IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 22464/2022

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ***NO***

(2) OF INTEREST TO OTHER JUDGES: ***NO***

(3) REVISED: **NO**

(4) Date: 14 February 2025

Signature: _[redacted]

In the matter between:

AD ALL CC t/a MILLENIUM BODYGUARDS Plaintiff/Respondent

And

JONIBACH (PTY) LTD Defendant/Excipient

JUDGMENT

NYATHI J

A. INTRODUCTION

[1] On 31 March 2022, the plaintiff instituted action against the defendant for breach of contract.

[2] During August 2018, the plaintiff and the defendant concluded a written services agreement pursuant to which the plaintiff was to render security services to the defendant for a fee. This would be in terms of a service level agreement (“SLA”) between the parties.

[3] On receipt of the summons, the defendant delivered a notice to remove a cause of complaint under Rule 23(1). The plaintiff amended its particulars of claim. This caused the defendant to deliver a further notice to remove cause of complaint, whereafter it excepted to the amended particulars of claim.

[4] I refer to the parties as in the action. References to the particulars of claim are to the amended particulars of claim.

[5] The exception is founded on two grounds, both of which assert that the particulars of claim lacks averments necessary to sustain a cause of action against the defendant.

[6] The first exception engages the provisions of the Private Security Industry Regulation Act, 56 of 2001 ("the PSIRA").

[7] The second exception concerns an unenforceable agreement-to-agree which the plaintiff attempts to enforce in this Court.

B. THE LEGAL PRINCIPLES ON EXCEPTIONS

[8] Uniform Rule 23(1) provides that an exception may be taken against a pleading on the grounds that *"it lacks averments which are necessary to sustain an action".*

[9] For the purposes of determining whether a cause of action has been pleaded, the Court is required to assume that all of the averments in the particulars of claim are correct.

[10] Based on the two grounds detailed in its exception, the defendant contends that the particulars of claim does **not** disclose a cause of action against it.

C. FIRST GROUND: The plaintiff is not a registered security service provider

[11] The plaintiff, a security service provider, does not allege that it is a registered security service provider with PSIRA. It is essential that it should allege that it is a registered security service provider with PSIRA.

[12] The plaintiff claims in its particulars of claim that the defendant breached the SLA when it failed to pay the plaintiff for security services that were rendered under the SLA.

[13] As the plaintiff's claim relates to the rendering of security services by someone other than the State, and as the private security industry in South Africa is regulated by the PSIRA, it was necessary for the plaintiff to allege in its particulars of claim that it is entitled under the PSIRA to be paid for the rendering of such security services. Should it fail to do so, its claim will be excipiable in that it will not disclose a cause of action.

[14] The PSIRA defines a *"security service provider"* in section 1 as:

> *"a person who renders a security service to another for a remuneration, reward , fee or benefit and includes such a person who is not registered as required in terms of this Act."*

[15] Considering the above definition, a "security service provider" as contemplated in the PSIRA can therefore either be a registered security service provider or an unregistered security service provider. The plaintiff's particulars of claim simply state that: "The Plaintiff is a security service provider as contemplated in the Private Security Industry Regulation Act, 56 of 2001."[1]

[16] Section 20(1) of the PSIRA, however, expressly prohibits the rendering of security service for remuneration, reward, a fee or benefit by anyone other than a registered security service provider. In this regard, section 20 reads as follows:

> *"no person, except a Security Service contemplated in section 199 of the Constitution, 1996, may in any manner render a security service for remuneration, reward, a fee or benefit, unless such person is registered as a security service provider in terms of this Act".*

[17] Section 20(3) provides that any contract, whether concluded before or after the commencement of this Act, which is inconsistent with a provision contained in subsection (1), (2) or section 44(6), is invalid to the extent to which it is so inconsistent.

[18] The purpose of section 20 of the PSIRA and its effect on this action is therefore clear: unless the plaintiff alleges and proves that it is a registered security service provider under the PSIRA, it cannot succeed in its claim.

---

[1] Paragraph 1.3 of particulars of claim.

[19] Section 38(3)(a) of the PSIRA makes it an offence to contravene or not comply with section 20(1).

[20] There are instances of similar statutory provisions to those referred to above, for example:

20.1 The Housing Consumers Protection Measures Act, 95 of 1998 (“the HCPMA”); and

20.2 The predecessor of the Property Practitioners Act, 22 of 2019 ("the PPA"), being the Estate Agency Affairs Act, 112 of 1976 ("the EAAA").

[21] Regarding the provisions of the HCPMA:

21.1 Section 10 provides that no person shall receive any consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home, unless that person is a registered home builder; and

21.2 Section 21 makes it an offence to contravene section 20.

21.3 In *Hubbard v Cool Ideas*[2], the Supreme Court of Appeal held that although a contravention of section 10 would not affect the validity of such an agreement, it would nevertheless disentitle unregistered home builders from receiving or claiming

[2] *1186 CC* 2013 (5) SA 112 (SCA).

consideration under it and the Court will be precluded from enforcing it.

21.4 In *IS & GM Construction CC v Tunmer*[3], Goldblatt J, held that particulars of claim based on a written agreement to erect a dwelling house was excipiable as the plaintiff did not allege that it is a registered home builder as defined in the HCPMA. The plaintiff therefore failed to establish that it was entitled to receive any consideration.[4]

[22] Insofar as the EAAA is concerned:

22.1 Under section 34A, an estate agent was not entitled to any remuneration or other payment in respect of or arising from the performance of any act referred to in subparagraph (i), (ii), (iii) or (iv) of paragraph (a) of the definition of 'estate agent', unless at the time of the performance of the act a valid fidelity fund certificate has been issued (a) to such estate agent; and (b) if such estate agent is a company, to every director of such company or, if such estate agent is a close corporation, to every member referred to in paragraph (b) of the definition of ‘estate agent’ of such corporation.

22.2 The above prohibition is repeated in section 56 of the PPA.

22.3 In *Taljaard v TL Botha Properties,* The Supreme Court of Appeal confirmed that unless an estate agent had a valid fidelity fund

[3] 2003 (5) SA 218 (W).

[4] At 220H-I.

certificate when she performed the relevant act, she will be prevented from enforcing her/his claim.

[23] By parity of reasoning, unless the plaintiff alleges and proves that it is a registered security service provider as contemplated in the PSIRA, it cannot establish that it is entitled to remuneration under the PSIRA, and it cannot seek the court's assistance in enforcing its claim.

[24] The plaintiff therefore failed to plead that it as a registered security service provider.

[25] The PSIRA makes it an express condition for a security service provider to be registered before it becomes entitled to remuneration, reward, a fee or benefit.

[26] It was therefore necessary for the plaintiff to allege that its claim falls within the parameters of the statute. The plaintiff therefore had to plead that it was a registered security service provider. As it did not do so, it failed to establish its legal entitlement to payment and its particulars of claim fails to disclose a cause of action.[5]

[27] The statutes referred to above by way of similar examples as well as the PSIRA provisions that are at issue here, makes it quite clear that the plaintiff's insistence that its allegations disclose a cause of action, fall short of what is expected in light of the statutory provisions.

[28] It follows that, even if the plaintiff's allegations in the particulars of claim are factually correct, the absence of the allegation of registration as a security service provider, supported by evidence of course, renders the particulars of claim fatally defective and disentitles the plaintiff from judgment.

---

[5] IS & GM Construction CC v Tunmer 2003 (5) SA 218 (W) at 220G-I.

[29] The first ground of the defendant's exception is upheld.

D. THE SECOND GROUND: An agreement-to-agree is unenforceable

[30] The plaintiff's damages claim against the defendant is based on the Service Level Agreement (SLA) that was automatically renewed on 13 August 2021 (**"the 2021 renewal"**).[6]

[31] For the plaintiff to succeed in its damages claim arising from the 2021 renewal, the plaintiff must allege the existence of a valid and enforceable renewal agreement. This entails alleging at least terms relating to:

31.1 the nature and scope of the security services that were to be rendered by the plaintiff to the defendant; and

31.2 the remuneration payable by the defendant to the plaintiff in return for such security services.

[32] Whilst the 2021 renewal contained identifiable and enforceable terms relating to the nature and scope of the security services that were to be rendered by the plaintiff to the defendant, it is silent on the **terms** relating to the remuneration payable by the defendant to the plaintiff in return for such security services under the 2021 renewal. [emphasis added].

[33] Clause 3.4 of the SLA in dealing with the remuneration, reads as follows:

[6] Particulars of claim – paras 5.4 and 9.

"The contract price with regard to any renewal in terms of the agreement will escalate annually on the anniversary of this agreement by a rate subject to the negotiation".

[34] The words used in Clause 3.4 evinces "an agreement to agree", a *pactum de contrahendo,* which is unenforceable in law. In *Van Zyl v Government of the Republic of South Africa*[7] the Supreme Court of Appeal reiterated the trite position that a promise to contract is not a contract.

[35] This is so because an "agreement to agree" or an agreement to negotiate further in order to close gaps in an existing agreement is as a basic point of departure, unenforceable and insufficient to cure an incomplete agreement, specifically because the parties retain an absolute discretion to agree.[8]

[36] In *Seale v Minister of Public Works*[9]*,* the Supreme Court of Appeal stated "I accepts that there was implicit obligation on the parties to negotiate in good faith, but subject thereto, the further agreement was entirely dependent on the will of the parties". It was thus highlighted that an agreement to agree is not enforceable as there is no provision to address the failure to negotiate.

[37] The SLA does not stipulate what is to happen should the parties not be able to agree on a rate of escalation and it also does not contain a deadlock-breaking mechanism to make provision for such an event. The SLA, particularly the 2021 renewal, is therefore void for vagueness and uncertainty and is unenforceable.

---

[7] 2008 (3) SA 294 (SCA)

[8] ABSA Bank Bpk v Janse van Rensburg 2002 (3) SA 701 (SCA) at 708-9.

[9] [2020] JDR 2131 (SCA)

[38] Due to the above considerations, the plaintiff has failed to make the necessary allegations in its particulars of claim to disclose a cause of action.

[39] The second ground of the defendant's exception stands to be upheld as well.

E. CONCLUSION

[40] In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*[10] it was held that an exception provides a useful mechanism to weed out cases without legal merit. The claim as it stands in the particulars of claim suffers from similar deficiencies.

[41] Accordingly, I make the following order:

41.1 The first and second exceptions are upheld and the plaintiff's amended particulars of claim dated 31 March 2022 is struck out.

41.2 The plaintiff is afforded a period of 10 days from the date of this order within which to give notice of its intention to file an amended particulars of claim under Uniform Rule 28;

41.3 Should the plaintiff fail to comply, or timeously comply, with paragraph 40.2 above, the defendant may approach the Court

[10] 2006 (1) SA 461 (SCA) at 465H.

on the same papers, duly amplified, for an order dismissing the plaintiff's claim;

41.4 The plaintiff shall pay the excipient's costs.

J.S. NYATHI
Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 16/10/2024
Date of Judgment: 14 February 2025

On behalf of the Plaintiff: Adv. JL Myburgh
Duly instructed by: Horn Attorneys, Pretoria
e-mail: quentin@hornlegal.co.za

On behalf of the Respondent: Adv MJ Kleyn
Duly instructed by: Rianie Strydom Attorneys
e-mail: rianie@strijdomprok.co.za

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 14 February 2025.