

SUPREME COURT OF APPEAL OF SOUTH AFRICA

PRESS RELEASE

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

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal

The Supreme Court of Appeal today upheld an appeal against a judgment of the South Gauteng High Court which, using the principles of Californian law to interpret a contract, held that Kern, an expert in systems for entries in the yellow pages of the telephone directory, was entitled to damages.

Kern, an American citizen, had entered into a contract with Telkom Directory Services (TDS), undertaking to introduce a new system for yellow pages entries. The parties agreed that Californian law would govern their contract, which included a clause that entitled either party to terminate the contract on giving 30 days' notice. It also provided for 'work orders' to be concluded in respect of different stages of the work to be done. The work order concluded, and which was extended twice, expressly referred to the termination clause, but also provided that each party had to meet time and money obligations after the work order was signed. Kern contended that this provision precluded termination once work orders had been signed.

During the course of the third stage TDS gave Kern notice of termination. He sued for damages (some R6 million), asserting that TDS had not been entitled to terminate. At the request of the parties the high court determined only the question of liability and not the quantum of damages.

Kern and a former employee of TDS, Ms Sheasby, gave evidence at the trial to the effect that they had intended, when concluding the agreement, that

once work orders were signed, neither party could terminate on notice. They pointed to the time and money provision in the work order.

In Californian law, evidence of the intention of the parties is provisionally admitted to determine whether the written agreement is reasonably susceptible to the interpretation contended for by a party. The high court concluded that Kern's and Sheasby's evidence as to their intention should be admitted although in conflict with the express terms of the written contract, and thus found that the termination amounted to a repudiation of the agreement.

The SCA, on the other hand, concluded that the written agreement was not susceptible to the interpretation advanced for Kern, and that the evidence should not have been admitted. On a clear construction of the terms of the contract TDS had been entitled to terminate it on notice. It thus upheld the appeal by TDS.
