THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***8th April 2021*** Signature: _____

CASE NO: 39734/2018

DATE: 8TH APRIL 2021

In the matter between:

MARKIT SYSTEMS (PTY) LIMITED Plaintiff

and

FULCRUM GROUP (PTY) LIMITED Defendant

Coram: Adams J

Heard on: 17, 18, 19, 21 and 22 August 2020;
14, 15, 16, 17 and 18 September 2020.

Closing Argument on: 21 October 2020 – The 'virtual hearing' of this matter (the trial) was conducted as a series of videoconferences on the aforementioned trial dates on the *BlueJeans* digital platform.

Delivered: 08 April 2021 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GLD and by release to

SAFLII. The date and time for hand-down is deemed to be 12H00 on 8 April 2021.

Summary: Interpretation of contract – between provider of information technology services and customer for the development and build of system – cancellation of agreement in terms of cancellation clause – supplier alleges unlawful cancellation and repudiation of contract by customer – claim for contractual damages resulting from repudiation of agreement by customer – whether customer entitled to cancel agreement in terms of the cancellation clause and whether cancellation amounted to repudiation – agreement validly cancelled as eventuality allowing cancellation materialised – claim dismissed – counterclaim allowed –

ORDER

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(1) The plaintiff's claim is dismissed with costs, which costs shall include all reserved costs, the qualifying fees of defendant's expert witness, Mr Hands, who is declared a necessary witness, and all costs consequent upon the employment of two counsel, one being a Senior Counsel.

(2) Judgment is granted on the defendant's counterclaim in favour of the defendant against the plaintiff for:

   (a) Payment of the sum of R4 500 000;

   (b) Payment of interest *a tempore morae* on R4 500 000 at the applicable legal rate of 10.25% per annum from 14 December 2014 to date of final payment;

   (c) Costs of suit, including the costs consequent upon the employment of two counsel, one being a Senior Counsel.

JUDGMENT

Adams J:

[1]. On 26 April 2017, the plaintiff, Markit Systems Limited (Markit), and the defendant, Fulcrum Group (Pty) Limited (Fulcrum), concluded a written technology agreement (the agreement), in terms of which Markit was to provide Fulcrum with technology and related services aimed at building and thereafter maintaining and supporting an innovative Insurance Broker software system ('the System') to replace the outdated information technology system (Flexibroker) used at that stage by Fulcrum. The parties agreed that the project would commence immediately upon signature of the agreement and it was envisaged that once the system had been built, Fulcrum would enjoy a technological advantage in the insurance and insurance brokerage industry.

[2]. The scope of the project was to be agreed upon between the parties and recorded in a Business Requirement Document ('the BRD'), which would set out Fulcrum's requirements subsequent to a detailed analysis of their business and business requirements by Markit. Either party was entitled to terminate the agreement immediately at any time by written notice to the other party if agreement could not be reached on the details to be included in the BRD.

[3]. The main issue in this action is whether Fulcrum was entitled to terminate the agreement on the basis that the parties failed to agree on the details to be included in the BRD. Intricately related to this issue was the other in this action, that being whether Fulcrum's termination of the agreement amounted to an unlawful repudiation of the contract and a breach of its admitted obligation to cooperate with and assist Markit in preparing and finalising the BRD. If not, then, in my view, *cadit quaestio* as regards Markit's case.

[4]. It bears emphasising at the outset that, at the time the parties concluded the agreement, Fulcrum's business information and operating system was the Flexibroker system. This system was at that time still serving its purpose as a vehicle which enabled Fulcrum to serve its insurance and insurance broker

customers. However, it had become outdated and antiquated and at the very least required to be upgraded so as to keep up with the times and to enable Fulcrum to remain relevant and to retain a competitive edge in the insurance industry. From Fulcrum's point of view, it was desirous to replace that system in its entirety with a more modern, up to date, efficient and generally better operating system.

[5]. It was therefore envisaged by Fulcrum and so communicated to Markit that a new and improved information technology system was required to be developed by modifying and expanding their existing software system, that being the old Flexibroker system. This meant, as testified to by Fulcrum's expert witness, Mr Hands, that a reverse flow of information was required from Markit, as the supplier, to Fulcrum, as the customer. It therefore stands to reason that Markit needed to educate Fulcrum in the features and functions of the Markit system, using it as a sounding board or catalyst to elicit Fulcrum's requirements.

[6]. The agreement was to 'continue indefinitely unless cancelled upon written notice as provided for in [the agreement]'.

[7]. However, on 13 December 2017 Fulcrum gave written notice to Markit of immediate cancellation of the agreement, ostensibly on the basis that Markit had committed material breaches of the agreement. Importantly, Fulcrum, in their notice of cancellation of the contract, alleged that the BRD had not been agreed upon, which entitled it (Fulcrum) to cancel the agreement. Markit's response to the cancellation notice was to deny that it had breached the agreement and it insisted on Fulcrum complying with its obligations in terms of the agreement. It was in fact Fulcrum, so Markit retorted, which was in breach of the agreement in that it had failed to co-operate in the production of the BRD and its purported cancellation of the agreement amounted to an unlawful repudiation of the contract.

[8]. In this action, Markit claims R40 414 803 as damages for breach of contract. Essentially, the basis of the claim is that Fulcrum's termination of the agreement constitutes an unlawful repudiation of the contract, resulting in Markit

suffering damages, which damages also resulted, so Markit alleges, from numerous other actionable material breaches of the agreement by Fulcrum.

[9]. Fulcrum defends the action on the basis that its conduct did not constitute a repudiation of the agreement – it was simply enforcing its right under the agreement to terminate in the event that an agreement had not been reached on the BRD, described by Fulcrum as a 'critical document'. The case of Fulcrum is simply that it had the right to cancel the agreement in the event of the parties being unable to reach agreement on the BRD. Fulcrum alleges that this eventuality, as contemplated by the parties in the agreement, in fact materialised, therefore it was entitled to cancel the contract without further ado, which is exactly what they did.

[10]. Fulcrum denies Markit's claim that the reason why agreement could not be reached on the BRD was due to a breach on the part of Fulcrum of the agreement, which required Fulcrum to co-operate with Markit in the preparation and compilation of the BRD. In any event, so the case on behalf of Fulcrum goes, irrespective of the reason for the failure to reach agreement on the BRD, once there is no agreement on the BRD within a reasonable period, any of the parties had the right to cancel the contract. That defence is contained in and incorporated in a Special Plea raised by Fulcrum.

[11]. As regards Markit's contention that Fulcrum did not cooperate with it in ensuring that agreement on the BRD was reached, Fulcrum admits its obligation in terms of the contract to timeously provide Markit with complete and accurate information to enable it to perform its obligations. However, Markit, being the information technology expert employed by Fulcrum precisely for its expertise, was obliged, so Fulcrum contends, to solicit such information from Fulcrum, and, in breach of the agreement, failed to do so.

[12]. Fulcrum also counterclaims a refund of the amount of R4 500 000 paid by it to Markit in terms of the agreement, which it alleges should be repaid on the basis that it was not due in terms of the agreement.

[13]. At the heart of the dispute between the parties is the BRD, which is defined in the agreement as: 'A document detailing the business processes the system

will need to address as set out in schedule 2'. Schedule 2 to the signed agreement was a blank page with the heading: 'Schedule 2'. And to this day that is what Schedule 2 to the agreement is – a blank page.

[14]. Clause 02 of the agreement provides that 'the scope of the project is explained in more detail in the BRD as detailed in Schedule 2', and then goes on to provide that:

'Once [Markit] has analysed and documented [Fulcrum's] business requirements, both parties shall jointly agree on:

a A BRD which shall set out what [Fulcrum's] requirements are subsequent to a detailed analysis of [Fulcrum's] business by [Markit]. The BRD shall include (but shall not be limited to):

I Application Functional and Non-Functional Requirements;

II Migration Requirements including:

(a) details of insurer products required to be migrated;

(b) customer data;

(c) details of the migration process, stipulating the level of automation to be implemented in the process.'

[15]. This clause is central to the dispute, as are clauses 2(d) and 16, which I cite extensively in the paragraphs which follow.

[16]. Clause 2(d) of the agreement reads as follows:

'Either party shall be entitled to cancel this agreement in accordance with clause 16 (c) below in the event that the parties are unable to reach agreement on the details of the BRD'.

[17]. The relevant portions of clause 16 of the agreement reads thus:

'16. **Term and termination**

a. This agreement shall commence on the Effective Date and shall continue indefinitely unless cancelled upon written notice as provided for in this clause 16.

b. Notwithstanding the above, neither party shall be entitled to cancel this agreement within the first five years from the Effective Date, save for termination in accordance with this clause 16 (c).

c. Either party may terminate this agreement immediately at any time by written notice to the other party if:

i. that other party commits any material breach of its obligations under this agreement which (if remediable) is not remedied within [14] days after the service of written notice specifying the breach and requiring it to be remedied; or

ii. that other party:

1. . . . . .

. . . . . .

5. any process is instituted which could lead to that party being dissolved and its assets being distributed to its creditors, shareholders or other contributors (other than for the purposes of solvent amalgamation or reconstruction); or

iii. … ….

iv. … …;

v. The Parties fail to reach agreement in respect of the details to be documented in the BRD,

vi. The Supplier fails to meet the mutually agreed timelines and expectations to be recorded in the detailed BRD or any requirements as stipulated in the BRD (Schedule 2) and/or Project Plan (Schedule 1); or otherwise fails to perform or meet the requirements of the agreed Service Levels documented in Schedule 3.

vii. … ...'

[18]. Fulcrum's case, as explained by its Counsel, Mr Morison, is that it was entitled to cancel because the parties were unable to reach agreement on the content of the BRD. That is the pleaded case of Fulcrum. The cancellation happened because they could not agree on the BRD. Markit's case is that Fulcrum failed to cooperate, which resulted in Markit being unable to produce the BRD. Fulcrum's case is not that Markit failed to perform as the basis of the cancellation – it is that the parties did not agree on the content of the BRD and that gave Fulcrum the right to cancel.

[19]. Markit disputes Fulcrum's entitlement to cancel the agreement in terms of clause 16(c)(v), because, so Mr Berridge, Counsel for Markit, contended, the parties did not fail 'to reach agreement in respect of the details to be documented in the BRD'. Far from it, so the contention on behalf of Markit goes, the parties were well on their way to reaching such agreement and, but for the unlawful

termination of the contract by Fulcrum, agreement would have been reached and the BRD or BRD's would have been produced.

[20]. Other relevant clauses relied upon by Markit in support of its cause are clauses 3 and 4 of the agreement.

[21]. Clause 3 sets out Markit's responsibilities and provides in clause 3(a) that it was Markit's obligation to 'analyse and document Fulcrum's requirements, to be encapsulated in the BRD as provided in clause 2(a) above'. Fulcrum interprets this clause as placing on Markit the responsibility and the obligation to produce the BRD. Markit disagrees. In this clause one finds, so Markit contends, a temporal and consecutive element, that being the analysis and documentation process (which was Markit's responsibility) preceded the production of the BRD, which was the joint exercise upon which the parties had to jointly agree.

[22]. Markit contends that this clause does not impose the obligation of producing the BRDs upon Markit. I will revert to this aspect of the matter later on in the judgment. Suffice to say, at this point, that in the view I take of this matter, nothing turns on this.

[23]. Fulcrum's responsibilities are detailed in clause 4 of the Agreement. Clauses 4(a) and (b) provide as follows:

'(a) [Fulcrum] acknowledges that [Markit's] ability to provide the services is dependent upon the full and timely co-operation of [Fulcrum] (which [Fulcrum] agrees to provide), as well as the accuracy and completeness of any information and data [Fulcrum] provides to [Markit]. Accordingly, [Fulcrum] shall provide [Markit] with access to, and use of, all information, data and documentation reasonably required by [Markit] for the performance by [Markit] of its obligations under this agreement.

(b) To assist [Markit], [Fulcrum] will appoint a dedicated Business Analyst to assist with the creation of the BRD. [Fulcrum] shall be responsible for the accuracy and completeness of the Materials on the System.'

[24]. 'Materials' are, in turn, defined as meaning the content provided to Markit by Fulcrum from time to time for incorporation on the System.

[25]. It is this clause 4 that Markit contends was breached by Fulcrum.

[26]. In addition, and in terms of clause 8 of the Agreement, each party was obliged to appoint a project manager. This clause provides as follows:

'8. **Project management**

Each party shall appoint a project manager who shall:

a. provide professional and prompt liaison with the other party; and

b. have the necessary expertise and the authority to commit the relevant party.

The project managers shall jointly appoint a Project steering committee which shall constitute representation from both Parties.'

[27]. Simply put, the questions to be answered in the adjudication of the disputes between the parties are the following: (1) Did the parties fail to reach agreement in respect of the details to be documented in the BRD? (2) And if so, was this failure to reach agreement on the details as a result of a breach by Fulcrum of the terms of the agreement? In seeking answers to these questions, one is required to embark on a legal interpretation of the relevant clauses of the agreement and of the agreement as a whole.

[28]. Markit's conclusion is that there was not a failure by the parties to reach agreement in respect of the details to be incorporated in the BRD. In any event, so Markit submits, even if there was such a failure to reach agreement, such failure was caused as a result of Fulcrum's breach of the terms of the agreement in that it failed to comply with a number of its obligations in terms of the agreement, notably its failure to cooperate with Markit and to furnish it with the requisite information and data which would have enabled Markit to analyse and document Fulcrum's business requirements. Fulcrum's case is that there was a failure by the parties to reach agreement on the details to be incorporated in the BRD and that failure was not as a result of any breach by them of any of the terms of the agreement.

[29]. In support of its claim, Markit led the evidence of two of its senior executives, namely: Malcolm McLean, its Chief Technical Officer, and Simon Turner, its Executive Chairman, as well as the evidence of an Expert, Cornelius Fourie, a Forensic Accountant. Mr Fourie's evidence related to the quantification of the plaintiff's claim. Fulcrum led the evidence of Paul Schreuder, who was its Chief Information Officer at the relevant time, and the evidence two of its Project

Managers, Shirley Ann Oakley-Brown and Karen Bouic. Fulcrum also called an expert witness, Mr William Michael Hands, an IT Expert, who gave evidence on the merits of the case of Fulcrum. In the end and after the evidence was completed, it became apparent that there were not many genuine factual disputes between the parties. In my view, the versions of the parties part ways only at the point of interpretation of the facts, which, in any event, were borne out for the most part by the documentary evidence. I deal in the paragraphs which follow with the salient and relevant facts in this matter as gleaned from the evidence placed before me by both parties. That I do simultaneously with the discussion and the analysis of the law and its application to the facts in the matter.

[30]. However, before I do that, it may be apposite at this juncture to say something briefly about the correct legal approach to the interpretation of contracts.

[31]. It is so, as submitted by Mr Berridge, that the more modern approach to interpreting contractual instruments that was started by decisions such as *Natal Joint Municipal Pension Fund v Endumeni Municipality*[1] and *Bothma-Batho Transport (Edms) Beperk v S Bothma and Seun Transport (Edms) Beperk*[2] and carried through into judgments such as, for example, *Novartis SA (Pty) Limited v Maphil Trading (Pty) Limited*[3], has conveniently been summarised as follows in *North East Finance (Pty) Limited v Standard Bank of South Africa Limited*[4]:

'The court asked to construe a contract must ascertain what the parties intended their contract to mean. That requires a consideration of the words used by them and the contract as a whole, and, whether or not there is any possible ambiguity in their meaning, the court must consider the factual matrix (or context) in which the contract was concluded.'

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1 *Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)

2 *Bothma-Batho Transport (Edms) Beperk v S Bothma and Seun Transport (Edms) Beperk* 2014 (2) SA 494 (SCA)

3 *Novartis SA (Pty) Limited v Maphil Trading (Pty) Limited* 2016 (1) SA 518 (SCA)

4 *North East Finance (Pty) Limited v Standard Bank of South Africa Limited* 2013 (5) SA 1 (SCA)

[32]. Thus, whilst the logical point of departure remains the language of the provision itself, that is no longer the end of the enquiry and as was reiterated in *Tshwane City v Blair Athol Homeowners Association*[5]*:*

'It is fair to say that this court has navigated away from a narrow peering at words in an agreement and has repeatedly stated that words in a document must not be considered in isolation. It has repeatedly been emphatic that a restrictive consideration of words without regard to context has to be avoided. ... the purpose of the provision being interpreted is also encompassed in the enquiry. The words have to be interpreted sensibly and not have an unbusinesslike result. These factors have to be considered holistically.'

[33]. The aforegoing approach is subject to the proviso that the evidence must indicate a common understanding of the terms of the agreement, may not alter the meaning of the words used and should be used as conservatively as possible. In that regard, see: *KPMG Chartered Accountants (SA) v Securefin Limited and Another*[6]. The point is that, whilst accepting the parol evidence rule remains part of our law, the manner in which the parties themselves not only understood but implemented their contractual obligations is a very important aid in the interpretative process, provided of course that such interpretative exercise does not alter the written words of the contract itself.

[34]. That brings me back to a discussion of the facts in the matter and applying to those facts the aforegoing principles.

[35]. Prior to the conclusion of the agreement, Markit, during February 2017, produced and furnished to Fulcrum a 'Project Initiation Plan', referred to by the parties as a 'PID'. Markit attaches substantial weight to this PID, although no mention is made thereof in the agreement. The PID was reviewed and refined by Fulcrum's Mr Schreuder during June 2017 and he also made certain critical insertions to it. Markit seems to suggest that this document is evidence that the parties were working towards the BRD.

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5 *Tshwane City v Blair Athol Homeowners Association* 2019 (3) SA 398 (SCA)

6 *KPMG Chartered Accountants (SA) v Securefin Limited and Another* 2009 (4) SA 399 (SCA)

[36]. This document, however, was clearly not a BRD neither did it contain all of the details to be included in the BRD. All that was recorded in this document as and at 15 June 2017 under the heading 'Scope' was the following: 'All existing functionality in Flexibroker'. Similarly, it cannot be said that a document produced during October 2017, titled: 'Product and Entity – Business Requirement Specification', was an indication that agreement had been reached between the parties on the details to be included in the BRD. This document, which was a discussion document, is also referred to by the parties as the Product and Entity BRD, and specifically dealt with Fulcrum's product and entity business requirements relative to the project. It was a sub-BRD, which, by all accounts, was very close to being signed off by Fulcrum and Markit. This document was however not signed off by the parties, and, in any event, cannot be said to have contained all of the details to be included in the BRD.

[37]. The same applies to a series of emails between Fulcrum's Business Analyst, Mr Ashmeer Mahabeer, and Markit's Mr Roger Walters during November 2017, starting on 14 November 2017 and ending on 22 November 2017. This series of emails is referred to by Mr Berridge as a 'multicoloured document' and started off with a list of twenty sub BRDs from Mr Roger Walters, the first one being the 'Entity and Product Configuration'. In the emails exchanged, questions are asked by Mahabeer in relation to the sub-BRDs, to which Walters respond and between the two of them the BRDs are discussed. The point is that this document also did not amount to an agreement between the parties on the details to be included in the BRD. And this was seven months since the agreement had been signed.

[38]. The multicoloured emails, Mr Berridge submits, best exemplify the fact that the parties would indeed have been able to reach agreement on the details to be included in the BRD. Quite clearly, so Mr Berridge contends, that email exchange was the very implementation of the 'teamwork philosophy' that the parties would have had in terms of the agreement. It comprised a series of questions and a flow of information that was either forthcoming or promised to be forthcoming from Fulcrum in the future.

[39]. I disagree. The point is that by November 2017 the parties had still not agreed on the details to be included in the BRD and that, in my judgment, was not as a result of any breach on the part of Fulcrum. On the contrary and as already indicated, this can be laid squarely at the door of Markit and the supine attitude adopted by them after the conclusion of the agreement.

[40]. The express agreement between the parties was that work on the project would start immediately. This, in my view, required of Markit to immediately start the process of analyzing and documenting Fulcrum's business requirements with a view to the parties jointly agreeing on the BRD. This positive obligation to analyse and document Fulcrum's business requirements is placed on Markit by clause 2 as well as by clause 2a, which provides in no uncertain terms the BRD shall set out what Fulcrum's requirements are 'subsequent to a detailed analysis of [Fulcrum's] business by the Supplier [Markit]' (emphasis added). There can be no doubt that, as a starting point of the project, Markit was to immediately embark on an analysis and a documentation of Fulcrum's business requirements. This is expressly provided for by the wording of the contract.

[41]. Notwithstanding the aforegoing provisions and despite the fact that it was the party with the necessary expertise and the requisite skill and was required to take the lead in the project, Markit adopted a somewhat supine attitude and expected of Fulcrum to do all the work which it was required to do in terms of the contract. For at least the months of May and June 2017 Markit did nothing other than to receive payment of the initial deposit of R3 million payable in terms of the agreement.

[42]. It is so, as argued by Markit, that, if regard is had to clause 4 (supra) of the agreement, the BRD was to include information and data which had to emanate from Fulcrum. It may also be that Fulcrum failed to appoint in good time the personnel it was contractually obliged to appoint – such as the Project Manager and a dedicated Business Analyst.

[43]. However, in my judgment, the primary obligation to ask for and obtain that information lay with Markit, who was obliged to analyse and document Fulcrum's

business requirements. This obligation is reiterated by clause 3 of the agreement under the heading: 'Supplier Responsibilities', which provides that:

'The Supplier shall:

a. Analyse and document the Customer's requirements, to be encapsulated in the BRD as provided in clause 2(a) above.'

[44]. It is also instructive to note that clause 4, which is relied upon fairly heavily by Markit for its claim that Fulcrum was in breach of its obligation to cooperate with Markit, also provides that:

'a . . . Accordingly, the Customer shall provide the Supplier with access to, and use of, all information, data and documentation reasonably required by the Supplier for the performance by the Supplier of its obligations under this agreement.' (Emphasis added).

[45]. I therefore conclude that by the time Fulcrum gave Markit notice on 13 December 2017 of immediate cancellation of the agreement, the parties had failed to agree on the details to be included in the BRD. I am also of the view that the failure to agree upon the detail to be included in the BRD did not result from Fulcrum's breach of any of the provisions of the agreement, but rather from Markit's failure to comply with its obligation to analyse and document Fulcrum's business requirements.

[46]. The only question remaining is whether the aforegoing entitled Fulcrum to cancel the agreement in view of the fact that the relevant clause does not expressly provide for a time period during which such agreement ought to have been reached. This calls for a further interpretation of the relevant clauses and the agreement as a whole by the application of the principles alluded to *supra*.

[47]. There can be no doubt that the parties contemplated and agreed that agreement on the details should be reached within a reasonable time. The alternative postulation to the effect that the parties would have given themselves an indefinite period within which to reach agreement on the details is nonsensical. There would then have been no need and no reason to include the particular cancellation clause in the agreement. Therefore, in my view and as pleaded by Fulcrum, in terms of the agreement, either party could terminate the contract if

the parties within a reasonable period failed to reach agreement in respect of the details to be included in the BRD.

[48]. The question whether a reasonable time had elapsed before the cancellation is answered by the contract and the evidence during the trial. In the technology agreement the parties recorded their expectation that the agreement on the BRD would to be achieved within three months. By the time the cancellation took place they had been working at the project for eight months. As confirmed by the expert witness, Mr William Hands, the parties had given themselves a reasonable time to reach the agreement, yet they had failed and the only sensible thing for them to do was to end the project.

[49]. Mr Berridge submitted that what had to be agreed in terms of the agreement were not the BRDs themselves, but rather the details that were to be included in them. In this regard, so he submits further, with reference *inter alia* to the multicoloured emails, there was a great deal of agreement. It was not only agreed that there would be one single high-level (or 'umbrella') BRD, with a number of sub-BRDs, it was also agreed what each of those sub-BRDs would comprise. Each sub-BRD was given a name which was descriptive and showed what type of detail needed to be included in it. There was most certainly not an inability or a failure to reach agreement on these aspects, so Mr Berridge contends, but rather the contrary. I disagree – the point is simply that within a reasonable time the parties did not agree in respect of the details to be included in the BRD, and therefore they had 'failed' to reach such agreement.

[50]. In all of the circumstances, I am of the view that Markit has failed to prove that Fulcrum was not entitled to cancel the agreement in terms of clause 16(c)(v). Markit's claim therefore stands to be dismissed.

[51]. Concomitantly, Fulcrum's counterclaim should be upheld. The quantum thereof should be based on the provisions of clause 19(c))(iii) of the agreement, which provides as follows:

'iii. Should this agreement be terminated in accordance with clause 16, due to non-compliance with the BRD or failure to reach agreement on the BRD, the balance of the initial deposit shall thereafter be paid over to the Customer.'

[52]. The reference to the balance of the initial deposit is a reference to the 50% of R3 million upfront deposit payable into the trust account of a firm of attorneys to be held in trust until such time as the BRD had been produced. It stands to reason that all other payments made by Fulcrum should be refunded.

[53]. As regards costs, the general rule is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*[7].

[54]. I can think of no reason why I should deviate from this general rule.

[55]. I am therefore of the view that Markit should pay Fulcrum's costs of the application.

Order

[56]. Accordingly, I make the following order: -

(1) The plaintiff's claim is dismissed with costs, which costs shall include all reserved costs, the qualifying fees of defendant's expert witness, Mr Hands, who is declared a necessary witness, and the costs consequent upon the employment of two counsel, one being a Senior Counsel.

(2) Judgment is granted on the defendant's counterclaim in favour of the defendant against the plaintiff for:

   (a) Payment of the sum of R4 500 000;

   (b) Payment of interest *a tempore morae* on R4 500 000 at the applicable legal rate of 10.25% per annum from 14 December 2014 to date of final payment;

   (c) Costs of suit, including the costs consequent upon the employment of two counsel, one being a Senior Counsel.

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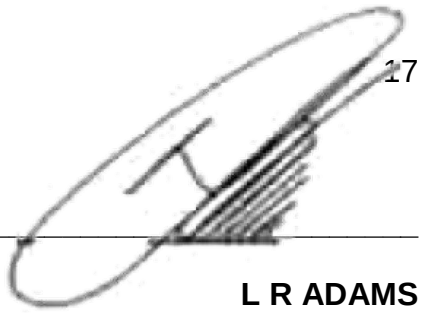
[7] *Myers v Abrahamson* 1951(3) SA 438 (C) at 455



L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	17, 18, 19, 20 & 21 August 2020; 14, 15, 16, 17 & 18 September 2020 – in a 'virtual hearing' during a series of videoconferences on the *BlueJeans* digital platform
CLOSING ARGUMENT ON:	21st October 2020
JUDGMENT DATE:	8th April 2021 – judgment handed down electronically
FOR THE PLAINTIFF:	Adv Bruce Berridge SC
INSTRUCTED BY:	Clyde & Co Incorporated
FOR THE DEFENDANT:	Adv L J Morison SC, together with Adv Ntombi Mncube
INSTRUCTED BY:	Nicqui Galaktiou Incorporated