



Reportable:	YES/ NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO

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

Case number: **267/14**

Z J BUSINESS ENTERPRISE CC

APPLICANT

And

UNITRANS PASSENGER (PTY) LTD T/A

MEGA BUS & COACH

RESPONDENT

Coram: Matlapeng AJ

JUDGMENT

- [1] The respondent, Unitrans Passenger (Pty) Ltd, entered into a written agreement with the Department of Transport, Roads and Public Works, Northern Cape for the provision of transport services. One of the conditions of this agreement was that the respondent should empower local entrepreneurs. In pursuance thereof, the respondent called for tenders from the local entrepreneurs to subcontract with it

for the provision of transport service on a particular route. One of the conditions of this tender was that the successful bidder should own a 65 seater bus.

[2] The applicant, Z J Business Enterprise CC, submitted its bid and was awarded the tender. During the interview, the applicant disclosed to the adjudication panel that it did not have the bus as required by the tender. However, the respondent indicated that it was willing to lease a bus to the applicant, presumably to enable the applicant to comply with the requirement of the tender.

[3] Pursuant hereto, the parties entered into a written subcontracting agreement. Clauses 2, 5, and 16 are relevant to the resolution of this dispute. They provide as follows:

2. **Contract Period**

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

5. **Ticketing Machine/Two-Way Radio**

The sub-contractor will hire from MBC a Mercedes Benz 1624 OF Bus, an electronic ticketing machine including a two- way radio at

R25 000.00 per month. This includes the provision of normal wear and tear maintenance but excludes damage caused by abuse.

16. **Cancellation of Contract**

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

- i) If the subcontractor fails to comply with the conditions set out in book 1 and 2 of the contract NV/C/0033.*
- ii) If MBC fails to reimburse the subcontractor for services rendered.*
- iii) If any actions by the subcontractor threaten the cancellation of the contract.*
- iv) If the subcontractor fails to operate the trips as set out in the timetable.*
- v) If the subcontractor submits false claims to MBC.*
- vi) If the subcontractor interferes or competes with the services rendered by MBC in the Kuruman and Surrounding area.*
- vii) Notice of such cancellation must be in writing at least 14(fourteen) days in advance (sic).*

[4] On 11 October 2013, the applicant received a letter from the respondent in which the respondent cancelled the subcontracting agreement. In the letter the respondent states that the since the

commencement of the agreement, the applicant has failed to comply with the clauses of the agreement which includes:

- (a) *Non-participation in the day to day running of your operating route.*
- (b) *Non- involvement in the commuter transport industry.*
- (c) *No intention of purchasing your own vehicle was shown.*
- (d) *Carelessness and reckless manner in which your driver operates the Mega Bus vehicles.*
- (e) *Not acting in terms of the sub-contractor rules as per the Department of Transport (DOT).*

Data for the preceding three years was attached to the letter which according to the respondent shows that the applicant was in a position to buy its own bus. In the letter the respondent still reiterates that the applicant has failed to buy its own bus.

[5] On 13 November 2013, the respondent through its attorneys informed the applicant that due to its failure to acquire a bus of its own, it was given until 31 January 2014 to acquire the bus. Furthermore, the

applicant was requested upon failure to comply with the letter aforesaid to return the leased bus to the respondent.

[6] On 01 February 2014 the respondent took its bus back. On 25 February 2014 the applicant launched the current proceedings to be placed in the same position it was in previously. This application started its life in the urgent court. As certain applications took place in the intervening period, both parties are agreed that because of the effluxion of time, urgency is no longer an issue.

[7] In these proceedings, both the applicant and the respondent, in their papers refer to a lease agreement. However, during argument, the applicant submitted that what is at issue is the subcontracting agreement in which the lease of the bus is incorporated. On behalf of the respondent, it was submitted that the subcontracting agreement remains extant. What was cancelled was the lease of the bus and the two issues should remain separate.

[8] The question to be decided in this matter is whether the parties entered into two distinct agreements, namely the subcontracting agreement and the lease of a bus incorporated in the subcontracting

agreement. The second question is whether the respondent has lawfully terminated the lease agreement.

- [9] In order to arrive at an answer, the starting point is the written agreement. To the extent that this may relate to the interpretation of the agreement, the general rule in the interpretation of written contracts is as follows:

“Now this Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence”. **Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd 1941 AD 43 t 47.** This is what is known as the parol evidence rule.

- [10] However, it appears that over the years the parol evidence rule has undergone some modifications. There is a notable shift from the strict adherence to the rule. This significant shift was heralded in **Johnston v Leal 1980 (3) SA 927 (A)** where the Appellant Division enunciated

the new approach as follows at pages 942-H - 943: *“As has been indicated, the parol evidence rule is not a single rule. It in fact branches into two independent rules, or sets of rules: (1) the integration rule, described above, which defines the limits of the contract, and (2) the rule, or set of rules, which determines when and to what extent extrinsic evidence may be adduced to explain or affect the meaning of the words contained in a written contract: see, for example, the exposition by SCHREINER JA in **Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 (A) at 453-5** (for convenience I shall call this latter rule “interpretation rule”). Neither rule, in my opinion, affects the matter under consideration”.*

[11] In this case, I was urged by the respondent to find that the second set of rules expounded in **Johnson v Leal** supra are applicable which in turn will lead to understanding the context under which the agreement was reached.

[12] I was further referred to the unreported judgment of a case heard in the South Gauteng Local Division under Case No. 6836/2013 which was handed down on 2 September 2014 at paragraph 15.3 which is in line with the Johnson case supra:

“The meaning of a provision is determined with reference to its language and in the light of its factual context, which includes what has previously been referred to as “background circumstances” and “surrounding circumstances”. Since interpretation is “one unitary exercise”, the process requires the court “from the outset” to consider the language and the context of the provision together, whether or not there is any possible ambiguity”.

- [13] After much debate about the proper judicial approach to the interpretation of contracts, the Supreme Court of Appeal delivered a seminal judgment in **Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)** where it stated as follows at paragraph 18: *“.... The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever nature of the document, consideration must be given to the language used in the light of the*

ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production". This is the route that I intend to follow.

- [14] In the present case, the main cause of contention is clause 5 of the written agreement. This clause languidly provides: "*the subcontractor will hire a bus from MBC a Mercedes Benz 1624 OF Bus, electronic ticketing machine including a two- way radio at R25 000.00 per month. This includes the provision of normal wear and tear maintenance but excludes damage caused by abuse*". The language used in this clause is clear and unambiguous. It does not require one to go beyond its every day grammatical use. As a result, it is not necessary to deviate from the ordinary meaning of the words used.

- [15] It has often been said that in the law context is everything. In line with Endumeni supra I am obliged to have regard to the context and the circumstances surrounding the conclusion of this agreement. These are:

15.1 the tender required that the tenderer should have a bus;

15.2 the applicant`s tender was non responsive in that the applicant did not have a bus;

15.3 this notwithstanding, the applicant was awarded the tender.

It is clear to me that even at the conclusion of the agreement, the respondent knew that the applicant did not have a bus of its own. This did not stop the parties from entering into the agreement. Furthermore, in order to enable the applicant to honour its contractual obligations, the respondent leased one of its buses to the applicant.

[16] As a result the applicant was able to perform its contractual obligations. All these happened with the full knowledge and co-operation of the respondent. Until the first letter of 11 October 2013, the respondent never raised any complaint that the applicant failed to provide its own bus.

[17] Nothing in the subcontracting agreement gives any inkling that the clause relating to the lease of the bus is divisible from the agreement and taking the whole subcontracting agreement into account, I see no reason why it should be divisible. The duration of the lease of the bus is linked to the duration of the subcontract period which in turn is the same as the main contract namely, on a month to month basis. The

submission by the respondent that this should be the case is therefore rejected without substance.

- [18] The subcontracting agreement makes provision for circumstances under which the agreement may be terminated. These are listed in clause 16. Possession of a bus by the applicant was never essential to the coming into being of the contract. That this is so is not hard to fathom as the applicant declared at the interview that it did not possess a bus and was awarded the contract notwithstanding. Flowing from this, it seems clear to me that there was no obligation on the part of the applicant to purchase its own bus.
- [19] Based on the above exposition, I would dismiss the respondent's submission as mere sophistry. According to the evidence, the respondent knew that by taking the bus from the applicant, the applicant would not be able to deliver the service as agreed. It follows that the respondent knowingly and deliberately caused the applicant's inability to perform. The conclusion is ineluctable that the respondent's conduct in the circumstances is both mala fide and unconscionable. I am constrained to find as I hereby do, that the respondent's termination of the contract is therefore unlawful.

[20] The respondent further submits that after the parties were granted a postponement in order to attempt to settle their differences, the applicant issued a summons against it based on an alleged oral agreement. As this allegation of an oral agreement is at variance with the allegations in the current proceedings, the respondent argues that this new alleged oral agreement has substituted the written agreement. This defence by the respondent is diversionary in the sense that no existence of the oral agreement has been proved. The mere fact that an allegation is made in the particulars of claim, the terms of which the respondent disputed, does not make the existence of such an allegation a fact. It can only become a fact if it is not disputed.

[21] In the circumstances the following order is made.

1. The cancellation on 11 October 2013 by the applicant of the subcontracting agreement which was entered into by the parties on 03 March 2010 is declared null and void.
2. The respondent is ordered to place the applicant in immediate possession of the bus that it leased in terms of the

subcontracting agreement within 30 days of this order or be placed in possession of a similar bus.

3. The applicant be allowed to lease the bus described above from the respondent on the same terms and conditions set out in the subcontracting Agreement subject to the necessary variations taking into account the changed circumstances.
4. The applicant be allowed to render transport services set out in the subcontracting agreement on the same terms and conditions set out in the subcontracting agreement.
5. The respondent is ordered to pay the costs of this application which costs shall include the costs occasioned by the postponement of this application on 27 March 2016.

Bhupakshi

for
D I MATLAPENG
ACTING JUDGE

Northern Cape High Court, Kimberley

Counsel:

For the Applicant:	<u>Adv A.D Olivier</u>
Instructed by:	Hugo Mathewson & Oosthuizen Inc

For the Defendant:	<u>Adv W.B Pye</u>
Instructed by:	Fletcher's Attorneys

Date of Hearing:	25 November 2016
Date of Judgment:	13 March 2017