

SOUTH AFRICA / JUDGMENT

Roka Media (Pty) Ltd v Kunene Makopo Risk Solutions (Pty) Ltd (55741/21) [2024] ZAGPJHC 1247 (5 December 2024) [2024] ZAGPJHC 1247

COURT

South Gauteng High Court, Johannesburg

BEFORE

Windell

CASE / FILE NUMBER

55741/21

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

No: 55741/21

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

5

December 2024

In

the matter between:

ROKA

MEDIA (PTY) LTD

PLAINTIFF

And

KUNENE

MAKOPO RISK SOLUTIONS (PTY) LTD

DEFENDANT

JUDGMENT

WINDELL, J:

Introduction

- [1] This is an action for damages based on an alleged breach of a service level agreement (SLA). The SLA was entered into on 18 December 2020 between the plaintiff, Roka Media (Pty) Ltd (Roka), and the defendant, Kunene Makopo Risk Solutions (Pty) Ltd (KMRS).
- [2] Mr Ofentse Moroka (Mr Moroka), the managing director of Roka, represented Roka at the conclusion of the SLA, while Mr Siyanda Kunene (Mr Kunene) and Mr Lwazi Kunene, both directors of KMRS, duly represented KMRS.
- [3] In terms of the SLA, Roka was contracted to render certain app development services, namely, ‘to produce a project plan/methodology with ordered development items of app features’ (the services) within specified time frames set out in annexures A-C of the SLA. The initiative required Roka to create a web application (the Web App) that is known as Imbewu Stokvest. This modern-day "stokvel" is designed to assist individuals in saving money and is accessible both online and offline.
- [4] The scope of the work as agreed, as well as the remuneration to be paid to Roka were set out in annexure A attached to the SLA. The disbursements payable to Roka were contingent upon the completion of milestones on specific dates (which dates were extended from time to time) as specified in annexure B. The SLA also provided for an end-to-end testing phase and maintenance phase set out in annexure C to the SLA. The parties’ duties and obligations were set out under clause 10 and clause 11 and annexure A-E of the SLA.
- [5] The SLA provided in clause 4.2 that the agreement shall terminate on the termination date (26 February 2024), unless the parties agreed to extend the duration of the agreement in writing, subject to the parties agreeing the terms and conditions applicable to such extension period. Clause 4.3 provided that notwithstanding the above, that the principal (KMRS) may terminate the agreement in its discretion by giving the supplier (Roka) sixty (60) days written notice.
- [6] In February 2021, KMRS requested for additional development of a Progressive Web App and Hybrid App on the Google Play Store or the Apple iOS store and additional features on the Web App already in development (collectively referred to as “the Apps”). This resulted in the conclusion of annexure D on 17 March 2021 and annexure E on or about 28 April 2021.

- [7] The total amount payable to Roka as per annexure A-C was R426 981.00. KMRS paid a deposit of 75% (R320 235.75). A balance of 25% in the sum of R106 745.25 remained outstanding. As far as annexures D and E are concerned, the contract price was R295 123.12 and R65 160.00 respectively. KMRS paid 50% of these amounts. A balance of R147 061.56 (annexure D) and R32 580.00 (annexure E) remained outstanding. The total amount outstanding for annexures A-E was thus an amount of R286 386.81.
- [8] Two important aspects of the SLA need to be highlighted from the outset: One, Roka was responsible for ensuring the timely development of the Apps and their timely delivery to KMRS, either upon completion, or upon termination of the SLA. Two, KMRS agreed to provide Roka with reasonable support required to develop the Apps, including but not limited to, access to KMRS's premises, Data Centre physical security (SSL certificate) and MySQL Infrastructure to host the Apps (emphasis added).
- [9] By 31 May 2021, the extended deadline for the end-to-end testing of the Apps, KMRS had not yet been able to "go live" with the Apps, which is the point at which something becomes available for use. Roka's excuse was that it was unable to do so because KMRS had failed to provide the necessary infrastructure since the inception of the project.
- [10] The first access to the infrastructure had to be provided by January 2021. It was not provided. The parties agreed that Roka would use its own infrastructure for app development and later migrate the Web App to KMRS's infrastructure to speed up the process. Roka had also extended an offer to provide KMRS with the infrastructure at an additional cost; however, the offer was declined, and KMRS subsequently resolved to acquire its own infrastructure from other service providers.
- [11] On 19 February 2021, the final day of the development in the original agreement, KMRS had not yet provided the necessary infrastructure. The date was negotiated and extended to 22 March 2021. By that date, KMRS had still not provided the required infrastructure. The dates were further extended to 14 April 2021 to accommodate KMRS. However, the infrastructure was only made available in May 2021 and completed database testing on it by 18 May 2021. Despite that, it was not the required infrastructure and did not meet the specified requirements listed in the risk register.
- [12] To finalise the services, Roka required additional resources and thus additional capital. Roka asserts that they informed KMRS that due to the delays, they would receive a quotation detailing the necessary resources for project completion. KMRS received a quotation in the amount of R393 198.00 on 9 June 2021, providing for the allocation of additional resources (a senior developer for 15 days at R1105, two developers for 30 Days at R910 and a database administrator at R910) to continue development beyond the set project timelines.

[13] On or about 22 June 2021 KMRS raised concerns and issues with the App and the quotation and requested a meeting with Roka to 'engage in dispute resolution negotiations.' In a meeting on 23 June 2021, KMRS expressed their dissatisfaction with the current results and claimed that the services did not meet the agreed standards as per the SLA, resulting in unfulfilled project timelines. They also raised an issue with the additional amount required to finalize the services. From a transcript of the proceedings the following transpired:

'SIYANDA [Kunene]: That is what you are saying and what you are then saying now is because of that is how you are doing it, you will not complete the project because we have to pay over and above the amount that was quoted, the additional plus- minus 400K, in spite of the amount we paid and despite the fact that even though some of the developments have not been done for the amounts that have been paid, because it as based on a fixed period; that is what you are saying?

MALE SPEAKER 1 [Roka]: Yes.

SIYANDA [Kunene]: And that is what you are going to stick to?

MALE SPEAKER 1 [Roka]: Yes and it was made clear even to Ulwazi on the 13th of April—

SIYANDA [Kunene]: Okay, alright, then let's not waste each other's time, neh, that is what you are going stick to, right?

SIYANDA [Kunene]: Okay and that is not going to change, so I think let's wrap up this meeting, we will engage you with our legal team then, I think legal can take care of this going forward.

MALE SPEAKER 1 [Roka]: Alright.

SIYANDA [Kunene]: Okay thank you, gentlemen.'

[14] According to Roka, Mr Kunene then requested an in-person meeting to discuss the quotation, among other issues between the parties. They met in person on 25 June 2021. It is Roka's case that it was during this meeting on 25 June 2021 that the parties agreed on the requirements needed to complete the remaining portion of the services (the oral agreement). According to Roka, it was also agreed that KMRS would incorporate the terms of the oral agreement in an annexure F, which shall form part of the SLA. Mr Moroka further testified that KMRS agreed to pay 50% of the amount on 1 July 2021 and the balance upon completion of the services.

[15] KMRS disputes the events of 25 June

2021. They claim that they received an email from Roka on 3 June 2021, which stated that the milestones had been revised to be fulfilled on new dates and that the Apps would be tested only after it was concluded by 30 August

2021. KMRS had not granted their consent for this to occur. The milestones were also substantially different from those that were originally agreed upon and purportedly completed. In addition, further modifications were implemented, increasing the number of milestones from four to seven.

[16] KMRS confirmed that they received the further quotation for completion of the services in the specified amount on 9 June 2021. The quotation was further discussed between the parties, as confirmed by email correspondence and the evidence adduced by both parties. Mr Kunene testified that KMRS needed to accept the quotation before their legal team could incorporate it into the SLA as annexure F. This was communicated to Roka in an email on 28 June 2021 which reads as follows:

“Hi Ofentse [Mr Moroka]. Thanks for the meeting with me and following our discussion on Friday, we would like to reconsider the terms of your quote and

incorporate such as an addendum. We are clarifying with legal and would request that we proceed with the latest demo in the interim.

Would this coming Friday be suitable? Please feel free to set up the demo with the project manager. Regards, Siyanda [Kunene]”

[17] KMRS received a progress report from 28 June 2021 to 2 July 2021, which showed an increase in milestones from 7 to 9 and satisfactory completion of milestone 6. On 2 July 2021 Roka hosted a demonstration to showcase the developments and milestones achieved as of that date. The minutes of the meeting reveal that Roka developed approximately 95% of annexure A-D, but the remaining portion of the services relied on KMRS providing Roka with the necessary infrastructure to host the Apps. Because KMRS had failed to provide the required infrastructure and the SSL certificate, Roka was incapable of handing over completely developed Apps at that stage.

[18] From the minutes of the meeting on 2 July 2021 it was agreed that the following requirements were still outstanding:

- i. SSL Certificate is required — Roka Media has not yet received it from KMRS
- ii. MySQL Server Access is required — Roka Media has not yet received it from KMRS
- iii. Claim requirement list is required — Roka Media has not yet received it from KMRS
- iv. SendGrid Account was not working — A payment to SendGrid by KMRS was required.
- v. Next demo to present the entire Imbewu Stokvest app demo from the beginning to cover the entire journey of the Imbewu Stokvest App.’

[19] The following commercial requirements were noted:

‘KMRS will have an internal discussion to finalise the addendum required for additional resources. Siyanda is to contact Ofentse later today or tomorrow to discuss in more detail. Amendments to the termination clause are required in order to align with the addendum.’

- [20] Roka sent numerous follow-up emails to KMRS about the outstanding items discussed during the 2 July 2021 meeting and the drafting of annexure F. The last email was sent on 29 July 2021. No response was received from KMRS.
- [21] In any event, it is common cause that annexure F was never drafted nor signed. Instead, KMRS terminated the SLA on 3 August 2021 in terms of clause 4.3. In the termination notice Roka was informed that the SLA was terminated on the ‘completion of the notice period’ and required Roka ‘to hand over all work, completed from the onset, up to and including 2 October 2021, the termination date’.

The legal proceedings

- [22] Roka instituted action for damages for breach of contract on 11 November 2021 in the amount of R679 584.81. The amount is made up of two claims: Claim A and Claim B.
- [23] Claim A is in the sum of R286 386.81 under annexure A-E (the remaining 25% under annexure A-C and the remaining 50% under annexure D-E). Claim B is in the sum of R393 198.00 based on the oral agreement between the parties (annexure F).
- [24] In their particulars of claim, Roka, among other things, claimed that it had finished the development of the Apps prior to the termination on 3 August 2021, and the sole remaining component of the development was the installation of the Apps on KMRS’ infrastructure, which necessitated KMRS’ compliance with its material obligations under the agreement. In order to facilitate Roka's completion of the application development, it is alleged that KMRS failed to deliver the SSL certificate and MySQL infrastructure. According to Roka, it had tried many times to settle the dispute with KMRS in accordance with the provisions of clause 12.1 and 12.2 of the SLA, but without success.
- [25] KMRS pleaded to the claims. The balance claimed in Claim A in terms of annexure A-E of the SLA was not disputed. It was also not disputed that the infrastructure had to be supplied by KMRS. They, however, contended that Roka never sent any correspondence to KMRS placing them in ‘breach’ and calling on them to rectify the purported breach within the required 10 business days after written notice was delivered. KMRS further denied that any failure to provide Roka with the SSL Certificate and infrastructure to host the Apps delayed the completion of the Apps within the periods agreed upon. KMRS argued that the SLA provided for specific milestones and the completion of tasks involved in app creation. These milestones were never achieved or delivered by Roka. It was thus denied that KMRS owed Roka any amounts under the SLA or at all.

[26] Finally, KMRS contended that Roka had engaged a third-party supplier, Irays Solutions (Irays), to provide the services to KMRS that Roka had agreed to provide in accordance with the SLA. This was done without KMRS' knowledge or consent and in spite of Roka's assurance that it possessed the requisite personnel, expertise, and skills to execute the services. This conduct, so it was alleged, constituted a breach of the SLA.

[27] As far as Claim B was concerned, KMRS denied conclusion of an oral agreement of which annexure F would have been provided to Roka for signature as an annexure to the original SLA. KMRS did not provide annexure F to Roka, nor did it agree upon the conclusion of additional resources amounting to R393 198.00.

[28] The common issues in dispute to be decided by the court are thus the following:

1. Did Irays involvement constitute a material breach of the SLA?
2. Did Roka perform and meet its obligations in terms of the SLA with all its annexures? More particularly, did Roka fulfil its obligations in terms of the termination notice?
3. Did KMRS perform its obligations in terms of the SLA with all its annexures?
4. Was there an oral agreement concluded between parties?
5. Was it necessary to place KMRS in mora?

The evaluation of the evidence

Does the involvement of Irays constitute a material breach of the contract?

[29] Evidence was led by both parties over the course of five days. During his testimony Mr Moroka acknowledged that in terms of clause 9.3.1 of the SLA, Roka warranted that it had the necessary expertise, skill and personnel required to supply the services. He testified that Roka had joined forces with a certain Mr Praveen Upadhyaya (Praveen) from Irays on a number of other initiatives and had employed him as an independent contractor for this project.

[30] He maintained that Irays' involvement in the project did not initiate following the signing of the SLA. Roka was required to submit bid proposals to KMRS and conduct demonstrations of their culpabilities prior to the conclusion of the agreement. Irays was involved in the tendering and negotiation phases before the SLA was finalised. This was corroborated by Mr Kunene. Therefore, KMRS was informed and aware from the outset that Praveen was the technical individual with whom Roka would be collaborating to develop the Apps.

[31] Additionally, KMRS was able to observe and identify Irays in a variety of forms of communication, including email correspondences and virtual meetings. Irays was responsible for the preparation of the Business Requirement Specification document, which featured the organisation's logo. KMRS did not object or express any concerns regarding Irays' involvement in the project at any point prior to or following the execution of the SLA.

[32] The evidence of Roka dealing with Irays' involvement was not seriously disputed. I am satisfied, on a balance of probabilities, that KMRS was aware of Irays' involvement in the project from the beginning, and they did not have any reservations about it. It only became a point of contention between the parties after summons was issued.

[33] In any event, in my view it does not matter that Roka made use of an independent contractor. The purpose of a warranty of expertise is to allocate risk and establish liability in the event of a breach. Praveen's position as an independent contractor is akin to that of an agent, and Roka would be liable for any damages cause by Praveen in the execution of the services.[1]

Did the parties perform and meet their obligations in terms of the written agreement with all its annexures after the SLA was terminated?

[34] A no-fault clause (clause 4.3), which states that KMRS 'may terminate the agreement at its discretion by giving the supplier sixty (60) calendar days' written notice', served as the basis for the termination of the SLA. Mr Kunene testified that he terminated the contract due to, inter alia, Roka's request for additional funds.

[35] Clause 4.3 must be read with clauses 13.5 and 13.5.2, which read as follows:

'In the event that the Principal terminates this agreement or any part thereof, for any reason whatsoever, the supplier shall, in accordance with the principal written instruction, either:

13.5.1 immediately cease all service hereunder and be paid for the service rendered until the receipt of the notice of termination; or

13.5.2 Complete any services in the course of being rendered until the end of the notice period and be paid the remuneration accruing thereon'.

[36] KMRS clearly elected to rely on clause 13.5.2 as they informed Roka that it 'hereby terminates the agreement upon the completion of the notice period' and required from Roka 'to hand over all work, completed from the onset, up to and including 2 October 2021, the termination date'.

[37] Consequently, the termination date of the SLA was 2 October 2021, and Roka was required to complete the services and transfer all work up to and including that date.

[38] The end-to-end assessment of the applications was a point of contention between the parties during the hearing. It is common cause that the SLA was terminated on 3 August 2021 prior to completion of end-to-end testing. Roka indicated that the end-to-end testing of all the applications was scheduled for the conclusion of their development. Despite a date being arranged for 31 May 2021, the end-to-end testing was not able to be completed for the reasons outlined below.

- [39] As far as the Web App was concerned, Roka had effectively completed milestone three, as confirmed by the progress report, and the payments were made in accordance with the milestones that were established between the parties. Roka's witnesses testified that KMRS was provided with virtual demonstrations of the Web App's features, during which testing was conducted to ascertain their functionality. KMRS also received consistent progress reports regarding this matter.
- [40] Despite both parties confirming the completion of milestones 1 to 3, KMRS did not conduct any physical testing on the Web App. Roka exclusively conducted virtual demonstrations during which KMRS was shown specific functionalities of the Web App.
- [41] As far as development and conclusion of the Progressive Web App and Hybrid App was concerned, the focus of KMRS' dispute was on delivery and not on development. Upon termination, KMRS refused to allow Roka to migrate the Apps into KMRS' inadequate infrastructure, conduct demonstrations, and perform end-to-end testing.
- [42] From the evidence of both parties, it is clear that Roka experienced challenges from the project's inception to complete the services and hand over the Apps to KMRS. This was primarily the result of KMRS' consistent failure to provide the necessary infrastructure, SSL certificate and certification of the Business Requirements Specification (which was only signed on 14 May 2021). As a result, the risk register was implemented to document the hazards that were linked to these delays and inadequate infrastructure.
- [43] Praveen explained the importance of appropriate infrastructure and the SSL certificate. He stated that without the necessary infrastructure, the project would collapse as more users joined, unable to meet the increased demand. He testified that the infrastructure that was ultimately provided in May 2021 was deficient in many areas and did not satisfy the specified requirements outlined in the risk register, including insufficient server capacity, process capacity, and hard drive capacity. The infrastructure that was provided could have only functioned temporarily if it had been implemented. Praveen also testified that the SSL certificate was mandatory because the developed Web App was a financial application, necessitating precautionary measures to safeguard KMRS from any potentially fraudulent activities.
- [44] Praveen testified that the package file (APK) that was delivered to KMRS was the file format that was used by the Android operating system and a variety of Android-based operating systems for the distribution and installation of mobile apps, mobile games, and middleware. The App's ultimate product is what allows the public to access the App on the App Store or Google Play. Without an adequate infrastructure, the APK would be rendered inoperable.

- [45] Praveen stood his ground under cross examination and no evidence was led to refute his testimony. Roka furthermore provided evidence that KMRS was consistently informed of the potential repercussions of failure to fulfil its obligations and that the project's delay would incur additional expenses for KMRS. Despite these setbacks, Roka continued to develop the Apps up to a point where the requested infrastructure and SSL certificate were necessary.
- [46] Consequently, the overall conclusion of Roka's evidence was that the services had been completed, and the sole remaining component was contingent upon KMRS fulfilling its obligations, which included providing access to the necessary infrastructure and SSL certificate. KMRS send a termination notice on 3 August 2021 without fulfilling its obligations under the SLA. KMRS' inability to fulfil these obligations prevented the transfer of the Apps to them.
- [47] It is important to be reminded that Roka was given 60 days to hand over all work completed on the termination date, namely 2 October
2021. Roka continued to request access to the server from KMRS even after the termination notice was delivered. This was necessary to deploy the application to KMRS and conduct demonstrations, which included testing. In a letter dated 18 August 2021 Roka tried to get the parties to end their disagreements amicably by suggesting that they hand over all the progress made so far and end the agreement, as KMRS had asked, as long as the remaining balance was paid in full (A- D). Alternatively, Roka proposed to finalize the project, transfer all the development, and terminate the agreement in accordance with the wishes of KMRS, subject to full payment of the outstanding balance (A-F) and 12 months maintenance and support fee. KMRS rejected the offer. Mr Kunene testified that he rejected the handover or delivery of the Apps because Roka requested additional funds, which KMRS had not agreed upon.
- [48] Roka later suggested that the completed version of the developed Apps be delivered to KMRS in order to demonstrate its functionality before transferring it to KMRS' infrastructure, in order to resolve the dispute between the parties without resorting to legal action. KMRS declined to accept the Apps delivery and instead requested a task log that included the completion dates of the assignments. The task log was provided on 21 September 2021, which outlined all completed tasks and those that were still pending (which were not disputed). However, it did not include the dates on which such tasks were completed.
- [49] The evidence established, at least on a balance of probabilities, that Roka had completed the majority of the tasks on the task log. The sole task that remained required the SSL certificate and access to the infrastructure in order to be completed. In all the correspondence from June to July 2021, Roka made it clear that the SSL certificate and MySQL were still pending completion.

Expert evidence

- [50] Mr Tebogo Mokgoloboto (“the expert”) is an Information Technology Specialist and was called as a witness on behalf of KMRS. His expertise was established, and his opinion evidence was admitted into evidence.
- [51] His testimony did not take the matter further. His opinion was inconclusive and exclusively focused on the software development life cycle, with a particular emphasis on testing. He testified that the technical designs were not provided to him, which resulted in the absence of a definitive opinion. He was unable to assess the functionality of the Hybrid App during the implementation phase, and as a consequence, no opinion was provided. The deployment and maintenance phases were contingent upon the completion of end-to-end testing prior to the App's launch. It is common cause that end-to-end testing never occurred, consequently, these two phases could not be reached.
- [52] The expert criticised Roka for not completing the end-to-end testing on the date scheduled (31 May 2021). In my view, the criticism is unwarranted. The parties scheduled the end-to-end testing at the conclusion of the development process, as indicated in annexures C and D. KMRS had postponed the project's completion in accordance with the evidence previously mentioned, so the scheduled dates in the agreement are of no consequence. The parties were unable to meet the deadlines outlined in annexure D as a result of the delays caused by KMRS.
- [53] The expert also expressed an opinion on Roka’s Risk Management. It is unclear what additional actions Roka could have taken, as they emphasised the hazards associated with the development of the Apps more than once, and KMRS failed to comply with them.
- [54] The expert’s apprehension regarding KMRS’ payments that were made at the conclusion of the agreement without the delivery of the App in the executive summary of the report are also irrelevant. So are his recommendations in clause 12 of the report as they centre on Roka’s responsibility to deliver the Apps to KMRS without addressing the numerous endeavours that Roka made to deliver the application and conduct testing with KMRS. In addition to the aforementioned, the expert did not provide any recommendations regarding payment after the Apps had been delivered and tested.
- [55] Finally, the expert stated that he did not possess the necessary technical abilities to create an application. As a result, his professional assessment of the application's development was of no value.

Placing KMRS in mora

- [56] KMRS contends that Roka never addressed a breach letter to them, despite numerous complaints about their failure to deliver the infrastructure and SSL certificate. This was confirmed in evidence. Neither was KMRS ever placed in breach and called to rectify the aforesaid “breach” within 10 days as per the SLA.

[57] Mora ex re is applicable to a contract in which the parties have explicitly or implicitly specified a specific time for performance in the

agreement.[2] Consequently, demand is not necessary to place the debtor in mora.[3] In *Scoin Trading v Bernstein*[4] the court held:

‘[11] The starting point is therefore an examination of the meaning of mora. The term mora simply means delay or default. This concept is employed when the consequences of a failure to perform a contractual obligation within the agreed time are determined. The date may be stipulated either expressly or tacitly and there must be certainty as to when it will arrive. Thus, when the contract fixes the time for performance, mora (mora ex re) arises from the contract itself and no demand (interpellatio) is necessary to place the debtor in mora. The fixed time, figuratively, makes the demand that would otherwise have had to be made by the creditor.’ (Footnotes omitted)

[58] It is common cause that KMRS terminated the agreement in terms of clause 4.3. The termination letter requested Roka to hand over all completed work by the termination date, and stipulated KMRS’ liability for payment. This is in compliance with clause 13.5.1, which was previously mentioned, and clause 8.3 of the SLA, which stipulates that KMRS is obligated to pay Roka the remuneration that is lawfully owed to it as of the date of termination if the agreement is terminated early in accordance with the provisions of clause 4.3.

[59] In the specific circumstances of this case, it was thus not necessary for Roka to place KMRS in mora. KMRS terminated the agreement and Roka’s had demonstrated that they properly performed in that they completed the development of the Apps, with the remaining portion contingent on KMRS’ failure to meet its reciprocal obligations. Roka attempted to deliver the developed Apps, but KMRS rejected it. In accordance with clause 8.3 read with clause 13.5.2, Roka is entitled to remuneration in terms of annexures A-E (Claim A).

The oral agreement

[60] On 9 June 2021, Roka sent the quotation for additional funds. Mr Moroka testified that he had a meeting with Mr Kunene on 25 June 2021, following their virtual meeting on 23 June 2021, during which the parties agreed to proceed with the development of the Apps and to incorporate the quotation of R393 198.00 as annexure F to the SLA. Mr Moroka further testified that part of the agreement was that 50% of the aforesaid amount would be payable upfront, and the balance would be payable upon completion and handover of the services. It is common cause that no payment was made.

[61] Although KMRS agrees that there was a meeting on 23 June 2021 to discuss Roka’s request for additional resources, it disputes that any agreement was reached.

[62] On 28 June 2021, an email was addressed from Mr Kunene to Mr Moroka indicating that the terms of the quotation would be “reconsider” (reconsidered) and incorporated into an addendum. Mr Kunene further specifically stated that they would be ‘clarifying with legal and would request that we proceed with the latest demo in the interim. Would this coming Friday be suitable?’”

[63] When the demonstration of the Apps was held on 2 July 2021, annexure F was still outstanding. In an email dated 8 July 2021, Roka advised KMRS that they were still waiting for the ‘addendum from your legal team’ and that development will continue once the commercial amendments have been finalised and the requested SSL certificate and MySQL server had been provided.

[64] On 20 July 2021, Mr Moroka once again addressed an email to Mr Kunene indicating that:

“Roka Media have not received any feedback regarding the email below and new addendum as promised. Could you kindly advise soonest on when we’ll receive feedback. We would like to continue with development of Imbewu Stockvest App and concluded the project.

In order for the software development to continue we require the information requested in our meeting:

New addendum for additional resources SSL Certificate MySQL server access”

[65] On 29 July 2021, Mr Maroka sent the last email to Mr Kunene stipulating that:

“I have not had any feedback regarding the email below and items required. As agreed we still have resources allocated to the project

and we’d like to continue the APP development.”

[66] It is KMRS’ evidence that the quotation was never accepted by them, and neither was any annexure concluded and attached to the SLA marked as annexure F. Roka, on the other hand, argues that the oral agreement was valid and binding on the parties and the fact that it was not incorporated into the SLA is irrelevant.

[67] The court is faced with two mutual destructive versions. Roka bears the onus on a balance of probabilities to prove that the agreement was concluded on the terms pleaded. In *National Employers' General Insurance Co Ltd v Jager*,^[5] the court remarked on the approach to follow:

'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In

deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff then the court will accept his version as being probably true. If however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false'.

- [68] Firstly, based on objective facts, I am not convinced that there was a consensus regarding the additional amount necessary to finalise the project. The agreement was purportedly reached on 25 June 2021. However, the transcription of the virtual meeting that took place two days prior on 23 June 2021, plainly demonstrates that KMRS was not willing to pay any additional amount to Roka. Further, in the email on 28 June 2021 (three days later), KMRS specifically indicated that the quotation is still being considered or is reconsidered which will be incorporated as an addendum to the SLA and that they are still clarifying with 'legal'. In the event that a meeting of the minds occurred on 25 June 2021, and an agreement was reached in the terms alleged by Roka, why did Mr. Kunene not confirm the agreement in the email dated 28 June 2021?
- [69] Secondly, the parties put all the other amendments to the SLA in writing and signed them (annexures D and E). The SLA contained a non-variation clause (clause 23). Roka understood that the validity of the alleged agreement would depend on its formal incorporation into annexure F to the SLA. This is made clear in the email of 8 July 2021, wherein Roka informed KMRS that it would not conclude the project until annexure F had not been finalized.
- [70] Thirdly, the court is faced with two mutually destructive narratives. Roka can only succeed if they can convince the court on a preponderance of probabilities that their version is true and accurate, and therefore acceptable, and that the other version advanced by KMRS is false or mistaken, and therefore subject to rejection.
- [71] I am unable to make such a finding on the evidence produced. Roka therefore failed to discharge the onus to demonstrate that the parties had entered into a valid and binding oral agreement. Consequently, Claim B must fail.

[72] In the result the following order is made:

Claim A:

[a]. The defendant is ordered to make payment to the plaintiff in the amount of R286 386.81.

[b]. Payment of interest on the capital amount at the rate of 7% calculated 14 days from the date of Judgment to the date of final payment.

Claim B:

[a] The claim is dismissed.

Costs:

[a] The defendant to pay the costs of the action on a party and party scale C.

L. WINDELL

JUDGE OF THE HIGH COURT

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 5 December 2024.

APPEARANCES

Attorney for the plaintiff: Mr B. Mathebula Instructed by: B. Mathebula Inc. Counsel for the respondents: Advocate D. Strydom Instructed by Sefume Attorneys Inc Date of hearing 27 May 2024 to 31 May 2024 Heads of argument filed: 10 June 2024 and 18 June 2024 Date of judgment: 5 December 2024

[1] See the minority judgment in *Rehau Polymer (Pty) Ltd v Brunettes Electrical & other* (641/2018)

[2019] ZASCA 101.

[2] Ibid at 294.

[3] *Laws v Rutherford* 1924 AD 261 at 262.

[4] 2011

(2) SA 118 (SCA) at [11].

[5] 1984

(4) SA 437 (ECD) at 440D-441A.

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