(99)

/SG

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

DATE: 29/8/2012
CASE NO: 40325/2009

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

29/8/2012 ..... DATE SIGNATURE

In the matter between:

CIRCLE SEVEN TRADING 26 CC PLAINTIFF

And

THE MINISTER OF JUSTICE
AND CONSTITUTIONAL DEVELOPMENT DEFENDANT

JUDGMENT

RANCHOD, J

[1] Plaintiff instituted action against the defendant for what plaintiff alleges was defendant's unlawful termination of an oral agreement entered into between the parties alternatively, repudiation, further alternatively breach of the

agreement, as a consequence of which the plaintiff has suffered damages in the amount of R978 679.30.

[2] The defendant is cited in his official capacity as the minister responsible for overseeing the affairs and administration of the National Prosecuting Authority of South Africa (NPA).

[3] Plaintiff alleges that "on or about" May 2006, the defendant advertised tender number NPA17-05/06. The tender was for the provision of guarding and special services at all the NPA's offices nationally. The tender was for three years. The plaintiff was appointed as the successful tenderer or preferred service provider for the services in the Eastern Cape Province. Another company the NSA Security Company, was awarded the tender to provide these services in Gauteng, Limpopo and Mpumalanga. Other companies were appointed for the remaining provinces but these are not relevant for the purposes of these proceedings before me. In October 2007 and prior to the expiry of the three year contract, the defendant terminated NSA Security Company's Services in Gauteng, Limpopo and Mpumalanga provinces.

[4] Plaintiff's cause of action is set out in paragraph 9 of its particular of claim. It bears setting out in full:

> "On or about October 2007, the plaintiff and the defendant entered into an oral agreement, wherein the plaintiff was required to continue providing the services in the Gauteng, Limpopo and Mpumalanga provinces which was supposed to have been provided by NSA Security Company."

[5] Plaintiff further alleges:

> "10. The material express, alternatively, implied, further alternatively, tacit terms of the oral agreement were that:
>
> 10.1 The plaintiff was to provide the security and guarding services to the defendant in the Gauteng, Limpopo and Mpumalanga provinces;

10.2 The contract was initially for a period from October 2007 to 31 March 2008 (the particulars of claim mentioned 2007 but it is common cause that this is a typographical error and should read 2008) and was thereafter extended on a month to month basis;

10.3 The contract was to be terminated on a month's notice, alternatively, on a reasonable notice;

10.4 The plaintiff was to provide the security and guarding services on a continuous basis, 24 hours per day and seven days per week;

10.5 The defendant was to pay the plaintiff monthly in arrears for the security and guarding services rendered."

[6] Plaintiff says he dully honoured his obligations in terms of the oral agreement between the parties.

[7] Plaintiff then goes on to say that the defendant breached the agreement alternatively repudiated it on one or more of several grounds. It says the defendant failed to give the plaintiff a months' notice alternatively reasonable notice of termination of the plaintiff's services and instead gave it only three days notice which constitutes an unreasonable period of notice of termination. Accordingly, says plaintiff, the defendant unlawfully terminated the agreement between the parties.

[8] The damages that plaintiff claims is for an amount of R774 000.00 which the plaintiff says it had to pay to 146 security personnel as salary in lieu of notice, in the November 2008 month; expenses incurred in respect of equipment costs amounting to R23 000.00; and overhead costs for one month amounting to R181 679.30. The total amount is therefore R978 679.30. The plaintiff also claims

interest at the prescribed rate *a tempore morae* and costs of suit.

[9] The defendant entered an appearance and thereafter filed a "notice to remove causes of complaint" dated 8 September 2009 in which he informed the plaintiff that he intended to raise an exception against the plaintiff's particulars of claim on the grounds that it did not disclose a cause of action and/or it is vague and embarrassing. The defendant then withdrew the notice to remove causes of complaint in terms of a notice of withdrawal dated 22 September 2009 as he had served the earlier notice out of time. The following day, the defendant filed his plea.

[10] The defendant raised two special pleas. Firstly, it was pleaded that the plaintiff failed to comply with the provisions of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Act). Secondly, that plaintiff failed to comply with the provisions of rule 18(6) of the Uniform Rules of Court in its reliance on the existence of an oral agreement. The defendant says plaintiff failed to

plead the precise date when and the place where the oral agreement was entered into and also failed to state who represented the parties to the oral agreement. Hence, plaintiff's reliance on the oral agreement does not disclose a cause of action and is not in compliance with the Uniform Rules and accordingly the defendant is unable to plead thereto. The defendant then pleads over.

[11] The plaintiff thereafter replicated to the defendant's special pleas.

[12] Plaintiff pleaded that it had served a notice in terms of section 3(2)(a) of the Act on the defendant on 20 March 2009 in compliance with the provisions of the Act. It attached a copy of the said notice. Plaintiff further pleaded that the notice was served within a period of six months from the date on which the plaintiff's cause of action arose. The plaintiff did not deal with the second special plea in the replication.

[13] At the commencement of the trial plaintiff's counsel, Mr Mokwena, said that the defendant's ttempt to raise the cause of complaint by way of a special plea was unacceptable as it had deprived the plaintiff of dealing with the complaint which it would have been able to do had the defendant properly complied with rule 23. The rule provides for circumstances where a plea may be, *inter alia*, vague and embarrassing. A party may then serve notice in terms of the rule that it intends to raise an exception if the cause of complaint is not removed. Raising it as a special plea was in the circumstances impermissible. I agree. In any event although the defendant in the special plea said he is unable to plead, he pleaded comprehensively to plaintiff's claim.

[14] The defendant says that the cause of action as set out in plaintiff's particulars of claim differs materially from what is set out in the notice in terms of the Act. Whereas plaintiff's notice refers to an unreasonable and procedurally unfair administrative action on the part of the NPA, in the summons the plaintiff pleads the existence of an oral agreement. Hence, says defendant, plaintiff failed to disclose a cause of action against the defendant. Furthermore, says defendant,

the plaintiff failed to plead compliance with the provisions of section 3 of the Act in its particulars of claim.

[15] These issues raised in the special plea are identical to those raised in the withdrawn notice of exception.

[16] From the plaintiff's replication it is clear that the relevant notice in terms of the Act was served on the defendant within a period of six months from the date on which plaintiff's cause of action arose and the special plea in this regard falls to be dismissed with costs.

[17] I turn then to the second special plea.

[18] In essence, defendant's contention is that the plaintiff did not allege an oral agreement in the notice in terms of the Act but referred to an administrative action on the part of the defendant. It is so that the plaintiff did not persist with its claim on the basis of an administrative action as such. For then it would have had to proceed with a review in terms of the Promotion of Administrative Justice Act (PAJA).

[19] Section 3(2) of the Act provides:

"A notice must –

(a) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4(1); and

(b) briefly set out –

(i) the facts giving rise to the debt; and

(ii) such particulars of such debt as are within the knowledge of the creditor."

[20] The notice in terms of the Act was sent by plaintiff's attorneys to the National Prosecuting Authority of South Africa. The notice is dated 19 March 2009 and comprises of four pages. After setting out the background as to how the plaintiff came to be appointed to render guarding and security services to the NPA it further sets out the facts

relating to the termination of NSA's services and the plaintiff's appointment in place of NSA. The notice then goes on to state:

"7. Our instructions are further that:

7.1 Circle 7, at your request, continued to provide the services to you beyond 31 March 2008;

7.2 You embarked on a bid process in July 2008, however, the bid was cancelled and circle 7 continued to render its services to you at your request;

7.3 On 28 October 2008, Circle 7 received a letter from you dated 27 October 2008 wherein you state that:

7.3.1 You intended to issue a new bid for the services to be finalised on

30 September 2009, and the services in terms thereof to commence on 1 October 2009;

7.3.2 You had decided in the interim to participate in the guarding services bid issued by the Department of Justice and Constitutional Development ("DOJ") in respect of the services until the finalisation of your bid on 30 September 2009;

7.3.3 You were accordingly giving Circle 7 a three days notice of termination of its services.

8. Our instructions are further that:

8.1 Having received your notice of termination, Circle 7 advised you of the labour relations implications of your decision and requested

a month's notice to enable it to make proper arrangements with the security personnel in its employ, including those of the NSA;

8.2 You refused to accede to Circle 7's request on the basis that you had no obligation to give Circle 7 a month's notice and on the basis that you had no relationship with the security personnel;

8.3 As a consequence of your refusal, Circle 7 had to pay 196 security personnel's salaries in lieu of notice, amounting to R777 700.00 (seven hundred and seventy seven thousand seven hundred rands), incurred equipment costs amounting to R23 000.00 (twenty three thousand rands) and overheads amounting to R181 679.30 (one hundred and eighty one thousand six

hundred and seventy nine rands and thirty cents)."

The letter then goes on to state that the NPA's decision to no longer utilise the services of Circle 7 amounted to an administrative action and its decision was unreasonable and procedurally unfair. Further, that unless the NPA rectified its actions within 30 days of the date of the letter or notice Circle 7 will proceed to have the decision reviewed. The notice ends with a demand for payment of an amount of R1 119 912.40.

[21] Counsel for the defendant argued that the plaintiff ought to have indicated in its notice that it was relying on a cause of action premised on an oral agreement. It was argued that the notice reveals a cause of action pertaining to an administrative action and not an oral agreement. These submissions are untenable.

[22] The relevant section of the Act only requires the plaintiff to briefly set out the facts giving rise to the debt and such

particulars of such debt as are within the knowledge of the creditor. In my view the Act does not require the plaintiff to set out the full terms of the agreement or to plead those terms which would normally be pleaded in the particulars of claim. Nor, in my view, is the plaintiff required to state its cause of action in the notice. On a proper construction of the notice sent by the plaintiff to the defendant, the plaintiff has set out the facts giving rise to the debt and such particulars of the debt as were within its knowledge in more detail than it was required to do in terms of section 3(2) of the Act. In paragraph 6 of the notice it is stated:

> "6. Our instructions are further that:
>
> ...
>
> 6.3 In October 2007, Circle 7 was appointed to provide the services in the provinces which were awarded to NSA, in (*sic*) the period October to 30 November 2007;
>
> ...

6.6 On or about 21 November 2007, you approved the appointment of Circle 7 for the period up to 31 March 2008 to, *inter alia*, give yourselves time to advertise and follow the tender process in respect of the services."

[23] It is common cause or not in dispute that the plaintiff rendered certain services over the various periods of time. It is also not in dispute that the defendant gave three days' notice terminating plaintiff's services. The essence of plaintiff's complaint in the notice was that the notice period of three days was unreasonable and that a reasonable period would have been one month. These facts are alleged in the particulars of claim as well. In the circumstances, I am of the view that there is no substance in this special plea and it falls to be dismissed with costs. I turn then to the next special plea.

[24] This plea has been raised in terms of rule 18(6) of the Uniform Rules of Court. The essence of the defendant's

complain, in this regard, is that the plaintiff has failed to plead the date when and the place where the oral agreement was entered into and the individuals who represented the defendant and the plaintiff when it was concluded.

[25] Rule 18(12) provides that:

> "If a party fails to comply with any of the provisions of this rule, such pleading shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with rule 30."

Rule 30 deals with irregular proceedings. Where a pleading both fails to comply with rule 18 and is vague and embarrassing, the defendant has a choice of remedies. He may either bring an application in terms of rule 30 or raise an exception in terms of rule 23(1). *In casu*, the defendant failed to invoke either of these rules.

[26] Rule 23(1) provides that:

"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 set it down for hearing in terms of paragraph (f) of sub rule (5) of rule (6): provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complain within fifteen days: provided further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due deliver his exception."

[27] As I said earlier, the defendant served a notice of intention to except but then withdrew it when it realised that it was out of time in doing so. It then raised the grounds for exception by way of the special plea. In my view, it is impermissible for the defendant to have proceeded in the way that it did and it has deprived the plaintiff of the opportunity to cure any

alleged defect in its particulars of claim. In any event, any alleged defect relating to the alleged oral agreement was cured by the plaintiff through the evidence that it has adduced during the course of the trial. Had a proper exception been raised this court would nevertheless still have had the power to defer consideration of the exception to the trial. In Erasmus: *Superior Court Practise;* service issue 35, 2010 at B1-160 it is stated:

> "A court has the power to defer consideration of an exception to the trial, and will do so where the question raised by the exception seems to be interwoven with the evidence which will be led at the trial. Thus, for example, where the whole of a contract is not before the court, it will not assign any meaning to particular words or clauses thereof at the exception stage if there is room for a contention, *ex facie* the pleadings, that the omitted terms, whether considered with or without additional evidence of surrounding circumstances, might have a significant bearing on the issues before the court."

In the circumstances that special plea also falls to be dismissed with costs.

[28] I turn then to the merits of the case.

[29] I will deal firstly with the second claim that was introduced by the plaintiff pursuant to it having been granted leave to amend its particulars of claim at the end of the trial.

[30] The second claim reads as follows:

> "On or about 23 August 2007, the defendant, prior to the plaintiff been approached to render the services which was supposed to be rendered by NSA, recommended and approved that the plaintiff should render those services for the remaining period of 22 (twenty two) months.
>
> This information was concealed from the plaintiff and only discovered during the discovery process, a few

days before the trial and subsequent to the plaintiff having delivered its particulars of claim.

The abovementioned facts give rise to a further cause of action and claim by the plaintiff.

Despite the recommendation and approval, the defendant fails to appoint the plaintiff for the remaining period of 22 (twenty two) months.

The plaintiff has suffered loss of earnings as a result of the direct conduct of the defendant.

The plaintiff claims for loss of profit over a period of 22 (twenty two) months minus one month already computed in the current cause of action as apparent from the combined summons.

Wherefore the plaintiff claims for: –

1. Payment of the amount of R1 635 113.50;

2. Interest thereon at the prescribed rate *a tempore morae*;

3. Costs of suit;

4. Further and/or alternative relief."

[31] This claim is based on an internal memorandum dated 23 August 2007, of the NPA. The memorandum is from Mr Tebogo Setabela, Senior Manager, Supply Chain Management Unit to Mr Brian Graham, Chief Financial Officer. Its purpose is stated to be "to appoint Circle 7 CC as a preferred service provide (*sic*) for guarding and special service to NPA officers in Gauteng and Free State". It is further stated in the memorandum that:

> "The NSA has breached the contract and approval has been granted to terminate the contract and appoint the new service provider through Treasury Regulation 16A 6.4. ... It should be noted that from all service providers awarded the contracts Circle 7 and NSA

were the only companies that demonstrated capacity to manage the contract by scoring high points on functionality during the valuation (*sic*) process. Circle 7 has representation in more than two provinces. ... It is therefore recommended that Circle 7 be appointed for the remaining period of the contract (22 months) to provide guarding and special service for all offices previously guarded by NSA."

[32] The Treasury Regulation referred to is:

"16A 6.4 If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority."

[33] Although the recommendation by Mr Setabela was approved by Mr Brian Graham the Chief Financial Officer, it was not communicated in the form of an offer to the plaintiff and it can therefore not be said that the plaintiff accepted it. The second claim therefore falls to be dismissed.

[34] I turn then to the first claim.

[35] Much evidence was led about whether there was an oral agreement or not between the parties. In the absence of a written agreement the agreement must have been oral. This much seems evident from the evidence of Mr Dikobe, for the plaintiff that as a result of a phone call from a Mr Sepati Sizana of the NPA a meeting took place with Ms Charmain Marshal when it was agreed that plaintiff render the services previously rendered by NSA. The services had been rendered, initially for just under six months and thereafter for varying periods of one or more months. This much is common cause. Hence the defendant's submission that there was no oral agreement cannot prevail. Defendant says the services were provided on a "quotation" basis

hence there could be no question of any "notice period" arising. The submission, as I understand it, is that once plaintiff submits a quotation for a specific period and it is accepted by defendant, the service is rendered for that period and paid for by the defendant, hence there can be no question of any notice period. That would no doubt be the case generally. However, several difficulties present themselves. Initially, services were not rendered on a quotation basis. Quotations were requested only later. And I accept that quotations were presented later. If a quotation basis is used then it is trite that the service is rendered only after the quotation is accepted. The evidence, however, indicates that in a number of instances the so-called quotations were presented in arrears or after the services were rendered. Ms Marshal testified that the so-called quotations were merely a means to facilitate payment by the defendant. The price, the services to be rendered and where they were to be rendered were already determined beforehand. Mr Dikobe testified that the services were to be rendered on a month to month basis. What was not discussed was any notice period. This makes sense. If it was understood that the services were rendered on a month

to month basis then the question of a notice period cannot arise. That this was the case is borne out by Mr Dikobe's evidence that when he received a letter dated 27 October 2008 informing him that plaintiff's services would no longer be required after the end of October 2008 his immediate response was to ask the NPA in a letter dated 28 October 2008 for a one month notice as plaintiff would have to give its employees a month's notice to terminate their services.

[36] From the evidence it is clear that a notice period was never discussed beforehand. The question to be determined then is whether defendant was obliged to give – as plaintiff contends – reasonable notice and if so, what would constitute a reasonable period of notice. In this regard it is important to note that Mr Dikobe testified that plaintiff operated on its own timeframe with its employees. Its timeframe (in other words, period of employment arrangement with its employees) was not based on the timeframe or period for rendering services to the NPA. Given this concession and the other facts I have referred to it cannot be said that the defendant was obliged to give any

notice, let alone reasonable notice, to plaintiff. That plaintiff was obliged to give its employees one month's notice in terms of labour law provisions is beside the point. That is a matter between the plaintiff and its employees.

[37] For all these reasons I make the following order:

1. Plaintiff's application to amend its particulars of claim is granted with costs;

2. Defendant's special pleas are dismissed with costs,

3. Plaintiff's claim is dismissed with costs.

N RANCHOD
JUDGE OF THE HIGH COURT

40325/2009/sg

Heard on:	12 October 2010 and 7 November 2011
For the Plaintiff:	Adv Mokwena
Instructed by:	Messrs Werksmans, Johannesburg
For the Defendant:	Adv Bezuidenhout
Instructed by:	State Attorney, Pretoria