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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO.: 4835/2024

In the matter between:

THUSE HOLDINGS (PTY) LTD

Plaintiff

and

**NATIONAL DEPARTMENT OF PUBLIC WORKS
AND INFRASTRUCTURE**

Defendant

JUDGMENT

MHAMBI AJ

Introduction

[1] This is a claim by the plaintiff, Thuse Holdings Pty Ltd, seeking payment of its invoices for the services rendered to the defendant. The amount claimed in the particulars of claim is the sum of R610 650.00.

[2] It appears *ex facie* the pleadings that the plaintiff submitted two bids for the respective tenders advertised by the defendant. On 26 June 2023, the plaintiff was offered the tender, and they subsequently accepted the offer. This tender relates to services to be rendered at Matatiele Magistrates ' Court, the first tender.

[3] The second tender related to the services to be rendered at a State house at 4[...], D[...] T[...] Drive, Mthatha. The tender was offered and subsequently accepted by the plaintiff on 17 July 2023.

[4] Both tenders were for a period of twenty-four months from the date of acceptance of the tender.

[5] In both tenders, the plaintiff was issued an appointment letter. It is common cause between the parties that there was a contract between the parties. The plaintiff's invoices are for the months between October 2023 and February 2024.

[6] The defendant denies liability to pay the plaintiff's invoices, and pleads that the defendant did not render the services as it has alleged in the particulars of claim. The defendant further amplifies its denial of liability and states that the

plaintiff did not render services according to the scope of work agreed upon between the two parties.

[7] The first tender shall hereinafter be referred to as ‘Matatiele Magistrates Court’, the second tender shall hereinafter be referred to as ‘Don Thomson’.

[8] This court has to determine whether the defendant is liable to pay the plaintiff’s invoices, and if so, how much shall be paid.

[9] The plaintiff’s claim may be classified as a contractual claim. It is trite that in a contractual claim, once a plaintiff has established that there is a basis for a payment, a defendant attracts a duty of rebuttal. In *Skjelbreds Redire A/S v Heartless*,¹ it was held:

“The true position as to the question of *onus* was that the respondent bore the overall burden of showing that it is possessed of rights which entitled it to claim the attachment order: that overall *onus* remained on it throughout. However, since the respondent is armed with a written agreement which appeared on the face of it to confer such rights on it, the appellants bore the burden (‘weerlegginglas’) of rebutting that *prima facie* case.”

[10] In evidence, the plaintiff testified that: soon after signing the acceptance of the tender offer, the company started to perform its services. The plaintiff was contracted to do grass cutting in both contracts. During October 2023, it submitted

¹ 1982 (2) SA 710 (A).

an invoice by emailing the email address of the defendant designated to receive the invoices. It was the requirement in the contract that the job-card was meant to be signed by the designated officer of the defendant, and the register reflecting the plaintiff's employee attendances at the contract site.

[11] The plaintiff has attached the invoices, unsigned job-cards and the registers for the months October 2023 to December 2023, January to February 2024. He testified that all these invoices were not paid by the defendant. The plaintiff maintained that it rendered the services at all material times until it decided to stop rendering services due to nonpayment. The plaintiff denied that it rendered its services as alleged by the defendant. It is the plaintiff's evidence that after it raised concerns about non-payment, the defendant refused to pay on the basis that the plaintiff did not complete its work, it failed to collect the refuse or garbage out of the grass cutting. From the evidence that was not part of the scope of work, it has to be rendered to the defendant.

[12] During the cross-examination, the plaintiff conceded that the scope of work requires it to do refuse collection after grass-cutting. It was further conceded that failure to do so amounted to non-completion of the services rendered or performance of duties on its part. The scope of work is contained in the Service Level Agreement signed by the parties.

[13] In respect of the Don- Thompson contract, the plaintiff testified that services could not be rendered for the month of January 2024, due to the fact that, when its employees were on the site to collect the garbage or refuse, it appeared there was another service provider employed by the defendant on the site. This point was communicated to the defendant's relevant employees; however, there was no response confirming site clearance for the plaintiff to proceed and work. It was then conceded that, for January 2024, there were no services rendered by the plaintiff at the Don-Thompson site. In fact, it appeared during cross- examination that the other service provider had already rendered the services and completed the unfinished work by the plaintiff. Don-Thompson is the second contract.

[14] In an attempt to rebut the plaintiff's case, the defendant testified that, from the outset, the plaintiff did not perform or render its services according to the scope of work agreed by the parties. The plaintiff did not attend to the site as claimed in the registers attached to its invoices. The court was pointed to the defendant's own registers that appear to have few entries of the plaintiff in each month claimed. It was testified further that a series of engagement meetings were held with the plaintiff, the purpose of which was to afford the plaintiff an opportunity to complete its work before payment was authorised. There was a series of email communications, the purpose of which was for the plaintiff to remedy several

breaches in the contract. In all attempts, the plaintiff undertook to remedy the breaches but ultimately failed to do so.

[15] The defendant acknowledged non-payment; however, he says that it was due to no unsatisfactory work by the plaintiff.

[16] The defendant confirmed the receipt of the invoices of the plaintiff as alleged, but testified that the plaintiff has not attended to both sites after January 2024, either partially or otherwise. This point is, in fact, not disputed by the plaintiff.

[17] Despite the cross-examination on both sides, the veracity of the plaintiff's breach or non-performance of services, save to say it did not collect the garbage or refuse. It remains unclear exactly how much the plaintiff is entitled to, in respect of the partial rendering of services. The defendant suggested an amount of R17000; however, I am not certain how that figure has been computed. What remains disputed is that the defendant rendered the circumstances impossible for the plaintiff to complete its work.

[18] On this aspect, I put the blame on both counsel for having a helpless cross-examination, respectively. Below, I deal with the purpose and importance of cross-examination as pointed out by a plethora of authorities.

[19] The implications of these kinds of failures were identified in the *President of the Republic of South Africa and others v South African Rugby Football Union and Others*² as follows:

‘The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts. ‘

The Court added the following:³

‘The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence *is* to be challenged but also *how* it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative

² 2000 (1) SA 1 (CC) para 61.

³ Fn 2 *supra* para 63.

evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.”

[20] In *ABSA Brokers (Pty) Ltd v Moshonanana NO and Others*⁴

“It is an essential part of the administration of justice that a cross-examiner must put as much of his case to a witness as concerns that witness (see *Van Tonder v Killian NO en Ander* 1992 (1) SA 67 (T) at 72I). He has not only a right to cross-examination but, indeed, also a responsibility to cross-examine a witness if it is intended to argue later that the evidence of the witness should be rejected. The witness’ attention must first be drawn to a particular point on the basis of which it is intended to suggest that he is not speaking the truth and thereafter be afforded an opportunity of providing an explanation (see *Zwart and Mansell v Snobberie (Cape) (Pty) Ltd* 1984 (1) PH F19 (A)). A failure to cross-examine may, in general, imply an acceptance of the witness’ testimony. In this regard Pretorius has the following to say in ‘*Cross-examination in South African Law*’ Butterworths 1997 p149-150 :

“... it is unjust and unfair not to challenge a witness’s account if offered the opportunity, then later argue – when it is no longer possible for the witness to defend himself or offer an explanation – that his evidence should not be accepted.

...

...It would create an untenable situation if each witness had to be recalled later to respond to claim emerging from the opponent’s case which the witness might be able to

⁴ (2005) 26 ILJ 1652 (LAC) para 39.

elucidate. In the interest of finality and convenience of witnesses, it is clear that all matters must, as far as possible, be dealt with at a single opportunity. There can thus be no doubt that there is a clear responsibility on a cross-examiner to cross-examine if a witness's account is rejected.”

[21] Due to the flaws in the respective cross-examinations, this matter has to be decided based on the contradictory versions between the plaintiff and the defendant. I will do so in line with the principle articulated in *Stellenbosch Farmers' Winery Group Ltd. and Another v Martell & Cie SA and Others*⁵:

“.....The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv)

⁵ 2003 (1) SA 11 (SCA) para 5.

and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[22] During the argument, the plaintiff contended that it had discharged the requisite onus to establish its entitlement to the payment claimed. It was contended that there is no basis for withholding the payments claimed, lastly, that it is the defendant who made the circumstances impossible for it to complete its services under the second contract.

[23] The defendant contended that it relies on the principle of *exception non adimpleti contractus* for withholding the payments due to the plaintiff. It further contended that the plaintiff's version is much more probable than that of the defendant.

[24] Insofar as the two versions, due to the shortfalls in the respective cross-examinations and the principles of evidence analysis I have cited above, I am satisfied that the version of the plaintiff is credible and reliable to discharge the onus of its entitlement to the payment claimed. The second leg is to deal with how much should be paid to the plaintiff, taking into account, first, the conceded partial rendering of services and non-rendering of services for January 2024, second, the unchallenged evidence that in the second contract, Don Thompson's services were rendered by another service provider.

[25] The plaintiff elected not to pursue a claim for the damages for the breach of contract, if any, same as the defendant has not instituted proceedings to claim repudiation of the contract due to breach by the plaintiff. The plaintiff elected to couch its claim as a liquidated one, based on its invoices. The plaintiff is correct in its approach. In *Haynes v King Williamstown Municipality*⁶, it was held that it is permissible for the plaintiff to elect to hold the defendant to his contract and claim performance by him of precisely what he had bound himself to do, or to claim the damages for the breach.

[26] The difficulty I find in the defence of the defendant is that it was not properly pleaded with specific particularity as to in what respect the performance

⁶ 1951 (2) SA 371 (A)

was defective and how much is the reasonable amount the plaintiff is entitled to based on the contended partial performance.

[27] The *SCA* in *Telcorda Technologies Inc v Telkom SA Ltd*⁷ Held that:

“ A defendant who wishes to raise the *exceptio non adimpleti contractus* on the basis of an incomplete tender must particularise in the plea in what respects performance was defective and will ordinarily have to give evidence on this aspect first”

[28] Despite that, the defendant has led uncontroverted evidence to say the partial performance is in respect of refuse or garbage collection, to this extent, the defence of the defendant should only succeed to permit this court to subtract or minus the reasonable amount to cater for the services not rendered by the plaintiff.

[29] In determining the amount to be paid to the plaintiff, I am guided by the following authority.

[30] In *Leymac Distributors Ltd v Hoosen and Another*,⁸ the court concluded that the quantum of damages claimed necessarily has to be assessed by a court on the basis of what the court itself considers to be reasonable, fair and just. The court went on further to say, “*the court cannot assess the quantum of damages in a vacuum. It has to hear evidence...* ”. The quantum of a military claim is regarded as

⁷ [2007 (3) SA 266 (SCA) para 163.

⁸ 1974 (4) SA 524 (D) at 527 F-G

liquidated if, firstly, the amounts thereof have, prior to the application for summary judgment, been agreed upon by the parties. Secondly, if the amount thereof can be readily ascertained by way of simple mathematical calculation or, thirdly, if the amount thereof has been determined by a court of law.⁹

[31] In dismissing the summary judgment application in respect of the towing cost in *Leymac Distributors*¹⁰, case above, Howard J said the following:

“Applying the test which I consider to be the correct one, the plaintiff’s other claim (*b*) is manifestly not a claim for “a liquidated amount in money”. It is for damages in an amount of R80, representing expenditure allegedly incurred by the plaintiff in having the bus towed from Braemar to Durban. Clearly, the amount of these damages will not be liquidated until the Court has assessed the *quantum* thereof, by the exercise of its own judgment on the question whether the alleged expenditure, in whole or in part, was reasonably and necessarily incurred as a result of the first defendant’s breach of contract”

[32] In considering the amount due and payable to the plaintiff, regard must be had to the services not rendered. In doing so, the plaintiff has conceded not to have rendered services for Don-Thompson for January 2024. In respect of Don-Thompson invoices, the plaintiff is not entitled to payment beyond December 2024.

⁹ Van Niekerk Summary Judgement, a Practical Guide, Service Issue 14, 2015, pp 3-7

¹⁰ Fn 8 above at 528E-F.

[33] In respect of the Matatiele contract, there is no evidence to support the proposition that the Plaintiff did not render services for January 2024. The communication between the parties in January 2024 suggests that the plaintiff was afforded seven days to complete the work, in which case the plaintiff, in its evidence, says it complied with the seven-day extension for Matatiele; it only had an issue for Don- Thompson. No version was put to the plaintiff to rebut this evidence; I see no reason to depart from the common principle that evidence not rebutted or challenged during cross-examination is deemed to be accepted.

[34] However, it is uncontested defendant's evidence that at all material times, the plaintiff rendered unsatisfactory and unfinished services. I have not been guided by evidence of both parties or by counsel as to how much should be subtracted as a reasonable and fair amount for the services not rendered in all the invoices. This court is then left with a discretion to subtract a reasonable and fair amount using its own judgment by simple mathematical calculation. In my view, a reduction of 10% from the capital amount to be paid to the plaintiff is reasonable and necessary in the facts of this case. In the amount to appear in the order below, 10% reduction has already been effected. I have done so to avoid further litigation between the parties due to disagreement. In that amount, I have considered the invoices for October to December 2023, and January 2024, only for the Matatiele contract.

[35] The plaintiff's claim succeeds to the extent that 10% is to be deducted from the allowed invoices, and that no payment is to be made for January 2024.

[36] It is apposite for me to stress that, the fact that the plaintiff claim succeeds for the months awarded does not in any way or whatsoever justify the conduct of the plaintiff in not rendering services as agreed in the scope of work. The conduct of the plaintiff is unjust and is against good faith. Good faith is the fundamental principle that underlies the law of contract and is reflected in its rules and doctrines. The principle of *pacta sunt servanda* requires that agreements freely and voluntarily concluded must be honoured. See: *Trustees, Oregon Trust v Beadica* 2019 (4) SA 517 (SCA) at 25.

[37] In relation to the award of costs, I see no reason to depart from the normal principle that costs follow the result, the defendant elected not to cancel the contract in circumstances it had all the facts favourable to do so, other than that, the defendant could have simple offered the plaintiff an amount reasonable for the work it has rendered taking into account the unfinished work, therefore the defendant cannot escape a costs order in the ordinary scale of costs.

Order

[36] In the result, the following order is issued:

1. The defendant is ordered to pay to the plaintiff an amount of **One Hundred and Fourty eight Thousand and Fifty Rands only** (R148,050).
2. The defendant is ordered to pay the plaintiff's costs of suit on scale "A".

M MHAMBI
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Plaintiff : *adv. S. Baleni,*

Instructed by : M. Nkonyeni Inc.

Mthatha

Counsel for the Respondent : *Adv N. Gama*

Instructed by : State Attorney

Mthatha

Heard on : 19 – 20 May 2026

Judgment Delivered on : 02 June 2026