REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

CASE NO:7126/2021

(1) **REPORTABLE: ~~YES~~ / NO**
(2) **OF INTEREST TO THE JUDGES: ~~YES~~ / NO**
(3) **REVISED.**

Signature [redacted]

Date: 05/09/2025

In the matter between:

MENP TRADING PROJECTS CC **PLAINTIFF**

(Registration number:2007/018258/23)

And

MIMED(PTY)LTD **DEFENDANT**

(Registration number:2014/131627/07)

JUDGMENT

MPHAHLELE AJ

A. INTRODUCTION

[1] This case is concerned with answering whether the Plaintiff MENP Projects cc. is entitled to damages as claimed, On the 10th July 2021, the Plaintiff and Defendant entered into a Service Level Agreement. The said Agreement was termed 'version 1.1', due the parties having concluded an earlier version of the Agreement on the 16th May 2019. The Agreement between the parties was for duration of 12 months (twelve) months, whereafter it could be automatically renewed unless terminated with 60 *(sixty)* days' notice. The Plaintiff was at all times represented by Mr. Mziwandile Nombula, who is the director of MENP Trading Projects.

[2] In terms of the Agreement overview, the Plaintiff was appointed to provide the Defendant Mimed (Pty)Ltd with Radiology services to support and sustain occupational health services of Mimed. The dispute arose after Mimed Pty Ltd emailed and terminated the Agreement on the 19th July 2021, which notice was signed by Dr. Michael Dzivhani the Director of Mimed (Pty) Ltd. The Plaintiff proceeded with claim A, where Claim B was conceded and not in dispute.

B. BACKROUND

[4] The Agreement entered between the parties was for a period of from the 01st July 2021 and was valid for a period of 12 month and reviewed once a year, with both parties responsible for the facilitation. The Agreement was for the rendering of Radiology services. The services covered by the Agreement included Primary health Radiology services; Occupational Health Radiology Services; Radiology Reports on all Primary Radiology Services; IOD (Injury on Duty) Radiology Services.

[5] Mimed had the responsibility to ensure payment of all support costs and make available Mimed (Pty) Ltd representative when resolving a service-related incidents. MENP Trading Projects was responsible for meeting response times associated with service - related incidents; Appropriate notification to Mimed Ltd (Pty) Ltd for all scheduled maintance; Ensuring that resources are available for all requests by Employer.

[6] The Agreement had Annexures which specified general information as Schedule 1, which specified the duration of 12 (Twelve months) starting on the 01st July 2021 with end date of 30 June 2022.The Notice termination date of 60 *(Sixty)* days, and the Notice of renewal also 60 *(Sixty)* days. Annexure B of the agreement provided for rates while 'Annexure C' provided for the rates payable. Which will appear later to be interpreted differently by the parties.

[7] According to clause 1.1 on Annexure B, which contained the rates applicable in the contact that-:

"1.1.1 MENP will provide ***Occupational Health X-Rays*** *(PA Chest) for capitation fee of R 65000.00(Excluding Vat) per month irrespective of the number of clients referred for Black Chrome Mine employees".*

[8] According to clause 1.2 **Primary Health X-Rays,** which clause provided that-:

"'1.2.1 All primary health -Rays will be treated privately and MENP Trading projects is responsible for claiming from patients or third parties (Medical Aid) MENP Trading Projects will use its normal X-Ray price list. Discounts will be negotiated between MENP and Patient".

[9] The Plaintiff's Claim is founded on the fact that the Defendant had not given the appropriate Notice in line with the Agreement and further that the Plaintiff suffered damaged as a result of the termination of the agreement. It is the plaintiff's submission that: The Plaintiff provided the Defendant with operational facilities; X-ray room matching radiation board standards, lead linings, doors and windows which would remain the property of the Plaintiff. The Defendant was to provide the electricity, water, in-house cleaning services, landline phones and internet as well as maintenance. The X-ray equipment was maintained by the Plaintiff as it was its X-ray equipment, as specialised technicians were required and booked in advance to service X-ray equipment.

[10] The Plaintiff therefore claimed the amount of R780 000.00 *(Seven hundred and Eighty Rands)* from the Defendant due to the unlawful termination of the Agreement, in that the Defendant failed alternatively refused to afford the Plaintiff 60 (sixty) days termination Notice period as stipulated in the Agreement. This amount is calculated based on the R65 000.00 (sixty-five thousand rands) per month capacitation fee multiplied by the 12 (twelve) month period.

[11] The Plaintiff submitted that the fact that Black Chrome Mine was undergoing liquidation is not Force Majeure event in terms of the Agreement between the Plaintiff and Defendant, but in the submission acknowledge that the liquidation of the company is rather something that makes it difficult or uneconomical for the Defendant to perform.

C. MERITS

[12] The Defendant raised the following defenses:

a. Force Majeure -The Defendant's raised the defence that it was impossible to perform in terms of the contract. The impossibility was resulted in the Black Chrome mine closure and liquidation.

b. It is further the Defendant's submission that the Agreement entered does not contain a clause bearing the risk of impossibility.

[13] I have looked into the sequence of events leading to the termination of Agreement as testified by the both the Plaintiff and Defendant. The Defendant had written a letter to the Plaintiff on the 19th July 2021, the letter addressed to MENP Trading Projects and addressed to Mr. Nombula which on paragraph 1 & 2 of the Letter reads:

[14] *"We regret to inform you that we will no longer be needing your services in terms of the SLA Agreement in place with MIMED (Pty) Ltd effective by July 2021. The decision to terminate I on the basis of a force majeure events occurring at Sail Consulting (Pty) Ltd known to you as Black Chrome Mine. After receiving instant and unexpected notification form them indicating they are undergoing liquidation at this current moment, we fear that it will no longer be relevant for Mimed to sustain the SLA Agreement in place as the required services were mainly on the basis of our agreement with the mine".*

It is important to note that the contents of the letter and the termination of the SLA are common cause to the parties as well as the termination letter.

[15] The Defendant led evidence by Dr. Dzivhani who is the sole Director of Mimed (Pty) Ltd led evidence for the Plaintiff and testified that his company did enter into an agreement with MENP Trading Projects. He is a qualified Doctor with medical degree and a Master's in Business. the company Mimed was awarded a contract to render occupational services to Black Chrome Mine and a service of a Radiographer was required. As a result of the contract an earlier version of the

contract was entered between the parties, which was termed Version 1.0 entered in 2019 and that version is not in dispute.

[16] According to him he had admitted to knowledge of all of the terms of Agreement between his company and the Plaintiff. However, the dispute arose out of the Capitation fee clause, according to him the capitation fee clause was only for Black Chrome mine. Accordingly, if the contract between Mimed and Black Chrome Mine is terminated, the agreement between the Plaintiff and Defendant would not be possible to maintain a monthly capitation fee of R 65000.00(Sixty-Five Thousand Rands) monthly. It is important to note that the defendant did request the meeting to discuss further meeting with the Plaintiff to discuss further services that may be required which clause read:

"However, we kindly request a meeting a meeting wherein we may sit and discuss requirements of your services on the basis of the limited requirements we are anticipating in the coming months".

The evidence provided to this court is that there was never any meeting between the Parties regarding the contents of the Contract after the Notice.

[17] According to the Defendant, there were various patients to be assisted under the contract, which were the Black Chrome Mine Clients and other Patients, who will be billed privately either through IOD (Injury on Duty) procedures and others through direct cash payments directly to the plaintiff. The aspect of the billing and

the monthly Capitation fee(retainer) was the main dispute as the Plaintiff had testified that the Capitation fee was applicable to all patients irrespective of whether the patients were from black chrome mine or not.

[18] During Cross-Examination, the Plaintiff when asked about the various cash payments received, the Plaintiff confirmed that there were certain cash payments received from various other patients which either paid cash or by medical aid. This was shown on the sample of schedule of patients attended to by Mimed Trading Projects. (P 76 -Trial bundle)

LIQUIDATION OF BLACK CHROME MINE

[19] The Defendant raised a defence of *Force Majeure* and submitted that the impending liquidation of Black Chrome mine made it impossible to perform, according to Dr. Dzivhani the agreement with MENP Trading Projects became impossible to perform due to the unforeseen circumstances which occurred at Black Chrome Mine (BCM), when he was advised by the nurses that were placed at the Black Chrome Mine that the gates were closed. It later appeared that the gates were closed due to the liquidation of the mine. A letter dated 21st July 2021 from Metrust Liquidators was referred to stating the following:

"SAIL CONTRACTING (PTY)LTD (IN LIQUIDATION)

We confirm that the above company was placed in liquidation on the 05th July 2021 and Klein was the appointed as a joint liquidator with the Master of the High Court, *together with K. Monyela, YM Hassen Harms and Hajee-Osman. A provisional certificate of Appointment was issued by the Master".*

[20] The Liquidation of Sail Contracting which was trading as Black Chrome Mine had affected the agreement between the Plaintiff and the Defendant in that the Defendant would not have patients to refer to the Plaintiff under the capitation fee, according to the Defendant. There was an acknowledgement that the closure of Sail Contracting was not going to affect other cash paying patients, only the Black Chrome Mine patients were affected. The defendant did acknowledge that private patients and other cash paying patients were not affected by the closure. He further confirmed that after the closure of Black Chrome Mine, the patients that were referred to the Plaintiff were primary health care patients. It was the plaintiff's evidence that he was not forced to move, however, the Plaintiff moved his property from the venue on his own as it was not going to economical for him to proceed to service only private patients.

[21] The question that is with the court is whether the Capitation fee was for the whole Agreement or only Black Chrome Mine? To answer that I had a look into the payment clauses in the Agreement. According to clause 1.1 on Annexure B, which contained the rates applicable in the contact that-:

*"1.1.1 MENP will provide **Occupational Health X-Rays** (PA Chest) for Capitation fee of R 65000.00(Excluding Vat) per month irrespective of the number of clients referred for Black Chrome Mine employees".*

I do accept that the Defendant's version that the Capitation Fee of R 65000.00 was for Black Chrome Mine Employees as stipulated. The impending Liquidation of the Black Chrome Mine affect the performance and Rates in line with The Agreement? And whether it made it impossible to still perform in line with the Capitation Fee Clause in the Agreement? From the Agreement Clause on rates on Annexure B, I am convinced that there were different rates from 1.1 to 1.4 being Occupational Health X-rays (BCM); Primary Health X-rays (Private Patients); IOD X-Rays (IOD)

[22] The test for Force Majeure is clearly stipulated in the case of *Nuclear Fuels Corporation of SA (Pty) Ltd. v Orda Ag* where the Learned Judge placed a test on foreseeability of impossibility to perform cited **Bischofberger v Van Eyk <u>1987 (2) SA 607</u> (W) at 611 B-D:**

"*When the Court has to decide on the effect of impossibility of performance on a contract, the Court should first have regard to the general rule that impossibility of performance does in general excuse the performance of a contract, but does not do so in all cases, and must then look to the nature of the contract, the relation of the parties, the circumstances of the case and the nature of the impossibility to see whether the general rule ought, in the particular circumstances of the case, to be applied. In this connection regard must be had not only to the nature of the contract, but also to the causes of the impossibility. If the causes were in the contemplation of the parties, they are generally speaking* *bound by the contract. If, on the contrary, they were such as no human foresight could have foreseen, the obligations under the contract are extinguished."*[1]

[23] Upon closer look into the Agreement entered between the parties and the evidence presented, there could have not been a foresight by the Defendant that Black Chrome Mine would be liquidated. It is clear that no termination clause was not included in the Agreement only termination Notice Period. The termination clause would have made the Agreement easy to implement where either party wishes to terminate the Agreement. It has been common to the parties that the Notice Period is 60 *(Sixty)* Days.

D. QUANTUM

[24] The Plaintiff's claim B is for an amount of R780 000.00 (*seven hundred and eighty rands*) from the Defendant due to the unlawful termination of the Agreement, this amount was calculated based on the R65 000.00 (sixty-five thousand rands) per month which was Capitation fee multiplied by 12 (twelve) month period.

[25] I find that the Plaintiff did not prove that damages in the amount of R 780 000.00 were suffered. The agreement was signed on the 01 July 2021 by the parties and the Notice of termination dated 19th July 2021.Although in the evidence

[1] (Nuclelar Fuels Corporation of SA (Pty) Ltd. v Orda Ag (412/94) [1996] ZASCA 108; 1996 (4) SA 1190 (SCA); [1997] 1 All SA 11 (A); (25 September 1996), 1996)

presented in court, the plaintiff pointed that there were other services rendered after the termination date, It became clear that those services were arising from the contract but not the Black Chrome mine patients. However, I find that the Defendant was obligated under the Agreement to give the Plaintiff 60 Days' Notice of the termination on reasons related to the liquidation of Black Chrome Mine.

[26] I hereby make the following Orders:

E. ORDER

CLAIM A

i. The claim of R 780 000.00 does not succeed

ii. The plaintiff's alternative relief does succeed as far as it relates to Notice Period

iii. The Defendant is ordered to pay the Plaintiff an amount of R 130 000.00 *(One Hundred and Thirty Thousand Rands)*

iv. Interest at an applicable rate per annum *Temporae morae*

v. Cost of suit on attorney and own client scale

M.A. MPHAHLELE

ACTING JUDGE OF THE HIGH COURT,

LIMPOPO DIVISION, POLOKWANE

APPEARANCES

HEARD ON	: 25TH MARCH 2025
JUDGMENT DELIVERED ON	: JUNE 2025
COUNSEL FOR THE PLAINTIFF	: ADV D. STRYDOM RIVONIA GROUP OF ADVOCATES
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COUNSEL FOR THE DEFENDANT	: ADV J VAN ROOYEN
INSTRUCTED BY	: KABELO MAFA ATTORNEYS INC