THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1186/2023

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY **APPLICANT**

and

BUSINESS CONNEXION (PTY) LTD **RESPONDENT**

Neutral citation: *Ekurhuleni Metropolitan Municipality v Business Connexion (Pty) Ltd (*1186/2023) [2025] ZASCA 41 (10 April 2025)

Coram: NICHOLLS, SMITH, KEIGHTLEY and BAARTMAN JJA and MODIBA AJA

Heard: 17 March 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 10 April 2025

Summary: Section 17(2)*(f)* of the Superior Courts Act 10 of 2013 – contractual claim – software and licences – whether there was

delivery of the licences – budget cuts reason for cancellation – no grave injustice – matter struck from the roll.

ORDER

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

The matter is struck from the roll and the applicant is to pay the costs of the reconsideration including the costs of two counsel.

JUDGMENT

Nicholls JA (Smith, Keightley and Baartman JJA and Modiba AJA concurring):

[1] This matter comes before this Court pursuant to an application for reconsideration to the President in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013 (the Act). On 31 January 2023, the Gauteng Division of the High Court, Johannesburg (the high court) found that there was a valid and binding agreement between the Ekurhuleni Metropolitan Municipality (the Municipality), the applicant, and the respondent, Business Connexion (Pty) Ltd (BCX). It ordered the Municipality to pay to BCX the sum of R85 479 535.26 plus interest for the purchase of software licences and related services. The high court refused an application for leave to appeal by the Municipality, as did two judges of this Court on petition.

[2] The first consideration is whether this Court has jurisdiction to hear the appeal. The power conferred on the President in terms of s 17(2)*(f)* is to determine whether there are exceptional circumstances that warrant a reconsideration of the matter.[1] If

[1] Section 17(2)*(f)* of the Superior Courts Act 10 of 2013, was amended in Government Gazette No. 50430, with effect from 3 April 2024, and reads as follows:
'…
(f) The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may, in circumstances where a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute, whether of his or

the President exercises her discretion in favour of the applicant, the matter is then referred to five judges. This Court has held in *Motsoeneng v South African Broadcasting Corporation Soc Ltd and Others*,[2] and more recently in *Bidvest Protea Coin Security (Pty) Ltd v Mabena*,[3] that it is the court to which a referral is made in terms of s 17(2)*(f)* that must decide whether there are exceptional circumstances. Only if exceptional circumstances are established does this Court have jurisdiction.[4]

[3] Although there is a reluctance to define what exceptional circumstances entail as each case must be considered on its own merits, it is generally accepted that it must encompass something out of the ordinary. This Court in *Avnit v First Rand Bank,*[5] emphasised that what is not contemplated is a re-hashing of old arguments 'unless it is strongly arguable that justice will be denied unless the possibility of an appeal can be pursued',[6] or there must be a matter of some importance that has been overlooked.

[4] The issues in this application for reconsideration do not raise any important or disputed questions of law. The disputes are largely factual. The thrust of the Municipality's application is essentially that there was a factual basis to claim non-performance of the contract which warrants a reconsideration. It remains to determine whether there is a risk of a grave failure of justice, which this Court is obliged to remedy.

[5] It is not disputed that the Municipality entered into an agreement with BCX for the purchase of software and licences for the sum of R85 479 535.26. The question is whether there was non-performance of the contract by BCX, which absolves the Municipality from making payment. The Municipality relies primarily on two defences. The first is that BCX failed to show that there was delivery of the said licences and the software, which it was obliged to do in order to succeed in its claim. The second is the timing of the delivery, which the Municipality contends should have taken place only

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her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.'

[2] *Motsoeneng v South African Broadcasting Corporation Soc Ltd and Others* [2024] ZASCA 80; 2024 JDR 2195 (SCA) para 14.

[3] *Bidvest Protea Coin Security (Pty) Ltd v Mabena (Bidvest)* [2025] ZASCA 23; 2025 JDR 1325 (SCA) para 12.

[4] Ibid para 12.

[5] *Avnit v First Rand Bank* [2014] ZASCA 132; 2014 JDR 2014 (SCA) paras 6 and 7.

[6] Ibid para 6.

once its infrastructure had been upgraded to a more stable environment. As such the Municipality contends that the software was to be purchased on an 'as-and-when-required' basis.

[6] In March 2020, Oracle Corporation (South Africa) (Pty) Ltd (Oracle) assessed the Municipality's information system and advised that it needed to upgrade its infrastructure. As a result, in May 2020 the Municipality embarked on a process to establish a panel of accredited service providers to renew the existing software licences and to procure new software licences from Oracle. BCX was appointed by the Municipality to its panel of service providers.

[7] On 5 August 2020, the Municipality sent a Request for Quotation (RFQ) to each of the Oracle partners on the list, including BCX. The heading of the letter largely mirrors that of the letter of appointment and stipulates that it is '…for the acquisition of additional software licences, software licence renewal, software maintenance, implementations and enhancements for Oracle Software that is in use from date of award until 30 June 2023'. BCX's bid was successful.

[8] On 27 August 2020 the Municipality sent the agreement to be signed by BCX. This was titled, 'ICT Instruction to Perform Work' (IPW). Once again, the heading is identical to the RFQ. The licence specifications and prices are set out with a total sum provided for in the amount of R85 479 535.26. The IPW was followed by a letter from the Municipality to Oracle SA confirming the 'execution' of the agreement with BCX and setting out the Oracle products to be purchased. Believing that they had been awarded the tender, on 28 August 2020, BCX procured the specified licences and made payment. On 1 September 2020, Oracle sent a welcome letter to the Municipality 'C/O Business Connexion (Pty) Ltd' confirming the purchase and the availability of the licences, as well as technical support services. The letter was emailed to Ms Musa Tleane (Ms Tleane) at BCX and to Mr Peter Paulos Moloko Monyepao (Mr Monyepao) at the Municipality. Mr Monyepao is the deponent to the Municipality's answering affidavit.

[9] On 23 September 2020, Ms Matlhodi Senyatsi from the Municipality sent an email to Ms Tleane at BCX stating that they 'would like to place the order for

procurement of additional licences on hold, while the City determines if the modules intended to be used by these licences will be required going forward'. Ms Tleane responded that BCX had ordered and procured the licences as per the Municipality's instruction of 27 August 2020. It was therefore impossible to put the procurement on hold. A couple of days later, on 25 September 2020, Mr Monyepao sent an email stating that due to budget cuts, the Municipality was unable 'to honour the order for additional licences' and that they had not received delivery of the licences. They would, however, proceed with the procurement of the Taleo and compliance licences which is the first line item on the IPW. Ms Tleane responded that the licences were emailed to Mr Monyepao between 29 and 30 August 2020, consisting of the welcome pack from Oracle with all the entitlements attached to the software, as per the IPW.

[10] On 29 October 2020, the Municipality sent a letter to BCX in the following terms (letter of cancellation):

'SUBJECT: REQUEST FOR CANCELLATION OF ORDER

City of Ekurhuleni placed an order with BCX on 27 August 2020 for procurement of additional Oracle software, which includes acquisition of Taleo subscription and technical licences to allow migration of software licences to a new environment and cater for the expansion of additional modules. Refer to the attached Annexure.

The City hereby requests for cancellation of the order, the only licence which the City would like [to] proceed with is the acquisition of the Taleo Licences. Due to the Covid-19 pandemic, the City has been struggling with revenue collection and as a result, budgets have been drastically cut.

Departments have been instructed to reprioritise the maintenance of existing solutions. The City has also been struggling with the successful implementation of these Oracle Modules since 2017; despite engaging the Original Equipment Manufacturer (OEM).'

[11] BCX responded in a letter dated 27 January 2021, setting out how Oracle processed the order from BCX and issued an electronic entitlement copy to the Municipality via the email address of Mr Monyepao. The letter confirmed that the order was non-cancellable, BCX had paid for the licences and it would be impossible to reverse the transaction. It was noted that '…the proposed cancellation is of a

commercial budget nature' and BCX offered to come to some workable payment arrangements. When no agreement could be reached, BCX launched this application on 14 October 2021.

[12] The high court rejected the Municipality's defences. Firstly, it rejected the argument that Mr Benjamin Strydom, the deponent to BCX's founding and replying affidavits, had no personal knowledge of the matter. It held that as the managing executive of BCX to whom all Oracle units reported, he had sufficient knowledge of the matter. Secondly, the high court found that there was 'no legal basis' for the Municipality's contention that the licences were not delivered. On the facts, the keys were made available for utilisation by the Municipality on 28 August 2020. Moreover, said the high court, the Municipality did not deny it received the Taleo licences which were delivered at the same time. It had tendered to pay R6 933 948 in respect of the Taleo licences on receipt of a proper invoice. Finally, the high court did not accept that it was a tacit term of the agreement that the licences were not required immediately but at some future date when the Municipality had migrated from an outdated, unstable and unsupported IBM environment to a more stable Huawei environment.

[13] As indicated, in the application for reconsideration, too, the primary focus was the non-delivery of the licences and what was referred to as the timing of the delivery. In respect of the latter, the Municipality sought to bolster its argument that the licences were not to be delivered until the upgrades had taken place, by referring to paragraph 2 of the RFQ, which provides as follows:

'Acquisition of additional software licences

The department intends to migrate the current Oracle solution to a more stable and supported Huawei environment. …The service providers will be requested to provide a quotation to procure additional infrastructure licences to cater for this migration.'

[14] This, said the Municipality, shows that the intention to acquire the licences at some future date, rather than immediately, was expressly contemplated in the RFQ. It is common cause that a request for a 'service quotation' was never forthcoming from the Municipality. In any event, this interpretation is at odds with the language employed in the IPW and the confirmation of execution letter. There is no express or implied term that the appointed service provider was obliged to ascertain the Municipality's licence

needs prior to procurement. Furthermore, the IPW did not explicitly state that the Taleo licences would be required immediately, while the others would not be. The IPW in its terms presents one order for all the licences listed therein.

[15] If it were indeed the intention of the parties that the contract would be executed as and when certain upgrades were made, this would have been clearly and unambiguously stipulated in the agreement. Nor would the tender office of the Municipality have written to confirm the rates for 12 months after approval if it had not anticipated that the procurement would be within the year. In the email exchange between the parties, at no point did the Municipality positively assert that the agreement between the parties was to procure the licences as and when required. Significantly this is not one of the grounds for the purported cancellation of the agreement. The high court was quite correct in dismissing this defence.

[16] On the question of non-delivery, the Municipality contends that BCX did not provide proof that it had provided the licences. For this it relies on the fact that the welcome letter was sent by Oracle to the Municipality 'C/O BCX'. This is of little moment, the licences were delivered by email to Mr Monyepao, as was confirmed in an email to him almost four weeks later. Delivery by email to Mr Monyepao was also confirmed by Mr Anees Mayet who was employed by Oracle.

[17] Mr Monyepao does not directly deny receiving the email with the licences but rather puts BCX to the proof thereof. As this Court has re-iterated on numerous occasions, a genuine dispute of fact only exists where the party who raises the dispute seriously and unambiguously addresses the disputed facts. A bare denial is only sufficient where there is no other way open to the disputing party.[7] This is not such a case. The Municipality set out no details as to what steps it took to confirm that the key codes did not grant it access to the licences. Nor is it explained how the Taleo licences, which it was conceded were made available on the same basis, were accessible on receipt of the welcome letter but the remaining licences were not.

[7] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008(3) SA 371 (SCA) paras 13 and 14.

[18] It is the letter of cancellation that sets out in the clearest terms the reason for the Municipality's refusal to pay. Nowhere is the non-delivery of the licences mentioned, or that the common understanding was that the licences would only be required once certain upgrades were completed. The sole reason provided is that the Municipality did not have the money to pay the purchase price because their revenue had been drastically reduced due to Covid-19. It was conceded by the Municipality in argument that the reason it did not want the licences was because it was unable to pay for them.

[19] Inability to pay for a contract freely and voluntarily entered into is no defence in these circumstances. It is undisputed that BCX procured the licences and paid for them on the instruction of the Municipality. BCX will be out of pocket to the tune of R85 479 535.26 should the appeal succeed. The high court cannot be faulted for dismissing both of these defences.

[20] The judgment of the high court led to no grave injustice and did not bring the administration of justice into disrepute. Consequently, given also that I have found that there is no disputed question of law that arises for consideration, there are no exceptional circumstances that warrant our reconsideration of the decision of this Court to decline leave to appeal. This matter accordingly does not engage the jurisdiction of this Court.

[21] The following order is made:

The matter is struck from the roll and the applicant is to pay the costs of the reconsideration including the costs of two counsel.

C E HEATON NICHOLLS
JUDGE OF APPEAL

Appearances

For the applicant:	G I Hulley SC (with N Strathern)
Instructed by:	Du Plessis, De Heus Van Wyk and Chiba Attorneys, Benoni Symington De Kok Attorneys, Bloemfontein
For the respondent:	M S Baloyi SC (with M Phukubje)
Instructed by:	Motsoeneng Bill Attorneys Inc, Sandton Honey Attorneys, Bloemfontein.