THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE:

(2) OF INTEREST TO OTHERS JUDGES:

(3) REVISED

1/11/16

DATE SIGNATURE

1/11/2016

CASE NO: A266/15

In the matter between:

NAMABITI TECHNOLOGIES **APPELLANT**

and

HANDSOME KAHARI **RESPONDENT**

Heard: 8th September 2016

Delivered: 1st November 2016

JUDGMENT

Molahlehi AJ

Introduction

[1] This is an appeal against the judgment and the order by the Magistrate court, Tshwane Central, made under case number 3031/13 and made on 14 January 2015. In terms of the judgment the Magistrate upheld the respondent's claim and accordingly ordered the appellant to pay him the amount of R54 000,00 with costs.

[2] It is apparent from the particulars of the claim of the respondent, that his cause of action was based on specific performance arising from the written contract that he had concluded with the appellant.

Background facts

[3] It is common cause that at the close of the respondent's case during trial the applicant unsuccessfully sought an order of the absolution from the instance. Initially the appellant had intended to lead evidence after its application for the absolution from the instances was dismissed. It later changed its position and

decided not to lead any oral evidence in that regard. The case of the appellant was then closed.

[4] It is common cause that the parties entered into a fixed term contract in terms of which the respondent was to render IT services on behalf of the appellant and such services were to be rendered at DBSA -Midrand. The case of the respondent was not that he rendered the services at the DBSA but that he was deployed to perform work at the City of Tshwane (Tshwane) and that is where he rendered his services in terms of the contract.

[5] The averment that the instruction to render services at Tshwane was given came from a certain Veren, who had convened an interview with the respondent. The interview was held at Tshwane. According to the respondent, he was after the meeting informed by Veren to report at Tshwane the following day.

[6] The following day the respondent reported at Tshwane offices where all arrangements were made for him to perform his duties including being given access to the premises and the IT system.

[7] At the end of the week, the respondent completed the weekly worksheet which he submitted to Veren. The respondent was thereafter assigned to work at Mintek.

Grounds of appeal

[8] The appellant contends that the magistrate erred in concluding that the services which were rendered by the respondent at Tshwane were rendered as part of

the written contract concluded between the parties. The applicant further contended that the magistrate erred in interpreting the agreement to be saying that the assignment location could be changed by the respondent.

[9] As concerning the findings of the law, the appellant contended that the respondent was not entitled to the relief of specific performance because he did not render his services at the DBSA as provided for in the contract.

[10] The other ground raised by the appellant is that the trial court was wrong in entertaining the oral evidence about how the work done at Tshwane formed part of the contract between the parties. This the appellant contended, contravened the parole evidence rule.

The magistrate's decision

[11] As indicate earlier the magistrate upheld the respondent's claim and accordingly ordered the appellant to pay him R54 000,00 with costs. The reasons for the order made was subsequently provided at the request of the appellant. In his decision, the magistrate confirmed that the parties concluded an agreement in terms of which the respondent was to render IT services, "initially at DBSA in Midrand." He further recorded in his judgment that the respondent performed his services at Tshwane. He rejected the contention of the appellant that the respondent was in terms of the agreement bound to exclusively render the services at DBSA Midrand.

The issue

[12] It is apparent from the record that the magistrate was confronted with having to interpret the written agreement between the parties. In this regard, the onus was on the respondent to show that even though the contract expressly provided for work to be done at the DBSA -Midrand, that included work done at Tshwane.

Evaluation

[13] It is common cause that the parties concluded an agreement in terms of which the respondent was to render IT services to the appellant and those services were to be rendered at the DBSA -Midrand. At paragraph 5 of the particulars of claim the respondent states the following:

> ". . . Plaintiff will work at the Development Bank of South Africa (DBSA) Midrand and or as required from time to time by the defendant as per the schedule to the agreement which formed part of the whole agreement as attached."

[14] The case of the respondent was further that after the conclusion of the agreement the applicant arranged for a meeting at Tshwane where he was advised to report for duty there the following day. He performed his duties regularly at Tshwane and submitted his weekly worksheets which showed the services that he had rendered.

[15] The main issue as indicated above relates to the interpretation of the written contract concluded between the parties. It is trite that in interpreting any document the starting point is the language of the document. It has also been

held that the language of a document that is a subject of interpretation must be construed in the light of its context, apparent purpose, and knowledge of those responsible for the production of the document.

[16] In Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd,[1] in confirming what it said in its previous decisions,[2] relating to the approach to adopt when dealing with an interpretation of a document, the Supreme Court of Appeal had the following to say:

> ". . . in interpreting any document the starting point is inevitably the language of the document but it falls to 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. Context, the purpose of the provision under consideration and the background to the preparation and production of the document in question are not secondary matters introduced to resolve linguistic uncertainty but are fundamental to the process of interpretation from the outset. The approach of the arbitrator cannot be faulted in this regard".

[17] The claim of the respondent was based on the specific performance in terms of the written agreement. The respondent conceded during cross-examination that there was no other contract between the parties.

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[1] 2013 (6) SA 520 (SCA).
[2] KPMG Chartered Accountants (SA) v Securefin Ltd [2009] 2 All SA 523 (SCA) par 39) and *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paras 18 and 19.

[18] It has not been pleaded that the contract has been amended. It was also conceded during cross-examination that the respondent was to perform work at the DBSA but never did. The schedule attached to the contract also refers to the client, where the services were to be performed by the respondent, and that was the DBSA -Midrand.

[19] The relevant parts of Clause 13 of the agreement, for the purposes of this judgment reads as follows:

> 19.1 This agreement constitutes the entire agreement between the parties and no representation by either of the parties, or their agents, where they may have prior to or subsequent to the signing of this agreement, shall be binding on either of the parties, unless in writing and signed by both parties hereto.

19.2 No variation, alteration or consensual cancelation of this Agreement or any of the terms thereof, shall be of any force or effect, unless in writing and signed by the parties hereto, save for such terms and conditions as arise out of this Agreement.

19.3 No waiver or abandonment by either party of any of his rights in terms of this Agreement, shall be binding on that party, unless such waiver or abandonment is in writing and signed by the waiving party." The respondent conceded during cross-examination that he had read clause 13.1 and had fully understood its import. He also conceded that any changes to the contract had to be done with the consent of both parties and needed to be done in writing. And more

importantly, he conceded that if changes were to be made from DBSA to Tshwane that needed to be done in writing and be signed by both parties. He also conceded that there was nothing in writing that instructed him to work at Tshwane.

20 The respondent having conceded that he did not perform any duties at the DBSA, the question that pertinently arose before the Magistrate was whether he was entitled to the relief he claimed. In order to succeed in this respect the respondent had, in terms of PA Cooling Services (Pty) Ltd v Church Council of the Full Gospel,[3] to show his readiness and willingness to carry out his obligations under the contract and also tender to do so.

21 It follows from the above analysis that the respondent was not entitled to specific performance and on that ground alone it ought to have been found by the Magistrate that he had not made the averment necessary to sustain his claim. In other words in failing in his pleadings to state that he was ready and willing to carry out his obligations under the contract and also tendered to do so was a basis for the Magistrate to have dismissed the specific performance claim of the respondent.

22 Another aspect of the respondent's case which was not pleaded was that he was required to perform services at Tshwane. It would appear that those instructions were issued to him orally. It is common cause that the contract signed by the respondent makes no reference to rendering services at

[3] 1995 (3) SA 541 (D).

Tshwane. In other words there is no term in the contract that says in addition to rendering the services on behalf of the appellant at the DBSA – Midrand the respondent would in addition do that at Tshwane.

23 In light of the above I am of the view that the appellant has made out a case warranting interference with the decision of the Magistrate and accordingly that decision stands to be set aside.

Order

In the premises the following order is made:

1. The appellant's appeal is upheld.
2. The order of the Magistrate is set aside and substituted with the following:
   i. "The Plaintiff has failed to make out a case for specific performance.
   ii. The Plaintiff's claim is dismissed with costs including costs of counsel and the costs of the appeal.

E MOLAHLEHI AJ

JUDGE OF THE HIGH COURT

I agree and it is ordered

M Twala AJ

JUDGE OF THE HIGH COURT

For the appellant : **ADV CJ WELGEMOED**
Instructed by: **THAPHELO KHARAMETSANE ATTORNEYS**

For the Respondent: **ADV T CHAUKE**
Instructed by : **AMODA ATTORNEYS**