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**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION - MAHIKENG**

CASE NO: 1576/2021

Reportable: **No**

Circulate to Judges: **No**

Circulate to Magistrates: **No**

Circulate to Regional Magistrates: **No**

In the matter between:

MAROLE–NAMENG TRADING ENTERPRISE CC PLAINTIFF

and

TEN FLAGS THEME PARK (PTY) LTD

DEFENDANT

Coram: **MASIKE AJ**

*Judgment is handed down electronically by distribution to the parties' legal representatives by e-mail. The date that the judgment is deemed to be handed down is **26 JANUARY 2026 at 15h00.***

ORDER

- (i) The defendant is to pay to the plaintiff R447 679.34.
- (ii) The defendant is to pay the plaintiff an amount of R6 890.00.
- (iii) Interest on the above amounts at the prescribed *mora* rate from date of service of the summons on 29 October 2021 to date of final payment.
- (iv) The defendant's counter claim is dismissed.
- (v) The defendant to pay the costs of suit on a party and party scale which shall include the costs of counsel on scale "A".

JUDGMENT

MASIKE AJ

INTRODUCTION

- [1] Plaintiff's claim against the defendant is for R554 237.94 for services rendered by the plaintiff to the defendant at the specific request of the employees and or agents of the defendant. The plaintiff further claims R6 890.00 for goods sold and delivered by the plaintiff to the defendant at the specific request and or insistence of the defendant.

THE PARTIES

- [2] The plaintiff is Marole – Nameng Trading Enterprise CC, a close corporation with limited liability, duly registered in terms of the statutes of the Republic of South Africa, with principal place of business at Farm Karussel, 5[...] R[...] Road, Rustenburg.
- [3] The defendant is Ten Flags Theme Park (Pty) Ltd (Registration number: 2019/627018/07), a private company with limited liability duly registered and incorporated in terms of the statutes of the Republic of South Africa, with registered address at plot 4[...], Waterkloof, Rustenburg, North West Province.

BACKGROUND FACTS

[4] Plaintiff alleges that on or about September 2020 and at the registered address of the defendant, the plaintiff duly represented by M Malesa (“Malesa”) and the defendant duly represented by E Lottering (“Lottering”) and T Tshepe (“Tshepe”), entered into an oral agreement in terms of which:

- 4.1 The plaintiff would provide landscaping and plant hire services to the defendant.
- 4.2 Plaintiff would provide written quotation to the defendant indicating the scope and services and amounts payable for relevant services required.
- 4.3 Upon receiving confirmation from the defendant’s representative that the quotation is acceptable, plaintiff would commence with irrigation of the plant hire services.
- 4.4 Upon conclusion of the relevant services as indicated in the quotation, plaintiff will deliver to the defendant a tax invoice confirming the amount payable by defendant to the plaintiff.
- 4.5 Invoices to the defendant would be payable upon delivery.

- [5] It is the pleaded case of the plaintiff that from September 2020 to December 2020, the plaintiff performed in terms of the agreement and Malesa delivered four written quotations to Lottering, an employee of the defendant.
- [6] It is the pleaded case of the plaintiff that Lottering informed Malesa on the dates on which the quotations were delivered to him, that the quotations are acceptable and the plaintiff should proceed to render services as per the quotations.
- [7] The plaintiff performed in terms of the agreement and from October 2020 to January 2021, plaintiff caused to be delivered to Lottering, the employee of the defendant, four tax invoices. The total amount claimed in the four tax invoices was R1 087 347.94.
- [8] It is alleged that the defendant despite having received the tax invoices has failed and or refused to pay the claimed amounts in terms of the oral agreement entered into between the plaintiff and the defendant. It is alleged that the defendant only affected payment to the plaintiff in the amount of R540 000.00 with the balance due and payable by the defendant to the plaintiff in the amount of R547 347.94.
- [9] The second claim of the plaintiff against the defendant is for goods sold and delivered by the plaintiff to the defendant at the instance and specific request of the defendant in the amount of R6 890.00.
- [10] The defendant defended the matter and filed a counterclaim. The defendant in its plea to the plaintiff's particulars of claim, admits the plaintiff rendered landscaping services from September 2020 to January

2021 and the services were paid for. The defendant further pleaded that the plaintiff exaggerated the services it rendered and overpriced its services.

[11] The defendant pleaded that Lottering had no authority to accept quotations and only Tshepe had the authority to accept quotations. As it relates to the second claim, the defendant pleaded that another service provider was paid for the goods that the plaintiff sold to the defendant.

[12] In the defendants counterclaim, it is alleged that the plaintiff and defendant entered into an agreement in terms of which the plaintiff would supply 100 square meter wooden fence and plantation of palm trees. It is the case of the defendant that the plaintiff failed to render services in a competent and workmanlike manner as the fences were not properly installed, were blown away by the wind within a period of two months from the date of installation. The palm trees were not properly planted they withered within a period of two months.

[13] The defendant claims an amount of R155 415.00 for the installation and supply of the 100 square meter wooden fence and plantation of the palm trees and return of the damaged wooden fence.

EVIDENCE OF THE PLAINTIFF

[14] The plaintiff called one witness, Moses Malesa (“Malesa”). Malesa testified that he is the sole member of the plaintiff. The plaintiff renders landscaping and plant hire services. Malesa told the Court that he was informed by Tshepe that he would be reporting to Lottering, Lottering

would tell him where to work, he would give invoices to Lottering and the invoices would be paid after he gave the invoices to Lottering.

[15] Malesa told the Court the procedure followed was that the plaintiff would render the services, he would give the invoices to Lottering after the services were rendered, Lottering would approve that the service had been rendered and he would sign off the necessary documents, payments would then be made to the plaintiff.

[16] Malesa was referred to the trial bundle, Exhibit "A" in the proceedings. He confirmed the quotations at pages 1, 2, 3 and 4 were verbally approved by Lottering. At page 5 of Exhibit "A" is an invoice which was allegedly signed by Lottering. The invoice is for R324 415.00

[17] On the invoice at page 5 of Exhibit "A", Malesa testified that the plaintiff was paid R229 000.00. Malesa testified that he was told by Lottering that the defendant was waiting for payments and the balance of the invoice would be paid. At page 6 Malesa was referred to an invoice of R291 065.00. Malesa testified that on this invoice, the defendant paid only R291 000,00, the invoice was signed by Lottering. There is a balance of R65.00 on this invoice.

[18] Page 7 of Exhibit "A" is an invoice of R292 352.94, it was signed by Lottering. No payment has been received in respect of this invoice. Lottering told Malesa that they were waiting for payment. Page 8 is an invoice of R179 515.00, at the bottom of the invoice, in manuscript it is written R285 000.00.

- [19] On page 10 of Exhibit “A” is a consolidated statement which was given to Lottering. According to the consolidated statement, the defendant was as of 18 August 2021, indebted to the plaintiff in the amount of R554 237.94. At page 9 of Exhibit “A” is the invoice from Obaro. Malesa testified that Lottering requested the plaintiff use its account with Obaro to purchase irrigation material and the defendant would refund the purchase price of the irrigation material. The material cost R6 890.00, the defendant never refunded the amount. Malesa testified that the defendant never caused for the plaintiff to be told about the defects with the fence or anything about the palm trees.
- [20] Under cross examination, it was put to Malesa that Malesa was supposed to have approached Tshepe for approval of the payments. Melesa insisted that he was told that Lottering was the person he had to deal with on the project.
- [21] Malesa testified that he was supposed to plant grass on the area as per the quotations and the invoices, this came to 14750m². It was put to Malesa that the defendant disputes that he planted the grass as claimed.
- [22] In re – examination Malesa testified that Tshepe was sometimes on site and sometimes he was not there. The plaintiff then closed its case without calling further witnesses.
- [23] The defendant applied for absolution. In the application for absolution from the instance Advocate Wessels who appeared for the defendant submitted that the information of Malesa relied on Lottering and Lottering was not called as a witness, the signature of Lottering has not been confirmed and the claimed amounts do not collate. I refused the

application for absolution and indicated that reasons for the refusal would be provided later.

DEFENDANTS CASE

[24] The defendant called Thapelo Tshepe (“Tshepe”). Tshepe testified that he is an engineer by profession and sole director of the defendant. Lottering was the one who brought the plaintiff to the defendant, the plaintiff was supposed to install the irrigation system.

[25] Lottering was working with two managers. The managers were the ones who approved the work. Tshepe testified that the procedure for processing payments was for the invoices to be given to the supervisor, then taken to the financial manager. If the financial manager is not happy, he does not pay the invoice and tells the supervisor what must be fixed before payment could be released. Tshepe disputed the claimed area that the plaintiff worked on to plant the grass. He said the area was just 2 hectares. Tshepe testified that the area was measured and found to be 2000m². This was troubling because the plea of the defendant reads that the square meters of landscaping service provided by plaintiff is 9817.5m² as opposed to 14750m² as suggested in the quotation.

[26] The defendant then applied for an inspection *in loco* to be conducted on the area on which grass was planted. I granted the application. The matter was postponed to 13 December 2024 at Ten Flags Theme Park (“Ten Flags”) for the inspection *in loco*.

THE INSPECTION IN LOCO

- [27] The inspection *in loco* was held on 13 December 2024, representatives of the plaintiff and the defendant were present at Ten Flags to conduct the inspection *in loco*. Tshepe and Malesa were also present. Measurements of the agreed area on which the plaintiff planted grass were taken and the disputed area. It was agreed between the parties that a joint minute of the inspection *in loco* would be prepared and filed. This was attended to. I am grateful to the attorneys of the plaintiff and the defendant in this regard. The total agreed measured square meters the plaintiff planted grass was 11812.09m².
- [28] The plaintiff, after the inspection *in loco* was held, applied for an amendment to its particulars of claim. The defendant opposed the application. A formal application for amendment was brought before this Court, it was argued and I granted the application.
- [29] I granted the application for amendment of the reference to the square meters in the particulars of claim and the claimed amount because in my view there could not have been any prejudice to the defendant. The defendant disputed the alleged square meters as contained in the unamended particulars of claim of the plaintiff. A finding that the defendant was correct that the plaintiff had not measured the area correctly, would not have amounted in the claim of the plaintiff being dismissed. At best it would have resulted in a reduction of the plaintiff's claim to the area that it was found to have worked on, this applied equally to the claimed amount.

[30] The defendant in my view would not be prejudiced by the intended amendment as it would be entitled to make consequential changes to its plea, the amendment did not in any way affect the counterclaim of the defendant and if it was found that the amendment extinguished the plaintiff's claim, the defendant would be entitled to costs of the action. This was not the case.

[31] The plaintiff affected the amendment and the trial continued on 3 June 2025. The defendant elected not to amend its plea despite having been served with the amended particulars of claim. The further evidence of Tshepe was led.

[32] Tshepe testified that Lottering was being investigated because he appeared to be living beyond his means. Lottering had told the financial director that Tshepe told him to process certain payments and pay the plaintiff. Tshepe denied the amounts reflected in the quotations and invoices. He denied figures that referred to plant hire. He further stated that there was some grass that was removed and planted near the pool, but the plaintiff had claimed to have planted that grass. The grass was removed from the warehouse area and re-planted near the pool, the plaintiff should have claimed for labour, not for the grass. He could not remember the measurements relating to the grass. Tshepe further testified that he did not remember the plaintiff planting grass at the camping site.

[33] Under cross examination it was put to Tshepe that the plant hire referred to the trucks that brought the grass to Ten Flags. He conceded this was correct. Tshepe conceded that he was not present when the grass was being planted at the pool area, he was not present when the grass was being removed from the warehouse area. He never was presented with an

invoice for removing the grass from the warehouse area and planting it at the pool area.

[34] A number of photographs taken when the grass was being planted by employees of the plaintiff were shown to Tshepe and presented to the Court. Tshepe indicated he could not remember or he was not certain if grass was planted on those areas. In some instances, he testified that he was told that grass was planted in those areas by “my guys”.

[35] Tshepe was then referred to the whatsapp bundle. Tshepe admitted that the whatsapp bundle contained communication between himself and Malesa at pages 1 to 22. Tshepe sought to clarify the whatsapp communication by saying he was told to keep communicating with Melsa and not make him aware that Lottering was being investigated. It was pointed out to Tshepe that in the whatsapp communication, Tshepe never disputed the defendant being indebted to the plaintiff.

[36] In re – examination Tshepe said that the financial manager and the HR manager were investigating Lottering, that is why Tshepe continued speaking with Malesa even though they disputed being indebted to the plaintiff. The financial manager was unfortunately late.

[37] At the conclusion of Tshepe’s evidence, the Court enquired if the HR manager was still employed by the defendant. Tshepe confirmed that this was the position. The defendant closed its case without calling any witnesses.

ANALYSIS

- [38] The issue for determination in this matter is whether the plaintiff rendered services to the defendant as claimed in the amended particulars of claim and as per the evidence of Malesa. The evidence of Malesa was to the point. A record of photographs was taken when the grass was being planted, it was presented to the Court and shown to Tshepe for his comments. The photographs depict various areas of Ten Flags when the grass was being planted by employees of the plaintiff.
- [39] In my view, Tshepe was not the correct witness to have been called to deal with the issue of where the grass was planted. His evidence for the most part consisted of him saying he does not recall, he was not there when a certain event took place or he was told by “my guys” that grass was planted there.
- [40] The defendant denies being indebted to the plaintiff and Tshepe testified that the plaintiff exaggerated the invoices but some of the invoices of the plaintiff were paid, and it is alleged that they were signed off by Lottering. If Tshepe was the only person who could authorise payments. How does Tshepe explain the partial payments made for the invoices dated 23 October 2020, 19 November 2020 and 30 January 2021. All the quotations relating to those invoices and the invoices themselves were signed by Lottering and not Tshepe.
- [41] A plaintiff who claims payment has to allege a failure by the defendant to make payment. It is however required of a defendant, who wishes to rely on a payment in defence, to allege and prove the fact of payment.¹

¹ *Pillay v Krishna* 1946 AD at 946; *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (In Liquidation)* [1997] ZASCA 94; 1998 (1) SA 811 (SCA) at para 823D)

[42] It is not in dispute that employees of the plaintiff were at Ten Flags on the dates the plaintiff alleges. In my view, within a balance of probabilities, it is more probable that the plaintiff rendered the services as claimed in the amended particulars of claim and for the amounts claimed in the amended particulars of claim.

[43] I am not convinced that when Tshepe admitted to Malesa that the defendant is indebted to the plaintiff this was all a ploy on instructions of the erstwhile financial manager and the HR manager. The financial manager is late according to Tshepe, but the HR manager is very much alive, and he was not called as a witness to corroborate the version of Tshepe. Tshepe even said the HR manager is still employed by the defendant.

[44] In *Shishonga v Minister of Justice and Constitutional Development and Another*² the court said the following:

"A party's failure to call available witnesses may in exceptional circumstances lead to an adverse inference being drawn from such failure against the party concerned. The extent to which such an inference can be drawn will depend on the circumstances of the case. The Court should, inter alia, consider the following: Was the party concerned perhaps under erroneous but bona fide impression that he had proved his case and that there was therefore no need to have called the witness? Is there a possibility that the party concerned believed that the potential witness was biased, hostile or unreliable?"

[45] I am of the view there is no reason for this Court not to draw an adverse inference against the case of the defendant for failing to call the HR manager to corroborate what Tshepe had said regarding the whatsapp communications, from the reading of the whatsapp communication,

² 2007 (4) SA 135 (LC) at paragraph 112

Tshepe admitted the defendant is indebted to the plaintiff, requests for extensions were made for payment by Tshepe. Malesa event went so far as to negotiate for the defendant to pay a reduced amount on the monies owing to the plaintiff.

[46] As it relates to the plaintiff's second claim, the evidence of Tshepe does not challenge this claim. I have further noted that no evidence was led in support of the counterclaim of the defendant. The counter claim of the defendant must accordingly fail.

[47] I refused the application for absolution from the instance because there was no merit to the argument by Advocate Wessels that Lottering had not been called as a witness, that the signature on the invoices it was not verified to be that of Lottering. What Advocate Wessels missed is, some invoices of the plaintiff were partly paid, and others were not paid at all. It was for the defendant to answer on why the invoices were paid even though it was pleaded that it was only Tshepe who could authorise payments and the invoices were never presented to him. There was a case for the defendant to answer.

[48] Advocate Wessels in her heads of argument contends that the plaintiff does not set out how the amount of R447 679.35 was arrived at in the amended particulars of claim. Advocate Wessels in her heads of argument contends that it appears the figure was arrived at by dividing the amount R447 679.35 with the area of 11 812.09m². Advocate Wessels contends that for the planting of the grass it comes down to R37.50 per/m² whereas in terms of the agreement it was agreed at R29.50 per/m² and because the plaintiff has failed to set out how the amended claimed amount of R447 679.35 was arrived at, plaintiff's claim must be dismissed.

- [49] The contention by Advocate Wessels is clearly wrong. The quotation and invoices were not made up of the agreed figure of planting grass per square meter alone, they also included the rates for plant hire, the rates for supplying of trees, irrigation labour and the supply of wooden fence.
- [50] The plaintiff deducted from the initial claimed area of 14750m² the agreed total area in which grass was planted which is 11812.09m² the difference is 2937.91m². The plaintiff then multiplied the area of 2937.91m² by R29,50. The R29.50 is the agreed rate per square meter for planting grass. This gives one the figure to R86 668.35 excluding VAT. When VAT at 15% (percent) is added to the figure of R86 668.35 it amounts to R99 668.60. When R99 668.60 is deducted from the initial claimed amount of R1 087347.94 this leaves an amount of R987 679.34 when one deducts the amount paid by the defendant to the plaintiff of R540 000.00 this leaves an amount of R447 679.34 which is the claimed amount in the amended particulars of claim. The plaintiffs claim resultantly, must succeed.

COSTS

- [51] It is a trite principle in our jurisprudence that costs follow the cause, and I have not found any reason to deviate from this principle. The trial of this matter was lengthy, it was of importance to the plaintiff, but it was not complex. In exercising my discretion in awarding costs and considering the scale applicable, I have not found any reason to order costs on a scale other than scale “A”.
- [50] Resultantly, the following order is made:

ORDER

- (i) The defendant is to pay the plaintiff R447 679.34.
- (ii) The defendant is to pay the plaintiff an amount of R6 890.00.
- (iii) Interest on the above amounts at the prescribed *mora* rate from date of service of the summons on 29 October 2021 to date of final payment.
- (iv) The defendant's counterclaim is dismissed.
- (v) The defendant is to pay the costs of suit on a party and party scale which shall include the costs of counsel on scale "A".

T MASIKE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

APPEARANCES

For the Plaintiff:	Mr N J Esterhuyse
Instructed by:	Du Plessis van Der WestHuizen Inc C/o LFS Attorneys Inc Mahikeng
For the Defendant:	Advocate C Wessels

Instructed by: Pule Attorneys
C/o Motshabi Attorneys
Mahikeng

Date Heard : 16 July 2025

Date Handed Down: 25 January 2026