

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 41835/19

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|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: NO |

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|------------|-------------|----|
| Date: | 10 May 2022 | WJ |
| du Plessis | | |

In the matter between:

EC SECURITY CC

PLAINTIFF

and

THE BODY CORPORATE OF SAFFRON GARDENS

DEFENDANT

JUDGMENT

DU PLESSIS AJ

[1] This is an action for damages based on breach of a contract concluded between the plaintiff security company, EC Security and the defendant, the Body Corporate of

Saffron Gardens (the "Body Corporate") for the provision of security services at a residential complex.

[2] The plaintiff is claiming the sum of R 1 306 408,55 from the defendant, being the contract price, and later amended its plea to, in the alternative, include a loss of profit of 10%. The claim is based on what the plaintiff regards as a repudiation of the contract entered into, after which repudiation it elected to cancel the contract and claim damages from the defendant for the outstanding term.

[3] The defendant pleads that plaintiff failed to comply with its contractual obligations in that it did not provide the expected standard of security services in terms of the contract (poor quality), and that these breaches were communicated with the plaintiff. As such it is pleaded that the defendant lawfully cancelled the agreement. On the issue of damages, the defendant pleads that the plaintiff is not entitled to the full monthly service fees as damages, and as the guards employed were deployed to alternative sites, which means that the plaintiff did not suffer damages. It also denies that the profit margin would have been 10%. It asks for the claim to be dismissed.

[4] For the plaintiff to be successful, it needs to prove that the words or the conduct of the defendant objectively amounts to a repudiation of the contract, that it then exercised its right to cancel the contract, and that due to this it suffered damages (and then, of course, the quantum). For the defendant to be successful, it needs to prove that it lawfully cancelled the contract, or that the plaintiff did not discharge its onus with regards to damages.

[5] The case turns on mainly two issues: whether there was adherence to the "breach clause", and the issue of damages: whether it was proved, and if so, what the amount is. To understand these issues, it is important to set out the contract terms and the evidence.

[6] The terms of the contract

[7] The parties entered into an agreement on 15 December 2014, where it was agreed that the plaintiff would perform the following services:

- 2 grade "D" security officers for the dayshift (06:00 – 18:00), 3 grade "D" security officers for the nightshift (18:00 – 06:00);
- 2 Guard Monitoring Systems;
- Electric Fence Monitoring;
- Install and maintain certain equipment, including 2 panic buttons, 16 cameras, 16 channel Network Video Recorders, 1 19" monitor, 1 guardhouse, 3 battons, 3 handcuffs, 3 pepper sprays and 3 torches.

[8] In terms of the contract (clause 4), the plaintiff had to ensure, amongst other things, that it complies with the defendant's security and emergency procedures and regulations and conforms to the reasonable standards and policies of the defendant.

[9] The price quoted was R44 260,00 per month, with an 8% fee increment effective from 1 September every year (clause 6.2). The contract also provides that the defendant is not allowed to withhold payment (even if there is a complaint) (clause 6.4) and that payment is due on the 7th of each month (clause 6.5).

[10] Clause 7, the "breach clause" that forms the crux of the dispute, provides:

"7.1 The [Body Corporate] acknowledges that the contract pertains to services offered to different branches. *Should a breach occur at one of the [Body Corporate's] branches, it shall notify the Management of [EC Security] in writing of such a breach, setting out the specific nature thereof. Should [EC Security] fail to rectify such breach to the [Body Corporate's] reasonable satisfaction within a period of 14 (fourteen) business days after receipt of such notice (or, should it not be possible due to the factors outside [EC Security's] control to rectify such breach within such period of 14 (fourteen) business days, then such additional period as may reasonably be required for the rectification of such breach) then the [Body Corporate] shall be entitled to cancel the service Agreement for that specific branch subject to one calendar month's notice of its intention to do so. The agreement pertaining to services offered at different branches if [sic] the [Body Corporate] shall continue for the duration of the contract".* (own emphasis)

[11] This seems to be a standard contract of the plaintiff that is used for all their clients. Reference to "branches" in 7.1 is not applicable in this instance. What is

important for this case is that this clause requires that the defendant inform the management of the plaintiff in writing when a breach occurs, giving the plaintiff 14 business days to rectify the breach. Much of the evidence led focused on the content of this clause and whether there was compliance with it.

[12] Points not in dispute

[13] The parties do not dispute that the service contract was entered into. They also do not dispute the written terms of the service contract. It is also agreed that the defendant furnished the plaintiff with a termination notice on 15 March 2019 and that the plaintiff demanded payment from the defendant.

[14] Points in dispute

[15] The dispute, as crystallised in the joint practice note, turns on the following points:

[15.1] The plaintiff states that it duly complied with its obligations in terms of the agreement, specifically clause 4; the defendant disputes this;

[15.2] The plaintiff states that the notice of termination sent on 15 March 2019 is a repudiation of the contract; the defendant disputes this.

[15.3] The defendant states that it lawfully cancelled the service contract; the plaintiff disputes this.

[15.4] If it was found that the defendant did repudiate the contract (which repudiation enabled the plaintiff to elect cancellation), the defendant disputes that the plaintiff suffered damages, and if the plaintiff suffered damages, that it was not to the amount claimed.

[15.5] Liability and costs.

[16] Evidence

[17] The plaintiff's witness

[18] The plaintiff and the defendant each called one witness to testify on these matters.¹ The plaintiff's witness was Mr Holdstock, the general manager of EC Security Services for seven years. His general duties are to liaise with management and follow up with staff on issues on the different sites. Operations managers and the regional manager report to him.

[19] Holdstock testified that the plaintiff was approached by a management agent for a quote and to make a presentation to the trustees of the defendant. Based on the presentation and the quotation, they were awarded the contract. Both parties signed the service level agreement. Three trustees signed for the defendant.

[20] There was no testimony on whether the contractual terms were explained to the trustees or whether they disputed or questioned any of the terms before signing.

[21] During evidence in chief, Holdstock explained how the contract price would have increased had the contract run its full course until 30 November 2020, repeating what is set out in the particulars of claim. He then stated that the plaintiff would have received the amount of R 1 306 408,55 had they continued the contract. He also testified that due to the competitive and regulated nature of security services, the profit margin fluctuates between 10% - 18%. He did not testify on how this 10% is calculated.

[22] In cross-examination, Holdstock testified that the staff were re-deployed elsewhere at the end of the contract. Four were retrenched, and 3 were re-employed, based on his memory, but he could not say for sure. The plaintiff re-used some of the equipment elsewhere, and some are gathering dust in the office. He did not testify on the plaintiff's expenses or the severance packages the plaintiff had to pay to retrench the guards.

¹ The matter was heard online on the Microsoft Teams platform. The court requested from the parties to ensure the integrity of the online witness testimony of the witnesses. Both parties assured that the witnesses will testify alone in room. This was accepted by both counsel.

[23] The defendant's witness

[24] Witness for the defendant was Mr Beukes, a trustee at the time of cancellation of the defendant, in charge of security and maintenance of the security complex. He testified that the body corporate has lost complete faith in the ability of the plaintiff to provide security services and thus cancelled the contract. He further testified that the problems with the cameras, the torches, the guards and the Ubers (discussed in more detail below) amounted to a breach of the service agreement entitling the body corporate to terminate the agreement. These issues were communicated to the plaintiff in various forms – from emails to weekly meetings with operations managers.

[25] Correspondence

[26] The plaintiff read the agreement into the record, along with other written correspondence between the defendant and the plaintiff; correspondence between the attorneys and the defendant, and lastly, and central to many of the factual points, entries into an "operations book". In this operations book (OB) the guards recorded any incidences during their shift, the patrolling done around the complex, and all the items handed over to the next shift. Later, guards were also requested to sign in on the defendant's request.

[27] Various correspondence was also handed up as evidence. The most crucial ones are the following:

The email of 15 November 2018

[28] In an email of 15 November 2018, one of the trustees, Nthabiseng, in an email to Holdstock, requested that there not be such a "big rotation" (i.e. constantly having different guards at the complex) of guards, as they do not know the guards, and the guards will not know them. She ends the email by saying that they can, in the new year, "make a decision about this contract going forward".

Email exchange of 27 December 2018

[29] On 27 December 2018, there was an exchange of emails between the trustees about their concern that a guard did not pitch up for work and that some guards were sleeping on the job, which was forwarded to, amongst others, Holdstock. There was a request that the two guards on duty should not be allowed back on the site. In this email, Nthabiseng writes, "I really think we need to make a decision about our contract with EC". Holdstock replied immediately that the guards would be removed.

Email of 14 January 2019

[30] Beukes expressed his concern in an email to all the trustees that he was not happy with the plaintiff's management. He expresses that he raised his concerns with them, and they have tried to iron out the issues, but the problems seem to keep popping up. He also states that despite trying to talk to the plaintiff, the situation seems to be getting worse. He expressed to the trustees that he thinks that they have hit a wall.

The email of 15 March 2019

[31] This email is central to the dispute. On 15 March 2019, Beukes sent an email to the Groupe CEO of EC Security Service informing them that they signed a contract with a new service provider and wished to end the contractual relationship with the plaintiff with one month's notice. He lists all the issues they were unhappy with in the email, namely the cameras, equipment (torches), guards and Ubers. Since these issues are central to the question of the cancellation of the contract, I will discuss these issues in detail below.

Attorney's letter of 13 May 2019

[32] A letter dated 13 May 2019 from the plaintiff's attorneys communicated that they elected to cancel the contract based on what they deemed a repudiation of the contract by the defendant. Based on clause 5 of the contract, they claim damages for breach of contract.

[33] Evidence on the question whether the plaintiff complied with its contractual obligations

[34] The defendant claims that the plaintiff did not comply with the obligations in terms of the agreement, as it did not provide "the expected standard of security services in terms of the contract and [that it] was the services of poor quality".² The defendant also states that the breaches by the plaintiff were "repeatedly recorded and communicated by the defendant to the plaintiff".³ The plaintiff insists that they did comply.

[35] The nature of the unhappiness of the defendant can be gleaned from the correspondence and oral evidence of Beukes. The correspondence of 15 March 2019 sets the defendant's concerns, namely the cameras, the torches and the guards' conduct, and what I refer to as "the Uber problem". I deal with each separately.

The camera problem

[36] Defendant complains that the plaintiff was notified in writing "on multiple occasions to sort out the camera system and to ensure that the cameras were functional and recording".⁴

[37] Holdstock testified that they were contractually obliged to install 16 cameras but installed 24. This also required an upgrade to a 32 Network Video Recorder system, which he deemed more than what they were contractually obliged to provide. He states that even if some cameras were not working, there were always at least 16 cameras working. Moreover, when the plaintiff was informed that the cameras were down, the plaintiff fixed it, usually within 24 – 72 hours.

[38] Beukes did not dispute that there were always 16 cameras working but did say that the cameras are not working and the fact that the defendant constantly had to ask the plaintiff to fix it, is not satisfactory service. He accepted that the cameras (all but one

² Par 4.2.1 of defendant's plea.

³ Par 4.2.1 of defendant's plea.

⁴ Email from Beukes sent to Eugene Coetzee dated 15 March 2019.

– the camera at the pick-up point) were fixed but quickly added that the cameras repeatedly gave problems.

[39] Under cross-examination, Holdstock admitted that cameras not working might be a possible blind spot in terms of security – in other words – not monitoring crucial areas, but he could not say for sure. He also testified that even if the camera outside of the pick-up, and drop-off zone was constantly tampered with by the Uber drivers, there were still two general overview cameras on the perimeter wall that monitored the area.

[40] It is not clear if the defective cameras recorded in the OB book were always the same ones not working (and thus remained unfixed) or if they were different ones. From the testimony, it seems that it was different ones.

The torches problem

[41] The defendant further complained that there are dark spots around the complex that make it difficult for the guards to patrol and require flashlights. This is especially so during "loadshedding".⁵

[42] The issue of the torches was dealt with in minute detail. The defendant considered this as a material term of the contract. Beukes testified that he addressed this issue with Theo (the regional manager of the plaintiff) and Justice (the operations manager of the plaintiff). According to him, the guards themselves complained to him about the lack of flashlights.

[43] Beukes also testified that the guards were eventually supplied with one torch, and later two more, but that these were inadequate as they were too small and hardly made light. Under cross-examination, he stated that Theo informed him that the supplier of the usual cameras they use was out of stock. It seems from the entries in the OB book that there were only three entries that referred to the handover of torches.

⁵ Perhaps to clarify for future generations, who hopefully will not sit with this problem, "loadshedding" can be described as a period of time when electricity is switched off in certain areas at certain times as to relieve the overload the national electricity grid who cannot keep up with the demand due to various failures of the national electricity provider, ESKOM.

The problem with the guards

[44] As for the guards, there were numerous complaints. Some of them relate to one guard assaulting another guard, sleeping on duty, allowing a tenant to walk into the complex when another tenant opened the gate ("tailgating"), and a guard selling a remote to a tenant. There were also allegations of guards sleeping in the refuse area at night, false patrolling, and false entries in the operations book.⁶

[45] There was one incident emphasised, where a guard assaulted a visitor. A tenant wrote in an email⁷ that his guest dialled his unit number, and he opened it, but due to a guard walking past the sensor the gate closed, so the guest had to dial the tenant again. When the tenant investigated why his guest could not enter, he saw one of the guards grabbing the helmet of his guest. This was captured on the cameras, but without sound.

[46] On the plaintiff's version, the guest was obstructing the entrance to the complex and refused to move when the guards asked. Under cross-examination, Holdstock testified that it was a racially motivated incident where the visitor called the guards vulgar names, which then lead to a heated argument. Holdstock also testified that the guards were "over-excited" and that a disciplinary hearing was held on the incident.⁸

[47] Beukes testified that he was aware of the incident and that they complained to Theo about it. He denies that it was a racial incident. They found the assault of the visitor at the gate unacceptable. Beukes also testified that after complaining to Theo, the guard was removed thereby addressing the issue, but that this nonetheless was "unprofessional conduct" from the plaintiff.

[48] The allegation of guards sleeping in the refuse area and not patrolling could not be proved and must therefore be regarded as hearsay. Those that could be proved, such as the assault of the visitor that was captured on video footage, and the guards

⁶ See also in this regard the email of José Cosme (trustee) at CaseLines 21-5 that states "They do their patrols, but I suspected last week that night shift wasn't and I asked the day guards and then suddenly I saw a night guard patrolling again however I believe their route was also changed so then you don't see them as expected anymore".

⁷ At CaseLines 021-15.

⁸ See also correspondence between management of EC Security and the Body Corporate at 021-14 on CaseLines.

assaulting one another, were investigated. Those guards were taken through a disciplinary hearing (and were dismissed in some instances) or removed from the site.

[49] The defendant was also frustrated with what they perceived to be a high turnover in staff, and they considered this a safety risk, as the new guards did not know the tenants. Holdstock testified about the plaintiff's frustration: the defendant complains about the guards' conduct, but then when the plaintiff took action and removed the guards, they complained of a high turnover. It seems that the crux of the problem is that the level of service received from the plaintiff did not meet the defendant's expectations.⁹ The question is what the legal implications of these frustrations are.

[50] While the guards not patrolling, sleeping in the refuse area or not pitching for work are hearsay or perceptions (and not outright denied by the plaintiff), they contributed to the frustrations of the defendant about the level of service received from the plaintiff. The plaintiff, in turn, perceived many of these complaints as "personal". Be that as it may, Holdstock testified that many of the complaints received about the guards were addressed in 24 to 72 hours. Much of this was confirmed in Beukes' email of 15 March 2019.

[51] For instance, in the same email that purported to cancel the agreement (the 15 March email) for the breaches, Beukes noted that the plaintiff removed the guard involved in the assault from the site and dismissed the guard sleeping and the guard selling the remote. Beukes admitted to it during cross-examination, that in many of these instances, the plaintiff addressed their concerns by acting. During examination in chief of Holdstock, he testified that for the other allegations contained in the email (forging entries, sleeping in the refuse area, and not patrolling), there was not enough evidence to take action.

⁹ See also the email of Jose at CaseLines 021-5 that clarifies to the body corporate that the guards "will only do security according to their grading. I believe we have grade "D" security guards. Not sure if we have been upgraded, as the guards have been the same for a while. As for that, they only operate entries and exit points. That is their main function. We have them patrol the complex as well. That is actually all they get paid to do."

The Uber problem

[52] Some complaints recorded in the OB book related to the conduct of Uber drivers adjusting cameras, causing them to malfunction. The defendant's rule is that Ubers are not allowed into the complex, and there is a designated pick up and drop off point outside the gate for them. Despite this rule, residents often let the Uber drivers into the complex. While the guards often confronted cars that they thought to be Ubers (based on the make and the colour), they could not do much if tenants let them in.

[53] There was one Uber incident where a driver threatened to kill one of the security guards. The staff then pressed the panic button. It seems from the entry in the OB book that no backup arrived, but that the guards contacted the manager ("Piet"). Only the next day, there was an inquiry into the panic button. Holdstock avers that the matter was solved within a few minutes and that backup was no longer needed. Beukes testified that he disagreed that all was in order. The defendant thought that the failure of backup to arrive after the panic button was a serious breach.

[54] The issue of the Ubers is not straightforward. While one can expect the guards to direct Ubers to the drop-off zone outside, it is a different issue if a resident themselves dial in an Uber. These incidences were recorded in the OB book, and Beukes signed next to most of them, meaning that he took note (and presumably issued fines in terms of the body corporate rules).

[55] All this must be kept in mind when the court considers the question of whether there was a breach of contract through repudiation of the contract, as the plaintiff claims, or a lawful cancellation of the contract, as the defendant pleads.

[56] Evaluation of the evidence

[57] Overall, Holdstock came across as confident and well versed with the facts. During cross-examination, there were a few questions that seemed to have frustrated him, but in general, he explained what he was asked to explain thoroughly. Counsel for the defendant described some of his explanations as flippant or dismissive.

[58] Beukes came across as nervous. There were contradictions in some of his testimony, probably more due to the fallibility of human memory than him wilfully lying. Some of the allegations made in the emails and during the examination were hearsay evidence with no other evidentiary backup, although they were not contested by the plaintiff. They will be dealt with below when the specific issues are addressed.

[59] There was no dispute about the authenticity of the contract or the emails or the entries in the OB book. These are then accepted as is.

[60] Breach of contract

[61] That the members of the defendant were frustrated with the plaintiff is clear from the correspondence between the trustees for the defendant themselves, but also in the correspondence with the plaintiff. But no matter how great, frustration does not per se constitute a breach of contract, nor does a breach per se constitute a material breach of contract.

[62] The law on breach of contract: positive malperformance and repudiation

[63] Parties to a contract are bound to respect the contract and perform their obligations in terms of the contract. If a party, by act or omission, without a lawful reason, fails to honour the contractual obligations, they commit a breach of contract.¹⁰

[64] Where a party does perform in terms of the agreement but does so in a defective manner (i.e. by providing a substandard service), this is a breach of contract. For it to be a breach of contract it need not be significant or relate to a material term. The materiality of the breach instead becomes important when asking whether a party has a right to cancel the contract.

[65] The aggrieved party can then either cancel the contract, accept the defective performance, and claim damages, or reject the performance and demand specific performance or damages in lieu of performance.¹¹

¹⁰ Jacques Du Plessis and others, *The Law of Contract in SA 3e*, vol Third edition (Oxford University Press Southern Africa 2017).

¹¹ Ibid.

[66] A party may cancel (in the absence of a *lex commissoria*) a breach if it is so serious as to justify cancellation by the innocent party. In *Singh v McCarthy Retail Ltd (t/a McIntosh Motors)*¹² the court stated the approach as follows: whether the innocent party is entitled to cancel the contract (absent a *lex commissoria*) because of malperformance entails a value judgment by the court. It requires a balancing of competing interests: that of the innocent party claiming rescission and that of the party who committed the breach. Ultimately the criterion must be to treat both parties fairly, keeping in mind that specific performance or damages are preferred to the rescission of the contract.¹³ Then the question becomes "[i]s the breach so serious that it is fair to allow the innocent party to cancel the contract and undo all its consequences?"

[67] If there is a cancellation clause, the aggrieved party may cancel the contract even if the breach is not serious or material.¹⁴ If there is such a clause, the aggrieved party may only rescind the contract if the notice was given,¹⁵ and the debtor remains in default on the expiry of the period in question.¹⁶ Such notice must make it clear what is required from the defaulting party, otherwise, the notice will not be the notice as contemplated in the contract.¹⁷

[68] If there is no such clause, the aggrieved party may cancel the contract if the breach is so serious that one cannot reasonably expect the party to abide by the contract and be satisfied with damages alone.¹⁸

Plaintiff claims repudiation

[69] Unlike positive malperformance, repudiation is unknown to Roman-Dutch law and is derived from English law. The repudiating act *per se* constitutes the breach, a violation of a fundamental obligation, *ex lege*, to honour the agreement. For that reason, the injured party does not "accept" the repudiation, but rather at the repudiation makes

¹² (429/98) [2000] ZASCA 41; 2000 (4) SA 795 (SCA); [2000] 4 All SA 487 (A) (14 September 2000)

¹³ Par 15.

¹⁴ *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A).

¹⁵ R. H. Christie and G. Bradfield, *Christie's law of contract in South Africa* (2016) 637; see also *Bekker v Schmidt Bou-Ontwikkelings CC* 2007(1) SA 600 (C), *Standard Bank of SA Ltd v Hand* 2012(3) SA 319 (GSJ), *Hano Trading CC v JR 209 Investments (Pty) Ltd* 2013(1) SA 161 (SCA).

¹⁶ *Van Zyl v Rossouw* 1976 (1) SA 773 (NC)

¹⁷ *Godbold v Tomson* 1970(1) SA 61 (D).

¹⁸ *Singh v McCarthy Retail Ltd t/a McIntosh Motors* 2000 (4) SA 795 (SCA)

an election¹⁹ to either reject the repudiation and continue despite the repudiation or elect to rescind the contract.²⁰

[70] In *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*²¹ the Supreme Court of Appeal stated that the test for repudiation is objective. The test is if a reasonable person in the aggrieved party's position would conclude that proper performance in terms of the agreement will not happen.

[71] The plaintiff claims that the defendant repudiated the contract. The court must thus ask if the defendant, with words or conduct and without lawful grounds, indicated their unequivocal intention to no longer be bound by the contract and that they will not perform their obligations any longer. It does not matter whether that is what the defendant meant or not; the question is whether a reasonable person, looking at the defendant's conduct, would regard their actions as a repudiation.²² Whether the defendant was under the impression that they were allowed to terminate the contract or not is irrelevant. If they did not have a lawful ground for terminating the contract and declaring their intentions to terminate it, it could be repudiation.²³ In other words, thinking that the email of 15 March 2019 is a lawful notice to the plaintiff to terminate the contract when there is a procedure to be followed in terms of clause 7.1 to terminate it lawfully does not mean that the defendant did not "repudiate".

[72] This is what the plaintiff argued happened in the case. The defendant puts forth a different argument.

Defendant argues lawful cancellation of contract

[73] Counsel for the defendant did not dispute that the email cancelled the contract but argued that this is not a "repudiation", since the defendant lawfully cancelled the contract in terms of the law. The defendant is of the opinion that the *plaintiff* breached

¹⁹ *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A).

²⁰ Du Plessis and others, *The Law of Contract in SA* 3e.

²¹ 2001 (2) SA 284 (SCA) par 16.

²² In other words, it is an "objective test".

²³ *Metamil (Pty) Ltd v AECI Explosives and Chemicals Ltd* 1994 (3) SA 63 (A) 676I-J; *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 (2) SA 835 (A) E at 845 in fine-846A.

the contract, arguing that the breach was material and that they then gave the plaintiff 30 days' notice of cancellation in terms of clause 7.1, the "breach clause".

[74] One of the questions when it comes to the cancellation of contracts is whether the contract contains a clause that a party that is unhappy with the other party's performance must give them a "breach notice" (*lex commissoria*).²⁴ Clause 7.1 of the agreement is an example of such a clause.

[75] Counsel for the plaintiff stated that this clause must be interpreted in line with *Natal Joint Municipal Pension Fund v Endumeni Municipality*²⁵ which stated that

"A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike result or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used".

[76] During argument, the court was referred to *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association*,²⁶ which states

This court has consistently stated that in the interpretation exercise the point of departure is the language of the document in question. Without the written text there would be no interpretive exercise. In cases of this nature, the written text is what is presented as the basis for a justiciable issue. No practical purpose is served by further debate about whether evidence by the parties about what they intended or understood the words to mean serves the purpose of properly arriving at a decision on what the parties intended as contended for by those who favour a subjective approach, nor is it in juxtaposition helpful to continue to debate the correctness of the assertion that it will only lead to self-serving statements by the contesting parties. Courts are called upon to adjudicate in cases where there is dissensus.

[77] In the alternative, the plaintiff argued that the common law applies, which requires that the plaintiff first be placed in *mora ex persona* before the agreement can

²⁴ *GPC Developments CC v Uys* [2017] 4 All SA 14 (WCC), relying on *North Vaal Mineral Co.Ltd v Lovasz* 1961(3) SA 604 (T) at 606C.

²⁵ 2012 (4) SA 593 (SCA) par 18.

²⁶ (106/2018) [2018] ZASCA 176; [2019] 1 All SA 291 (SCA); 2019 (3) SA 398 (SCA) (3 December 2018) at par 63.

be cancelled.²⁷ Neither of these gives the defendant to right to summarily terminate the agreement without giving the plaintiff the opportunity to correct its performance.

[78] Counsel for the defendant, on the other hand, urged me to look at the clause through the glasses of the Constitution and the higher duty that security companies have in fulfilling their contractual obligations in line with the Constitutional Court case of *Loureiro v Invula Quality Protection (Pty) Ltd*.²⁸ In this case, the court looked at the relationship between security companies and clients through the "rights of life, freedom and security of person, freedom from all forms of violence"²⁹ and the increasing role that the private security industry plays in protecting private individuals' safety and security. To that end, Van der Westhuizen J remarks, when dealing with the question of wrongfulness in delict, that³⁰

There is a great public interest in making sure that private security companies and their guards, in assuming the role of crime prevention for remuneration, succeed in thwarting avoidable harm. If they are too easily insulate from claims for these harms because of mistakes on their side, they would have little incentive to conduct themselves in a way that avoids causing harm.

[79] This is authority, the defendant avers, for a security company to be held to a higher standard of compliance also in terms of contract law. It states that public policy and the legal convictions of the community demand this, "taking into account the degree or extent of the risk created by a breach, the gravity of the consequences where harm occurs and its burden of eliminating or reducing the risk of harm". This implies that reading a breach clause without qualification will be against the constitutional values (not specifying which) and the legal convictions of the community. The plaintiff objected that the defendant did not plead this.

²⁷ Mora ex persona would require that the defendant demand performance unequivocal; provided a fixed and reasonable date for performance and in a notice of intention to cancel. *Ponisammy v Versailles Estates (Pty) Ltd* 1973 (1) SA 372 (A), *Ver Elst v Sabena Belgian World Airlines* 1983 (3) SA 637 (A), *Nel v Cloete* 1972 (2) SA 150 (A).

²⁸ 2014 (3) SA 394 (CC).

²⁹ Par 1.

³⁰ Par 56.

[80] In *Shill v Milner*³¹ the court stated that the importance of pleadings should not be unduly magnified. The objective of pleadings is to define issues, and that parties will be kept to the pleadings if departure from it will cause prejudice or prevent full inquiry. However

within those limits the Court has a wide discretion. For pleadings are made for the Court, and not the Court for the pleadings.

[81] In *Robinson v Randfontein Estates GM Co Ltd*³² the court stated that

parties will be kept strictly to their pleas where a departure would cause prejudice or prevent full enquiry. But within those limits the court has a wide discretion.

[82] I take heed of the plaintiff's objection that the defendant did not plead this and that evidence was not *per se* led on the matter. However, as the supreme law, the Constitution informs all laws and interpretations.

[83] The defendant asks the court to find that the clause is *contra bonis mores* and sever it from the rest of the contract. It also alleges that the 14-day period cannot apply to a security contract because even a breach of one day can be a significant security risk.

[84] There is a debate in South African law of contract about whether a judge may refuse to enforce an otherwise valid term of the contract because it would be unduly harsh, unfair, or unreasonable in the circumstances of the case do so. At heart lies the competing interests of certainty and fairness in the law of contract. As a rule, commercial contracts will require a great deal of certainty. The law must be predictable, as it must allow for the businessperson to plan. On the other hand, contractual terms must also be fair to be legitimate.³³ The court must strike a balance in every case.

[85] Before the Constitution, certainty would, in most instances, trump fairness. However, since the Constitution, the Constitutional Court has persistently stated that the

³¹ 1937 AD 101 at 105.

³² 1925 AD 173 at 198.

³³ Dale Hutchison, 'From bona fides to ubuntu: the quest for fairness in the South African law of contract' (2019) 2019 Acta Juridica 99 100.

values of fairness, good faith and ubuntu infuse the law of contract.³⁴ This can be a complicated and intricate exercise.

[86] Herein I take guidance from the Constitutional Court in *Barkhuizen v Napier*³⁵ where Ngcobo J considered the caution from the Supreme Court of Appeal that judges should take care not to intrude in contracts apparently entered into voluntarily, specifically when it requires a judge to impose their individual conceptions of fairness and justice on parties' individual arrangements.³⁶ However, when a court is asked to make a call on public policy issues, it must head to the freedom of contract and ensure simple justice between the parties.

[87] *Barkhuizen v Napier*³⁷ read with *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust*³⁸ laid down a two-stage test to determine whether a provision is fair. Firstly, is the provision in question objectively so unreasonable on its face that it offended public policy? If it is, then it is void. But if it is not, the second question is whether in the particular circumstance, including the relative position of the parties and in the particular case and the reason for non-compliance, would make it contrary to public policy to enforce the clause.³⁹

[88] The provision in clause 7.1 does not offend public policy.⁴⁰ It sets out a procedure to follow in the case of a breach. Some issues have been raised in argument that it was a "standard clause", which will be addressed separately to below. However, this does not detract from the fact that the clause itself does not offend public policy. I also don't find the enforcement of this clause, in this case, to be against public policy. If *none* of the guards reported for duty on one shift, it could be against public policy to enforce the clause and allow for a 14-day rectification. But this was not the case.

³⁴ Ibid 100.

³⁵ 2007 (5) SA 323 (CC).

³⁶ *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) par 13.

³⁷ 2007 (5) SA 323 (CC).

³⁸ [2020] ZACC 13.

³⁹ Paras 56 -72. See Leo Boonzaier, 'Contractual Fairness at the Crossroads' (2021) 11 Constitutional Court Review 229 for a good explanation of how to interpret the most pertinent cases on this topic.

⁴⁰ See also *GPC Developments CC v Uys* [2017] 4 All SA 14 (WCC).

[89] Thus, even regarding the contract through the lens of the Constitution in the facts of this case, I do not find that it allowed for a deviation from the “breach clause”, clause 7.1. The defendant was thus bound to follow the procedure.

[90] To answer whether the defendant lawfully cancelled the contract, the defendant must firstly show whether there was compliance with the breach clause. Much of this turns on what an acceptable "breach notice", taking into account the aforementioned discussion, and how clause 7.1 should be interpreted is in this case.

[91] Was there adherence to clause 7.1 the “breach clause” (cancellation clause)?

[92] Holdstock insisted that they did not receive a breach notice. When asked what such a breach notice would entail, Holdstock stated an email setting out exactly what the breach is, informing them that failure to remedy it would lead to a cancellation of the contract, and then giving them 14 days to remedy the breach.

[93] Beukes testified that the defendant did not consult attorneys when they wanted to terminate the contract. Under cross-examination, he stated that he had no idea what was in the contract. Therefore, he regarded the 15 March 2019 email as a valid cancellation notice.

[94] During evidence in chief, Beukes stated that they had lost complete faith in the ability of the defendant to provide the service and that they regarded the plaintiff to be in breach of the contract (the contents of which he did not know) and could therefore rightfully cancel the agreement in the manner they did. He felt that they had communicated their frustrations multiple times in emails, in weekly on-site meetings, and in the three meetings they had with the whole of the plaintiff's management.

[95] In the plaintiff's reply to the purported cancellation email of 15 March 2019, the plaintiff made the defendant attend to the terms of the service level agreement that requires that once they have been notified of a breach, they should be given 14 days to remedy the breach. In that email, the plaintiff disputed that they breached the contract and reminded the defendant that they are contractually bound until 30 November 2020.

The email ends that they "respectfully cannot accept the current request for cancellation".

[96] The defendant regards the many complaints communicated, including the incident with the Uber driver and the panic button, of notifying them of a breach. Beukes, however, conceded that he did not send a letter that explicitly informed the plaintiff that they are in breach and that they must rectify it within fourteen days after which they will then cancel the contract.

[97] To argue that this was indeed the case, various arguments were raised. I have divided them into three: whether a breach notice was sent, whether an accumulation of several breaches can be regarded as a material breach and the standard clause argument.

Was there a "breach notice"?

[98] Much of the case that is crucial to the dispute is the question: did the defendant send such a "breach notice" to the plaintiff, and if they did, did the plaintiff remedy the breach within 14 days?

[99] The defendant argued that in this specific instance, the clause, read without qualification, is against the constitutional values and the legal convictions of the community. For this reason, it should be interpreted against the plaintiff. Also, a breach of the security contract can have dire consequences in jeopardising the safety of the defendant's members should lead to a more favourable interpretation for the defendant.

[100] It is not always clear what the defendant's argument is in this regard. The pleadings alleged that the plaintiff failed to comply with the terms of the agreement and that these breaches were repeatedly recorded and communicated to the plaintiff.⁴¹ The defendant pleads that it did not repudiate the contract but gave notice to the plaintiff who was defaulting on its obligations.

[101] The defendant did notify the plaintiff on numerous occasions about defects, and it was this build-up of frustration that eventually led to the cancellation. However, despite

⁴¹ Par 4.2.2 of the plea.

notifying and raising concerns on various occasions, the defendant never sent out a formal letter of the breach that stated unequivocally that the plaintiff has now breached a specific term, that plaintiff has 14 days to rectify the breach, and if failing to do so, that defendant will then cancel the contract. The question then is: can the contract be lawfully cancelled without adherence to the specific procedure set out in clause 7.1?

[102] In my opinion, there might be situations that warrant such an interpretation. But in this case, weighing up the need to adhere to the principle that contracts freely entered into should be enforced (ie the breach clause), and notions of fairness and good faith do not tip the scale in favour of the defendant for the reasons that follow.

[103] As far as the cameras are concerned, I am satisfied that the plaintiff attended to the malfunctioning cameras when alerted and that there were always at least 16 cameras working. Even if every malfunctioning camera can amount to a breach, on the plaintiff's evidence, they attended to the breaches within 24 – 72 hours. This was not disputed. The plaintiff thereby complied with their obligations in terms of the contract, as far as the cameras are concerned.

[104] As for the torches: on the evidence (the entries in the OB book) and the oral testimony of Beukes, I accept that there were not always torches available to the guards. Since the contract specifies "3 x Torches", one would expect the OB entries to, every day, reflect that the guards handed this over to the next shift (along with the batons, handcuffs, and pepper spray that were always duly recorded). The fact that there were no torches, is a breach of the agreement and was communicated to the defendant. I am satisfied that the plaintiff did not comply with this contractual obligation on the torches issue and did not attend to the issue within 24 – 72 hours, or 14 days.

[105] On the facts, the plaintiff also complied with the contract regarding the guards are concerned. Where there were breaches and the plaintiff could take action, it did so. Either by removing the guards or by taking disciplinary actions against them. Also, in the specific incident with the panic button, I am satisfied that a trained security guard can assess a security situation and find that backup is no longer needed and that the situation is under control.

[106] As far as the Uber issue is concerned, I am satisfied that the plaintiff did not breach the agreement by allowing unauthorised people randomly into the complex.

Can the accumulation of many faults constitute a breach?

[107] If the court does interpret the contract through the lens of the Constitution and find that it complied, the defendant asserts that the court cannot merely ignore the emails where the trustees, as ordinary people, tried to bring the faults to the plaintiff's attention in writing. The accumulative effect of all these emails, it is submitted, constitutes an overall breach by the plaintiff that justifies cancellation.

[108] The Namibian (previously South West African) decision of *Kabinet van die Oorgangsregering van die gebied van Suidwes-Afrika v Supervision Food Services (Pty) Ltd*⁴² does not bode well for the defendant. In a case similar to the facts dealing with a contract for the supply of hospital food, on the question of what the requirements are of such a notice, it is said that the clause of the contract is decisive. In that case, the clause provided that, if any conditions of the contract are not met, notice must be given to the other contractual party in writing, who then has 30 days to rectify its mistake. The court found that such a notice must be in writing but that it does not require that it must expressly state the party must comply with the contractual terms or that it must be done within 30 days.⁴³ However, the breach must be clearly stated, and only after the passing of the time indicated in the clause, and if the breach was not remedied by then, will a party be entitled to cancel.⁴⁴ However, the court also clarified that if the non-compliance was brought to the party's attention and if that specific non-compliance is attended to within the given time, non-compliance of a similar but different incident will require a new notice in terms of the clause.⁴⁵

[109] The English case of *GB Gas Holdings Ltd v Accenture (UK) Ltd & Ors*⁴⁶ refers to a "factual matrix" of complaints and problems with the services received from Accenture.

⁴² 1989 (1) SA 967 (SAW).

⁴³ At 972A.

⁴⁴ At 974A.

⁴⁵ At 974E.

⁴⁶ [2010] EWCA Civ 912 (30 July 2010).

[46] ...this court is confined to the legal questions whether it is contractually possible for individual breaches of warranty to be aggregated to produce a "fundamental" breach of warranty and whether the consequences of individual fundamental breaches of warranty can be aggregated to produce a severe adverse effect.

[110] The court found it is possible but added that once a defect is fixed, it has no further part to play in contributing to a fundamental defect. In other words, only unfixed defects can accumulate together to make the breach fundamental.⁴⁷ Of course, this court is not bound to either of these judgments, but it does give some guidance.

[111] Although it might be that the accumulation of complaints can add up to constitute a breach in certain instances, this is not the case here. The plaintiff attended to most complaints within 24 – 72 hours. On the issue of the torches, it seems, on the balance of probabilities, that the plaintiff was in breach of acquiring good working torches and that they failed to remedy that breach for some time. The issues of the guards were addressed, either by just removing them and re-deploying them to a different site or by dismissing them after a disciplinary hearing. However, the unresolved breaches (the issue of the torches) put together do not amount to a breach that goes to the root of the contract.

The contract is a standard contract

[112] Counsel for the defendant also raised the issue that the reference to "branches" indicates that this is a standard clause of the plaintiff and not tailor-made for the defendant. This links to the dissenting judgment of Sach J in the *Barkhuizen* case,⁴⁸ and is in line with the direction in which contracts are moving in the context of consumer law.

[113] For instance, the Consumer Protection Act⁴⁹ gives consumers the right to "plain language" in consumer contracts.⁵⁰ While attorneys are focused on protecting their client's interest when drafting contracts to make sure that the contracts will stand up in

⁴⁷ Par 51.

⁴⁸ From par 121.

⁴⁹ 68 of 2008.

⁵⁰ Section 22. Elizabeth de Stadler and Liezl Van Zyl, 'Plain-language contracts: Challenges and opportunities' (2017) 29 SA Mercantile Law Journal 95 95; N. J. Melville, *The Consumer Protection Act made easy* (2011) 160.

court, in the end, the audience (such as a trustee of a Body Corporate) must understand what their obligations are.

[114] Holdstock explained in his testimony that they also provide security to car dealerships, therefore the reference to "branches". A standard contract tailored for a car dealership, where one can presume a certain level of understanding of commercial contracts, might not be ideal for a contract concluded with a trustee of the defendant.

[115] Unfortunately, as lawyers, we inherit the burden of legalese through endless copy and pasting of previous precedents. It takes effort to express ourselves in clear and plain language. Also, to save time and money for clients, clauses and agreements are copied from previous contracts without putting much thought into whether the consumer (in the broader sense) fully understands what they are signing, which begs the question if there is then really a "meeting of minds". This should not be an excuse: if our supreme law, the Constitution, can be written in plain language, then commercial contracts can also be.

[116] Be that as it may, the provisions of the Consumer Protection Act relating to plain language do not apply to the Security Services Industry.⁵¹ Moreover, a juristic person includes a body corporate, and there is a threshold of an R 2 000 000 turnover. And since none of these issues was properly pleaded or ventilated in the court, it would be improper to make a ruling on it. Therefore, these remarks are a friendly *obiter* warning, similar to the one Sachs J offered in *Barkhuizen v Napier*.⁵²

[117] Still, Holdstock's reply to the 15 March 2019 email was a clear reminder of the terms of the agreement and that they are bound to the contract. I am satisfied that at the very latest, when that email was sent, the defendant should have paid more attention to the terms of the contract and complied with them.

⁵¹ See notice no 533 in *Government Gazette* no 34400 of 27 June 2011.

⁵² *Barkhuizen v Napier* (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC).

[118] Conclusion on the cancellation of the contract

[119] I, therefore, find that the defendant did not follow the steps set out in the breach clause to cancel the contract. Even on a lenient interpretation of a higher standard required for security companies, and the possibility that the various emails were notification of the breaches, the defendants did not make their intention to cancel the contract in clear and unequivocal language.

[120] Therefore, I find that on the facts of this case, the conduct of the defendant was such that a reasonable person in the position of the plaintiff would impute from their conduct and words (specifically the email of 15 March 2019) that the defendant no longer wants to be bound by the contract. And despite the warning in reply to the 15 March 2019 email and the emphasis on the terms of the service level agreement, the defendant did not change its conduct. The plaintiff could therefore elect to cancel the contract and claim damages.

[121] This leaves this court with only determining whether the plaintiff suffered damages due to the repudiation, whether the damages were proved, and the quantum.

[122] Damages

[123] Contracts are normally concluded with the aim of full performance by the parties. Even so, there are ways to end a contract lawfully. In this case, the contract provided for the contract to run for a specific period in clause 2.1 (three-year intervals) and a mechanism to bring the contract to an end before the expiration of the three-year period, namely the breach clause in clause 7.1 (also called a cancellation clause).

[124] When the contract is not lawfully cancelled but is ended through a breach of a party, the innocent party has a range of remedies available to either force the breaching party to comply with its obligations or to cancel the contract on account of the breach. In both instances, the innocent party will have a claim for damages if the party is worse off than they would have been, had there been no breach. If there is no loss, there can be no claim for damages, as South African law does not accept the doctrine of punitive

damages. This should be distinguished from damages in lieu of performance where specific performance is no longer possible.⁵³

[125] Damages are quantified by looking at the actual position the plaintiff finds itself in subsequent to the breach and comparing it to the hypothetical position it would have occupied, had there been no breach – the difference theory.⁵⁴ Contractual damages are therefore measured according to the plaintiff's positive or expectation interest⁵⁵ including the loss of profit.

[126] There is usually an expectation to gain or profit from a transaction. But for a person to profit from a transaction, they must perform their side of the bargain. When performing their side of the bargain, they will often incur expenditure. These expenses are made because there is a reliance on the fact that there is a binding contract, and that the expenses will be recouped from the gross profits. When another party, for instance, repudiates the contract, the party will suffer both the reliance loss (wasted expenditure) and the expectation loss (the net profit lost on the contract).⁵⁶

[127] This is a matter of causation: but for the breach, the plaintiff would have been entitled to a natural end of the contract. It would have made a profit and would have had expenses. So the plaintiff can then claim both for the expectation loss of profit, and the reliance loss for expenses.⁵⁷

[128] It should also be noted that the breach in itself does not justify an award of damages – the plaintiff will have to show that it suffered patrimonial loss.⁵⁸ Whether

⁵³ Du Plessis and others, *The Law of Contract in SA* 3e.

⁵⁴ *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A) at 8; *Culverwell v Brown* 1990 (1) SA 7 (A) at 25.

⁵⁵ The terms positive and negative interesse has a German origin (rather than Roman). In Anglo-American law, the terms used is expectation and reliance interest. Much has been written on this, see for instance Lon Luvois Fuller and William R Perdue, 'The reliance interest in contract damages: 2' (1937) 46 *The Yale Law Journal* 373, Gerhard Lubbe, 'The assessment of loss upon cancellation for breach of contract' (1984) 101 *S African LJ* 616, Dale Hutchison, 'Back to basics: Reliance damages for breach of contract revisited' (2004) 121 *South African Law Journal* 51.

⁵⁶ Du Plessis and others, *The Law of Contract in SA* 3e.

⁵⁷ *Tweedie v Park Travel Agency (Pty) Ltd t/a Park Tours* 1998 (4) SA 802 (W) at 808-9; *Masters v Thain t/a Inhaca Safaris* 2000 (1) SA 467 (W) at 474. *Ibid.*

⁵⁸ *Swart v Van der Vyver* 1970 1 All SA 486 (A); 1970 1 SA 633 (A) 643CE.

there is a loss resulting from a breach of contract, is a question of fact. The court needs to ask itself, what would have occurred, had the contract been fulfilled.⁵⁹

[129] A plaintiff claiming damages for the breach of a contract needs to prove that the breach caused the loss on a balance of probabilities.⁶⁰ The general principle is

that most difficult question of fact – the assessment of compensation for breach of contract. The sufferer by such a breach should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without due hardship to the defaulting party.⁶¹

[130] Due to the repudiation and the subsequent cancellation of the contract, the plaintiff could no longer render the contractual service to the defendant and was therefore deprived of receiving a monthly service fee, which is what it claims. But from that, it would also have had to pay salaries and maintenance of the equipment, leaving it with a profit.

[131] In its original particulars of claim, Plaintiff claims the full contract price. The plaintiff is claiming an amount of R1 302 205,48 for damages flowing from the breach, it being the total contract price had the contract run until 30 November 2020. But this is not placing the plaintiff in the same position as it would have been had the contract not been repudiated. This puts it in a better position,⁶² as from this contract price, the plaintiff would have had to subtract wages and other expenses. What the plaintiff did suffer is a loss of profit.

[132] After asking for supplementary heads on the issue of damages, the plaintiff amended its particulars of claim to, in the alternative, claim the loss of profit.

⁵⁹ *Combined Business Solutions CC v Courier and Freight Group (Pty) Ltd t/a XPS* [2011] 1 All SA 10 (SCA).

⁶⁰ *Sandlundlu (Pty) Ltd v Shepstone & Wylie Inc* ([2011] 3 All SA 183 (SCA)) [2010] ZASCA 173 par 20.

⁶¹ *Victoria Falls & Transvaal Power Co. Ltd. v. Consolidated Langlaagte Mines Ltd.*, 1915 A.D. 1 at 22.

⁶² *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd* 1973 (3) SA 739 (NC) at 743-4.

[133] The defendant denies in both instances that the plaintiff suffered loss – either in the form of the contract price or in the form of profits. The defendant further argues that a party who has suffered a loss due to the breach of an agreement has to mitigate it.⁶³

[134] Once damages are proven, the defendant bears the onus of pleading and proving mitigation of damages.⁶⁴ The defendant questioned plaintiff's duty to mitigate its loss on the basis that the plaintiff did not state how many guards could be re-deployed, how many were retrenched and so forth. It also argued that the plaintiff did not indicate what equipment could be used elsewhere. Based on the failure to show how damages were mitigated, it is argued that the court can not make a finding on the quantum of the plaintiff's claim. Therefore the court must dismiss the claim.

[135] The issue of the damages claimed – both the contractual price and the profit – left the court in a difficult position. The plaintiff is not entitled to the full contract price for reasons set out above. Did the plaintiff claim damages in lieu of specific performance, this might have been possible.⁶⁵ But the plaintiff claimed damages as a result of the breach of contract.

[136] This left me in somewhat of a peculiar position, as the plaintiff, at best, through the testimony of Holdstock, testified that the profit margin is "between 10% - 18%". No other evidence was led on this. How does the plaintiff get to 10% - 18%? Counsel for the defendant rightly asked in argument – between 10% and 18%, "which one is it?" To that effect, counsel for the plaintiff replied that the court must choose a more favourable outcome for the defendant.⁶⁶ But that still does not solve the problem that the court can rely on the sole viva voce evidence of the plaintiff's general manager. The court thus faces the problem that in the absence of any evidence on *how* the plaintiff gets to "10% - 18%", this is speculative.

[137] Did the plaintiff, for instance, bring financial statements and other evidence that profit varies between 10% - 18%, and the expenses it incurred as a result of the breach

⁶³ *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 687C–F.

⁶⁴ *Desmond Isaacs Agencies (Pty) Ltd v Contemporary Displays* 1971 3 SA 286 (T).

⁶⁵ This will be damages that flow from the contract itself, rather than from the cancellation of the contract.

⁶⁶ *Bellairs v Hodnett* 1978 (1) SA 1109 (A) at 1140.

(for instance retrenchment and the removal of the equipment) the court would be inclined to make a finding of at least a loss of 10% of the profit,⁶⁷ plus the wasted expenditure. This would be based on the case of *Stolte v Tietze*⁶⁸ where the court stated that

if there is evidence that some damages have been sustained, but it is difficult or almost impossible to arrive at an exact estimate thereof, the court must endeavour, with such material as is available, to arrive at some amount, which in the opinion of the court will meet the justice of the case.

[138] Or *Esso Standard SA (Pty) Ltd v Katz*⁶⁹ the court stated

It is not possible, however, to ascertain with mathematical accuracy [...] and it accordingly behoves me to make an estimate based on an average price that will not be unfair to either party.

[139] However, the problem is not that I cannot make an accurate mathematical calculation based on the viva voce evidence of Holdstock. The problem is that if I do so, it would be based on fragile evidence. It is not difficult for a plaintiff to prove its profit. Without referring to facts to support its claim, a mere say so cannot be regarded as proof of profits between 10% -18%.

[140] I, therefore, find that the plaintiff's damages are the loss of profit (plus wasteful expenditure incurred due to the breach of the contract), but that plaintiff consequently did not prove its damages sufficiently for the court to award it.

[141] Costs

[142] This leaves the issue of costs. The defendant asks for attorney-client costs. In light of the fact that plaintiff was successful in its claim for breach of contract, I see no reason to deviate from party-to-party costs.

⁶⁷ *Emslie v African Merchants, Ltd* (1908) 22 EDC 82 at 95.

⁶⁸ 1928 SWA 51 at 52.

⁶⁹ [1981] 3 All SA 135 (AD).

[143] ORDER

[144] Therefore, the following order is made:

1. The claim is dismissed with costs.

WJ du Plessis

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the plaintiff: Mr B Bester

Instructed by: Van der Merwe Inc Attorneys

For the defendant: Mr A du Plooy

Instructed by: Richards Attorneys

Date of the hearing: 12 & 13 April 2022

Date of judgment: 10 May 2022