



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	YES
Circulate to Magistrates:	NO

Case number: 6011/2010

In the matter between:

MOSIUOA ERNEST MOFOKENG

Plaintiff

and

MEC: DEPARTMENT OF EDUCATION,
FREE STATE GOVERNMENT

Defendant

JUDGMENT BY: DAFFUE, J

HEARD ON: 10, 11 and 13 NOVEMBER 2015
26 – 29 JULY 2016
14 NOVEMBER 2016

DELIVERED ON: 29 JUNE 2017

I INTRODUCTION

- [1] A taxi operator and the Department of Education, Free State Province are at loggerheads. Litigation has been dragged out over a period of six years.
- [2] The central issue emanates from a three year fixed term contract entered into between the taxi operator and the Department of Education following a tender process and in terms whereof the taxi operator had to transport learners from their homes in the district of Petrusburg to the Inoseng Primary School in the town of Petrusburg, which contract has been terminated by the Department during the first half of the second year.

II THE PARTIES

- [3] The plaintiff is Mr Mosiuoa Ernest Mofokeng, a taxi operator of Bloemfontein to whom I shall refer hereinafter as the plaintiff. He was represented by Adv CD Pienaar, duly instructed by Phatshoane Henney attorneys of Bloemfontein.
- [4] The Member of the Executive Council of the Department of Education, Free State Province has been cited as defendant in his official capacity. I shall hereinafter refer to the Department as the defendant. Adv Khoza SC assisted by Adv TL Manye appeared for the defendant on instructions of the State Attorney although Adv Khoza did not take part in the latter part of the proceedings.

III RELIEF CLAIMED

[5] It is plaintiff's case that defendant repudiated the contract entered with him in that (a) defendant failed to give reasonable notice of termination and (b) there were no lawful grounds for termination. The following relief is claimed in the particulars of claim as amended:

- “1. An order declaring that the Department's purported termination of the contract on or about 27 April 2009 was in breach of the terms and provisions of the contract and thus unlawful.
2. An order declaring that the contract concluded between the parties on 28 September 2007 is still in force and binding upon the parties.
3. Payment of the amount of R953 436.00 as from 1 May 2009 until the date on which the contract expires or the date on which the contract is lawfully terminated.
4. Payment of the amount of R3000.80 per school day as from 1 May 2009 until the date on which the contract expires or the date on which the contract is lawfully terminated.
5. Interest on the aforesaid amounts calculated at 11.5%, *a tempore morae*.
6. Alternative relief.
7. Costs of suit.”

[6] There are also two alternative claims, the one being for payment of the amount of R361 845,80 plus interest and costs on the basis that the plaintiff's claim for specific performance is unsuccessful. The second alternative claim in the same amount of R361 845,80 is claimed on the basis of the court's finding that plaintiff had elected to cancel the contract as a result of defendant's repudiation and breach of the contract.

- [7] At the commencement of the proceedings and by agreement between the parties I granted an order in terms whereof the issues were separated on the basis that the *quantum* of plaintiff's claim stood over for later adjudication, if required. All other disputes between the parties were to be dealt with and adjudicated during the hearing. As mentioned the main and material issue central to the dispute between the parties is whether defendant lawfully terminated the contract or whether its purported termination constituted repudiation, entitling plaintiff to specific performance and/or damages.

IV **THE DEFENDANT'S DEFENCE ON THE MERITS**

- [8] Two special pleas were raised, but have not been proceeded with. It is therefore not necessary for purpose of this judgment to deal with these special pleas. The first special plea, being in respect of alleged non-compliance with the provisions of Act 40 of 2002, was waived during the pre-trial conference on 5 November 2015, whilst the second special plea to the effect that the parties had to resolve their dispute by mutual consultation or mediation was eventually waived at the commencement of the trial on 10 November 2015.
- [9] Defendant pleaded as follows in respect of the main claim:

“3.2 ad 5.4 Save to admit that the Defendant cancelled the contract the remaining allegations in this paragraph are denied.

3.3 ad 5.5 The Defendant notes the allegations in this paragraph, however the Defendant pleads that the Plaintiff did not have the right to enforce the contract so lawfully terminated.

...

3.6 The Defendant pleads fluctuation of the number of learners and changes which necessitated review of the contract such as hostels housing learners having been erected and developed by the Defendant's department.

3.7 Further the Defendant pleads that at all relevant time the Defendant reserved the right to terminate the contract in the circumstances where there was fluctuation of the number of learners and other factors which necessitated the review and cancellation of the contract.

3.8 The Defendant pleads that the termination of the contract was lawful." (emphasis added)

[10] Based on the allegations contained in the plea defendant also denied that plaintiff was entitled to succeed with the first or second alternative claim and prayed for judgment in its favour with costs.

[11] In response to a request for further particulars defendant elaborated on the reasons for termination of the contract and provided certain answers. It admitted that the number of learners transported by plaintiff fluctuated between 6 and 13 from the date of conclusion of the contract to the 30th of April 2009, but insisted that the contract was cancelled "because there were no learners for the plaintiff to transport."

The crux of the issues between the parties is therefore whether defendant's written letter of termination dated 27 April 2009 lawfully terminated the contract or whether the purported termination constituted repudiation as no lawful grounds or reasons for termination existed.

V ISSUES NOT IN DISPUTE

[12] *Ex facie* the pleadings the following issues are not in dispute:

- 12.1 During 2007 defendant invited tenders for the rendering of transport services to primary school learners in Xhariep district for and on its behalf.
- 12.2 Plaintiff duly tendered and his bid was accepted, whereupon the parties entered into a written contract on 28 September 2007.
- 12.3 Certain material terms of the contract are recorded herein, to wit:
 - (a) Plaintiff would transport farm school learners on route 46 at a rate of R18 per kilometre from their homes on farms in the district of Petrusburg to the Inoseng Primary School in Petrusburg and back on a daily basis during the school term.
 - (b) Defendant reserved the right to terminate the contract in certain circumstances and for the purpose hereof the following paragraphs of the specifications for transport, being part and parcel of the contract between the parties, read as follows:

“27. Duration of the contract:

The duration of the contract is for three years on condition that all requirements of the specifications are met. The offer will be terminated if clause 31 is applied.

...

30. Fluctuation of the number of learners and changes in contract conditions:

The allocated number of schools and/or learners will not necessarily remain the same. Other processes in the Department will have an impact on this for instance, the closing of schools, transfer of learners to hostels, issuing of section 21 status and other factors which may necessitate the review of the contract. In case of any of these situations, the Department reserves the right to terminate the contract. The Department of Education reserves the right to reshuffle transport operators/bidders as and when the need arises.

31. Variation order

In case the number of kilometres changed due to migration, re-location and/or resettlement of learners and closure of farm schools, variation order will be applied.”

12.4 The defendant’s right to terminate the contract was subject to reasonable notice of termination being given to plaintiff.

12.5 Plaintiff rendered transport services in accordance with the contract from 9 January 2008 until 30 April 2009 and invoiced defendant accordingly who effected payment of plaintiff’s invoices pertaining to the aforesaid period.

Defendant purported to summarily terminate the contract with immediate effect in a letter dated 23 December 2008. After negotiations the letter of termination was withdrawn on 21 January 2009.

12.6 In a letter dated 27 April 2009 the defendant notified plaintiff of the termination of his contract with effect from 30 April 2009.

12.7 It is not in dispute that plaintiff was willing and able to carry on with his contractual obligations.

VI SUMMARY OF THE EVIDENCE LED DURING THE TRIAL

[13] Plaintiff testified in his case and two witnesses testified on behalf of defendant. However, bearing in mind the time lapse of between six and seven years from the negotiations prior to termination of the contract and the leading of evidence, it is quite understandable that the memories of the witnesses faded. They had to rely to a great extent on the documentation discovered and handed in as part of two bundles, exhibits “A” and “B” respectively.

[14] This matter can be seen as a test case. Several similar contracts were concluded by defendant with other taxi operators for the transport of learners on numerous other routes in the Xhariep district and it appears from defendant’s presentation to taxi operators that contracts in respect of forty one routes had been

cancelled. I have reason to believe that many other taxi operators eagerly await the outcome of the present proceedings.

[15] Plaintiff testified that in compliance with contractual obligations the driver of his taxi on a daily basis completed delivery notes in which the relevant date, route number, number of learners to be transported and number indeed transported, time of arrival and time collected, were recorded. These documents were signed by the school principal on a daily basis and handed to the defendant on a monthly basis. The delivery notes were used to substantiate plaintiff's claim for payment.

[16] On 8 January 2009 taxi operators, including plaintiff, were called to a meeting held by defendant's officials. They were then informed of the first letter of termination with immediate effect dated 23 December 2009. During the negotiations following upon the first purported letter of termination, taxi operators were informed that defendant could not afford to continue with the various contracts as "the Department is not having money". After meeting Mr Lioma of defendant, plaintiff received a letter from him dated 21 January 2009 in which it was recorded that "the contracts of the affected transport operators will continue to be valid until the outcome of discussions with the affected transport operators."

[17] During January 2009 to March 2009 further negotiations took place between plaintiff and certain taxi operators, they having formed a steering committee on behalf of all taxi operators affected by the defendant's intention to terminate their contracts. Notwithstanding meetings, defendant issued letters of termination

dated 27 April 2009 to taxi operators, including plaintiff, notifying them of the termination of their contracts with effect from 30 April 2009. Plaintiff did not rely on the letter sent to him, but a letter sent to a colleague, Mr Pati, but it is not in contention that the contents of the letters were the same. The defendant *inter alia* recorded herein that the learners “have been identified to be accommodated into hostels” and therefore his route “will be terminated as per Learner Transport Clause quoted in item 2 above”.

- [18] During a presentation in the meeting of 2 February 2009 between the parties Mr Motsoeneng referred taxi operators to a spread sheet on his laptop stipulating that plaintiff’s contract and those of several other taxi operators had to be terminated because they transported less than eight learners. Other reasons were advanced in respect of others. No document was handed out to them at any stage, although a print-out of this document now forms part of the evidential material. However, it is clear that although plaintiff was contracted to transport six learners only, he with the knowledge of officials of defendant often transported as many as thirteen learners. During April 2009, i.e. from the start of the second term on 15 April 2009, he transported nine learners, save for the first two days when he transported seven and eight learners respectively. Plaintiff carried on transporting learners during the first week in May 2009, i.e. after the contract had been terminated by defendant, but the school principal refused to sign the particular delivery notes. It must be borne in mind that although plaintiff’s contract made provision for the transport of six learners on the particular route, he often transported up to thirteen learners. The number never fluctuated below six.

According to him he was in a position to proceed with the contract for the remainder of the three year period and was in fact prepared to continue.

- [19] During cross-examination plaintiff explained that the defendant's version that it had run out of money could not be true insofar as the learner transport project was approved by the National Government and Provinces were requested to co-ordinate the project within their boundaries. According to him sufficient money would have been set aside for the transport needs of the learners.
- [20] Ms N W Ngogodo employed by defendant as a district co-ordinator for the Xhariep district and Mr T S Motsoeneng testified on behalf of the defendant. They testified in general terms and were not specific in respect of the reasons why plaintiff's contract was cancelled. When Ms Ngogodo did offer a reason, her version was contradicted by the objective facts and defendant's own documentation. She incorrectly mentioned that there were no learners to transport in April 2009. She also incorrectly testified that plaintiff's route had to be closed as the number of learners decreased. Their memories really faded and, were it not for the documentation to which they were referred during the evidence and a summary of events prepared by an unknown official from which Mr Motsoeneng testified, it would be virtually impossible to present any meaningful evidence. Defendant attempted to justify its purported termination of the contract between the parties based on the fluctuation of the number of learners which according to plaintiff was not applicable *in casu*. If these witnesses' evidence is considered together with the

documentation relied upon, being prepared for and on behalf of the defendant, e.g. the report of Ms Ngododo dated 19 December 2008, the minutes of the Bid Adjudication Committee (“BAC”) dated 19 December 2008 and the BAC’s letter to Mr Lioma dated 30 March 2009, the only inference to be drawn is that the defendant embarked on a cost-cutting exercise and that termination of the contracts of all taxi operators were considered in general terms without considering reasons for termination of the individual contracts. Therefore the emphasis in the defendant’s pleadings was on a fluctuation of numbers of learners. Mr Motsoeneng testified that the Head of Department of Education (“HOD”) was the only person that had the authority to terminate the contracts of taxi operators. The HOD was not involved in any of the negotiations between defendant’s officials and the steering committee of the taxi operators.

VII **SOME RELEVANT AUTHORITIES**

- [21] The issues in dispute between parties should be defined in the pleadings. These must be clarified with precision and certainty. A party should not be allowed to rely on certain issues in his pleadings and then try to canvass others at the trial. However, pleadings are made for the court and not the other way round. See: *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (AD) 107 C – 108 D, relying *inter alia* on *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198.
- [22] Lewis, JA, writing for the full court, emphasised that a court must examine all the facts – in context – in order to determine what

parties intended when they contracted with each other. This must be done “whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.” See: *Novartis SA v Maphil Trading* 2016 (1) SA 518 (SCA) at paras [24] - [31] and [28] in particular. In the process of interpreting a commercial document the court should in general favour a commercially sensible construction, or as Wallis, JA put it in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18]: “A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.”

- [23] A fixed term contract was entered into between the parties for a period of three years. It was terminated mid-stream. The authorities are clear. None of the parties to a fixed term contract has the right to terminate the contract before expiry of the fixed period, unless there is a specific provision permitting termination on notice during the contractual period. Notice of cancellation of a fixed term contract before the expiry date is a repudiation because it does not in itself constitute a contractually permissible act of termination. See: *Air Traffic and Navigation Services v Esterhuizen* (668/2013) [2014] ZASCA 138 (25 September 2014) at para [17], citing with approval the *dicta* of Cheadle, AJ in *Lottering v Stellenbosch Municipality* 12 BLLR 1306 at paras [14] and [20]. Although the authorities quoted deal with employment contracts, there is to my mind no reason why the principle should not apply to other fixed term contracts as well.

- [24] The common law right to enforce a fixed term contract was confirmed in *Fedlife Assurance Ltd v Wolfaardt 2002 (1) SA 49* (SCA) at para [13]. The court held at para [16] that employees (in submission also other innocent parties in non-employment matters) had a right to be fully compensated for damages they can prove they have suffered by reason of an unlawful premature termination of their fixed term contracts.
- [25] Mr Manye referred me to *Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd 2014 (5) SA 287* (SCA). The facts are totally distinguishable. In *Plaaskem* a contract of unspecified duration was the subject of dispute. The contract did not contain an express term dealing with its duration, although there was no indication that the parties intended to be bound in perpetuity. Hancke, AJA considered all relevant authorities and concluded at para [26] that in such case the surrounding circumstances had to be taken into account as well as commercial efficacy in order to import a tacit term to the effect that the contract would be terminable on reasonable notice. *In casu* the parties are *ad idem* in the pleadings that defendant had to give reasonable notice of termination. Therefore the principle applied in *Plaaskem* may be relevant eventually. It will be considered *infra*.
- [26] Repudiation is discussed in detail in *Christie's The Law of Contract in South Africa*, 6th ed, 538 and further. Where one party to a contract, without lawful grounds, indicates a deliberate intention no longer to be bound to the contract, it is regarded as repudiation. The test is objective. Subjective intent of the party

that does not fulfil his contractual obligations is immaterial. The objective conduct of such person needs to be established. See also: *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (AD) at 22 D - H and *Metalmil (Pty) Ltd v Aeci Explosives and Chemicals Ltd* 1994 (3) SA 673 (AD) at 684 I – 685 G.

- [27] Defendant did not plead a compromise or waiver, but it is deemed apposite to consider authorities in this regard in light of the cross-examination of plaintiff and the minutes of the meeting of 25 March 2009 to which I shall refer again *infra*. The *onus* is on the party relying on compromise or waiver. See: *Christie's The Law of Contract*, 6th ed at 473 and *Hepner v Roodepoort-Maraaisburg Town Council* 1962 (4) SA 772 (AD) at 778. The issue of consent to a court order being granted and waiver in particular was recently considered in *Occupiers of Erven 87 & 88 Berea v CF de Wet NO* [2017] ZASCA 18 at paras [29] – [33] with reliance on the *dicta* in *Laws v Rutherford* 1924 AD 261 at 263. It must have been informed consent in order to be valid and for the consent to be legally effective, it must have been given freely and voluntarily with full awareness of the rights being waived.
- [28] The Free State Provincial Government and its Department of Education in particular is a defendant in these proceedings. Accordingly, it is apposite to remember that Government should set an example and not become lawbreakers or being ignorant of the rights of parties with whom they have contractual relationships. I therefore regard it appropriate to quote extensively from *Free State Province v Terra Graphics* 2016 [3] SA 130 (SCA) para [21]:

“[21] It is important that governmental institutions respect the rights of those with whom it transacts. Government should be a scrupulous role model. In this regard the following part of a dictum of the Constitutional Court in *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC) (2001 (2) SACR 66; 2001 (7) BCLR 685; [2001] ZACC 18) is apposite (para 68):

'South Africa is a young democracy still finding its way to full compliance with the values and ideals enshrined in the Constitution. It is therefore important that the State lead by example. This principle cannot be put better than in the celebrated words of Justice Brandeis in *Olmstead et al v United States*:

"In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. . . . Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.

'The warning was given in a distant era but remains as cogent as ever. ■ Indeed, for us in this country, it has a particular relevance: we saw in the past what happens when the State bends the law to its own ends The legitimacy of the constitutional order is undermined rather than reinforced when the State acts unlawfully.'"

VIII EVALUATION OF THE EVIDENCE AND SUBMISSIONS OF THE PARTIES

- [29] Mr Pienaar submitted that the contract was not lawfully terminated and that defendant repudiated the contract. He emphasised that insofar as a contract was entered into in terms whereof plaintiff had to transport six learners, defendant could not rely on clause 30 to terminate on the basis that plaintiff transported less than eight learners. There was no fluctuation of numbers less than contractually agreed upon. In fact, plaintiff was still transporting nine learners – more than contractually required - during the second term. According to him it is clear that the defendant did not consider the individual contracts, but merely took a general decision. Nothing changed relating to the factual position in plaintiff's case that warranted termination in terms of clause 30.
- [30] Mr Manye requested me to make the following findings:, i.e. (a) that without doubt hostels were developed and/or renovated; (b) according to the minutes of the meeting of 25 March 2009 there was a general agreement and the parties were *ad idem* (plaintiff included) that the contracts would be terminated, including plaintiff's contract in respect of route 46; (c) the termination of the contracts was communicated to taxi operators a few days later and thereby giving effect to the *consensus* reached and (d) the notice of termination was thus lawful. He emphasised that defendant considered the interests of learners and this was the over-riding factor in coming to its conclusions.

- [31] The reader will remember that plaintiff *inter alia* sought an order declaring that the contract between the parties entered into on 28 September 2007 which would run for a period of three years from January 2008 was still in force and binding upon the parties. The matter took an extremely long time to be heard as indicated *supra*. By the time I heard the evidence of Mr Mofokeng in 2015, the three year period for which the contract was concluded, had expired some four years earlier. It is therefore not competent for me to make an order in terms of prayer 2 of the particulars of claim.
- [32] Prayers 3 and 4 relate to claims for payment of money from 1 May 2009 until expiry of the contract or such date on which it is lawfully terminated. These amounts are claimed on the supposition that plaintiff was entitled to specific performance and/or damages. The fact of the matter is that it is impossible to order specific performance due to the time lapse. In any event the amounts claimed are in essence nothing but damages which by agreement I do not have to consider at this stage of the proceedings insofar as the issue of damages stands over for later adjudication if necessary. The first and second alternative claims also deal with damages and do not have to be adjudicated at this stage.
- [33] The only issue to be considered is whether defendant repudiated the contract as relied upon by plaintiff or whether it was lawfully terminated as alleged by defendant. The words in clause 30 must be read in context and in the process of interpreting the contract the court should favour a commercially sensible construction, or

put otherwise, not a construction that will lead to insensible or unbusinesslike results or undermines the apparent purpose of the document. See: *Novartis and Endumeni supra*.

[34] The time that lapsed since the dispute arose at the end of 2008 and beginning of 2009 caused tremendous difficulties for the witnesses. They cannot be blamed for memory losses. No doubt, plaintiff's memory was not as affected as that of defendant's witnesses. This is also understandable as plaintiff experienced the events on a personal level, whilst defendant's witnesses acted in the course and scope of their employment and apparently had to deal with other work-related matters at the same time. The documentation provided to the court in two bundles and handed in as exhibits "A" and "B" respectively, provides a useful paper trail of the events leading to the termination of plaintiff's contract. The witnesses were referred to particular documents contained in the bundles throughout their testimony. Insofar as a witness disagreed with the contents of some of the documents, I shall be at pains to establish which version to accept. Fact of the matter is that the reasoning of defendant's officials in coming to the conclusion that plaintiff's contract should be terminated appears from the documentation and it is shown to be clearly untenable and invalid.

[35] I reiterate that based on a conspectus of all the evidence and the manner in which the witnesses presented themselves in the witness box, plaintiff made a much more favourable impression on me than the two witnesses of defendant. I am also satisfied that the defendant's witnesses testified about reasons for

termination which contradicted the defendant's version as pleaded. I shall explain in the next paragraphs. Suffice to mention at this stage that, as plaintiff testified, it was not a contractual term that defendant could lawfully terminate the contract "if the Department runs out of money." However, if one scrutinises the defendant's documentation relied upon, this was one of the primary reasons to get rid of the taxi operators such as plaintiff. I quote from paragraph 4.7 of the minutes of the meeting of 19 February 2009: "The fact is that it is too costly to run this transport operation and it is not practical." The same sentiments are echoed in the letter of Mr Motsoeneng to the chairperson of the BAC, the recommendation contained therein being recommended by Mr Lioma on 5 March 2009 and I quote from paragraph 6.1: "Learner Support Directorate does not have funds to continue to meet contractual obligations of the affected routes." Contrary thereto, defendant did not rely on cash flow problems and/or insufficient funds for termination of the contract in its pleadings. It would be illogical to do so as one would expect it to budget properly for expenses to be incurred.

- [36] The following resolutions appear from the minutes of a special meeting of the BAC dated 12 March 2009: "Funds are not available to continue meeting contractual obligations of the affected routes. No costing had been done to determine the cost-effectiveness of accommodating learners in hostels versus transporting them between home and school. The Section does not seem to have a clear plan for resolving this matter before the schools re-open in April 2009." The BAC did not make any recommendations and referred the matter to the HOD for directions. A letter to this effect was also sent to Mr Lioma on

30 March 2009, stating *inter alia* that no feedback was received from the HOD.

- [37] It appears from the minutes of the meeting of 25 March 2009 as if an agreement was reached between the defendant's officials present and members of a steering group representing affected taxi operators. Paragraph 4.4 reads as follows: "Mr Lioma indicated that letters will be sent to individuals whose transport contracts will be terminated as agreed in the meeting." There is no indication as to the terms on which termination would be effected. The HOD was not part of the meeting and there is no evidence or even a suggestion that the steering group had a mandate to enter into any agreements. Plaintiff testified that this was not the final meeting and that a further meeting took place at which occasion the spread sheet referred to *supra* was presented to the steering committee. Therefore he denied that the minutes are a true reflection of the discussions on 25 March 2009. According to him Mr Lioma instructed Mr Motsoeneng at this meeting to arrange a further meeting for him to present them with the costing that defendant had done on all affected routes. There was indeed such a further meeting. Plaintiff never mentioned this further meeting in the founding affidavit of the aborted review application. It is possible that plaintiff is mistaken as to precisely when the spread sheet was shown to them, but I am prepared to accept his version that no agreement was entered into. Surely, if that was the case, it could be conditional only as the steering committee had to go back to the other taxi operators to obtain a mandate. Compromise or waiver was not proven. If an agreement was entered into on 25 March 2009 as defendant's witnesses want us

to believe, I would have expected the immediate issuing of letters of termination. Nothing happened for more than a month.

[38] On 23 September 2009 the HOD presented written reasons for termination of plaintiff's contract which document was filed in the review application launched by plaintiff which was aborted later. He stated the following: "Department invoked the provisions of clause 30 above by transferring the learners to the hostels in order to promote an efficient, economic and effective use of the Government resources as contemplated in section 195 of the Constitution of the Republic of South Africa."

[39] I am satisfied that even if it was anticipated that the learners transported by plaintiff would eventually have to be hosted in a hostel, defendant failed to produce evidence that this is what in fact occurred. Plaintiff testified that he proceeded to transport learners after the April school holidays and even during the first week of May 2009 (and after receiving notice of termination effectively from 30 April 2009). According to defendant's records the affected learners were to be hosted in the hostel in Jagersfontein. This is contrary to the documentary evidence – the delivery notes for April – and plaintiff's direct evidence, but also appears to be illogical insofar as the learners at all relevant times attended the Inoseng Primary School in Petrusburg. Neither of the two witnesses of defendant could shed any light in this regard. Ms Ngododo, in particular, was extremely vague and uncertain of herself.

[40] Plaintiff was initially awarded a further contract to transport learners on route 99. He testified that this contract was cancelled by mutual agreement during 2008, the reason being that the particular school was to be closed down at the end of the particular term. According to his memory he was given three months' notice of termination. Unlike in that case, plaintiff did not receive any reason for termination which applied to his contract in particular. If defendant presented plaintiff with a particular and valid reason for termination within the ambit of clause 30, which it failed to do, plaintiff would have been entitled to reasonable notice and in that regard the judgment in *Plaaskem supra* might have been considered. *In casu* defendant initially purported to terminate the contracts in December 2008 with immediate effect and on 27 April 2009 it purported to terminate the contracts as on 30 April 2009, i.e. with three days' notice if it could be accepted that letters were hand-delivered the same day which was not the case.

[41] Ms Ngogodo's letter to the BAC chairperson dated 19 December 2008 to which I referred *supra* serves as overwhelming evidence that a general approach was adopted with costs savings as a prime target. It is unnecessary to quote extensively from the letter. The impression is created that termination of the 41 contracts was a foregone conclusion, subject to approval from the BAC. It is in this letter that the criteria used to terminate contracts were mentioned. These were the following: "4.1 Long routes which are costly to run; 4.2 routes with less than eight learners and less; 4.3 all routes which are 16 km and less; 4.4 routes where learners have been

identified to be transferred to hostels; 4.5 routes with learners from the township who are attending school in farm schools.”

[42] As mentioned, according to the spread sheet referred to, route 46 fell in the second category, insofar as it was alleged that plaintiff transported less than eight learners. The reason given in the spread sheet is in direct conflict with the reasons advanced by the HOD on 23 September 2009 as mentioned *supra*. Both these reasons cannot be reconciled with the reasons advanced in the pleadings, to wit a fluctuation of learners. I have considered Mr Manye’s able submissions, but am unable to find in defendant’s favour as submitted.

[43] No doubt, the defendant was within its right to terminate plaintiff’s contract if circumstances arose as described in clause 30. However, this clause should not be interpreted to give a right to termination if plaintiff still carried on transporting at least six learners as agreed to. Defendant could not unilaterally decide to terminate the contract because plaintiff’s contract provided for transportation of six learners only. No fluctuation occurred on the basis that less than six learners were transported and none of the factors mentioned in the clause are applicable. The opposite is true as mentioned: plaintiff transported more than the six learners agreed upon even after the notice of termination was issued. I am satisfied that defendant could not rely on clause 30 in the circumstances and that its purported termination of the fixed term contract is unlawful and consequently I find that it repudiated the contract. I referred to *Air Traffic and Navigation Services supra* and emphasise that termination during the contractual period is

not an inherent feature of fixed term contracts and therefore it requires specific stipulation. As mentioned in *Terra Graphics supra* governmental institutions must respect the rights of those with whom they transact. If government becomes a lawbreaker, it breeds contempt for the law and anarchy will follow.

[44] It is not possible to grant specific performance for the reasons set out *supra*. Plaintiff is entitled to claim damages as a result of defendant's repudiation and the premature termination of the fixed term contract. The *quantum* of his damages is to be proven in a later hearing or to be agreed upon.

IX ORDERS

[45] The following orders are issued:

- (1) Defendant's purported termination on 27 April 2009 of the contract between the parties was unlawful and a repudiation of the contract.
- (2) Plaintiff is entitled to such damages still to be proved or agreed to between the parties.
- (3) Defendant is liable for plaintiff's costs of the action to date hereof.

J.P. DAFFUE, J

On behalf of the plaintiff: Adv. CD Pienaar
Instructed by:
Phatshoane Henney Inc

BLOEMFONTEIN

On behalf of the defendant: Adv. TL Manye
Instructed by:
State Attorney
BLOEMFONTEIN

/eb