THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 908/2013

Reportable

In the matter between:

Sakhiwo Health Solutions (Limpopo) (Pty) Ltd **Appellant**

and

MEC of Health, Limpopo Provincial Government **Respondent**

Neutral Citation: *Sakhiwo Health Solutions v MEC of Health, Limpopo* 908/2013 [2014] ZASCA 206 (28 November 2014)

Coram: Lewis, Bosielo and Wallis JJA and Schoeman and Dambuza AJJA

Heard: 17 November 2014

Delivered: 28 November 2014

Summary: In construing a contract a court must have regard to all the provisions of the contract and not view any in isolation. A service delivery agreement, entered into pursuant to a request for proposals (RFP) and a bid award, and which expressly referred to the RFP, had to be read subject to the provisions of the RFP.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Fabricius J sitting as court of first instance)

1 The appeal against paragraph 2 of the order of the high court is dismissed.

2 The appeal against the orders granting prayers 3, 4, 8 and 9 of the notice of motion is upheld with costs including those of two counsel and those orders are set aside and replaced with the following:

'(a) The MEC of Health, Limpopo Provincial Government is directed to allow Sakhiwo Health Solutions (Limpopo) (Pty) Ltd to continue to provide facility management services, in terms of the contract between them concluded pursuant to the request for proposals (HEDP 849/08), for a maintenance period of five years after commissioning of each project undertaken by it under that contract and to pay invoices rendered by Sakhiwo Health Solutions (Limpopo) (Pty) Ltd for those services within a period of 30 days from date of such invoices.

(b) The MEC of Health, Limpopo Provincial Government is directed to comply with all the client's obligations in terms of the contract, including:

(i) effecting payments as and when they become due in terms of the contract;

(ii) executing variation orders where these have arisen due to additional and supplementary work required by the MEC to the projects commissioned before the expiry of the service delivery agreement between them;

(iii) payment of the invoices submitted by Sakhiwo Health Solutions (Limpopo) (Pty) Ltd to the MEC in the sum of R26,817 754.17 which is due and payable; and

(iv) payment of the sum of R13,401 563.01 which is due and payable.

(c) The MEC is directed to pay to Sakhiwo Health Solutions (Limpopo) (Pty) Ltd such further amounts of money as are due to Sakhiwo Health Solutions (Limpopo) (Pty) Ltd after a statement and debatement of account between the parties, and to

that extent it is directed that:

(i) the debatement of the statement of account takes place immediately upon the grant of the order as substituted, and be completed within a period of two months from the date of the order as substituted;

(ii) the MEC pay to Sakhiwo Health Solutions (Limpopo) (Pty) Ltd such amounts as are found to be due after the debatement of the statement of account by the parties, and such payments be made within 30 days of the debatement of the account.

(d) Each party is to pay its own costs.'

JUDGMENT

Lewis JA (Bosielo and Wallis JJA and Schoeman and Dambuza AJJA concurring)

[1] This appeal turns on the interpretation of a contract between Sakhiwo Health Solutions Limpopo (Pty) Ltd (Sakhiwo), the appellant, and the Department of Health, Limpopo Province represented by the MEC for the province who is cited as the respondent. I shall refer for convenience to the respondent as the department. The contract was for service delivery in respect of public healthcare facilities in Limpopo. It was concluded in several stages, beginning with a 'Request for Proposals' (RFP) issued by the department, followed by a bid made by Sakhiwo, a bid award and a service delivery agreement (SDA). At issue is the duration of a maintenance agreement that forms part of the contractual matrix.

[2] The department decided that the contract had terminated after the lapse of three years, plus two periods for which it was extended (the extensions were for a total of 18 months). Sakhiwo, on the other hand, contended that the maintenance portion of the contract endured, in respect of each completed project, for a further period of five years after the initial projects that it had undertaken were completed. A list of these projects reflecting the date of commencement of maintenance

services, and the outstanding period for each project was annexed to the answering affidavit as 'JJL2', and was not challenged in reply. The department brought an urgent application in the North Gauteng High Court, Pretoria for a declaratory order that the contract had terminated, and for ancillary relief. Sakhiwo counter-claimed for an order that the purported termination of the SDA was of no effect, and asked for orders that it was entitled to provide facility and maintenance services, and to various payments.

[3] The high court held that the entire contract between the parties had terminated on 30 March 2013, the date for which the department contended. It came to this conclusion by considering only the provisions of the SDA, ignoring the provisions of the RFP and the bid award, on the basis of the so-called *Shifren* principle (that the parties had agreed that the contract could not be varied other than in writing, by which they bound themselves: *SA Sentrale Co-op Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A), confirmed in *Brisley v Drotsky* 2002 (4) SA 1 (SCA)).

[4] The high court did not consider the principles of contractual interpretation that have evolved over the last decade or so in this court, and misapplied the *Shifren* principle that deals with variation, and not interpretation, as well as the parol evidence rule. The application for leave to appeal was granted by the high court on the basis that this court might interpret the contract differently.

[5] The appeal turns essentially on the application of the correct principles of contractual interpretation. I shall deal first with the factual background. The facts are not in dispute but of course they explain the origin and the evolution of the transactions.

The factual matrix

[6] The department is obliged to ensure that health care facilities in Limpopo are created and maintained. The obligation arises from the Constitution (part A of schedule 4). It lacked the expertise and the staff to fulfill its obligation itself. Accordingly, in 2008 it published a 'Request for Proposal' (RFP) – a tender – calling for bids from entities to act as an implementing agent for the revitalization of health

and social development facilities. This would entail construction of new healthcare facilities and upgrading of existing ones. The successful bidder would in effect fulfill the project management role of the department itself, if it had had the resources, seeing to the implementation of work by contractors.

[7] Sakhiwo was the successful bidder, and the department awarded the tender to it on 2 June 2008. The SDA envisaged in the RFP was concluded on 30 September 2008. As stated by the department in its founding affidavit, 'the tender process and service level [delivery] agreement brought about an agreement' in terms of which Sakhiwo was appointed as the department's agent for the implementation of its infrastructure plan for the revitalization of health and social development facilities – construction and upgrading – in Limpopo. The SDA set out the responsibilities of Sakhiwo, which included managing contracts during the project implementation or construction, the 'defects liability period and the corresponding maintenance period'. The duration of the SDA was 36 months.

[8] The period was extended, at the instance of the department, to 30 September 2012. And before then, Sakhiwo wrote a letter to the head of the department requesting a further extension of time. The department acceded to a further period of six months, until 30 March 2013.

[9] However, when Sakhiwo wrote to the head of the department later in 2012 she decided that she would not reply and considered that further correspondence was not appropriate. Requests by Sakhiwo for meetings to discuss various matters were ignored. On 25 March 2013, five days before the six-month extension was due to expire, the department advised Sakhiwo that the contract between them would terminate on 30 March 2013. Sakhiwo responded that the three-year period related only to the introduction of new projects: the contract was meant to endure until all projects were completed and then for a further five-year period after completion of each project for the purpose of maintenance.

[10] The view of the department was that all obligations ceased after the three-year period, and the further 18 month extension, and that the contract was accordingly terminated on 30 March 2013. Sakhiwo's stance was that it was entitled

and required to manage the maintenance of the facilities which had been constructed or upgraded during the subsistence of the SDA for a period of five years, as was stipulated in the RFP. The dispute as to the maintenance period and the duration of the contract between the parties led to the application to the high court for the declaratory order that the contract had terminated and the other relief sought.

[11] The high court had regard only to the provisions of the SDA in finding for the department. That approach was plainly wrong. As will be seen, the SDA was an auxiliary agreement: it followed on the RFP, the tender and the bid award, which was the principal contract. A glance at the documents makes this clear. The SDA expressly incorporated the terms of the RFP into it, and the SDA itself was concluded pursuant to the contract that came into operation when the bid by Sakhiwo was accepted by the department. I turn now to the pertinent terms of the documents, starting with the RFP (numbered HEDP 849/0[8]).

The provisions of the RFP

[12] Under the heading 'Invitation and scope of work' a number of items were listed. They included: providing health and social development infrastructure planning; development of concept designs, detailed designs and 'technical tender' documentation; site supervision during construction; overall co-ordination and project management; commissioning of the facility and decommissioning, and, importantly for the determination of the meaning of the contract, facility management for a maintenance period of five years after commissioning.

[13] The terms of reference, an annexure to the RFP, stated that 'Limpopo Department of Health and Social Development invites capable, competent and experienced Service Providers to submit proposals for acting as programme implementing agent for the revitalization of Health and Social Development facilities (new construction and upgrading).' The scope of the work was repeated. A condition was said to be that the implementing agent should have a demonstrable track record in so far as 'implementation and management of project initiation, design and build in general and particularly of infrastructure provision and maintenance.'

[14] The objective of the RFP was said to be to ensure that the facilities met the required standards of health and social development, and to ensure fully functional facilities that operated efficiently. The scoring points for bids were set out in a table, and points were to be allocated for a number of factors, including commissioning and decommissioning facilities, and 'facility management for maintenance . . . after commissioning'.

[15] A second annexure set out the 'conditions' of contract. Clause 1.1 provided that the contract in terms of the invitation to bid 'shall come into being on the date of issue of the letter of acceptance of the bidder's bid' by the department and 'shall continue in force for a period of 36 months. The bidder will furthermore be obliged to enter into a SLA [the service level agreement was accepted to be the same as the SDA actually entered into], a mutually binding *auxiliary* agreement which provides additional or supplementary service delivery standards to be met by the successful bidder . . .'.(My emphasis.)

The bid award

[16] The letter from the department to Sakhiwo informing it that it was the successful bidder was dated 2 June 2008. It indicated that a service level agreement would be entered into for every project. (It appears that the SDA actually covered all projects.) And it stated that supplementary services included 'post occupancy facility maintenance management services'. Although the high court and the department focused their attention on the terms of the SDA in determining the duration of the parties' contractual relationship, it is clear that the tender made pursuant to the RFP, and the bid award, constituted the primary contract between the parties.

The terms of the SDA

[17] It is of course necessary to consider all the terms of a contract in order to determine the meaning of any one. The department and the high court had regard to only two provisions, the high court finding that they were dispositive of the dispute as to the duration of the contract. (In setting out the provisions, and where quoting them, I shall not use the same formatting used in the contract itself.)

[18] In terms of clause 3, Sakhiwo accepted appointment as agent for the purpose of implementing the programme of managing health care facilities. In clause 6.1, headed 'Period of this agreement', the parties acknowledged the importance of the speed of the development of the programme, and Sakhiwo undertook to use its 'best endeavours to ensure that the projects are implemented and completed' in terms of the department's timetable. Clause 6.2, which the department argued was determinative of the duration of the contractual relationship, read: 'The contract shall endure for a period of 36 months after signature by both parties'.

[19] That interpretation, it argued, was supported by clause 4.2, under the heading 'The programme budget', which provided that:

'The parties agree to meet no later than 90 (ninety) days prior to the expiry of the period of the Agreement, for the purpose of attempting to reach agreement on the extension of the agreement with regard to maintenance.'

[20] As I have said, clauses 6.2 and 4.2 were found by the high court to conclude the enquiry as to the duration of the contractual relationship. Hence the finding that the contract expired after 36 months of signature and after the two periods of extension. I shall return to this finding when construing the contract as a whole.

[21] Clause 1.2, under the heading 'Interpretation', read:

'This document shall be deemed to constitute the sole agreement between the parties, with reference to its HEDP 849/08 Programme, read with the letter of award and letter of acceptance and shall cancel and negate any prior verbal or written communications relating to such subject matter, whether expressed or implied, including any letters, memoranda or minutes.'

[22] Clause 1.8, under the same heading, read:

'If any provision in a definition is a substantive provision, conferring rights or imposing obligations on any party, effect shall be given to it as if it were a substantive clause in the body of the Agreement, notwithstanding that it is only contained in the definitions clause.'

[23] The relevant definitions, in clause 2, are 2.1: programme means 'the HEDP 849/08 programme of the client as set down within the client's infrastructure plan and

further defined annually in the scope of works'; and 2.8: '"Period of agreement" means the period specified in HEDP 849/08, commencing on signing of this agreement'.

[24] Finally, under the heading 'Responsibility of the agent', clause 9.20 required Sakhiwo to manage contracts between the department and contractors and suppliers 'during project implementation and construction, defects liability period and corresponding maintenance period. Unless the context indicates otherwise or [the department] directs otherwise, maintenance shall include post-occupancy facility maintenance management service'.

Principles of interpretation and the approach of the high court

[25] The principles governing the construction of a contract are well-settled. I do not propose to rehearse them. In ascertaining the meaning a court must establish what the parties intended – what the purpose of the contract was. In doing so, a court must consider all of its provisions and may not isolate any of them and consider them in a vacuum: *Swart v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202C-D. Thus the high court's finding that clauses 4.2 and 6.2 could be viewed without considering the other provisions of the SDA, the RFP and the bid award, was plainly wrong.

[26] It was also plainly wrong not to consider the context in which the contracts were concluded, sketched earlier, which showed that the department needed an implementing agent not only for managing of construction and upgrading of healthcare facilities but also for the maintenance of those facilities. Indeed the contract as a whole said just that. The SDA was just one part of the parties' contractual arrangement. The RFP dealt expressly with a five-year maintenance period after commissioning of each project, and the SDA referred back to that and incorporated it expressly, as the definitions show. All the contractual documents had to be read together. A request for proposals binds the body making it and the successful bidder once the bid is accepted. It could not be altered other than with the clear agreement of the parties.

[27] The high court considered that it could not look outside the four corners of the SDA in order to determine the duration of the maintenance agreement. It did not have to do so since the SDA clearly incorporated the RFP and the award. But this court has held that even where there is no ambiguity in a contract, in ascertaining what the parties' intention is, a court must have regard to the factual matrix. There is a long line of cases that state that the process of interpretation involves a consideration of the factual matrix. The most recent of them are *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 (4) SA 399 (SCA) para 39; *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA) para 13; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA) paras 24 and 25; *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* 2013 (6) SA 520 (SCA) para 16 and *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) paras 11 and 12.

[28] Moreover, a contract must be interpreted so as to give effect to its purpose, and to make business sense: *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd & another* 2008 (6) SA 654 (SCA) and *Ekurhuleni* above. It would make no sense, argued Sakhiwo, for the maintenance obligations to run concurrently with the construction period. Maintenance is what is required after construction. The healthcare facilities to be constructed or upgraded in Limpopo were complex: a sensible and businesslike interpretation requires that maintenance would extend beyond the commissioning stage. That is why clause 9.20 of the SDA, set out above, stated that unless the context indicated otherwise, or the department otherwise directed, maintenance included 'post-occupancy facility maintenance management service'. It would be illogical to limit the period of the maintenance management obligation to the period of construction.

[29] The high court considered that clause 4.2 of the SDA, which provided for a request for an extension of the period of the contract, clearly meant that the duration of the contract was limited to three years unless such an extension was given. It referred to the requests for extensions made by Sakhiwo, and the fact that

extensions were granted. Why were they sought, it was asked by the department, if there were indeed a further five-year maintenance agreement?

[30] The answer in my view lies in the reasons for the requests, set out by Sakhiwo in asking for the extensions. Not all projects had been completed before the expiry of the three-year period: as the chief executive officer said in her letter of 1 August 2012 requesting an extension, 'all projects in our scope of work in terms of the SDA will have to be brought to completion by ourselves and we have a subsequent 5-year facility maintenance management obligation post occupancy in respect of all projects constructed under the management of Sakhiwo'. She attached annexures showing the projects that had been completed, those 'on site' and those 'on hold'. The request was obviously meant in respect of the provision of project management services in the construction phase of the contract and not in respect of maintenance. Clause 4.2 of the SDA, which referred to an extension with regard to maintenance, must, having regard to the contract as a whole (the RFP, the bid award and the SDA), refer to an extension prior to the expiry of the five-year maintenance phase of the contract, not the three-year period for the initial construction and upgrading of facilities.

[31] As Sakhiwo argued, it had undertaken many different projects for the department under the agreement. Different projects would be completed at different times. The maintenance period would begin after each project was commissioned. The parties must have intended that the maintenance obligations in respect of each project would commence and end at different times. That is the logical and businesslike construction of the contract: 'defects liability and corresponding maintenance period' (clause 9.20) could begin only after the construction was finished.

The parol evidence rule

[32] The high court held that the application of the parol evidence rule precluded reliance on the RFP. There are two aspects to the rule: first, that a court cannot entertain evidence of extrinsic matter that adds to or alters a written contract and second, the extent to which extrinsic evidence may be allowed in the process of construction of a written contract. (See *KPMG*, above, para 39, and *Absa*

Technology Finance Solutions (Pty) Ltd v Michael's Bid A House CC 2013 (3) SA 426 (SCA) paras 20 and 21.) In so far as the second aspect is concerned, it is clear that a court may have regard to any matter that forms part of the factual matrix. That is what this court has decided in the cases referred to above.

[33] In so far as the first aspect is concerned, the parol evidence rule does not prevent this court from considering the RFP and its terms since it is the contract itself. It is not extrinsic to the SDA. As we have seen, the SDA is auxiliary to the RFP, which is the foundation of the contract. The purpose of looking at the provisions of the RFP is to understand what the parties intended to achieve when concluding the contract. The RFP, the award and the SDA tell us that.

The Shifren principle

[34] Equally, the *Shifren* principle has no application, despite the wording of clause 1.2 of the SDA, set out above. Sakhiwo was not attempting to vary or cancel the agreement in a manner not permitted by the contract. The dispute turned only on what the parties intended when entering into the contract. And that exercise required the high court to examine all the provisions of the contract, and the context in which it was concluded, to ascertain what was intended.

[35] The high court's conclusion that the entire contract came to an end after three years was clearly wrong. But the order it issued – that the SDA had terminated after three years – was correct. The appeal against that order thus cannot succeed. However, the RFP remains in effect in so far as the maintenance obligations are concerned. Accordingly the other orders must be set aside and substituted with orders that recognize the continuing rights and obligations of the parties.

[36] The department argued that since the relief it sought in the high court – an order that the SDU had expired on 30 March 2013 – would not be reversed on appeal, it should not have to pay the costs of the appeal. In my view, however, Sakhiwo has had substantial success in the appeal, and should be awarded its costs, including those of two counsel. The costs order in the high court should, on the other hand, be that each party pays its own costs.

[37] In the result:

1 The appeal against the order of the high court that the service delivery agreement has expired is dismissed.

2 The appeal against the orders granting prayers 3, 4, 8 and 9 of the notice of motion is upheld with costs including those of two counsel and those orders are set aside and replaced with the following:

'(a) The MEC of Health, Limpopo Provincial Government is directed to allow Sakhiwo Health Solutions (Limpopo) (Pty) Ltd to continue to provide facility management services, in terms of the contract between them concluded pursuant to the request for proposals (HEDP 849/08), for a maintenance period of five years after commissioning of each project undertaken by it under that contract and to pay invoices rendered by Sakhiwo Health Solutions (Limpopo) (Pty) Ltd for those services within a period of 30 days from date of such invoices.

(b) The MEC of Health, Limpopo Provincial Government is directed to comply with all the client's obligations in terms of the contract, including:

(i) effecting payments as and when they become due in terms of the contract;

(ii) executing variation orders where these have arisen due to additional and supplementary work required by the MEC to the projects commissioned before the expiry of the service delivery agreement between them;

(iii) payment of the invoices submitted by Sakhiwo Health Solutions (Limpopo) (Pty) Ltd to the MEC in the sum of R26,817 754.17 which is due and payable; and

(iv) payment of the sum of R13,401 563.01 which is due and payable.

(c) The MEC is directed to pay to Sakhiwo Health Solutions (Limpopo) (Pty) Ltd such further amounts of money as are due to Sakhiwo Health Solutions (Limpopo) (Pty) Ltd after a statement and debatement of account between the parties, and to that extent it is directed that:

(i) the debatement of the statement of account takes place immediately upon the grant of the order as substituted, and be completed within a period of two months from the date of the order as substituted;

(ii) the MEC pay to Sakhiwo Health Solutions (Limpopo) (Pty) Ltd such amounts as are found to be due after the debatement of the statement of account by the parties, and such payments be made within 30 days of the debatement of the account.

(d) Each party is to pay its own costs.'

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C H Lewis

Judge of Appeal

APPEARANCES

For Appellant:	JJ Gauntlett SC, FB Pelser
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	McIntyre & Van der Post, Bloemfontein
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