



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 941/2014

In the matter between:

Mangaung Metropolitan Municipality

Plaintiff

and

Lerisa Teq (Pty) Ltd

Defendant

HEARD ON: 28, 29 & 31 March 2017 & 11, 12 & 13 April 2017

JUDGMENT BY: NICHOLSON, AJ

DELIVERED ON: 4 May 2017

Background:

- [1] The Plaintiff in this matter, the Mangaung Municipality, alleged that on 17 March 2011 it entered into a written contract with the Defendant, Lesira Teq (Pty) Ltd. The contract was to endure for a

period of five months and five days from 25 January 2011 until 30 June 2011. In terms of the contract, the Defendant was to supply, install and maintain 13 500 prepaid water meters, vending units and a management system for the Brandwag Flats Housing Scheme (BFHS).

- [2] The total contract price was R 34 200 188.10 and the Defendant would invoice the Plaintiff for the prepaid water meters supplied, installed and maintained by it. The Plaintiff undertook to make payment on the Defendant's invoices submitted in terms of the agreement within 30 days of date of receipt thereof.
- [3] The Defendant submitted four invoices from February 2011 to December 2011 for a total value of R 19 850 830.00. (Invoice 1 dated 25/2/2011 for R 6 395 400.00; invoice 2 dated 18/4/2011 for R 6 395 400.00; invoice 3 dated 5/7/2011 for R 6 950 887.80; and invoice 4 for 6/10/2011 R 109 143.60).
- [4] The conclusion of the contract and the submission of the four invoices referred to above and appearing on pages 57-60 of the indexed pleadings are common cause, as is the fact that the Plaintiff paid the amounts reflected on the four invoices to a total value of R 19 850 830.00 to the Defendant.
- [5] The Plaintiff alleged that the submission of the invoices represented to it that the Defendant had supplied and completed the specified work reflected on the invoices and that, relying on these representations and in compliance with the agreement, it paid the four invoices in the total amount of R 19 850 830.00.

- [6] The Plaintiff alleged that subsequent to making payment, it became aware that the Defendant had only supplied and installed 1075 of the prepaid meters and has, to date, failed to supply and install the balance in terms of the agreement. It is thus the Plaintiff's submission that the Defendant has been overpaid by R 17 642 777.00.
- [7] It is the Plaintiff's contention that by submitting the invoices, the Defendant fraudulently misrepresented to the Plaintiff that it had successfully supplied and installed the pre-paid meters claimed for in the invoices and that the representation was material and induced the Plaintiff to make the payments referred to above. The Plaintiff asserts that the Defendant knew or should have known that it had not supplied and installed the water meters claimed for and thus, the Plaintiff has suffered damages in the sum of R 17 642 777.00 as a result of the fraudulent misrepresentations in that it has overpaid the Defendant in this amount.
- [8] In the alternative, the Plaintiff argues that, should the Court find that the Defendant did not fraudulently misrepresent to the Plaintiff that it had completed the work reflected in the invoices, the Defendant has been unjustly enriched at the Plaintiff's expense in that it was paid for the meters reflected in the invoices when in fact, the Defendant had only supplied and installed 1075 pre-paid water meters to the value of R 2 208 053.00. The Defendant has thus been overpaid in the amount of R 17 642 777.00 by the Plaintiff, which amount was neither due nor payable. The Plaintiff thus asserts that the defendant has been unjustly enriched in the sum claimed and that the Plaintiff has been impoverished in this sum.

The Plaintiff thus seeks to recover the said sum on the basis of unjust enrichment.

[9] The Defendant denies that it made any fraudulent misrepresentations. It admits the agreement between the parties exists but alleges that the agreement extended beyond the BFHS and that the said scheme was merely a pilot project which lent its name to the bigger project.

[10] The Defendant admitted in the pleadings that it submitted the four invoices relied upon by the Plaintiff in the amounts mentioned and that the submission of the invoices represented to the plaintiff that it had successfully supplied the water meters and completed the specified work reflected on the invoices. It further admitted that the Plaintiff relied on the correctness of the invoices and honoured them in terms of the agreement. The Defendant denies that it only supplied and installed 1075 prepaid meters, that it made fraudulent misrepresentations that induced the plaintiff to pay or that it was overpaid in respect of the invoices submitted. The Defendant thus denies the Plaintiff's claim for damages in the sum of R 17 642 777.00 or that the Plaintiff is entitled to repayment of that amount on the basis that it has been unjustly enriched and Plaintiff concomitantly impoverished in this amount.

[11] The Defendant instituted a claim in reconvention. This claim was abandoned and need not be explored further.

The Plaintiff's case:

- [12] At commencement of the trial, the Plaintiff brought an application in terms of rule 39(11) of the Uniform Rules of Court requesting that, in light of the pleadings, the Plaintiff has little to prove and that the burden to begin should be shifted to the Defendant.
- [13] The Court determined that the broad onus of proof rests on the Plaintiff to prove its case on a balance of probabilities. The court may however, vary the order in which evidence is presented to the court in terms of rule 39(11) of the Uniform Rules of Court where such a variation would benefit the logical sequence in which evidence is adduced before the court and thus shorten the proceedings. This is generally done where the Plaintiff has made out a *prima facie* case and the Defendant has raised facts that give rise to a special defense of some type.
- [14] In this case, the Plaintiff set out a *prima facie* case in the pleadings and the Defendant made a significant number of important admissions, however, the Defendant's bare denial of aspects of the Plaintiff's case did not constitute a special defense and thus, in the circumstances, the court was not convinced that it should vary the ordinary rules regarding the order in which evidence should be adduced. The Plaintiff thus carried the burden to begin and the rule 39(11) application was dismissed. (The court referred, inter alia, to *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA 706 (A) in arriving at this decision.)
- [15] The Plaintiff led two witnesses. The first, Mr. Mpho Motolo is an employee of the Plaintiff and has been so employed since 2010. He has worked in Plaintiff's Billing Unit since 2012. At the time the

Plaintiff and Defendant contracted, and throughout the effective period of the contract, the witness was an intern in the finance department of the Plaintiff, gaining experience in all financial aspects of the Plaintiff's business. Mr. Motolo was thus not a party to the negotiation or implementation of the contract.

[16] Mr. Motolo was taken through the contractual terms and the addenda to the contract by counsel. With reference to a copy of the contract, Mr. Motolo verified the agreement, its effective dates, the performances to be rendered in terms of the agreement, the place of performance and the value of the contract.

[17] Mr. Motolo also verified that according to the contract, payment was to be made to the Defendant within 30 days of submission of invoices in respect of "pre-paid water meters supplied, installed and maintained". He confirmed that the Defendant submitted the four invoices reflected in the papers as BB1, BB2, BB3 and BB4 and that a total amount of R 19 850 830.00 was paid in respect of these invoices.

[18] Mr. Motolo testified that, based on a report compiled by Ms. Matlali Solfafa, the Chief Risk Officer of the Plaintiff at the time the report was compiled, (the Plaintiff's second witness), only 1075 pre-paid water meters were supplied and installed in terms of the contract. Thus, based on the information contained in the report referred to above, the Defendant had been overpaid in the amount of R 17 642 777.00 as the four invoices referred to above claimed for, inter alia, 9000 prepaid water meters.

- [19] Mr. Motolo testified that the Plaintiff had made payment based on the amounts claimed in the four invoices referred to on the understanding that the work reflected had been done. The witness declined to draw any legal conclusion regarding whether or not the invoicing amounted to a fraudulent misrepresentation. He did however confirm that the invoices were submitted to elicit payment and that the Plaintiff would not have paid had the Defendant not submitted the same. He confirmed that the Defendant knew, or ought to have known that the pre-paid meters had not been installed and that the Defendant had thus been paid for work it had not done. The Defendant should only have been paid for the 1075 pre-paid meters installed, and was thus overpaid in the sum indicated above at the expense of the Plaintiff who was concomitantly impoverished. Mr. Motolo explained how Ms. Solfafa calculated the number of pre-paid water meters actually installed and the amount the Plaintiff should have paid as set out in her report. Ms. Solfafa also testified in this regard.
- [20] It was Mr. Motolo's testimony that in 2011, he was requested to compile a list of users who would require pre-paid meters. This work took place after the effective date of the contract had expired. It was his opinion that the Defendant would be contracted to install pre-paid water meters at the residences indicated on the list.
- [21] Mr. Motolo testified that it was his opinion that the Defendant should only have been able to claim payment in terms of the contract once the specified work had been completed. When questioned on whether or not this would have included the maintenance work provided for in the contract he responded in the

negative stating that as maintenance is continuous this would not be required before payment could be claimed.

[22] Mr. Motolo indicated that on his reading of the documentation, the defendant's invoices BB1- BB4 were, *inter alia*, for the supply of 9000 water meters. He conceded that nowhere on the said documentation was there any suggestion that these meters had been installed. Based on this, he stated that the invoices did not contain any lie and, in his opinion, if the Defendant could prove it had delivered the 9000 meters alleged, it would be entitled to payment for the same. He remained adamant, however, that the invoicing should not have taken place before installation had been completed, despite each element of the work having an individual cost as reflected on the schedule to the contract, found at page 54 of the indexed bundle of pleadings. He based his conviction in this regard on clause 5.1 of the contract which specified that the Plaintiff would compensate the Defendant "...after the satisfactory completion of the specified piece of work and the submission of an invoice".

[23] The Plaintiff's second witness, Ms. Solfafa, was a former employee of the Plaintiff who took up employment with the Plaintiff on 1 September 2012 and retired from the Plaintiff on 1 September 2016. She was employed as the Plaintiff's Chief Risk Officer whose responsibilities included the investigation of all reported cases or allegations of fraud, corruption, irregular expenditure and the like. She created a report in respect of the matter before the court, which report was presented to the court and about which she testified. The report was dated 11 July 2013 and related to possible irregular

procurement and delivery of goods and service to the Plaintiff and an assessment of whether or not the Plaintiff received value for money from the Defendant. She reviewed certain documents, conducted certain interviews and made certain site visits in compiling the report. She explained in her report how she calculated the number of pre-paid water meters actually installed and how she arrived at the amount of money that should have been paid to the Defendant and, by extrapolation, the extent of the Plaintiff's alleged overpayment to the Defendant.

[24] Ms. Solfafa, could not find any relevant documentation other than the contract dated 17 March 2011 (without its annexures) between the Plaintiff and the Defendant, in the Plaintiff's records. She thus relied upon this document, some information reflected on the computerized system of the Plaintiff (the Venus system), oral information imparted to her by various employees of both the Plaintiff and the Defendant and a visit to the Defendant's Pretoria factory in finalizing her report. The senior staff of the Plaintiff who could have informed the investigation had all left the employ of the Plaintiff by the time the investigation took place and were uncooperative with the process.

[25] Ms. Solfafa testified that the contract required the Defendants to supply, install and maintain pre-paid water meters, vending units and a management system for the BFHS. Only 1075 prepaid water meters were supplied and installed according to the records available to Ms. Solfafa when she compiled her report. Ms. Solfafa raised certain questions in her enquiries and her report. She indicated that the Defendant failed to supply her with the purchase

orders or delivery notes in respect of the meters allegedly supplied and that the Defendant did not satisfy her as to why they would have continued to supply pre-paid meters knowing the Municipality did not have sites ready for installation or storage facilities to accommodate the pre-paid meters. She found their explanation that they felt pressure to comply with their contractual undertakings to be unconvincing and stated under cross-examination, that she had not previously seen the installation schedule appended to the contract.

- [26] As regards the delivery notes and waybills discovered by the Defendant, Ms. Solfafa indicated that although she could not possibly know all the employees of the Plaintiff, some signatories on the delivery notes and waybills were unknown to her and she was certain that Daniel (from the Plaintiff's finance department) was not an appropriate signatory to sign for receipt of pre-paid water meters, that the address in Lessing street that appeared on a Waybill did not belong to the Plaintiff and that she was uncertain about the Vickers street address on one delivery note. She also stressed that certain of the documents were not correctly signed and none of them bore the Municipal stamp. She was adamant that an official municipal stamp was required on delivery notes for goods supplied to the Municipality at the time the water meters should have been supplied although she could not confirm by whom she had been given this information. She did state however, that she had verified this by checking other delivery notes from this time. No such notes were presented to the court. Ms. Solfafa also pointed out discrepancies between the contents of certain delivery notes and the alleged corresponding waybills before the court. Ms.

Solfafa concluded in her report that proper procedure for receipt of goods by the Plaintiff had not been followed and that the expenditure was irregular. She stated that the contract for 13 500 prepaid meters for BFHS was odd in that there were not sufficient units in the BFHS to accommodate so many meters and this in itself, tended to indicate there was some problem with this contract.

- [27] In conclusion, Ms Solfafa opined that the procedure for the delivery of the meters and other items was irregular as the parties who purported to sign for receipt of the goods for the municipality were not authorized to do so and no Municipal stamp was affixed to the invoices to verify their authenticity. Delivery notes should have been signed for by someone from water and sanitation in the technical division. It appears from the documentation that "Daniel" from finance signed for some, an unknown H Steyn for others, Mabaleng and Mangaung and an employee of the Defendant ("Khotso") for receipt of others.
- [28] Under cross examination, the poor state of the Plaintiff's record keeping was exposed, as was the insufficient nature of the investigation undertaken. Ms. Solfafa was not in the employ of the Plaintiff when the contract was entered into or acted upon and those who had been so employed were uncooperative, leaving Ms. Solfafa to draw conclusions based on extremely limited and sketchy information. Despite the limited scope of the investigation, Ms.Solfafa was actively engaged with the legal department of the Plaintiff in the initiation of litigation in this matter based upon her recommendation that the monies paid to the Defendant should be recovered.

- [29] During cross examination, Ms. Solfafa conceded that the Plaintiff had no record of the transactions beyond the contract and what was reflected on the Venus system and that she had to rely on documentation supplied by the Defendant. She also conceded that she was aware that the invoices were paid out for the supply of 9000 prepaid meters, not for their installation and that where installation was claimed for, it appeared separately on the invoice. Ms. Solfafa also conceded that there were problems associated with installations.
- [30] The Plaintiff closed its case after Ms. Solfafa's evidence without leading any witness who had been party to the negotiation or implementation of the contract between the parties.

The Defendant's case:

- [31] The Defendant led five witnesses. The first of these, Mr. Andile Meke, is an employee of the Defendant and has been in the Defendant's employ since 2008. In 2011 he was employed to do Human Resources (HR) work and to act as Dispatch Manager for the company. Mr. Meke explained the normal process that would be followed when a purchase order was received by the Defendant. This process was: On receipt of a purchase order, the Defendant would contact the meter suppliers who would prepare the order and, once ready, the meters would be received from the supplier by the Defendant on the Defendant's factory floor. The Dispatch Manager would then contract with an independent courier company, Discovered Integrated Couriers, (the courier company)

to load the meters on the factory floor and to deliver them to the client. For this purpose, a delivery note would be generated by the Defendant and that delivery note would contain the details of the delivery address and the client's contact details. This delivery note and a document with a detailed list of the description and serial numbers of all the water meters in the shipment would be given to the courier company and would accompany the shipment to the delivery address. The courier company employee would generate a waybill for each shipment transported.

- [32] The Dispatch Manager would follow up telephonically to confirm the shipment had arrived at its destination. The client would sign for receipt of the shipment on the delivery note as well as on the waybill. The signed delivery note would be returned to the defendant and the waybill to the courier company which would use that document to generate an invoice for payment by the Defendant. The list of serial numbers of the water meters contained in the shipment would be retained by the recipient as the Defendant would have a copy of this on their records.
- [33] Mr. Meke indicated that the courier company had been used to transport four or five shipments of pre-paid water meters and related items to the Plaintiff in Bloemfontein. As the Plaintiff had not yet identified installation sites for the meters, after the first delivery, the balance of the Plaintiff's water meters were taken to a storage facility hired by the Defendant in Bloemfontein and were later returned to the Defendant's Koedoespoort, Pretoria warehouse where they are currently stored for the Plaintiff. The meters were brought back to Koedoespoort as the Defendant had

been renting storage in Mangaung to accommodate same but this had proven so costly that a decision was taken to move the meters back to the Defendant's own premises and to store them there on the Plaintiff's behalf.

[34] Mr. Meke confirmed that Ms. Solfafa visited the Factory floor in Koedoespoort, Pretoria for purposes of her investigation on behalf of the Plaintiff but indicated that she did not interview him. He did however, point out the water meters that the Defendant alleged were those of the Plaintiff to her and that Ms. Solfafa then took photographs of these with her tablet before leaving. He stressed that during her visit, Ms. Solfafa was accompanied by the Defendant's employee, one Lydia Mashoane, to whom she addressed her questions. He stated further, under cross-examination, that there were between seven and eight thousand meters belonging to the Plaintiff in the warehouse at the time of the visit and that these were all new meters despite Ms. Solfafa's assertions that some looked as though they were used. He stressed that the Defendant had not gathered the meters together quickly when they heard about the visit so they would have something to show Ms. Solfafa. He denied he had any prior knowledge that the visit would take place.

[35] Under cross-examination, Mr Meke was asked about the various delivery notes and the two waybills that were discovered by the Defendant. He denied that the requirement that deliveries had to be authenticated by the stamping of the delivery note with an official municipal stamp had ever been communicated to him. For

this reason, he was not aware that he needed to check for such a stamp.

[36] Mr. Meke confirmed that the delivery notes and waybills for shipments should correspond with each other. He was unable to explain the discrepancies between the relevant delivery notes and the corresponding two waybills that were discovered. Nor was he able to explain the absence of waybills for all the delivery notes discovered or the discrepancies in the contents of the delivery notes themselves. He could not explain why the items delivered differed in their descriptions from delivery note to delivery note or why one waybill used the descriptor "1500 parcels". He was unable to identify the places for delivery indicated on the various delivery notes and waybills or the persons to whom delivery had allegedly been made on behalf of the Plaintiff and referred the court to witnesses from the Defendant's local office in Bloemfontein in this regard.

[37] Mr. Meke identified the Defendant's employees in Bloemfontein as Lydia Mashoene, Jerry Shinnars and Khotso Mahlonoko. These persons were, according to his evidence, tasked with facilitation of the arrival of the shipments in Bloemfontein. (Mr Shinnars testified before the court.)

[38] Mr. Meke was questioned about an amendment to one delivery note where the number of pre-paid water meters had been changed from 5000 to 3550. He could not recall why or by whom the change had been made and stated that Simon, the truck driver would be able to deal with this discrepancy. (Simon did indeed

testify but could shed no light on this discrepancy) In re-examination he stated that it could have been that some of the shipment was sent on a second truck or in a trailer but he could not recall. Mr. Meke could also not offer any explanation why, if only 3550 water meters were on the truck, 5000 spindle keys would still have been delivered. It was also noted during his cross examination that the waybills did not list additional items such as spindle keys or installation seals, thus their delivery could not be verified.

[39] Mr. Meke did not find “Khotso’s” signing for a shipment to be odd as he was in Bloemfontein to receive shipments. This was however irregular as Khotso was an employee of the Defendant and could thus not receive the shipment on behalf of the Plaintiff.

[40] The second witness for the Defendant was Mr. Simon Mbenzi, a driver for the courier company contracted by the Defendant. In his evidence, Mr. Mbenzi indicated that he recalled making a number of trips to the Plaintiff in Bloemfontein to deliver prepaid water meters on behalf of the Defendant. He testified that he collected from Mr. Meke in Pretoria and delivered to Mr. Shinnars in Bloemfontein.

[41] It was Mr. Mbenzi’s testimony that on arrival in Bloemfontein he would phone Mr. Shinnars who would meet him and he would follow Mr Shinnars to the delivery point in Bloemfontein. He said after meeting Mr. Shinnars they would deliver at City Storage which he was advised was the Plaintiff’s storage facility.

- [42] Mr. Mbenzi verified that he signed a number of delivery notes presented to him and that the receipt of the deliveries were signed for by different people for the Plaintiff.
- [43] Mr. Mbenzi stated that he collected shipments from the factory floor and that he counted the items as they were loaded on the truck. He also indicated that he would also count the items when he offloaded them. He could not offer any clarity on the delivery note for 5000 meters that had been altered to 3550.
- [44] Under cross examination, Mr. Mbenzi confirmed that he was the only driver by the name of Simon in the employ of the courier company at the time. When confronted with the discrepancies in the signatures he affixed to the various delivery notes he confirmed that it was indeed he who had signed the documents in all instances. He also recalled one instance where he signed regarding a discrepancy in the items listed on the delivery note and those actually counted but he could not remember when exactly this happened. He attempted to deal with numerical inconsistencies in the delivery notes and waybills by explaining that on occasions the loads were split across vehicles or between the truck and a trailer but he could add little to clarify the issues.
- [45] The third witness for the Defendant was Mrs. Prescilla Nel from City Storage. She testified that she has been in the employ of City Storage since July 2011 and that the storage facilities are located at 10 Lessing Street Estoire, Bloemfontein. She stated that City Storage use a Pastel accounting system and that from the system she could verify that the Defendant rented storage facilities from

City Storage from March 2012 to May 2013. She stated that the records do not go further back although she stated she was aware that City Storage did business with the Defendant before that date.

[46] Ms. Nel indicated that when she took up employ at City Storage the Defendant had more than one storage unit, she thought they had two but that by May 2013 they only had one such unit.

[47] Ms. Nel testified that she had never seen the contents of the storage unit(s) and could thus not verify what the Defendant had stored there, if anything, save to say that the items were not permitted to be flammable.

[48] The fourth witness for the Defendant was Mr. Jerry Shinnars who had been an employee of the Defendant since 2003 and worked as a technician and was also responsible for receiving goods. He was transferred to Bloemfontein by his employer to receive the pre-paid water meters and to assist with technical matters in late 2010. He remained in Bloemfontein until 2013.

[49] It was Mr. Shinnars' testimony that when a shipment of pre-paid water meters was dispatched by the Defendant from Pretoria to Bloemfontein, he was notified by Mr. Meke when it was scheduled to arrive in Bloemfontein and he would meet the truck and direct it to the correct place to offload the contents. He would accompany the delivery and he, the driver and others would count the contents of the truck as they were being offloaded.

- [50] Mr. Shinnars confirmed that the various persons whose names appeared on the delivery notes discovered were indeed the Plaintiff's employees, save where Khotso signed.
- [51] Mr. Shinnars also confirmed that initially the water meters were off loaded at the Plaintiff's department of water and sanitation but, when there was no further space for meters there, later shipments were taken to storage facilities at City Storage hired by the Defendant for the storage of the Plaintiff's meters. It was his testimony that the Plaintiff had to notify the Defendant where to install the meters and, without such instructions, they could not install the meters and they were thus placed in storage.
- [52] Mr. Shinnars acknowledged the discrepancies in the various documents. He could not shed any light on these.
- [53] Mr. Shinnars also testified that he did not know of any requirement that the Plaintiff's representative receiving the meters had to endorse the delivery note with an official stamp. He stated that the signatories were, to the best of his knowledge, authorized to receive the shipments and that there were occasions where Defendant's employees would sign for the deliveries and then take the delivery note to the Plaintiff.
- [54] The final witness for the Defendant was Mr. Edwin Sibiya, the Managing Director of the Defendant. Mr Sibiya was personally involved in the negotiation of the contract and its implementation. He testified that he has worked at the Defendant since 2003.

- [55] Mr. Sibiya was involved in the pilot project with the Plaintiff in 2010 when pre-paid water meters were supplied and installed in the BFHS and later in the project that gave rise to the current proceedings. He stated that the contract that led to the current action was for installation of prepaid water meters throughout Bloemfontein as the 2010 pilot project in BFHS was completed in 2010 and further meters were not required there.
- [56] Mr. Sibiya confirmed that the contract was, inter alia, to supply, install and maintain the meters. The Defendant was obliged to supply meters in accordance with a schedule of delivery annexed to the contract and thus it continued to supply meters despite not having been given locations for installation. He remained firm in this interpretation of the contract despite the Plaintiff's assertion that the delivery schedule was for supply and installation as delivery related to delivery of the services in terms of the contract and not delivery of the meters only.
- [57] Mr. Sibiya also testified that when meters were invoiced for, the invoice was accompanied by the relevant delivery note(s). He could neither confirm nor deny that the invoices sent to the Municipality were accompanied by such notes as he does not work in the finance department of the Defendant.
- [58] As with the other witnesses for the Defendant, Mr. Sibiya was unable to explain the absence of certain documentation, discrepancies in the information in the available documentation and the absence of a municipal stamp on the delivery notes showing that they were received by an authorized person on behalf

of the Plaintiff. He too, testified that the use of a stamp to authenticate the signatory's authority to accept the goods on behalf of the Plaintiff was not communicated to him or, to the best of his knowledge, to the Defendant.

[59] Mr. Sibiya corroborated that most of the water meters that were delivered to the Plaintiff were placed into storage pending notification from the Plaintiff regarding where their meters were to be installed. The storage costs eventually became too high and the Defendant then moved the meters back to their own property in Koedoespoort, Pretoria where they have been stored on the Plaintiff's behalf. He testified that the water meters have been tendered to the Plaintiff on a number of occasions and that the Plaintiff has failed to collect its pre-paid meters or to make arrangements to take possession of them. He stated that he could not account for the absence of a waybill or the details of the meters returned to Koedoespoort as he is not in Operations.

[60] Mr. Sibiya stated that the Defendant had ordered the meters from the manufacturer according to the schedule it had to meet and that it billed the Plaintiff on delivery as it was obliged to pay the manufacturer for the meters they had supplied.

[61] The witness remained firm in his testimony that he was entitled to bill for delivery of the meters, even before installation and that, as the meters had been delivered, the Defendant was entitled to claim payment for the meters in terms of the invoices submitted.

[62] After Mr. Sibiya's testimony, the Defendant closed its case.

The issues and the law:

- [63] The Plaintiff has relied upon allegations of fraudulent misrepresentation and unjust enrichment to found its two claims in the alternative.
- [64] In order for the Plaintiff to succeed with its claim based on fraudulent misrepresentation, the Plaintiff must show that the elements of fraudulent misrepresentation are present. This means the Plaintiff must establish that the Defendant made material representations to it that induced it to act in a manner that caused it to suffer damages in circumstances where the Defendant was aware or ought to have been aware that the representations were not true.
- [65] Unjust enrichment is a subsidiary remedy. (DuPlessis, J *The South African Law of Unjustified Enrichment* 2012 Juta at 6-7) For this reason, the Plaintiff relied upon the remedy in the alternative. Although it is not essential that the specific *condictio* relied upon be named in the pleadings, (Du Plessis *supra* at 2) counsel for the Plaintiff indicated that the Plaintiff's claim was based on the *condictio indebiti*.
- [66] As no general enrichment action exists in South African law, despite repeated statements that such an action may be desirable, (*Nortje v Pool NO* 1966(3) SA 96 (A); *Kommissaris van Binnelandse Inkomste v Willers* 1994 (3) SA 283 (A); 1999 (3) SA 19 (SCA); *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001

(3) SA 482 (A)) the Plaintiff must rely on a specific *condictio*. For the Plaintiff to succeed with the enrichment action, more particularly with the named *condictio*, it must establish: That the Defendant had been enriched at the expense of the Plaintiff who had been concomitantly impoverished; that the payment made by the Plaintiff to the Defendant had not been due and payable; and that the payment was made *sine causa*.

[67] It is also of value to note here that the Plaintiff's financial matters are regulated by the Municipal Finance Management Act (56 of 2003),(MFMA) which Act places an obligation on the accounting officer to manage the expenditure of the entity and, to that end, to take all reasonable steps to ensure: "the entity" has and maintains an effective system of expenditure control including procedures for the approval, authorization, withdraw and payment of funds"; (Section 99(1) & (2)(a); that a management, accounting and information system is maintained that , inter alia, accounts for payments made by the entity; (Section 99(2)(c) and that a system of internal controls is maintained in respect of creditors and payments.(Section 99(2)(d).

Application of the law to the facts:

[68] In the present case, it is clear that the documentary records of both the Plaintiff and the Defendant with regards to the implementation of the contract between the parties are inadequate. The Plaintiff relies upon the ability of the Defendant to provide documentation upon which it can prove its case and the Defendant's documentation is incomplete and littered with procedural

irregularities and discrepancies. In light of the provisions of the MFMA set out above, it would appear that the Plaintiff's accounting officer has failed to deliver on his mandate.

- [69] It is for the Plaintiff to prove its case on a balance of probabilities. With regards to claim 1 which is founded upon an allegation of fraudulent misrepresentation, the Court must assess whether or not the onus has been discharged with regards to the various elements of fraudulent misrepresentation referred to above. From the pleadings it appeared that Plaintiff's allegations of fraudulent misrepresentation were founded on the basis that by invoicing for 9000 pre-paid water meters, the Defendant represented these had been both supplied and installed. It had in fact delivered but not installed these and the Defendant had thus deliberately misled the Plaintiff to pay for work not yet done. During the trial it however, became apparent, that the Plaintiff was in fact presenting the argument that the Defendant had delivered and installed only 1075 water meters and that the balance of the water meters for which the Plaintiff had been invoiced had not in fact been delivered.
- [70] It was the Plaintiff's position that the onus was on the Defendant to prove it had delivered the water meters invoiced for and that, given the unsatisfactory state of the documentation supplied by the Defendant with regards to the various alleged deliveries, such deliveries could not be proven to have taken place.
- [71] The onus of proving that the water meters had not been delivered in fact falls upon the Plaintiff and this onus has not been discharged. The Plaintiff depended almost entirely upon a report

drafted by Ms. Solfafa to found its allegations. This report was inadequate and did not reflect any inputs from any employee of the Plaintiff who was involved with the negotiation and implementation of the contract. The witnesses called by the Plaintiff could offer no first-hand evidence with regards to the circumstances attached to the contract. Furthermore, Ms. Solfafa was not familiar with all the signatories to the delivery notes who purported to accept deliveries on behalf of the Plaintiff but this did not exclude the possibility that they were so authorized.

- [72] Despite the irregularities, inconsistencies and discrepancies found in the paperwork supplied by the Defendant, there was no evidence that any or all of the parties who participated in the generation or completion of the documentation acted in a dishonest manner calculated to defraud the Plaintiff.
- [73] The Defendant's witnesses substantially corroborated the information each supplied and, if the totality of the evidence is weighed, it would appear more probable than not that the Defendant delivered water meters to the Plaintiff over the period regulated by the contract and that these meters could not be installed because the Plaintiff was unable to give installation sites.
- [74] The Defendant certainly contracted with a courier company to transport something to Bloemfontein on a number of occasions. It hired office space and placed personnel in Bloemfontein to effect some work in Bloemfontein and it hired storage facilities at City Storage for some purpose. Why would the defendant have incurred such costs if not to service the contract? It seems extremely

improbable that all of this was done with the intention to defraud the Plaintiff.

- [75] In terms of its own controls, it would be unlikely that the Plaintiff would pay out such substantial invoices, running into millions of Rands, without verifying that the goods being charged for had in fact been delivered. If this is indeed the case, this would be grossly negligent on the part of the Finance Department of the Plaintiff. The plaintiff is unable to produce any independent documentation of their own and fails to explain why they would pay out on invoices without first verifying the performance in respect of which the invoices claimed re-imbusement.
- [76] The Plaintiff has argued quite convincingly that the deliveries from the Defendant and the supporting documentation they have supplied to the court is questionable. The fact that the delivery notes were riddled with inconsistencies, lacked certain signatures and stamps which should, allegedly have appeared on them does raise some questions as to how many meters were actually delivered. The Court cannot, however, on the evidence before it, find that the meters were not delivered although exactly how many, remains somewhat obscure.
- [77] Fraudulent misrepresentation in this case would have required a conspiracy between the Defendant's employees in Bloemfontein, the Dispatch Manager in Pretoria and the employees of the courier company who were responsible for the transportation of the goods from Pretoria to Bloemfontein.

[78] On the matter of the claim in the alternative, the Court finds the Plaintiff's reliance on the *condictio indebiti* to be inappropriate. For the Plaintiff to succeed on this *condictio*, the payment made by the Plaintiff to the Defendant would need to have been made *sine causa*. In this case the payment was made in terms of a valid contract between the parties. To allow the Plaintiff to pursue an enrichment action to recover a portion of the monies paid in these circumstances would be to allow the enrichment action to be used to achieve contractual restitution. The Court thus finds that the *condictio indebiti* cannot be relied upon in this case.

In light of the above, the court orders that:

The Plaintiff's claims 1 and, in the alternative 2, for repayment of the sum of R 17 642 777.00 are both dismissed with costs.



C. NICHOLSON, AJ

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