



Case no: 10139/2018P

PIETERMARITZBURG COMMUNITY PLAINTIFF

DEVELOPMENT AND AIDS OUTREACH PROJECT

REG NO: 2003/005781/08

THE MEC FOR HEALTH, KWAZULU-NATAL DEFENDANT

Delivered: 25 August 2023

ORDER

Judgment is granted in favour of the plaintiff against the defendant for:

1. Payment of the sum of R11 243 786;
 2. Interest from date of judgment to date of payment; and
 3. Costs of suit.
-

This judgment was handed down electronically by circulation to the parties' legal representatives by email as per agreement with their respective counsel. The date for the handing down of the judgment is deemed to be 25 August 2023.

JUDGMENT

M E Nkosi J

Introduction

[1] The plaintiff is a non-governmental organisation (NGO) involved in the field of condom distribution in and around the Province of KwaZulu-Natal (KZN). It sued the defendant in his official capacity as the Member of the

Executive Council (MEC) responsible for the Department of Health ('the Department') in the KwaZulu-Natal Provincial Government for damages in the total sum of R11 243 786 arising from an alleged repudiation by the Department of a contract that was entered into between the plaintiff and the Department on or about 7 September 2017 ('the contract').

The contract

[2] Like all government contracts, the contract is made up of two parts. The first part constitutes the Special Terms and Conditions of Contract, and the second part constitutes the General Conditions of Contract. Of particular relevance for the purposes of this matter are the following provisions of the contract:

'Special Terms and Conditions of Contract

2.5 CHECKING OF SERVICE

Checking of service shall be done by the nominated official at the Department of Health, as well as by the Service Provider at intervals agreed upon by the Service Provider and the Department of Health. The Department reserves the right to conduct site visits of the relevant warehouse/distribution sites of the awarded supplier.

...

2.22 PRO RATA DECREASE OF COMPENSATION

Should the services not be rendered to the satisfaction of the Department and unsatisfactory items/aspects/events have already, in writing, been brought to the attention of the Bidder, the Department reserves the right in terms of paragraphs 2.28 hereunder, to retain payment to the Bidder for as long as the unsatisfactory service continues.

2.25 TERMINATION OF SERVICES

Should the Bidder fail to meet the conditions of this contract, or continue rendering unsatisfactory service, the Employer reserves the right to terminate the contract, after

written notification has been served on the Bidder, with retention of the right to recover from the Bidder any losses which the Employer may suffer/incur as a result of the failure, without prejudicing any other rights it may have.

...

2.27.1 UNSATISFACTORY PERFORMANCE

Unsatisfactory performance occurs when performance is not in accordance with the contract conditions.

(i) Before any action is taken, the Department shall warn the Bidder by registered/certified mail in accordance with the contract conditions unless the Bidder complies with the contract conditions and delivers satisfactory supplies or services within a specified reasonable time (14 days minimum). If the Bidder does not perform satisfactorily despite the warning the Department will:

- (a) Take action in terms of its delegated powers
- (b) Make a recommendation for cancellation of the contract concerned.'

(My underlining)

'General Conditions of Contract

8 PAYMENT

8.1 The contractor shall furnish the Province with an invoice accompanied by a copy of the delivery note upon fulfilment of [its] other obligations stipulated in the contract.

8.2 Payments shall be made promptly by the Province, but in no case later than thirty (30) days after submission of an invoice or claim by the Contractor.

8.3 Payments will be made in Rand unless otherwise stipulated.

8.4 Payments for goods are made by the Province only. Any disputes regarding late or delayed payments must be taken up with the department and if a problem persists, the Supply Chain Management Office can be requested to investigate the delays.

9 INVOICES

All invoices submitted by the Contractor must be Tax invoices indicating quantity ordered and quantity delivered, the amount of tax charged and the total invoice amount.'

[3] For the reason which will become apparent later on in this judgment, I propose to adopt as a starting point a brief comment on the terms 'checking of service' and 'delivery note' that are used in clauses 2.5 and 8.1, respectively, of the contract. Starting with the term 'checking of service', what appears to have been intended by the parties by the use of that term was an ongoing liaison between the nominated official of the Department and a person designated by the service provider to ensure that the Department was satisfied with the services provided by the service provider during the subsistence of the contract.

[4] Regarding the term 'delivery note', on the other hand, it is significant to note that the term is not defined anywhere in the contract. It is only the word '*delivery*' which is defined under the 'Definitions' clause of the contract, and is assigned the meaning: '*delivery in compliance with the conditions of the contract or order*'. Furthermore, it was apparent from the evidence led before this court that it was never discussed or agreed between the parties as to which document/s, in particular, should accompany the plaintiff's invoices as contemplated in clause 8.1 of the contract.

[5] Within the context of the comments made in the preceding paragraphs, I now proceed to deal with the remaining terms of the contract I consider relevant for the purposes of this judgment. The gist of the contract is encapsulated in the request for proposals that was published by the

Department on 9 December 2016. For the sake of convenience, I will first deal with the pricing guide which formed part of the plaintiff's tender for the contract.

The pricing guide

[6] Amongst the documents included in the tender documentation for the contract was the pricing guide for bidders in respect of each one of the 11 districts where the distribution was to occur. It contained the detailed information which had to be taken into account by the bidders in the pricing of their bids for each district, including the number of primary collection sites in the district; the types of secondary distribution sites, such as taverns, shops, traditional offices and others as specified by the Department; the estimated number and weight of boxes of male and female condoms to be distributed per month, and, the maximum distance to be travelled by the contractor's employees between the primary distribution sites and the secondary distribution sites in each district.

[7] According to the pricing guide, the estimated number of boxes of male and female condoms the contractor was expected to distribute per month throughout the districts were: 141.65 (male) and 10.14 (female) for Amajuba District; 1023 (male) and 74 (female) for eThekweni District; 173.27 (male) and 9.52 (female) for Harry Gwala District; 128.58 (male) and 12.31 (female) for iLembe District; 210.06 (male) and 14.81 (female) for Ugu District; 300.78 (male) and 21.54 (female) for uMgungundlovu District; 165.16 (male) and 11.64 (female) for uMkhanyakude District; 131.04 (male) and 9.23 (female) for uMzinyathi District; 186.16 (male) and 13.24 (female)

for uThukela District; 262.63 (male) and 18.66 (female) for uThungulu District, and; 221.80 (male) and 15.66 (female) for Zululand District.

[8] Based on the pricing guide, the prices tendered by the plaintiff for distribution in its tender document were R145 per box of male condoms and R85 per box of female condoms. After further negotiations between the parties, the total revised bid price of the plaintiff, inclusive of transportation, storage, human resources and training was fixed at an all-inclusive monthly budget of R706 831. The tender price for distribution was also revised to R241 per box per month, inclusive of human resources, transportation, training and storage.

The evidence

[9] The first witness who testified for the plaintiff was Dr Humphrey Mubiru ('Mubiru'), who is the director of the plaintiff. His evidence, briefly stated, was that the plaintiff had considerable experience in the field of condom distribution in and around the KZN Province. It had carried out numerous similar projects for communities, municipalities and government departments in KZN over the last 20 years. The plaintiff was granted tax exemption by the South African Revenue Service (SARS) in terms of a letter dated November 2005, a copy of which was tendered as evidence.

[10] During or about 2015 or 2016, he was approached by certain officials of the Department who requested him to give them advice on formulating a strategy which could be utilised by the Department to achieve success in the condom distribution programme it was embarking upon. Such officials

included Ms Thuli Buthelezi, who was responsible for condom distribution in the Province of KwaZulu-Natal, as well as her erstwhile supervisor, Dr R Ndaba. He was informed that the programme was part of a campaign to assist the South African Government to meet its target of reducing the prevalence of HIV/AIDS, STI's and TB infections in the country.

[11] It was during his discussions with the relevant Department officials when he was requested by them to write a proposal on how to expand the condom distribution project in KZN. He did so, and delivered the proposal to Dr Ndaba. Dr Ndaba advised him that the Department would publish an advertisement inviting tenders for condom distribution in the KZN Province based on the suggestions made by him in the written proposal. The relevant advertisement was subsequently published in the newspapers on 9 December 2016. It invited interested parties to submit bids for the distribution of condoms throughout the KZN Province over a period of three years.

[12] The plaintiff was one of the bidders who submitted bids in response to the advertisement. Its bid was considered by the Department with the other bids received by it in a competitive bidding process. The plaintiff's bid was considered successful by the Department, and the resultant contract was signed on behalf of the parties on 7 September 2017. In terms of the contract, the price payable by the Department to the plaintiff for its services was R706 831 per month, inclusive of all applicable taxes. The agreed date for the commencement of the contract was 20 September 2017. However, the Department instructed the plaintiff not to commence with condom distribution until it had been officially introduced to the relevant officials in each one of the 11 districts in the Province.

[13] In order to carry out its obligations in terms of the contract, the plaintiff was required to, *inter alia*, identify sites which would be used for condom distribution; ('the secondary distribution sites'); obtain permission from the owners and/or occupiers of the secondary distribution sites to allow the plaintiff to use their sites for condom distribution, and conduct the education and training in relation thereto; recruit and train suitable persons to carry out the work of condom distribution and to educate members of the public on the correct usage thereof; identify suitable premises to be used for condom storage in each one of the 11 districts and conclude leases with the owners or occupiers thereof, subject to the Department's approval; collect supplies of condoms from the storage facilities of the Department ('the primary distribution sites') and transport them to the plaintiff's warehouses in each one of the eleven districts; monitor and supervise the work of the distributors and trainers in the field and report monthly to the Department on the overall work done by the plaintiff.

[14] The plaintiff commenced performing its obligations in terms of the contract on 20 September 2017, save for those districts where it was unable to commence operating due to reasons beyond its control. These included, *inter alia*, the delay on the part of the Department to formally introduce the plaintiff to the relevant officials in some of the districts; the unavailability of condoms for distribution at some of the Department's primary distribution sites while the affected districts were waiting for the delivery of stock; as well as the unrestricted number of organisations who were entitled to collect condoms directly from the primary distribution sites.

[15] The plaintiff submitted five invoices to the Department for the services it rendered during the period November 2017 to March 2018, but none of those invoices was paid by the Department. This was notwithstanding the numerous meetings he had with the relevant officials of the Department, as well as the repeated exchange of emails and telephone calls between him and them, to establish the reason/s for non-payment. The officials concerned gave him a variety of excuses for non-payment of the plaintiff's invoices.

[16] During or about March 2018 he finally informed the relevant officials of the Department that the plaintiff could not continue to distribute condoms without being paid for its services. By then, the plaintiff was experiencing serious cash flow problems. In response, certain officials of the Department had begged him to let the work continue, to which he agreed. Thereafter, the plaintiff continued to distribute most of the remaining condoms at its own expense, without rendering any invoice/s to the Department for its services. By the time the plaintiff ceased its services in terms of the contract it had already distributed a total number of 12 780 000 male condoms, and 780 000 female condoms.

[17] It was put to Mubiru during his cross-examination by Mr *Mthembu*, who appeared with Ms Dhoda for the defendant, that the quantities of condoms which the plaintiff was required to distribute monthly in each district were stipulated in pages 53 to 63 of the contract. This was admitted by Mubiru, but he added that the monthly targets of condom distribution in each district were 'scratched out' in terms of certain emails which were subsequently received by the plaintiff from the relevant officials of the

Department. When he was asked to produce proof of such emails, he was unable to do so.

[18] The evidence of Mubiru was corroborated in all material respects by the evidence of eight other witnesses who were all employed by the plaintiff during the subsistence of the contract, namely, Simon Ntsele, Khuthala Nkabinde, Ntethelelo Ngxongo, Brian Mlotshwa, Linda Zuma, Pearl Mlotshwa, Zimhlophe Mkhize and Sphelelo Hlatshwayo. They each testified in respect of the specific districts to which each one of them was assigned by the plaintiff for the purposes of the contract.

[19] The gist of their evidence was that pursuant to their respective employment contracts with the plaintiff, they first obtained permission from the owners and/or occupiers of the secondary distribution sites in their respective districts to distribute condoms and teach the recipients about the correct use thereof. They used their own transport to collect boxes of condoms in varying quantities from the primary distribution sites in their respective districts and distributed them at the various secondary distribution sites. To serve as proof of the services they rendered, they got the owners and/or occupiers of the secondary distribution sites concerned to sign the forms which were commonly referred to as the 'bin cards' acknowledging receipt of the quantities of condoms distributed at their respective establishments.

[20] The bin cards were specifically designed by the plaintiff to serve as a monthly reporting tool to the Department for the purposes of the contract. The individual recipients of condoms were also made to sign a different form designed by the plaintiff confirming their attendance of training sessions

conducted by the plaintiff's employees where they were taught about the correct usage of condoms. Just like the bin cards, the latter forms were also utilised by the plaintiff as a reporting tool to the Department.

[21] After the close of the plaintiff's case, the first witness who testified for the Defendant was Ms Thuli Buthelezi ('Buthelezi'), who is employed by the Department in the capacity of Assistant Director of its HAST unit. HAST is an acronym for AIDS, Sexually Transmitted Infections and Tuberculosis, which is a unit of the Department responsible for, *inter alia*, the distribution of condoms throughout the province of KZN. According to Buthelezi, her area of responsibility is HIV prevention, and her experience in the field dates back to the time of her employment with the Department during or about 2013.

[22] Her evidence, briefly stated, was that the plaintiff was required to distribute a total of 2 795 male condom boxes and 1 023 female condom boxes per month. However, from the commencement of the contract, on 20 September 2020, the plaintiff failed to discharge its contractual obligation to distribute the requisite number of condom boxes. She said there were also instances when the plaintiff delayed commencement with the distribution of condoms in some districts. Furthermore, the first invoice submitted by the plaintiff for payment for the period 20 September 2017 to 20 October 2017 did not contain sufficient details to enable the Department to determine the actual amount of work done by the plaintiff during that period.

[23] In an attempt to address the matter, she and the other officials of the Department held a meeting with Mubiru during or about January 2018. At that

meeting, they advised Mubiru that it would not be possible for the Department to pay the invoices submitted by the plaintiff without the supporting documentation. Mubiru undertook to provide the Department with supporting documentation, but he never did. Instead, she started receiving threats from certain persons she believed were associated with the plaintiff. They queried the non-payment of the plaintiff's invoices. This caused her to cease any further involvement in the receipt and consideration of the plaintiff's invoices.

[24] It was put to her during her cross-examination by Mr *Blomkamp*, who appeared for the plaintiff, that the plaintiff had subsequently submitted the required supporting documentation, which were received by Sandile Miya on behalf of the Department. She said she was not aware that the plaintiff had done so as her direct interactions with the plaintiff had ceased shortly after the meeting they held with Mubiru in January 2018. Her next involvement in the matter was when she was part of a team of officials in the Department who reviewed the bin cards submitted by the plaintiff. They found that the bin cards contained a lot of duplications, while the information contained in some of them was barely legible. However, she admitted in response to a question put to her by Mr *Blomkamp* that the problems they found in the bin cards were never referred to the plaintiff for resolution.

[25] Ms Buthelezi added that in addition to the bin cards, the plaintiff was required to submit to the Department other supporting documentation to prove that it had done the work. Such documentation included the lease agreements in respect of the secondary distribution sites, the receipts signed by the owners and/or occupiers of those sites, as well as the attendance registers of the training sessions conducted by its employees at the secondary distribution

sites. A question was put to her by Mr *Blomkamp* as to whether this was stipulated anywhere in the contract, to which her response was that she did not know.

[26] Notwithstanding the foregoing, Ms Buthelezi remained steadfast in her assertion that the Department required the plaintiff's invoices to be accompanied by the supporting documentation to prove that it had done the work. This was notwithstanding her evidence that the Department had designated a 'nominated official' in each district who was responsible for checking the plaintiff's services as contemplated in clause 2.5 of the Special Terms and Conditions of Contract under the heading 'CHECKING OF SERVICE'. A similar assertion was made by Mr Nkosinathi Roji ('Roji'), who testified for the Department in his capacity as Deputy Director of the Medical Male Circumcision and HIV Prevention unit (MMC) of the Department.

[27] Roji stated in his evidence that his involvement in the contract was to authorise payments to the plaintiff, and to attend to any queries which might arise in relation thereto. He said the queries regarding the plaintiff's invoices were first brought to his attention by Buthelezi towards the end of October 2017. At that stage, the plaintiff had submitted only its first invoice in respect of the period 20 September 2017 to 20 October 2017. The first invoice was queried by Buthelezi on the basis that it did not contain sufficient information to enable the Department to make payment thereof, such as the actual services which were provided by the plaintiff for the relevant period.

[28] Roji added that according to his experience, the plaintiff's invoice was supposed to contain a detailed description of the work done by it, such as the total number of condom boxes it distributed, the unit price for condom boxes, as well as the amount of VAT payable in respect of each invoice. However, just like Buthelezi who testified before him, Roji was unable to indicate the specific clause of the contract which contained a requirement to that effect.

[29] It was put to Roji during his cross-examination by Mr *Blomkamp* that the second invoice submitted by the plaintiff in respect of the period 20 October 2017 to 20 November 2017 contained even lesser details than its first invoice, which contradicted his and Buthelezi's evidence that the plaintiff was requested to provide more details on its invoices when they held a meeting with Mubiru during or about January 2018. His response was that the plaintiff had also failed to submit copies of the delivery notes with its invoices. He admitted that the term 'delivery note' was not defined in the contract, but added that according to his understanding, it meant supporting documentation, such as the bin cards, the record of the training sessions conducted by the plaintiff's employees, as well as copies of the lease agreements in respect of the secondary distribution sites.

[30] He further testified that after the plaintiff's submission of supporting documentation to the Department a team comprising himself, Buthelezi and Miya had gone through the bin cards and recorded on a piece of paper the total number of condom boxes which were distributed by the plaintiff from 20 September 2017, which was the date of the commencement of the contract, up to the end of December 2017. Based on their calculations, he then wrote a letter dated 19 June 2018 addressed to Dr M Gumede ('Gumede'), the Acting

Head of the Health Department; Dr T D Moji ('Moji'), the Acting Deputy Director General of the District Health Services; and Dr V Mubaiwa ('Mubaiwa'), the Chief Director of the Strategic Health Programs. In that letter, he recommended that the plaintiff be paid the *pro rata* amount of R180 991 for the services it provided from 20 September 2017 to the end of December 2017, inclusive of storage costs for those months, and that the contract be terminated with immediate effect. His letter of recommendation was approved by Gumede on 18 September 2018. However, the plaintiff declined to accept the *pro rata* payment that was offered to it by the Department.

[31] Apart from the evidence of Buthelezi and Roji, Mr *Mthembu* had also led the evidence of the relevant officials who were responsible for, *inter alia*, the issuing of condoms to the plaintiff's employees from the primary distribution sites in their respective districts. They included Mr Xolani Mbangatha ('Mbangatha') from Ugu District, Mr Thabiso Joshua Makhoba ('Makhoba') from Amajuba District, Ms Zanele Nelisiwe Ntombela ('Ntombela') from uMgungundlovu District and Ms Ntsoaki Portia Lecheko ('Lecheko') from uMzinyathi District. The evidence of the relevant officials from the remaining districts was summarised by Mr *Mthembu* in a manuscript comprising 15 pages, which was admitted as evidence marked Exhibit 'K' following confirmation by Mr *Blomkamp* that the contents thereof were admitted by the plaintiff.

[32] The gist of the evidence of the relevant officials in the 11 districts was primarily that: firstly, the number of condom boxes collected by the plaintiff's employees from their respective primary distribution sites fell short of the

monthly targets stipulated in the contract for the duration of the contract, and: secondly, that at no stage during the subsistence of the contract had any of the primary distribution sites within their respective areas of jurisdiction experienced a shortage of condom boxes. It was also confirmed by all the witnesses from the districts that they kept records (in the form of bin cards) of the total number of condom boxes which were collected by the plaintiff's employees from the primary distribution sites in their respective districts.

[33] Notably, it was only Makhoba, from Amajuba District, who stated in his evidence that his office had also kept copies of the bin cards which were completed by the plaintiff's employee, Mr Mfundo Mlotshwa ('Mlotshwa'), for reporting purposes to the Provincial office of the Department. These contained, *inter alia*, the secondary distribution sites to which the condom boxes were distributed by Mlotshwa, as well as the total number of condom boxes which were distributed at those sites. It was indicated by Makhoba in his evidence-in-chief that some of the copies of the bin cards kept in his office records reflected a lesser number of condom boxes than the same bin cards that were submitted by the plaintiff to the Provincial office of the Department.

[34] It was put to Makhoba during his cross-examination by Mr *Blomkamp* that the reason for the number of bin cards kept in his office being lesser than the number submitted by the plaintiff to the Provincial office of the Department was that Mlotshwa only furnished his office with copies of the bin cards while he kept the originals for submission to the Department at the end of the month. There were instances when some of the clinics requested additional boxes of condoms before the end of the month, which were then distributed by Mlotshwa and added to the original bin cards for the months in

which the additional distributions occurred prior to the submission thereof to the Department. This was not disputed by Mlotshwa.

Assessment of the evidence

[35] In my view, it is clear from the terms of the contract dealing with the ‘pricing structure’ that the quantities of condoms which were stipulated for monthly distribution in each district were by no means intended to serve as the prerequisite for the plaintiff’s entitlement to payment for its services, particularly, in respect of the first month when the plaintiff was still to put in place the necessary infrastructure and wait for the Department to introduce it and its employees to the Department officials in all the 11 districts. Instead, the quantities were intended to serve as a pricing guide for bidders in the calculation of their respective bid prices, and to be used by the Department to measure the plaintiff’s performance for the duration of the contract. Apart from that, there is nothing else in the contract which suggests that the plaintiff would not receive any payment if it did not distribute the requisite number of condoms per district over any period of the contract.

[36] In terms of the contract, the target number of condom boxes the plaintiff was required to distribute per month was 17.6 million. In order to reach that target, the plaintiff was required in each one of the eleven districts in the Province to, *inter alia*, employ and train staff to distribute condoms and to conduct training of the recipients thereof; conclude lease agreements in respect of its warehouses for the storage of condoms, and; obtain written consent from the owners and/or occupiers of the secondary distribution sites to conduct training and distribute condoms on their premises. Bearing this in

mind, I believe that it was impractical for the Department's officials to expect the plaintiff to distribute the target number of 17.6 million condoms within the very first month of the contract (20 September 2017 to 20 October 2017) without first allowing the plaintiff a reasonable period to, *inter alia*, recruit staff, secure warehouses for storage and obtain permission from the owners and/or occupiers of the secondary distribution sites to distribute condoms and conduct training on their premises.

[37] Besides, it was admitted by Buthelezi that the plaintiff was ordered by the Department not to start operating in any district until its workers were formally introduced to the Department's officials in that district. It was further admitted by Buthelezi that in some districts the holding of meetings to introduce the plaintiff's workers to the Department's officials in the districts concerned was delayed for more than a month, which resulted in the plaintiff not being able to commence with the distribution of condoms in those districts, at least, during the first month of the contract.

Repudiation of the contract

[38] According to the evidence of Buthelezi, the reason for non-payment of the plaintiff's first invoice for the period 20 September 2017 to 20 October 2017 was the lack of supporting documentation. Although the only supporting documentation required in terms of the contract was a copy of the delivery note, the plaintiff had nonetheless complied with the Department's requirement by submitting copies of, *inter alia*, the bin cards in respect of the period 20 September 2017 to 26 December 2017, the lease agreements in

respect of its warehouses for the storage of condoms, as well as the consent forms signed by owners and/or occupiers of the secondary distribution sites.

[39] Even after receipt of the aforesaid supporting documentation from the plaintiff, the relevant officials of the Department persisted in their refusal to pay any of the invoices submitted by the plaintiff. Their excuses for non-payment ranged from the complaint that some of the bin cards were either duplicated or illegible to the contention that the plaintiff had failed to meet the condom distribution targets stipulated in the contract. However, as I indicated in the preceding paragraphs of this judgment, it is not stipulated anywhere in the contract that the plaintiff was required to meet any target as a prerequisite for payment. In the circumstances, I am satisfied that the plaintiff has succeeded to prove on a balance of probabilities that the Department officials concerned had repudiated the contract by their conduct.¹ See also: *Nash v Golden Dumps (Pty) Ltd*², where the court held that ‘Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to “repudiate” the contract...’.

[40] Besides, even if the plaintiff was required to reach a certain target as a prerequisite for payment, which was clearly not the case in my view, the plaintiff’s failure to reach such target would not in itself entitle the Department to terminate the contract without first giving the plaintiff notice in terms of clause 2.27.1(i) of the contract. In such notice, which had to be sent by registered or certified mail, the Department was required to allow the plaintiff

¹ See *Vromolimnos (Pty) Ltd and another v Weichbold and another* [1991] 3 All SA 856; 1991 (2) SA 157 (C) at 163.

² 1985 (3) SA 1 (A)

a reasonable period (not less than 14 days) to deliver satisfactory performance, failing which the Department would then be entitled to make a recommendation for the cancellation of the contract.³

[41] It is common cause that the Department had failed to give the plaintiff any notice in terms of clause 2.27.1(i) that it was not satisfied with the plaintiff's performance in terms of the contract before it made a recommendation for the cancellation of the contract. In any event, by the time the contract was terminated by the Department (on 19 June 2018), the plaintiff had already accepted, either expressly or impliedly, the Department's repudiation of the contract through the persistent conduct of its officials not to pay the plaintiff's invoices. Had it not, the Department's failure to give notice of termination in terms of the contract would have constituted an act repudiation in itself.

[42] It was indicated by both Buthelezi and Roji in their evidence that they believed that the plaintiff was required in terms of the contract to submit the aforesaid 'supporting documentation' with its invoices. However, even if they honestly and on good grounds believed that they were entitled to act in the way that they did, the Department will still be guilty of repudiation because their conduct amounted to a denial of the Department's contractual obligations towards the plaintiff.⁴ In my view, their conduct would clearly lead any

³ See *Smith v Weeks* 1922 TPD 235; *Bulawayo Municipality v Bulawayo Indian Sports Ground Committee* [1956] 1 All SA 85; 1956 (1) SA 34 (SR).

⁴ See *Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd* [1994] 4 All SA 7 (AD) at 15.

reasonable person to the conclusion that the Department did not intend to carry out its part of the contract at all.⁵

Summary of the tendering process

[43] Based on my assessment of all the evidence led during the trial in its totality, the tendering process in respect of the contract may be summarised as follows:

- (a) Firstly, the Department's Bid Evaluation Committee (BEC) made a recommendation to the Department's Bid Adjudication Committee (BAC) that the relevant tender be awarded to the plaintiff based on the plaintiff's quoted price of R105 per box of condoms;
- (b) The BEC's recommendation was, in turn, approved by the BAC, but subject to confirmation by the plaintiff that its quoted price was inclusive of the following costs: (i) transportation; (ii) storage/warehousing; (iii) human resources; and (iv) training;
- (c) Upon receipt of the requisite confirmation from the plaintiff, the BAC proceeded to grant its approval of the revised bid price of the plaintiff, inclusive of the human resources, transportation, training and storage/warehousing costs, in an all-inclusive annual budgeted amount of

⁵ See *Ponisammy and another v Versailles Estates (Pty) Ltd* [1973] 1 All SA 540; 1973 (1) SA 372 (A) at 387; *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) at 653; *Discovery Life Ltd v Hogan and another* 2021 (5) SA 466 (SCA) para 17.

R8 481 972. Divided by 12, the annual budgeted amount came to an all-inclusive monthly budgeted amount of R706 831; and

- (d) In its determination of the budgeted amount, the BAC used the pricing guide stipulated in pages 53 to 63 of the contract, and its approval was subsequently ratified by Dr S T Mtshali, in his capacity as the erstwhile Head of Department, on 25 July 2017.

[44] In essence, this is a brief summary of how the plaintiff's monthly payment of R706 831 was arrived at, not by calculating the number of condoms or boxes distributed by the plaintiff per month as the target.

[45] In conclusion, I accordingly find the defendant liable for the damages suffered by the plaintiff arising from the defendant's repudiation of the contract.

Quantum of damages

[46] Regarding the quantum of damages payable by the defendant to the plaintiff, it was argued by Mr *Blomkamp* that in cases of breach and/or repudiation of contract, the award of damages is intended to put the innocent party in the position in which it would have been in if the contract had been properly honoured by the guilty party.⁶ That is of course trite, but the challenge comes with the actual calculation of the amount of damages payable

⁶ *Trotman and another v Edwick* 1951 (1) SA 443 (A).

by the guilty party to the innocent party arising from the breach or repudiation of contract.

[47] In *Esso Standard SA (Pty) Ltd v Katz*⁷ the Appellant Division held that: ‘It has long been accepted that in some types of cases damages are difficult to estimate and the fact that they cannot be assessed with certainty or precision will not relieve the wrongdoer of the necessity of paying damages for his breach of duty.’

See also *Sun World International Inc v Unifruco Ltd*,⁸ where it was held that: ‘Our courts do not non-suit a plaintiff who has suffered patrimonial loss and is incapable of proving the *quantum* thereof with mathematical precision if satisfied that such evidence as was reasonably available was adduced...’

[48] In the present case, the only evidence before me on the issue of quantum was that of Mubiru. According to his calculations, the plaintiff suffered damages in the total sum of R11 243 786, which is the difference between the payments of R706 831 per month for 36 months which the plaintiff would have received and the expenses it would have reasonably incurred during the same period had the contract been allowed to run its course without being repudiated by the defendant. No evidence was led by the defendant to refute the plaintiff’s evidence on quantum. Therefore, in the absence of any evidence to gainsay the plaintiff’s evidence on quantum, I am satisfied that the plaintiff’s evidence on quantum is reasonable after due consideration of the estimated expenses it would have incurred if the contract had run its course.

⁷ *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A) at 969–970G.

⁸ *Sun World International Inc v Unifruco Ltd* 1998 (3) SA 151 (C) at 170F-G; See also *Hersman v Shapiro & Co* 1926 TPD 367 at 379-380.

Order

[49] Judgment is granted in favour of the plaintiff against the defendant for:

1. Payment of damages in the total sum of R11 243 786;
2. Interest from the date of judgment to date of payment; and
3. Costs of suit.

A handwritten signature in black ink, appearing to be 'ME NKOSI J', written over a horizontal line.

ME NKOSI J

Appearances

For the Plaintiff: Mr Blomkamp SC

Instructed by: L L M Attorneys, Scottsville, Pietermaritzburg.

Tel: 033 – 346 2391

Cell: 064 – 505 9742

Ref: L MANYATHI

Email: llmattorneysinc@gmail.com

For the Defendant: Mr Mthembu SC

Instructed by: Ms Nosisa Gwebela, The State Attorney, KZN,
Pietermaritzburg.

C/O A P Ngubo Attorneys, Durban.

Tel: 031- 365 2542

Ref: 24/6804/18/P/P33 and N.NOGWEBELA/cet

Email: Tsepojama@merchiston.co.za /
dhodahawa@telkomsa.net

Date of Hearing: 06 – 16 February and 10 – 14 July 2023

Date of Delivery: 25 August 2023