IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)

Case Number: 32723/13

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED.

16/8/13

DATE SIGNATURE

16/8/2013

In the matter between:

THE MEC OF HEALTH,
LIMPOPO PROVINCIAL GOVERNMENT **APPLICANT**

And

SAKHIWO HEALTH SOLUTIONS
(LIMPOPO) (PTY) LTD + 49 OTHERS **RESPONDENT**

JUDGMENT

Fabricius J,

1.

In these opposed proceedings, the Applicant seeks a declaratory order that the Service Level Agreement concluded between the parties, in terms of which first Respondent was appointed as "Implementing Agent" for the "Revitalisation of Health and Safer Development Facilities" in the Limpopo Province, was duly terminated by the effluxion of time on 13 March 2013. It also seeks an order compelling the first Respondent to hand over certain documents, and an interdict relating to the Respondents' alleged interference with contractors and consultants. An order is also sought against the 2nd to 50th Respondents, which would oblige them to direct all enquiries and payment claims to the Applicant and not to the first Respondent. These Respondents did not oppose the application. First Respondent filed a counter-application in terms of which it sought an order declaring that the Applicant was not entitled to terminate the relevant Service Delivery Agreement, and sought further ancillary relief in that context.

2.

There is no conflict of fact between the parties and the arguments revolve around the interpretation of the relevant contract.

3.

Accordingly I deem it convenient to first deal with the documentation that was placed before me and thereafter with the parties' argument. The Department of Health and Social Development, Limpopo, issued a Request For Proposal (RFP) under RFP number: HEDP 849/07. This was in early 2008.

This RDP contained a paragraph relating to the "Scope Of Work", which included "Facility Management for a maintenance period of five years after commissioning". The relevance of this quote will become apparent hereunder. The objective of the invitation was that the Department, which was in the process of improving the level and quality of health and social development facilities in the province, could meet the required standards of health and social development and that the quality of services of it, could respond to the desired needs of the people. It was stated that at the core of this project was the balancing of quality, cost and time within which a facility was to be delivered. It was stated that financial proposals had to be made based on a clearly defined fee. In the context of the administrative process that was to be followed, it was stated that the bid document would be made up of various "TH forms", in fact eight of them. As far as the evaluation process was concerned, certain points would be given for certain requirements and under the heading "Health and Social Development Infrastructure Planning" relevant experience was required for "Facility Management for maintenance of facilities after commissioning."

As Annexure B to the invitation to bid, the "Basic Conditions of Contract" were a part. It was stated in clause 1.1 thereof that the contract would come into being on the date of issue of the letter of acceptance of the bidder's bid and would continue and force for a period of 36 months. The bidder would further more be obliged to enter into a Service Level Agreement.

4.

The Respondent put up a financial proposal and under the heading "Fee Calculation Example", it is stated that the fee structure was inclusive of the programme management fee, the commissioning fee, and the facility maintenance management fee as being 22,01%. This percentage relates to published guidelines for relevant disciplines. It is noteworthy that no separate fee for "Facility Maintenance Management" was quoted.

5.

On 2 June 2008 the Department issued a letter awarding the contract to the Respondent and two aspects of this letter are important for present purposes: namely clause 1 and part of clause 4.2. Clause 1 reads as follows: "Your bid for Appointment of the Program Management Unit/Services for the Revitalisation of Health and Social Development Facilities...for the abovementioned Institute has been accepted subject to compliance to all the conditions and requirements contained therein and further to specification. Your appointment is for management of health facilities (Vote 7) only." It was stated there that for each and every project, the Scope of Work would be specified by the Department on a yearly basis and confirmed in writing. The relevant part of clause 4 refers to the scope of supplementary services and in this context stated "Post Occupancy Facility Maintenance Management Services."

6.

What followed was a "Service Delivery Agreement" dated 30 September 2008. It is necessary to refer to certain parts, terms and definitions thereof. The preamble to this Agreement referred to the relevant context, namely that the Department had allocated funds for purposes of the HEDP 849/08 Programme and required the Respondent, as Agent, to provide services in order to implement such Infrastructure Programme. Under the heading

"Interpretation", which heading was stated to be inserted, for reference purposes only, the usual "Sole Agreement" clause was inserted and it is necessary to quote this clause 1.2 "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." Before continuing, I may also add that it was the Applicant's case that this clause was clear, and meant what it usually meant, namely that this document was the sole agreement between the parties read together with the letter of award and the letter of Acceptance. The Respondents in turn argued that the agreement also included the HEDP 846/08 Program, which in turn, as I have said, made reference to "facility management for the maintenance period of 5 (five) years after commissioning" . The "Period of Agreement" was defined as being the period specified in HEDP 849/08, commencing on the signing of this agreement. I already mentioned that Annexure "B" to the invitation to bid referred to a period of 36 months. Clause 6 of the agreement referred in turn to the "Period of Agreement" and clause 6.2 stated the following: "The contract shall endure for a period of 36 months after signature by both parties." It is my view that this clause is unequivocal, unambiguous and overwhelmingly clear, and I will again refer to it in the contents of the parties' argument. Clause 9.20 referred to certain responsibilities of the Respondent which, in terms of this clause, required maintenance, including post-occupancy facility maintenance management service. The Applicant said that this clause merely provided that first Respondent would be responsible for maintenance service obviously during the validity period of the Agreement. Respondent, I may add at this stage, which by now would have been obvious, said that this maintenance referred to the five year period that appears in the RFP under the heading "Scope of Work". Clause 9.21 at first glance appears innocuous, but having regard to the proper context, it is necessary to keep it in mind. It states that the Respondent would enter into agreements, subject to the approval of Applicant, with each of the Service Providers, namely contractors, suppliers and other professional Service Providers envisaged by the agreement. It was Applicant's case that this right could obviously not outlive the duration of any agreement inasmuch as the overseer of the whole project was the Applicant, a government service, which was responsible, and which had to decide what it required and when, obviously within the framework of the Agreement entered into. The point was made by Applicant that for instance Respondent could not enter into an agreement during the last week of the three year period with a contractor, and then insist on being responsible for the subsequent maintenance for another period of five years, obviously for remuneration. It was Applicant's case that the Agreement did not provide for this arrangement, which was in any event wholly absurd.

7.

For present purposes it can be assumed that Applicant happily paid Respondent, who in turn happily received the remuneration agreed upon, and obviously hoped that this arrangement would continue for a long time, for obvious reasons. The Agreement would have expired on the 29th of September 2011 ie. after the period of 36 months referred to in clause 6.2. It is for this reason and I cannot think of any other, that Applicant wrote to Respondent on 14 December 2010 and said that following in the first unnumbered paragraph of this letter: "We refer to our current appointment as PMU for your Department which is due to expire on 28 September 2011 unless we reach agreement for the extension of such appointment. The purpose of this letter is to approach yourself with the view of extending our appointment". Nothing was said of any five year period that had allegedly been envisaged or was part of the relevant contract.

8.

On 12 September 2011 the Department wrote to Respondent stating in the context of Contract HEDP 849/08, that the contract with the Department was extended until 30 September 2012 with the same terms and conditions.

9.

On 1 August 2012 Respondent again wrote to the Department, and referred to the current appointment which was due to expire on 30 September 2012 unless an agreement was reached for the extension of such. The purpose of the letter was to "approach yourselves with a view of extending our appointment". It was then stated in this letter that "as you are aware all projects in our scope of work in terms of the SDA will have to brought to completion by ourselves and we have a subsequent five year Facility Maintenance Management obligation post-occupancy in respect of all projects constructed under the management of (ourselves). The current Facility Maintenance Management component of our scope of works also had another 2 - 3 years to run." It was stated that it was estimated that Respondent would operate in the Province in terms of the existing contract for at least another five or more years. The last sentence then read as follows:

"We therefore want to respectfully request your consideration to extent (sic) our contract to 30 September 2014 or at least until 30 September 2013". This meant that at the least a one year extension was asked for, alternatively a two year extension, but certainly not a five year extension.

10.

The Department replied on 28 September 2012 and extended the contract until 30 March 2013 "with the same terms and conditions of the contract". That, in my view, upon a proper interpretation of the Agreement between the parties ought to be the end of the matter, but on 8 November 2012 Respondent wrote to the Department and said the following, and I will quote certain sub-paragraphs:

10.1 "The Contract was for the period of 3 (three) years. However, this was extended by a year to September 2012. Recently it has been extended by another six months to March 2013. "

10.2 "Sakhiwo (the Respondent) also appreciates the gesture of the extension of the contracts twice by yourself"

A meeting was then requested as Respondent wished to discuss the process for completion by themselves of projects commenced with, and those that would extent beyond 30 March 2013 and the process of Facility Maintenance Management post-occupation for a period of five years from the date of occupation in respect of facilities erected by themselves and also in respect of existing post-occupation facilities erected by others.

11.

The Department replied on 25 March 2013 stating that the contract would expire on 30 March of that year, and that it did not intend to extent the contract further.

12.

On 28 March 2013 Respondent wrote to Applicant telling it that it was misguided in respect of the advice given to them as to how interpret the SDA, and said that it was clear that the contract provided that they would have to complete all projects forming part of the Scope of the Works through to commissioning of the facility with the five year post-construction responsibility for Facility Maintenance Management. That in their view was the only feasible interpretation that could be given to the contract. It was stated that "the reference to the contract enduring for the period of 36 months (clause 6.2 of the SDA) (as extended twice in this instance) as also provided in the RFP only refers to the period within which projects under the Scope of Works could be added to the contract. We accept that no projects can be added to the Scope of Works after 30 March 2013."

13.

Other correspondence between the parties does not take the argument any further, which ought to be apparent by now. I will firstly deal with the Applicant's argument. Mr Erasmus SC in the context of the factual matrix that I have set out, relied on the normal, so called Shifren Rule contained in clause

1.2 of the Agreement which has stated that the SDA Agreement was the sole *memorium* of the Agreement between the parties.

See: ***SA Sentrale Co-op Graan Maatskappy Bpk v Shifren 1964 (4) SA 760(A)*** and ***Brisley v Drotsky 2002 (4) SA 1 (SCA) at 10 to 12.***

When interpreting a contract the fundamental object is to ascertain and to give effect to the common intention of the parties as reflected, in the case of a written agreement, in that agreement. The intention of the parties had to be construed from the language which they used, not what either of them may have had in mind.

See: ***Engelbrecht v Senwes Ltd 2007 (3) SA 29 (SCA) par 7.*** The golden rule of interpretation is that if the language of the contract is clear and unambiguous, effect must be given to its ordinary everyday meaning, unless of course it leads to an absurdity or something which the parties never envisaged.

See: ***Durban's Water Wonderland (Pty) Ltd v Botha 1999 (1) SA 982 (SCA) at 989.***

Accordingly Applicant's Counsel submitted that the Agreement could not have been clearer in its terms, with reference to clause 6.2. which provided for the mentioned period of 36 months. Accordingly, the contract was terminated by the effluxion of time as at end of March 2013. The construction placed on the Agreement in the correspondence of Respondent would lead to absurd results inasmuch as Respondent contended that it was entitled to "see out" the project, and to remain in charge of Management and Maintenance even after the Agreement had been terminated, due to the five year clause that appeared in the RFP. A well known principle of interpretation of agreements is that the Court will never interpret an agreement where such would lead to an obvious absurdity. I asked Counsel the obvious question in this context namely if Respondent was entitled to oversee maintenance for a further five year period, what would be the rights and obligations of the parties in this context and what would be the fee structure that had allegedly been agreed upon? Or not agreed upon, one may add? Further more, what did the reference to 36 months in Annexure B to the Invitation to Bid mean? Also. what is the effect of Respondent not having quoted the price separately for Facility Maintenance? These questions are quite apart from the clarity of clause 6.2 of the Agreement between the parties.

See: ***Lambons (Edms) Bpk v BMW (SA) (Edms) Bpk 1997 (4) SA 141 (HHA) at 158***

14.

Respondent's Counsel Mr. Maleka SC eloquently adopted a novel approach. He said that he did not intend to go beyond the Shifren Principle or clause 6.2 at all. He said that upon a proper interpretation of clause 1.2 of the Agreement, which I have quoted, the reference to the "HEDP 849/08 Programme" meant that the request for proposal (RFP) was incorporated into the Service Delivery Agreement by reference, and that gave Respondent the right to do the maintenance management irrespective of the provisions of clause 6.2 which referred to the period of the contract as being 36 months. He accepted that the provisions of clause 6.2 provided that the Agreement would endure for a period of 36 months. He also accepted that the duration of the Agreement was properly extended until 30 March 2013. His argument was therefore that on a reasonable interpretation of the contractual documents.

which included the RFP, the Service Delivery Agreement contemplated that the "Scope of Works" provided therein, expressly provided for the right and obligation to provide Facility Maintenance and Management services for a period of five years after the date of commissioning of each of the projects which fell within the Scope of Works. I therefore had to take regard of all of the documents to ascertain the true intention of the parties. This approach is however, as ought to be obvious when I refer to the correspondence, that correspondent did not see it that way at the time the letters were written requesting an extension and being grateful for the subsequent "extension". Mr. Maleka SC however also referred me to the conduct of the parties which would assist in the interpretation of the Service Delivery Agreement. In the main, in this context, he relied again on the terms of the RFP and Respondent's response thereto. He emphasized that his submissions were not intended to contradict the terms of the Service Delivery Agreement, but to assist in the interpretation of that Agreement, and it was a well established rule that a Court would be entitled to have regard to evidence of the conduct of the parties in that context. I was referred to ***Rane Investment Trust v Commissioner South African Revenue Service 2003 (6) SA 332 (SCA) at par 27*** in support of that argument. It appears however clearly from par 26 of that judgment that a Court is only entitled to have regard of the conduct of the parties, when attempting to interpret an agreement, when there is an ambiguity or uncertainty.

See also: ***A J Kerr, The Principles of the Law of Contract, 6th Edition at 409 and 416 - 417***

In my view, as I have already stated, there is no ambiguity or uncertainty in the present context and in the context of clause 6.2 of the Service Delivery Agreement. It is as clear as the view from the top of Mount Everest in good weather, as I imagine that scenery. Or perhaps as clear as the waters of the Okavango Delta, which scenery I do not have to imagine.

15.

My conclusion is therefore that the interpretation given by Respondent to the Service Delivery Agreement is unwarranted and cannot be sustained.

16.

Accordingly I grant Prayers 2, 3, 8 and 9 of the Notice of Motion with costs, including the cost of two Counsel, and also order that the Counter Application be dismissed with costs including the cost of two Counsel.

JUDGE H J FABRICIUS
JUDGE OF THE NORTH GAUTENG HIGH COURT

Case no.: 32723/13

Parties' Representatives:

Counsel for the Applicant:	Adv C. Erasmus SC Adv M Kgatle Instructed by: The State Attorney
Counsel for the 1st Respondent:	Adv Maleka SC Adv Koboni Instructed by: Poswa Inc

Heard on: 01/08/2013

Date of Judgment: 16/08/2013 at 10:00