THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 25 November 2022

Status: Immediate

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Datacentrix (Pty) Ltd v O-Line (Pty) Ltd (891/2021) [2022] ZASCA 162 (25 November 2022)

Today the Supreme Court of Appeal (SCA) handed down judgment upholding with costs an appeal against the decision of the Gauteng Division of the High Court, Pretoria (the high court).

The respondent provides various services including manufacturing, warehousing, distributing and marketing, and selling electrical and mechanical support systems. The respondent desired to upgrade its software system and change to a Sage X3 system and, on the recommendation of Sage, the manufacturer and seller of the software based in Germany decided to engage the services of the appellant to implement and configure its software.

On 25 November 2013, the parties concluded a written Implementation and Support Services Agreement (the agreement). The terms of the agreement are not in dispute. The respondent paid the appellant the amount of R1 936 815 in terms of the agreement for implementation of the Sage software. However, after the installation, the respondent averred that the services provided by the appellant were defective in two material respects. Firstly, the respondent alleged that the appellant failed to successfully configure and implement the software, resulting in an inability on its part to use the software. Secondly, the respondent alleged that the appellant failed to provide sufficient suitably trained staff to perform the support services set out in the agreement.

The high court found that the appellant had breached the agreement, and that the respondent had properly cancelled it. It held that restitution of the system by the respondent in the circumstances was impossible and ordered that the contract price of R1 936 815 be returned to the respondent by the

appellant. The issue before this Court was whether the order should have been granted and that concerns the validity of the purported cancellation of the agreement by the respondent.

The SCA dealt with two significant clauses of the agreement dealing with breach and cancellation. The first is clause 17, which deals with service level failures. Service levels are defined in the agreement as the agreed performance standards and measures set out for the services, as detailed in the service level annexures. Clause 17.1 deals with *Notice of Non Performance*. This clause provides that if it is agreed or determined in a Dispute Resolution Procedure that the appellant has failed to 'comply with any Service Level in any measurement period', then the respondent may, on written notice to the appellant, 'require it to submit a rectification plan in accordance with the provisions of clause 17.2'. Clause 17.2, in effect, deals with the rectification plan. It sets out a detailed and complex process for the rectification of the service level failure. If the service level failure cannot be rectified, clause 17.3 provides that 'such failure shall constitute a breach by Datacentrix' of the agreement between them.

Clause 18 provides, in the relevant part, that should a party to the agreement commit a material breach of the agreement and fails to remedy such breach within 30 days of having been called upon to do so by the other party, then the innocent party may terminate the agreement on written notice to the defaulting party in which event such termination shall be without prejudice to any claims the innocent party may have for damages against the defaulting party 'occasioned by the default or termination of this Agreement in terms of this clause'.

The SCA found that there was some confusion on the part of the respondent as to the basis for its purported cancellation of the agreement. The respondent relied on two letters. In the letter dated 8 June 2015, the respondent alerted the appellant to a range of breaches of the agreement. They related to the lack of performance of the software and what it termed its 'failed project management' – the breach of the warranty. On 22 October 2015, the respondent communicated the cancellation of the agreement based on various breaches.

The SCA held that both letters did not comply with the cancellation procedure set out in either clause 17 or 18 of the agreement and that being the case, the respondent had failed to prove that it had validly cancelled the agreement.

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