IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: 1177/2012

In the matter between:-

M R PROPERTY DEVELOPERS (PTY) LTD Plaintiff

and

THE MEC FOR THE DEPARTMENT OF HEALTH
OF THE NORTH WEST PROVINCIAL GOVERNMENT Defendant

CIVIL MATTER

DATE OF HEARING	:	28 MARCH 2013
DATE OF JUDGMENT	:	11 APRIL 2013
COUNSEL FOR THE PLAINTIFF	:	ADV DAVIS SC
COUNSEL FOR THE DEFENDANT	:	ADV MOTAU SC with ADV MOAGI

JUDGMENT

HENDRICKS J

Introduction:-

[1] On 17th March 2008 the Plaintiff and the Defendant entered into a Service Level Agreement ("SLA") with each other. In terms of the agreement, the Plaintiff was obliged to provide in the health technology needs of the Vryburg Hospital; to commission all health technology hardware; to provide training on the use of such health technology to the hospital staff; to provide after-sale support including maintenance and service support; to handle, transport and install furniture, accessories and the like at the hospital; and to store equipment, furniture and accessories in a hardware situated in Midrand, which warehouse was to be leased at the cost of the Defendant.

[2] Plaintiff has, in compliance with its obligations in terms of the SLA, supplied equipment, furniture, accessories and health technology to the value of R134 539 935.33; and commissioned the equipment, provided for the maintenance thereof and trained staff in the use of the health technology. In terms of the SLA, the Defendant was obliged to effect payment to the Plaintiff within (thirty) 30 working days after receipt of accurate invoices from the Plaintiff for the goods supplied and services rendered in terms of Clause 8.3 of the SLA. This was done by the Defendant to the extent that a substantial amount of the money claimed was indeed paid, except for four invoices delivered on 05 October 2011. These invoices were for the amounts of R6 726 996.79; R672 699.72; R32 179 637.74; and R10 656 624.41 respectively.

Despite demand, the Defendant failed and/or refused to effect payment. This prompted the Plaintiff to issue summons on 08th August 2012 for payment of the aforementioned invoices. On the 26th September 2012 the Defendant filed its notice of intention to defend. Whereafter, the Plaintiff applied for summary judgment which was set down for hearing on 28th March 2013. For ease of reference, and to avoid possible confusion, the parties will be in the remainder of this judgment, referred to as Plaintiff and Defendant.

[3] As defence to the application for summary judgment, the Defendant states that Plaintiff's particulars of claim do not contain sufficient averment to justify summary judgment being granted against the Defendant and it is therefore excipiable. In particular, Clause 8 of the SLA provides that the amount payable to the Plaintiff shall be in accordance with the schedule of services, quantities and rates which is not attached to the summons, and furthermore, the Plaintiff does not allege in the particulars of claim that the amounts claimed were computed in accordance with the schedule of services, quantities and rates. So too, the outstanding amount on CAPEX.

[4] It was also raised as defence that there is no contractual clause pleaded by the Plaintiff justifying a claim for:-

- commissioning of the equipment;
- a training fee for the training of staff;
- maintenance of the equipment.

[5] Insofar as the agreement refers to the rendering of services *in accordance with the schedule of services, quantities and rates"* and insofar as those schedules have not been annexed to the Plaintiff's particulars of claim, it has nowhere been denied that such schedules are not in existence or that the Defendant is not in possession thereof. More importantly, it has also not been sufficiently expressly denied that the amounts claimed by the Plaintiff are not in accordance with such schedule of services, quantities and rates. Payment had been effected in the past on similar invoices.

[6] The Defendant's main contention is simply that the Plaintiff has neglected to attach the schedule of services. This, in itself constitutes no defence in my view. The learned author Harms summarises the onus on the Defendant as follows in his work entitled:- Civil Procedure in the Supreme Court, Harms (Red.) at B32.13:-

> *"The defence must be a defence in law and the facts set out in the affidavit must be sufficient to support such a defence."*

See also:- **Maharaj v Barclays National Bank Ltd** 1976 (1) SA 418 (A) at 422.

It is trite that, in order to avoid an order in respect of a summary judgment application, the Defendant is obliged to depose to an affidavit setting out a ***bona fide*** defence. For the under mentioned reasons I am of the view that the Defendant has failed to do so.

[7] In dealing with the respective claims:-

- The claim for the amount of R6 726 996.79 is in respect of **commissioning** of the equipment supplied by the Plaintiff;
- The claim of R672 699.72 is in respect of **training** of the staff of the Vryburg Hospital;
- The claim for R32 179 637.74 is for the **maintenance** of medical technology supplied by the Plaintiff for a period of five (5) years.
- The claim for R10 656 624.41 is in respect of an outstanding amount due for the **supply of 2 theatres, 7 treatment rooms and 93 ward beds**.

[7.1] The Defendant alleges that there is no contractual clause pleaded by the Plaintiff justifying a claim for **commissioning** of the equipment. This is incorrect. Clause 6.1.2 of the agreement states:-

> *"6. <u>Duties of the Service Provider</u>*
>
> *……*
>
> *6.1.2 Commissioning of all health technology hardware, house and office furniture."*

[7.2] Similarly the Defendant alleges that there is no contractual clause justifying a claim for a **training** fee. This is equally incorrect. Clause 6.1.3 of the agreement states:-

> *"6.1.3 Provide training on the user of such health technology to the hospital staff."*

[7.3] The Defendant also denies a contractual clause justifying a claim for **maintenance** of the equipment. This is also incorrect. Clauses 6.1.5, 6.1.6, 6.1.7, 7.1.4 deals with this aspect. These clauses reads thus:-

> *"6.1.5 Provide after sales support.*
> *6.1.6 In respect of maintenance service and support.*
> *6.1.7 Handle, Transport, install equipment, furniture, accessories etc at the cost of the department.*
>
> *7.1.4 Provision of after sale support and maintenance support."*

[7.4] The Plaintiff alleged that it had complied with its obligations in terms of the SLA and has already supplied equipment, furniture, accessories, health technology and services to the Defendant which the Defendant has paid (save for the amounts claimed in the present claim. These averments are not disputed by the Defendant. The Defendant's denial for the further supply of equipment for the two theatres and beds amounting to R10 656 624.41, purely based on the absence of an annexing of the schedule of services, quantities and rates does, in my view, not amount to a defence.

[8] On the other hand, the Defendant alleges payment to the Plaintiff of the *"entire amount payable in terms of the agreement"*. In this regard, the Defendant bears the onus to satisfy the Court by way of the furnishing of sufficient particulars regarding dates, times and

amounts of payment, that it has done so. This, the Defendant failed to do.

See:- **Pillay v Krishna** 1946 AD at 946.

[9] The date of commencement of the SLA was 17 March 2008 and it was agreed that it will *"endure until the completion of (the) assignment"*. No specific period was therefore agreed upon. The invoices are dated 05 October 2011 and the letter of demand is dated 27 June 2012. Summons was issued on 08 August 2012 and the matter was heard on 28th March 2013, which covers a period of five (5) years. The invoice relating to the maintenance stipulates that the maintenance is over a period of five (5) years. Calculated from March 2008 and bearing in mind that the endurance of the contract will be *"until completion of assignment"*, it is well within the five (5) year period until summons was issued. Plaintiff is therefore entitled, in my view, to the amount claimed.

[10] As far as the claims for the training of staff, the commission fee and the outstanding amount on CAPEX for the supply of 2 theatres, 7 treatment rooms and 93 ward beds are concerned, there can be no doubt that the Plaintiff complied with the terms of the SLA.

Conclusion:-

[11] In my view, a case had been made out for the granting of summary judgment. I am satisfied that the Defendant does not have a ***bona fide*** defence to Plaintiff's claims, bearing in mind especially the fact that substantial amounts of monies were paid in the past on

similar invoices. There is also no reason why costs should not follow the result, which costs to include the costs consequent upon the employment of senior counsel due to the magnitude and importance of this matter to both parties.

Order:-

[12] Consequently, the following order is made:-

1. Payment of the amount of R6 726 996.79;

2. Interest on the aforesaid amount of R6 726 996.79 at the rate of 15.5% per annum from 5 October 2011 to date of payment thereof;

3. Payment of the amount of R672 699.72;

4. Interest on the aforesaid amount of R672 699.72 at the rate of 15.5% per annum from 5 October 2011 to date of payment thereof;

5. Payment of the amount of R32 179 637.74;

6. Interest on the aforesaid amount of R32 179 637.74 at the rate of 15.5% per annum from 5 October to date of payment thereof;

7. Payment of the amount of R10 656 624.41;

8. Interest on the aforesaid amount of R32 179 637.74 at the rate of 15.5% per annum from 5 October 2011 to date of payment thereof;

9. Costs of suit which includes the costs consequent upon the employment of senior counsel.

R D HENDRICKS
JUDGE OF THE HIGH COURT

ATTORNEYS FOR THE PLAINTIFF:- MAREE AND MAREE ATTORNEYS