

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2023-011485

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

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SIGNATURE

...3 February 2025
DATE

In the matter between:

TIBCO SOFTWARE (SOUTH AFRICA (PTY) LTD

PLAINTIFF

and

TECHSOFT INTERNATIONAL (PTY) LTD

FIRST DEFENDANT

TS INNOVATIONS (Pty) Ltd t/a Tibo Solutions

SECOND DEFENDANT

JUDGMENT- Exception application

Manoim J

INTRODUCTION

- [1] This case concerns an exception application that the two defendants have brought in relation to the plaintiff's particulars of claim.
- [2] The defendants are both subsidiaries of a large US based software company known as Tibco Incorporated. Because the US company, although not a defendant in the matter, plays a role in the events, I will refer to it as the Tibco Parent.
- [3] The Tibco Parent licences its affiliates worldwide, which in turn sublicense its software rights to local intermediary companies. This is where the defendants fit in. They are affiliates of the Tibco Parent, based in South Africa, and in turn selected the plaintiff, Techsoft, as a sub-licensee of its products. Plaintiff then licenced Tibco products to its customers who were end users. Thus, the plaintiff is an intermediary. It licences users for which it earns revenue and it in turn pays royalties to the defendants. The relationship soured. The details are not of concern at this stage. Suffice to say that the plaintiff alleges that the defendants were in breach of the licensing agreement and in 2023 it elected to accept the repudiation and cancel.
- [5] It then brought a claim for damages both in contract and in delict. The plaintiff has made out four separate claims for damages. In a related application the defendants have brought an application for the winding up of the plaintiff which has not yet been heard. This judgment only concerns exceptions raised in the damages claim.

BACKGROUND

- [6] Over the course of the life of the damages claim the defendants have raised various exceptions. On two occasions the plaintiff has amended its particulars of claim in response these exceptions. However, this has not satisfied the defendants. In the latest round of exceptions, the defendants raise five grounds of exception to three of the four claims brought by the plaintiff. Since the plaintiff does not consider these exceptions have any merit this dispute has to be decided by me.
- [7] In the damages action the plaintiff makes out four claims.
- [8] In the first claim it seeks a refund of a balance paid. No exception is raised in this connection, so it need not be considered further.
- [9] In the second claim it seeks damages for breach of contract. The claim arises out of an agreement that plaintiff entered into with the first defendant in November 2020. It was known as the Strategic Partnership Agreement (SPA) and according to Techsoft, subject to various conditions being fulfilled, was set to continue until 2033.
- [10] Pursuant to this agreement the plaintiff entered into various agreements with end user customers. These are known as End User Licence Agreements or EULAS. The plaintiff entered into 106 such agreements. They are classified differently but that distinction is not material for present purposes.
- [11] The parties fell out with one another. In September 2022, the defendant served a notice of breach on the plaintiff and required it to rectify its breach within 30 days. The plaintiff has challenged the validity of this notice but in any event in February 2023 announced that it had accepted the defendant's repudiation.

- [12] Hence from this alleged unlawful breach and lawful repudiation, the plaintiff's claim for damages arises.
- [13] What the plaintiff alleges is, that but for the breach, its EULAS would have continued for the entire duration of the SPA until 2033, provided that it continued to perform in terms of the EULA agreements. Put differently, as the intermediary, the plaintiff would have continued to earn revenue from its customers, the end users, as long as it, as the supplier, and the defendants, adhered to the SPA. Once the defendants had breached the SPA, the Plaintiff alleges it suffered damages in respect of the loss of just over R 350 million.
- [14] The third and fourth claims relate to damages owing to the alleged unlawful termination of contracts that the plaintiff had with specific clients. The third claim relates to a contract with Telkom and the fourth relates to a contract with Nedbank. Both are similar in that the plaintiff alleges that these contracts, originally with the Tibo Parent, were assigned to it with the consent of the two respective customers but then terminated due to the alleged breach which plaintiff alleges amounted to a repudiation of the respective agreements that it had accepted. Each of these claims has attracted two objections, one relates to whether the contracts were lawfully assigned to the plaintiff and if they were, the basis for alleging that they would have endured until 2033, which is the same duration period as for the EULAS.

First objection: EULAS

- [15] The plaintiff has only attached one of the EULA agreements. It pleads that it is unable to attach the remaining 105, as these were all on a server controlled by the defendants to which it (the plaintiff) no longer has access. Put simply it says

it has been blocked. However, it has attached one EULA, with Mediclinic, as the end customer. It says the standard terms of this EULA are the standard terms of all the others.

[16] However, and this is where the first objection comes from the defendants. They allege that the particulars read with the agreements attached, do not sustain the allegation that the EULAS would have persisted until 2033. The defendants point out that the EULA's comprise a standard form agreement (called the Master terms) and a separate document containing terms called an Order form. The Order form, forms part of the contract and contains in its preamble that if there is any conflict between its terms and that of the Master agreement, the terms of the Order form prevail. On the Mediclinic order form there is a table which, inter alia, provides for the start date and the term end date. According to this Order, the Mediclinic contract starts on 7 November 2019 and ends on 6 November 2022.

[17] Given the limited duration of the contract on this Order form the defendants allege that no basis is set out in the contract for the allegation that the EULAS (i.e. all 106 of them) would have continued until 2033. Thus, the conclusion is that the order form, which forms part of the contract, and supersedes the terms of the Master agreement, conflicts with the particulars of claim in respect of duration and render it expiable.

[18] But the plaintiff argues that this is a misreading of the contracts. The order form it argues simply provides for that is termed an 'initial period' notwithstanding the words "Term end date" found on the Mediclinic order form.

[19] Instead, the plaintiff argues one must read the terms of the Master agreement which are complementary to and not contradictory with the duration terms on the Order form. In Annexure A of the Master agreement Clause 12.1 says the agreement commences on the effective date reflected in the “initial order” form and shall remain in effect for a period of one year. Granted thus far this is making the excipients’ point. But in the next sentence it states that: *“Subject to ... the parties may agree to renew the agreement for additional one year periods subject to payment by the partner of the applicable annual fees.”*

[20] Then in Annexure B two provisions deal with continuity. The first is section 12(a) which provides that the agreement remains in effect until terminated. But the more meaningful section is 12(c) which says:

“Following the end of the initial term for ... the Term will automatically renew continuously for the same length as the Initial term unless either party gives written notice of at least 60 days prior to the end of the initial or any renewal term of its intention to terminate.”

[21] The plaintiff argues that this provides that the contract between the parties is one that continually rolls over despite the fact that it has an initial period and is composed of several renewal period. On this interpretation of the Agreement there is a reasonable interpretation that the contract remains in place subject of course to contingencies for an indefinite period. Given that the plaintiff’s rights existed until 2033 in terms of the SPA, that would, on this interpretation, be a plausible end period.

[22] In this respect the exception fails. The provisions on the Order and the Master agreement can be read to complement one another and not to contradict the

allegations made out in the Particulars of claim. As was held in the well-known *Sun Packaging* decision where a contract is susceptible to several meanings the courts are reluctant to make this determination at exception stage.¹

- [23] More problematic is how the plaintiff reaches the quantum of damages for this claim. Here the assumption made by the defendants was that the amount was realised using the Mediclinic fees as a proxy for all the others. This was a reasonable assumption. However, during the hearing counsel for the plaintiff advised that this was not the case, and each contract was different in this respect. If that is the situation then it is necessary for the plaintiff to specifically plead how these figures are arrived at. Granted a spreadsheet is provided of the total figures for each year until 2033, but there is no breakdown for each respective contract if these figures are different. These figures should be provided. The plaintiff's response is that this was not an issue specific to the exception and should not be ordered. That may be so, but it is implicit in the exception taken based as it was on a reasonable misunderstanding of the pleading. Given that the plaintiff is going to have to go back to the drawing board in respect of some of the exceptions which I will uphold, it would be convenient to order this now to avoid a further series of exceptions from the defendants – precisely what the plaintiff has complained about.

Second Objection: The Telkom claim

- [24] In its third claim the plaintiff claims damages from the defendants for repudiating a contract between itself and Telkom which it alleged would have persisted until 2033. This repudiation took place in October 2022 when the second defendant

¹ *Sun Packaging Ltd v Vreulink* 1996 (4) SA 176 (A) at 186J

withheld access to certain rights and services to the plaintiff and approached Telkom directly to provide the services. The plaintiff accepted the repudiation in February 2023 and now sues for damages for loss of profit.

[25] The claim is based on a tripartite contract entered into between the second defendant, Telkom, and the plaintiff in March 2020. The contract is annexed to the particulars of claim.

[26] To found its claim under this head of damages the plaintiff relies on the following clauses in the tripartite contract.

[27] A clause that records that the parent company had a contract with Telkom in terms of a Master agreement dated September 2007.

[28] Then a clause in which the second defendant assigns its rights and obligations arising from the Master agreement to the plaintiff. There are then clauses in which the plaintiff accepts the assignment and to which Telkom gives its consent. Thus, the claim is based on the terms of this assigned agreement.

[29] But the exception is that there is a gap here. The Master agreement was with the parent. This is evident from clause 2.4. But 2.4 is phrased in this way under a section headed recordal:

“Addenda 14 and 15 are governed by the terms of the Agreement No 091C/06 for the provision of Licensed Software Maintenance, Support and Services entered into on 29 September 2006 with contract number SLSA4 877 between Telkom SOC Limited and TIBCO Software inc. (“Master Agreement”) as assigned from TIBCO Software Inc [Tibco parent] to TS Innovations (Pty) Limited [the second defendant] on 28 September 2007.”

[30] Addenda 14 and 15 comprise the agreement allegedly then assigned on to the plaintiff. But says the second defendant, there is no allegation that these rights were assigned by the parent company to the second defendant. The most that can be said is an allegation by way of a recordal that they had been assigned to the second defendant.

[31] But this does not mean that the plaintiff has not made out a cause of action. It relies on the tripartite agreement, and it alleges that the second defendant had been assigned these rights by its parent in September 2007. Granted it does not attach the agreement of assignment, but it alleges it had taken place. If there was no such assignment and the second defendant could not lawfully pass on these rights the plaintiff, then the defendants can plead that. The plaintiff's cause of action here is made out clearly.

[32] I find that there is no basis to this objection, and it is dismissed.

Third Objection: Duration of the Telkom claim

[33] Recall that the claim is for the duration of the contract which the plaintiff alleges would have persisted until 2033. In this objection the defendants allege there is no basis to contend that the contract would have endured for this period.

[34] The pleaded case is that the agreement was in force for one year from the effective date. However, in the miscellany of contracts that govern the Telkom agreement is one referred to as 091C/06. That contains in paragraph E a clause that states:

“Term and Termination. This initial term for the provision of Maintenance shall be from the Effective Date of this Agreement and thereafter may be renewed annually upon payment of the applicable Maintenance Fee. Maintenance

Services may be terminated: (a) by either upon a default of the other, such default remaining uncured for fifteen days from written notice from the non-defaulting party; (b) upon the filing for bankruptcy or insolvency of the other party, (c) by either party upon prior written notice at least sixty days prior to the end of any annual Maintenance period.”

- [35] The plaintiff’s argument here is the same as that with the EULAS; whilst there is mention of an initial period, the contract contemplates an annual renewal provided the conditions are met. Thus, the renewed annual provision subject to the fulfilment of the conditions can be interpreted to provide a roll over provided the plaintiff retains its rights from the second defendant. This it is alleged is retained until 2033. Again, I find that a cause of action is disclosed here for the period alleged. This exception must be dismissed.

Fourth Objection: the Nedbank contract: assignment

- [36] Here the plaintiff alleges an assignment of a contract again of a key customer, Nedbank. The plaintiff alleges that in October 2020 it entered into a three way assignment agreement with a representative of the second defendant, as well as Nedbank. This agreement is said to be verbal by which I understand this to mean an oral agreement between the three parties. As a matter of law although unusual, an assignment of an agreement does not require the formality of being reduced to writing. But unlike with the Telkom contract there is no agreement annexed.
- [37] Instead, what is attached is a consent from Nedbank dated 15 September 2020. The document records that Nedbank had had a Master service agreement with

the Tibco Parent company since 2006. Thus far this is on all fours with the Telkom situation. However here Nedbank in the consent states the following:

“Nedbank acknowledges that TIBCO intends to assign Agreements to TechSoft International (Proprietary) Limited, Registration Number 2016/365152/07 (eTechSoft).”

- [38] From this letter which is all that has been provided by the plaintiff there is an allegation that the Tibco Parent company (that is the Tibco contemplated in the letter) will assign the agreements directly to the plaintiff. Here there is no intermediate role for the second defendant, unlike there was with Telkom. Yet in the particulars of claim the allegation is that it is the second defendant which makes the assignment to the plaintiff. Thus, there is confusion and the exception that there has been no assignment alleged is well taken. The plaintiff needs to clarify this issue. Did the representative of the second defendant who according to the particulars of claim agreed to the assignment, represent the parent as well, or had the parent already assigned the agreement to the second defendant and the Nedbank letter is mistaken on this point. The exception here is upheld and the plaintiff must clarify its case on this point. The defendant is entitled to know which entity is alleged to have assigned these rights to the plaintiff.

Fifth Objection: the Nedbank contract: duration

- [39] The same allegation is made by the plaintiff that the Nedbank agreement would have endured to 2033 but for the unlawful repudiation by the second defendant. But given that I have upheld the exception in respect of the underlying agreement it is premature to decide this point. In anticipation of future

challenges, this challenge will be determined by the existence of same roll over provisions as in the Telkom agreement. If that is on the same terms, then a roll over would have been sufficiently pleaded. But if not, the outcome will depend on the particularity that will be furnished.

Conclusion

[40] I have dismissed three exceptions, upheld one, partially upheld another (the Eula quantification aspect) and have not been able to determine the one which is contingent on the outcome of further pleading in respect of the objection I upheld (the Nedbank duration). As no party has been completely successful each should pay its own costs.

[41] Both parties agreed that if an exception was upheld the plaintiff was entitled to be given an opportunity to amend its pleadings. I have done so.

ORDER: -

[42] In the result the following order is made:

1. Objection one is partially dismissed, but partially upheld. It is partially upheld in respect the plaintiff failing to plead in what respect each respective claim for damages for the Eulas is made up. The plaintiff is given 20 days to amend its particulars of claim in this respect.
2. Objections two and three are dismissed.
3. Objection four is upheld. The plaintiff is given 20 days to amend its particulars of claim in this respect.
4. Objection five is postponed, pending the outcome of the amendment of the particulars in respect of objection four.
5. Each party is liable for its own costs.



N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG

Date of hearing: 04 December 2024

Date of Reasons: 3 February 2025

Appearances:

Counsel for the First and second defendant

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