Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 11480/11

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

THE MEC FOR HEALTH
WESTERN CAPE PROVINCE Applicant

and

INSTITUTIONAL PHARMACY MANAGEMENT (PTY) LTD Respondent

JUDGMENT DELIVERED: 13 JUNE 2011

BINNS-WARD J:

[1] In December 2005, the Provincial Government of the Western Cape, represented by the Head of the Province's Department of Health, concluded a written agreement with the respondent company in terms of which the latter was appointed by the former to establish and operate a chronic medication dispensing unit. The parties gave the deed of agreement in question the heading, 'Service Level Agreement'. It is convenient to refer to it as 'the SLA.

[2] The duration of the executory period of the contract was five years, which was extended by agreement to the end of July 2011. The service

provided by the respondent in terms of the SLA plays an important role in the efficient dispensing and provision of chronic medication to more than 160 000 patients throughout the Cape Town metropolitan area and the Winelands and West Coast regions of the Province. Now that the end of the contract period is nigh, the Department must provide in one way or another for a continuation of the service. To this end tenders were invited and received. The respondent is one of the parties which competed for the award of the new contract. The new contract was, however, awarded to a third party. The respondent has challenged that award in judicial review proceedings which are currently pending.

[3] The means of the provision of the service in terms of the SLA is complex. It is fortunately unnecessary for current purposes to engage with those complexities in any detail. It is sufficient to say that an important part of the process entails the receipt by the respondent of prescriptions of chronic medication written out by prescribing medical officers for patients at government clinics and hospitals. These prescriptions were referred to in the evidence and in argument as 'the hard copy scripts'. The respondent captures the information on the hard copy scripts electronically. The information is captured in a format which renders it usable in a computer software program that is employed by the respondent in the dispensing and distribution of the prescribed medication. The software program is a specially modified version of a commercially available program widely used by retail pharmacies. The respondent avers it 'spent considerable amounts of time, effort and money commissioning and paying for the design, construction and

implementation of its electronic database and computer systems which are used in providing the services as defined in the SLA'. The applicant does not deny these allegations, save to allege that the system had been developed before the implementation of the SLA and to contend that 'it is not a system that is generic to [the respondent's] service to the Department'.

[4] The availability of the information on the chronic medication prescriptions in electronic form is essential to the efficient continuation of the service after the termination of the SLA at the end of next month. If the Department is not permitted to obtain the information in electronic format it will be required, if it is not to continue to avail of the services of the respondent, to create its own electronic date base. The expense that would be entailed in that exercise is estimated by the Head of Department to be in the region of R1,5 million. The respondent, on the other hand, points out that in order to provide the information stored on its electronic database in an electronic format that could be used intelligibly by the Department, it would need to manipulate the data to render it compatible with the obviously different software program on which the Department or any alternative service provider would wish to use the data. This would entail time, effort and expense by the respondent.

[5] The respondent concedes that the information on the hard copy scripts is the 'intellectual property' of the applicant. It maintains, however, that the work involved in capturing and encoding the information in a electronic database in a manner that enables its use compatibly with the specially

modified software program referred to earlier results in the information in its electronically rendered format being the 'intellectual property' of the respondent. The applicant on the other hand contends that the information on the scripts in whatever format it might be held by the respondent is proprietary to the Department and that the Department is in consequence entitled to access to it. In the context of the special definition of the expression 'intellectual property' in clause 21 of the SLA, it is fortunately not necessary to consider the technical correctness of the use of the term in the given context. Both parties accept that the information on the prescriptions whether in hard copy or stored in an electronic database is 'intellectual property' within the meaning of that expression as it is used in clause 21.1.1 of the SLA.

[6] Clause 21 of the SLA provides insofar as currently relevant:

> **21 INTELLECTUAL PROPERTY**
>
> 21.1 "Material or information" made available to or obtained by the Service Provider from the Department or in connection with or as a result of the rendering of the Services and in respect of which the intellectual property rights of which vest in the Department shall remain the property of the Department ("the Intellectual Property"). No rights therein shall vest or pass to the Service Provider. Each Party will retain ownership of all rights, titles and interests in its pre-existing products, methodologies, templates, tool kits, know-hows, software and tools, training materials, proprietary data and programs (and changes, additions and enhancements thereto that constitute derivative works thereof) and all of the intellectual property rights therein, including, without limitation, copyrights, trade secrets and patent rights.
>
> 21.1.1 Upon cancellation or expiration of his Agreement and subject to payment of all Fees due and owing in terms of this Agreement being received by the Service Provider for Services rendered, the

"Intellectual Property", other than Intellectual Property owned by or belong to any third party, belonging to the Department, or created by the Service Provider by means of using the Department's Intellectual Property which may be in possession of the Service Provider, shall be assigned, transferred and delivered to the Department within 14 (fourteen) Calendar Days from date of receiving the notice of cancellation from the Department or the termination of this Agreement (as the case may be).

21.2.....

[7] The facts and allegations just described provide the essential backdrop to the matter in dispute between the parties which made the applicant, who is the Member of the Executive Council responsible for health, seek the following substantive relief:

2. Declaring clause 21.1.1 of Service Level Agreement concluded between the Applicant and Respondent, which only entitles the Applicant access to its own intellectual property (being the Applicant's patient scripts) on termination of the contract, and only after payment of all Fees due and owing, in both electronic and hard copy format, within 14 calendar days from the date of termination of the service level agreement, as being contrary to public policy and unenforceable.

3. Compelling the Respondent by no later than 10h00 on Saturday 11 June 2011 to:

   3.1 Allow the Applicant access to Respondent's computer database to enable the Applicant to obtain in electronic format all prescriptions ("scripts") and details of those of the Applicant's patients who are recipients of the chronic medication and all other relevant information relating to these recipients as contained in the Respondent's electronic database; alternatively that the Respondent provide the Applicant with an electronic copy of the aforementioned information;

   3.2 Physically hand over all the hard copy scripts which had been provided to the Respondent subject to a mutually acceptable arrangement relating to scripts which may still be required for the purposes of dispensing of medication by the Respondent until 31 July 2011.

[8] The respondent had tendered to provide the applicant with copies of the hard copy scripts before the institution of proceedings. The tender had been made subject to a condition the import of which had been misunderstood by the applicant and therefore regarded by him as unacceptable. In its answering papers the respondent clarified the meaning of the condition attached to its earlier tender and in the context of that explanation unequivocally and unconditionally stated its readiness to make copies of the hard copy scripts available to the applicant. In the replying affidavit, the Head of Department accepted the respondent's unconditional tender to provide the hard scripts. That development, as well as the manner in which the issues were considered and traversed in the course of argument, resulted in the applicant's counsel asking for an order in terms somewhat different from those presaged in the notice of motion. In terms of the draft order which I invited the applicant's counsel to hand in after the conclusion of argument, the substantive relief sought by the applicant is formulated as follows:

1. The Respondent shall allow the Applicant access to all information relating to prescriptions for the Applicant's patients who are recipients of chronic medication, contained in the Respondent's computer system, to enable the Applicant to extract and copy such information in electronic format;
2. In accordance with the Respondent's tender, the Repondent shall deliver to the Applicant all of the hard copy prescriptions for the Applicant's patients who are recipients of chronic medication, in its possession, subject to a mutually acceptable agreement being reached between the parties relating to prescriptions which may still be required for the purposes of the dispensing of medication by the Respondent until 31 July 2011;
3. To the extent that it is necessary, that the enforcement of clause 21.1.1 of the Service Agreement concluded between the Applicant and Respondent be declared contrary

to public policy and unenforceable, insofar as its effect would be to deny the Respondent access to information as described in paragraph 1 above.

[9] There is no realistic prospect that the judicial review application will be heard or determined before the end of July 2011. It thus appears probable that the applicant will be constrained to make interim arrangements in respect of the provision of the service until the disputes about the award of a replacement contract are resolved. The Head of Department candidly admits that the applicant's ability to obtain in electronic format the information held on the respondent's electronic database will play an important role in any decision as to the nature of those interim arrangements. He does not deny the averments by the deponent to the respondent's answering affidavit that having regard to the 'extensive set-up costs' entailed, which could be incurred viably only against the opportunity of recovery during a long-term service provision contract, only the respondent or the competing tenderer to whom the replacement contract had been awarded in the tender process impugned in the review proceedings - which had already incurred set-up costs - could be viable contenders in the interim if the applicant were not in a position to furnish the interim service provider with a ready-created electronic database. The Head of Department concedes that a determination of the Department's claim to the right to the information on the respondent's electronic database is sought urgently in order to assist him in deciding the way forward.

[10] The respondent contended on the papers that the application did not qualify for consideration and hearing as a matter of urgency. This contention was not pressed with any vigour by the respondent's counsel at the hearing,

correctly so in my view. It does not count against the applicant that the Head of Department was engaged for a period of a few weeks in extracurial efforts to settle the disputes before the institution of proceedings. Attempts by parties to settle their differences, thereby also endeavouring to achieve an avoidance of an unnecessary imposition on the court's limited resources, should indeed generally be encouraged as a matter of policy. I also do not accept that there is any merit in the respondent's argument that the Department's right to press its alleged proprietary claim with any urgency is contingent upon a prior, and as yet unmade, decision by the Head of Department as to which service provider should be engaged to provide the service after 31 July 2011.

[11] The expenditure of a not insignificant sum of public funds is entailed in the decision that has to be made by the Department. It is therefore reasonable in the peculiar circumstances that the Head of Department should have certainty as to the existence and extent of the Department's rights to obtain the information electronically stored by the respondent to qualify him to make the decision responsibly. In the context of the dispute between the parties and the resulting exigencies, the Head of Department could not obtain the required determination of rights by litigation conducted in the ordinary course. I am thus satisfied that the applicant is entitled to the procedural relief sought in terms of rule 6(12) so as to be able to prosecute the application as one of urgency.

[12] The submissions of counsel on both sides concentrated on the implications of clause 21 of the SLA. Clause 21 is not well drafted in relevant respects – indeed its latent ambiguity was exposed in the debate during the argument of the application. Its provisions fall to be interpreted in accordance with the well-established approach. A recent recapitulation of that approach by Plasket AJA in *Hyprop Investments v Shoprite Checkers* [2011] ZASCA 51 (30 March 2011), at para 12, goes as follows: "*The process of interpretation of contracts involves a search for the intention of the parties through the words that they used, considered in the context of the agreement as a whole, including the factual background and construed "in accordance with sound commercial principles and good business sense so that it receives a fair and sensible application".*' Counsel for the applicant acknowledged the application of the well-established principles, referring in their heads of argument to some of the well-known cases, such as *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 767E-768E and *KPMG Chartered Accountants v Securefin Limited* 2009 (4) SA 399 (SCA) at para 39, in which those principles have been rehearsed. However, it is evident that insufficient regard was had to them in determining the evidential material that was put before the court to qualify me to properly apply them. Clause 37.7 of the SLA provides: '*This Agreement must be read in conjunction with the Terms of Reference dated 28 April, 2005 and the Service Provider's proposal dated 30th June 2005*'. Neither of those documents (save for one of the annexures to the Service Provider's proposal) was produced in evidence.

[13] The respondent's counsel argued that at best for the applicant - even if the latter's claim to proprietorship of the relevant information were well-founded – applicant was entitled to return of the information only within 14 days from the termination of the agreement, subject to the payment by then of all fees due and owing to the respondent by the Department in terms of the agreement for services rendered under the SLA. This, they contended, was the clear effect of the provisions of clause 21.1.1 of the SLA. The applicant's counsel, while they did not take issue with the respondent's construction of the clause, submitted that the provisions of clause 21.1.1 did not detract from the applicant's right, *qua* proprietor of the information, to access it in the respondent's possession at any time prior to the termination of the contract. They contended that if the effect of the sub-clause was to prevent them from obtaining the applicant's information in electronic format it should be severed from the SLA as a provision that was contrary to the public interest.

[14] Having carefully considered the provisions of the SLA read as a whole, albeit subject to the limitations following on the non-availability of the terms of reference and the respondent's proposal of 30 June 2005, I have concluded that the respondent's argument is correct.

[15] The provisions of the SLA expressly require the respondent, as the service provider to procure, install and maintain computer hardware and software in order to render the services. An exception is made in respect of the software to be used in the ordering of medicine from the Department's

medical depot in Chiappini Street. Clause 8 of the SLA treats especially with the 'Information Technology (IT)' requirements of the contract. Clause 8.4.2 of the SLA provides: '*The Service Provider undertakes to procure and install its own required software system that will be suitable to provide the necessary reports and data as set out in the "Software Requirements", annexed hereto, marked annexure "B", and incorporated herein, subject to the provision of the relevant information by the Department, as agreed by both parties.*' Annexure B to the SLA specifies that the respondent was required at its own cost to provide an IT software system '*which is in English*'. The stated purpose of the required software system was '*to provide management reports and other information*'. Four categories of capacity and utility are specified for the software in the annexure. They are (i) capacity to identify and alert the pharmacist at the CDU [i.e. the Chronic Dispensing Unit established in terms of the SLA at premises made available by the Department at Tygerberg Hospital] to clinical and prescribing information (non-exhaustive instances of such information given in the annexure include the listing of Provincial Code List requirements to identify non-compliant prescriptions; drug-drug interactions; drug-gender interactions and 'early refill requests'; (ii) pharmaceutical supply chain information (iii) drug utilisation review data and (iv) '*other information required*'. It is evident that '*other information required*' pertains to information that would be used in the monitoring of the operation of the dispensing and distribution of medicines in the execution of the contract. Annexure B concludes with the following sentence: '*The system shall provide reporting capabilities that shall meet user needs for both*

standard and ad hoc reports. The service provider will ensure that the system will be able to be enhanced in terms of technology development.'

[16] The SLA agreement provides for the provision of reports by the respondent in respect of a number of matters. So, for example, in terms of clause 13.3.9, the respondent is required to '*conduct an inventory and report electronically, or via facsimile any short deliveries*' or stock- related discrepancies. Quarterly reports on stock reconciliations are required in terms of clause 13.6. The respondent is required in terms of clause 13.8.4 to report to the Department, within 21 days of its expiry, details of all stock that has expired that is being stored at the CDU. Such reports have to include details of the item, pack size, ICN number, quantity, value, date of expiry and reason for expiry. A monthly report, containing nine categories of specified information, is required from the respondent in respect of all items or patient medicine parcels not collected by patients from the participating hospitals, clinics or health centres (clause 16.8.10). Clause 26.1 provides that the respondent will provide to the Department '*all information, documents, records and the like in the possession of, or available to the* [respondent] *as may reasonably be requested by the Department for the purpose of complying with any of its statutory reporting obligations including its reporting obligations under the* [Public Finance Management Act] *and the Auditor-General Act, 1995*'.

[17] The SLA makes provision for a 'project team' headed by an appointee of the Department and comprised of representatives of both the Department

and the respondent. The function of the team is to monitor and review the execution of the contract. The respondent is also required (in terms of clause 27 of the SLA) on notice to provide any person nominated by the Department with access to monitor the respondent's performance in respect of the services rendered.

[18] It is striking, in the context of the detailed provision in the SLA for reporting by the respondent to the Department and for monitoring and access by the Department, that there is nothing in the terms of the agreement which provides that the respondent shall be obliged to provide, or the Department entitled to make a copy of its electronic database of prescriptions under administration for the purposes of the contract to the applicant. The only circumstances expressed in the SLA in which the Department is given the right to access to information in the possession of the respondent, howsoever obtained, are those related to the monitoring or assistance of the execution of the contract, or for the making by the Department of reports to third parties in the discharge its statutory reporting obligations. There is nothing in the SLA, other than the provisions of clause 21.1.1, that provide that the applicant is entitled to the possession of the information in the hard copy scripts encoded in the respondent's database. Clause 21.1.1 specifies the time at which any such entitlement accrues and the condition to which such accrual is subject. (The invocation by the applicant in his founding affidavit of the provisions of clause 14.1.2 of the SLA, which requires the respondent to keep records for a period of five years from the date of dispensing, either in hard copy or electronically, relating to medicines compounded and dispensed by it in the

execution of the contract does not assist him. That provision merely echoes one of the provisions in the 'Rules Relating to Good Pharmacy Practice' made by the South African Pharmacy Council in terms of s 35A(b)(ii) of the Pharmacy Act 53 of 1974 - in particular one of the prescribed 'Minimum Standards Relating Specifically to Institutional Pharmacies'.[1] The provision creates a statutory obligation on the respondent, which clause 14.1.2 of the SLA merely confirms. Clause 14.1.2 does not afford the applicant the right to a copy of the electronic database compiled by the respondent for the purpose of carrying out its contractual obligations.)

[19] The Head of Department candidly confesses that the situation with which he is now confronted, in which it would be convenient for the Department to obtain the electronic database of prescriptions so as to give it a free hand in the appointment of a replacement service provider without having to incur the costs attendant on the creation of an electronic database, was not foreseen or provided for when the SLA was concluded. As mentioned, the applicant seeks to avoid the strictures of clause 21.1.1 by contending that the provision does not detract from the assertion of its proprietary right to the information during the executory period of the contract and, in the alternative, that the effect of the clause, if it is to deny the applicant the right to obtain the information during the executory period of the contract, is so inimical to the public interest that it should not be given legal effect. Both these contentions imply some degree of recognition that the terms of the SLA are of no assistance to the applicant. In my judgment neither of them can be upheld.

[1] See Board Notice 129 of 2004 published in *Government Gazette* No. 27112 on 17 December 2004.

[20] The SLA contains a number of provisions in terms of which the respondent is afforded the use of the Department's property for the duration of the contract. The residual rights of access and monitoring retained by the Department in respect of this property are expressly spelled out in the agreement. The Department is not able to exercise vindicatory rights in respect of property that it has contractually given over to a third party, save to the extent that the relevant contract or the common law in the context of the given contract might otherwise provide or imply, as the case might be. The Department's contention that it should have access to the electronic database compiled by the respondent for the purposes of executing the contract so as to be able to copy it runs four square against the provisions of clause 21.1.1. The right of retention against payment of its fees afforded to the respondent in terms of that provision, whatever its purpose might be, would be rendered nugatory if the respondent were obliged, upon request, to make a copy of the 'intellectual property' in the form into which the respondent had rendered it available to the Department. The applicant's contention in respect of the meaning and effect of the clause in the context of the Department's alleged proprietary rights thus cannot be sustained. The applicant did not contend for the existence of any tacit term that would give the Department the right of access it contends for. Having regard to the cost and effort that the respondent avers would be entailed in rendering the electronic database available in intelligible format, it seems unlikely in any event that any contention for the existence of a tacit right could succeed.

[21] The contention that the clause is contrary to public policy cannot succeed because nothing about the provision prevents the Department from rendering the service concerned. Nothing in the clause defeats the Departments ability to retain or access the information that it makes available to the respondent when it gives over the hard copy scripts. There is nothing in the SLA which prevents the Department from retaining a copy of the scripts. The participating facilities, which in all cases are hospitals or clinics administered by the Department, receive a hard copy version of the script from the respondent together with every prescription that is dispensed and distributed by the respondent in terms of the SLA. That much follows from the provisions of clause 15.3.1 of the SLA.

[22] The effect of clause 21.1.1 is merely to make the continuation of the service at the end of the contract period potentially more inconvenient and expensive if a different service provider is to be given the role of providing it. The provisions of clause 21.1.1 do not fall to be excised from the contract simply because, with the wisdom of hindsight, they have come to be recognised as fortuitously affording the respondent an unintended bargaining tool for the renewal of the contract and constituting for the Department concomitantly a commercial disadvantage which it had not contemplated. In *Grinaker Construction (Tvl) (Pty) Ltd v Transvaal Provincial Administration* 1982 (1) SA 78 (A), Viljoen JA reiterated the relevant principle thus, at 96H: '*If the plaintiff has struck a bad bargain, the Court cannot, out of sympathy with him, amend the contract in his favour. In Van Rensburg v Straughan 1914 AD 317 at 328 INNES JA said: "The position for him is no doubt hard; but those*

who enter into onerous or one-sided agreements have only themselves to thank. A court of law cannot assist them merely because the results are harsh.'' See also, Haviland Estates (Pty) Ltd and Another v McMaster 1969 (2) 312 (A) at 336E-G.' (The remarks of Wessels JA in *Haviland Estates* supra, loc cit, are particularly apposite in the context of the current case. The learned judge of appeal said *'It not infrequently occurs that, where subsequent developments show that a party has contracted 'inadequately', equitable considerations may at times give rise to a natural desire to come to the aid of the party concerned, particularly so where the 'inadequacy' of his right vitally affects him. This feeling of sympathy should, however, not be permitted to blunt the Court's understanding of the meaning of the words.'*) I find nothing relevant in the terms of the contract which could be said to be inimical to constitutional values; cf. *Barkhuizen v Napier* 2007 (5) SA 323 (CC), at para 30.

[23] The applicant's counsel asked that even if the respondent were successful - as it has been - in avoiding an order requiring it to make the electronic database available, an order should be made directing it to hand over the hard copy scripts in accordance with the unconditional tender to that effect which the applicant has accepted. The respondent's counsel did not object to such an order being made.

[24] The primary purpose of the current proceedings was to enable the applicant to obtain a copy in electronic format of the prescriptions held on the respondent's database. The applicant has failed in that objective. There is

thus no doubting that the respondent has been the substantially successful party in the litigation. No reason exists in this case to depart from the generally applicable principle that the substantially successful party should obtain an order for its costs.

[25] In the result the following order is made:

1. **The respondent is directed, in accordance with its tender, which the applicant has accepted, to deliver to the applicant forthwith copies of the hard copy prescriptions obtained by it for the purposes of carrying out the Service Level Agreement.**

2. **The application is otherwise dismissed with costs, including the costs of two counsel.**

A.G. BINNS-WARD
Judge of the High Court