

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case No: A3125/2021

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE: 6/9/22

SIGNATURE: [Signature]

In the matter between:

HOSI TECHNOLOGIES (PTY) LIMITED

Appellant

and

NOMVULA BEBEZA

Respondent

JUDGMENT

Todd AJ

Introduction

1. This is an appeal against a judgment and order handed down in civil proceedings in the Randburg Regional Court on 11 August 2021.
2. The respondent had instituted proceedings against the appellant claiming damages arising from an alleged breach of contract. The court *a quo* found that there had indeed

been a breach of contract and ordered the appellant to pay the respondent damages in the amount of R72,000 together with interest, and costs.

3. That is the order against which the appellant now appeals.

Summary of relevant facts

4. The contract which gave rise to the dispute was one under which the respondent was engaged to provide services to the appellant as an independent contractor.
5. Under clause 1 of the contract the respondent was engaged to render services as an independent contractor in the capacity of Automation Tester, reporting to the "Test Lead". The appointment was for a one year project commencing October 2019 and ending October 2020. The project was described as involving work "in the BAU Division on a non-disclosed project at MTN".
6. Clause 3 of the contract regulated the performance of the services, requiring the respondent to render services under the general direction and to the satisfaction of the reporting line manager and of the appellant generally, and it precluded either party from making alterations or additions or variations to the services without prior written instruction and agreement.
7. The remainder of clause 3 of the contract regulated termination of the contract. This provided for termination of the contract on three distinct grounds. The first was if the contractor (the respondent) failed to execute her duties, in which event the appellant was entitled to terminate the contract on grounds of "non-performance" on giving one week's written notice. This ground is not relevant.
8. The second ground was that either party had a right to terminate the contract (without being required to give any reason) by giving the other party one month's written notice. The formulation of this ground in the contract was as follows:

"Termination of the contract by both parties will be one month's written notice".
9. The third ground provided for the automatic termination of the contract in the event that a service level agreement between the appellant and MTN terminated. This ground was formulated in the contract as follows:

"The Contract will also effectively terminate when the service level agreement between Hosi Technologies (Pty) Ltd terminates, you shall be informed in writing of this termination."

10. The background to the third ground of termination of the contract was that the respondent, in common with other similarly situated independent contractors, had been engaged by the appellant to assist in carrying out the appellant's obligations to MTN under a service level agreement that had been concluded between the appellant and MTN. It was common cause between the parties that although MTN was not expressly referred to in the third ground of termination, the service level agreement being referred to there was the service level agreement between MTN and the appellant. The effect of this was that if that service level agreement came to an end, the respondent's contract with the appellant would terminate at the same time.
11. The respondent was entitled to be paid "according to the number of hours worked in a day" at an agreed hourly rate. She was required to render a monthly invoice against which she would be paid by no later than the 30th of each month.
12. The source of the dispute that subsequently arose was a communication to the appellant by MTN sent by email dated 30 April 2020. The email reads as follows:

"Due to the IT budget cuts applied for our 3+9 budgets for 2020 and the project demand across business unit expected to drop drastically, it is an unfortunate situation that MTN needs to let go of about 34 resources from a total of 38 across all testing streams. We have to reduce capacity drastically considering the available budget for the remainder of the year and also that the project demand is also slowing down. The reduction of the resources is effective 4 May 2020. The below information is how we are going to respond to the effective changes;

All resources allocated to the dedicated stream will not be required as of 4 May 2020 and should not continue under those projects. Unless if the testers allocated are paid from the business budget.

...

Please take note that MTN is not cancelling the contractual agreement for the testing services, as in when resources are required a service request will be

sent to all suppliers and follow a fair process to onboard required capacity going forward.”

13. It is common cause that this communication from MTN signaled a dramatic reduction in the volume of work that the appellant would be required to deliver to MTN. It was also common cause, however, that it did not serve to terminate the service level agreement between MTN and the appellant.
14. Having received this communication from MTN the appellant's response as regards the respondent and similarly situated independent contractors was to inform them that by reason of the provisions of clause 3 of their contracts, their contracts were terminated with immediate effect.
15. Specifically, the appellant communicated to the respondent, by letter dated 4 May 2020, that *“due to the extraordinary circumstances the company finds itself in due to the Covid 19 situation and the restrictions implemented by the Government to contain the situation, we as Hosi Technologies have taken a decision to terminate your contract due to our clients conditions that have deteriorated to an unprecedented level and them having to drastically reducing headcount (sic)”*. The letter concluded that should the situation change and the company find itself in a better position it would “afford you the first opportunity”.
16. This stance was queried by the respondent, who pointed out that each party had a right under the contract to give one month's notice to terminate the contract. The respondent contended that the contractual consequence of the termination of the service level agreement by MTN could not be invoked because that was not what had occurred.
17. The response to this, communicated by email from the appellant's Mr Mkhacana, was that *“as per the agreement if the SLA is terminated the agreement between you and Hosi effectively terminates no notice period is due”*.
18. There were subsequent interactions between the parties in which they restated their respective positions. These further interactions did not serve to resolve matters and are not further relevant for present purposes.

Decision of the court *a quo*

19. The court *a quo* found that it was clear that partial cancellation of the Service Level Agreement between the appellant and the MTN had not been considered or provided for in terms of the contract concluded between the parties, and that this was not a ground for termination of the contract by the appellant without invoking the 30 day notice period.
20. The court also accepted the appellant's contention that it had been unable to perform under the contract on grounds of supervening impossibility of performance, and found that it was impossible for the appellant to perform under the contract because it did not have automation testing projects allocated to it by MTN that it could offer to the respondent for the further duration of her contract.
21. The court ordered the appellant to pay damages in an amount equivalent to the respondent's loss of earnings during the notice period, being the amount of R72,000. This was the average of the monthly fees that the respondent had received during the period of the contract prior to its termination.

Issues in the appeal

22. In this appeal the appellant advances two main contentions. The first is that the court *a quo* erred in its interpretation of the contract, and should have found that, properly interpreted, the contract terminated automatically when MTN gave notice that it no longer required the appellant to provide the services that had thus far been rendered by the respondent. In other words, the appellant contends that on the facts the court should have found that the contract had terminated on the third ground provided for in clause 3 of the contract (referred to in paragraph 9 above).
23. The appellant's second main contention is that in light of the conclusion the court *a quo* had reached that there was a supervening impossibility of performance, the court erred in finding that the appellant was nevertheless obliged to give notice to terminate the contract, and that it should have concluded that in those circumstances, even if this was not a situation contemplated in the third ground of termination provided for in the contract, no notice was required.

Analysis

24. As regards the appellant's first contention Mr Modiba, counsel appearing for the appellant, submitted that on a proper interpretation of the provisions of the contract the third ground of termination provided for in the contract was sufficiently broad, having regard to its rationale and the presumed intentions of the parties when they concluded the contract, to extend to a situation in which the service level agreement with MTN did not terminate, but where only the services specifically provided by the respondent were no longer required by MTN.
25. Put differently, the appellant contends that the third ground of termination extended to a situation in which there was a reduction in the volume of work required to be performed for MTN under the service level agreement with the result that the services of the respondent were no longer required. This is in effect what occurred here.
26. In support of this submission Mr Modiba referred us to the decisions of the Supreme Court of Appeal in *KPMG Chartered Accounts (SA) v Securefin Ltd*¹ and in *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd*.² He invited us to depart from the words used in the contract by having regard to the background and surrounding facts which indicated the purpose and intention of the parties.³ The appellant submitted that the termination was based on the "rationale of the contract", and specifically the proposition that where there was no work available to perform there was no need to give notice, in the same way as would have been the case where the service level agreement was terminated. In advancing this submission the appellant essentially contends that the rationale behind the third ground of termination was that if there was no longer any work to be performed by the respondent for MTN the contract with the respondent would terminate with immediate effect, without any need to give notice.
27. The difficulty with this submission is that it seeks, in effect, to achieve a complete rewriting of the contract between the parties, and the insertion of a term which on the evidence was not in fact contemplated by them when they concluded their contract. The appellant did not seek rectification of the contract. This was hardly surprising since

¹ 2009 (4) SA 399 (SCA) at para [39]

² 2016 (1) SA 518 (SCA) at paras [27], [28], [30] and [35]

³ Referring to *V v V* [2016] ZAGPJHC 311 at para [12]

both parties agreed that the specific situation that had arisen had not in fact been contemplated by them when they concluded their contract.

28. The appellant has also not contended for an implied term. It would in our view have been difficult for it, if it had pleaded an implied term, to establish a term to the effect that a reduction in resources required by MTN that impacted the respondent would also result in an automatic termination of the contract.
29. The simple problem facing the appellant on the interpretation of the contract is that the contract does in fact cater for a situation in which the services of the respondent might no longer be required during the course of the contract or project. In that event the respondent's services could be terminated by the appellant giving notice.
30. In our view there are no grounds on which to adopt the purposive interpretation for which Mr Modiba contended. This would in effect amount to rewriting the contract for the parties, something the Supreme Court of Appeal specifically warned against in *Natal Joint Municipal Pension Fund v Endumeni Municipality*:⁴

"Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made."

31. In those circumstances we cannot fault the conclusion of the court *a quo* that notice was required to terminate the contract.
32. In light of the conclusion reached by the court *a quo* on the question whether notice was required to terminate the contract in the circumstances it is difficult to understand the court's reasoning in thereafter describing the situation as one involving supervening impossibility of performance. Nor is it apparent how or in what way this contributed to the order which the court *a quo* made. It appears, from the sequence of its reasoning, that the court considered this question to be one that impacted the quantum of damages that the respondent had suffered in consequence of the breach. The court's reasoning appeared to be that since the appellant could not in fact have

⁴ 2012 (4) SA 593 (SCA) at para [18]

provided further work to the respondent under the MTN service level agreement, the amount of damages should be limited to the fees the respondent could have charged during the notice period. This was what the court then ordered.

33. The appellant is correct that if the situation had in fact been one in which there was a supervening possibility of performance, its failure to perform could not properly have been held to constitute a breach of the contract. In supplementary written argument delivered after oral argument (which we have decided to admit and have carefully considered) the appellant characterizes the court *a quo*'s finding that there was supervening impossibility of performance as a finding of fact with which, the appellant submits, this court is not at liberty to interfere in the absence of a cross appeal.
34. There are a number of answers to this contention. The first is that the finding of the court *a quo* that there was supervening impossibility of performance is clearly not a finding of fact but a conclusion of law based on the established facts. The conclusion is clearly wrong, for reasons explained further below. The second is that the correctness or otherwise of the court's finding in this regard is placed squarely before us in this appeal by the appellant's own submissions, and we are clearly permitted, and indeed required, to decide the matter with proper regard to the correctness or otherwise of the court's conclusion on this score. No cross appeal is required for this court to have regard to the correctness or otherwise of findings of fact. An appeal or cross appeal seeks to attack an order and not only the reasons for it.
35. Even where findings of fact are concerned, an appeal court is not constrained in the manner suggested by the appellant:

"What must be stressed here, is the point that has been repeatedly made. The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule. It is a recognition of the advantages that the trial court enjoys which the appellate court does not. These advantages flow from observing and hearing witnesses as opposed to reading "the cold printed word." The main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should not be used to "tie the hands of appellate courts". It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to

disregard the findings on facts and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it."⁵

36. Turning to the question of supervening impossibility of performance, where changed circumstances make it uneconomical for a party to carry out its obligations this does not mean that performance has become impossible. The point was explained clearly in *Unibank Savings and Loans v ABSA Bank*:⁶

"Impossibility is furthermore not implicit in change of financial strength or in commercial circumstances which cause compliance with the contractual obligations to be difficult, expensive or unaffordable. Deteriorations of that nature are foreseeable in the business world at the time when the contract is concluded."

37. There are simply no grounds on which it can be contended that it was impossible for the appellant to have given the respondent notice of termination of the contract. That the appellant might have been "out of pocket" in the circumstances, as it submits it would, is neither here nor there. Mr Modiba submitted that it was no longer possible for the appellant to provide the respondent with further work to perform for MTN under the service level agreement. Even if this had been so, however, that did not preclude the appellant giving the respondent notice to terminate the contract.
38. Other than in circumstances in which the service level agreement itself was terminated, which it is common cause did not happen here, the parties had expressly made provision in the contract for the possibility that either party might want to bring the contract to an end prematurely, by giving written notice to terminate it.
39. In summary, there was in fact no obstacle to the appellant complying with its contractual obligation to give notice, and it was entitled to do so. The appellant elected not to give notice, choosing instead to rely on the contractual provision that provided for automatic termination of the contract on termination of the service level agreement between MTN and the appellant. But, as the court *a quo* correctly held, it was common

⁵ *Bernert v ABSA Bank Ltd* 2011 (3) SA 92 (CC) at [106]

⁶ 2000 (4) SA 191 (W) at 198D-E

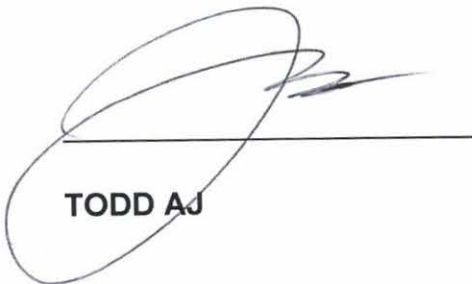
cause that MTN had not cancelled or terminated its service level agreement with the appellant. As a result, that provision did not come into play.

40. The final matter that remains to be considered is whether the respondent discharged the onus that she bore in the court *a quo* to demonstrate that she had suffered damages in an amount equivalent to the fees she would have charged during the notice month. Although this was not a separate ground on which the appellant appealed against the order of the court *a quo*, the issue is closely connected to the interpretation of the contract for which the appellant contended, and was raised in oral submission. Consequently, it is a matter that in our view requires decision in this appeal.
41. The appellant submitted that the absence of available work from MTN meant that even if the respondent had been given notice she would have had no work to do and consequently would have earned no fees for work performed during the notice period.
42. Mr Modiba accepted that there were circumstances in which the respondent had been paid fees during periods when she had performed no services for MTN. These, he submitted, were exceptions. In one instance this occurred during an induction period, when payment was made entirely "*ex gratia*", and in other instances it occurred where the appellant could charge MTN for resources that were made available to it even though MTN's own systems were not functioning or there was some other interruption in work.
43. In response to this Mr Netshipise, who appeared for the respondent, conceded that the respondent was not entitled to charge fees in circumstances in which she performed no work. He submitted, however, that on the evidence the respondent was equipped to perform services outside the narrow ambit of those for MTN for which she had been engaged during the contract, and that the fact that she had been paid fees at various times during the subsistence of the contract when she had not actually rendered services for MTN demonstrated that it was not necessarily so that she would not have been paid during the notice period.
44. Ultimately, Mr Netshipise submitted, the opportunity was there for the respondent to have been allocated work during the notice period had the appellant given her that opportunity. Mr Netshipise submitted that there were no grounds on which to reach a positive conclusion that no work would have been performed in circumstances in which the appellant had failed to give notice and to provide an opportunity for that to happen.

45. In reply on this issue the second Mr Modiba, the appellant's instructing attorney, submitted that it was possible on the evidence to determine positively that no work would have been performed during the notice period.
46. In our view, and insofar as this is an issue in the appeal, the evidence did not in fact establish that there would have been no work for the respondent at all during the notice period. Nor did it establish that MTN would not have paid for services made available to it during the notice period. The stance adopted by the appellant was that the respondent's contract effectively terminated on 4 May 2020 in consequence of the MTN email to the appellant. It took no steps either to allocate work to the respondent thereafter, to procure work from MTN, or to seek an undertaking from MTN to pay the appellant in respect of the respondent's services for the notice period. In those circumstances we can find no reason to depart from the quantification of the harm that was suffered, being damages in the amount of R72,000 as determined by the court *a quo*.
47. The respondent submitted that this was a case in which costs should be awarded on a punitive scale. We can see no justification for this, and consider this to be a case where costs should follow the result, on the ordinary scale.

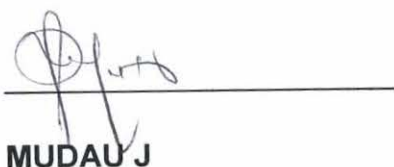
Order

48. In those circumstances the appeal is dismissed, with costs.



TODD AJ

I agree.



MUDAU J

REFERENCES

For the Appellant:

Mr Modiba

Instructed by:

Sami Modiba Attorneys

For the Respondent:

Mr Netshipise

Instructed by:

Mudau & Netshipise Attorneys

Judgment reserved:

11 August 2022

Judgment delivered:

6 September 2022