REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: **47482/209**

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED. ✓□

..... **15/10/2015**
SIGNATURE **DATE**

MUKOMA TECHNOLOGIES CC **PLAINTIFF**

AND

METRORAIL **DEFENDANT**

JUDGMENT

THOBANE AJ,

[1] The defendant has applied for absolution from the instance and that the plaintiff's case be dismissed. He has further applied that the plaintiff be ordered to pay the costs of this action on a punitive scale. The application is opposed by the plaintiff. The plaintiff made a significant concession but I will dealt therewith in some detail below.

[2] The plaintiff issued summons for payment of the sum of R1 850 564-00 (one million eight hundred and fifty thousand, five hundred and sixty four rands) and payment of the sum of R12 497 394-20, (twelve million four hundred and ninety seven thousand three hundred and ninety four rand twenty cents), plus interest plus costs. The particulars of claim and plea were amended and eventually when the matter went on trial the aforementioned figures had been amended to read R2 871 785-82 (two million eight hundred seventy one thousand seven hundred and eighty five rand eighty two cents) and R24 481 689-08 (twenty four million four hundred and eighty one thousand six hundred and eighty nine rand eight cents) respectively. The relief sought with regard to interest and costs remained the same. Further, in the amendment, the plaintiff sought to remove an invoice which was an annexure P3 to the initial particulars of claim. In this regard the plaintiff stated in the Rule 28 Notice as follows;

> *"By removing Annexure P3 (invoice) and replacing it with a "revised invoice" n named Annexure P3."*

[3] On or about the 3rd November 2008 the plaintiff and the defendant, duly represented, entered into an agreement in terms of which the plaintiff was to render certain services *"as and when"* such services were required, to the defendant. The terms of the agreement are not in dispute. It is also not in dispute that the agreement followed a process of tendering in terms of which the plaintiff was the successful bidder.

[4] At the commencement of the trial the parties were in agreement that the issues for determination were the following;

4.1. The claim for services rendered and the amount therefor;

4.2. Was there repudiation of the contract, if found to have been, then in that event;

4.3. The damages suffered by the plaintiff as a result of the repudiation.

PLAINTIFF'S CASE

[5] The plaintiff called three witnesses to give evidence. Rogers Magoro testified that he was the member of the plaintiff and that he formed the entity. He testified that he was an IT specialist with relevant qualifications and that he had been trained in Taiwan for some 5 months and also in Israel. Further, that he possesses extra skills in the installation of security systems. He was *au fait* with the installation of CCTV, alarms, cameras and doing security assessments. He listed *inter alia* seven hospitals as projects for which he had successfully tendered. Before the tender which is the subject of this dispute, which was won by him, he had an on and off relationship with the defendant in terms of which they would from time to time seek his opinion and service on matters relating to IT.

[6] Immediately on winning the tender which had been advertised in August 2008, he received a letter from the defendant informing him of the successful tendering. He then began doing assessments and filing reports in November and December of 2008. I pause to indicate that the contract entered into

between the parties, was to run from the 10th November 2008 to the 9th November 2009. After doing assessments he proceeded to work as per the project plan. He stopped work on the 24th December 2008 and resumed on the 4th January 2009. He worked until February 2009 when he was informed that the defendant had insufficient funds and that while awaiting approval of the new budget, they had to stop all work. He indicated that an email was sent to them so that they could access a limited number of sites or premises of the defendant where they were to do some work.

Around December 2008 he submitted his invoice for services rendered till then. On submitting his invoice, he was told that he was to prepare a cash flow of R750 000-00. He did not even know what it was but he made inquiries and was advised of same. When preparing his invoices, he invoiced for Park Station and Germiston Station separately. He was paid about R460 000-00 and R135 000-00, respectively. There were no further payments made thereafter. The court was referred to page 94 of Bundle D and it was stated that it was an invoice for work done but not paid by the defendant. He testified that in order to gain access to the premises of the defendant, he had been provided with access certificates on the basis of which he was able to gain entry. He had various teams who each had a copy of the original certificate. Around June 2009 he was informed that access to all the premises had been revoked. The workers also informed him that they had been threatened with with arrest should they enter the premises of the defendant.

[7] He was told to stop all work in March 2009. He then requested a meeting which took place on the 11th May 2009. It was agreed, so he testified, that the period of the contract would be extended or will factor in, the duration of the work stoppage.

It was on the basis of this understanding that his team went to work on the 12th May 2009. On the 17th June, they were informed that a certain Mr Mthombeni had taken over and that he had introduced new systems. At some point he borrowed them his DVR as they did not have theirs. There was follow up correspondence directed to Mr Mthombeni with regard to the abrupt work stoppage and when he did not respond, the plaintiff went to Werksman Attorneys for them to initiate legal proceedings. He led further evidence as to how job cards were completed. He indicated that the client, defendant, always satisfied itself that the work allegedly done as per the job card, was in fact done. That is why the client had to sign the job card. He testifies as to how he drafted his invoices. He approached a certain Mhangwana who compiled a report for purposes of the summons and according to him about R12m was owed for damages and R1.8m was in respect of services rendered. He testified that Mhangwana explained to him how the figures were arrived at. He later consulted with PKF Accountants and provided them the following documents for purposes of compiling a report, project plans, maintenance plans, job cards and instructing letters. He testified that all the job cards were in annexure DD and also explained that it was not possible to forge the job cards as they are verified by the client.

[8] The second witness to testify is Mpho Maboa a technician who was at the time of the contract between the plaintiff and the defendant in the employ of the plaintiff. He confirmed that they rendered services to various government departments and also that they worked at Johannesburg Park Station where he was team leader replacing and servicing CCTV. He explained the process of writing up job cards and the inspection of the work in terms of the job cards. He confirmed further that at some stage they were stopped from working on the premises of the defendant. On making enquiries at their offices he was informed that the defendant was out of budget.

[9] Hermanus Christopher Niewoudt testified that he is both a registered accountant and a registered auditor. He was contracted by the plaintiff to compile a report on procedures. He was provided with schedules by the plaintiff which he used to determine the accuracy of the mathematical calculations in respect thereof. His findings were that they were mathematically correct. He testified that he was not mandated to calculate loss of income and that same was out of the scope of his report. He was referred to page 201 of Bundle B and he indicated that what appears there was not related to his report. During cross examination he testified that he was not provided with the contract that the parties entered into and that it is possible that his opinion would have been different had it been provided to him.

[10] The test applicable in considering an application for absolution from the instance is trite and has been repeated over time. The principle is stated by the Appellate Court in ***Oosthuizen v Standard General Versekeringsmaatskappy Bpk 1981 (A) at 1035H-36A*** as follows:

> *"If at the end of the plaintiff's case there is not sufficient evidence upon which a reasonable man could find for him or her, the defendant is entitled to absolution." Where there is only one defendant, as in casu, at the close of the case for the plaintiff, "it can be fairly inferred that the Court has heard all the evidence which is available against the defendant, any further evidence that would be forthcoming if the case continued would be likely to operate only to the detriment of the plaintiff. That being so it is considered unnecessary in the interest of justice to allow the case to continue any longer if, the plaintiff has closed his case, there is no prima facie case against the defendant"; vide* ***Putter v Provincial Insurance Co Ltd and Another 1963 (4) SA***

771 (WLD) at 772F-G.

[11] In ***Gordon Lyod Page & Associates v Rivera & Another 2001 (1) SA 88 (SCA) at p92 par [2]*** where the Court said that:

> *"[2]The test for absolution to be applied by a trial court at the end of the plaintiff's case was formulated in* ***Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G-H*** *in these terms:*
>
> > *'...(W)hen absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff* ***Gascoyne and Hunter 1971 (TPD) 170 at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA307 (T).)'***
>
> *This implies that a plaintiff has to make out a prima facie case—in the sense that there is evidence relating to all the elements of the claim—to survive absolution because without such evidence no court could find for the plaintiff* ***(Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at 37G-38A; Schmidt Bewysreg 4th ed at 91-2).***"

[12] The plaintiff's pleaded case is that there was an agreement and that *"the*

plaintiff fulfilled its obligation under the contract" therefore that the defendant is indebted to the plaintiff in the sum of R2 871 785 -82, inclusive of Value Added Tax, in respect of work done in terms of the contract prior repudiation thereof. I shall deal in detail with the alleged repudiation below. To succeed on the above cause of action, the plaintiff must prove;

12.1. The agreement,

12.2. The services rendered,

12.3. Demand and failure to pay.

[13] The plaintiff relied on job cards that were completed as and when services were being rendered. At no point did the plaintiff refer to the job cards with the view to establish *quantum.* I understood the plaintiff's evidence to be that there was agreement about the bill of quantities, that as and when work was done job cards would be prepared and countersigned by the defendant and that an invoice is prepared based on both the bill of quantities and the job cards. In view of the defendants plea to this cause of action, namely, that the plaintiff failed to fulfill its obligations under the contract, failed to repair, maintain, service and install necessary equipment, invoiced for work not done and that excessive invoices were lodged, the plaintiff was expected to lead proper evidence to show, on a balance of probabilities, that he did perform in terms of the contract. This the plaintiff would have done by leading evidence about the work done in terms of the job cards. He would have prepared a schedule of all the job cards, reference them to the bill of quantities and finally show the tally in the invoice. It is my view that the plaintiff failed to do so. He referred the court to three job cards, even then, only to explain how they were completed and who had to countersign. The exercise would have further involved the exposition of the date on which such services were rendered, by whom, the nature of the work done and the details of the person on the side of the

defendant, who confirmed that such work was done. The court was referred to an array of documents, none of which were entered into evidence. The documents to which the court was referred included an invoice, Bundle B page 221, purporting to show that the sum of R2 871 785-82 was due and payable to the plaintiff.

There are 13 items listed on the invoice. It would not have been difficult to, in each case, show the job card (countersigned by the defendant), the bill of quantities (to confirm the agreed rate) and to cross reference to the relevant line item in the invoice. This was not done.

[14] Issues were not separated in this case. That means at the end of the plaintiffs case not only must the merits be proven but also the quantum. The expert witness called was not of assistance to the plaintiff's case. He only did a mathematical calculation of schedules and procedures that were provided to him and nothing else. The critical question therefore is whether there has been evidence tendered on the basis of which *quantum* in respect of services rendered can be determined.

The plaintiff bears the onus to prove not only damages but also the *quantum* thereof. See ***Monument Art Co v Kenston Pharmacy (Pty) 1976 (2) SA (CPD) 111 at 120C-E*** where Rose Innes AJ, as he then was, said:

> *"The onus rest upon plaintiff to prove not only that its goods have been damaged, but also the amount of the damages thereby sustained. I apply with respect the dicta of Muller A.J.A, as he then was, in*

Erasmus v Davis case at 19A where he said:

> *"It is for the plaintiff to establish not only that he has suffered damages but also the quantum thereof. Consequently it is for the plaintiff to show that the method which he employs is appropriate to the particular circumstances; in other words that the evidence produced by him establishes the quantum of the damage which he has suffered."*

In circumstances where there is inadequate or insufficient evidentiary proof to assess loss on the probabilities, as in this matter, damages can not be assessed for lack of proof of *quantum.* See ***Monument Art Co v Kenston Pharmacy (Pty)*** page 118D-F Rose Innes AJ, as he then was continued to say:

> *"....the court does not have to embark on conjecture in assessing damages where there is no factual basis in evidence or, an inadequate factual basis, for an assessment, and it is not competent to award an arbitrary approximation of damages to a plaintiff which has failed to produce available evidence upon which an assessment of the loss could have been made".*

[15] I now turn to consider whether or not there was repudiation of the contract. The defendant has been called upon to answer a case to the effect that there was a repudiation which was accepted. In this regard the plaintiff pleaded thus;

"7. On 23 March 2009 the Defendant repudiated the contract by denying the plaintiff access to its sites."

8. The Plaintiff accepts the repudiation and cancels the contract

herewith."

Consequently, so did the plaintiff plead, it has suffered damages and then proceeded to claim R24 481 689-08 presumably, being in respect of loss of earnings. I interpose to state that from the reading of the particulars of claim it is not clear what the cause of action is. In paragraph 10 of the particulars of claim the plaintiff simply states;

"10. During the period 23 March 2009 to 9 November 2009 the Plaintiff would have earned a net profit of R 24 481 689-08."

[16] The requirements that one has to meet in proving repudiation are trite. In order to succeed the plaintiff must allege and prove the following;

16.1. Repudiation of a fundamental term of the contract or conduct that exhibits a party's deliberate or unequivocal intention not to be bound by the contract;

16.2. An election by the innocent party to terminate, and;

16.3. Communication of the election to the guilty party.

See ***Schlinkmann v van der Walt 1947 3 All SA 92 (E), 1947 (2) SA 900 (E) 919. Highveld Properties (Pty) Ltd v Bailes 1999 4 All SA 461 (A), 1999 (4) SA 1307 (SCA).***

In casu, Mr. Magoro testified in chief that after the 23rd March 2009, he was allowed to proceed and do some work in a limited number of stations after he had sought a meeting with the defendant. During cross examination he was asked to confirm if it was true that after March 2009 he had been allowed

access to some stations and he duly confirmed. During argument I engaged counsel for the plaintiff about the concession made. He was of the view that this was a mere technicality and that *"it could be cured by evidence"*. I pointed out to him that it was not a mere technicality and that it could not be cured by evidence as it was plaintiff's pleaded case to which the defendant was called to answer. It is not necessary to deal with the balance of requirements in view of the admission that the repudiation could not have taken place on the 23rd March 2009.

[17] For all the above reasons, I am persuaded that it would serve no purpose to allow this matter to advance beyond this stage.

[18] I was asked to consider a punitive costs order against the plaintiff. I am of the view that it is not warranted.

[19] In the result I make the following order;

19.1. Absolution from the instance is granted;

19.2. The plaintiff is directed to pay the costs.

SA THOBANE
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

Heard	:	9th October 2015
Delivered	:	15th October 2015
Counsel for Plaintiff	:	Adv. Zondi
Counsel for Defendant	:	Adv. Mokotedi