THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 065/2021

In the matter between:

TEE QUE TRADING SERVICES (PTY) LTD **APPELLANT**

and

ORACLE CORPORATION SOUTH AFRICA (PTY) LTD **FIRST RESPONDENT**

SOUTH AFRICAN POST OFFICE **SECOND RESPONDENT**

Neutral citation: *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)

Coram: DAMBUZA, MOCUMIE and DLODLO JJA, MEYER and SMITH AJJA

Heard: 28 February 2022

Delivered: 17 May 2022

Summary: Contract law – arbitration and governing law clauses in licence agreements – whether subsequent contracts replaced or rendered clauses inoperative – no variation of the licence agreements – subsequent contracts regulating different aspects of business – arbitration clause and governing law clause not invalid.

ORDER

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

1 The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

Dambuza JA (Mocumie and Dlodlo JJA, Meyer and Smith AJJA concurring)

Introduction

[1] The issue in this appeal is whether an arbitration clause and a governing law clause in a licence agreement concluded between the appellant, Tee Que Trading Services (Pty) Ltd (TQ), and the first respondent, Oracle Corporation South Africa (Pty) Ltd (Oracle), were rendered inoperative by three agreements which were later concluded by the same parties. Allied to that is the question whether similar clauses in a related sub-licence agreement between TQ and the South African Post Office (SAPO) were replaced by the dispute resolution clauses in the three agreements concluded between TQ and Oracle. The Gauteng Division of the High Court, Pretoria (high court), per Verster AJ, held that the clauses in the earlier licence and sub-licence agreements remained valid and ordered a stay of the action proceedings instituted by TQ against Oracle and SAPO, pending referral of the dispute between these parties to arbitration. This appeal, with the leave of this Court, is against that order of the high court.

Background

[2] During 2004 I-Flex Solutions Limited (I-Flex), a company based in India, concluded a written licence agreement with TQ in terms of which it granted to TQ a non-exclusive, personal, non-transferable, royalty free and intangible right to sub-licence a specific software system to the second respondent, SAPO. A related sub-licence agreement concluded between TQ and SAPO authorised TQ to '. . . grant to the Bank [SAPO] and the Bank [to] accept the non-exclusive, personal, non-transferable, royalty-free and intangible right [the Sub-licence] to [u]se the Software System' for its own business purposes.

[3] Both the licence and sub-licence agreements (collectively referred to as the licence agreements) contained arbitration and governing laws clauses in terms of which disputes between the parties thereto would be referred to arbitration. The licence agreement stipulated that any dispute 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 any dispute 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 (ICC)[1] would be applicable.[2]

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[1] The International Chamber of Commerce is an international arbitration institution. Its rules are used around the world to resolve disputes.

[2] Clauses 25 and 26 of the licence agreement provided:
'25. ARBITRATION
All disputes, controversies and differences of opinion arising out of or in connection with this contract or for the breach hereof which cannot be settled amicably by the parties hereto, shall be settled by arbitration according to the then applicable rules of arbitration of the International Chamber of Commerce (ICC). The place of arbitration shall be London, England.
26. GOVERNING LAWS
This agreement shall be construed and enforced in accordance with the laws of England without regard to its principles of conflict of laws. The parties agree that the jurisdiction and venue of any action with respect to this agreement shall be in a court of competent subject matter jurisdiction located in London, England and each of the parties hereby agrees to submit itself to the exclusive jurisdiction and venue of such court for the purpose of any such action.'
Clauses 25 and 26 of the sub-licence agreement were in identical terms, save for stipulating that the rules applicable to the arbitration would be the rules of arbitration of the International Chamber of Commerce (ICC), that the place of arbitration would be South Africa and that the governing laws would be South African laws.

[4] 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.

[5] In 2005 Oracle acquired the I-Flex business and became the latter's successor in tittle in respect of the licence agreement. In addition to the existing licence agreement, TQ was required by Oracle to assume membership of the Oracle Partner Network so that the relationship that it (TQ) had with I-Flex could be extended to Oracle and also that TQ could distribute Oracle's other programs, services and equipment. The membership was renewable annually. For that purpose TQ and Oracle concluded an agreement termed the 'Oracle Partner Network Agreement' (OPNA or OPN agreement).

[6] TQ first became a member of the Oracle network in 2008. Over time, and in line with the Oracle network membership requirement, two more agreements were concluded between TQ and Oracle. These were: the Oracle Licence and Services Agreement (OLSA) and the Oracle Partner Network Full Use Distribution Agreement (FUDA). Each of these additional agreements (the OPNA, OLSA and FUDA) stipulated that disputes relating thereto would be determined by South African courts, in accordance with South African laws.

The dispute

[7] In March 2018 TQ instituted a civil claim against Oracle and SAPO in the high court for damages in the amount of R61 603 515.00 for breach of the licence agreements. It alleged that contrary to the terms of the licence agreements, Oracle and SAPO had negotiated and contracted directly with each other, that they had 'purported' to transfer licences from TQ to SAPO, that Oracle issued additional licences and sold additional modules of the I-Flex software system to SAPO, and

that Oracle and SAPO had concluded a software maintenance agreement to the exclusion of TQ.

[8] In response to the summons, Oracle brought an application for a stay of the action pending referral of the dispute to arbitration. It invoked the provisions of clauses 25 and 26 of the licence agreements and pleaded that the dispute had to be referred to international arbitration under the auspices of the ICC. Oracle also pleaded that the South African Arbitration Act 42 of 1965 was not applicable to the licence agreements.

[9] An alternative contention by Oracle was that even if the high court were to find that domestic arbitration was envisaged, it was entitled to a stay of the pending action, pending referral of the dispute in accordance with s 6 of the domestic Arbitration Act.[3] And even if the court were to determine that the licence agreements provided for a choice of arbitration court, the parties thereto had chosen the courts of London, England, so it was contended.

[10] Notwithstanding its concession that the dispute related to the licence agreements, TQ insisted that the dispute resolution mechanism specified in the Oracle network membership agreements was the applicable dispute resolution mechanism. It contended that the business relationship between the parties was governed by the network membership agreements. Without those agreements the licence agreements were impracticable, because execution of the software maintenance obligations were dependant on its membership in the Oracle

[3] Section 6 provides the following: '(1) If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other steps in the proceedings, apply to that court for a stay of such proceedings.
(2) If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make an order staying such proceedings subject to such terms and conditions as it may consider just.'

network. The gist of this argument was that the network membership agreements and the dispute resolution clauses therein superseded clauses 25 and 26 of the licence agreements. It was also asserted that referral of the dispute to international arbitration would not be in the interests of any of the parties as they were all based in South Africa and the cause of action arose within the Republic.

[11] In granting the order of stay of the action, the high court rejected TQ's contentions. 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 (IAA), applied to the licence agreements. Further, in terms of Article 8 of the Model Law[4], on a proper interpretation of the licence agreements, the court was compelled to order a stay of the action proceedings pending referral of the dispute to arbitration. The court held that unlike with the provisions of the domestic Arbitration Act, under the IAA the court had no discretion.

On appeal

[12] In this Court both TQ and Oracle repeated more or less the same submissions they had made in the high court. At the heart of the submissions made on behalf of TQ was that the dispute was not an international commercial dispute because I-Flex was no longer party to the licence agreements and the entities involved were based in South Africa.

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[4] Article 8 of the Model Law provides that:
'(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his or her first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.'

[13] The submission on behalf Oracle was that the issues raised in TQ's cause of action were governed exclusively by the licence agreements. The network membership agreements which governed other aspects of the parties' relationship could not supersede the arbitration dispute resolution mechanism stipulated in the licence agreements.

The agreements

[14] Five contracts require close consideration in this appeal – the two licence agreements and the three Oracle network membership agreements. Each of these regulates a specific aspect of the parties' business relationship. The licence agreement laid the ground for TQ to acquire the specified rights to the I-Flex software in anticipation of the sub-licence agreement between TQ and SAPO. Clause 2.1 of the licence agreement provided that:

'2.1The Company [I-Flex] grants to the Licencee [TQ] and the Licencee hereby accepts the non-exclusive, personal, non-transferable, royalty-free and intangible right (the Licence') as further described in this section to sub-licence the Software System to the Bank [SAPO] as follows:

a. To directly sub-licence the Software System to the Bank for its own internal business purposes.
b. The payment of the full licence fees and all other charges, as stated herein below, to the Company shall entitle the Licencee to grant the sub-licence permitting the installation and use of the Software System to the Bank in South Africa to the extent stated in Schedule 1.
c. Prior to the delivery of the Software System to the Bank, the licencee shall enter into a binding Sub-Licence Agreement in the form in Schedule 4, in the event that there is any change, modification or alteration in the form of the Sub-Licence Agreement which imposes on the Licencee any obligation or liability which is additional to those stated or envisaged under this Agreement then such additional obligations or liability shall not be binding on the Company.
d. The use of the Software System by the Bank shall be solely on and in conjunction with the Equipment and software tools as described in Schedule (1) and (2) hereto for the

> processing of its own data, for its own internal business purposes at the Support and Production Location during the Term of this Agreement subject to the terms and conditions herein contained.'

[15] In terms of Clause 2.1 of the sub-licence agreement TQ granted to SAPO the rights of use of the Software System together with certain specified equipment.

[16] The complementary relationship between the licence agreements is illustrated in Clause 5 of the sub-licence agreement in terms of which TQ, I-Flex and SAPO agreed on a project plan for installation of the software system onto SAPO's work premises. SAPO had to pay to TQ the sub-lease fee, customisation fee and on-site charges as specified in Schedule 1 to the sub-licence agreement.

[17] The period of the licence agreements was 'perpetual', subject to termination by either party as provided in the agreements. Any variation of the agreements had to be incorporated in a revised schedule thereto. A party could terminate the licence agreement on 30 days written notice to the other party.

[18] The arbitration clause specified in Clause 25 of the licence agreements was repeated in Clause 11 of both licence agreements as follows:

'In the event of any disputes between the parties, the matter will be resolved through arbitration identified in clause 25 and 26.'

[19] The OPN agreement(s) were concluded between TQ and Oracle only. SAPO was not party thereto. In terms thereof TQ had to apply for membership of the OPN. On acceptance of its application for membership of the Oracle Partnership Network, TQ would be allocated and enrolled to one of country specific partner levels - silver, gold, platinum or diamond. On payment of membership fees, TQ would be able to access 'partner level benefits', subject to

maintenance of certain criteria applicable to the particular membership level it was admitted to. The partner level benefits entailed use of technology and application programs which could be downloaded electronically, together with access to technical support, and use of Oracle consulting methodologies and engagement material for the programs, and other additional Oracle resources.

[20] The OLSA regulated TQ's limited right(s) to use the programs made available to it on acceptance to the network. For example, removal, modification, and reverse engineering of the programs was prohibited. Warranties and disclaimers by Oracle, and 'exclusive remedies' available to members were set out in this agreement.

[21] TQ's rights to distribute programs, hardware learning credits and other services to end users were regulated by the FUDA. In terms thereof members were authorised to use Oracle's trademarks and copyrights in terms of guidelines set out in Oracle's Third Party Usage Guidelines.

The law

[22] An arbitration agreement is interpreted according to the established principles governing the interpretation of legal documents.[5] It is a self-contained agreement collateral to the main agreement to which it relates.[6] It may only be terminated with the consent of all parties, unless it provides otherwise.[7]

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[5] In *KPMG Chartered Accountants (SA) v Securefin Limited and Anothe*r (644/07) [2009] ZASCA 7; 2009 (4) SA 399 (SCA); [2009] 2 All SA 523 (SCA); *Natal Joint Municipal Pension Fund v Endumeni Municipality* ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).
[6] 2 Lawsa 3 ed para 90.
[7] 2 Lawsa 3 ed para 93. This position in this country is entrenched by the provisions of s the Arbitration Act 42 of 1965.

Discussion

Were the arbitration and governing law clauses superseded by the dispute resolution clauses in the network membership agreements?

[23] At first TQ pleaded that the dispute resolution clauses provided for in the network membership agreements had superseded clauses 25 and 26 of the licence agreements. This meant that the dispute resolution clauses in the network membership agreements had to be imported onto the licence agreements. There was no explanation as to how or why some clauses of the licence agreements remained valid and others not. Nevertheless, this contention later changed to the effect that the arbitration and governing law clauses became inoperative on conclusion of the network membership agreements.

[24] Whatever the ultimate contention by TQ in this regard was, its express reliance on the licence and sub-licence agreements is pertinent. The absurdity in TQ's arguments was this: on the case pleaded by it, clauses in the network membership agreements, to which SAPO was not party, would be incorporated into the sub-licence agreement without any consent from SAPO. Further, no regard was paid to the intention of the parties as expressed in the agreements.

[25] In terms of the licence agreements, the arbitration and governing law clauses would only terminate if the parties or one of them invoked the provisions of the termination clause. Apart from regulating termination for breach, Clause 15, in both agreements, regulated termination of the licence agreements as follows:

'The licencee [Bank] may terminate this Agreement after full payment of the Total Licence [Sub-licence] Fees with 30 days written prior notice to the Company [TQ] of the Licencee's [Bank's] intent to terminate. However such termination shall not entitle the Licencee [Bank] to a refund of any part of the Total Licencee [Sub-licence] Fee nor shall such termination prevent the Company [TQ] from recovering any balance outstanding.'

[26] No variation of the licence agreement was ever effected in terms of this clause. And nothing in the wording of the network membership agreements indicates that TQ and Oracle intended to terminate the licence agreements or any clause therein. Instead, as stated, each of the agreements regulated different aspects of the business relationship between TQ and Oracle. It is also relevant that in the summons TQ pleaded that the three network membership agreements were concluded with the intention of granting TQ the right to distribute '*other Oracle products in addition to the [TQ's] rights acquired in terms of the Licence agreement'*. (emphasis supplied)

[27] While the licence agreements granted and regulated specified rights between TQ, Oracle and SAPO in relation to the I-Flex Software, the OPN agreement regulated membership to the business relationship between TQ and Oracle based on TQ's membership of the Oracle network and as regulated by the three later agreements.

[28] A further relevant consideration is that in the summons TQ pleaded that prior to signing the network membership agreements it was assured by Oracle that its rights under the licence agreements would not be negatively affected by the new contracts because the later agreements would 'only apply to all new Oracle Technology Licence'. The parties were therefore alive to the real or perceived impact of the network membership agreement on the licence agreements and they agreed that the licence agreements remained in place. Their alleged discussions are consistent with the terms of all the contracts between them. The contention by TQ that the later agreements rendered clauses 25 and 26 in the licence agreements inoperative is therefore contrived.

Did the IAA and Model Law apply to the dispute?

[29] The IAA was enacted in South Africa with the specific objective, amongst others, to domesticate the Model law as adopted by the UNICTRAL in 1985.[8] The Model Law reflects worldwide consensus on key aspects of international arbitration practice. Section 3 of the IAA sets out the objectives of that Act as to:

'(a) facilitate the use of arbitration as a method of resolving international commercial disputes;

(b) adopt the Model Law for use in international commercial disputes;

(c) facilitate the recognition and enforcement of certain arbitration agreements and arbitral awards; and

(d) give effect to the obligations of the Republic under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), the text of which is set out in Schedule 3 to this Act, subject to the provisions of the Constitution.'

[30] The Model Law appears in Schedule 1 to the IAA. In terms of Article 1(1) thereof its provisions apply to international commercial arbitration, subject to any agreement in force between the Republic and any other State or States. Article 1(2) however provides that the provisions of the Model Law apply only if the juridical seat of arbitration is in the Republic, except in relation to Articles 8, 9, 17H, 17I, 17J, 35 and 36 thereof. In terms of Article 1(3) an arbitration is international if:

'*(a)* the parties to the arbitration have, at the time of the conclusion of that [arbitration] agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business;

> (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
>
> (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.'

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[8] PAA Ramsden *The Law of Arbitration – South African and International Arbitration* 2nd ed (2018) at 21.

[31] It was submitted on behalf of TQ that on a proper interpretation of Article 1of the Model law, Article 1(3) thereof was inapplicable to the dispute because its application was excluded under Article 1(2). This argument was intended to provide a basis for this Court to ignore the definition of international arbitration set out in Article 1(3). It was also contended that the dispute was not an international dispute because all the parties thereto are South African entities, and the dispute arose in South Africa.

[32] The submission that the Model Law is excluded from application in the dispute between the parties is misguided. It is necessary to highlight that the IAA and the Model Law, as incorporated therein, is South African law. It is in this context that Article 1(2) becomes relevant. 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 IAA and the Model law apply.

[33] In this case, in the licence agreement, the parties opted to settle their disputes through international commercial arbitration. They specified the juridical seat of their arbitration as London, England. They also specified that the disputes between them would be settled by arbitration 'according to the then applicable rules of arbitration of the International Chamber of Commerce (ICC)'. Both the specified juridical seat and the applicable rules rendered the arbitration an international arbitration.

[34] In relation to the parties to the dispute being South African entities, there is no bar to parties who conduct business in the Republic choosing a place of arbitration that is situated outside the Republic. Under Article 20 of the Model Law, parties are free to agree on the juridical seat of arbitration.[9] In *Polysius (Pty)*

[9] Article 20 states that: '(1) The parties are free to agree on the juridical seat of arbitration. Failing such agreement, the juridical seat of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.'

Ltd v Transvaal Alloys (Pty) Ltd[10] where an objection similar to that raised by TQ, Slomowitz J remarked that: 'When the parties contracted, they were fully alive to the nature of the issues that were likely to arise . . . With this in mind, they stipulated for an arbitration in Switzerland and should be held to it'. Similarly in this case, when TQ and Oracle extended the terms of the original contract between TQ and I-Flex, they were alive to the location of their businesses and opted retain the arbitration and governing law clauses.

[35] This conclusion is consistent with the approach to interpretation of similar international arbitration agreements elsewhere in the world. In *Orbitel Mobile Communications Limited v Novatel Communications (Far East) Limited*[11], an agreement between Hong Kong companies that London would be the place of arbitration, the arbitration was held to be international. Similarly, in *Marko Tel & Hes Kablo Albania v ZTE Albania Sh pk Albania*[12] an arbitration clause between Albanian companies that arbitration was to take place in London, was upheld.

Discretion to refuse stay of action proceedings

[36] The Model Law reflects the international approach to international commercial arbitration agreements that, unless an arbitration agreement is null and void, inoperable or incapable of being performed, courts are obliged to stay action proceedings pending referral to arbitration. In this case, the arbitration and governing law agreements between Oracle, TQ and SAPO remain valid and operative.

[10] *Polysius (Pty) Ltd v Transvaal Alloys (Pty) Ltd and Another; Transvaal Alloys (Pty) Ltd v Polysius (Pty) Ltd* 1983 (2) SA 630 (W) at 651G-H.

[11] *Orbitel Mobile Communications Limited v Novatel Communications (Far East) Limited* (case number: HCA9014/1995) High Court (Hong Kong) (16 February 1996).

[12] *Marko Tel & Hes Kablo Albania v ZTE Albania Sh pk Albania* Supreme Court 11243-01441-2013 (06 June 2013), CLOUT case 1459.

[37] Furthermore, a consequence of South Africa having ratified the Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the NYC) is that the provisions of the Convention are included in Schedule 3 of the IAA. In Article II the schedule sets out the text of the NYC as follows:

'Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.'

No valid basis has been established for interference with the arbitration agreements in this case.

[38] Consequently, the appeal is dismissed with costs including the costs of two counsel.

N DAMBUZA
JUDGE OF APPEAL

Appearances:

For appellant:	RB Mphela with N Ngwenya
Instructed by:	Nicholas Ngwenya Inc, Centurion
	SMO Seobe Attorneys Inc, Bloemfontein
For 1st respondent:	HWS Martin with D Bernstein
Instructed by:	Baker McKenzie Attorneys, Sandton
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