



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 09982/2022

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES ☒ NO
(2) OF INTEREST TO OTHER JUDGES: YES ☒ NO
(3) REVISED: *yes*

18/7/2024
.....
DATE

[Signature]
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SIGNATURE

In the matter between:

**WHOLESALE & RETAIL SECTOR EDUCATION
AND TRAINING AUTHORITY**

Applicant

and

REMOTENET (PTY) LTD

Respondent

JUDGMENT DELIVERED ON 18 JULY 2024

CP WESLEY AJ

INTRODUCTION

1. The substantive relief that the applicant seeks is an order that directs the respondent to comply with the tender award conditions and agreement that was entered into between the parties, and to compel specific performance by the respondent of its' contractual duty to deliver to the applicant the source code for the Education Training Quality Assurance ("ETQA") module, in terms of what was referred to on the papers as the Management Information System ("MIS System"), that was purchased from and customised by the respondent.
2. The applicant further seeks a punitive cost order against the respondent due to its conduct, which the applicant describes as being obstructive and dilatory.
3. The respondent opposes the application and contends that it should be dismissed.
4. The respondent also contends that a cost order should be granted against the applicant "*on a punitive scale*". At the same time the respondent contends that the "*representative of the applicant*", which I presume is a reference to the deponent to the applicant's founding and replying affidavits, should be personally liable for the costs of the application, again "*on a punitive scale*". It is presumed that what the respondent envisages is the grant of a cost order against the applicant and the deponent jointly, and "*on a punitive scale*".

PRELIMINARY MATTERS

5. Both parties raised preliminary issues at the outset of the application. These are dealt with under the associated headings below.

Application to strike out

6. The applicant seeks an order striking out certain paragraphs in, and annexures to, the respondent's answering affidavit in terms of Rule 6(15), on the basis that the same is scandalous, vexatious or irrelevant.
7. In light of this court's view regarding the merits of the application, it is not necessary to adjudicate the applicant's application to strike out. Although the material concerned is undoubtedly irksome to the applicant and its officers, it would serve little purpose to determine the issue now. Whether the material concerned remains on the papers or is struck out will have no effect the outcome of the application.¹

¹ It is noted, however, that some of the content of the answering affidavit is unnecessarily insulting and derogatory of the applicant and its officers. This material is, on the face of it, scandalous and vexatious. On the meaning of "scandalous" and "vexatious" in Rule 6(15), see *Vaatz v Law Society of Namibia* 1991 (3) SA 563 (Nm) at p 566C to E: "*In Rule 6(15) the meaning of these terms can be briefly stated as follows: Scandalous matter - allegations which may or may not be relevant but which are so worded as to be abusive or defamatory. Vexatious matter - allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy. ...*".

Lis alibi pendens

8. The respondent raises the defence of *lis alibi pendens*, contending that the applicant brought an urgent application under case number 17445/2021 for the same relief that it seeks in the present application, and that the urgent application is still pending. According to the respondent, the application should be dismissed for this reason alone.
9. Simultaneously with the delivery of its replying affidavit, the applicant served a notice of the withdrawal of the urgent application under case number 17445/2021 on the respondent. That addresses the respondent's defence of *lis alibi pendens*, which cannot succeed in the circumstances. The liability for the costs of the urgent application under case number 17445/2021 is not an issue that is before this court.

Disputes of fact

10. The respondent contends that there are, on the papers, material disputes of fact between the parties which the applicant should have foreseen. According to the respondent, motion proceedings were therefore not appropriate in this instance, and the application should be dismissed for this reason alone.

11. Having read the papers, this court is of the view that regarding the issues in this application that are essential to its determination, there are no material disputes of fact between the parties on the papers. Accordingly, the application does not fall to be dismissed for this reason.
12. What remains for decision by the court are the merits of the application and the cost order that falls to be granted.

THE PERTINENT BACKGROUND FACTS

13. The applicant is a public entity which aims to facilitate the skills development needs of the Wholesale and Retail Sector through the implementation of learning programmes, the collection of levies, the disbursement of grants and the monitoring of education and training as outlined in the National Skills Development Strategy. It does so through the use of a software platform, which is the MIS System.
14. All aspects of the applicant's business and legislative mandate are processed through the MIS System. It is the primary manner by way of which the applicant interfaces with its stakeholder's, being the wholesale and retail industry, the accredited learning institutes, the accredited instructors, and the learners.

15. The MIS System is made up of various modules. One of these modules is the ETQA module. As indicated, it is the source code to this module that is central to the application.
16. In 2019 the applicant went out to tender under number ITD/2019/0012, for the provision of the MIS System. The respondent was the successful bidder.
17. The parties duly concluded a contract with each other, styled the Master Service Agreement ("MSA"), on 30 August 2019. The MSA obliged the respondent, against payment of the agreed price by the applicant, to develop, support and maintain the MIS System for the applicant. For present purposes, other salient terms of the MSA include that:
 - 17.1 the termination date of the MSA was 31 March 2020 (clause 3.16);
 - 17.2 both parties were bound by specific confidentiality undertakings towards each other (clause 10);
 - 17.3 the respondent acknowledged that all software materials, in terms of the MSA, were the property of both the applicant and the respondent (clause 17.2);

- 17.4 the future copyright, source code and other rights in all software materials created in terms of the MSA were assigned to the applicant and the respondent (clause 17.3); and
- 17.5 the MIS software solution, inclusive of all of its integrated modular framework features applicable to the MSA, were for the sole use of the applicant's employees and various stakeholders directly engaged in the applicant's business (clause 17.7).
18. The respondent did not provide the MIS System to the applicant by 31 March 2020. In the result, on that day the parties concluded an addendum to the MSA ("the March Addendum"). The March Addendum provided that the termination date of the MSA was now 30 June 2020 (clause 2.1), and that the provisions of the MSA otherwise continued to apply (clause 3.1)
19. As the respondent had still not provided the complete MIS System to the applicant by 1 February 2021, the term of the MSA was extended by a further Master Service Agreement that was concluded by the parties on that day Module ("the February Agreement"). The purpose of the February Agreement was to finalise certain deliverables, including *inter alia* the ETQA. The February Agreement also extended the termination date of the MSA to 31 March 2021.

20. Clause 6.12 of the February Agreement provided that the applicant would have full access, use and enjoyment of the MIS System for an indefinite period regardless of the termination date of the agreement, and would be allowed to develop/customise the MIS System further to suit its business requirements as and when required, subject to the intellectual property rights contained in section 17 of the MSA.
21. The respondent contended that the February Agreement effectively novated both the MSA and the March Addendum, and that it alone constituted the agreement between the parties. In light of clause 16.1 of the February Agreement, this argument cannot be correct. Clause 16.1 of the February Agreement expressly provided that it, the MSA, compliance documentation, terms of reference, price, as well as the General Conditions of Contract, were the whole agreement between the parties regarding its subject matter. In the result, the MSA, the March Addendum, and the February Agreement, together with the other applicable documents, together constituted the contract between the parties.
22. As stated, the MSA, read with the March Addendum and the February Agreement, obliged the respondent, against payment from the applicant, to provide the MIS System to the applicant. The contract between the parties intended that the applicant was to have access to the source code of the MIS System that it purchased from the respondent, and that was customised through development by the respondent, including the source code to all of the modules

thereto. The contract between the parties also intended that the applicant was to have full access, use and enjoyment of the MIS System, and that it was permitted to develop and/or customise the MIS System to further its business requirements as and when required.

23. The MIS System, and in particular the ETQA module, was eventually provided to the applicant by the respondent by about 1 July 2021.
24. It is common cause that the applicant has complied with its contractual payment obligations towards the respondent.
25. Notwithstanding the terms of the contract between the parties, and despite being requested to do so by the applicant, the respondent has to date refused to hand over the source code for the ETQA module to the applicant. It is this refusal that has resulted in the application that is before this court.

SPECIFIC PERFORMANCE

26. A party wishing to claim specific performance in terms of a contract must allege and prove, first, the terms of the contract and, second, compliance with any antecedent or reciprocal obligation, or it must tender such compliance.²

² See *SA Cooling Services (Pty) Ltd v Church Council of the Full Gospel Tabernacle* [1955] 3 All SA 257 (D); *RM van de Ghinste & Co (Pty) Ltd v Van de Ghinste* [1980] 3 All SA 105 (C); *Nkengana and another v Schnetler and another* [2011] 1 All SA 272 (SCA).

27. Having regard to the facts of the matter, the applicant has proven the requisites for an order for specific performance.
28. The court is fortified in its foresaid view by the fact that in argument before the court it was conceded by the respondent's counsel that but for the respondent's defence as enunciated below, the applicant was entitled to an order for the delivery of the source code for the ETQA module. This concession was correctly made.

THE RESPONDENT'S DEFENCE OF UNCLEAN HANDS

29. According to the respondent, the applicant was not entitled to the relief that it sought because it came before this court with unclean hands. The applicant's hand were unclean, so the argument went, because the applicant breached the contract between the parties in various ways during the currency thereof.

The applicant's alleged breaches of contract

30. The respondent asserted that during the currency of the contract between the parties, the applicant failed to perform certain specified agreement related tasks in a timeous manner. The respondent pointed out on 11 February 2021 it addressed a letter to the applicant, placing the applicant on terms in this regard. On 16 February 2021 the respondent addressed another letter to the applicant

with reference to the 11 February 2021 notice, noting that the applicant had not remedied its breaches and that the respondent would be claiming damages from the applicant in terms of the agreement. This was then repeated in an email that the respondent addressed to the applicant on 29 June 2021.

31. The applicant's alleged breaches of the contract between the parties that the respondent relies on were apparently not, in the view of the respondent, of such a material nature that they affected the continuation of the contract between the parties, such that the respondent elected to cancel the contract. In contrast, the respondent was satisfied with a possible claim for damages against the applicant as its remedy for the same. The applicant's alleged breaches may have been viewed in a serious light by the respondent at the time, but ultimately the same seem to have been relatively inconsequential.
32. The respondent next raised as an issue a procurement irregularity, internal to the applicant, that was reported to it by the applicant. This irregularity did not implicate the respondent but, according to the respondent, it detrimentally affected the relationship between the parties. It is not evident what steps, if any, the respondent took to protect its interests in light of this alleged breach. The respondent was, again, seemingly not of the view that the alleged breach warranted for example that the contract between the parties should be cancelled. And again, this alleged breach of the contract between the parties seems to have been relatively inconsequential.

33. The respondent finally contended that the applicant breached the respondent's intellectual property rights *"to various degrees of severity"*. In support of this assertion the deponent to the respondent's answering affidavit stated, for example, the following (quoted verbatim):

"10.6 On or about 7 July 2022, I was contacted by Praxis Computing (Pty) Ltd, which is a company also operating in the Sector Education Training Authority environment, who enquired from me whether the Respondent would want to work with them on a tender that was being given out by the Applicant;

10.7 I was quite perturbed by the request as I knew nothing of what was going on.

10.8 It then became evident that the Applicant intended seeking the amendment of and access of IP of the Respondent, without its' written approval."

34. The difficulties with the respondent's claim are, first, that it is vague and, second, that it is not supported by any evidence that the applicant did in fact breach the respondent's intellectual property rights as alleged. The claim is based more on suspicion than fact. The applicant, in any event, denies the claim. The applicant contends that it was compelled to appoint a third-party provider, being Praxis Computing (Pty) Ltd, because the respondent failed to deliver the required functionality, and that it did not at any time hand over the respondent's intellectual property to that service provider. Ultimately, this alleged breach of the contract between the parties was not proven.

35. The respondent contends that having regard to the applicant's breaches of the contract between the parties as alleged by it, the applicant "[cannot] be deemed to be an innocent party for purposes of claiming relief through contractual specific performance."

The law regarding the defence of unclean hands

36. The defence raised by the respondent was recently discussed in detail by the Constitutional Court in *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH* 2023 (4) BCLR 461 (CC). It is appropriate to quote the relevant passages from the Constitutional Court's judgment in full. The Constitutional Court held as follows in the relevant part (references omitted):

"[71] Whether there is a common-law doctrine of unclean hands that can deprive a plaintiff of its claim ... was a matter much debated before us.

[72] Our courts have long recognised their power, in exceptional circumstances, to prevent an abuse of process. That power has more recently been affirmed, and an abuse of process may include a litigant who comes to court with unclean hands. The power is an incident of the court's inherent power to ensure that those who use the process of law do not do so for ulterior ends that undermine what the courts are established to secure. It is a power most sparingly used. That is so because the exercise of the power prevents a litigant from having their dispute resolved before the courts, the very essence of their right under section 34 of the Constitution. But the authorities do bear out the proposition that to dismiss a claim that a litigant would pursue before the courts on the grounds of abuse is not precluded because that claim exists

in law. The claim is dismissed because the litigant who would bring it is disqualified from doing so by reason of their abuse.

- [73] *Villa Crop relied upon a number of cases that it contended recognised and applied the doctrine of unclean hands The essential proposition was that the courts will not assist a wrongdoer, irrespective of whether their rights derive from the common law or a statute.*

...

- [77] *This binary position fails to appreciate the true juridical nature of the power enjoyed by the courts to prevent an abuse of process, of which the doctrine of unclean hands is a species. An abuse of process can occur in a variety of ways. The litigation may be frivolous or vexatious. A litigant may seek to use the legal process for an ulterior purpose or by recourse to conduct that subverts fundamental values of the rule of law. The behaviour of the litigant may be so tainted with turpitude that the court will not come to such a litigant's aid. The unclean hands doctrine references this latter type of abuse. It is the abusive conduct of the litigant that, in a proper case, may warrant the exercise of the court's power to non-suit such a litigant. The court does so, even though the litigant claims a right that they would vindicate in the court proceedings. For this reason, the power is to be exercised with great caution. Put simply, the court enjoys the power to safeguard the integrity of its process. The court will only exercise this power upon a careful consideration of the prejudice that this may cause to the abusive litigant, and, in particular, the harm that may be occasioned to a litigant whose claim of right will not be decided by the court. But the court's power to prevent the abuse of its process is not determined by the right that the abusive litigant claims."*

Consideration of the defence of unclean hands

37. Arising out of the judgment in *Villa Crop*, the question is whether or not the applicant's behaviour as complained of by the respondent so taints the applicant with turpitude that this court will refuse to come to the applicant's aid?
38. The answer to the foresaid question is a resounding no. The respondent's claim that the applicant breached the respondent's intellectual property rights was not proven. The applicant's other conduct that is complained of by the respondent is not, by any stretch of the imagination, of such a nature as to move this court to take the drastic step of closing the doors of the court in the face of the applicant. The late performance of contractual obligations by the applicant in the present circumstances is not, in itself, an extraordinary occurrence. By the same token, the happening of an event that does not implicate the respondent, but that negatively impacts the relationship that the respondent has with the applicant as contracting party is also, in itself, not an extraordinary occurrence. The applicant's conduct cannot, in the present circumstances, be typified as being an abuse that so taints the applicant with turpitude that this court will refuse to come to its aid. This conduct does not rise to the level of conduct that would move this court to exercise its extraordinary power to non-suit the applicant.
39. It follows that the respondent's defence based on the doctrine of unclean hands cannot succeed.

COSTS

40. The general rule is that costs follow the event, that is that the substantially successful party in the litigation is entitled to recover its costs from the unsuccessful party.³ There is no reason to depart from this rule.
41. Having made out a case for the grant of the relief that it seeks, it cannot be gainsaid that the applicant has been substantially successful in this litigation. Costs should thus follow the event.
42. Clause 11(2)(c) of the February Agreement provides that in the event of litigation ensuing between the parties, the successful party would be entitled to a cost order on the attorney and client scale against the unsuccessful party. Effect will be given to this clause in the order that will be made.

ORDER

43. In the result this court makes the following an order:
- 43.1 The respondent is directed and ordered, within 10 days after service of this order, to perform its obligations under tender number ITD/2019/0012, the Master Services Agreement dated 30 August 2019, the Addendum

³ *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1984 (1) SA 839 (A).

thereto dated 31 March 2020, and the further Master Service Agreement dated 1 February 2021, and hand over to the applicant the source code for the Education Training Quality Assurance ("ETQA") module developed under ITD/2019/0012, including all password and/or access codes to the source code for the development, user testing, dynamic link libraries and production platforms of the ETQA module.

- 43.2 The respondents is to pay the applicant's costs of suit, on the attorney and client scale.



CP WESLEY

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

For applicant: Adv N Strathern
instructed by Ismail & Dhaya Attorneys

For the respondents: Adv W Coetzee
instructed by Du Toits Attorneys

Date heard: 22 May 2024

Date of Judgment: 18 July 2024