

IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA
REPUBLIC OF SOUTH AFRICA

CASE NO: 43363/11

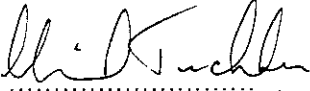
In the matter between:

20/2/2014

ATTACHMENT CORPORATION

Plaintiff

and

(1)	REPORTABLE:	YES / NO
(2)	OF INTEREST TO OTHER JUDGES:	YES / NO
19/02/14 DATE		 SIGNATURE

MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS

Defendant

JUDGMENT

Tuchten J:

- 1 The plaintiff sues the defendant for payment of license fees which it says are due under a written agreement ("the license agreement") concluded between the parties in June 2005. The plaintiff gave the defendant ("the DWA") the right to copy, instal on DWA computers and use a suite of software owned by the plaintiff called EXTRA MainFrame Server Edition 8.1.

- 2 This software enables a number of users, typically geographically dispersed, to access data typically stored by a large concern on its mainframe computer at some central location. In broad terms, the license agreement requires the DWA to select the number of its devices upon which it decides the software should be installed. The DWA must then pay a fee to the plaintiff for each device¹ upon which the software has been installed.
- 3 In addition, the plaintiff claims damages for breach of the terms of the written agreement between the parties in relation to the maintenance of the software. It is common cause on the pleadings that there was such an agreement (which I shall call the "maintenance agreement") and that the terms of the maintenance agreement are to be found in the plaintiff's technical support guide, a copy of which was attached to the particulars of claim.²

¹ The term desktop was used in the evidence to include desktop, laptop and tablet computers; indeed all devices upon which the plaintiff's software could be installed and used.

² There is a third claim, alternative to the license claim, for copyright infringement. In light of my findings, I need not consider this alternative claim.

- 4 There is a mainframe computer ("the mainframe") housed in the premises of SITA.³ The mainframe carries data for all government departments. The DWA's data is thus accessible by the DWA and users authorised by the DWA for this purpose. The DWA used the plaintiff's software to access its data on the mainframe.
- 5 Components of the plaintiff's software were installed⁴ on the mainframe and on individual devices used by DWA employees. Once the component of the plaintiff's software which has been installed on the individual device had been activated, the human user of the device became able, if certain action were taken by the DWA, to access the defendant's data on the mainframe. To enable a user to do so, the DWA had to assign a unique number on its server⁵ to its authorised user. Although, as the system was operated, all users whom the DWA authorised were issued with unique usernames and passwords, the DWA did not tie a user to a specific device.

³ State Information Technology Agency. SITA acted as software procurement agent to all government departments. All such departments have access privileges to the mainframe.

⁴ The term install means to place a thing on an apparatus or system so that the thing is in position for service.

⁵ A server is a system (software and suitable computer hardware) that responds to requests across a computer network to provide, or help to provide, a network service. ([http://en.wikipedia.org/wiki/Server_\(computing\)](http://en.wikipedia.org/wiki/Server_(computing)))

- 6 The software has a number of functionalities but was only intended by the DWA to be used to enable those of its employees, who were required to do so to access certain data stored on the mainframe. Those data were stored in electronic files referred to in the evidence as Persal and Logis respectively. Persal contains human resources data and enables government employees to be identified, certain of their employment information to be accessed and their salaries to be paid from time to time. Logis relates to the purchase of goods and services by the DWA, the warehouses in which such items are kept and for payment for what was purchased. The evidence shows that save perhaps for a few highly placed managerial personnel, employees would work on Persal or on Logis but not on both.
- 7 The mainframe component of the software was installed by the plaintiff's technicians. But the component to be used by the individual human users ("the user component") within the DWA was provided to the DWA through a suite of programs ("the installation software") which enabled the DWA to load and install the software onto the devices within the department, described in technical terms as its environment. DWA technicians loaded the user software on each individual device.

- 8 Once the user component was installed on a device, the software became functional. But the DWA sought to restrict access to its Persal and Logis data through the requirement of the software that it be configured for such access. In the first place, an officer whose work required access to Persal or Logis had to make a written application, supported by her supervisor. If the application were approved, when manual installation was the way the software was loaded, a technician would instal and configure the software using an electronic tool provided with the user component called an installation wizard. Once the configuration process had been completed, the software was activated, in the sense that I use that term in paragraph 5 above.
- 9 The installation process required the inputting in a box on the screen generated by the installation wizard of an access code, which was supplied to the DWA technicians but not to its users generally. Certain other rather esoteric information had to be inputted through the wizard during the installation process.
- 10 One of the screens generated by the wizard related to what was called Centralised Management. Centralised management was achieved through a centralised management server ("the CMS"), a computer device connected between the individual device and the mainframe. As explained in the wizard itself, the CMS enabled the appropriate

administrator to manage, update and distribute certain data to all devices connected to the CMS. A further box on the same screen invited the human user of the wizard to "Require product activation on first use". The human user of the wizard could select product activation on first use by placing an electronic tick in the box provided for this purpose. If this box were not ticked, then product activation was not achieved.⁶

- 11 In June 2005, under the license agreement, the DWA bought from the plaintiff the rights to make 300 copies of the plaintiff's software, to install the software on devices within the DWA's environment and to use the functionalities provided by the software. The price paid by the DWA was R455 per copy. This was the unit price negotiated between the plaintiff and SITA as agent for government departments including the DWA and is significantly lower than the price that the plaintiff would have charged a customer who bought the rights in respect of a single copy of the software.
- 12 In addition to conferring these rights on the DWA, the plaintiff undertook to maintain the software until the end of April 2006. This was achieved under a written agreement ("the maintenance agreement"). The terms of the maintenance agreement appear from

⁶ This information is relevant to a defence raised by the defendant.

a section in the plaintiff's technical support guide version 6.14 called Attachmate Maintenance Program. It was common cause on the pleadings that this section of the technical support guide governed the maintenance and support which the plaintiff provided in respect of the software. The maintenance agreement provides for its annual renewal at the election of the customer.

- 13 The plaintiff's policy is and has at all relevant times been that a customer is free to decline to buy any maintenance contracts at all but that if the customer does want the plaintiff's maintenance services, the customer must pay a maintenance fee for every copy of the software which the customer was entitled to make. The DWA elected to receive maintenance after April 2006 and paid maintenance fees of R204 per copy for 300 copies. The plaintiff's pricing is based on the US dollar, which consistently appreciated against the rand, thereby causing the annual maintenance fee to increase progressively.
- 14 The license agreement provides for the plaintiff to issue what is called a licensed units certificate. Only after the issue of a licensed units certificate was the DWA entitled to install and use the software. And then only on devices to the number of licensed units reflected in the certificate. The plaintiff issued such a certificate, in respect of the 300 copies of the software which the DWA was entitled to make.

15 It seems likely on the evidence that from the outset of the relationship the DWA did not pay much regard to its obligation to make no more than 300 copies of the plaintiff's software. In the course of maintaining the software, the plaintiff discovered that the DWA had made and installed a total of 660 copies of the plaintiff's software on devices within its environment. The parties entered into negotiations to regularise the position. In 2006, the plaintiff agreed to sell the DWA the right, at the same prices of R455 per copy and R204 maintenance fee, to make, instal and use an additional 360 copies of the plaintiff's software.

16 The DWA however continued, it seems entirely promiscuously, to make, install and use additional copies of the plaintiff's software on devices within its environment in excess of the increased number of 660 copies which it was licensed to make. It is unnecessary to analyse the reasons why it did so. The primary questions as framed by the pleaded license fee claim are, firstly, how many copies in excess of 660 were made by the DWA; secondly, whether the written agreement between the parties rendered the DWA liable to pay the plaintiff for the copies made by the DWA in excess of 660; and, thirdly and subject to a determination on liability, what amount per copy the DWA is liable to pay. In addition, the plaintiff claims that the maintenance agreement obliged the DWA (which, as I have said, elected to receive

maintenance from the plaintiff in respect of its authorised copies) to buy maintenance contracts in respect of the additional, unauthorised copies in excess of 660.

- 17 The South African law in relation to the interpretation of documents is clear. The starting point is the language. But the document must be construed in the light of its context, the apparent purpose to which it is directed and the material known to those responsible for its production. These latter considerations are not secondary matters introduced to resolve linguistic uncertainty but are fundamental to the process of interpretation from the outset.⁷
- 18 I turn to an analysis of the provisions of the license agreement. The references which follow are to clauses in the license agreement,
- 19 The starting point is that the license granted by the plaintiff permits the purchaser to use a copy of the software on a single device only. The purchaser may only begin to use any software so installed by it once the plaintiff has issued the purchaser with a licensed unit certificate. This certificate licenses a specific number of licensed units.⁸

⁷ *Dexgroup (Pty Ltd v Trustco Group International (Pty) Ltd and Others* 2013 6 SA 520 SCA para 16. See also *KPMG Chartered Accountants (SA) Securefin and Another* 2009 4 SA 399 SCA paras 39 and 40 ; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 SCA paras 18 and 19.

⁸ Clauses 1(f), 2(a) and 2(b).

- 20 The license agreement allows only one situation under which the purchaser of the software may load onto devices copies of the software in excess of the number of units specified in the licensed unit certificate. This is provided for in clause 2(f) which reads:

This section applies to the [user component of the software]. If you select the Central Management and Require Installation options, then [the plaintiff] grants you the right to install images or copies of the [user component] on unlimited number of devices within your company/organisation ("the Unpaid Copies"), provided you have a process in place that prevents Devices or users from running or using the Unpaid Copies. You must purchase an additional unit of the SOFTWARE for every copy of [the user component of the software] that you want to run or use on a Device. No Device (or user) may run or use any Unpaid Copies.

- 21 The purpose of the conditional permission in clause 2(f) to make copies of the software for which the customer did not have to pay was explained in the evidence. The plaintiff's pricing policy was to charge for each copy of the software the customer elected to make. But the plaintiff recognised that within a customer's organisation there might not be certainty as to the number of devices on which the customer might need to run the software. It might suit the customer to install the software on a greater number of devices than reflected by the number of licensed units recorded in the licensed unit certificate. This would

cater for the possibility that the customer might need to increase the number of licensed units at its disposal.

22 But until the number of licensed units was increased, the license agreement restricted the customer from making copies of the plaintiff's software in excess of the number permitted under the licensed unit certificate. Only in the situation contemplated in clause 2(f) is a customer entitled to make copies of the plaintiff's software in excess of that number.

23 The meaning of "Central Management and Require Installation options" within clause 2(f) was explained in the evidence. These options are available during the process of configuring the software for use by the user of a device after the software has been installed on the device. As I have explained, this process of configuration was performed by a DWA technician through the use of the electronic tool called the installation wizard.

24 The evidence given on behalf of the DWA, which was uncontradicted and which I accept, was that there were two ways in which the software could be installed on a DWA device. The first way was that the technician manually accessed the installation package of the software to be found on the DWA's server and used it to install the

user component on a single device at a time. To perform the installation, the technician used the installation wizard. At the point the wizard called for elections⁹ in relation to the Central Management and Require Installation options, the technician would routinely select the Central Management option. But, routinely, the technician would NOT select the Require Installation option.

- 25 The second way the software was installed was like this: in the course of replacing aged devices within its environment, the DWA bought a number of devices branded as Mecer, from Mustek, the supplier of Mecer devices to the DWA. The DWA technicians prepared a sample hard drive within a Mecer device of the model the DWA had ordered. On this sample hard drive the DWA technicians installed the software which the DWA required to be delivered on each Mecer device of the same model which it had ordered from Mustek. The software installed on that sample hard drive included the user component of the software. Mustek then cloned the sample hard drive⁹ and installed the hard drives so cloned in all the Mecer devices of the same model as the sample provided by the DWA.

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ie copied the software on the sample hard drive onto other hard drives so that the sample hard drive and the copies carried identical software.

26 The evidence on behalf of the DWA was that it was unable to determine how many of these Mecer devices it ordered or received. Apparently the records of the DWA did not reflect these data and the request to Mustek itself by the DWA was made too late for Mustek to gather the information, if indeed Mustek were able to do so.

27 Because the software was preloaded onto these Mecer devices, these devices were delivered to the DWA with the plaintiff's software already installed. That meant that it was unnecessary for a DWA technician to *install* it by accessing the installation software on the DWA's server. But it still had to be configured. This was done, according to the DWA evidence, by using that part of the installation wizard that provided for configuration. In such a case, too, the Central Management option was selected but the Require Installation option was not.

28 Clause 11 of the agreement reads:

AUDIT: At [the plaintiff's] request and upon ten (10) days prior written notice, a representative [of the plaintiff] or an independent auditor selected by [the plaintiff] may inspect and audit your computers and records for compliance with this License Agreement and Licensed Unit(s) Certificate, during your normal business hours and no more than twice a year. You shall fully cooperate with such audit and provide any necessary assistance and access to all records and computers. If an audit reveals that you possess or at any

time possessed unlicensed copies of the SOFTWARE, you will promptly pay [the plaintiff] **the applicable license fee for such unlicensed copies.** (my emphasis)

- 29 The plaintiff received information which indicated that the DWA had installed copies of the software in excess of the permitted number, ie 660. Its South African representatives tried, as they had done before, to resolve the problem through negotiation. In this the plaintiff was unsuccessful. It is unnecessary to analyse why these negotiations failed. I however find that the negotiations did not fail from any lack of patience or failure to supply relevant information on the part of the plaintiff.
- 30 The plaintiff resorted to clause 11. It called for an audit. The audit was performed by a firm called KPMG. The audit by KPMG established that as at 7 December 2009, the DWA possessed 1 564 unlicensed copies of the software. It was common cause at the trial that this conclusion was correct and that at the time KPMG did its audit, the DWA possessed (within the meaning of cause 11) that number of unlicensed copies. But the plaintiff contended for a higher number.

- 31 A factual dispute at the trial was therefore whether the figure of 1 564 was definitive of the number of unlicensed copies or whether the DWA had been in possession of more than this number and had deleted some copies before the audit by KPMG was undertaken.
- 32 The case for the plaintiff, which bears the onus on this issue, centres upon two statements made by a Mr Botha, who was not called as a witness. Botha was a consultant to but not an employee of the DWA and headed a team of technicians to whom the task had been given to administer the installation and operation of the plaintiff's software on devices within the DWA environment. There was a close relationship between Botha and his team and the DWA. Botha and his team had office space allocated to them within the DWA head office.
- 33 There were at the relevant time 5 204 devices within the DWA environment. The KPMG investigation revealed only 2 224 devices in all on which the software had been installed. There is no evidence of any deletion of the software from DWA devices before KPMG did its audit. The plaintiff asks me to draw the inference that a substantial number of copies (more than 2 000) had been deleted from the devices upon which they had been installed by the process of uninstalling the plaintiff's software.

- 34 Inferential reasoning in a civil case must be undertaken in accordance with the principles articulated in *R v Blom* 1939 AD 188, with appropriate adjustments for the difference in the onus of proof in civil and criminal cases. This was recognised in *MacLeod v Rens* 1997 3 SA 1039 E at 1048I-1049C where the court held that the inference sought to be drawn had to be consistent with all the proved facts. If it were not, the inference could not be drawn. The proved facts should be such as to render the inference sought to be drawn more probable than any other reasonable inference. If they allowed for another more or equally probable inference, the inference sought to be drawn could not prevail.
- 35 Arising from the plaintiff's assertion that the DWA appeared to have made unauthorised copies of the software, Botha was interviewed by KPMG in relation to the audit that KPMG had been mandated to undertake. At a later stage the DWA conducted its own investigation through auditors PwC and Botha was interviewed by PwC as well.
- 36 Both auditors produced reports. In addition KPMG kept minutes of its meeting with, *inter alios*, Botha. The evidence establishes that at a meeting on 16 November 2009, Botha told KPMG:

90% of desktops in the environment are imaged with Attachmate software but the user cannot use the application without the license key.

- 37 The evidence of what Botha told PwC emerges from PwC's report which was sent to the DWA under cover of a letter dated 13 June 2011. The report was the subject of a notice by the plaintiff under rule 35(10). This subrule reads:

Any party may give to any other party who has made discovery of a document or tape recording notice to produce at the hearing the original of such document or tape recording, not being a privileged document or tape recording, in such party's possession. Such notice shall be given not less than five days before the hearing but may, if the court so allows, be given during the course of the hearing. If any such notice is so given, the party giving the same may require the party to whom notice is given to produce the said document or tape recording in court and shall be entitled, without calling any witness, to hand in the said document, which shall be receivable in evidence to the same extent as if it had been produced in evidence by the party to whom notice is given.

- 38 The PwC report is thus receivable in evidence as if it had been produced by the DWA. The case was argued on both sides, however, as if this established that Botha in fact told PwC precisely what appears in the report and I shall assume in favour of the plaintiff that he did so. On that footing, Botha told PwC:

All computers used by DWA employees had the [plaintiff's] software installed.

39 Counsel for the plaintiff submitted that these statements by Botha, while admittedly hearsay, were receivable for the truth of their contents. Counsel relied upon the proposition that a statement by a third person is admissible against a litigant if the litigant expressly or by implication authorised that third person to speak on her behalf and then made a statement adverse to the litigant. I was referred generally to *LAWSA* vol 9 (2nd ed) para 736 and *Makhathini v Road Accident Fund* 2002 1 SA 511 SCA paras 15-22.

40 The position in relation to hearsay in a civil case is regulated by s 3 of the Civil Proceedings Evidence Act, 25 of 1965. I need not quote these provisions because their effect was authoritatively summarised in *Makhathini* para 22:

Hearsay evidence is not, as a general rule, admissible. A long recognised exception to the rule occurs where the contested hearsay statement amounts to an admission made by a party to the litigation and, by extension, by someone who has an identity of interest with such a party. ... Before the advent of the Act statements made by strangers to a suit which were construed as admissions were not admissible unless they fell within the exceptions referred to in para

[19].¹⁰ Now such statements are examined to see whether they fall within the statutory definition of hearsay evidence. If they do they are then measured against the requirements set out in s (3)(1)(c)(i)-(vii) and are admitted if they pass muster.

41 The factors enumerated in s 3(1)(c) include the probative value of the evidence and the reason why the evidence was not given by the person upon whose credibility the probative value of the evidence depends. The factors specifically listed in s 3(1)(c) are not a closed list. Under s 3(1)(c)(vii) the court must take into account any other factor which in the opinion of the court should be taken into account.

42 Although there was no evidence as to the availability of Botha, the case was argued by both sets of counsel on the basis that Botha was indeed available and should have been called by the other side. I can see no reason why the plaintiff, which sought to rely on Botha's evidence, should not have called him. It was suggested that because of his relationship with the DWA, he was the "defendant's witness". I do not agree. He was not an employee but a consultant. I find nothing in the evidence to support the submission of counsel for the plaintiff that Botha was authorised to speak for the DWA, whether expressly or impliedly. Plainly he was interviewed not as the representative of

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Of the judgment in *Makhathini* from which I am quoting. It is unnecessary for present purposes to consider these exceptions.

the DWA but as someone who might be expected to give relevant information to the interviewers.

43 Botha's statements taken in context amount to no more than impressions and, moreover, are contradictory. There is no explanation why he told KPMG in 2009 that 90% of the devices had been loaded with the plaintiff's software but told PwC in 2011 that *all* computers used by DWA employees had the plaintiff's software installed. I think that Botha's statements are inherently unreliable.

44 This unreliability is aggravated when the other evidence on the point is considered under the rubric of any other factor.

45 The reference by Botha to imaging in his statement to KPMG must be a reference to the imaging process undertaken by Mustek in relation to the cloned hard drives loaded by them on the Mecer devices supplied by Mustek to the DWA. No witness from Mustek was called and none of Mustek's documents were tendered in evidence. Mr Homsby and Mr de Beer testified for the DWA on this issue.

46 Before I deal with their evidence I must point out that the DWA was unable to produce any records of its own which showed, or even tended to show how many copies of the plaintiff's software had been

installed on DWA devices or even how many relevantly imaged Mecor devices had been received from Mustek. Mr Kingma, a member of the plaintiff's sales team, who tried to negotiate a resolution to the claims presently before me, said after being pressed to do so by the court, that he found the DWA to be in disarray in relation to the present dispute. I think that the evidence as a whole demonstrates that this assessment is accurate and explains the DWA's inability to provide this information. There was no conspiracy to suppress information in this regard.

- 47 Homsby was a member of Botha's team of consultant technicians. He physically performed manual installations of the plaintiff's software. He was not asked to perform any uninstallations of the plaintiff's software before December 2009. But at a later date a decision was made to configure access to the mainframe through a new gateway management server for those persons in the DWA who were actually required to do so. Homsby himself did so for every device at the DWA head office and kept a record of who needed such access and who did not. He was then instructed to remove the plaintiff's software from the devices of those persons who did not need to connect to the mainframe, which he did centrally by running a script, ie an instruction to all affected devices to uninstall. This was clearly an arduous task which, Homsby said, took him about a month to complete.

48 Homsby did know of any management decision within the DWA before December 2009 to uninstall the plaintiff's software. He was unable to estimate a percentage of DWA devices onto which the plaintiff's software had been loaded but differed from the views expressed by Botha in the statements I have quoted. He thought that the true figure was not even remotely close to 90%.

49 According to Homsby, until 2011 users could install and uninstall programs from DWA devices without restriction. After that the privilege was restricted to designated administrators. So it was technically possible for any user to uninstall the plaintiff's software before KPMG undertook their audit. But I think that the probabilities are against any uninstallation by a significant number of DWA employees. Those who needed the software to do their work would not have been able to do their work after an uninstallation and would have had to ask for technical help to re-install it. This is because such a user would not be in possession of the license key or the technical skills to configure the software. Those who did not use the software had no interest in uninstalling it and would be unlikely to know what impact an uninstallation would have on the capacity of their devices to do the tasks they were required to perform.

50 This leaves the speculative possibility, suggested by counsel for the plaintiff, that a coterie of officials within the DWA undertook a clandestine uninstallation campaign to defeat the plaintiff's claim by removing electronic evidence. With respect to the great industry applied by counsel to their brief, I do not think that this argument has any foundation in the evidence. The proposition conflicts with the evidence that the DWA was in disarray. If the hypothetical coterie had decided to defeat the plaintiff's claim, one wonders why they left behind the 1 564 unauthorised copies which the KPMG audit revealed. One wonders too how the coterie identified those DWA employees who actually needed the plaintiff's software and how, when and why they would have undertaken this arduous, personally unrewarding and career threatening action without reference to the technicians such as Homsby who would actually have the skills, if not the motivation, to do something like that.

51 The likelihood is that the unauthorised copies were made negligently and without a proper appreciation of the plaintiff's rights and the DWA's obligations. There is no suggestion in the evidence that any specific official, let alone any coterie of officials, stood to get into trouble as a result of the unlawful copying. No motive for a secret uninstallation campaign has been suggested, let alone established, on the evidence. I accordingly find that there was no wholesale

uninstallation campaign. It then follows that the conclusion derived from the KPMG report, that at December 2009 1 564 unlicensed copies were in existence, is a fair reflection of the number of unauthorised copies which in fact had been made and thus of the number of unlicensed copies of the software which the DWA possessed. On that ground alone, the estimates expressed in Botha's statements are thoroughly unreliable.

52 Homsby was similarly unable to estimate on how many Mecer devices the image had been cloned. Evidence in this regard was also given by De Beer, who was at first a contractor to the DWA but in 2006 was appointed IT infrastructure manager within the DWA. De Beer made quite considerable efforts to establish the number of devices upon which the image I have described had been cloned. He could not find any useful records in the DWA and approached Mustek. His evidence was that because of the age of the transactions, Mustek were unable to find any useful records by the time of the trial.

53 De Beer was adamant that the most devices the DWA ever bought from Mustek at one time would have been in the order of 100. The departmental budget would not allow for larger orders. He would have been very surprised to hear that any order exceeded 125 devices. This is important because an image is devised for a specific model

only. It is notorious that rapid model changes in that industry are the rule, rather than the exception, as technological advances and savings in component costs are achieved. De Beer's view, which I find plausible, is that the likelihood was that the Mecer model within which the imaged hard drive had been developed would have been superceded by new models quite quickly. As the image had been developed for one Mecer model only, De Beer reasoned, it was unlikely that the cloned hard drives had been supplied in great numbers. I find therefore, that the inference sought to be drawn by the plaintiff is inconsistent with the proven facts and is not the only reasonable inference.

54 On these grounds, I exercise my discretion against the admission of Botha's statements for the truth of their contents. The plaintiff has accordingly failed to prove that the DWA ever possessed more than 1 564 unlicensed copies of the software.

55 As to credibility, counsel did not advance any arguments in relation to credibility or suggest that any of the witnesses who testified before me were otherwise than trying to tell the truth as they saw it. The weight to be accorded to any specific evidence is of course something else. My own impression is that all the witnesses who testified in the trial were trying to tell the truth and were generally reliable. I have only one

reservation, and that of a minor order. I think that the evidence of Mr Gates, the plaintiff's director of license compliance, might have been coloured by his zeal to promote the plaintiff's interests and enable the plaintiff to exact from the defendant the very maximum the law might be persuaded to allow.

56 It follows that the question of the DWA's liability must be assessed on the basis that the plaintiff has proved on a balance of probabilities that the DWA possessed 1 564 unlicensed copies of the plaintiff's software.

57 It was conceded by counsel for the DWA that the DWA could only escape liability in principle under clause 11 if it could bring itself within clause 2(f) of the license agreement.

58 It was accepted by the DWA, indeed it was the evidence of Homsby, the DWA technical witness, that the Require Activation option had never been selected during the configuration process.

59 Counsel for the plaintiff submitted that that was the end of the clause 2(f) enquiry: that unless the two conditions, Central Management and Require Activation, were selected, the DWA could not claim the protection of clause 2(f).

60 The argument for the DWA, shortly stated, is that when clause 2(f) is read in its context and its purpose, preventing abuse of the software, is born in mind, then "... select Central Management *and* Require Activation installation options ..." should be read as "... select Central Management *or* Require Activation installation options ...".

61 I am simply unable to read the clause in the way proposed by counsel for the DWA. It was not suggested either in the evidence or in argument that any one of the two options by themselves would confer protection against abuse of the same order as the selection of both options would do. The language is clear. I find that the DWA cannot bring itself within clause 2(f) because the Require Activation option was not selected.

62 In the result, on the DWA's own version, it did not bring itself within the conditional protection provided by clause 2(f). The DWA therefore breached the agreement by installing, on devices within its environment, copies of the software in excess of 660, made up as to the 300 initially licensed plus the additional 360 which it bought when its unlawful copying was detected in 2006.

63 This conclusion makes it unnecessary for me to consider whether the proviso, that the DWA should have a "process in place that prevents, Devices or users from running or using the Unpaid Copies", has been met. It follows that the DWA is liable, in the language of clause 11 of the license agreement, "promptly [to] pay [the plaintiff] the applicable license fee for such unlicensed copies". What is the applicable license fee? I shall deal later with this question.

64 I proceed to the claim for damages for breach of the maintenance agreement. I shall set out the claim as pleaded by the plaintiff:

32 The [DWA] was obliged in terms of the [maintenance agreement] to purchase from the plaintiff maintenance for all copies of the ... software it was licensed to use in terms of the [license agreement].

33 The [DWA] breached the terms of the [maintenance agreement] in that as at March/April 2006, as appears from the PwC Review, the [DWA] was in possession of 4 544¹¹ copies of the ... software in respect of which the [DWA] did not purchase maintenance and technical support but in respect of which the [DWA] was able to avail itself of the maintenance and technical support provided by the plaintiff in respect of the licensed copies of the ...software.

¹¹ I have found that the plaintiff has only proved 1 564 unlicensed copies. This does not affect the merits of the maintenance claim; only the quantum.

34 At the time the [DWA] purchased the maintenance and technical support and accepted the terms of the [maintenance agreement] the [DWA] was aware that the [DWA] would have to pay for maintenance and support for all copies of the ... software, were the unlicensed programs licensed.

35 The plaintiff suffered damages directly as a result of the [DWA]'s breach of the terms of the [maintenance agreement] **in that the [DWA] appropriated maintenance and support provided in terms of the 660 licensed copies of the 660 licensed copies of the [software] in order to maintain and support the 4 544 unlicensed copies of the ... software. [my emphasis]**

65 The evidence does not support the allegation that the unlicensed copies were all maintained. The evidence on behalf of the DWA was that there were never more than 660 active users of the software and that the unlicensed copies, while installed, were never used unless configured by one of the DWA technicians. On that basis, none of the unlicensed copies would ever have required maintenance unless so configured and then used. The evidence of Homsby was that once a user had been authorised on written application to access Persal or Logis on the mainframe, he or one of his technician colleagues loaded (if necessary) and configured the software, starting by inputting the license key, which was unknown to the lay user. In addition, the lay user who had not been authorised to access the mainframe for this

purpose had no reason to try to run the software except, perhaps out of curiosity, and would certainly not have asked for or received maintenance for software she was not required by her job description to use.

66 But the trial was not run on the basis that the damages alleged in paragraph 35 of the particulars of claim were not proved. The case for the plaintiff was that once the DWA had elected to receive maintenance for the licensed copies of the software and had further elected to load the unauthorised copies, the position was as if the DWA had bought the unauthorised copies in the regular, normal course. In such a case, ie where a client had elected to receive maintenance, the plaintiff's policy was only to agree to supply such maintenance for *all* the licensed copies. By failing to license its additional copies and have the additional copies added to the maintenance agreement, the plaintiff argued, the defendant had breached the maintenance agreement and the plaintiff was entitled to damages as a surrogate for performance, which in this case amounted to the maintenance fees themselves for the additional copies because there were no saved costs to be deducted.

67 Counsel for the plaintiff relied on the provision in the maintenance agreement to be found under the heading "How to purchase or Renew Maintenance":

Typically, a maintenance plan is purchased at the time of your initial ... software purchase and is renewed annually on your purchase anniversary. You can add to your maintenance plans as you acquire new Attachmate products. Each Attachmate product must be covered by its own maintenance plan. Maintenance for a specified product must be purchased for all licensed copies of the plan.

68 Counsel for the DWA, however, submitted that there is no provision in the maintenance agreement that renders the DWA liable to pay a maintenance fee for an *unlicensed* copy of the software.

69 I confess that during argument on the point I found the argument advanced by counsel for the plaintiff beguiling. However, on reflection, I believe that the submission of counsel for the defendant is correct. The license and maintenance agreements are separate and distinct agreements. They are related and each forms part of the context for the interpretation of the other. But each has its own separate provisions. There is no express term in the maintenance agreement which obliges the DWA to take out a maintenance contract in respect

of an unlicensed copy of the software. When the plaintiff's maintenance claim cause of action arose, the unlicensed copies were just that: unlicensed copies. Even though I have found for the plaintiff that it is entitled in principle to be remunerated in respect of the unlicensed copied under clause 11 of the license agreement, the unlicensed copies remain unlicensed copies. If they still existed, the DWA would not be entitled to use them because it does not have a licensed units certificate in respect of the unlicensed copies.

70 The maintenance agreement expressly requires maintenance agreements to cover all licensed copies. The plaintiff has not pleaded a tacit term that obliges the DWA to purchase a maintenance plan for an unlicensed copy. I think that counsel for the DWA are correct that such a tacit term should not be read into the maintenance agreement because the DWA is not entitled to use an unlicensed copy and therefore cannot require maintenance for an unlicensed copy. But it is not necessary for me finally to come to a conclusion on this point because it was never before me.

71 I therefore find that the plaintiff has not established its claim for damages under the maintenance agreement.

- 72 The next question I must consider is the quantum of the claim under the license agreement. The question is whether an "applicable license fee" can be determined on the evidence. Counsel for the plaintiff argued that there were two possible candidates for applicable license fee: on the one hand, the deeply discounted fee that the plaintiff agreed with SITA to charge government departments such as the DWA and, on the other, the plaintiff's very much higher single unit list price. Counsel for the DWA submitted that the expression "applicable license fee" was too vague to be given a quantifiable meaning but that if it could, the SITA price was the applicable license fee.
- 73 According to the *Shorter Oxford Dictionary*, the word applicable means able to be applied (to a purpose etc), having reference, relevant, suitable, appropriate.
- 74 Logically, the starting point on this topic should be whether the phrase applicable license fee is too vague. In *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* 1997 2 SA 548 AD 561G, the court held that in considering whether an agreement is fatally vague, it must have regard to a number of factual and policy considerations. These include the parties' initial desire to have entered into a binding legal relationship, that language is inherently flexible and should be

approached sensibly and fairly, that contracts are not concluded on the supposition that there will be litigation and that the court should strive to uphold and not to destroy bargains. See also *De Beer v Keyser* 2002 1 SA 827 SCA 834 para 12. In my respectful view these remarks are equally applicable when the enforceability of a provision within an otherwise binding agreement is under consideration.

75 In *Levenstein v Levenstein* 1955 3 SA 615 SR 619, the court classified the void for vagueness cases into four categories. It seems to me that the present case falls within the fourth category, ie that where the unspecified details of the contract are questions of fact capable of determination by evidence.

76 In *Fluxman v Brittain* 1941 AD 273, Tindall JA found that a condition under which the plaintiff would be entitled to draw "moderate" amounts from a business was not void for vagueness and that, while it might not be easy to determine what a moderate amount was at a particular time, such a determination was possible on evidence of the relevant facts. To my mind "applicable" is of the same order as "moderate" in *Fluxman v Brittain* and that evidence is admissible to determine what is relevant, suitable and appropriate in the circumstances of the case.

77 I think that one of the purposes of clause 11 was to provide the plaintiff with a procedure to obtain evidence to determine whether unlicensed copies of its software had been made by the customer and, if so, how many. This evidence would in most cases come from the customer's own records. Absent a measure such as clause 11 in the license agreement, the plaintiff could potentially anticipate a struggle to get the evidence which would ground a claim of unlawful copying. An audit which revealed that the customer possessed unlawful copies triggers an obligation on the part of the customer to pay the appropriate license fee. The plaintiff need in such a case therefore not prove damages. So a further purpose of clause 11 was to make it easier for the plaintiff to recover remuneration in respect of unlicensed copies.

78 The general purpose of the applicable license fee provision, in my view, was to provide a flexible measure to determine a remuneration which would take into account all relevant circumstances in any specific case, including previous dealings between the parties, so as to put the plaintiff in the financial position in which it would have been, as far as license fees are concerned, had the plaintiff agreed to supply additional licensed units to the customer before further copies of the software were made.

79 Counsel for the plaintiff submitted that the purpose of the clause 11 machinery was to discourage unlawful conduct. In the same context, counsel submitted that to find the applicable license fee was a discounted one would offend public policy because it encouraged unlawful conduct. I do not agree with either of these propositions. The written part of the license agreement did not make any provision for the price a purchaser would pay for her license(s). Clause 11 is a provision within the plaintiff's standard terms on which it offers to sell licenses to customers. Clause 11 must be interpreted so that it fits the case, as effectively as may be possible, of the whole spectrum of potential purchasers: from the single unit purchaser right down to the massive volume corporate purchaser (such as SITA in its representative capacity). It would make no commercial sense to punish (or, to use counsels' careful language, deter) the high volume corporate purchaser who overstepped her licensed unit certificate by one unit more severely than a single unit purchaser who exceeded his lawful entitlement by many thousands of units.

80 Counsel were agreed that there is nothing in the license agreement itself that sheds light on the meaning of applicable license fee. The evidence of Mr Gates is that the plaintiff maintains two price lists: a normal price list and a compliance price list. The single unit undiscounted price is the price which the plaintiff, on the strength of

Mr Gates' evidence and the context, urges me to find to be the applicable license fee. There is nothing in the evidence to indicate that the single unit undiscounted price is the applicable license fee except Mr Gates' testimony, which I accept, that it was the policy of the plaintiff not to settle for any lesser amount once the clause 11 audit procedure was under way.

81 There is no evidence that it was brought to the attention of the DWA or even to SITA that the price at which the software was offered to South African government departments or any other customer was a discounted price or that the DWA or SITA were ever made aware that there was such a thing as a compliance price list.

82 I find no justification for the suggestion made by counsel for the plaintiff that the determination of the applicable license fee was to be made unilaterally by the plaintiff.¹² To my mind, the purpose of this phrase is to take the determination of the applicable license fee outside the realm either of negotiation or of determination by either one of the parties.

¹² Counsel made it clear that the suggestion was that the plaintiff had to make the kind of determination characterised by the notion of the *arbitrium boni viri*, the judgment of a fair-minded person.

83 The SITA price, on the other hand, was not only the price at which the parties had contracted from inception, but also the price at which the plaintiff had agreed to contract when the DWA's earlier unauthorised copying had been exposed. The SITA price was, to test it against the dictionary definition of the word applicable, relevant and had been regarded by the parties as suitable and appropriate for their dealings. Had the DWA recognised its unlawful copying which gave rise to this action before the audit had been undertaken, the probability is that the plaintiff would have sold the additional units to the DWA at the SITA price. I recognise the difference between the earlier situation and that which arose as a result of the invocation by the plaintiff of clause 11 but I do not think that this difference is weighty enough, in the light of all the other considerations I have discussed, to carry the day.

84 In the result, I find that the plaintiff has established a right to be paid for 1 564 unauthorised copies at the SITA price. Counsel agreed the arithmetic which would follow this conclusion. Their agreement will be reflected in the order which I shall in due course make.

85 These conclusions make it unnecessary for me to consider the plaintiff's alternative claim for damages for breach of copyright (which was not argued) and a defence of prescription in relation to the

difference between the number of 1 564 copies and an increased number, which the particulars of claim were amended to include.

86 There remains the question of *mora* (post-judgment) interest. The plaintiff originally claimed *mora* interest at 12%, the rate alleged to be applicable under the law of the State of Washington, USA whose law, it was pleaded, governed the contract.¹³ However, the parties agreed that the rate made applicable by the Prescribed Rate of Interest Act, 55 of 1975 would apply in respect of any judgment in favour of the plaintiff. The dispute between the parties is the date from which this *mora* interest should begin to run.

87 In my view the debt the DWA owes the plaintiff arose at the latest on the date the results of the KPMG audit were communicated to the DWA, ie 14 December 2009. This is the date from which the plaintiff claims *mora* interest. The debt was liquidated, ie it did not require quantification by agreement between the parties or by order of court. Clause 11 provides that this debt be paid promptly by the DWA, ie on the date it fell due. The plaintiff is entitled to interest as claimed.

¹³ No evidence of the law applicable in the State of Washington was adduced and I was expressly asked to decide the case on South Africa legal principles.

88 I make the following order:

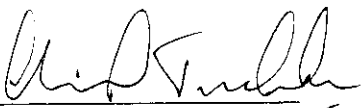
1 In relation to the claim for the applicable license fees, the defendant is ordered to pay the plaintiff:

1.1 the sum of R1 168 495;

1.2 interest on the sum of R1 168 495 at 15,5% per annum from 14 December 2009 to date of payment.

2 The claim for maintenance fees is dismissed.

3 The defendant must pay the plaintiff's costs which are to include the fees of both senior and junior counsel.


NB Tuchten
Judge of the High Court
19 February 2014