THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no**: 482/09**

In the matter between:

TELKOM DIRECTORY SERVICES (PTY) LTD **Appellant**

and

FREDERICK JOSEPH KERN **Respondent**

Neutral citation: **Telkom Directory Services v Kern (482/09) [2010] ZASCA 116 (22 September 2010)**

Coram: Lewis, Heher, Ponnan, and Mhlantla JJA and R Pillay AJA

Heard: **7 September 2010**

Delivered **22 September 2010**

Summary: Interpretation of contract in terms of Californian law, as agreed: extrinsic evidence of intention admitted provisionally: terms of written agreement not, however, susceptible to meaning advanced by plaintiff: claim for breach of contract should have been dismissed.

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Victor J sitting as court of first instance).

1 The appeal is upheld with costs.

2 The order of the court below is replaced with:

'The plaintiff's claim is dismissed with costs, including those of the plaintiff's expert witness, Mr Meredith, who is declared a necessary witness.'

JUDGMENT

LEWIS JA (HEHER, PONNAN AND MHLANTLA JJA and R PILLAY AJA concurring)

[1] This appeal turns on the interpretation of a contract in terms of Californian law. Fortunately the parties have agreed on the principles that govern the interpretation, and the appeal turns only on whether the high court applied them correctly. The respondent, Frederick Kern, claimed damages for breach of contract from the appellant, Telkom Directory Services (Pty) Ltd (TDS). The contract was expressly stated by the parties to be governed by the domestic laws of the state of California. The issues of liability and quantum (some R6m was claimed) were separated by agreement. A claim for rectification of the contract was abandoned at the outset of the trial. Victor J found that TDS was liable to pay damages to Kern in terms of the agreement. TDS appeals against that order with the leave of this court.

[2] Kern is an expert in creating systems for entries in yellow pages of telephone directories. He is American and was resident in California when the contract was concluded in November 1998. In 1997 Ms C Sheasby became the managing director of TDS, a South African company that publishes the telephone directories, and which was in the process of merging its yellow pages database with the white pages database previously managed by Telkom, the state entity that provides telephone services in South Africa. In

1998 TDS mandated Sheasby to find an appropriate computer system for this purpose.

[3] To this end, in October 1998 Sheasby attended a conference in Florida, America, on behalf of TDS: there she met Kern, who agreed to provide services to TDS. They concluded a contract, referred to as a Master Consulting Agreement on 3 November 1998, and subsequently (on 18 January 1998) a 'work order' in respect of the first phase of services to be rendered. The work order was extended (updated) twice, once in September 1999 and then in June 2000. Kern had drafted the master agreement and the work order and updates himself, using a precedent that he had worked on previously. (The agreements were all in the name of Logos Consulting Group, but it transpired that there was no such entity and that Kern himself was the party to the contract and would render the services. Nothing turns on this.)

[4] On 13 March 2001 TDS purported to exercise its right to terminate the agreement, giving the requisite notice. The dispute centres on whether a termination clause in the master agreement had been superseded by a term in the work order. If so, TDS would be liable in damages having repudiated the contract. If, however, the right to terminate was not affected by the work order then Kern would have no claim.

[5] I shall turn to the terms and the parties' respective interpretations shortly: but it is necessary to state at this point that Californian law allows the leading of evidence on the intention of the parties provisionally. If, after considering the evidence, the court decides that the parties had a common intention and that the language of the contract is reasonably susceptible to the interpretation suggested by a party, the court will admit the evidence and give effect to that intention. Both Kern and Sheasby (for Kern) testified as to what had been intended by them in the conclusion of the contract and the high court admitted the evidence. But first the terms themselves.

[6] The master agreement provided that it would become effective on 3 November 1998 and would remain in force 'until terminated as provided

herein'. Kern would render services in terms of 'work agreements' which would be 'attached to and become an integral part of this Master Agreement'. A clause headed 'Termination' provided: 'Either party may terminate this agreement upon giving thirty (30) days prior written notice thereof to the other.'

[7] The work order, which was part of the master agreement, stated:

'This Work Order shall become effective on January 18, 1999, and, *unless sooner terminated as provided in the Master Consulting Agreement*, shall remain in force and shall continue thereafter until all work has been satisfactorily completed as described herein' (my emphasis).

Under the heading 'Compensation' it was stated that project management would be broken into several stages 'for the purposes of corporate approval'. The first stage would be from January to September 1999; the second the remainder of 1999 and 2000; and the third stage would encompass subsequent periods 'if any, that are mutually agreed upon'. The work order had been extended, as I have indicated, to the third stage. The clause continued:

'Negotiations for each subsequent stage must be completed 45 days prior to the next stage or Logos is free to accept alternate assignments. Once both parties have signed the Work Order for a subsequent stage, *they are both bound to fulfil the time and monetary obligations of the Work Order*' (my emphasis).

[8] Kern contended that this provision in effect excluded the right to terminate on 30 days' notice in the master agreement. Once a work order or extension had been signed, the stage in question had to run its course and the contract could not be terminated. TDS, on the other hand, argued that the work order was part of the master agreement and that the termination clause continued to be operative. TDS contended moreover that there was no conflict between the different provisions of the contract: at all times either party had the right to terminate on notice. The obligation to 'fulfil the time and monetary obligations' had to be read in the context of the entire clause. It meant no more than that the parties were bound to negotiate the next stage within a particular period and to perform their respective obligations. This is reflected

in the letter of termination of 13 March 2001 which first gave notice and then stated:

'We confirm that, in terms of the termination provisions of the Master Agreement, we shall have no liabilities to you except for charges for services performed by you and accepted by you under the agreement prior to receipt of this notice.'

[9] As indicated earlier, Californian law allows the provisional tendering of evidence: if the terms of the written contract are susceptible to the interpretation contended for in evidence as to their mutual intention then that interpretation will prevail. Evidence as to what the parties intended was thus provisionally allowed. Only evidence for Kern was led. Both he and Sheasby testified that they believed that after signing the master agreement, and once the first phase had been completed, TDS was not entitled to invoke the termination clause. They made much of the fact that Kern would have to relocate to South Africa to render his services, and would be foregoing work in America. It was thus important to him to know that he had some security – assured work from TDS. From Sheasby's perspective, it was important not to lose Kern's services. He was central to the project TDS was undertaking. And so once a work order was signed the contract would remain in force until the agreed date. But neither of them showed that their understanding had been conveyed to anyone else at TDS, including its board of directors.

[10] Victor J considered the evidence to be admissible and accepted Kern and Sheasby's assertion that the right to terminate could not be invoked once the work order had been signed. She accordingly found for Kern. TDS contended on appeal that the learned judge erred in the application of the principles governing contractual interpretation – that the written contract was not susceptible to the meaning attributed to it by Kern and Sheasby.

[11] Prior to the trial the parties had agreed on certain principles of interpretation based on expert advice. They state:

'1 The parties agree that there is one contract that consists of the Master Agreement, the Work Order and the two updates to the Work Order.

2 The contract must be interpreted so as to give effect to the mutual intention of the

parties as it existed at the time of the contracting (meaning the dates that the Master Agreement, the Work Order and the two updates were executed).

3 The language of the contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.

4 Since the contract is in writing, the intention of the parties is to be ascertained from the writing alone, if possible.

5 To determine whether it is possible to ascertain the intention of the parties from the writing alone the court should consider the following:

a The language of the contract; and

b Extrinsic evidence, including testimony of the intentions of the parties, if not excluded by the parol evidence rule.

6 The parol evidence rule provides that the terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement

7 Extrinsic evidence to explain an extrinsic ambiguity or otherwise to interpret the terms of the contract is not excluded by the parol evidence rule.

8 Evidence of subsequent negotiations or subsequent agreements may be received when the subsequent agreement is in writing.

9 Where the court finds an apparent conflict between different clauses or provisions of the written contract, the court may consider the recitals of the agreement and other admissible extrinsic evidence.

10 *If a party asserts a meaning of the contract, the court shall provisionally receive evidence of the asserted meaning. If the court finds that the language of the contract is reasonably susceptible to the asserted meaning based on the language of the contract and the evidence of the asserted meaning, then the evidence is not excluded by the parol evidence rule* (my emphasis).

11 The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other. That is, if one provision of the contract, taken in isolation, is clear and explicit, it does not necessarily follow that that provision will govern the interpretation of the contract. *The court should attempt to give some meaning to every provision of the contract so that none is rendered meaningless, so long as consistent with the mutual intent of the parties* (my emphasis).

12 Under no circumstances is evidence of unexpressed unilateral intentions of a party admissible. If admissible under the above principles, evidence of expressed intentions of a party is admissible. . . .

13 The purpose of these principles is to make the language of the contract serve rather than subvert the mutual intention of the parties
14 When a general provision and a specific provision are inconsistent the specific provision is paramount to the general provision so long as consistent with the intention of the parties.
15 Based on the foregoing principles, the court should attempt to give effect to the mutual intention of the parties.'

[12] These principles are borne out by Californian cases dealing with contractual interpretation, and on which both parties relied. The leading case is *Pacific Gas and Electric Company v GW Thomas Drayage and Rigging Company* (1968) 69 Cal. 2D 33, followed in *Bionghi v Metropolitan Water District of Southern California* 70 Cal App 4th 1358 (March 1999). In *Pacific Gas* Traynor CJ said (para 5):

'Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, these terms must first be determined before it can be decided whether or not extrinsic evidence is being offered for a prohibited purpose. The fact that the terms of an instrument appear clear to a judge does not preclude the possibility that the parties chose the language of the instrument to express different terms. That possibility is not limited to contracts whose terms have acquired a particular meaning by trade usage, but exists whenever the parties' understanding of the words used may have differed from the judge's understanding.
Accordingly, rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties.'

[13] The principle is elucidated further in *Bionghi* (at 1365):

'*Pacific Gas & Electric* is thus not a cloak under which a party can smuggle extrinsic evidence to add a term to an integrated contract, in defeat of the parol evidence rule. Instead, it calls for a two-step process. First, the court must determine whether the language of the contract is reasonably susceptible to the meanings urged by the parties. In so doing, the court must give consideration to any evidence offered to show that the parties' understanding of words used differed from the common understanding. If the court determines that the contract is reasonably susceptible of the meanings urged, extrinsic evidence relevant to prove the meaning agreed to by the parties is admissible.'

[14] In my view, the evidence was not helpful. Neither of the witnesses shed any light on the mutual intention of the parties in respect of the exclusion of the termination clause. And, as TDS argued, the high court gave effect to the intention of Kern and Sheasby, as expressed in their oral evidence, without regard to the written contract as a whole. While they asserted that they believed that after the first phase the agreement could not be terminated, this was not consonant with the wording of the contract. Their testimony ignored entirely the express provision that the work order and updates were part of the master agreement. In effect, on their view, the termination provision was excluded from the agreement, contrary to the express terms of the work order.

[15] The principles agreed make it clear, argued TDS, that it is the mutual (shared) intention of the parties that must be given effect. There was no evidence at all that the board of TDS was aware, at the time of entering into the master agreement and subsequent work order, of Sheasby and Kern's view that the right to terminate fell away once the second phase commenced. And they did not explain coherently how the termination clause fitted in with their understanding of the contract.

[16] In my view the most important principle on which the experts agreed is that every provision in a contract should be given effect: none should be rendered meaningless as long as 'consistent with the mutual intent of the parties'. The high court invoked this principle in finding that the 'monetary and time clause' must be given meaning – but in the process appeared to overlook the termination clause itself.

[17] TDS contended, correctly in my view, that the high court assumed that there was a conflict between the termination clause and the clause imposing an obligation to perform (fulfil time and monetary obligations) under the work order. The assumption led the learned judge to allow the latter provision to prevail over the termination clause, and to ignore the fact that the termination clause was very much part of the entire contract. The decision took no account of the principle that every part of the contract must be given effect.

[18] As indicated, TDS argued that the time and monetary clause in the work order simply set the time when the second and third stages would come into operation. But once in operation either party could invoke the right to terminate. To find otherwise would be to read into the termination clause a provision that it ceased to be operative as soon as a work order was signed: and that would be contrary to the express provision of the work order that it was part of the master agreement and would remain in force until a specified date 'unless sooner terminated as provided in the Master Consulting Agreement'.

[19] I consider that TDS's interpretation is the only one consonant with the express provisions of the contract, read as a whole. The contract was not reasonably susceptible to the construction advanced by Kern. The evidence was thus not admissible. The high court accordingly erred in admitting and relying only on the evidence of Kern and Sheasby and in failing to consider the actual terms of the contract, as is required by Californian law, reflected in principles 3, 10 and 11 above and as stated in *Pacific Gas* and *Bionghi*, above. TDS was entitled to terminate the agreement as envisaged in the termination provision.

[20] 1 The appeal is upheld with costs.

2 The order of the court below is replaced with:

'The plaintiff's claim is dismissed with costs, including those of the plaintiff's expert witness, Mr Meredith, who is declared a necessary witness.'

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C H Lewis

Judge of Appeal

APPEARANCES

APPELLANTS: B H Swart SC

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