

(Inlexso Innovative Legal Services) gr

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 12773/2021

DATE: 2021.03.31

DELETE WHICHEVER IS NOT APPLICABLE (1) REPORTABLE: YES / NO (2) OF INTEREST TO OTHER JUDGES: YES / NO (3) REVISED ✓

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In the matter between

ESKOM SOC LTD

and

ORACLE CORPORATION SOUTH AFRICA (PTY) LTD

J U D G M E N T

WEPENER, J: This application served in the urgent court
 20 Johannesburg in the week when a large number of matters
 were brought to court and it is a short week as the coming
 Friday is also a public holiday. In these circumstances it is not
 possible to produce a full and reasoned judgment in relation to
 all issues that were touched upon in the papers or during
 argument. Nevertheless, I will deal with the main issues as

they crystallised before me.

The applicant seeks a *mandamus* in terms of which the respondent is ordered to continue providing services to it for another period of a year. During 2017 the parties entered into an agreement in terms of which the respondent was to supply services on an annual basis for a period of five years. The renewal and annual services were by way of invitation by the respondent and the applicant placing a task order on the respondent for a further period of one year.

10 In the meantime, a dispute regarding payment for its services arose between the applicant and the respondent. The dispute arose subsequent to an audit performed by the respondent, which audit it was entitled to perform in terms of the written agreement between them. One of the clauses of the agreement reads as follows:

20 “8.9. Upon 45 days’ written notice Oracle may audit your use of the operating system, integrated software and integrated software options. You agree to cooperate with Oracle’s audit and provide reasonable assistance and access to information. Any such audit shall not unreasonably interfere with your normal business operations. You agree to pay within 30 days of written notification any fees applicable to your use of the operating system, integrated software and integrated

software options in excess of your licence right. If you do not pay Oracle can end, a), the service offerings (including technical support) related to the operating system, integrated software and integrated software options and , b) ...”

Subsequent to the audit the respondent claimed payment of sums of money for the use of the operating system, generally said, supplied by the respondent. The applicant disputes the correctness of the audit and has instituted action
10 against the respondent in which it seeks the following relief:

That is a declaration that the refusal by the defendant, in this case the respondent, to continue its service offerings to plaintiff is wrongful and unlawful and directing the respondent to provide such services until 30 April 2002.

What is immediately apparent is that the relief is not for a review of the defendant’s audit which it had undertaken. If relief is to be sought in relation to an incorrect audit it is still to be formulated and prosecuted. The relief now sought, being an interim interdict pending the hearing of the action, is, in my
20 view, misplaced as the action will not determine the validity of the outcome of the audit.

The plaintiff is seeking an interdict in the absence of any arrangement or agreement between the parties as to their respective rights and obligations in the event of disputes arising. Such contractual arrangements are commonplace in

contracts such as those for construction or building.

In this matter, due to a lack of agreement by the parties regarding their respective rights in the event of a dispute, the applicant argues that it is entitled to a *mandamus* in common law, as supported by section 34 of the Constitution.

The applicant's case, in my view, has several difficulties. The first difficulty is that the applicant's right to have a dispute heard in a court is not affected at all. The action which it instituted is proceeding and is unhindered and
10 it had no technical obstruction in bringing the present application. Whichever of the proceedings the applicant relies upon and seeks the support of section 34 of the Constitution, it has it and its rights are not adversely affected contrary to the provisions of the section.

The second difficulty is that the first requirement that is always considered when an interdict is sought is the requirement that a party seeking an interdict must show a clear right to the relief sought by it. Much of the debate before me with counsel for the applicant centred around the issue and
20 counsel, in my view, had difficulty in defining the right which the applicant wishes to exert.

The reference to the action which I referred to cannot be that right as it is not in danger in any way. It is common cause that those proceedings are continuing. Then what is this right? The right seems to be then the one that finds its basis

in the written agreement, that is the continuation of the services rendered by the respondent, but that is regulated by the contract in no uncertain terms. I have quoted the clause above.

It is common cause that the respondent raised the payment of fees after the audit and that these were not paid within 30 days, resulting in the respondent ending the service as is provided for in the agreement. The applicant's disagreement with the outcome of the audit is of no moment as
10 the right of the respondent contracted for is not qualified in any manner.

Relying on *Metcash Trading Ltd v Commissioner of SARS* 2001 (1) SA 1109 (CC) it was argued that the principle of pay now whilst the dispute is pending cannot apply. In *Metcash* the Court found that the relevant provisions of the act provided for such a course of conduct.

The relevant section specifically provides that the duty to pay the tax is not suspended during the disputed proceedings, but, as I said, it is so provided in the act. That is
20 also the type of arrangement one finds in, for instance, building and other contracts. The agreement in this matter does not deal with such an instance and the applicant has failed to identify a right upon which it can rely to seek interim relief.

In all the circumstances I come to the conclusion that

the application falls to be dismissed with costs.



WEPENER, J

JUDGE OF THE HIGH COURT

DATE:

2/ June 2021
~~2020~~

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