REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO:

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE
SIGNATURE

In the matter between:

EXACUBE CC t/a EXACUBE TRAINING INSTITUTE Plaintiff
(Registration Number 2010/105757/23)

And

THE GAUTENG DEPARTMENT OF First
Defendant
AGRICULTURE AND RURAL DEVELOPMENT

THE MEC OF THE GAUTENG DEPARTMENT FOR Second Defendant
ECONOMICAL ENVIRONMENT AGRICULTURE AND
RURAL DEVELOPMENT

JUDGMENT

MAKUME, J:

BACKGROUND

[1] During 2016 the Defendant requested proposals from service providers in the field of Agriculture specifically to train aspirant and existing farmers in the Province of Gauteng on various short courses.

[2] The Plaintiff was the successful bidder and was informed by way of a letter addressed to it dated the 24th October 2016. On the 27th October 2016 a detailed service level agreement was concluded between the Plaintiff and the Defendant ("the Agreement").

[3] Training commenced on the 6th November 2016 and was meant to be completed by April 2017 in terms of a revised training plan and schedule.

[4] It is common cause that in terms of the Agreement the Plaintiff was to provide training in both theory and practicals to 1036 farmers who would have been identified by the Defendant. In the execution of the Agreement the Defendant appointed a Mr Njoni as the project manager whilst the Plaintiff was represented by Mr Alex McNab.

[5] The total contract value was the sum of R6 921 929.60. On the 16th January 2017 the Defendant made payment of R2 171 455.00 to the Plaintiff and on the 13th February 2017 a further payment of R1 202 652.00 was made both after the Plaintiff had invoiced the Defendant for services rendered.

[6] A further invoice for the period 15th February 2017 was submitted but the Defendant declined to make payment instead on the 3rd March 2017 Mr Njoni sent an SMS to Mr McNab informing him that the contract is suspended.

[7] The Plaintiff later accepted the Defendant repudiation of the Agreement cancelled same and issued summons claiming payment of the sum of R4 012 823.40 made up as follows:

CLAIM A	R1 603 536.00
CLAIM B	R 465 000.00
CLAIM C	R1 944 287.40
TOTAL	R4 012 823.40

THE ISSUES

[8] It is common cause that the terms of the Agreement are not in dispute what is in dispute is whether it is the Plaintiff or the Defendant who breached the agreement.

[9] In their counter claim the Defendant claims repayment of the amount paid to the Plaintiff as set out above on the basis that the Plaintiff failed to deliver services in accordance with the Agreement.

THE PLAINTIFF'S CASE

[10] The Plaintiff's case is that it complied fully with the Agreement including terms of reference since inception and that the Defendant unlawfully suspended and later verbally cancelled the agreement without furnishing any reasons for such cancellation in writing. In the result the Plaintiff seeks to hold the Defendant liable for payment of the full contract price of R6 921 929.60.

THE DEFENDANT'S CASE

[11] The Defendant's case is that Plaintiff failed to provide services in accordance with the Agreement including the terms of refence, further that payments made to the Plaintiff during January and February 2017 were made on condition that Plaintiff remedied the defective services that it had been rendering. In particular, the Defendant says the learner farmers were not given practicals and therefore service was defective.

EVIDENCE

MISS NOMTHANDAZO BUSISIWE LUBISI

[12] The first witness for the Plaintiff was Ms Nomthandazo Busisiwe Lubisi. She is the sole member of the Plaintiff. Mr Alex McNab is employed as a

Manager. She told the Court that she developed interest in Agriculture because her father was involved in Agriculture. During the year 2013 after she finished University studies and whilst doing in service training in Mpumalanga she met Mr Alex McNab and that is when the idea of being involved in training farmers developed.

[13] Ms Lubisi went on to explain how accreditation of courses by the Agriculture seta (Agriseta) takes place and how certification takes place once a student or aspiring farmer finishes attending training. They as trainers are accredited by Agriseta. They do training and assessment and therefore issue a competence certificate to the learner and also inform Agriseta about the student's competency.

[14] The Agreement that the Plaintiff and the Defendant concluded during October 2016 was to offer training on short courses to the farmers identified by the Defendant. Each week after they shall have trained a group of farmers they did assessment and the farmers wrote an examination on what had been taught to them.

[15] In their training they use training manuals which they get from Agriseta which manuals have been accredited by the Standard Qualifications Authority (SAQA). They also source accredited learning material relevant to their training from other institutions.

[16] When the Defendant published the Request for Proposal (RFP) Mr Alex McNab completed the tender document and submitted same to the Defendant. Subsequent to that they received a letter of award on the 24th October 2016. The letter of award indicate that they had to train farmers with credit bearing training in terms of the Request for Proposal (RFP).

[17] Ms Lubisi confirmed that a Service Level Agreement to which was attached Terms of Reference as well as scope of work was signed on the 27th October 2016. The document titled Terms of Reference sets out clearly what they as the successful tenderer had to do in the training of 1036 farmers.

[18] The scope of work and the deliverables were set out in the Terms of Reference (TOR). The training was aimed at qualifying the farmers on short courses on NQF level 1 and level 2 and because the dates that appear on the Terms of Reference were dates that were before the tender was awarded a new Training plan was then drafted and agreed upon between Mr McNab and Mr Njoli. That training plan commenced on the 6th November 2016 and was to continue until April 2017.

[19] Miss Lubisi described that the abbreviation HACCP stood for a training course on food safety. In executing the training, it was agreed that each week before a Friday the Department through Mr Njoli will forward a list of names of identified farmers to the Plaintiff which list also indicated where the persons had to be picked up by the Plaintiff.

[20] The arrangement was that the trainees were to be picked up at identified places on a Sunday and be transported to the training venue being a lodge identified and approved by the Defendant in this case called the Don Bosco Centre in Walkerville.

[21] Training would start on a Monday and last until the Friday and when that group has been assessed they would then be given certificates of competency where-after the next group would be picked up on a Sunday then training start on a Monday.

[22] Ms Lubisi was referred to clause 17 of the Agreement which deals with default and breach. She told the Court that contrary to what clause 17 stipulated no written notice of cancellation of the agreement was ever sent by the Defendant to the Plaintiff. What was sent to them on the 3 March 2017 was an sms suspending the contract. According to her understanding clause 17.10 of the Agreement placed a duty on the Defendant to provide them with a written notice setting out the reasons for cancellation of the agreement. The Defendant failed to do that.

[23] Similarly clause 18.1 also placed a duty on the Defendant to appoint another services provider in the event the Plaintiff defaulted subject to the Defendant giving written notice which she says was never done. Clause 18.6 also requires written notice to be given on termination of the Agreement.

[24] Reference was also made to clause 23.1 of the document titled Government Procurement General Condition of Contract July 2010. That clause also placed an obligation on the Defendant to terminate a contract awarded by giving written notice to the tenderer/supplier.

[25] On the 14th December 2016 Ms Lubisi sent to the Defendant the first of their invoices for services rendered for the period 6th November 2016 to 9th December 2016 for the sum of R2 171 455.00. The Defendant made payment of that invoice during 20 January 2017.

[26] On the 3rd February 2017 Ms Lubisi sent to the Defendant the second invoice for services rendered for the period 15th January 2017 to 3rd February 2017 for the amount of R1 202 572.00 which amount the Defendant also paid.

[27] On the 28th February 2017 Ms Lubisi sent to the Defendant their third invoice for services rendered for the period 15th February 2017 to 24th February in the amount of R1 202 652.00. This invoice was not paid.

[28] A fourth invoice dated the 10th March 2017 for services rendered for the period 26th February 2017 to 3rd March 2017 for the amount of R400 884.00 was sent to the Defendant and was also not paid.

[29] The amounts stated in paragraphs 26 and 27 above make out the amount in claim A being the sum of R1 603 536.00.

[30] She testified that as regards claim B being the sum of R465 000.00 she is unable to say how it was arrived at but that Mr McNab will be able to explain how the amount was arrived at and what it was for.

[31] Claim C being for payment of the sum of R1 944 787.40 that claim is in respect of the balance of the repudiated contract. She testified that but for the repudiation they as the Plaintiff would have provided the agreed services and would have been entitled to payment of that amount.

[32] Ms Lubisi testified that during or about November 2016 a meeting was held with Mr Njoli when various complaints were addressed. Among the complaints was dissatisfaction with the venue and the food provided by Don Bosco as a result Mr Njoli on behalf of the Defendant asked the Plaintiff to look for a better venue. This the Plaintiff did and the training venue was moved to a place called Lapeng. This was done despite the fact that the Defendant had prior to awarding the contract approved Don Bosco secondly when moving to the new venue the Defendants were told that it will be more expensive and the amount being charged by Lapeng were not in the tender document. The Plaintiff had prepared its tender in respect of the venue using the rates at Don Bosco.

[33] The first meeting took place on the 29th November 2016. The second meeting was held on the 5th December 2016. In the minutes penned by the Plaintiff pursuant to both meetings it is clear that the issues that formed the basis of those meetings were resolved.

[34] Amongst the complaints was the issue of Practical training which the Plaintiff conceded did not take place because the trainees did not come properly dressed for practicals to be carried out at the piggery and at chicken farms. However, Ms Lubisi indicated that the trainees observed how work was done that is those who did not have proper PPE clothing. According to her it was the Defendant's duty to see to it that the trainees had PPE's not them. She testified that in their tender they did not quote- for PPEs. As the Plaintiff they did inform Mr Njoli about their trainees not properly dressed and Mr Njoli in an email acknowledged that and never raised the issue that they as Plaintiff had to provide PPEs.

[35] During January 2017 the training was moved to a new venue called Lapeng Hotel even though they had not as yet been paid for services already rendered. They had to take an overdraft on their business account in order to pay Lapeng Hotel. When they started with training at Lapeng they thought that all the complaints had been dealt with and resolved.

[36] During February 2017 some of the learners started being uncooperative they would arrive for classes being under the influence of liquor and became rowdy and disruptive. They as the Plaintiff complained to Mr Njoli who responded by saying that the Trainees were adults and can't be admonished. Training continued under those difficult and disruptive circumstances.

[37] It also happened that when their drivers went to pick up the trainees some would be drunk and along the way would insist on having the vehicle stop to enable then to relive themselves. In one of the grievances the farmers had questioned how they as the Plaintiff had been awarded the tender Ms Lubisi informed Mr Njoli telephonically on the 2 March 2017 about the behaviour of the trainees. Mr Njoli was in Durban at that time. Instead on the 3 March 2017 Njoli sent an sms to Alex McNab suspending the contract. When McNab informed him that they had already paid for the hotel accommodation and transport for learners for the week commencing on the 5 March 2017 they were told that if they proceed with training it will be at their own expenses.

[38] A meeting was held on Monday the 6th May 2017 attended by Mr Njoli, Mr Ishmael, Alex McNab, Miss Lubisi a student called Vusi. It was on this day that Mr Ishmael verbally told them that the contract had been cancelled. Mr Ishmael told the Plaintiff to give him reasons why the contract should not be terminated. He told them that a formal letter will follow. That did not happen.

[39] She testified further that the sms dated 3 March 2017 did not give reason for the suspension of the agreement. She received the farmer's grievance document on the 3rd March 2017. The document itself is not dated.

[40] On the 8th March 2017 she addressed an email to Mr Njoli in the following words:

> "I am doing a follow up on the sms I received on Friday 3 March 2017 where you were suspending the training and went along to invite us to a meeting for Monday where we were supposed to solve the challenges raised. When we arrived for the meeting on Monday 6 March 2017 we were told verbally that our contract had been terminated and up until today we have not received any formal cancellation.
>
> We are actually in the dark as to what is going on because we had already prepared for all the remaining trainings. The hotel, transport, training material etc. had already been paid for.
>
> We are still waiting for a way forward.
>
> Regards,
> Thandi."

[41] Mr Njoli responded with a short and terse warning on the 9th March 2017 and said the following: "As per your email below, I wish to remind you that you were part of the meeting and you know what is the way forward as per the meeting resolution."

[42] Miss Lubisi told the Court that she had no idea what the way forward was as a result a further meeting was held with the Head of the Department a certain Ms Mbassa the meeting was held on the 22nd March 2017. Prior to that the Plaintiff had sent a detailed letter to the Head of the Department setting out the problem and the issues. They also sent a detailed training report for the attention of Miss Mbassa. In the report they had trained +/- 800 farmers when the contract was suspended.

[43] The meeting of the 22 March 2017 did not resolve the issues the status remained the same according to the Defendant the contract had been cancelled because of non-performance of the agreed terms. The HOD told the CFO to pay for services rendered.

[44] Miss Lubisi produced a document indicating that on the 1st March 2017 Plaintiff paid Lapeng hotel the sum of R440 000.00 being accommodation for the period starting on 5 March 2017 to 10 March 2017. Accommodation was not used because Defendant had suspended the contract. Plaintiff was not reimbursed by the hotel nor by the Defendant. They also had paid transport fees for transporting learners on the 5 March 2017 to Lapeng hotel.

[45] On the 6 June 2017 they instructed P Smit Attorneys who addressed a letter of demand to the Defendant to make payment. That letter was not responded to.

[46] Miss Lubisi was cross-examined at length by counsel for the Defendant. It turned out that most of the issues that concerned management of the project at Don Bosco and at Lapeng hotel, she was not personally involved and referred to Mr McNab who would be able to answer such questions.

[47] Miss Lubisi confirmed that she addressed a letter to the Head of the Department on the 20th March 2017 which letter was a precursor to their meeting arranged for the 22nd March 2017 at which meeting they as the Plaintiff sought audience from the Head of the Department about the cancellation of the contract.

[48] Miss Lubisi was cross-examined extensively on the issue of the learners or farmers that attended practicals without Personal Protective Equipment (PPE). She indicated that on the occasions that the learners had to go and do physical practicals at a Piggery in Delmas they did not have their protective clothes on as a result they were not allowed inside the Piggery. This was the same position when they had to go and do practicals at a chicken farm.

[49] It was eventually put to Miss Lubisi that the Defendant's officials cancelled the agreement because the Plaintiff did not execute training in accordance with the agreement by not taking students for practicals. This became a vexed

and contentious question and it is at the centre of the dispute as to the cancellation of the contract.

[50] The version of the Defendant was that the Plaintiff had to supply the learners with protective clothing. The Plaintiff denied this and referred to an email written by Mr Njoli in which Mr Njoli asked the Plaintiff's representatives to remind him that he should tell the learners to bring protective clothing. That letter alone indicates in no uncertain terms that the responsibility for protective clothing lay with the Department not the Plaintiff.

[51] In any event Miss Lubisi explained that practiclas did take place even though some of the learners did not have protective clothing. This evidence was later corroborated by Mr Alex McNab who elaborated that when such an event takes place they devise other means to expose learners to practical work. Also that not all practicals take place at farms some are carried out inside the classrooms.

[52] Ms Lubisi elaborated that learners completed feed-back question and she never saw any complaint about lecturers being mentioned in all the feed-back document that they received from the learners. This evidence was also corroborated by Mr McNab who referred to a number of evaluation forms in which the learners expressed their appreciation at the level of training they were receiving and exposed to.

[53] Miss Lubisi indicated further that pursuant to the meeting held with representatives of the Defendant on the 29 November 2016 they as a company decided to change the venue from Don-Bosco to Lapeng hotel. This was done to satisfy the complaints by the farmers (learner) as some of them had said they expected to be housed at places like the Garden Court in Hartfield not chalets in Walkerville.

[54] Mr Njoli was informed and also approved of the new venue after having visited it and inspected it in the same way he had done with the venue at Don-Bosco Mr Njoli gave his go-ahead about the new venue.

[55] Miss Lubisi testified that when Mr Njoli suspended the contract on the 3rd March 2017 they as a company had already trained 711 farmers. She told the Court that the numbers as well as the particulars of the farmers who attended and were certified competent is in a detailed report that was sent to the Defendant.

[56] Miss Lubisi testified that when Mr Njoli suspended the contract on the 3rd March 2017 they as a company had already trained 711 farmers. She told the Court that the numbers as well as the particulars of the farmers who attended and were certified competent is in a detailed report that was sent to the Defendant.

[57] Miss Lubisi was questioned about her email wherein she put the number of people trained at +/- 800. This in my view was a dead question because it is clear that in the letter Miss Lubisi estimated.

[58] Sacono and Nulaid was their strategic partner who now and then came to the training centre to make presentation on their products and were never involved in the assessment of students.

[59] Miss Lubisi stressed further that Mr Njoli was made aware before the start of the training in January 2017 that the learners appointed by them had to have PPE's Lubisi indicated further that Mr Njoli was aware of that requirement as far back as December 0f 2016.

[60] Cross-examination shifted once more to the issue of practicals as opposed to theory. Miss Lubisi re-emphasised that not all practicals took place at the farms some did take place in the class room when learners were asked to make presentation after the lecture. According to them that also sufficed as practical training.

[61] When it was put to her that failure to take the learners for actual practical at a Piggery or Chicken farm was not in compliance with the agreement she disputed this.

[62] Cross-examination continued on the following day being 25th January 2022. Miss Lubisi gave a different number of learners they had trained which now appears to have been 745 trainers. She explained this contradiction by telling the Court that the report was compiled by Mr McNab. I do not find this mild contradiction being material after all Miss Lubisi gave an estimate not an exact number. She then indicated that Mr McNab will be better placed to respond to that question about the number because he wrote the reports.

[63] As regards the uploading of the names of those farmers who had been certified competent by the Plaintiff which information was entered into the record of the Agriseta Lubisi said that the question will be best answered by Mr McNab but she herself knows that it was done.

[64] The issue of the PPE's was revisited again when it was put to Miss Lubisi that Mr Njoli will testify that he wrote the email about PPE's not as an admission that PPE's was their responsibility.

[65] Likewise the issue of the learners not having done practical at a Piggery and in respect of layers was brought up again in cross-examination. It became clearer that Miss Lubisi did not have first-hand information and referred such question to Mr McNab. She however, did indicate that practicals do not only take place at a farm some do take place in classrooms and that suffices. In certain instances, the learners do observations at a particular farm without them necessarily taking part. She insisted that observation is also practical.

[66] It was put to Miss Lubisi that Mr Njoli will say that the first time he came to know that the learners were misbehaving and came to class drunk was on the 5th March 2017. Miss Lubisi disputed this and told the Court that each month Mr McNab in his monthly report to the Department did mentioned unruliness and usage of alcohol as a challenge to the training.

[67] The witness was also questioned as to why the issue of the PPE was not pleaded by the Plaintiff Miss Lubisi correctly responded that she has no knowledge how his legal representatives chose to style the pleadings. She emphasised that it was the responsibility of the Department to have told the learners to buy PPE's for training purposes.

[68] Miss Lubisi further testified that claim A being payment of the sum of R1 603 536.00 was for services rendered and for which the Defendant is refusing to pay.

[69] It was put to Miss Lubisi that the Defendant will testify that they paid the first two invoices totalling the sum of R3 374 107.00 not because services had been rendered but it was on condition that the Plaintiff made good all its mistakes and deficiencies in rendering the services. Miss Lubisi denied this and told the Court that payment was unconditional and was made because Defendant had satisfied themselves that the services had been rendered.

[70] As regards payment of the amount of R440 000.00 to Lapeng hotel by the Plaintiff which is part of claim B it was put to Miss Lubisi that the relocation of the learners from Don-Bosco to Lapeng hotel was made after the Defendant brought it to the attention of the Plaintiff that Don Bosco as a venue was substandard and not in line with the Department's requirements. Miss Lubisi responded that when they responded to the tender they submitted quotations from Don-Bosco and once they had been shortlisted the Department's officials visited the venue and approved of it.

[71] Defendant's Counsel then proceeded to put versions by two of the learners namely, Rowan Mckey and one Kenny Mhlari who will testify that the rooms that they were allocated were dirty, filthy and had leakages. Miss Lubisi responded that it was never brought to her attention and in any case the rule is that if tenants are not happy with the condition of the rooms they had to report to the hotel management.

[72] It was put to Miss Lubisi that there was no need to make payment to Lapeng because the contract had been suspended she responded that when they were told of the suspension payment had already taken place via EFT on the 1st March 2017.

[73] On the 6th March 2017 when the CFO told them at a meeting that the contract had been cancelled she asked that the cancellation giving reasons be done in writing and up to now the Department had not given them written notice of cancellation.

[74] She testified further that in preparation for the next intake of students or learners that were to come in on Sunday the 5th March 2017 Mr McNab paid Bafo Taxi Services a cash amount of R25 000.00. This was not recovered even though no services were rendered by the Taxi Group. Similarly, the payment to Lapeng was not recovered even though no one came because it was a block booking of the premises. She concluded by saying that Mr Alex McNab will be in a position to give evidence on the payment of the sum of R25 000.00 transport costs.

[75] Miss Lubisi was accused of being evasive and changing her version of events. This she denied. Miss Lubisi was then cross-examined on the contents of an affidavit deposed to by Mr Njoli when the Defendant opposed an application for summary judgment. In particular reference was made to a document by the South African Farmers when numerous complaints had been listed. Miss Lubisi responded that the document was never there at the first meeting held on the 29th November 2016 and that the first time they saw that document was on the 6th March 2017 at the second meeting.

[76] On the 2nd March 2017 some of the farmers refused to attend classes and were toy-toying outside. Miss Lubisi called Mr Njoli who was in Durban at that time informing him about the happenings Mr Njoli sent one of his colleagues to come speak to the farmers. Miss Lubisi told the court that at that meeting the toy-toying farmers raised the issue that they were used to being trained by

ARC and not the Plaintiff. She could not recall if the farmers listed any complaint.

[77] At the third and last meeting held with the HOD Miss Mbassa the HOD asked both Mr Njoli and the CFO Mr Ismael Ebrahim why the contract was cancelled. She said that she is going to institute an investigation but in the meantime she gave an instruction to the CFO to pay the outstanding invoices.

[78] Despite that instruction the CFO did not pay and sent an email to the HOD that there was a backlog meaning that because it was almost end of financial year the payment may not be made timeously. When Miss Lubisi was referred to an email by the CFO wherein they as the Plaintiff were required to separate the invoices and indicate what amount was involved for theory and how much for practicals to separate that as the tender did not make provisions for that.

[79] The witness Miss Lubisi was then referred to the affidavit in support of the resistance to the application for summary judgment which affidavit had been deposed to by one Bright Nkontwana. In the affidavit dated the 20th November 2017 Mr Nkotwana described himself as the Head of Department and paragraph 32 thereof Mr Nkotwana says that payment of the two invoices by the Defendant totalling the amount of R3 374 107.00 was done based on the undertaking by Plaintiff's representatives that it would urgently rectify the problems complained of by the farmers. In response Miss Lubisi indicated that when payment was made Mr Nkotwana was not the HOD it was a Miss Thandeka Mbassa. Secondly the so called farmers' grievances continued in Annexure NSI were only presented at a meeting in March 2017 long after payments had been made which means that such complaints played no role in the decision by the Defendant to make payments. Miss Lubisi concluded that payment was made with no conditions attached it was made because the Defendant had satisfied itself that indeed services had been rendered.

[80] Finally it was put to Miss Lubisi that there was no obligation on the CFO and other officials to made payments despite instructions to do so by the then

HOD Ms Mbassa because according to the CFO and Njoli the Plaintiff had failed to render services in accordance with the agreement.

[81] In answering questions put to her by the Court Miss Lubisi said that they did not ask for a refund of the amount of R440 000.00 and the R25 000.00 paid to Lapeng hotel and Bafo Taxis respectively even though no services were rendered because firstly Lapeng had been block booked for the duration of this training and the taxi people were paid in cash and Mr McNab who made the payment will be able to give more information on that.

MR ALEX DANIEL MCNAB

[82] The second witness for the Plaintiff was Mr Alex McNab who took the stand on Tuesday the 25th January 2022 in the late afternoon and only finished testifying on Thursday the 27th January 2022. This is understandable as he is the witness who was the executor of the agreement. He signed the agreement with the Defendant. He is the one who prepared the tender document and was also the project manager overseeing facilitation of the learners, arranging transport, prepared training schedules and generally was the face of the Plaintiff in the execution of the agreement. He also prepared reports that were sent each week to the Defendant and compiled reports that accompanied invoices for payment.

[83] Mr Alex McNab explained that he was the manager at Exacube Training and not a Director at the time of the completion of the tender documents. After they had been awarded the tender he had a discussion with Mr Njoli the Department's representative, a new training schedule was prepared to fit in with the period 6th March 2016 to 30th March 2017 in terms of the bid documents.

[84] The evidence of Mr McNab both in chief and under cross-examination mostly traversed what had already been testified to by Ms Lubisi with exception of minor and immaterial difference their evidence corroborated each other on the

major and real issues in this matter. Mr McNab's evidence dealt to a large extent with the following matters:

84.1 Preparation of Training schedules.
84.2 Supervision of Training (Theory & Practicals).
84.3 Accommodation at Training Centres.
84.4 Personal Protective clothing.
84.5 Collection and Transportation of Learners/Farmers.
84.6 Communication with the Defendant's representative Mr Njoli Skhalele (Njoli).
84.7 Submission of Invoices and Payments.
84.8 Complaints and Meetings held.

[85] I will now deal with each of the above topics individually or collectively but not in the sequence that they are listed above.

PREPARATION OF TRAINING SCHEDULES

[86] Mr McNab testified that he and the Plaintiff are accredited Trainers in the field of Agriculture. The accreditation was done by Agriset in accordance with standards approved by the South African Qualification Authority.

[87] In terms of the agreement the Defendant appointed the Plaintiff to conduct training of 1036 Farmers in the Gauteng Province and after such training to issue them with SETA accredited certificates.

[88] During the bidding process it became clear that the bid document had dates that had passed as a result after the tender had been awarded it was agreed between Mr McNab and Mr Njoli Skhalele (Njoli) the Defendant's project manager that the training schedule be revised. This Mr McNab did and submitted same to Mr Njoli who approved same. The unit standards and subjects to be taught were proposed by Mr McNab to fit in with the deliverables and taking into consideration the time period allocated for the whole training.

[89] Mr McNab testified further that as a result of the period allocated being 5 months from November 2016 to March 2017 he had to squeeze in unit standards thus making it short courses geared to train farmers on the basics and not qualifying them from small to commercial farmers Mr Njoli approved of the training schedule and the unit standard and topics to be covered. A training plan was submitted by Plaintiff which was approved by the Defendant.

ACCOMMODATION FOR TRAINING

[90] As part of their bid document the Plaintiff had sourced a quotation for a training centre at a place known as Don-Bosco Centre in Walkerville South of Johannesburg. The Defendant's representative did a site inspection of the centre and approved of it.

[91] Training commenced at that centre on the 6th November 2016. During that month complaints were raised by some of the trainee farmers who complained about the condition and food being served at Don-Bosco. This led to a meeting between the project managers on the 29th November 2016 the issues were discussed and resolved. Mr McNab testified that however in order to mitigate the problem he proposed to Mr Njoli that they as the company will seek a new venue. This they did and from 15th January 2017 training was moved to Lapeng hotel which is not far from Don-Bosco in the same area.

COLLECTION AND TRANSPORTATION OF TRAINEE FARMERS TO AND FROM THE TRAINING VENUE

[92] In terms of the training schedule training commenced on a Monday and ended on a Friday. What used to happen is that because Mr Njoli and his colleagues in the department were already in possession of the agreed training schedule it was their duty to appoint or nominate aspirant trainee farmers at the different arrears within the Province of Gauteng and furnish the names and

particulars of such trainees to the Plaintiff at least seven days before training day.

[93] In the document from the department (Defendant) the Plaintiff was advised as to where to pick up the trainees at what time and how many. Based on such information the Plaintiff through Mr McNab would then arrange with a Taxi fleet owner in this case Bafo Taxi Association to make available transport on a Sunday before the Monday. Drivers would then pick up the trainees at particular times at the pick-up points and drop them off at the training centre on a Sunday. That process was not without its own problems. It was reported that at certain instances a driver would arrive having been given a list of say 10 people to pick up but only find 3 or 5 of them. At times trainees arrived under the influence of liquor from the pick-up points and presented problems on the way to the centre. As a result, the number always fluctuated. However, it was the duty of the Defendant that they meet the agreed number of 1036 by the end of March 2017.

[94] McNab testified that when Mr Njoli suspended the contract by way of an sms on Friday the 3rd March 2017 the Plaintiff had already paid Lapeng Hotel an amount of R440 000.00 on the 1st March 2017 which amount was for accommodation of 100 learners for the week commencing on Sunday the 5th March 2017 to Friday the 10th March 2017. He also made a cash payment of R25 000.00 to Bafo Taxi on the 3rd March 2017 even though he had already received the sms suspending the contract. He confirmed that the hotel rooms were not occupied by the learners during that week as the driver found no one at the nominated pick up points.

TRAINING (THEORY AND PRACTICALS PPE'S

[95] Mr McNab sourced facilitators to conduct training in both theory and practicals. One such facilitator was a Mr Sabelo Zulu. Each trainee was in possession of a training guide as well as a learner guide. Students were also provided with own learning material including note books and pens.

[96] Earlier on Mr Njoli had in an email dated the 30th October 2016 raised concerns about the number of training days which he said had been reduced from five to three days Mr McNab responded that he explained to Mr Njoli that training will still last 5 days and they are guided by the approved unit standards as approved by SAQA. They as trainees are also guided by Agriseta as to at what level they could pitch seeing that the period of training was to be only 5 months. This meant that all that they as trainees had to present was short courses that equals to a grade 9 certificate.

[97] It is common cause that in the training there is the theoretical part as well as the practical part. Mr McNab told the Court that whilst theory is done mostly in the classroom in certain instances practicals are also conducted in the classroom depending on what the subject matter is. It is also common cause that when learners are taken out to do practicals at farming operations for example a poultry farm, piggery, vegetable, farm and others it is a requirement that learners should be properly dressed in protective clothing (PPE). He testified that in terms of the agreement it was the responsibility of the Defendant to see to it that their learners which had been identified by them bring along PPE to the training course.

[98] Mr McNab told the Court that he informed Mr Njoli during December 2016 that when training commenced in January 2017 the learners should have PPE. He explained that in training in Unit standard NQF levels in 5 there are specific percentages for theory and practicals which is usually 30% theory and 70% practicals. However, some practicals for example a course in Co-operative Governance a facilitator would do practicals in class with the learners by requiring them to do presentation after learning theory.

[99] He also explained that in those instances where learners are taken out to, for example, a vegetable farm for practical training and it so happens that some of the learners are not properly clothed in PPE's then only those who have PPE will take part in actual training whilst those without will only observe. That observation is taken as practical training. The same thing happens at piggeries and poultry farms.

[100] In respect of those learners who did Advance beef Cattle production the sort of practical training that they gave was to take learners to a farm and show them and what methods was used to grow it for example the type of feed not where it is kept. They show them how such cattle are slaughtered after it shall have been weighed. They are taught how to weigh it before such a carcass is sent to the butchery.

[101] Mr McNab was confronted during cross-examination with a statement that they as facilitators unilaterally took decisions to change the way practicals should be done and which was not in line with the provisions of the agreement. Mr McNab disputed this and said everything was done in accordance with the agreement and that in instances where learners did not have PPE they as facilitators had to devise means to accommodate them and that is not a unilateral amendment of the agreement.

COMMUNICATION BETWEEN PLAINTIFF AND DEFENDANT AND MEETINGS HELD TO RESOLVE ISSUES RAISED BY FARMERS AND THE DEFENDANT

[102] Three meetings were held the first on the 29th November 2016 followed by one on the 6th March 2017 and lastly the meeting held with the Head of the Department on the 22nd March 2017. In between the meeting Mr McNab and Mr Njoli held informal meetings and exchanged views in project managing the learning of the farmers.

[103] A recordal of the resolutions taken after the first meeting held on the 29th November 2016 is contained in emails dated the 29th November 2016 and those dated the 5th December 2016 by Mr Njoli and Miss Lubisi respectively. A reading of those emails captures the notion that there were complaints by farmers about the food being served at Don-Bosco as well as the condition of the rooms. The farmers wanted TV sets in their rooms. As regards training the only thing mentioned was that the drafting of a Constitution should be included in the manual for training on the subject of Co-operative Governance. Language in the training was also raised.

[104] A reading of the email by Miss Lubisi dated the 5th December 2016 clearly sets out that all the issues that were raised at the meeting were amicably resolved. In particular, the issue around accommodation at Don-Bosco was not a problem to be resolved by Exacube but by the management of Don Bosco in any case Mr McNab re-emphasised that the Representatives of the Defendant visited

Don-Bosco before the tender was awarded and satisfied themselves of its suitability and the type of meals served.

[105] Mr McNab in response to a document marked "NSI" which was an annexure to the affidavit resisting Summary Judgment which document purported to come from an organisation calling themselves South African Farmers(Gauteng) in which it has set out various grievances by the "farmers" against Exacube Mr McNab told the Court that the first time that, that document surfaced was during the second meeting held on the 6th March 2017 and not at the first meeting. As proof that the document was not there at the November 2016 meeting Mr McNab informed the Court that no practicals for piggery had as yet taken place in November 2016 and the fact that the memorandum makes reference to such training is proof that it was never there.

[106] Mr McNab indicated that from the onset of the agreement they had made preparation to train 1036 learner farmers in accordance with the bid document. He indicated that some learners came more than once in other words they would come in week one, then two and three when it was expected that each week there would be new faces. Mr McNab aptly called it "recycling" and said that they as trainers could do nothing about that as it was the choice and prerogative of the Defendant to indicate people that had to attend.

[107] The second meeting that took place on the 6th March 2017 being a Monday was preceded by an sms message addressed to Mr McNab or Miss Lubisi by Mr Njoli informing them that the contract had been suspended with immediate

effect pending resolution of the complaints laid by the farmers. When Mr McNab received that sms on the 3rd March 2017 he had already in preparation for training scheduled to begin on the 6th March 2017 paid Lapeng Hotel R400 000.00 for accommodation of 100 learners and paid R25 000.00 to Bafo Taxi Association to enable them to pick up the learners on Sunday the 5th March 2017 and drop them off at Lapeng Hotel. Mr McNab on telling that to Mr Njoli received a terse message that if they Plaintiff go ahead it will be their own fruitless expenditure.

[108] Mr McNab telephoned Mr Sibandze the owner of Bafo Taxi Services on Sunday the 5th March 2017 not to send out his drivers to the designated pick up points. The meeting took place on Monday the 6th March 2017 which was attended by Mr McNab, Miss Lubisi, Mr Njoli, Mr Ebrahim Ismael (CFO) and others. Mr McNab as well as Miss Lubisi told the Court that at that meeting Mr Ismael the CFO verbally told them that the contract had been cancelled and asked the Plaintiffs to tell him why they should not be blacklisted from doing further business with Government. Mr McNab asked for written reasons for cancellation of the agreement and was promised that such a letter will follow. We now know that no such letter was ever written and or received.

[109] Frustrated by that decision Miss Lubisi and Mr McNab decided to address a letter to the Head of Department of Miss Thandi Mbassa on the 20th March 2017 as a result of that letter a third meeting was convened for the 22nd March 2017 attended by all the people who attended the second meeting and added to it the legal representatives of the Department of Agriculture.

[110] Mr McNab and Miss Lubisi testified that after deliberations Miss Mbassa told the CFO to make payment of invoices that had already been submitted whilst she institutes an investigation around the cancellation. Mr McNab told the Court that Miss Mbassa questioned the cancellation of the agreement hence the decision that payment be made whilst she undertook an investigation.

[111] According to the Plaintiff this was payment in respect of claim A being the sum of R1 603 536.00. The CFO did not pay instead he addressed an email

to the Deputy HOD that there was a back log which meant that the request for payment of the amount will be kicked out because it will most probably fall in the ensuing financial year. According to Mr McNab once the Finance Department had received instruction they had to pay.

SUBMISSION OF INVOICES FOR PAYMENT

[112] On the 14th December 2016 the Plaintiff submitted their invoice for services rendered for the period 6th November 2016 to 9th December 2016 duly accompanied by training reports as well as attendance register. The invoice was for payment of the sum of R2 171 455.00. The Defendant made payment of that amount on the 16th January 2017. On the 3rd February 2017 the Plaintiff submitted their second invoice for payment of the sum of R1 202 652.00 for services rendered for the period 15th January 2017 to the 3rd February 2017 that amount was paid on the 13th February 2017.

[113] During March 2017 the Plaintiff submitted a third invoice for payment of the sum of R440 000.00 which amount the Plaintiff had already paid in advance to Lapeng Hotel. This invoice was not paid, on the 10th May 2017 a further invoice for payment of R25 000.00 which the Plaintiff had paid to Bafo Taxi Services was sent to the Defendant. Both invoices which make up claim B being the sum of R465 000.00 also remain unpaid.

[114] When it became clear that the Defendant was not prepared to reengage the services of the Plaintiff Mr McNab prepared a final report for the whole period being the 6th March 2016 up to 30th March 2017 he explained that claim C being the sum of R1 944 287.40 was for loss of earnings pursuant to the unlawful cancellation of the contract.

CERTIFICATE OF COMPETENCE

[115] Mr McNab explained the process leading up to the certification of learners and said that after the completion of training on a Thursday the learners are assessed on Friday through writing examination and for those who cannot

write oral examinations are done. When the assessor is satisfied a certificate of competence is issued and the names of the successful candidates are linked in the profile of Exacube with Agriseta as proof that a particular candidate had acquired such and such competency.

[116] The certificates are then handed over to the Department of Agriculture who would decide when to hand them over to the successful candidates. In accordance with the Service Level Agreement it was a provision that in the event that the service provider does not issue the certificate then the Department was entitled to withhold 10% of the invoice due at that time. It is significant that when the two payments were made no amounts were withheld which means that the Defendant was satisfied that the certificates had been issued.

[117] Mr McNab said that early this year he was able to check with Agriseta and can confirm that the names of all the learners they trained appeared on the Agriseta system as having been trained by them. He gave the total number that they trained as 711 it later changed to 745 during cross-examination.

EVIDENCE OF MR MCNAB UNDER CROSS EXAMINATION

[118] The cross-examination was long and repetitive and stretched over a period of 2 days during which time Mr McNab appeared clearly irritated by questions being repeated. He however, despite all that was able to field all questions that were of relevance to the dispute in this matter.

[119] The Defendant's version which was put to Mr McNab as well as to Miss Lubisi is to the following effect:

i) That the Plaintiff failed to provide services in accordance with the agreement in the following respect:

a) The accommodation was of a poor quality at Don Bosco.

b) That the food was of a low standard at Don Bosco.

c) Training did not include Practical training.

d) That payment of the first two invoices was done conditionally in that the Plaintiff had agreed to remedy its shortcomings as far as training was concerned.

e) That Mr Njoli and Mr Ebrahim Ismael had the right and authority to cancel the agreement as they did.

f) That the Head of the Department Ms Thandi Mbassa at no stage gave instruction that the outstanding invoices should be paid.

g) That it was the Responsibility of the Plaintiff to provide the learners with PPE's.

[120] In the process of responding to question by Defendant's Counsel Mr McNab also alluded to one of issues which involved the fact that some learners arrived late in class others were in fact not aspirant farmers' one of the facilitators Mr Sabelo Zulu informed the Court that amongst the learners was a car washer. It was also brought to the attention of Mr Njoli that some learners attended class whilst under influence of liquor and slept during lessons. Despite all that Mr McNab supported by the evidenced of Sabelo Zulu the facilitator informed the court that lessons proceeded as planned. He spoke of all these as challenges that required him together with the officials of the department to resolve together.

[121] In dealing with the instructions of the HOD given verbally on the 22nd March 2017 that Plaintiff's invoices be paid Mr McNab referred to the email from Ms Vuyokazi Jongwana dated the 24th March 2017 two days after the meeting with the HOD. In that email addressed to a Bra Mike and Njoli reference was made to the invoice from Exacube. Miss Jongwana instructed Njoli and Bra

Mike to prepare and submit RL502 to Finance should the invoice be acceptable. The email concluded with the following salutary words:

> "I think it was sent to HOD due to the meeting that was held with HOD and yourselves on Wednesday."

[122] Mr McNab explained that once an invoice is submitted to Finance it is due for payment. He disputed that there was a rider to that. It was put to him that the invoice was not acceptable to Mr Njoli and the CFO hence no payment was made.

[123] What is clear and obvious in this instance is that both Mr Njoli and the CFO defied the instructions of their Superior namely the HOD What is also strange is that the CFO responded to that email on the same day at 09h03 and said the following:

> "Unfortunately the system for invoices is back-logged at GDF. We not sure if this will make it into the Webcycle for today due to this. Further I am not sure if Mr Njoli and Mosifane will GRV this given the information request they sent to Exacube."

[124] The issue of practical and the PPE's occupied a large portion of the cross-examination and in the final result Mr McNab stood firm that firstly PPE's was not a responsibility of the Plaintiff and secondly the fact that when doing practicals the facilitators made those learners who did not have PPE's to observe and not take part in actual practical was a way of compromise and as far as he is concerned they followed methods suggested in the learning materials. All learners were accommodated. When they did that they told Mr Njoli he indicated that he and Mr Njoli spoke on a daily basis over the phone or met physically and he Mr McNab reported all the challenges that they were facing.

[125] The cross-examination then moved on to deal with the version of two learners namely Kenny Mhlari and Rowan Mckery who according to the Defendant

would testify about the filthiness of the rooms and the behaviour of Mr McNab. These in my view is one of those issues that are irrelevant and had no bearing on what was in issue before me. Mr McNab testified that they as the Plaintiff decided to change the venue not so much because they wanted to satisfy the learners but because they wanted to preserve the relationship as a service provider with the Gauteng Department of Agriculture it was part of their own project management decision. He also informed Mr Njoli who approved.

[126] It was put to Mr McNab that the tender documents required the Plaintiff to train farmers from being small scale to large scale. His response was that seeing that what they had designed for the training which was approved by the Department was short courses that in itself will not qualify the learners to be commercial farmers. It is impossible to do that type of training in five days.

[127] The incident of what led to firstly the suspension and later cancellation of the contract was revisited once more Mr McNab told the Court that on the 1st and 2nd meeting in March 2017 the learners were scheduled to go and do practicals before sitting for tests on Friday the 3rd March 2017. He received information about drunkenness by the learners from the hotel management when he arrived in the morning some learners were toy-toying and disrupted classes. It was then that Miss Lubisi telephoned Mr Njoli who said that he was in Durban and will sent someone. Indeed, a representative from the Department did arrive it was a lady but she also could not convince the learners to continue with classes she left. It was then that they as the Plaintiff received the sms suspending the contract on Friday 3rd March 2017.

[128] He indicated that he has given Agriseta all the information about the people they trained and it is not their duty as Plaintiff to upload that information onto the Agriseta system it is Agriseta which must do it. According to his calculations they trained 711 students. It was put to Mr McNab that the Defendant will testify that none of the learners' particulars have been uploaded onto the Agriseta system Mr McNab said it is the duty of Agriseta to do that all that Exacube did was to furnish, Agriseta with the required information.

[129] After each training on a Friday the Defendant's officials used to hand over to the learners' forms for evaluation which they completed as anonymous and in none of the evaluation forms submitted by the learners during December 2016 was there a complaint about the standard of training on the manuals. The forms presented to court indicates total satisfaction.

[130] It was put to Mr McNab that at that meeting the CFO did tell Mr McNab and Miss Lubisi that the contract was being cancelled because of non-compliance. Mr McNab disputed that they were never told anything only that they should give reasons why they as a company should not be blacklisted from doing business with the Government in future.

[131] As regards payment of the sum of R25 000.00 to Bafo Taxi he indicated that payment was done by him on Friday the 3rd March 2017. He collected cash from one of their businesses a shop in Boksburg and paid the money to Mr Sibandze of Bafo Taxi Services.

[132] As regards the claim C Mr McNab testified that it is common sense that he made arrangements and preparation for 1036 learners to be taught till 30 March 2017 and because the contract was cancelled prematurely without any valid reason they were entitled to damages. He himself could testify how the amount of R1 944 289.40 claimed in claim C is arrived at.

[133] He confirmed that Mr Sibandze did not issue a receipt when he paid him the amount of R25 000.00 in cash. He distributed money to other taxi drivers whom he had subcontracted to enable them to put in petrol and also money for airtime and food for the drivers. Each taxi owner received R3 500.00 for the delivery and fetching of the learners from home to the training centre and back home making it four trips for each taxi.

[134] The Plaintiff called Mr Sabelo Zulu a facilitator to testify. Mr Zulu holds a National Diploma in Agriculture as well as a B-Tech degree in Crop production. He confirmed that during the period November 2016 till March

2017 he was engaged by the Plaintiff as a facilitator at Don-Bosco and Lapeng hotel in Walkerville.

[135] He gave lessons or facilitated lessons to farmer in Co-operative Governance and open vegetable production. In facilitation he used learning material supplied by Agriseta. He not only taught the learners in class but took them out to farms to do practical training. As regards Co-operative Governance practicals were done in the class room. During the training he used English as a medium of instruction however he also accommodated those who had difficulty with the language and used a vernacular language.

[136] He lectured and trained learners on vegetable production for 2 weeks i.e 10 days during which time practicals were also done. Practicals on open vegetable production were done at a farm called Varsfontein. He taught them how to do planting, fertilisation, irrigation and spraying.

[137] He explained that when they went out to do practicals those learners who did not wear protective clothing could only observe and not take part in practicals but this was also regarded as sufficient.

[138] He disputed the grievances set out in a document from the South African Farmers Association. He stressed that all what was complained of in that document relating to training was not correct. Mr Zulu also indicated that some learners arrived to lessons under the influence of liquor whilst others slept in class during lecturing. It also came to his notice that some of the people who attended were in fact not farmers. He however, continued to teach them.

[139] In cross-examination he told the Court that the process of uploading the names of successful candidates onto the Agriseta system was not his department he does not know how it has to be done. However, each day that he managed a class he has to make sure that each learner signs an attendance register. Practicals were also done in the classroom.

[140] Mr Zulu corroborated the evidence of both Mr McNab and Miss Lubisi when he testified that not only were some of the practicals done in the classroom but when they went out to farms those learners who were not properly clothed in protective clothing could only do observation when those with PPE's performed practicals, this was regarded as being in compliance.

[141] At the end of the week learners that he taught completed anonymous evaluation forms. All the people that he taught could only say positive things about his teaching method save to say that one complained that he spoke too softly.

[142] Mr Justice Sibandze told the Court that he concluded an agreement with Mr McNab to fetch identified learners from their places and transport them to Walkerville on a Sunday and then collect them and take them back home on the Friday.

[143] On the 3rd March 2017 Mr McNab paid him R25 000.00 which was agreed transport costs to collect 100 learners on Sunday the 5th March 2017. He has 2 minibus taxis that carry 22 persons and he subcontracted the other 15 seater taxis from other taxi owners.

[144] On Sunday the 5th March 2016 he had already paid the owners of the 4 taxis their quoted or agreed prize which amounted to R3 500.00 per taxi. He received a call from Mr McNab that he should tell all drivers not to do any collection as the contract has been suspended.

[145] The Plaintiff then called 3 witnesses who were part of the learners namely Vusumuzi Makhoba, Mrs Thandi Mthimkhulu and Miss Tselane Alina Mathope. All three testified that they attended training at Bosco and Lapeng hotel and that they were satisfied with the training. Mr Makhoba in particular told the Court that since he attended the training his business has grown. The witness contradicted each other on issues around practicals and the time spent. However, it must be recalled that they were called to testify on events

that took place in 2016/2017 and their memories were faint. Despite that all three expressed their satisfaction and informed the Court that they learnt a lot.

[146] The Plaintiff then closed its case. The Defendant called as its first witness Mr Abdula Mohammed Ismael.

[147] Mr Abdula Mohammed Ismael is the CFO in the Department of Agriculture of the Defendant. He signed the service level agreement on behalf of the Department and regards himself to be bound by the PFMA in the conduct of the agreement in particular that in terms of Section 45 of the PFMA Act it is his duty as the official responsible for expenditure in the department to see to it that there is no unauthorised, irregular or wasteful and fruitless expenditure in the department.

[148] In evidence in chief he was led on the specific terms and conditions of the service level agreement and under cross-examination he confirmed that clause 21.1 provides that "no amendment, alteration, variation of or addition to this agreement shall be of any force or effect unless reduced to writing and signed by the parties or their duly authorised representatives."

[149] Mr Ismael was also referred to clause 18.2 of the service level agreement which reads as follows: "That in the event of the Department providing the service provider with written notice of the service providers breach and the breach not being remedied by the service provider within 7 days from the date of receipt of the written notice, the Department shall be entitled *inter alia* to cancel the agreement."

[150] Clause 18.2 read with 18.6 reiterate the principle that any of the parties to the agreement had the right to terminate the relationship if the other commits any breach of any term and fails to remedy such breach within 7 days after the giving of a notice to that effect by the other party.

[151] Similarly clause 20.1 provides that "notices in terms of this agreement must be in writing and will take effect from receipt of the stated domicilium. Such

notice might be given by registered mail, by hand against written confirmation upon receipt or per facsimile.

[152] Mr Ismael confirmed that the golden thread running through the clauses referred to above is that notices must be in writing. The evidence in this matter has clearly and in no uncertain terms demonstrated that cancellation of the contract was never done in writing. Mr Ismael was at pains to explain that the HOD did write that letter of cancellation but it was never signed. That unsigned letter was never discovered nor was it presented as evidence before this Court. I have no doubt to conclude that the contract was terminated unlawfully and without following the prescribed procedures. Mr Njoli and Mr Ismael were never authorised to unilaterally and verbally suspend repudiate the agreement. They acted on their own.

[153] The next vexed question that was put to Mr Ismael and which took him a long and roundabout way was as follows:

MR COWLEY: Specific to this contract what would have been required before payment was made?

MR ISMAEL: In this instance the portfolio of evidence would be that you would receive the certificates, the accredited certificates of the farmers to justifiably say that they have reached the standard and that they have passed and they are now accredited in that field. So you have met the requirements of that training or we have met the requirements and you subsequently can pay us.

[154] What Mr Ismael said is not provided in the service level agreement. There is nowhere in that agreement which requires that the service provider must submit certification of training before payment can be made. All that clause 7.2 says is that:

> "(7.2) The service provider shall render original invoices to verify expenditure. Invoices shall be detailed and refer to work done

and time spent and costs."

Clause 7.3 provides that:

"(7.3) The invoices shall contain:

- A reference to this agreement
- The GPG order number
- A description of the services and or products."

[155] Mr Ismael quickly contradicted himself when a follow up was made as to his earlier evidence that certification was a requirement before the department could make a payment.

MR COWELY: Where is the requirements that certification was necessary

before payment was made?

MR ISMAEL: I would not say it is specifically in the contract that it says you would need to certify.

[156] Mr Ismael's evidence around this question became more and more confusing as he avoided answering a simple question to indicate where in the contract does it state that payment will only be made by the Department on production of certificate of training.

[157] In the final analysis Mr Ismael failed dismally to produce any evidence that certification was a requirement before payment could be made. His evidence on that aspect crawls with inconsistences. He was argumentative and his evidence was invariably unconvincing. In his veiled attempt to explain why payment of two invoices was made by the department despite the fact that according to him the Plaintiff had not complied with the terms of the contract Ismael gave a ludicrous response. The question and answer proceeded in the following manner:

MR COWLEY: Let me understand then Mr Ismael, payment was made not in terms of the SLA nor in terms of Annexure A or B this was done because of an act of gratuity by the Department?

MR ISMAEL: Well, I would not say an act of gratuity because what we did ask them to show us is evidence of the advancements we made towards accommodation and the food and the transport so that we could justifiably say that they did advance money and that what we were paying was going towards part of the costs of the training"

[158] Mr Ismael conceded under further cross-examination that he is unable to dispute the evidence of Mr McNab that he submitted the Plaintiff's invoices for payment to the project manager Mr Njoli who in terms of the department's internal procedures issued the GRV to Finance to make payment. He Mr Ismael as the CFO does not deal with that. He however insisted that payment was made to "assist" the Plaintiff. This last answer is problematic in the first instances it was put to the Plaintiff's witness that payment was made on condition that the Plaintiff made good on their failures it was never put to them that they were being pitied or being assisted.

[159] Once more the "assist" or advance payment made to the Plaintiff was in contravention of clause 7.6.4 which reads that No up-front payment may be made. When it was put to Mr Ismael that according to his evidence the two payments were made not in terms of the contract he as usual gave a nonsensical response which goes as follows: "I would not necessarily agree with that I did explain that even though it says no upfront payment were made, we applied the rules of Section 45of the PFMA. We understood the predicament Exacube were in because they had advanced substantial amounts for accommodation. We were trying to assist this institution to deliver on this training on behalf of the department hence we used Section 45 of the PFMA."

[160] It was not surprising that Mr Ismael could not explain how Section 45 of the PFMA was the reason for this so called “advance” or “assist” payment. In the result I reject and dismiss his evidence as misleading and evasive and not at all helpful.

[161] Mr Ismail was referred to clause 6.1 of the SLA which reads as follows:

> “The Department shall pay the service provider after completion, review, approval of each deliverable received from the service provider. The invoice must detail specific activities performed.”

[162] It is to be noted that the two invoices that the Defendant paid complied with the requirements set out in clause 6.1. The Defendant never raised any issue about the two invoices not being compliant. Mr Ismael in justify payment which he says should not have been done says that: “If we were very stringent on the entirety of the SLA at the onset, we would have dismissed Exacube in the first meeting and not pay even a single cent to them, but like I have repeated your Lordship, we were always trying to work and assist them on two fold, one to grow them as an institute and to ensure that we as a Department received this training that is of utmost importance in terms of our dollar/grand. But yes in terms of 6.1 we should know they have paid any invoices. And we did not pay any of the invoices in terms of 6.1.”

[163] Mr Ismael kept on insisting that payment was made in terms of Section 45 of the PFMA Act and not in terms of clause 6.1. Mr Ismael’s interpretation of Section 45 of the PFMA is to say the least irresponsible. That Section prevents precisely what he says he did, it prohibits unauthorised, irregular and fruitless expenditure. I find his evidence once more to be problematic and evasive. The simple answer is that the payment if he did it in terms of his own interpretation was not authorised and is thus irregular expenditure. Mr Ismael insisted that the fact that no certificates had been issued to the learners when payments were made it means no services had been rendered. I find his attitude to be very patronising. He wants this Court to believe that it was because of feeling pity for the Plaintiff that they made payment. This Court

does not believe that Mr Ismael would run the risk of his Department's Finances being qualified because of that and at the expense of him being disciplined.

[164] Mr Ismael conceded that Mr Njoli the Project Manager issued the GRV to Finance Department to make payment after he had satisfied himself that the Department had received value in that the Plaintiff Exacube had paid for accommodation, transport and for food. The question then remains if that is the case why is the Defendant demanding refund.

[165] In its counterclaim the Defendant claims payment of the amount it paid in respect of the two invoices without taking into consideration that it conceded that the Department did receive value in respect of what the Plaintiff paid for accommodation, transport and food. The Department's counterclaim is in my view excipiable and falls to be dismissed. He now says that the payment they made amounts to fruitless and wasteful expenditure and has created a material irregularity in terms of the Public Audit Act and that it needs to be recovered. Mr Ismael has now miraculously abandoned his reliance on Section 45 of the PFMA Act as justification for the irregular payment.

[166] Mr Ismael whilst conceding that the payment made is irregular and will cause the Auditor General to raise a materiality impact he on a question posed now in the year 2022 says that no such materiality has been raised but that the payment made has been raised as a contingent liability and a contingent asset.

[167] In trying to justify their claim for a refund from the Plaintiff Mr Ismail made an example about their Department having made payment of an amount of R2.5 million to a wrong person who has refused to repay it as a result they as the Department have now referred the matter to the National Prosecuting Authority. With due respect this is an irrelevant and inappropriate example. The facts in that matter are miles apart from the facts in this matter because firstly payment has not been made to a "wrong person" secondly payment was made in terms of a written agreement.

[168] Under further cross-examination Mr Ismael agreed that the proposal that Exacube presented to the Department met with the requirements of the tender hence they were successful and were then appointed. This answer in my view puts paid to the evidence that the Plaintiff failed to amongst other secure proper accommodation for the conference. It confirms what Mr McNab and Miss Lubisi testified to namely that Mr Njoli inspected the venue at Bosco and was satisfied.

[169] In line with his concern above Mr Ismael was referred to the document annexed to the SLA being the Department Terms of Reference. In that document under the subheading "Project Deliverable" he agreed that what the Plaintiff had to deliver in respect of courses, the number of trainees for each course and the time to be spent on each course including the Unit Standards is as certified by Agriseta. He conceded that he cannot deny that after the awarding of the tender Mr McNab and Mr Njoli met and revised the training plan which was acceptable to the Department.

[170] Mr Ismael agreed that he cannot comment on the training schedules submitted to Mr Njoli indicating the subject and the number of farmers to be trained. He said that only Mr Njoli will be able to respond to that evidence. Mr Ismael in fact confirmed that it is only Mr Njoli in his capacity as the Project Manager who has the responsibility to confirm that the training material consisted of the required deliverables. He agreed that the training material that Exacube submitted with their tender documents had been approved and prescribed by Agriseta.

[171] Mr Ismael was taken through the different learner guides that were used in the training from which it became clear that the practical training in respect of some of the units or courses took place in the classroom not necessarily outside for example learner guide 44 being in respect of "Risk factor in food safety and quality."

[172] Mr Ismael told the Court that he cannot dispute that Agriseta needed a copy of a farmer's identity document the attendance register relevant to the specific unit standard as well as the assessment where after a competency certificate would be issued by Agriseta. Mr Ismael was referred to a number of competency certificates produced by Exacube and which had been loaded onto the system of Agriseta he could not dispute that the certificates were authentic. That evidence was also not disputed when Mr McNab testified.

[173] It became very clear during further cross-examination that the Department was aware of the competency certificates that Exacube had produced and uploaded onto Agriseta's website to enable that institute to issue the learners with certificate of competency and yet the Department did nothing to verify their authenticity. Mr Ismael once more was disingenuous in his stance that the certificates were not genuine. His excuse being that he had left the employ of the Department of Agriculture two years ago and would not be able to say why it was not done. He finally agreed that it is up to the Department to take up the offer to visit the Agriseta website and verify if the certificates of competency had infact been issued and if they fail to do so then the evidence of Mr McNab remains unchallenged.

[174] Mr Ismael's responses when asked about the first invoice submitted by Exacube dated the 14th December 2016 changed dramatically he now says that whilst he recognises that the invoice tallies in all respects with the document on the training schedule and that same complied with the provisions of clause 7.2 he now advises that the certificates must be verified before payment could be made. It must be recalled that this is one of the invoices that was paid without any query being raised by the Department and to now keep on adding other conditions by Mr Ismael is in my view strange to say the least. It is not what was put to the Plaintiff's witnesses. His version changed from accreditation to verified. He struggled and could not explain this obvious contradiction. Mr Ismael then confirmed that the unpaid invoices look exactly or are formatted in the same manner as the paid invoices.

[175] Mr Ismael agreed that as far as the disputed evidence about the HOD Ms Mbassa having given instructions to pay the disputed invoices it is only Mrs Mbassa who can testify on that issue.

[176] Mr Ismael confirmed that the first meeting held in November 2016 with Exacube related to complaints about food, accommodation and transport and nothing else. That meeting was attended by Mr Njoli, Mr McNab, Ismael and Mr Mosefani a former director responsible for Agriculture in the Department. Mr Njoli reported to him. It became clear that at that meeting some aspects of training were discussed when Mr Ismael was shown the emails dated the 29th November 2016 from Mr Njoli and one dated the 5th December 2016 from Miss Lubisi. Mr Ismael confirmed that all issues raised at that first meeting were resolved.

[177] An issue arose about a document marked NSI emanating from a group called South African Farmers Gauteng. That is a document that contained grievances by the farmers. When it was brought to the attention of Mr Ismael that the grievances therein could not have been discussed at that first meeting because items or lessons complained of in that document had not taken place as yet when the meeting was held, Mr Ismael agreed and glibly responded that this happened a long time ago and that Mr Njoli is best suited to respond to that. The contradictions about issues discussed at that meeting becomes obvious when it was revealed that in fact Mr Njoli in his affidavit resisting Summary Judgment actually referred and attached that farmers' grievances document to the affidavit in which he confirmed that those grievances were discovered at the first meeting in November 2016. Once more Mr Ismael in attempting to evade and explain this obvious contradiction says that the document has no date. He eventually conceded that the document was possibly produced much later than the first meeting.

[178] Mr Ismael further complicated the issues when he testified that a second meeting took place at the end of January 2017 and that it is at that meeting that issues raised by the South African farmers were discussed. He now agreed that what Mr Njoli said in his affidavit resisting Summary Judgment

could not be correct. It was put to him that if what he says is correct that Mr Njoli was present at that second meeting held at the end of January 2017 then it was expected of Mr Njoli to have mentioned that meeting in his affidavit. Mr Ismael again avoided answering the question by deferring the response to Mr Njoli. When asked by the Court if minutes are not kept at such meeting he steered away from answering the question and said that he is only an attendee it is not his meeting he only comes to such meetings to help, rectify the situation or mediate. Once again I find his response in that regard extremely unconvincing and a clear indication to avoid the obvious.

[179] Mr Ismael agreed that at that second meeting if there was any material breach of contract by the Plaintiff they as the Department should have acted in accordance with clauses 18.2 and 18.6 of the agreement and placed the Plaintiff on terms in writing to rectify the breach within seven days. He in fact says that same should have been done after the first meeting held in November 2016. It was put to Mr Ismael that when the first invoice was paid on the 16th January 2017 there was no evidence that the Plaintiff had infact breached any terms of the agreement. Mr Ismael's response to that goes this way: "Mr Ismael: I do not necessarily agree but there is no evidence to prove otherwise more so as the Project Manager he will share with you any breaches." This last answer to me just about wraps up the Defendant's counterclaim as being unfounded.

[180] The Court posed the following questions:

COURT: No evidence to prove what?

MR ISMAEL: If there was any breach.

COURT: So you cannot prove it, only the Project Manager can say It?

MR ISMAEL: I would not be in a position because I was not at the forefront of this programme, if there was actually a continuation of breach by Exacube.

Mr Ismael further confirmed that payment could only have been made because Mr Njoli as the Project Manager signed off the invoice with goods received voucher (GRV).

[181] Mr Ismael admitted that they erred as a Department by not putting the Plaintiff on terms after the first and second meetings. As regards the meeting of the 6th March 2017 there was no agenda. His evidence is that in fact that meeting never took long because according to them Plaintiff's representatives namely Mr McNab and Miss Lubisi were uncooperative and walked out of the meeting. He conceded that they should have long addressed a letter of intention to terminate the agreement if Exacube failed to make good their breach of contract. He however miraculously recalls after the Plaintiff had walked out of the meeting the HOD had written as formal letter of termination to Exacube but that letter was never signed and could accordingly not be sent to the Plaintiff. He could not explain why the HOD did not sign that letter and could not tell the court where that letter was. This Court finds that explanation highly unconvincing and implausible. I have no doubt to deduce that no such letter exists.

[182] In as far as provision of Protective Personal Equipment or clothing is concerned Mr Ismael agreed that nowhere in the agreement does it state that it was the duty of the Plaintiff to supply the learners with PPE's. He was referred to the email dated the 29th November 2016 from Mr Njoli to Exacube in which Mr Njoli said "Please inform me in advance if farmers will have to bring their work suit for practical purposes" Mr Ismael response was as usual not helpful at all he avoided the question by saying that Mr Njoli by so saying was only trying to help Exaculbe because they as the Department were not to supply the PPE's.

[183] On the 20th March 2017 prior to the meeting with the HOD Miss Lubisi had addressed a letter to the HOD in which amongst others she pointed out that the farmers did not have PPE's as a result they were refused access to Piggery in Delmas for practical training. Mr Ismael dismissed this by saying he is not sure if Ms Lubisi was writing on behalf of Exacube. I find this response also being dodgy and unhelpful.

[184] In the final analysis under cross-examination Mr Ismael agreed that the training offered to the farmers was to give them an opportunity to get training in an effort to build them up into large scale farmers and that the 5-day training offered to the farmers was never meant to turn them suddenly into large scale farmers. This was just one of the processes and steps leading to that. Mr Ismael's exact words were as follows:

> "You are correct it is not that simple then, you would just become a magnificent farmer that is why we offer the small, the first student of the training and then advance. So that small farmers would go for the first training probably then in this financial year received. He or she then move to the advance training because they have now got production inputs in the ground. So it is growth process."

[185] In re-examination Mr Ismael repeated that the HOD never gave instructions for payment of the disputed invoice. He added that Ms Mbassa is not the only person who can testify to that there are other officials within the Department who could testify to that. Mr Ismael did not tell the Court who else was available to give evidence on that aspect it was left hanging instead counsel for the Defendant raised the issue or implied that the Plaintiff itself should have called Ms Mbassa to testify.

[186] Mr Ismael confirmed that Ms Mbassa was the Accounting Officer in the Department and he reported to her. Mr Ismael could not express a view why Mr Njoli addressed an email dated the 10th March 2017 to Exacube in which Mr Njoli thanked Exacube for sending the detailed invoices and requesting that Exacube indicate on the invoices how much practical training, catering

and theoretical training was charged. It must be recalled that this email is addressed after the Defendant had repudiated the agreement. The question to be asked is why ask that information. The only reason why Njoli asked that is because he was preparing to pay the invoices.

[187] Mr Derrick Skhalele Njoli was the next witness for the Defendant. He testified that he joined the Department of Agriculture Gauteng Province in 2009 and left in 2018. He is presently based at the National Office of the Department of Land Reform and Rural Development based in Nelspruit. In his work he interacts a lot with farmers he advices and trains farmers. Training is done in two ways firstly in house by the Department and also external in which they outsource to accredited trainers.

[188] He confirmed that he was the project manager in charge of the training provided by the Plaintiff (Exacube). They as the Department did the selection of the farmers that required training and provided the list to Exacube. He dealt with Mr Alex McNab from Exacube. The whole aim of the training ws to move the farmers being subsistence farmers to a level where they will be commercial farmers.

[189] Mr Njoli told the Court that he was involved in the bidding process and made certain that the successful bidder would give value to the Department in compliance with Section 45 of the PFMA. Exacube was appointed as they qualified in all requirements.

[190] Mr Njoli insisted that it was the duty of Exacube to provide PPE's to the learners. He relies in this respect on clause 5.4 of the Agreement which clause only speaks about the service provider complying with all applicable legislative and regulatory requirements on health and safety. What Mr Njoli and Mr Ismael want this Court to accept is that the clause means Exacube had to supply the learners with PPE's. That interpretation is flawed in all respects none of the two witnesses could tell this court where specifically in the agreement is it stated that Exacube had to supply PPE's. The issue gets

worse when the letter sent by Njoli to McNab stated that he Njoli wants McNab to remind him if the learners have to bring their protective clothing.

[191] It is also worth mentioning that the Defendants never pleaded that it was a term of the contract that Plaintiff was obliged to supply protective clothing to the learners neither was it alleged that the Plaintiff had breached such term of the contract.

[192] This evidence by Njoli was an afterthought. It was also pointed out by Mr McNab that the RFP did not require the bidders to quote for the provisions of protective clothing. Mr Njoli went so far as to allege when questioned by this Court that the Plaintiff was supposed to keep stock of protective clothing at the training venues despite not knowing the sizes of each learner. I find that ridiculous if not disingenuous.

[193] It is common cause that on the 3rd March 2017 Mr Njoli sent an sms to Miss Lubisi informing her of his decision to suspend the contract. This was after it had been reported to him by McNab that some learners were disrupting lessons. It is also common cause that on Monday at a meeting attended by Lubisi, McNab, Ismael, Njoli and other Department officials Ismael in his capacity as CFO unilaterally informed Lubisi and McNab that the contract is cancelled.

[194] An issue arose during the evidence of Mr Njoli when he alleged that the Plaintiff was not accredited to offer a course in Co-operative Governance because it was not an Agriseta accredited course. This was an absurdity because Exacube was awarded the tender on what they presented to the Department in any case when Mr McNab and Miss Lubisi testified this was never put to them. The truth of the matter is that at the time the Plaintiff submitted their tender that course was an Agriseta accredited course.

[195] It is common cause also that Mr McNab and Njoli jointly agreed to work according to a training plan and schedule that had been adjusted to meet the time frame set aside by the Department for completion of the training.

[196] Mr Njoli in trying to distance himself from the agreed training schedule told the Court that the document on 004-154 was just a “training implementation plan” Njoli did not bother to explain what the difference between a training schedule and a training implementation plan was. In any event the alleged failure which Njoli says was a breach was never identified by the Department during or after the termination of the Agreement. It is once more an afterthought and that evidence falls to be rejected. During cross-examination Mr Njoli conceded that the training manuals offered the best evidence on which both theory and practical training took place. He Mr Njoli told the Court that he did not visit the training centre each week he depended on extension officers to advise him. It is so that the Defendant never called any of the extension officers to testify for the Defendant about training.

[197] The evidence by Ismael and Njoli that no practicals were offered stands to be rejected because firstly they never attended at the training centre. Secondly the reports signed by the learners made no complaint about no practicals. Similarly, the evidence about inadequate training material and outdated material cannot be accepted. The only evidence tendered by the Defendant in this regard is that by two learners namely Mr Mhlari and one Ms Mckerry. Mr Mhlari clearly attended a course which was far below what he already knew and as for Miss Mckerry she became upset when she was made to make photocopies for herself because she arrived late on a Tuesday. The evidence of the two can hardly be said to prove that the Plaintiff had materially breached the agreement.

[198] Contrary to what Mr Mhlari and Miss Mckerry testified the Plaintiff had also called two learners as witnesses in the person of Ms Mthimkhulu and Ms Mathope. Both witnesses testified that they benefitted immensely from the training and in practicals Ms Mthimkhulu said that her business as a vegetable farmer had expanded since she received training. The other witness who testified for the Plaintiff was a Mr Vusi Makhoba he also is a vegetable farmer. The evidence of Mthimkhulu, Mathope and Makhoba was that they received

training manuals according to which they were trained. That evidence was left unchallenged by the Defendants.

[199] The evidence of Njoli and Mr Ismael about the memorandum prepared by a group calling themselves South African Farmers Gauteng is another of those bizarre pieces of evidence that the two of them sought to rely on for cancelling the agreement. Both of them insisted that the memorandum was discussed at the first meeting held on the 29th November 2016 when in fact it was clear that the issues stated in that memorandum only arose in February 2017. Mr Ismael in his usual casual manner kept on saying that as a result of that document they should have in fact terminated the agreement in November 2016 but they just felt pity for the Plaintiff. This aspect of Messrs Ismael and Njoli's evidence placed their credibility in question. Mr Ismael was argumentative and evasive.

[200 It needs to be remembered that the complaints in that memorandum were never set out in a letter to the Plaintiff as a basis or reason for cancelling the agreement.

[201] In an attempt to salvage the contract that was clearly terminated unlawfully and unprocedurally Miss Lubisi addressed a passionate letter to the HOD Miss Thandeka Mbassa. Amongst the issues set out in that letter Miss Lubisi and Mr McNab explain the circumstances that resulted in practical training as regards visit to the Piggery not taking place. The Department despite the requirements of the agreement did not see it fit to place the Plaintiff in mora and call on them to remedy the breach. Instead the Department summarily terminated the agreement without giving the Plaintiff the required breach notice.

[202] The evidenced of Mr Mhlari and that of Ms Mckerry takes the Defendant's case no further. The Defendant pleaded that the facilitators were not qualified, also that one of them had an unacceptable attitude and that manuals without explanation. This bold plea was not supported by any

evidence when regard is had to the evaluation documents completed by the learners none of them raised the pleaded issue.

[203] It has by now become clear that the only issues discussed at the meeting of the 29th November 2016 was about the quality of food as well as the accommodation. That aspect was resolved when according to Miss Lubisi and Mr McNab the two of them went out of their way to please their client by arranging a new place being Lapeng hotel where further learning took place.

[204] Like all other grievances the issue about catering was never stipulated as a material breach in any written notice of breach in accordance with the agreement. The same applies to issue about transportation of farmers. Mr Sibandza the Transport Company Official confirmed that he received the amount of R25 000.00 from Mr McNab on the 3rd March 2017 being fees for transportation of learners for the week commencing the 5th March 2017.

[205] The evidence of both Lubisi and McNab that Lapeng hotel was paid R440 000.00 (Four Hundred and Forty Thousand Rands) for accommodation for the period 5th March 2017 to 10th March 2017, that payment was never disputed by the Defendant. Likewise, the evidence by Mr Sibandze that he was paid R25 000.00 was not disputed. The Defendant failed to provide any evidence to the contrary.

EVALUATION OF EVIDENCE

[206] The evidence presented by both Ms Lubisi and Mr McNab stands largely unchallenged in as far as it concerns payment of the two invoices which were indeed paid by the Defendant during January and February 2017 totalling the amount of R3 347 107.00. It is this amount that forms the Defendant's counterclaim.

[207] The evidence of both Ismael and Njoli in support of the counterclaim is flawed. It is based on the allegation that the Plaintiff failed to perform in terms of the agreement secondly that payment was made conditionally on an undertaking

by the Plaintiff to remedy the non-performance thirdly that payment was made in order to assist the Plaintiff with cash flow. On the Defendant's own version, the Defendant made payment contrary to the provisions of the agreement and most seriously in contravention of the Public Finance Management Act.

[208] For the Defendant to succeed with its counterclaim it must prove that the Plaintiff failed to perform its obligations as imposed by the terms of the agreement or that the performance was wrong. Secondly the Defendant must demonstrate that it placed the Plaintiff in *mora* and that despite having done so the Plaintiff failed to make good its non-compliance. Magid J in the matter of **Ally and Others NNO v Courtesy Wholesalers (Pty) Ltd 1996 (3) SA 134 at page 149 F** said the following:

> "The right to cancel the agreement in terms of clause 8 thereof which I have quoted above arises if and only if:
>
> a) The offending party has committed a breach of the agreement.
>
> b) The innocent party has given the offending party 14 days' written notice to remedy the breach.
>
> c) The offending party has notwithstanding the notice, failed to remedy the breach."

[209] The Defendant has not managed in this matter to demonstrate in evidence any of the three jurisdictional requirements. To the contrary the Plaintiff has proved that on the 6th March 2017 the Defendants officials unilaterally repudiated the agreement verbally which repudiation the Plaintiff accepted and is entitled to damages occasioned by the premature and unprocedural termination of the agreement. The SLA provides that if a breach occurs then the defaulting party must be placed on terms and afforded seven days to

remedy the breach and only if he remains in breach the innocent party may elect to cancel. It did not happen in this case.

[210] It is further common cause that on the 28th February 2017 the Plaintiff rendered its third and fourth invoices for the amount of R1 202 652.00 being in respect of lessons conducted for Basic Boiler Production, Basic Beef Production, Advanced Boiler Production, Advanced Beef Cattle Production and Advanced Small Cattle. These courses were given over the period 15th February 2017 to 24th February 2017. During the last week of February two further courses were given and an invoice dated the 10th May 2017 was generated in the sum of R400 884.00.

[211] The Plaintiffs claim A is a combination of the third and fourth invoices which makes a total of R1 603 536.00. This amount remains unpaid. Instead of paying the amount the Defendant unilaterally cancelled the agreement. In the result he Plaintiff is entitled to payment of the amount as set out in its third and fourth invoices. It is for the services already rendered.

[212] Claim B comprises of disbursements made by the Plaintiff in respect of accommodation and transport costs. There is no dispute that the amount of R440 000.00 was paid to Lapeng hotel and R25 000.00 (Twenty-Five Thousand Rand) paid for transport costs. The Plaintiff proved that the payment was made in advance before the Defendant unlawfully cancelled the agreement. The Defendant is in my view liable to reimburse the Plaintiff for such.

[213] Claim C is for payment of the sum of R1 479 286.60 being payment of the balance of the contract price. The question to be asked in order to answer this claim is the “but for test” which is would the Plaintiff have suffered the loss but for the Defendants’ breach? The Court in the matter of **International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA (AD) page 680 at 700 F – G** described this loss and resultant claim as follows:

> "This enquiry as to factual causation is generally conducted by applying the so called "but for test" which is designed to determine whether a postulated cause can be identified as a cause *sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the Defendant."

[214] I am satisfied that had the Defendant not acted as it did on the 3rd and 6th March 2017 when it wrongfully cancelled the agreement it prevented the Plaintiff from earning the full amount of the contract price. The Plaintiff did nothing wrong to cause cancellation of the contract. It is the Defendant who unilaterally and without just cause terminated the contract and for that the Plaintiff is entitled to be placed in the positon it would have been "but for " the wrongful action of the Defendant.

[215] In the result I find that the Plaintiff has proved its cause of action in all respects and is entitled to judgment in its favour on the other hand I must find that the Defendant has failed to prove that it is entitled to a refund of monies already paid under the contract accordingly the Defendant's counterclaim falls to be dismissed.

ORDER

1. The Plaintiff is granted judgment as prayed for and the Defendant's counterclaim is dismissed with costs.

2. The Defendant is ordered to pay the Plaintiff the amount of R3 547 822.60 being the total of claim A, B, C plus interest thereof calculated at the rate of 10.25% calculated from the 6 June 2017 to date of payment.

3. The Defendant is further ordered to pay the Plaintiff taxed party and party costs which costs shall include the costs of two counsel.

Dated at Johannesburg on this 15th day of November 2022

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M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING	:	JULY 2022
DATE OF JUDGMENT	:	15 NOVEMBER 2022
FOR APPLICANT	:	ADV HH COWLEY SC
WITH		ADV S MATHIBA
INSTRUCTED BY	:	TL SI INCORPORATED
FOR RESPONDENT	:	ADV MATHIBEDI SC
WITH		ADV MHANGO
		ADV MOTHEBE
INSTRUCTED BY	:	OFFICE OF THE STATE ATTORNEY