REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

25/6/17
DATE

SIGNATURE

CASE NO: 2009/37167

In the matter between:

GONDO SECURITY SERVICES Plaintiff

and

TRANSNET LIMITED Defendant

SUMMARY:

1. Plaintiff provided security services to Transnet in terms of a contract - contract terminated in terms of a sub-clause which included that "incidents resulting in loss shall be considered irremediable breach" - agreement to

be understood in context of not only language but also purpose and implementation.

2. Materiality of guarding and crime prevention of Transnet personnel, assets and services emphasized – sub-clause permitting termination of contract focusses on frequency of incidents and consideration of 'irremediable' while subsequent termination sub-clause focusses on quantum of financial loss sustained - meaning of irremediable discussed - budgetary constraints limit guarding services which Transnet could obtain – Transnet cannot pay for brass and claim gold and equally could not limit services and expect an absence of crime, merely a "professional service".
3. Transnet management exercised a discretion – not all incidents resulting in loss resulted in termination - instead there were amendments to and revisions of the deployment plan of resources - there were no warnings or non-performance letters to the contractor - there was neither documentation nor rationale given for termination of the contract.
4. Claim for damages for remainder of contract upheld.

JUDGMENT

SATCHWELL J

INTRODUCTION

[1] Plaintiff provided security services to Defendant in terms of an Agreement dated April 2007 (alternatively 1 October 2007[1]) which agreement was terminated on 27th August 2008. Plaintiff (Gondo) now sues Defendant (Transnet) for R 5, 062,492.10 being the balance claimed to be owing under the contract [Claim A]

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[1] The reason for the uncertainty in the Particulars was never addressed in evidence.

and a further sum it alleges are due to it for services rendered during September 2008 subsequent to the purported termination of the contract [Claim B].

[2] The first issue is whether or not Transnet was lawfully justified in terminating the contract and entitled to do so in the manner in which it did. The second issue is whether Gondo performed services to Transnet subsequent to the purported termination for which it is entitled to be paid.

[3] The relevant portions of the Agreement[2] pertaining to termination read as follows:

> "29.1 In the event of either party to this Agreement committing a breach of a provision of this Agreement and failing to remedy such breach as soon as practically possible, but not later than forty eight (48) hours after having received written notice by the other party to remedy such breach, the aggrieved party shall be entitled to cancel the relevant portion or part of the agreement if it is severable, or the whole agreement, if it is not, immediately by notice in writing to the other party."
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> "29.5 In the event that there are incidents where losses occur, including theft, at any of the sites that the Contractor is guarding, then this shall be considered to be an irremediable breach of this agreement in which event the Client shall have the right to terminate this Agreement with immediate effect;"
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> "29.6 Alternatively, in the event that there are losses (including theft) amounting to R 100 000 (One Hundred Thousand Rand) or more, either during one incident, or cumulatively over a period of time as a result of various incidents at various sites, the Client shall have the right to terminate this Agreement with immediate effect. Such termination by the Client shall not be considered to be a dispute as intended in dispute resolution procedure in

[2] All documents presented in court are unsigned – but the parties agreed at commencement of trial that the documents being used "are what they purport to be".

terms of this Agreement and shall not form the subject of any arbitration."

[4] It is common cause that on 27th August 2008 Transnet wrote to Gondo advising of termination of the Agreement within 24 hours of service of that letter/notice.

THE EVIDENCE

[5] I heard evidence from the Founder and Director of Gondo (Thika), the former Depot Manager for Johannesburg East (now Inspector of Operations for Transnet Freight Rail) (under subpoena) (Moghoseng), a Senior Protection Official for Johannesburg East (now Security Inspector) (Shibambo), the Depot Manager (now Regional Security Manager) (Motaung) and the Acting Head of Security (now Project Manager in the Officer of the C.O.O.) (Khanye).

[6] In summary, I learnt that there was a tender process which included a Bill of Quantities which detailed the numbers of security personnel and equipment required in certain areas of Transnet operations, that an Agreement was concluded between Transnet and Gondo, that a Deployment Plan sets out the detail of the number and grade and equippal of security officers to be deployed at static sites or between patrol areas marked by identifying poles carrying electric cables (known as 'mass poles') as well as the shifts to be staffed. I learnt that when an 'incident' such as cable damage/cutting or theft occurs the operational centre, Central Transport Control or the Overhead Electrical Control Centre, would realize this had happened, would give both a call out and authorisation to Transnet officials to go out to identify the nature and location of the incident, that while such inspection was taking place the Transnet officials would liaise with Gondo security from whom they would receive a report, check their pocket books and find out what role Gondo had played (if any) in preventing the 'incident'.

[7] A series of documents were canvassed. These identified the chronology of reporting of and investigation of 'incidents' and included the entries in Occurrence

Books of both Transnet and Gondo, monthly summaries of weekly summaries of compliance with 'visiting sheets' (which are apparently the checks conducted by Transnet on Gondo security), pro-forma invoices, credit notes prepared by Gondo which allow for deductions from the Gondo invoice where Gondo is penalized in terms of clause 24 of the Agreement for failure to comply with the terms of the Agreement[3].

[8] At trial it appeared that Transnet has not been in possession of relevant documents since commencement of this action or, at least, since the time of discovery. Transnet did not refer to nor rely upon any signed or dated document emanating from Transnet – whether the Agreement, the Service Level Agreement, Occurrence Books, summaries of loss making incidents, non-performance letters. What was produced in evidence all seemed to emanate from Gondo. The only explanation for the absence of Transnet documentation was given by Mokhoseng and related to the advent of and involvement of an entity identified as GNS [4] and thereafter the forwarding of documents to the Rissik Street office alternatively the explanation of Shibambo that files were to be disposed of through Metrofile

TERMINATION BY TRANSNET BY REASON OF ALLEGED BREACHES BY GONDO

[9] Defendant's plea is to the effect that Transnet notified Gondo in August 2008 "of the escalation of occurrence of incidence of theft in the areas for which the plaintiff was responsible to provide security services", "the escalation of incidents related to losses suffered by the defendant ... were in particular for the periods January 2008 to 31 August 2008", that Gondo "was afforded 72 hours to make written

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[3] Which penalties range for breaches such as "failure to possess a cellphone whilst on duty" to "non-attendance at weekly meeting".

[4] GNS appears to be an entity brought in by Transnet to conduct 'intelligence' or 'statistical' work who prepared schedules of all incidents at all sites , irrespective as to whether or not Gondo was responsible for that site, which schedules was based on the Occurrence Books kept by both Transnet and Gondo.

representations explaining why the defendant should not invoke the provisions of clause 29.5 and 29.6 of the Service Level Agreement", that Gondo "failed to respond to the letter or provide written representations" Further, Defendant's plea avers that "the aforementioned losses were in excess of R 100, 000 either individually or cumulatively". [paragraphs 5.4, 5.7, 5.5, 5.6, 5.10].

[10] Defendant concludes that Gondo's "aforementioned failure constituted irremediable breaches in terms of clause 29.6 alternatively clause 29.5 further alternatively clause 29.6 read with clause 29.5 of the Service Level Agreement" and as a consequence of Gondo's breaches Transnet lawfully terminated the SLA on 27 August 2008. [paragraph 5.11].

[11] A great deal of time was expended by reason of the reliance by Transnet of certain schedules prepared by GNS (an outside investigating contractor) which schedules covered geographic areas and shifts which had nothing to do with the services provided by or the responsibility of Gondo. Some of these incidents were disputed by Thika and stated not to be the responsibility of Gondo whilst others were conceded as being the responsibility of Gondo.

[12] Transnet had not itself prepared any schedule of relevant 'incidents', simply relied upon the work of GNS and was therefore quite incapable of any proper analysis of the quality of service rendered by Gondo (or any other of its security services providers such as Afriguard, Futuris, Fidelity) for purposes of determining issues such as 'materiality' or 'irremediability'.

[13] Ms Segeels, counsel for Transnet, took some of the witnesses through various OB registers and summaries of 'incidents' as prepared by either Gondo or Transnet. This was a time consuming exercise made necessary because the parties could not agree, despite my suggestion that they so do, on a schedule setting out each 'incident' alleged by Transnet and the response of Gondo

thereto. However, after completion of argument at the end of trial and once the court had adjourned I was furnished by Adv Segeels with such a schedule.

[14] At the end of the day the 'incidents' over the period January to August 2008 for which Transnet alleged Gondo was responsible (both as to failure to prevent and as to financial loss) were as follows:

a. 12 February 2008 –Painville – theft of 403 metres of phase wires.
b. 20 February 2008 – Kaartbosfontein – theft of 31 x 6 span wires.
c. 24 February 2008 – Zestfonteinn – theft of 60 m of catenary wire.
d. 24 February 2008 – Arbor – theft of 200 metre of catenary wire. (area of theft not conceded to be responsibility of Gondo Security).
e. 29 February 2008 – Ystervakfontein – 14 x 67 metres of overhead wires.
f. 12 March 2008 – Painville – 4 x 2 metre underground cable.
g. 2 May 2008 – Cowlesdam – theft of axle counter cable.
h. 5 May 2008 – Delmas – theft of 40 metres of cable and 8 metres 3 x ankle counter.
i. 12 May 2008 – Sentrarand/Varkfontein – damage to 14 mass poles.
j. 3 August 2008 – Welgedagt – theft of 3 transformers (not Gondo responsibility on deployment plan).
k. 8 August 2008 – Varkfontein – "10 x loss"Welgedgagt – theft of 7 batteries (not conceded).
l. 11 August 2008 – Servaas – theft of 134 metres of wire.
m. 13 August 2008 – Welgedagt – theft of 7 batteries (not Gondo responsibility on deployment plan).
n. 17 August 2008 – Geduld – theft of 67 metres of wire.
o. 20 August 2008 – Welgedagt – theft of 7 batteries (another service provider also deployed).
p. 22 August 2008 – Varkfontein – theft of 402 metres.

[15] I have attempted to place the incidents set out in this schedule in chronological order. As can be seen there were 5 incidents in 5 different areas in February, one incident in March, no incidents in April, 3 incidents in 3 different areas in May, no incidents in June, no incidents in July, 7 incidents in August in 4 areas with 3 incidents repeated in the Welgedagt area and 2 in the Varkfontein area.

[16] The schedule did not set out any agreement as to the monetary value of any loss sustained.

THE AGREEMENT – BREACHES – TERMINATION

Materiality of Security to Transnet operations

[17] On a conspectus of all the evidence, there can be no doubt as to the importance of ensuring the security and safety of Transnet Freight Rail infrastructure, assets, operations and personnel. The Agreement between the parties sets out that Transnet "desires to obtain the services of professionally trained and duly qualified security officers from the Contractor to perform security services on the property of the Client and its operating divisions"[5]. The 'challenges' identified by the witnesses were those Motaung summarized as "theft and vandalism and exploitation" of "copper cable, steel and infrastructure" .

[18] For instance, overhead cables strung up on ' mass poles' carry current to enable electric locomotives to operate and where the electric cable is cut or cut and stolen or where the line or signal equipment is damaged or stolen the impact on the running of the service is both endangered and hindered. Without electricity a locomotive cannot run and the service to customers of Transnet (in the form of T.F.R.) is hampered or delayed. Without operating signals the safety of staff and the locomotive is endangered. Where cables are cut or removed then this may impact on the pantograph atop the train. Repair and replacement entails considerable financial cost to Transnet.

[19] In sum, I appreciate that enormously heavy machinery and loads are conveyed across this country through the services of TFR and that certain breaches of security, through damage and theft, can cause damage resulting in physical injury, death, financial loss to equipment and cargo and national infrastructure.

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[5] Preamble to Agreement

I accept the significance of and the necessity for competent and efficacious security services which are strictly evaluated on an output basis pertaining to failures or breaches in security.

The Case

[20] Transnet seeks to justify its right to terminate the agreement with Gondo on "clause 29.6 alternatively clause 29.5 further alternatively clause 29.6 read with clause 29.5 of the Service Level Agreement".

[21] Quite clearly, Transnet cannot rely on clause 29.6 because, as was conceded in the course of argument, no monetary loss (either in one event or cumulatively over several events) have been proven to amount to R 100, 000 (one hundred thousand rand). Accordingly, the case for Transnet must rely upon the first alternative plea , ie. "alternatively clause 29.5".

[22] I must place on record my regret that neither counsel prepared heads of argument and that one counsel, Advocate Madonsela SC, saw fit, when I asked for any authority for his argument, to respond that this was "off the cuff". Our courts do not treat cases in an 'off the cuff' manner – neither in the preparation by practitioners nor in the consideration of evidence or law or drafting of judgments. The same counsel claimed to have two written judgments available on another point which turned out to bear no relation whatsoever to the issues before the court. Junior Counsel for Plaintiff only appeared in court at 12h30 on the first day of hearing and apparently had 'double-booked' himself in another court. I regret that I have had to prepare this judgment without the assistance which a court would customarily expect.

Clause 29

[23] Sub clauses 29.5 and 29.6 to the agreement are clearly discrete since the latter is identified as "alternative" to the former and their wording indicates that they encompass different considerations.

[24] Notwithstanding the abandonment of reliance upon sub clause 29.6, there is some value in having regard to the relevant considerations (though different) in clauses 29.5 and 29.6 which give rise to the right to terminate - in clause 29.5 it appears to be frequency of "incidents" while in clause 29.6 it appears to be the monetary quantum of "losses".

[25] It cannot be open to argument that clause 29.5 permits Transnet to terminate on the basis of one loss of R 100 and another loss of R 2,5000 because there would be no need for clause 29.6 to exist if that were the case. Clause 29.6 requires a minimum quantum of R 100, 000 in one or more losses and clearly escalates the quantum of loss as a basis for termination which suggests that clause 29.5 does not focus on monetary loss but on frequency of incident and the inability to reverse same or rectify the situation resulting in a considered determination that the situation was 'irremediable'.

Clause 29.5 – plurality

[26] In contradistinction to clause 29.1 which entitles termination where there is a breach and failure to rectify same within 48 hours after receipt of written notice, sub clause 29.5 entitles termination where there has been more than one incident resulting in more than one loss and such incidents "shall be considered to be an irremediable breach of this agreement.." [my underlining].

[27] It was argued by Transnet that clause 29.5 requires no more than the occurrence of more than one incident causing loss at a guarded site to endow Transnet with the right to terminate.

[28] I am in agreement that the plain wording of the sub clause requires a plurality of incidents and of losses. It may be that the plurality of incidents must take place at the same site by reason of the words "at any of the sites" but this was not argued. The schedule does not disclose agreed/conceded incidents on more than one occasion at the same site.

Clause 29 - irremediable

[29] The thrust of the argument of Advocate Segeels was to the effect that the mere occurrence of incidents and loss has the result that this is an "irremediable breach" by Gondo of the agreement. Such breach is automatically 'irremediable' and no person or entity is required to apply his or her or it's mind to any factors which would result in such 'consideration' or view as to whether or not the breach is 'irremediable'.

[30] As to determination of the caliber or level of breach as 'irremediable' there is no definition in the Agreement. The Concise Oxford English Dictionary defines the word as "impossible to remedy"[6]. It's use in law has contrasted impossibility with mere 'significance"[7], linked 'irremediable' with 'fundamental'[8], defined it as such because it constitutes "annihilation"[9] and "death"[10], and therefore absent the opportunity or ability to "mitigate"[11] or "potentially remediable"[12] or "without remedy"[13].

[31] I do note that the wording of sub-clause 29.5 is peremptory. The incidents/losses "shall be considered irremediable" [my underlining].

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[6] Concise Oxford English Dictionary.
[7] **Bothma v Else and others** 2010 (1) SACR 184 CC.
[8] **Wichmann NO and another v Langa and others** 2006(1) SA 102 LCC.
[9] **S v Makwanyane and another** 1995 (2) SACR 1 CC.
[10] **S v Swartz** 2009 (1) SACR 452 C.
[11] Mavromati v Union Exploration Import Pty Ltd 1947 (4) SSA 192 A.
[12] S v Smile and another 1998(1) SACR 688 SCA.
[13] Green v Johannesburg Liquor Licensing Board 1957 (1) SA 698 W.

[32] The question then arises whether there should be a rationally and reasonably based decision that the situation is irreversible and cannot be repaired through rectifying action or whether it is sufficient that there be two or more breaches with consequent loss?

Interpretation and application of the Agreement

[33] This court cannot focus on the words "shall" or "be considered" in isolation from the remainder of the Agreement. I must start with the wording of the contract and then read the entire provision of sub-clause 29.5 in the light of the document as a whole, the circumstances attendant upon its coming into existence, the apparent purpose to which it is directed. Obviously, a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the contract. It is not for me to substitute what I would regard as reasonable or sensible for the words actually used and so make a contract for the parties other than the one they in fact made. (See **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 SCA; **Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk** 2014 (2) SA 494 SC) . Irrespective of whether or not there is perceived ambiguity, there is no reason not to look at the conduct of the parties in implementing the agreement.

> "Where it is clear that they have both taken the same approach to its implementation and hence the meaning of the provision in dispute, their conduct provides clear evidence of how reasonable business people situated as they were and knowing what they knew, would construe the disputed provision. It is therefore relevant to an objective determination of the meaning of the words they have used and the selection fo the appropriate meaning from among those postulated by the parties. (**Comwezi Security services (Pty) Ltd v Cape Empowerment Trust** Ltd [2012] ZASCA 126 at para 15].

[34] There are a number of factors which I believe point to more than mere reliance upon the apparently peremptory and automatic allocation of irremediability to the breaches. These include the budgetary or financial constraints of Transnet which impact upon the opportunity given to Gondo to render services without any breach resulting in losses; that Transnet has not previously acted upon clause 29.5 as a peremptory direction but has appreciated that infringements of security with consequent losses are sometimes unavoidable and has exercised a discretion in it's response to apparent loss-making incidents; the complete absence of warning or non-performance letters from Transnet to Gondo; that the deployment plan is regularly subject to revision or amendment based upon breaches and losses which are identified as 'challenges'. In short, the practice of Transnet and it's implementation of the Agreement has been contrary to the meaning for which it now contends.

[35] Financial limitations upon security services:

a. It is apparent from the evidence that all security services provided were subject to the limitations of the budget allocated to the Agreement between Transnet and Gondo. Thika commented that it was "because of the limited resources TFR had" that there was a need for Transnet to "rationalise their deployment". He went on to comment on the input of the advisory contractor GNS that they "came with a beautiful plan which made a lot of sense and which would have meant a bigger contract for Gondo". Moghoseng said that it all "comes to the budget" when he decided how "many guards, vehicles, horses" to deploy and where. Moghoseng gave as an example that a portion of line in the Welgedagt area was not patrolled by security until such time as he took "one of my clients[14] to show [I had] no resources' and then the line became 'protected'. Shibambo referred to the need for some foot patrollers to cover 1.5 km by foot and agreed that they could be at one edge of the mass patrol area when an incident occurred

[14] The witness elucidated that the 'client' was" the people running the trains".

at another edge of the mass patrol area but said "you have a budget, you can't allow more" and agreed that if the depot manager said that he could only afford less than he, as an SPO, said was needed he would have to live with the decision of the depot manager

b. The Agreement between Transnet and Gondo limited the financial expenditure on security to be made by Transnet and therefore the personnel/vehicles/equipment to be deployed as determined by Transnet in conjunction with Gondo. Transnet could obviously not expect to pay for brass and expect gold in return. Total exclusion or elimination of all "theft, vandalism and exploitation" could neither be guaranteed nor expected.

c. Of course, Gondo entered into the Agreement and accepted the responsibilities which it undertook but there is nothing in the Agreement which requires anything more than provision of a professional security operation – there is no obligation to eliminate all security challenges, incidents and loss.

d. The Agreement could neither demand nor contain an undertaking that there would be no breaches of security because the provision of security services did not exist in a perfect world of unlimited resources.

[36] Not all vandalism, theft, loss caused by hostile third parties constitutes a breach of the Agreement although it may be a breach of the security wall:

a. Both Thika and Moghoseng gave evidence that, in certain cases, notwithstanding that security had been breached within the geographical and time responsibility of Gondo, Gondo would neither be held legally liable nor financially penalised .

b. Thus, where the area to be patrolled was bounded by mass poles (each 67 metres apart from each other) a considerable distance apart - Thika spoke of 2.4 km while Moghoseng spoke of a patrol area encompassing 14 mass poles - it would not be considered possible for Gondo guards

to have prevented or intervened in an incident at the furthest end of the patrol area from the guards' position at the time of the incident. Moghoseng also gave the examples of an incident which might occur in a defile or cutting while guards were further along the line and the hillock containing the cutting precluded observation by the guards on patrol. Another example given was where the guards were patrolling along the line and had followed a curve and would then be unable to view behind or before them around the line of the curve. Finally, there was the example of vegetation obscuring sight of an incident. Moghoseng referred to such considerations as being those of "terrain".

c. Both Thika and Moghoseng stated that the purpose of the joint 'investigation' conducted after an incident was "to establish and verify possibilities of negligence" and to "determine the cost, loss and penalty" of such incident. As Moghoseng said the questions to be posed were "Would guards be able to protect? Where were guards and could they prevent? Are these guys able to see? Could they prevent?".

d. Moghoseng believed that he had a discretion as to whether or not he should issue a non-performance letter or notice to a service provider. Only after the investigation had taken place would he sit down with Gondo and work out why the 'incident' had been able to occur and whether Gondo was responsible for the area and should have been able to prevent it. Moghoseng said that where he found Gondo was not liable for the incident then they would sit down and see what could be done - such as reducing the number of mass poles defining the area to be patrolled by the guards or changing the number of guards on night as opposed to day shifts.

e. Motaung said that he was not aware that Moghoseng had such a discretion and said that the Agreement "clearly stipulates" the areas for which Gondo was responsible. Shibambo took the view that the terrain was known when the deployment plan was drawn up and that "as long as there is a deployment plan they [Gondo] are accountable". According to

him the purpose of the investigation was to establish what went wrong and to prevent it happening again.

f. Moghoseng pointed out that neither the Service Level Agreement nor the deployment plan determined 'terrain' and persisted that it was his job, as depot manager, to conduct an investigation to determine if the contractor was responsible. The discretion for which Moghoseng contended is one, he says, within his area of responsibility as depot manager.

g. As regards the relevance of terrain and other considerations, the evidence of Moghoseng is corroborated by the existence of deployment plan amendments/revisions; as regards the exercise of a discretion by Moghoseng the absence of any non-performance or warning letters emanating from Transnet supports the existence of such discretion; as regards the finality of the SLA, the continuing amendments thereto indicate the opposite and, in any event, the discretion contended for by Moghoseng would not necessarily be found in the Agreement but within Moghoseng's responsibilities as depot manager – as contended for by him.

[37] Amendments to/ revisions of the deployment plan:

a. It appears that the deployment plan was regularly amended in accordance with the number and nature of incidents resulting in losses and the considered response or action plan prepared thereto.

b. Shibambo gave evidence that there were weekly meetings and if it was decided that there was a need to review the deployment plan this would be done. He said we " check if the deployment plan still addresses our challenges and look at the practicality. The purpose of review of the deployment plan is informed by previous incidents demonstrating challenges and to check whether the deployment plan still addresses our challenges." He indicated that it might be decided it was necessary to remove guards from one place and deploy them elsewhere. As an SPO ,

Shibambo said that he had the authority to revise and sign deployment plans. Motaung confirmed that the deployment plan was "not cast in stone" and was considered on a weekly basis at regular meetings during which the occurrence of incidents would be discussed and that Gondo would be asked to provide an action plan to correct the situation. Each such action plan would be contained in the ongoing revisions to the original deployment plan.

c. Shibambo said that minutes were prepared of such meetings - either in manuscript or on computer and placed in a file kept at the Transnet depot. Neither he nor Motaung had any knowledge of the whereabouts of such documents which they agreed constituted amendments/revisions to the Deployment Plan (and hence to the Agreement).

d. The development of and agreement to such revisions to the deployment plan confirm that the original deployment plan and the SLA were not considered finally determinative of 'responsibility' or 'terrain'. Incidents resulting in loss did not constitute an irremediable breach of contract by Gondo without further ado nor did same result in termination of the contract. Instead there was investigation, analysis and discussion which resulted in an attempt to resolve the breach in security with an action plan taking into account financial and contractual constraints. Absent a final SLA (or indeed any SLA or amendments from Transnet) the only information on incidents presented to this court is to be found in the schedule handed up after argument to which I have already referred.

[38] <u>No warning or non-performance letters:</u>

a. There is no corroboration of the existence of any 'warning letters' or ' non-performance letters' or other written 'notice' given to Gondo over any period of the Agreement.

b. Moghoseng's evidence was that he had never issued such non-performance letters. Motaung said that he had seen such letters.

Unfortunately, same were not disclosed in discovery by Transnet and made no appearance before the court. Despite my specific request of Motaung, he could not indicate where same might be.

c. Since it is conceded in the schedule that incidents did take place for which Gondo did bear responsibility, the absence of notices or warnings to Gondo, does bear out Moghoseng's evidence that he did exercise a discretion as he had testified. Since Motaung was in charge from April 2008 and aware of all incidents and all losses and apparently he did not himself issue any notices or warnings to Gondo, this suggests that he also did not view incidents resulting in loss by third party/ies as automatically giving him entitlement to terminate or propelling him towards termination the Agreement.

[39] The decision to terminate the Agreement:

a. Meetings were held regularly of management – Khanye described these as cross-functional meetings. Motaung stated that "incidents on the ground led to the conclusion by the meetings to terminate the Agreement" and that Executive Manager Sinamela took the decision to do so "based on the proof provided to him". Khanye confirmed that the late Mr Sinamela took the decision.

b. The decision to terminate was based, according to Motaung, upon "the list of incidents" "the incidents logged on the system in the past 24 hours". Khanye advised that the statistics office compiled a report (of which no copy appears extant) indicating incidents of cable theft and how this was escalating and disrupting Transnet services. Neither witness knew where the minutes of these meetings couild be found.

c. Motaung also took the view that Transnet had the right to terminate the Agreement with Gondo because once there was a reoccurrence of incidents and loss then the situation was irremediable.

d. Khanye explained that 'we' were required to write a letter to Gondo to give the contractor 72 hours to explain why they should not be terminated." This was done at the instance of those who were responsible for writing the notice of termination because "we needed to be fair. The people writing the termination letter needed the other side of the story".

e. The schedule of incidents with which I have been provided gives no indication as to the circumstances of any escalation in the occurrence of incidents. The absence of minutes and evidence means that there is no indication of any consideration as to the circumstances of any escalation in incidents and loss, whether or not there consideration was given to the state of the economy, increases in crime generally or on Transnet premises in particular since conclusion of the Agreement, costing of the GNS proposals, whether budgetary constraints played any part in disallowing expansion of security services since conclusion of the Agreement. I do not suggest that these were or are the factors which should have been considered at such meetings – it is just that I have no information as to the factors which were considered by Transnet management in reaching it's decision to terminate.

f. There is no indication of the basis upon which the so-called 'statistics' were compiled or by whom. Finally, the absence of warning or non-performance letters or notices renders it difficult to comprehend the basis upon which the decision to terminate was based.

[40] Conclusion:

a. The language of the agreement cannot be ignored. In arguing that the benchmark 'irremediable' plays no part in the termination and that it has no meaning because the mere existence of incidents and loss result in a breach without further ado, asks the court to only have regard to the word "shall" and to ignore the words "be considered an irremediable breach". The court must attempt to value and harmonise the Agreement as drafted. The court cannot nullify the wording incorporated in the Agreement and

find, as it has been asked to do, that Transnet need not investigate the 'incidents' and 'loss', 'consider' same and reach a view as to the 'irremediable' nature of any breach shown to have occurred.

b. Budgetary constraints make it clear that Transnet does not expect and cannot expect an impermeable wall of security to protect each and every asset or portion of infrastructure. The response of Transnet to each infringement of security by third parties resulting in an 'incident' and 'loss' exemplifies an understanding that the threat by such third parties in the form of theft and vandalism and otherwise is a constantly moving source of concern to which there is a need for ongoing flexibility and adaptation. Such is found in the weekly and other meetings resulting in revision or amendment to the deployment plan. Such is found in the collaboration between Transnet and Gondo in their combined response to such 'challenges'. Such is found in the absence of warning or non-performance notices.

c. Both the wording of sub clause 29.5 and the context within which both Transnet and Gondo have implemented the Agreement go towards the conclusion that there has previously been consideration of all relevant factors in reaching a determination as to whether or not the violations of the security operations can be laid at the door of Gondo - and whether or not such can be considered sufficient to reach a determination that such violations render the Agreement to have been irremediably breached by Gondo.

d. As I have remarked, absent such a purposive meaning there would be no point in inserting sub-clause 29.6 in the Agreement. It would mean that plurality of incidents and loss would be sufficient and the further criterion of 'quantum' would not be required in sub clause 29.6 nor that of 'irremediable' in sub-clause 29.5.

Letter of Termination dated 27 August 2008

[41] This letter emanates from the General Manager of Strategic Supply Management and is headed 'without prejudice'. It states the following:

a. ""Gondo security personnel have violated the above agreement".

b. "This has been brought to your notice over the period of the contract".

c. "Our correspondence dated 14th August 2008 has reference. Scanned copy enclosed."

d. "Gondo thus finds Gondo in breach of the above agreement in terms of and with reference to clause 29.5 of the MOA."

e. "This leaves Transnet with no other option but to terminate the above agreement with respect to all the sites of the above mentioned MOA within 24 hours of this notice being served."

[42] The above notice gives no indication of the dates, manner, type or cost of violation; when such alleged violations had been brought to the attention of Gondo; the correspondence of 14th August is not attached to the document handed to the court[15] ; refers only to clause 29.5 of the agreement as the grounds for termination

.

CONCLUSION

[43] On the information made available to this court as to 'incidents' resulting in 'loss' and the manner in which same may or may not have been considered, this court cannot find that Transnet has been faced with an 'irremediable breach' of the Agreement by Gondo.

[44] There are indeed incidents involving loss in areas where Gondo was responsible for security. The evidence is to the effect that none of the operational personnel of Transnet expected perfection, that it was acknowledged that the deployment plan always needed to be adjusted as circumstances changed, that security

[15] The response of Gondo was to ask for a copy of this correspondence which was not apparently forthcoming – it is not included in the discovered documents or the court bundle.

resources could not simply be expanded but the parties had to act within the budget, that 'incidents' resulting in 'loss' were not penalized with termination.

[45] No warnings appear to have been made to Gondo and the evidence is that a discretion was exercised to the effect that Gondo was not in breach of it's obligations to furnish professional and efficacious security services to Transnet.

[46] As I have already indicated, this court is, in the face of the denial by both Thika and Moghoseng, without evidence as to the dates or content of warning or non-performance or notice-of-breach letters. It is difficult then to know on what basis anyone could or did take a decision as to the "irremediable' nature of any breach.

[47] There is a termination clause in the Agreement and thus the issue of 'materiality' if Gondo had been shown to be in breach need not be determined by this court. The benchmark has already been decided by the parties, in reaching this Agreement, to be "irremediable".

[48] Absent details given by Transnet to Gondo prior to the termination letter of those incidents resulting in loss which resulted in consideration of an 'irremediable breach', I cannot agree with the submission by counsel for Transnet that it is for Gondo to set out the action plan which it proposes to meet the 'challenges' of Shibambo.

[49] Accordingly, I find that Transnet resiled from the Agreement without lawful grounds and that the Notice of Termination constitutes repudiation of the Agreement.

[50] Gondo is thus entitled to claim the balance which it would have earned under the Agreement for the remaining portion of the duration of the Agreement.

ORDER

An order is made as follows:

1. Plaintifff's claim succeeds in the amount of R 5 062,492.10 (Five million and sixty two thousand and four hundred and ninety two rand and ten cents);
2. Costs are to be paid by Defendant , such costs to include the cost of one senior junior counsel and none of the costs associated with travel or accommodation.

DATED AT JOHANNESBURG 20TH JUNE 2017

SATCHWELL J
Judge of the High court,
Gauteng Local division, Johannesburg

Attorney for Plaintiff:	Mnguni & Associates
Attorney for Defendant:	Ncube Incorporated Attorneys
Dates of Hearing:	12, 13, 14, 15 June 2017.