IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED ✓
DATE 24/4/15 SIGNATURE

CASE NO: 22599/2015

DATE: 24/4/2015

IN THE MATTER BETWEEN

DAIMLER FLEET MANAGEMENT SOUTH AFRICA (PTY) LTD t/a "dEBIS"	APPLICANT
AND	
TELKOM SA (SOC) LTD	FIRST RESPONDENT
BIDVEST BANK LTD	SECOND RESPONDENT

JUDGMENT

PRINSLOO, J

[1] This rather complex matter came before me in the urgent court on 9 April 2015.

In the urgent sessions of the preceding week, and on 30 March 2015, my learned brother Louw, quite correctly, declined to entertain the matter because of noncompliance with the strictly applied practice directive, but he made an interim order ("the 30 March order) the working of which would expire by midnight on 10 April 2015 or such extended date as another court may determine ("the end date").

At the conclusion of the proceedings before me, I gave an order extending the end date until midnight on 24 April 2015 and reserved judgment on the issues before me, which judgment I propose handing down on 24 April 2015.

[2] Before me, Mr Whitcutt SC, allegedly at times assisted by Mr Itzkin, who I did not have the pleasure of meeting, appeared for the applicant. Mr Badenhorst SC, assisted by Mr Fourie, appeared for the first respondent ("Telkom"). The second respondent ("Bidvest") did not take an active part in the proceedings but, filed papers indicating its support for Telkom's case. I shall refer to the applicant as "Daimler" although I am informed that the applicant also trades under the name "dEBIS".

[3] At the commencement of the proceedings, I enquired from counsel whether there would be any arguments as to urgency. Mr Whitcutt submitted that both Daimler's application and Telkom's counter-application were urgent and Mr Badenhorst maintained that the arguments offered in heads of argument that Daimler's application was not urgent were not abandoned, although he declined to argue the issue *in limine*.

In my view, given the procedural path already travelled by this case, the issues of urgency have been overtaken so that I will treat the matter as one of urgency.

[4] Because of the urgency of the matter, and for valid logistical reasons which I explained to counsel at the conclusion of the proceedings, it is not practicable to give a detailed judgment.

A brief synopsis

[5] Daimler, the applicant (here in the corporate capacity of Daimler Fleet Management South Africa (Pty) Ltd) is a subsidiary of Mercedes Benz South Africa Ltd. It operates a fleet management business in terms of which it offers a full maintenance lease as well as an *ad hoc* rentals solution to its customers. Daimler's main customer is Telkom.

[6] The business relationship between Daimler and Telkom has now endured for almost fifteen years. In March 2000, pursuant to a sale by Telkom of its then fleet operation business to Daimler, as a going concern, the parties entered into a Service Level Agreement ("SLA") in terms of which Daimler was to render services to Telkom. As such, the fleet management service was outsourced to Daimler.

[7] The initial SLA was terminated on 31 March 2005 and then renewed for a further period of three years until 31 March 2008. On 25 March 2008 the parties entered into the 2008 SLA which terminated on 31 March 2013. The 2008 SLA was extended for one year ending 31 March 2014 and in terms of a further addendum, concluded on 31 March 2014, the 2008 SLA was extended for a further one year period which terminated on 31 March 2015, the day after the 30 March order was made.

[8] The fleet management service rendered by Daimler to Telkom is a wide ranging affair: it involves some 5 600 vehicles (at the official count, reflected in annexure "A" to the notice of motion to which I will refer). Daimler purchases the vehicles from various manufacturers and retains ownership in the course of the fleet management service. Before each new vehicle is included in the fleet, it is modified by Daimler to meet Telkom's unique needs. The vehicles are primarily bakkies/pick-up trucks. The modification entails removing the rear portion of each such vehicle and replacing it with a "swoppable box" which has been designed by Daimler to carry the tools and equipment used by Telkom's maintenance technicians who utilise the vehicles. The swoppable boxes are installed on the vehicles in such a manner that they can be detached from each vehicle and replaced with a different box. This facilitates the easy loading of equipment, and also plays an important role in the event that a vehicle breaks down *en route* to conduct the repairs. In that case the box carrying the equipment can be loaded onto a different vehicle. Prior to its inclusion in the fleet, each vehicle is fitted with a Vehicle Tracking and Management System ("VTMS") which has been specifically designed for managing the fleet of vehicles and procured from a third party service provider by Daimler. The VTMS is used, *inter alia*, to track the location of the vehicles, to monitor the driving habits of each individual driver and to log calls for roadside assistance. Importantly, Telkom in its papers, alleges that this VTMS also enables Daimler to immobilise any vehicle in the fleet by remote control. These allegations do not appear to be in dispute.

[9] Other services supplied by Daimler in the course of the fleet management include: training of drivers, registration and licensing of the vehicles, obtaining certificates of roadworthiness, supplying routine and preventative maintenance, providing break-

down, roadside assistance and accident management services, managing the payment of traffic fines, managing the payment of E-tolls, toll fees and weigh-bridge fees, supplying fuel cards for each vehicle, supplying regular reports to Telkom, monitoring and investigating vehicle abuse, withdrawing old vehicles and replacing them with new ones.

[10] Daimler is handsomely paid for the services: over the years it has been paid billions of rand and for the last financial year preceding this litigation, the monthly payment was some R66 million.

[11] My impression is that it is this very issue of Daimler's rates which led to the parties drifting apart and eventually embarking upon the litigation now under consideration: the uncontested evidence illustrates that, presumably with the impending expiry of the contract in March 2015 in mind, Telkom initiated talks with Daimler with the view to arriving at mutual agreement on what acceptable rates would be taking the contract forward. It appears that the parties could not reach an agreement. Daimler was given an opportunity to supply a quotation which Telkom would find acceptable. This did not happen. This inspired Telkom to put the contract out to tender. Daimler took part in the tender activity but was defeated by the successful bidder, Bidvest. The contract was awarded to Bidvest with effect from 1 April 2015.

[12] The main bone of contention between the parties, for present purposes, is the correct interpretation of stipulations in the 2008 SLA providing for a "lead out phase" which governs the situation when the contract comes to an end, either through cancellation or effluxion of time. In the event of termination through effluxion of time, like here, the

lead out phase will be effective for a period of three months. In this case, from 1 April 2015 to 30 June 2015.

[13] In broad and basic terms, the dispute can be described as follows: Daimler insists that any obligations which it may have to discharge during the lead out phase do not include the supply of vehicles to Telkom. Telkom argues that on a proper interpretation, the lead out phase makes provision for the vehicles to remain available to Telkom during the lead out phase, to be gradually phased out and replaced by Bidvest during this period.

[14] It is common cause that Bidvest is not able to immediately replace the some 6 000 strong fleet with effect from the commencement, at the beginning of April, of the lead out phase.

[15] Clause 7.1 of the 2008 SLA, dealing with the lead out phase, stipulates:

> "The Parties agree that in the event of this Agreement being cancelled for whatsoever reason, alternatively terminated through the effluxion of time the Service Provider undertakes to use its <u>best endeavours</u> to render to Telkom all assistance as indicated in the exit management plan (**'lead out plan'**) as reflected in schedule 13 and all such other assistance which may be reasonably necessary to enable Telkom to, either resume provision of the services itself, or to enable Telkom to transfer the provision of the services from the service provider to one or more third parties."

Clause 7.2 of the 2008 SLA provides:

"The Lead Out Plan shall reflect all appropriate system requirements, processes, procedures as well as resources required to facilitate the aforesaid transfer of provision of Services."

[16] Clause 7.3 provides:

"The Parties shall bi-annually for the duration of this Agreement review and update the Lead Out Plan to ensure that it is at all times updated with current system requirements, processes, procedures as well as resources required to facilitate the aforesaid transfer of provision of Services. In the event that Telkom identifies information and/or assistance, which may be necessary and in addition to what was initially included in the Lead Out Plan, Telkom shall inform the Service Provider of the same in writing. The Service Provider will in this regard firstly incorporate such additions into the Lead Out Plan and secondly <u>use its best endeavours</u> to provide such additional information and/or assistance as identified by Telkom as and when the need arises. Any additional assistance and/or service to be provided by the Service Provider at Telkom's request will be charged to Telkom at market related prices."

[17] Clauses 7.4.1 and 7.4.2 provide that all assistance necessary so as to cause the minimum of disturbance and disruption of a material nature to the day-to-day operations of Telkom as a result of the cancellation or expiry of this agreement will be provided and there must also be a hand over of control to Telkom of all data and information of whatsoever nature necessary to facilitate the transfer of the services from Daimler to the next service provider or to Telkom.

[18] Perhaps importantly, in my view, is the following provision contained in clause 7.6.2:

> "The Service Provider shall not be entitled, for the period referred to in clause 7.6.1, to sell, hypothecate or otherwise encumber any or all of the Vehicles reflected in schedule 2 during the last month of the currency of the Agreement, unless the Service Provider shall have first, by Written Notice to Telkom, offered to sell such Leased Vehicles to Telkom."

(It is provided that the sales, if any, should be at fair market value.)

The question which arises is why there should be this prohibition on Daimler to alienate the vehicles in the last month leading up to the expiry of the contract if the vehicles were not to play a role during the lead out phase.

[19] Clause 33.1.2(2), also stipulated to apply during the lead out phase, provides that during this phase Daimler (will) "use its <u>best endeavours</u> to render to Telkom all assistance necessary to effect an orderly hand-over of the Services to Telkom or any third party nominated by Telkom for this purpose in order to achieve the minimum of interruption or inconvenience to Telkom".

"Services" is defined in the 2008 SLA as meaning "the Vehicle services in clause 5 to be provided by the Service Provider to Telkom in terms of this Agreement". Clause 5 deals with the full management and operation of the vehicles.

[20] Schedule 13, dealing in more particularity with the lead out phase, was not attached to the founding papers but it was attached to the opposing affidavit. It provides, in clause 1.4:

> "The Service Provider is obliged in terms of clause 7 to <u>use its best endeavours</u> to provide all necessary assistance to enable Telkom, on termination, to resume the services, as conducted by Fast Fleet prior to the effective date, with the minimum of disturbance and disruption of a material nature to the day-to-day operations of Telkom."

(The repeated emphasis of the reference to the use of Daimler's best endeavours is mine.)

[21] Clause 1.6 of schedule 13 provides

> "The Service Provider wishes to submit a high-level lead-out plan which shall form the basis and framework within which the parties shall negotiate a final and detailed lead-out plan."

As I understood Mr Badenhorst, such a high level plan never became a reality. In my view, not much turns on this for present purposes.

[22] I turn briefly to my repeated emphasis of the contractual duty on Daimler to use its "best endeavours" to, for example, "render to Telkom all assistance as indicated ... and all such other assistance which may be reasonably necessary to enable Telkom to either resume provision of the services itself or to enable Telkom to transfer the provision of the services from (Daimler) to one or more third parties".

Counsel for Telkom, with reference to some English authority, strongly argued that the use of the phrase "best endeavours" in various clauses of the contract, fortifies their argument that the SLA should be interpreted in such a way that the conclusion that the vehicles were to remain available to Telkom during the lead out phase is the reasonable and correct one.

[23] In supplementary heads of argument, counsel for Telkom submitted that in English law, the phrase "best endeavours" has been held to have specific meaning in commercial contracts. The starting point is that the phrase "means what the words say; they do not mean second-best endeavours", and mean an obligation to leave no stone unturned, within the bounds of reason (*Sheffield District Railway Co v Great Central Railway Co* [1911] 27 TLR 451).

Counsel pointed out that this has been further refined by the Court of Appeal to require the obligors "to take all those steps in their power which are capable of producing the desired results ... being steps which a prudent, determined and reasonable obligor, acting in his own interests and desiring to achieve that result, would take" (*IBM United Kingdom Ltd v Rockware Glass Ltd* [1980] FSR 335).

[24] The weight of the English authority quoted, and I will not dwell on the subject any further, appears to indicate that an obligation to use best endeavours should usually be held to be an enforceable obligation.

[25] Against this background, Daimler seeks final interdictory relief restraining Telkom from using the vehicles as from 1 April 2015 (as I explained, this "end date" was extended to 10 April by the 30 March order and to 24 April when the matter came before me on 9 April).

The final interdictory relief sought in the form of a *mandamus* is also to direct Telkom to hand over possession of the vehicles to Daimler in accordance with a proposed hand over schedule.

[26] Telkom, on the other hand, seeks interim relief aimed at ensuring the continued use of the vehicles during the lead out phase, as required, considering that new vehicles will be brought in by Bidvest, pending the outcome of arbitration proceedings or the institution of other procedures.

[27] So much for a brief synopsis of the case.

[28] I now consider, in that order, Daimler's application for final interdictory relief and, thereafter, Telkom's counter-application.

A. DAIMLER'S APPLICATION FOR FINAL INTERDICTORY RELIEF

(i) <u>The notice of motion</u>

[29] The relevant prayers read as follows:

> "2. That the first respondent be interdicted and restrained from utilising any of the vehicles described in annexure '**A**', as from 1 April 2015.
>
> 3. That the first respondent be directed to hand over possession to the applicant of the vehicles described in annexure '**A**' in accordance with the hand over schedule set out in schedule '**B**'."

[30] Annexure "A" is an impressive affair. It lists, in alphabetical order, no less than 279 cities, towns and villages throughout the country and illustrates the number of Telkom vehicles deployed, as at 31 March 2015, to each such city, town and village. For example, there is only one Telkom vehicle in Albertinia, Alice, Calvinia, Darling, Delareyville, Garies, Hoopstad and many others. Towns like Balfour, Bergville, Carolina, Hluhluwe, Melmoth, Mogwadi, Uniondale and a number of others have graduated to sport two vehicles. The number of vehicles deployed in the various cities, towns and villages range from 1 to 577 in Johannesburg and 518 in Pretoria.

The grand total comes to 5 588 vehicles. Annexure "A" is only a summary. Full details are particularised in a memory stick as agreed between the parties, reflecting the position as at 31 March. The memory stick, by agreement, is in the safe custody of Telkom's attorney of record.

[31] Annexure "A" graphically illustrates the magnitude of this particular motor leasing operation.

[32] Annexure "B" is the so-called "hand over schedule" prepared by Daimler and attached to the notice of motion. In broad terms, it suggests that Daimler is in the process of finalising a detailed collection plan of all its vehicles available to Telkom by close of business on 30 March 2015. A Daimler staff member will contact the relevant Telkom yard supervisor on 31 March 2015 to confirm that the vehicles are ready for collection in line with a "supplied collection plan" which, as far as I can gather, has not yet seen the light. It is foreshadowed that "collection" will commence on 1 April 2015. In annexure "B", Daimler estimates the "complete collection process" not to

exceed 20 business days. This would cover approximately one calendar month, or the first of the three months applicable to the lead out phase. As it is, that period would have all but expired by the time I hand down this judgment on 24 April, as I intend to do, on the eve of the expiry of the extended "end date" by midnight on that day.

[33] So much for the notice of motion.

(ii) The rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 (AD) ("the *Plascon-Evans* rule")

[34] "... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order ... where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."

- *Plascon-Evans* at 634E-F, quoting from *Stellenbosch Farmers' Winery Ltd v Stellenbosch Winery (Pty) Ltd* 1957 4 SA 234 (C) at 235E-G.

[35] The "exception" to this general rule is described as follows by the learned Judge of Appeal at 635B-D:

> "Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers ..."

[36] I mention at the outset that I find nothing whatsoever in the submissions made on behalf of Telkom in opposition to the Daimler application "so far-fetched or clearly untenable" that I consider that they can be rejected merely on the papers.

Disputed facts on the papers, in this case, must therefore be decided on Telkom's version together with the admitted facts in Daimler's affidavits.

(iii) <u>The requisites for a final interdict</u>

[37] I find it convenient to refer, generally, to the account given on the subject by the learned author Prest *The Law and Practice of Interdicts*, which is considered to be an authoritative work on the subject. For the sake of brevity, I refrain, as far as I can, from referring to authorities quoted by the learned author in the footnotes.

[38] At p42-43, the learned author states:

> "Unlike an interim interdict, which does not involve a final determination of rights of the parties, a final interdict affects such a final determination of rights. It is granted 'in order to secure the permanent cessation of an unlawful course of conduct or state of affairs'. For the grant of such an order there are three requisites, all of which must be present."

It is trite that these requisites are a clear right, "injury actually committed or reasonably apprehended", and proof that there is no other satisfactory remedy available to the applicant.

(a) Clear right

Prest, p43, suggests that "the word 'clear' relates to the degree of proof required to establish the right and should strictly not be used to qualify 'right' at all. The existence of a right is a matter of substantive law. Whether that right is clearly established is a matter of evidence. In order to establish a clear right the applicant has to prove on a balance of probability the right which he seeks to protect."

[39] In the founding affidavit, Daimler does not say much about its alleged clear right to this final interdictory relief. It appears to limit its submissions to the following three paragraphs:

> "96. The applicant has a clear right to the return of its Vehicles after 31 March 2015.
>
> 97. Telkom is obliged, in terms of the implied term of the 2008 SLA, to return the Vehicles upon the termination of the period of the 2008 SLA (as extended until 31 March 2015).
>
> 98. The ownership of the Vehicles vests in the applicant, and there is no legal basis for Telkom to retain possession of the Vehicles after 31 March 2015 in circumstances where the 2008 SLA will expire through effluxion of time on that date, and where DFM's (read Daimler's) obligations in respect of the Lead Out Phase do not include providing Telkom with possession of the Vehicles."

As to the "implied term of the 2008 SLA", referred to, this seems to be mentioned in paragraph 46 of the founding affidavit:

> "It is an implied clause in terms of the 2008 SLA (read with schedule 13 and annexure 6) that Telkom is to return possession of the vehicles to DFM when the 2008 SLA terminates by effluxion of time on 31 March 2015. This in circumstances where the vehicles are owned by DFM, where DFM is entitled to sell the vehicles during the Lead Out Phase, and where there is no contractual (or other legal) basis on which Telkom is entitled to retain possession thereof beyond 31 March 2015."

In the alternative, Daimler states in paragraph 47 of the founding affidavit that it is entitled to the return of the vehicles upon termination of the agreement by virtue of the fact that it owns the vehicles.

I have already pointed out that the contracts provide that Daimler is not at liberty to sell or alienate the vehicles during the lead out phase period without having first, by written notice to Telkom, offered to sell the vehicles to the latter.

It is argued on behalf of Telkom that, properly interpreted, the provisions of clause 7.6 of the SLA (dealing with the selling of the vehicles during the lead out phase) do not override the obligations of Daimler towards Telkom during the lead out phase. It is argued on behalf of Telkom that these obligations include providing Telkom with the use of the vehicles, to the extent required by Telkom for the duration of the lead out phase.

[40] There is no reference in the founding affidavit, as far as I can make out, to clear provisions in either the SLA or schedule 13 or annexure 6 to the effect that the vehicles are not to remain available during the lead out phase.

[41] Where the parties specifically provided for a three month lead out phase in the contract, and where clause 7.1 of the SLA clearly provides that Daimler undertakes to use its best endeavours to render to Telkom all assistance as reflected in schedule 13, and all such other assistance which may be reasonably necessary to enable Telkom to, either resume provision of the services itself, or to enable Telkom to transfer the provision of the services from Daimler to one or more third parties, I find it difficult to accept an interpretation of these provisions to the effect that the parties intended that their relationship, as far as the use of the vehicles is concerned, would come to an end by midnight on 31 March 2015. There is no clear provision to that effect. Given the magnitude of the operation, it is difficult to identify an intention by the parties that all the vehicles, country-wide, numbering almost 6 000, would remain available and in use until midnight on 31 March and, when the clock strikes 12, become unavailable to Telkom. Even Daimler's own "collection plan" to be found in annexure "B" to the notice of motion, foreshadows the gradual removal from Telkom yards of the vehicles over a period of almost a month.

[42] On Daimler's proposed interpretation of the agreement, it seems that one must accept a situation of Cinderella like proportions: at the stroke of midnight, all the vehicles, from Albertinia to Zeerust, from Gingindlovu to Odendaalsrus and from Kirkwood to Rouxville all become unavailable to Telkom engineers using them up to midnight. I was not informed what the parties intended, on Daimler's version, to happen after

midnight. Were the vehicles to be abandoned on the spot by Telkom drivers and engineers using them at the time, or were they to be taken to some or other "Telkom yard" such as there may be in each of these distant little towns and villages?

[43] Perhaps more importantly, on Daimler's interpretation, one has to assume that the parties intended a seamless hand over of services between Daimler and Bidvest at the stroke of midnight: reminiscent of what happened to Cinderella, brand new Bidvest vehicles must suddenly emerge from nowhere in Alice, Flagstaff and Hartbeesfontein at midnight to carry the baton forward and avoid an interruption in the delivery by Telkom of, for example, emergency services.

[44] It is convenient, at this point, to quote what Telkom has to say, in the opposing affidavit, about the effect of an interruption to its services. This evidence is **undisputed** as, in the replying affidavit, Daimler simply suggests that Telkom failed to take the necessary steps timeously to implement a "reasonable hand over plan or accept DFM's repeated offers of assistance". I will revert briefly to these "offers of assistance" but it is necessary to mention the Telkom allegations about the results of an interruption:

> "25. It follows that loss of this vital resource will immediately cause paralysis of some of Telkom's essential business activities throughout South Africa.
>
> The purpose for which the Telkom fleet is utilised is as follows-
>
> 25.1 99% of the fleet is assigned to technicians which *inter alia* perform the following main functions;

25.2 installation of new telecommunication services;

25.3 repair of faulty telecommunication services;

25.4 routine maintenance of telecommunication services; and

25.5 planning and engineering of telecommunication services.

26. Telkom's fleet, which is deployed throughout South Africa, travels an average 9 million kilometres per month in total – this gives some idea of the important contribution made by the fleet in enabling Telkom's daily business activities.

The effect on Telkom's infrastructure if it did not have the use of the fleet.

27. Depriving Telkom's fleet of vehicles, will **immediately** result in a total inability to perform repairs, routine maintenance and the extension of Telkom infrastructure.

28. This will have the following immediate consequences:

28.1 no new services will be installed (a current average of 13 600 installations per week);

28.2 inability to repair any service interruptions reported. (A current average of 29 600 incidents per week); and

28.3 general deterioration as a result of the lack of routine maintenance of the infrastructure, will aggravate the vulnerability of the said infrastructure making it prone to more failures.

29. It will also have the following likely consequences:

29.1 failures in Telkom's infrastructure will not only impact the Telkom primary customers, but the secondary customers, utilising our Telecommunication Transportation infrastructure will also suffer catastrophic failures;

29.2 with specific reference to the Telkom's large wholesale customers (Vodacom, MTN, Cell C and Internet Solutions) whose own services will be adversely affected by the failure of Telkom's provided services to them.

30. The increasing cascade of unrepaired failures across the network may have the combined effect of causing catastrophic large-scale failures in the South African telecommunications network as a whole.

31. Such failures could include a total shut-down of all financial services (for example banks, automated teller machines, internet transactions). The isolation of medical services, inability of organs of State (inclusive of National Key Points) to communicate as well as every single large enterprise business utilising the telecommunication network being adversely affected. Indeed, the internet service – both local and international – is likely to be compromised.

32. It is commonly accepted that a link exists between efficient telecommunication infrastructure and economic growth, it is therefore likely that a catastrophic failure of Telkom's infrastructure will not only result in social decay, but also in economic collapse of the country."

[45] It may be, that the deponent to the opposing affidavit is dramatising to an extent, but this is the Telkom version which I have to accept and it is in any event uncontested.

[46] Against this background it is difficult to interpret this contract, centered around a motor leasing scheme of this magnitude, and featuring a three month lead out phase, in such a way that it was the intention of the parties that by midnight upon the expiry of the contract and upon the commencement of the lead out phase, the vehicles would no longer be available to Telkom.

In my view, relevant considerations in interpreting this contract must include the fact that there are almost 6 000 vehicles, specially customised for the use of Telkom and spread all over the country.

[47] For purposes of attempting to interpret the contract, I was referred by Telkom's counsel to an often quoted recent judgment namely that of *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA). I quote a few extracts from what was stated in para [18]:

> "Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document."

And:

> "The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

Another leading recent case is that of *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 2 SA 494 (SCA) where the following is said in para [12]:

> "The process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being."

[48] In my view, and in these particular circumstances, the "sensible meaning (which) is to be preferred to one that leads to insensible and unbusinesslike results or undermines the apparent purpose of the document", in the words of the learned Judge of Appeal in *Endumeni*, is that the parties intended that the vehicles should remain available during the lead out phase.

[49] I am not making a final pronouncement on this. Firstly, because I do not consider it necessary in order to decide whether or not Daimler succeeded in discharging the *onus* of proving that it has a clear right to this final interdictory relief, and, secondly, because to do so could be to usurp the function of another court or tribunal to which this dispute may be referred.

[50] Finally, and before turning to the next requirement for final interdictory relief, it is worth mentioning that there is strong and undisputed evidence (which I must in any event accept because it is the Telkom version) that the executive chair person of Daimler, Mr Koller, at a meeting on 15 January 2015 with Bidvest, stated that Daimler

> "remains contractually committed to providing Telkom with all the services until such time as the newly appointed Service Provider is in a position to do

> so. He emphasised however, that they would not be leasing vehicles to us (meaning Bidvest) on a sub-lease basis but rather that they would continue to lease direct to Telkom until the relevant vehicle is replaced by the new Bidvest vehicle."

This is stated in a letter of 29 January 2015 by Mr Byron Corcoran the Head: Fleet and Asset Finance Division of Bidvest. As I indicated, this is not disputed on the papers. Corcoran deposed to a confirmatory affidavit. It is perhaps significant that there was no affidavit from Koller.

In a later electronic letter dated 16 February 2015, Corcoran again reports on a meeting he had with Koller on the same date. He states that Koller

> "reconfirmed that he is contractually bound to provide all services for 90 days from 1 April 2015 and is prepared to deliver these services in line with the lead out agreement. He stated that he had received a letter from Telkom advising that DFM is no longer required from 1 April 2015 and therefore is happy to extract his fleet if it is not required ... I have strongly urged Telkom not to terminate their lead out agreement with DFM as Bidvest simply cannot supply the required number of vehicles on 1 April 2015."

Daimler disputed that Koller said that Daimler is contractually bound to provide all services during the lead out phase. In the replying affidavit Daimler states that the meeting was held on a "without prejudice" basis and Koller did not use the word "Services" – according to the deponent he used the word "support". This qualification may be inspired by the fact that "Services" is defined in the contract as including the use of the vehicles. In any event, I consider it inherently improbable that Corcoran would have fabricated this version and, in view of *Plascon-Evans*, I have to accept his statement. The allegation that Telkom indicated that the services would not be required from 1 April is denied on oath by Mr Ian Russel, chief procurement officer employed by Telkom. He states:

> "What I told Mr Alp was that Telkom will not be renewing the agreement with dEBIS. I never said that Telkom would forego the lead out services which dEBIS is obliged to render in terms of the agreement."

Corcoran's e-mail of 16 February is quite a lengthy affair. Only the aforementioned statement is disputed. The following statement by Corcoran is not disputed:

> "Mr Koller's preference is to continue to contract directly with Telkom for the 90 days but may be willing to consider contracting with Bidvest from 1 April."

[51] In their heads of argument, Telkom's counsel submit that an interpretation of Daimler's obligations during the lead out phase that excludes the duty to make the fleet of vehicles available to Telkom, is absurd, and would deprive the lead out section of all business meaning.

[52] Against this background, I have come to the conclusion, and I find, that Daimler has failed to discharge the *onus* to prove that it has a clear right to the final interdictory relief contended for.

(b) "Injury actually committed or reasonably apprehended"

[53] With reference to the trite authorities, *Prest*, at 45, states:

"A reasonable apprehension of injury is one which a reasonable man might entertain on being faced with the facts which the court finds to exist on a balance of probabilities. The test for apprehension is an objective one. The applicant must therefore show objectively that his apprehensions are well grounded. Mere assertions of his fears are insufficient. The facts grounding his apprehension must be set out in the application to enable the court to judge for itself whether the fears are indeed well grounded."

[54] After dealing in the founding affidavit, in rather brief terms as I have illustrated, with its contentions for a clear right, and before turning to the subject of the alleged absence of an alternative remedy, Daimler only states the following:

"99. Moreover, given the significant risks that will arise in relation, *inter alia*, to loss and/or damage of the vehicles as from 1 April 2015, there is a reasonable apprehension that the applicant will suffer damages if it does not regain possession of the vehicles (regard being had, in particular, to the large number of vehicles involved)."

[55] Under the heading "balance of convenience", which does not, strictly speaking, apply to final interdictory relief, Daimler, rather vaguely, only states the following:

"104. In particular, in circumstances where DFM intends, on 1 April 2015, to offer certain of the Vehicles for sale to Telkom in terms of clause 7.6.2 of the 2008 SLA (and to offer them for sale to a third party if Telkom does not take up the offer – which may include Bidvest if it wishes to purchase the Vehicles), the balance of convenience weighs in favour of giving effect to DFM's rights in relation to the vehicles."

[56] In paragraph 82 of the founding affidavit Daimler also claims that Telkom's continued possession of the Vehicles after 31 March 2015 would be "severely prejudicial" to Daimler, and the following points are made:

1. Daimler would receive no consideration for Telkom's continued possession and use of the Vehicles. This is incorrect. In the counter-application, it is proposed that Daimler will continue to receive payment at the normal rates, escalated, if applicable, in line with the Consumer Price Index.
2. The Vehicles would not be subject to insurance cover. This is not correct. Telkom insures the Vehicles.
3. Daimler would be liable for expenses arising from the use of the Vehicles by Telkom including traffic fines, E-toll fees and similar expenses. This is the prevailing situation in any event and must form part of the handsome compensation of some R66 million per month which, on Telkom's version, which I must accept, is well in excess of market related tariffs.
4. The Vehicles will depreciate in value. This will in any case be the position.
5. The Vehicles "are likely to be placed by Telkom under the control and management of the incoming Service Provider, Bidvest, which has no rights in respect of the Vehicles". There are clear signs, as I have illustrated, that Daimler contemplates the sale of these Vehicles to Bidvest, if the latter would be interested.

6. Alterations to the VTMS and other systems in the Vehicles would be necessary in order for Bidvest to render the services to Telkom and result in warranties in respect of the Vehicles being rendered void. This appears to be nit-picking and something which will be resolved through negotiation.

7. Daimler would be required to continue delivering the full suite of services in circumstances where there is no contractual arrangement in place "and which would be severely prejudicial to DFM". I have dealt with the issue of the contractual provisions.

[57] Telkom's counsel, correctly in my view, argue that Daimler failed to establish a legitimate fear of irreparable harm occurring if Telkom makes use of the fleet during the lead out phase. As I have indicated, Telkom insures the vehicles and pays Daimler handsomely for their use (some R66 million per month on average during the last financial year).

Counsel argue that it is important to bear in mind that these are customised bakkies and cannot be sold or otherwise disposed of overnight for a reasonable price. It seems to me that on this basis, it may be to the advantage of Daimler to have the vehicles put to proper use during the lead out phase (of which only about two months remain) given the handsome compensation received in the process.

Counsel reconfirm the obligation on Telkom to insure the vehicles by referring to a Certificate of Insurance attached to Telkom's answering affidavit. All the vehicles are directly insured by Telkom from 1 April 2015 to 31 March 2016.

Counsel also refer to the rather vague allegations in paragraph 104 of the founding affidavit, to which I have referred, dealing with the potential of selling the vehicles to Bidvest or other parties. There is no evidence that the potential offers have materialised, or that potential offers have fallen away or are likely to fall away as a result of Daimler being ordered to comply with its obligations (on the Telkom version) under the lead out phase. Counsel contend that the market for some 6 000 used and customised "Telkom" bakkies cannot be particularly liquid, and is unlikely to change much in the next three months (now two months, to be exact).

[58] Against this background, I am not persuaded that Daimler managed to discharge the *onus* of showing "injury actually committed or reasonably apprehended" if the vehicles were to remain available to Telkom during the lead out phase.

(c) <u>No other remedy</u>

[59] *Prest*, at 45, and with reference to the trite authorities says the following:

> "A final interdict is a drastic remedy and (probably largely for that reason) in the court's discretion. The court will not, in general, grant an interdict when the applicant can obtain adequate redress in some other form of ordinary relief. An applicant for a permanent interdict must allege and establish, on a balance of probability, that he has no alternative legal remedy. The courts will not, in general, grant an interdict when the applicant can obtain adequate redress by an award of damages."

[60] The best Daimler can do, in the founding affidavit, under the heading "absence of alternative remedy" is the following:

> "100. The applicant has no alternative way of protecting itself and its proprietary interests other than by way of the relief sought in this application.
>
> 101. A claim for damages would also necessitate Bidvest being embroiled in a dispute in relation to contraventions of DFM's rights by Telkom.
>
> 102. Self-evidently, this would lead to significant complications in relation, *inter alia*, to the determination of liability and the quantification of damages."

[61] I find these submissions vague, and, with respect, utterly unconvincing.

[62] Counsel for Telkom argue, correctly in my view, that Daimler has an obvious alternative remedy – a claim in contract for payment of services rendered (which, in any event, is proposed for purposes of the counter-application, coupled, to boot, with increases in terms of the CPI) and a claim for contractual damages if any arise in the next three months (now two months).

Counsel submit that there can be no basis for an allegation that such damages will not be capable of quantification or that Telkom will be unable to satisfy a successful claim for damages.

[63] The claim by Daimler that Bidvest will become "embroiled" in the dispute is, in my view, nonsensical and without merit.

[64] In the circumstances, I have come to the conclusion that Daimler failed to prove that it has no alternative remedy which, on the trite authorities, ought, generally, to result in the application for final interdictory relief being dismissed.

[65] In view of all the circumstances, I have come to the conclusion, and I find, that not one of the requirements for final interdictory relief has been proved, so that the application falls to be dismissed.

B. TELKOM'S COUNTER-APPLICATION

[66] The counter-application, broadly speaking, is aimed at obtaining interim relief which will preserve the *status quo* (including the availability of the vehicle fleet services) for what is left of the lead out phase, pending the final resolution of the disputes between the parties in accordance with the dispute resolution process provided for in clause 40 of the 2008 SLA.

[67] For the sake of brevity, I will not quote extensively from clause 40 but it can be said that it is a wide ranging affair providing a mechanism for resolving disputes which may arise between the parties in connection with, *inter alia*, the formation, implementation, interpretation, application of the provisions of, respective rights and obligations of the parties arising out of, breach or termination of and validity, enforceability, termination or cancellation of the SLA.

[68] The present dispute between the parties clearly falls inside the ambit of what is covered by clause 40.

[69] Clause 40.4, it should be mentioned, provides that notwithstanding anything to the contrary contained in clause 40, neither party shall be precluded from obtaining interim, "injunctive" or similar relief from a court of competent jurisdiction. For this reason neither party was prohibited from approaching the court for the relief which they are seeking.

The requirements for an interim or interlocutory interdict

[70] As pointed out by *Prest* at 50 the requirements were stated as follows by Corbett J (as he then was) in *L F Boshoff Invesments (Pty) Ltd v Cape Town Municipality* 1969 2 SA 256 (C) at 267A-F:

> "Briefly these requisites are that the applicant for such temporary relief must show -
>
> (a) that the right which is the subject-matter of the main action and which he seeks to protect by means of interim relief is clear or if not clear, is *prima facie* established, though open to some doubt;
>
> (b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
>
> (c) that the balance of convenience favours the granting of interim relief; and
>
> (d) that the applicant has no other satisfactory remedy."

(i) *Prima facie* right

[71] I have dealt with, and considered, the provisions of the 2008 SLA and schedule 13. In order to interpret the contract, and determine the intention of the parties, I have referred to certain authorities and also considered some surrounding circumstances, including the utterances of Mr Koller, Daimler chief, indicating that he also considered the maintenance of the fleet services throughout the lead out phase to be appropriate.

[72] It is not necessary to re-visit all these issues. I have expressed the *prima facie* view that Telkom's interpretation is the most reasonable and businesslike one. On that interpretation, the fleet services must be maintained throughout the lead out phase, subject to reduction as the Bidvest vehicles come into play. I refrained from finally pronouncing on the subject, indicating that, in my view, it was not necessary to do so in order to decide whether or not a clear right had been proved by Daimler and, secondly, such a final pronouncement would usurp the functions of the final arbiter on the subject, such as the clause 40 arbitration body or another appropriate forum.

[73] Nevertheless, on my interpretation of the contract, Telkom has a *prima facie* right to the interim relief, even if it were to be "open to some doubt" in the words of the learned Judge.

(ii) A well-grounded apprehension of irreparable harm to Telkom if the interim relief is not granted

[74] I have quoted the undisputed evidence of Telkom about the catastrophic results that will ensue if the fleet services and the use of the vehicles were to be removed. I have

indicated that it is common cause that Bidvest is not able to immediately step into the breach, but will only do so gradually.

[75] In the result, I have come to the conclusion, and I find, that the required well-grounded apprehension of irreparable harm has been properly established by Telkom.

(iii) <u>The balance of convenience favours the granting of the interim relief</u>

[76] The catastrophic results that will come about if the fleet services were to be interrupted at this stage overlapse with the question of the balance of convenience.

[77] The next leg of the enquiry is to determine whether the prejudice or inconvenience to Telkom, if the interim relief is not granted, will exceed the inconvenience to Daimler if the interim interdict is granted. *Prest*, at 69, puts it as follows:

> "The balance of convenience is the test whereby a court considers the potential injustice to the plaintiff if the injunction is withheld and the potential injustice to the defendant if the injunction is granted. The course to be taken is that which would involve the least risk of ultimate injustice, having regard to the actual and potential rights and liabilities of the parties on both sides."

[78] It is common cause that the prejudice and inconvenience to Telkom, if the relief is not granted, will be particularly severe, if not catastrophic.

[79] I have dealt with the potential harm or inconvenience to Daimler if the relief were to be granted: Daimler would simply carry on, for another two months, doing what it has been doing for the last 15 years. It will be handsomely rewarded, and, in certain

respects, the rates will be increased according to the CPI. It will have more time to find a market for the 6 000 customised vehicles, while receiving handsome compensation in the meantime. Its interests in the vehicles remain protected, because Telkom provides proper insurance.

[80] In my view, there is no question that the balance of convenience favours Telkom. I find accordingly.

(iv) No alternative remedy

[81] In these urgent, and, in my view, desperate, circumstances, I see no alternative remedy for Telkom to avoid the imminent interruption of the fleet services.

[82] The granting of an interim interdict is a discretionary remedy. *Prest*, at 79, puts it as follows:

> "In every case of an application for an interdict *pendente lite* the court has a discretion whether or not to grant the application."

[83] In my view, this is a proper case for exercising my discretion in favour of Telkom.

Conclusion

[84] In all the circumstances, and for the reasons mentioned, I have come to the conclusion that the Daimler application for final relief ought to be dismissed and the Telkom application for interim relief ought to be granted.

[85] As to the specific relief I propose granting in respect of the counter-application, it takes into account, partly, certain proposals made on behalf of Telkom in draft orders submitted to me.

The costs

[86] I see no reason for departing from the normal approach that the costs should follow the result. No arguments to the contrary were submitted to me.

[87] There was some argument presented to me about the costs of the proceedings of 30 March which led to the 30 March order being granted. After due reflection, I have come to the conclusion that these costs should also follow the result.

The order

[88] I make the following order:

1. Daimler's application for final interdictory relief is dismissed.

2. Pending the final resolution of the disputes between the parties (which arise in these proceedings) in accordance with the dispute resolution process referred to in clause 40 of the 2008 Service Level Agreement ("SLA"):

   2.1 Daimler is ordered to comply with the following obligations during the lead out phase, 1 April to 30 June 2015, of the SLA:

   2.1.1 to use its best endeavours to render to Telkom all assistance as indicated in the exit management plan (schedule 13 to the SLA);

   2.1.2 in addition thereto, to use its best endeavours to provide all other assistance which may be reasonably necessary to enable

Telkom to transfer the provision of the Services to a third party, including to ensure that the existing fleet of vehicles as at 31 March 2015 remains available for the ongoing conduct of Telkom's business activities;

2.1.3 to update the lead out plan in response to Telkom informing it in writing of new requirements;

2.1.4 in addition thereto, to use its best endeavours to provide such additional information and assistance as identified by Telkom as and when the need arises;

2.1.5 to provide all assistance necessary to as to cause the minimum of disturbance and disruption of a material nature to the Day to Day operations of Telkom as a result of expiry of the SLA;

2.1.6 to hand over and grant access to all data and information required to enable a hand over of services to the new Service Provider (Bidvest);

2.1.7 to allow full access to data relating to fleet management.

2.2 Daimler is ordered to, during the lead out phase, 1 April to 30 June 2015, render reasonably necessary assistance to enable Telkom to transfer the provision of the Services to the new Service Provider, Bidvest, as follows:

2.2.1 respond timeously and in a forthright manner to requests for information, both from Telkom and from Bidvest;

2.2.2 maintain the operational capacity and ability to render to Telkom the full suite of Services required, for as long as is required by Telkom in order to ensure uniterrupted fleet services, until conclusion of the lead out phase;

2.2.3 continue to provide uninterrupted fleet services to Telkom;

2.2.4 scale down services at Telkom's request in step with the scaling up of services by Bidvest.

2.3 Daimler will be remunerated by Telkom for such services actually provided during the lead out phase aforementioned at the rates applicable in terms of the SLA, plus an increase in line with the Consumer Price Index ("CPI"), on those items that are subject to CPI increase.

3. The orders made herein are without prejudice to any legal proceedings which either Daimler or Telkom may be advised to pursue in due course.

4. Daimler is ordered to pay the costs of its own application as well as the costs of Telkom's counter-application, including the costs of two counsel, such costs to include the reserved costs of the hearing of 30 March 2015.

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

22599-2015

HEARD ON: 9 APRIL 2015
FOR THE DAIMLER: C WHITCUTT SC ASSISTED BY R ITZKIN
INSTRUCTED BY: WEBBER WENTZEL
FOR THE RESPONDENTS: C H J BADENHORST SC ASSISTED BY G A FOURIE
INSTRUCTED BY: EDWARD NATHAN SONNENBERGS

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

24/4/15

CASE NO: 22599/2015

BEFORE THE HONOURABLE JUDGE MR PRINSLOO
ON THE 24TH APRIL 2015

IN THE MATTER BETWEEN:

DAIMLER FLEET MANAGEMENT SOUTH AFRICA (PTY) LTD	**APPLICANT**
AND	
TELKOM SA (SOC) LTD	**1ST RESPONDENT**
BIDVEST BANK LTD	**2ND RESPONDENT**

DRAFT ORDER

HAVING read the documents filed of record, having heard counsel and having considered the matter:

THE COURT ORDER THAT:

1. Daimler's application for final interdictory relief is dismissed.

2. Pending the final resolution of the disputes between the parties (which arise in these proceedings) in accordance with the dispute resolution process referred to in clause 40 of the 2008 Service Level Agreement ("SLA"):

2.1 Daimler is ordered to comply with the following obligations during the lead out phase, 1 April to 30 June 2015, of the SLA:

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2.1.2 in addition thereto, to use its best endeavours to provide all other assistance which may be reasonably necessary to enable Telkom to transfer the provision of the Services to a third party, including to ensure that the existing fleet of vehicles as at 31 March 2015 remains available for the ongoing conduct of Telkom's business activities;

2.1.3 to update the lead out plan in response to Telkom informing it in writing of new requirements;

2.1.4 in addition thereto, to use its best endeavours to provide such additional information and assistance as identified by Telkom as and when the need arises;

2.1.5 to provide all assistance necessary to as to cause the minimum of disturbance and disruption of a material nature to the Day to Day operations of Telkom as a result of expiry of the SLA;

2.1.6 to hand over and grant access to all data and information required to enable a hand over of services to the new Service Provider (Bidvest);

2.1.7 to allow full access to data relating to fleet management.

2.2 Daimler is ordered to, during the lead out phase, 1 April to 30 June 2015, render reasonably necessary assistance to enable Telkom to transfer the provision of the Services to the new Service Provider, Bidvest, as follows:

2.2.1 respond timeously and in a forthright manner to requests for information, both from Telkom and from Bidvest;

2.2.2 maintain the operational capacity and ability to render to Telkom the full suite of Services required, for as long as is required by Telkom in order to ensure uniterrupted fleet services, until conclusion of the lead out phase;

2.2.3 continue to provide uninterrupted fleet services to Telkom;

2.2.4 scale down services at Telkom's request in step with the scaling up of services by Bidvest.

2.3 Daimler will be remunerated by Telkom for such services actually provided during the lead out phase aforementioned at the rates applicable in terms of the SLA, plus an increase in line with the Consumer Price Index ("CPI"), on those items that are subject to CPI increase.

3. The orders made herein are without prejudice to any legal proceedings which either Daimler or Telkom may be advised to pursue in due course.

4. Daimler is ordered to pay the costs of its own application as well as the costs of Telkom's counter-application, including the costs of two counsel, such costs to include the reserved costs of the hearing of 30 March 2015.

BY THE COURT

Lombard

REGISTRAR

REGISTRAR OF THE NORTH GAUTENG HIGH COURT, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
JUDGE'S SECRETARY
24 APR 2015
REGTERS KLERK
PRETORIA 0001
GRIFFIER VAN DIE NOORD GAUTENG HOË HOF, PRETORIA

M. Lombard

24 APR 2015

Draft Order