

SOUTH AFRICA / JUDGMENT

Networked Energy Services Corporation v Utility Administration Services (Pty) Ltd (2019/11710) [2020] ZAGPJHC 79 (12 March 2020) [2020] ZAGPJHC 79

COURT

South Gauteng High Court, Johannesburg

BEFORE

Wepener

CASE / FILE NUMBER

2019/11710

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NUMBERS: 2019/11710

In

the matter between:

NETWORKED
ENERGY SERVICES CORPORATION
Applicant
vs
UTILITY
ADMINISTRATION SERVICES (PTY)
LTD Respondent

Coram:

Wepener J

Heard:

10 March 2020

Delivered:

12 March 2020

Summary:

JUDGMENT

Wepener, J:

[1] The applicant seeks payment for goods sold and delivered to the respondent. The purchase of the goods is common cause or not

contentious.

[2] In resisting payment, the respondent raised and persisted with five points at the outset of the hearing but abandoned reliance on the arbitration clause as a bar to this court hearing the matter. Of the remaining four points, the question of conflict of laws i.e. which law to apply to a relationship between the parties was also eventually not further pursued. Regardless thereof, where the law of a foreign state cannot be ascertained readily, and with sufficient certainty, and in the absence of proof of the nature of such law by any party relying on such law, the courts employ a presumption that the foreign law is the same as the South African law.[1] Nothing was placed before this court to show that the law of California is different to the South African Law and the question as to which law applies does, consequently, not arise.

[3] The defences to be considered are threefold: the applicability of the rule in Walker Fruit Farms;[2] the election by the applicant to cancel the agreement and an indication that it intended to sue for damages thus disentitling the

applicant from enforcing the contract; the failure to tender performance timeously and thus disentitling the applicant to seek

relief.

[4] The rule in Walker Fruit Farms is as follows:[3]

‘No doubt it is correct that, where there is repudiation and where the other party elects to treat the contract as at an end, the latter cannot thereafter enforce the contract.’

The respondent submitted that the applicant had cancelled the contract and is now attempting to enforce the contract. It is correct that the applicant had cancelled the contract, but the enforcement which it seeks now relates only to rights that had accrued prior to the cancellation. In this regard, the Walker Fruit Farms case continued to state:

‘But it appears to me that this only applies to the executionary portion of the contract; but where a certain right has accrued to the one party before the election, such right is not affected after the election. He treats the contract as at an end as from the date when he makes his election; up to that date the rights have come into existence and can be enforced.’[4]

[5] The respondent’s submission that the applicant elected to cancel the agreement between the parties and that it is now

disentitled from claiming enforcement of the contract misses the fact that the applicant is seeking specific performance in relation to rights that accrued prior to cancellation of the agreement. In terms of the written agreement between the parties. The purchase price of the good and services, which formed the subject of the agreement, was payable at least 30 days after date of invoice.[5] The applicant's right to payment therefor accrued well before it later cancelled the agreement and the applicant is entitled to seek payment of the invoiced amount, which included certain hardware and services. There was some dispute between the parties as to whether the services portion of the invoice related to future services but due to the amount having become due and payable well before cancellation of the agreement, nothing turns on that. The respondent did not raise an entitlement to a reduction of the purchase price by way of the *actio quanti minoris* and I need not consider this issue further.

- [6] In the circumstances, the rights which came into existence for the applicant prior to cancellation of the agreement remained enforceable in terms of the Walker Fruit Farms principle and the applicant is entitled to sue out for it. That really brings the matter to an end as the obligation of a party to tender performance in terms of a contract only arises if the obligation exists despite the cancellation of the agreement. In the matter under consideration the agreement is gone and there was no obligation on the applicant to perform any future obligations in terms thereof and a belated tender, made by the applicant to perform such services, is in my view of no consequence.
- [7] As a further point regarding this matter, the respondent submitted that the applicant elected to cancel the agreement and is now approbating and reprobating by seeking to enforce the provisions of the contract. I have shown why this argument cannot be sustained. The respondent went further and submitted that the applicant elected to cancel the agreement and claim damages, as this is what it said in a letter. But that argument misses the point that the election that a party makes is as to the cancellation or keeping the contract in esse. Once that election is made, the remedies which the electing party has, are not limited to damages claim. It may well claim damages, but its accrued rights are unaffected and the election to cancel the agreement does not expunge the claim to accrued rights. It can claim what is due to it as a result of the accrued rights as well as damages, if such has been suffered.
- [7] The final point made by the respondent is that the tender is too late as it should have been made prior to cancellation of the

agreement.[6] However, as indicated earlier, the tender takes the matter no further as the right to payment accrued well before cancellation of the agreement.

- [8] Having regard to the aforesaid, the defences raised by the respondent cannot succeed. In the circumstances, the applicant is entitled to judgment. The applicant set out in its affidavit why it is claiming an amount less than the amount referred to in the notice of motion due to certain credits and subsequent payments received from the respondent. In the circumstances, it is entitled to judgment for the balance owing to it.

[9] I grant judgment to the applicant as follows:

1. The Respondent is ordered to make payment to the Applicant of an amount of United States \$203 809, 60;
2. Interest shall be paid by the Respondent to the Applicant on the amount of United States \$203 809, 60 from 4 April 2018 at the rate of 1 ½ % (one and a half percent) per month until date of payment;
3. The Respondent is to pay the costs of the application.

W.L. Wepener

Judge of the High Court of South Africa

APPEARANCES

Counsel for the Applicant: C.M. De Witt

Attorney for the Applicant: Fullard Mayer Morrison Inc.

Counsel for First Respondent: C. Gibson

Attorney for First Respondent: Adams & Adams

[1] See Maschinen Frommer GmbH and CO KG vs Trisave Engineering & Machinery Supplies (Pty) Ltd 2003 (6) SA 69 at p 79D-I.

[2] Walker Fruit Farms Limited vs Sumner 1930 TPD 394.

[3] At p 401.

[4] Walker Fruit Farms *ibid*.

[5] See Pienaar v Fortuin 1977 (4) SA 428 T at 429E-H.

[6] See Valentino Globe BV v Phillips and Another

[1998] ZASCA 43; 1998 (3) SA 775 (SCA).

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Prepared on 11 October 2026 · Esheria