

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NO.: 28286/2019

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
.....

In the matter between:

DARK FIBRE AFRICA (PTY) LTD

Plaintiff

And

EKURHULENI METROPOLITAN MUNICIPALITY

Defendant

JUDGMENT

van der Westhuizen, J

[1] The plaintiff instituted an action against the defendant in respect of payment of monies due and owing flowing from a contractual obligation entered between them during 2015.

- [2] The defendant published a Government Tender for the installation and service of an optic fibre network infrastructure within its jurisdiction. The plaintiff, a national installer and maintenance service provider of optic fibre network infrastructure, was the successful tenderer. After the tender had been awarded, a service level agreement was concluded with the defendant under reference number A-ICT08-2015.
- [3] The Service Level Agreement would endure for a period, i.e. from 28 September 2015 to 30 June 2017. It is common cause that the Service Level Agreement had two components, viz. an installation component and a maintenance component. It is further common cause that the installation component was completed and paid for in full. The dispute arose in respect of the maintenance component.
- [4] The plaintiff alleged in its particulars of claim that its obligations in respect of the maintenance component had been complied with and that it was entitled to remuneration in respect thereof. The plaintiff provided the invoices to the defendant in respect of the maintenance it had undertaken. The defendant neglected to pay the said invoices on the due dates.
- [5] The defendant pled that the plaintiff did not undertake any maintenance and further that the invoices supplied were incomplete and did not conform to the requirements as stipulated in the Service Level Agreement. The said plea is contradictory in nature. Either no maintenance was undertaken at all, or maintenance was undertaken, but the invoices were incomplete. In oral evidence led on behalf of the defendant, the aforesaid contradiction was repeated. The defendant's witnesses clearly did not understand the contradiction and persisted therewith when confronted during cross-examination. No explanation for the dichotomy was provided, neither in evidence, nor in argument on behalf of the defendant.

- [6] Furthermore, much of the evidence led on behalf of the defendant in support of its plea during oral evidence, was not put to the plaintiff's witnesses when cross-examined, in particular where the defendant's evidence was contrary to that of the plaintiff's witnesses.
- [7] The disputes in respect of the requirements relating to the issue of maintenance were directed at the provisions of the Service Level Agreement and would require the interpretation thereof. It is to be noted that at no stage had the defendant invoked the provisions for breach of obligations in terms of the Service Level Agreement. At no stage prior to the rendering of any of the invoices, or the combined invoice, had the defendant object to, or queried, the invoices supplied.
- [8] A further dispute raised by the defendant, and expanded upon during the evidence led on behalf of the defendant, related to the alleged requirement of the installation of *performance monitoring equipment* and *performance monitoring services on the network*. No evidence was led with reference to those requirements in the Service Level Agreement. Nor was the witness who testified in respect thereof, led as an expert witness. The evidence that was presented, was clearly that of an expert witness.
- [9] The plaintiff initially, after the completion of the required installation and payment thereof, provided three invoices in respect of the maintenance undertaken by it. The defendant thereafter sought and requested a combined invoice of the three already supplied. A final combined invoice relating to all maintenance provided was handed to the defendant.
- [10] In view of the approach taken in this judgment, and the findings of fact supporting that approach, it is not required to consider the submissions in respect of the requirements of the Service Level Agreement and the interpretation thereof. The other disputes that arose are equally not required to be dealt with.

- [11] It was not disputed by the defendant that the plaintiff sent a demand for payment of the invoice(s) relating to the maintenance undertaken. The plaintiff obliged to every request for the resending of invoices and the documentation relating thereto. On 28 June 2017, the plaintiff rendered to the defendant its invoice for all maintenance undertaken. The invoice amounted to R4 346 185.12. No payment was received within the period due for payment, i.e. 30 days. In fact, the defendant confirmed its indebtedness when requested by the plaintiff to make a payment.
- [12] On 5 November 2018, the defendant advised the plaintiff in an e-mail that the indebtedness on the part of the defendant was referred to its Corporate Legal Department for a legal opinion. The defendant in a later e-mail advised that its Corporate Legal Department confirmed the latter's opinion that the unpaid amount was due and that the defendant was to draft an item to Council seeking approval to pay from the budget of the period 2018/2019, as the services rendered occurred during the 2016/2017 financial year. Allegedly, only the Council could authorise payments in terms of the provisions of the MFMA for debts incurred in a different financial year from the relevant current financial year. That advice was a clear admission of indebtedness and a clear undertaking to make good on the admitted debt, albeit that the required authorisation was to be obtained from the Council. However, no payment was received. Furthermore, no evidence was led on behalf of the defendant that it addressed the request for payment to the Council for such authorisation.
- [13] The defendant did not deny the foregoing facts in evidence led on its behalf, nor were submissions made in respect thereof during argument on behalf of the defendant. The defendant boldly ignored that evidence of the plaintiff. Where that evidence was not challenged, nor disputed at least in a particular context, the evidence stands. The admitted indebtedness of the defendant in respect of the maintenance was proven by the plaintiff.

- [14] The alleged defences raised on behalf of the defendant found no resonance in any documentation exchanged between the parties prior to the issue of summons. The defences were only raised after the summons was issued and pleadings exchanged. In my view, the defences raised were contrived and a clear afterthought. A so-called lawyer's point. There is no merit in any of the defences raised on behalf of the defendant. The defences stand to be struck out.
- [15] It follows that the plaintiff stands to succeed in its claim for payment.
- [16] There remains the issue of costs. The plaintiff sought payment of costs on a punitive scale. That request was premised upon the plaintiff's perception that the defendant adopted an attitude of *catch me if you can*. The defendant was litigious and employed an attitude of frustration and obstruction attempting to evade the inevitable, payment of an admitted debt. Reliance was placed upon the judgment in *Nel v Waterbeerg Landbouers Ko-Operatiewe Vereniging* 1946 AD 597 at 106. On behalf of the defendant a punitive costs order was also sought in the event that the plaintiff's claim was dismissed. In that regard the defendant relied upon the judgment in *Johannesburg City Council v Television & Electrical Distributors* 1997(1) SA 157 (AD). The plaintiff allegedly fought a lost cause and was vexatious in particular having regard to the allegedly irrelevant documentation presented.
- [17] In my view the plaintiff is entitled to a punitive costs order. The defendant presented a defence that was unmerited and further in view of the manner it had presented its case, an ambush during the leading of evidence on its behalf. Furthermore, the obvious avoidance to deal with the pertinent issue of acknowledgement of debt confirms the unmerited defences raised.

I grant the following order:

1. The defendant is to pay the plaintiff the amount of R4 346 185.12;
2. The defendant is to pay interest on the amount of R4 346 185.12 at 10.25% per annum;
3. The defendant is to pay the costs on an attorney and client scale, such costs to include the costs occasioned by the employment of two counsel.

C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

Judgment reserved: 26 May 2022

On behalf of Plaintiff: J de Beer
A C J van Dyk
Instructed by: Kruse Attorneys Inc.

On behalf of Defendant: S Nelani
Instructed by: Sibanda Bukhosi Attorneys Inc.

Judgment delivered: 15 June 2022