



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NO. 9582/2008

In the matter between:

MILLENIUM WASTE MANAGEMENT (PTY) LTD

PLAINTIFF

And

ENVIROMENTAL CLEANSING SOLID (PTY) LTD

DEFENDANT

JUDGMENT DELIVERED ON FRIDAY 15 JUNE 2012

DLODLO, J

INTRODUCTION

- [1] The Plaintiff claims judgment against the Defendant for payment of the sum of R204 495.48, together with interest thereon at the rate of 15.5% per annum with effect from the 1st of June 2007 to date of payment and costs. The Plaintiff's claim is based on an agreement concluded between the Plaintiff and the Defendant in terms whereof the Plaintiff rendered services to the Defendant by providing two compactors to the Defendant in terms of an agreement. The Defendant has admitted the Plaintiff's claim in its entirety and prayed that the amount of the Plaintiff's claim be set off against the Defendant's counterclaim, alternatively that the adjudication of the Plaintiff's claim be stayed until the Defendant's counterclaim has been adjudicated upon.

- [2] The Defendant's counterclaim is based on an alleged agreement in terms whereof the Defendant claims payment from the Plaintiff in the amount

of R826551.82, the Defendant alleging that the Defendant supplied refuse removal and disposal services in the informal settlements of Hout Bay and Hangberg on the Plaintiff's behalf during the period June 2006 to January 2007. The Plaintiff has denied the existence of the alleged agreement and denied that the Defendant did the alleged work in Hout Bay and Hangberg. The Plaintiff pleaded in the alternative that the Defendant is estopped from proving that it is entitled to payment.

EVIDENCE ADDUCED

- [3] **MR BONGANI MBINDWANE**, the Managing Director of the Defendant company, testified that the Defendant tendered to remove waste from the informal settlements. The tender was an open tender in that it was awarded not only to the Defendant but also to the Plaintiff company and others. The bidding was for standard and additional removals. Additional removals for schedules 1, 2, 3 and 4 were awarded to the Plaintiff company. The requirements were tax clearance certificate, sufficient tools, not declared delinquent contractor and the company must be registered with Tradeworld. When Mr Mbindwane was asked about Hans Gottschalk, he answered that he was of German descent and worked for Solid as Operations Manager. He also testified about Environmental Cleansing ECL (Pty) Ltd and he testified that this entity was confusing in that documents also indicated that it was a CC (meaning a Close Corporation). Hans Gottschalk was employed full time as Operations Manager whilst Mr Mbindwane was office bound in that he was busy with personnel allocations to sites, truck maintenance and logistics. Mr Mbindwane for the Defendant company, Mr Marius Conradie for the Plaintiff company were summoned for a discussion by Mr Truter of the City of Cape Town. The purpose of the meeting was to discuss logistics and mobilizing. It was discussed, *inter alia*, how the shipping containers

would be managed, the roll out timing and capacity of the two companies. Importantly, the contract entailed the collection of waste from the containers and to dump it accordingly. Mr Truter of the City wanted assurances that the tender would go smoothly. In that meeting, according to Mr Mbindwane, Marius Conradie of the Plaintiff company indicated that the latter did not have the correct trucks to drive between shacks – their trucks were too large. That resulted in the tender being amended. This had both positive and negative consequences. It was agreed that, seeing that Solid was already at a particular area and was best positioned to pick up any additional waste, it had to do so. The City approved additional pickups to be done by Solid although the contract was awarded to the Plaintiff company. It was agreed that the Plaintiff company would invoice the City for the waste that was picked up by Solid and reimburse Solid. Asked who would Solid invoice, Mr Mbindwane explained that Solid would invoice Millenium and the latter would collect money from the City of Cape Town and reimburse Solid for the work done. He added that minutes evidencing this agreement were unavailable because the computer crashed. In terms of the agreement Marius Conradie of Millenium and Hans Gottschalk of Solid would liaise in respect of additional pickups but the approval by the City Council was core to all this. Payment would have had to be signed off which will only be effected if the correct parties completed their individual contracts.

- [4] The same Hans Gottschalk who was the Operations Manager at Solid was also involved in Environmental Cleansing SA, according to Mr Mbindwane. He testified that Environmental Cleansing SA had closed down as a company and was not registered with Tradeworld. He acknowledged, however, that Environmental Cleansing SA submitted invoices to Millenium and the latter paid the former and not Solid. Mr

Mbindwane became aware of this when he was telephoned by Millenium Johannesburg branch. The accounts lady wanted VAT for invoices already paid. Subsequently Mr Mbindwane was sent a statement indicating the work invoiced and payment made to Environmental Cleansing SA (Pty) Ltd. According to Mr Mbindwane, Environmental Cleansing SA (Pty) Ltd had no employees and that if Hans Gottschalk used any employees to remove waste it would have been employees from Solid. This prompted Mr Mbindwane to visit Millenium depot site. He had a meeting with Marius Conradie and one Witness Mdudu. According to Mr Mbindwane Millenium agreed not to contract or deal with Hans Gottschalk any further. Mr Mbindwane told the Court that he had never had interaction with Witness Mdudu. After some time Mr Mbindwane gathered that Marius Conradie was arrested. From then Mr Mbindwane started having dealings with Mr Oosthuizen who made promises that the Plaintiff would recover money paid erroneously to Environmental Cleansing SA (Pty) Ltd and reimburse the Defendant company. Mr Mbindwane was subjected to some lengthy and truth searching cross-examination.

- [5] **MR WITNESS MDUDU** testified for the Plaintiff company. He has worked for Millenium for twenty six (26) years as the Operations Manager. He testified that Marius Conradie was in charge of the Bellville office of the Plaintiff company. Marius Conradie was Mr Mdudu's immediate boss. It was Mr Mdudu's function also to dispatch trucks and instruct employees. Mr Mdudu testified that he was aware that a tender was awarded by the City of Cape Town for the removal of waste in informal settlements. The contact person was Tony Truter for the City. According to Mr Mdudu when the tender was awarded it was confusing in that two contractors had to work on the same tender. Mr Mdudu

testified that Hans Gottschalk was awarded the first schedule and Millenium was awarded the second schedule. Testifying further, Mr Mdudu told the Court that he and Marius Conradie “looked at the tender and decided to call Hans Gottschalk into a meeting to discuss how we are going to execute this tender.” According to Mr Mdudu they, together decided to go to Mr Truter of the City of Cape Town. With Mr Truter involved, a decision was taken to divide the areas because Mr Truter also foresaw that there would be problems in executing the tender. According to Mr Mdudu, Millenium’s area then became Houtbay and Hangberg it being convenient in that Millenium was already doing a door to door collection in Houtbay. Therefore, if a truck had a breakdown it would easily be assisted by another truck working in the same area. According to Mr Mdudu, the agreement reached was that Millenium would do schedule 1 and 2 in the same area. Asked who was present at that meeting, Mr Mdudu testified that it was himself, Marius Conradie and Hans Gottschalk. Schedule 2 at other areas was to be done by the Defendant represented by Hans Gottschalk in that meeting. Hans Gottschalk was thus doing De Noon, Langa and Atlantis.

- [6] Mr Mdudu told the Court that he had no role whatsoever in invoicing. Marius Conradie was doing the invoicing. Mr Mdudu’s only role in that regard was to give Marius Conradie information on how many containers were done per month. He testified that the Plaintiff company had many vehicles, the compactors. At a stage there were seventeen (17) compactors. These vehicles were numbered and thus identifiable. There were seven (7) containers in Houtbay and four (4) in Hangberg. The City added three (3) more at Hangberg so that there were fifteen (15) containers in that area. Asked about what Mr Mbindwane said about truck of Millenium being too big to manoeuver in between the shacks, Mr

Mdudu testified that the containers were on pavements; there was no place for containers between the shacks. There was a sub-contractor that took black bags from the shacks to the containers. At Hangberg containers were on the side of the tar road and even there – no containers were placed between the shacks. After the appointment of Mr Oosthuizen, Mr Mdudu took him to the area to see how work was carried out there. Eventually Mr Oosthuizen took a decision that the Plaintiff company will no longer have an interest and the contract was given to someone else.

THE ALLEGED AGREEMENT

- [7] It is our law that the Defendant bears the onus to prove the agreement it alleges and on which reliance is placed. See: *Stocks and Stocks (Pty) Ltd v T.J. Daly and Sons (Pty) Ltd* 1979 (3) SA 754 (A) at 762 G-H. Perhaps I need to set out this *infra*:

“Ordinarily, the general rule is that a plaintiff who sues on a contract must prove his contract, even though this may involve proving a negative, viz that an additional term by the defendant was not agreed to by the parties (Kriegler v Minister and Another 1949 (4) SA 821 (A) at 826-8; Topaz Kitchens (Pty) Ltd v Naboom Spa (EDms) Bpk 1976 (3) SA 470 (A) at 472-4).” Of this much was common cause between the parties. In the Defendant’s counterclaim the Defendant formulated the alleged agreement as being an oral agreement concluded telephonically between the Plaintiff and the Defendant during November 2005, the Defendant being represented by Bongani Mbindwane and the Plaintiff represented by a certain Wendy and a certain Witness. It is alleged that the Plaintiff’s representatives were in Bellville and the Defendant’s representative was in Cape Town. The Defendant alleged that the terms of the agreement are the following:

- “3.1 The defendant would supply refuse and disposal services in the informal settlements of Hout Bay and Hangberg on plaintiff’s behalf;*
- 3.2 The defendant would charge plaintiff on the basis of R444.80 per hour;*
- 3.3 The defendant would invoice plaintiff on a monthly basis;*
- 3.4 The defendant’s invoices would be paid on presentation.”*

- [8] The evidence presented by the Defendant in order to prove the alleged agreement, did not prove the alleged agreement, so much so that Mr Mbindwane stated that the evidence that he gave on behalf of the Defendant, in order to prove the alleged agreement, was in conflict with the agreement as pleaded saying that he was not sure *“how the defendant’s attorneys could miss this.”* He conceded that his evidence regarding the agreement contradicted each term and each allegation pleaded by the Defendant setting out the agreement. Noticeably, Mr Mbindwane presented evidence in which he unhesitantly accused the Defendant’s legal team of failure to present the Defendant’s case properly. I have no intention of making an issue out of this nor will it be used to the prejudice of the Defendant’s case. But it does need to be said that it indeed is concerning in that ordinarily the Defendant’s legal team must have had consultation with their only witness, Mr Mbandwane, in connection with this matter and in such consultation they would have dealt with and fully considered the allegations as pleaded on behalf of the Defendant.
- [9] Most certainly such consultation did as a matter of fact take place. This is evidenced by the fact that it was realized that the agreement as pleaded was in conflict with Mr Mbindwane’s instruction. I say so because prior

to the trial an application was made on behalf of the Defendant to amend paragraph 2 of the claim in-reconvention i.e. by amending the date when the alleged agreement was concluded and by amending the name of the person who allegedly represented the Defendant. Importantly, the further particulars for purposes of trial were requested and these were supplied by the Defendant on 30 March 2012. In all fairness to the present legal team of the Defendant, it must be mentioned that a different set of attorneys drafted the claim in reconvention. The present attorneys currently representing the Defendant had nothing to do with drafting the claim in reconvention. The current attorneys representing the Defendant however, supplied the requested further particulars. That possibly explains how the problem regarding the counterclaim came into being. Mr Mbindwane, who appeared angered by this accused the Defendant's legal representatives of carelessness saying they were "*not my friends at the moment.*" Even though the blame cannot be placed on the current legal representatives who are handling the case for the Defendant, one would be inclined, however, to infer that at the time the counter claim was drafted, it was and must have been drafted in accordance with the instructions given by Mr Mbindwane at that point in time. That in effect must mean he has changed his evidence such that it conflicts with what was pleaded on behalf of the Defendant.

- [10] The evidence of Mr Mbindwane was that the agreement was orally concluded between himself on behalf of the Defendant (Solid), Marius Conradie for Millenium and Mr Truter on behalf of the City of Cape Town. Mr Mbindwane testified that the terms of the agreement were (a) Solid would do Millenium's additional collections; (b) Solid would use Millenium's rates to bill for the work done; (c) Millenium would invoice the employer for the work including the work done by Solid; (d) the City

authorized the arrangement. The difficulty is that the evidence relating to the terms of the agreement as briefly set out above, is not only in conflict with the terms of the claim in re-convention but it is also in conflict with information contained in the documentation presented as evidence. Mr Mbindwane's evidence is self-contradicting. It was demonstrated in his evidence where for instance, he stated that the Plaintiff's representatives were aware at all times that the Defendant (Solid) was the party that the Plaintiff was dealing with in the execution of the tender requirements awarded by the City of Cape Town. However, in an Affidavit dated 2 March 2007 the opposite evidence was presented to the Court in an urgent application set out in Bundle D. In D234 for an example Mr Mbindwane stated the following:

"In addition, there is nothing contained in the affidavit of the Second Respondent to suggest that Millenium agreed to enter into separate agreements with the First Respondent. On the contrary, there is no evidence to suggest that Millenium was even aware of a distinction between the Applicant and the First Respondent."

In D235 of the same Affidavit deposed to by Mr Mbindwane the following *inter alia* appears:

"60.It is significant that no correspondence from Millenium supporting this contention is attached to the Affidavit. It is difficult to see how Millenium could have been aware of a distinction between the Applicant and the First Respondent when in reality the representatives of millennium would have only dealt with the Second Respondent. It would have been up to the Second Respondent to point out to Millenium that he was now representing another entity before Millenium could have undertaken to enter into an agreement with that entity."

[11] The First Respondent in that urgent application was Environmental Cleansing SA (Pty) Ltd whilst the Second Respondent was Hans Jorg Gottschalk. Mr Hans Gottschalk was not called by the Defendant in the instant matter to substantiate the allegations contained in the claim in-reconvention including whether or not the work was done in terms of the agreement. Mr Acton in his submission asked me to merely accept that the work was done because there are invoices in terms of which the Plaintiff paid. The difficulty is that payment Mr Acton seemingly relies on were not made to the Defendant but to an entity known as Environmental Cleansing SA (Pty) Ltd. I am asked by both counsel to consider the probabilities. It would be improbable that Mr Mbindwane as the CEO of the Defendant would get involved in the discussions and arrangements relating to the logistical implementation of the execution of the obligations in terms of the tender. Importantly, the Defendant had a specialist operations manager that had vast experience in waste management, albeit according to Mr Mbindwane in wet waste. That operations manager I am referring to is Hans Gottschalk, who also was a significant shareholder in the Defendant. Mr Mbindwane himself was in charge of the accounting matters of the Defendant. It remains improbable that Hans Gottschalk would have been excluded in discussions relating to the implementation and discussions relating to the tender.

[12] Another important improbability is that Mr Mbindwane would not have been aware of invoices not being raised by the Defendant in respect of the alleged work as set out in the counterclaim. It of course remains inexplicable how Mr Mbindwane could not have been aware that the Defendant was not issuing invoices in respect of work that it alleges it did on the Plaintiff's behalf – until December 2006. It is safe to assume that Mr Mbindwane must have been aware of this improbability and that is

probably the reason why he advised his legal representatives that invoices in respect of the work were issued on a monthly basis “*for a specific month, at the beginning of the following month.*” The Defendant is of course probably totally unaware of whether or not work had been done in terms of the alleged agreement and what such work actually entailed. This much appears from the replies to the request for further particulars for purposes of trial.

UNDERTAKING TO PAY

- [13] Mr Acton submitted that the meeting was set by Mr Mbindwane and he gave clear evidence in this regard that Mr Oosthuizen undertook to pay the amounts and seeing that the Plaintiff omitted to call Mr Oosthuizen, I must accept that Mr Mbindwane’s account is correct. However, nowhere in the pleadings is any undertaking pleaded allegedly made by any party on behalf of the Plaintiff in terms of which payment of any invoices was to be made. An attempt is being made to utilize the final paragraph of A119 in support of this alleged undertaking by Marius Conradie to pay. This paragraph properly construed does not contain an undertaking to make payment of the invoices that had been rendered in the past. Similarly the allegation that A143 is suggestive of an “agreement” concluded between Mr Mbindwane and Mr Oosthuizen in terms whereof the latter undertook to make payment of the invoices to the Defendant, is not born out by the document. The correct reading of the pleadings reveals that from the inception the Plaintiff did not accept any responsibility to make payment to the Defendant and it insisted on payment of the amount of its claim.

- [14] Mr Mbindwane as a witness was praised by Mr Acton in his submission *inter alia*:

“He gave clear and reasoned evidence; he clearly had good recall of the events germane to the dispute; he came across as an honest and reliable witness; he coped admirably under vigorous and lengthy cross-examination.”

Mr Acton is clearly simplifying what is after all rather a complex issue. Mr Mbindwane undoubtedly has remarkably good business acumen. But as a witness in the instant matter another picture of him presents itself. I was not personally impressed by Mr Mbindwane as a witness but indeed very impressed by his display of business know-how. Not only did he not answer questions put to him, but he elected to give a long never ending narration when confronted in cross-examination. This is what caused apparent contradictions in his evidence and some inexplicable improbabilities some of which have already been documented *supra* in this judgment. He became angry whilst under cross-examination and went so far as to accuse the Plaintiff's representatives as being dishonest, guilty of fraud and corruption. It was also out of apparent anger and frustration in cross-examination when he accused the Defendant's legal representatives of certain inequities. This Court is more than aware of the practice that certain witnesses and/or litigants tend to place the blame on their legal representatives whenever they find it difficult to explain certain aspects of their cases. This obtains even in criminal proceedings.

- [15] The reality is that on the evidence given by Mr Mbindwane one would safely conclude that the Defendant has no claim against the Plaintiff because payment had already been made. It shall be recalled that Mr Mbindwane's evidence was that Hans Gottschalk was authorized to act on behalf of the Defendant to issue invoices, and to procure payment for and on behalf of the Defendant. After Hans Gottschalk had obtained such payment, it was his obligation to ensure that the money is paid into the

Defendant's bank account. According to Mr Mbindwane, it was at that stage that Hans Gottschalk diverted the monies to the account of Environmental Cleansing SA (Pty) Ltd. This also appears from the allegations in the legal proceedings instituted against Environmental Cleansing SA (Pty) Ltd and Hans Gottschalk. In those proceedings it was in fact alleged that Hans Gottschalk stole the money from the Defendant. I was concerned about this such that I posed the question in clarification to Mr Mbindwane as to the whereabouts of Hans Gottschalk and the status of the civil claim lodged against him by the Defendant. It came as a shock to me to gather that such a civil claim to recover that money from Hans Gottschalk had either been abandoned or was withdrawn. The Defendant must have been ill-advised in this regard. It had a legitimate claim against its own employee and co-shareholder to recoup the money meant for the Defendant which would have reached its destination but for the interventions by the employee and co-shareholder, Mr Hans Gottschalk. In any event why must the Plaintiff pay twice the same amount? Money was paid but was diverted and stolen by Mr Hans Gottschalk, the employee and co-shareholder of the Defendant. Certainly the Defendant must look up to Hans Gottschalk to repay the money he pocketed. The paper trail talks louder. This money is clearly traceable from Millenium to the account of Environmental Cleansing SA (Pty) Ltd an account apparently being used by Hans Gottschalk. I hardly understood Mr Mbindwane's evidence that Environmental Cleansing SA (Pty) Ltd was a company that ceased to trade and there is confusion as to what it exactly is between being a private company or a close corporation.

- [16] After the evidence in chief I was left with the impression that this is some kind of company that was wrongly incorporated and registered in that its name is so closely similar to the Defendant. My impression was that Mr

Mbindwane indeed knew nothing about Environmental Cleansing SA (Pty) Ltd. I was taken aback though when during the cross-examination of Mr Mbindwane it emerged for the first time that he (Mr Mbindwane) in fact knew much more about Environmental Cleansing SA (Pty) Ltd. He together with Hans Gottschalk were the only shareholders of this company when it was incorporated. Even though payments were made by the Plaintiff to the account held on the name of this entity, it is not uncommon that parties make arrangement where the payment must go. How would the Plaintiff have known that Hans Gottschalk was then acting to the prejudice of a company where he is a co-shareholder? The blame goes back to the systems put in place by the Defendant. There appears to have been no control at all. Just about anybody and everybody could issue invoices. Hans Gottschalk manipulated what he saw and considered to have been a loophole in the Defendant's business management.

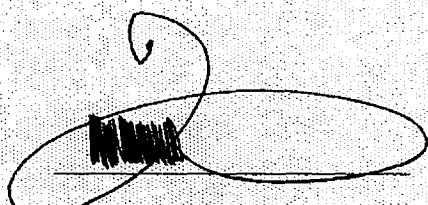
- [17] Even though the Plaintiff also called only one witness to refute the Defendant's allegations, its witness (Mr Witness Mdudu) was the only person who could give factual evidence as to how the tender contract was executed. Mr Mdudu was a good witness. His evidence was clear and chronological. He occupied a position in the Plaintiff company similar to that occupied by Hans Gottschalk at the Defendant company. According to his evidence the Plaintiff did all the work at Hout Bay and Hangberg. Even if the latter part of his evidence may be opened to some doubt in view of money paid to Environmental Cleansing SA (Pty) Ltd, the fact of the matter is that the Defendant has not discharged the onus and its claim in-reconvention stands to be dismissed with costs forthwith. After the cross-examination of Mr Mbindwane (the Defendant's only witness) just before I excused him from the witness stand, Mr Acton moved an

application to amend the alleged provisions of the agreement pleaded in the counterclaim. Even though this was not objected to on behalf of the Plaintiff, the amendment came rather in the afternoon of the Defendant's case. Damage had already been done in this regard. Although in terms of Rule 28 an amendment can be asked and effected at any stage of the civil trial, practitioners must guide against amendments that come extremely late because they may not resuscitate the litigant's case.

ORDER

[18] In the circumstances judgment is entered in favour of the Plaintiff against the Defendant as follows:

- (a) It is ordered that the Defendant pays to the Plaintiff the sum of two hundred and four thousand four hundred and ninety five rands and forty eight cents (R204 495.48).
- (b) The Defendant shall pay interests on the abovementioned sum of money calculated at the rate of 15.5% per annum with effect from 1 June 2007 to date of payment thereof as well as costs of suit.
- (c) The Defendant's claim in reconventions is dismissed.



BLODLO, J