IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: CIVAPPFB13/22
COURT *A QUO:* 1121/19

In the matter between:-

REONET (PTY) LTD T/A REONET UTILITY Appellant
(Reg No 1[...])

and

RUSTENBURG LOCAL MUNICIPALITY Respondent

ORDER

DJAJE DJP, REID J AND MFENYANA J:

The following order is made:

i) The appeal is upheld.

ii) The matter is referred back to the court *a quo* to be determined before another Judge.

iii) The costs of the appeal are costs in the cause.

iv) Should the appellant not proceed with the appeal, the appellant is ordered to pay the costs of the appeal.

JUDGMENT

FMM REID, J:

Introduction:

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[1] This is an appeal against a judgment from a single judge from this Division (Petersen J) dated 28 July 2021 ("the court *a quo*"). The appeal is with leave from the Supreme Court of Appeal, leave to appeal having been refused by the court *a quo.*

[2] The court *a quo* dismissed the claim of the appellant (plaintiff in the court *a quo*) with costs after upholding the second plea of "Premature Action" raised by the respondent (defendant in the court *a quo*).

[3] In this judgment I will refer to the appellant / plaintiff and the respondent / defendant interchangeably for ease of reference.

Material factual background

[4] The respondent advertised a bid with the description *"Automated Meter Reading Water Demand Management Program Bid Number: R[...]*. The appellant successfully tendered and was awarded the contract. A letter of appointment was forwarded to the appellant on 19 September 2013 and the appointment was duly accepted on 25 September 2013.

[5] The parties concluded a Service Level Agreement (SLA). The terms and conditions of the SLA were common cause. As required in the terms and conditions of the SLA, the appellant rendered services in

terms of the agreement and furnished the respondent with invoices for rendering such services. The SLA determined that the respondent was required to remunerate the appellant within 30 days from the date of the invoice.

[6] In the particulars of claim the appellant pleads, and the respondent admits, that the SLA was extended on 28 November 2016 for a further period from 1 September 2016 to 30 June 2017. The appellant continued to render services to the respondent in accordance with the provisions of the SLA during the extension period (the first extension).

[7] The appellant further pleaded in the particulars of claim that the SLA was extended from 1 July 2017 to 30 June 2018 (the second extension). The respondent disputes the validity of the second extension. On 7 July 2017 the respondent placed a publication in the local newspaper, Platinum Weekly, in notification of the extension.

[8] The appellant claims payment for services that were rendered during the second extension and attached an invoice for the services rendered (also called a "statement") dated 20 April 2019 to its particulars of claim. The statement details all the separate invoices issued to the respondent for professional services rendered by the appellant to the respondent in terms of the SLA.

[9] In the court *a quo,* and for purposes of dealing with the special plea, it was accepted to be common cause that the services were rendered for the period of the second extension from 1 July 2017 to 30 June 2018. The legality and/or validity of the second extension of the SLA was disputed.

[10] The appellant caused a letter of demand to be sent to the respondent, which letter of demand is dated 7 March 2019. In the letter of demand, the appellant's attorney demanded that the respondent make payment

for the services rendered by 15 March 2019, failing which the appellant would take further action.

[11] The plaintiff issued summons against the defendant on 15 April 2019 for payment of an amount of R318,346.20 (Three Hundred and Eighteen Thousand Three Hundred and Forty-Six Rand Twenty Cents) together with interest and costs, which summons was served on the defendant on 3 May 2019. The defendant filed a notice of intention to defend on 7 May 2019 and filed its plea, incorporating the second special plea, on 18 June 2019.

The pleadings

[12] The particulars of claim succinctly set out the background, and read as follows:

"4

During September 2013, the Plaintiff was appointed by Defendant for BID R[...] – Automated Meter Reading Water Demand Management Program, in terms of a letter of appointment dated 19 September 2013, which was duly accepted on 25 September 2019, the letter is attached hereto as ***Annexure 'A'****.*

5.

In consideration of the above-mentioned, the express, alternatively implied, alternatively tacit terms of the agreement were that Plaintiff would render the services in terms of the appointment and Defendant would remunerate Plaintiff for the services rendered within 30 (thirty) days from date of invoice. The service level agreement dated 9 September 2013 is attached hereto as ***Annexure 'B'*** *and incorporated herein, as if specifically pleaded.*

6.

Plaintiff accepted the appointment and commenced rendering professional services work to the Defendant under the terms and conditions set out in the letter of appointment.

7.

The contract was extended form 1 September 2016 to 30 June 2017 on 28 November 2016. The confirmation of the extension is attached hereto marked ***Annexure 'C'****.*

8.

The contract was further extended from 1 July 2017 to 30 June 2018 as evidenced by the publication on 7 July 2017. The publication is attached hereto marked ***Annexure 'D'****.*

9.

During the period between July 2017 to June 2018 the Plaintiff submitted various invoices to the Defendant for professional services rendered by it in respect of the appointment. The statement dated 20 April 2019 is attached hereto marked ***Annexure 'E'****.*

10.

The Plaintiff complied with the terms of the agreement. Defendant breached the agreement by failing, alternatively, neglecting, alternatively refusing to remunerate Plaintiff for the services rendered, which became due and payable 30 (thirty) days after date of invoice.

11.

On 7 March 2019 a letter of demand was sent to the Defendant by the Plaintiff's attorneys of record, attached hereto and marked ***Annexure 'F'****. Annexure 'F' was a notice sent in compliance with the provisions of the* ***Institution of Legal Proceedings against certain Organs of State Act*** *No 40 of 2002.*

12.

Plaintiff's attorneys of record further sent the abovementioned letter of demand marked ***Annexure 'F'*** *on the 7th March 2019 to the MEC for Finance in the North West Province as well as the National Treasury with a request to intervene in terms of section 139 of the* ***Municipal Finance Management Act*** *No 56 of 2003 due to the Defendant's persistent and material breach of its financial obligations…*

…

14.

Alternatively, *and in the event that it may be found that the agreement, as pleaded in paragraph 8 supra, is invalid (but not unlawful) because of non-compliance with the statutory formalities as encapsulated in Section 116 of the* ***Local Government: Municipal Finance Management Act*** *56 of 2003 ("the MFMA") the Plaintiff pleads that it is entitled to payment of the sum of R318,346.20 on the basis of the condictio indebiti in the following circumstances:-*

14.1 The Defendant was enriched by the Plaintiff performing professional goods and services, as pleaded

supra and to the extent, as set out therein in the amount of R318,346.20.

14.2 The Plaintiff was impoverished by the rendering of professional goods and services as pleaded supra and to the extent, pleaded supra in the amount of R318,346.20.

14.3 The Defendant's enrichment, as afore-stated was at the expense of the Plaintiff;

14.4 The enrichment, as pleaded, was unjustified, alternatively sine causa;

14.5 In the premises the Plaintiff is entitled to payment of the amount of R318,346.20.

15.

***In the further alternative, <u>and only in the event that the Honourable Court may find that the agreement, as pleaded in paragraph 8 supra, is illegal for reason of non-compliance with the statutory requisites</u>**, as encapsulated in Section 116 of the MFMA and furthermore*

15.1 The Plaintiff rendered goods and services to First Defendant in the amount of R318,346.20, alternatively in favour of the Defendant;

15.2 The agreement between the parties in respect thereof, alternatively performance thereof was illegal in terms of Section 116 of MFMA;

15.3 The First Defendant was unjustly enriched at the expense of the plaintiff in circumstances where professional goods and services were rendered to the value of R318,346.20.

15.4 In the premises, the Plaintiff is entitled to payment by the First Defendant in the amount of R318,346.20.

16.

Despite demand the Defendant has failed, neglected or alternatively refused to make payment to the Plaintiff as was agreed between the parties. The Defendant is in arrears and indebted to the Plaintiff."
(own emphasis)

[13] The relevant part of the SLA contract that deals with *"Breach and Termination"* is attached as **Annexure "B"** to the particulars of claim and reads as follows in paragraph 15 thereof:

"15. BREACH AND TERMINATION

…

15.2 In the event that either party breached any provision of this agreement; and

15.3 The breaching party is RLM, then in such event SERVICE PROVIDER shall be entitled to cancel the agreement or claim specific performance and damages save where specifically prohibited herein.

15.4 The breaching party is SERVICE PROVIDER, then in such event RLM shall give SERVICE PROVIDER thirty (30) days written notice to rectify such breach failing which RLM shall be entitled, without prejudice to their common law rights and such other remedies as are provided for herein, to cancel this agreement or to claim specific performance and in all cases to

claim any damages suffered. Notwithstanding the afore going, RLM shall not be required to give any notice to SERVICE PROVIDER in the event that:

15.4.1 The breach relates to any breach of clauses 14 above;

15.4.2 RLM has given SERVICE PROVIDER written notice to remedy any breach on one or more occasions in any 6 (six) month period."

[14] The particulars of claim as quoted above, set out in detail that the plaintiff's claims against the defendant is based specifically on two (2) alternative grounds. The second ground is raised in the alternative to the first ground. There are two causes of action before court, one in the alternative to the other. This is clear from the introduction to the alternative claim, that the alternative claim will come into effect "*only in the event that the Honourable Court may find that the agreement, as pleaded in paragraph 8 supra, is illegal for reason of non-compliance with the statutory requisites."*

[15] The two alternative causes of action as set out in the particulars of claim can be summarised as follows:

15.1. Contractual on the basis of services rendered in terms of the SLA. The contractual claim specifies alternatives of the contractual basis of the claim and is set out in the particulars of claim, and in the alternative to the contractual claim;

15.2. Delictual on the basis of unfair enrichment on the basis of the services rendered by the plaintiff to the defendant. The delictual claim also specifies alternatives on a delictual basis as set out in the particulars of the claim.

[16] In the plea, the defendant raised two (2) special pleas:

16.1. That the proceedings should be **stayed** pending the finalisation of **arbitration proceedings** agreed to by the parties on 25 September 2013. In addition to the aforesaid, that the SLA contains an arbitration clause in clause 22 thereof that determines that the plaintiff and defendant shall enter into arbitration proceedings; and

16.2. That the plaintiff instituted **premature action** premised on an alleged breach of the SLA, but the plaintiff did not act in terms of the SLA to grant the respondent the prerequisite period of 30 days' notice of demand after the alleged breach to rectify the breach.

[17] Only the second special plea is relevant to this appeal. The second special plea reads *verbatim* as follows:

> *"DEFENDANT'S SECOND SPECIAL PLEA: PREMATURE ACTION PREMISED ON BREACH OF THE AGREEMENT*
>
> *2.*
>
> *….*
>
> *2.2 Clause 15 of the agreement concluded between the Plaintiff and the Defendant deals with the "breach and termination" of the agreement and clause 15.2, read with clause 15.3 stipulates in a peremptory fashion as follows:* "15.2 In the event that either party breached any provisions in this agreement; and … 15.3 The breaching party is RLM, then in such event SERVICE PROVIDER shall give RLM thirty (30) days written notice to rectify such breach failing which SERVICE PROVIDER shall be entitled to cancel the agreement or claim specific performance and damages save where specifically

prohibited herein."
(own emphasis)

2.3 In paragraph 10 of the Plaintiff's particulars of claim the Plaintiff avers that "… the Defendant breached the agreement…"

2.4 Accordingly and in terms of the peremptory provisions set out in clause 15.3 of the agreement the Plaintiff was obliged to "… give RLM thirty (30) days written notice to rectify such breach…" *The Plaintiff has failed to give the Defendant the aforementioned notice and has failed to allow the Defendant the agreed period to "rectify" its alleged breach of the agreement.*

2.5 The Plaintiff proceeded to institute this action against the Defendant claiming the relief of specific performance against the Defendant without adhering to the provisions of clause 15.3 and as such the Plaintiff has failed to place the Defendant in mora as per the provisions of the agreement and the Plaintiff's actions against the Defendant is therefore premature, inopportune and non-suited.

2.6 In the premise, the Defendant prays that the Plaintiff's action be dismissed with costs."
(own emphasis)

[18] The crux of the respondent's second special plea is that the appellant should be barred from proceeding with its claim since it did not place the respondent in *mora* per the provisions of the SLA specifically by not granting the respondent the opportunity of the contractually agreed period of 30 (thirty) days to correct the contract breach. The respondent consequently asserted that the appellant's action is premature. On the converse, the crux of the appellant's argument is that the letter of demand granted the respondent sufficient time and more than 30 (thirty) days as determined in the SLA to correct the

breach. It is argued on behalf of the appellant that although the letter of demand dated 7 March 2019 set a deadline of 15 March 2019, the summons was only issued on 15 April 2019, and therefore granted the respondent more than 30 (thirty) days to correct the contractual breach.

[19] In the pre-trial minutes, the appellant requests the respondent to admit that the agreement was lawful, and that the agreement was lawfully extended for the two (2) individually mentioned periods: the first extension and the second extension. In the defendant's formal answer to this question, the following was recorded in the pre-trial minutes:

> *"The extension of the Service Level Agreement for the period from 1 July 2017 to 30 June 2018 was not executed in compliance with applicable and peremptory procurement processes and could not have been lawfully extended in terms of the provisions of section 116(3) of the* ***Local Government: Municipal Finance Management Act*** *56 of 2003 as averred by the Plaintiff."*
> (own emphasis)

[20] The respondent's position on the pleadings was a denial of the allegations made by the appellant. The answer to the question raised in the pre-trial, curtailed the defence of the respondent essentially to a defence that the second extension was not entered into legally and therefore not enforceable. The appellant expected the respondent to amend its pleading in changing its defence. This did not happen. It is trite law that one party cannot "compel" another to amend its pleadings, and each party is bound to its case as pleaded.

[21] In the court *a quo,* it was argued for the appellant that the allegations of illegality of the SLA as made in the admission in the pre-trial questions, called for evidence to be heard on the factual question in determination of whether the contract was concluded legally or not.

The court *a quo*

[22] The court a *quo* held that the appellant was required to prove that the 30-day notice period was complied with, and after a detailed discussion of the law and the facts, ultimately held that the argument that summons was issued after the expiry of the 30 days' period to remedy the default, cannot prevail and the special plea was upheld. The plaintiff's claim was dismissed with costs.

[23] The court *a quo* deals with the question of time period in paragraph 8 of his judgment as follows:

> *"My understanding is that the plaintiff takes no issue with the 30-day period for in clause 15.3 that "**the issue relates to the period given by the plaintiff to the defendant to remedy the alleged breach of the SLA, that is the bone of contention**".*

[24] It is argued by Adv Laubscher that the special plea isolated the issue before the court *a quo* and that the court *a quo* was correct in having regard to the following two (2) issues:

24.1. The wording stipulated in the SLA which is a compulsory compliance period of 30 days to remedy any breach of the contract;

24.2. Whether the respondent was granted 30 days after demand, to remedy any breach of the contract.

[25] Accepting the argument of the respondent, the court *a quo* made a finding that the lawfulness of the contract when considering the special plea, is not an issue to be engaged by the court. The court *a quo* calculated that 30 days were not granted to the respondent, calculating the 30 days from the date of the letter of the demand being 7 March

2019.

[26] Adv van As argued on behalf of the appellant that the narrow approach of the court, in accepting the argument of Adv Laubscher that the 30-day period should be viewed in isolation, the *a quo* erred in the following manner:

26.1. That the defence of the respondent in the court *a quo* that there was no compliance with the 30-day period, will only become applicable after a factual finding has been made that there (a) was a valid, legal contract, and (b) there was a breach of this contract;

26.2. The factual finding of whether there was a valid and legal contract, and whether there was a breach of the contract, can only be made after hearing evidence;

26.3. The respondent denies the validity of the contract and as such cannot rely on a 30-day clause which, on the respondent's own version, is invalid and illegal.

[27] Adv van As essentially argues for the appellant that the court should have had a proverbial "birds-eye view" of the matter and not be bound to the issues set out by Adv Laubscher on behalf of the respondent.

Legislative context

[28] The court *a quo* placed reliance on the matter of **Henriques and Another v Lopez** 1978 (3) SA 356 in which the *lex commissoria* clause required a party to furnish 10 days' notice in writing prior to proceeding with its action. In the **Henriques** matter the action was instituted prior to the lapse of 10 days from the date of the receipt of the letter of demand. The court a *quo* held that the **Henriques** matter is applicable to the special plea before it.

[29] The respondent relied on **Joss v Barclays Western Bank Ltd** 1990 (1) SA 575 (TPA) at 581H – I, where the court held that where an agreement provides that a party is in default and notice must be given within 10 days and no such notice is given, the cause of action has not been perfected. This is distinguishable from the matter before court, since there was no notice issued at all in the **Joss** matter.

[30] The court *a quo* relied on the unreported judgment of **Firstrand Bank Ltd v Tyrer** 2012 JDR 0673 (ECP), where the following is stated by the court:

> *"It is common cause that the Appellant did not give notice in terms of the aforesaid provision.*
>
> *[7] Mr Richards, who appeared for the Appellant, submitted that the failure by the latter to give the aforesaid notice did not preclude it from issuing summons which effectively accelerated payment of the full outstanding amount because the summons in the effect constituted the required notice."*

[31] In **Tyrer** the court dismissed an application for summary judgment on the basis that no notice of demand was given to the defendant and the court found that there was a *bona fide* defence. This, too, is distinguishable from the matter in the court *a quo* as notice has been given *a quo.* At issue *in casu* is the question whether the plaintiff complied with the SLA having regard to the time periods between the notice of demand, the 30 days' time period thereafter, and the institution of the action.

Analysis

[32] I agree with the argument of Adv van As that the case law referred to by Petersen J was not applicable to the matter before the court *a quo*. Both matters that the court *a quo* relied upon, were not applicable if one has specific regard to the time periods that the notices of demand

was issued. In **Henriques** there was no notice of demand issued and the summons was served on the defendant within the 10-day period after the notice of demand was sent. In **Tyrer** no notice of demand was given at all.

[33] I further agree with Adv van As that the court *a quo* erred in having regard to only the issues as limited and classified by Adv Laubscher. A greater issue needs to be answered first, namely the legality or the validity of the extension of the SLA before it can be determined whether there was substantial compliance with the terms of the SLA.

[34] The dismissal of the plaintiff's claim as a whole (which includes the contractual as well as the alternative the delictual claim) was incorrect even if the special plea was to be upheld. In my respectful view, at the very least, the second special plea could have been upheld in relation to the plaintiff's alternative claim and an order be made that the matter proceed to trial to determine the merits of the plaintiff's main claim.

[35] The plaintiff was never granted an opportunity to prove its main claim or alternative claim against the defendant. The second special plea only had regard to the contractual claim with the cause of action the SLA and the terms thereof being complied with or not. The delictual claim of unlawful enrichment remains alive and was not dealt with by the court *a quo.* In my respectful view this was an oversight by the court *a quo* and is sufficient ground to uphold the appeal.

[36] The second plea was pleaded in the alternative to the first plea, and could only be upheld once the court has decided on the factual issue whether the contract between the parties was not valid, or illegal, and/or lawfully cancelled or not. To make a finding that the second plea is upheld without making a factual finding on the validity of the contract, the court *a quo* erred in upholding the special plea and dismissing the plaintiff's claim.

[37] In the premise, I find that the appeal should be successful and the finding of the court *a quo* should have been that the second special plea against the claim can only be determined after evidence has been led. The matter should be referred to trial to grant the plaintiff an opportunity to prove its claim(s). The special pleas can be best determined at trial after the hearing of evidence.

[38] The matter should therefore be referred back to the court *a quo* for determination before another presiding officer.

Order:

[39] In the premises the following order is made:

i) The appeal is upheld.

ii) The matter is referred back to the court *a quo* to be determined before another Judge.

iii) The costs of the appeal are costs in the cause.

iv) Should the appellant not proceed with the appeal, the appellant is ordered to pay the costs of the appeal.

FMM REID
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG

I agree

JT DJAJE

DEPUTY JUDGE PRESIDENT
NORTH WEST DIVISION MAHIKENG

I agree

S MFENYANA
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG

DATE RESERVED: **20 JANUARY 2023**

DATE OF JUDGMENT: **20 JULY 2023**

APPEARANCES:

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