



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

Case No:047934/2022

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

23 DECEMBER 2022

DATE

Meersingh

MEERSINGH A.J.

In the matter between:

TECHSOFT INTERNATIONAL (PTY) LTD

(Registration Number: 2016/365152/07)

And

TIBCO SOFTWARE (SOUTH AFRICA) (PTY) LTD

(Registration Number: 1998/006551/07)

TS INNOVATIONS (PTY) LTD

(Registration Number: 2006/029260/07)

Trading as **TIBCO SOLUTIONS**

TIBCO SOFTWARE INC

(Registration Number: FC020734)

TELKOM SA SOC LTD

(Registration Number: 1991/005476/06)

APPLICANT

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

FOURTH RESPONDENT

(Registration Number: 1951/000009/06)

JUDGMENT

MEERSINGH AJ:

INTRODUCTION:

1. This is an application brought in terms of Rule 6 (12) of the uniform rules of court for the interdictory relief being Part A pending the hearing under Part B alternatively an action to be instituted. This application was enrolled and heard on an urgent basis.

NOTICE OF MOTION

2. Part A is before this court for consideration. The interdictory relief sought is as follows: -

1. The first respondent ("Tibco") is interdicted from giving effect to the cancellation of the Strategic Partnership Agreement in terms of the cancellation notice dated 21 October 2022;
2. Against Techsoft complying with paragraph 3 below Tibco be and is hereby directed to comply with the Partnership Agreement, and in particular to render performance thereunder to Techsoft and to enable Techsoft to fully support and service all customers.
3. That Techsoft be and is hereby directed to comply with its obligations in accordance with the payment addenda and/or the payment plan.
4. That Tibco whether acting directly or indirectly (via its associated entities or otherwise) be and is hereby: -

4.1. Interdicted and restrained from acting in the manners described in the subparagraphs below as it pertains to Techsoft's customers, (such customers to include the fourth respondent ("Telkom") and fifth respondent ("Nedbank") or in relation to any person involved with or connected to the projects: -

4.1.1. From in any manner contacting such persons;

4.1.2. from communicating to such persons: -

4.1.2.1. The status of the Partnership Agreement;

4.1.2.2. That the Partnership Agreement has been cancelled;

4.1.2.3. That Techsoft is unable to deliver software or services that it is able to in terms of the Partnership Agreement or the Assigned Contracts as identified in the founding affidavit ("the Telkom and Nedbank Contracts");

4.1.2.4. That Techsoft is unable to or no longer able to lawfully or legally provide such software and services as it provided under the Partnership Agreement or the assigned contracts;

4.1.2.5. That Techsoft is no longer trading or in existence;

4.1.3. From marketing any services as contemplated by the Partnership Agreement in the Territories as defined or identified in the Partnership Agreement;

3. That the relief set forth in paragraphs 2 to 5 supra is to operate as an interim order and is to operate as interim relief with immediate effect pending: -

1. The final determination of the matters, which require a determination under Part B of the Notice of Motion;
2. Alternatively, an action to be launched by Techsoft within thirty (30) days of the granting of the relief under PART A of the Notice of Motion for the relief envisaged under Part B of the Notice of Motion.

APPLICANT'S CASE

4. The applicant's case is that the applicant concluded a **Partnership agreement** with the first respondent "**Tibco**" which entitled the applicant to distribute, resell and sublicense Tibco's software exclusively in Sub-Saharan Africa.

5. As at the 22nd October 2022 the applicant owed Tibco USD 9 700 413.02.

6. Applicants in its founding affidavit refer to verbal discussions between the applicant and the respondent. These verbal discussions were held between the duly authorised representatives of the Applicant one Mr Koobandhra Naidoo and the respondent one Mr Beller: -

[a] pertaining to the applicants' indebtedness to the respondent as set out in Paragraph 33.1 of the applicant's founding affidavit.

[b] Applicants furnished a payment plan which was emailed to Mr Beller as set in Paragraph 33.3 of the founding affidavit.

[c] Mr Beller accepted the payment plan on the 26th August 2022 as per Paragraph 34 of the founding affidavit.

[d] In accordance with the payment plan being accepted by Mr Beller and the applicant made payment as aforesaid.¹

¹ Founding Affidavit para 34.2.

7. Despite the foregoing, Tibco as at the 22 October 2022:

- [a] prematurely and unlawfully cancelled the Partnership Agreement
- [b] stopped supplying
- [c] services contemplated by the Partnership Agreement, and two further assignment contracts (***Telkom Assignment Agreement*** and the ***Nedbank Assignment Agreement***)
- [d] training
- [e] professional services and

8. Tibco commenced approaching the Applicant's customers directly in an attempt to supply the very same services previously provided by the Company (in terms of the Partnership Agreement) in an attempt to sabotage the Company and carry out a hostile takeover of the Company's business.

9. It is the applicants case that the parties concluded a *pactum de non petendo*, which precluded Tibco from invoking the breach provisions of the Partnership agreement, subject to payment by the Company on a scheduled basis (payment plan). The Company acted in accordance with such at all material times paying Tibco R5'334'319-00.

10. Accordingly the Respondents cancellation of the partnership agreement is unlawful.

FIRST RESPONDENT'S CASE

11. The first respondent's case is that a breach notice was delivered to the applicant in accordance with the partnership agreement as a result of the applicants persistent and continued breach of its payment obligations. The partnership agreement was lawfully cancelled on the 22 October 2022.²

12. As per Paragraph 9.2.3 of the replying affidavit the respondent alleges that the applicant failed to: -

[a] Disclose all or relevant facts relating to Tibco's recent interaction with the applicant.

[b] Disclose the relevant context in which certain of the events arose.

[c] Provide this court with the truthful account of the interactions with the respondent.

13. The First respondent denies that there was an acceptance of the payment plan. The First respondent has been demanding payment of its arrears since March 2022 as set in Paragraph 9.2.4 of its replying affidavit.

14. The applicant is substantially in arrears and has been for a considerable period of time the respondent was entitled to cancel the agreement which they duly did as per Paragraph 9.2.1 on the replying affidavit.

15. The First Respondent alleges that the version of the Applicant is improbable and implausible moreover it is false and fabricated as per Paragraph 9.4 of the replying affidavit.

² *Replying Affidavit para 9.2.1.*

16. It is the First respondent case that no *pactum de non petendo* existed.

17. The applicant submitted that during a telephonic conversation on the 26th August 2022 with one Mr Bellar a duly authorised representative of the First Respondent a proposed payment plan to liquidate the arrear amount owing to the first respondent was accepted. This payment plan was previously emailed to Mr Bellar on the 25 August 2022.

18. This payment plan was accepted by Mr Beller on behalf of the first respondent. The acceptance of this payment plan is borne out by the applicants having made the first payment of R5'334'319-00 on the 1 September 2022 which was in terms of the payment plan.

19. A breach notice was delivered to the applicant on the 16 September 2022 in terms of Section 19.5 of the partnership agreement.

20. The First respondent denies that there was acceptance of this payment plan which is borne out by the First respondent having proceeded in terms of its breach notice dated the 16 September 2022.

21. The First respondent cancelled the partnership agreement on the 22 October 2022 in terms on section 19.5 of the partnership agreement.

22. The applicant has submitted that the cancellation of the partnership agreement was premature. This issue is to be determined in Part B of the application and would require an interpretation of clause 19.5 of the partnership agreement.

REQUIREMENTS FOR AN INTERIM INTERDICT

23. The requirements for an interim interdict are namely:

1. A *prima facie* right albeit open to some doubt,
2. A well-grounded fear of irreparable harm to the applicant if the interim relief is refused and the ultimate relief is granted eventually
3. The absence of a satisfactory alternative remedy, and
4. The balance of convenience favours the grant of interim relief.³

FIRST REQUIREMENT: A PRIMA FACIE RIGHT ALBEIT OPEN TO SOME DOUBT

24. The first question before this court is whether the applicant has shown a *prima facie* right albeit open to some doubt.

25. In determining whether the applicant has established a *prima facie* right, the test for interim relief has been framed as follows:

“The proper approach is to take the fact set out by the applicants together with any facts set out by the respondents, which the applicants cannot dispute, and to consider whether having regard to the inherent probabilities the applicants should, not could, on those facts obtain final relief at the trial. It is also necessary to repeat that although normally stated as a single requirement, the requirement for a right prima facie established, though open to some doubt, involves two stages. Once the prima facie right has been assessed that part of the requirement which refers to the doubt involves a further enquiry in terms whereof the Court looks at the facts set up by the respondent in contradiction

³ *Setlogelo v Setlogelo*, 1914 AD 221 at p. 227, and **Webster v Mitchell** 1948(1) SA 1186 (W).

*of the applicants' case in order to see whether serious doubt is thrown on the applicant's case and if there is a mere contradiction or unconvincing explanation, then the right will be protected. Where, however, there is serious doubt then the applicant cannot succeed."*⁴

26. The applicant relies on the acceptance of the payment plan in order to show its prima facie right.

27. Having regard to papers as filed and having heard counsel on point, this court is unable to make a determination on whether a *pactum de non petendo* existed without the benefit of oral evidence in order to establish whether the applicants do have a prima facie right.

ORDER

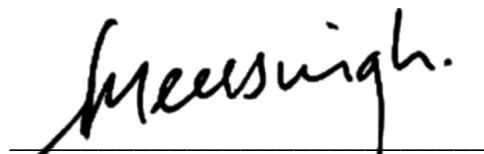
28. Consequently, the following order is made:

28.1 The application is enrolled as an urgent application in terms of Rule 6(12).

28.2 In respect of PART A, the matter is referred for oral evidence on the aspect of the communications between the parties in respect of the payment plan, the acceptance thereof and the *pactum de non petendo*.

⁴ **Webster v Mitchell** 1948(1) SA 1186 (W) at 1189; **Gool v Minister of Justice and Another** 1955(2) SA 682 (C) at 688.

28.3 Costs reserved.

A handwritten signature in black ink, appearing to read 'Meersingh.', is written over a horizontal line.

MEERSINGH A.J.

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

APPEARANCES

FOR THE APPLICANTS: ADVOCATE A RAFIK BHANA SC

Instructing Attorneys: Pather and Pather Attorneys Inc.

FOR THE RESPONDENT: ADVOCATE N GRAVES SC

Instructing Attorneys: THOMSON WILKS INC

DATE OF HEARING: 07 DECEMBER 2022

DATE OF JUDGMENT: 23 DECEMBER 2022 (handed down electronically)