IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

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

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

(3) REVISED: ~~YES~~ / NO

14/4/2025 [redacted]

DATE SIGNATURE

CASE NUMBER: 60250/2018

CASE NUMBER: 86068/2018

In the matter between:

MINISTER OF WATER & SANITATION	Plaintiff
and	
FUMILE ADVISORY SERVICES (PTY) LTD	First Defendant
JOHN HLAKUDI	Second Defendant
MBALENHLE MANAUKUZA	Third Defendant
NOMBULELO MBEKI	Fourth Defendant
SIFISO MKHIZE	Fifth Defendant
REBECCA NKOMO	Sixth Defendant

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date and time for hand-down is deemed to be 10h00 on **14 April 2025**.

JUDGEMENT

LE GRANGE AJ:

[1] This matter pertains to the appointment of the first defendant (Fumile) to perform specified professional accounting services to the plaintiff (the Minister) for the tax year 2017/2018.

[2] Subsequent to Fumile's appointment, the Minister instituted review proceedings (under Case number: 60250/2018) claiming that Fumile's appointment was irregular.

[3] Fumile retaliated, denying the irregularity, and claimed in a counter-application payment of all outstanding invoices for services rendered as depicted in:

- Invoice 2[1] (dated 3 May 2018) to the amount of R 21 883 431.34; and
- Invoice 3[2] (dated 28 June 2018) to the amount of R 11 190.28.

[4] The Minister simultaneously issued summons against Fumile (and various officials of its own department) (under Case number 86068/2018), re-claiming payment of the amount paid to Fumile in terms of Fumile's Invoice 1[3] (dated 1 March 2018) to the amount of R 17 900 594.37.

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[1] Caselines 01-67.
[2] Caselines 01-68.
[3] Caselines 01-66.

[5] The total amount claimed by Fumile for the work done during the 6-month period from 3 January 2018 to 22 June 2018 amounts to R 50 974 523.

Issues

[6] The issues, which is up for adjudication before this Court, has been curtailed by the parties themselves, and has ended up in an order of this court granted on 19 December 2019, the relevant part of which reads as follows:

> 'HAVING read the documents filed of record, heard Counsel for the parties and considered the matter:
>
> IT IS ORDERED BY AGREEMENT THAT:
>
> ...
>
> 3. [Fumile]'s counterclaim is referred for trial and shall be heard together with Case number 86068/18 following issues:
>
> 3.1 Whether or not [Fumile] had undertaken and/or performed any work pursuant to the agreement concluded between the parties? And if so;
>
> 3.2 the determination of the financial value of the work so performed in terms of the agreement.'

[7] The issues before this Court are therefore crisp and as follows:

(i) Under case number 86068/2018: Is the Minister entitled to repayment of the amount of R 17 900 594.37 due to the appointment being irregular?

(ii) Under case number 60250/2018: Did Fumile undertake and/or performed any work pursuant to the agreement concluded between the parties? And if so;

(iii) What is the financial value of the work so performed in terms of the agreement?

Enrichment

[8] The Minister's cause of action is based on unjustified enrichment due to an illegal contract. The Minister claims that Fumile's appointment was irregular, irrational, and unlawful and that it is entitled to restitution of the amount of R 17 900 594.37 (Invoice 1) based upon a void or voidable contract – i.e. in terms of the *Condictio ob turpen vel iniustam causam.*

[9] The onus to prove its claim, foremost the basis thereof (that the contract was illegal) lies with the Minister.

[10] Pertaining to illegality, the Minister elected not to further advance the allegation of illegality in the review proceedings, by withdrawing its review of Fumile's appointment.

[11] This led counsel for Fumile to conclude, at the opening stage of the trial, that the Minister's claim 'of R 17 million is not at play anymore.'

[12] Added hereto, the Minister elected not (or failed) to lead evidence regarding the question of legality.

[13] For this reason, I did not find it strange that counsel for the Minister did not deal with its enrichment claim in its argument, and did it become *a fait a compli* early on, that the issue of legality and hence the claim was stillborn – as initially assumed by counsel for Fumile.

[14] Instead, the Minister opted to advance a case, in the trial by way of cross-examination, of overpayment and/or set-off which has not been pleaded.

[15] In the premises, the Minister's claim stands to be dismissed.

[16] By dismissing the Minister's claim, I certainly do not find that Fumile was not overpaid on Invoice 1, however the Minister has simply failed to advance a claim

in its pleadings and to prove same, which proverbially left Fumile (potentially) of the hook.

Services rendered and the value of those services

[17] Fumile bears the onus to prove that it rendered the services (as set out in the Invoices), and the financial value of those services rendered.[4]

[18] Taking a step back, the Department of Water and Sanitation (Department) in previous years obtained negative audits from the Auditor General and had challenges with specific areas of its reporting. To this end, Fumile was appointed to assist the Department with its financial reporting for the tax year 2017/2018, with an aim to obtain a positive audit (the project). The project was to be undertaken and performed nationally in all provinces and according to the Service Level Agreement and annexure C thereto, Fumile had to supply certain deliverables.

[19] With the purpose to relieve it of its burden, counsel for the Minister called 5 witnesses being Mr Moyo, Mr Muradya, Mr Chesaina, Mr Motloung and Mr Nteo.

Mr Moyo

[20] Mr Moyo testified that he, being a senior directors of Fumile, was allocated to be the provincial leader to oversee a team conducting the project in two provinces, i.e. the Easter Cape and KwaZulu Natal.

[21] He further, in detail, set out what Fumile *had to do in conducting the project*. For instance (to understand the nature of the evidence having been led) on the expenditure side, he stated that:

> '*And our role here was* to ensure that each payment is indeed valid and represents services rendered. And that involved us looking at the primary supporting documents such as the

[4] *Pillay v Krishna and Another* 1946 AD 946.

independent payment certificates which are prepared by the department's engineers could be internal engineers or external engineers and that payment certificate will have basically measured the nature and extent of works that have been per formed and compare it to the invoice or inform the invoice of that service provider. *So our role was* to ensure that each expenditure which is being claimed by a service provider had a completion certificate with it and that rendered it a valid expenditure to the project. And we also looked at the expenditure being presented and going through the payment system of the department. *Which basically relays to us reviewing* the bank statements, reviewing the bus report, bus is the accounting system that the department has deployed in order to account for its financial transact ions. So whatever transact ion the department concludes is then recorded on the bus system which is an accounting system that is also utilised to inform the financial reporting process for the department to arrive at the annual financial statements. *So that is basically the scope of work* that was done on the expenditure side and in our delivery [indistinct] the listing of the expenditure that have been verified, M' Lord, will then be presented to the department.' [Emphasis added.]

[22] He concluded by stating that the work having been done in a specific province would then be send to head office where it was consolidated by a team to form a final report.

[23] Mr Moyo further testified about a meeting that was held during the 'closure process' at Roodeplaat (meeting). This meeting (as evidenced by the minutes[5]) was heavily relied upon by the Minister during the trial to lay emphasis upon the fact that the Department officials were unsatisfied with the services rendered by Fumile – the work thus being substandard. According to Mr. Moyo the meeting (and the minutes) is confirmation that services were rendered in fact and that the parties were in the process, which is normal in the industry, to iron out different balances, calculations and findings in the effort to enable the minister to attain a proper audit opinion. The meeting was nothing but a processes to engage with the Department to ultimately ensure a complete, correct and comprehensive report, with which both parties agree. I can at this junction state that I accept Mr Moyo's explanation and finds, on this basis alone, that work was indeed performed on some of the deliverables by Fumile.

[5] Caselines 36-47

[24] In relation to the value of the services rendered, Mr Moyo explained that timesheets (as compiled by the employees to track and record the time that they have spent in performing the work) (timesheets) were used to determine the value of the services rendered, and to justify the amounts claimed by Fumile in the invoices.

[25] These timesheets[6] have as content: (i) the name of the person who did the work, (ii) the week/period during which the work was done, (iii) the hours that was spend on a specific deliverable, and importantly (iv) the specific deliverable itself on which the hours have been spend.

[26] Mr Moyo, like the other witnesses, quickly came under fire in cross examination, regarding the veracity and correctness of the timesheets. In this regard, Mr Moyo admitted to the fact that various timesheets which was placed before the Court did not pertain to the Department but to other clients of Fumile like Transnet. There were also various duplications of timesheets, and some timesheets indicated that the employee seemed to bill hours for a holiday.

[27] In the premises, the Minister's concern as to the veracity and correctness of the timesheets were, on the face of the timesheets alone, certainly real.

[28] Seeming that the timesheets were voluminous and that the employees it pertains to (or who compiled them) where in the reagent of approximately 30 people, and due to the fact that there was a disparity in respect of the total amounts calculated by Fumile in comparison with the amounts calculated by the officials of the Department with regard to the timesheets which were bound and contained in Bundle E1, E2 and E3, I directed that the parties work together to remove all discrepancies, irrelevant timesheets and to at least try and come to an agreement as to what hours, timesheets, or portions thereof are not in dispute. Save for ironing out some duplicate and irrelevant timesheets and agreeing that the timesheets provided in E1 to E3 added up to the invoices claimed, the parties

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[6] Caselines 08-111 onwards.

were unable to reach an agreement as to the amount of the hours spend or work performed.

[29] As to the hourly rates it seems common cause that Fumile is bound to charge the rates that are regulated by the South African Institute for Chartered Accountants, and which were further agreed upon with the office of the Auditor General. These rates appear in the calculations after each invoices (i.e. the annexures to E1 to E3) and although it was not confirmed to be correct, the correctness thereof was never put in disputed.

[30] To a question as to who is responsible to verify the correctness or veracity of the timesheets of the officials of Fumile, Mr Moyo answered as follows:

> '[T]his is in the *form of a hierarchy* …, at a provincial level you will have myself as the highest in the hierarchy and reporting directly to me there will be a senior manager, who will then have other report to him which are third level now that I am talking about and a fourth level, let us say that is the hierarchy. So, my timesheet will basically be my completion, which obviously, after I submit, I share with my leadership in terms of the overall hierarchy of the project. But, below my role my *senior manager* [i.e. for the Easter Cape Mr Raymond Matlou and for KZN Mabulelane Mahlangu] would be responsible to basically monitor all the hierarchy's below him or her and we would therefore be responsible for making sure that the timesheets are correct and accurate…
>
> In terms of the hierarchy that I have explained, the head office leadership team, which is above me, will receive timesheets from me, *which I will have confirmed that I am comfortable and I am happy with the veracity and the hours that have been charged, and based on that the head office team will rely on my submission as the senior project manager and take those time sheet, consolidate, aggregate them and then prepare an invoice at that level.*' [Emphasis added]

[31] The last portion is worrying to say the least and does in no way provide a process of confirmation or verification of the correctness of hours claimed by each individual in their timesheets.

[32] What is further worrying is the fact that Mr Moyo (a director of Fumile and a provincial team leader) failed to properly understand the scope of work which

Fumile had to deliver. He was of the view that Fumile only had to determine the possibility of the expenditure being irregular and not to confirm that it was indeed irregular. The latter which according to him fell outside the scope of work. He later, after an 'explanatory objection' rectified this to say that it was not part of the work at that stage and had to be conducted later.

David Muradya

[33] Mr Muradya was appointed as project leader for the Limpopo Province, and his evidence was not much different. He also explained in detail what Fumile had to do and how it would be done. Like the previous witness, Mr Muradya also *ran* through the timesheets explaining what they are about.

Mr Chesaina

[34] The third witness, Mr Chesaina, was appointed team leader to aid the supervisor and the team who worked on the project in Mpumalanga -, Gauteng - and Western Cape Province. Similarly, he testified in detail what they had to do and how it would be done.

[35] Strangely, differently to Mr Moyo, Mr Chesaina stated that he could not testify about the timesheets as he had no control over it and was this done by the project leader at the head office, being a certain person by the name of Asanda, the surname of whom he had forgotten.

Mr. Motloung

[36] The fourth witness to be called by Fumile was Mr. Motloung who was the team leader of the team(s) that were deployed to conduct the accounting services on behalf of Fumile at the Freestate -, Northern Cape - and North West Province. Mr. Motloung also stated that the timesheets were compiled by the employees themselves (i.e. each member of the team), to be submitted on a weekly basis and *had to be authorised by him*.

Mr Nteo

[37] The last witness to be called by Fumile was Mr Nteo, an executive director and shareholder of Fumile, who was appointed to be the engagement director and leader of the entire project and the leader of the project management office. He was thus leader to the 4 provincial leaders who testified before him.

[38] Mr Nteo explained how the project came about, how it was planned and executed through the 9 provinces. Similarly to the other witnesses, this was left unchallenged, together with the allegations that: (i) the final consolidated report was accepted by the Department, and in certain parts ended up in the Department's financial statements, the latter which were ultimately approved by the Auditor General; and (ii) certain parts of this consolidated report were tabled in Parlement.

[39] Considering the evidence of the witnesses in toto, it cannot be said that Fumile did not perform accounting services, which exclude services pertaining to asset verification (it being common cause were not performed). This finding is supported by the meeting that were held and the fact that the Fumile's final report (or portions thereof) was received and subsequently utilised by the Department.

[40] The question however remained whether the contents of the timesheets were a true reflection of the actual time spend on specific work by a specific individual.

[41] Mr Nteo, similarly, to all the above-mentioned witnesses, failed to confirm the correctness of the contents of his own (let alone his team's) timesheets and that the correct hourly rate was subsequently used to calculate the value of the services that he (and/or his team) rendered in a specific province. The closest to a confirmation of the hours and work done by employees of Fumile, came from Mr Motloung who confirmed that the bundle of timesheets (which he was referred to) did relate to the work done by the team in those provinces.

[42] Mr Nteo confirm that the timesheets originated from the various provinces and were consolidated by *himself.* Stating: '… and once I am happy M'Lord then I will agree to the timesheet.' To this the Court was provided with a 'control sheet' consisting of the hours, per the timesheets (duplicates, and those relating to third parties excluded) which added up to be equal to the amounts claimed in the invoices.

[43] It was Mr Nteo's view that the parties are expected to work together where the timesheets and the invoices are in dispute and to agree to a final figure. The view is unfortunately wrong and no such obligation rests upon an opposing litigant. I may say, in the instance it would not have assisted, save for obvious discrepancies which were raised by the Minister, due to the lack of knowledge at the side of the Minister who could not have been in the position to either confirm or deny the hours spend by every employee. For this reason, and due to the obvious discrepancies within the timesheets and the calculations, the Minister persisted with the issues in dispute and emphasised that evidence must be led about the work performed by each and every employee[7], certainly with the view that it be tested for correctness.

[44] Mr Nteo's testimony worsened for Fumile when he indicated, while admitting to a discrepancy to the timesheet of an employee by the name of Kathrine Mbaloi, that he himself had a continuous problem with her and other employees (which he failed to name but did admonish) who provided timesheets which were copy-pasted from old timesheets.

[45] Mr Nteo then continued to state the methodology of how Fumile would use the timesheets to compile their claim per the invoice. He stated as follows:

> 'So, Counsel, on this case, *when we do our timesheets* and capture information for purposes of the records and the claim, that is the invoice. *We look at the week ending and we look at the details of what a person has done, whether it is consistent with the plan for that week. And once we are satisfied with that, the manager would approve.* So in this case, like I was saying, remember the manager would be receiving and he would see the signature is the same. It is the

[7] Caselines 49-121

same manager that has been approving all this time, she is. So he will be receiving than 30 timesheets per week, not only coming from this project of DWS but any other project that we are working on to approve this. So if now he is involved on other projects, *now when we see the week ending and we look at the hours and we look at what was supposed to be done in terms of the details. Along with the plan of that week, we are happy with that and we take the total hours and we complete it into our.*

...

The only thing that I was saying, M' Lord, there was that tendency of them instead of starting a timesheet afresh in terms of copying it. They will take the one that they have used previously but what is important, M 'Lord, for us as the management or office of project management, *we look at our plan for this week, this is what we are covering. Did they cover that? Yes, they covered it. Did she spend time for that project for that period? Yes, she did and then the manager will approve*. And it is not the only project that I am doing, M' Lord, but in terms of this dates, what is important for us is the week ending.' [Emphasis added.]

[46] The methodology that he explained here did not coincide with his previous testimony and that of Mr Moyo – that a process of verification in hierarchical order took place to confirm the correctness of the timesheets the latter which was used to compile the invoices – but is rather a case where the manager at the head office (receiving the timesheets) approved hours which management felt would be sensible after considering the timesheets, what work had to performed and what were performed during the week. The latter which is more in line with the testimony of Mr Chesaina and the fact that the only signature on all of the timesheets is that of Mr Molako, the manager at the head office.

[47] Mindful of the inner conflicting versions, it is important to note that neither the employees' nor the senior manager of the provinces or the provincial leaders' signatures appears on these timesheets.

[48] The latter's signature which is not necessary, according to Mr Nteo, as the mere sending of the timesheets to the head office is proof of verification. He thus stated: '[The provincial leaders] are saying that they are happy with what their teams have done. And once they send them, we take that as an approval *but the approval for purposes of*

completing invoice and record purposes is this done by the office of the project management.' [Emphasis added.]

[49] One would have expected, even more so once no agreement could have been reached as proposed by this Court, that Fumile would have called as witness the employees themselves, who performed the work to confirm the correctness of their timesheets. This would also have led to the confirmation of what work (if any) had been performed during the hours claimed in each individual's timesheet(s).

[50] Fumile's failure to lead firsthand evidence regarding the above left the timesheets uncorroborated and empty, which in turn left the value of its claim unproved.

Further interlocutory applications

[51] It need be stated that after the hearing, both parties approached the Court with further applications which delayed judgement in this matter.

[52] Fumile sought to join a party which application was later withdrawn, while the Minister sought to amend their particulars of claim by adding further allegations to paragraph 5.1.4A thereof, and to re-open its case to adduce further evidence in order to counter Fumile's assertions that the work was accepted, approved and incorporated into the financial statements of the Department which was subsequently audited by the Auditor-General, and also tabled at Parlement – assertions which was left unchallenged during the trial.

[53] I have considered all application in line with the evidence tendered and find them without merit, especially due to my findings above.

[54] For this reason, the applications that are left, stands to be dismissed.

Costs

[55] Seeing that both parties failed in their claim(s) I find it fair that neither should be responsible for the other's costs.

Order

[56] In the result the following order is made:

1. The plaintiff's application to amend is dismissed.

2. The plaintiff's application to re-open its case is dismissed.

3. The plaintiff's claim is dismissed.

4. The first defendant's counterclaims are dismissed.

5. Each party to pay its own costs.

[redacted]

AJ le Grange

Acting Judge

APPEARANCES

PLAINTIFF:	HOR Modisa together with P Loselo as instructed by the State Attorneys, Pretoria.
FIRST DEFENDANT:	ME Manala together with BN Rasalanavho as instructed by Matela Sibanyoni & Associates Inc.

SECOND TO SIXTH DEFENDANTS: No appearance.