



Reportable:	YES / <u>NO</u>
Circulate to Judges:	YES / <u>NO</u>
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case no: 267/2014
Date heard: 18-02-2019
Date delivered: 03-05-2019

In the matter between:

UNITRANS PASSENGER (PTY) LTD t/a MEGA BUS & COACH Appellant

and

ZJ BUSINESS ENTERPRISES CC Respondent

Coram: Tlaetsi JP; Phatshoane ADJP et O'Brien AJ

JUDGMENT

O'BRIEN AJ

- [1] This is an appeal with leave of the court *a quo* (per Matlapeng AJ) against the whole of its judgment and order dated 10 March 2017 declaring null and void the cancellation of the subcontracting agreement dated 03 March 2010 entered into between Unitrans Passenger (Pty) Ltd t/a Mega Bus & Coach, the appellant, and ZJ Business Enterprises CC, the respondent. Further ancillary relief, *inter alia*, the return of a bus or its prototype to the respondent; that the respondent be allowed to lease the bus in issue on the same terms and conditions as set out in the subcontracting agreement "subject to the necessary variations taking into account the changed circumstances"; and that it be

allowed to render transport services as set out in a sub-contracting agreement, was also granted.

[2] With that prelude I turn more fully to the facts. The appellant was awarded a contract by the Department of Transport and Public Works, Northern Cape (“the department”). The initial contractual period expired and this necessitated the renewal of the contract which would operate on a month to month basis. The appellant’s obligation in terms of this contract was to provide vehicles for transport. Due to the department’s empowerment initiatives, the appellant was allowed to sub-contract some of its transport routes to empowerment partners. The rationale behind this initiative was to transfer experience and skill which would enable these partners to act independently as the main contractors of the department.

[3] During March 2010, the respondent, represented by Mr Z Khumalo, as a potential empowerment partner, submitted a tender to sub-contract the route between Loopeng and Kuruman. It was a tender requirement that a sub-contractor provide its own 65-seater bus to service the relevant route. The tender was awarded to the respondent but it was indicated to the adjudication panel that it did not have a bus. According to the appellant it was agreed to lease a bus to the respondent as an interim measure as it was always the latter’s intention to buy its own vehicle. The end result was a sub-contract incorporating the lease of a bus by the appellant to the respondent.

[4] On 3 March 2010, the appellant and the respondent entered into a written sub-contract (“the agreement”) the salient terms of which read as follows:

“Clause 1: Introduction:

MBC [the appellant] operates public passenger services between Kuruman and surrounding areas in terms of contract NVC/0033 with the Department of Transport, Roads and Public Works, Northern Cape Province. Tender rules, general conditions as well as the specifications of the contract are set out in Book 1 and 2 of the contract attached for ease of reference and are an integral part of this agreement.

Clause 2: Contract Period:

This agreement is valid for the duration of the current contract which operates on a month to month basis.

Clause 3: Route:

The sub-contractor [the respondent] will operate the trips between Loopeng and Kuruman or a part thereof in terms of the attached timetable approved by the Department. In the event that this route is not economically viable, MBC will allocate an alternative route.

Clause 4: Vehicle

The bus to be utilised must comply with the requirements as set out in Book 1 and 2 of the contract...

Clause 16: Cancellation of Contract:

This agreement is subject to cancellation by either party in the following circumstances:

- (i) If the sub-contractor fails to comply with the condition set out in Book 1 and Book 2 of the contract MV/C/003.*
- (ii) If MBC fails to reimburse the sub-contractor for services rendered.*
- (iii) If any actions by the sub-contractor threaten the cancellation of the contract.*
- (iv) If the sub-contractor fails to operate the trips as set out in the timetable.*
- (v) If the sub-contractor submit false claims to MBC.*
- (vi) If the sub-contractor interferes or competes with the services rendered by MBC in the Kuruman and Surrounding Areas.*
- (vii) Notice of such cancellation must be in writing [and must be given] at least 14 (fourteen) days in advance.*

...

- [5] Subsequent to the lease in respect of the bus being concluded the relationship between the parties turned acrimonious. The appellant alleged that the respondent did not abide by the terms of the lease because Mr Khumalo had failed to attend to the daily route and had made no attempts to get involved in the operation of the transport business. The appellant explained that this was not in the spirit of the agreement as it related to the transfer of experience and skills.
- [6] In an attempt to find a resolution the appellant set about assisting the respondent to obtain its own bus. A meeting was arranged between the respondent and a third party to discuss the purchase options which the respondent had failed to honour. The meeting was to be attended by the appellant, the respondent and one Hans Collins of Busmark, the latter being a supplier of buses which provides a number of purchase options concerning buses available to buyers. The respondent failed to take up this opportunity.

- [7] The department, through its monitoring of the main contract and lease, expressed concern, first, at the respondent's reluctance to gain the requisite experience and skill as was envisaged in the agreement and second, that it had not purchased its own bus.
- [8] At a meeting held on 3 October 2012 attended by all relevant parties the respondent was reminded to be more involved in the running of the business and same was alerted to the fact that it was a requirement that it should possess its own bus.
- [9] On 13 November 2013 the appellant cancelled the lease of the bus on the basis that the respondent did not obtain its own bus to service the route and took no part in the operation of the business. However, in its notice of cancellation, reference was made to the main agreement and not necessarily to the lease itself. In correspondence the appellant sought the return of its bus from the respondent.
- [10] On 25 February 2014 the respondent approached this court on an urgent basis for an order declaring the cancellation of the lease wrongful; placing the respondent in immediate possession of the bus, alternatively, that it be placed in possession of a similar bus; that the respondent be allowed to lease the bus on the same terms and conditions as set out in the lease applicable as at 31 January 2014; that the respondent be allowed to render transport services as set out in the lease on the same terms and conditions as was applied for on 31 January 2014; and further ancillary relief.
- [11] On 10 July 2015 the court granted leave to the appellant to file a further affidavit. In this supplementary affidavit the appellant avers that during April 2014 the parties had entered into discussions regarding the further operation of the bus service by the respondent. The respondent wished to renegotiate the terms upon which it wanted to continue to provide the bus services to the appellant. Furthermore, the respondent wanted to secure a future contract

which would extend beyond the current contractual term between the respondent and the department. The negotiations came to naught and no new contract was concluded between the parties.

[12] On 19 March 2015, the respondent served summons on the appellant containing various claims. The relevant claim is couched as follows:

“Claim 3

- ...
19. *On or about April/May 2014 and at Mothibi Stad, Northern Cape Province, the parties entered into an oral agreement (hereinafter “the Oral Agreement”).*
 20. *During the conclusion of the oral agreement, the plaintiff was duly represented by Z J Kumalo, whilst the defendant was duly represented by Mr Pieter Gouws.*
 21. *The material express, alternatively tacit, alternatively implied terms of the oral agreement were as follows:*
 - 21.1 *The plaintiff will obtain its own bus in order to continue to render transport services as a sub-contractor to the defendant;*
 - 21.2 *The parties will, in due course enter into a formal written contract, which will set out the details of the terms of the agreement between the parties in terms whereof the plaintiff will render transport services as a sub-contractor to the defendant;*
 - 21.3 *The plaintiff will secure the services of its own driver for the purposes of rendering the above transport services;*
 - 21.4 *The plaintiff will, in addition to obtaining its own bus as well as securing the services of its own driver and in order to be able to render the transport services as sub-contractor to the defendant in terms of the agreement mentioned in paragraph 21.2 hereinabove, submit to the defendant the following documentation:*
 22. *...*
 22. *The plaintiff adhered to the terms of the oral agreement by purchasing its own bus during April 2014 and by submitting all the above documentation to the defendant by May 2014.*
 23. *The defendant fails to adhere to the terms of the oral agreement by failing to conclude a written contract with the plaintiff as is mentioned in paragraph 21.2 hereinabove.*
 24. *On the above premise the defendant breach the terms of the oral agreement.*
 25. *The above-mentioned breach of the oral agreement by the defendant pertain to a material term of the oral agreement and the plaintiff consequently cancel the oral agreement, alternatively cancel it herewith.*
 26. *As a result of the breach of the oral agreement by the defendant the plaintiff had to return the bus during September 2014.*
 27. *As a result of the breach of the oral agreement by the defendant and the resulting return of the bus by the plaintiff, the plaintiff suffered damages in the amount of R42 857-00.”*

[13] The appellant claims that, by issuing summons and alleging a new agreement, the respondent had repudiated the agreement between the parties. The appellant, therefore, accepted the repudiation and cancelled the agreement.

The court *a quo*'s judgment

[14] The court *a quo* determined the issues to be, firstly, whether the parties had entered into two distinct agreements, namely a sub-contracting agreement and a sub-contracting agreement incorporating the lease of a bus and secondly, whether the respondent had lawfully cancelled the lease.

[15] The court *a quo* found that the lease of the bus had been incorporated in the main agreement. It reasoned that the respondent needed a bus in order to fulfil its contractual obligations. It held that the duration of the lease of the bus was linked to that of the main agreement and would, therefore, be on a month to month basis as set out in the main contract between the appellant and the department.

[16] The court *a quo* found the cancellation of the agreement to be wrongful and bad in law. It reasoned that the requirement that the respondent must have a bus of its own was not part of the agreement.

[17] With regard to the subsequent oral agreement, the court found that it did not substitute the agreement. The mere fact that an allegation is made in the particulars of claim, which is disputed, does not make the existence of such an allegation a fact.

[18] The court determined that the cancellation of the agreement was null and void. It granted the respondent ancillary relief as set out in the first paragraph of this judgment.

The grounds of appeal

[19] Before us the appellant contends that the court *a quo* erred in not finding that the reliance by the respondent on a subsequent oral agreement did not constitute a repudiation or replacement of the initial written sub-contract. Expanding on this ground, the appellant argues that the court *a quo* erred in not

finding that there was a direct interconnection between the written sub-contract and the later oral agreement in that both causes of action arose out of an identical subject matter.

[20] The appellant further argued that the Court had erred in making an order for specific performance since the cancellation of the original agreement three years prior. It was contended that the reference to “the necessary variations taking into account changed circumstances”, in the order for specific performance, is vague and unenforceable regard being had to the period that had lapsed. In addition, having made an order for specific performance the court *a quo* had erred in not finding that the Northern Cape Provincial Department of Transport, Safety and Liaison had a direct and substantial interest in the outcome of the application and should have been joined in the proceedings, the argument continued.

The analysis

[21] Both counsel candidly accepted the cancellation of the agreement as wrongful. However, the appellant contends that the court *a quo* misdirected itself in not finding that the subsequent oral agreement superseded the written agreement. By issuing summons, so contended by the appellant, the respondent evinced an intention not to be bound by the written agreement. In effect, the appellant accepted the issuing of the summons as a repudiation of the agreement and had therefore cancelled the written agreement.

[22] As was explained in *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*:¹

“Repudiation has sometimes been said to consist of two parts: the act of repudiation by the guilty party, evincing a deliberate and unequivocal intension no longer to be bound by the agreement, and the act of his adversary, ‘accepting’ and thus completing the breach.”

And at para [16] of the judgment the following dictum of Corbett JA in *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) appears:

¹ 2001 (2) SA 284 (SCA) para 1

“Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is set to ‘repudiate’ the contract ... Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated ...”

[23] It is trite that the test for repudiation is objective. See *Poni Sammy & Another v Versailles Estates (Pty) Ltd*²; *Tuckers Land & Development Corporation (Pty) Ltd v Hovis*.³

[24] What arises for consideration is whether the issuing of the summons was an act of repudiation. It is to be remembered that after the appellant’s purported cancellation of the agreement, the respondent returned the bus. Following this, the parties engaged in negotiations for the reformulation of the terms of their prior written agreement. These negotiations became an exercise in futility. As already mentioned, the respondent launched an urgent application on 28 February 2014 resulting in the relief granted by the court *a quo*.

[25] What is remarkable is that the respondent issued summons against the appellant alleging that there was an oral agreement, the terms of which were that: it would obtain its own bus to render transport services that had been initially contemplated in the written agreement; the parties would in due course formalise the oral agreement by reducing it to writing and the respondent would secure its own driver. The respondent further alleges that it had complied with the terms of the oral agreement and had bought its own bus. It contended that the appellant had failed to comply with the terms of the oral agreement; had accordingly breached same resulting in the respondent cancelling the oral agreement and claiming damages.

² 1973 (1) 372 (A) at 387 A – C

³ 1980 (1) SA 645 (A) at 653 B – G).

- [26] The court *a quo* took the view that the oral agreement was merely an allegation in the summons which was disputed by the appellant and therefore, no reliance could be placed on it.
- [27] In my view, the court *a quo* was incorrect in holding as it did. By issuing summons based on the alleged breach of the oral agreement and claiming damages, the respondent evinced an unequivocal intention not to be bound by the written agreement. It elected to rely on the oral agreement, the terms of which are different from those contained in the written agreement, and to claim damages. The respondent did not transfer the terms of the written agreement into the oral agreement. What it did was to create new terms by providing, *inter alia*, its own bus to render transport services which had not been contemplated in the cancelled written agreement.
- [28] In the written agreement the transport route was described as trips between Loopeng and Kuruman or a part thereof in terms of an attached timetable approved by the department. Should this route not be economically viable, the appellant will allocate an alternative route. However, in the subsequent oral agreement it was allegedly agreed that the respondent will render transport services with its own bus and own driver together with certain documentation. It was also allegedly agreed that the oral agreement will be formalized by a written contract. It must be noted that in the written agreement a specific route is stipulated whereas in the alleged oral agreement as per claim three, no route whatsoever is mentioned. This is an indication beyond doubt that the parties had intended a new agreement.
- [29] Objectively considered, the manifestation of an outward act (conduct) shows unequivocal intention not to be bound by an agreement. In this instance the respondent has shown its intention not to be bound by the original agreement which would explain its claim for damages under the new oral agreement. By issuing summons and claiming damages the written agreement, was extinguished. The appellant was within its rights to accept the repudiation and to cancel the agreement. In the premise, the court *a quo* incorrectly disregarded

the issuing of the summons and claims for damages as not constituting an act of repudiation.

[30] On the view we take of this matter, it is not necessary to deal with the question of non-joinder of the department. The point of non-joinder was not enthusiastically pursued. The appellant's contention was that the order of the court *a quo* was vague insofar as: the respondent being allowed to lease the bus in issue on the same terms and conditions as set out in the subcontracting agreement "*subject to the necessary variations taking into account the changed circumstances*". In my view, words such as "necessary variations" and "changed circumstances" are quite vague and may potentially lead to further litigation between the parties. Apart from being vague, the order of the court *a quo* is not competent when regard is had to the lapse of time between the unlawful cancellation of the agreement and the date of the launching of the application.

[31] The upshot of the above analysis is that the appeal ought to be upheld. With regard to costs in the proceedings before the court *a quo*, the respondent was entitled to approach the court on an urgent basis to enforce its rights in terms of the purported cancelled written agreement. This was conceded by the appellant's counsel. Therefore, the respondent is entitled to its costs up until the filing of the replying affidavit. The following order is made.

Order

- 1. THE APPEAL SUCCEEDS WITH COSTS, SUCH COSTS TO INCLUDE THE APPLICATION FOR LEAVE TO APPEAL;**
- 2. THE ORDER OF THE COURT A QUO IS SET ASIDE AND, IN ITS STEAD, THE FOLLOWING ORDER IS ISSUED:**

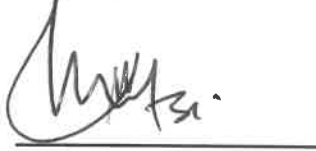
**“1. THE APPLICATION IS DISMISSED WITH COSTS. THE RESPONDENT
IS ENTITLED TO ITS COSTS UP UNTIL THE FILING OF THE
REPLYING AFFIDAVIT.”**



O'BRIEN AJ

Northern Cape High Court, Kimberley

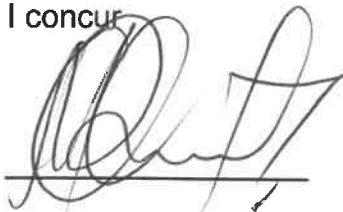
I concur



TLALETSI, JP

Northern Cape High Court, Kimberley

I concur



PHATSHOANE, ADJP

Northern Cape High Court, Kimberley

For the Appellant: Adv WB Pye

Instructed by: Fletcher's Attorneys

For the Respondent: Adv D Olivier

Instructed by: Hugo, Mathewson & Oosthuizen