**IN THE HIGH COURT OF SOUTH AFRICA**
**(EASTERN CAPE HIGH COURT: BHISHO)**

**CASE NO. 203/2000**
**REPORTABLE**

In the matter between:

**LUNGILE ELLIOT SIYEPU & 508 OTHERS** **Plaintiffs**

and

**PREMIER OF THE EASTERN CAPE** **Defendant**

**JUDGMENT**

**ALKEMA J**

[1] Five hundred and nine plaintiffs instituted action against the defendant claiming contractual damages in the total sum of R98 million arising from an alleged breach of contract. The facts are largely undisputed.

[2] The Provincial Government of the Eastern Cape Province (hereinafter called the Government), on 7 November 1995 at Bisho, represented by its then Premier, concluded a written agreement (the agreement) with the General Workers Union, then representing the former employees of the now defunct Transkei Road Transport Corporation (TRTC). Being a para-statal corporation, the TRTC was dissolved by Proclamation in terms of section 13 of the Corporations Act No.10 of 1985 (Transkei) on 18 January 1996, and

was subsequently liquidated. At the time of dissolution of the TRTC, it employed 1644 employees. The object and purport of the agreement was to settle the salary and wages claims of the former employees.

[3] I will later in this judgment refer in more detail to the terms of the agreement. For present purposes it suffice to say that the agreement made provision for the payment by government to the workers of salaries over a fixed future period, including payment of leave pay, accrued bonus, pension, and the like, and also the payment of severance packages calculated in accordance with an agreed formula. These payments were duly made, received and accepted, and there is no dispute between Government and the workers in this regard. The dispute relates to clause 3 of the agreement.

[4] In summary, clause 3 records Government's *"commitment"* to job creation (generally) in the transport industry for the 1644 workers, and in particular, to *"...assist former TRTC employees to secure employment in a new transport arrangement."* The clause specifically records that *"... government will put in place mechanisms to address transport needs in the Province and thereby creating employment opportunities."*

[5] The gravamen of the dispute is whether clause 3 is legally enforceable. There is a further dispute between the parties relating to the question whether or not Government, as a matter of fact, complied with its obligations under clause 3. I will later in this judgment return to these disputes.

[6] A number of other preliminary issues also arise from the pleadings which

require clarification. *Ex facie* the agreement, the contract is between Government and the General Workers Union *"... representing the former TRTC employees Grades 1 to 7."* The first plaintiff was cited as the *"Ex TRTC United Workers Front,"* a voluntary association of which plaintiffs 2 to 573 are members. It was formed specifically for purpose of instituting this action on behalf of its members. It has no constitution. In an interlocutory application it was found not to have *locus standi* to institute this action. It therefore is no longer before this Court.

[7] Plaintiffs 2 to 573 include workers who either were never members of the Union, and nor was there any evidence placed before this Court by either the Union or the non-member workers to the effect that they were represented by the Union when the agreement was concluded. In addition, plaintiffs 558 to 573 were at the time employees in Grades 8 to 15 (managerial positions) who, *ex-facie* the agreement, are not covered by the terms thereof, although they (or some of them) may (or may not) be members of the Union.

[8] The matter is further complicated by the fact, which appears to be common cause, that some of the plaintiffs either died before or after the institution of the action, and were never substituted by the executors in their deceased estates.

[9] Mr *Delport*, who appeared on behalf of the plaintiffs, submitted that the issue of the plaintiffs' *locus standi* only becomes relevant when the quantum of their respective claims are considered. This is a startling submission. The *locus standi in iudicio* of a plaintiff must exist from the time the action

was instituted until final judgment is delivered. In the absence of *locus standi*, a plaintiff is not entitled to judgment, either on liability or on quantum.

[10] In these circumstances the matter was adjourned after argument to enable the parties to reach agreement on a list on plaintiffs who have *locus standi* to institute the claim; and failing agreement to lead evidence on this issue. Fortunately, the parties managed to reach agreement on a list of 509 qualified plaintiffs who have the necessary *locus standi.* Such list is attached to this judgment, and it follows that this judgment is in respect only of those plaintiffs whose names appear on the attached list.

[11] The issue remains whether those plaintiffs who have *locus standi* and were employed in Grades 8-15 (managerial positions), stand in any contractual relationship with Government to claim damages arising from the alleged breach of clause 3 of the agreement. The agreement, as I said, only covers Grades 1 to 7 and not any of the managerial positions. Some of the plaintiffs whose names appear on the attached list were employed in the managerial positions.

[12] In this regard Mr *Delport* submitted that the agreement was implemented by Government in respect of all the former employees of the TRTC, including Grades 8-15 (managerial positions). Payment of salaries and other benefits were made under the agreement to all employees, including managers, who accepted such payments. As such, he submitted, a separate but implied and tacit agreement came into existence between Government and those employees in managerial positions, which contain the

very same terms and conditions as contained in the written agreement between the Union and employees in Grades 1 to 7. He submitted that the cause of action in respect of those plaintiffs is adequately covered by the allegations in paragraphs 9 and 10 of the particulars of claim. Mr *Mbenenge* SC, on behalf of the defendant, accepted this proposition.

[13] I am therefore prepared to accept, for purposes of this judgment only, and without making any finding in this regard, the correctness of Mr *Delport*'s submission.

[14] Finally, the parties are agreed that the quantum of the claim should stand over until after the liability is decided. I am therefore asked to determine the issue of liability only. It is, however, agreed that if the ruling of this Court is that the plaintiffs have not proved liability, then either judgment or absolution from the instance should be granted in favour of the defendant.

[15] The main issue remains whether or not clause 3 of the agreement spawns legal and enforceable contractual rights and obligations. It reads as follows (and I quote verbatim):

> *"3* ***Job Security***
>
> *3.1 The province of the Eastern Cape government is committed to job creation in the transport industry and Public/Passenger industry in particular.*
>
> *3.2 The government recognizes the crisis with former Transkei in respect of the already high unemployment*

*and the lack of reliable, efficient and affordable transport to the community.*

*3.3 To this end;*

*Government is committed to assist former TRTC employees to secure employment in a new transport arrangement, coupled with a process of job creation in the Transport industry from which TRTC employees would benefit.*

*3.4 The government will put in place mechanisms to address transport needs in the Province and thereby creating employment opportunities.*

*3.5 The process of involving all stakeholders including the Union should be initiated as a matter of urgency by the MEC for Transport and the Department of Transport with a view to arriving at a new transport system by 31 March 1996."*

[16] Clause 1 of the agreement makes provision for Government to make payment to the workers of salaries and ancillary benefits. The time period (10 weeks from 1 November 1995 to 16 January 1996) is agreed upon; the payments in lieu of leave accrued and pro-rata bonus are agreed; and specific categories of payments of short falls on, *inter alia* Unemployment Insurance Fund and Medical Aid are agreed upon. Clause 1 clearly establish a legal duty on Government to make payment of specific items, and it is

common cause that those legal duties have been complied with by Government.

[17] Clause 2 provides for the payment of severance packages and it prescribes the formulae for the computation of such severance packages depending on the length of service. Again, it is common cause that clause 2 imposes legal and enforceable contractual duties on Government, and that these obligations have been fulfilled.

[18] Clause 3 deals with the concerns of the future in respect of job security for the workers. It is quoted in full above and I shall shortly return thereto.

[19] Clause 4 deals with the implementation and monitoring of the agreement by the establishment of joint committees to oversee the payments and deal with unresolved issues. It is common cause that both parties have complied with their obligations thereunder and that the payments foreshadowed by the agreement were duly made.

[20] Before considering whether or not clause 3 creates legal contractual rights and obligations, it is necessary to first refer to the legal principles involved in this enquiry.

[21] It is generally recognized that not all provisions in a written agreement constitute enforceable undertakings. It may contain preambles recording historical events which may bear on interpretation; it may contain 'recordals' and 'recitals'; it may document future intentions; or it may contain clarificatory or explanatory statements; non of which were intended

to create enforceable contractual terms. A case in point is *Absa Bank Ltd v Swanepoel NO* 2004 (6) SA 178 (SCA) at 181 paras 6-8.

[22] Usually, the conclusion that a written provision in a contract constitutes a recital or a recordal and not a serious intention to be bound, can be gleaned primarily from the language used. This was the case in *Absa Bank Ltd* (*supra*). But this is not always the case. Very often the words used point to an intention to be bound by the undertaking, but the law does not recognize that particular undertaking to have legal effect or to constitute an enforceable contractual obligation. For instance, I am invited to dinner or a social event. I accept the invitation. However, without good cause and the courtesy of cancellation I fail to attend. My host may have suffered financial loss for having catered for me, but he has no enforceable contractual claim against me. I am in breach of my moral and ethical duties, but not in breach of an enforceable legal obligation. The authors De Wet and Van Wyk in *Kontraktereg en Handelsreg* (5th Ed.) p4-5, refer to such an example as a *'gentleman's agreement'* not capable of legal enforcement.

[23] How does the law distinguish between a *'gentleman's agreement'* and an enforceable contractual obligation? Historically, the demands of the merchant community required a person to honour his undertaking. The principle of sanctity of contract – *pacta servanda sunt* – is not only based on moral conceptions of good faith, but also on practical considerations necessary for healthy commercial trade. In *Absa Bank Ltd* (*supra*) Cameron JA said at 181 para 7 that a contractual provision can only be regarded as enforceable if it makes commercial sense or has business efficacy. This was also the approach in *Man Truck & Bus (SA) v Dorbyl Ltd* 2004 (5) SA 226

(SCA) at 232 para 9. The Court must therefore also have regard to the nature of the undertaking.

[24] But not every undertaking which has commercial value was necessarily intended to have contractual effect, or was necessarily understood to have such effect. A politician who on the eve of an election on behalf of his or her political party promises to build roads and houses and provide job opportunities to a particular community, and who fails to deliver on his political promises after being elected, may very well face the political consequences of his or her breach of undertaking, but it is doubtful in the extreme that those undertakings will necessarily be held to be enforceable in law. (Leaving aside, for a moment, the issue of a contract which is void for vagueness). An example of a case where the obligation relating to a pre-emptive right only had commercial content but was held to be a mere moral or ethical obligation not legally enforceable, is *Robinson v Randfontein Est. G.M. Co, Ltd* SA 1921 AD 168 at 189.

[25] Likewise, and as pointed out by the learned authors De Wet and Van Wyk (s*upra*) at 4 and 5, even a social undertaking may be enforceable. The learned authors refer to the example where aged citizens agree to prepare meals for each other for a period of one week per person. The intention is not only to engage in social interaction, but also to save costs on the preparation of meals. The authors suggest, convincingly, that in this situation the relationship is legally the same as that between a guest and a guesthouse owner, and may constitute an enforceable obligation.

[26] The distinction between contracts which have social content and those

which have commercial content is thus helpful, but certainly not conclusive. There must be other criteria. The weight of authority seem to indicate that the answer lies in the intention of the contracting parties. In addition to *consensus* on what obligations are agreed upon, there must also be an intent that those obligations are legally enforceable. In this regard Cameron JA (as he then was) said in *Absa Bank Ltd* (*supra*) at 181F:

> *"Only once it is determined that a provision was intended to have contractual effect will the Court try to interpret it so as to give it business efficacy. If it was not so intended, those rules of interpretation do not come into play. No 'business meaning' can be conjured out of a clause that was not intended to have contractual effect at all."*

(See also *De Wet and Van Wyk* (*supra*) at p4; Christie, *The Law of Contract in South Africa,* (5th Ed.) p2 and fn6).

[27] As I will attempt to demonstrate in the course of this judgment, the common intention of the contracting parties as a tool to arrive at the conclusion whether or not a contractual obligation is enforceable in law, is with great respect neither helpful on the facts of all cases, and nor is it as a matter of legal principle in my respectful view the correct tool to use.

[28] In cases where the unambiguous and plain meaning of the words used in the light of all contextual considerations clearly point to a *'recital'* or *'recordal'* and to the absence of an undertaking, such as in *Absa Bank Ltd* (*supra*), there is no difficulty. The difficulty arises where the plain and grammatical meaning of the words in both internal and external context point to an obligation undertaken by one party with the intention by all

parties that the first party will abide by his or her undertaking. The following example demonstrates the point.

[29] A restraint of trade in an employment agreement is perfectly valid and legal, and acknowledged as such by the contracting parties who have every intention to respectively abide thereby and/or enforce it. However, two years after the conclusion of the agreement the employee acts in breach thereof. The particular circumstances and facts of the case show that the enforcement of the restraint, in those particular circumstances, will be *contra bonos mores.* The Court refuses to enforce the restraint, notwithstanding the breach and common intention by the parties at the time of conclusion that the clause will be legally operational and enforceable. In these circumstances the refusal to enforce the contract is not based on the common intention of the parties, but on the absence of the definitional element of wrongfulness. And it is the Court, not the parties, who determines the issue of wrongfulness or enforceability. It is, respectfully, unclear why intent should play an additional role to that of wrongfulness in the enforceability of contracts.

[30] The issue of intent in the law of contract, it seems to me, is concerned with the formation of legal contracts and the creation of a *vinculum iuris,* and not with its dissolution or unenforceability based on wrongfulness. The philosophical debates concerning contractual intent are centered around theories such as the subjective consensual theory, the objective declaration theory and the reliance theory; all of which are concerned with the establishment of agreements and are dogmatically very far removed from the issue of the enforceability of contractual obligations which vests in the

element of wrongfulness. The search for the intent that undertakings, which are made and accepted seriously and in good faith, be legally enforceable is, respectfully, illusionary and somewhat artificial.

[31] I say 'illusionary and artificial' because the search for the common intent that their contract will be legally enforceable is as a matter of logic and common sense dependent on not only what the parties' legal convictions are at the time of contracting, but what they agreed their legal convictions will be when the contract is enforced. Put differently, it is not what they now say they then intended (which evidence is in any event inadmissible), but what the Court now finds they then believed their legal convictions will be at the time of enforcement. (also bearing in mind they had no idea at the time of contracting when, and if, legal redress will be sought by either of them to enforce their agreement). The Court, therefore, ends up in objectively enquiring what the legal convictions of society are at the time of enforcement, and then ascribing such legal convictions to the subjective intention of the parties at the time. And such circuitous reasoning brings the Court back to the issue of wrongfulness – a Court will only enforce a contract if it is lawful, and its wrongfulness depends on the legal convictions of society at the time of enforcement. Of course, the internal and external context of the agreement may point to a subjective intent of the parties which may be at variance with the legal convictions of society, but for reasons I will mention shortly, it makes no difference in principle.

[32] I will return to this issue again later in the judgment, but for present purposes it suffices to acknowledge that this Court is bound by the *stare decisis* rule and that, accordingly, the weight of authority obliges me to deal

with the issue as a matter of common intention, and not wrongfulness, which I propose to do.

[33] The point of departure is therefore to have regard to both the content and the context or the written deed, and to determine from such evidence whether the written provision was intended to have contractual effect. In this regard it is apt to observe that the distinction between background circumstances and surrounding circumstances has been abandoned by the Supreme Court of Appeal in *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 (4) SA 399 (SCA) para 39. The context is now determined by both the internal context, namely the language, words, grammar and syntax of both the provision in question and the document as a whole, and also by the external context provided by the factual matrix in which the document finds its setting, which includes both the background and surrounding circumstances.

[34] In a thought-provoking article entitled *"What's in a word: Interpretation through the eyes of ordinary readers,* SALJ, Vol 127, part 4, 673, the learned author Dr. Malcom Wallis suggests (albeit in a slightly different context to the issue under consideration in this case), with reference to the *'new'* approach to interpretation by English Courts (and followed to some extent in Australia and Canada), that it is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. It is what each party by word and conduct would have led a reasonable person in the position of the other party to believe. He says at 685:

> *"... The idea that what is being sought is a notional common intention*

> *is abandoned. Interpretation no longer has subjective overtones. When we speak of the intention of the parties we really mean the meaning objectively manifested in the words that embody their agreement."*

As pointed out by Dr Wallis in his article, the distance travelled by the interpreter from the initial enquiry into the subjective common intent of the parties to the end enquiry of the objective meaning as understood by ordinary and reasonable people (the legal convictions of society), is so far removed that the question can legitimately be asked whether the ultimate answer in reality still represents the subjective common intention.

[35] The objective approach supported by Dr. Wallis has not yet, as far as I know, found its way into South African jurisprudence on interpretation, but for reasons which follow it is certainly in my respective view a helpful guide to determine whether or not it was intended that contractual effect should be given to an undertaking embodied in a written deed. Indeed, I can conceive of no other logical method to achieve the result.

[36] With the above guidelines in mind, I now turn to consider if clause 3 of the contract under consideration was intended to have operational force.

[37] It is common cause, as I said, that all the other clauses of the written deed have operational content and have been given effect to. I think it is clear from their wording that clauses 3.1 and 3.2 are recitals and expressions of intent in respect of future conduct, but do not create enforceable contractual obligations. Clause 3.5 proposes a flexible time-frame (*"should be initiated."*) without fixing specific dates for the operation of *mora*

*debitoris* or *mora creditoris*. The argument of the plaintiffs is directed in particular at clauses 3.3 and 3.4 which, following the declaration of intent in 3.1 and 3.2, opens with the words *"To this end…"*

[38] I agree with Mr *Delport* that the structure and syntax of the words used point to a desire and intent on the part of Government to give effect to its commitments as recorded in 3.3 and 3.4. The words *"... is committed to ..."* and *"... will put in place ..."* on their literal meaning convey an undertaking or an obligation to perform, and can have no other meaning. I am therefore prepared to accept, in favour of the plaintiffs, that the content of the clauses manifest an intention on the part of Government to be bound by its written commitments and obligations.

[39] Having regard to the role of Government in circumstances where approximately 1644 workers were retrenched by it from a para-statal institution formerly controlled by it, and in an area plagued by lack of employment opportunities, I think it is fair to say that in the context of the prevailing circumstances, Government seriously intended to create job opportunities and to assist the former employees to obtain employment. And, as I will show shortly, Government indeed took steps to comply with its commitments. But what are these commitments which Government undertook? And were they intended to be legally enforceable and so understood by the plaintiffs?

[40] To answer these questions it is necessary, as I said, to examine the nature of the obligations and to ask, objectively, if the parties reasonably expected such obligations to have operational content and legal effect. The

language used in 3.3 and 3.4 is imprecise and loose. It is, effectively, a promise to provide a new transport system in the former area of the Transkei in order to create job opportunities, and to assist former workers to find employment in such new transport system.

[41] At the level of enforcement of the clause, pertinent questions are left unanswered. What is the precise nature of *'the new transport system?* Is it State-owned or in the hands of private enterprise? If the latter, how and to what extent, if at all, was it going to be funded? Was it intended that all workers retrenched would be re-employed? If so, when, at what rate, for how long and by whom? The last two questions, in particular, created a dilemma for Mr *Delport* when asked to explain the computation of the damages claimed by his clients.

[42] The plaintiffs do not claim specific performance of the obligations, and nor can they do so in the absence of any agreement in regard to what precisely the performance must be. Instead, they claim damages based on the alleged breach of contract of clause 3.3 and 3.4. In their particulars of claim, they allege that they reasonably expected *"... employment at the same level ... and at the same (rate of) remuneration ..."* of their prior employment with the Corporation. They further allege *"... it was reasonable to expect employment for a period of 5 years and Defendant was in law bound by the agreement to provide employment for such period to the Plaintiffs."* In these circumstances they claim a total of R98 million in damages from Government.

[43] The above allegations and computation of damages are unsupported by

the facts and untenable in law. The clause is silent on the rate of remuneration and duration of employment, and no facts relevant to either the internal or external context of the clause were placed before me to infer such facts. And the unilateral expectations of one contracting party, in the absence of consensus, and whether reasonable or otherwise, do not create substantive contractual rights. It is not the function of the Court, and nor is it empowered, to make agreements for contracting parties – its function is to interpret what the parties had agreed upon. See *Hochmetals Africa (Pty) Ltd v Otavi Mining Co. (Pty) Ltd* 1968 (1) SA 571 (A) at 583 B-D; *Nordis Construction Co. (Pty) Ltd v Theron Burke and Isaac* 1972 (2) SA 535 (D) at 544 G-H.

[44] The above principle, in turn, is derived from the principle of *pacta sunt servanda* – the self-autonomy and freedom of choice to make your own contracts, and the expectation of public policy that contracts made freely and voluntarily should be honoured. See *Telcordia Technologies Inc. v Telkom SA Ltd* 2007 (3) SA 266 (SCA) and *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 57.

[45] What, then, was intended by the parties? Once it is found, as I did, that sub-clauses 3.3 and 3.4 contain an obligation coupled with the intention to comply therewith, then effect must be given to the clauses. And to do this the nature of the obligation must be determined. The external context in which such determination can be made, is the following.

[46] The facts before the Court show that the TRTC was the main, if not the only, road transport operator in the Transkei at the time. It serviced all the

main routes and provided transport facilities for all the inhabitants of the Transkei. When it became a financial burden for the State which it could no longer afford, it was liquidated. Approximately 1644 households in the Transkei lost their only source of income. Thousands of commuters were left stranded and in need of transport facilities to reach schools, hospitals, towns and work. The State was left with hundreds of busses and numerous bus-depots and other assets to sell. It was also left with the responsibility – *qua* government – to assist the citizens with transport needs and to create a business environment where new job opportunities can arise and flourish. The recognition of these governmental responsibilities is recorded in clauses 3.1 and 3.2. It is given effect to in 3.3 and 3.4.

[47] The pecuniary damages suffered by the plaintiffs due to their retrenchment were compensated by Government by the payment of salaries and other benefits under clauses 1 and 2. Clause 3 is therefore not aimed at the compensation for such damages. It was aimed at addressing the transport needs of the public and to create new job opportunities. It created an environment for new job opportunities by arranging the formation and registration of a number of companies; the members, directors and employees of which were former TRTC employees. It then subsidized the companies by selling the busses of the liquidated TRTC to them at discounted rates. It rented their depots to the companies and authorized transportation services along the routes previously serviced by the TRTC. It created a Transkei Bus Tenders Forum and rendered assistance in the management of these companies. Sadly, it seems that, for various reasons, these companies collapsed and never became successful enterprises. Jobs which were created were again lost.

[48] The steps taken by Government in satisfaction of its obligations under clause 3 may not today in the belief of the plaintiffs constitute compliance with its obligations as understood by them at the time, but in my view Government neither intended to replace the TRTC with another para-statal transportation corporation, nor to re-employ any of the former retrenched employees. At best, the undertakings constitute the role Government perceived it to play as Government – not to physically create job opportunities, but to create a climate or environment where private enterprise can flourish and job opportunities can be created to fill the void left by the liquidation of TRTC. And this it did. And, I believe, it was objectively and reasonably so understood by the plaintiffs at the time when the agreement was concluded.

[49] Did the parties intend the obligations of Government described above to be legally enforceable? For the reasons advanced earlier in this judgment, and in the absence of the context pointing to a different direction, the answer to this question can only be determined on the assumption that the legal convictions of the parties at the time of contracting were reasonable and accorded with that of society. Therefore, when they contracted, they must have intended that at the time of enforcement of the clause it will be recognized as lawful and enforceable only if recognized as such by the legal convictions of society at the time of enforcement. To arrive at the subjective intention of the parties therefore, the Court must objectively determine the legal convictions of society at the time of enforcement.

[50] In this regard even early South African law of contract, following

Roman-Dutch and Roman Law, recognized that not every contractual obligation is enforceable, but only those contractual obligations recognized by the law as being enforceable. In para 12 p6 Wessels, *The Law of Contract in South Africa* (Edited by A A Roberts, 2nd Ed., Vol.1) the learned author states:

> *"The State, or, as it is usually expressed, the law, determines in what cases the* ***vinculum juris*** *should be established and in what cases there shall be no bond."*

And in para 16 p7:

> *"... It must, however, be remembered that every contract derives its binding force from the law. It is only by virtue of the law that an agreement is enforceable in our Courts. A contract is not enforceable because there is a moral obligation to keep one's promise but because the law insists that certain promises shall be carried out ..."*

[51] *In casu,* the promises made by Government in this case were in the nature of political promises to do its duty; to assist private enterprise to create job opportunities. It was not, and nor was its duty, to form or establish a new State owned transportation business which would re-employ all retrenched employees of the TRTC. Because the legal convictions of society do not expect political promises of this nature to be legally enforceable, the common intention could not be, and therefore was not, that promises of this nature be legally enforceable. I therefore come to the conclusion that the parties harbored no common intention that clause 3 will have any contractual effect.

[52] It remains to make a final remark. I think it is clear from the aforesaid

that the reasoning process in the search for a common intent that the agreement made will be legally enforceable, is laborious, circuitous and somewhat artificial. For the reasons mentioned, the search for the subjective common intent concludes with an objective assessment of the legal convictions of society, and this is precisely the test for the definitional element of wrongfulness as requirement for the enforceability of a contractual undertaking – which in my respectful view should have been the enquiry in the first place. Ultimately, it remains a question of whether or not the law recognizes the contract as being enforceable – not whether the parties intended it as such. And the law will only recognize a contractual obligation as legally enforceable if the legal convictions of society where the contract is to be enforced recognize it as lawful.

[53] Take the following example: A criminal drug dealer concludes an agreement with an illegal and criminal drug manufacturer for the supply and delivery of prohibited drugs. Both parties genuinely and honestly have every intention to abide by the agreement (and know what the consequences of non-performance will be). But both know full well that their agreement will have no legal force or effect and will be unenforceable in a Court of law. They therefore have no intention to enforce it in a Court of law. As a matter of law, and not by factual intention, the agreement is unenforceable on the basis of its unlawfulness. But what if they did not know that their agreement will be legally unenforceable? What if they genuinely believed and intended at the time to enforce it by law, such as a restraint of trade agreement, but then find the law refuses to enforce it? Our law recognizes in the latter case that if the enforcement offends the legal convictions of society, it remains to be unenforceable, notwithstanding the subjective

intention of the parties, and the same principle applies. I fail to see, with respect, in these circumstances what role intention has to play in the enforceability of contractual obligations.

[54] It is necessary to remark on the use of the legal concepts of 'unlawfulness' and 'wrongfulness'. These words are used intermittently to describe certain conduct in breach of legal obligations which attract the sanction of the law or which call into play the force of judicial recognition. The concept of 'unlawfulness', on my understanding, in the narrow sense refer to a breach of a statutory duty or to conduct in contravention of a general recognized legal principle such as, *inter alia* , a common law crime or delictual wrong. The concept of 'wrongfulness' in the wider sense goes beyond conduct in contravention of recognized legal principles, and includes conduct which is regarded by the legal convictions of society as so immoral, unethical and reprehensible that it is deserving of judicial protection. In this sense, certain contractual obligations may attract mere moral, or ethical obligations, but they are neither 'unlawful' nor 'wrongful.' And to be termed 'wrongful' such obligations need not necessarily constitute a breach of a statutory, criminal or delictual wrong; they will be held 'wrongful' if the legal convictions of society demand that such obligations become justicable in a Court of law. Notwithstanding the intermittent use of these two concepts, they have in common the judicial recognition of legal protection or enforcement of the law. In this sense, a contractual obligation may not be 'unlawful' in the narrow sense, but it may be deserving of legal protection or enforcement in the wider sense and accordingly be held 'wrongful'. On the facts of this case, I have already found the contractual obligation under consideration to be neither 'unlawful' nor 'wrongful' and thus not deserving

of legal protection.

[55] The above approach is, in my respectful view, not only a frank recognition of the real nature of the enquiry, but it is also firmly rooted in the jurisprudential dogma as it developed from early Roman law to present modern South African legal principles. I say this for the following reasons.

[56] The law of delict and the law of contract are not only branches of the private law, but are also the main sources of legal obligations. As such, both branches of the law form part of the law of obligations. In both branches of the law the performance or non-performance of the obligation give rise to certain legal consequences. Provided the respective definitional requirements of a contract or a delict are met, it gives rise to either a *vinculum iuris* in the law of contract which establishes a legal and enforceable contract, or it gives rise to the existence in the law of delict of a wrong which attracts legal sanction such as a claim for damages. But the similarity does not end here. In neither the law of contract, nor the law of delict, is an enforceable claim established (notwithstanding the presence or existence of all other essentials or requirements), unless the law recognizes such obligation to be legally protectable and enforceable.

[57] I have already referred to the authorities in the law of contract in support of the above proposition, and to some examples of obligations which create mere moral or ethical obligations but are not recognized by the law as legally enforceable. Similarly, in the law of delict not every negligent or intentional act or conduct becomes actionable – it is only actionable once it occurs in circumstances that the law recognizes it as actionable. But this is

where the similarity between the law of contract and the law of delict, in respect of *ius obligationes*, ends.

[58] In the law of contract, as I said, we are told that the law only recognizes contractual obligations as legally enforceable if it is lawful and, in addition, if it was so intended by the parties. In the law of delict, the element of fault is only capable of being legally recognized if the act of omission can be termed as legally wrongful. In both instances of *omissio* and *commissio* it has been held in the law of delict that the element of fault (intent) must not be confused or conflated with the element of wrongfulness. In the law of delict it is now trite that the issue of wrongfulness must be determined anterior to the issue of intent, and that these are two very different concepts. (See *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at 441E-442C (para 12;13). In cases of both *commissio* and *omissio* the conduct is labeled in delict as wrongful only if it offends the *boni mores* of society. And the *boni mores* of the society is vested in the legal convictions of society. See *SM Goldstein & Co (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd and Another* 2000 (4) SA 1019 (SCA) at 1024; *Minister van Polisie v Ewels* 1975 (3) 590 (A) at 596H – 597G; *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 at para 9 (SCA); *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) at 1056E-H (para14); *Minister of Safety and Security v Van Duivenboden* (*supra*), and my own attempt in *R L Judd v Nelson Mandela Bay Municipality* (Eastern Cape, Port Elizabeth) unreported, Case No. 149/2010 delivered on 17 February 2011.

[59] The enforceability of an obligation in the law of delict is thus dependent on the legal convictions of society. And although certain obligations give

rise to mere moral or ethical obligations, they do not enjoy the legal force of the law. An example often referred to in the law of delict is where a passer-by observes a child falling into a swimming pool. He or she foresees the real possibility that the child may drown, but does not render assistance. Although morally and ethically repugnant, the law does not recognize in all these circumstances a legal duty on the passer-by to render assistance and the failure to do so may not necessarily attract legal sanction. I have already referred to some examples where the principle operate in the law of contract and where an obligation which has only social or political content may attract moral and ethical duties, but is not contractually enforceable.

[60] The law of contract also recognizes the unenforceability of certain contractual obligations in circumstances where the enforcement will offend the *boni mores* of society. Lawfulness is an essential element of an enforceable contract. However, in the law of contract, it seems, common intent that the contract will be held to be lawful is an additional requirement for enforceability. Whereas the concepts of lawfulness and intent are kept separate in the law of delict, it seems to be conflated in the law of contract on the issue of enforceability.

[61] There is no reason, in my respectful view, why the *ius obligationes* cannot be uniformly applied. The issue of the enforceability of a legal obligation, whether contractual or delictual, does not as matter of principle vest in the element of intent, but in the element of wrongfulness.

[62] The temptation to deal with the issue of enforceability of contractual obligations as a matter of wrongfulness and not as a matter of intent, seems,

at this stage of the development of our law on the subject, a bridge too far. Until such time the Supreme Court of Appeal gives another direction, the High Courts must deal with the issue as a matter of intent. I have done so, but am constrained to remark that even if I had dealt with it as a matter of wrongfulness (which I believe is the correct approach), the result would have been the same and, may I add, less cumbersome to arrive at.

[63] I make the following order:

> The plaintiffs' claims are dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

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**ALKEMA J**

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| Delivered on | : | 08 September 2011 |
| Attorney for Plaintiffs | : | Mr J T Delport |
| Instructed by | : | Delport van Niekerk |
| Counsel for Defendant | : | Mr S M Mbenenge SC<br>with Ms C T S Cossie |
| Instructed by | : | The State Attorney, King Williams Town |