THE SUPREME COURT OF APPEAL OFSOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED

FROM The Registrar, Supreme Court of Appeal

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STATUS Immediate

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Tee Que Trading Services (Pty) Ltd v Oracle Corporation South Africa (Pty) Ltd and Another (case no 065/2021) [2022] ZASCA 68 (17 May 2022)

MEDIA STATEMENT

Today the Supreme Court of Appeal dismissed an appeal against an order granted by the Gauteng Division of the High Court, Pretoria, in terms of which a stay of the action proceedings instituted by Tee Que Trading Services (Pty) Ltd (TQ) against Oracle Corporation South Africa (Pty) Ltd (Oracle) and the South African Post Office (SAPO), pending referral of the dispute between these parties to arbitration, was ordered.

The matter relates to a written contract concluded during 2004 between I-Flex Solutions Limited, a company based in India and Tee Que Trading (TQ). In terms of the contract I-Flex granted to TQ a right to sub-licence a specific software system to the South African Post Office. A related sub-licence agreement concluded between TQ and SAPO authorised TQ to grant to SAPO a right to use the software system for its own business purposes. Both these licence agreements contained arbitration and governing laws clauses in terms of which disputes between the parties would be referred to arbitration. The licence agreement stipulated that disputes between I-Flex and TQ would be referred to international arbitration in London, England to be determined in terms of the laws of England. The sub-licence agreement provided that disputes between TQ and SAPO would be determined in South Africa, according to South

African laws, and the rules of arbitration of the International Chamber of Commerce would be applicable. Both agreements had a non-variation clause in terms of which each written agreement constituted the entire agreement. No variation thereof would be binding unless it was incorporated in a revised schedule to the agreement and signed by the respective parties.

After acquiring the I-Flex business in 2005, and in addition to the existing licence agreement, Oracle required TQ to assume membership of the Oracle Partner Network so that the relationship that TQ had with I-Flex could be extended to Oracle and also that TQ could distribute Oracle's other programs, services and equipment. Three network membership agreements were concluded for this purpose which stipulated that disputes relating thereto would be determined by South African courts, in accordance with South African laws.

In 2018 TQ instituted a civil claim against Oracle and SAPO in the high court for breach of the licence agreements. In response, Oracle brought an application for a stay of the action pending referral of the dispute to arbitration. It invoked the provisions of the arbitration and governing laws clauses of the licence agreements and contended that the dispute had to be referred to international arbitration. Notwithstanding its concession that the dispute related to the licence agreements, TQ insisted that the network membership agreements and the dispute resolution clauses therein superseded the arbitration and governing law clauses of the licence agreements. TQ argued that without those agreements the licence agreements were impracticable, because execution of the software maintenance obligations were dependant on its membership in the Oracle network. It further argued that the arbitration licence agreements were not international as the parties to the dispute were South African entities and the dispute arose within the Republic.

The high court found that the provisions of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration of 1985 (Model Law), which forms part of the International Arbitration Act 15 of 2017, applied to the licence agreements. It further held that the Model Law as incorporated into the International Arbitration Act, unlike the domestic Arbitration Act 42 of 1965, compelled the court to order a stay of the action proceedings pending referral of the dispute to arbitration.

In dismissing the appeal by TQ, the SCA rejected their argument that the network membership agreements had superseded arbitration and governing law clauses of the licence agreements.

The Court held that an arbitration agreement is interpreted according to the established principles governing the interpretation of legal documents and that it may only be terminated with the consent of all parties, unless it provides otherwise. The SCA found that there was no explanation provided as to how or why some clauses of the licence agreements remained valid and others not. It further found that no variation of the licence agreement was ever effected by TQ and Oracle and that nothing in the wording of the network membership agreements indicated that they intended to terminate the licence agreements or any clause therein. Instead each of the agreements regulated different aspects of the business relationship between TQ and Oracle. Furthermore, the SCA found that the International Arbitration Act and the Model Law, as incorporated therein, is South African law. It rejected TQ's argument that Article 1(2) of the Model Law, which stipulates that the Model Law apply only if the juridical seat of arbitration is in the Republic, excludes its application in this case. The Court held that the only sensible interpretation of Article 1(2) is that if the juridical seat of the arbitration is in the territory of South Africa, the provisions of the Model law apply. Under the International Arbitration Act and the Model Law, there is no bar to parties who conduct business in the Republic choosing a place of arbitration that is situated outside the Republic. The court concluded that no valid basis has been established for interference with the arbitration agreements in this case.

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