THE HIGH COURT OF SOUTH AFRICA

FREE STATE PROVINCIAL DIVISION

Reportable: yes/no
Circulate to other Judges: yes/no
Circulate to Magistrates: yes/no

Case Number 5560/2022

In the matter between:

KHUSELANI SECURITY AND RISK
(PTY) LTD Applicant

and

MANGAUNG METROPOLITAN MUNICIPALITY Respondent

CORAM: BERRY, AJ

HEARD ON: 25 MAY 2023

DELIVERED ON: 15 NOVEMBER 2023

JUDGEMENT BY: BERRY, AJ

JUDGMENT

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[1] The Applicant seeks judgment for unpaid capital debt in the sum of R2 053 162.31 with interest of R444 551.47 up to 31 October 2022.

[2] The Applicant states that should invoice numbers 145178 and 145179 have become prescribed, the capital claimed would be R1 933 449.17 and the interest would be R439 060.79.

[3] The Applicant claims *mora* interest from 01 November 2022.

[4] The parties concluded an agreement in terms of which the Applicant would render Security Services to the Respondent on 29 January 2019.

[5] This contract was followed by a service level agreement concluded during February 2019.

[6] The contract was for a period of 24 months, commencing on 1 March 2019 and ending on 28 February 2021.

[7] The Applicant would render invoices monthly, reflecting which services has been rendered per site.

[8] The Respondent agreed to pay these invoices within 30 days from submission.

[9] The Applicant originally claimed an amount of R3 488 675.65 in the Founding Affidavit, but during hearing of the matter it became clear that the outstanding capital claimed is R2 053 162.31, as two payments were made.

[10] Payments of R 717 756.67 on 26 May 2020, and R 717 756.67 on 25 June 2020 were made.

[11] The Applicant argues that the Respondent admits that Security Services were rendered during the period of the contract, that invoices were presented to the Respondent and that certain of those invoices remain unpaid.

[12] The Applicant asserts that it's not disputed that the services were rendered, and that the correctness of the invoices were never disputed by the Respondent.

[13] The Applicant argues that the two payments of R717 756.67 made on 26 May 2020 and R717 756.67 on 25 June 2020, were payment of an existing larger debt and that these payments interrupted prescription of invoice numbers 145178 and 145179, thus prescription could only run from 25 June 2020.

[14] The Applicant sent a letter of demand for payment on 31 October 2022.

[15] The Respondent raises the following points *in limine*.

a) That the claim for invoices 145178 for R115 781.33 and 145179 for R4 831.80 prescribed.

b) Paragraph 12 of the agreement provides that any dispute must be referred to arbitration.

c) That the Respondent stopped rendering services on 14 December 2019 and the matter should have been referred for mediation and arbitration.

d) That Sec 3(1) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 requires that the creditor must give notice in writing of its intention to institute legal proceedings and that the letter of demand for payment on 31 October 2022 does not meet the requirements.

[16] The Applicant claim that it complied with the service-level agreement and rendered the services in accordance with the contract.

[17] The Respondent disputes that the Applicant complied with the agreement and deny that services were rendered in accordance with the contract, in that the Applicant stopped rendering services on 14 December 2019, without invoking any of the dispute resolution procedures provided for in the contract.

[18] The Respondent sent a letter to the Applicant advising that it disputes the invoices rendered from 16 December 2019 to 31 January 2020 on 9 January 2020, as the Applicant stopped rendering services from 14 December 2019.

[19] The Respondent relies on par 9.4 the agreement:

> "In the event that the contractor fails to perform the services in this agreement, the municipality shall, without prejudice to its other remedies under this agreement, deduct from the contract price as a penalty, a sum calculated on the underperformed services."

[20] The Respondent did not make any submission on the amount of the penalty it may deduct in terms of Par 9.4 or provide any indication of how the amount should be calculated.

[21] The Respondent relies on the arbitration clause, as well as its right to deduct penalties in terms of Par 9.4 of the contract.

[22] The Respondent submits that the dispute arose on 14 December 2019 and that the Applicant should have exercised its rights in terms of Par 10 of the agreement, which deals with breach of the agreement, as well as the Arbitration Clause in Par 12.

[23] The Respondent asserts its rights created in the contract.

[24] The Respondent submits that Sec 3(1) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 is applicable.

[25] The Applicant submits that Act 40 of 2002 is not applicable as this is not a claim for damages, but a contractual claim.

[26] I regard the argument around the applicability of Act 40 of 2002 as a legal question, but in view of my finding, I do not deal with this question.

[27] The Respondent submits that the Applicant has been aware of the dispute since 14 December 2019, but elected to follow the Application procedure on 08 November 2022, to prevent prescription.

[28] There are no merits in this argument, as the Applicant could just as easily have issued summons on 08 November 2022. But it elected to follow motion proceedings.

[29] The Applicant states in Paragraph 22 of its Founding Affidavit that it is preferred that Action Proceedings should be instituted in a claim for money, and that it is usually frowned upon to institute Application Proceedings for payment.

[30] The Applicant argues that this case justifies Application proceedings as it did not foresee any disputes.

[31] This was the Applicant's position at the time it drafted the Founding Affidavit. It did not have the Respondent's version at the time.

[32] A real *bona fide* and genuine dispute of facts arose. The Respondent disputes the amount claimed; whether prescription of the two invoices occurred; and whether penalties may be levied in terms of the contract exist.

[33] This brings this Application into the realm of **Plascon-Evans Paints v Van Riebeeck Paints**[1].

[34] It must be decided on the Respondent's version, together with those facts that are undisputed and common cause whether factual disputes exist.

[35] The Respondent's version should be rejected if it is untenable and far-fetched.

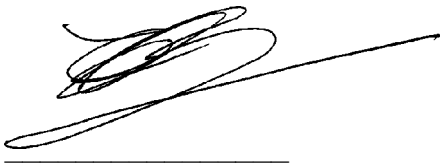
[1] Plascon-Evans Paints v Van Riebeeck Paints 1984 (3) SA 623 (A) at 634H-635A)

[36] I find that there is a genuine dispute of facts, and that Plascon-Evans is applicable under the circumstances of this case.

ORDER

[37] The following Order is made.

1. The Application is dismissed with costs.



BERRY, AJ

APPEARANCES:

For the Applicant:	**Adv. G Reddy**
Instructed by:	Vathers Attorneys
	C/O Honey Attorney's
	BLOEMFONTEIN
For the Defendant:	**Adv. M Motselebane**
Instructed by:	Moroka Attorneys
	BLOEMFONTEIN