, the plaintiff provided the goods and services in the **bona fide** belief that it was a party to valid contract with the defendant. The enrichment claim was for the sum of R837, 902-50 which has since been amended to R692, 450-61.

[17] The matter had come before me subsequent to an order by my brother Willis J on 12 July 2011 in which he stated as follows:

"BY AGREEMENT BETWEEN PARTIES IT IS ORDERED THAT:

1. *When the trial between the parties commences on 29th August 2011 or any subsequent date to which the trial may be postponed, the following matters will be determined first:*
   1.1. *Whether any agreement as alleged by the plaintiff exist;*
   1.2. *whether, if such agreement exists, the agreement is valid;*
   1.3. *whether, if such agreement is valid, AJ Annandale and Gavin Graham had authority to enter into a contract which is binding on defendant;*
   1.4. *the date on which the contract was entered into;*
   1.5. *the date of the commencement of the contract;*
   1.6. *the duration of the contract*
   1.7. *services that the plaintiff was required to render in terms of the contract;*
   1.8. *whether during the period of 1 September 2008 to 31 March 2009, when the plaintiff allegedly rendered services to the defendant, any agreement that it had concluded with the defendant was still valid;*
   1.9. *whether rendering of services during the period 1 September 2008 to 31 March 2009 amounts to performance in terms of any contract that was valid and in force at the time;*
   1.10. *if it is found that the agreement is valid and not binding on the defendant;*
      1.10.1. *Whether the plaintiff laboured under a mistaken belief that it had a valid and binding agreement with the defendant;*
      1.10.2. *whether such mistaken belief was reasonable."*

[18] I gave judgment regarding Claim A on 15 September 2011 and in that judgment I found the contracts entered into prior to December 2004

were valid whereas those contracts purportedly entered post December 2004 were invalid for want of legality. I reserved the decision on the question of undue enrichment (Claim B) and costs for a determination at a later date, hence this hearing.

The issues

[19] The parties are the same and the issue to be determined is whether the plaintiff has an enrichment claim against the defendant arising out of the provision of goods and services to the defendant for the period September 2008 until March 2009. It is not disputed that services were rendered by the plaintiff to the defendant from about March 2003 until March 2009 but what has to be determined is whether defendant was unduly enriched as a result thereof.

The law

[20] The law of unjustified enrichment is meant to restore the economic benefits to the plaintiff, at whose expense they were obtained and for the retention of which the defendant has no legal justification[1]. The law provides recourse to the plaintiff who believes he has unjustly enriched another person for the disgorgement of the benefits. More importantly, the object of the **condictio indebiti** is to recover money or other property transferred in intended payment or performance of a non existent debt[2].

[21] Du Plessis writing on enrichment is of the view that, in any enrichment action the primary claim is a claim for the transfer of the property where that is possible. If not, the quantum of the enrichment claim is established by determining the extent of the impoverishment and the extent of the enrichment. The impoverished party is then entitled to the

[1] Visser D Unjustified Enrichment (2008) 4
[2] See Visser (supra) 5 and LAWSA 9(2) 211

lesser of the two amounts so determined.[3] He deals with various ways of being enriched and among these is enrichment through doing something, such as performing services and work, including the improvement of another's property.[4]

[22] The **condictio indebiti** is used to reclaim performance made in terms of an invalid contract if invalidity is due to failure to comply with the prescribed formalities but not if the contract is void because it is unlawful.

See Legator Mckenna v Shea (2009) 2 All SA 455 SCA

[23] The essential elements are that:

23.1. The defendant must be enriched

23.2. The plaintiff must be impoverished

23.3. The defendant's enrichment must be at the expense of the plaintiff; and

23.4. The enrichment must be **sine causa**

See: McCarthy Retail Ltd v Shortdistance Carriers CC (2001) 3 All SA 236 (A), 2001 (3) SA 482 SCA

[24] The burden of proof in respect of these elements is on the plaintiff.

See: Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue (1992) 4 All SA 62(A) 1992(4) SA 202 (A) 224

Senwes Ltd v Jan Van Heerden and Sons CC (2007) 3 All SA 24 (SCA)

[25] Transfer must be made in the **bona fide** but mistaken belief that it was owing. Stated differently the error must be reasonable or excusable. In

[3] J Du Plessis "The South African Law of Unjustifiable Enrichment"

[4] Supra para 2.2.6.2 p36

the **Willis Faber Enthoven (Pty) Limited** decision (supra) it was held that there is no logic in the distinction between mistakes of fact and mistakes of law in the context of **condictio indibiti**. In that case the law was stated as follows:

"All that need to be said is that, if the payer's conduct is so slack that he does not in the court's view deserve the protection of the law, he should, as a matter of policy not receive it. There can obviously be no rules of thumb; conduct regarded as ***inexcusably slack*** *in one case need not necessarily be so regarded in others, and vice versa. Much will depend on the relationship between the parties; on the conduct of the defendant who may or may not have been aware that there was no* ***debitum*** *and whose conduct may or may not have contributed to the plaitiff's decision to pay; and on the plaintiff's state of mind and the culpability of his ignorance in making the payment. (Consider, for example, the case of a person who, whilst in doubt as to whether money is legally due, pays it not caring whether it is and without bothering to find out). These are only a few considerations that come to mind; others will no doubt manifest themselves with a passage of time..."*

[26] The **Willis Faber** decision (supra) effectively altered the position as earlier stated in the case of **Rahim v Minister of Justice 1964(4) SA 630(A)** in which the Appellate division had held that an amount of money paid **indebiti** in mistake of fact could not be recovered by means of the **condictio indebiti** where the conduct was found to have been "inexcusably slack". In Willis Faber the finding was that mistakes of law and mistakes of fact should be treated in similar manner.

[27] In **casu**, plaintiff called the evidence of Heather Dietrich, Delmaine McDougall and Alan Wintermeyer. Heather Dietrich had testified in the earlier trial and she confirmed and stood by her evidence at that stage. Heather Dietrich was employed by the plaintiff as a regional director.

She testified that services had been rendered by the plaintiff to the defendant at the latter's special instance and request.

[28] She testified that plaintiff rendered invoices to defendant monthly and that those had to be accompanied by an order number which was generated by defendant's procurement department. Later, plaintiff had been issued with a vendor number which thereafter served as a form of identification when plaintiff submitted invoices for payment.

[29] Delmaine McDougall was employed by plaintiff as an area manager and her duties entailed visiting various sites at which plaintiff rendered services. Some of those sites were the areas where plaintiff rendered services for defendant. If there were concerns in any of the sites, she would see to the resolution thereof. She had during the cause of business regular meetings with Gavin Graham and Alan Annandale who were defendant's employees and who functioned as contact persons during the duration of the relationships between defendant and plaintiff.

[30] McDougall testified how she had to follow up with Gavin Graham where payments were delayed and these would be resolved in due course without difficulty.

[31] Four categories of services were rendered and these included grounds, gardens and maintenance; office cleaning; dogs and kennels and horses and stables. Mcdougall had to ensure that there were sufficient numbers of people to render these services in between shifts or leave of absence by any of the employees.

[32] Dietrich's evidence was largely supplementary to McDougall's with regard to the number of employees on the ground, their pay and pay increases. She also testified about how they had to eventually abandon government business because of difficulties they had experienced with regard to settlement of their accounts.

[33] It is common cause that the services rendered by plaintiff to defendant particularly for the period 2005 to 2009 were rendered without the existence of a valid written contract. In that regard the requirement that the enrichment must be unjustified or **sine causa** is satisfied without much ado.

[34] Regarding the other elements, namely, defendant's enrichment, plaintiff's impoverishment and whether or not defendant's enrichment was at the expense of the plaintiff, these are more particularly dealt with in the discussion of the evidence of Alan Wintermeyer who was plaintiff's accountant and who was called to testify in this regard and the evidence of Rhajan Silal who was called by the defendant.

[35] In an enrichment action, the primary claim is a claim for the retransfer of the property if that is possible. The quantum of the enrichment claim is established by determining the extent of the impoverishment and the extent of the enrichment. The impoverished party is then entitled to the lesser of the two amounts so determined[5].

[36] One of the categories of enrichment which the learned authors refer to is one where there is a non-decrease in the assets or patrimony where a decrease would have taken place but for the enrichment.

[37] In **casu** the evidence showed that animals such as horses and dogs were a costly asset to the city in which huge efforts are invested not only to ensure that they are trained to the required standard but also that they are kept in a hygienic and clean environment. The evidence showed that the service was rendered on a continuous basis all year round. Needless to say, had there been any interruption of the service of maintaining these assets in a good state there would have been an

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[5] Eiselen & Pienaar "Unjustified Enrichment: A Casebook" (3rd Ed. 2008) para 1.3.2 p29

immediate and serious decrease in the city's assets or patrimony. According to the evidence before me this never occurred.

[38] Allan Wintermeyer was called by plaintiff to give direct evidence as plaintiff's accountant and expert evidence as far as his qualifications and experience would support such expert evidence. He stated that he was a B.Compt Honours and Certificate in the Theory of Accounting graduate who possessed years of experience as an accountant for large companies. He confirmed that in terms of the expert notice filed he was responsible for the administration function for the North and South Gauteng regions which comprise 60 percent of plaintiff's turnover, the total of which is closely approaching R1 billion.

[39] Cost accounting formed part of his studies and was also an important component of the operational side of plaintiff's services. He was involved with the defendant from the accounting point of view and was ultimately responsible for the billing and collection of accounts. His department was also responsible for payment of wages and the allocation of payments from the customer.

[40] In considering Wintermeyer's evidence I have had to consider the cautionary statement of the law in the case of **Singh v Ebrahim All South African Law Reports July(2) 2010 210(3) All SA 187 D para 34**.

"The general approach to expert evidence is trite. Receiving the opinion of an expert is an exception to the basic rule that opinion evidence is in admissible- ***Ruto Flour Mills Ltd v Adelson(1) 1958(4) SA 235 (T) at 237A*** *[also reported at* ***[1958] 4 All SA 198(T)-ed] and R v David 1962(3) SA 305 (SR) at 306H****. Ultimately, it is for the Court to decide whether an opinion is in fact correct to be relied upon- see* ***Van Wyk v Lewis 1924 AD 438 at 448, R v Mbongwe 1954 (3) SA 1016(T) at 1019 and S v Gouws 1967 (4) SA 527(E) at 528D*** *[also reported at* ***[1967] 4 All SA 438(E)-Ed]"*** .... and at para 35:

"In particular in the context of expert evidence, Addelson J in Meday v Protea Assurance Co Ltd 1976(1) SA 565 (E) at 569E-H commented that:

However eminent an expert may be in a general field, he does not constitute an expert in a particular sphere unless by special study or experience he is qualified to express an opinion on that topic. The dangers of holding otherwise- of being overawed by a recital of degree and diplomas-are obvious; the court has then no way of being satisfied that it has not been blinded by pure 'theory' untested by knowledge or practice. The expert must either himself have knowledge or experience in the special field on which he testifies (whatever general knowledge he may also have in pure theory) or he must rely on the knowledge or experience of others who themselves are shown to be acceptable experts in that field... When, therefore, an expert relies on passages in a text book, it must be shown, firstly, that he can, by reason of his own training, affirm (at least in principle) the correctness of the statements in that book; and, secondly, that the work to which he refers is reliable in the sense that it has been written by a person of established repute or proved experience in that field. In other words, an experience with purely theoretical knowledge cannot in my view support his opinion in a special field (of which he has no personal experience or knowledge) by referring to passages in a work which has itself not been shown to be authoritative. Again the dangers of holding the contrary are obvious."

[41] Wintermeyer testified that labour costs were loaded onto the computer system through the payroll system and that it is possible to tell the percentage or proportion of a particular invoice which made up certain costs. This would enable the company to identify whether or not it was making a gross profit on a particular contract or not.

[42] He stated that plaintiff had embarked on a drive to obtain government contracts which is a highly competitive source of work. Towards this end, plaintiff had quoted at much lower gross profit margins. Ultimately

it had found problems with receiving payment from government which eventually led to abandonment of business in the public sector and pursuit of commercial business.

[43] Wintermeyer had overseen the compilation of a spreadsheet which was handed into court and marked exhibit 1. He explained that the cost of labour on exhibit 1 reflected the cost of UIF contributions of the staff based at the plaintiff. Eighty two (82) percent is the norm for government contracts and the labour component of each invoice was calculated by him at eighty two (82) percent.

[44] Similarly he explained the percentages applied to chemicals and uniforms. He explained that the reason for choosing each set of percentages was that these were linked to the type of contracts and services provided to the defendant. In this case the chemicals were especially suited for dogs and horses and the associated hygiene and the cost of uniforms represented a higher percentage owing to the fact that gumboots, safety shoes and other type of equipment was needed for the handling of horses and dogs. These uniforms represented a far higher cost than those used for simple office cleaning.

[45] He stated the flat rate of R129-00 for depreciation of equipment supplied for use at the defendant such as lawnmowers, weed-eaters and equipment related to the horses and dogs. These were capitalised over five years. Gaps appear in the spreadsheet for purely labour charges which would not attract depreciation.

[46] The component relating to fuel was in respect of the plaintiff having to utilize the defendant's own tractor but being responsible for the funding thereof.

[47] In this manner and by a detailed breakdown and analysis of costs, he was able to conclude that the average gross profit percentage in each of the invoices was in the region of 5.7 percent. Further, he confirmed

that the total costs incurred by the plaintiff for the running of the contract was arrived at by totalling the total cost of all invoices on the spreadsheet (exhibit 1) and arriving at a figure of R692, 450-61. Plaintiff amended the quantum of its enrichment claim by reducing the initial amount claimed to this figure.

[48] Under cross-examination he confirmed that exhibit 1 was prepared by an accountant who worked underneath him with accounting experience and under Wintermeyer's supervision. The two had sat together to verify the spreadsheet details regarding labour, supervision, chemicals and uniform.

[49] After weighing all the aspects of Wintermeyer's evidence, I am satisfied that he cannot be categorised as a textbook expert witness. He had wide-ranging industry experience gained not only from working for the plaintiff but also for other companies. His expertise and evidence can therefore not be said to be theoretical. He is an employee of the plaintiff but I cannot only by reason of such employment deem his evidence to be biased. He has sufficiently supported his testimony by reference to the relevant facts and figures.

[50] As stated earlier, the onus is on the plaintiff to prove enrichment. Once it has proven a transfer **indebite**, if the defendant has pleaded non-enrichment as a defence then the onus shifts to the defendant to prove that the transfer did not enrich it. The defendant may adduce evidence in rebuttal of the allegation that it was enriched and thereby indicate that the claim must fail.

[51] The plaintiff's burden of proof of enrichment and its measure is facilitated by a presumption that the defendant was enriched if the plaintiff can prove that the defendant received a transfer of money, property or services.

See **FNB v Perry 2001(3) SA 960 SCA at para 31**

Kudu Granite Operations v Caterna Limited 2003(5) SA 192 SCA at para 21

In the present case defendant received neither money nor property but services.

[52] It is not enough merely to deny enrichment. The defendant has to plead facts justifying a finding of enrichment less than that which has been received. A failure to adduce such evidence gives rise to a duty to restore the full value.

See **Hardaker v Phillips 2005(4) SA 515 SCA para 14**

[53] The defendant called one witness, one Rajhan Silal who confirmed that plaintiff was no longer rendering services to the defendant. He further testified regarding other companies which are currently rendering services similar to the ones previously rendered by plaintiff.

[54] According to Silal, defendant is paying less for similar services than what was charged by plaintiff. It is not clear to me whether this evidence was meant to suggest that defendant was overcharged by plaintiff. If this was the intention, no sufficient basis was set to enable the court to draw such a conclusion. Similarly the evidence of Silal does not rebut the evidence given by Wintermeyer regarding the extent to which plaintiff was impoverished and defendant enriched. The performance by the other companies was **ex post facto** and can therefore not be conflated into this claim.

Defendant did not plead non enrichment nor did it call any evidence to demonstrate that it was not enriched.

[55] I cannot but come to the conclusion that defendant was well aware that no valid tender process had been followed prior to establishing a business relationship with plaintiff. Plaintiff had offered a written contract to defendant but this offer was not taken up. There was

accordingly no written contract in place and the relationship was **sine causa** in the absence of compliance with the requirements of the MFMA post December 2004. To impute the omission to the plaintiff would be nothing short of expecting plaintiff to take over defendant's operational responsibilities.

The consistent conduct of not only accepting the services rendered by plaintiff, accepting their invoices and paying over a number of years established a pattern of behaviour. It can therefore by any stretch of imagination be suggested that plaintiff's conduct was 'inexcusably slack' to the extent that it does not deserve protection of the court.

See **Willis Faber Enthoven Pty Limited (supra)**

[56] Taking the conspectus of the evidence into account, I am persuaded that plaintiff has succeeded to prove its case on a balance of probabilities.

[57] In the result the following order is made;

57.1. Judgment is granted in favour of plaintiff in the sum of R692, 045-61

57.2. Defendant to pay the wasted costs including the costs incurred in:

57.2.1. February 2010

57.2.2. 13 August 2010 (on an attorney and client scale)

57.2.3. July 2011

57.2.4. 15 September 2010

57.2.5. 20 November 2012

S.A.M BAQWA

(JUDGE OF THE HIGH COURT)

Plaintiff's attorneys:	Salant Attorneys
Counsel for the plaintiff:	Adv W.B Bank
Defendants attorneys:	Lennon Moleele & Partners
Counsel for the defendants:	Adv F.R Memani