

SOUTH AFRICA / JUDGMENT

MIIB Business Technologies (Pty) Ltd v Matjhabeng Local Municipality (3073/2020) [2021] ZAFSHC 233 (15 October 2021)

[2021] ZAFSHC 233**COURT**

Free State High Court, Bloemfontein

BEFORE

Chesiwe

CASE / FILE NUMBER

3073/2020

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**IN
THE HIGH COURT
OF SOUTH
AFRICA,
FREE
STATE
DIVISION,
BLOEMFONTEIN**

Reportable: NO
Of
Interest to other Judges: NO
Circulate
to Magistrates: NO
Case

number: 3073/2020
In

the matter between: MIIB
BUSINESS TECHNOLOGIES (PTY)
LTD Plaintiff
and
MATJHABENG
LOCAL
MUNICIPALITY Defendant

JUDGMENT

BY: CHESIWE, J

HEARD ON: 03 AUGUST 2021

DELIVERED ON: 15 OCTOBER 2021

- [1] The plaintiff instituted a claim for damages founded on unjust enrichment in the amount of R10 335 400-00. The matter is defended.
- [2] The plaintiff is MIIB Business Technologies (Pty) Ltd, a private company duly registered in accordance with the laws of South Africa, with registration number 1998/022906/07, and its principal business is at Hazel Court 4, 160 Witch-Hazel Avenue, Highveld Techno Park Centurion, Gauteng Province.
- [3] The Defendant is Matjhabeng Local Municipality, established in terms of the provisions of the Constitution of the Republic of South Africa, with its business address at no. 319 Stateway Street, Welkom Free State Province.
- [4] The parties entered into a Service Level Agreement (SLA) (Annexure "MA1") on 15 February 2010. Both parties were duly represented by their authorised representative.s
- [5] The SLA was pursuant to a tender process advertised under BID no. 36/2009 MB 21/2009 for the development and installation of asset management systems (DIM). The plaintiff was the successful bidder. The SLA contract became effective on 18 January 2010 and lasting for a period of six (6) months.
- [6] On 30 July 2010, the parties entered into another agreement, that is the scope change agreement ("MA3") to give effect to clause 21 of the SLA, which reads as follows:
- "21.1 MLM and the service provider will follow the change control procedure as detailed in the prospect charter for any scope change or amendment to the contract.
- 21.2 The effort involved for any change in scope has to be estimated by the service provider and approved by the MLM project management".
- 21.3 The unit rates provided by the service provider in its proposal will form the basis for the calculating of costs implications for any charges in scope based on the approved estimates."
- [7] The plaintiff performed in terms of both annexures "MA1" and "MA3" and received payment of the contract price in accordance with the payment clause.
- [8] The defendant on 25 February 2011 terminated the agreement with a 30 days notice ("MAS"), a letter dated 25 February addressed to the plaintiff.

[9] The plaintiff referred the dispute regarding the termination to the Arbitration Foundation of South Africa (AFSA). The hearing was held in August

2019. The arbitrator issued an award as follows:

"38.1 The claimant and the defendant concluded an invalid and illegal impermissible scope change contract which is declared of no force and effect against the defendant.

38.2 The claimant's contractual claim B is dismissed with costs including costs consequent upon the employment of two counsel."

[10] The plaintiff proceeded to institute an action against the defendant. The combined summons with the particulars of claim was filed on 21 August 2020.

[11] The defendant before pleading to the plaintiff's particulars of claim for unjust enrichment, raised three special pleas as follows: non-compliance with section 3 of Institution of Legal Proceedings against Certain Organs of State, Act 40 of 2002; that the plaintiff's claim ought to have been referred to mediation and/or arbitration; that the plaintiff is precluded by agreement from instituting the claims against the defendant.

[12] Pursuant to the special pleas raised, I therefore have to deal with the above mentioned pleas.

[13] Adv. Shokoane, Counsel on behalf of the defendant submitted in oral argument that the plaintiff failed to comply with the section 3 notice and has to date, not filed its application for condonation which will be 10 years late. Counsel submitted that the plaintiff failed to follow the mediation/arbitration to resolve the dispute between the parties as envisaged in the SLA.

[14] Adv. Madima, SC, Counsel on behalf of the plaintiff submitted that the claim is based on unjustified enrichment, thus the plaintiff did not have to give a section 3 notice. Counsel submitted that at arbitration, the parties did not deal with enrichment.

NON-COMPLIANCE WITH SECTION 3 OF ACT 40 OF 2002

[15] Section 3 (1) provides as follows:

"No legal proceedings for the recovery of a debt may be instituted against an organ of State unless

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(a) the creditor has given the organ of state in question notice in writing of his

or her or its intention to institute the legal proceedings in question; or

(b) the organ of state in question has consented in writing to the institution of that legal proceedings -

(i) without such notice; or

(ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2)

A notice must - (a) within six months from date on which the debt became due, be served on the organ of state in accordance with section 4 (1); and

(b) briefly set out -

(i) the facts giving rise to the debt; and

(ii) such particulars of such debt as are within the knowledge of the creditor."

[16] The requirements for notification of intention to sue an organ of state are clear. In *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd*[1], the court said:

"The conventional explanation for demanding prior notification of intention to sue organs of State is that, with its extensive activities and large staff which tends to shift, it needs the opportunity to investigate claims laid against it, to consider them responsibly and to decide before getting embroiled in litigation at public expense, whether it ought to accept, reject, or endeavour to settle them."

[17] Where a litigant has failed to deliver the notice as contemplated in section 3 (1) of the Act, section 4(a) of the Act provides that such a person may apply for condonation. In this instance, there is no application for condonation. Counsel for the defendant confirmed in court that the defendant has not been served with a condonation application.

[18] The defendant for purposes of Act 40 of 2002 and section 239 of the Constitution, is an organ of state. The plaintiff in terms of section 3(1) is obliged to notify the defendant of any intended legal proceedings within six (6) months from when the debt became due.

[19] I have perused all the papers and pleadings in the court file and no Section 3 notice or any letter that was sent to the defendant as a section 3 notice was found. The defendant already in its plea, dated 18 October 2020, raised the special plea of non-compliance with section 3. The plaintiff instead of responding to the special plea, filed a notice of exception in terms of Rule 23, stating that the plaintiff's claim is based on unjustified enrichment.

[20] Even if the plaintiff's claim is based on unjustified enrichment, it involves money that may be paid by the defendant, if the plaintiff is successful. It is not about debt, but about notifying the defendant of a potential litigation for a claim of money. The plaintiff's contention that the claim is based on unjustified enrichment does absolve the plaintiff from serving the section 3 notice. It is neither here nor there whether the claim is based on unjustified enrichment. Section 3 is clear and not ambiguous that a notice must be served on an organ of the state. Even if the plaintiff approached court on unjustified enrichment claim, the plaintiff is obliged to serve the defendant with a section 3 notice. In this instance, a section 3 notice was not served and the court cannot ignore that blatant non-compliance by the plaintiff.

[21] The plaintiff cannot expect this court to ignore the fact that a section 3 notice was not served on the defendant. As already stated above, the notice is meant to assist the defendant to conduct its own investigation and/or find employees that were involved in such matters. The amount claimed is quite substantial and the plaintiff cannot expect litigation to proceed against the defendant, if such a serious defect has been raised by the defendant. The special plea for non-compliance of section 3 was raised as far back as in October 2020, meaning that it is almost a year later.

[22] In my view, the submissions made by the defendant are just and fair. The plaintiff to date has not served the notice nor filed an application for condonation. I am inclined to agree with the defendant that the application ought to be dismissed.

[23] The second issue is that the dispute ought to have been referred for mediation/arbitration. Paragraph 27 of the SLA provides as follows:

"27.1 All disputes or differences between the parties whatsoever which shall at any time hereafter whether during the continuance in effect of this contract or after its termination, arise between the parties hereto concerning any matter specified in this contract or as to the rights, duties or liabilities of the parties hereto or either of them under or by virtue of this contract or otherwise, or as to any other matter arising out of the subject matter of this contract shall be referred to mediation by a mediator appointed by agreement between the parties.

27.2 Should the parties not resolve the dispute through the process of mediation or decide not to refer it to mediation, the dispute or difference between the parties shall be finally settled under the Rules of the Arbitration Foundation of Southern Africa (AFSA)... "

[24] The parties were at arbitration, but only to deal with the validity of the contract. The other disputes were therefore not resolved. Clause 27 of the contract is clear, as it refers to "all" disputes (my emphasis) between the parties and that if disputes are not resolved, these shall be finally settled under the Rules of the AFSA . Clause 27.2 further states that the said arbitrator(s) shall have full power to open, review and revise any matter related to the dispute. The defendant correctly stated that, parties are to go back to arbitration to settle their dispute. Counsel for the defendant submitted that the plaintiff should not be allowed to stop arbitration and approach court on a matter that was not finalised at arbitration. In my view, the defendant's submission that parties return to arbitration for their dispute is correct. The clause gives the Arbitrator the power to open up, review and revise disputes between the parties.

[25] In *Aveng (Africa) Ltd formerly Grinaker - LTA t/a Grinaker - LTA Building East v Midros Investments (Pty) Ltd*[2], the court held:

"An arbitration clause is inserted in a contract at the time of its conclusion because the parties contemplate as a matter of commercial convenience that is desirable to adopt this as a mechanism for resolving the disputes that may arise in the cause of their business relationship. Its construction should therefore be influenced by a consideration of the underlying commercial purpose of including such a clause in the agreement."

[26] It is clear in the SLA that if a dispute arose, the parties are to resolve it in accordance with the rules of the AFSA and in accordance with their agreement. The contract is clear that the parties are bound to follow arbitration mechanisms. In *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*[3], the court affirmed the principle of freedom of contract and stated the following:

"The decision to refer a dispute to private arbitration is a choice which, as long as it is voluntarily made, should be respected by the courts. Parties are entitled to determine what matters are to be arbitrated... "

[27] As in this instance, parties only approached the arbitrator for the legality of the scope of change agreement. The SLA agreement does give the arbitrator the power to review, revise and re-open any matter related to the dispute.

[28] It follows the defendant's submissions that the court has no jurisdiction as the parties had an arbitration clause in their agreement. The SLA contract between the parties expressly states that any dispute will be settled under the rules of AFSA. Section 3(2)(c) provides that a court may set aside an arbitration agreement on "good cause shown" and that discretion must be judicially exercised. However, there is no application to set aside the arbitration. The defendant correctly indicated that the matter be referred back to arbitration as the court has no jurisdiction with regard to the arbitration clause. In *BP Southern Africa (Pty) Ltd v Mahmood Investments (Pty) Ltd*, [4] Lewis JA stated as follows:

"It is settled law that a contractual provision must be interpreted in its context, having regard to the relevant circumstances known to the parties at the time of entering into the contract. It is also clear that the provision must be given a commercially sensible meaning."

[29] Based on the defendant's third special plea that the plaintiff is precluded from instituting a claim based on enrichment, the signed SLA at clause 28.2 provides as follows:

"In the event of termination as contemplated in this clause, the MLM shall pay to the services of the service provider all fees owing for milestones completed as per the payment/ pricing clause and for any reasonable out of the pocket expenses incurred by the service provider in rendering its obligation in terms of this contract until such a termination. Other than as stated herein, the service provider shall have no other claims whether based on enrichment or for compensation, reimbursement or any other claim of any nature whatsoever against MLM in respect of or arising from or connected to termination contemplated in this clause. The termination as contemplated shall not be subjected to any mediation or arbitration as per clause 28."

- [30] The plaintiff in the particulars of claim submitted that its claim is based and founded on undue enrichment in respect of the scope of change agreement. The plaintiff further indicates that the enrichment claim does not arise from the SLA nor is connected to its termination. The question one could ask is then, from where does the enrichment arise if it is not from the SLA and the scope of change agreement that import clause 28.2, barring the plaintiff from instituting any action based on enrichment and/or estoppel? The plaintiff cannot expect this court to ignore the fact that even if there was a scope of change agreement, which flowed from the SLA, all these contracts are connected and the plaintiff's claim does fall within the category of clause 28.2. In any event the Arbitrator made a finding that the scope of change agreement was null and void.
- [31] Unjustified enrichment has no general enrichment in our law. The principles simply it is that, no person's estate must unjustifiably be increased at the expense of another. Enrichment of the defendant must be at the expense of the plaintiff and the enrichment must be unjustified. In *McCarthy Retail Ltd v Shortdistance Carriers CC*,^[5] the appeal court stated that on the general action for enrichment, there must be a belief, or fear that a tide of litigation will be let loose.
- [32] The question is, was the enrichment on the part of the defendant and was the enrichment at the expense of the plaintiff and if it was unjust. The South African Law of Unjustified Enrichment, page 40 paragraph 2.2.7 states that: The burden of proof of enrichment, as with other elements of enrichment liability, rests with the plaintiff. However, the burden of proof regarding the defence of loss of enrichment rests on the defendant." However, in this instance the issue of unjustified enrichment between the parties is dealt with in the SLA agreement.
- [33] Counsel for the defendant correctly submitted that the relationship between the parties had its genesis and source in the SLA as concluded by the parties. Clause 28.2 of the SLA clearly indicated that "the service provider shall have no other claims whether based on enrichment. The plaintiff's duly legal representative signed the contract being fully aware of clause 28.2. The plaintiff cannot now come before court and expect that clause 28.2 be ignored. The contract was binding between the parties. It is not for this court to allow the plaintiff to institute a claim that was clearly excluded in the signed contract.
- [34] The defendant raised the *par delictum* Rule in respect of the illegality of the contract. The principle of this rule is to discourage illegality as it would be contrary to public policy. This principle was set out in *Afrisure v Walson*^[6], also see *Jajbhay v Cassim* 1939 AD 537 at 559 and *National Credit Regulator v Opperman* 2013

(2) BCLR 170 (CC) at 15-16.

The court said the following:

"The principle underlying the par delictum rule is that, because the law should discourage illegality, it would be contrary to the public policy to render assistance to those who defy the law... ,But [sic] the keystone to the par delictum defence is that the plaintiff has rendered performance dishonourably or with turpitude. Absent turpitude on the part of the plaintiff, the par delictum defence is simply not available."

[35] The arbitrator award at paragraph 36 stated as follows:

"The SLA lapsed and could not be revived by the parties. The conclusion and the implementation of the scope of change contract/agreement constituted a new agreement. The acquisition of the service to implement work under the scope change contract/agreement had to be done through a valid tender process and such process of procurement was not followed. Consequently, the scope of change of contract/agreement is invalid, irregular, illegal and unenforceable (my emphasis). It is not legally permitted to revive a contract that has lapsed by effluxion, in particular, taking into account the constitutional process put in place for procurement of services by organs of state."

[36] There is several case laws on matters of illegality of procurement process. The plaintiff proceeded lawfully in terms of the conclusion of the first SLA, however things changed when the plaintiff failed to follow the same process in the scope of change agreement. Indeed, the plaintiff approached this court with tainted hands. Having been informed by the arbitrator that the contract for the scope of change agreement did not follow correct processes and it is therefore invalid, illegal and unenforceable against the defendant.

[37] The plaintiff has to take responsibility for negligently proceeding with a contract that did not meet the required degree in dealing with an organ of state in procurement processes. It would indeed be contrary to public policy for this court to allow a service provider to rely on a contract that was obtained illegally and that is unenforceable.

[38] The courts have to deal frequently with tender processes that did not follow the procurement policies for supply chain management. In my view, allowing such a claim will be tantamount to allowing illegality and encouraging conduct that is against public policy. The plaintiff's lack of turpitude can only be placed squarely at its door. (See Afrisure supra)

[39] Thus, the special plea of par delictum rule as raised by the defendant ought to succeed. Therefore, the defendant's application on all three special pleas ought to succeed.

[40] Adv. Shakoane submitted that the plaintiff's action is to be dismissed with costs on an attorney and client scale, including costs of two Counsel. It is trite that the general rule in respect of costs is that cost orders usually follow the successful party.

[41] The basic rule is that costs are in the discretion of the court. This discretion is wide, though unfettered and must be exercised judicially upon a consideration of the facts of each case. Bearing in mind that such an order as to costs would be fair and just between the parties.[7] Attorney and client scale as prayed by the defendant, is a form of punishment for the losing party. In some cases, the court will grant such an order to show its disapproval of the conduct of the losing party. The plaintiff's conduct in this instance does warrant an attorney

and client scale cost order.

ORDER

[42] I accordingly make the following order:

1. The defendant's special pleas succeed.
2. The plaintiff's action is dismissed with costs on an attorney and client scale, including costs of two Counsel.

S. CHESIWE, J

On Behalf of the Plaintiff: Adv. T S Madima SC

Instructed by: Matsepe Attorneys

BLOEMFONTEIN

On Behalf of the Defendant: Adv. G Shakoane SC

Instructed by: Bokwa Attorneys

[1] 2010(4) SA 109 SCA at para 13

[2] (3187/05)

(2011) ZAKZDHC 14; 2011(3) SA 631 (KZD); (2011) 3 All SA 204 (KZD) (8 March 2011); (2011) JOL 270 28 (KZN)

[3] 2009 (4) SA 529 (CC)

[4] (683/08) [2009] ZASCA 153; [2010J 2 ALL SA 295 (SCA) at para [11] (27 November 2009).

[5] McCarthy Retail Ltd v Shortdistance Carriers CC 2001 (3) SA 482 (SCA)

[6]

[2009] 1 ALL SA 1(SCA)

[7] Fripp v Gibbon & Co 1913 AD 354 at 363.

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