THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 882/2013

NON-REPORTABLE

In the matter between:

X-PROCURE SOFTWARE SA (PTY) LTD **APPELLANT**

and

SUTHERLAND, TERRY LINDA **RESPONDENT**

Neutral citation: *X-Procure Software (Pty) Ltd v Sutherland* (882/13) [2014] ZASCA 196 (28 November 2014)

Coram: Maya, Leach, Willis and Saldulker JJA and Mocumie AJA

Heard: **18 November 2014**

Delivered: **28 November 2014**

Summary: Interpretation of a written contract – claim for commission - context and also the need for a sensible and businesslike result required an interpretation that commission would be payable – appeal dismissed with costs.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Boruchowitz J sitting as the court of first instance)

The appeal is dismissed with costs.

JUDGMENT

Willis JA (Maya, Leach and Saldulker JJA and Mocumie AJA concurring):

[1] The appellant, the defendant in the high court, appeals with the leave of that court. The high court had granted judgment in favour of the respondent. The high court found that there was an amount due to her as commission, arising from a written agreement concluded between the parties on 9 October 2003, and granted its order accordingly. The sum awarded was R447 873. Judgment included interest thereupon and costs.

[2] The respondent had sued for specific performance, which was alleged to have been the payment of commission due to her from advertising agreements which she had concluded on the appellant's behalf with the appellant's customers. The respondent had based her action on a term of this written 'Outsource Sales Agreement' (the agreement), clause 10 of which provides as follows:

'X/procure [the appellant] shall effect payment to the marketer [the respondent] of an amount equal to 20% of the gross amount payable to X/procure less any commission payable to advertising agencies for and in respect of each advertising agreement concluded *solely* by reason of the efforts of the [the respondent] pursuant to and in terms of this agreement.' (My emphasis.)

[3] The agreement terminated on 31 March 2004 as a result of disagreements between the respondent and Mr Dirk Odendaal, the founder, majority shareholder and executive chairman of the appellant. In her particulars of claim, the respondent alleged that she had been entitled to the amount of her claim by reason of various advertising agreements which had been concluded on behalf of the appellant solely by reason of her efforts. The appellant's case was that the only advertising agreements which had been concluded solely by reason of the respondent's efforts had been two agreements concluded between the appellant and pharmaceutical companies known respectively as 'Beyers Health Care' and 'Roche'. The appellant averred that the amount due to the respondent, arising from these agreements was R35 248.62.

[4] After various preliminary skirmishes between the parties, which included a later abandoned claim in reconvention by the appellant, the respondent reduced her claim to the amount awarded to her by the high court: viz R447 873.

[5] The case turns on whether the clause in paragraph 2 above is to be interpreted so as to mean that the respondent was entitled to commission only on contracts which she concluded on behalf of the appellant with new customers or whether it applied to renewals or extensions of existing contracts with the appellant and its customers as well. The appellant contended that, by reason of the fact that there had been pre-existing advertising agreements with certain of the appellant's customers, renewals or extensions thereof could not be regarded as having been concluded 'solely by reason of the efforts of' the respondent.

[6] By reason of the fact that there is disagreement over whether the expression 'solely by reason of the efforts of' is ambiguous, and whether there can therefore be a departure from the parol evidence rule, it is necessary first to deal with the question of whether there is ambiguity in the expression.

[7] As a contract is a bilateral juristic act (there must, at the very least, be a meeting of two minds, even if one and the same person acts in different capacities), no contract can ever come into being solely as a result of the efforts of one person,

except if that person is acting in different capacities.[1] Inasmuch as it is common cause that a contract had indeed come into being between the parties, the use of the word 'solely' in the clause is inherently ambiguous. This type of ambiguity in question has been described as a 'latent ambiguity' in *Delmas Milling Co Ltd v Du Plessis*,[2] which has been followed in innumerable cases since then. Referring to *Delmas Milling*, the trial court used this term to describe the expression that was in contention between the parties. Having referred to the *Oxford Dictionary*, the trial court took a similar view regarding the ambiguity of the word 'solely' in this context.

[8] Where the language of a written contract is ambiguous, extrinsic evidence is admissible in order to construe its meaning, by reference to its 'context' or the 'factual matrix' in which the contract was concluded.[3] Moreover, the apparent purpose to which the contract was directed may be considered when interpreting it.[4] The high court therefore correctly admitted and had regard to extrinsic evidence in order to determine what was probably in the minds of the parties when the agreement was concluded.

[9] Relevant to the interpretation of the agreement is the definition of 'advertising agreements', which is as follows:

'the standard form agreements used and prescribed by [the appellant] from time to time to contract with manufacturers, wholesalers and distributors of pharmaceutical products stipulating the terms and conditions in terms whereof [the appellant] sells advertising space on [the appellant] to such manufacturers, wholesalers and distributors of pharmaceutical products.'

Implicit in the use of the words 'from time to time' in this definition is that existing agreements between the appellant and its customers could be varied.

[10] The agreement also provides that:

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[1]See for example *Vaal Reefs Exploration and Mining Co Ltd v Burger* 1999 (4) SA 1161 (SCA) para 8; *Van der Merwe v Nedcor Bank Bpk* 2003 (1) SA 169 (SCA) paras 4 to 8.

[2]*Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 454G.

[3] See *Coopers & Lybrand & others v Bryant* & others 1995 (3) SA 761 (A) at 768C-D. See also *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) paras 22 and 23; *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd & another* 2008 (6) SA 654 (SCA) para 7; *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 39; *Potgieter & another v Potgieter NO & others* 2012 (1) 637 (SCA) para 24 and *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA) para 2.

[4]See *Communicare & others v Khan & another* 2013 (4) SA 482 (SCA) para 31.

‘In addition to its other obligations under this agreement the marketer shall:

11.1 use its best efforts to promote, sell and service the products within the territory using trained and qualified personnel;

11.2 be responsible for all costs and expenses related to its performance under this agreement.’

It is significant that the promotion, sale and service of products is not qualified in any way suggestive of the interpretation which the appellant has sought to place on the agreement. The contrary is true. The word service is indicative of a continuing relationship with an existing customer.

[11] Clause 5 of the standard advertising agreement between the appellant and its customers provides that:

‘This agreement shall thereafter commence on the date of signature thereof by or on behalf of the parties and shall continue indefinitely until 6 (six) calendar months written notice of termination is given by either party to the other, unless otherwise stated’.

Despite the seemingly indefinite nature of the advertising agreement, it refers also to annexures thereto. In these annexures are set out different products of the appellant and the rates to be applied thereto. It was the evidence not only of the respondent but also Mr Lewis, who had been the managing director of the appellant at the relevant time, that the advertising agreements were often varied by adding to or substituting previous annexures.

[12] In addition to the definition of ‘advertising agreements’ in the agreement between the parties and the terms of clause 5 of the standard advertising agreement, there are various other pointers to what must have been intended between the parties when they entered into their agreement. These pointers are to be found against the background that not only had the respondent been appointed to market the appellant’s products that had been defined in the agreement as types of ‘advertising space’ known as ‘banners, browser pages, screen savers and linked adverts’ but also the respondent’s remuneration of the appellant was derived entirely from commission.

[13] The undisputed evidence of the respondent was that 90 per cent of her time had been spent maintaining the appellant's relationship with these existing customers and it was as a result of the respondent's sole efforts that existing advertising agreements had either been renewed or extended. Furthermore, she had to carry all the administrative expenses relating to the procurement of advertising agreements herself, regardless of whether these related to new customers or renewals or extensions of these agreements with pre-existing customers. There was no evidence that anyone else, within the appellant, was responsible for the renewal or extension of agreements with these pre-existing customers. Self-evidently, the renewal or extension of the agreements would not have occurred either automatically or autonomously. As the trial court correctly observed:

'It is highly improbable and makes unreasonable business sense to think that the respondent would have expended all her financial and personal efforts in procuring advertisements when she, on the version of the appellant, would not have been remunerated at all in respect of these agreements.'

[14] An analysis of the notes of the appellant's negotiations with Bayer shows that the appellant had introduced Bayer to its products prior to Bayer having had any dealings or association with Bayer. Nevertheless, the appellant had remunerated the respondent for agreements concluded between Bayer and the appellant between September 2003 and June 2004, during which period the respondent had actively participated in the negotiations. Similar considerations apply in respect of advertising contracts concluded between the appellant and Roche.

[15] It is common cause that, during the currency of the agreement, the respondent had received R109 002.37 from the appellant as commission for concluding advertising agreements with these existing customers. This payment was not made in a lump sum but on an ongoing basis. Tax was deducted on these sums and made over to the South African Revenue Service. Mr Odendaal, who testified on behalf of the appellant, said that these payments had been made 'ex gratia'. In its plea and in its affidavit resisting summary judgment, the appellant described these payments as having been 'overpayments'. No satisfactory explanation for this discrepancy in versions could be given by Mr Odendaal when he was cross-examined thereupon.

[16] Mr Lewis, the former operations manager of the appellant, who at one stage in his evidence said that the sum of R109 002.37 was an ‘overpayment’, under cross-examination later said that he did not know how the payments to the respondent had been calculated as he had not been responsible therefore. He also conceded under cross-examination that the respondent would have been entitled to commission for new business which she had generated from existing customers of the appellant. This is a clear indication that the appellant itself did not understand its agreement with the respondent to be as it now purports to interpret it.

[17] It is obvious that renewals or extensions of existing contracts between the appellant and its existing customer could not be self-generating. The decision to renew would depend, inter alia, on the following: the historical effectiveness of past advertising arrangements, budgets, experience of the appellant’s competitors and the introduction of new products and/or the discontinuance of other by the customer. The decision would also depend on the building of relationships between the appellant and its customers which would include advice and guidance from the appellant’s representative. It is in this regard, that the contribution from the respondent would have played a significant role.

[18] The appellant’s case was that the only commission to which the appellant had become entitled was an amount of R35 248.62. It was not in dispute that the appellant had paid the plaintiffs an amount of R139 746.63 in respect of various a commissions. This, the appellant claimed, was an overpayment. In its counterclaim the appellant claimed the difference between these two amounts. This claim was later abandoned by the appellant.

[19] In proving the aggregate of her claim the respondent relied on an exhibited schedule of contracts, for each individual item of the claim. Although she was cross-examined in general terms about her claims, most of the individual items were not disputed. Cross-examination focused on whether she could correctly assert that the contracts were concluded ‘solely’ as a result of her efforts. The arithmetic of the schedules was not in question. The respondent stood up well under cross-examination. There was no reason to disbelieve her. The concessions that the

respondent made under cross-examination and that were seized upon by counsel for the appellant in an attempt to show that she had admitted that these contracts had not been concluded solely by her on the appellant's behalf did not, in the context in which they were made, detract from her essential version of events. That account of affairs is that, without her efforts the appellant, would in all probability, not have secured the renewal or extension of contracts as it did. The trial court correctly held that each extension or renewal relating to contracts concluded with existing clients constituted a new advertising agreement.

[20] Accordingly, the trial court cannot be criticised for having accepted the respondent's version. The trial court also correctly found that, as the respondent's contentions in respect of the interpretation of the agreement had prevailed over those of the appellant, she had succeeded in proving her revised claim for R447 873.

[21] The trial court relied strongly on the decision of this court in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[5] to conclude that not only context but also the need for a sensible and businesslike result required an interpretation that commission would be payable in respect of new sales in respect of advertising agreements concluded not only between the appellant and its new customers, but also existing customers. In reaching this conclusion, the trial court relied on the following facts:

(a) the respondent had been remunerated purely on a commission basis;
(b) by a huge margin, most of her time had been spent maintaining the appellant's relationship with these existing customers;
(c) it was as a result of the respondent's sole efforts that existing advertising agreements had either been renewed or extended;
(d) the respondent had to carry all administrative expenses relating to the procurement of advertising agreements herself;
(e) she had, during the currency of the agreement, received commission for concluding advertising agreements with these existing customers;
(f) the 'internally contradictory' evidence of Mr Odendaal and Mr Lewis, as to whether the payments for commission had been made 'ex gratia' or were 'overpayments';

[5] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

(g) the improbability and absurdity that the parties could have intended the clause in contention to have the interpretation which the appellant wishes now to have place on it.

In my opinion, the reasoning of the trial court cannot be faulted.

[22] The following order is made:

The appeal is dismissed with costs.

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N P WILLIS

JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	M D Cochrane Instructed by: Harris Billings Attorneys, Johannesburg c/o Honey Attorneys, Bloemfontein
For the Respondent:	A R G Mundell SC Instructed by: Van Zyl Hertenberger, Johannesburg c/o Kramer Wehmann & Joubert Inc, Bloemfontein