

SOUTH AFRICA / JUDGMENT

Datacentrix (Pty) Ltd v O-Line (Pty) Ltd (891/2021) [2022] ZASCA 162 (25 November 2022) [2022] ZASCA 162

COURT

Supreme Court of Appeal

BEFORE

Zondi, Molemela, Plasket, Mabindla-Boqwana,
Makaula

CASE / FILE NUMBER

891/2021

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 891/2021

In the matter between:

DATACENTRIX (PTY) LTD

APPELLANT

and

O-LINE (PTY) LTD

RESPONDENT

Neutral citation: Datacentrix (Pty) Ltd v O-Line (Pty) Ltd (891/2021)

[2022] ZASCA 162 (25 November 2022)

Coram: ZONDI, MOLEMELA, PLASKET, MABINDLA-BOQWANA JJA and MAKAULA AJA

Heard: 12 September 2022

Delivered: 25 November 2022

Summary: Contract law – breach of contract – interpretation of cancellation clause in a contract – non-compliance with prescribed procedure for cancellation of contract.

ORDER

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

1. The appeal is upheld with costs.
2. The order of the high court is set aside and replaced with the following:

‘The action is dismissed with costs.’

Makaula AJA (Zondi, Molemela, Plasket and Mabindla-Boqwana JJA concurring)

- [1] This appeal is against the judgment and order of the Gauteng Division of the High Court, Pretoria (the high court). The high court ordered Datacentrix (Pty) Ltd (the appellant) to pay an amount of R1 936 815 plus interest for breach of contract entered into between the appellant and O-line (Pty) Ltd (the respondent). The high court refused the appellant’s application for leave to appeal, but this Court on petition, granted leave. The appeal is before us with leave of this Court.

Facts

- [2] The respondent provides various services including manufacturing, warehousing, distributing and marketing, and selling electrical and mechanical support systems. Prior to the agreement between the parties, the respondent used a software system called ACS Embrace for its financial record-keeping, accounting and reporting, recording of stock levels, inventory control, monitoring and planning of its manufacturing processes and recording of sales and receipts. The respondent desired to upgrade its software system and change to a Sage X3 system. The respondent did not have expertise in the operation of the Sage ERP X3 software and, on the recommendation of Sage, the manufacturer and seller of the software based in Germany, decided to engage the services of the respondent to implement and configure its software.
- [3] On 25 November 2013, the parties concluded a written Implementation and Support Services Agreement (the agreement). The terms of the agreement are not in dispute. It is further not disputed that the respondent paid the appellant the amount of R1 936 815 in terms of the agreement for implementation of the Sage software. However, after the installation, the respondent averred that the services provided by the appellant were defective in two material respects. Firstly, the respondent alleged that the appellant failed to successfully configure and implement the software, resulting in an inability on its part to use the software. Secondly, the respondent alleged that the appellant failed to provide sufficient suitably trained staff to perform the support services set out in the agreement. The respondent argued that the results of the two failures by the appellant led to it being unable

to use the system for its intended purpose.

- [4] The high court found that the appellant had breached the agreement, and that the respondent had properly cancelled it. It held that restitution of the system by the respondent in the circumstances was impossible and ordered, in paragraph 1 of its order, that the contract price of R1 936 815 be returned to the respondent by the appellant. The high court upheld the counter-claim brought by the appellant and ordered, in paragraph 2 of its order, that the respondent pay R180 775 to the appellant. There is no cross-appeal in this regard. The issue before this Court is whether paragraph 1 of the order should have been granted. That concerns the validity of the purported cancellation of the agreement by the respondent. In what follows, I shall assume, in favour of the respondent that the appellant was in breach of the agreement and that its breaches were material.

Cancellation

- [5] There are two significant clauses of the agreement dealing with breach and cancellation. The first is clause 17, which deals with service level failures. Service levels are defined in the agreement as the agreed performance standards and measures set out for the services, as detailed in the service level annexures. Clause 17.1 deals with Notice of Non Performance. This clause provides that if it is agreed or determined in a Dispute Resolution Procedure that the appellant has failed to 'comply with any Service Level in any measurement period', then the respondent may, on written notice to the appellant, 'require it to submit a rectification plan in accordance with the provisions of clause 17.2'. Clause 17.2, in effect, deals with the rectification plan. It sets out a detailed and complex process for the rectification of the service level failure. If the service level failure cannot be rectified, clause 17.3 provides that 'such failure shall constitute a breach by Datacentrix' of the agreement between them.
- [6] While the respondent, in its particulars of claim, averred that it had cancelled the agreement in terms of clause 17, it changed its position and abandoned such reliance at the commencement of the trial and presented its case on the basis that it was entitled to cancel under clause 18. Clause 18 provides, in the relevant part, that should a party to the agreement commit a material breach of the agreement and fails to remedy such breach within 30 days of having been called upon to do so by the other party, then the innocent party may, 'in its discretion subject to the provisions of clause 19', terminate the agreement on written notice to the defaulting party in which event such termination shall be without prejudice to any claims the innocent party may have for damages against the defaulting party 'occasioned by the default or termination of this Agreement in terms of this clause'. Clause 19 deals with the procedures and assistance upon termination. It provides that on termination or cancellation, the appellant will provide the respondent with 'exit management assistance' in accordance with schedule 2 of Exit Management Principles.

[7] As aforesaid, there was some confusion on the part of the respondent as to the basis for its purported cancellation of the agreement. What is clear, however, is that it relied on two letters. The first letter it wrote to the appellants is dated 8 June 2015. In it, the respondent alerted the appellant to a range of breaches of the agreement. They related to the lack of performance of the software and what it termed its ‘failed project management’. The letter further concludes by stating:

‘In conclusion Datacentrix needs to submit a comprehensive proposal stating how this will be urgently remedied no later than Friday 12th of June for perusal by the board . . . O-line also reserves the right to withhold all outstanding payment . . . In the event O-line is not satisfied with either the proposal or success of the implementation the company will instruct lawyers to proceed with Litigations.’

[8] The parties exchanged correspondence and held various meetings in an attempt to resolve the issue. The respondent did not accept the two attempts by the appellant to bring about a rectification plan.

[9] On 22 October 2015, the respondent’s attorneys sent an email to the appellant communicating the cancellation of the agreement. Amongst the breaches, the respondent alleged that it was unable to produce accounts, trial balances, management accounts and that the fundamental set-up and implementation of the Sage programme was flawed. The letter referred to the contents of the letter dated 8 June 2015 that the appellant had been put to terms to develop a rectification plan. The letter concluded by stating that:

‘Accordingly, Datacentrix is in breach of the Agreement [in so far] as it has failed to provide the Services and/or Additional Services in terms of the Agreement which has not remedied within a 30 day period despite being called upon to do so, and/or is in breach of the warranties set out in clauses 15.1.1 and 15.3.1 thereof (“the warranties”) which breaches are fundamental, and which have not be remedied since 12 March 2015.’

On the strength of the above, the respondent then cancelled the agreement.

Analysis

[10] In Wille’s Principles of South African Law the following is said regarding breach notices:

‘Contracts frequently provide that in the event of breach the aggrieved party should give the party in breach notice of the breach and a stipulated period within which the latter has an opportunity to remedy or purge the breach. In such a case the procedure laid down in the contract must be followed as a necessary prelude to cancellation, except, so it has been held, where the breach takes the form of a repudiation of the contract. In that case the aggrieved party may cancel forthwith since the repudiating party cannot have it both ways by repudiating the contract and at the same time hold the other party to the rules prescribed by the repudiated contract.’[1]

[11] The purpose of requiring strict compliance with the prescribed procedure for cancelling was explained as follows by Yekiso J in *Bekker v Schmidt Bou Ontwikkelings CC*:^[2]

‘The purpose of a notice requiring a purchaser to remedy a default is to inform the recipient of that notice of what is required of him or her in order to avoid the consequences of default. It should be couched in such terms as to leave him or her in no doubt as to what is required, or otherwise the notice will not be such as is contemplated in the contract.’

[12] A reading of the letters of 8 June and 22 October indicates that the respondent correctly conceded that it was unable to cancel in terms of clause 17. The concession is correct because the letters did not comply with the procedure laid down in clause 17. Clause 18, as stated above, especially clause 18.1, states that if a defaulting party

‘commits a material breach of this Agreement, and fails to remedy such breach within 30 (thirty) days of having been called upon in writing to do so . . . then the Innocent Party may, in its discretion and subject to the provisions of clause 19, terminate this Agreement on written notice to the Defaulting Party’.

[13] The letter of 8 June 2015 did not pertinently give the appellant 30 days within which to remedy the breaches. Instead, it appears in part to have followed clause 17 by requiring the appellant to produce a rectification plan. The respondent was required to comply with the requirements of clause 18 strictly. It was required to couch the notice in such a manner that the appellant would have been in no doubt as to what was required of it to avoid the consequence of cancellation for such non-compliance. The letter never warned the appellant that a failure to comply within 30 days would result in cancellation. Instead, it alluded vaguely to instructing its lawyers to ‘proceed to Litigations’. Whatever this may have been intended to mean, it was not an unequivocal statement that the agreement would be cancelled if the appellant failed to remedy its breaches.

[14] I find therefore that the respondent failed to prove that it had cancelled the agreement in accordance with the procedure as set out in clause 17 or 18 of the agreement. In the light of this finding, there is no need for me to deal with the question whether the agreement was breached and, if so, whether the breach was material.

[15] There is no reason why the respondent, as a losing party, should not pay the costs. The employment of two counsel was, however, not necessary, as the matter was not complex.

[16] In the result, I make the following order:

M MAKAULA

ACTING JUDGE of APPEAL

Appearances

For appellant:

W N Shapiro SC and I Veerasamy

Instructed by: Macgregor Erasmus Attorneys Inc, Durban

Lovius Block Inc, Bloemfontein

For respondent:

K D Iles and X Khoza

Instructed by: Bowman Gilfillan Incorporated, Pretoria

Symington de Kok Attorneys, Bloemfontein

[1] Du Bois (ed) Wille's Principles of South African Law 9 ed at 877. See also South African Forestry Co Ltd v York Timbers Ltd 2005 (3) SA 323 (SCA) para 37; Hano Trading CC v JR 209 Investments (Pty) Ltd and Another 2013 (1) SA 161 (SCA) para 31; G B Bradfield Christie's Law of Contract in South Africa 7 ed at 637.

[2] Bekker v Schmidt Bou Ontwikkelings CC

[2007] 4 All SA 1231 (C) para 17; 2007 (1) SA 600 (C) para 17.

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Prepared on 12 October 2026 · Esheria