

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:

Date: **7th July 2021** Signature: _____

CASE NO: 39734/2018

DATE: 7TH JULY 2021

In the matter between:

MARKIT SYSTEMS (PTY) LIMITED

Plaintiff

and

FULCRUM GROUP (PTY) LIMITED

Defendant

Coram: Adams J

Heard: 7 July 2021 – The ‘virtual hearing’ of the application was conducted as a videoconference on the *BlueJeans* digital platform.

Delivered: 7 July 2021 – This judgment was handed down electronically by circulation to the parties’ representatives by email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 7 July 2021.

Summary: Application for leave to appeal – s 17(1)(a)(i) of the Superior Courts Act 10 of 2013 – an applicant now faces a higher and a more stringent threshold – leave to appeal granted

ORDER

- (1) In terms of Uniform Rule of Court 42(1)(b), the date (14 December 2014) in paragraph 2(b) of the Court Order of the 8th April 2021 is deleted and preplaced with '14 December 2018'.
 - (2) The plaintiff's application for leave to appeal succeeds.
 - (3) The plaintiff is granted leave to appeal to the Full Court of this Division.
 - (4) The cost of this application for leave to appeal shall be costs in the appeal.
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JUDGMENT [APPLICATION FOR LEAVE TO APPEAL]

Adams J:

[1]. I shall refer to the parties as referred to in the main action. The plaintiff is the applicant in this application for leave to appeal and the respondent herein was the defendant in the action. The plaintiff applies for leave to appeal against the whole of the judgment and the order, as well as the reasons therefor, which I granted on the 8th of April 2021, in terms of which I had dismissed the plaintiff's claim and gave judgment against it (the plaintiff) in favour of the defendant on the latter's claim-in-reconvention for payment of the sum of R4 500 000, together with interest thereon and costs.

[2]. At the outset, I need to deal with a preliminary issue relating to a patent error in the judgment and the order relating to the defendant's counterclaim. Interest on the amount of R4 500 000 was ordered to be paid from 14 December 2014, which date, as pointed out by Mr Berridge SC, who appeared on behalf of the plaintiff, predates the agreement and, by all accounts could not have become payable by 14 December 2014. Therefore, this date, being 14 December 2014, was quite clearly a patent error. The intention was to order payment of interest from 14 December 2018, which is the date of the defendant's claim-in-reconvention. I therefore intend granting an order in terms of Uniform Rule of

Court 42(1)(b), correcting the patent error, which is such that it had resulted in an order being granted which did not reflect my real intention when I pronounced the order. The error is clearly attributable to the court itself, and I may therefore *mero motu* correct what is undoubtedly a clerical error in my order so as to give effect to my true intention.

[3]. The application for leave to appeal is mainly against my legal conclusion, relating to my interpretation of the relevant clauses of the agreement between the parties, and the related factual findings. In sum, I had concluded in my judgment that the defendant was entitled to lawfully cancel the agreement on the basis of one of the provisions of the cancellation clauses of the agreement. The essence of the plaintiff's application for leave to appeal is captured, in my view, in the following extract from the plaintiff's notice of application for leave to appeal:

'1. The Honourable Court should have found that the plaintiff had discharged its onus, on a balance of probabilities, of establishing those matters which it bore the onus of establishing, namely:

1.1 that there was no inability or failure to reach agreement on the details to be documented in the Business Requirement Documents ("BRDs") as required by clause 16(c)(v) read with clause 2 of the Technology Agreement ("the Agreement"), and consequently there were no grounds for cancellation of the Agreement in respect of this clause, or at all;'

[4]. The plaintiff also appeals against my factual finding that the reason why the BRDs were not agreed or finalised was not due to any breaches of the agreement on the part of the defendant. The court *a quo* should have found, so the plaintiff submits, that the defendant unlawfully and without any legitimate cause purported to cancel the agreement on 13 December 2017 and that entitled the plaintiff to the damages it sought. The plaintiff therefore contends that I had erred and misdirected myself in not finding that the defendant breached the agreement and such breach entitles the plaintiff to the damages it sought.

[5]. Nothing new has been raised by the plaintiff in this application for leave to appeal. In my original judgment, I have dealt with most of the issues raised and it is not necessary to repeat those in full. Suffice to restate what I said in my judgment, namely that applying the applicable legal principles relating to

contracts and on a proper interpretation of the agreement, the defendant was entitled to cancel the agreement, which it did during December 2017.

[6]. The traditional test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court may come to a different conclusion to that reached by me in my judgment. This approach has now been codified in s 17(1)(a)(i) of the Superior Courts Act 10 of 2013, which came into operation on the 23rd of August 2013, and which provides that leave to appeal may only be given where the judge concerned is of the opinion that *'the appeal would have a reasonable prospect of success'*.

[7]. In *Mont Chevaux Trust v Tina Goosen*, LCC 14R/2014 (unreported), the Land Claims Court held (in an *obiter dictum*) that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted. I agree with that view, which has also now been endorsed by the SCA in an unreported judgment in *Notshokovu v S*, case no: 157/2015 [2016] ZASCA 112 (7 September 2016). In that matter the SCA remarked that an appellant now faces a higher and a more stringent threshold, in terms of the Superior Court Act 10 of 2013 compared to that under the provisions of the repealed Supreme Court Act 59 of 1959. The applicable legal principle as enunciated in *Mont Chevaux* has also now been endorsed by the Full Court of the Gauteng Division of the High Court in Pretoria in *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016).

[8]. I am persuaded that the issues raised by the plaintiff in its application for leave to appeal are issues in respect of which another court is likely to reach different conclusions to those reached by me. I am therefore of the view that there are reasonable prospects of another court coming to legal conclusions different from those reached by me. The appeal therefore, in my view, has a reasonable prospect of success.

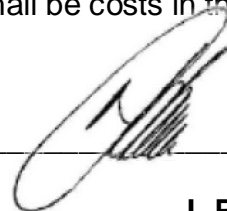
[9]. Leave to appeal should therefore be granted.

[10]. Having said that, this matter is not of a such complex nature that it should be referred to the Supreme Court of Appeal. And I therefore intend granting leave to appeal to the Full Court of this Division.

Order

In the circumstances, the following order is made:

- (1) In terms of Uniform Rule of Court 42(1)(b), the date (14 December 2014) in paragraph 2(b) of the Court Order of the 8th April 2021 is deleted and preplaced with '14 December 2018'.
- (2) The plaintiff's application for leave to appeal succeeds.
- (3) The plaintiff is granted leave to appeal to the Full Court of this Division.
- (4) The costs of this application for leave to appeal shall be costs in the appeal.



L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	7 July 2021 – in a ‘virtual hearing’ during a series of videoconferences on the <i>BlueJeans</i> digital platform
JUDGMENT DATE:	7 th July 2021 – judgment handed down electronically
FOR THE PLAINTIFF:	Adv Bruce Berridge SC
INSTRUCTED BY:	Clyde & Co Incorporated
FOR THE DEFENDANT:	Adv L J Morison SC, together with Adv Ntombi Mncube
INSTRUCTED BY:	Nicqui Galaktiou Incorporated