THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE
Case No: 20071/2014

In the matter between:

ATTACHMATE CORPORATION **APPELLANT**

and

MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS **RESPONDENT**

Neutral citation: *Attachmate v Minister of Water and Environmental Affairs* (20071/2014) [2015] ZASCA 68 (20 May 2015).

Coram: Brand, Bosielo, Majiedt, Petse and Mbha JJA
Heard: **4 May 2015**
Delivered: **20 May 2015**

Summary: Software license agreement – unlicensed copies made by licensee in breach of agreement – interpretation of clause providing for that event – maintenance agreement providing for payment per unit in respect of licensed copies – whether licensee also liable in respect of unlicensed copies.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Tuchten J sitting as court of first instance):

1 The appeal is upheld to the extent reflected in paragraph (3) below.
2 The respondent is ordered to pay the appellant's costs, including the costs of two counsel.
3 Paragraph 2 of the order of the court a quo is set aside and replaced by the following:
'2 In relation to the plaintiff's claim for maintenance fees, the defendant is ordered to pay the plaintiff:
2.1 The sum of R7 744 302.40
2.2 Interest on the sum of R7 744 302.40 at the rate of 15.5 per cent per annum from 14 December 2009 to date of payment.'
4 Save for paragraph (3) above, the order of the court a quo is confirmed.

JUDGMENT

Brand JA (Bosielo, Majiedt, Petse and Mbha JJA concurring):

[1] The appellant, Attachmate Corporation (Attachmate), is incorporated in the United States of America with its head office in Seattle, Washington State. The respondent is the minister in the national cabinet responsible for the Department of Water and Environmental Affairs (the Department). The appeal turns on the interpretation and the application of two written agreements between the parties, both concluded in June 2005. The first of the two is a software license agreement (the license agreement) in terms of which the Department acquired from Attachmate

300 licenses for a suite of software known as EXTRA! Mainframe Server Edition Version 8.1 (the software). The second is a maintenance and support agreement, entitled Technical Support Guide (the maintenance agreement) in terms of which Attachmate was obliged to provide maintenance and support in respect of the software furnished in terms of the license agreement.

[2] Generally speaking, the software was aimed at enabling a number of users, typically geographically dispersed, to access data stored by a large concern in its mainframe computer at some central location. The mainframe computer in this case was housed in the premises of the State Information Technology Agency (Sita). In accordance with its general function, the software thus enabled employees of the Department to access the data on the mainframe by means of their desktops, laptops and other personal computers. Mindful of the affinity for acronyms in this field of IT, I shall refer to these collectively as PCs. In the main the information accessed by departmental employees through their PCs in this way was stored in electronic files on the mainframe referred to as Persal and Logis. Persal contained human resources data while Logis related to the procurement of goods and services as well as payment for these by the Department.

[3] The license agreement required the Department to determine the number of PCs upon which it decided the software to be installed. The Department then had to pay a license fee to Attachmate for each PC upon which a copy of the software had been installed. The agreement pertinently prohibited the use of the licensed software until the Department had obtained a so-called license unit certificate from Attachmate, which permitted it to install up to the number of software copies reflected in the certificate. The license unit certificate issued to the Department on 30 June 2005, reflected 300 units only. In terms of the maintenance agreement, Attachmate undertook to provide maintenance and support required by the Department in respect of all licensed units, but only until the end of April 2006. The agreement, however, made provision for its annual renewal at the election of the Department. After the initial period, the Department was therefore free to decline to

buy any maintenance at all. But, once it elected to do so, as the Department eventually did, it was obliged to pay the maintenance fee in respect of all the licensed copies, not just some of them. The maintenance fee at the time was R204 per unit. So it happened that the Department paid a maintenance fee in respect of each of its 300 copies in April 2006.

[4] The license fee paid by the Department in 2005 was R455 per copy. It was common cause between the parties that the Department had acquired the licenses through a procurement process facilitated by Sita and that the R455 was a deeply discounted rate. The discount was prompted by the consideration that Sita was able to estimate that it would purchase, on behalf of various State departments, in the order of about 500 000 licenses from Attachmate. The uncontroverted evidence by Mr Harry Kingma, the sales director of Attachmate in South Africa, was that, if the Department had not purchased the licenses through Sita, it would not have qualified for the discount, but would have rather paid the list price that applied to buyers of single units or smaller quantities.

[5] The mainframe component of the software was installed by the technicians of Attachmate. The interfacing components on the PCs, on the other hand, were provided to the Department together with the installation software that enabled departmental technicians to load the software copies onto the individual PCs. Right from the outset, so the evidence shows, the Department did not pay much heed to its express undertaking not to install more than the 300 copies reflected in the license unit certificate. So it came to the notice of Attachmate in 2006 that the Department had installed a total of 660 copies on PCs within the Department. The parties entered into negotiations and managed to reach an agreement which regularised the position. In terms of this agreement, Attachmate afforded the Department the license to use 360 additional copies at the original price of R455 per copy. At the same time it extended its undertaking to support and maintain these additional copies for the same fee of R204 each.

[6] What gave rise to the present litigation, however, was that the Department continued, in rather cavalier fashion, so it seems, to make and install additional copies of Attachmate's software without its consent. When this information was conveyed to Attachmate during the latter half of 2009, it first tried to resolve the issue through negotiations. What Kingma essentially requested the Department to do was to determine the number of copies installed in excess of R660 and to pay the license fee for these additional copies at the prevailing Sita rate during 2009, which was US$100 per unit. Initially the Department appeared to be willing to comply with this request, but eventually failed to come up with a final answer. The reason for this, Kingma concluded, was not that the Department was trying to avoid payment of license fees, but that its affairs were in such disarray that it could not determine the number of unlicensed copies involved. However, be that as it may, the upshot was that Attachmate compelled an audit in terms of clause 11 of the license agreement. This clause provided:

'AUDIT

At Attachmate's request and upon ten (10) days prior written notice, an Attachmate representative or an independent auditor selected by Attachmate may inspect and audit your computers and records for compliance with this License Agreement and Licensed Unit(s) Certificate during your normal business hours and no more than twice a year. You shall fully cooperate with such audit and provide any necessary assistance and access to all records and computers. If an audit reveals that you possess or at any time possessed unlicensed copies of the software, you will promptly pay Attachmate the applicable license fee for such unlicensed copies.'

[7] The audit was conducted by KPMG. According to the audit report subsequently brought out by KPMG on 7 December 2009, the Department possessed 1 564 unlicensed copies of the software. At the trial, the Department accepted this number, but Attachmate contended that the number of unlicensed copies were substantially more than this. In essence its claim was that every one of the PCs in the Department, of which there were about 5 000 at the time, had been installed with a copy of the software. Accordingly its claim was based on 4 544 (ie 5 204 – 660) unlicensed copies. Attachmate further contended that (a) the

Department was obliged to pay the 'applicable license fee' as contemplated in clause 11 for each of these copies; (b) that its list price – ie the price payable by purchasers of single units – constituted that 'applicable license fee'; and (c) that in 2009, its list price for the software amounted to R5 308 per unit. In addition Attachmate claimed that, in terms of the maintenance agreement, it was entitled to payment of a maintenance fee in respect of all the unlicensed copies, ie 4 544, at the rate of R1 237 per copy, which was its prevailing maintenance rate in 2009.

[8] With regard to Attachmate's claim based on the license agreement, the Department denied, as I have said, that there were more than 1 564 unlicensed copies. It further contended that, in any event, it was absolved from paying for these copies for two reasons. First, because of an exemption in clause 2(f) of the license agreement. Secondly, because the concept of 'an applicable license fee' in clause 11 of the license agreement, which lay at the heart of Attachmate's claim, was too vague to be given a quantifiable meaning. In the alternative the Department contended that, if the rate of an 'applicable fee' could be given a meaning, the Sita discount price of R455 in 2005 represented that rate. As to Attachmate's claim based on the maintenance agreement, its answer was essentially that, since this agreement provided for licensed copies only, Attachmate was not entitled to any maintenance fee in respect of unlicensed copies at all.

[9] With regard to the license fee claim, the court a quo (Tuchten J) held that Attachmate had failed to establish that there were more than 1 564 unlicensed copies. At the same time, the court dismissed the Department's defence that it's liability was excluded, either by clause 2(f) – which the court found not applicable on the facts of the case – or on the basis that no meaning could be given to 'applicable license fee' in clause 11. As to the meaning of this expression, the court, however, accepted the Department's alternative argument that the applicable fee was the Sita discounted rate in preference to the list price contended for by Attachmate. On the face of it, the court also appeared to have endorsed the Department's contention that the applicable rate was R455 per copy, which was the Sita discount price in

2005. But when it came to the calculation of the amount awarded under this heading, the court clearly applied the rate of US$100 per copy, which was the Sita discount price in 2009. As to Attachmate's claim based on the maintenance agreement, the court a quo agreed with the Department's argument that the maintenance agreement did not afford Attachmate the right to claim maintenance in respect of unlicensed copies at all. The appeal against that judgment is with the leave of the court a quo.

[10] On appeal, Attachmate accepted that it had failed to establish that the number of unlicensed copies exceeded 1 564. It only took issue with the court's finding that the applicable fee as contemplated by clause 11 of the license fee agreement was the Sita discount price of US$100 in 2009. Instead it stood firm in its contention that the applicable license fee contemplated in clause 11 was the list price of R5 308 per license. In support of its claim based on the maintenance agreement Attachmate persisted in its contention, which did not find favour with the court a quo, namely, that it was entitled to payment of R1 237.90 – that being the prevailing maintenance fee in 2009 – for each of the 1 564 unlicensed copies.

[11] With regard to Attachmate's claim under the license fee agreement, the Department accepted on appeal that Attachmate was entitled to payment of a license fee for the 1 564 unlicensed copies, but supported the court a quo's finding that the applicable fee contemplated by clause 11 was the Sita discount rate of US$100, as opposed to the list price, in 2009. As to the quantum of Attachmate's claim under this heading, it was common cause on appeal that: (a) if Attachmate's list price for the software in 2009 was the 'applicable fee', it was entitled to payment in a total amount of R8 301 714; but (b) if the US$100 per unit represented the 'applicable fee', the amount of R1 168 495, which was awarded by the court a quo under this heading (in paragraph 1 of its order), should prevail. With regard to the license fee claim, the dispute on appeal thus turned on the narrow issue as to whether the applicable fee was Attachmate's list price, on the one hand, or the Sita discount price, on the other.

[12] As to Attachmate's claim in respect of the maintenance agreement, the Department supported the court a quo's finding that, on a proper interpretation of this agreement, Attachmate was not entitled to any amount at all. As to the quantum of the claim under this heading, the Department conceded, however, that if Attachmate were held to be entitled, in principle, to any payment for the 1 564 unlicensed copies: (a) its fee should be calculated at the rate of R1 237.90 per copy; (b) over a period of four years; and (c) that in the event, its total claim under this heading would amount to R7 744 302.40. The parties also agreed that in this event, interest on the amount awarded should be calculated as from 14 December 2009, that being the date on which the KPMG report was communicated to the Department. Under this heading the dispute on appeal therefore, again turned on a narrow pivot, namely, was the court a quo right in holding that, in terms of the maintenance agreement, Attachmate was not entitled to any fee for unlicensed copies at all.

[13] I proceed to deal first with the confined issue regarding Attachmate's claim under the license agreement. It is common cause that this issue hinges on the interpretation of the expression 'applicable license fee' in clause 11 of the license agreement. What is also common cause is that the expression is not specifically defined in the agreement. According to Attachmate's witnesses, they intended 'applicable license fee' to be represented by Attachmate's list price for the particular software. But of course, in accordance with established principles, interpretation is a matter for the court and not for witnesses. Accordingly, the admissibility of evidence in this regard is limited to the provision of the context or the factual matrix of the document (see eg *KPMG Chartered Accountants (SA) v Securefin (Ltd) & another* 2009 (4) SA 399 (SCA) para 39).

[14] As explained more recently by this court in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) paras 10-12, the starting point in interpreting a contract remains the words of the document. Yet the process of interpretation does not stop at the literal meaning of those words. It

construes them in the light of admissible evidence as to the context of the document, including the circumstances in which the contract came into existence. With regard to context, Attachmate pointed out, first of all, that clause 11 explicitly relates to unlicensed copies. It is therefore concerned with a situation where an audit had revealed a breach of contract by the Department. To apply the deeply discounted rate that had been negotiated with Sita, in these circumstances, so Attachmate's argument went, would be to encourage non-compliance with the license agreement. The licensee would be able to install and use software without charge until discovered, after which it would pay the same rate that had been negotiated commercially. Hence, the licensee would benefit from its own unlawful conduct and the interpretation which found favour with the court a quo would therefore encourage that unlawful conduct. By contrast, so Attachmate argued, the interpretation for which it contends would serve to discourage and deter unlawful non-compliance with the terms of the license agreement by unauthorised copying of its software. The licensee would know that if it breached the agreement through unlicensed copying, it would have to pay the substantially higher list price whereas if it 'came clean' by seeking a license, it would only have to pay the discount rate.

[15] My problem with the interpretation contended for by Attachmate is that it casts clause 11 in the role of a penalty clause. I say that because on that interpretation, Attachmate would get much more than contractual damages for a breach by the Department through unlicensed copying. A contractual damages claim for such breach, as I see it, would be calculated on the basis of the number of unlicensed copies multiplied by the price the licensee would have paid for every license had that license been properly obtained. Once it is appreciated that Attachmate's interpretation provides for a penalty that exceeds its claim for damages, it becomes apparent that the 'one size fits all' provisions of clause 11 would have a far more punitive impact on the licensee with a substantial discount than on the licensee who had to pay the list price in any event. If that is so, I can think of no reason why the parties would have intended this result. After all, in that event the list price would have a deterrent effect on the one licensee and not on the other. Moreover, once

clause 11 is recognised as a penalty clause, one would have expected a distinction between the licensee who deliberately and dishonestly copies to avoid payment of a license fee, on the one hand, and the licensee who negligently or even inadvertently copies, on the other. The examples given by Attachmate in argument of conduct by the licensee which Attachmate would seek to deter, all relate to deliberate dishonesty. But the difficulty with these examples, as I see it, is precisely that clause 11 is not confined to deliberate conduct. It applies with equal force to negligent or even inadvertent copying. In this case there is no suggestion that the Department was deliberately dishonest.

[16] What the concept of 'an applicable license fee' conjures up to me, is a flexible, supple yardstick: a fee that varies in its application with reference to the circumstances of every case, including the identity of the licensee. It is not a defined yardstick that applies in all cases and with complete indifference to the identity of the licensee, as would be the case with a list price or standard price of the seller. If this is so, 'applicable fee' with reference to a particular licensee would of necessity be a reference to the fee that this particular licensee has to pay, having regard to the negotiated discount, if any. Put somewhat differently: once a license fee had been determined through negotiation between Attachmate and the licensee involved, I do not think the fee applicable to that licensee can be determined without any reference to the negotiated fee.

[17] Accordance to the court a quo's understanding, the whole purpose of clause 11 was to provide Attachmate with a procedure to obtain evidence so as to determine whether unlicensed copies of its software had been made and, if so, how many. I agree with this interpretation. The exact number of unlicensed copies would in most cases be peculiarly within the knowledge of the licensee. Without a remedy in the nature of clause 11, Attachmate would potentially have great difficulty in establishing a claim for damages based on unlawful copying. Once the number had been established, the licensee would then have to pay the fee applicable to it. Attachmate need not prove any damages at all. That, I believe, was the purpose of

clause 11. It was not intended to introduce a penalty. Thus understood, the clause was intended as a means in favour of Attachmate to facilitate proof of its claim for the damages it had suffered through unlicensed copying. It was not intended to enhance the quantum of its damages claim. There is no evidence at all in this instance of deliberate dishonesty on the part of the Department, and Attachmate did not contend otherwise.

[18] Finally, and even if I am wrong in my understanding of 'applicable fee' Attachmate only has itself to blame. After all, the terms of its standard contract were clearly formulated by someone on its behalf and approved by it. If it wanted to stipulate for its list price or its standard price or some other penalty in the situation contemplated by clause 11, I can think of nothing which prevented it from doing so. These considerations are reflected in what is commonly known as the *contra proferentem* rule (see eg *Fedgen Insurance Ltd v Leyds* 1995 (3) SA 33 (A) at 38B-E). It follows that in my view the court a quo's interpretation of clause 11 of the license agreement cannot be faulted. It follows from this that the appeal against paragraph 1 of its order, cannot be sustained.

[19] This brings me to the appeal against the dismissal of Attachmate's claim under the maintenance agreement. The court a quo's reasoning in support of this dismissal, went along the following lines:

(a) In terms of the maintenance agreement, maintenance fees are calculated with reference to all licensed copies.

(b) There is no express term in this agreement which obliges the Department to pay maintenance fees in respect of any unlicensed copy of the software.

(c) Attachmate did not plead a tacit term that obliged the Department to purchase a maintenance plan for an unlicensed copy.

(d) In any event, such tacit term could not be read into the maintenance agreement, because the Department would not be entitled to use such an unlicensed copy and therefore could not require maintenance for it.

[20] I find this line of reasoning fundamentally flawed. The fundamental flaw, as I see it, is that it starts out from the assumption that Attachmate's claim is for specific performance of the maintenance agreement. That is a misconception. On Attachmate's pleadings, its claim for maintenance fees is clearly formulated as one for damages arising from breach of contract. Moreover, it was common cause on the pleadings that the maintenance agreement was part of the license agreement and that obligations flowing from the former were also derived from the latter. Properly understood, Attachmate's claim was therefore that it is entitled in law to be placed in the position – by way of an award of damages – it would have occupied if the maintenance agreement, read with the license agreement, had been properly performed. That approach, as we all know, is in accordance with the correct yardstick in determining contractual damages.

[21] Application of that yardstick leads me to the following line of reasoning:

(a) If the Department had complied with its obligations under the license agreement, it would have paid for and in that way become the holder of a license for all the copies it had eventually made and installed on its PCs. That would, of course, have included not only the 660 licensed copies, but the 1 564 unlicensed copies as well.

(b) In terms of the maintenance agreement, maintenance fees were to be calculated on the basis of each licensed copy.

(c) Had the Department complied with the obligations under both agreements, the 1 564 unlicensed copies would have become licensed copies, for which Attachmate would have received a maintenance fee at the agreed rate.

(d) In order to place Attachmate in the position it would have occupied – in terms of both contracts – if the Department had complied with its contractual obligations, damages would have to be awarded to it which would be calculated on the basis of 1 564 x the agreed rate x four years (between 2006 and 2009) which adds up to R7 744 302.40.

[22] Another contention raised by the Department as to why it should not have to pay maintenance for more than the 660 licensed copies, was based on the evidence at the trial, that no more than 660 departmental employees had access to the Persal and Logis electronic files, with the result that no more than 660 employees had any use for Attachmate's software. The conclusion to be drawn from all this, so the Department's argument went, was that, since only 660 employees could use the software, no more than 660 copies had to be maintained by Attachmate under the maintenance agreement. But I believe there are two answers to this contention. The first derives purely from the facts. The second relies on the interpretation of the maintenance agreement. As to the first, the assumption that the number of copies used would be no more than the number of employees who were entitled to use it, is a *non sequitur*. This is so because of the further evidence that one employee, who visits different departmental offices in different localities, could use different PCs in those localities as long as they were installed with Attachmate's software. It follows that one employee could and probably would use a number of PCs upon which the software had been installed. The second answer, which derives from an interpretation of the maintenance agreement is this: the agreement clearly provided for payment of a fee in respect of every copy which the Department was entitled to use. It was not limited to the numbers which it actually used. That is quite understandable. The maintenance agreement was in the nature of an insurance contract. It follows that the Department had the right to demand maintenance in respect of every copy it was entitled to use in exchange for payment of the 'insurance premium'. Whether or not that right had in fact been exercised by the Department, was of no consequence to Attachmate in the calculation of the 'insurance premium' payable under the maintenance agreement.

[23] In the result:

1 The appeal is upheld to the extent reflected in paragraph (3) below.

2 The respondent is ordered to pay the appellant's costs, including the costs of two counsel.

3 Paragraph 2 of the order of the court a quo is set aside and replaced by the following:

‘2 In relation to the plaintiff’s claim for maintenance fees, the defendant is ordered to pay the plaintiff:

2.1 The sum of R7 744 302.40

2.2 Interest on the sum of R7 744 302.40 at the rate of 15.5 per cent per annum from 14 December 2009 to date of payment.’

4 Save for paragraph (3) above, the order of the court a quo is confirmed.

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F D J BRAND

JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	A R Sholto-Douglas SC & M Ioannou Instructed by: Cliffe Dekker Hofmeyr Inc, Cape Town c/o, Symington & De Kok, Bloemfontein
For the Respondent:	R Michau SC & M P D Chabedi Instructed by: The State Attorney, Pretoria c/o The State Attorney, Bloemfontein