

REPORTABLE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2007/16441

DATE: 05/11/2010

In the matter between:

TACTICAL REACTION SERVICES CC

Plaintiff

and

BEVERLEY ESTATE II HOMEOWNERS' ASSOCIATION

Defendant

J U D G M E N T

MBHA, J:

[1] This is a matter concerning a dispute between a security company (*"the plaintiff"*) and a homeowners association (*"the defendant"*) as to whether or not a written contract for the provision of services came into existence.

[2] The plaintiff sued the defendant in terms of a security contract for payment of the sum of R151 807.00 plus interest and costs. The matter became defended and proceeded to trial.

[3] The plaintiff's case, as pleaded, is that a written contract between the parties came into effect on 10 September 2007 when:

3.1 the plaintiff's offer to contract was communicated by Renato

Ramos ("*Ramos*") to the defendant; and

- 3.2 the defendant, represented by Simon Bradshaw ("*Bradshaw*") communicated the defendant's acceptance of the offer by means of an e-mail sent by Bradshaw to the plaintiff.

[4] The plaintiff averred in the alternative, that in the event of it being found that the communication as aforesaid did not constitute the defendant's acceptance of the offer, then the defendant through its conduct, induced the plaintiff into the reasonable belief that the defendant was accepting the offer.

[5] The defendant:

- 5.1 denied that it entered into any written contract as alleged;
- 5.2 averred that only a verbal month to month agreement was concluded between the parties;
- 5.3 averred that a three month probation or assessment of services was agreed upon; and
- 5.4 denied that the defendant's conduct constituted an implied acceptance of all or any of the terms of the plaintiff's offer to contract.

[6] It is not in dispute that if the written contract exists and governs the relationship between the parties, then the plaintiff is entitled to an order as sought in the particulars of claim.

[7] It is common cause that:

7.1 the written contract contained a three month probationary period and was to thereafter endure for a 12 month period; and

7.2 the written contract was not signed by the defendant.

[8] The plaintiff's sole witness, Ramos, testified that on 10 September 2007 he e-mailed a quotation and a written contract which was in template form i.e without the manuscript portions having been completed, to Bradshaw. On the same day, Bradshaw responded by e-mail in which he advised the plaintiff "*Thanks, I will call you as soon as I have it signed*". There is no doubt that Bradshaw was clearly referring to the contract.

[9] It is common cause that Bradshaw received the aforesaid quotation and the incomplete written contract on 10 September 2007, and on the same day he forwarded these to Edwards, a director of the defendant and to the defendant's managing agent, stating "*Hi All, quotation and contact for TRS*". The TRS mentioned in the e-mail referred to the plaintiff.

[10] Ramos responded on 11 September 2007 by asking that the contract be signed by that Friday 14 September 2007. For reasons which will be apparent later, I consider it apposite to quote the relevant text of Ramos' aforesaid e-mail. It reads :

"Please note that I will need to have the contract signed from your committee no later than Friday this week. I am on course but please let me know and I will have one of my staff collect the contract so that it can be processed etc "

[11] On 11 September 2007 Bradshaw replied by sending Ramos an e-mail in which he undertook to have the contract signed "*as soon as possible*", stating he would let Bradshaw know once the contract had been signed.

[12] Ramos testified that on 13 September 2007 he personally hand delivered the completed contract to Bradshaw. According to him, it was at this meeting that a detailed job description was agreed upon and that the implementation date for the provision of security services at the defendant's complex would be 22 September 2007.

[13] Ramos also testified that at this meeting, Bradshaw stated that the defendant accepted the contract, the contract had been signed and one more witness still had to sign.

[14] Bradshaw, in his testimony:

14.1 denied he was ever presented with a completed written contract on 13 September 2007;

14.2 was adamant that only a verbal month to month contract was concluded by the parties during July 2007; and

14.3 insisted that it was agreed that a permanent one year contract would only be concluded subject to a positive and satisfactory security evaluation at the defendant's complex being conducted. Bradshaw was adamant that he never had sight of any completed written agreement.

[15] It was submitted on behalf of the plaintiff that based on all the objective facts of the case, the court ought to reject Bradshaw's contention and find that Ramos completed and signed the contract and thereafter delivered it to Bradshaw on 13 September 2007.

[16] It is common cause that with effect from the implementation date, the 22nd September 2007, the plaintiff duly employed and posted guards at the defendant's premises. Furthermore a security evaluation was conducted on 24 October 2007 at which several concerns were raised *vis-à-vis* the plaintiff's overall performance at the site.

[17] It was submitted on behalf of the plaintiff, *inter alia*, that as the quotation does make provision for a "*security evaluation to take place on*

acceptance of quote and delivered within two weeks of signed contract", and as the security evaluation was concluded, it was clear that the plaintiff's state of mind was that a contract was concluded either on 10 or 11 September 2007. In this regard Mr Vivian, appearing for the plaintiff, submitted that the party whose actual intention did not conform to the common intention of the parties was Bradshaw who misrepresented the facts to Ramos by leading the plaintiff to believe that the offer contained in the e-mail of 10 September 2007, enclosing the incomplete written contract and quote, was accepted. It was also submitted that this belief was reasonable in the circumstances.

[18] In support of this contention, the plaintiff sought to rely on numerous entries in Ramos' diary wherein reference is made about collecting the (signed) contract from Bradshaw and Edwards.

THE LAW

[19] It is trite law that a contract is created by offer and acceptance. Furthermore, acceptance of an offer by the offeree must be clear, unequivocal and unambiguous. See *Boerne v Harris* 1949 (1) SA 793 (A) at 799-800, *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 421-2, *Potchefstroomse Stadsraad v Kotze* 1960 (3) SA 616 at 634 (per Malan AJA dissenting.)

[20] Not only must the offer be accepted but the acceptance itself must be communicated by the offeree to the offeror. Until that happens, no contract

can validly come into existence. See Willie's Principle of South African Law 9th Edition at page 743.

[21] It is also trite that where the mode of communication of the acceptance of the offer has been prescribed, the offeree is bound to accept in the mode prescribed.

[22] In *Driftwood Properties (Pty) Ltd v Mclean* 1971 (3) SA 591 (A) at 597 D-E Van Blerk JA said the following:

"It is trite that an offeror can indicate the mode of acceptance whereby a vinculum juris will be created, and he can do so expressly or impliedly".

The court held that where the transferee was expressly requested to sign the contract as a mode of acceptance, failure to do so would result in the lapse of the offer. See also *Dietrichsen v Dietrichsen* 1911 T.S. 486 at 494.

[23] Needless to say, acceptance of the offer can be done by conduct indicating acceptance of the offer as well as by words expressing it. This position was aptly described by Watermeyer A.C.J. in *Reid Bros. (South Africa Ltd) v Fischer Bearings Co. Ltd* 1943 A.D. 232 at 241 when he stated:

"Now a binding contract is as a rule constituted by the acceptance of an offer, and an offer can be accepted by conduct indicating acceptance, as well as by words expressing acceptance. Generally, it can be stated that what is required in order to create a binding contract is that acceptance of an offer should be made manifest by some unequivocal act from which the inference of acceptance can logically be drawn."

[24] In order for a court to find that a contract has come into existence under the doctrine of quasi-mutual assent or estoppel, as in this case, there must be a representation which, through conduct, induces a reasonable belief on the part of the other party, that the former was accepting the offer thereby precluding such former party from denying the existence of such contract. See *JC Sonnekus "The Law of Estoppel in South Africa"*, at page 31. The question that has to be asked, is whether or not the party who is trying to resile from the contract is to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself. See *George v Fairmead* 1958 (2) SA 465 A 471 B-C.

[25] A related question is whether the doctrine of *quasi*-mutual assent can be applied in circumstances where the acceptance of an offer does not take place in accordance with a prescribed mode, but the conduct of the offeree is such as to induce a reasonable belief on the part of the offeror that the offer has been duly accepted according to the prescribed mode. In *Pillay and Another v Shaik and Others* 2009 (4) SA 74 (SCA) at 846, Farlam JA, affirming that although a mode of acceptance was prescribed, the doctrine of quasi mutual assent applied, opined:

"This raises the question as to whether the doctrine of quasi-mutual assent can be applied in circumstances where acceptance does not take place in accordance with a prescribed mode but the conduct of the offeree is such as to induce a reasonable belief on the part of the offeror that the offer has been duly accepted according to the prescribed mode. Viewed in the light of basic principle, the question must surely be answered in the affirmative because the considerations underlying the application of the reliance theory apply as strongly in a case such as the present as they do in cases where no mode of acceptance is prescribed and the misrepresentation by the offeree relates solely to the fact that there is consensus."

[26] The principle is thus established that if a defendant behaved in such a manner as to make the plaintiff believe that it had accepted the contract, then the court will hold that there was consensus even though the defendant never accepted the offer in the manner prescribed, for example by signing the contract to signify its acceptance.

APPLICATION OF THE LAW TO THE FACTS

[27] It is common cause that the plaintiff's offer to contract in this case was contained in the quotation and the incomplete contract Ramos e-mailed to Bradshaw on 10 September 2007. Furthermore, the defendant did not sign any written contract.

[28] The plaintiff submitted that there was a binding agreement which was valid for one year and that the defendant, by its conduct, led the plaintiff to believe that a validly binding contract had been concluded. Furthermore, such belief was reasonable in the circumstances.

[29] I am in total agreement with the plaintiff that the fact that a party, in this case the defendant, omitted or failed for whatever reason to sign a contract, is no bar per se, to the conclusion of a valid contract, provided all the other requirements for the conclusion of a contract have been met. See *Pillay and Another v Shaik and Others (supra)* at 83F-G.

[30] In my view, a clear method or mode of acceptance was prescribed in the offer to contract which the plaintiff made to the defendant. The defendant had to signify its acceptance by signing the contract. I say so for the following reasons:

30.1 the quotation that was emailed by Ramos together with the incomplete contract, expressly provides that the contract had to be signed by the defendant. This quotation expressly provides:

“Security evaluation to take place on acceptance of quote and delivered within two weeks of signed contract. No charge.” (my underlining.)

30.2 In the email dated 11 September 2007 which Ramos sent to Bradshaw on the same day, it was similarly made clear to Bradshaw that the plaintiff needed the contract “... signed from your committee ...” (my underlining). Significantly, in the said email Ramos made it clear that the contract had to be signed by Friday (14 September) of that week.

30.3 Ramos testified that during the ensuing period until about the middle or end of December 2007, he either personally went to or phoned Bradshaw or Edward, both representing the defendant, on numerous occasions specifically intending to collect the signed contract. To this end Ramos referred the court to various entries in his diary wherein it is recorded that he either had to

phone or personally go to the defendant to collect the signed contract.

[31] As the contract was never eventually signed, it follows that no written contract was concluded between the parties.

[32] The question to be answered is whether the defendant, by its conduct, in particular Bradshaw's conduct, if any, led the plaintiff, (Ramos) to believe that Bradshaw had accepted the contract on behalf of the defendant.

[33] I have set out in detail the manner of exchange of the relevant correspondence and emails between Ramos and Bradshaw in paragraphs [8] to [11] above. Based on the aforesaid chronology of events, the plaintiff submitted that:

33.1 Bradshaw led Ramos to believe that the offer contained in the email of 10 September 2007 (the written but incomplete contract and the quotation) was accepted by the defendant;

33.2 this belief was entirely reasonable in the circumstances; and

33.3 a contract came into force on 10 or 11 September 2007, which contract included the terms contained in the written contract.

[34] Bradshaw's responses, as can clearly be seen from his emails, were that he would have the contract signed. Clearly he would not be able to sign the contract personally. In fact as can be gleaned from Ramos' email dated 11 September 2007, Ramos was acutely aware that the defendant's committee had to authorise and sign the contract. Apart from the fact that Ramos had expressly stated in this email that he had wanted the committee (of the defendant) to sign the contract, he conceded during cross examination that he possessed extensive and detailed knowledge and expertise of the inner workings of homeowners associations, and added that resolutions were required to enter into contracts on behalf of homeowners associations similar to the defendant.

[35] In my view, it defies logic that Ramos, who had this sort of background knowledge on the inner workings of homeowners associations, could reasonably rely on any assertion that Bradshaw would "*get it (the contract) signed*" or possess the authority on his own to bind the defendant. J.C Sonnekus, in "*The Law of Estoppel in South Africa*" 2nd Edition, at page 57 states that:

"Any pre-knowledge as to the real or factual legal position applicable to the circumstances will tend to minimize the chances that the representee will be considered to have been misled by the representation. This rule ties in with the common sense approach according to which a person who is aware of the real position can never be heard to say that he was misled by any conduct of the other party."

[36] Bradshaw's testimony that the defendant could not simply rush in and enter into a yearly contract with the plaintiff until a satisfactory evaluation of the security situation at the defendant's residential complex, accords with

common sense and with the common cause facts. It was not disputed that there was dissatisfaction amongst residents at the defendant's complex with the previous security company that rendered security services. It accordingly follows as a matter of logic, that the defendant would have first wanted to satisfy itself that the plaintiff would be able to discharge the defendant's security needs at the complex.

[37] In the light of all the aforesaid, I come to the conclusion that the plaintiff has failed to prove the conclusion of a written contract with the defendant either on the ground of quasi mutual assent or estoppel as alleged.

[38] Even if I were to charitably interpret in the plaintiff's favour the defendant's conduct and hold that a valid contract was concluded, the question that still has to be answered is whether the defendant's reasons and manner of cancellation of the contract on 7 January 2008 were reasonable in the circumstances, an issue to which I now turn.

[39] It is common cause that the probationary period stipulated in the contract was from 22 September 2007 until 22 December 2007.

[40] The defendant only notified the plaintiff on 7 January 2008 that:

40.1 based on the verbal agreement the parties had to convene on the expiration of the probationary period and negotiate a fixed term contract;

- 40.2 the defendant had decided not to enter into any term fixed contract with the plaintiff because of unsatisfactory work performance by the plaintiff's security guards; and
- 40.3 as the defendant's offices closed on 14 December 2007 for the festive holidays, they could not convey their aforesaid decision not to enter into a fixed term contract with the plaintiff at the end of the probationary period.

[41] In my view, the defendant's explanation that because their offices closed on the 14th December 2007, and consequently it was not possible to notify the plaintiff that they were not going to enter into any fixed term contract, was reasonable in the circumstances. There was no practical way in which the defendant could have notified the plaintiff of this fact before 22 December 2007. Furthermore, in my view, the defendant did not extraordinarily delay unduly to notify the plaintiff of its intentions.

[42] In the circumstances, I find that no written contract was concluded between the parties. There was a month to month contract concluded between the parties which contained a probationary period of three months. At the conclusion of the probationary period, the defendant gave proper notice to the plaintiff that as defendant was not satisfied with the plaintiff's work performance, the defendant was not going to enter into any fixed term contract.

[43] It is common cause that the plaintiff, at the instance of the defendant, stopped rendering services at the defendant's premises on 11 January 2008.

[44] As there was a month to month agreement between the parties, the plaintiff was entitled to a month's notice of cancellation of the (verbal) agreement. This means that the defendant is liable to pay the plaintiff the sum R13 000.00 in respect of the period 11 January 2008 until 11 February 2008. Because of the amount involved, I have decided that costs due to the plaintiff should be on the Magistrate Court scale.

[45] I accordingly make an order as follows:

45.1 Judgment is entered in favour of the plaintiff for:

- (a) payment of the sum of R13 000.00;
- (b) interest thereon at the rate of 15.5% per month from 11 February 2008 to date of payment, both days inclusive;
- (c) costs of suit on the Magistrate Court scale.

B H MBHA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG