

SOUTH AFRICA / JUDGMENT

Dimension Data (Pty) Ltd v Minister of International Relations and Cooperation (99014/2015) [2017] ZAGPPHC 190 (22 May 2017)

[2017] ZAGPPHC 190

COURT

North Gauteng High Court, Pretoria

BEFORE

TM Makgoka

CASE / FILE NUMBER

99014/2015

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HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Not reportable

Not of interest to other Judges

CASE NO: 99014/2015

22/5/2017

DIMENSION DATA (PTY) LTD Plaintiff

and

MINISTER OF INTERNATIONAL RELATIONS

AND COOPERATION Defendant

JUDGMENT

MAKGOKA, J

[1] This is an exception. The plaintiff, Dimension Data (Pty) Ltd (Dimension Data) has instituted a contractual action in this court

against the defendant (the Minister) for payment of a sum total of R15 704 122.70 based on three claims in its amended particulars of claim ('A', 'B' and 'C'). The Minister, who is the executive authority of the Department of International Relations and Cooperation (the department) excepts to Dimension Data's amended particulars of claim on various grounds, which I shall fully refer to later. The exception is opposed by Dimension Data.

Factual background

- [2] Dimension Data's claims against the Minister are based on a service level agreement (the agreement) concluded by it and the department on 11 October 2010, together with two schedules thereto, concluded on 4 March 2013. In terms of the agreement, Dimension Data would be responsible for the maintenance and support of the department's information and communication technology equipment and connectivity at certain of its sites. The agreement was for a fixed term of 36 months, and despite its conclusion on 11 October 2010, it was with retrospective effect from 1 September 2010. Therefore, the agreement was to terminate on 31 August 2013.
- [3] Dimension Data's original particulars of claim were amended on 23 May 2016 following the delivery by the Minister of a notice in terms of Rule 23(1) of the Uniform Rules of Court on 11 April 2016 on the ground that the particulars of claim lacked averments to sustain a cause of action and that they were vague and embarrassing. Pursuant to that notice Dimension Data amended its particulars of claim. It is the amended particulars of claim which this exception is directed against.
- [4] In its amended particulars of claim, Dimension Data alleges that on 17 September 2013 the parties agreed to extend the agreement for a period of twelve months from 1 September 2013 to 31 August 2014. The agreement to extend the agreement, according to Dimension Data, was partly oral and partly in writing. The written portion is said to comprise a letter dated 17 September 2013 and a purchase order of the same date.

The amended particulars of claim

- [5] As stated already, Dimension Data's amended particulars of claim comprise three claims against the Minister. Below is a summary of each claim.

Claim 'A'

- [6] Dimension Data alleges the following. During the period September 2013 to August 2014 it quoted certain fees for services to be rendered to the department, based on the then prevailing ZAR and USD exchange rates. The department did not instruct Dimension Data to fix the exchange rate used for the quotations by taking out a forward exchange contract. Dimension Data performed the services for which it had quoted, and the department paid the amount of the quoted fees. The prices for the services were subject to exchange rate fluctuations, and it, Dimension Data, became entitled to adjustments as a result of the exchange rate fluctuations, as contemplated in clause 12.4 of the agreement. The exchange rates used by Dimension Data covers the period September 2013 and August 2014. Dimension Data claims R9 724 933.17 being the total variance between the actual amounts paid to it by the department and the adjusted prices, less certain 'SLA credits'.

Claim 'B'

- [7] Dimension Data alleges during the period 1 January 2013 to 30 September 2013 it rendered 'various site migration and upgrade

services' under the agreement for the period 1 January 2013 to 30 September 2013. The total amount claimed is R2 866 992.59.

Claim 'C'

- [8] Claim C is for 'outstanding payments for increased costs caused by the defendant (the department).' Dimension Data alleges that this was pursuant to a proposal concluded between it and the department in November 2012, in terms of which the existing MPLS services would be re-priced at a reduced fee, subject, among others, to the cut-over of the WAN (wide area network) sites in London and Vienna from a third party connectivity provider, Level 3 Communications LLC (Level 3) to a new service provider, Nippon Telegraph and Telephone Telecommunications Company (Nippon).
- [9] Dimension Data further alleges that it was a term of the proposal that the department would provide 'all the necessary co-operation' to enable the services to be cut-over from Level 3 to Nippon. Until the department provided such co-operation and the cut-over was achieved, the department would be liable for the additional cost charged by Level 3 for holding capacity available in anticipation of the cut-over. Pursuant to the proposal, in November 2012 Dimension Data agreed with Nippon that it would make capacity available in anticipation of the cut-over, and Nippon commenced charging Dimension Data for such capacity and set-up charges in respect of the London and Vienna sites. According to Dimension Data, the department failed to timeously provide the necessary co-operation referred to above, and failed to reimburse it for the additional fees it had paid to Nippon. It therefore claims the additional cost charged by Nippon. The total claim in this regard is R3 112 196.98.

The exception

- [10] On 22 June 2016 the Minister delivered a notice of intention to take exception to Dimension Data's amended particulars of claim in terms of Rule 23(1) of the Uniform Rules of Court. The general and overarching complaint by the Minister was about the averment in the amended particulars of claim that the agreement was extended by agreement. It was said that the purported extension was unenforceable as it did not comply with the provisions of clause 23 of the agreement, which provides that nothing at variance with any of its terms and conditions was binding unless it had been reduced to writing and signed by both parties. Accordingly, the amended particulars of claim, according to the Minister, lacked averments to sustain a cause of action.
- [11] The Minister's complaint regarding Dimension Data's individual claims was that the claims were vague and embarrassing or lack averments necessary to sustain a case of action. I set them out below.

Complaint in respect of claim 'A '

[12] The Minister complained that in claim 'A' it is not pleaded what 'certain fees' and what services were rendered, and what the 'quoted' fee was. The Minister said that she accordingly did not know what the quoted fee was, nor did she know what services were to be rendered, for that fee. In addition, the words 'certain services' were said to be vague. Consequently, the Minister complained that the department did not know, alternatively could not accurately know what case it had to meet. Accordingly, the amended particulars of claim were said to be vague and embarrassing.

Complaint in respect of claim 'B'

[13] The Minister complained that Dimension Data did not plead what the 'various' services were, with the result that the department did not know, alternatively could not accurately know what case it had to meet. Accordingly, the amended particulars of claim were vague and embarrassing.

Complaint in respect of claim 'C'

[14] Here it was complained that the amended particulars of claim lacked the following averments, and to that extent, were vague and embarrassing:

- (a) what the department undertook to co-operate with/in;
- (b) what the co-operation entailed;
- (c) why the co-operation was 'necessary'; and
- (d) in what respects the department breached its undertaking to co-operate.\

[15] The Minister gave Dimension Data 15 days from the date of service of the notice, to remove the causes of complaint, failing which she would deliver its exception. Dimension Data did not respond to the notice. Consequently, on 14 July 2016 the Minister served her exception on Dimension Data. As expected, the exception mirrors the notice in terms of rule 23(1).

The

issues

[16] From the consideration of the amended particulars of claim and the exception, the crisp issue for determination is whether the extension of the contract pleaded by Dimension Data constitutes an 'amendment of the agreement' as envisaged in clause 23, which had to be reduced to writing and signed by both parties. If this question is negatively answered, it should be determined whether Dimension Data's amended particulars of claim have been formulated with the necessary clarity to enable the Minister to know what case to meet. Put differently, and colloquially, whether the particulars of claim are 'vague and embarrassing'.

[17] To consider the main issue concerning the validity of the extension of the agreement, clause 23 of the agreement should be read with clause 5. Clause 23, on the one hand, contains standard non-variation provisions. It reads:

'This SLA constitutes the whole agreement between the parties regarding the subject matter hereof and no agreement at variance with any of the terms or provisions hereof shall be binding upon either Dimension Data or the Client [the department] unless contained in a written document signed by each of them or by the duly authorised representative of both parties.'

[18] On the other hand, clause 5 provides for the duration of the agreement. It reads:

'Services provided in terms of this SLA shall commence on the Effective Date and continue in force for a period of 36 (thirty-six) months, unless terminated in accordance with its terms or extended by mutual agreement between the parties.'

[19] Counsel for the Minister, Ms Hassim, submitted that clause 5 constitutes a 'term or provision' of the agreement. On that premise, it was submitted that for there to be an enforceable amendment (such as extension) there has to be compliance with the formalities prescribed in clause 23. In other words, clause 5 is a material or substantive provision, while clause 23 is the formality that is required for the variation of the agreement. It was thus submitted on behalf of the Minister that the extension of the agreement for the period 1 September 2013 to 31 August 2014 is not binding, and accordingly, the parties' obligations under the agreement were discharged when the agreement expired by effluxion of time on 31 August 2013. After that date, so was the argument, Dimension Data had no right against the Minister.

Discussion

[20] I do not agree with the argument advanced on behalf of the Minister. Clause 23 of the agreement concerns agreements which are 'at variance with any of the terms' of the agreement. Clause 5 expressly gives the parties the right to extend the agreement by mutual consent. It does not prescribe the form of extension. In particular, it does not say that the extension has to be in writing and signed by the parties. The extension is not an 'amendment' envisaged in the non-variation provisions of clause 23. I therefore conclude that the extension does not offend that clause.

[21] I turn now to the complaint in respect of claim 'A', which is that Dimension Data has failed to plead what fees were quoted and what services were rendered. The short answer to this complaint is that the services provided by Dimension Data are mentioned in the agreement. There can be no other services except for those in the agreement. If it is the Minister's case that Dimension Data did not render the services as agreed, it can simply plead that without any embarrassment.

[22] It is also instructive that Dimension Data has alleged that the department has made part-payment in respect of services rendered to it by Dimension Data. As I see it, what is being claimed in this part of the amended particulars of claim, is simply a sum of adjusted

amounts previously claimed from, and paid by, the department. The claim relates to exchange rate fluctuations only. The Minister can fairly plead whether she agrees with the applicability of the exchange rates, and the actual rates. On these considerations, I do not see how the Minister can be embarrassed in pleading to the relevant averments in the amended particulars of claim.

- [23] In respect of claim 'B' the Minister complains that Dimension Data has failed to plead what 'various' services rendered. I am of the view that the Minister is in a position to plead to the substance of the allegation, which is that 'site migration and upgrade services under SLA' were rendered on behalf of the Minister in various countries, namely Chad, Congo, Guinea, Romania, United States of America, as well as locally. The use of the word 'various' was clearly mere verbiage, which adds nothing to the essence of the allegations under this claim. Similarly, there is simply no merit in this ground, and it is mentioned to be dismissed.
- [24] Lastly, I consider the Minister's complaint in relation to claim 'C'. Dimension Data alleges that the department had undertaken to provide 'all necessary co-operation.' I agree with the argument on behalf of the Minister that this averment lacks clarity as to what, in particular, was expected of the department. Indeed, what role was supposed to be played by the department in the cut-over process from Level 3 to Nippon? Put differently, what were the department's obligations and to whom, and within which time-frames were the obligations to be fulfilled? What did the department do or not do, in breach of the proposal? Lack of detail in this regard drives me to the conclusion that the allegations have not been pleaded with sufficient clarity for the Minister to plead to them without embarrassment. I am therefore of the view that the Minister would be seriously prejudiced in pleading to these allegations as they stand.
- [25] In her written submissions, Ms Hassim pointed out that the proposal on which this claim is based, is invalid and in breach of clause 23 to the extent it has the effect of amending the agreement, whereas it has not been signed by both parties. She appears to be correct in this regard. However, I cannot decide the exception to this claim on that basis, for the simple reason that it was not raised in the notice of exception. I am confined to the exception before me. As stated above, I decide this ground in favour of the Minister on the basis that the averments are vague and embarrassing.
- [26] To sum up, the Minister's exception fails in its main argument on clause 23 and on two of its grounds of exception. She has been successful in one. This must be reflected in the costs order. I am of the view that the Minister should be liable for two-thirds of Dimension Data's costs.
- [27] In the result the following order is made:
1. The defendant's exception that the plaintiff's particulars of claim lack the averments necessary to sustain a cause of action based on clause 23 of the service level agreement, is dismissed;

2. The defendant's exception in respect of claims 'A' and 'B' of the plaintiff's particulars of claim is dismissed;
3. The defendant's exception in respect of claim 'C' of the plaintiff's particulars of claim is upheld. The plaintiff is granted leave to give notice, if any, of its intention to amend claim 'C' of its particulars of claim, within 15 days of the granting of this order.
4. The defendant is ordered to pay two-thirds of the plaintiff's costs, including the costs of two counsel where such were employed.

TM Makgoka

Judge of the High Court

APPEARANCES:

For the Defendant: SK Hassim SC (with ME Mahlangu)

Instructed by:

State Attorney, Pretoria

For Plaintiff: JPV McNally SC (with T Mafukidze)

Eversheds, Johannesburg

Jacobson & Levy Attorneys, Pretoria

DATES:

Heard:

9 May 2017

Judgement

delivered: 22 May 2017

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