

SOUTH AFRICA / JUDGMENT

Makaula Zilwa Incorporated and Another v Bushbuckridge Local Municipality (A31/2012) [2017] ZAGPPHC 1067 (18 August 2017)

[2017] ZAGPPHC 1067**COURT**

North Gauteng High Court, Pretoria

BEFORE

Mngadi

CASE / FILE NUMBER

A31/2012

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Source record**IN THE HIGH COURT OF SOUTH AFRICA,****GAUTENG DIVISION, PRETORIA****CASE NO: A31/2012****In**

the matter between:

MAKAULA
ZILWA INCORPORATED
1ST PLAINTIFF
MNB CHARTERED
ACCOUNTANTS
2ND PLAINTIFF
AND
BUSHBUCKRIDGE
LOCAL MUNICIPALITY
DEFENDANT

JUDGEMENT**MNGADI AJ**

- [1] The first plaintiff is Makaula Zilwa Incorporated a company of a firm of attorneys incorporated and registered in accordance with the company laws of the Republic of South Africa. The second plaintiff is MNB Chartered Accountants a company of chartered accountants incorporated and registered in accordance with the company laws of the Republic of

South Africa. The defendant is Bushbuckridge Local Municipality established according to the provisions of the Constitution of the Republic of South Africa, Act 108 of 1996 and the Local Government Municipality Systems Act 32 of 2000.

[2] The plaintiffs sue the defendant for payment of R4 517 134 as commission for debt collection services rendered. The plaintiffs formed a joint venture and successfully tendered for the rendering of bad debt

collection services to the defendant. The parties regulated their relation by concluding a written service level agreement (the SLA). The SLA was concluded in August 2013. The SLA provided that the plaintiffs would provide debt collecting services by collecting on arrear municipal accounts overdue by more than 60 days. The plaintiffs would be entitled to 20 per cent commission of the amounts

collected. It is alleged by the plaintiffs that in September 2013 the defendant handed over to them its entire debtors book overdue by more than 60 days for collection. It was in the aggregate amount of R941 545 549. 33. It included government accounts in the aggregate amount of R385 686 057.

[3] The plaintiffs state that they carried out their obligations which resulted in the Department of Works for Mpumalanga Province (PWD) paying the following amounts; R7 094 160 on November 2013; a sum of R3 408 624 on December 2013 and a sum of R12 641 805 on January 2014. The plaintiffs state that they claimed commission on the abovementioned amounts by issuing invoices BLM/001/2013 for R1 684 806 on 15 November 2013; invoice number BLM/002/2013 for R974 478 on 15 December 2013 and invoice number BLM/003/2013 for R2 956 146 on 15 January 2014. The defendant on 28 February 2014 paid R974 478 in full

settlement of invoice number BLM/002/2013 and paid sums of R64 749 and R59 068 on 4 July 2014 leaving a balance of R4 517 134 which

remains unpaid.

[4] The defendant in its plea raised a special plea in that it was an organ of state and no notice as envisaged in section 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 had been served on it as a result the plaintiffs were non-suited. At the commencement of the trial the defendant's counsel abandoned the special plea.

[5] In the plea over the defendant admitted the existence of the SLA and denied that it is indebted to the plaintiffs in the amount claimed or at all. It denied that the debtors book as alleged was handed over for collection; that the plaintiffs carried out their obligations and that as a result payment as alleged were made by PWD. It admitted

receipt of the invoices and it admitted the payments it made in relation to the mentioned invoices. The defendant pleaded that the plaintiffs failed to provide it with the documents in support of their claim on request in Annexure E

[6] The plea did not clearly set out what was admitted; what was denied and what the defendant was unable to deny or admit. It denied the handing over of the debtors' book for collection. It denied that the plaintiffs carried out their obligations. But it admitted making some payments in terms of invoices claiming commission for debts collected

in the debtors' book. It did not make clear on what basis it was claiming that it was not indebted to the plaintiffs in the amount

claimed or at all. Its allegation in relation to annexure E suggests that in terms of the SLA the plaintiffs were required to provide the defendant with the documents in support of their claims on request failing which the plaintiffs were not entitled to payment.

[7] Annexure E was marked Ex C . It is a letter written by the defendant to the plaintiffs. It does not have a date but it was common cause that it was written in April 2014 after a meeting held between the parties on 11 April 2014 minuted in the document marked Ex F. The meeting in question dealt with various issues. One issue raised was that up to that date only one invoice had been paid out of the three invoices. The Chief Financial Officer of the defendant responded by saying the delay was due to a dispute by themselves relating to the payments made by PWD.

The dispute mainly related to the total amount paid during the current year and what is normally paid by them annually over the previous years. The municipality is of the opinion that it was due to no intervention by the debt collectors as Public Works would have paid any way. The CFO undertook to give the plaintiffs in writing a letter which stipulated exact figures which they were disputing in relation to the Public Works payments.

[8] Exhibit C extracted in full reads as follows:

'PAYMENT FOR DEBT COLLECTION SERVICES

The following invoices submitted by yourselves for payment have reference

1. Invoice number BLM/00112013
2. Invoice number BLM/002/2013
3. Invoice number BLM/003/2014

The SLA between the Municipality and Makaula Zilwa Attorneys clearly details the kind of supporting documentation to be provided by debt collectors to substantiate their efforts and thus their claim.

In all of the above claims, what we have been provided with is a list of payments by customers as per our statements, however, it is not possible for us to verify that these payments are as a result of intervention by debt collectors.

The debt collectors are aware of the legislative requirements in terms of accounting for expenditure incurred. Hence in this regard we have a measure challenge to do so. One of the debt collector's invoices have been paid whilst you are given an opportunity to collate all supporting documentation in terms of the SLA to support your claims for payment. This will enable the BLM to account for expenditure appropriately

Your attention is also drawn to the fact that debt collection efforts must be focused on debt that is doubtful. An incident like Department of Public Works claims is a good example of this. The past trend for this account is that they paid R19m, R18m, R21m, and R23m annually for the past four years now.

However, the debt collectors have included these payments in their invoice as payment due to them, whereas the old debt which the BLM is looking to recover from Public Works is still outstanding. In our analysis, the money which may be due to the debt collectors on the account for Public Works may only be the R2.1m received towards the old debt of 2010/2011, and possibly another R2.2m for 2011/2012, which may not have been recovered otherwise."

Firstly, it is common cause that in February 2014 the plaintiffs had been furnished by the defendant with a letter confirming that the payments made by PWD were as a result of the interventions by the plaintiffs. Therefore, the claimed inability to verify whether the payments were as a result of intervention in paragraph 3 from the bottom were unfounded. Secondly, the letter concedes that there were payments made by PWD which were as a result of the interventions by the debt collectors. The intervention would be directed at the payment of the debt owed by the entity. It would be an impossible task after payment has been made to distinguish what was paid as a result of the intervention from what would have been paid any way. Thirdly, the letter talks about collecting old debt without

saying that the debt by PWD was not overdue by 60 days. It required the plaintiffs make further categorization of debts not provided for in the SLA.

[9] The plaintiffs called Mr. Ntuli as their first witness and only witness. He testified that he is an accountant by profession and he was at all material times in charge of the debt collection project of the defendant. The relationship between the plaintiffs and defendant is in terms of the admitted Service Level Agreement handed in as Exhibit A. They received the debt book which was in the region of R900m. They worked on it as prescribed in the SLA. They then invoiced

the defendant as per the SLA for commission in respect of those accounts they had worked on and payments had been made.

The invoices were not accompanied by any supporting documents. They report their activities in monthly reports and in the meetings with defendant's employees. One common problem was that the debtors did not have statements and they did not know how much they

owed the Municipality which included PWD. They had to go and collect the accounts from the Municipality and deliver it to customer. The payments collected in relation to which invoices were issued and payment is outstanding is as stated in the particulars of claim.

[10] Mr. Ntuli stated that initially the defendant stated that it would not pay the two invoices relating to PWD accounts because it had not mandated the plaintiffs to do collection on those accounts. It was pointed out to the defendant that the government accounts were part of the accounts handed over for collection and they were overdue by more than 60 days. Thereafter, the defendant stated that it would not pay them because it was not satisfied that the payments were as a result of their interventions. They provided the defendant with monthly reports relating to their collection activities and they constantly interacted with the defendant. In addition, they obtained a letter from PWD which confirmed that the payments made were as a result of their intervention, the letter was handed in and marked Exhibit B. He stated that the defendant did not advise them what supporting documents were required to have the claims paid. In their letter marked Exhibit C they did not specify what supporting documents were required. He testified that Exhibit D was a letter dated 28 June 2014 written by him to the defendant pointing out what was done in relation to PWD accounts and the reports to defendant relating thereto. He called upon the defendant to respond or settle the two outstanding invoices within 5 days as they had been outstanding for more than half a year. He did not receive any response.

[11] Mr. Ntuli referred to various clauses in the SLA which were the basis of their obligations as well clause relating to claiming payment and the right of the defendant to have access to their files. He denied that the debts which were the subject of the plaintiffs' claim were not supposed to be collected.

The SLA gave the plaintiffs mandate to collect those debts. The interaction was in the form of meetings and telephonic contacts. In those interactions PWD collections were also discussed. He testified that he cannot deny that the letter Exhibit B was signed

by Mr Phakula who was an acting Senior Manager in PWD Mpumalanga who was acting in the place of Mr Mashego who had become an M.E.C. He does not know the email address appearing in the letter. He met Mr. Ngwenya who was the person to deal with in the Department of Public Works relating to the accounts. He testified that he would not know why PWD did not have statements of accounts. He went to the defendant and he fetched the statements of accounts which he took to PWD. The defendant only told him that they were not supposed to collect on those accounts after they had collected. Mr. Ntuli wanted to refer to minutes of meetings with the defendant but there was an objection that they had not been discovered.

[12] Mr. Ntuli testified that PWD paid as they made arrangements with them but those arrangements were not formally recorded. He could not remember whether there was any agreement relating to payment of interest. He was not aware of an arrangement that PWD will be billed by the defendant annually. He did not keep copies of the invoices they had taken to PWD. He testified he did not give details of the activities in the invoices that he

submitted to the defendant. The details were in his reports. He testified that they complied with clause 9.5 by giving a report that complied with the required fields. They were not aware what legislative requirements they were required to comply with. They were not advised that the supporting documents required were reports in terms of clause 9.5 of the SLA. The proof of intervention from PWD was called for in a meeting by Ms Nkuna, the CFO of the defendant. He stated at no stage was it raised by the defendant that their reports were not in accordance with clause 9.5 of the SLA.

[13] The defendant called two witnesses Mr Ngomane and Ms Nkuna. Mr Ngomane testified that at the relevant time from May 2013 until January 2015 he was the administrator of the defendant. He had taken over the functions of a mayor as well those of a municipal manager. He signed the SLA on behalf of the defendant. Mr Ngomane referred to various clauses of the SLA and their importance. The Auditor-General (AG) will audit the defendant in accordance with the stipulations in SLA. He testified the PWD was part of the book debt handed over for collection. He stated that the AG will look for the portfolio of evidence. He stated that he recognized Exhibit C, it was signed by his deputy. The CFO brought it to his attention that certain supporting documents were outstanding and clause 9.5 of the SLA refers to supporting documents. Before payment is authorized the defendant must satisfied that deliverables have been met. He testified that in terms of his expectations Exhibit B is irrelevant for satisfying clause 9.5 of the SLA.

[14] Mr Ngomane testified that he had left municipality by the time the summons was received. He authorized the payment of invoice paid because no issues relating to that invoice were brought to his attention. He testified

that he was aware of Exhibit C. It was as a result of the meeting and the CFO briefed him on the issues. He wanted the problem resolved. The problem related to supporting documents in terms of clause 9.5 of the SLA. He cannot explain why the other invoice similar to the two invoices was paid with no queries. He does not know why the CFO did not brief him of any queries relating to the invoice that was paid. He is not able to say what needed to be complied with in terms of legislative requirements. He is not able to say why the plaintiffs were not told that a report in the format of clause 9.5 was required. The other reports were not given to him. The briefing to him was that no written reports had been furnished. No payment could be made without a report in accordance clause 9.5 of the SLA. He testified that he was advised by the CFO that PWD has an arrangement to be billed annually. It is an informal arrangement.

[15] Mr Ngomane testified that he did not verify the figures on Exhibit C. They were prepared by the CFO. The CFO took the decision not to pay the plaintiffs. He then gave authority that they should not be paid. He does not have minutes relating thereto because he does not keep minutes of his meetings with his officials. He testified that letters to the outside are prepared and then brought to him with the relevant file by the relevant official for him to consider and sign.

[16] Ms Nkuna testified that she was employed by the defendant as Chief Financial Officer since November

2013. The debt collection project fell under her department. The SLA was signed in August 2013. She got involved in it in December

2013. She was briefed by the revenue manager on progress and the particular activities. In December 2013, she had a meeting with the plaintiff. She was told of the interactions taken place. She was not aware of any invoices that had been submitted for payment. She did not see the actual debtors' book that was handed over for collection. There are state departments

whose accounts are with PWD and other departments which keep their own accounts. Her understanding was that there was an arrangement

that government departments be billed by the defendant once annually. She was aware that certain customers had a challenge that they had not received the statements/invoices and the invoices had to be reissued. There was no such a challenge with PWD accounts that she was aware of. An invoice is generated after the billing process. She has a B. Com degree, a post graduate diploma and she is studying for a Master's degree. In a meeting on 17 December 2013 there was no reference to any previous reports that had been submitted by the plaintiffs. The reports in bundle 'C' are monthly reports by the plaintiffs and she has seen these reports and they were discussed in their meetings. She saw the invoices requesting payments in January 2014 when they were brought to her by the revenue manager. The invoices did not have details of each customer interacted with.

[17] Ms Nkuna testified that she asked the gentleman placed in the Municipality by the plaintiffs for additional information. He gave a list of customers. She compared the list to the bank statement reflecting payments and she was not satisfied that all those customers in the list the plaintiffs had interacted with. She told him that the list was not sufficient. She testified when she received the invoices from the plaintiffs for payment, she asked the revenue manager how to test the accuracy of the information. She said she will ask for more information. She came back with the list. She realized that there was some missing information in terms of clause 9.5 of the SLA. She had not received those reports and she had not been referred to those reports. She had not received any reports in the format prescribed in clause 9.5 of the SLA. She then made payment of one invoice although

it also did not have supporting documents. She made payment because she had confirmed that the service provider was there on the ground and they were working. They incurred expenditure. She in fact was not disputing that they had worked. She wanted them to prove in a complete manner what they had done. She expected them to furnish her with the required information in a short space of time. She interacted with some business people and people living in the municipality. It was reported to her that there are these people following up on municipal accounts but it was not known who were they. She was aware the challenge of customers not having statements and the plaintiffs coming for statements to give to customers.

[18] Ms Nkuna testified the invoice she paid invoice number 2 related to the payment by PWD on 9 December 2013. The first and the third invoices that were not paid related to payments made by PWD in November 2013 and 17 January 2014 respectively. She was not furnished with any written arrangement between PWD and the plaintiffs regarding an undertaking by PWD to pay its debts. She explained that the letter Ex C was written regarding the delay in the payment of the invoices of the debt collectors. She had a meeting with the debt collectors and in that meeting the issue was raised. She explained the delay as

captured in the minutes Ex F and she was requested to convey the reasons for the delay in writing and she then wrote the letter Ex C. The debt collectors had brought a letter Ex B she had found it insufficient and she told the person who brought the letter Njamela that the letter was not sufficient. She verified that the letter Ex B was signed by Mr Phakula then an acting senior manager for PWD acting in the position previously occupied by Mr Mashego who had subsequently become an MEC. She verified that Ngewnya was the official in charge with collection of property rates who met with the plaintiffs. The email address was for somebody based at Pilgrims Rest not at Thumahelo. Phakula has confirmed that the letter was brought to sign but he was not familiar with the issues. She stated that she reports to various stake holders. They have reserved funds for the invoices that have not been paid. It must be explained why a particular invoice remains unpaid. The invoice paid, if it is found that it was paid in error, that payment shall be recovered. The invoice relating to PWD that was paid was in the same format as the two invoices that the defendant refused to pay.

[19] Ms Nkuna testified that in January 2014 she became aware of four invoices issued by the defendant for PWD. She was preparing a quarterly report and a half year report. The copies of the invoices were handed by consent. The invoices were marked Ex E1 to E4. The invoice Ex E1 has a date of issue 31 August 2013 stipulating that payment for R2 164 104 be made before 30 November 2013. The invoice Ex E2 has the same details as E1 but it refers to property description Shatale and it is for R1 402

704. The invoice Ex E3 has the same details E1 and E2 but refers to property description Dwarsloop and it is for R3 527 352. The invoice E4 has the issue date 5 November 2013 to be paid before 30 November 2013 for R3 408 624. The invoices are endorsed paid with the date 10 October 2013 and Ex E4 the date is 27 November 2013. All the invoices bear the same signature in the place for Chief Financial Officer. Ms Nkuna testified that the invoices indicated that they were not overdue by 60 days when they were paid. That concluded the evidence.

[20] Ntuli the witness for the plaintiff has an interest in the matter identifiable with the interest of the plaintiffs. He showed no obvious bias. He appeared measured in his evidence. He sought reliance on the records for his evidence. He responded to questions without hesitation. It appeared that if the real issues had been clearly and timeously highlighted he

would have been more positive on his evidence. His evidence accorded with probabilities and the sequence of events. He appeared to have never understood the defendant's refusal to pay their invoices. His attempt to explain why customers including PWD would not have account statements although billed was obvious speculation. I found him to an impressive witness.

[21] Mr Ngomane was obviously a senior official in the department. He acted as an administrator of the defendant. He explained eloquently from his perspective the implications of the various clauses of the SLA. Mr Ngomane's evidence on what happened and why it happened was very poor. He shifted the blame to the Chief Financial Officer. However, the events unfolded under his watch. He was the administrator and the accounting officer. He was aware of the refusal to pay the plaintiffs

invoices and he was supposed to do a proper investigation to determine whether as the Municipality they were justified to refuse

to pay the invoices. found him not to be an impressive witness.

[22] Ms Nkuna was clear in her evidence. She tended to give full explanations even if not called for to obfuscate. She was bent on convincing rather than the mere presentation of facts or information. Her oral testimony is not consistent with contents of the documents. I found her not to be an impressive witness.

[23] The defendant did not come clear not only in its plea but from the inception of the

issues

of its position. Ms Nkuna got involved with the project in December 2013, if it came to her attention that the plaintiffs were not complying with clause 9.5 of the SLA it is not explained why she did not raise the issue with the plaintiffs.

[24] Mr Ngomane represented the defendant and his evidence is that if there was non-compliance with clause 9.5 of the SLA the AG would make a finding with the Municipality but it is not explained why he did not ensure that there was compliance. Even when the issue of payment was hot and it was simple to point out to the plaintiffs that they would not be paid because they have not provided reports stipulated in clause 9.5 of the SLA that was not done instead they were referred to supporting documents and legislative requirements in vague terms. It appears the plaintiffs, as they claim, they furnished reports which satisfied the requirements of the defendant although not in the exact format as prescribed in clause 9.5 of the SLA.

[25] The defendant in the hearing without having done so in its plea, raise the issue that the collections for which the plaintiffs claim commission, they had no mandate to collect in that these accounts were not overdue by

more than sixty days. The issue in the trial is raised in the context that these accounts were not overdue. The issue raised with the plaintiffs was that the mandate did not include government accounts. When it was explained that there was no such exclusion in the SLA the issue was not persisted with. If this was the issue it is not explained why it was raised with the plaintiffs when they furnished invoices claiming payment. In addition, if it was an issue why the other invoice was paid. Ms Nkuna testified that if the plaintiffs had furnished sufficient proof of their intervention she would have authorized payment of their invoices even if they were not supposed to collect on those accounts. This indicates that it is a made- up issue with no substance that the plaintiffs collected on PWD on which they were not supposed to do collection.

[26] The issue of the invoices Ex E1 to E4 is the same. There is no issue raised in the plea relating to these invoices. Ms Nkuna became aware of the invoices in January 2014. The invoices are issued by the Municipality of which she is the Chief Financial Officer. She could investigate whether these invoices were included in debtors' book handed over for collection, and if so, exactly in what manner. The Municipality must have remained with the copy of the debtors' book handed over for collection. The debtors' book shall indicate whether the invoices are included, if not, no commission can be claimed. If they were included what was the due date reflected in the debtors' book. If not overdue by more than 60 days at the commencement of the collection no commission would be payable. The failure by the defendant to properly raise the issue results in the status and significance of the invoices remaining unknown.

[27] The defendant denied being indebted to the plaintiffs as claimed or at all. It is argued that PWD's payment was not as a result of any effort from the plaintiff. I find that the plaintiffs on the totality of the evidence

and on the preponderance of probabilities they have proved that the PWDs accounts were part of the debtors' book handed over to them for collection and that as a result of their intervention, particularly in the absence of evidence to the contrary from PWD, PWD made the payments in relation to which the plaintiffs are claiming commission.

Secondly, it is argued and a substantial part of the evidence related to this issue, that the plaintiffs are not entitled to payment because they failed to comply with the terms of the SLA in that they failed to provide the defendant with the supporting documents to prove their intervention. I found the defendant's evidence particularly poor as to what supporting documents were not furnished. If this was not clear from the side of the defendant it follows as alleged by the plaintiffs that it was never made clear to them. I find no substance in the claim by the defendant.

Thirdly, it is argued that the PWD debt was not due for collection and reliance is placed in Exhibits E1 to E4. The defendant is a Municipality dispensing public funds. It is required that it avoids wasteful and fruitless expenditure. If the service provider

submits a claim for work done for which it was not engaged to do the Municipality is bound to summarily reject the claim. The totality of the evidence is not to the effect that this was the attitude of the defendant. It is required that a clear and concise statement of material facts upon which the pleader relies for his claim, defense or answer to any pleading with sufficient

particularity to enable the opposite party to reply thereto. A pleading that states conclusions without alleging material facts is defective. In the plea, there is no statement that the plaintiffs were not entitled to collect the PWD debt. (see Rule 18(4) Of the Uniform Rules of Court; Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa 5th edit pages 565/6)

ORDER:

Judgement in favour of the plaintiffs is granted for payment of R4 517 134.66 plus interest at the prescribed rate at 9 per cent per annum a tempore morae, plus costs of suit.

MNGADI AJ

Date of judgement: 18 August 2017

APPEARANCES

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