



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

Reportable:	NO
Of interest to other Judges:	NO
Circulate to Magistrates:	NO

Case no: **3494/2023**

In the matter between:

BLATEW SECURITY (PTY) LTD

Plaintiff

and

MATJHABENG LOCAL MUNICIPALITY

Defendant

Coram: DAFUE J

Heard: 7 AUGUST 2024

Delivered: 11 OCTOBER 2024

Summary: The plaintiff, a service provider delivering security services, issued summons against a local municipality for payment of the amount of R 20 835 186.26 plus interest and costs for services allegedly rendered during the period April 2020 to 31 March 2023. In its amended plea the defendant inter alia relied on a special plea based on non-compliance with clause 21.2 of the Service Level Agreement between the parties, effectively pleading that the plaintiff's claim had prescribed. The plaintiff's summary judgment application was opposed, primarily on the same basis. Having considered the application, the court refused summary judgment and granted leave to the defendant to oppose, costs to be costs in the main action.

ORDER

1. The application for summary judgment is refused.
 2. Leave is granted to the defendant to defend the action.
 3. Costs of the summary judgment proceedings shall be costs in the main action.
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JUDGMENT

Daffue J

Introduction

[1] This is an opposed summary judgment application which has been postponed more than once. The defendant filed a notice to amend its plea on receipt of the application for summary judgment which caused the first postponement. Hereafter and just prior to the hearing of the application the amended plea and answering affidavit were filed. This caused a further postponement. The plaintiff filed a supplementary affidavit to deal with the issues raised in the amended plea.

The parties

[2] The plaintiff is Blatew Security (Pty) Ltd, a company with its registered office in Welkom, Free State Province.

[3] The defendant is Matjhabeng Local Municipality, a municipality duly incorporated in terms of the laws of the country and regarded as an organ of state within the sphere of local government. Its principal office is situated in Welkom. The city of Welkom and several surrounding towns fall within its jurisdiction.

The relief sought

[4] The plaintiff seeks summary judgment against the defendant for:

1. Payment of the amount of R20 835 186.26.
2. Interest thereon calculated at 10.5% tempore morae from the date of the letter of demand to the date of full payment.
3. Costs of this suit.'

Common cause facts ex facie the pleadings

[5] The only pleaded fact admitted by the defendant is its own particulars. It elected to merely note the citation and description of the plaintiff as well as the allegation that this court has jurisdiction to adjudicate the dispute.

The claim and the defence

[6] In its initial plea to the plaintiff's amended particulars of claim, the defendant relied on a bare denial. It denied each and every allegation by the plaintiff in respect of its cause of action as contained in paragraphs 4 to 10 of the amended particulars of claim. In its plea on the merits the defendant denied that (a) the Service Level Agreement (SLA) was entered into between the parties, (b) the defendant issued a letter of appointment to the plaintiff, (c) the plaintiff delivered security services to and on behalf of the defendant, (d) the defendant acknowledged its indebtedness to the plaintiff on 2 March 2022 in the amount of R 1 808 825, (e) it made a partial payment of R 313 725 on 15 October 2022 and finally, (f) an amount of R20 835 186.26 remains outstanding pertaining to the plaintiff's invoices for the period April 2020 to 31 March 2023.

[7] In its amended plea the defendant relies on two special pleas, one based on clause 21.2 of the SLA and the other on clause 15.1 of the SLA. As strange as it may sound, whilst relying on the SLA in its special pleas, it elected once again to deny each and every allegation made by the plaintiff in paragraphs 4 to 10 of its amended particulars of claim. Therefore, the existence of the SLA and services rendered in terms thereof are denied.

Litigation history

[8] The combined summons was issued on 10 July 2023. After the defendant filed an exception to the particulars of claim, it was amended on 27 November 2023. On 2 February 2024 the defendant filed its plea to the plaintiff's amended particulars of claim which caused the plaintiff to file an application for summary judgment on 14 February 2024, indicating that the plaintiff would apply for summary judgment on 14 March 2024.

[9] On 23 February 2024 the defendant filed a notice of intention to oppose the summary judgment application, but failed to file an answering affidavit. On 13 March 2024 and a day before the intended hearing on 14 March 2024, the defendant filed an

application for postponement, claiming that it was advised to amend its plea. Consequently, the application was postponed by agreement to the opposed roll of 20 June 2024, costs to stand over for later adjudication. On 14 May 2024 the defendant filed its amended plea and on 7 June 2024 its answering affidavit to the summary judgment application. This caused a postponement of the application to the opposed roll of 1 August 2024.

[10] On 4 July 2024 the plaintiff filed a supplementary affidavit to deal with the defendant's special plea. After receiving heads of argument and listening to the oral submissions, the court reserved judgment on 1 August 2024 and granted leave to the parties to file supplementary heads of argument. Leave was also granted to the plaintiff to file a draft order, bearing in mind interaction in court.

Evaluation of the evidence and submissions made

[11] The court considering an application for summary judgment merely has to enquire whether the defendant has pleaded a bona fide defence, ie that the defendant has sufficiently disclosed the nature and grounds of the defence and whether on the facts so disclosed the defendant appears to have a bona fide defence good in law. The amendment of rule 32 has not changed the principles summarised long ago in *Maharaj v Barclays National Bank Ltd*.¹ The defendant is not at the summary judgment stage required to persuade the court of the correctness of the facts stated, or in the event of a dispute, that the preponderance of probabilities favours their version. However, the defence must be valid in law. This being the legal position, it is now time to evaluate the evidence and submissions.

[12] In my view the defendant's amended plea is excipiable, but the plaintiff did not file an exception in this regard. The defendant's main defence is that no SLA was entered into, but in its two special pleas it relies on the very same SLA relied upon by the plaintiff. However, bearing in mind that these are summary judgment proceedings, I shall consider the defences raised.

¹ 1976 (1) SA 418 (A) at 426.

[13] The second special plea is really irrelevant and does not take the matter any further. It is the defendant's case that this matter should not be heard by the High Court as the parties agreed on mediation in the event of a dispute. Clause 15 deals with dispute resolution, but it is not the defendant's case in the pleadings that a dispute has arisen between the parties pertaining to service delivery and/or the execution of the SLA. No bona fide defence has been made out in this regard.

[14] Before I deal with the defence based on clause 21.2 of the SLA, it is apposite to mention the following: (a) the duration of the agreement, as initially agreed upon, was for a period of three months only from 1 March 2020 as provided for in clause 4.1; (b) in clause 4.2 the parties agreed that the duration 'may be extended by mutual agreement on an month to month basis subject to the terms and condition contained in this agreement'; (c) on 28 February 2020 the plaintiff was officially appointed by the defendant's acting municipal manager as service provider to provide security services in critical arrears of the Matjhabeng Municipality, effectively from 1 March 2020.

[15] The plaintiff attached to its particulars of claim various official orders and requisitions issued by the defendant over a period from June 2020 to February 2022 as is apparent from annexure C thereto. It also attached statements and tax invoices covering a period till March 2023. Although there is no indication that the majority of these invoices found their way to the defendant, it transpired that several have been received. A Mr Thembisa Mgxabayi acknowledged receipt thereof under his signature.

[16] In their supplementary heads of argument the parties inter alia dealt with the amounts of the various invoices acknowledged in writing. Although they differed from each other, I did the same exercise. I agree with the defendant's counsel in respect of the amounts mentioned by him, but need to indicate that he failed to take the statement of 30 November 2020 in consideration, indicating the balance due as on that date in the amount of R 985 697.97. Consequently, the total of invoices and statements for which a representative of the defendant signed, amounts to R 7 583 543.80. In my view the figure in excess of R 10 million arrived at by the plaintiff's counsel is wrong. I seriously considered granting summary judgment for the amount calculated by me and to grant leave to the defendant to defend the remainder of the claim. However, the aspects dealt with in the next paragraphs persuaded me not to do so.

[17] It is now appropriate to deal with clause 21.2 relied upon by the defendant in its first special plea. It reads as follows:

'Any claim, however arising, must be commenced formally by service of court summons or process initiating arbitration proceedings within 1 (one) year after the claimant becomes aware (or ought or reasonably have become aware) of the facts which give rise to the claim and, in any event regardless of the knowledge of the claimant, by no later than 2 (two) years after the date of the alleged breach of contract, delict or other or omission giving rise to a cause of action. This expressly overrides any situation provision or rule of common law which otherwise may apply.'

[18] In *Barkhuizen v Napier*² (*Barkhuizen*) the facts were the following. The plaintiff in the court a quo, cited as the applicant in the Constitutional Court, entered into a short-term contract of insurance in terms whereof he was inter alia insured against the loss resulting from damage to his motor vehicle. When the vehicle was damaged, he notified the insurer of the occurrence and claimed the amount of the loss. The claim was repudiated. Two years later, he instituted action against the insurer, but his claim was met with a special plea, alleging that the insurer had been released from liability because the applicant had failed to serve summons within 90 days of being notified of the repudiation of his claim.

[19] The plaintiff in *Barkhuizen* relied on a constitutional challenge to the contractual terms, inter alia stating that the relevant clause relied upon by the insurer unreasonably and unjustifiably limited his right to access to court, guaranteed in s 34 of the Constitution. The Constitutional Court considered the doctrine of *pacta sunt servanda*, public policy, the right of access to courts and the alleged unreasonableness of the specific clause and concluded as follows:³

'In these circumstances I am unable to conclude that the 90-day period allowed to the applicant to sue is so unreasonable that its unfairness is manifest and that therefore its enforcement would be contrary to public policy.'

The court continued further on to mention the following:⁴

'But this [the failure of the applicant to provide reasons for non-compliance with the time clause] has consequences for the appeal. In the result, without facts establishing why the applicant did not comply with the clause, I am unable to say that the enforcement of the

² 2007 (5) SA 323 (CC).

³ *Ibid* para 67.

⁴ *Ibid* para 85

clause would be unfair or unjust to the applicant. For all we know he may have neglected to comply with the clause in circumstances where he could have complied with it. And to allow him to avoid its consequence in these circumstances would be contrary to the doctrine of *pacta sunt servanda*. This would indeed be unfair to the respondent.'

[20] I point out that the defendant did not specifically plead that the plaintiff's claim had prescribed, but merely pleaded that the claim did not comply with clause 21.2 and therefore, it should be dismissed with costs. In this regard it is submitted that the cause of action arose on 31 April 2020 (*sic*) and that the summons was only issued on 27 July 2023 and thereupon served upon the defendant. I do not agree that the cause of action arose at the end of April 2020. It is apparent from the various tax invoices that services were rendered until 2023, although the last tax invoice of which receipt was acknowledged is dated 28 October 2021. In accordance with the general principles, prescription would only start to run from the date that payment became due in respect of each and every tax invoice. Consequently, the defendant is wrong to submit that the complete cause of action arose at the end of April 2020.

[21] The plaintiff relies on an acknowledgement of debt dated 2 March 2022. Having said this, it shall be noted that the plaintiff failed to file a replication to deal with the defendant's special plea. I am not convinced that the aspects raised by the defendant were properly dealt with during argument which leaves me in doubt as to whether summary judgment should be granted for the amount mentioned above. It is trite that an acknowledgement of debt after a claim has already prescribed does not interrupt prescription.⁵

[22] Although I am satisfied that the defendant is kicking for touch and probably unnecessarily delaying the plaintiff's claim, I am not prepared to grant summary judgment in circumstances where the defendant has raised non-compliance with clause 21.2. The trial court will be in a much better position to consider the aspect, after hearing evidence and perhaps with the benefit of amended pleadings and/or full legal argument. The special plea of prescription is a legal defence to which the plaintiff did not even file a replication. I do not have to decide whether this special plea will succeed after a full-blown trial. Summary judgment proceedings are not appropriate to deal with this defence.

⁵ *Desai NO v Desai & Others* 1996 (1) 141 (A) 147 G.

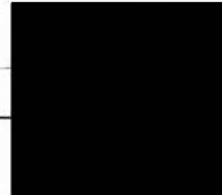
Conclusion

[23] I reiterate that I do not have to determine the merits of the defence or the prospects of success at this stage of the litigation. Consequently, the application should be refused. The appropriate order in line with these kinds of circumstances is that the costs of the summary judgment application shall be costs in the main action. There is no reason to grant costs against the plaintiff at this stage of the proceedings.

Order

[24] The following order is made:

1. The application for summary judgment is refused.
2. Leave is granted to the defendant to defend the action.
3. Costs of the summary judgment proceedings shall be costs in the main action.



DAFFUE J

Appearances

For plaintiff:

Instructed by:

Adv S Ngombane

Thebe Attorneys Inc

BLOEMFONTEIN.

For defendant:

Instructed by:

Adv KP Mohono

Tshangana and Associates Inc

BLOEMFONTEIN.