**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**From:** The Registrar, Supreme Court of Appeal

**Date:** 20 March 2024

**Status:** Immediate

***The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal***

*SAP SE v Systems Applications Consultants (Pty) Ltd t/a Securinfo and Another (Case no 376/2022) [2024] ZASCA 26 (20 March 2024)*

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Today the Supreme Court of Appeal (SCA) upheld an appeal with costs against a judgment of the Gauteng Division of the High Court of South Africa, Johannesburg (the high court).

In 2008, the first respondent, Systems Applications Consultants (Pty) Limited, trading as Securinfo (SAC), a local software development company, caused summons to be issued out of the high court for damages in the amount of €609 803 145 against the appellant, Systems Applications Products AG (since renamed SAP SE) (SAP), a German global software company involved in the development and sale of software systems application products. SAC's assertion, was that it had concluded a Software Distribution Agreement (the SDA) with a German IT consulting company, SAP Systems Integration (SAPSI), in respect of a software security product (Securinfo) that had been developed by it. The broad thrust of SAC's case was that subsequent thereto, SAP acquired a controlling share in SAPSI and an interest in a competing security product known as VIRSA and thereafter unlawfully interfered in the SDA.

SAP denied having unlawfully interfered with the SDA and disputed liability for the damages claimed. The issues of the merits and quantum having been separated, the matter proceeded to trial in respect of the former before Tsoka J. The trial commenced in October 2020 and ran in total for some 74 days. The hearing was conducted virtually on the Zoom platform in accordance with the then prevailing practice in the high court as a result of the COVID 19 pandemic. All the usual formalities and decorum of the court was observed, i.e. the judge and counsel were robed; the witnesses testified under oath and, whilst the court was in session, the proceedings were at all times to be presided over by the presiding judge, who could be observed on a video link and heard on an audio link.

On Friday, 6 November 2020, when the trial was into its 20th day and whilst one of SAC's witnesses, Mr Mario Linkies, was being cross-examined by counsel for SAP, the presiding judge, Tsoka J, irritatedly abstracted himself from the proceedings and informed counsel 'when you've finished you'll let me know. I'm taking a break'. On 9 November 2020, SAP brought an application, which was opposed by SAC, for the recusal of Tsoka J. On 13 November 2020, Tsoka J dismissed the application on the basis that the application was based on a selective, subjective and contrived interpretation as to what had occurred. The matter thereafter proceeded on the separated issue to finality before Tsoka J, who, on 7 December 2021, delivered a written judgment and ruled in favour of SAC.

On 28 December 2021, SAP applied to the learned judge for leave to appeal to this Court in respect of both his judgment on the recusal application as well as his judgment on the merits. Both applications were dismissed. On 5 May 2022, SAP petitioned this Court for leave to appeal, which was referred to oral argument on 13 July 2022.

Before this Court, the primary issue for consideration and determination was whether a reasonable, objective and informed person, on the correct facts, would have reasonably apprehended that the Judge

had not or would not bring an impartial mind to bear on the adjudication of the dispute between the parties.

The SCA held that: In the circumstances, the reasonable, objective and informed person in SAP's position would have apprehended that a presiding judge, who: (a) prevented its counsel from cross-examining a witness in response to a challenge from such witness to be shown why his credibility was being impugned; (b) then irritatedly abstracted himself from the hearing, without first adjourning; and, (c) whilst at the same time directing that the hearing continue in his absence until counsel had 'finished', had shown himself to have closed his mind to the evidence and the submissions of counsel. The SCA further held that, the belated improbable explanation by the judge for his abrupt departure, namely that he had to urgently go to the toilet, served simply to exacerbate the apprehension. It followed, as a consequence of the cumulative factors alluded to by the SCA that the question: whether a reasonable apprehension of bias could have been said to exist, had to accordingly be answered in the affirmative. What resulted from this, held the Court, was that the further judgment of Tsoka J on the merits was vitiated by him continuing to sit in a trial where recusal was required. The only question was whether there was a reasonable apprehension of bias: if there was, *cadit quaestio* (the question falls away/the case is closed), no matter what effect that might have had on the particular proceedings. As a result, the application for leave to appeal had to succeed and consequently the appeal upheld, with the result that the order of Tsoka J dismissing the application for his recusal was set aside and substituted with and an order allowing the recusal application with costs.

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