

REPUBLIC OF SOUTH AFRICA

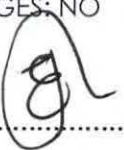


**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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

31/01/2023

DATE



SIGNATURE

Case no.: **48972/2021**

In the matter between:

BUSINESS CONNEXION (PTY) LIMITED

APPLICANT

And

EKURHULENI METROPOLITAN MUNICIPALITY

RESPONDENT

Coram:

Dlamini J

Date of hearing:

17 October 2022 - Open Court (9B)

Date of delivery of Judgment:

31 January 2023

This Judgment is deemed to have been delivered electronically by circulation to the parties' representatives via email and same shall be uploaded onto the caselines system.

JUDGMENT

DLAMINI J

- [1] This is an application wherein the applicant seeks a declaration of the contract between the applicant and the respondent to be valid and binding and an order that the respondent must pay the applicant an amount of R 85 479 535,26.
- [2] The applicant is a private company duly registered and incorporated in accordance with the company laws of the Republic of South Africa.
- [3] The respondent is the Ekurhuleni Metropolitan Municipality (the CoE), a municipality and an organ of the state duly established in terms of section 12(1) of the Municipal Structures Act.¹
- [4] The facts which form the background to this dispute are broadly common cause. The applicant testified that on 5 August 2020, the respondent issued a Request for Quotations (the RFQ) under bid reference number C-ICT 04-1 2020 for the acquisition of additional software licenses, software maintenance, implementation, and enhancement for the Oracle software that is in use from the date of award until 30 June 2023. The applicant submitted its bid for this project.
- [5] On 10 July 20220, the applicant was selected by the respondent to provide the services under the abovementioned RFQ.

¹ Act 117 of 1998

- [6] On 27 August 2020, the respondent issued an Instruction to Perform Work (the IPW) to the applicant in terms of which the applicant was required to acquire certain specified software licenses on behalf of the respondent in the sum of R85 479 535.26.
- [7] Pursuant to the issuing of the IPW, the applicant testified that it procured the licenses from Episdon Technology Distribution (Pty) Ltd (Episdon). That Episdon is one of Oracle's authorized resellers in South Africa. The applicant testified that it placed the order for the license through Episdon. Episdon in turn secured the licenses directly from Oracle. After the delivery of the licenses, the applicant issued an invoice in the amount of R85 479 535,26 to the respondent for the licenses as set out in the IPW.
- [8] The applicant avers that on 28 August 2020, it delivered to the respondent the keys to the licenses listed in the IPW. Delivery was done, insists the applicant, by delivering to the respondent the keys to the licenses. Further, says the applicant, Oracle also delivered the licenses to the respondent as it appears from Oracle's letter dated 1 September 2020.
- [9] The applicant says that it received a letter dated 29 October 2020 titled Request for Cancellation from the respondent, wherein the respondent requested to cancel the order for all but one of the licenses listed in the IPW.
- [10] The applicant avers that it does not accept the repudiation of the order, as the licenses had already been delivered to the respondent. The applicant seeks that the respondent abides by its obligation in terms of the agreement between the parties. Finally, the applicant insists that the respondent must make payment for the licenses delivered to it as per the contract.
- [11] In its answering affidavit, the respondent testified that it acknowledges liability for the amount in respect of the Taleo licenses which the respondent insists was purely for the renewal of existing licenses and required that only the invoices be submitted in respect of this amount.

- [12] Whilst admitting that it issued the RFQ and IPW and the applicant was required to procure the additional licenses from Oracle, however, the respondent avers that the applicant was not required to do so immediately. The respondent says that it was operating on an outdated, unstable, and unsupported IBM environment. That the respondent needed to first migrate to a more stable Huawei environment before the applicant could procure the additional licenses.
- [13] Accordingly, the respondent states that it is not liable to the applicant in the sum of R85 479 535, 26, but is only liable to pay the sum of R6 933 948, 00, and the respondent tenders this amount.
- [14] The respondent also brought an application in terms of Rule 16A, that the contract was unlawful, unconstitutional, and *contra bonos mores*.
- [15] On the merits, the question to be answered is whether there are material disputes of facts present in this matter and further whether there exist tacit or express terms in the contract signed by the parties.
- [16] At the hearing of the matter, the respondent abandoned the Rule 16A application.

PRELIMINARY OBJECTIONS

- [17] However, before I deal with the pertinent question on the merits of this matter, I want to address the preliminary issue that has been raised by the respondent. The respondent argues that the deponent of the applicant's founding affidavit Mr. Benjamin Strydom has no personal knowledge of this matter. That Mr. Strydom was never involved in the matter, had attended no meetings, had neither sent nor received any related correspondence, and had not submitted the tender or been involved in the formation of the agreement.
- [18] The respondent submit that the confirmatory affidavits attached to Mr. Strydom's replying affidavit of Ms. Musa Tleane, Mr. Deon Els, and Mr. Anees Mayet are vague and meaningless. That more was required of them. Further,

they had to explain in clear and detailed terms their respective roles in this matter.

[19] In reply, the applicant denies that Mr. Strydom has no personal knowledge of this matter. The applicant submits that Mr. Strydom's replying affidavit fully explains the source of knowledge of the facts that the deponent has. That the explanation is complete and should accordingly be accepted.

[20] In his replying affidavit, Mr. Strydom testified that he is the managing executive of the applicant. He avers that the applicant's Oracle unit reports to him and it is part of his responsibility. Mr. Strydom continues and testify that he was involved with considering the RFQ and approving the quotation submitted to the respondent. Further, Mr. Strydom submits he had sight of the correspondence exchanges between the applicant and the respondent which is attached to the pleadings herein, and that he knows the contents thereof.

[21] Taking into account the manner, time, and nature of involvement of Mr. Strydom in this matter, I am satisfied that he has sufficient, relevant, and intricate knowledge of this matter. Mr. Strydom's claim of his involvement and participation in this matter is corroborated by Ms. Tleane, Mr. Els, and Mr. Mayet. Accordingly, the respondent's claim that the deponent of the applicant's founding affidavit has no personal knowledge of this matter is dismissed.

MATERIAL DISPUTES OF FACTS

[22] I now turn to deal with the question of whether there exist material disputes of facts in the matter.

[23] In argument, the applicant submits that there is no merit to this contention. The applicant insists that the facts of the conclusion of the contract are common cause. That the issuing of the IPW, by the respondent, the acceptance thereof by the applicants, the acquisition of the licenses and

services to be provided in terms thereof, and the price are clear on the face of the IPW.

[24] Further, the applicant submits that the respondent does not dispute that it received the letter of Welcome from Oracle which confirms that the licenses and services are available for use by the respondent. That the respondent admits that it received the Taleo license which was provided in terms of the same IPW. Accordingly, says the applicant, there is therefore no real dispute of fact whether or not the respondent received the licenses in the IPW and the letter from Oracle

[25] The high water mark of the respondent's claim of the existence of material dispute of facts is the issue surrounding the fact whether the applicant delivered the licenses to the respondent and the applicant's claim for payment of R85 479 535.26.

[26] For this submission, the respondent submits that its Head of Legal Services wrote to the applicant in which he asserted that the respondent denies the applicant delivered all the licenses entitlements and further that the CoE has had access to and right of use of all the licenses.

[27] The principles regarding the determination of facts in applications in our law are well established. The general rule was set out succinctly by Corbet JA's judgment in *Plascon- Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd*.² He defined the rule for the resolution of disputes of fact as follows:-

"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavit which have been admitted by the respondent together with the facts alleged by the respondent, justify such order".

² (53/84) [1984] ZASCA 51 (21 May 1984)

- [28] In *National Director of Public Prosecutions v Zuma*³, Harms DP said applications are designed to deal with legal issues on common cause facts. Unfortunately, few applications meet this idealized standard, with the result that rules have been developed to determine how disputes of fact should be dealt with in application proceedings.
- [29] Heher JA in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*,⁴ restated that *"an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers"*.
- [30] I consider the respondent's allegations that the applicant did not deliver the licenses to have no legal basis and fall to be dismissed. This is because the facts before me indicate that the keys to licenses were delivered by the applicant to the respondent on 28 August 2020 by making the keys to their utilization available to the respondent. This fact is supported first, by the evidence of Mr. Els an employee of the applicant, and confirmed in full by the evidence of Mr. Mayet an employee of Oracle, who testified that indeed the keys to the licenses were delivered to the respondent by letter on the 28 August 2020 and confirmed by letter from Oracle dated 1 September 2020.
- [31] Significantly, the respondent does not deny that it received the Taleo licenses and has offered to settle the amount that relates to the Taleo licenses. However, the respondent does not deny the applicant's submission that the Taleo licenses were delivered simultaneously by Oracle and the applicant by the 28 August 2020 letter. This simply means that, when the respondent admits delivery of the Taleo licenses, the respondent must simultaneously admit the delivery of the rest of the licenses as per IPW as all the keys to the licenses were delivered to the respondent by the applicant all at once.

³ (573/08) [2009] ZASCA 1 (12 Jan 2009)

⁴ (66/2007) [2008] ZASCA 6 (10 March 2008)

- [32] Critically, the Request for Cancellation by the respondent to the applicant is silent on the issue of none delivery of the licenses by the applicant to the respondent. Also, nowhere is it disputed by the respondent that it awarded the IPW to the applicant and that the applicant purchased and delivered the licenses to the respondent. The respondent submission in this regard is an after-thought as it was raised for the first by the respondent in the answering affidavit, the same falls to be dismissed.
- [33] Considering all of the above, it is my considered view that there are no material disputes of facts in this matter.

TACIT TERMS

- [34] I now turn to deal with the question of whether expressly, by implication, or tacitly on the evidence before this Court the parties agreed that the provisions of licenses in terms of the IPW would be deferred until the respondent would be able to use them after it had migrated from the existing IBM environment to new Huawei infrastructure.
- [35] Before this Court, *Adv Baloyi SC* for the applicant submitted that evidence before this court does not support an agreement to defer compliance with the IPW. The applicant contends that there is no express or unequivocal evidence of conduct or circumstances from which it appears, on a balance of probabilities, that the parties agreed to defer provisions of the licenses as alleged by the respondent. Further, that the respondent's contentions are not supported by the RFQ on which the respondent relies.
- [36] Finally, the applicant contends the IPW stipulates that no other terms outside of the IPW apply to the procurement of licenses and services listed therein. The applicants insist that this is a sensible meaning that must be preferred. That, the terms sought to be imported by the respondent " leads to insensible or unbusinesslike results" in that it contemplates that notwithstanding the duration of 12 (twelve months) and the purchase price agreed on the IPW, the parties contracted for an undetermined and uncertain period in the future when


the respondent would be ready to utilise the licenses as alleged by the respondent. I agree.

- [37] On behalf of the respondent, *Adv Hulley SC* submitted that the Municipality wished first to migrate to the Huawei environment and that the additional software licenses were only required to operate in the new environment. The respondent argues that no purpose would have been served in acquiring the additional licenses until the migration had already taken place. Further, that the applicant was aware that the Municipality could not use the licenses in its current environment but needed to migrate first to Huawei.
- [38] The respondent further submits that having regard to the background and surrounding circumstances, the Municipality contends that the express, alternatively tacit terms of the agreement between the parties are in sum, that applicant was not required to procure the licenses immediately in terms of the IPW but that the applicant should have supplied these licenses in the future.
- [39] The principle of interpretation of statute in our law is now well established. In *Firststrand Bank LTD v KJ Foods*, the Supreme Court of Appeal held that in interpreting terms of contract or legislation as the case may be; "the principles enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality and Novartis SA (PTY) Ltd v Maphil Trading (PTY) Ltd* find application. These cases and other earlier ones provide support for the trite proposition that the interpretive process involves considering the words used in the Act in the light of all relevant and admissible context, including the circumstances in which the legislation came into being. Furthermore, as was said in *Endumeni* , "a sensible meaning is to be preferred to the one that leads to insensible or unbusinesslike results "Thus ... the court must consider whether there is a sensible interpretation that can be given to the relevant provisions that will avoid anomalies. Accordingly, in this instance, the approach in the interpretation of the provisions is one that is in sync with the objects of the Act, which includes '[enabling] the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interest of all relevant stakeholders.

- [40] The ICT Instructions to Perform Work signed by the parties on 27 August 2020 contains the following Clause "***No additional clauses are applicable to this scope***", my emphasis. On a clear reading and interpretation of this clause, it is abundantly clear that the contract constituted the entire agreement between the parties. That no additional clauses except those that are specifically included in the contract are binding to the parties. Therefore, the respondent's submission of the existence of express alternatively tacit terms in this contract is baseless and stands to be dismissed. Had the respondent considered these alternative terms to be so crucial, the respondent could have simply included the terms in the ICT contract. Nothing prevented the respondent from including these alternative terms in the contract as this contract was prepared and drawn up by the respondent itself.
- [41] Significantly, the Request For Cancellation by the respondent is silent on this critical issue. The reasons cited by the respondent for the cancellation of the contract is that CeE had difficulties brought as a result of the Covid -19 pandemic, there is no mention that the applicant was not required no procure the licenses as per the IPW.
- [42] Taking all the above into consideration, it is my view that the applicant has made it out its case and the application must succeed

ORDER

1. The contract between the Applicant and Respondent is valid and binding.
2. The Respondent is indebted to the Applicant in the amount of
R85 479 535.26 plus interest.
3. The Respondent is ordered to pay the costs of the Applicant, including the costs of two Counsels.



DLAMINI J

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

Date of hearing: 17 October 2022

Delivered: 31 January 2023

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