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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO. 32833/2020

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES:NO

(3) REVISED: NO

DATE: 14/03/2023

SIGNATURE:

In the matter between:

PASSENGER RAIL AGENCY OF SOUTH AFRICA EXCIPIENT/ DEFENDANT

AND

SINQOBILE SECURITY SERVICES CC RESPONDENT/ PLAINTIFF

JUDGMENT

MAKHOB A J

- 1) The applicant (defendant in the main action) is the PASSENGER RAIL AGENCY OF SOUTH AFRICA LTD (PRASA), a legal entity established in terms of section 22 of the Legal Succession to the South African Transport Service Act, 9 of 1989 with registered address at PRASA House, 1[...] B[...] Street, Hatfield, Pretoria, Gauteng Province.

- 2) The respondent (Plaintiff in the main action) is SINOBILE EQUESTRAIN SECURITY SERVICES CC (Registration No.1[...]), a close corporation duly registered and in terms of the Close Corporations Act, 69 of 1984 with principal place of business at 1[...] M[...] Street, Cnr K[...] and M[...] Streets, Boksburg, Gauteng province, for purpose of this judgement the parties will be referred to as applicant and respondent respectively.
- 3) The respondent is duly registered as a private security provider with the Private Security industry regulatory Authority in terms of the Private Security Industry Regulatory Act, 56 of 2001.
- 4) During 2011 the applicant advertised a security tender under reference P[...] Which was awarded to the respondent.
- 5) In a letter dated 28/02/20 the applicant terminated the Respondents appointment with effect from 30 April 2020. On the 24 July 2020 respondent institutes summons against the applicant. The pleadings closed in November 2020.
- 6) In May 2022 The respondent gave notice of its intention to amend the particulars of claim. The respondent effected the amendment under Rule 28 of the uniform Rules of court. In July 2022 the applicant delivered its exception to the respondent's particulars of claim on the basis that the particulars of claim do not disclose a cause of action.
- 7) The main issue between the parties is that the respondent in its amended particulars of claim, claims that the applicant failed to pay the PSIRA (the Private Security Industry Regulatory Authority) increases for certain periods of time. However, the respondent does not allege that any of its invoices remain unpaid.
- 8) According to the amendments, the respondent claims that the applicant's failure to pay the PSIRA increases was a breach of the contract between the parties at the time.

9) In his submissions before this court counsel for the applicant summarize the applicant's case as follows

(a) The respondent can only seek payment if it has performed its obligations in terms of the agreement.

(b) The issuing of a correct invoice is obviously a pre-requisite for being paid the correct amount.

(c) On the respondent's own version, it has not corrected its monthly invoice.

(d) Respondent cannot claim payment for the correct amount when correct invoice were not issued. for this reason, the particulars of claim disclose no cause of action. Respondent has not alleged that the essential prerequisite for payment has occurred.

10) For the above reasons the applicant referred the court to the locus classicus case on reciprocal performance¹

11) The respondent submitted to this court that, the respondent effected the amendment by serving its amended pages on 6 June 2022 and the applicant did not object to the respondent affecting the amendment. In this regards the respondent relies on rule 28(8)

12) The Respondent submitted further that the applicant did not serve and file its notice of exception within 15 days as per rule 28(8) but waited until 25 July 2022 before it served the plaintiff with the notice of exception. On this ground alone the respondent asked the court to dismiss the exception. The respondent denies that the amendment creates a ripple effect for the pleadings already filed.

¹ *BK Tooling (PTY) Ltd V Scope Engineering (Pty) Ltd [1978] ZASCA 1*

13) Counsel for the respondent asserts that in interpreting the respondent's particulars of claim as a whole the respondent amended particulars of claim disclose a cause of action.

14) In Pretorius V TPF² in paragraph 15 the court said the following:

“In deciding an exception a court must accept all allegations of fact made in the particulars of claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient- has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts. The purpose of an exception is to protect litigants against claims that are bad in law or against an embarrassment which is so serious as to merit the costs even of an exception. It is a useful procedural tool to weed out bad claims at an early stage, but an overly technical approach must be avoided.”

15) Rule 23 (1) allows a defendant to deliver a notice of exception within the time allowed if the particulars of claim fail to make out a cause of action³.

16) Thus therefore in terms of Rule 28 an exception is allowed for 15 days after a party has effected an amendment to a pleading. The amendment may be effected at any stage before the court hands down judgement.

17) It is not in dispute that the applicant did not serve and file its notice of exception within 15 days after the respondent effected the amendment. On this ground alone the exception must be dismissed.

² 2019 (2) SA 37 (CC) in paragraph 15

³ Rule 23(1) provides: Where any pleading is vague and embarrassing, or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may apply to the registrar to set it down for hearing within 15 days after the delivery of such exception.

- 18) Again the excipient must show the court that upon every interpretation upon which the pleadings are based, no cause of action is disclosed.
- 19) A cause of action can be described as every fact which would be necessary for the plaintiff to prove ⁴ The exception must go to roof of the claim.
- 20) The submissions to by counsel for applicant, especially in paragraph nine of this judgement are cogent but with respect in my view do not render the amendment of the further particulars excipiable
- 21) I am therefore of the view that the applicant (defendants) failed to make out a proper case, the Respondent (defendants) amended particulars of claim disclose a cause of action on this ground as well the exception ought to be dismissed.
- 22) A request was made by counsel for the respondent for a punitive costs order. However, there is not enough reasons furnished for a punitive costs order.
- 23) I make the following order:
- (a) The exception is dismissed with cost including the costs of two counsel.

D. MAKHOB
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the Plaintiff:

Adv L J Morison SC

Instruction:

Cliffe Dekker Hofmeyr Inc

For the Defendant:

Adv Van den Berg SC

Instructed by:

Albert Hibbert Attorneys

⁴ *Mckenzie V Farmers Cooperative Meat Industries Ltd Mckenzie V Farmers' Cooperative Meat Industries Ltd. 1922AD 16 See also Barclays National Bank Ltd V Thompson 1989 (1) SA 547(A)*

Date heard: 28/02/2023

Date delivered: 14/03/2023