IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: 4/2008

In the matter between:-

CHILOANE TECHNOLOGIES & MANAGEMENT CC Applicant

and

RATLOU LOCAL MUNICIPALITY Respondent

CIVIL MATTER

DATE OF HEARING : 06 FEBRUARY 2012

23 APRIL 2012

23 MAY 2012

DATE OF JUDGMENT : 28 JUNE 2012

COUNSEL FOR THE APPLICANT : ADV MAREE

COUNSEL FOR THE FIRST RESPONDENT : ADV SWART

JUDGMENT

HENDRICKS J

[1] The Defendant, a local municipality, invited tenders for the maintenance of its information and communication technology (ICT) infrastructure and for the development of a website. Acting upon this invitation to tender, the Plaintiff, a information technology (IT) close corporation, tendered and made a comprehensive written proposal of what it would do in relation to the tender. ***Inter alia***, it was proposed that the Plaintiff would design a layout plan that will ensure that there is a common outreach server room accessible to all networking points and offices; replace old ICT equipment with the current up to date equipment by using the latest software and technology; training of staff, establish a call centre; develop a website including a wireless network, etc. Included also in this proposal was the following monthly pricing and costs implications:-

ITEM	DESCRIPTION	COST
ICT installation	Installation of ICT infrastructure.	R19 600-00
ICT support	Maintenance of e-mail system, and	R29 630-00

	support to staff to utilize and understand the ICT services.	
Website development	Develop the website handling all the RLM information and communication links.	R8 800-00
Website maintenance and upgrades	To continuously monitor and maintain the website, to upgrade the information and service provision by RLM. This will include latest pictures of events within the RLM.	R1 200-00
TOTAL		R59 230-00

[2] The Defendant accepted Plaintiff's tender and a contract were concluded between the parties. Work in terms of the said contract commenced during December 2006. At the end of each month for the period 1 December 2006 to 31 May 2007, Plaintiff would issue an invoice and the Defendant effected payment on the strength of the invoice submitted. Although specified to a certain extent, the invoice was not itemized detailed but a global amount was invoiced. For example the invoice for the period 1 March 2007 to 31 March 2007 contained the following:-

"User Support"

Technical support (users)
Antivirus scan (server)
Run Backups (server)
Installation & Cable Crimping – Patch Lids (Switch)
Installation & Re-configuring Server
Testing, Fault Finding and Local Area connections

with the subtotal of R50 937-98 plus VAT (Value Added Tax) at R7 131-31 totalling R58 069-29.

For the period 1 April 2007 to 30 April 2007 the invoice reads:-

"User Support"

Technical support (users)
Antivirus scan (server)
Run Backups (server)
Microsoft Office XP Installation
Testing, Fault Finding and Local Area connections

with the subtotal of R50 937-98 plus VAT (Value Added Tax) at R7 131-31 totalling R58 069-29.

[3] The invoice submitted at the end of June 2007 was not paid during July 2007. There was an exchange of correspondence between the parties, regarding the non payment of the June 2007 invoice. Ultimately, the Defendant issued a letter of suspension which reads as follows:-

"August 6, 2007

A.C.M. Kekana
Chiloane Technologies and Management
5324 Lerwana Close
Unit 13
MMABATHO

2735

SUSPENSION OF IT SERVICES

Your IT services provision to Ratlou Local Municipality is hereby suspended with immediate effect, pending legal advice on the matter.

The fact that there is no service level agreement signed between the Municipality and yourself, the numerous complains about the level of service, and charges on service currently not provided, has prompted this decision.

We will discuss way forward with yourself once we receive an opinion from our legal advisors.

Yours Sincerely

Phihadu Ephraim Motoko
MUNICIPAL MANAGER*"*

This was followed by a letter of termination dated 18 September 2007 which reads thus:-

"18 SEPTMEBER 2007

Chiloane Technologies and Management
C/O Mr. M.C. Kekana
5324 Lerwana Close
Unit 13
MMABATHO

2735

Sir

TERMINATION OF IT SERVICES: RATLOU LOCAL MUNICIPALITY // CHILOANE TECHNOLOGIES & MANAGEMENT CC

1. *The above stated matter refers.*

2. *Kindly note that the municipality has without prejudice, resolved to terminate your IT services with immediate effect for the following reasons:-*

   2.1 That you have continuously been misrepresenting the municipality in regard to the services that you render;

   2.2 That you have been submitting invoices to the municipality, which invoices do not relate to the current IT infrastructure of the municipality; and

   2.3 That your dishonest relationship to the municipality has caused the municipality to lose a lot of money.

3. *Should you wish to address the municipality in regard to this issue, you are afforded the opportunity to do so within 5 (five) days of the date hereof and if you fail to do so, no indulgence would be given to you.*

I trust you find the above in order.

Yours sincerely,

P.E. MOTOKO

THE MUNICIPAL MANAGER"

[4] This prompted Plaintiff to institute an action for damages in the sum of R1 014 023-36 (plus Value Added Tax (VAT) and interest) based on Defendant's repudiation/unlawful cancellation of the contract. This action was defended. Defendant not only denies any indebtedness to the Plaintiff but also filed a counter-claim which was served on Plaintiff's attorneys of record on 18 June 2008 in the sum of R387 262-06 that was alledgedly overpaid to the Plaintiff as a result of Plaintiff's misrepresentation.

[5] Mr Amos Chiloane Kekana testified on behalf of the Plaintiff. His evidence can be succinctly summarized as follows:-
He is the sole member of the Plaintiff. He confirmed that work commenced during December 2006 after concluding the contract. When they started, the ICT was a complete mess. They had to start all over again. Although there was a server, computers and laptops, the network was completely dead. There were viruses on the computers and the laptops and all the computers and laptops had to be cleaned. It took them one and a half months to strip and rewire the system and to clean the viruses.

[6] Some of the users were not computer literate and it was suggested that a workshop be held. Due to a shortage of office space it was not done but instead some users received individual training. He

does not know of any charges for services not provided as claimed in the letters of suspension and termination of the contract. He denied any misrepresentation. The invoices submitted were based on work done and the total costs payable. Invoices were submitted and payments were received for the amounts invoiced for the period December 2006 to May 2007.

[7] No letter of complaint was received although, based on some verbal concerns raised, they decided mid-way to implement a job card system as proof for work done. It was never a term of the contract according to him, that installation would be a once-off charge. According to him, the contract was for a fixed amount irrespective of the work done and for a fixed term of two (2) years. That means, for example R19 600-00 per month was budgeted for installation totalling R440 000-00 over the two year period.

[8] He conceded during cross-examination that the Plaintiff never paid for the trial anti-virus program that was initially used. He, on behalf of the Plaintiff, installed the said trial anti-virus program that he had for the period December 2006 to 19 March 2007. The Defendant, according to him, was to purchase its own anti-virus program, which would be registered in Defendant's name. This was despite the fact that in terms of Plaintiff's proposal with regard to pricing and costs, an amount of R19 600-00 per month would be charged for ICT installation which would include all hardware and software.

[9] He admitted that the Plaintiff never bought any software programs that was used, nor was any computer purchased. No external modem was either supplied or installed. Although the Norton Anti-

virus software was charged for and included in the invoice for January 2007, Plaintiff did not supply it but only installed it, after it was bought by the Defendant. He conceded further that for the installation he received R19 600-00 per month for six months totalling R117 600-00.

[10] He conceded that in order to develop a website, one does not need a telephone line although he initially testified that Plaintiff had to wait for a Telkom telephone line to be installed, before he could install internet. It can be done wireless. The R8 800-00 for six months totalling R52 800-00 was an overpayment. This much was also conceded to by Mr Kekana because a website was never developed. No proof of purchase of the cabling that was apparently redone was furnished. During cross-examination by Adv Swart on behalf of the Defendant, it was also pointed out to Mr Kekana that even in terms of the tender invitation, it was mentioned that the ICT infrastructure was recently installed. This he conceded. He also conceded that a call centre was never established.

[11] The concessions made by Mr Kekana goes to the heart of this matter. It is clear that unlike what he initially testified, there was no full compliance with the terms of the contract. No call centre was erected, no independent backup system was in place, no workshop training was offered to the Defendant's personnel, etc. This, despite the fact that for a period of six months, Plaintiff was paid for it.

[12] Mr Olibogeng Abel Monchusi, who was the Acting Municipal

Manager for the period November 2006 until March 2007, was called as a witness by the Plaintiff. Although he was initially reluctant to testify, he decided to do so on the date to which the matter was remanded in order to afford him the opportunity to obtain legal advice whether to testify or not.

[13] His evidence can be succinctly summarized as follows:-
He confirmed that the tender was awarded to the Plaintiff for the two (2) year period from 01 December 2006 to 30 November 2008. The Defendant's information technology (IT) system was dysfunctional. There was no person appointed that was responsible for the IT of the Defendant, that is why it was resolved that a service provider be appointed. There were no internet facilities. During the first two to three months of the contract period, Plaintiff's personnel reconfigured the IT system and installed an antivirus program. When the network was up and running, they experienced problems which caused a job card system to be introduced. All the complaints attended to by Plaintiff's personnel had to be recorded on a job card. According to him, the network encountered virus problems and it was *"agreed"* that an antivirus program be installed, which was purchased by the Defendant. By August 2007 when Plaintiff's services was suspended, the status of the IT system of the Defendant had improved although there were problems here and there.

[14] During cross-examination by Mr Swart on behalf of the Defendant, it was pointed out to this witness that in terms of the tender, Plaintiff was supposed to provide all the software including the

antivirus program. To this, he initially had no comment, but later on attempted to hide behind the fact that the antivirus program was not included in Plaintiff's scope of work. This is, to say the least, a nonsensical answer, if indeed it is an answer, to the question posed.

[15] He conceded that he did not check whether the work was done before he approved the payments. According to him, the Defendant had a contractual obligation to pay whether the Plaintiff's personnel were present or not, or whether the work was performed or not. So did he, for example, pay for three months on a monthly basis for the development of a website and the maintenance thereof, although it was not even developed. So too, was it with the call centre that was never established. His explanation was that maybe, if the contract was allowed to run for its entire duration, the website and call centre may have been created at a later stage.

[16] I may hasten to state that the demeanour of this witness in the witness box leaves much to be desired. Not only did he on numerous occasions refuse to answer questions but he was also argumentative and defensive when he provided some of the answers. He was at times arrogant and at times nonchalant, displaying a don't care attitude. Whilst being cross-examined it became clear to me why this witness was from the onset reluctant to testify. It was quite apparent that he had something to hide. He, as the accounting officer did not inspect whether the work was done according to specifications in terms of the contract and just approved and effected payments. No wonder that Plaintiff's

personnel attended occasionally – perhaps two days per week – to IT problems when they should have been on site on a daily basis to attend to IT problems and assist with the necessary training of staff, etc.

[17] Mr Gift Logare testified on behalf of the Defendant. His testimony is to the effect that he was in the employ of the Defendant as cashier when the work was commenced with by the Plaintiff's employees. No new computers were installed by the Plaintiff. The wiring of the IT system that was in place was redone – even over weekends. No licensed independent anti-virus system was installed. No training in the form of a workshop was afforded to the personnel of the Defendant. He was not in a position to state exactly and to what extend the Plaintiff failed to honour its contractual obligations. Given the position that he held by then in the establishment, it is understandable as a junior employee that he would not be in a position to know about all the details of the contract.

[18] However, the concessions made by Mr Kekana on behalf of the Plaintiff, and some of the evidence tendered by Mr Monchusi, who was the Acting Municipal Manager, clearly indicate that despite work not been performed in terms of the contract, Plaintiff claimed and was paid for it. Mr Monchusi stated that he trusted that the work was done and affected payment on the strength of the invoices submitted without verifying whether there was compliance in terms of the contract. For him, because there was a contract in place, payment had to be made if and when an invoice was submitted. It is not difficult to comprehend why a new Municipal

Manager had to be appointed and why the new Municipal Manager had to bring the aforementioned practice to an end sooner rather than later. It is not difficult to comprehend that what in actual fact happened is that fraud was committed by the Plaintiff, which entitled the Defendant to summarily terminate the contract.

See:- **The Law of Contract** by RH Christie, 4th Edition page 339 – 346;

See also:- **Claassens v Pretorius** 1950 (1) SA 37 (O);
Pocket's Holdings (Pty) Ltd v Lobel's Holdings (Pty) Ltd 1966 (4) SA 238 (R);
Voges v Wilkins 1992 (4) SA 764 (T).

[19] It was contended that the contract period was for two (2) years and that the contract was prematurely terminated by the Defendant without the Plaintiff been place ***in mora***. Had it been allowed for the Plaintiff to continue with the contract for the specified period, so it was submitted, all that which was outstanding would have been complied with in the allotted time period of the contract. With due respect to the Plaintiff, this proposition is to say the least not sound in law. A party to a contract who does not perform properly in terms of the contact cannot claim payment for such non-performance and raise as a defence that there is still time left in terms of the contract period in which that party can perform. In particular, can a party to a contract not be allowed to claim and be paid on a monthly basis for example to maintain a call centre that was never even erected – needless to say that it cannot be maintained. That undoubtedly constitutes fraud.

[20] It was furthermore contended that no evidence was presented by

the Defendant to substantiate its counter claim. Mr Logare as the only witness called by the Defendant could not testify to that regard. In my view, it was not strictly necessary due to the concessions made by Mr Kekana on behalf of the Plaintiff. He conceded that no e-mail system or call centre was put up or maintained for the period of six months for which Plaintiff claimed and was paid R29 630-00 per month totalling R177 780-00. So too, was no website developed and maintained for the period of six months for which Plaintiff claimed R8 800-00 and R1 200-00 per month respectively, totalling R60 000-00. It doesn't need rocket science or a rocket scientist to determine what was paid in terms of the invoices which were not due to the Plaintiff. Applying simple mathematic calculations, an amount of R237 780-00 was overpaid to the Plaintiff. In favour of the Plaintiff, I find on the totality of the evidence tendered, that Plaintiff was entitled to the amounts charged in relation to ICT installations and that such installations were not to be a once off claim.

[21] In my view, the Defendant acted well within its rights to terminate the contract due to the fraud and non-performance by the Plaintiff and that Plaintiff's claim should consequently be dismissed with costs. A case has been made out on a balance of probabilities for the recovery of what was overpaid by the Defendant to the Plaintiff and therefore, the Defendant's counterclaim must be upheld with costs to the extend conceded by Mr Kekana on behalf of the Plaintiff.

Restitution in the form of repayment of, for example, the purchase price previously paid by the claimant is not a claim for damages but a distinct contractual remedy.

See:- **National Sorghum Breweries (Pty) Ltd t/a Vivo Africa Breweries v International Liquor Distributors (Pty) Ltd** 2001 (2) SA 232 (SCA).

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

[i] Plaintiff's claim is dismissed with costs;

[ii] Defendant's counterclaim is upheld with costs;

[iii] Plaintiff is ordered to pay the amount of R237 780-00 to the Defendant;

[iv] Plaintiff is ordered to pay interest on the amount of R237 780-00 at a rate of 15.5% per annum from being 18 June 2008 (date of service of the counterclaim) until date of payment.

R D HENDRICKS
JUDGE OF THE HIGH COURT

ATTORNEYS FOR THE APPLICANT:- GERRIT MAREE ATTORNEYS