

SOUTH AFRICA / JUDGMENT

Famante Infocast (Pty) Ltd v Mafikeng Local Municipality (150/12) [2017] ZANWHC 93 (19 October 2017) [2017] ZANWHC 93

COURT

North West High Court, Mafikeng

BEFORE

DJAJE

CASE / FILE NUMBER

150/12

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IN
THE HIGH COURT OF SOUTH AFRICA
NORTH
WEST DIVISION, MAHIKENG
Case
Number: 150/12
In

the matter between:

FAMATE
INFOCAST (PTY) LTD
PLAINTIFF
And
MAFIKENG
LOCAL MUNICIPALITY
DEFENDANT

JUDGMENT

DJAJE J

[1] The Plaintiff issued summons against the Defendant for payment of the amount of one million seven hundred and twenty five thousand

(R1 725 000-00) for damages suffered as a result of the repudiation of a contract by the Defendant. The Defendant pleaded

that there was no compliance with the suspensive conditions of the contract by the Plaintiff and therefore the plaintiff is not entitled to any payment.

Plaintiff's evidence

[2] The evidence for the Plaintiff was led through Mr Tebogo Mametja ("Mametja") who is the Managing Director of the Plaintiff. He testified that Plaintiff renders services of revenue enhancement solutions and design payment incentive scheme for municipalities. During March and April 2007 the Defendant issued a tender for payment incentive scheme for the years 2008 and 2009. The Plaintiff submitted a proposal on 25 May 2007 which included the cost of the programme for the duration it was designed for. The costs were stated as R143 750-00 per month for twelve months which totalled R1 725 000-00. The Plaintiff received a letter dated 30 April 2008 signed by Mr H J Smit, the Municipal Manager of the Defendant at that time stating as follows:

"This serves to confirm that a proposal to implement an Incentive Scheme has been awarded to you as per your proposal dated 25th May 2007.

You will be appointed on a 12 months contract (01 June 2008 to 31 May 2009) and at a later stage we will have to enter into a service level agreement. We would also request your kind selves to come and present fully your proposal, in order for us to clarify what's not understood by us fully.

Should you require further information please contact the Acting Head: Income, Mr Maphologela at 018 3890 452."

[3] Thereafter, according to Mametja there was a meeting with one Ms Thandi Modibela ("Thandi") and Mr Maphologela ("Maphologela") who were in the Defendant's financial department regarding information needed by the Plaintiff and to explain further how the programme would be carried out. In his testimony, Mametja stated that the service level agreement was prepared by the Plaintiff and forwarded to the Defendant's Chief Financial Officer, Mr Rantao and Thandi. There was correspondence between the Plaintiff through Mametja and the Defendant through Mr Rantao, Thandi and other officials of the Defendant regarding the data required to implement the programme. On 5 May 2009 the Plaintiff received a faxed letter from the Defendant's Head Legal Services raising certain issues that needed to be corrected in the service level agreement sent by the Plaintiff to the Defendant. The following was stated in the said letter:

“.....Our recommendation regarding the service level agreement between Mafikeng Local Municipality and Famate is as follows.

1. Item 3 (Duration)

The Service Level Agreement must reflect the date of commencement as well last date of the contract. Let's us as far as possible discourage open ended contract.

2. Item 9 (Fees)

Let us have an exact amount on the final service level agreement for the whole period of the agreement.

3. Item 22.1 (General)

The paragraph should be read as “This agreement between Mafikeng Local Municipality and annexed hereto from time to time will constitute the entire agreement between the parties pertaining to the subject matter hereof.

4. Item 24 (Domicilia and Notices)

Rectification of the word “Any notice”

The entire service level agreement is fine.

.....”

[4] Mametja testified that the above corrections were made on the service level agreement and sent back to the Defendant. No other query was received by the Plaintiff concerning the service level agreement. However, the service level agreement was never signed by the Defendant despite all the follow ups made by Mametja on behalf of the Plaintiff. It was Mametja's evidence that whilst waiting for the service level agreement to be signed the Plaintiff was given tasks to perform for the Defendant. The Defendant furnished data on the residents' payment profile in the Municipality to the Plaintiff in order to facilitate the implementation of the project. Defendant also furnished the Plaintiff with a list of its debtors on 23 February 2009. The Plaintiff was requested by the Communications department of the Defendant to prepare a document on “Effective Marketing and Communication Strategy for the Payment Incentive Scheme for Mafikeng Local Municipality” which was duly done.

[5] In his testimony, Mametja stated that when the service level agreement was not signed he asked for intervention from the Mayor and he did not receive any response. Thereafter he spoke to the Municipal Manager who advised him that there were some delays and mentioned that the Defendant would consider extending the period of the contract with Plaintiff. At no time was the Plaintiff advised that there was an issue with the signing of the service level agreement by the Defendant. In March 2009 the Plaintiff sent an invoice to the Defendant's finance department for the work done in the amount of nine hundred and eighty

three thousand two hundred and fifty rand (R983 250-00). The invoice was never queried but no payment was made by the Defendant.

It was his evidence further that the Plaintiff was never advised that there has been no compliance with any conditions of the contract.

Defendant's evidence

- [6] Only the former Municipal Manager of the Defendant, Mr Smit ("Smit"), testified for the Defendant. He was the Municipal Manager for the Defendant from 2006 until 2011. He admitted that he is the one who signed the letter of appointment for the Plaintiff. According to him the letter of appointment dated 30 April 2008 had certain qualifications. The Plaintiff had to do a presentation to all stake holders with an attendance register and a signed service level agreement. In his testimony Smit could not recall if there was any presentation done by the Plaintiff or if he had delegated any junior staff members to engage with the Plaintiff in concluding the terms of the contract. Further that he does not recall seeing or signing any service level agreement prepared by the Plaintiff. It was his evidence that if a service level agreement was not signed then no rights and obligations were established for any of the parties. When asked why the service level agreement was not signed he answered that it was because of the upfront payment clause in the agreement. He however testified that he could not recall if the Plaintiff was ever notified of that.
- [7] During cross examination it was put to Smit that he had accepted the proposal by the Plaintiff which contained benefits to the Defendant and the budget for the project. Further that there was no specific date proposed for the signing of the service level agreement by both parties and no complaints were ever raised about the service level agreement drafted by the Plaintiff except for the corrections suggested by the legal department of the Defendant. Smit could not dispute that Mametja wrote to him enquiring about the commencement of the project and had no response. Further that the Plaintiff did prepare a marketing and communication strategy document for the Defendant as requested by the communications department. The Plaintiff also did analyse the debtor details given by one Mr Pierre Gerrits working for the Defendant and no one complained about the quality of the work done by the Plaintiff. On all these questions, Smit could not respond as he could not recall what took place then.

Issues

- [8] The issue to be determined in this matter is what the implications of the appointment letter dated 30 April 2008 was in relation to the project of incentive scheme proposal.

Submissions

- [9] It is the Plaintiff's argument that failure by the Municipal Manager to include the words 'subject to' in the appointment letter was an indication that there were no conditions attached to the appointment of the Plaintiff. In its argument the Plaintiff referred to the case of *Command Protection Services (Gauteng) v SA Post Office* 2013 (2) SA 133 (SCA) at p142 B para21 where the following was stated:

"The second stipulation under 'subject to' requires the 'successful finalisation...of a formal contract'. 'Finalisation envisages a process, which in the context can only signify further negotiation, while the reference to 'successful' suggests an awareness that the process might not be successful. In the context, 'successful' can only mean resulting in a formal contract."

Reference was also made to the case of *Lewis v Oneate (Pty) Ltd* and another

- [1992] ZASCA 174; 1992 (4) SA 811(A) where the court held that where parties reach agreement on some aspects of the contract, but other material aspects are outstanding requiring further negotiations, the said agreement is not absent of enforceability.

- [10] It was submitted on behalf of the Plaintiff that the Defendant through its officials requested certain tasks to be conducted by the Plaintiff. In doing so the said officials furnished the Plaintiff with confidential information on the residents' payment profile. This was seen by the Plaintiff as a step towards the facilitation and implementation of the project. As far as the signing of the service level agreement is concerned it was argued by the Plaintiff that at no point did the Defendant indicate any dissatisfaction with the clauses or that it would not be signed without a presentation by the Plaintiff. Further that the electronic

communication between Mametja and the officials of the Defendant regarding the service level agreement indicated that further negotiations would take place to finalise the service level agreement. It is the Plaintiff's case that by accepting the proposal the Defendant demonstrated an intention of such agreement acquiring contractual force and further negotiations would take place

to finalise the service level agreement. Further that the Defendant frustrated the process of signing the service level agreement and should not benefit from its failure to meet its obligation at the expense of the injured party, in this case the Plaintiff.

- [11] In contention the Defendant argued that the appointment letter was subject to two suspensive conditions being a presentation and the signing of the service level agreement. It was submitted that the Plaintiff has not been able to establish that the presentation was done as there is no information about the date, time and venue of the meeting and a list of the people who attended the said presentation. It is the Defendant's case that the service level agreement was not signed and the implication thereof is that there was no contract concluded between the Plaintiff and the Defendant and as such no legal basis for a claim of payment.

Analysis

[12] It is trite that upon acceptance of a tender a contract comes into being and such an agreement is binding in law. However, parties may intend to have a comprehensive agreement with matters that are outstanding in the first agreement. The following was stated in the case of CGEE Alstom Equipments Et Enterprises Electriques, South Africa Division v GKN Sankey (Pty) Ltd [1986] ZASCA 108; 1987 3 All SA 619 (AD):

“The existence of such outstanding matter does not, however, necessarily deprive an agreement of contractual force. The parties may well intend by their agreement to conclude a binding contract, while agreeing, either expressly or by implication, to leave the outstanding matters to future negotiation with a view to a comprehensive contract. In the event of agreement being reached on all outstanding matters the comprehensive contract would incorporate and supersede the original agreement.”

[13] It has not been disputed that there was a contract between the Plaintiff and the Defendant created by the letter of appointment

dated 30 April 2008. Further that no service level agreement was signed by the parties. The dispute relates to whether there were conditions created in the appointment letter to be complied with by the Plaintiff before the contract could take effect. According to the Defendant the conditions were that the Plaintiff had to do a presentation to all stake holders to clarify what was not understood. The second condition was the signing of a service level agreement.

[14] The appointment letter which creates a contract refers to a service level agreement to be entered into at a later stage. The construction of this as a condition is very important as the intention is to protect the Defendant. However it needs to be clearly expressed to capture that the validity of the agreement is dependent on the said condition. The other factor to consider is whether the parties intended to suspend the validity of the contract pending the conclusion of the service level agreement.

[15] Mametja on behalf of the Plaintiff testified that there was a presentation done at the offices of the Defendant and the officials

who were present were Thandi and Maphologela from the finance department of the Defendant. On the other hand Smit who was the Municipal Manager at that time could not recall if such a meeting took place at the Defendant's offices or not. The Defendant in presenting its case did not call either Thandi or Maphologela as witnesses to confirm or deny the version of Mametja in relation to the meeting where a presentation about the project took place. Further to that Smit could not confirm or deny that there was

correspondence between Mametja for the Plaintiff and officials of the Defendant pertaining to the project and tasks that had to be performed by the Plaintiff for the Defendant. The Chief Financial Officer at that time, Mr Rantao was also not called to testify

despite evidence that he was also involved in discussions with Mametja in relation to the project and the tasks that had to be

performed. The testimonies of all these officials is of critical importance and in their absence the only version is that of Mametja

on behalf of the Plaintiff.

[16] It is important also to have regard to the evidence of Smit that as an accounting officer he was the only person who could enter into a contract on behalf of the Defendant and that the officials referred to by the Plaintiff could not have concluded any enforceable contract with the Plaintiff. The Plaintiff in response referred to the last part of the appointment letter which states that “Should you require further information please contact the Acting Head: Income, Mr Maphologela at 018- 3890 452.” It was as a result of that statement that the Plaintiff had meetings and correspondence with the Maphologela and Thandi who provided

confidential information for the implementation of the project. Mametja also testified that he did contact Smit telephonically to discuss the commencement of the project wherein Smit stated that there were delays but the contract with the Plaintiff may be

extended. Smit could not confirm or deny the said conversation. Again the only version is that of Mametja on behalf of the Plaintiff.

[17] On the issue of the service level agreement the undisputed evidence of the Plaintiff is that correspondence was sent to the Defendant enquiring about the signing thereof. The Plaintiff also attended to the corrections that were requested from the legal department of the Defendant. This was an indication from the Plaintiff that there was every intention to have the service level agreement signed and the Defendant did not raise any concerns with the service level agreement but instead decided not to sign the agreement for reasons unknown to the Plaintiff.

[18] The undisputed evidence of the Plaintiff was further that the proposal submitted to the Defendant contained all the details of the project and the cost thereof. The appointment of the Plaintiff for the project must have taken all that into consideration. Further, the evidence of Mametja stands undisputed that a presentation was made at the offices of the Defendant with Thandi and Maphologela. It therefore does not appear that there were any matters outstanding to agree on for the contract to be binding. Over and above the Plaintiff performed certain tasks as requested by the Defendant and submitted an invoice. The invoice was never queried or rejected by the Defendant.

[19] The evidence tendered does not show that the parties in this matter contemplated that consensus would have to be reached on the outstanding service level agreement before a binding contract could come into existence. In its argument the Plaintiff relies on fictional fulfilment in that the Defendant frustrated the signing of the service level agreement and can therefore not benefit from the failure to meet its obligation. I am in agreement with this submission as discussed in paragraph 17 above that the Plaintiff

effected the corrections on the service level agreement but there was still no response from the Defendant about the signing thereof. It is therefore my view that there were no suspensive conditions to be fulfilled before the contract between the parties based on the appointment letter could be binding. The Defendant's conduct of denying the contract based on the unfulfilled conditions constituted repudiation and cannot succeed. There was a contractual arrangement between the Plaintiff and the Defendant when the Plaintiff received the letter of appointment dated 30 April 2008 and the Defendant is liable to the Plaintiff in the amount of R1 725 000-00 as indicated in the accepted proposal.

Order

[20] Consequently, I make the following order:

1.

Judgment

is granted in favour of the Plaintiff in the amount of R1 725 000-00 plus interest thereon calculated at the legal rate from the date of demand on 27 July 2009 to date of payment;

2. The Defendant is ordered to pay the costs of suit.

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 12 & 13 SEPTEMBER 2017

DATE OF JUDGMENT : 19 OCTOBER 2017

COUNSEL FOR PLAINTIFF : ADV. M. MKHATSHWA

COUNSEL FOR DEFENDANT : ADV. N. FERRIS

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