

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 2023/ 034641

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES:NO
(3)	REVISED: NO
	
DATE: 30 MAY 2024	SIGNATURE

In the matter between:

PPT GROUP (PTY) LTD

Applicant

and

BITCO TELECOMS (PTY) LTD

Respondent

JUDGMENT

FISHER J

Introduction

- [1] This matter concerns the interpretation of a written service agreement and an addendum thereto. The addendum came about in circumstances which are not disputed.

- [2] The question to be considered is whether the terms of the addendum, which amended the cancellation terms of the service agreement, entitled the respondent to cancel the agreement in the circumstances of this case.
- [3] The applicant contends that the addendum, properly construed, did not entitle the respondent to cancel in the circumstances. It alleges, thus, that the purported cancellation was a repudiation of the agreement which it duly accepted and that, as a result, it is entitled to invoke an early cancellation clause resulting in a claim for damages in an agreed liquidated amount which it now claims together with interest calculated at the current prevailing prime rate plus 2% per annum, calculated and compounded daily, being the agreed rate.
- [4] There was an application for condonation of the late filing of the answering affidavit which was not opposed and was granted.
- [5] I move to deal with the facts.

Factual background

- [6] The parties entered into a service agreement on 17 November 2021 which it was agreed would be regarded as commencing on 1 November 2021 and run for a period of 24 months.
- [7] The service agreement related directly and specifically to a particular project which is referred to by the parties as the "BitCo Project".
- [8] The agreement was initially implemented by the parties according to its terms.
- [9] This changed during June 2022 when the respondent's Managing Director, Mr Deon Retief asked for an indulgence from the applicant in the form of a temporary stay of the operation of the agreement and thus payment of amounts which would become due thereunder. This indulgence was granted.

- [10] The respondent had become involved in negotiations to sell its business and/or shareholding. The negotiations apparently resulted in the services of the applicant under the agreement not being required whilst they ensued.
- [11] The intricacies of the negotiations and the reason why this required a break in the receipt of services is not explained in any detail. The deponent to the answering affidavit, Mr Carlo Gonzaga, a director of the respondent explains that the reason for the stay was that the consulting services being rendered by the applicant formed part of the business that was to be sold and that it followed “logically” that there was no point in making use of the services if they would ultimately be for the benefit of the purchaser.
- [12] The upshot was, that a stay in the operation of the agreement was required by the respondent for the purposes of saving it money. Mr Gonzaga explains further that the respondent gave no guarantee as to the period of the stay. The respondent wished that the stay period be tied to the duration of the negotiations. It seems there was a sense that there would be some amelioration of the position of the applicant either by an extension of the period of the agreement or some other recoupment – perhaps in the context of the sale. There was initially an informality to the arrangement.
- [13] It is relevant that clause 13 that if the agreement was terminated by the respondent prior its expiration, other than for breach, it would be liable to and make payment to the applicant of what is referred to as an “early cancellation penalty”. The early cancellation penalty amounts to six months of the prevailing fee schedule or any other work being undertaken at the time of the cancellation.
- [14] The negotiations of the respondent’s sale apparently dragged on beyond the period anticipated. This created a tension in the contractual relationship.
- [15] The protagonists dealing with the implementation of the contract and the discussions relating to the suspension of services and payment were directors of the parties – Mr Anthony Silva for the applicant and Mr Chatz for the respondent.

- [16] In September 2022 Mr Chatz requested an extension of the stay – possibly to March 2023. He sought that this position be reduced to writing. As I have said there was already tension in the relationship. Mr Silva felt aggrieved by the non-payment and that he was now was being asked to accommodate the position for longer than initially anticipated.
- [17] These tensions were a catalyst for communications by the two men by text on the WhatsApp social media platform during which harsh words were exchanged in relation to the losses being suffered by the applicant as a result of the stay . It was clear that the personal business relationship between the two men had suffered a significant breakdown as a result of this exchange.
- [18] It seems that both parties were aware of the fact that the respective rights in terms of the contract needed to be navigated and accommodated. There followed a process of attempted conciliation which resulted in an apology on the part of Mr Silva, an acceptance of the apology by Mr Chatz and, importantly, the written addendum in issue which sought to formalize the extension period and which was also apparently directed at the assuaging of the indignation felt by Mr Chatz. It emerges from the addendum that part of this latter endeavour involved agreeing a mechanism in terms of which Mr Silva exited the Bitco project and would not be involved in any future business undertaken between the parties.
- [19] The nature and scope of this mechanism is the focal point in this dispute.
- [20] The terms of the addendum are in essence as follows: There was a recordal of facts leading to the conclusion of the addendum including that the applicant had agreed to a stay until 01 March 2023; that as a result of the temporary stay the applicant had suffered a loss of R 1 266 012; that the loss would be made up when the contract resumed; that in consequence of the stay the parties had agreed to amend the duration of the agreement and the fees payable thereunder were increased.

[21] A further recordal referenced the breakdown in the relationship between Messrs Silva and Chatz. As this is a central recordal I quote it in full:

“Based on messages sent from Anthony Silva to Jarryd Chatz, BitCo is demanding that Antonio Silva be totally removed from the BitCo project and will furthermore have no more business-related interactions with any BitCo employee for as long as they are employed by BitCo with immediate effect. Antonio will hand over his current role on this project and any future projects at BitCo to persons nominated by PPT who will have direct access to any BitCo employee and supplier whom they might need to assist them complete (sic) the project.”

[22] Mr Gonzaga explains pertinently in the answering affidavit that the sole basis upon which he was willing to allow the respondent to have a business relationship with the applicant was if Mr Silva was excluded from any future involvement and interaction with the respondent and its staff.

[23] The resultant amendment was the addition of a new clause 28.1 which read as follows:

"28.1 In the event that Anthony Silva has any interaction whatsoever with any BitCo employee and/or spreads any defamatory statements about BitCo, its employees and its suppliers, then BitCo reserves the right to immediately cancel/terminate all agreements with PPT Group (Pty) Ltd with no early termination cost/fees as referred to in clause 17 of the service agreement." (emphasis added)

[24] This new escape clause came to be tested in December 2022 when Mr Silva attended a virtual meeting held between Bulldog Group (Pty) Ltd, (Bulldog) which is a client of the applicant and representatives of the respondent who were also doing business with Bulldog .

[25] Mr Silva attended the meeting on the basis that:

- (i) He was overseeing a project between Bulldog and the respondent in his capacity as employee of the applicant;
- (ii) His attendance arose out of the contractual relationship between Bulldog and the applicant which entailed an oversight duty on all Bulldog projects related to technology;
- (iii) He was involved in the meeting for the purposes of a 'watching brief' only for the purposes of the contract between applicant and Bulldog and was neither required nor expected to have any input into the meeting;
- (iv) his position did not entail him having any contact with or engagement with the respondent's representatives at the meeting- he was merely in attendance.

[26] The representatives of the respondent attending the meeting objected to Mr Silva's attendance on the basis that they said it constituted a breach of clause 28.1 of the agreement as amended.

[27] Mr Silva refused to withdraw from the meeting on the basis that he held the position that the attendance in question was not hit by clause 28.1 of the agreement as amended by the addendum.

[28] Approximately a month later the respondent sought to cancel the agreement for breach of clause 28.1 and contended that the applicant was, in consequence, not due any damages under the agreement.

Issues for determination

[29] The applicant contends that his "watching" attendance did not constitute the type of interaction which was intended to be prevented by the prohibitory clause. It thus claims that the purported cancellation is a repudiation of the agreement and accordingly, it seeks payment of the amount due under the cancellation provisions of the agreement. The quantum is not disputed.

- [30] This court is thus called upon to decide the scope of the interaction prohibited by clause 28.1.
- [31] The applicant argues that the clear intention of the parties in relation to the prohibition of interaction by Mr Silva with employees of the respondent was confined to the Bitco project and any possible future project undertaken between the two parties and that the scope was limited to the direct business relationship between the applicant and respondent and did not extend to interaction outside of this context.
- [32] The respondent, on the other hand argues, that the prohibition extended to all dealings in a business (as opposed to social context) regardless of whether those dealings implicated the business relationship between the parties.
- [33] A further question is whether, in any event, the “watching brief” constituted the intended interaction.

Applicable legal principles

- [34] On a purely linguistic treatment of the clause, it prohibits “any interaction whatsoever with any BitCo employee”.
- [35] The respondent concedes that this cannot mean that “all” contact is prohibited. There are, it concedes limitations to this prohibition which are to be found in the context. Thus, from what evidence are these limitations to be discerned?
- [36] In *University of Johannesburg v Auckland Park Theological Seminary and Another (University of Johannesburg)*¹, the Constitutional Court affirmed that an expansive approach should be taken to the admissibility of extrinsic

¹ *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13 at para 68.

evidence of context and purpose, whether or not the words used in the contract are ambiguous, so as to determine what the parties to the contract intended².

[37] The Court, however, emphasised that while such evidence was admissible to contextualise the document (since “context is everything”) in order to establish purpose it must be used conservatively³.

[38] Thus, the scope of the agreement must first be sought in the text of the agreement itself before importing a wider context and with this the temptation to an attempt to admit evidence which is parol in nature.

Discussion

[39] The parties deliberately recorded in the addendum the context in which the amendments, including clause 28.1 came about.

[40] This recordal in the agreement of context yields the following accepted facts:

(i) the sale of the respondent was being negotiated and for that reason a stay of the terms of the agreement between the parties had been negotiated and agreed;

(ii) as result of this suspension a loss of R 1 266 012 had accrued;

(iii) that this loss would be recovered when the contract resumed;

² See also *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*) para 18.

³ See the succinct and illuminating exposition of the parol evidence rule in our law as set out by Unterhalter AJA in *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* (470/2020) [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) (9 July 2021) at paras 39 to 46.

- (iv) Based on the altercation between Messrs Silva and Chatz, Mr Silva would be substituted on the project for another employee of the applicant and would not be used by the applicant on any future projects between the parties.

[41] To my mind, it emerges clearly that the prohibitory clause was fashioned in the context of the business relationship between the parties. It clearly was not intended to extend to circumstances where Mr Silva was carrying out his functions in his capacity as employee of the applicant which entailed him performing services for other clients of the applicant.

[42] The question of whether Mr Silva's presence at the meeting constituted 'interaction' for the purposes of the prohibitory clause must also be determined in this stated context.

[43] To my mind this would mean that Mr Silva's mere attendance at a meeting involving the BitCo project would be enough to constitute intended prohibitory involvement whether he spoke or not.

Conclusion

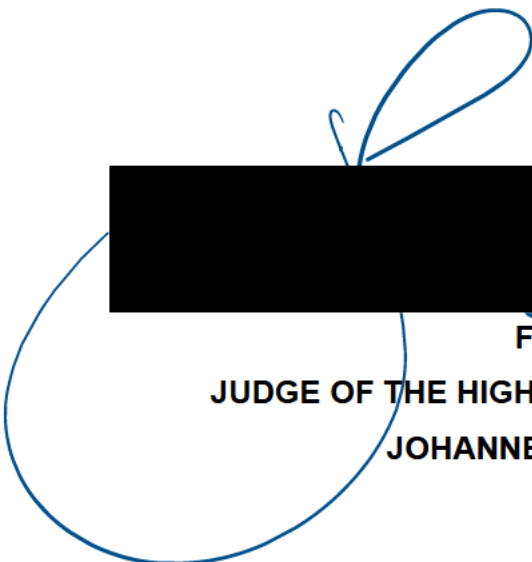
[44] Clause 28.1 of the agreement as amended was not breached by the attendance of Mr Silva at a meeting which was unrelated to the Bito project.

[45] The attempt at cancellation constituted a repudiation of the services agreement. Such repudiation was accepted by the applicant in terms of its attorney's letter of 1 February 2023 and the agreement was thus lawfully terminated on such date by the applicant.

Order

[46] I thus make an order which reads as follows:

- a. Judgment is handed down against the respondent in the amount R1 169 695.00;
- b. The respondent is to pay interest on this amount on the prevailing prime rate plus 2% per annum, calculated and compounded daily from 02 February 2023 to date of payment;
- c. The respondent is to pay the costs of suit.



**FISHER J
JUDGE OF THE HIGH COURT
JOHANNESBURG**

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 30 May 2024.

Heard: 30 April 2024

Delivered: 30 May 2024

APPEARANCES:

Applicant's counsel: Adv. C van der Spuy

Applicant's Attorneys: Lanham-Love Galbraith van Reenen Inc

Respondent's Counsel: Adv. H P van Nieuwenhuizen

Respondent Attorneys: Alan Allschwang & Associates