

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH AND SOUTH GAUTENG HIGH COURT, PRETORIA)

DATE: 30/10/2009

CASE NO: 16945/2004

In the matter between:

COMMAND PROTECTION SERVICES (GAUTENG) (PTY) LTD t/a MAXI
SECURITY PLAINTIFF

And

SOUTH AFRICAN POST OFFICE LIMITED DEFENDANT

JUDGMENT POSWA, J

INTRODUCTION

[1] This is a judgment in an action in which the plaintiff, relying on issues raised in paragraphs 3 to 9 of its particulars of claim, seeks determination by the Court as to whether or not a binding and enforceable agreement was concluded between it and the defendant,

as the plaintiff alleges to be the case. Based on its submission that a contract between it and the defendant is in existence, the plaintiff claims payment by the defendant of a sum of R13 890 988.00, being damages it allegedly suffered in consequence of the defendant being in breach of such agreement. Such breach is alleged to have arisen by way of a letter written by the defendant to the plaintiff, dated 30 January 2004, (annexure PC4), which is headed "TERMINATION OF CONTRACTUAL RELATIONSHIP".

[2] It is common cause between the parties that, on or about 28 July 2003, the defendant addressed and delivered a letter to the plaintiff, a copy whereof is attached to the particulars of claim, as annexure "PC3". Interpretation of the meaning and effect of PC3 is one of the co-elements of this case, with whose interpretation this Court is seized. Whilst both parties are in agreement that the contents of PC3 were accepted by the plaintiff, they differ as to the implications of such acceptance. Suffice it to say, for present purposes, that, according to the defendant, PC3 provided conditional appointment of the plaintiff as a provider of guarding security services, details whereof will appear more fully in the course of this judgment.

[3] A full setting out of paragraphs 3 to 9 of the plaintiff's particulars of claim, on the one hand, and the defendant's corresponding, paragraphs 4 to 16 of its plea, in response to the plaintiff's aforementioned paragraphs, on the other hand will, in my view, facilitate a full appreciation of the parties' respective submissions.

[4] **Paragraphs 3 to 9 of the Plaintiff's Particulars of Claim**

"3.

3.1 During October 2002 Defendant caused an advertisement, a copy whereof is annexed hereto marked 'PC1', to be placed in national newspapers.

3.2 In terms of such advertisement, Defendant informed the readers thereof as follows:

3.2.1 Defendant invited interested and suitable companies and other entities to submit proposals for the management of Defendant's guarding requirements at post

office outlets and mail centres in certain regions;

3.2.2 Contracts would be awarded on a regional basis, and bidders were entitled to apply for more than one region;

3.2.3 Details of Defendant's requirements were stipulated in a Request for Proposal document, which would be made available by Defendant.

4.

4.1 On or about 28 November 2002, Plaintiff submitted a written offer to Defendant for the provision and management of guarding services in respect of certain regions, described therein as (a) Central Region, (b) Kwazulu-Natal, (c) Northern Region, (d) Witwatersrand, and (e) Western Cape Province.

4.2 A copy of the written offer is annexed hereto marked 'PC2'.

5.

5.1 On or about 28 July 2003, Defendant addressed and delivered a letter to Plaintiff, a copy whereof is annexed hereto marked 'PC3'.

5.2 In terms of such letter, Defendant accepted the offer of Plaintiff described in paragraph 4 above.

- 5.3 The contents of the aforementioned letter were in turn accepted by Plaintiff as is evident from the wording which appears at the foot of 'PC3'.

6.

- 6.1 On 30 July 2003, a meeting took place at Pretoria, attended by Mr D. de Villiers, Mr S. Mowzer, Mr S. Boulton and Mr Z Sithole, representing Plaintiff, and Mr M. Mngqibisa, Mrs E. Lotriet and Mr N. Els, representing Defendant.

- 6.2 During such meeting, Mr Mngqibisa, representing Defendant, informed Plaintiff, represented by the persons referred to above, -

- 6.2.1 that Plaintiff had been awarded the tender in respect of three regions, namely (a) the Western Cape Province, (b) the Northern Region and (c) the Central Region;

and Plaintiff, represented as aforesaid, accepted that the agreement between the parties was concluded on this basis.

- 6.3 During such meeting, Mr De Villiers and/or Mr Mowzer, representing Plaintiff, provided and explanation of Plaintiff's black economic empowerment ('BEE') status, and Defendant's representatives were satisfied with such explanation.
- 6.4 During such meeting, Mr Mngqibisa, representing Defendant, advised Plaintiff's representatives that a draft written contract would be forwarded to

Plaintiff within a week, but that Plaintiff had won the tender as described above, and that the signing of the contract was merely a formality.

6.5 During such meeting, Plaintiff and Defendant, represented as described above, agreed that Plaintiff would commence rendering services in terms of the agreement between the parties on 1 September 2003.

7. In the premises, and by virtue of the facts set out in paragraphs 4 and 5 above, -

7.1 On or about 28 July 2003, Plaintiff and Defendant concluded a written agreement in terms whereof Plaintiff would provide and manage regional guarding services for Defendant, for an initial two year period.

7.2 Such written agreement is constituted by the documents annexed hereto marked 'PC2' and 'PC3'.

7.3 The services to be provided by Plaintiff, the regions in respect of which such services were to be provided, and the prices to be charged by Plaintiff in respect of such services, are set out in annexure 'PC2' hereto.

8.

8.1 In annexure 'PC3' hereto, the following is stated:

'This appointment is subject to the following:

- BEE improvement; and

- The successful finalisation and signing of a formal contract.’

8.2 The reference in such letter to ‘BEE improvement’ does not constitute a suspensive condition. Alternatively, and to the extent that it might be alleged and found that it does, Plaintiff states as follows:

8.2.1 Such condition was fulfilled, and accepted by Defendant as having been fulfilled, by virtue of the facts described in paragraph 6.3 above;

8.2.2 In the alternative to paragraph 8.2.1, Defendant waived compliance with such condition, in the manner described in paragraph 6.3 above;

8.2.3 In the alternative to paragraph 8.2.1 and 8.2.2, by virtue of the facts described in paragraph 6.3, Defendant represented to Plaintiff that it was satisfied that such condition had been fulfilled, and Plaintiff, relying on such representation, acted to its prejudice by making preparations, and incurring expenses, to enable it to perform its obligations in terms of the agreement between the parties. In the circumstances, Defendant is estopped from denying that the condition has been fulfilled.

8.3 The reference in such letter to ‘the successful finalisation and signing of a formal contract’, does

not constitute a suspensive condition.

Alternatively, and to the extent that it might be alleged and found that it does, Plaintiff states as follows:

8.3.1 In the of the facts described in paragraphs 6.4 and 6.5 above, (a) the parties agreed that the relevant portion of the letter would not constitute a suspensive condition, (b) alternatively waived compliance therewith;

8.3.2 In the alternative to paragraph 8.3.1, Defendant intentionally prevented the formal contract from being finalised and signed, by failing to present Plaintiff's frequent requests that this be done. In the circumstances, the suspensive condition should be deemed to be fictionally fulfilled.

9. By virtue of the facts described in paragraph 6.2 and 6.5 above, the agreement referred to in paragraph 7 above was amended in the following respects:

9.1 The regions in respect of which the agreement would operate would be the Western Cape Province, the Northern Region and the Central Region (instead of all of the regions referred to in annexure 'PC2')

9.2 Plaintiff's services would be provided as from 1 September 2003."

[5] **Paragraphs 4 to 16 (pages 89 to 94 of the papers)**

"4. **AD PARAGRAPH 4 THEREOF:**

4.1 Annexure 'PC2' to the particulars of claim is not signed by the plaintiff.

4.2 Save for the foregoing, the allegations contained in this paragraph are admitted.

5. **AD PARAGRAPH 5 THEREOF:**

It is admitted that the plaintiff's tender offer in terms of annexure 'PC2' was accepted by the defendant in terms of annexure 'PC3' and subject to the conditions therein state.

6. **AD PARAGRAPHS 6.1 AND 6.2.1 THEREOF:**

Save for stating that the award of the tender to the plaintiff was at all times subject to annexure 'PC3', the contents of these paragraphs are admitted.

7. **AD PARAGRAPH 6.2.2 THEREOF:**

7.1 The allegation contained in this sub-paragraph is denied.

7.2 The defendant avers that Mr MNGQIBISA informed the plaintiff that, should the plaintiff revise its pricing schedule in terms of annexure 'PC2' and offer an appropriate discount, the defendant would be prepared to consider awarding a contract in terms of the tender for three years instead of two years.

8. **BALANCE OF PARAGRAPH 6.2:**

This is denied and the plaintiff is put to the proof thereof.

9. **AD PARAGRAPH 6.3 THEREOF:**

Save to admit that Mr DE VILLIERS presented some description of the plaintiff's BEE status, the contents of this paragraph are denied, and more particularly it is denied that the defendant was satisfied with the plaintiff's BEE constitution and profile.

10. **AD PARAGRAPH 6.4 THEREOF:**

While it is admitted that the defendant informed the plaintiff that a draft written contract would be forwarded to the plaintiff as soon as possible, the remaining allegations contained in this paragraph are denied as if specifically traversed.

11. **AD PARAGRAPH 6.5 THEREOF:**

11.1 The allegations contained in this paragraph are denied as if specifically traversed.

11.2 The defendant pleads that from 1 September 2003, it employed the plaintiff to continue providing certain guarding services (as it had provided prior to that date on a limited scale) on a month to month basis.

12. **AD PARAGRAPH 7 THEREOF:**

The allegations contained in this paragraph, including sub-paragraphs, are denied as if specifically traversed.

13. **AD PARAGRAPH 8.1 THEREOF:**

The contents of this paragraph are admitted.

14. **AD PARAGRAPH 8.2 THEREOF:**

14.1 The allegations contained in this paragraph, including the sub-paragraphs are denied as if specifically traversed.

14.2 The defendant pleads that the reference to ‘BEE improvement’ did constitute a suspensive condition.

15. **AD PARAGRAPH 8.3 THEREOF:**

15.1 The allegations contained in this paragraph, including its sub-paragraphs, are denied as if specifically traversed.

15.2 The defendant pleads that the reference to ‘the successful finalisation and signing of the formal contract’ did constitute a suspensive condition.

16. **AD PARAGRAPH 9 THEREOF:**

The allegations contained in this paragraph are denied as if specifically traversed.”

[6] PC3 is a response to PC2 – the latter being dated 28 November, 2002 and addressed to the defendant, containing an invitation by the defendant to whoever could provide management and guarding services to its post offices in five specified regions. The respective counsel for the plaintiff, on the one hand, and for the defendant, on the other hand, gave their factual interpretation of the contents of both PC2 and PC3 and their respective understanding of the implications of the interplay between PC2 and PC3.

Counsel’s Factual Interpretation of the Contents of Paragraphs 3-9 of the Particulars of Claim, Read with Paragraphs 3-16 of the Plea

[7] Mr Newdigate, on the plaintiff’s behalf, both in his heads of argument on the plaintiff’s behalf and his submissions during argument, emphasised the plaintiff’s submissions in paragraph 5 of its particulars of claim, on the one hand, and the defendant’s response to that paragraph, in paragraph 5 of its plea, on the other hand. He pointed

out that, in PC3, the “defendant accepted the offer of plaintiff described in paragraph 4 above”, which is reference to the plaintiff’s offer to the defendant, contained in PC2. He then pointed out that, in paragraph 5 of its plea, the defendant states that:

“It is admitted that the plaintiff’s tender offer in terms of Annexure PC2 was accepted by the defendant in terms of Annexure PC3 and subject to the conditions therein stated.”

He submits that what emerges from the two documents, PC2 and PC3, is that a written offer of contract by the plaintiff was accepted, in writing, by the defendant.

[8] To the defendant’s submission that PC3 constituted a counter-offer, Mr Brett replied that the defendant’s submission was irrelevant, for the following reasons:

- (a) There is no doubt that an offer was made by the plaintiff and that it was accepted by the defendant;
- (b) Alternatively, in the event of it being held that there was, indeed, a counter-offer, such counter-offer by the defendant was accepted by the plaintiff, which is common cause.

[9] Mr Newdigate submitted that the conditions set out in PC3 do not negate the existence of a contract, in consequence of the acceptance, by the defendant, of the offer made by the plaintiff. He subsequently addressed the Court on the legal interpretation to be given to the conditions contained in PC3, **an aspect to be dealt with later in the judgment.**

[10] According to Mr Newdigate, the ambit of the dispute is contained in subparagraphs 8.2 and 8.3 of the particulars of claim, on the one hand, and paragraphs 14 and 15 of the plea, on the other hand. During his

address, Mr Brett summed up the plaintiff's attitude in respect of this aspect up, as follows:

*"It is clear that the **primary question** is whether these provisions [in PC3] constitute suspensive conditions, as contended by the defendant, or not, as contended by the plaintiff. If there are not suspensive conditions, we will submit that the conclusion which the plaintiff seeks in these proceedings, namely that a valid and binding agreement **was concluded** must be drawn."*

- [11] It is necessary to refresh ourselves as to what the conditions mentioned in PC3 are. The relevant portion reads:

"This appointment is subject to the following:-

- *BEE improvement; and*
- *The successful **finalisation** and signing of a **formal contract**."*

- [12] It is further submitted, on the plaintiff's behalf, that, if the Court should hold that one or the other or both of the conditions mentioned above is/are a suspensive condition(s) or suspensive condition(s), a number of other issues have to be determined, viz.,

- (a) waiver;
- (b) estoppel; and
- (c) fictional fulfilment, as more fully set out in subparagraphs 8.2.1 to 8.2.3 and 8.3.1 to 8.3.2 of the particulars of claim.

- [13] In those subparagraphs, the plaintiff avers that, if the Court finds that PC3 creates a suspensive condition or suspensive conditions, the defendant, firstly, waived compliance with such condition, as set out in paragraph 6.3 of the particulars of claim. Before dealing with that

submission, it should be pointed out that the plaintiff called only one witness, Mr Mohammed Shaffie Mowser, whereas the defendant called two witnesses, viz., Mr Amos Monkie Vilakazi and Mr Nicholaas Els.

[14] Although we are not, at this stage, dealing with the evidence of the respective witnesses, it is a fact that Mr Mowser stated, during his evidence, that, at a meeting on 30 July 2003, Mr Deviliers, then employee of the plaintiff, or Mr Mowser himself, provided an explanation of the plaintiff's Black Economic Empowerment ("BEE") status to the satisfaction of the defendant's representatives who were at such meeting. Hence the alternative submission of waiver. At such meeting, Mr Mngqibisa, who represented the defendant, advised the plaintiff's representatives that a draft written contract would be forwarded to the plaintiff, within a week, but that the plaintiff had, otherwise, won the tender as described in PC2 and that the signing of the contract was a mere formality (paragraph 6.4 of the particulars of claim). In fact, according to Mr Mowser, the parties' representatives at that meeting agreed that the plaintiff would commence rendering services in terms of the agreement between the parties on 1 September 2003.

[15] Although the substantial allegations contained in paragraph 6.3 (so also in 6.4 as will later appear) are denied by the defendant, it is submitted, on the plaintiff's behalf, that Mr Mowser's evidence should be accepted and that it is evident therefrom by virtue of the defendant expressing satisfaction with the plaintiff's BEE status, the plaintiff fulfilled the BEE condition contained in PC3.

[16] In the event of the Court not upholding the plaintiff's submission that it fulfilled the BEE status, it is submitted, on the plaintiff's behalf, that the defendant waived compliance therewith. That submission is also based on what was allegedly discussed, on the plaintiff's version at the meeting of 30 July, 2003. I am puzzled as to how, if the Court were to reject the evidence of fulfilment of the BEE requirement, based on Mr

Mowser's evidence, it would, nevertheless, find that there was waiver, by the defendant, of the need to comply with that condition, based on the self-same evidence by Mr Mowser regarding the meeting of 30 July, 2003, that was rejected. That, however, is the submission contained in subparagraph 8.2.2 of the particulars of claim. During argument, Mr Brett informed the Court that the plaintiff was no longer relying on waiver.

- [17] A further alternative submission by the plaintiff, if waiver (before it was abandoned in court) failed, was that the defendant was estopped from denying that that condition had been fulfilled. This submission is also based on the acceptance of Mr Mowser's version of the facts, with regard to the meeting of 30 July, 2003. It is submitted, as outlined in subparagraph 8.2.3, that, because the defendant's representative allegedly informed the plaintiff's representatives, at that meeting, that the defendant was satisfied with the plaintiff's BEE status, the plaintiff "acted to its prejudice by making preparations, and incurring expenses, to enable it to perform its obligations in terms of the agreement between the parties. In the circumstances, the defendant is estopped from denying that the condition has been fulfilled." As I earlier remarked, it is difficult to understand how the Court would, not having accepted that the defendant's representatives expressed satisfaction at the meeting, nevertheless find that the plaintiff had been misled into acting to its prejudice in the manner alleged. I should not be understood, however, as having made a decision with regards to what transpired at the acceptability or otherwise of Mr Mowser's evidence with regard to what transpired at the meeting of 30 July, 2003. That decision awaits a later stage in the judgment.

- [18] With regard to the second condition in PC3, viz., "... full finalisation and signing of a formal contract", Mr Brett submits, based on the contents of subparagraph 8.3 of the particulars of claim, that it does not constitute a suspensive condition, as he later argues, relying on some authorities. Alternatively, in the event of it being held that it does

constitute a suspensive condition, the plaintiff submits that, in view of what Mr Mngqibisa allegedly said at the meeting of 30 July 2003, i.e., that the plaintiff had won the tender and that it will commence rendering services, “in terms of the agreement between the parties”, on 1 September 2003 (subparagraph 6.4 and 6.5), the parties had agreed that that second condition would no longer constitute a suspensive condition. Alternatively, it was submitted, (in subparagraph 8.3.1), that the defendant had waived compliance with that condition (an aspect abandoned in Mr Brett address).

- [19] Finally and alternatively, with regard to the condition that relates to the successful finalisation and signing of a formal contract, it is submitted that the defendant intentionally prevented the formal contract from being finalised and signed. It did so by failing to present the plaintiff with the final draft contract for its signature, in spite of frequent requests by the plaintiff that such be done. The Court is, therefore, asked to deem such second suspensive condition as having been fictionally fulfilled.
- [20] According to Mr Newdigate, the primary question in this case is one of contractual interpretation with reference. In particular, to the “BEE improvement” and “the successful finalisation and signing of a formal contract”, which are contained in PC3. I have already set out, in quite some detail, how, according to Mr Newdigate’s submissions, that interpretation should be, in the plaintiff’s favour. He submits that, based on legal principles of interpretation, which will be discussed later in the judgment, notwithstanding the use of the phrase “subject” to in PC3, “the words ... are neutral, and do not indicate, in and of themselves, that the obligations in terms of a particular agreement are dependent on the occurrence or non occurrence of the uncertain future event” (paragraph 11 of the plaintiff’s heads of argument). The defendant does not, so Mr Vorster submits, gain any assistance from the process of contractual interpretation that creates a constructive suspension out of reference to the “BEE improvement”. I shall return

to the plaintiff's submissions in this regard when dealing with authorities.

- [21] It is further submitted, on the plaintiff's behalf, that there are no material disputes of fact. As Mr Newdigate put it, during his address,

"The matter turns on facts which are '[a] common cause on the pleadings ... or [b] which are not in dispute, having regard to the evidence' [page 7 of the addresses]."

In this regard, Mr Newdigate alludes to Mr Vorster's criticism of Mr Mowser as a witness and submits that criticism of witnesses – whether Mr Mowser or the defendant's witnesses – is unnecessary, on the facts of this case. He makes this submission in the following form:

"We submit to your Lordship in the first place, [a] that all of the relevant issues are common cause and that, [b] there are no material disputes of fact; [c] that the exercise embarked on by our learned friends is a nitpicking one." (... numbering is added)

As Mr Newdigate puts it in his address, it is not a credibility case at all. "One is not weighing up the evidence of Mr Mowser against the evidence of Mr Els, for example." [Page 9]

- [22] The **defendant's submissions**, as summarised by Mr Vorster, based on the defendant's plea, are as follows:

1. In terms of PC3, the defendant accepted the plaintiff's offer, in PC2.
2. On the face of PC3, the **appointment** of the plaintiff was, as the document says:

"subject to the following: -

- *BEE Improvement; and*

- *The successful finalisation and signing of a formal contract.”*

3. The letter of appointment itself could not, in law, constitute acceptance of the plaintiff's offer, but constituted a counter-offer, which counter-offer was accepted by the plaintiff, so submitted Mr Vorster. He draws the Court's attention to the bottom of PC3, where the portion provided for acceptance or non-acceptance is completed, on the plaintiff's behalf, with an indication that the counter-offer was accepted.
4. Mr Vorster alludes to the plaintiff's heavy reliance on clause 5 of the “REQUEST FOR PROPOSAL DOCUMENTS”, more specifically the following portion thereof:

“Acceptance of our proposal will be communicated to us by letter order through the post. The post office shall be regarded as our agent and delivery of such acceptance with the post office shall be treated as delivery to us.”

The plaintiff have submitted that, by communicating PC3 through the post office, as stipulated in PC2, the defendant had accepted the plaintiff's proposal. Mr Vorster submits that, notwithstanding the provisions of clause 5, it is common cause that PC3 contains a qualification which renders PC3 itself not to constitute an unqualified acceptance of the plaintiff's offer as contained in PC2. He submits that PC3 constitutes a counter-offer with new provisions.

5. By accepting PC3, the plaintiff accepted the conditions set out therein.
6. It is common cause that, after acceptance of PC3 by the plaintiff, parties continued being involved in negotiations, with a

view to successfully finalising and signing a formal contract, as required by PC3.

7. The final paragraph in PC3 bears great significance, in that it sets out a clearly defined process to be followed after acceptance of PC3 by the plaintiff.
8. Like Mr Newdigate, Mr Vorster relies on a number of decisions, which will be discussed later in this judgment.

FACTS

[23] As mentioned in the Introduction section, this is an action for damages, in which the plaintiff sues the defendant for payment of the sum of R13 890 988.00, it being damages allegedly suffered by the plaintiff when the defendant allegedly breached a contract that allegedly existed between the two of them. According to such contract, the defendant had awarded a tender to the plaintiff, to provide guarding services for post offices in three regions, viz., the Western Cape Province, the Northern Region and the Central Region. The existence of such contract is based on the plaintiff's aforementioned interpretation of PC3.

[24] The alleged breach of contract flows from a letter of "TERMINATION OF CONTRACTUAL RELATIONSHIP", dated 30 January, 2004, written by the defendant to the plaintiff. The following is stated in paragraph 1 of that letter:

"1. *As you are aware, the South African Post Office ('the Post Office') conditionally appointed your company to render guarding security services in 3 operational regions as delineated by the Post Office for its purposes. This appointment was on a **month-to-month basis** from*

01 September 2003, subject, to and until finalisation of negotiations and the conclusion of the written agreement as contemplated in paragraph 3 hereof.” (Emphasis added)

In paragraphs 3, 4 and 5, the letter read as follows:

- “3. *It was a term and condition of the appointment that your company and the Post Office (collectively referred to as ‘the parties’) would conclude and sign a written agreement between a reasonable period from the date of award of the said tender to accompany you.*

- 4. *It was a further term of the agreement between the parties that the relationship between them would be one of utmost good faith, giving the nature of the services procured by the Post Office from your company.*

- 5. *Regrettably, whilst negotiations towards conclusion of a written agreement were in progress, your company engaged in conduct that has materially and seriously undermined the trust and utmost good faith between the parties.”*

The letter then lists a number of examples of conduct that the plaintiff allegedly engaged in and which “materially and seriously undermined the trust and utmost good faith relationship between the parties”, according to the draft.

In paragraph 6 of the letter the following is stated:

- “6. *Your company has engaged in conduct that has tarnished the good name of and image of the Post Office, and has put the Post Office in disrepute.”*

The letter then list a series of alleged examples of the conduct mentioned in paragraph 6.

[25] Paragraphs 7 to 9 of the letter read as follows:

“7. *These incidents, and others that are not mentioned herein, have materially affected the trust and utmost good faith relationship between the parties. You company’s conduct is clearly irreconcilable with a continued intention to maintain the month-to-month contractual relationship, nor to enter into any further contractual relationship with the Post Office. The incidents constitutes (sic) a clear breach of the basis of the existing relationship between the parties. The Post Office therefore hereby exercises its rights and gives your company notice that: -*

*7.1 it will not continue with any **contractual negotiations** with your company as envisaged in the award of the tender to your company; and*

*7.2 **the month-to-month contractual relationship** between the parties will come to an end on 29 February 2004, on which date your company must vacate all premises of the Post Office.*

8. Kindly note that although the Post Office is giving your company 30 [thirty] days notice notice (sic) of termination. I shall, this is on the understanding that your company will maintain proper standards of service in accordance with the current ISO quality standards. Should your company lower the service standards in any

way, the Post Office will terminate notice period and the relationship on 24-hour notice.

9. *With immediate effect, kindly direct all oral and written communication arising from this letter and the provision of services to the Post Office to Mr Siviwa Mapisa, Acting Senior General Manager: Security and Investigations.”*
(Emphasis added)

The paragraph ends with details relating to a manner of communication thereafter. This letter is referred to as PC4. It will have been noted that the defendant has, from the onset of the conflict, been of the view that there was a month-to-month contract between the parties, independent of the contract that is now the subject of the dispute.

[26] In a letter dated 27 May 2004, addressed to the defendant, the plaintiff's attorneys wrote as follows in paragraphs 1 to 3 thereof:

- “1. *During July 2003, our client's written offer (dated 28 November 2002) for the provision and the management of guarding services was accepted in writing by yourselves, **resulting in the conclusion of an agreement** between our client and yourselves.*
2. *It was subsequently agreed that our client was to provide guarding services in respect of three regions ... and that the contract was to endure for a period of three years.*
3. *However, by means of a letter dated 30 January 2004, the South African Post Office Limited has seen fit to repudiate the agreement between the parties, and has persisted in such repudiation. Your repudiation is hereby accepted.”* (Emphasis added)

The letter then sets out damages allegedly suffered by the plaintiff, in consequence of such alleged repudiation of the alleged agreement between the parties, claiming, in the letter, an amount of R20 836 482.00, and not the R13 890 988.00 claimed in the summons. This letter is referred to as PC5. It will be noted that the plaintiff has, from the commencement of the action, approached the dispute on the basis of the existence of a single contract of provision of guarding services by the plaintiff to the defendant. That is the contract which is the subject of dispute before the Court. There is not as much as mention, in the plaintiff's letter of 27 May, 2004, of the month-to-month contract mentioned in PC5. In his evidence, however, Mr Mowser acknowledged that the plaintiff provided the defendant with guarding services, on a month-to-month basis, before and whilst awaiting signing of what the plaintiff regards a contract.

[27] On 27 February, 2004, the plaintiff brought an urgent application in which it sought to have the "purported termination of the contract between the parties in terms of the Respondent's [the defendant's] letter of 30 January 2004 declared unlawful. It also sought that the parties be ordered to perform in terms of "the agreement" described above, in this judgment, and that the respondent (the defendant) be ordered to "forthwith seize and desist from negotiating with and/or appointing another party in substitution of the applicant (the plaintiff) as provider of guarding services in the three regions. That application was dismissed for lack of urgency and was not pursued in the ordinary motions court thereafter. A bundle containing papers meant for such application has been placed before the Court in, the present action and has been referred to in evidence, from time to time. A large number of other documents used for the parties are contained in a bundle, Exhibit A.

[28] A very interesting question, as to whether the defendant has, in fact, repudiated the contract that the plaintiff has in mind – and not a

month-to-month contract – was not argued or even raised before the Court. The issue before me is one of interpreting the condition set out in PC3. The question of the existence or otherwise of the alleged month-to-month contract is, however, not an unimportant consideration, in my view.

[29] As earlier stated, the plaintiff relied on the oral evidence of a single witness, Mr Mohammed Shaffie Mowser, who, like the defendant's witnesses, relied heavily on documentary evidence, in support of his own evidence. Mr Mowser is the Chief Executive Officer and also Director of a company known as Command Holdings Limited. He is also the plaintiff's Director, the plaintiff being a wholly-owned subsidiary of Command Holdings Limited, trading as Maxi Security. At the time of the bringing of the action, the former director of the plaintiff, Mr Danie De Villiers, and Mr Mowser were having a hostile relationship. Consequently, Mr De Villiers was not called as a witness, although he featured in a large number of important aspects of the case. Mr De Villiers is said to have misappropriated company funds and, as at the time of the action being heard in court, such funds were the subject of an action for recovery in another High Court matter. Mr Steven Boulton, one of the plaintiff's project managers, whose name figures prominently in evidence, had a very close relationship with Mr De Villiers and, consequently, he also could not be called as a witness for the plaintiff. There are other often-mentioned employees of the plaintiff who were not called as witnesses, for reasons not stated. It is not far-fetched to surmise that they also were influenced against the plaintiff by their having worked closely with Mr De Villiers.

[30] Mr Mowser spent some time in his evidence dealing with the plaintiff's Black Economic Empowerment (BEE) credentials. This was, no doubt, due to the fact that BEE features prominently in PC3. In that regard, Mr Newdigate asked Mr Mowser to "describe ... the basic structure of the Command Group and this particular plaintiff in this respect", to which question Mr Mowser replied as follows:

“Your Lordship, Command Holdings Limited is listed on the Johannesburg Stock Exchange, it is controlled by two trusts, essentially the Inkwezi Investment Trust.”

He went on further to elaborate as follows:

*“Command Holdings Limited is **the only black controlled and managed security service provider in the country** listed on the Johannesburg Stock Exchange.”* (Emphasis added)

By that he meant that “the shareholding is in the hands of historically disadvantaged individuals”.

- [31] It is common cause that the “SPECIFICATIONS AND REQUIREMENTS” clause in the “Request for Proposal by the South African Post Office Ltd, for Guarding Services at Post Office Outlets and Mail Centres”, contains the following with regard to BEE:

“(2) Objectives:

The management of the Regional Service will be responsible for:

2.1 ...

2.2 ...

2.3 ...

2.4 ...

2.5 ...

2.6 *Ensuring that Black Economic Empowerment targets are achieved.”*

Concerning evaluation criteria, the following is stated:

“(3) Evaluation Criteria:

Builders will need to illustrate:

3.1 ...

3.2 *BEE status and contribution to BEE and SMME development as well as corporate and social responsibility.” [Page 19 of exhibit A]*

[32] It is common cause further that, according to the defendant’s ratings, the plaintiff scored very poorly with regard to the BEE requirement, a mere 13%. According to the defendant’s evidence, the plaintiff was the lowest scoring of three successful service providers with regard to BEE. As will appear more fully during discussion of evidence, the plaintiff was extremely aggrieved by this rating and disputed it. This explains why it is mentioned early in Mr Mowser’s evidence.

[33] Mr Mowser states that the plaintiff responded to the defendant’s proposal in PC1, in late November 2002. On 27 June 2003, the defendant approached the plaintiff, requesting it to supply temporary guarding services. On 30 June 2003, the plaintiff, in a letter that appears on page 97 of annexure A, responded to the request as follows:

“We hereby ... of your telefax dated 27 June 2003 in respect of the supply of temporary guarding services. As requested we have undertaken a review of the scope and the required services and ... wish to advise that we are able to supply them at the following rates: ...

NB: *We would like to draw your attention to the fact that should we be favoured with the envisaged work we are able to commence on 72 hours notice if required.”*

Once more, no mention is made of temporary guarding services, on a month-to-month basis provided by the plaintiff, before 28 July 2003.

- [34] Mr Mowser then referred to both PC2, the plaintiff's written offer to the defendant for the provisions and management of guarding services in respect of five regions, and PC3, the defendant's response to the offer. I deliberately use the word "response" because the pertinent issue before me, between the parties, is precisely whether this was an unconditional acceptance of the offer in PC2, as submitted by the plaintiff, or a counter-offer, as submitted by the defendant. Mr Mowser stated that he was surprised, on reading PC3, to see reference being made to BEE Improvement by the plaintiff. In that regard he elaborated further as follows:

"... I was always aware that BEE credentials were necessary for the successful tenderer, because that was set out in the initial document, but what I was not aware [of is] that it was of [sic] the concern of the Post Office that Command required an improvement in their BEE credentials. It was only brought to my attention when I received this letter [PC3]."

So important was the question of BEE status of a service provider that it covered pages 56 to 67 of the document on rating proposals.

- [35] It is common cause that a meeting took place on 30 July 2003, between representatives of the respective parties. Whereas, as will later transpire when discussing cross-examination of Mr Els, one of the defendant's witnesses, that such meeting was in due course, Mr Mowser asserts that it was in consequence of his reaction, with surprise, to reference, in PC3, to the need for improvement in the plaintiff's BEE status. He testifies as follows in that regard:

"The moment this letter [PC3] was faxed to me by Mr De Villiers, I raised, I was actually shocked to see an improvement on BEE, because I could not understand, I mean we are the real business, I cannot understand how we must improve. We cannot change where we come from, and we cannot change

*who we are, so I had the concern. **This resulted in a meeting a couple of days later with the Post Office procurement section to resolve the matter.** ... we then arranged a meeting to see the Post Office, because they had a time limit to accept this offer, this award.”* (Emphasis added)

Meeting of 30 July 2003

[36] Mr Mowser attended the meeting on 30 July 2003, at the defendant’s procurement offices. He was with the following people from the plaintiff’s side, Mr De Villiers, Mr Boulton and a Mr Sithole. The defendant was represented by Mr Mongezi Mngqibisa, Mr Els and Ms Emma Lotriet. Asked by Mr Newdigate as to whether it was correct that it was agreed, at that meeting, that the plaintiff had been awarded the tender in respect of three regions, the Western Cape, Northern Region and Central Region, Mr Mowser replied:

*“Quite correct, in actual fact we were congratulated and the Post Office was looking very forward to us being a service provider that was BEE (**sic**), because I gave a brief overview which they (**sic**) gave to the court earlier on as to what we were and how Command was structured. ... Ms Lotriet was actually thrilled that we could provide the service as a BEE entity.”*

It is common cause that Ms Lotriet was the defendant’s project manager of the guarding services. Mr Mowser concludes this aspect of the meeting as follows:

*“In actual fact we were never questioned or requested to provide any explanation. I was introduced by Mr De Villiers, and I gave a brief overview where I came from, who the company was **and BEE was not raised ever again after that.** Open in remarks (**sic**) they were satisfied. ... Well, the fact that I had informed the meeting at the outset of how Command was structured and who the role players were and how the*

*shareholding worked out, **there was (sic) no further questions regarding our BEE status or a request for an improvement thereof.***

[37] Although Mr Mowser concludes that aspect with the statement “they never did raise it again”, it is not clear to me whether he refers to never again at that meeting or never ever. I mention that because it is common cause that, as late as October, as will appear more fully later, the defendant was still concerned about the plaintiff’s BEE status.

[38] Other aspects discussed at the meeting include the date of commencement. Mr Mowser says it was mentioned that “the commencement date of **the contract**” was 1 September 2003. From Mr Mowser’s evidence, it is evident that the details contained in the tender were likely to be changed in a number of respects. For instance:

“Emma Lotriet indicated that the schedule that was submitted in the proposal may have to change because there are a number of Post Offices that were not included in the tender, and that would be finalised soon, and that they had sufficient time ... the month of August to finalise those for commencement date on 1 September 2003.”

That date was agreed upon. Mr Mowser says Ms Lotriet also expressed concern about the defendant’s budget, referring to a practice in the past in which the Post Office was under budgeted, often resulting in it taking money from other departments to subsidise the guarding services budget. She was actually addressing Mr Mngqibisa:

“Her concern was basically that there could be more guards required for more sites than had been envisaged in the tender.”

[39] Mr Mowser further stated that the defendant's representatives at the meeting on 30 July 2003 stated that **the contract** would be ready in a weeks time and **would be finalised and signed** within a week, and that we must continue **as though we have go the contract would be ready**. (Emphasis added)

[40] It appears to me that, although Mr Mowser was aware of, and had actually mentioned in his evidence, the arrangement between the plaintiff and the defendant for provision of temporary month-to-month guarding services, he had forgotten about that when he gave his evidence with regard to the commencement of the bid on 1 September 2003. This emerges, in my view, from his answers to questions by both the Court and Mr Newdigate in that regard. His evidence regard goes thus:

COURT: *'He must continue as though he had a contract?*

--- Yes.

*So **were you already working?** --- **No**, we were to start on 1 September.*

*And you were going to **start without a contract**.*

*--- **Without a contract**.*

Mr Newdigate: *Could I just clarify, sorry ... (intervenes).*

COURT: *Now that was the, ... (inaudible) of the 30th of ?*

---July.

...

*As [early as] 30 July there was already a possibility of your starting in September **without a contract**. ---*

Correct

*It takes long. --- Correct, in actual fact, we started in August already on certain sights **at the request of the Post Office**.*

*You are right, but as you are talking to one another on 30 July you **had not started anywhere.** --- No, we **had not started.***

*But are you saying subsequent to that meeting was (**sic**) further discussions. --- Further discussions.*

Which caused you to start in August.

In August before the 1st of September.”

- [41] When that line of evidence was further pursued by Mr Newdigate (on pages 52 and 53), after he referred to receipt of PC3, by the plaintiff, Mr Mowser’s evidence went as follows:

*“... but when you received this letter, what was your attitude and by you I mean the plaintiff, as to whether you had an agreement or not? --- No **we had an agreement** we were told that we must start on the 1st, we must recruit, we must acquire equipment, vehicles, we must start on 1 September.*

... the plaintiff after that try and start making preparations to implement the agreement? ---Yes.”

- [42] Mr Newdigate then asked Mr Mowser whether, if he had been told by the defendant’s representatives, at the meeting of 30 July, 2003:

“The defendant had problems with the plaintiff’s BEE explanation and that, as far as the defendant was concerned, unless the plaintiff sorted out BEE improvements, there as no agreement, the plaintiff would have proceeded to implement the course.”

Mr Mowser replied that he would not have gone on with the contract in those circumstances.

- [43] Mr Mowser then referred the Court to a document forwarded by the defendant to Mr De Villiers, on 14 August 2003, which accompanied a, in Mr Mowser's words, "draft agreement". The following evidence was accused by Mr Mowser, in ... questions by Mr ..., in that regard:

*"Thank you, and the point I think Mr Mowser, was that this was the **draft agreement** provided after the meeting. --- That is quite correct.*

*Now as we see at page 110, the document is not complete, for example the names of the parties are not in. **It is not ready for signature.** --- No*

*But I would like nonetheless to deal with certain pages with you. Page 115, paragraph 1.8. **Effective date is give[n] as 1 September 2003.** --- Correct.*

How does that reference relate to your discussion on 30 July? --- Exactly the way it was discussed at the meeting." (Emphasis added)

- [44] Seeing that both Mr Mowser, on behalf of the plaintiff, and Mr Vilakazi, on behalf of the defendant, were referred, extensively, to clause 39 of the draft agreement, on page 160 of annexure A, it is prudent to quote the entire clause. It reads:

"39. BLACK ECONOMIC EMPOWERMENT ('BEE')

39.1 The Contractor acknowledges that it has been informed of the BEE policy and requirements of the Post Office;

39.2 The Contractor agrees to comply with the said BEE policy and requirements and shall at all times

maintain not less than the required BEE component in the fulfilment of this Agreement.

39.3 *It is a critical aspect of this Agreement at all times that the Contractor ensure[s] real, effective and measurable skills transfer to the previously disadvantaged persons and entities controlled by such person.*

39.4 *In this regard the Contractor shall ensure that by the end of 3 (three) years from the Signature Date, 40% of its voting shares are held by persons and/or entities from previously disadvantaged background.*

39.5 *Notwithstanding the Effective Date, the Post Office reserves the right to carry out a due diligence exercise on the Contractor at six (6) monthly intervals to monitor the Contractor's compliance with such BEE policy and may take whatever action is deemed necessary in terms of this Agreement including termination for the subsequent failure of the Contractor to maintain such compliance."*

[45] Mr Mowser was then asked, by Mr Newdigate, whether, if clause 39 had been part of the contract, the plaintiff and Mr Mowser himself would have had any problem with signing that contract. Mr Mowser answered that there would have been no problem. A request, by the Court, for clarification of that answer led to the following comment by Mr Newdigate:

"Your Lordship will recall that there is a dispute as to what the reference, the chronic (?) reference in PC3 to BEE

*improvement is. And in particular the issue is, is it a suspensive **condition**. ...”*

He went on to explain that paragraph 39 is part of a document that “is simply a draft”.

*“It is a clause **in a draft** put up by the defendant indicating, we argue in due course, **the way the defendant saw BEE improvement**. In other words **as a term of the agreement, not a suspensive condition**. And the question is really directed at this inasmuch as this is what the defendant said is the way that it would be trashed out, would Mr Mowser and the plaintiff have seen it in the same way. And the answer is a simply yes.” [Emphasis added]*

[46] Whilst the discussion above, between the Court and Mr Newdigate, is more about legal interpretation, it is, nevertheless, significant in that it indicates the relevance of Mr Mowser’s evidence, in the plaintiff’s view. As earlier pointed out in the judgment, Mr Newdigate submitted that it is not necessary to rely on evidence in this case, for one to arrive at a correct interpretation which, according to the plaintiff, is that PC3 does not contain a suspensive condition. He, however, submitted that, in the event of the Court holding that the wording of PC3 is not unambiguous, evidence on surrounding circumstances indicates how PC3 should be interpreted. It is in this context, therefore, that Mr Mowser’s evidence is of significance according to Mr Newdigate.

[47] Although Mr Mowser gave evidence with regard to a number of other events that occurred after 30 July 2003, he had no direct knowledge thereof and relied on reports given to him by people like Mr De Villiers and Mr Boulton. He also relied on e-mails and other documents that he was referred to from the bundles. As I have already stated, no other witness was called on the plaintiff’s behalf. During Mr Vilakazi’s evidence, on the defendant’s behalf, he alluded to a meeting of the

parties on 17 October 2003, wherein a number of things were allegedly said. Mr Mowser did not attend that meeting. Consequently, his evidence with regard to what was not said at that meeting does not assist either the plaintiff or the Court.

[48] During cross-examination, Mr Mowser did not shift from his essential averments during his evidence-in-chief. He was, however, a much poorer witness during cross-examination than he was during his evidence-in-chief. Because of the view I have as to how this case should be approached, I do not find it necessary to give examples in support of my view that Mr Mowser was a poorer witness during cross-examination. Suffice it to say, in his favour, that he occupied the witness box for a very long time. His 365 pages of evidence are over four volumes of transcription. It is not unusual for a witness who is questioned for that long to have lapses of concentration, in my experience.

[49] As I have already stated, the defendant called only two witnesses, Mr Vilakazi and Mr Els. Like the plaintiff, the defendant was unable to call quite a number of witnesses, on account of the fact that they had parted company with the defendant in an unhealthy manner and could not be relied upon to give supportive evidence. However, unlike the plaintiff, the defendant had a witness with regard to each of two very important meetings, the one of 30 July 2003, alluded to by Mr Mowser, and another of 17 October 2003. The first witness, Mr Vilakazi, did not attend the meeting of 30 July 2003, which was attended by Mr Els, who, in turn, did not attend the meeting of 17 October 2003, which was attended by Mr Vilakazi.

[50] Save to indicate what each of the witnesses, Mr Vilakazi and Mr Els, are in relation to the scheme of things and their positions with the defendant, it is, in my view, unnecessary to state their evidence in detail. Mr Vilakazi is an attorney by profession and also the defendant's attorney in this action. He told the Court that he received

instructions from the defendant, through one Ms Kanthi Nagiah, who was in charge of the defendant's legal department, the Investigations Audit Department. His mandate was to draft a guarding contract and a cash in transit contract (CIT) on its behalf. The following day, on 21 February 2003, Ms Nagiah furnished him with a template for a guarding contract, still awaiting further information in respect of the CIT contract. Ms Nagiah's e-mail read as follows:

"Hi Amos (that being Mr Vilakazi's first name) – our discussion yesterday refers concerning the drafting of a guarding contract and cash in transit contract. I am forwarding the guarding contract to you – I shall await the info on the CIT contract – as mentioned both contracts must be thorough and detailed – most importantly I want an early termination clause, penalty clause (which must not prevent us from terminating should we so wish) and other protection for the PO built into the contract. Must look at authority to represent in future amendments and the BEE component. Before you commence the mandate, PLS advise me what your fee would be for the drafting of the contracts. I trust it will be reasonable."

On 4 March 2003, Mr Vilakazi sent his e-mail to Ms Nagiah, which reads as follows:

"I just wanted to remind you that we agreed on the following course:

- 1. Your (sic) forwarded us a draft guarding contract for immediate perusal and commencement with preliminary work on it;*
- 2. You are supposed to forward us information regarding the CIT contract. When you think you will be able to do this?*

3. *We need to have a meeting with internal stakeholders, as agreed. As you know the meeting should have been held already, but was twice cancelled. In light of the fact that there is a **tight deadline** to this job, it is critical that this meeting be held within this week. We are able after 13:00 on Thursday 06 instant, otherwise it has to be next week. The difficulty is that the time **pressure is mounting and may result in the deadline being compromised**. Please do let us know how to proceed.*

4. *We will liaise with you on both contracts once we have all identified the requirements of internal stakeholders. Delivery of the **final product** will be made to you. Please do revert on these issues so that we are able to satisfy your internal clients.” (Emphasis added)*

[51] In his evidence, Mr Vilakazi stated that he had already received oral instructions from Ms Nagiah on 20 February 2003 and had accepted the mandate. What is evident from his e-mail are his emphasis on speedy action and that what he was given by Ms Nagiah was only a draft and not “the final product”.

[52] Mr Vilakazi had been made to understand that the situation in the defendant’s practice, before he was instructed, was untenable. He describes it as follows, at page 440 of the transcript:

“My understanding at the time was that the defendant had a lot of small service providers throughout the country. The contract that they had with these service providers were by and large presented to the defendant by those service providers, they were not drawn up by the defendant or the defendant’s lawyers. The defendant had the problem that it could not readily manage these contracts and it wanted to appoint three service providers

who had to be appointed to provide services in three different regions of the country. ... [The defendant] sought to appoint three service providers, each one of them to provide guarding services in a designated region of the country.”

Mr Vilakazi stated, in evidence, that the original source of the **e-mail sent to him by Ms Nagiah, on 21 February 2003**, was actually Mr Nicholas Els. Indeed, this is reflected at the bottom of the e-mail from Ms Nagiah. The relevance of this part of his evidence will become apparent when I allude to Mr Els’ evidence later in the judgment.

- [53] Asked what the rational was behind the defendant’s insistence on a “thorough and detailed contract” of the manner described above, Mr Vilakazi replied as follows (at page 442):

*“M’Lord, I was instructed that [a] the Post Office had been engaged in some cases where service providers had either taken them to court or to arbitration and that [b] on occasion the defendant had lost some of these cases and [c] the real reason being because the contracts on which those disputes were based, did not give the Post Office the protection that it required. As a result, [d] having lent from such experiences, the Post Office wanted to have **its own contract which would provide the protection that it would need**, so that in the event of future legal disputes it would be able to then successfully defend itself.”* [Emphasis and insertion of subparagraph numbering is mine.]

From this quotation, it is evident that the defendant’s approach was that there were terms favourable to it still to be built into the future agreement with service providers – guarding and CIT services alike – by Mr Vilakazi and to be agreed to by the service providers.

- [54] Asked to “elaborate on what [his] instructions were with specific reference to the BEE Component that we see in this message [from Ms Nagiah]”, Mr Vilakazi replied as follows, on page 443:

*“M’Lord, as far as the BEE Component, issue was concerned, my instructions was that the plaintiff in this matter or rather before we get to the plaintiff, at the stage my instructions were that [a] the Post Office had a BEE policy; ... [a] and that [b] it required the services providers who would be appointed **in terms of this contract I was to prepare** to comply with that BEE policy; [c] [p]art of the BEE policy was that [i] the service provider had to not only meet a bench-mark, a BEE bench-mark at the beginning of the contractual relationship between the services provider and the Post Office, but that [ii] such BEE component, composition had to be sustained through the contractual relationship and [c] I was therefore required to build into the contract a provision that would entitle the Post Office from time to time to make audits of the BEE compliance or BEE status of a service provider throughout the life of the contract.”* [Emphasis and the insertion of numbered subparagraphs are mine.]

- [55] Mr Vilakazi explained the significance of consulting with internal stakeholders in the defendant’s establishment. Firstly, he pointed out that there was a large number of departments that were considered internal stakeholders, which had their special requirements in respect of services provided. For instance, the very Investigations and Audit Department headed by Ms Nagiah had its own requirements with regard to the provision of guarding services. The procurement section, i.e., the Supply Chain Management, stakeholder needed to be consulted, so also the Legal Services division. He concludes that aspect as follows:

*“As I have already indicated there was a history to this issue of provision of guarding services and because of this history and the problems that had been experienced by the Post Office, there was need for various people to give their inputs into the contract-drafting process, so that their experiences would be taken into account in developing a **standard contract**”*
(emphasis added)

- [56] The initial deadline for the provision of a standard contract was the end of March 2003. Mr Vilakazi has instructed that a number of individual contracts were coming to an end and that there was need for the standardised contract to be developed and be ready for signature by the end of March. They were to be signed by both the defendant and the people “that would be appointed”.

He and Ms Nagiah would represent the legal services stakeholder, with him being given the task of leading discussions between the defendant, on the one hand, and service providers such as the plaintiff, on the other hand.

- [57] Although the first version of the draft contract, Version 1 was ready by 16 March, 2003, it was not ready for signature. Due to the need for consultation with stakeholders, which entailed holding a number of meetings with them, countrywide, it simply was not possible to meet the end of March deadline. On 28 July, 2003, Version 3 was finalised. It should be pointed out that Mr Vilakazi kept adding inputs from the various stakeholders into the draft contract and then sending the document around for further comments. In the interim, however, there was an ongoing month-to-month arrangement between the defendant and the plaintiff, for provision of guarding services by the plaintiff – just as was ultimately conceded by Mr Mowser.

- [58] The significance of Mr Vilakazi’s evidence, with regard to the reasons for the delay in finalising the draft contract is, in my view, not simply

anecdotal. It is relevant to part of the plaintiff's claim in its particulars of claim, where it is stated, in subparagraph 8.3.2, as an alternative submission, that the defendant:

“intentionally prevented the formal contract from being finalised and signed by failing to present plaintiff with the final document for signature, notwithstanding plaintiff's frequent request that this be done. In the circumstances, the suspensive condition should be deemed to be fictionally fulfilled.”

Mr Vilakazi's evidence, if accepted, suggests that the delays in finalising the draft contract were unavoidable.

- [59] Another problem, with regard to the question of delay in the finalisation of the draft contract, relates to reported comments by Abelard Underwriting Agency, the plaintiff's underwriters. Those comments are set out in full on pages 164 to 169 of annexure A. The underwriters were commenting on the contents of Version 3. Incidentally, Mr Vilakazi points out that the version in question is incorrectly referred to, elsewhere, as Version 1. It is significant to note that these comments by Abelard were forwarded on 1 September 2003, at which time there was still no finalised draft contract for signature. As this is documented, the plaintiff must have been aware that the draft contract was still not finalised by 1 September, 2003 and that it contained some clauses that were objectionable to the plaintiff. Mr Vilakazi's approach to Abelard's comments is as follows:

“M'Lord, having gone through these comments, I was or I had three general views in regard to these comments, I characterised these comments into three broad, general views, one could say categories, for want of a better word. [a] The one was that there were some comments in this document that were actually merited, they had merits and those I believed should be entertained readily. [b] There were other comments which I felt

were a complete no-no, they were unacceptable, simply unacceptable and [c] in between there were comments, one could call them the grey area comments, which I believed through negotiation there was a possibility that agreement could be reached to resolve those other comments, either one way or the other. So there were three broad views I held in regard to the comments by Abelard."

Mr Vilakazi dealt with these comments one by one and prepared a confidential attorney and client memorandum dealing with them, which was for the consumption of internal stakeholders. An e-mail sent on 16 October 2003, by Mr Vilakazi, to Ms Nagiah and Ms Lotriet, refers to a discussion document which Mr Vilakazi had prepared and which was privileged and meant only for his client's eyes.

[60] As I am not following the pattern in which the evidence of the defendant's witnesses was given, I move on to indicate that, during his cross-examination by Mr Newdigate, Mr Vilakazi stated that he understood the merit contained in quite a number of the objections raised by Abelard in their comment. For instance, they were unhappy about the penalty clauses. He agrees that such penalty clauses are onerous on the part of the plaintiff and favour the defendant. He states, however, that he deliberately inserted such contentious clauses in the draft because he meant to provide precisely that kind of protection to the defendant. It is clauses like those that also created further delay in the finalisation of the draft contract whereas the objections thereto were raised by Abelard, they were in a standard draft contract that affected other service providers who were not, necessarily, dealing with guarding services and others, who were operating in other regions and dealing with guarding services. None of the other service providers objected. It was not possible, therefore, to finalise a draft that accommodated only the plaintiff whilst not accommodating the other service providers. Moreover, seeing that these were not accidentally introduced, Mr Vilakazi, as the defendant's

attorney, felt very strongly about them, especially bearing in mind the message that was given to him in the e-mail of 21 February 2003 from Ms Nagiah.

[61] Although Mr Vilakazi had not attended the meeting of 30 July 2003, he had been informed, as the person that was to finalise the draft contract to be signed by, *inter alia*, the plaintiff, that, at such meeting, the question of the plaintiff's poor BEE status and the need, therefore, for the plaintiff to improve had been raised. This aspect was confirmed by Mr Els, although he had attended the meeting more, as he describes himself, as "a spare wheel". He describes himself in that fashion because, whereas he had, before 30 July 2003, been running the process, he was, so to speak, toppled, and the process was now to be run by a combination of Mr Vilakazi, Ms Nagiah and Mr Mngqibisa, the latter being the Acting General Manager and the person who led the Post Office delegation at the meeting of 30 July, 2003.

[62] Because Mr Els attended the meeting 30 July, 2003 more as an observer than one directly involved, he did not have written official notes of the deliberations at the meeting. He did, however, present a copy of a piece of paper on which he made certain notes and signs that helped him remember what had transpired. Whilst his evidence, with regard to the events at that meeting, is weaker than Mr Mowser's, he is, in my view, heavily supported by objective factors, such as events that transpired after that meeting. The main difference between him and Mr Mowser is that, having seemingly conceded that the defendant's party at that meeting accepted Mr Mowser's explanation of the plaintiff's BEE status, which was certainly far above the recorded 13%, his evidence, viewed holistically, amounts to a denial of their having been such acceptance and, more specifically, that the plaintiff was congratulated for his BEE status. Whilst there might still have been a doubt as to the correctness of his evidence in that regard, Mr Vilakazi's unchallenged evidence that he was informed that he had to await further inputs from the plaintiff, with regard to its BEE status

being much higher than the rating by the defendant, makes it unlikely that the defendant would have accepted such an explanation at the meeting of 30 July, 2003. It would have been senseless to give the person tasked with producing a document to be signed by all service providers with information that contradicted the defendant's stance at the meeting.

- [63] Moreover, the following internal e-mails, i.e. between Danie (Mr De Villiers) and one Shaffie (Mr Mowser) in the e-mail of 20 October 2003, and between Mr De Villiers and a Mr Zac Sithole, also for the attention of Mr Mowser, on 22 October 2003, indicate beyond doubt, that the plaintiff's BEE status was still an issue of concern inside the plaintiff's administration in October, 2003. They read as follows:

"From Steve to Dannie,

*'I refer to our discussion relating to the **BEE status required by the Post Office**. It was again raised at the meeting on Friday [it is common cause that is the meeting on 17 October 2003, attended by Mr Vilakazi and not by Mr Mowser). The points set down by Steve are the issues that were raised during the diligence conducted by both the Post Office and Transnet. We scored 72% during the Transnet due diligence.*

***The problems we are currently experiencing** is due to the incompetence of the woman who conducted the Post Office enquiry. It has subsequently been established that the suspensions in the procurement department was (**sic**) as a result of paying the firm of attorneys ... 00 000 [the e-mail has a portion of the amount thus cut] per BEE audit they conducted. They were apparently paid over 7 million in 6 months!!*

*We have requested that **our BEE status be revisited since it is causing serious problems with the payment process and is an issue that has to be resolved for the contract to be finalised.** It should be conducted by their internal department who, given the circumstances will conduct an in-depth evaluation.”*
[Emphasis added]

That e-mail was from Mr De Villiers to Mr Mowser. One between **Mr De Villiers and Mr Sithole, on 22 October 2003**, reads thus:

“Evening Zack

***I refer to our discussion on Wednesday 22 October with regards to the BEE review we are preparing for, the Post Office.** We have not been registered as a BEE company and this is causing us problems with both **the finalisation of the contract** and our payment terms. I have forwarded the requirements to Shaffie but it should most probably be better to drive from Johannesburg, and get you involved with the process. The requirements that we identified are set out in the mail sent to Shaffie on Monday and are set out below. In addition we are **awaiting (sic) for the criteria that the Post Office is going to evaluate us on.** The minutes of the resolution passed by the Command board to issue shares to the guards is an important element **that we can use during the evaluation.** Please contact me as soon as possible so that we can be well **prepared for the evaluation.**”* [Emphasis added]

- [64] What clearly emerges from both 21 October, 2003 and 22 October, 2003 e-mails, inside the plaintiff, is that (a) the plaintiff was aware that the defendant was unhappy with the plaintiff's BEE status; (b) the plaintiff needed to prepare information with which to convince the defendant that the plaintiff's BEE status was of acceptable level; (c) the plaintiff's BEE status was still to be (further) evaluated by the

defendant; and (d) the BEE status issue was delaying “the finalisation of the contract”.

MR ELS

[65] Although, at the time of his giving evidence, he was Group Compliance Officer, Mr Els used to be Senior Manager, Contract and Licensing, i.e., in the Supply Chain Management Division. The latter division is, in his own words:

“tasked with all the procurement for the Post Office. There was a formal document in terms of tenders and what we also refer to as informal procurements in terms of RFQ, that is a request for quotes.”

Before Ms Nagiah and Mr Vilakazi took over from him, his job entailed the following;

“The intention was that once the contracts had been finalised between the parties, I would then take over my formal responsibilities of getting the documents signed and then do the compliance check to ensure that they comply with the original Board approval and then obviously, once they were signed, get copies to the respective parties and then file it in the database, which was part of my management responsibility to maintain .”

Mr Els is evidently knowledgeable about contract matters, even if he may be inaccurate about what happened at the meeting of 30 July, 2003 – about which I have already expressed my view.

[66] Mr Els’ evidence supports that of Mr Vilakazi, with regard to the delay in the finalisation of the draft contract. Referring to the practice in that regard, he says the following:

“I had become aware in the past, because of the long length of time that it took to finalise tenders, often the spec and this is specifically where we refer to services that had to be provided, with change. As was indicated by the process that was followed over here, that at the time the tender was awarded quite a number of sites, this is now Post Offices, had been closed or new ones had been opened and that would more likely have impacted on the actual roll-out of the provision of services in the Post Office.”

[67] If there were, indeed, intentional delays on the defendant’s side, so as to, for whatever reason, frustrate the plaintiff and delay the finalisation of a formal contract, such evidence has not been tendered by the plaintiff. On the evidence of Mr Vilakazi and numerous objective factors emerging from documents, there was no malicious intention on the part of, at least, Mr Vilakazi and Ms Lotriet, the project owner, in the delaying the finalisation of the draft contract.

[68] There are numerous areas of evidence where both Mr Vilakazi and Mr Els, respectively, refer to the draft contract that still had to be signed by the parties, on completion thereof. I have already alluded to portions in Mr Mowser’s own evidence, wherein he clearly speaks with the understanding that the document that was being prepared by the defendant was the ultimate contract to be signed by the two parties. I also referred to their internal e-mails of 21 and 22 October, 2003, within the plaintiff’s administration.

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[69] It is common cause between the parties that, if the words “This appointment is subject to the following”, in PC3, created a suspensive condition, then such condition has not been fulfilled. The parties differ, however, as to how to arrive at a decision as to whether or not a suspensive condition was created by PC3. According to Mr Newdigate, on the plaintiff’s behalf, the proper approach is to follow the

elementary principles of contract, viz., with regard to offer and acceptance. He submits that it is quite patent from the relevant documentation, PC1, PC2 and PC3, that the plaintiff made an offer to provide guarding services to the defendant. The plaintiff further indicated how the defendant was to indicate its acceptance of that offer, viz., by way using the Post Office. Because this was an acceptance and not a counter-offer, it cannot, in law, create a suspensive condition. It is only if the submission is not sustained by the Court that, according to Mr Newdigate, reference can be made to evidence.

- [70] From the evidence tendered by Mr Mowser as well as various documents referred to in evidence, it has, according to Mr Newdigate, circumstantially been established that the defendant could not have intended to create a suspensive condition. After all, so Mr Newdigate submits, the draft contract whose various versions were placed in evidence makes it clear that the defendant's intention was to make the BEE provision part and parcel of the contract and not something that was to happen later. There cannot, therefore, have been a condition that was to be fulfilled later which, if not fulfilled, would render the contract impossible. In paragraph 7.3 of the plaintiff's heads of argument, the following submissions are made:

“7.3 In the case of a resolute condition, the obligations in terms of the agreement are immediately enforceable, but such obligations fall away in the event of the uncertain future event taking place.”

Because this, in my view, is a correct description of a suspensive condition, I find it unnecessary to repeat the many authorities cited by the plaintiff in that paragraph. It is not clear, however, whether the plaintiff submits, in the paragraph and in the alternative, that the relevant words in PC3 created a suspensive condition. If the words created a suspensive condition, it obviously must be on the basis of

acceptance of Mr Mowser's evidence that, at the meeting of 30 July, 2003, whatever the defendant's perception might have been until then, with regard to the plaintiff complying or not complying with the required BEE status, that problem disappeared at the meeting. That, of course depends upon the Court accepting Mr Mowser's evidence that the BEE requirement was put to bed at that meeting. I have stated why that evidence is unacceptable.

- [71] Mr Newdigate correctly points out, in the plaintiff's heads of argument, that authorities after *Vizir Gianakis v Karp* 1965 3 SA 145 (W), no longer accept that the words "subject to" are necessarily indicative of a suspensive condition and now accept that they may indicate either a suspensive condition or a resolute condition. (See *Badenhorst v Van Rensburg* 1985 (2) SA 321 (T) 335I-336D; *Pangbourne Properties Ltd v Gill and Ramsden (Pty) Ltd* 1996 (1) SA 1182 (A) 1187H-1188B; *Premier Eastern Cape and Another v Sekeleni* 2003 (4) SA 369 (SCA) 375G-J; *Parsons Transport (Pty) Ltd v Global Insurance Co Ltd* 2005 JOL 1560 (SCA).
- [72] In support of the defendant's submission that the BEE agreement has a suspensive condition, Mr Vorster relies, primarily, on the wording of PC3, which he submits is unambiguous. He initially, as I understood him, submitted that the mere presence of the phrase "is subject to the following" creates a suspensive condition, as opposed to a resolute condition. Subsequently, however, referring to authorities, he conceded that whether or not such words create a condition or a term of a contract depends on the particular facts of the case in question. He then submitted that, on the facts of the present case, those words do, indeed, create a suspensive condition. In so saying, he emphasised that PC3 has to be seen as a counter-offer, rather than a straightforward acceptance of the plaintiff's offer contained in PC2. Like Mr Newdigate, Mr Vorster cited a number of authorities in support of the defendant's case. Whilst I have read all of them, I do not find it necessary for me to discuss each and everyone of them.

Summary of Factual Background for this Judgment

[73] The court's decision in this matter is given in the context of the following summary of the factual position:

1. At the end of 2002, the defendant invited offers from, *inter alia*, service providers of guarding services, to apply for providing such services at its Post Offices countrywide. The defendant had divided the country into six regions but had seemingly sought offers in respect of only five of such regions.
2. The plaintiff responded to the invitation by making an offer, during November 2002, as contained in PC2.
3. In view of its previous legal problems concerning its relationship with service providers, the defendant had resolved to create a national or standard contract that would be used by all service providers, even those that were not involved with guarding services.
4. The unchallenged evidence of both Mr Vilakazi and Mr Els, on the defendant's behalf, leaves no doubt that the defendant wanted a thorough contract – one that would ensure that the defendant was indemnified by the service providers in a number of respects, which indemnification had hitherto been non-existent. According to Mr Vilakazi, the idea was to bring an end to the then common occurrence of the defendant finding itself on the losing side when involved in court action against service providers, due to inadequate protection by the contracts then in use. Moreover, there is no doubt, from the same evidence, that the defendant regarded the provision of such a contract as one of urgency. The end of March was the deadline by which, if things had gone according to the defendant's expectation, the first draft of the standardised contract, Version

1, would have been ready, seemingly also for signature. The internal e-mails, between the plaintiff's senior administrators sufficiently indicate the defendant's concern about the plaintiff's BEE status:

5. For reasons previously stated in this judgment, which do not appear to have anything to do with a desire on the defendant's part to frustrate the plaintiff with regard to the finalisation of a formal contract, the deadline of 31 March 2003 could not be achieved. The reasons include the plaintiff's BEE status, as perceived by the defendant, and the plaintiff's objection to some clauses in the draft contract.
6. As at 27 July, 2003, when PC3 was provided to the plaintiff, there still was no final draft of the envisaged contract. In fact, Version 3, which had been finalised on 16 March, 2003 and which is erroneously referred to as Version 1 on page 109 of exhibit A, was forwarded to the plaintiff only on 14 August 2003. According to Mr Vilakazi, the delay in that regard had been caused by the plaintiff's failure to provide information that it had undertaken to furnish the defendant with, in support of its alleged higher BEE status than what alleged by the defendant.
7. As at the time of the meeting of 17 October, 2003, with regard to which the plaintiff has not been in a position to tender evidence, there still was no final draft contract for signature. At that meeting, the plaintiff's BEE status was, once more, raised (see the internal e-mails previously referred to in this judgment, amongst Messrs De Villiers, Mowser and Zac Sithole, where there is reference to the BEE status that "was again raised at the meeting on Friday [17 October 2003]").
8. For reasons that included the plaintiff's BEE status and the underwriter's comments that either required further discussion

or were unacceptable, there still was no contract ready for signature by December, 2003.

9. For the above reasons Mr Mowser's evidence that Mr Mngqibisa stated, at the meeting of 30 July 2003, that the signing of the contract was a mere formality must be rejected. It should be borne in mind that, although none of the defendant's representatives who attended that meeting was called in evidence, Mr Vilakazi stated under oath, that that statement by Mr Mngqibisa is improbable, unlikely, in the light of the objective situation as described by Mr Vilakazi and documentary evidence placed before the Court.

[74] When the defendant wrote the letter of "TERMINATION OF CONTRACTUAL RELATIONSHIP", annexure PC4, on 30 January, 2004, the "BEE improvement" and "successful finalisation and signing of a formal contract", referred to in PC3, had still not happened. Whilst there is a dispute with regard to the first issue, the second one is common cause. I have already stated that I find that Mr Vilakazi's evidence, with regard to the BEE status issue not having been finalised, correct.

[75] During his address, Mr Vorster submitted that, in the light of the case of *Premier Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA), he had come to the conclusion that his submission that the tender was subject to a suspensive condition was incorrect. It simply was a nullity. The following appears in *Firechem*, at paragraphs [35], **431F**:

"As Christie the Law of Contract in South Africa 3rd ed at 152 explains, it is somewhat of a solecism to describe a conditional contract as one in which the condition is purely potestive (Sivolam of Roman Law), as such a provision is destructive of any enforceable agreement. Nor does it matter if

*the provision is cast as a term; and **Christie (op cit at 109).***

*The result is the same. Accordingly, if the provision is potesthve it does not matter for present purposes whether it is classified as a condition or a term. In either case enforcement is dependent upon the will of all parties ... An agreement that the parties will negotiate to conclude another agreement is not enforceable, because of the absolute discretion vested in the parties to agree or disagree: **Scheepers v Vermeulen 1948 (4) SA 884 (O) at 892, Putco Ltd v TV and Radio Guarantee Co (Pty) Ltd and Other Related Cases 1985 (4) SA 809 (A) at 828I.** Such a discretion was vested in the parties as they were to sign 'a contract' the precise terms of which were not fixed in the letter of acceptance, which ... did not refer to annexure B [a contract that was subsequently concluded with the parties]. ... there was, according, room for a breakdown in negotiations before a contract was concluded. The position is similar to that described in **Namibian Minerals Cooperation Ltd v Benguela Concessions Ltd 1997 (2) SA 548 (A) at 567A/C***

*'Since this provision was couched as a suspensive condition, it cannot in my judgment, be said that the parties could have intended to have had a binding agreement simply upon the exercise of the option. They had expressly agreed that only a fuller arrangement will have bound them to the joint venture. Fulfilment of the condition was necessary and the condition required **consensus** of the parties. It is thus not a case where the exercise of the option would have given rise to a contract and that other terms would merely have been left for late negotiation and agreement. I therefore am of the view that the exercise of the option could not have give rise to a contract with certain or ascertainable terms and that on this ground "farm-in" clause is void for vagueness.'*" (Emphasis added)

- [76] In *Putco Ltd v TV and Radio Guarantee* the relevant parts of the agreement between the parties read as follows:

“This letter serves to confirm that we have granted to your company (or its nominee) the sole and exclusive rights with regard to all buses operated by our company. ... This letter, although binding upon both of us, is intended to be a temporary interim arrangement, and we confirm that, in due course, a detailed agreement will be concluded between us as a result of the negotiations which we have been conducting.

*The purpose of this letter is to enable you to satisfy all said parties that you have been granted these exclusive rights and that there is a current **binding arrangement** between us. ...”*

(824A-E, emphasis added)

- [77] The judgment continues, thus at 824G:

*“During the period 1976 to 1981 various attempts were made by Putco and TV to conclude the detailed agreement contemplated, including the preparation and exchange of several draft proposals for such an agreement, but to no avail. The result was that **no detailed agreement was ever concluded.**”* (Emphasis added)

- [78] Whilst it has repeatedly been stated that each case has to be determined on its own facts, facts in the case before me are, with necessary adjustments, similar to those in *Putco Ltd and TV v Radio and Guarantee*. This is more so with regard to “a detailed agreement” to be concluded between the parties (824D). The following appears at **829D-G**.

*“In the alternative it was contended on **Putco’s** behalf that the agreement had been entered into on the assumption that **a detailed agreement would be concluded later and**, as no such agreement was entered into, the assumption had failed and the agreement was accordingly at an end. This contention is without substance. It has not been established in the present matter that the parties would have refrained from entering into the agreement had they known that a detailed agreement would not be concluded later. The agreement envisaged that **the parties would negotiate and conclude a detailed agreement in future. Had such a later contract eventuated the agreement would have terminated but there is no indication to be found in the agreement that it would terminate on the failure to conclude the envisaged detailed agreement.** **Putco’s** attentive contention therefore cannot succeed.*

*It was accepted on behalf of **Putco** that if its contentions in respect of summary termination failed, the agreement was terminable on reasonable notice. All that therefore remains to be considered is whether a valid and reasonable notice of termination was given.”*

- [79] In my interpretation of **Putco** and applying the judgment on the facts of the case before me, it ought to be said that the agreement contained in PC2 and PC3 is terminable on the signing of the contemplated future contract referred to in PC3. Otherwise, the defendant could have terminated it on reasonable notice. That would entail determining whether the notice given in PC4 is reasonable. I am reluctant to go that route for two reasons. Firstly, it seems to me the approach in *Firechem* is different from that in *PUTCO*, *Firechem* being the more recent of the two cases. Secondly, it appears to me that the defendant, has not, in any case, attempted to cancel the agreement in PC2 and PC3. It dealt with the month-to-month agreement.

[80] In my view, the interpretation given in *Firechem*, fifteen years after *Putco*, is how this case should be decided. The second requirement in PC3, “the successful finalisation and signing of a formal contract”, is the unenforceable provision in an agreement that is described in *Firechem*, “because of the absolute discretion vested in the parties to agree or to disagree” (431H). The impasse created by Abelard’s comments, for instance, is the sort of problem that arises where the finalisation of a formal contract depends on the will of the parties. There is no knowing whether Abelard would ever yield its resistance in respect of all or some of the clauses raised in its letter. From Mr Vilakazi’s evidence, on the other hand, and from his letter of instruction by the defendant, it is quite evident that protection of the defendant was paramount in the creation of the standard contract. It seems, therefore unlikely that the impasse would ever be overcome.

[81] Even if the correct position was that described in *Putco Ltd v TV and Radio Guarantee*, it would appear to me that the notice given by the defendant to the plaintiff, in the absence of evidence and/or a submission to the contrary, is reasonable. This, of course, is on the assumption that the letter, PC4, was intended to terminate the proposed long-term, and not the month-to-month, agreement.

[82] If the interpretation in *Putco Ltd v TV and Radio Guarantee* is the appropriate one, it may well be that the bid remains, in that the defendant has not challenged it. In that event, however, the plaintiff will have the problem that it will have come to court for relief when nothing had been done by the defendant to disturb the existing arrangement between them. I leave this aspect open, however, because I have arrived at the conclusion that the case should be resolved on the basis of the decision in *Firechem*.

[83] In the circumstances I make the following order:

1. The tender awarded to the plaintiff by the defendant's Tender Board, on 28 July 2003, as contained in annexure PC3, is null and void;
2. The tender award is, consequently, set aside;

3. The plaintiff is ordered to pay costs of this action.

J N M POSWA

JUDGE OF THE NORTH GAUTENG HIGH COURT

16945/2004/sg

Heard on: 08.11.2005

For the Applicant: Adv Newdigate, SC & Adv Howe

Instructed by: Messrs Gross, Papadopulo and Associates

For the Defendant: Adv Vorster, SC & Adv Ramawele

Instructed by: Messrs A M Vilakazi Tau Attorneys

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Date of Judgment: 30.10.2009