REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-ACT-CON-2020/00724

In the matter between:

OLIVETTI CAR RENTALS CC
PLAINTIFF

And

KHOMAS REGIONAL COUNCIL **DEFENDANT**

Neutral citation: *Olivetti Car Rentals CC vs Khomas Regional Council* (HC-MD-CIV-ACT-CON-2020/00724) [2022] NAHCMD 558 (14 October 2022)

Coram: PRINSLOO J
Heard: **25 April 2022; 27 April 2022; 23 June 2022**
Delivered: **14 October 2022**

Flynote: Action proceedings – Contract law – Parties concluded a written service level agreement – Breach of contract – Plaintiff was in mora by reason of his failure to perform in terms of the bid awarded – Plaintiff's claim dismissed.

Summary: The plaintiff is averring that on or about 18 February 2019 the defendant awarded a bid, NCS/ONB/KRC-DOEAC-01/2018, for the lease of twenty-one motor vehicles with full maintenance plans to the Directorate of Education for a period of thirty-six months. On 20 February 2019, the plaintiff, represented by Abraham Hamalwa, and the defendant, represented by C Mafwila, concluded a written service-level agreement. It is further the plaintiff's case that it complied with all its obligations in terms of the said agreement in that, (a) on 1 April 2019 the plaintiff commenced with the delivery of the vehicles in accordance with the contract, (b) the plaintiff made the necessary arrangements with its financier and suppliers for the delivery of the remaining vehicles.

The plaintiff pleads that the defendant breached the agreement as the defendant, on 31 May 2019, without lawful cause, and contrary to the agreement, returned the three vehicles already delivered to the defendant. Then, on 7 June 20192, the defendant terminated the agreement between the parties. On 26 June 2019 the plaintiff demanded that the defendant performs in terms of the agreement between the parties, but despite demand, the defendant failed to or refused to comply.

The plaintiff abandoned the relief sought for specific compliance by the defendant and instead claims relief for damages suffered, being the loss of profit as a result of the alleged breach and unlawful cancellation of the contract.

The defendant on 16 July 2020 filed a notice to defend and its plea and counterclaim on 16 July 2021, whereby the defendant denies that the plaintiff complied with its obligation in terms of the agreement and pleaded in amplification that the defendant failed to deliver any of the twenty-one vehicles agreed upon. The defendant denies that the plaintiff has a basis for the alleged loss of profit claimed in the amount of N$3,640,486.74. The defendant denies that the plaintiff suffered damages in the aforementioned amount, and pleads that instead the plaintiff is liable to the defendant for liquidated damages for the non-performance in terms of the conditions of the agreement. It is on this basis that the defendant filed a counterclaim.

The plaintiff on 30 July 2021 filed a replication and a plea to the counterclaim of the defendant, wherein the plaintiff concedes that the date of delivery was extended with sixty days and calculated the said due date to be 14 May 2019 and pleads that on 1 April 2019 the plaintiff delivered three vehicles to the plaintiff. The plaintiff further denies that allegation by the defendant that the vehicles provided to it was delivered in terms of a short-term lease agreement.

The plaintiff pleads to the defendant's counterclaim that the defendant acted with a fixed intention to unlawfully and unreasonably terminate the agreement between the parties by refusing to provide the plaintiff with the necessary information. The defendant further refused to grant an extension period to the plaintiff, taking into consideration that the defendant was directly contributing to the delay in delivering the remaining vehicles. The plaintiff also denies that the defendant suffered any damages and further failed to plead how it quantifies its counterclaim.

The parties filed a joint proposed pre-trial report on 10 November 2021 and it was made an order of court on 17 November 2021.

Held that: the plaintiff failed to perform in terms of the bid awarded to it even after a lapse of 102 days. In terms of the bid award and bid papers the days within which to perform had to be calculated in calendar days, therefore if the plaintiff had to deliver the vehicles within sixty days from date of signature of the acceptance of the, i.e. then the delivery date of the vehicles were 21 April 2019. Failure to deliver the vehicles on the said date, in the absence of an extension caused the plaintiff to be in material breach of the contract between the parties. The view of the plaintiff is that they would have performed in terms of the contract and the defendant unlawfully terminated the contract.

Held that: the plaintiff was well aware of the date of set for the full compliance with the agreement and the delivery date was already and there could be no doubt in the mind of the plaintiff as to the delivery date. I am therefore of the view, in line with the

Microutsicos matter, that the plaintiff was in mora by reason of his failure and the plaintiff cannot rely on the thirty day notice in order to rescue or justify its breach.

Held further that: I am further of the view that the plaintiff was in breach of material terms of the agreement between the parties and as a result the defendant would be entitled to liquidated damages as set out in clause 2.9 of the agreement and which was agreed upon between the parties.

Plaintiff's claim is dismissed.

ORDER

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1. The plaintiff's claim is dismissed with costs.
2. The defendant's counterclaim succeeds with costs in the following terms:

2.1 The plaintiff is ordered to pay liquidated damages to the defendant for non-performance at twice the daily remuneration rate payable as per para 4.2 of the conditions of the contract for the period of 42 days that the services have not been provided. The total amount of liquidated damages shall not exceed 10% of the monthly remuneration for the service.

JUDGMENT

PRINSLOO J:

Introduction

[1] The plaintiff, Olivetti Car Rentals CC, a close corporation with limited liability and duly registered in terms of the Close Corporation Act 26 of 1988, issued summons

against the defendant, Khomas Regional Council (KRC), a Regional Council established in terms of s 2(1) of the Regional Councils Act 22 of 1992.

Pleadings

Particulars of claim

[2] In terms of its particulars of claim the plaintiff is averring that on or about 18 February 2019, the defendant awarded a bid, NCS/ONB/KRC-DOEAC-01/2018, for the lease of twenty-one motor vehicles with full maintenance plans to the Directorate of Education for a period of thirty-six months.

[3] On 20 February 2019 the plaintiff, represented by Abraham Hamalwa, and the defendant, represented by C Mafwila, concluded a written service level agreement, wherein the salient terms of the agreement were as follows:

a) KRC would rent at a specific fee, several motor vehicles from the plaintiff for a period of thirty-six months;
b) The vehicles would consist of the following:
    a. Eight four-door sedan vehicles;
    b. Two 4x4 single cab bakkies fitted with canopies;
    c. Two 4x4 single cab bakkies fitted with rails;
    d. Four 4x4 double cab bakkies fitted with canopies;
    e. Two 16-seater Quantum mini-busses;
    f. One 22-seater bus;
    g. One panel van; and
    h. One 4-5 ton Hino Truck.

[4] It is further the plaintiff's case that it complied with all its obligations in terms of the said agreement in that:

a) On 1 April 2019, the plaintiff commenced with the delivery of the vehicles in accordance with the contract.
b) The plaintiff made the necessary arrangements with its financier and suppliers for the delivery of the remaining vehicles.

[5] The plaintiff pleads that the defendant breached the agreement as the defendant, on 31 May 2019, without lawful cause, and contrary to the agreement, returned the three vehicles already delivered to the defendant.Then, on 7 June 2019, the defendant terminated the agreement between the parties.

[6] On 26 June 2019, the plaintiff demanded that the defendant performs in terms of the agreement between the parties, but despite demand, the defendant failed to or refused to comply.

[7] The plaintiff abandoned the relief sought for specific compliance by the defendant and instead claims the following relief for damages suffered, being the loss of profit as a result of the alleged breach and unlawful cancellation of the contract:

a) Confirmation of the cancellation of the contract between the parties;
b) Payment in the amount of N$3,640,486.74;
c) Interest on the outstanding balance *a tempore morae* at the rate of 20% per annum;
d) Cost of suit on a party and party scale[1]; and
e) Further and/or alternative relief.

The defendant's plea

[8] The defendant conceded that the parties entered into an agreement for the provision of twenty-one motor vehicles to KRC with full maintenance lease for a period of three years, however, the defendant pleads that in terms of clause 1.2 (section v) of

[1] The scale of the cost order was amended at the commencement of the trial.

the agreement, the plaintiff was obliged to carry out the services no later than thirty days after the contract becomes effective.

[9] In the current instance the plaintiff was awarded the tender in a letter dated 18 February 2019. However, contrary to the bid document, the plaintiff was granted a sixty day period within which to deliver the twenty one vehicles agreed upon, to the defendant. The sixty day period would run for the date of signature of the acceptance award letter. The plaintiff accepted the award with its terms on 20 February 2019. However, the plaintiff failed to deliver the twenty-one vehicles within the agreed sixty day period.

[10] The defendant denies that the plaintiff complied with its obligation in terms of the agreement and pleaded in amplification that the defendant failed to deliver any of the twenty-one vehicles agreed upon.

[11] The defendant further pleads that on 29 March 2019, a meeting was convened between the parties to determine the delivery schedule of the vehicles. During the said meeting the defendant was informed that there were some logistics that still had to be resolved and the plaintiff requested a 10 per cent upfront payment from the defendant. This, according to the defendant, was contrary to the terms of the agreement.

[12] The defendant pleads that the plaintiff requested a further thirty day extension for the delivery of the vehicles during the said meeting. The defendant pleads that in turn it insisted that the plaintiff provide a copy of the original order of the vehicles to the manufacturer and a response from the plaintiff's financial institution but the plaintiff failed to provide the said documents.

[13] The defendant pleads that on 22 May 2019 a further meeting was held with the plaintiff, who at that point still failed to provide the defendant with the requested documents, and instead only provided a stock list from the supplier.

[14] The defendant pleads that the plaintiff's failure to deliver vehicles amounted to a material breach of the agreement, which warranted the cancellation of the contract.

[15] The defendant denies that the plaintiff commenced with the delivery of the vehicles in satisfaction with the agreement between the parties and pleads that the three vehicles delivered to it on 1 April 2019 did not form part of the initial contract and that the vehicles were leased from the plaintiff on a short-term basis of thirty-seven days and the said vehicles were returned to the plaintiff on 31 May 2019. Full payment was made to the plaintiff in respect of the said lease.

[16] The defendant denies that the plaintiff has a basis for the alleged loss of profit claimed in the amount of N$3,640,486.74. The defendant denies that the plaintiff suffered damages in the aforementioned amount and pleads that instead, the plaintiff is liable to the defendant for liquidated damages for the non-performance in terms of the conditions of the agreement.

[17] In this regard, the defendant filed a counterclaim wherein it claims as follows:

a) Payment in the amount of N$ 78 682.20 for liquidated damages in terms of clause 2.9 of the agreement calculated from the agreed date of delivery of the vehicles (21 April 2019) until 7 June 2019, being the date of cancellation of the contract, for each day that the services were not delivered;
b) Alternatively, payment in the amount of N$314 728.80 calculated from agreed time of delivery until date of issuing of summons (12 March 2020);
c) Interest on the aforesaid amounts at a rate of 20 per cent per annum from date of judgment to date of full payment;
d) Cost of suit;
e) Further and/or alternative relief.

Replication by the plaintiff and plea to the counterclaim

[18] The plaintiff concedes that the delivery date was extended by sixty days and calculated the said due date to be 14 May 2019 and pleads that on 1 April 2019 the plaintiff delivered three vehicles to the plaintiff. The plaintiff pleads that the defendant was informed that there were delays with the financiers and the dealership service provider and therefore the plaintiff requested an extension of thirty days. This request was, however, never addressed by the defendant and the defendant unilaterally cancelled the agreement without giving any notice, which the defendant was required to provide to the plaintiff in terms of the agreement. As a result of the unilateral cancellation of the contract, the plaintiff was never granted the opportunity to remedy the defect in terms of the agreement.

[19] The plaintiff further denies the allegation by the defendant that the vehicles provided to it was delivered in terms of a short-term lease agreement.

[20] The plaintiff pleads to the defendant's counterclaim that the defendant acted with a fixed intention to unlawfully and unreasonably terminate the agreement between the parties by refusing to provide the plaintiff with the necessary information, such as a confirmation of whether the agreement is for thirty-six months or fourteen months. The defendant further refused to grant an extension period to the plaintiff, taking into consideration that the defendant was directly contributing to the delay in delivering the remaining vehicles. The plaintiff also denies that the defendant suffered any damages and further failed to plead how it quantifies its counterclaim.

Pre-trial conference

[21] In terms of the pre-trial conference the only issue of fact to be determined is whether the plaintiff performed in terms of the written agreement.

[22] On the issues of law to be determined, the parties agreed that the following is for determination:

a) Whether the plaintiff duly complied with its obligations in terms of the agreement;
b) Whether or not the plaintiff suffered damages in the amount of N$3,640,486.74 as a direct result of the termination of the agreement by the defendant;
c) Whether or not the defendant is liable for the said damages;
d) Whether or not the plaintiff is liable to the defendant for the contractual and delictual damages suffered as a result of the plaintiff's failure to perform in terms of the agreement, and
e) Whether the quantum of damages suffered by the defendant is as claimed in the defendant's counterclaim.

Common cause facts

[23] It is common cause that the KRC invited bids for the provision of twenty-one motor vehicles on a full maintenance lease for a period of thirty-six months.

[24] The plaintiff's bid was valued in the amount of N$9,441,844.68 (including VAT), and BID NO: NCS/ONB/KRC-DOEAC-01/2018 was awarded to the plaintiff.

[25] In the award letter dated 18 February 2019, the plaintiff was informed that the vehicles were to be delivered to the Khomas Regional Council: Directorate of Education within sixty days from the date of signing of the acceptance of the award.

[26] The plaintiff accepted the bid award and Mr Abraham Hamalwa signed the acceptance of the award on behalf of the plaintiff on 19 February 2019.

[27] The parties entered into a contract agreement, which agreement was signed on 20 February 2019 by Mr Hamalwa and Mr Mafwila, the Chief Regional Officer (CRO).

[28] On 1 April 2019, the plaintiff delivered three vehicles to the defendant, which were returned to the plaintiff on 31 May 2019.

[29] The plaintiff requested a further extension of thirty days to comply with the agreement, but no permission was granted in this regard by the defendant.

[30] The contract was terminated by the defendant on 10 June 2019, without a thirty day notice to the plaintiff.

The evidence adduced

[31] Only one witness was called to testify on behalf of the plaintiff, and that was the member of the plaintiff, Mr Abraham Shafokutya Hamalwa, who prepared the bid on behalf of the plaintiff and was the one who was engaged in the meetings and negotiations between the parties.

[32] The majority of Mr Hamalwa's witness statement was a reproduction of the plaintiff's particulars of claim, and I do not intend to repeat same. I will therefore just refer to the evidence where the witness amplified his witness statement and what resulted from cross-examination.

[33] Mr Hamalwa testified that the bid amount of N$9,441,844.68 consists of the monthly unit price calculated over a period of thirty-six months, being the duration of the contract.

[34] Mr Hamalwa testified that the three vehicles delivered to the defendant on 1 April 2019 were delivered in partial compliance with the bid award and not in terms of a short-term lease agreement as pleaded by the defendant. Yet these vehicles were returned to the plaintiff on 31 May 2019, in contravention of the agreement between the parties.

[35] Mr Hamalwa testified that shortly after the return of the three vehicles, the plaintiff received a letter dated 7 June 2019 authored by the CRO, Mr Mafwila, wherein the defendant cancelled the bid awarded to the plaintiff, citing the reason for the cancellation of non-delivery of the vehicles.

[36] Mr Hamalwa testified that in terms of the agreement, the plaintiff had to be given thirty days written notice to remedy any failure in terms of clause 1.7 of the General Conditions of the contract, if any, but was not afforded this opportunity before the termination of the agreement. The witness further testified that on 17 April 2019, the plaintiff directed a letter to the defendant requesting a further extension of 30 days but never received a response in this regard.

[37] Mr Hamalwa testified that the plaintiff suffered a loss of profit in the amount of N$3,640,488.74. The witness testified that the losses were calculated at a rate of 45 per cent per unit (vehicle) plus vat, i.e.:

Total cost of all vehicles (VAT included): N$7,034,756.99 x 45% (VAT excluded)
= N$3,165,640.65 plus VAT of N$474,846.00
Total profit loss for 21 vehicles/ 3 year contract: N$3,640,486.74

[38] Mr Hamalwa testified that for purposes of the calculation of the damages and loss of profits the plaintiff relies on clause (g) under the heading After Sales of the plaintiff's bid document that deals with the termination of the contract, which reads as follows[2]:

'Termination of lease of contract: if any vehicle on a FML contract terminated before the end of the contract, the early termination fee will charge as 45% of the unexpired rental excluding VAT (15%) is to recoup the loss of on book value versus the market value on each vehicle. Khomas Regional council should issue a thirty (30) written notice and submit it hand/via email to Olivetti Car Rentals Head office. However we will try and sell the vehicles to minimize the cost to Khomas Regional Council.'

[39] During cross-examination Mr Hamalwa confirmed the following:

[2] Plaintiff's Technical and Financial Proposal.

a) The contract price was payable in the amount of N$262,274.02 monthly for the service rendered by the plaintiff[3];
b) That the service provider will be liable to pay liquidated damages to the employer for non-performance at twice the daily remuneration rate payable for each day that the services hve not be provided[4];
c) That liquidated damages will be calculated as per clauses 2.9 and 4.2 of the agreement;
d) The plaintiff performance period was extended to sixty days from date specified in the award letter and the sixty day period would be calculated from 19 February 2019.

[41] Mr Hamalwa, however, disagreed with the defendant's calculation of the date for delivery as 20 April 2019. Mr Hamalwa testified that the days should have been calculated as working days and not calendar days. This issue was ,however, put to rest when the plaintiff's legal representative drew the court's attention to clause in the bid documents wherein the days were defined as calendar days. I will return later to this issue.

[42] Mr Hamalwa on questions of the court indicated that the plaintiff actually wanted a ninety days period to deliver the vehicles but was informed that the award could not be amended and he needed to apply for a further extension of thirty days, which he did on 17 April 2019 and the defendant never responded to the request.

[43] On questions by Ms Harker in this regard, Mr Hamalwa conceded that a letter authored by the CRO dated 13 May 2019 was received wherein the plaintiff was requested to provide the Directorate with a copy of the original order to its manufacturer or supplier as well as the response for its financial institution concerning the project justifying the delays.

[3] As per clause 4.2 of Section V- Conditions of Contract.
[4] As per clause 2.9 of Section V- Conditions of Contract.

[44] According to the witness he provided the defendant with the dealer stock list and further insisted that the plaintiff could not finalise the financing with the financial institution because firstly the defendant failed to provide the plaintiff with a financial certificate or guarantee when so requested and secondly the discrepancy between the award letter indicating contract period as thirty six months and clause 1.3.1 of the Conditions of Contract agreed upon between the parties, which indicated the completion date as 31 July 2020, i.e. fourteen months. The latter issue apparently caused the plaintiff's financial institution to insist on a guarantee for KRC.

[45] When confronted with an email received from Pupkewitz Motors that by 31 May 2019, the dealership has not done anything in respect of the vehicles (fitments and registration) as it was still awaiting payment from Mr Hamalwa, who again indicated the process was delayed by the defendant for failing to provide a financial certificate that could be submitted to his financial institution in order to move the payment and delivery of the vehicles forward.

[46] On the calculation of the plaintiff's claim and the plaintiff's reliance on sub-clause (g) of 'After Sale Service' clauses, Mr Hamalwa denied that his reliance on the said clause is misplaced and insisted that this specific clause provides for the early termination of the agreement and as a result the plaintiff was entitled to calculate its losses in terms of the said clause.

[47] Mr Hamalwa further remained adamant that the three vehicles provided to the defendant was in terms of the contract agreement between the parties, despite the fact that the vehicles were no fitted with the required fittings and these vehicles came from the fleet of the plaintiff. He further stated that the vehicles met the requirements of the defendant as it was within the 90 000 km range and that the bid documents did not state that the vehicles to be delivered had to be new.

[48] This concluded the case for the plaintiff.

On behalf of the defendant

[49] On behalf the defendant two witnesses were called to testify, i.e.:

a) Gerard Norman Vries;
b) Mr Conrad Lionel Hoakhaob;

Gerard Norman Vries

[50] At the time of the tender award to the plaintiff Mr Vries was the Regional Director of the Khomas Regional Council: Directorate of Education, Arts and Culture which position he occupied from 1 September 2014 to 31 August 2020. Currently, he is the Deputy Executive Director in the Ministry of Education, Arts and Culture, Directorate of Lifelong Learning.

[51] Mr Vries testified that he was a member of the Khomas Regional Council Procurement Committee during his tenure as the Deputy Executive Director and is well acquainted with the background that led to the bidding process in which the plaintiff took part and the circumstance of the allocation of the award to the plaintiff.

[52] Mr Vries testified that on 29 March 2019, a meeting was held with Mr. Abraham Hamalwa, on the progress with regards to the delivery Schedule of the vehicles. During the meeting Mr. Hamalwa assured the Directorate that he was on par with the delivery of the vehicles and that only logistical arrangements needed to be sorted out before the vehicles are delivered. According to the witness during the same meeting, Mr. Hamalwa requested for 10 per cent advance payment of the awarded amount because he only secured 70 per cent funding from the financial provider. Mr. Hamalwa was, however, informed that such an arrangement would be against Treasury Instructions and that payment would only be made once the plaintiff performed in terms of the agreement.

[53] Mr Vries confirmed that the defendant received a request via email from Mr Hamalwa on 19 April 2019, requesting for thirty day extension for delivery of the vehicles, due to the slow financing from his financial institution and a delay on the delivery of the vehicles from the manufacturer. Mr Vries testified that on 2 May 2019, the request for extension on delivery of the vehicles, was tabled at the Procurement Committee and it was recommended that a consultative meeting be arranged with the plaintiff and that the plaintiff must furnish the Directorate with a copy of the original order to the manufacturer as well as the request and response from the bank/financial institution justifying the delays. The recommendation was transmitted to the plaintiff but despite numerous attempts the attendance of Mr Hamalwa could not be secured for purposes of a consultative meeting. Mr Vries testified that Mr Hamalwa also failed to submit the documents as requested.

[54] Mr Vries testified that following the written assurances by the plaintiff that everything was on track to deliver the vehicles, the Directorate independently made enquiries from the possible suppliers of the vehicles to ascertain that the declaration of the Service Provider about the delivery of the vehicles was correct. A follow-up was done with Pupkewitz Toyota and Indongo Toyota, respectively. Pupkewitz Toyota replied that the plaintiff ordered 8 vehicles but will not start with anything on the vehicles if no payments are made by plaintiff.

[55] The witness testified that from 27 May 2019 correspondence ensued between Mr Hamalwa, on behalf of the plaintiff and the defendant’s officials. During this correspondence Mr Hamalwa confirmed that the four sedan vehicles arrived and were pending their fitments and registration. In respect of the 4x4 double cab vehicles Mr Hamalwa indicated that only one of the vehicles was on schedule but assured the Directorate that the rest would be delivered by 19 June 2019. Mr Hamalwa undertook to provide the defendant with the vehicle registrations and the VIN numbers of the vehicles, since plaintiff already started the registration of the vehicles.

[56] However, despite the assurances by the plaintiff Mr Hamalwa requested a bank guarantee letter from the KRC on 31 May 2019. Mr Vries testified that the plaintiff further declared that it was almost done with the registration of the vehicles and were about to deliver the vehicles but by 6 June 2019, no vehicles were delivered and no proof of registration of the vehicles were provided

[57] Mr Vries testified that this issue served before the Procurement Committee on 7 June 2019 and the Procurement Committee made a recommendation to the Regional Council to terminate the agreement with the plaintiff. Under the hand of the CRO, the contract was terminated on 10 June 2019.

[58] Mr Vries testified that the plaintiff's conduct was a clear inability to perform in terms of the agreement and the plaintiff misrepresented itself to the defendant as regards to its capacity to deliver in terms of the agreement.

[59] On the alleged partial compliance of the plaintiff with the agreement, Mr Vries testified that the three vehicles delivered to the defendant on 1 April 2019, was a short-term loan agreement to enable the Directorate to continue with its logistical and administrative operations. The loan vehicles were to be rented for 37 days and was separate from the bid NCS/ONB/KRC-DOEAC01/2018. The cars were second hand and more than a year old. These vehicles were returned to the plaintiff on 31 May 2019 and the payment for the lease period in respect of the said vehicles were paid in full. Mr Vries testified that it is clear from the bid documents that the vehicles had to be new vehicles.

[60] In respect of the defendant's counterclaim, Mr Vries testified that because of the plaintiff's breach in delivering the vehicles in terms of the contract, the KRC (Directorate of Education, Arts and Culture) operational functions and process were severely curtailed and the defendant is entitled to be paid the liquidated damages for the plaintiff's non-performance at twice the daily remuneration rate payable for each day that the services have not been provided on the site.

[61] Mr Vries testified that the calculation should be done in terms of clause 2.9 of the contract, which reads as follows:

> **'2.9 Liquidated damages for non-performance**
> The Service Provider shall pay liquidated damages to the Employer for non-performance at twice the daily remuneration rate payable for each day that the services have not been provided on the site. The total amount of liquidated damages shall not exceed 10% of the monthly remuneration for the service. The Employer may deduct the liquidated damages from payment due to the Service Provider. Payment of liquidated damages shall not affect the Service Provider's other liabilities.'

[62] During cross-examination Mr Nangolo confronted the witness with the powers and authorities of the Khomas Regional Council Procurement Committee (KRCPC) and Mr Vries testified that KRC was the umbrella body under which the Directorate of Education, Arts and Culture sits. He further testified that KRCPC acted as an extension of the KRC. Mr Vries testified that the KRCPC has a recommendatory function to the Chief Regional Officer. It was further put to the witness that the KRCPC is not a party to the proceedings if one has regard to the identity of the parties to the agreement. The witness insisted that the KRCPC cannot be separated from KRC.

[63] The witness was confronted with the contradiction in respect of the award period being either thirty-six months or fourteen months. In this regard Mr Vries testified that in the award letter there was no uncertainty as to the period of the agreement and if there was uncertainty on the part of the plaintiff it could have been resolved between the parties, however, Mr Hamalwa never communicated this issue to the defendant. Mr Vries testified that in his view the defendant was generous in granting the plaintiff an extended period in which to perform and although the plaintiff is placing the blame for the delay in performance at the door of the defendant it was the representative of the plaintiff that elected not to attend the consultative meetings in order to keep the defendant abreast of the developments. The witness further testified that KCR was not

obligated to issue the plaintiff with a guarantee letter as the letter of award served as proof of the award awarded to the service provider.

[64] When confronted by Mr Nangolo with the thirty day notice period that the plaintiff claims it is entitled to, Mr Vries confirmed that no letter in this regard was issued to the plaintiff and stated that the plaintiff was granted a sixty day period in order to deliver the vehicles and a period of 102 days lapsed without the plaintiff performing. Mr Vries testified that the defendant did not deem it necessary to give the plaintiff a further thirty day notice over and above the 102 days it had to its disposal within which to perform.

[65] Mr Vries further testified that the delivery of the vehicles were extremely time sensitive. Mr Vries testified in detail the extend of the services that the KRC: Directorate Education, Arts and Culture delivers to schools and hostels and why the Directorate could not function as a result of the non-delivery of the vehicles.

Mr Conrad Lionel Hoakhaob

[66] Mr Conrad Lionel Hoakhaob is a Chief Administrative Officer at the Ministry of Urban and Rural Development stationed at Government Park, Windhoek.

[67] Mr Hoakhaob confirmed the evidence of Mr Vries and I do not intend to burden the record by replicating it. I will merely deal with the cross-examination by counsel in summary form.

[68] Mr Hoakhaob was adamant that the three vehicles delivered to the defendant on 1 April 2019 was not in partial satisfaction of the agreement between the parties. Mr Hoakhaob testified that the vehicles were delivered to the defendant in terms of a rental agreement and the initial quotation received from the plaintiff was for a period of thirty-seven days. The witness stated that the idea was to use the said vehicles until the plaintiff performed in respect of the twenty-one vehicles that had to be delivered. The three vehicles were however kept beyond the thirty-seven day period as he was unable

to get hold of Mr Hamalwa in order to return the vehicles. Mr Hoakhaob testified that eventually the vehicles were returned on 31 May 2019

[69] This concluded the case for the defendant.

Closing argument

On behalf of the plaintiff

[70] Mr Nangolo argued this matter on three fronts, i.e.:

a) Khomas Regional Council Procurement Committee is not a party to the agreement in dispute;
b) The Chief Regional Officer signing of the termination of the termination letter; and
c) No thirty days termination notice was given to the plaintiff.

[71] Mr Nangolo argued that it is clear from the documents before court that the agreement in dispute is exclusively between the plaintiff and the defendant and the KRCPC is a different organisation or entity, which is not a party to the agreement in the dispute.

[72] Mr Nangolo referred the court to s 55(1) of the Public Procurement Act 1 of 2015[5] and s 1 of the said Act, wherein a public entity is defined.

[73] Mr Nangolo argued that the KRCPC is not a public entity as per s 1 of the Public Procurement Act and consequently the KRCPC has no power or authority to enter into any procurement agreement with the plaintiff or any other party. Mr Nangolo argued that its power is limited to recommend to the accounting officer the approval for the award of the procurement contract.

[5] **55 Award of procurement contracts**
(1) The Board or a public entity must award a procurement contract to the bidder having submitted the lowest evaluated substantially responsive bid which meets the qualification criteria specified in the pre-qualification or bidding documents, following the steps outlined in subsections (3) and (4).

[74] In this regard Mr Nangolo referred to the letter dated 7 June 2019[6] directed to the plaintiff, stating that the Khomas Regional Council Procurement Committed 'deliberated on the bid and the decision was reached to cancel the contract with immediate effect'. Mr Nangolo argued that it is clear that the decision to terminate the agreement was done exclusively by the KRCPC, despite the fact that the KRCPC is not a party to the agreement.

[75] Mr Nangolo argued that a party who is not privy to a contract cannot terminate it, therefore there was no legal basis upon which the Procurement Committee could have terminated the agreement and the agreement was therefore unlawfully terminated. Mr Nangolo contended that the KRCPC acted ultra vires by terminating the agreement.

[76] Mr Nangolo, further, still with reference to the letter dated 7 June 2019 argues that although the letter states that 'the Regional Council hereby cancels the bid awarded to Olivetti Car Rental', it is necessary to note that the Chief Regional Officer only signed the letter on 10 June 2019, by which time the decision was already made by the Procurement Committee. Therefore, the defendant did not make the decision to terminate the agreement and the Chief Regional Officer simply signed the letter conveying the termination message.

[77] Mr Nangolo submitted that by signing the said letter, it is neither indicated nor pleaded that the Chief Regional Officer was ratifying the decision of the Procurement Committee.

[78] For purposes of his argument Mr Nangolo also referred the court to the powers and duties of the Chief Regional Officer and the Regional Council. Mr Nangolo contended that if one keep these powers and duties in mind then it is clear that this was no decision by the defendant to cancel the agreement with the plaintiff because when

[6] Exhibit F.

the Chief Regional Officer signed off the termination letter on 10 June 2019 he did not have the power to sign the letter, or ratify the decision by the Procurement Committee.

[79] According to Mr Nangolo the defendant did not produce any lawful decision/resolution to terminate the agreement taken by the Khomas Regional Council at a properly requisitioned and convened meeting at contemplated in s 11 of the Regional Council Act 22 of 1992 (as amended).

[80] Mr Nangolo further argued that in terms of clause 1.7.2 of the General Conditions of Contracts provided for a thirty day period written notice before termination of the contract, yet no notice was given to the plaintiff. Mr Nangolo submitted that clause 1.7.2 should be interpreted to mean that it is compulsory to give a thirty day written termination notice. Mr Nangolo submitted that in the event that the court accepts the defendant's version it still remains the case for the plaintiff that the agreement was not lawfully terminated.

[81] Mr Nangolo is also of the view that the defendant's counter-claim should be dismissed.

On behalf of the defendant

[82] First and foremost, Ms Harker argued that almost the totality of the argument advanced by Mr Nangolo was neither pleaded nor defined in the pre-trial order agreed upon between the parties.

[83] Ms Harker therefore requested the court to disregard those part of the plaintiff's argument that is not in line with the issues up for adjudication as set out in the pre-trial order. Ms Harker referred the court to *Cloete v Beukes*[7] wherein the court held that a pre-trial order is a compromise and the parties are bound by their pre-trial report, which constitute their binding compromise. Ms Harker submitted that the defendant also did

[7] *Cloete v Beukes* (HC-MD-CIV-ACT-CON-2020/01511) [2021] NAHCMD 329 (13 July 2021) at paras 6 to 8.

not call witnesses to attest to the issues raised by the plaintiff in argument as it is not and was not issues for determination by this court.

[84] Mr Harker submits that the plaintiff misrepresented to the defendant that the vehicles were delivered to it and that it was in the process of registration. However, the defendant became aware that the vehicles were not delivered to the plaintiff and were not in the process of being delivered and that this is clear from the fact that the plaintiff at that late stage was still unable to source finances for the vehicles. This was the position well after the vehicles were supposed to be delivered.

[85] Ms Harker argued that at that point the plaintiff was still unable to provide confirmation from its financial institution of the reason for the delays in sourcing finances. Ms Harker pointed out that the plaintiff requested a guarantee from the defendant on 31 May 2019 but did not say that the guarantee was necessitated by the contradiction of the period of contract. Instead the letter only states that it is required to source financing of the twenty one vehicles.

[86] Ms Harker argues that the three vehicles provided to the defendant was clearly not part of the twenty-one vehicles and the understanding between the parties were clearly that new vehicles had to be delivered to the defendant and when one considers the bid documents it is clear that bid prices were for new vehicles and not second hand vehicles.

[87] Mr Harker argued that the conduct of the plaintiff's amounts to repudiation and as such the defendant was entitled to terminate the agreement. Ms Harker further submitted that the plaintiff would not be entitled to claim damages in terms of clause (g) of the agreement in respect of vehicles that were not delivered to the defendant. In addition thereto Ms Harker is of the view that the plaintiff could not have incurred any loss because it did not purchase the twenty-one vehicles.

[88] In conclusion Ms Harker submitted that notwithstanding the repudiation of the plaintiff, which entitled the defendant to cancel the contract, the Public Procurement Act allows the defendant to cancel the agreement at any time if it is in public interest. Mr Harker submitted that it is clear from the evidence of Mr Vries that it was in the interest of the public to cancel the agreement when it became clear that the plaintiff could not honor the agreement between the parties.

Applicable legal principles

The issues for determination as per the pre-trial order

[89] Before I proceed to discuss the legal principles applicable to the matter is it necessary to yet again deal with the issue of consensus reached between the parties during pre-trial conference.

[90] It is clear from the questions directed to Mr Vries during cross-examination as well as the argument advanced by Mr Nangolo that the plaintiff wishes to rely on the role of the KRCPC and the power and authority of the CRO in order to substantiate its argument that the contract was unlawfully terminated and that the decision was ultimately made by the KRCPC and not the Regional Council.

[91] Ms Harker correctly pointed out that this was never an issue between the parties and it was not pleaded by the plaintiff. If it was properly pleaded by the plaintiff then the defendant would have been able to respond thereto and present their case accordingly. Yet no reference was made anywhere in the pleadings that the decision to terminate was ultra vires or anything to the effect that the KRCPC was the actual decision maker in this matter and not the Regional Council.

[92] In my considerate view the plaintiff now attempts to make out a different case in argument from that which was pleaded and that is unacceptable.

[93] The object of pleading has always been to define issues and this has become even clearer with the advent of the current Rules of the High Court, which further provides for pre-trial conference and avoidance of trial by ambush. In the current instance the parties agreed in the pre-trial proceedings on what the issues of fact and law would be and that the agreement is replicated in paras 21 and 22 above. There was no amendment to the pre-trial order but even if there was an amendment to incorporate the issues now raised in argument on behalf of the plaintiff, it would not speak to the pleadings. Mr Nangolo also apparently lost sight of the fact that the relief sought in declaring the termination of the contract by the defendant as unlawful and of no legal force and effect was abandoned. The merits of the submission made in this regard is thus of no value.

[94] I remain resolute in my stance that the plaintiff is bound by the pre-trial order and cannot be allowed to rely on issues not contained in the pre-trial order.

Discussion

[95] The defendant's case is that the plaintiff repudiated the agreement entered into between the parties and as a result it was entitled to terminate the agreement. The plaintiff's stance is that it had no intention to repudiate the agreement and the defendant terminated the agreement without lawful cause. The plaintiff further maintains that the defendant was at fault in more ways than one, by i.e. failing to grant a further thirty day extension, failure to provide the plaintiff with the guarantee when so requested to present it to its financial institution, the controversy regarding the contract period and the defendant's failure to grant the plaintiff to cure any non-compliance by giving it the required thirty day notice.

[96] In *Mobile Telecommunications Limited v Eckleben* Mainga JA discussed the test to determine whether conduct amounts to repudiation as follows:

‘[14] The test to determine whether conduct amounts to repudiation has been stated as being 'whether fairly interpreted it exhibits a deliberate and unequivocal intention no longer to be bound' has been stated as being 'whether fairly interpreted it exhibits a deliberate and unequivocal intention no longer to be bound'[8]. In *Ponisammy and Another v Versailles Estates (Pty) Ltd* [9] the following passage from the judgment of Devlin J is cited with approval:

'A renunciation can be made either by words or by conduct, provided it is clearly made. It is often put that the party renunciating must evince an intention not to go on with the contract. The intention can be evinced either by words or by conduct. The test of whether an intention is sufficiently evinced by conduct is whether the party renunciating has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract.'[10]

[97] In order to determine if there was repudiation on the part of the plaintiff it is necessary to holistically consider the facts before this court.

[98] If one begins at the bid document, it is clear that the plaintiff was expected to have the capacity to perform and render the services required by the defendant. From the onset there appeared to be an issue and understandably due to the nature of the services that the plaintiff had to render and the vehicles it had to procure an extension in the date of delivery was granted as early as in the award letter and the plaintiff was granted a period of sixty days instead of the normal thirty day period.

[99] All was well and seemingly on track up to the meeting on 29 March 2019 when the plaintiff’s Mr Hamalwa informed the member of the meeting that there were some technicalities that needed to be resolved, and then the first cracks appear when the plaintiff requested a ten per cent advance in the award payment as he was unable to secure a hundred per cent loan from the plaintiff’s financial institution.

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[8] *OK Bazaars (1929) Ltd v Grosvenor Buildings (Pty) Ltd and Another* 1993 (3) SA 471 (A) at 480I – J. See also the authors WE Cooper The South African Law of Landlord & Tenant 2 ed (Juta & Co Ltd) at 321.
[9] *Ponisammy and Another v Versailles Estates (Pty) Ltd* 1973 (1) SA 372 (A) at 387B. See also *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) at 653D – E.
[10] *Universal Cargo Carriers Corporation v Citati* (1957) 2 QB 401 ([1957] 2 All ER 70 (QB)) at 436.

[100] Mr Hamalwa denies that he requested an advance, however, I find it strange that both Mr Vries and Hoakhaob had this recollection of the meeting if this did not happen, bearing in mind that neither one of them have any personal interest in the matter.

[101] The next crack in the armour of the plaintiff is that it was clearly unable to deliver by the due date of 20 April 2019 and this is clear if one has regard to the request of extension by the plaintiff on 17 April 2019. Mr Hamalwa vehemently denies that the due date for delivery was 20 April 2019 because according to his calculation (in working days) the delivery date was May or June 2019. The request for extension date 17 April 2019, however tells a different story.

[102] Mr Hamalwa quite adamantly insisted the calculation of the days for delivery had to be in calendar days and it was not made clear in the papers that the delivery date for the vehicles would be calculated in calendar days. However, the second paragraph of the bidding document under the heading 'Instructions to Bidders' reads as follows:

> '1.2 Throughout these bidding documents, the terms "in writing" means any typewritten or printed communication, including e-mail, and facsimile transmission, and "day" means calendar day. Singular also means plural.'

[103] Mr Hamalwa throughout insisted that he thought the calculations were according to working days as the dealerships and his offices are not working over weekends and public holidays. On a question of this court whether he did not regard the calculation of the days and date of delivery as a critical factor Mr Hamalwa conceded that it was but indicated that he did not deem it necessary to verify the delivery date. Mr Hamalwa indicated that he was guided by the bidding document and in his view there was no guideline in this regard.

[104] With the greatest deference to Mr Hamalwa, his explanation regarding the delivery date is embarrassing. The delivery date in a contract as the one between the

parties can make or break the agreement. Mr Hamalwa was extremely vague as to the date that the vehicles were due to be delivered and on a question of the court said it was 28 June 2019. When asked how this date was calculated Mr Hamalwa relied heavily on a period of ninety days to deliver the vehicles as a term of reference in the plaintiff's bid, however, the award letter granted the plaintiff sixty days and although the plaintiff request for thirty day extension it was not granted. Mr Hamalwa also confirmed that there was no assurance of an extension of the delivery date.

[105] Even with a stretch of the imagination it is not clear how Mr Hamalwa would calculate the delivery date to be 28 June 2019.

[106] By beginning of June 2019, no vehicles were forthcoming yet and it appears the plaintiff attempted to appease the defendant by making promises of providing it with registrations papers and VIN numbers but nothing was presented to the defendant. When the plaintiff requested and extension of the delivery date as per the email date 17 April 2019 the request was deliberated and the plaintiff was requested to provide proof of the orders for the respective vehicles and confirmation from its financial institution, clearly to confirm the plaintiff's ability to fund the expense of the twenty-one vehicles. Nothing was forthcoming from the plaintiff.

[107] It is the evidence of both Mr Vries and Mr Hoakhaob that several attempts were made to arrange for a consultative meeting with Mr Hamalwa to discuss the request for extension of time but these attempts by Mr Hoakhaob, apparently bore no fruit.

[108] Then finally, when the defendant's officials could not pin Mr Hamalwa down for a meeting they started doing their own enquiries as to the progress in respect of the delivery of the vehicles and despite the plaintiff's assurances that some of the vehicles arrived and were fitted with the required fitments and were in the process of being registered it came to bear that the vehicles were not paid for and the dealership is not prepared to expend anything on the vehicles unless it is paid for.

[109] The bottom line is that by 7 June 2019 when the matter again served before the KRCPC no vehicles were delivered to the defendant or even paid for at the dealership.

[110] In fact, the plaintiff requested a payment guarantee from the KRC only on 31 May 2019, apparently at the behest of its financial institution, according to the plaintiff. The letter reads at para 2 thereof[11]:

> 'Upon receiving this award, Olivetti Car Rentals have approached BFS/NamPro Funds for financial assistance to enable us to deliver twenty-one- (21) vehicles. It is for this reason that, the institute have requested us to obtain a Payment Guarantee letter from Khomas Regional Council.'

[111] Mr Hamalwa testified that this payment guarantee was necessary because of the discrepancy of the duration of the contract between the bid document and the contract agreement. Not a word in this regard appears from the letter dated 31 May 2019 and from my reading of the document it would rather appear that at that stage the financing of the vehicles were still not in place.

[112] Mr Vries testified that the award letter is the only document issued by the defendant in confirmation of the bid award and that in any event the plaintiff's member never approached the defendant's officials to resolve the contradictory periods and surmised that the contradiction in respect of the contract period could not have been the reason for the insistence by the plaintiff on receiving a payment guarantee letter.

[113] The plaintiff further maintains that there was a partial compliance with the contract as three vehicles were delivered to the defendant on 1 April 2019. It is common cause that these vehicles were delivered but the question is whether it was in satisfaction of the agreement between the parties.

[114] The evidence of Mr Vries was that these were second hand vehicles and were more than a year old and according to the bid the vehicles had to be new and had to

[11] Exhibit R.

comply with the specific fitment requirements of the defendant, which was not the case. Mr Hamalwa denied this and stated that the vehicles were new and were from his fleet and it met the requirement, however, in the face of unequivocal denial by the defendant that those vehicles were part of the twenty-one vehicles in terms of the bid one would have expected the plaintiff to proof that those vehicles were according to the specifications of the defendant. I find it interesting that when asked about these vehicles Mr Hamalwa's response was that on the one hand that the vehicles were new and on the other hand that the bid document did not specify that the vehicles had to be new that had to be provided to the defendant. Yet, for all intents and purposes the plaintiff were sourcing new vehicles from the dealership and the schedule in terms of exhibit H in respect of the profit loss of the plaintiff the calculations were done on the price of new vehicles and not second-hand vehicles.

[115] According to Mr Hamalwa the defendants wanted these three vehicles to be able to remain operational and the defendant's officials requested a quotation for short term rental and as the short term rental would have been too expensive these vehicle were delivered in satisfaction of the contract.

[116] This does not make sense that the plaintiff would provide the KRC with a mixture of new and old vehicles in the long term. I did not hear the witness to say that once the new vehicles became available the older vehicles would be replaced.

[117] Given the circumstances of this matter I am not convinced that there was a partial satisfaction of the agreement between the parties.

[118] The plaintiff failed to perform in terms of the bid awarded to it even after a lapse of 102 days. In terms of the bid award and bid papers the days within which to perform had to be calculated in calendar days, therefore if the plaintiff had to deliver the vehicles within sixty days from date of signature of the acceptance of the, i.e. then the delivery date of the vehicles were 21 April 2019. Failure to deliver the vehicles on the said date, in the absence of an extension caused the plaintiff to be in material breach of the

contract between the parties. The view of the plaintiff is that they would have performed in terms of the contract and the defendant unlawfully terminated the contract.

[119] The calculation of days, to which Christie RH[12] refers as the civil method of computation must be applied in calculating the date for delivery of the vehicles, which means including the day on which the period begins to run and excluding the last day, unless there are special circumstance justifying the departure from the general rule and the adoption of what is known as the natural method of computation. According to the learned author the natural method requires the fixed time to be calculated *de momento ad momentum*, from the moment of the event from which the period begins to run until the identical moment on the last day of the period. In the current instance the calculation of the sixty days from date of signature of the acceptance of the award (19 February 2019), i.e. then the delivery date of the vehicles were 20 April 2019. Failure to deliver the vehicles on the said date, in the absence of an extension caused the plaintiff to be in material breach of the contract between the parties.

[120] In Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd[13] 2001 2 SA 284 (SCA) the court held that:

‘Conceivably it could therefore happen that one party, in truth intending to repudiate (as he later confesses), expressed himself so inconclusively that he is afterwards held not to have done so; conversely, that his conduct may justify the inference that he did not propose to perform even though he can afterwards demonstrate his good faith and his best intentions at the time. The emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred

[12] The Law of Contract in South Africa, 5th Ed at 499.
[13] *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 2 SA 284 (SCA) at 294.

intention accordingly serves as the criterion for determining the nature of the threatened actual breach.

[17] As such a repudiatory breach may be typified as an intimation by or on behalf of the repudiating party, by word or conduct and without lawful excuse, that all or some of the obligations arising from the agreement will not be performed according to their true tenor. Whether the innocent party will be entitled to resile from the agreement will ultimately depend on the nature and the degree of the impending non- or malperformance.

[18] Repudiation, it has often been stated, is 'a serious matter' (cf Ross T Smyth & Co Ltd v T Bailey, Son & Co [1940] 3 All ER 60 (HL) at 72B; Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd (supra at 685B - C), requiring anxious consideration and - because parties must be assumed to be predisposed to respect rather than to disregard their contractual commitments - not lightly to be presumed.'

[121] In my view, on the facts before me the argument of Ms Harker appears regarding repudiation in my view is unsound. What is clear is that from the evidence of Mr Hamalwa is rather an ineptitude on the part of the plaintiff in complying with the terms of the bid award. There was no intention to repudiate on the part of the plaintiff, on the contrary Mr Hamalwa wished to and probably intended to carry out the plaintiff's obligations but in my view the plaintiff was ill-equipped to do so. Ms Harker premised her argument not only the plaintiff's failure to deliver the vehicles but also the subsequent demeanor and conduct, specifically with reference to the assurances given by the plaintiff, which now appears not have been factually correct.

[122] Repudiation must be specifically pleaded and averred in the pleading and in any event repudiation consists of two parts, ie the act of repudiation of the guilty party, evincing a deliberate and unequivocal intention to no longer be bound by the agreement and secondly the act of the adversary of 'accepting' and thus completing the breach. This is not the case in the current matter.

[123] The plaintiff as a last resort clings to the fact that the defendant did not comply with the provisions of clause 1.7 of the General Conditions of the contract which reads as follows:

'1.7.2 Notwithstanding sub-clause 1.7.1[14] the Employer may terminate the Contract for convenience after giving thirty (30) days' written notice.

[124] The purpose of the notice would serve to place the service provider in mora. Bear in mind that at this point the delivery of the vehicles were already 42 days overdue. In this regard in *Louw v Trust-Administrateurs Bpk*[15] Coleman J stated that:

'It seems to me that a purchaser who has not put the seller in mora will, nevertheless, be entitled to cancel for non-performance or late performance in any one of the following situations:

(a) If a time for performance was stipulated in the contract and it was expressly provided therein that time should be of the essence.

(b) If a time for performance was stipulated in the contract and from the nature of the performance or other relevant circumstances it is to be inferred that time was to be of the essence.

(c) If no time for performance was stipulated, but it is clear that immediate performance was contemplated, and that immediacy was essential by reason of the subject matter of the contract or the relevant circumstances. (That would seem to be implied in the formulation of the rule by WESSELS, J.A., in Breytenbach's case, supra at p. 549; and it meets the difficulty which would otherwise arise out of some of the examples mentioned by ROBERTS, A.J., in Broderick's case, supra).

(d) If no time for performance was expressly stipulated in the contract, but by necessary implication it can be shown that performance by some specific time was intended, and was essential. (What I have in mind here is, for example, a contract to sell and deliver a ticket of admission to a theatrical performance on a particular day. Although no time for delivery is expressly mentioned, it would clearly be an implied, and a vital term that delivery be made in such time as would enable the purchaser to make use of the ticket for the intended purpose).

(e) If the failure or delay in delivery showed, in the circumstances, an intention on the part of the seller to repudiate his obligation to deliver.' (my underlining)

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[14] ' 1.7.1 The Employer may terminate the Contract, by not less than thirty (30) days' written notice of termination to the Service Provider, to be given after the occurrence of any of the events specified in paragraphs (a) through (e) of the Sub-Clause:

a) If the Service Provider does not remedy a failure in the performance of its obligations under the Contract, within the prescribed time or after being notified or within any further period as the Employer may have subsequently approved in writing; -(d)'

[15] *Louw v Trust-Administrateurs Bpk* 1971 1 SA 896 (W) 903E.

[125] In *Microutsicos and Another v Swart*[16] 1949 (3) SA 715 (A), Farlam AJA stated as follows:

'For my present purpose it is sufficient to say that, where a time for the performance of a vital term in a contract has been stipulated for and one party is in mora by reason of his failure to perform it within that time, but 'time is not of the essence of the contract', the other party can make it so by giving notice that if the obligation is not complied with by a certain date, allowing a reasonable time, he will regard the contract as at an end.' (my underlining)

[126] According to the evidence of Mr Vries the on time delivery of the vehicles as per the bid award was critical for the service delivery of the KRC: Directorate Education, Arts and Culture, who served the learner population (of approximately 80 000) of the schools and hostels in the Khomas Region by transporting supplies, gas and water to the schools and hostels. The witness testified that the non-delivery of the vehicles severely curtailed the operations of the Directorate.

[127] The plaintiff was well aware of the date of set for the full compliance with the agreement and the delivery date was already and there could be no doubt in the mind of the plaintiff as to the delivery date. I am therefore of the view, in line with the *Microutsicos* matter *above,* that the plaintiff was in mora by reason of his failure and the plaintiff cannot rely on the thirty day notice in order to rescue or justify its breach.

[128] I am further of the view that the plaintiff was in breach of material terms of the agreement between the parties and as a result the defendant would be entitled to liquidated damages as set out in clause 2.9 of the agreement and which was agreed upon between the parties. The agreed upon liquidated damages is a simple mathematical calculation and need not be quantified as clause 2.9 is clear that 'the Service Provider shall pay liquidated damages to the Employer for non-performance at twice the daily remuneration rate payable for each day that the services have not been provided on the site. The total amount of liquidated damages shall not exceed 10% of the monthly remuneration for the service.'

[16] Microutsicos and Another v Swart 1949 (3) SA 715 (A) at 730.

Order

[129] My order is therefore as follows:

1. The plaintiff's claim is dismissed with costs.
2. The defendant's counterclaim succeeds with costs in the following terms:

2.1 The plaintiff is ordered to pay liquidated damages to the defendant for non-performance at twice the daily remuneration rate payable as per para 4.2 of the conditions of contract for the period of 42 days that the services have not been provided. The total amount of liquidated damages shall not exceed 10% of the monthly remuneration for the service.

_____

JS Prinsloo
Judge

APPEARRANCES

PLAINTIFF:	E Nangolo Of Sisa Namandje & Co. Inc, Windhoek
DEFENDANT:	H Harker Of Office of the Government Attorneys, Windhoek