

SOUTH AFRICA / JUDGMENT

AD All CC t/a Millenium Bodyguards v Kapa Bokoni Trading and Projects 10 CC (A 58/2024) [2024] ZAGPPHC 803 (13 August 2024)

[2024] ZAGPPHC 803

COURT

North Gauteng High Court, Pretoria

BEFORE

Swanepoel, Van der Schyff

CASE / FILE NUMBER

A 58/2024

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IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

Case number: A 58/2024

Date of hearing: 25

July 2024

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August 2024

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHERS JUDGES: NO

(3)

REVISED: NO

DATE: 13/8/24

SIGNATURE

In

the matter of:

AD

ALL CC t/a MILLENIUM BODYGUARDS

Appellant

and

KAPA

BOKONI TRADING AND PROJECTS 10 CC

Respondent

JUDGMENT

SWANEPOEL J: (Van der Schyff J concurring)

INTRODUCTION

- [1] This is an appeal against an order granted by the learned Regional Magistrate in an action, dismissing the appellant's claim and granting the respondent's counterclaim. As a preliminary issue, the appellant sought the reinstatement of the appeal that had lapsed for appellant's failure to prosecute the appeal timeously. In the absence of opposition to the reinstatement application, the appeal shall be reinstated.
- [2] The appellant issued summons in the Regional Court for payment of R 199 329.50 in respect of security services rendered by it to the respondent, pursuant to a written agreement, during the period 1 March 2020 to 31 August 2020. The appellant purportedly terminated the agreement upon issuing summons on 27 August 2020. The appellant alleged that it was also entitled to payment of damages for the remainder of the term of the agreement, for the period 1 September 2020 to 18 January 2021. It therefore claimed payment of R 164 881.25 for the remainder of contract period.
- [3] The respondent admitted that it had entered into the written agreement. It pleaded that the agreement was one contemplated in section 20 (1) (a) of the Private Security Industry Regulation Act, 56 of 2001 ("the Act") which reads as follows:
- "(1)(a) No person, except a Security Service contemplated in section 199 of the Constitution (Act 108 of 1996), may in any manner render a security service for remuneration, reward, a fee, or benefit, unless such a person is registered as a security service provider in terms of this Act."*
- [4] It is common cause that the appellant was not at any material time a registered security service provider in terms of the Act. Therefore, the respondent said, it was not obliged to give effect to the agreement. Furthermore, the respondent pleaded that it had made payment of R 411 173.26 to the appellant in respect of security services previously rendered, that the appellant had not been entitled to receive any payment by virtue of the fact that the agreement was void, and that the respondent was therefore entitled to repayment of the monies that it had paid to the appellant. The respondent abandoned an amount of R 11 173.26 in order to bring the claim within the jurisdiction of the Regional Court.
- [5] In its replication the appellant pleaded that it had been unaware of the possible illegality of the agreement when the agreement was entered into. It said that the respondent had been enriched at the appellant's expense in the amount of R 411 173.26, due to the fact that the appellant had actually rendered security services to the respondent equal to that amount. For that reason, the appellant pleaded, it was not liable for repayment of the monies that it had received from the respondent.

[6] The matter came before the court a quo by way of a stated case. The parties agreed that the following facts were common cause:

[6.1] That the agreement purported to be in force for the period 19 January 2020 to 18 January 2021;

[6.2] That the appellant continued to render security services and issue invoices to the respondent until August 2020;

[6.3] That appellant was not a registered security services provider as contemplated by the Act;

[7] Furthermore, the appellant alleged that its sole member, Mr. G Van Rensburg, was also the sole director of Millenium Bodyguards Security and Cleaning Services (Pty) Ltd ("Millenium"). Both Mr. Van Rensburg and Millenium are registered security service providers in terms of the Act. The appellant alleged that by virtue of the control that Mr. Van Rensburg and Millenium exercised over the appellant, the appellant was entitled to render security services for a fee even though it was not registered in terms of the Act.

[8] The questions that were required to be determined by the court a quo were the following:

[8.1] Was the appellant required to register in terms of the Act, notwithstanding that it was controlled by a registered security service provider, and notwithstanding that its sole member was registered as such?

[8.2] If the answer to 8.1 above was answered in the affirmative, did that render the entire agreement invalid?

[8.3] If the answers to both the above questions were in the affirmative, did that then 'eliminate' the appellant's performance of security services?

[8.4] Was the appellant entitled to payment of R 364 210.75 notwithstanding the fact that the agreement was invalid?

[8.5] Was the appellant entitled to retain the payments received from the respondent for the period 18 January 2019 to 25 February 2020?

THE ACT

[9] The Act has, inter alia, the purpose to "achieve and maintain a trustworthy and legitimate private security industry which acts in terms of the principles contained in the Constitution and other applicable law, and is capable of ensuring that there is greater safety and security in our country." [1]

[10] For the aforesaid reason, the state has a vested interest in controlling each and every person that renders security services for remuneration. If a person is obliged to apply for registration he/she can be assessed for suitability, and they can be monitored on an ongoing basis. There are thus compelling reasons for requiring the registration of all persons who operate in the private security industry. In *Bertie Van Zyl (Pty) Ltd and Another v Minister*

for Safety and Security and Others,[2] the Constitutional Court applied a wide interpretation to ‘security service’ and ‘security service provider’. The Court explained the rationale for exercising close control over the private security industry as follows:

“The sheer size of the security industry, as well as the coercive power it wields during the regular conduct of its business, underscores the need for regulation and adherence to appropriate standards. Close control and management of this massive industry is imperative. This ensures a sound balance between complying with the rule of law on the one hand, and exercising their coercive power in protecting the safety and security rights of the public, as well as those of members of the private security industry itself, on the other.”[3]

THE COURT A QUO

- [11] The learned Regional Magistrate thoroughly considered the aspect of ‘control’ of one company or close corporation over another, and, based on the principle that only a natural person may be a member of a close corporation, he concluded that Millennium could not exercise control over the appellant. Consequently, the magistrate concluded that the appellant was not entitled to provide security services for a fee without being registered in terms of the Act.

DISCUSSION

- [12] In my view the issue of control is a red herring, and the first question is more easily resolved. Section 20 (1) (a) of the Act specifically precludes any person (which by definition of the Act includes a close corporation) from rendering security services for profit. Section 20

- (3) goes even further and reads:

“(3) Any contract, whether concluded before or after the commencement of this Act, which is inconsistent with a provision contained in subsections (1), (2) or section 44 (6) is invalid to the extent that it is so inconsistent.”

- [13] The appellant pleaded in its particulars of claim that it rendered security services to the respondent, more specifically, it provided two Grade C security officers per day, one each for the day and night shifts. The service level agreement between the parties says that the purpose of these officers is to minimize the risk of theft and the loss of life, and to protect the respondent’s personnel and property. This the precise activity that is referred to in subsection

- (a) of the definition of ‘security service’ in the Act.

- [14] In this case the appellant provided security services directly to its clients. In *Private Security Industry Regulatory Authority and Others v Association of Independent Contractors and Another*[4] the Court was concerned with an association that sought work for security officers who worked as independent contractors. Once a security officer was placed with a client, the association became a party to the contract between the client and the officer,

receiving a share of the contract price, although it took no part in providing the actual service.

- [14] The Supreme Court of Appeal held that even where the association's involvement was at arm's length and indirect, it nonetheless provided a security service to the client, and was thus required to be registered in terms of the Act. In my view, where the security services were rendered directly, as in the case before us, the necessity to register as a security service provider is even more apparent.
- [15] In *Bertie Van Zyl* (supra) a farming company appointed its own security guards to protect its various interests. The Constitutional Court held that even if a company's own employees provided security services to protect the company's interests, they were required to be registered in terms of the Act.
- [16] The purpose of the Act can, in my view, only be achieved if the person who actually renders the security service is registered, and any other interpretation does not do justice to the purpose of the Act, nor to the wide interpretation applied by the Constitutional Court and the Supreme Court of Appeal. The enquiry is therefore not about who controls the appellant, but about whether the appellant was rendering a security service. Once it is established that the appellant rendered a security service for remuneration, which it admits it did, it follows then that it ought to have been registered.
- [17] With that principle established, the further questions resolve themselves. The agreement was invalid by virtue of the fact that the appellant rendered security services for remuneration without being registered in terms of the Act. However, the matter goes even further. Section 38 (3) of the Act provides that any person who does not comply with section 20 is guilty of an offence. Therefore, the agreement is not only invalid, it is illegal.
- [18] The appellant argued that the definition of a security service provider in the Act includes a person who is not registered under the Act, and that the appellant was therefore entitled to provide the services without being registered. That may be so, but the argument misses the point. The Act does not prohibit the provision of security services for free. It proscribes the provision of security services for remuneration, reward, a fee or benefit, which is exactly the nature of the agreement between these parties.
- [15] A contract that is invalid is void ab initio, and can confer no right of action.[5] The court a quo relied upon the judgment in *Cool Ideas 1186 CC v Hubbard and Another*[6] in finding that the appellant was not entitled to payment in terms of the agreement. In *Cool Ideas* a building contractor had claimed payment on a building contract notwithstanding that it had not been registered as a home builder in terms of the Housing Consumers Protection Measures Act 95 of 1998 ("the Housing Protection Act"). In terms of section 10
- (1) of the Housing Protection Act no person is entitled to carry on the business of a home builder, or to receive any consideration in terms of an agreement for the sale or construction of a home, unless that person is registered in accordance with the Act.

- [16] The Supreme Court of Appeal held that although section 10 did not invalidate the entire agreement, it disentitled the home builder from claiming payment for its services. That finding was upheld by the Constitutional Court. The appellant argued that Cool Ideas is distinguishable on the facts from this case. That is, in my view, correct, although the distinction does not assist the appellant. In this case, unlike in Cool Ideas, the statute contains an explicit provision[7] that invalidates any agreement that is in conflict with section 20, to the extent of its invalidity, which is not the case in the Housing Protection Act. The agreement between the parties is therefore invalid.
- [17] An agreement that is invalid is in principle unenforceable.[8] An illegal contract must be distinguished from a contract that is invalid because of non-compliance with statutory formalities and an unenforceable contract.[9] This principle is captured in the maxim *ex turpi causa non oritur actio*. An invalid agreement can thus have no consequences, although it has been held that for reasons of equity, there may be a deviation from the general rule in *pari delicto potior est conditio defendentis*. [10]
- [18] The appellant has argued that in this case one must avoid the strict application of the *pari delicto* rule, for reasons of equity. The appellant points to the fact that the appellant in fact rendered security services for the respondent for over a year, and that the respondent had the enjoyment of those services. For that reason, the appellant says, the appellant should be allowed to retain what payment it has already received.
- [19] In *Wilken v Kohler*[11] Innes J said[12] that it does not necessarily follow that a court cannot enforce a contract that has no force. The court said (obiter) that in cases where both parties have performed in accordance with an invalid agreement, the purpose of the agreement has been achieved and there is no justification to interfere with the result. The Wilken ‘rule’ has been criticized, but has achieved some support in *Wilken v NO en ‘n Ander v Bester*[13] and more recently in *Legator Mc Kenna and Another v Shea and Others*[14].
- [20] However, that situation is not comparable to this case. Here the agreement is not only invalid by virtue of section 20 (3) of the Act, it is also an offence to enter into such an agreement. The agreement in itself is not only invalid, but it is, in fact, illegal. It is then relevant to consider the approach of the Supreme Court of Appeal in *Legator* (supra), where Brand JA said the following[15]:
- “From the ‘achieved purpose’ analysis it is clear, however, that the Wilken v Kohler rule cannot apply where the purpose of the transaction is prohibited by law. The law cannot preserve a transaction which it has prohibited. It follows that a defence based on that rule is not available against a claim brought under the conditio ob turpem vel in iustam causam.*
- [21] The result of the aforesaid analysis is twofold: Firstly, the appellant is not entitled to claim performance in terms of an illegal contract. Secondly, the appellant is not entitled to retain what it has received pursuant to the illegal contract.

ORDER

[22] In the premises, the following order is granted:

[22.1] The application for the reinstatement of the appeal is granted.

[22.2] The appeal is dismissed with costs.

SWANEPOEL J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION ,PRETORIA

I agree, and it is so ordered:

VAN DER SCHYFF J

Counsel for the appellant: Adv. MJ Kleyn Instructed by: Rianie Strijdom Attorneys Counsel for the respondent: Adv. NS Nxumalo Instructed by: Tshabalala Attorneys Date heard: 25 July 2024 Date of judgment: 13 August 2024

[1] See: The Preamble to the Act.

[2] 2010

(2) SA 181 (CC).

[3] At para 35.

[4] 2005

(5) SA 416 (SCA).

[5] Wilken v Kohler 1913 A.D. 135; Botes v Toti Development Co. (Pty) Ltd 1978 (1) SA 205 (TPD).

[6] 2014

(4) SA 474 (CC).

[7] Section 20 (3).

[8] See: Christie's Law of Contracts in South Africa 7th Ed, page 455 (more specifically the authorities quoted at footnote 599).

[9] LTC Harms Amler's Precedents of Pleadings 8th ed. Lexis Nexis123.

[10] Pswayayi v Pswarayi 1960 (4) SA 925; Jajbhay v Cassim 1939 A.D. 537.

[11] 1913 AD 135.

[12] At 144.

[13] 1997

(3) SA 347 (SCA).

[14] 2010

(1) SA 35 (SCA).

[15] At para [29].

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