

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**



CASE NO.: 20243/2022

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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In the matter between:

**BASTINCEPT (PTY) LTD t/a
BASTI SECURITY SERVICES**

APPLICANT

and

JCB GEARVEST (PTY) LTD
(Registration Number: 2004/032539/07)
LEYTON INVEST (PTY) LTD
(Registration Number: 2015/202608/07)

FIRST RESPONDENT

SECOND RESPONDENT

JUDGMENT

MANAMELA AJ

INTRODUCTION

- [1.] This is an opposed application for specific performance of a contract.
- [2.] The Applicant is mainly seeking a declaratory order that (a) the termination of the written agreement for the provision of security services concluded on 24 March 2021 is declared unlawful and in breach of the agreement; and (b) that the first respondent be ordered to perform its contractual obligations, namely by allowing the employees of the Applicant to return to site immediately and paying all amounts due in accordance with Annexure A of the agreement.
- [3.] The remainder of the prayers set-out in the notice of motion are of ancillary nature, namely, the referral to trial or oral evidence and interim interdict pending adjudication of trial or oral evidence.
- [4.] This application commenced in the urgent court on 20 April 2022, before van der Westhuizen J and was dismissed for lack of urgency and the costs were reserved.

FACTUAL BACKGROUND

[5.] The Applicant and the Respondent concluded a service level agreement for the provision of security services, the relevant terms of which are that

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- 4.3.1. *The First Respondent entered into an agreement with the Applicant to secure and safeguard personnel, assets and buildings through the provision of 24-hour security on a monthly basis (clause 1.1.2).*
- 4.3.2. *The First Respondent appointed the Applicant to provide security services at its territory in Limpopo (clause 1.1 and 3.1).*
- 4.3.3. *The First Respondent would pay a monthly fee for the security services (clause 4.1).*
- 4.3.4. *The scope of the work is set out in annexure A to the agreement (clause 4.2).*
- 4.3.5. *The security teams would report to and fall under the client's operational manager and would be paid for completed and active monthly service only (clause 4.4).*
- 4.3.6. *The Service Level Agreement was entered into for a fixed term of 36 months from the date of signature of the written agreement, and in the event of no-compliance, the client will have the right to cancel the agreement based on the suspensive conditions according to section 8 of the agreement (clause 5).*

- 4.3.7. *Section 8 of the agreement is merely a restraint of trade and does not contain a suspensive condition (clause 8).*
- 4.3.8. *Clause 11 of the agreement states that if any party breaches any provision of the agreement and remains in breach for seven days after receipt of a written notice from the other party requiring the defaulting party to rectify the breach, or if any party repudiates this agreement, the other party will be entitled to cancel this agreement fully within twenty four hours (clause 11.1).*
- 4.3.9. *The agreement contained all the express provisions agreed to by the parties about the subject matter of the agreement and the parties waive the right to rely on any alleged express provision not contained in the agreement (clause 20.4).*
- 4.3.10. *No contract varying, adding to, deleting from or cancelling the agreement and not waiver of any right under this agreement, shall be effective unless reduced to writing and signed by or on behalf of the parties (clause 20.6).*
- 4.3.11. *According to the operational plan, the First Respondent was to pay the Applicant 24-hour security services to be rendered by two Grade C security guards at R11 900 per month, and three Grade C night guards also at R11 900 per month of whom two must be qualified dog handlers and with one patrol dog, for a total of R59 500 per month with yearly escalations (Annexure A read with clause 22)."¹*

¹ Founding Affidavit

- [6.] The terms of the agreement are common cause between the Applicant and the Respondent in so far as it has been recited from the agreement, except for the interpretation of clause 8 of the agreement as set-out in clause 4.3.7 above. Furthermore, the parties are not in agreement in so far as to whether the agreement is subject to a suspensive condition.
- [7.] The Applicant was served with a termination letter dated 9 March 2022, which states that *'Due to failure to uphold your service Level Agreement with JCB Gearvest (Pty) Ltd. Please note that in writing the services of Basticept (Pty) Ltd T/A Basti Security Service will be terminated, the last working day will be Thursday, 31st March 2022'*.
- [8.] The First Respondent did not serve any breach notice as contemplated in clause 11 of the Agreement, in terms of which the Respondent had to give 7 days' notice to the Applicant to remedy any breach.
- [9.] The nature of breach is not mentioned, and the Applicant's through its attorneys addressed a letter requesting the First Respondent to retract its defective notice of termination, which they refused to do.
- [10.] The Applicant was aggrieved and demonstrated, in its founding affidavit, the extent of financial loss resulting from this termination, estimated to be around R54,800.00 per month, but still tendered its services to the First Respondent.
- [11.] On the other hand, the Respondent contents that the termination notice is valid. The Respondent contents that the Applicant was aware of the numerous complaints and concerns raised, and that the Respondent had a right to cancel the agreement *'due to the breach by the application in the form of persistent and unremedied defective performance'*.

[12.] The first Respondent's counsel argues that the termination was effected pursuant to clause 5.1 of the agreement and not clause 11. The relevant part of clause 5.1, is that '*In neglecting or non-fulfilment of the expected performance levels the client has the right to cancel the agreement based on the suspensive conditions of this agreement according to section 8 of this agreement*'. The provision of section 8 relates to restraint and makes no mention of suspensive conditions.

[13.] There is no clear basis for the Respondent to rely on clause 5.1.

[14.] The Respondent further denies that the services were rendered as quoted for by the Applicant; and that there was never a complaint of breach. The Respondent further contends that there was any oral arrangement regarding the provision of the patrol dogs, and that the contract contains no suspensive conditions.

ISSUES FOR DETERMINATION

[15.] Whether the Applicant is entitled to specific performance of the contract; whether the matter should be referred to trial or oral evidence and whether interim interdict should be granted if matter is referred to trial / oral evidence.

LEGAL PRINCIPLES

[16.] It is trite that specific performance is a primary remedy for breach of contract available for the aggrieved party, enforcing the performance of contractual obligations². A plaintiff has a common law right to demand

² Basson and Others v Hanna (37/2016) [2016] ZASCA 198,

specific performance of a contract, but the court has a discretion to deny it³. The court has a discretion to grant or decline the order of specific performance. The discretion must be exercised judicially and does not confine on rigid rules.

[17.] Courts decide each case according to its own facts and circumstances. Generally, the aggrieved party has a right of election whether to claim specific performance or a claim for damages for breach of contract. The election to either claim specific performance or damages is only available to the aggrieved party and the wrong party does not enjoy any choice in this regard. It is important to note that the innocent party remains entitled to rather seek an order of execution of the contract even where the guilty party is unwilling to accept the counter-performance tendered by the innocent party⁴.

Specific performance as remedy for breach

[18.] Christie's *Law of Contract in South Africa* 7 ed at 616 states:

'The remedies available for a breach or, in some cases, a threatened breach of contract are five in number. Specific performance, interdict, declaration of rights, cancellation, damages. The first three may be regarded as methods of enforcement and the last two as recompenses for non-performance. The choice among these remedies rests primarily with the injured party, the plaintiff, who may choose more than one of them, either in the alternative or together, subject to the overriding principles that the plaintiff must not claim inconsistent remedies and must not be overcompensated.'

³ Jones & Buckle, *The Civil Practice of the Magistrates' Court in South Africa*, van Loggerenberg, (10th edition (loose leave edition) vol 1 at act 306

⁴ Heinrich Schulze, *General Principles of Commercial Law*, 8th edition, at 134

[19.] In contract of services, specific performance is generally not often awarded. However, recent developments have demonstrated that specific performance will usually be granted in employment contracts if there is equality of bargaining power among contracting parties and such order will not produce undue hardship to the defaulting party.

[20.] In *Basson and Others v Hanna*⁵ the court held that –

[41] A creditor's right to demand performance from the debtor cannot be at the debtor's mercy. The exercise of that right cannot depend on what the debtor chooses to do with the asset to which the creditor's right relates. To say that a claim for damages as a surrogate for specific performance is not recognised in law, would deprive the creditor of the right, where it has elected to enforce the contract, to be put as much as possible, in the position that it would have been in if the performance was made in forma specifica.

[42] The respondent is entitled to the relief that he seeks. He has established that he concluded a valid agreement with Basson; that Basson repudiated the agreement; that he was willing to carry out his obligation under the agreement; and that he had elected to hold Basson to the terms of the agreement. Because of Basson's conduct, which rendered specific performance impossible the respondent amended his particulars of claim so as to introduce a claim for damages in lieu of specific performance. The parties have agreed on the quantum and the mora interest rate to be awarded should the appeal fail. This means that the judgment of the court below should be corrected to the extent proposed by the parties. As regards the question of costs, there is no reason to deprive the respondent of his costs.

⁵ (37/2016) [2016] ZASCA 198; [2017] 1 All SA 669 (SCA); 2017 (3) SA 22 (SCA) (6 December 2016),

[21.] Public policy generally favours the utmost freedom of contract and requires that parties should respect or honour their contractual obligations in commercial transactions. Public policy is rooted in the constitution and can sparingly be used to strike down contracts.

[22.] Specific performance should not continue to be a primary remedy for breach of contract. Contracting parties should be allowed to resile from the contract and use damages as a remedy for breach of contract.

DISCUSSION

[23.] In the Founding Affidavit, the Applicant based its claim for specific performance on repudiation from the agreement, resulting from the termination without notice. The respondent alleged that it had a right to cancel the agreement due to breach by the applicant in the form of persistent and unremedied defective performance, whilst the Applicant claims that the termination constitutes repudiation from the agreement.

[24.] The extent to which a court may refuse to enforce valid contractual terms on the basis that it considers that enforcement would be unfair, unreasonable or unduly harsh is a burning issue in the law of contract in our new constitutional era.⁶

[25.] The Applicant illustrates that, shortly after conclusion of the agreement, the First Respondent indicated through Mr. Otto, its representative, that it did not want the patrol dog anymore, as it would cause health and safety

⁶ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* (CCT109/19) [2020] ZACC 13; 2020 (5) SA 247 (CC).

issues at the site. This discussion started as we were erecting the dog kennels, at the beginning April.

[26.] The Applicant indicated that this was not a problem, and the dog was not taken on site. In lieu of provision of the guard dog, the Applicant agreed to provide two extra guards, without changing the price. The Applicant ended up providing 9 guards on fixed term employment.

[27.] The explanation given by the Applicant appears to be a speculation of what could be the reason for termination of the agreement.

[28.] In the exercise of the discretion of the court, regard is had to the impact of termination on the employment agreement between the Applicant and its employees, which automatically terminates on “expiry” of the employer’s agreement with the Respondent, any summary termination would obviously have direct impact on the employees, and such cannot be cured by any other remedy than specific performance. The doctrine of public policy favours the enforcement of the contract by way of specific performance.

COSTS

[29.] It is inevitable that the First Respondent should bear the cost of this application including the reserved costs of the urgent application, as this matter could have been resolved. After a warning letter from the Applicant’s Attorneys, I do not see why the First Respondent should be excused from paying costs at a punitive scale.

CONCLUSION

I agree with the Applicant that the Respondent's refusal to remedy the defective termination when given an opportunity to do so, constitutes repudiation from the agreement.

ORDER

In the result, the following order is made –

1. The termination of the written agreement for the provision of security services concluded between the Applicant and the First Respondent on the 24th of March 2021 is unlawful.
2. The First Respondent is in breach of the agreement; and is ordered to comply its contractual obligations, namely by allowing the employees of the Applicant to return to site immediately and paying all amounts due in accordance with Annexure A of the agreement.
3. The Respondent is liable to pay the costs of this application on attorney and client scale.
4. The Applicant is to bear the reserved costs on a party and party scale.

P N MANAMELA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 23 August 2022

Judgment delivered: 15 November 2022

APPEARANCES:

Counsel for the Applicant: Adv. AC Diamond

Attorneys for the Applicant: Everton Dankuru Attorneys

Counsel for the Respondents: Adv. GR Ergan

Attorneys for the Respondents: Kriek Wassener & Venter Inc