

25/9/2009

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HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG PRETORIA

NOT REPORTABLE

CASE NO 22515/2003

MO-AFRICA-AFRICA

PLAINTIFF

V

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

CIVIL TRIAL
CORAM: - SAPIRE AJ

Defendant	NOT APPLICABLE
(1) REPORTABLE	No.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	✓
(3) REVISED: Yes.	✓
JUDGMENT	
DATE	SIGNATURE
25/09/09	[Signature]

Plaintiff is a close corporation the business of which was to provide cleaning services.

The Defendant is the City of Tshwane Metropolitan Municipality.

On 17th February the parties entered into a written contract when the defendant accepted Plaintiff's tender to furnish a "community based refuse removal service". Although the plaintiff's summons and statement of claim states that a copy of the contract is attached thereto, this is not correct for what is attached is a copy of the letter from the defendant accepting the tender. The full terms of the tender

and the complete contract are to be found as an annexure to the plea and in the tender document which was produced in evidence as an item in a bundle prepared by the Plaintiff.

The Plaintiff, in amended particulars of claim filed during the hearing, alleges that the Defendant unilaterally unlawfully and without due notice to the Plaintiff terminated the contract by means of a letter.

The breach on which the Plaintiff relies is described in paragraph 7 of the amended particulars of claim as

"7.1 He¹ failed to give the defendant the written instructions and or 3 (three) opportunity during which to rectify a breach if any;

7.2 He failed to give Plaintiff 30(thirty) day's written notice while he should have done so"

At the commencement of the trial, the Plaintiff had not filed the amended particulars of claim and on reading the papers as they were it appeared that plaintiff was making two claims arising from breaches of the same contract. Only when I observed that the evidence being led by Plaintiff's counsel did not accord with the allegations upon which the claim was being made was the amended plea filed. One of the original claims was not persisted in, and the only issues before the court were those arising from the amended particulars as answered in the plea.

The principal obligation undertaken by the Plaintiff was as alleged in the amended particulars of claim was

¹ (sic the Defendant is not a male individual)

That the Plaintiff would remove refuse for over a period of 3 (three) years with effect from the 1st of March 2003 or nearest date for units 4, 16, and 17 at a firm price of R15 000(fifteen thousand Rand) per block per month

It is clear from the terms of the contract that the three units mentioned constituted the block.

The Plaintiff claims as damages, payment of an amount of R1 744 200 which it says it would have received in respect of units 4, 16, and 17 but for the wrongful termination of the contract.² In the original summons the amount claimed was for R495 000. 00 representing the amount the Plaintiff would have received in respect of units 4, 16, and 17 but for the unlawful termination of the contract. There is no explanation for the vast difference between the two amount claimed. It is after all only a simple arithmetical calculation.

² Plaintiff's claim overlooks the terms of the agreement, which in dealing with the duration of the contract provide that the period was to be three years, but terminable by either party at any time on one months notice. The claim also does not appear to take into account that the plaintiff would have expenses in carrying out its obligations. The damages to which Plaintiff would be entitled could not exceed the profit he would have made during one month's operation.

The parties agreed to separate the issues of wrongful breach and damages and I was requested to give a decision on the first only.

It was a matter of common cause that the Defendant terminated the contract on the 25th June 2003. Defendant alleges in its plea that

Plaintiff did not fulfil its obligations in terms of the agreement Annexure "PCC1" and the Defendant, as it was entitled to, cancelled the agreement with the Defendant on 25th June 2003.

Defendant apparently (so it emerged from the evidence) relied on Paragraph 11.4 of the agreement which reads

11.4 a) in addition to any other remedies for breach of contract which are set out in this agreement, the Tshwane Municipality shall be entitled to regard any breach of this contract as a material breach entitling it to

1).....

ii) Forthwith cancel the contract and/or recover any damages it may have sustained consequent to any breach thereof

Plaintiff appeared to consider that Defendant's right of cancellation was limited to what is provided in 11.1 which also provides for cancellation on breach after notice, but must be read as being complementary to 11.4. The agreement is badly drawn having some seemingly overlapping provisions on this and other topics. It is however clear the Defendant could treat any breach as material and

on the basis thereof terminate the agreement summarily without notice and without affording the Plaintiff an opportunity of remedying the breach. The question to be decided therefore was whether the Plaintiff's termination was in breach of the agreement, the Plaintiff having complied with its obligations thereunder.

At the outset of the hearing I raised the question of onus, and on which of the parties it rested. After hearing brief argument I ruled without deciding the question of onus that the Plaintiff should begin.

For the plaintiff three witnesses were called of which John Sibanyoni, a member of the Plaintiff and chief if not the only, role-player in its dealings with the Defendant, was the first. Sibanyoni testified that having contracted with the Defendant, by him personified, acquired a tractor and trailer and employed a complement of six workers who carried out the duties assumed by the Plaintiff in terms of the contract. His evidence was directed to denying that the plaintiff had been in breach of its contract.

From cross examination it emerged that the defendant was relying on a number of specific instances when the service had broken down, or been rendered incompletely, causing complaints to be received. Sibanyoni denied all knowledge of these complaints. He further denied all knowledge of the complaints which had been lodged in his file with the supervisor appointed by the Defendant. If indeed Sibanyoni was unaware of the complaints and the instances of defective

performance by the plaintiff, his ignorance, the defendant attributed to Sibanyoni's failure to keep constant and continuous contact with the Defendant, as undertaken in terms of the contract.

The Plaintiff's business in providing the services contracted for, was conducted in a most informal and casual fashion. It had apparently no office premises, kept no books or records and did not comply with many of the duties which the law prescribes in respect of employment of staff, and taxation. In this it was in breach of the agreement on which it relies. This was however not the breach on which the Defendant based its case, but is indicative of the scant respect with which the Defendant treated its obligations.

Sibanyoni was not an impressive witness. The weakness of his blanket denial of any failure on his part to comply with the provisions of the agreement, is exacerbated by his denial of the receipt of a letter dated 13th February 2003, which set out the times and areas when and where the clearances were to be done. The letter bears, what appears clearly, to be his signature acknowledging receipt. Yet he says the signature is not his. The evidence for the defendant is that the letter was handed to him and signed for by him. It is difficult to comprehend why anyone should have wanted to forge Sibanyoni's signature to an innocuous document from which no benefit could have been obtained.

He also denied receipt of a letter from the Defendant dated 4th April 2003 in which the Defendant's failure to give satisfactory service were

drawn to his attention. Jacko van der Vywer who testified for the plaintiff claimed to have handed the letter to Sibanyoni personally and to have witnessed him acknowledging receipt thereof by placing his signature thereon. The signature is indeed a scribble quite unlike the clearly written name appearing on the other letter to which reference has been made. Sibanyoni denied both receipt of the letter and his signature. So unlike was it the Van Den Vywer suspected at the time that Sibanyoni was disguising his signature to be able to deny it later. The issue here is less clear cut but in the light of the totality of the evidence Defendant's version is to be preferred by far.

Defendant called two further witnesses in support of its case. They however were not helpful in deciding whether the Defendant had failed to give a satisfactory service. They were unaware of any breaches by plaintiff, but this of course does not mean that there were not any.

The Defendant called Jacko van der Vywer, a council employee tasked with the supervision of community based services including those which the Plaintiff had undertaken to render. Sibanyoni was to have been in continual contact with him and to have been contactable at any time when he was needed. He testified that Sibanyoni was frequently uncontactable when complaints were received.

Van der Vywer called by the Defendant, recounted, with reference to documents contained in bundle "B" by which he supported his evidence the history of Plaintiff's unsatisfactory performance of the

contract. He told of the difficulties he had in contacting Sibanyoni when the necessity for doing so arose because of complaints from residents of the non collection of the refuse from their homes.. This was reflected in a letter, number 1 in the bundle from the Defendant to the Plaintiff dated 10th January 2003.

He told of the instances, again with references to documentation when refuse removal had not taken place. On one occasion, when Plaintiff had failed to remove the refuse and complaints were received Sibanyoni was uncontactable and the Municipality had to use its own recourses to do the work which should have been done by the Plaintiff.

It is not necessary to deal specifically and separately with each instance of non performance by the plaintiff described by Van den Vywer. His account is largely supported by the documentation and outweighs Sibanyoni's denials.

Each of the failures by Plaintiff to carry out its obligations was regarded as material as contemplated in the agreement. Plaintiff's persistence in non performance persuaded the Defendant to terminate the contract as it was entitled to do.

The evidence adduced by the Defendant far outweighs that of the Plaintiff both in quality and cogency. No conclusion other than that to which I have come is possible on a consideration of the body of evidence placed before the court.

Defendant's termination was not a breach of the contract and Plaintiff has no claim arising therefrom.

There will therefor be judgment for Defendant dismissing Plaintiff's claim with costs.