"ENM 1"

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION – EAST LONDON

Case no: 257/14
ECD: 557/14
Date Heard: 20/06/17
Date Delivered: 15/08/17

In the matter between:

METGOVIS (PTY) LTD **PLAINTIFF**

AND

BUFFALO CITY METROPOLITAN MUNICIPALITY **DEFENDANT**

JUDGMENT

SMITH J:

Introduction

[1] The plaintiff sues for damages in the sum of R395 021. 57, in respect of licence fees for its computerized municipal property valuation and management system called "Metval" and technical support provided to the defendant for the period 1 July 2013 until 10 October 2013. The plaintiff is a duly registered company trading under the name of Metropolitan Government Systems, and the defendant is a Metropolitan Municipality established in terms of section 12 of the Local Government: Municipal Structures Act, 117 of 1998.

The pleadings

[2] It is common cause that the parties concluded a written Software License Agreement on 4 February 2008, at East London. In terms of that agreement the defendant was granted a licence to use the Metval system. The plaintiff thereafter installed the system on the defendant's computers, provided technical support and trained its staff on the use of the system. The agreement terminated on 30 June 2017, but provided for automatic renewal for a further period of three years on the same terms and conditions, if it had not been expressly terminated on three months' written notice.

[3] The plaintiff pleaded that the Software License Agreement was expressly, alternatively tacitly, renewed for a period of three years which expired on 30 June 2013. It furthermore averred that:

> "12.1 On or about 30 June 2013, at the special instance and request of the defendant, the parties agreed to expressly, alternatively tacitly, renew the "Software Licence Agreement" in terms whereof the Plaintiff would continue to render its services to the defendant, on a month-to-month basis, in accordance with the terms and conditions of the "Software License Agreement" until terminated by the Defendant by notice."

[4] Plaintiff asserts that pursuant to that agreement, it continued to make the license available to defendant and to provide technical support to the defendant's staff from 1 July 2013 until 10 October 2013. Its damages claim is in respect of the license fee for the Metval system, an annual telephone and

remote support fee, and the monthly agreed or reasonable charges in terms of the agreement, from 1 July 2013 to 10 October 2013.

[5] In its plea the defendant admitted that the parties concluded the Software Licence Agreement, but averred that the purported automatic renewal of the agreement was unlawful and thus invalid.

[6] The defendant initially denied that month-to-month contracts had been concluded on the bases alleged by the plaintiff in respect of the period from 1 July 2013 until 10 October 2013. It, however, amended its plea on 20 June 2017, effectively denying that such contracts had been concluded, and averring in the alternative that any of the defendant's officials who purported to act on its behalf during negotiations with the plaintiff, lacked the necessary authority to contract on behalf of the defendant in the manner alleged, or at all. It furthermore denied that it had authorised the municipal manager, or any other functionary, to contract either tacitly or otherwise with the plaintiff. It accordingly averred that the purported contracts are *ultra vires* and null and void.

[7] Anticipating an amendment of this nature, alternatively the possibility that the issue of legality may be raised by the court *mero motu*, the plaintiff amended its replication, averring an alternative claim based on unjustified enrichment. That amendment was effected on 1 June 2017. The defendant thereafter filed a special plea averring that the plaintiff's claim based on unjustified enrichment had become prescribed.

[8] By agreement between the parties I was not called upon to rule on the validity of the initial agreement or its purported automatic renewal. The defendant also admitted that the plaintiff did indeed render the services as alleged during the period from 1 July 2013 until 10 October 2013 and that the amounts reflected in invoices raised pursuant thereto had been properly calculated. It accordingly admitted the *quantum* of the damages claimed by the plaintiff.

[9] While the plaintiff averred an express (alternatively tacit) agreement in respect of the aforesaid period, it proceeded on the basis that the agreement was tacit, and had adduced evidence on that basis. Only the following issues accordingly fell for decision:

(a) whether the plaintiff succeeded in proving, on a balance of probabilities, that it had concluded a tacit agreement with the defendant in terms whereof the defendant would continue to use the plaintiff's software and services on a month-to-month basis, on the same terms and conditions contained in the original agreement, until a new service provider could be appointed;

(b) whether the defendant's special plea, filed on the basis of a consequential amendment in terms of Rule 28(8) of the Uniform Rules of Court, and raising the issue of prescription of the plaintiff's claim based on unjustified enrichment, constitutes a procedural irregularity; and

(c) In the event of the court ruling that the special plea had been filed properly, whether the plaintiff's claim based on unjustified enrichment had become prescribed.

The Evidence

[10] The parties called only one witness each. The plaintiff called Ms Janet Channing, its Managing Director and majority shareholder, and the defendant called Mr Christopher Lourens, its Municipal Valuer.

[11] Ms Channing testified that the Metval Valuation System is a property valuation and management system designed to assist municipalities in the compilation, administration and maintenance of their immovable property valuation roll. The system is also configured to comply with municipalities' legislative responsibilities in terms of the Municipal Property Rates Act, 6 of 2004. Amongst others, it provides for the collection and capturing of data, the generation of values through a computer assisted appraisal process, and the finalisation of the valuation roll. It also manages the appeal process in terms of which ratepayers are entitled to lodge objections to valuations. The system is also designed to provide for effective maintenance of the valuation roll by accounting for the subdivision, consolidation and demolition of properties. It accordingly updates and reconciles properties that had been bought, sold, subdivided or consolidated during the course of the month, to enable the defendant to issue new valuations. It also interacts with municipalities' financial system to ensure that ratepayers are timeously and correctly billed every month. By June 2013 the system was managing approximately 144 000

properties situated within the defendant's municipal boundaries. The plaintiff continued to render these services until 10 October 2013 on the same terms and conditions contained in the initial agreement.

[12] She said that by 30 June 2013 the defendant had no alternative system in place to enable it to perform its constitutional and statutory functions regarding the maintenance of a proper valuation roll. She was accordingly approached by various municipal functionaries and requested that the plaintiff should continue to render the services until a new service provider could be appointed. Being mindful of the deleterious consequences for the defendant if the plaintiff simply terminated access to the system on 1 July 2013, the plaintiff agreed to continue rendering the services until a new service provider could be appointed. She testified furthermore that the plaintiff did not receive any notice requiring it to terminate its services, or to vacate the municipal premises prior to 10 October 2013.

[13] By 30 June 2013 the system had been installed, the defendant's data captured, and had been managing and reconciling property valuations for uploading to the municipality's financial system to enable timeous and correct monthly accounts to be sent to ratepayers. In addition to being used by the staff in the defendant's valuation department, the software was also used by staff in the financial department. The plaintiff also had an on-site technician to provide support and assist with operational issues that may arise on a daily basis.

[14] On 4 July 2013 she addressed a letter to Mr Andile Fani, the municipal manager at the time, (and also copied the defendant's Contracts and

Procurement Manager) requesting an urgent meeting "to address the continued use of the Metval Property Management System by the city in the new 2013/2014 financial year". In that letter she draws attention to the fact that the plaintiff's bid, submitted on 10 May 2013, included provision for the monthly payment of software license fees. She accordingly requested a meeting to establish "a way forward for the continued use of the Metval Property Management System, as well as procedure for billing the city for the use of the software until the new appointment has been finalised". She did not receive any reply to the letter and consequently, on 15 July 2013, addressed another letter to Fani wherein she stated that in the light of the fact that the plaintiff did not receive a reply to the previous letter "and as a result of the continued use by the city of the Metval system", she proposed to continue rendering services on the basis of the existing Software License Agreement. She also attached the invoice for the annual advance payment of the license fee.

[15] Consequently, and at the behest of municipal functionaries, the plaintiff continued to make the software available to the defendant and also to provide on-site technical support for the effective operation of the system. During that period there had not been any written or oral requests from the defendant for the plaintiff to terminate the services or to vacate the premises.

[16] Ms Channing also testified, with specific reference to login records, that during the period from 30 June 2013 to 10 October 2013, various municipal functionaries employed by the defendant in its valuation department, as well as the finance department, made use of the system and had logged on as users.

[17] The services terminated on 10 October 2013 when the plaintiff's technicians were instructed to vacate the municipal premises and were escorted from the premises by security guards.

[18] During cross-examination, and with reference to a letter purportedly written by the municipal manager, Mr Fani, and indicating that the contract was only to be renewed until 30 June 2013, Mr *Swartbooi* put to Ms Channing that the purported renewal at the behest of other junior officials was accordingly of no force and effect, and that the agreement for the plaintiff to render service on a month-to-month basis was accordingly null and void. Mr *Van As* objected to the admission of the document since its authenticity had not been admitted by the plaintiff. I nevertheless allowed Mr *Swartbooi* to put the question to Ms Channing on the understanding that the contents of the letter would only be admitted into evidence if its authenticity had been confirmed through the testimony of Mr Fani. Fani was, however, not called to testify in this regard. In the event, Mr *Van As* did subsequently agree that the letter could be admitted into evidence. In my view the purported statement by Fani did in any event not take the matter any further since he had not been called to confirm whether or not there had been subsequent instructions regarding the extension of the contract, particularly in view of the fact that the conduct of senior municipal functionaries was at variance with that instruction.

[19] The defendant thereafter called Mr Christopher Lourens, who is the Municipal Valuator employed in the defendant's Finance Directorate: Evaluation Department. Lourens testified that on 30 June 2013 he was instructed by his immediate supervisor to tell Mr Mathew Duminy, the plaintiff's on-site

technician, that the contract had expired and that he should vacate the defendant's premises. Duminy, however, did not heed this instruction and instead told him that he had spoken to Ms Channing who instructed him not to vacate the premises.

[20] On 10 October 2013 he again received an e-mail from his supervisor instructing him to tell Duminy to vacate the premises. On that occasion Duminy complied and was escorted off the premises. He admitted that he and other officials made use of plaintiff's software from 1 July until 10 October. He had been under the impression that the defendant had purchased the software. During cross-examination by Mr *Van As* he conceded that there would have been deleterious consequences for the municipality if it were unable to use the Metval system after 30 June 2013 before a new system had been installed. In this regard he said that "the eventual effect would be you would not be able to collect rates on properties". He also said that he had been relieved that they were able to carry on logging into the Metval system after 1 July 2013, and confirmed Ms Channing's testimony regarding the use of the system and the rendering of technical assistance by the plaintiff's on-site technician. He also conceded that he had been incorrect in his understanding that the defendant had purchased the Metval system.

[21] Lourens also admitted that he had not been involved in the negotiations between Ms Channing and the municipal functionaries before or after 30 June 2013. He had no knowledge of what had been discussed or agreed between them, and said that he had simply been relieved that he had been able to utilize the Metval system to enable him to do his job properly.

Tacit Agreement

[22] It is trite that the party alleging a tacit agreement must allege and prove the unequivocal conduct and circumstances from which the tacit contract is to be deduced. In order to prove the tacit month-to-month contract as averred in its particulars of claim, it was accordingly incumbent on the plaintiff "to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation then that the parties intended to, and did in fact, contract on the terms alleged." (*Standard Bank of South Africa (Ltd) and Another v Ocean Commodities Inc. And Others* 1983 (1) SA 276 (A), at 292A-C. Where a response has been requested from a party and that party has failed to respond, a tacit contract may be inferred, "when according to ordinary commercial practise and human expectation firm repudiation of such assertion would be the norm if it was not accepted". (*McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A), at p.10E-G)

[23] It has not been disputed that the plaintiff's pleadings contained sufficient details of the terms of the alleged tacit contract, as well as the conduct and circumstances from which it is to be deduced.

[24] It must have been clear from my summary of the evidence that the plaintiff has been able to establish, on a balance of probabilities, that the conduct of all the parties, including the defendant's employees, established a clear and unequivocal intent to continue with the contract on the original terms, on a month-to-month basis, with effect from 1 July 2013. I also did not

understand Mr *Swartbooi* to contend otherwise. The defendant has furthermore failed to establish any of the bases on which it denied the existence of the tacit agreement as set out in its amended plea. The evidentiary burden to establish the illegality as alleged in its amended plea rested on the defendant. (*Pratt v First National Bank* 2009 (2) SA 119 (SCA). The defendant's failure to call the municipal accounting officer, Mr Fani, as a witness meant that it was unable to establish that the persons who purported to contract on behalf of the defendant lacked the necessary authority to do so. It had consequently failed to establish illegality. I am accordingly satisfied that the plaintiff has been able to establish the existence of the month-to-month contracts for the period 1 July 2013 until 10 October 2013.

Unjustified enrichment and special plea of prescription

[25] Even if I am wrong in my finding that the plaintiff has established the existence of the month-to-month contracts, the plaintiff is still entitled to rely on its alternative claim based on unjustified enrichment.

[26] In this regard it is manifest that the defendant's special plea of prescription lacks merit, is untenable and can consequently not be upheld. First, Mr *Van As's* submission that the special plea constitutes a procedural irregularity since it has been filed as a consequential amendment in terms of Rule 28(8), is compelling. He argued that the defendant was obligated to object to the plaintiff's amendment prior to it being effected or to file an exception in terms of Rule 23. In my view the special plea can be dismissed on this basis alone. I am, however, not inclined to dispose of the special plea on this technical basis.

Second, and more importantly, the special plea is also substantively lacking in merit. It is trite that in terms of the Prescription Act, 68 of 1969, prescription only runs when the debt becomes due. A debt only becomes due when the creditor acquires a complete cause of action and has knowledge of all the facts which it requires to plead its case and to succeed with its claim. The defendant only amended its pleadings to include an allegation that the month-to-month contracts were illegal on 20 June 2017. The facts upon which those averments had been predicated were peculiarly within the knowledge of the defendant, and the plaintiff would consequently not have had knowledge of the possibility of the court pronouncing that the contract was illegal, and consequently the need for it to rely on unjustified enrichment in the alternative. The defendant's special plea is accordingly dismissed for these reasons.

[27] In order to succeed with its claim based on unjustified enrichment the plaintiff was required to establish on a balance of probabilities that: the defendant had been enriched; it had been impoverished; the defendant's enrichment was at its expense; and that it had acted with clean hands at all material times. As I have mentioned earlier, it was common cause that the defendant had utilised the plaintiff's services and software. The defendant also admitted the *quantum* of the plaintiff's claim and that it had derived a direct and clear benefit from plaintiff's services. I am accordingly satisfied that the plaintiff has established all the legal requisites for its claim based on unjustified enrichment on a preponderance of probabilities.

Order

[28] In the result there is judgment for the plaintiff in the following terms:

(a) Payment of the sum of R 395 021,57;

(b) Interest on the aforesaid amount at the legal rate from date of demand; and

(c) Costs of the suit.

JE SMITH
JUDGE OF THE HIGH COURT

Counsel for the Plaintiff	:	Advocate E. Van As
Attorneys for the Plaintiff	:	Don Maree Attorneys 19 Tecoma Street Berea East London

Counsel for the Plaintiff	:	Advocate S.J. Swaartbool
Attorneys for the Plaintiff	:	Makhanya Attorneys 2nd Floor, Werners Building Argyle Street East London