

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2023-027863

- (1) REPORTABLE: Yes ☐ / No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒
(3) REVISED: Yes ☐ / No ☒

Date: 04 July 2024

WJ du Plessis

In the matter between:

**THE LR MANAGEMENT GROUP (PROPRIETY)
LIMITED**

APPLICANT

and

EMFULENI LOCAL MUNICIPALITY

RESPONDENT

JUDGMENT

DU PLESSIS AJ

Background

- [1] This is an application for a money judgment against the Respondent Municipality for an amount of R1 632 578,48 with *mora* interest of 7% from 29 December 2020 until payment in full, plus an amount of R833 045,49 together with *mora* interest of 7% from 17 July 2021 until payment in full.

- [2] The Applicant sent two invoices to the Respondent (on 28 February 2020 and 28 April 2021) in terms of a written Skillsoft Digital Learning Renewal Agreement (the SLDR Agreement) concluded between the parties in April 2019. The invoices were not paid. Despite various demands for payment, the demands went unanswered, and the invoices are still unpaid. No dispute was raised regarding the indebtedness before the Respondent's answering affidavit was delivered.
- [3] On 24 March 2023, the Applicant instituted the application based on the understanding that the Respondent's indebtedness was undisputed and that there were no foreseeable disputes of fact. The cause of action is set out as follows: The parties concluded a written agreement dated 22 May 2018, in which the Respondent appointed the Applicant to provide specialised services as set out in the agreement. This agreement is a framework for providing services – the services were to be specified in a project charter. The Applicant offered to renew its services in October 2018 by concluding the SLDR agreement to offer it for another three years. This offer was accepted and signed, the terms of which were set out in the SLDR agreement. In short, the Respondent's responsibility is to sign off on all invoices and deliverables.
- [4] The Applicant states that they fulfilled their obligations under the agreement. The Respondent performed the first year by paying the Applicant. However, for the other two years, the Respondent did not pay. Despite demands for payment, no responses were received, no payment was made, no disputes were lodged, and the contract was not cancelled.
- [5] However, on 8 May 2023, after the launching of the application, the Respondent delivered an answering affidavit opposing the relief sought. This was the first time the Applicant heard of the Respondent's defence, mainly depending on the *exceptio non adimpleti contractus*. To understand it, some background detail is necessary.

The agreement

- [6] As stated, the SLDR Agreement emanated from an earlier Master Agreement dated 22 May 2018 and signed on 10 October 2018. In terms of this Master Agreement,

the Respondent appointed the applicant as an independent service provider to provide specialised services, including Skillsoft digital learning licences, to assist the unemployed with computer skills to improve their employment prospects. The agreement was to endure indefinitely.

- [7] Clause 3.2 of the Master Agreement states that the specifications for the services shall be stated in the Project Charter. Cause 15.2 states that all amounts payable to the Applicant shall be set out in the Project Charter. The “Agreement” includes the Project Charter and annexures, underscoring the document's importance. The Applicant does not rely on this document for their cause of action.
- [8] In terms of the later SDLR agreement, the software licenses were renewed for another three years, with the renewal prices set out on page 9 of that agreement. It provided that payment is due 30 days from the invoice payment. The Respondent signed this SLDR agreement extending the licenses on the terms set out in that agreement. The Applicant relies on this document for their cause of action.
- [9] The Respondent was invoiced in terms of the SDLR agreement, and it paid for the first year. The non-payment for the other two years gives rise to this dispute.
- [10] In terms of clause 10.5 of the Agreement, if the Respondent discovers a fault or error, the fault or error shall be reported to the Applicant before the expiry of the evaluation period, which the Applicant must correct within the time stipulated in the project charter. If the Applicant is not notified of such a fault or query, the deliverable will be deemed accepted by the client.
- [11] In terms of clause 21, if a party breaches the agreement and fails to remedy the breach within five days after receipt of a written notice from the other party calling upon the defaulting party to remedy the breach, the aggrieved party may either claim specific performance or cancel the agreement. The Respondent did not give the Applicant a breach notice, did not claim specific performance and did not cancel the agreement.

- [12] Clause 15.7 states that the Applicant will invoice the Respondent in line with the nature of the service provided. An invoicing schedule is to be included in the Project Charter. The Respondent must sign and return to the Applicant an AIC before receiving the invoice. The clause states specifically that “[t]he AIC is a document LRMG (the Applicant) uses to set out exactly what it intends to invoice the Client (the Respondent) for”. In case of a dispute, the Respondent, in terms of clause 15.8, must pay the invoice balance due and withhold only the disputed amount. The dispute must then be resolved in terms of clause 26.
- [13] The Respondent avers that the Applicant failed to comply with the terms of the SDLR Agreement and/or the Proposal and is, therefore, not entitled to the payments. This was because:
- i. It failed to ensure that a Project Charter, as per the SDLR Agreement, was signed between the parties before rendering any services to the Respondent;
 - ii. The Respondent was not informed of the progress of its performance of the services at all times by preparing for and conducting review or progress meetings and periodic reporting to the Respondent;
 - iii. The Applicant failed to provide the Respondent with an Authorisation to Invoice (the “AIC”) to sign before invoicing the Respondent;
 - iv. The Applicant failed to provide a functional portal for 2020 onwards. The portal provided had constant errors and was non-functional, as was communicated to the Applicant’s representative. The Respondent thus raises the *exceptio non adimpleti contractus*.
- [14] All this constitutes a “dispute” that must, in terms of clause 26.2 read with clause 15.8 of the SDLR Agreement, be submitted to arbitration under the AFSA Rules, which means that this application must be stayed pending the final determination of the dispute by an arbitrator in terms of the SDLR Agreement. The Respondent is obliged to pay the undisputed amount until the dispute is resolved, which it did.

- [15] The Respondent also states that the Applicant failed to plead the Project Charter and that it has complied with it, which is a necessary document before services can be rendered in terms of the Master Agreement. Given the importance of the document, the Applicant had to plead it. Without such a pleading, there is no complete cause of action, and the claim must fail.
- [16] Likewise, the Applicant failed to produce a signed AIC despite it being a condition before invoicing in terms of clause 15.7 of the Master Agreement. The Applicant, therefore, failed to establish a cause of action. It failed to do so in its founding affidavit and cannot make a case or introduce a new matter in reply.
- [17] The Respondent states that a dispute of fact must either be resolved through the *Plascon-Evans* rule or through the presentation of oral evidence before an Arbitrator.
- [18] The Applicant disagrees. The Applicant states that this is not a *bona fide* defence. For one, the Respondent does not disclose his defence and the material facts upon which it is based with sufficient particularity and completeness. In short, there is not enough information before the court.
- [19] The Applicants also argue that the defence is lacking on the following grounds:
- i. First, the Respondent did not reply to the two letters of demand and at no time before the institution of the proceedings suggested that it had a defence to the claim. The Respondent also does not explain the silence.
 - ii. Secondly, the Respondents have provided no evidence to support their claim and rely only on the municipal officials' words. The nature of the claims is such that it requires documentary evidence. For instance, it alleges that the Applicant failed to comply with its contractual obligations, but there was no termination of the Agreement on written notice to the Applicant, there was no termination or withdrawal from the Project Charter on written notice to the Applicant, there was not furnishing the Applicant with written notice of any problem.

- iii. Thirdly, the replying affidavit shows that their claims are baseless. The Respondent's claim that the Project Charter was signed was refuted by the Applicant attaching a signed copy; the claim that the Applicant did not inform the Respondent of its progress was refuted by the Applicant giving detailed examples of feedback meetings and email exchanges; the Respondent's claims that it did not sign an AIC was refuted by the terms of the contract that does not require an AIC as a condition of payment; the claim that the portal had errors and was non-functional cannot stand because only one customer support query was received, and was attended to and resolved on the same day – there were no other complaints lodged.
- iv. Fourthly, as an organ of state, the Respondent is held to a higher standard when litigating.
- v. Fifthly, and linking with the previous point, an organ of state has unique and disproportionate power in litigation. It has access to public funds. This means that the Respondent's allegations are informed by an ulterior purpose – dissuading the Applicant from recovering its debt and forcing it into expensive arbitration proceedings. In any case, in terms of clause 26 of the Master Agreement, a liquidated claim does not need to go to arbitration.

[20] The Applicant adds that arbitration proceedings only aim to resolve a dispute. Without a *bona fide* defence, there is no purpose in referring the matter to arbitration.

Discussion

[21] What is to be made of the Respondent's inaction and silence until the application was launched? *McWilliams v First Consolidated Holdings (Pty) Ltd*¹ stated that although a party not replying to a letter asserting that there is an obligation owed does not necessarily mean that they accept this to be true, in general, based on ordinary commercial practice and human expectation, a firm repudiation of such an

¹ 1982 (2) SA 1 (A).

assertion would be the norm. In other words, silence or inaction, unless explained, may be taken as accepting the truth of the assertion or at least contribute to an adverse assessment against such a party as to the probabilities in determining the dispute.

- [22] The other hurdle that the Respondent must pass, as far as this is concerned, is clause 10.6 of the Agreement, which states that if the Applicant is not notified of a fault or error, *it is deemed to have been accepted* by the Respondent. This should be read with the duty to report a fault in clause 10.5. The Respondent did not provide the court with any documentary evidence that it informed the Applicant of such faults or errors. It is thus deemed to have accepted the Applicant's performance.
- [23] The argument of the Respondent that it stated in the answering affidavit that the performance is defective and that based on the *Plascon-Evans* rule,² the court must go with the version that is also not sustainable. That is only half of the *Plascon-Evans* rule. The rule is qualified in that if, in the court's opinion, there is no real, genuine or *bona fide* dispute of fact, or if it is so far-fetched, the court is justified in rejecting it. This was further explained recently in *Wightman t/a J W Construction v Headfour (Pty) Ltd*.³ The court stated that a true, genuine, and bona fide dispute of fact can only exist if the court is convinced that the party raising the issue honestly and unambiguously addressed the matter in its affidavit. In its replying affidavit, the Applicant highlights why the dispute the Respondent sought to raise is not bona fide, genuine, or untenable. It does so by attaching a signed version of the Project Charter (signed by a representative of the Respondent itself). It highlights the lack of documentary evidence for the Respondent's claims regarding the defective performance of the Applicant. There is very little evidence before the court to back up the ascertain made in the answering affidavit that the performance was defective,

² *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-635C.

³ [2008] ZASCA 6 para 13.

and there is even less evidence that these faults and errors were communicated to the Applicant as per contractual terms.

- [24] As for the AIC, the Respondent contends that the Applicant failed to provide it with an AIC for the Respondent to sign before the Applicant invoiced it. However, in clause 15.7, the obligation rested on the Respondent to sign and return to the Applicant an AIC before receiving the invoice. There is also no indication that the AIC is a precondition for payment. It also seems that the purpose of the AIC is to know what it is invoiced for, but the Respondent already knew when it signed the SLDR that it was accepting it.
- [25] The Project Charter was not part of the Applicant's cause of action as set out at the beginning of this judgment. They plead a master contract, the three-year extension in terms of the SLDR, and the non-performance of the Respondent in terms of that agreement. The Project Charter is not a prerequisite for performance in terms of the SLDR contract.
- [26] Lastly, to address the defence of the *exceptio non adimpleti contractus*. This defence entitles a party from whom performance is demanded to withhold such performance until the party who demands it has rendered or tendered its performance in full.⁴ It is a defence against a party demanding performance but who has not rendered their reciprocal performance precisely or in full.
- [27] Normally, the *exceptio* is available if the defect in performance is not serious enough to justify its rejection or the cancellation of the contract by the defendant.⁵ The *exceptio* foresees the upholding of the contract; in other words, the *exceptio* as a defence seeks the enforcement of contractual obligations.⁶ The burden of proof is on the plaintiff (against whom the *exceptio* is raised) to show that he has performed

⁴ The case that caused many law students worries, *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A), explores this in great detail.

⁵ *Thompson v Scholtz* (167/96) [1998] ZASCA 87.

⁶ Hutchison, A. "Reciprocity in contract law." *Stellenbosch Law Review* 24.1 (2013) 14.

his part of the contract.⁷ Having found that the Respondent's version of defective performance is untenable on the evidence before me, this defence is not available to the Respondent.

[28] This also means that there is no dispute to refer to arbitration. In *Parekh v Shah Jehan Cinemas (Pty) Ltd*⁸ the court stated that arbitration is a method of resolving disputes. If there is no dispute, arbitration is not needed. Moreover, there was no dispute when this application was launched, so it is unclear why clause 26 would be applicable. Clause 26.6 also provides for judgment in relation to a liquidated claim to be adjudicated by a court, which is what the Applicants did.

[29] The Applicant is thus entitled to its relief.

Order

[30] I, therefore, make the following order:

1. The Respondent is ordered to make payment to the Applicant of the following sums:
 - a. R796 533,48 (VAT inclusive), together with *mora* interest thereon at a rate of 7% from 29 December 2020 until payment in full; and
 - b. R836 045,49 (VAT inclusive), together with *mora* interest thereon at a rate of 7,5% from 17 July 2021 until payment in full;
2. The Respondent is liable for the costs of this application.



WJ DU PLESSIS

Acting Judge of the High Court

⁷ Hutchison, A. "Reciprocity in contract law." *Stellenbosch Law Review* 24.1 (2013) 16.

⁸ 1980 (1) SA 301 (D) p 304.

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines and sending it to the parties/their legal representatives by email.

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Date of the hearing:	21 May 2024
Date of judgment:	04 July 2024