

SOUTH AFRICA / JUDGMENT

O-Line (Pty) Ltd v Datacentric (Pty) Ltd (56269/2016) [2021] ZAGPPHC 16 (22 January 2021)

[2021] ZAGPPHC 16

COURT

North Gauteng High Court, Pretoria

BEFORE

E.M Kubushi

CASE / FILE NUMBER

56269/2016

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IN

THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER

JUDGES: NO

DATE:

25-01- 2021

Case

Number: 56269/2016

In

the matter between:

O-LINE

(PTY) LTD

PLAINTIFF

(Reg.

No.: 1982/00082/07)

and

DATACENTRIX

(PTY)

LTD

DEFENDANT

(Reg.

No.: 1996/015808/07)

JUDGMENT

KUBUSHI J,

This judgement is handed down electronically by circulating to the parties' representatives by email and by uploading on Caselines.

INTRODUCTION

- [1] This matter concerns a claim for the repayment of an amount of R1 936 815 paid by the plaintiff, O-Line (Pty) Ltd ("O-Line") to the defendant, Datacentrix (Pty) Ltd ("Datacentrix") for implementation by Datacentrix of SAGE ERP X3 software ("the software"). O-Line is said to be in the business of manufacturing cable ladders and devices that supports the cables. The software was to be the backbone of the business, as it was intended to do all manner of financial record keeping, accounting, reporting, records stock levels, controls inventory and monitors the lead time on manufacturing.
- [2] It is common cause, that Datacentrix is the party that installed and configured that software for O-Line. The installation and configuration of the software took place in terms of a written agreement entered into on

25 November 2013.

THE SALIENT FACTS

- [3] On 25 November 2013, O-Line duly represented by Mr Graeme Smith and Datacentrix, duly represented by Mr Werner Lindemann, concluded a written Implementation and Support Services Agreement ("the agreement"), in terms of which O-Line appointed Datacentrix to render the services to O-Line and such appointment was accepted by Datacentrix.
- [4] In terms of the agreement, Datacentrix agreed to the implementation of the software on behalf of O-Line and all related third party modules support. In essence, the role of Datacentrix was to analyse and design with documentation, configure systems, develop required systems and deploy the systems. Furthermore, Datacentrix was to provide what is called hand holding assistance post upgrade to O-Line in order to ensure a successful use of the software in the first month.
- [5] The software was to be implemented in two phases, namely: the statement of work number 1 and the statement of work number 2, as contained in the statement of work register. In accordance with the statement of work number 1, the parties agreed that Datacentrix would supply and implement the software solution for O-Line, in line with the requirements that would be determined during the analysis and design phase.

- [6] In the statement of work number 1, Datacentrix is alleged to have undertaken the responsibility of, amongst others, the analysis and design, to ensure a configuration and deployment of the system. The services to be rendered in this phase were to commence on 1 October 2013 and were to be completed by 15 November 2013 at the cost of R252 000.
- [7] In terms of the statement of work number 2, the parties agreed that Datacentrix would supply and implement the software solution for O-Line, in line with the requirements determined during the analysis and design phase conducted during the statement of work number 1. In this project phase, Datacentrix was required to ensure the implementation of the financial, distribution and manufacturing sectors of O-Line's business to the software ("the reporting level"). The services under this phase were to commence after the approval of the analysis and design phase set out in the statement of work number 1, the go-live date was scheduled 23 weeks after the commencement of the works and completion was scheduled 31 weeks after the commencement of the services under statement of work number 2 at the cost of R1 747 900.
- [8] It was in terms of the agreement that, if Datacentrix breached any of its obligations under the agreement, O-Line would be entitled to terminate the agreement on written notice. The parties agreed that should Datacentrix breach the terms of the agreement by failing to comply with any service levels in any measurement period as provided for in clause 17 of the agreement, O-Line would, before terminating the agreement, require Datacentrix, on written notice, to submit a rectification plan within five business days. Such rectification plan, which ought to be approved by O-Line before implementation thereof, was to detail the perceived cause of failure, together with steps, resources and time required to rectify the identified failure. It was further agreed that should Datacentrix fail to submit the draft rectification plan or fail to implement any agreed rectification plan, within the stipulated time, then such failure would constitute a breach of the agreement entitling O-Line to cancel the agreement.[1]
- [9] The agreement also stipulated in clause 18 that, if there has been a material breach of the agreement and it has not been remedied within thirty (30) days of having been called upon to do so in writing, the innocent party may, in its discretion and subject to the provisions of clause 19, be entitled to terminate the agreement on written notice.
- [10] In a further term of the agreement Datacentrix warranted that it would employ a sufficient number of suitably trained staff to provide the services contemplated in the agreement and to achieve the service levels agreed upon.[2]
- [11] O-Line avers in its particulars of claim that it has complied with its obligations under the agreement and in particular, made payment to Datacentrix in the cumulative amount of R1 936 815, in respect of the services that Datacentrix was required to render under the two statements of work. It is this amount that O-Line is claiming in these proceedings.

[12] The reason why O-Line seeks Datacentrix to repay the amount it is claiming is that O-Line alleges that Datacentrix breached the terms of the said agreement in that:

12.1 it failed to successfully configure and implement the software to O-Line's financial, distribution and manufacturing sectors, as a result of which O-Line was unable to utilise the software for the purposes for which it was purchased; and

12.2 in respect of the warranty, Datacentrix failed to provide a sufficient number of suitably trained staff to perform the services in accordance with the agreement, as the staff provided did not have the requisite business process system management or software application skills to successfully configure and implement the software to O-Line's financial, distribution and manufacturing sectors.

[13] Pursuant to the alleged breach, O-Line wrote to Datacentrix on 8 June 2015, demanding the latter to submit a comprehensive proposal stating how its failure to provide the services in accordance with the agreement, will be urgently remedied. Datacentrix was given a time limit of 12 June 2015 within which to submit the proposal for perusal by the Board (O-Line's Board). The proposal was submitted to O-Line on 17 June 2015. The proposal as provided by Datacentrix was not to the satisfaction of O-Line. In response to the said proposal, O-Line suggested certain amendments which it appears were also not to the satisfaction of Datacentrix, as Datacentrix did not respond to O-Line's suggested amendments.

[14] The agreement provided for the resolution of such a dispute, by referring it to an independent expert for determination, which Datacentrix failed to do. In so doing, O-Line submits that Datacentrix has breached the terms of clause 17 of the agreement. Alternatively, O-Line alleges that Datacentrix has failed to submit a draft rectification plan as envisaged in the agreement.

[15] As a consequence of the alleged breach of the warranty and/or clause 17 of the agreement and/or failure to successfully configure and implement the software to O-Line's financial, distribution and manufacturing sectors, O-Line contends that it was entitled to terminate the agreement which it duly did on 22 October 2015, by a letter to Datacentrix.

[16] The letter in which O-Line relied for the cancellation of the agreement ("the cancellation letter") became a bone of contention during the hearing. Mr Iles for O-Line, objected to the line of cross examination questions by Mr Wagner, on behalf of Datacentrix, in relation to this letter. The cross examination by Mr Wagner sought to elicit that the cancellation letter could not be regarded as having cancelled the agreement between the parties because at the time this letter was written the agreement had long been terminated by effluxion of time and Datacentrix had already performed.

[17] Mr Iles for O-Line, objected to the cross examination on the ground that the point sought to be elicited in the cross examination was not raised as a defence in Datacentrix's plea and was as a result a defence by ambush. In its argument, O-Line contended that the agreement had not been terminated in June 2015 but was cancelled by its cancellation letter of 15

October 2015. Conversely, Datacentrix argued that the agreement came to an end when what it had been mandated to do by the agreement was completed, that is, in June 2015, which was much earlier than 15 October 2015. It was argued further that O-Line cancelled the agreement when Datacentrix had already completed performance. O-Line did not agree to this argument and contended that there were still on-going discussions between the parties as to how the software was to operate, post June 2015. There was, therefore, an underlying question of the time of termination of the agreement between the parties.

- [18] Finally, the issue that fell for determination was whether on the papers as they stood, Datacentrix's counsel was entitled to cross examine O-Line's witnesses, lead evidence and/or argue that by the time of the purported cancellation of the agreement in October 2015, the agreement between the parties had already been discharged by effluxion of time and Datacentrix had already performed.
- [19] I, in the end, ruled in favour of O-Line and dismissed the objection, thus allowing O-Line to rely on this letter for its cancellation of the agreement.
- [20] It is therefore O-Line's claim that, flowing from its cancellation of the agreement and given the fact that the software has not been implemented and configured in the manner contemplated in the agreement, it is entitled to the repayment of the full amount of R1 936 815 which it paid to Datacentrix for the service it was required to render under the agreement.
- [21] To the extent that O-Line may be required to restore any performance to Datacentrix following the cancellation of the agreement, O-Line contends that it is excused from restoring performance by Datacentrix which was aimed at implementing and configuring the software in the manner contemplated by the agreement, all of which proved to be of no use to O-Line.
- [22] Datacentrix in its plea to O-Line's claim admits the agreement and that O-Line made certain payments to it, but contends that there is no basis in law for O-Line to claim the repayment of the contract price. In particular, Datacentrix denies that it breached the terms of the agreement as alleged by O-Line or that O-Line was entitled to cancel the agreement and puts O-Line to the proof thereof. Datacentrix pleads also that the letter dated 8 June 2015 by O-Line to Datacentrix did not constitute a request for the draft ratification plan as envisaged in the agreement, but was a request by O-Line for assistance of the difficulties it was experiencing due to its own failures and therefore Datacentrix was not obliged to refer such request for assistance to the independent expert. This cause of action was not pursued during trial, the parties having eventually agreed that the purported rectification plan remained in draft format, to date of the trial.

- [23] The contents of the letter of 8 June 2015 (“the breach letter”), as will more fully appear later in this judgment, turned out to be a contentious issue in determining whether it constituted a breach letter warranting a proper termination of the agreement as envisaged by the agreement.
- [24] The evidence also shows that due to the alleged software failures, O-Line called in one Mr Churchward Mucheki (“Mr Mucheki”) an X3 software consultant to audit the system. Mr Mucheki recommended that the software be removed and be reinstalled afresh. However, due to O-Line’s financial constraints, it contracted Mr Mucheki to repair the system. Mr Mucheki was not able to repair all of the functionalities that were not functioning.

THE WITNESSES

- [25] O-Line’s case rested, in the main, on the evidence of two witnesses to support its claim. The first is Mr Willem Burger Laubscher (“Mr Laubscher”), a factual witness who was to provide a background of what O-Line does, what the software was meant to do and how the process worked. The second witness is Mr Ferdinand Willem Hartzenberg Kruger (“Mr Kruger”). This witness wore two hats, as he was both a factual witness, he was involved in these events, and he also testified as an expert.

The evidence of Datacentrix, on the other hand rested solely on the evidence of Mr Petrus Arnoldus Fouché (“Mr Fouché”)

who was classified as an expert for the purposes of this matter.

- [26] Both parties presented expert evidence on the causes of the software failure. An objection as to the admissibility of the evidence of Datacentrix’s expert, Mr Fouché, was raised by O-Line’s counsel during the hearing. The objection was in relation to the admissibility of the evidence of Mr Fouché that was elicited during the cross examination of Mr Kruger and that was not contained in Mr Fouché’s summary of evidence.
- [27] In my ruling that followed, I dismissed the objection on the ground that the evidence objected to was valuable and would be of assistance in deciding the issues before me. As a result, I granted an order that Datacentrix provide a supplemented summary of Mr Fouché’s evidence which would include the evidence elicited by Mr Kruger during his cross examination. O-Line was also afforded an opportunity to consider the supplemented summary of the evidence of Mr Fouché and to consult further with Mr Kruger, if necessary.
- [28] During trial, both counsel attacked each other’s expert’s summary of evidence for being defective for want of reasons for their respective opinions. I, however, find it not necessary, in this judgment, to evaluate the differences and disagreements between the experts’ evidence. As correctly submitted by counsel for O-Line, there is sufficient evidence on record to assist in determining the issues before me without the need to delve into the experts’ evidence.

- [29] During the hearing of this matter Mr Iles for O-Line applied for the admission of Mr Mucheki's report as hearsay evidence. Although the application was opposed, I ruled that the report be provisionally admitted into evidence. Both parties did not address the issue of the admissibility of this report in their respective closing arguments and heads of argument. For the same reason provided for not dealing specifically with the evidence of the parties' experts, I am also not going to go into the Mucheki's report, as well.
- [30] It is common cause that the agreement and the amount paid by O-Line to Datacentrix are not at issue. This matter, therefore, falls to be determined mainly on two questions, namely, the factual and legal question.

THE ISSUES FOR DETERMINATION

- [31] The factual question that this court is called upon to determine is whether Datacentrix in fact breached the agreement in the manner suggested by O-Line and whether consequent upon the said breaches the agreement was properly cancelled.
- [32] The legal question is whether O-Line is entitled to be repaid the full amount of money it paid to Datacentrix under the agreement.
- [33] It is Datacentrix's argument that O-Line has not made out a proper case that it was entitled to cancellation, never mind a case that it be entirely excused from its primary obligation of restitution.
- [34] I deal hereunder with the two questions, starting first with the legal question of whether, under the circumstances of this matter, O-Line is entitled to be repaid the full amount it paid to Datacentrix.

Is O-Line Entitled to be Paid the Amount Claimed?

- [35] O-Line in its particulars of claim, is claiming for the repayment of the sum it paid to Datacentrix in the amount of R1 935 815 in respect of services rendered by Datacentrix to O-Line, which services are alleged to be not properly rendered as agreed. Datacentrix does not deny that the amount was paid to it.
- [36] O-Line's counsel in his submissions in chief, referred to a claim for "restitutional damages" which Datacentrix's counsel took issue with. However, in his reply to Datacentrix's heads of argument, O-Line's counsel confirmed that the word "restitutional damages" employed in the submissions in chief was an adoption of the language employed by the authors of Amler's Precedents of Pleadings.[3] Counsel confirmed that O-Line's claim is based, as pleaded, on restitution and not "restitutional damages". Therefore,

this matter falls to be decided on a claim for restitution.

The Applicable Law

- [37] It is generally accepted that the rules in regard to restitution are substantially the same whether such restitution is coupled with nullification of a contract on the ground of misrepresentation, undue influence or duress; or follows on rescission because of a latent defect or breach of contract. In the absence of an agreement to the contrary, each party is, on rescission, bound to restore to the other that which he has received in terms of the contract.[4] The rule is founded on equity and will be departed from where justice requires such departure.[5]
- [38] In Botha,[6] the court held that when dealing with a claim for restitution the principle of reciprocity comes into play.
- [39] It is trite that the law of contract in South Africa is infused with principles of equity, fairness, justice and reasonableness through the various doctrines that apply to the law of contract. One of those doctrines is reciprocity.
- [40] When a contract is cancelled the principle of reciprocity requires a primary obligation that the parties be put back in the position that they were before the contract was entered into. It means that the parties must return to the position that they were in and each party must give back what it received from the other party.
- [41] It is also trite that the rule of restitution, which is a part of the principle of reciprocity, is not inflexible. It can be adapted from time to time to ensure that the other party is not unduly benefited over the other party when restitution takes place. This is where equity comes in. And for that reason, in certain limited circumstances, a party that claims restitution is sometimes excused from counter prestation, that is, from giving back what was received.[7]
- [42] However, the party that wants to be excused has the onus of proof to show why the primary obligation of the restitution must not be complied with. O-Line must, therefore, prove why it must be excused from giving back, either, what it received or the monitory value thereof.

The Analysis

- [43] The parties agreed that in a claim for restitution, as is the case in this matter, the status quo ante should be maintained,[8] that is, each party must be returned to the position it was before the agreement was concluded. Each party must return that which it received in terms of the agreement. The parties are also in agreement that in certain circumstances, an innocent party may be excused from counter prestation, that is, excused from returning that which it received. In such circumstances, the party so excused must provide an explanation as to why it should be so excused.[9]
- [44] As already stated, O-Line seeks repayment of the amount it paid to Datacentrix in full. O-Line alleges in its particulars of claim that it should be paid the full amount it paid to Datacentrix because what it received from Datacentrix is of no use to it. It further submits that what it received from Datacentrix is not what it contracted Datacentrix to produce.

[45] Conversely, O-Line contends that it should be excused from returning that which it received from Datacentrix. Its argument, why it should be so excused is that it is impossible to return to Datacentrix what it (O-Line) received from Datacentrix.

Is O-Line entitled to part payment?

[46] The issue to be determined in this regard is whether it is possible for O-Line to return to Datacentrix what it received from Datacentrix.

[47] In support of its claim that it is impossible for it to restore that which it received from Datacentrix, O-Line relies on the case of Hall-Thermotank Natal,[10] which concerns the supplier of work and labour. It is a service case like the present one, wherein that which was performed could not be given back. The present case involves the implementation of a software which cannot be given back. It is contended that O-Line cannot un-configure the software or give back the time that has been spent in configuring the software.

[48] Datacentrix's submission, is that O-Line cannot seek to be excused in full because it continues to use some of the software as configured by Datacentrix. It fortifies this submission by means of the evidence tendered by Messrs Laubscher and Kruger who referred to two levels of use of the software. In accordance with their evidence the first level is the so called 'day to day use' and the second level is the reporting functional level. Both witnesses confirmed that the day to day functioning of the programme works fine – there is no problem with it. It is only the second level, the reporting functional level that has some difficulties. Both witnesses confirmed further that the statement of work number 1, which is the

analysis and design phase, was completely done and that it worked well.

[49] Thus, it is Datacentrix's submission that O-Line who seeks on an equitable basis a complete release from its obligation to return that which was received on the basis that what was received is of no use to it, has failed to prove its case because clearly, based on the evidence of Messrs Laubscher and Kruger, what was received is of some use to O-Line.

[50] In the alternative, Datacentrix, contends that because the software was useful in part, O-Line is not entitled to the full amount it paid to Datacentrix, but should, at the very least, work out what is the useful part of the software, assign some monetary value to it and seek payment of the amount paid less the amount for the useful part. The argument, therefore, is that the claim by O-Line should be proportional to the part of the software that is not working.

[51] In the defence raised by Datacentrix, the case it relies upon shows that this is an equitable determination the court has to make, the question for determination, therefore, is whether it is equitable for O-Line to be repaid the full amount paid to Datacentrix whilst it has derived some benefit from the software. The other side of the equation, is how inequitable it is to Datacentrix to be out of pocket of the amount claimed.

[52] O-Line's submission that it is unknown how inequitable it is to Datacentrix to be out of pocket of the amount claimed because no evidence was led in that regard, is correct. This, according to O-Line, is an evidential question and evidence ought to have been led to prove such. Without this evidence I only have to deal with the question of whether it is equitable for O-Line to be repaid the full amount it paid to Datacentrix whilst it derived some benefit from the software.

[53] Relying on the Constitutional Court judgment in Botha,[11] which I find not applicable herein, Datacentrix argues that because the computer programme functioned fully on the first level and the difficulties were limited, when this is compared with the granting of cancellation and therefore restitution, in circumstances where the majority of the work was done in accordance with the tender of the agreement, restitution in full would be a disproportionate penalty for the breach.

[54] In Botha, where the buyer had paid 80% of the purchase price but then defaulted and the seller cancelled the sale and claimed forfeiture of the amounts paid in terms of the agreement, the Constitutional Court found that the cancellation of the agreement of sale in such circumstances would be a disproportionate sanction and penalty for breach of the agreement by the buyer and would thus be unfair. Cancellation, in those circumstances, the court found, would result in the buyer losing her right to claim transfer of the

property into her name and in the forfeiture of three-quarters of the purchase price which she had already paid. The court was of the view that the sanction for breach sought by the seller would be disproportionate in relation to the considerable portion of the purchase price already paid.

[55] In its obiter dicta the court stated that depriving a buyer of her entitlement to transfer of the property would be a disproportionate sanction in

relation to the considerable portion of the purchase price the buyer had already paid, and would thus be unfair. Accordingly, the court refused to enforce the seller's right to cancel the sale agreement, on the basis that cancellation of the sale agreement would be "a disproportionate penalty for breach" and unfair in the circumstances of the case, particularly where three-quarters of the purchase price had already been paid.[12]

[56] This decision led to differing interpretation to the key issue whether an agreement (or the enforcement thereof) would be invalid merely because a court believed the agreement to be unfair, unreasonable or "disproportionate", which issue was finally resolved in the Constitutional Court judgment in Beadica 231 CC.[13]

[57] In Beadica 231 CC,[14] the court clearly stated that the Constitutional Court decision in Botha did not change the law to allow a court to refuse to enforce an agreement merely because the court believed it to be 'disproportionate', unfair or unreasonable. The court stated further that Botha dealt with the right of a buyer of land in terms of section 27 of the Alienation of Land Act 68 of 1981 ("the Alienation of Land Act"), to have the land

registered in the buyer's name if the buyer has paid at least half of the purchase price. The case, accordingly,

dealt with the interpretation of section 27 (1)[15] of the Alienation of Land Act and whether Ms Botha, the buyer therein, could exercise her section 27 (1) right even though the seller had cancelled the sale. The court's statement, regarding disproportionality in Botha was found to be made in the context of interpreting the statutory scheme created by section 27 (1) of the Alienation of Land Act>, and finding that Ms Botha retained her section 27 (1) right. Hence, my view that Botha does not find application in the present circumstances

[58] And if what O-Line received from Datacentrix is what cannot be seen, as is said in Hall-Thermotank, which is the number of hours that Datacentrix spent in configuring the software, it will be impossible for O-Line to give it back.

[59] O-Line argues further that for Datacentrix to rely on the evidence of Messrs Laubscher and Kruger that the analysis phase was done correctly does not carry any weight. This is so because, as argued, on the totality of the evidence tendered, it could not be so because Mr Fouché testified that the analysis document is inadequate and does not begin to capture the information which was required for the purpose of configuring the software.

[60] On evidence it cannot be said with certainty that level one of the software was working perfectly as testified by Messrs Laubscher and Kruger. It should be remembered that for the second phase of the software to be operational it depended on the proper functioning of the first phase of the software. To my mind, that the second phase of the software was not working, simply means that the first phase was not correctly configured hence it could not operationalise the second phase.

[61] The evidence of Mr Fouché, in this regard, is instructive. Mr Fouché, as we can remember is Datacentrix's expert witness, who gave evidence to the effect that there was information that was missing from the analysis phase that made the second phase of the software not to work. It should also be recalled that the configuration of a software such as the X3 could only be done by experts who are technically trained in that field. None of O-Line's employees were said to be technically trained in that regard. Datacentrix had professed to have the necessary trained staff, hence the evidence of Mr Fouché that O-Line employees would not have known what information was required and/or lacking and the consequences thereof, without the guidance of Datacentrix's technically trained staff. It does not appear from the evidence on record that this was done. Mr Fouché as it can be recalled was not part of the team in the analysis and design phase and could not

provide information about what happened during that phase.

[62] In the same breath, relying on Hall-Thermotank case, O-Line's counsel argues that, it would be impossible to expect of O-Line to return the number of hours that Datacentrix used when configuring the software. To the contrary, Datacentrix argues that O-Line should restore the monetary value of that which it received as it is not impossible to calculate the monetary value thereof.[16] This argument by Datacentrix is meritless as the explanation, which O-Line proffers in this regard is reasonable. O-Line's

explanation is that it is impractical on the facts of this case to have offered any kind of meaningful quantification due to the fact that a number of changes were made to the software in September 2015 to render it usable by Mr Mucheki, at a considerable cost to O-Line. By the time the trial was instituted it was not possible to inspect or audit the software to determine precisely how it had been configured.

[63] Of importance is that O-Line has gone live, it cut off its old software to use the new software. It cannot go back, in the sense that it cannot un-configure that which was configured and that is why O-Line maintains that it cannot restore what it received from Datacentrix.

Is O-Line Entitled to the Full Payment?

[64] In support of its claim for the restoration of the full amount that it paid to Datacentrix, O-Line relies on the decision of the court in Masters.[17] In that judgment, a family had booked a holiday to Inhaca Islands in Mozambique for the purposes of doing some snorkelling off that island. They had paid a tour package price to do snorkelling, which included the plane tickets and accommodation, but not inclusive of the snorkelling. They were going to pay for the snorkelling when they got to the island and that was a relatively low price. When they got there the snorkelling was not available. The court ordered that the plaintiff was entitled to the return of the full tour package price because the purpose for which the plaintiff and his family made the trip was not given to them.

[65] But, even though O-Line may in principle be entitled to repayment of the full amount claimed, Datacentrix raises a defence to the claim. In refusing to repay the amount, Datacentrix's defence is that O-Line seeks to be released wholly but has not put the court in a position at all, either by way of pleadings or by way of evidence, to determine a whole or partial repayment.

[66] In denying that O-Line is entitled to the full repayment or any payment at all, Datacentrix insists that O-Line must prove what is alleged in its particulars of claim. It is Datacentrix's submission that because in the pleadings O-Line's reason for its release from counter prestation is that what it received is of no use to it, in order to succeed in its claim, O-Line must prove that what it received from Datacentrix is of no use to it.

[67] Datacentrix in its proposition relies on the evidence of Messrs Laubscher and Kruger which establishes that there is a statement of work number 1 that was done separately from the statement of work number 2, and was concluded and is working properly. The configuration in terms of the statement of work number 2 is said to have been implemented over a very

long period of time, from 2013 until 2015. The work was done and there was no evidence of any complaint about the quality of work during that time. The go-live agreement was reached on 8 January 2015 confirming that the work which had been done up to that time had been properly tested and accepted. The first complaint only came in June 2015, by means of the purported breach letter.

[68] Thus, it is Datacentrix's submission that O-Line who seeks to be refunded the full amount that was paid to Datacentrix, has failed to prove its case because clearly, based on the evidence of Messrs Laubscher and Kruger, the software as configured by Datacentrix is used by O-Line.

[69] I find the explanation given by O-Line why it should be paid the full amount it paid to Datacentrix to be satisfactory. For, on the totality of the evidence proffered, if the software provided by Datacentrix to O-Line is not what O-Line had contracted Datacentrix to configure, the software would be of no use to O-Line even if part thereof is working. The analogy used by O-Line's counsel in this regard that it is like hiring somebody to come and install email on the computer and once the email is installed, the email can be opened and the message typed but it does not send, is instructive. Of course, such email, even though installed will be of no use. Similarly, in this instance, the software can do the day to day work

as testified by Messrs Laubscher and Kruger. The question is whether the software is of use to O-Line and/or whether the software as it is, is what O-Line contracted Datacentrix to configure.

[70] The evidence on record has established that O-Line had always had a software that enabled it to do the day to day running of its operations, the ASCA software. By commissioning the services of Datacentrix, O-Line wanted to improve its software system to produce more than the day to day services that ASCA was doing. It wanted to be able to record the financial, distribution and manufacturing sectors of the business. Without this new functionality the software installed by Datacentrix is of no use to O-Line and it is also not what O-Line commissioned

Datacentrix to configure; that which Datacentrix has been contracted to configure, the recording functionality, is not working.

[71] I am in agreement with O-Line's counter argument to Datacentrix's submission that O-Line is not entitled to the full restoration of the amount claimed because the software is working in part, that, that is not what O-Line contracted Datacentrix for. O-Line did not ask for parts of the software to work. The software, according to O-Line, is a package and should work in its entirety or it should not work at all. Hence it cannot be divided into parts – those working and those not working. Correctly, so argued, the software like the email is a package. It either works or it does not work. What O-Line had commissioned Datacentrix to do, was to configure the whole package and not just part of it. That there was any part of the software that was not working confirms O-Line's averment that the software was of no use to it.

[72] The argument that O-Line has used the working part of the software for a long time, since 2013 into 2015, before it could complain holds no water. Like in Masters, where the plaintiff had to use part of the days of the tour package whilst waiting for the defendant to organise the plaintiff's passage back to South Africa, in this instance, O-Line had to make use of the working part of the software whilst awaiting fulfilment of the agreement by Datacentrix. Put differently, whilst waiting to ascertain whether Datacentrix has correctly configured the software, O-Line had to make do with the part of the software that was working. More so, O-Line had to employ the services of Mr Mucheki in order to try and fix that which was not working before it can finally say that the software is of no use to it.

[73] Datacentrix is correct in its argument that O-Line has not made out a case for part payment of what it is presently using. Taken from O-Line's papers, it is quite clear that O-Line is contending for the full amount that was paid to Datacentrix. In this respect, the court in Hall-Thermotank[18] stated as follows:

"Why should an innocent party be deprived of his right to rescind on the ground of fraud or material breach of contract and to be paid back with what he has parted because he is unable through no fault of his to restore the work and labour attended by the party at fault? Which one of the two should be the loser? As foot 4.1.1 says restitutio in integrum is based on sheer common fairness. It does not seem to me unjust that the party who committed the fraud or the breach should bear the loss rather than that the aggrieved party should forfeit his remedy to rescind and be confined to a claim for damages."

[74] Taking into consideration the explanation provided as to why O-Line should be excused from counter prestation, I therefore hold that O-Line is entitled to the repayment of the full amount it paid to Datacentrix.[19]

[75] The question that follows is whether there was a breach of the agreement in the manner suggested by O-Line and if so, whether consequent upon such breach the agreement was properly cancelled, thereby entitling O-Line to the repayment of the amount claimed. According to O-Line, as a consequence of Datacentrix's breach of the warrantee and the failure to implement the software it was entitled to terminate the agreement. It is Datacentrix's submission that it did not breach the agreement in the manner alleged by O-Line, or at all.

Was there a Breach of the Agreement as alleged by O-Line?

[76] As already stated, O-Line relies on the warranty breach and the failure to configure the software. Datacentrix' argument is that O-Line failed to prove that it was entitled to cancel the contract based on the alleged breaches. The submission by Datacentrix is that the evidence showing a causal connection between its purported breaches and the eventual complaints of O-Line are tenuous at best, and that on the probabilities the difficulties O-Line experienced with the software were caused by O-Line's failure to properly partake in the analysis and design phase, which resulted in the build not complying with its wishes, rather than a failure by Datacentrix to build in accordance with the functional design.

- [77] With respect to the alleged breach that Datacentrix failed to successfully configure and implement the software to O-Line's financial, distribution and manufacturing sectors, Datacentrix contends that it is vital to note that its contractual obligation was not to build software solution in accordance with O-Line's eventual wishes and expectations, but to build it in accordance with the requirement determined during the analysis and design phases.
- [78] A further submission by Datacentrix is that it was never contractually obliged to 'successfully' configure and implement the software. Its obligation arising from the statement of work number 2 was only to configure the software in accordance with the requirements determined in the analysis and design phase. Datacentrix further submits that, although some errors in the functioning of the software were pointed out by O-Line, no evidence was presented that such errors were the result of a failure by Datacentrix to implement the software otherwise than 'in line with the requirements that were determined during the analysis phase' and there is no complaint about the work during the analysis phase because it was properly done.
- [79] As regards the warranty breach, according to Datacentrix, the high water mark of O-Line's evidence in this regard was that there was purportedly a high turn-over of Datacentrix's staff over the time period of the project, but very little detail thereof could be provided. In any event, a high turnover of staff does not constitute a breach of the warranty. No evidence was presented about the fact that there were purportedly too few staff members provided, and the issue of the suitable training of the staff members was also not appropriately dealt with, so it was argued.
- [80] The evidence presented by the experts, on both sides, in respect of whether or not the agreement was breached and by whom, was detailed, complex and mostly technical. As I have earlier indicated, there is sufficient evidence on record to assist in finding whether or not Datacentrix breached the agreement, or who of the parties caused such breach, without the need to evaluate the differences and disagreements between the experts' evidence. As, correctly contended for by O-Line, there are a number of primary facts which support the inference that the software failings arose from breaches of the agreement by Datacentrix.
- [81] It is trite that the process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be 'consistent with all the proved facts. If not, then the inference cannot be drawn and it must be the 'more natural, or plausible, conclusion from amongst several conceivable ones' when measured against the probabilities.[20]

Failure to Configure the Software Breach

[82] As regards the alleged breach by Datacentrix's failure to configure the software, it is common cause, Datacentrix has conceded as much, that some of the functionalities which were contracted for, were not present or did not work. It is also not in dispute that the software was to be implemented in line with the conceptual document (business specification) which contained the requirements which were determined during the analysis phase and described the functionality

which the software was to provide.

[83] In its evidence, which has not been contradicted, O-Line provided examples of the functionalities which the software was supposed to have in terms of the conceptual documents, which were not present, namely:

83.1 The enterprise work bench: the functionality was meant to do the automatic ordering, based on a history that has been build up by the system.

83.2 Currency conversions, which after installation, did not work automatically.

83.3 Inter-site purchasing, that did not work until fixed by

Mr Mucheki.

83.4 Purchase tolerances did not work, so that over-supplies need to be dealt with manually.

83.5 The material requirements planning feature of the software did not work. This feature was supposed to generate suggested purchase orders. Based on stock control levels, stock on hand, sales orders, purchase orders and lead times, suggested purchase orders were to be generated which would allow planners to evaluate the suggestions and action it from enterprise planning work bench.

83.6 The material requirement planning feature was meant to work together with the enterprise planning work bench.

83.7 Financial budgets feature was not working. This functionality was supposed to assist with the preapproval request for purchasing against the available budget for the item sought to be purchased.

83.8 Work order scheduling, was also not working. This is a manufacturing planning system which would have put the factory planners in a position to map out the manufacturing of a set of cable ladders.

83.9 Dashboards functionality; the Dashboards were meant to configure, on a daily basis, specific information that is important for each division, like the approval of purchase orders over a certain amount of money or the amount, the number of GRVs done the previous day, and the outstanding list on the galvanizers.

[84] As it can be remembered, Datacentrix's response to at least some, if not all of this lack of functionalities, was to contend that for these features to work properly, O-Line needed to provide the correct information. I have already made a finding rejecting this argument by Datacentrix and found that the mere fact that the second phase was unable to function is an indication that the first phase of the software was not properly configured, hence it could not operationalise the second phase.

[85] The further uncontested evidence of O-Line is that Mr Mucheki, an X3 consultant, was called in to audit the system. A number of problems were identified by Mr Mucheki who recommended that the software be removed and installed afresh. Even though some of the problems were attended to by Mr

Mucheki, not all problems were resolved, as O-Line did not have the budget to effect all of the necessary repairs.

The Warranty Breach

[86] As regards the warranty clause, the fact that Datacentrix failed to configure the software correctly and in accordance with O-Line's requirements, supports the inference that the project was not staffed with suitably trained persons.

All the aforementioned evidence show that the requirement of the breach clause was fully satisfied

[87] I find therefore that, Datacentrix breached the agreement as contended for by O-Line and O-Line was, thus, entitled to cancel the agreement. Nevertheless, Datacentrix raises a defence that the agreement was not properly cancelled.

Was the agreement Properly Cancelled?

[88] Datacentrix's submission is that, if it is found to have breached the agreement, then in that event, its defence is that O-Line has failed to strictly comply with the procedure and formalities to cancel the contract based on the alleged breaches. Datacentrix, submits that O-Line has not made out a case that it was entitled to cancel the agreement, and, if O-Line was not entitled to cancel the agreement, then its attempt at cancellation is void and of no legal effect. In the premises, O-Line cannot then claim relief that would only follow from a valid cancellation, so it is argued.

[89] In support of this argument, Datacentrix's counsel referred to LAWSA[21] dealing with the well-established authority in law which states that cancellation (rescission) is an '... extraordinary remedy of which the innocent party may avail him- or herself only in certain special circumstances'.

The Legal Principles

[90] In the Full Bench decision in GPC Development CC,[22] the court laid down the following legal principle regarding cancellation of an agreement:

“[27] Counsel were in agreement regarding the applicable legal principles. In his judgment Nuku J relied on a passage in the 6th edition of Christie. The following passage in the 7th edition is to the same effect:

“If the contract lays down a procedure for cancellation, that procedure must be followed or a purported cancellation will be ineffective.”

In the later edition the author refers to Bekker, Hand and Hano Trading [23] in support of the approach.

[28] In Bekker Yekiso J, relying on the decision in Godbold, held as follows:

[17] 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.

[29] In Godbold the learned judge cautioned as follows:

“The question for decision is always whether the conditions on which the right to cancel was dependent have been fulfilled (Rautenbach v Venner 1928 TPD 26 at 31). The purpose of such a notice is to inform the recipient of what is required to do in order to avoid the consequences of default, and if it is in such terms as to leave him in doubt as to the details of what he is required to do, then it may be that it will be held that the notice is not one such as is contemplated by the contract (Rautenbach’s case, supra at p 31)” ” (footnotes removed).

In Hano Trading CC,[24] it was stated that the peremptory provisions of a cancellation clause must be strictly complied with. Has O-Line strictly complied with the cancellation clause herein?

[91] O-Line committed itself to the breach letter, dated 8 June 2015, as the letter that constitutes strict compliance with the requirements of clause 18 of the agreement.[25] According to Datacentrix, the letter concerned does not constitute strict compliance with the provisions of clause 18. The submission is that nowhere in the letter –

91.1 is there a demand that Datacentrix must remedy any of the alleged defects presently relied upon; and

91.2 is Datacentrix afforded a period of thirty (30) days to remedy any of the alleged defects concerned.

[92] Instead, according to counsel, the letter merely calls upon Datacentrix to submit a comprehensive proposal on how it will remedy certain functionalities by no later than 12 June 2015. The submission of a comprehensive proposal relating to functionality is the process envisioned in clause 17 of the contract, being so-called service level failures. This is precisely the type of alleged breach that O-Line initially did claim for at paragraphs 14 to 21A of the particulars of claim, but abandoned in its opening address due to its failure to comply with the formalities required for the process concerned, so the argument goes.

[93] The dispute about the paragraphs in the breach letter under clause 18 of the agreement is whether

Datacentrix was being called upon to submit what is called a draft rectification plan or was called upon to remedy the breach.

[94] The argument by Datacentrix that the letter envisaged the rectification clause contained in clause 17 of the agreement, is not sustainable. Firstly, Datacentrix has already conceded in its plea that the breach letter does not constitute a request for the draft rectification plan as envisaged in the agreement. Datacentrix averred in the plea that the said letter was a request by O-Line for assistance of the difficulties which the latter was experiencing due to its own failures.

[95] Secondly, the submission made by O-Line's counsel in response to this argument is correct. Clause 17 comes into play only where the innocent party wants to retain the agreement and not where the intention is to terminate the agreement. Clause 18 of the agreement on the other hand is used where there has been a material breach of the agreement, like in this case. The purpose of the letter was to cancel the agreement and not to retain it because the breaches are material.

[96] Nevertheless, Datacentrix's proposition that in order for the agreement to have been properly cancelled, O-Line is supposed to have complied with the *lex commissoria*, is correct. The term '*lex commissoria*' was explained as follows in GPC Developments CC:[26]

"The term "lex commissoria" has acquired a somewhat flexible meaning in our law of contract. Van der Merwe et al[27], with reference to inter alia Nel v Cloete[28], observe that the phrase denotes, primarily, a term which permits a contracting party to resile from an agreement on the ground of delay, but that it has also acquired a wider and more general meaning, viz, a stipulation conferring the right to cancel an agreement on the basis of any recognised form of breach. Such a term may include a right on the part of the creditor to claim forfeiture of amounts already received, but it is not limited to that right."[29]

The question that ought to be determined is whether O-Line has complied with the *lex commissoria* in this instance.

[97] The cancellation clause of the agreement reads as follows:

"18. BREACH

Should either party ("the Defaulting Party"):

18.1 commit a material breach of this Agreement and fail to remedy such breach within thirty (30) days of having been called upon in writing by the other party ("the Innocent Party") to do so; and . . ."

[98] The clause provides that if there is a material breach of the agreement and it is not remedied within thirty

[30] days of having been called upon to do so the innocent party may in its discretion and subject to the provisions of Clause 19 be entitled to terminate the agreement on written notice.

[99] The letter of 8 June 2015, in my view, suffices as compliance with the requirements of the lex commissoria. Datacentrix's counsel accepted in addressing the letter that it contains a general complaint that the software does not do what O-Line thought it ought to do. As argued by O-Line's counsel, O-Line

was not meant to itemise every problem the software was having, in this letter. Since O-Line was not an expert as far as the software was concerned, it was sufficient that it mentioned that the software was not working. That, to me is enough.

[100] The letter mentions the breaches O-Line is complaining about, namely that the software is not working and that 'the calibre of people from a Sage knowledge perspective has been ridiculously poor' – which may be interpreted as a layman's language that Datacentrix's staff was not qualified or trained to deal with the configuration of the Sage software. The letter also gives Datacentrix time within which to rectify the breaches.

[101] Of importance is that O-Line's argument that it is not required that the letter state that Datacentrix should remedy the breaches within thirty (30) days, is indeed correct. In terms of clause 18 of the agreement the guilty party must only be informed that it is in breach and that it must remedy such breach. The clause does not prescribe when such breach should be remedied. The clause only states that the innocent party is entitled to cancel the agreement after thirty (30) days if such breach has not been remedied, that is, the guilty party must be given thirty (30) days within which to remedy the breach.

[102] O-Line has, as such, in the letter, informed Datacentrix about the breaches which it wanted to be remedied. It gave Datacentrix until 12 June 2015 to remedy the breaches. But, it was only in October 2015, after thirty (30) days had passed, that O-Line cancelled the agreement.

[103] Having found the agreement to have been properly cancelled, the question that ought to follow is whether the breaches concerned were material warranting the cancellation.

Was the Breach Material?

[104] The question that follows is whether the breaches O-Line is complaining about are material as required by clause 18 of the agreement to warrant cancellation of the agreement.

[105] Datacentrix contends that it cannot have been a material breach because 78% of the errors had nothing to do with this agreement. They were out of scope. I agree with counsel for O-Line that the percentage of the errors is not determinative of the materiality of the breaches. O-Line in its evidence provides a long list of examples of functionalities that were either not there or they were there but not functioning.[30] I mean, how can it not be said that the failure to configure the software is not a material breach of the agreement, when the business cannot even generate a simple Value Added Tax report or produce financials

for its year end or do a stock take. Without having to go into much detail, this is indicative that the breach is material.

CONCLUSION

[106] In the final analysis, I find that flowing from O-Line's cancellation of the agreement and the fact that the software had not been implemented and configured in the manner contemplated by the agreement, O-Line was entitled to cancel the agreement and to reclaim the full amount paid.

THE COUNTERCLAIM

[107] Datacentrix has filed a counterclaim. The basis of the counterclaim is a contention by Datacentrix that it is still owed an amount of R418 950 by O-Line for the performance by it of the services referred to in the agreement. It is common cause that O-Line has refused to pay this amount and denies that it is obliged to do so.

[108] The contention by O-Line is that Datacentrix has not established that it is owed the money and that if it is so, it has no claim against O-Line.

[109] Without such evidence, Datacentrix relies for the counterclaim on the uncontested evidence of Mr Kruger. In his testimony, Mr Kruger produced a document in which he had compiled a list setting out the invoices received from Datacentrix and the amounts paid to Datacentrix. On Mr Kruger's calculation there appears to be a shortfall in payment of an amount of R180

775. Mr Kruger conceded, and the documentary evidence which was discussed with him in the cross-examination showed that there was indeed at least a short payment by O-Line to Datacentrix of that amount. Having so conceded, as such, O-Line's counsel cannot from the bar argue it otherwise. On the other hand, Datacentrix having led no evidence to prove its claim of R418 950, can only succeed in the amount which was conceded by O-Line, that is R180 775.

THE ORDER

[110] Consequently, I make the following order:

1. The plaintiff succeeds in its claim of R1 936 815 together with costs and interest at 9% per annum on the aforesaid sum a tempore morae.
2. The defendant succeeds in its counterclaim of R180 775 together with costs and interest at 9% per annum on the aforesaid sum a tempore morae.

E.M KUBUSHI

JUDGE OF THE HIGH COURT

Appearance:

Plaintiff's Counsel

: Adv. K.D Iles

Plaintiff's Attorneys

: Bowman Gilfillan Incorporated

Defendant's Counsel

: Adv. S.D. Wagener SC

Defendant's Attorneys

: A L Maree Incorporated.

Date of hearing

: 22-26 June 2020

Date of judgment

: 25 January 2021

[1] Clause 17 of the agreement.

[2] Clause 15 of the agreement.

[3] Harms 9th ed p115.

[4] The Law of South Africa 5 (1) r 256.

[5] Feinstein v Niggli 1981 (2) SA 684 (A) at 700F to 701C.

[6] Botha & another v Rich NO & others

[2014] ZACC 11.

[7] Extel Industrial (Pty) Ltd & another v Crown Mills (Pty) Ltd

[1998] ZASCA 67; 1999 (2) SA 719 (SCA) at 731D/E - E. "The rule that an innocent party who elects to rescind may not do so if he tenders restitution is not an inflexible one. It applies only where such restitution remains physically possible. When through no fault of the rescinding party, restitution is no longer possible, the rescinding party is not precluded by the fact alone from resiling." At 732B ". . .that a tender of restitution, or the explanation and excuse for its failure, is a requirement in the proceedings for restitution is indeed trite."

[7] Extel Industrial (Pty) Ltd & another v Crown Mills (Pty) Ltd

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At 732B

“...that a tender of restitution, or the explanation and excuse for its failure, is a requirement in the proceedings for restitution is indeed trite.”

[8] See THHRR 1984 at 461.

[9] Extel Industrial (Pty) Ltd & another v Crown Mills (Pty) Ltd at 732B.

[10] Hall-Thermotank Natal v Hardman 1968 (4) SA 818 (D) at 831 - 832.

[11] Botha & another v Rich NO & others

[2014] ZACC 11 para 51.

[12] Botha para 49 - 51.

[13] Beadica 231 CC & others v Trustees for the time being of the Oregon Trust & others [2020] ZACC 13.

[14] Beadica 231 CC para 59.

[15] Section 27, in relevant part, reads: “(1) Any purchaser who in terms of a deed of alienation has undertaken to pay the purchase price of land in specified instalments over a period in the future and who has paid to the seller in such instalments not less than 50 per cent of the purchase price, shall, if the land is registrable, be entitled to demand from the seller transfer of the land on condition that simultaneously with the registration of the transfer there shall be registered in favour of the seller a first mortgage bond over the land to secure the balance of the purchase price and interest in terms of the deed of alienation.”

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[16] Extel Industrial (Pty) Ltd & Another v Crown Mills (Pty) Ltd at 733G. “Once the conductor operis has accepted the benefit of the locator’s services, restoration of the specie will often no longer be possible; hence, the conductor must perforce make restitution by way of pecuniary substitute.”

[16] Extel Industrial (Pty) Ltd & Another v Crown Mills (Pty) Ltd at 733G.

“Once the conductor operis has accepted the benefit of the locator’s services, restoration of the specie will often no longer be possible; hence, the conductor must perforce make restitution by way of pecuniary substitute.”

[17] Masters v Thin t/a Inhaca Safaris 2000

(1) SA 467 (W) 474H.

[18] Hall-Thermotank Natal v Hardman 1968 (4) SA 818 (D) at 831 - 832.

[19] Harper v Webster 1956 (2) SA 495 (FC) at 502.

[20] South African Post Office v De Lacy (19/08) [2009] ZASCA 45 para 35.

[21] The Law of South Africa, Volume 9 (Third Edition) para 423.

[22] GPC Development CC & other v Uys [2017] 4 All SA 14 (WCC) para 27 - 29.

[23] Hano Trading CC v JR 209 Investments (Pty) Ltd & another [2013] 1 All SA 142 (SCA) para 33.

[24] Hano Trading CC v JR 209 Investments (Pty) Ltd & another

[2013] 1 All SA 142 (SCA) para 33.

[25] See Part B page 74 on Caselines.

[26] GPC Development CC & Other v Uys [2017] 4 All SA 14 (WCC) para 34.

[27] Contract, General Principles (4th ed) at 299 fn126.

[28] Nel v Cloete 1972(2) SA 150 (A) at 160.

[29] Baines Motors v Piek 1955 (1) SA 534 (A) at 542 – 547.

[30] See para [83] of this judgment.

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