IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 005278/2023

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

EW Dunn
.....
SIGNATURE

6 December 2023
DATE

In the matter between:

RISE SECURITY SERVICES (PTY) LTD **Plaintiff (*qua* applicant)**

and

NATIONAL YOUTH DEVELOPMENT AGENCY **Defendant (*qua* respondent)**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected in it and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 6 December 2023.

JUDGMENT

DUNN AJ:

INTRODUCTION

[1]. The plaintiff, i.e., Rise Security Services (Pty) Ltd (**Rise Security**), instituted action against the defendant, i.e., The National Youth Development Agency (**NYDA**), for payment of the sum of R863 998.16.

[2]. The amount claimed by Rise Security from the NYDA is alleged to be due and payable in respect of security services rendered under an agreement concluded between these parties during October 2022 (**the security contract**).[1]

[3]. Rise Security's particulars of claim alleges that the security contract was concluded partly in writing and partly orally. The written portion thereof is attached to the particulars of claim as annexure '**POC 1**'.

[4]. Annexure '**POC 1**' is essentially comprised of two documents. The first document is an email dated Friday, 28 October 2022, addressed to Mr Kenosi Moraka of the NYDA,[2] together with a letter attached thereto. The attached letter, also dated 28 October 2022, contains Rise Security's written quotation for security services to be rendered at the NYDA's branch and district offices during the period 1 November 2022 to 31 December 2022. The material portion of this quotation reads as follows:[3]

> '*Att: Kenosi Moraka*
>
> *I thank you for affording us this opportunity to quote for security services *[**sic**] NYDA security services. I have great pleasure in submitting the following quotation from 1 November 2022 to 31 December 2022 for your consideration. (Own *insertion).*
>
> *DESCRIPTION: QUOTATION FOR PROVISION OF SECURITY SERVICES @ NYDA OFFICES*

Item	***Services Required***	***Description***	***Office***	***Unit Cost Per Shift***	***Total Cost***
	PRICING				
	DAY SHIFT	***07H00 – 16H00***			

[1] CaseLines: Particulars of Claim (**POC**): paras 3 to 6, pp. 001-5 and 001-6.

[2] ' *Ibid*., annexure '**POC 1'**, p. 001-9.

[3] *Ibid*., annexure '**POC 1'**, p. 001-10.

1	**SECURITY OFFICER**	**GRADE C DAY SHIFT**	**BRANCHES & DISTRICTS**	**R7 517.51**	**R356 823.98**
	DAY SHIFT	**07H00 – 16H00**			
2	**SECURITY OFFICER**	**GRADE C DAY SHIFT**	**BRANCHES**	**R7 517.51**	**R75 175.10**
	MONTHLY TOTAL VAT INCLUSIVE				**R431 999.08**
	TOTAL QUOTE FOR 2 MONTHS				**R863 998.16**

(signed)

Emmanuel Mabuza'

The second document forming part of annexure '**POC 1**', is an email comprising the NYDA's response to Rise Security's aforesaid quotation.[4] This email, dated 31 October 2022, was written by a Ms Thandi Mkwanazi. It was addressed to several persons (including Mr Kenosi Moraka) in the NYDA. It reads as follows:

> 'Good day
>
> **Please be advised that the Security Contract has been extended from 1 November 2022 to 31 December 2022. Whilst we prepare the extension contract, we request that you inform your Security Personnel to cover all the NYDA offices as previously done**.
>
> We thank you for your services and **look forward to fruitful engagements with yourselves in the coming two months**.
>
> Please do not hesitate to contact the undersigned should you require additional clarity.
>
> Regards
>
> Thandiwe Mkwanazi/Intergovernmental Relations'

[4] *Ibid*., annexure '**POC 1**', p. 001-8.

[5]. The NYDA delivered its plea to Rise Security's combined summons on or about 16 March 2023. On 5 April 2023, within the fifteen (15) days allowed for this specific step, Rise Security applied for summary judgment against the NYDA in terms of Rule 32 (1) of the Uniform Rules of Court (**URC**).

[6]. Rise Security's notice of application for summary judgement, was accompanied by an affidavit made by Mr Emmanuel Mabuza (**Mr Mabuza**), the sole director of Rise Security. In this affidavit, Mr Mabuza states that he: (1) in the first instance, can, and does, swear positively to the facts set out in Rise Security's particulars of claim;[5] (ii) additionally, verifies the cause of action and the amount claimed;[6] and (iii) lastly, sets out in some detail why the defences pleaded by the NYDA do not raise any issues for trial.[7]

[7]. In ***Breitenbach v Fiat SA (Edms) Bpk***[8] the court (*per* Colman J, with Nicholas J and Eloff J concurring) expressed the purpose of summary judgement in these terms:

> 'The purpose of the procedure known as summary judgement is well recognised. It is, indeed, implicit in the portion of Rule 32 which prescribes the contents of the affidavit which must be filed on behalf of the plaintiff**. It is a procedure aimed at the defendant, who, although he has no *bona fide* defence to the action brought against him, gives notice of intention to defend solely in order to delay the grant of judgement in favour of plaintiff**. In a case where that is what the defendant has done, the summary judgement procedure serves a socially and commercially useful purpose. The relevant Rule should, therefore, not be interpreted with such liberality to defendants that *[**sic**] purpose is defeated.'
>
> (Own emphasis and *insertion)

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5 CaseLines: Mr Mabuza's affidavit: para 3, p. 006-6. See Rule 32 (2) (a) of the URC.

6 *Id*. See too, Rule 32 (2) (b) of the URC.

7 *Ibid*., paras 4 to 19, pp. 006-6 to 006-9. Rule 32 (2) (b) of the URC is also applicable here.

8 1976 (2) SA 226 (T) at 227C.

THE DEFENCES RELIED ON BY THE NYDA

General:

[8]. The NYDA relies on two special pleas. The first special plea is to the effect that the agreement contended for by Rise Security does not comply with the Public Finance Management Act 1 of 1999 (**the PFMA**) and the NYDA's so-called Supply Chain Management Policy (**SCMP**) and that, in consequence thereof, it is invalid, unlawful and void *ab initio*.[9] The second special plea is that this court does not have the requisite jurisdiction to adjudicate the matter – seemingly because Rise Security has not alleged exactly where the agreement it relies on was concluded.[10]

[9]. The NYDA's plea on the merits is twofold: First, it alleges that no agreement came into being between the parties;[11] and second, it alleges that Rise Security did not render any security services to the NYDA during November and December 2022.[12]

The NYDA's opposing affidavit:

[10]. To ward off the granting of summary judgment against it, the NYDA elected to deliver an affidavit in terms of Rule 32 (3) (b) of the URC (**the opposing affidavit**). The opposing affidavit is deposed to by the NYDA's attorney of record, i.e., Mr Sakhile Malvern Sibeko (**Mr Sibeko**), who is the director of Sibeko Incorporated Attorneys.

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9 CaseLines: Plea: paras 1 to 11, pp. 004-2 to 004-8.

10 *Ibid*., paras 12 to 16, pp. 004-8 and 004-9, especially paras 13 and 14, p. 004-8.

11 *Ibid*., paras 3, 4 and 5 (inclusive of the subparas in each of them), pp. 004-9 to 004-12.

12 *Ibid*., para 5.4, pp. 004-11 and 004-12.

[11]. When any defendant - such as the NYDA in the present instance - chooses the route of trying to satisfy the court by delivering an opposing affidavit to the effect that it indeed has a *bona fide* defence to a plaintiff's action, Rule 32 (3) (b) requires that this must be done by either the defendant or '… ***any other person who can swear positively to the fact that the defendant has a bona fide defence to the action*** …' The opposing affidavit must further disclose fully the nature and grounds of the defence and the material facts relied on for such a defence.[13]

[12]. In general, the attorney acting for a defendant should not make the opposing affidavit. The same applies to the attorney acting for a plaintiff, who also should be discouraged from deposing to an affidavit supporting the application for summary judgement. The reason for this is that it has been held in a number of decisions that the attorney's evidence is almost invariably hearsay.[14]

[13]. It is unnecessary to evaluate Mr Sibeko's affidavit, and the defences outlined above, in view of the conclusion that I arrived at in relation to an issue that I raised with the parties' counsel prior to the commencement of the hearing.

IS RISE SECURITY'S CAUSE OF ACTION INHERENTLY DEFECTIVE?

General:

[14]. It is common cause that Rise Security's claim is one for security services rendered. In preparing for the argument in this matter, I considered whether it

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13 See Rule 32 (3) (b) of the URC.

14 Dendy, M and Loots, C, **Herbstein and Van Winsen - The Civil Practice of the Superior Courts of South Africa** – sixth edition – Juta, 2022 (Loose-leaf update) at §5.3, OS, 2021 p16-40. See too the authorities cited by the authors in footnote 30 of this section at OS, 2021 p16-54, including ***Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC & Another*** 2010 (5) SA 112 (KZP) at paras [7] to [16], pp. 115G-119G.

is not incumbent upon a plaintiff, such as Rise Security, to specifically allege and prove that it is registered as a '*security service provider*' in terms of s 20(1)[15] of the Private Security Industry Regulation Act 56 of 2001 (**PSIRA**) (**the registration issue**).

[15]. The expression '*security service provider*' is defined in s 1 (1) of PSIRA to mean:

> '… **a person who renders a security service to another for a remuneration, reward, fee or benefit** and includes such a person who is not registered as required in terms of this Act;'
> *(Own emphasis).*

[16]. When the matter was initially called, I mentioned the registration issue to the parties' counsel, and informed them that I would stand the matter down until the next day to enable them to prepare properly for their respective addresses to me on this issue.

[17]. The expression '*security service*' is widely defined in the same section of PSIRA and it includes a list of some thirteen different activities, ranging from the guarding of persons and property to, among other activities, the installation, servicing or repairing of security equipment. The very first activity listed - in paragraph (a) of this definition - is described as '*protecting or safe-guarding a person or property in any manner*.'[16] There can be no doubt that this is the very

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[15] Section 20 of PSIRA provides as follows:

'Obligation to register and exemptions — (1) (a) No person, except a Security Service contemplated in section 199 of the Constitution (Act No. 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.' (Own emphasis).

[16] Section 1 (1) of PSIRA *sv* '*security service*' under paragraph (a).

type of activity that Rise Security submitted its quotation for to the NYDA on 28 October 2022.[17]

[18]. In other words, in order to claim any remuneration, reward, a fee or benefit for the rendering of a security service, a person (including, obviously, a corporate entity) has to be registered as a '*security service provider*' in terms of PSIRA. In addition, any person who contravenes or fails to comply with, among other provisions, s 20 (1) (a) of PSIRA is guilty of an offence and, on a first conviction of a contravention of that specific provision (i.e., s 20 (1) (a) read with s 38 (3) (a)), is liable to a fine or to imprisonment for a period not exceeding five years, or to both a fine and such imprisonment.[18] A second conviction or subsequent conviction of further exposes a contravener to a fine or to imprisonment for a period not exceeding ten years, or to both a fine and such imprisonment.[19]

[19]. There is a further provision that requires consideration, *viz*., s 20 (3) of PSIRA. It provides as follows:

> '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 to which it is so inconsistent**.'
> (Own emphasis).

[20]. The purpose of s 20 (1) of PSIRA is self-evidently to ensure that no person - with the exception of a Security Service contemplated in section 199 of the Constitution - may in any manner render a security service for remuneration,

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17 CaseLines: annexure **POC 1**, p. 001-10.

18 See s 38 (3) (a) (i) of PSIRA.

19 See s 38 (3) (a) (ii) of PSIRA.

reward, a fee or benefit, unless such a person is registered as a security service provider in terms of PSIRA.

[21]. It seems to me that the only possible way in which a contract could be considered to be '*inconsistent*'[20] with s 20 (1) of PSIRA, is if it were to be found by a court of law that such a contract was concluded by a '*security service provider*' - i.e., a person rendering a security service to another for a remuneration, reward, fee or benefit - who is *not* duly registered as required in terms of PSIRA. In other words, on a proper interpretation[21] of s 20 (1) – read with s 38 (3) (a) - of PSIRA, once it is established that any such '*security service provider*' is *not duly registered* in terms of PSIRA any contract concluded by him/her/it would be invalid because of its inconsistency (i.e., *by it not being in keeping, or being discordant, or being at variance*)[22] with the clear purpose of s 20 (1).

[22]. These considerations about PSIRA's provisions concern a vital aspect of any application for summary judgement, namely the verification of the cause of action in the affidavit supporting such application. In ***Erasmus: Superior Court Practice*** the author explains what is required by verification (footnotes omitted):[23]

> 'Verification is done simply by referring to the facts alleged in the summons; it is unnecessary to repeat the particulars. All the facts supporting the cause of action must be verified. **It is hardly necessary to add that what the**

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20 The word '*inconsistent*' is defined in **The New Shorter Oxford English Dictionary** (Clarendon Press-Oxford), 1993, Volume 1 (A-M), p. 1341, as follows: '1. **Not in keeping, discordant, at variance** … incompatible, incongruous … 2. Lacking the harmony between different parts or elements; self-contradictory …' (Own emphasis).

21 Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at paras [18] and [19], pp. 603 E to 605 B; Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC) at para [28], p 484 F to 485 A; Telkom SA SOC Ltd v Commissioner, South African Revenue Service 2020 (4) SA 480 (SCA) at paras [10] to [17], pp. 485 to 489; and Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others 2022 (1) SA 100 (SCA) at para [25], pp. 107 and 108, as well as at paras [49] to [51], p. 115.

22 See, in this regard, footnote 20 above.

23 Van Loggerenberg, DE at RS 21, 2023, D1-402 I.

> **deponent must verify must be a completed (perfected) cause of action; a deponent cannot be said to 'verify' a cause of action which is not a complete cause of action**.'
>
> (Own emphasis).

[23]. The leading case on the meaning of the words '*cause of action*' is ***McKenzie v Farmers' Co-Operative Meat Industries Ltd***.[24] The erstwhile Appellate Division (*per* Maasdorp JA, with Innes CJ, De Villiers JA, Juta JA, and JER de Villiers AJA concurring) unanimously approved of the definition given to this expression in the English case of ***Cook v Gill*** (1873) LR 8 CP 107 in which it was defined thus:

> '… every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does, not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'

[24]. Quite recently, the Constitutional Court (**CC**) also approved of this definition in ***Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others***.[25] After referring to the definition given to the expression '*cause of action*', as approved of in ***McKenzie***, the CC stated this (footnotes omitted):

> '[51] Over a decade after *McKenzie*, the court in *Abrahamse & Sons* *[**Abrahamse & Sons v SA Railways & Harbours 1933 CPD 626 at 637**] explicated this phrase as follows:
>
> > "The proper legal meaning of the expression cause of action is the entire set of facts which give rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. **It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action**."
>
> [52] Of significance is the fundamental distinction that the court in *McKenzie* drew between the material facts which the applicant is required to prove in order to establish his or her case (*facta probanda*), and the evidence which the plaintiff must advance in order to establish those material facts (*facta probantia*). What this amounts to is that the 'cause of action' in a particular case consists of the *facta probanda* as opposed to

[24] 1922 AD 16 at p. 23.

[25] 2020 (1) SA 327 (CC) at paras [50] to [53], pp. 343 and 344.

> the *facta probantia*. In simple terms, the court in *McKenzie* endorses the view that the central basic facts of the case are not to be confused with the various items of evidence required to prove those facts.
>
> [53] More recently, Corbett JA cited the above cases with approval. To this end, cause of action means every fact that needs to be proved in order to support a litigant's right to a judgment. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'
>
> (Own emphasis and *insertion).

[25]. *Prima facie* a person claiming a remuneration, reward, fee or benefit for rendering a security service to another in terms of a contract will therefore have to allege and prove that it is registered in terms of s 20 (1) of the PSIRA and that he/she/it is not prohibited from concluding such a contract in terms of that Act.

[26]. In ***Schierhout v Minister of Justice***[26] the court considered the consequence of the validity of an act that took place in conflict with a statutory prohibition. The court (*per* Innes CJ, with whom Solomon JA, De Villiers JA, Kotzé JA and Wessels JA concurred) stated the following about such a conflict:[27]

> 'It is a fundamental principle of our law that **a thing done contrary to the direct prohibition of the law is void and of no effect**.'
>
> (Own emphasis).

[27]. However, in ***Lupacchini NO and Another v Minister of Safety and Security***[28] it was pointed out that that will not always be the case. In this regard, the court (*per* Nugent JA), the Supreme Court of Appeal (**SCA**) – after referring to what Innes CJ had stated in *Schierhout* – pointed out:[29]

> 'But that will not always be the case. Later cases have made it clear that whether that is so will depend upon the proper construction of the particular legislation. What has emerged from those cases was articulated by Corbett AJA in *Swart v Smuts* *[**1971 (1) SA 819 (A) at 829C – G**]:

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26 1926 AD 99.

27 ***Schierhout***, *supra*, at p. 109.

28 2010 (6) SA 457 (SCA)

29 ***Lupacchini***, *supra*, at para [8], p. 461 C - G.

> "Die regsbeginsels wat van toepassing is by beoordeling van die geldigheid of nietigheid van 'n transaksie wat aangegaan is, of 'n handeling wat verrig is, in stryd met 'n statutêre bepaling of met verontagsaming van 'n statutêre vereiste, is welbekend en is alreeds dikwels deur hierdie Hof gekonstateer (sien *Standard Bank v Estate Van Rhyn* 1925 AD 266; *Sutter v Scheepers* 1932 AD 165; *Leibbrandt v South African Railways* 1941 AD 9; *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (AD); *Pottie v Kotze* 1954 (3) SA 719 (AD); *Jefferies v Komgha Divisional Council* 1958 (1) SA 233 (AD); *Maharaj and Others v Rampersad* 1964 (4) SA 638 (AD)). Dit blyk uit hierdie en ander tersaaklike gewysdes dat wanneer die onderhawige wetsbepaling self nie uitdruklik verklaar dat sodanige transaksie of handeling van nul en gener waarde is nie, die geldigheid daarvan uiteindelik van die bedoeling van die Wetgewer afhang. **In die algemeen word 'n handeling wat in stryd met 'n statutêre bepaling verrig is, as 'n nietigheid beskou, maar hierdie is nie 'n vaste of onbuigsame reël nie. Deeglike oorweging van die bewoording van die statuut en van sy doel en strekking kan tot die gevolgtrekking lei dat die Wetgewer geen nietigheidsbedoeling gehad het nie**."
>
> (Own emphasis and *insertion).

[28]. In the present case, PSIRA's provisions reveal that, quite apart from the effect that criminal sanction created in s 38 (3) thereof might have had (if that were to have been the only consideration in respect of this issue in this matter), the legislature's express intention clearly was to render invalid and nullify any contract concluded in contravention of s 20 (1).[30]

<u>The parties' respective arguments on this issue</u>:

[29]. On behalf of the NYDA, its counsel, Ms Sempe, apart from one concession she made during the hearing in connection with the registration issue, endorsed the view that Rise Security was required to have alleged that it was duly registered in terms of s 20 (1) (a) of PSIRA to ground any claim on for remuneration under the security contract.

[30] See s 20 (3) of PSIRA – as quoted in para 18 above. This

[30]. On the other hand, a number of arguments on the issue under discussion were made on behalf of Rise Security by its counsel, Mr Steenkamp, who submitted that, in the light of these arguments, I should grant summary judgment in favour of Rise Security. The arguments advanced by counsel are the following:

[30.1]. First, he submitted that such an allegation was unnecessary in the present instance because Rise Security's letter of 28 October 2022[31] - containing its written quotation to the NYDA for the security services in question – reveals in its letterhead that its registration number under PSIRA is '*PSIRA NO: 417414*'.[32] In this regard, I was referred to the judgment in ***Tum Investments (Pty) Ltd v Xalindri Boerdery (Pty) Ltd and Others***,[33] where the Bloemfontein Division of the High Court (*per* Lekale J) stated the following:[34]

> '[23] In my view, the fact that the applicant does not expressly or specifically disclose, in the launching papers, that it is either registered or not required to register *[**i.e., as a credit provider in terms of the National Credit Act 34 of 2005**], does not per se dispose of the matter. **The enquiry, in my judgment, is whether or not it is apparent, *ex facie* the founding papers looked at as a whole, that the applicant is registered or exempt from registration as a credit provider so as to be able, in law, to enforce the relevant credit**.'
>
> (Own emphasis and *insertion).

[30.2]. Second, he additionally submitted that - even if his preceding submission was not upheld - the failure to make such an allegation would not necessarily render the security contract invalid. In this regard, he compared the present security contract with an estate

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31 CaseLines: annexure **POC 1**, p. 001-10.

32 *Id*.

33 [2017] JOL 36857 (FB) at para [23], p.6.

34 *Id*.

agent's agreement of mandate to bring about a sale of land and referred to me to the case of ***Taljaard v TL Botha Properties***.[35]

[30.3]. Third, he then submitted that it was for the parties to define their disputes, which, he maintained, the NYDA possibly could have done by in this instance by, e.g., the taking of an exception against Rise Security's particulars of claim on the basis that it disclosed no cause of action since it contained no express allegation relating to Rise Security's registration under PSIRA. In this regard, counsel referred me to the following cases: ***IS & GM Construction CC v Tunmer***;[36]

[30.4]. Fourth, and flowing from his third submission, counsel next submitted that it was impermissible a court to raise an issue, such as the one under discussion, *mero motu*. For this submission, counsel relied on ***Fischer and Another v Ramahlele and Others***.[37]

[31]. It is practical to deal with this last-mentioned submission first, because - if this court indeed is precluded from *mero motu* raising Rise Security's registration or non-registration as a security provider under PSIRA *per* counsel's submission - that could be the end of this specific debate. Thereafter, I will deal with the remaining submissions to the extent that they still remain relevant.

Rise Security's fourth submission in paragraph 30.4 above:

[32]. In ***Fischer*** the SCA dealt with an appeal that arose after the Western Cape Division of the High Court (*per* Gamble J) had granted certain declaratory relief

35 2008 (6) SA 207 (SCA) at, especially, paras [6], [7] and [8], p. 209 A – G.
36 2003 (5) SA 218 (W) at p. 220 H – I.
37 2014 (4) SA 614 (SCA) at paras [13] and [14], pp. 620 C – 621 C.

and mandatory interdicts[38] against the City of Cape Town (**the City**) in a counter-application that had been instituted against the City pursuant to the demolition of certain structures that had been erected on an immovable property (**the property in question**) owned by a Mrs Iris Fischer (**F**). A clear dispute of fact emerged between the parties on their respective affidavits delivered in the counter-application.[39] According to the counter-applicants they had already moved on to the property in question, erected structures and made those structures their homes. The respondents in the counter-application, i.e., the City and F, denied the counter-applicants' allegations and averred that the structures, which had been erected as part of a land invasion, were not inhabited and that no one's home had been demolished.[40] The deponents to the affidavits delivered on behalf of the City further explained that the City recognised that it could not evict people and demolish their homes, even if they had been unlawfully constructed and occupied, without first complying with the requirements of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.[41]

[33]. Prior to the granting of the declaratory relief and mandatory interdicts giving rise to the appeal, the parties recognised that the dispute of fact (as outlined

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38 The relief claimed was substantially granted in the form sought and can best be paraphrased as follows: (i) a declarator that the conduct of the City in demolishing and/or dismantling the informal structures erected by the applicants [**i.e., in the counter-application**] on the property in question is unconstitutional and unlawful; (ii) interdicting and restraining the respondent's [**i.e., the City and F**] from evicting or demolishing any informal structures erected by the applicants on the property in question without a valid court order; (iii) interdicting and restraining the respondents from demolishing, removing or otherwise disposing of any informal structures, constituent materials of such structures, erected by the applicants on the property in question; and (iv) directing the City to construct for those applicants, whose informal structures were demolished and you still require them, temporary habitable dwellings that are for shelter, privacy, and amenities at least equivalent to those that were destroyed and which are capable of being dismantled at the site at which the previous informal housing structures were demolished. See ***Fischer*** at paras [3], p. 616 C – G; and para [11], p. 619 D – I.

39 *Ibid*., at para [8], p. 618.

40 *Id*.

41 *Id*.

above) had arisen. Consequently, they entered into a written agreement and obtained an order from the court (*per* Zondi J) referring their dispute for the hearing of oral evidence. This order reads as follows:[42]

> '**Whether the structures which were dismantled** by the City of Cape Town on 7 and 8 January 2014, at the property known as Erf 150 Philippi-East remaining extent, **were those which were unoccupied and vacant**'
>
> (Own emphasis).

[34]. Instead of proceeding with the hearing of oral evidence to determine the factual issue referred to him (i.e., on the one hand, whether or not the City's factual averments were correct about the structures not being inhabited and that no one's home had been demolished or, on the other hand, whether individual counter-applicants were truthful when they claimed already to be in occupation of their homes erected on the property in question before 7 and 8 January 2014), the judge *a quo* '*required*' the parties to argue certain preliminary issues that had not been identified by the parties as relevant to their dispute.[43]

[35]. Against this background, I refer to what the SCA (*per* Theron JA and Wallis JA, with whom Mphati P, Hancke AJA and Swain AJA concurred) stated about the issues a court is called upon to adjudicate (footnotes omitted):[44]

> '[13] Turning then to the nature of civil litigation in our adversarial system, **it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues**. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for "*(i)t is impermissible for a party to rely on a constitutional complaint that was not pleaded*". **There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that**

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42 *Ibid*., at para [9], pp.

43 *Ibid*., at para [17], p. 622 D - E.

44 *Ibid*., at paras [13] and [14], p. 620 C – p. 621 C.

> **no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone**.
>
> [14] **It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them**. The parties may have their own reasons for not raising those issues. **A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point**. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. **That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits**.'

[36]. The SCA proceeded to state that it is regrettable that the court *a quo* '*ignored these salutary rules*'.[45]

[37]. It is evident that these salutary rules must be observed by judges. However, as the SCA itself recognised, in the fourth and fifth sentences of the above-quoted paragraph 13 of its judgment in ***Fischer***, there may be instances where a court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. The court added that this is subject to the *proviso* that no prejudice will be caused to any party by its being decided. Three cases cited were cited by the SCA in support of this.[46]

[38]. ***Fischer*** itself did not involve a summary judgment application. It was a case that initially required of the court *a quo* to determine a factual question that had been referred to it for resolution. None of the cases, cited in support of the

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45 *Ibid*., at para [18], p. 622 G - H.

46 ***CUSA v Tao Ying Metal Industries and Others*** 2009 (2) SA 204 (CC) at paras [67] and [68], p. 224 G – p. 225 A - C; ***Barkhuizen v Napier*** 2007 (5) SA 323 (CC) at para [39], p 336 C - E; ***Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd*** 2012 (3) SA 531 (CC) at paras [109] to [114], p. 571 D – p. 572 D.

proposition alluded to in the preceding paragraph, was concerned with a summary judgment application either.

[39]. The first cited case (i.e., ***CUSA***) concerned a labour dispute between the employees' union, i.e., the Commercial Workers' Union of South Africa (**CUSA**), and their employer, i.e., Tao Ying Metal Industries, a manufacturing entity. The employer failed to comply with wage provisions of the applicable bargaining council agreement, and claimed that it had been exempted from complying with the relevant provisions. CUSA obtained a favourable award from an arbitrating commissioner of the Commission for Conciliation, Mediation and Arbitration (**CCMA**). The Labour Court dismissed the employer's application to review the arbitrating commissioner's award. The employer's appeal to the Labour Appeal Court was unsuccessful too. However, a further appeal by the employer to the SCA was upheld. In a nutshell, the majority of the SCA found that the exemptions relied upon by the employer had not expired and held that the arbitrating commissioner did not have jurisdiction in respect of the dispute because it concerned the validity of a bargaining council agreement.[47] The issue of the arbitrating commissioner's jurisdiction had not been raised in Labour Court or the Labour Appeal Court. In other words, it was raised in the SCA for the first time. It was in this regard, that Ngcobo J (as he was then) stated the following:[48]

> '[67] Subject to what is stated in the following paragraph, the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. It may not, on its own, raise issues which were not raised by the party who seeks to review an arbitral award. There is much to be said for the submission by the workers that it is not for the reviewing court to

[47] ***CUSA*** at para [37], p. 217 E – H.

[48] *Ibid*., at paras [67] and [68], pp. 224 G – 225 C.

> tell a litigant what it should complain about. In particular, the LRA specifies the grounds upon which arbitral awards may be reviewed. **A party who seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant may not, on appeal, raise a new ground of review**. To permit a party to do so may very well undermine the objective of the LRA to have labour disputes resolved as speedily as possible.
>
> [68] **These principles are, however, subject to one qualification. Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality**. Accordingly, the Supreme Court of Appeal was entitled *mero motu* to raise the issue of the commissioner's jurisdiction and to require argument thereon. However, as will be shown below, on a proper analysis of the record, the arbitration proceedings, in fact, did not reach the stage where the question of jurisdiction came into play.'
>
> (Own emphasis).

[40]. The emphasised part of the above-quoted statement in paragraph 68 of CUSA, reinforces my view that the registration issue is one that can be raised mero motu, especially in an application for summary judgment. The requirement is a statutory one. The absence of an allegation required ex lege is obvious, i.e., apparent on the papers, albeit that it was not raised explicitly therein. Indeed, it is conspicuous by its very absence. The parties common approach to this issue was either that they were unaware thereof, or that they proceeded on a wrong perception of what the law is.

[41]. Therefore, notwithstanding counsel's submissions on this issue, I remain unpersuaded that the registration issue cannot be raised mero motu in the present case. I am not suggesting that the salutary rules mentioned in Fischer do not find application in summary judgment applications, but rather that the exception crafted out in CUSA illustrates that a court could be obliged to raise an issue, such as the registration issue mero motu. The prejudice Rise Security

might suffer by the raising of the registration issue mero motu, is the inconvenience that would flow from judgment in its favour being delayed, but – at the same time – it will have the opportunity to remedy its defective particulars of claim and, provided it is and was validly registered in terms of PSIRA at all material times, thereafter seek judgment at the end of the ensuing trail. Such '*prejudice*' can be avoided, or at least largely mitigated, by an appropriate costs order at the end of the trial, as well as by an order granting interest on the sum claimed.

[42]. Rise Security's remaining submissions, as advanced by its counsel, are dealt with next.

Rise Security's first submission in paragraph 30.1 above:

[43]. Although this submission is superficially attractive, it does not overcome the fact that a completed (perfected) cause of action has not been pleaded. In my view, a completed (perfected) cause of action would have required of Rise Security to positively allege that it is duly registered a security provider in terms of s. 20 (1) of PSIRA, and that this remained the case at all relevant times, including the time it entered into the security contract with the NYDA, as well as the time the security services were performed in terms of that contract.

[44]. As indicated in paragraph 29 above, Ms Sempe made one concession in connection with the registration issue. She stated, quite frankly, that she had accessed PSIRA's website and noticed that Rice Security was registered under the number referred to (i.e., '*PSIRA NO: 417414*'). It could be argued that, by this '*concession*' made by the NYDA's counsel, the manner in which the

application was conducted during the hearing dispensed with Rise Security's obligation to have alleged and proved a complete (perfected) cause of action, as outlined in the preceding paragraph, and, hence, that it would be fair and reasonable to grant summary judgment against the NYDA. To merely accept such a '*concession*' at face value, would also mean that this court will be required to assume that Rise Security's registration is indubitably valid and that it has remained so at all material times – this is simply a bridge too far.

[45]. In any event, I am disinclined to accept that Ms Sempe's '*concession*' can give rise to a situation that can relieve Rise Security from its obligation to have alleged and proved a complete (perfected) cause of action.

Rise Security's second submission in paragraph 30.2 above:

[46]. I agree with counsel that an estate agent's agreement of mandate remains valid notwithstanding the fact that the agent performed an act in breach of s 26 of the Estate Agency Affairs Act 112 of 1976, i.e., in the absence of a fidelity fund certificate having been issued to him or her. That situation is quite distinguishable from the present one. The reference to ***Taljaard's*** case[49] is of no assistance in the present instance. A security provider, who is not registered in terms of PSIRA, cannot enter into a valid security contract.[50]

Rise Security's third submission in paragraph 30.3 above:

[47]. As I understood Mr Steenkamp's argument, the latter submission was actually a precursor to his fourth submission, which I dealt with a little earlier. In other words, what counsel submitted in connection with the third submission was that

[49] 2008 (6) SA 207 (SCA) at, especially, paras [6], [7] and [8], p. 209 A – G.

[50] See, in this regard, paras [17] to [21] above.

the parties themselves should define their disputes. That, of course, is generally true. The cases cited by him in support of this argument, one cannot quibble with. Perhaps, it would have been better for the NYDA to have taken an exception against Rise Security's particulars of claim. But that did not happen, and the question then arose was whether or not I could *mero motu* raise the registration issue or not. Having concluded that I am entitled, in this particular instance, to have done so the third submission falls away.

CONCLUSION

[48]. For all these reasons, I am not prepared to enter summary judgment for Rise Security (i.e., the plaintiff) against the NYDA (i.e., the defendant) due to the former's failure to plead a complete (perfected) cause of action. As such, the incomplete cause of action also could not have been verified by the deponent to the supporting affidavit. This conclusion also means that I am not satisfied that Rise Security has an unanswerable case. In any event, even if I were to be wrong in this, I would further exercise my discretion[51] against granting summary judgment against the defendant, as I hereby do, on the very grounds and for the same reasons as those already articulated, where a reasonable possibility distinctly exists that the granting of summary judgment in such circumstances could result in an illegality, i.e., facilitating the commission of an offence in terms of s 38 (3) of PSIRA.

[51] ***Tesven CC and Another v South African Bank of Athens*** 2000 (1) SA 268 (SCA) at para [26], pp. 277 H – 278 A; and ***Mercantile Bank Ltd v Star Power CC and Another*** 2003 (3) SA 309 (T) at para [10], p. 312 G – H.

ORDER

[49]. In the result, the following order is made:

a. Summary judgment is refused;

b. the NYDA, i.e., the defendant, is granted leave to defend the action; and

c. the costs of the application for summary judgment are reserved for the decision of the trial court.

EW Dunn

EW DUNN
Acting Judge of the High Court
Gauteng Division, Johannesburg

Counsel for the plaintiff: Adv JP Steenkamp.

Instructed by: Thotharam Attorneys, Randburg.

Counsel for the defendant: Adv R Sempe.

Instructed by: Sibeko Incorporated, Sandton.

Date of hearing: Wednesday, 6 September 2023.

Date of Judgment: Tuesday, 6 December 2023.

Judgment handed down electronically