REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 22529/2018

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
18/4/2019
DATE
SIGNATURE

In the matter between:

UNIVERSAL CARE (PTY) LIMITED First Applicant
(Registration number: 1999/023901/07)

UNIVERSAL HEALTHCARE (PTY) LIMITED Second Applicant
(Registration number: 1999/013368/07)

and

ENTERPRISE OUTSOURCING (PTY) LIMITED Respondent

JUDGMENT

MODIBA J:

[1] In an amended notice of motion, the applicants seek an urgent order in terms of which the respondent is directed to hand over possession and use of the Microsoft Active Directory ("the Active Directory") and the applicants' data stored therein.

[2] The respondent is resisting the application on the basis that:

[2.1] the application fails to meet the requirements of urgency;

[2.2] the applicants are contractually not entitled to the Active Directory;

[2.3] it has repeatedly tendered the return of the applicants data. However, the applicants have not accepted it's tender.

[3] This matter was enrolled on the urgent court roll of 19 March 2019. When I indicated to the parties that I had prioritized the matter for hearing on that day, counsel for the respondent expressed its desire to file a fourth affidavit. Counsel for the applicants also requested time to file heads of argument. I could not accommodate the parties later that week due to a crowed roll. I therefore urged the parties to argue the matter on that day given that I had prioritized it, failing which I could only accommodate them the following Monday. Counsel for the respondent submitted that the respondent will argue the matter on the papers as filed by the 19th and that the respondent would no longer file a fourth affidavit. Counsel for both parties undertook to file heads of argument after argument. I heard argument and reserved judgment. Subsequently, counsel for both parties filed heads of argument. For this I am very grateful.

[4] In a surprising twist, on 22 March 2019, the respondent filed an affidavit which it contended ought to be taken into account when adjudicating the application. I granted the parties time frame in which the applicants would answer to the affidavit

and the respondent would reply. The applicant duly filed an answering affidavit. The respondent did not file a replying affidavit. The applicant asked the court to disregard the purported new evidence on the basis that at the commencement of argument, the respondent elected to argue the matter without filing a fourth affidavit. Therefore its attempt to place such an affidavit before the court after the court has reserved judgment ought to be disallowed, particularly because on the respondent's version, the averments set out in the affidavit relate to events that occurred before the applicant filed a replying affidavit. The respondent did not deal with these averments then. It also made a specific election not to file a fourth affidavit.

[5] Under these circumstances, allowing the respondent to go behind its election not to file the fourth affidavit would be inappropriate. Therefore its request to file a further affidavit is disallowed.

[6] The application emanates from an outsource agreement the ("the agreement") the parties concluded in November 2015. In terms of the agreement, the respondent would render to the applicant several specified IT services. The agreement expired by the effluxion of time at the end of February 2019. The applicant has appointed a third party IT service provider to take over its IT services from the respondent. The applicant has extended the contract with the respondent until 31 March 2019 for the purpose of transitioning to its new service provider. It is in this context that the dispute between the parties arose.

URGENCY

[7] The respondent contends that the applicants authored their own urgency. It warned the applicants in writing as early as October 2018, that the contract would expire in February 2019 and that in the event that the applicants do not re-appoint it as their IT service provider, it would require six months to transition to the applicants' third party service provider. The applicants did not respond to its correspondence. When the applicants informed the respondent in February 2019 that they had not appointed it, and when the parties commenced engaging on the transitioning of the applicants' IT services, not only did the respondent warn the applicants that they have set unreasonable time frames for this purpose, it also tendered to avail itself to assist the applicants with the transitioning process, but at a cost.

[6] By failing to plan timeously for the transitioning, the respondent further contends, the applicants failed to act in terms of clause 15.4 of the agreement, which I have quoted in paragraph 7 below.

[7] It is not the respondent's case that by not taking timeous action to effect the transitioning, the applicants breached the agreement. That the applicants did not heed the respondent's warning to start working on the transitioning in October 2018 does not disentitle the applicant to urgent relief. The ultimate test for urgent relief is trite. If, by refusing to give the applicants an urgent audience, the applicants would not have substantive redress in due course, the court ought to entertain the application.

[8] I am satisfied that the applicants satisfy the test for urgency. The applicants' business is managed health care services. They provide this service to approximately two million customers. They rely on IT infrastructure and services provided by the respondent to deliver managed health care services to their clients. They contend that a seamless transition of IT services from the respondent to the applicants' third party IT service provider is critical for the applicants' business continuity. It is common cause that if the applicants accepted their data on the format currently tendered by the respondent, the effect on the applicants would be catastrophic, as their business continuity would be affected. Therefore the applicants would not enjoy substantive redress in due course if the application is not dealt with on the basis of urgency.

[9] I therefore find that the application is urgent.

[10] From the issues between the parties as defined in the papers as well as the terms of the agreement, it is apparent that contractually, the applicants are not entitled to the Active Directory.

[11] It is common cause that the applicants do not own the Active Directory. Microsoft licenced the Active Directory software to the respondent. The licence is procured under the Microsoft Service Provider Licence Agreement ("MSPL agreement"). In terms of the said agreement, the licence is not transferable. Further, the respondent may not permit the applicants to access, maintain or otherwise use the Active Directory software, otherwise it would breach the said agreement.

[12] Therefore the applicants have failed to establish the right to possess or use the Microsoft Active Directory software. Therefore the applicants' bid to enforce this right stands to fail.

ACCESS TO THE APPLICANTS' DATA

[13] On the papers, there is no dispute that the applicants are contractually entitled to their data. The dispute between the parties has trickled down to the format in which the respondent ought to provide the data to the applicants' third party IT service provider. The respondent has tendered the data in the ASCII format. The applicants refuse to accept it in this format. They allege that providing the data in this format offends the agreement in that it amounts to data dumping as the data will not be of immediate use to them. They seek the data to be transferred in the NTDS.DIT format. The respondents refuses to give the applicants data in the latter format.

[15] In terms of clause 16.1, during the term of the agreement and for a period of 1 month thereafter, the respondent is under obligation to provide the applicants, on request, with assistance to facilitate the orderly transfer of responsibility for the provision of the IT service to the applicants or their third party service provider. Therefore the applicants' request to the respondent is within the ambit of this provision.

[16] Clause 16.2 and 3 are important clauses in light of the dispute between the parties. These clauses provide:

> *"16.2 For the avoidance of doubt, the Customer (the applicant) is responsible for the ownership, planning, management and completion of the Exit Transfer and the Service*

Provider shall be entitled to charge, at the applicable daily rate, for any services requested from and provided to the Customer to assist with the Exit Transfer, if applicable, on the basis referred to in clauses 15.2 and 15.3.

"16.3 Following notice of termination of this Agreement (whether in whole or in part) being given or received by the Service Provider, or at any time in the three-month period prior to expiry of this Agreement, the service provider will comply (and will ensure that any subcontractor will comply) with the Customer's reasonable directions and will provide the Customer with termination assistance reasonably requested by the Customer to complete the Exit Transfer. Such termination assistance may include-

> *"16.3.1 development with the Customer of a list of tasks, budget, and full project plan for the Exit Transfer;*
>
> *16.3.2 continuing to perform any or all of the Services requested by the Customer for a period or periods requested by the Customer which will not exceed 1 month. ..."*

"15.2 On termination or expiry of this Agreement for any reason, the Parties shall co-operate with each other, and provide all reasonable assistance to each other and any Future Service Provider (if any) with the Exit Plan as set out in clause 16. Subject to prior written approval in writing the Customer shall pay the costs incurred by the Service Provider for any other services duly provided under post termination services, save as provided in clauses 15.3 and 15.4, in accordance with the then applicable rate card (as per Annexure F, clause 2). ..."

Clause 15.3 further deals with the costs of returning each parties' property.

"15.4 Without limiting the generality of the aforegoing, the Service provider shall, in time for the Future Service Provider to take on the Customer and the Customer data in a way which enables it to commence its services to the Customer when its agreement commences, but by no later than the date that the termination of the Agreement becomes effective, unless otherwise agreed by the parties -

> *"15.4.1 deliver to the customer the usernames, and passwords for all the Customer Hardware and Software as listed in Annexures D and E of this Agreement; and*
>
> *"15.4.2 provide to the Customer all Customer data, which is stored on the Hardware and Software owned by the Service Provider as listed in Annexures D and E of this Agreement. Such data shall be provided to the Customer in the relevant application's standard format at no additional costs."*

[17] The applicants own the Exit Transfer. They are responsible for its planning, management and completion. The respondent's role and responsibility in this regard is as set out in 15.4. The agreement gives the respondent no entitlement to second guess the applicants' Exit Transfer. As part of the Exit Transfer, the applicants want

the respondent to transfer data to them in the in the application standard format NTDS.DIT.

[18] It is not the respondent's case that the applicants' directive that it transfers data to them in the application standard format NTDS.DIT amounts to breach of the agreement. Given that on the applicants' version, this format will enable the applicants' third party service provider to commence its services to the applicants when its news agreement commences on 1 April 2019, the respondent's refusal to comply with the applicants' directive is not in conformity with clause 16.3.

[19] The applicants have established the contractual right to direct the respondent to provide data to it in the application standard format NTDS.DIT. They have also established reasonable apprehension of harm if the respondent fails to act in accordance with this directive. On the papers filed prior to judgment being reserved, I am satisfied that the applicants have no suitable alternative remedy to receive the data in the application standard format NTDS.DIT.

[20] The applicants seek the appointment of Price Waterhouse Coopers to oversee the process of transferring its data from the respondent to applicants under the prayer 'further and alternative relief'. The respondent opposes this relieve on the basis that no case for it is made out in the founding affidavit. I disagree with the respondent. The case for the applicants' right to the Exit Transfer is made out in the founding affidavit. The dispute regarding the format in which the applicants' data ought to be transferred emanates from the answering affidavit. The applicants were entitled to respond to their in replying. The format in which the data ought to be transferred is incidental to the

applicants' entitlement to the data, which has clearly been made out in the founding affidavit.

[21] Therefore the applicants' prayer for the involvement of Price Waterhouse Coopers to oversee the process of transferring its data from the applicants to the respondent under the prayer for further and alternative relief stands to be granted.

[22] The delay in handing down this judgment is deeply regretted. The parties will recall that I was ready to hand the judgment down on 29 March 2019 and that my Registrar had arranged with their attorneys to brief counsel to note the judgment on that day. I had to pull the judgment back because by the 28th, the parties were still exchanging papers relating to the respondent's request for leave to file a further affidavit. I could not deal with the request promptly as I was settling six other judgments that I reserved in the urgent court in the same week as this judgment, which I had also scheduled to hand down on the 29th. The 29th was the last day of term. On that day, the six judgments referred to above were duly handed down. At the time, I was assisted by a relief Registrar who inadvertently omitted to note that this judgment had been pulled back. I discovered this file in my chambers on the morning of 18 April 2019 and only then did I recall that I had held this judgment back to deal with the respondent's request. I dealt with the outstanding issues promptly and handed the judgment down at 2:30pm on that day. I profusely apologize to the parties for the inconvenience occasioned by this delay.

[22] In the premises, the following prayer is made:

ORDER

1. The application succeeds with costs.
2. The respondent is ordered to provide the applicants, all the applicants' data, which is stored on the software and hardware owned by the respondent, as listed in Annexures D and E of FA1, in the application standard format NTDS.DIT.

MADAM JUSTICE L T MODIBA
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for applicant:	Advocate Jonathan Heher
Attorney for applicant:	Grasskopf Attorneys c/o Nelson Borman Inc
Counsel for respondent:	Advocate Jawaid Babamia
Attorney for respondent:	Mervyn Taback Incorporated
Date heard:	19 March 2019
Date of judgment:	18 April 2019