REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

…… ……

DATE SIGNATURE

Case no.**: 21/48972**

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY APPELLANT

And

BUSINESS CONNEXION (PTY) LTD RESPONDENT

Coram: Dlamini J

Date of hearing: 11 May 2023

Delivered: 26 June 2023

JUDGMENT

DLAMINI J

INTRODUCTION

[1] The applicant seeks leave to appeal against the judgment and order of this Court delivered on 31 January 2023.

[2] The applicant relies on various grounds for leave to appeal as contained in the Notice of Leave to Appeal as well as the Heads of Argument and submission made by Counsel for both parties before this Court.

[3] The applicant has launched this application for leave to appeal in terms of Section 17(1)(a) of the Superior Courts Act.[1]

[4] The test for granting leave to appeal is now a higher one. The legislator's use of the word would in section 17(1) (a) (i) of the Superior Court Act imposes a most stringent and vigorous threshold.

[5] This concept was captured by the Court *in Member of the Executive Council of Health Eastern Cape v Mkhita and Another,*[2] as follows" that a court may now only grant leave to appeal if it is of the opinion that the appeal would have a realistic chance of success not may have a reasonable chance of success. A mere possibility of success or even an arguable case is not enough.

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[1] Act 10 of 2013

[2] [2016] ZSACA 176 (25 November 2016). See also Erasmus Superior Court Practise Vol 1, A2-55; footnote 5 and 6

GROUNDS OF APPEAL

[6] Broadly summarized, the appellant's grounds of appeal are as follows;-

6.1 Mr. Benjamin Strydom, the deponent to the founding affidavit has no personal knowledge of the facts deposed to in the affidavit; and the court erred in finding that the confirmatory affidavits filed in support of Mr. Strydom's founding affidavit corroborated Mr. Strydom's involvement and participation in the matter. The confirmatory affidavits do not take the matter any further for the applicant.

6.2 The court erred in finding that the licences were delivered to the respondent.

6.3 The court erred in finding that the respondent in requesting cancellation of the IPW was silent about the applicant's alleged failure to deliver the licence keys and only raised this issue for the first time in its answering affidavit and erred that there was no dispute of facts.

6.4 The Judge erred in finding that IPW constituted the entire agreement between the parties.

6.5 The Judge decided the matter solely on the basis of the applicant's version and did not have regard to the respondent's version and defence and erred in finding that the respondent is indebted to the applicant.

[7] The parties' further grounds of appeal, their heads of argument, this Court judgment including the entire record of appeal must be deemed to be incorporated in this judgment.

BACKGROUND FACTS

[8] The applicant City of Ekuhruleni (CoE) had on 10 July 2022[3] issued an Instruction to Perform Work (the IPW) to the respondent Business Connexion (Pty) Ltd (BCX), under bid reference number C-ICT 04-1 2020, in terms of which the BCX was required to acquire certain specified software licences, software maintenance, implementation and enhancement for the

[3] See annexure FA3

oracle software. BCX testified that it secured the licences and delivered same to the applicant and thereafter invoiced the applicant an amount R85 479 535.26.

[9] The applicant on 29 October 2020 cancelled the contract and refused to make payment to BCX.[4] The respondents then launched this application to recover their debt.

[10] Below, I shall in turn deal with the individual grounds of appeal although others will be dealt with jointly as the appear to be relying on the same legal principles.

FOUNDING AFFIDAVIT

[11] The applicant has taken issue with Mr. Strydom's personal knowledge of the matter. The applicant insists that Mr. Strydom was never personally involved in this and therefore his evidence should be dismissed. Faced with a similar situation, the court in *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 cc & Another*[5] at 13 held that, *"[F]irst- hand knowledge of every fact which to make up the applicant's cause of action is not required, and that where the applicant is a corporate entity, the deponent may well legitimately rely on the records in the company's possession for their personal knowledge of at least certain of the relevant facts and the ability to swear positively to such facts."* My emphasis. See also *Nedcor Bank Limited v Behardien.*[6]

[12] Mr. Strydom has testified that he has full knowledge of this matter and was involved in the entire process, relating to this tender. He avers that he is the Managing Executive at BCX. He advised that, at all material times, he had sight of the RFQ, was involved in considering the RFQ and approving the quotation submitted to the applicant. He insist that he had sight of the correspondence exchanged between the respondent and the applicant. In

[4] See annexure FA9
[5] 2010 (5) SA 112 (KZP).
[6] [2020] JOL 29182 (C).

light of this, and in line with the *Shackleton* decision above, I am satisfied that Mr. Srydom had personal knowledge and was involved in the entire tender process. His testimony is corroborated in all material respect by the evidence of Mr. Deon Els, Ms. Musa Tleane, and Mr. Anees Mayet. This ground should accordingly be dismissed.

MATERIAL DISPUTES OF FACTS

[13] The applicant contends that this Court erred in finding that the licences were delivered to the CoE. The applicants further argue that this Court erred in finding that the CoE in requesting cancellation of the IPW was silent about the applicant's alleged failure to deliver the keys to the licences and only raised this issue for the first time in its answering affidavit. Additionally, argues the applicant that there exist material disputes of facts in this matter.

[14] For the sake of brevity and completeness, it is imperative that the request for cancellation dated 29 October 2020 must be quoted here in its entirety:-

"*City of Ekurhuleni placed an order with BCX on 27 August 2020 for procurement of additional Oracle software, which includes the acquisition of Taleo subscription and technical licenses to allow migration of software licenses to the new environment and cater for expansion of addition modules. Refer to the attached Annexure. The City hereby request for cancellation of the order, only the license that the City would like to proceed with is the acquisition of Taleo Licenses. Due to the Covid- 19 pandemic, the City has been struggling with revenue collection and as a result, budgets have been drastically cut. Departments have been instructed to reprioritise the maintenance of existing solutions. The City has also been struggling with the successful implementation of these Oracle Modules since 2017, despite engaging the Original Equipment Manufacturer (OEM). Trust you will find the above in order."*

[15] The letter of cancellation quoted above is clear and unambiguous, it makes no reference to the non-delivery of the licences as a ground for cancellation.

[16] On the facts and evidence presented before this Court all the keys to the licences as per IPW which included the Taleo licences were delivered by the respondent to the applicant in terms of the letter dated 1 September 2020 (**annexure FA8**) sent by the OEM Oracle to both BCX and the CoE. As a result, this Court's finding that the issue of non-delivery of the licences was only raised for the first time by the applicant in its answering affidavit stands.

[17] The applicant's submission that the Court erred in finding that the IPW constituted the entire agreement between the parties has no merit and must be dismissed. This is so because the IPW signed by the parties is clear, it contains the following clause "*No additional clauses are applicable in this scope*." In setting out the approach to the interpretation of contracts, the Court in *Natal Joint Municipal Pension Fund v Endumeni Municip*ality [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18 said "….the process is objective, not subjective. A sensible meaning is to be preffered to one that leads to insensible or un business results or undermines the apparent purpose of the document. Judges must be alert to guard against the temptation to substitute what they regard as reasonable, sensible, and businesslike for the words actually used. To do so in regard to a statute or statutory instruments is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made."

[18] Thus, a sensible interpretation of this clause, is that this contract constituted the entire agreement between the parties. Significantly, the letter of cancellation as it is apparent, makes no reference to the existence of other tacit or implied terms of the contract between the parties. The letter of cancellation does not infer that BCX , was in breach of these tacit or implied terms of the agreement. It is thus my finding that the exist no tacit or alternative express terms in the contract between the parties. To do so will result in this Court making a contract for the parties other than the one in which they had agreed upon.

[19] In my view, there exists no material dispute of facts in this matter. The issuing and awarding of the tender by the applicant to BCX is all common cause. I am satisfied that the keys to the licences were delivered to the CoE by Oracle and the respondent on 1 September 2020. The claim of non-delivery of the licences and the existence of implied or tacit terms, are just an afterthought on the part of the applicant and were only raised for the first time in the applicant's answering affidavit and they are only raised to frustrate the payment of the respondent's claim.

[20] In light of the above, based on section 17 of the Act and the factual facts of this matter, I am not persuaded that there are any reasons or extraordinary circumstances in this matter that warrants the grant of leave to appeal which would have reasonable prospects of success or that there are any other compelling reasons why the appeal should be heard, including conflicting Judgments on the matter under consideration.

[21] I am not convinced that the applicant has presented any facts that demonstrate that it has any prospects of success on appeal and therefore it would not be in the interest of justice to grant leave to appeal to the applicant.

ORDER

1. The application for leave to appeal is dismissed
2. The applicant is to pay the costs including the costs of two Counsels.

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DLAMINI J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Date of hearing:	11 May 2023
Delivered:	26 June 2023
For the Appellant:	Adv. G.I. Hulley SC gihulley@law.co.za N. Strathern nicky@strathern.co.za
For the Respondent:	S. Baloyi SC sesibaloyi@law.co.za M. Phukubje mphukubje@thulamelachambers.co.za