

SOUTH AFRICA / JUDGMENT

TND Risk Management CC v Mahikeng Local Municipality (M566/2016) [2018] ZANWHC 44 (4 October 2018) [2018] ZANWHC 44

COURT

North West High Court, Mafikeng

BEFORE

PL Nobanda

CASE / FILE NUMBER

M566/2016

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE NO:

M566/2016
NOT
REPORTABLE
NOT
OF INTEREST TO OTHER JUDGES
In

the matter between:

TND
RISK MANAGEMENT CC
PLAINTIFF
And
MAHIKENG
LOCAL MUNICIPALITY
DEFENDANT

JUDGMENT

NOBANDA A J:

Introduction

- [1] The Plaintiff, TDN Risk Management CC issued summons against the Defendant, Mahikeng Local Municipality for an alleged breach of contract claiming an amount of R1 125 000.00 and R4 555 100.00 respectively, plus interest at 9% per annum on both amounts a tempore morae.

Background

- [2] On or during June 2014, the Plaintiff and the Defendant (the Municipality) concluded a Service Level Agreement in terms of which the Plaintiff was to manage the Mahikeng landfill site from June 2014 to 8 June 2017 at a tariff of R205 000.00 per month with an annual escalation of 10% for the duration of the contract (the agreement).
- [3] The Plaintiff alleges that the Municipality breached the agreement by failing to pay invoices for the services rendered for the period June to November 2015. In addition, the Municipality cancelled the agreement on 27 October 2015. As a result, the Plaintiff claims from the Municipality:

3.1 Claim 1

Payment in the amount of R1,125,000.00 plus interest calculated at 9% per annum a tempore morae for the unpaid invoices of June to end of November 2015; and

3.2 Claim 2

Payment in the amount of R4,555,100.00 plus interest calculated at 9% per annum a tempore morae for the duration of the cancelled agreement.

- [4] In its plea, the Municipality denies that it breached the agreement. The Municipality admits that it had cancelled the agreement as the Plaintiff failed to perform the works in terms of the agreement. The Defendant alleges that the Plaintiff lacked the skills, experience and expertise to manage a landfill site. In addition, the Defendant denies that it is indebted to the Plaintiff for the amounts claimed in Claim 1 on the basis that the Plaintiff did not render any services during the periods claimed.

- [5] At the end of the trial and during argument, Plaintiff's Counsel conceded, correctly so, that in light of the evidence tendered by both parties' witnesses during the trial, either party was entitled to cancel the agreement and the Defendant elected to do so. As a result, the Plaintiff abandoned Claim 2 and is pursuing Claim 1 only. Consequently, it will not be necessary to deal with the evidence that led to the cancellation of the agreement in detail. Such evidence will only be dealt with insofar as it relates to Claim 1.

Summary of Evidence

- [6] The Plaintiff called three witnesses, Mr Mlingani Dlodlo, Mr Stephen Maruwakgomo and Mr Daniel Mokgotlwa while the Defendant called Mr Lloyd Malefo, Mr Kitso Komane and Mr Michael Howard. Mr Howard gave expert opinion on the management of the landfill site and his evidence for this part of the claim is not relevant. Accordingly it shall not be dealt with.
- [7] Mr Mlingani Dlodlo (Dlodlo), testified inter alia, that they started working on site in June 2014. From the first day, they experienced challenges in that:
- (a) the site was not fenced off;
 - (b) there was no overnight security guards on site;
 - (c) there was no controller at the entrance who directed trucks where to dump waste on site;
 - (d) there were fires all over the site; and
 - (e) there was no signage to direct the trucks where to go dump waste.
- [8] As a result, there was a huge backlog as illegal dumpers dumped waste at night, including tyres which were not supposed to be dumped there. Consequently, from day one, they were dealing with a backlog which affected their performance as they were always trying to catch up with the workload. He raised these issues with the Municipality including advising the Municipality to fence off the area and hire security guards to fend off illegal dumpers, to no avail. Instead, he was told to do the best he could under the circumstances as the Municipality did not have any funds to attend to those challenges.
- [9] Then at the beginning of February 2015, he was called by Mr Komane of the Municipality, informing him about the complaints raised in the report by Mr Daniel Mokgotlwa from Ngaka Modiri Molema Municipality who inspected the site. He told Mr Komane that those were the same complaints he has been raising with the Municipality from the beginning. In June 2015, the Municipality stopped paying their invoices. As a result, they were unable to continue performing the works which resulted in them vacating the site in August 2015.
- [10] In September 2015, one Mr Mokwena from the Municipality, called all the service providers, advising them of the Municipality's financial challenges. However, Mr Mokwena undertook to pay the Plaintiff as soon as the Municipality obtained funds. Mr Mokwena requested them to go back to work and undertook to pay two of the outstanding invoices. They returned to work but the Municipality paid only one invoice. When he enquired about the payment of

the second invoice, Mr Komane told him that they are not going to pay it and instead came back with a letter terminating the agreement and advising them to vacate the site by 1 December 2015.

- [11] Under cross examination, Mr Dlodlo conceded that the Plaintiff had never managed a landfill site on its own prior to its appointment by the Municipality. He was also referred to the minutes of the meeting held on site on 12 March and 12 May 2015 with Mr Malefo of the Municipality where Mr Nhlabathi, the Plaintiff's representative on site, admitted to Plaintiff not having the necessary machinery on-site and experience to manage the site. Mr Dlodlo also agreed with the findings in Mr Mokgotlwa's inspection reports of February and July 2015 regarding, inter-alia, that daily compaction of waste was not done and the backlog of uncovered waste he found on site.
- [12] Mr Stephen Moruwakgomo (Moruwakgomo) testified that he was the owner of the company that used to hire out machinery to the Plaintiff during 2014/2015 to wit, a front-end loader and a water browser which was on site throughout the period of March- November 2015. He testified that other machinery like the excavator, grader and tipper truck was brought on site as and when they were required.
- [13] Mr Daniel Mokgotlwa (Mokgotlwa), an Environmental Health Practitioner from Ngaka Modiri Molema Municipality confirmed that he did an inspection on site during 2015 and wrote reports of his findings. The purpose of the inspection was to ascertain whether the Municipality complied with the landfill permit and the minimum requirements for waste disposal in the landfill. He confirmed the findings of his reports of February and July 2015.
- [14] Mr Lloyd Malefo (Malefo), testified that he was the Acting Head for Waste Management in the Municipality from December 2014 to June 2016. He dealt with the Plaintiff directly for the management of the site. He conducted inspections during the tenure of the Plaintiff's contract and found that Plaintiff was not performing in accordance with the agreement. He held two meetings in March and May 2015 with the

Plaintiff's representative on site, Mr Nhlabathi, to address Plaintiff's poor performance. Notwithstanding, Plaintiff's

performance did not improve which led to the cancellation of the agreement.

- [15] Mr Kitso Komane (Komane), the Acting Director for Community Services in the Municipality, testified that during the period June - November 2014 he was the

Acting Head: Waste Manager and the management of the landfill site fell within his authority. Mr Malefo who reported to him directly was responsible for dealing with the Plaintiff at operational level. He confirmed that Mr Malefo documented Plaintiff's poor performance. He denied that there was a backlog on site when the Plaintiff took over. He averred that the previous service provider had been working on site on a month-to-month basis after its contract terminated, prior to Plaintiff taking over.

- [16] Mr Komane blamed Plaintiff's poor performance on Plaintiff's inexperience in operating and managing a landfill site. He testified that, despite Plaintiff's undertaking to improve on its performance, there was little improvement. As a result, the then Acting Municipal Manager, Mr Moller, withheld Plaintiff's payment for June and July and instructed them to terminate the agreement. Mr Moller however left before his instructions were implemented.
- [17] When the new Acting Municipal Manager, Mr Mokwena, took over in September 2015, he wrote a memo to him, updating him on the situation on site. In his memo, Mr Komane states that the Plaintiff was on site on June and July 2015 and rendered services, albeit substandard. He recommended that the Plaintiff's contract be terminated and a new service provider be appointed. However, that Plaintiff be paid for June and July but not for August as Plaintiff had vacated the site then.
- [18] Mr Komane further testified that at the beginning of August and around September 2015, the situation on site had reached a critical phase. There was refuse all over the place to the extent of blocking the entrance the trucks used when they came to offload. The community was also complaining. As a result, he approached Mr Dlodlo reminding him that he was still under contract and should accordingly attend to the site. He handed over the letter of termination of the contract to Mr Dlodlo in October 2015, advising the Plaintiff to vacate the site in December 2015.
- [19] The issue to be determined is whether or not Plaintiff is entitled to payment of the invoices submitted for the period of June to November 2015, excluding the one payment made in September 2015. The Municipality contends that Plaintiff is not entitled to any payment as the Plaintiff did not render any services for that period which entitle Plaintiff to payment. The Plaintiff on the other hand contends that it rendered the services for the period June, July, September to November, except August, where it rendered partial services using skeleton staff, due to non-payment of its invoices. Plaintiff's Counsel also contended that Plaintiff is entitled to full payment of all the invoices for that period as the contract was terminated with effect from 1 December 2015.
- [20] It is common cause that the Plaintiff received the letter terminating the agreement on 27 October 2015 with effect from 1 December 2015. It is further common cause that the Plaintiff was on site for the period June, except August, to November 2015. Defendant's Counsel contended that it is irrelevant that the Plaintiff was on site during that period as Plaintiff was not paid for being on site but for rendering services and the Plaintiff did not render any services during that period.
- [21] This however is contrary to the memoranda dated 3 July 2015, 17 September 2015 and 30 October 2015 from the then Acting Director Community Service, Mr Komane, to the then Acting Municipal Manager Mr Komane, in whose authority the landfill site fell, recommended payment for Plaintiff's June, July, September and October invoices, on the basis that Plaintiff rendered services for that period, albeit not to the standard specified in the agreement.

[22] In his testimony, Mr Komane said he was astounded why his recommendations were not approved. I also find this surprising since Mr Komane was the person who was directly involved in the overseeing of the Plaintiff's performance, including managing Mr Malefo, who reported directly to him. Waste management, including landfill site management, fell within Mr Komane's direct authority. In his memoranda, Mr Komane indicates that even though Plaintiff's performance was not to the standard specified in the agreement, the Plaintiff cannot be penalised for it, as there is no penalty clause in the agreement, to justify the imposition of a penalty for sub-standard performance, hence the recommendation for payment.

[23] Mr Komane does not however, recommend payment for the month of August in his memorandum of September 2015, on the basis that the Plaintiff was not on-site during that month. In his testimony, Mr Dlodlo concedes that the Plaintiff had vacated the site in August due to non-payment of the June and July invoices. However, Mr Dlodlo averred that the Plaintiff had provided some form of services using skeleton staff during that month. The onus is on the Plaintiff to prove the services it rendered for that month and if it rendered partial services, the Plaintiff has to prove the amount payable, if any, for such services. The Plaintiff has failed to do so.

[24] Mr Komane also testified that due to the deteriorated conditions on site at the beginning of August and around September, he had to call Mr Dlodlo reminding him that Plaintiff was still under the contract and should attend to the site. Mr Dlodlo confirmed that they returned to site and were paid one invoice in September 2015. They returned to site and worked until end November 2015 due to the cancellation of the agreement. Mr Komane also recommends payment for October on a

similar basis in his memorandum of October 2015. No evidence was tendered by the Municipality disputing that Plaintiff rendered

services in November 2015 other than the blanket denial contended by Defendant's Counsel during argument.

[25] In the premises, I find that the Plaintiff has proved on a balance of probabilities, that it had rendered the services at the landfill site on June, July, September, October and November 2015. Accordingly, the Plaintiff is entitled to payment for the services rendered for that period. The Plaintiff has however failed to prove that it is entitled

to any payment for the month of August 2015.

Order

[26] Accordingly, I grant judgment in favour of the Plaintiff in the following terms:

1. The Defendant is ordered to pay the Plaintiff an amount of R 899 500.00;

2. The Defendant is ordered to pay interest on the said amount calculated at 9% per annum a tempore morae;
3. Claim 2 is dismissed;
4. The Defendant is ordered to pay the costs of suit.

PL NOBANDA

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 27 JUNE 2018

DATE OF JUDGMENT

: 04 OCTOBER 2018

COUNSEL FOR THE APPLICANT : ADV VISSER

COUNSEL FOR THE RESPONDENT : ADV CHWARO

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANWHC/2018/44.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/tnd-risk-management-cc-v-mahikeng-unknown-topic-anwhc-2018>

Prepared on 11 October 2026 · Esheria