REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2022/00118

In the matter between:

NAMIBIA TRAINING AUTHORITY   **APPLICANT**

and

REMOTENET NAMIBIA ICT CC   **RESPONDENT**

Neutral citation: *Namibia Training Authority v Remotenet Namibia ICT CC* (HC-MD-CIV-MOT-GEN-2022/00118) [2024] NAHCMD 114 (15 March 2024)

Coram: UEITELE J
Heard: **24 August 2023**
Delivered: **15 March 2024**

Flynote: Motion proceedings — Interdicts — Requirements for mandatory interdict — A clear right — Actual or reasonable apprehension of injury — Absence of satisfactory remedy — Applicant has failed at the first hurdle and has not established that it has a clear right — Application dismissed.

Summary: In 2018, the parties concluded a service level agreement whereby the respondent would assist the applicant with the customised development of the Vocational Education Training Enterprise Resource Planning (VETERP) system from the period of May 2018 to 31 May 2019. Upon the expiration of the service level agreement, the parties engaged in negotiations for the respondent to continue assist the applicant with the development of the VETERP system. The negotiations culminated in the conclusion of a service level agreement during April 2020, in terms of which the respondent was contracted to develop, support, and maintain the VETERP system, and the agreement was extended to September 2019.

From 28 June 2021 onwards, there were disagreements between the parties on a number of issues and interpretations relating to the signed service level agreement, which resulted in the applicant repudiating the agreement and the respondent accepting such repudiation. As a result of the respondent's acceptance of the repudiation, the parties convened a meeting during 01 November 2021 where the issues in dispute between the parties were discussed. From the unsigned minutes attached to the respondent's answering affidavit, it appears that the parties agreed that the respondent will continue to render only support and maintenance service to the applicant at a cost of N$80 500 per month. Despite the agreement of 01 November 2021, the parties continued to exchange correspondences accusing each other of acting in bad faith and breaching the service level agreement.

On 02 December 2021, the applicant addressed a letter to the respondent in which letter it demanded that the respondent; grants it full access to the Lifetime Runtime License, removes the 'Notice Licence expires in' countdown from the system, provides it with the super user password and grants full administrative access rights to the applicant's IT team. The respondent refused to accede to the applicant's demands, which resulted in the applicant, during April 2022, commencing these proceedings seeking a mandatory interdict.

The applicant basis its application on the ground that the respondent allegedly breached the service level agreement, that in terms of the service level agreement it paid for the Lifetime Runtime License, and it thus has a right to full administrative access rights to the VETERP system. The applicant, furthermore, contends that the respondent interfered with its right by configuring a count down on the VETERP

system. This is an indication of when the respondent intends to disconnect the system.

In adjudicating the application, the court was tasked with ascertaining whether the applicant has placed sufficient evidence before the court which entitles it to the relief it is seeking.

Held that: before a court can grant an interdict, it must be established that the applicant possesses a clear right.

Held further that: to determine whether or not the applicant has established the clear right it asserts it has, it is necessary to interpret the service level agreement. To this end, the court has to examine all the circumstances surrounding the conclusion of service level agreement, i.e. the factual matrix or context, including any relevant subsequent conduct of the parties.

Held further that: the applicant has failed at the first hurdle and has not established that it has a clear right.

Held further that: having found that the applicant has failed to demonstrate that it has a clear right it becomes unnecessary for me to consider the other requirements for the grant of a mandatory interdict and the applicant's application stands to be dismissed and is so dismissed.

ORDER

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1.   The applicant's application is dismissed.

2.   The applicant must pay the respondent's costs.

3.   The matter is regarded as finalised and is removed from the roll.

JUDGMENT

UEITELE J:

Introduction

[1]   The applicant in this matter is firstly seeking an order directing the respondent to, in accordance with a service level agreement concluded between it and the respondent, give the applicant full administrative rights and access to the Vocational Education Training Enterprise Resource Planning (VETERP) system. Secondly, the applicant is seeking an order directing the respondent to remove the configured count down on the VETERP system aimed at disconnecting the system on 31 March 2022.

[2]   The applicant is Namibia Training Authority[1], a statutory body duly established in terms of the s 4 of the Vocational Education and Training Act 1 of 2008. The applicant is vested with the overall national obligation to develop and implement strategies for vocational education and training. The respondent is Remotenet Namibia ICT CC[2], a close corporation incorporated in terms of the Close Corporations Act 28 of 1988.

[3]   The factual background that led to the applicant instituting these proceedings is hotly contested between the applicant and the respondent, each providing its own version of what transpired. What can, however, not be disputed is that sometime during the year 2018, the applicant approached the respondent for the latter to assist it with the customised development of the VETERP system. This approach led the parties to conclude a service level agreement from the period May 2018 to 31 May 2019, which agreement was extended for successive periods to September 2019.

[4]   Upon the expiration of the service level agreement, the parties engaged in negotiations for the respondent to assist the applicant with the development of the

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[1] In the service level agreement the applicant's name is abbreviated as *'NTA'.*

[2] In the service level agreement the respondent's name is abbreviated as *'RNICT'.*

VETERP system. The negotiations culminated in the conclusion of a service level agreement during April 2020 (to be precise, on 15 April 2020), in terms of which the respondent was contracted to develop, support, and the VETERP system.

[5]   The service level agreement signed on 15 April 2020, amongst other clauses, provided:

(a)   In clause 4 for the duration and termination of the agreement, it provided that the agreement was to run for a period of one year (from 1 April 2020 until 31 March 2021); that a further 12 months period may be entered into once all deliverables were met as per schedule C and Scope of Works for 2020/2021 period. In the event that the applicant elects to terminate the agreement at 31 March 2021, and it wishes to obtain the source code, the applicant was obliged to pay the remaining balance of the total value of VETERP as per schedule 'A' to the service level agreement[3].

(b)   In clause 6 for the grant and nature of the license, it provided that the applicant acquired the Lifetime Runtime License for VETERP and the respondent

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[3]   '4,1.   Subject to the provisions of clause 4.3 below, the Agreement will commence on the Commencement Date for a period of 12 months ending 31 March 2021. Thereafter, a further 12-month period may be entered into once all deliverables are met as per Schedule C: Scope of Works for 2020/2021 period, or in the event that the NTA elects to terminate this agreement at 31 March 2021, in which event clause 4,6 shall apply.

4.2.   This Agreement remains valid until superseded by a revised agreement, mutually endorsed by the signatories below. This Agreement furthermore terminates and replaces any existing agreement for the rendering of services as set out herein effective from date of signature hereof.

4.3   Notwithstanding the provisions of clause 4.1, either Party shall be entitled to terminate this Agreement On written notice of not less than 60 (sixty) business days, to the other Party.

4.4   Where either patty is in breach of any provision of this Agreement, the non-offending party may serve written notice to the offending party to remedy such breach within 14 (fourteen) days from receiving such notice. Where the offending party falls to rectify such breach, the non-offending party shall be entitled, without prejudice to any other rights or remedies which it may have in law, to refer the matter as provided for in clause 10 (*dispute resolution*).

4.5   If termination of this Agreement is initiated by NTA, NTA will remain liable for the payment of fees to IRMICT in respect of services provided prior to the termination of this agreement.

4.6   If termination of this Agreement is initiated by NTA, and NTA wishes to obtain the Source Code, the NTA shall pay the remaining balance of the Total Value of VETERP as per Schedule 'A".

4.7   If termination of this Agreement is initialed by RNICT, RNICT will remain liable to provide NTA with the Source Code in production at the time of cancellation being issued.

4.8   If termination of this Agreement is initialed by RNICT, RNICT will remain liable for the delivery of services in respect of deliverables agreed and paid far prior to the termination of this agreement.

4.9   Upon mutual termination of this agreement by both parties, neither party will have any claim on the other.'

had granted the applicant the license on the terms set out in the service level agreement.[4]

(c)   In clause 7 relating to the purpose of the license, the purpose of granting the license to the applicant was to enable the applicant to have rights to host the Framework Source Code and Unlimited End User licenses[5].

[6]   On 31 March 2021, the parties did not renew the service level agreement and they engaged in negotiations to extend or go to the next phase of the service level agreement. Without the service level agreement having been renewed or extended,

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[4] Clause 6 of the Service Level Agreement reads as follows:

'*Grant and nature of License*.

6.1   The NTA has acquired the Lifetime Runtime License for VETERP and RNICT has granted the same to NTA on the terms set out in this Agreement.

6.2   The License granted to NTA authorizes NTA to use but not distribute the software.

6.3   NTA acknowledges and agrees that it is not acquiring the Framework Source Code and will not acquire any ownership of the Framework Source Code and shall only have the right to Source Code (once fully paid for) used to produce the software to the NTA and to no other third party, unless agreed to in writing between the Parties.

6.4   NTA may not copy or permit any party to copy the Software.

6.5   NTA may not alter, adapt, translate, modify, do-compile, disassemble or create adoptions of or otherwise reverse- engineer the Framework Source Code, provided that this stipulation will not be applicable where de-compilation is permitted by law.

6.6   NTA will protect the software using the same standard of care that it applies to its own proprietary, secret or confidential Information. NTA will store and handle the software in such a way as to prevent any unauthorised use, disclosure or reproduction thereof.

[5]   Clause 7 of the Service Level Agreement reads as follows:

'*The purpose of the license.*

7.1   The purpose of granting this License to NTA is for NTA to have rights to host the Framework Source Code and Unlimited End User licences.

7.2   NTA shall perform all maintenance and support services to the End User for purposes of ensuring the continued functionality of the Software.

7.3   NTA shall have no right to adapt, vary, modify or otherwise change the Framework Source Code in any form than what is provided to it by RNICT. Should the End User require certain technical or functional changes, upgrades or enhancements to the Framework Source Code which will require the Framework Source Code Lining modified **or** adapted, then NTA shalt advise RNICT who shall amend it accordingly, if possible and furnish NTA with the costs thereof.

7.4   NTA shall only be entitled to use, adopt, vary, modify or otherwise change the Source Code for the purpose of providing same to the End User upon access being granted with final payment and lumpsum payable for Source Code according to Schedule B of this document. It shall not permit any other parson, save for the End User to use the Software,

7.5   NTA may not, or cause any other person to modify or reverse engineer (the Software, or create derivative works of the Software; or sub-license the Software to other third parties; or use the Software outside of the permitted use of the software as set forth In this Agreement.'

the applicant, on 02 June 2021, emailed to the respondent an 'approved and amended purchase order[6] for monthly Support for SLA[7] April 2021 - March 2022'. After that approved purchase order was received, the applicant subsequently paid the respondent for the services delivered for the period 01 April 2021 to 31 May 2021.

[7]   From 28 June 2021 onwards, there were disagreements between the parties on a number of issues and interpretations relating to the signed service level agreement (that is the service level agreement signed on 15 April 2020). During July 2021, the applicant verbally informed the respondent that the board of the applicant instructed that development on the operations' modules be halted, and further that the board also instructed the applicant's ICT team to solicit requests for proposals for new service providers. The respondent was, however, instructed to continue with providing maintenance and support services. On 21 September 2021, the applicant sent a letter confirming the verbal instruction to halt the development on the operations' modules and informing the respondent that the service level agreement expired on 31 March 2021, that the approved purchase order P006436 would be amended.

[8]   During October 2021 (to be specific on 25 October 2021), the respondent responded to the applicant's letter of 21 September 2021 and communicated its acceptance of the applicant's repudiation of the service level agreement. As a result of the response, the parties convened a meeting on 01 November 2021 where the issues in dispute between the parties were discussed. From the unsigned minutes attached to the respondent's answering affidavit, it appears that the parties agreed that the respondent will continue to render only support and maintenance service to the applicant at a cost of N$80 500 per month.

[9]   Despite the agreement of 01 November 2021, the parties continued to exchange correspondences accusing each other of acting in bad faith and breaching the service level agreement. On 02 December 2021, the applicant addressed a letter to the respondent in which letter it demanded that the respondent; grants it full access to the Lifetime Runtime License, removes the 'Notice Licence expires in'

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[6] Purchase order, P006436.

[7] The abbreviation SLA stands for service level agreement.

countdown from the system, provides it with the super user password and grants full administrative access rights to the applicant's IT team. The respondent responded on 06 December 2021 refusing to accede to the applicant's demands. As a result of the refusal, the applicant, during April 2022, commenced these proceedings seeking a mandatory interdict, as set out in earlier, against the respondent.

[10]   The applicant basis its application on the ground that the respondent allegedly breached the service level agreement, that in terms of the service level agreement it paid for the Lifetime Runtime License, and it thus has a right to full administrative access rights to the VETERP system. The applicant, furthermore, contends that the respondent interfered with its right by configuring a count down on the VETERP production system. This is an indication of when the respondent intends to disconnect the system.

[11]   The applicant contends that if the VETERP production system is disconnected it will have the following impact on the applicant's business:

(a)   Firstly, the VET levy data in the system will be lost because the applicant's ICT team does not have full administrative access rights to the VETERP system in retrieving the data;

(b)   Secondly, the employers will not have a system whereon to make monthly VET levy declarations and to submit employer training grant applications;

(c)   Thirdly, the applicant will not be able to access and process the VET levy registered company information, monthly VET levy declarations and employer training grant applications;

(d)   Fourthly, the applicant will not be in a position to account for VET levy revenues in respect of the data captured in the system.

[12]   The respondent opposes the relief sought by the applicant primarily on the basis that the Lifetime Runtime License for the VETERP system does not include full administrative access rights and super user credentials. Those rights could only be granted once the source code was bought. The respondent further denies that the applicant has paid for the source code.

The issues for determination

[13]   From the condensed background that I have set out in the preceding paragraphs it is clear that the core question in this present matter is whether the applicant has placed sufficient evidence before the court which entitles it to the relief it is seeking namely; an order compelling the respondent to give it full administrative rights and access to the VETERP system.

[14]   Before I embark on answering that question I will briefly outline the applicable legal principles.

The applicable legal principles

[15]   Interdicts are important in our legal system; they serve as potent tools to protect rights and enforce obligations[8]. In our jurisdiction, interdicts are court orders that either restrain individuals from engaging in specific actions or compel them to fulfil certain obligations[9]. The term 'interdict' refers to the type of relief sought from court rather than a specific court procedure. There are two main types of interdicts in our law, namely, prohibitory interdicts (these aim to prevent or halt someone from engaging in certain activities that may infringe upon the rights of others) and mandatory interdicts (also known as mandamus, which compel individuals to perform specific actions or fulfil particular duties).

[16]   The requirements to obtain a mandatory interdict are now well established and they are:

(a)   A clear right: Before a court can grant an interdict, it must be established that the applicant possesses a clear right. This entails two crucial steps. Firstly, the right must exist in law, encompassing a broad range of rights arising from a valid contract, common law or statute law. Secondly, the applicant must prove the existence of the right in fact, substantiating it with evidence. The burden of proof lies with the

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[8]   See H. J. Erasmus, D. E. Van Loggerenberg, P. S. T. Jones, & H. O. Buckle *Jones & Buckle Civil Practice in the Magistrates Court SA,* Vol. 1, 6th ed p 71.

[9] *Ibid.*

applicant, who must demonstrate the existence of the right on a balance of probabilities. It is to be noted that an interest is not enough to seek the relief of an interdict[10].

(b)   Actual or reasonable apprehension of injury: The occurrence or reasonable expectation of an injury is another vital requirement for obtaining an interdict. In this context, injury extends beyond physical harm or financial loss and includes interference with rights. To prove injury, the applicant must present evidence of wrongful conduct by the respondent. The injury must be continuing or imminent, and the applicant must establish a reasonable apprehension of harm based on well-grounded facts. While the apprehension need not be indisputable, it must be reasonable on a balance of probabilities.

(c)   Absence of satisfactory remedy: One final requirement for an interdict is the absence of any other ordinary or satisfactory remedy available to the applicant. If alternative forms of redress exist that would adequately address the situation, the court may refuse to grant an interdict. However, certain exceptions exist, such as when the respondent lacks assets or money, the injury is a continuous violation of rights, or it is challenging to assess the damages caused.

<u>Has the applicant established a clear right?</u>

[17]   In the present matter, the applicant relies on the service level agreement to assert that it has a clear right to have full administrative rights and access to the VETERP system. There is no quibble that the parties, during April 2020, concluded a service level agreement in terms of which the respondent was contracted to develop, support, and maintain the VETERP system. The applicant relies on clauses 4, 6 and 7 of that service level agreement to demonstrate the existence of its right.

[18]   To determine whether or not the applicant has established the clear right, it is necessary to interpret the service level agreement and in particular clauses 4, 6, and 7 of the service level agreement. Whilst the starting point is the words of the

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[10] *Edrei Investments 9 Ltd (In liquidation) v Dis Chem Pharmacies (Pty) Ltd* 2012 (2) SA 553 (ECP) 556; *Setlogelo v Setlogelo* 1914 AD 221 at 227 Cilliers, A.C., Loots, C.& Nel, H.C *Herbstein & van Winsen: The Civil Practice of the High Courts and the Supreme Courts of Appeal of South Africa*. 5th ed (2009) at 1456.

agreement, it has to be borne in mind that our courts have consistently held that the interpretative process is one of ascertaining the intention the parties[11], in the present matter, what they meant to achieve by incorporating clauses 4, 6 and 7 in the service level agreement. To this end, the court has to examine all the circumstances surrounding the conclusion of service level agreement, i.e. the factual matrix or context, including any relevant subsequent conduct of the parties.

[19]   Clause 4 (1) of the service level agreement provides that the agreement runs for a period of one year ending 31 March 2021, but makes provision for the agreement to be extended for a further period of 12 months, once all deliverables are met per schedule C of the service level agreement. This clause furthermore provides the in the event that the NTA elects to terminate this agreement at 31 March 2021, then and in that event clause 4.6 applies. Clause 4.6 in turn provides that if termination of the agreement is initiated by NTA, and NTA wishes to obtain the source code, the NTA shall pay the remaining balance of the total value of the VETERP as per schedule 'A'.

[20]   Schedule A to the agreement is headed 'TOTAL VALUE OF VETERP' and looks as follows:

NTA purchase license + source code + 3 year development, maintenance and support contract.			
ITEM	AMOUNT EXCLUSIVE OF VAT	VAT	AMOUNT INCLUSIVE OF VAT
Run Time Licences Fee (2019/2020)	N$ 1 298 000.00	N$ 194 700.00	N$ 1 492 700.00
Lumpsum payment for Source Code	N$ 400 000.00	N$ 60 000.00	N$ 460 000.00
(2019/2020)	N$ 1 464 000.00	N$ 219 600.00	N$ 1 683 600.00
(2019/2020)	N$ 1 464 000.00	N$ 219 600.00	N$ 1 683 600.00
(2020/2021)	N$ 1 464 000.00	N$ 219 600.00	N$ 1 683 600.00

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[11] See *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) para 27 and *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors* CC 2015 (3) NR 733 (SC) para 23.

| (2021/2022) | N$ 1 464 000.00 | N$ 219 600.00 | N$ 1 683 600.00 |
| **TOTAL** | **N$ 6 090 000.00** | **N$ 913 500.00** | **N$ 7 003 500.00** |

[21]   The table above depicts the Total Cost of the VETERP Package, as the option preferred by the NTA.

TOTAL COMMITMENTS HONOURED TOWARDS (2019/2020) SLA+RUNTIME LICENSE			
ITEM	*AMOUNT EXCLUSIVE OF VAT*	*VAT*	*AMOUNT INCLUSIVE OF VAT*
Run Time Licences Fee (2019/2020)	N$ 1 298 000.00	N$ 194 700.00	N$ 1 492 700.00
(2019/2020) SLA AMOUNT PAID	N$ 625 012.00	N$ 93 751.00	N$ 718 763.80
TOTAL	**N$ 1 923 012.00**	**N$ 288 451.00**	**N$ 2 211 463.80**

[22]   What is clear from schedule A is that the applicant had agreed to pay for at least three different items. It had agreed to pay for:

(a)   a run time licences fee for the period of 2019/2020 at a total costs of N$1 492 700 VAT inclusive,

(b)   a source code for the lump sum of N$ 460 000 VAT inclusive, and

(c)   development, maintenance and support service for the periods of 2019/2020; 2020/2021 and 2021/2022 at a total cost of N$1 6836 000 VAT inclusive for each period.

[23]   What furthermore emerges from schedule A is that the applicant only paid an amount of N$1 492 700 in respect of the run time licences fee for 2019/2020 and an amount of N$718 763.80 in respect of the development, maintenance and support services rendered as at April 2020.

[24]   It is correct that in terms of clause 6.1 of the applicant acquired a 'Lifetime Runtime License' for the VETERP system and that the respondent granted the 'Lifetime Runtime License' to the applicant. However, what must not be lost sight of is the fact that the 'Life Runtime License' was granted subject to the terms and conditions set out in the service level agreement. Some of the terms and conditions are contained in clause 6 and those are that:

(a)   The license granted to the applicant authorizes the applicant to use but not distribute the software;

(b)   The applicant agrees and acknowledges that it is not acquiring the framework source code and will not acquire any ownership of the framework source code and shall only have the right to source code (once fully paid for) used to produce the software to the applicant and to no other third party, unless agreed to in writing between the parties.

[25]   Clause 2.4.5 of the service level agreement defines a license as follows:

'License shall mean a non-transferable and non-exclusive right granted to the NTA to use the Software in its current compiled output state to the End User. A license does not entitle the licence holder, ownership or access to the Source Code.'

[26]   What the applicant cannot deny in this matter is the fact that it has not paid for the source code. This means that in terms of the service level agreement, in particular clause 6.3, the applicant has not and could not acquire ownership of the source code and also have no right to use the source code. It thus follows that the applicant has failed at the first hurdle and has not established that it has a clear right.

[27]   Having found that the applicant has failed to demonstrate that it has a clear right, it becomes unnecessary for me to consider the other requirements for the grant of a mandatory interdict and the applicants application stands to be dismissed and is so dismissed.

[28]   As far as the issue of costs is concerned, the general rule is that cost are in the discretion of the court and that costs follow the cause. In resisting the applicant's claims, the respondent has been substantially successful and justice and fairness demands that applicant be ordered to pay the respondent's costs.

[29]   In the result I make the following order.

1.   The applicant's application is dismissed.

2.   The applicant must pay the respondent's costs.

3.   The matter is regarded as finalised and is removed from the roll.

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S Ueitele
Judge

APPEARANCES

APPLICANT: Eliaser Nekwaya
                         Instructed by Sisa Namandje & Co Incorporated,
                         Windhoek

RESPONDENT: Gokulan Thambapilai
                         Of Delport Legal Practitioners,
                         Windhoek