

SOUTH AFRICA / JUDGMENT

Izikhova Security Services CC v Durban University of Technology (D1946/2023) [2023] ZAKZDHC 88 (23 November 2023) [2023] ZAKZDHC 88

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Shapiro AJ

CASE / FILE NUMBER

D1946/2023

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IN THE HIGH COURT OF
SOUTH AFRICA
KWAZULU-NATAL LOCAL
DIVISION, DURBAN
Case no: D1946/2023
In

the matter between:

IZIKHOVA
SECURITY SERVICES
CC
PLAINTIFF
and
DURBAN
UNIVERSITY OF TECHNOLOGY
DEFENDANT
ORDER
1
The plaintiff's application for summary
judgment is dismissed with costs.
2
The defendant is given leave to defend
the action.

JUDGMENT

Shapiro AJ

- [1] The plaintiff instituted action against the defendant for payment of an amount of R5 313 542.08 arising out of guarding services allegedly rendered to the defendant. The plaintiff relies on the provisions of what it describes as a partly oral and partly written agreement concluded between the parties.
- [2] The written portion of the agreement is pleaded to be a Service Level Agreement (“SLA”) concluded on 20 March 2020, but which was stated in the SLA to commence on 15 January 2020. The oral portion of the agreement is pleaded to be verbal instructions given to the plaintiff by Mr Lucky Dlamini, who is described as having been the Acting Head of Protection Services employed by the defendant at the material times.
- [3] In the main, the plaintiff's claim is in respect of the "augmented" provision of security officers who were supplied pursuant to a verbal directive given to the plaintiff by Mr Dlamini.
- [4] The defendant has delivered a plea, which is described as a special plea. Essentially, the defendant denies any liability to pay the plaintiff because the services that allegedly were rendered were not rendered in terms of the SLA and the sites and number of guards specifically contemplated in annexure “A” to that agreement. The defendant pleads that the alleged provision of "augmented services" was therefore not binding, and it is not liable to pay what the plaintiff claims.
- [5] I pause to mention that the defendant's pleaded defence is consistent with the contents of the letter sent to the plaintiff's attorneys by the defendant's legal advisor on 5 December 2022, and which is annexed to the particulars of claim as “H”.
- [6] Viewing the pleaded defence as dilatory and unsustainable, the plaintiff applied for summary judgment against the defendant, and it is that application that served before me.
- [7] In answer to the defendant's allegation that any agreement to provide augmented security services was invalid for want of compliance with the provisions not only of clause 3 of the SLA, but also the non-variation clause, which is clause 31, the plaintiff has averred that the defendant acknowledged liability to pay a portion of the disputed invoices and has relied upon a proposal signed by certain officials of the defendant, and which is annexed to the particulars as "E".
- [8] In response to the allegation that the plaintiff has not sought rectification of the written agreement to permit either the inclusion of the disputed invoices or payment, the plaintiff has argued that rectification of the contract is not required because clause 3.2.3 entitles it to render the fees and charges contemplated in the agreement upon the addition or withdrawal of campuses or residences or the reduction or increase in security personnel.

- [9] At this stage of the proceedings, the only question is whether the defendant has advanced a defence that is bona fide, and which raises an issue for trial.[1]
- [10] However, it is necessary first to deal with the “Special Plea” delivered by the defendant. The plea sought to be both a special plea and a plea on the merits but did not achieve either objective.
- [11] The plea is not a dilatory plea or a plea in bar, such that it raises formal objections to the action without presenting any substantial answer on the merits of the action. It engages in the merits of the claim by denying liability on the basis that the alleged services were neither contracted for nor supplied in terms of the SLA yet, at the same time, the defendant reserved the right to plead to the merits, if the special plea was not upheld.
- [12] The defendant’s plea therefore is not a special plea and also does not comply with the provisions of Uniform Rule 22(2), in that the defendant has neither denied, admitted or confessed and avoided all the material facts alleged in the combined summons nor stated which of the said facts are not admitted and to what extent.
- [13] Although I accept that there has not been uniformity in the various divisions of this court about whether a defendant must plead over on the merits when delivering a special plea,[2] I do not understand the practice in this division to have permitted this. In any event, and if I am wrong, the question appears to have been settled by Binns-Ward J in Absa Bank Ltd v Meiring.[3] I will not repeat the learned judge’s reasoning, but respectfully align myself with his finding that the administration of justice would be better served by interpreting Rule 22 to require a defendant to plead over when delivering a special plea and by recognising that it does not leave scope for the continuation of the “Cape Practice” of permitting the former.
- [14] In my view, the defendant’s special plea was plainly irregular, and it would have been open to the plaintiff to invoke the provisions of Rule 30 in respect of this irregular step. However, and contrary to the submissions of Mr Jefferys, who appeared on behalf of the plaintiff, I cannot dismiss the plea or ignore its contents in the absence of the proper use of the Rule 30 procedure.
- [15] I do question quite how the defendant intends to run the trial with the pleadings in the state that they are, or how it could expect the trial to run on the merits and then to be somehow postponed for an amendment of the plea if the trial court does not uphold the “special plea”. However, that issue is not one that I need to decide. My focus must be on determining whether the defendant has established a bona fide defence to the action, even on its deficient pleadings.
- [16] In assessing the defence, the starting point must be the agreement concluded between the parties, and upon which both parties rely.

- [17] It was obviously intended that the agreement would apply to the whole relationship between the parties as it was stated to commence in January 2020 notwithstanding that the agreement was concluded on 20 March of that year.
- [18] Annexure "A" to the SLA was a list of sites, together with numbers of guards that the defendant required, and that the plaintiff agreed to supply.
- [19] In terms of clause 3.2 of the SLA, the defendant was entitled at any time from the date of commencement of the agreement to add campuses and/or residences to the list contained in Annexure A or to reduce or increase the number of security personnel required on certain conditions. The relevant conditions being that the defendant would give the plaintiff 30 days' written notice of the addition or withdrawal of the campus or residence or the reduction or increase in security personnel required and upon the additional withdrawal of campuses or residences from the list or the reduction or increase in security personnel, the fees and charges payable to the plaintiff would be increased or reduced in accordance with the charge out rates of the contract as contained in Annexure "A".
- [20] Prima facie, the agreement between the parties contemplated a structured process, to be driven by the defendant on a defined period of notice and in a defined way (being in writing) if either of the locations or number of guards contained in Annexure "A" were to be changed.
- [21] Mr Jefferys submitted that the procedure in clause 3.2 was inserted for the benefit of the defendant, who was entitled to waive compliance with its terms, in circumstances such as an emergency. He submitted that this is what Mr Dlamini did when giving verbal instructions to the plaintiff to augment the security services in excess of what was contemplated, and ultimately enshrined in Annexure "A" to the SLA.
- [22] Whilst there may be some attraction to this argument, it is not the plaintiff's case as currently pleaded. The plaintiff has pleaded that the agreement was partly oral (the verbal instructions) and partly written (the SLA) and that there was compliance with the terms of that composite agreement. It has not pleaded that the instructions arose out of a waiver of the defendant's rights under the SLA[4] or that those rights could be waived,[5] and this is not, therefore, an argument that I could have entertained from the bar at this stage of the proceedings.
- [23] The question therefore remains: has the defendant established a triable defence by relying on the express terms of the agreement and arguing that any oral "agreement" that does not comply with the terms of the SLA is neither valid nor binding?
- [24] It is common ground between the parties that the "augmented" services were communicated orally by Mr Dlamini and were not contained in writing on notice to the plaintiff.

- [25] On a plain reading of the SLA, and given the terms of the non-variation clause, it is certainly open to the defendant to argue that the addition or reduction in the number of guards or the locations at which they were or were not to render services could not be given orally unless clause 3.2 was varied to permit this. This is because the method and timing of these increases or reductions were required to be in writing and a variation to delete that provision likewise would have had to be in writing and signed by both parties. This does not appear to have occurred.
- [26] That the correct processes were not followed appears also to be confirmed by the contents of the proposal, which as I have stated, is annexed to the particulars of claim as "E".
- [27] This proposal seeks authority to pay various invoices "for additional manpower" when "no formal written instruction was given to the service provider" (being the plaintiff), nor was "a proper procedure followed". The proposal sought approval of "this deviation".
- [28] Prima facie, the proposal was no more than a proposal and although it was signed by various officials, including the Deputy Vice Chancellor of the defendant, it was not signed by the Vice Chancellor (who, I pause to mention, signed the SLA).
- [29] Further, the defendant did not make payment in line with the proposal, supporting at least one interpretation being that the proposal was not accepted. This is what the defendant has pleaded, a position which it has maintained consistently.
- [30] The parties agree on two material things: there was a written agreement concluded that contemplated a specific process to be followed if the services to be rendered and/or the locations at which the services were to be rendered were going to be changed, and that the additional or "augmented" services were not requested in writing by the defendant.
- [31] Given this common ground, it seems to me that the defendant's defence cannot be said to be mala fide or dilatory. The question of whether there could be oral portions of the agreement in the face of a non-variation clause is a legitimate challenge, and if services that were rendered were not rendered in terms of a contract, it is an open question whether the plaintiff can seek payment in terms of a contract that did not contemplate those specific services.
- [32] I am not required, and do not propose, to express a view on whether the plaintiff will be able to overcome these defences[6] and limit myself to finding that the defences raise triable issues which, if resolved in favour of the defendant, may well constitute a complete answer to the plaintiff's claims.
- [33] In the circumstances, the plaintiff has not made out a case for summary judgment against the defendant.

Costs

[34] The plaintiff has been aware of the defendant's defence since it received annexure "H" to the particulars on or about 5 December 2022. Neither in that letter, nor in the plea does the defendant advance a bare denial or leave the plaintiff guessing about the nature of the defence to be advanced.

[35] The defendant's defence was set out in greater detail in its affidavit opposing the summary judgment application and, even at that late stage, it should have been clear to the plaintiff that the defence advanced in the plea raised legitimate, triable

issues.

[36] The plaintiff proceeded to seek summary judgment at its peril.

[37] I do not consider that summary judgment was appropriate in the circumstances, or that the defence could be seen as one that could be dismissed summarily.

[38] In my view, there is no reason why costs should not follow the result in the circumstances.

Order

[39] I make the following order:

SHAPIRO AJ

JUDGMENT

RESERVED: 16 NOVEMBER 2023

JUDGMENT

HANDED DOWN: 23 NOVEMBER 2023

Appearances:

For plaintiff: Mr H P Jefferys SC Instructed by: CWH Attorneys Care of Ramchunder Attorneys Suite 1001, Durban Club Chambers 5 Durban Club Place Durban Ref: Charles Haveman For defendant: Mr A Christison Instructed by: Matthew Francis Inc. Suite 4, First Floor Block A 21 Cascades Crescent Montrose Pietermaritzburg Ref: Yuri Maharaj/KS/05D008005

[1] Uniform Rule 32(2)(b).

[2] To the extent that the plea is actually a special plea.

[3] Absa Bank Ltd v Meiring 2022 (3) SA 449 (WCC).

[4] It being common ground that the instructions were given before the SLA was signed.

[5] Or that Mr Dlamini would, for example, have been authorised to do so on his own.

[6] Or will succeed in advancing the waiver argument at some stage, if it elects to do so.

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