

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)**

CASE NO: 2192/07

In the matter between:

GLOBAL TELEMATICS SOUTH AFRICA (PTY) LTD

PLAINTIFF

and

VERSITRADE 540 (PTY) LTD t/a

SUTHERLAND TRANSPORT

DEFENDANT

JUDGMENT

MAGEZA AJ:

[1] Plaintiff is Global Telematics South Africa (Pty) Ltd, a company that conducts business in Information Technology and Telecommunications, including installation of hardware and software applications in vehicles to enable satellite tracking and fleet management.

[2] Defendant is Versitrade 540 (Pty) Ltd t/a Sutherland Transport, a registered company with registration number 2003/013569/07 which conducts a business of leasing out of trucks and vehicles.

Background:

[3] On the 31 March 2006 and at Port Elizabeth, Plaintiff, duly represented by Antionetta Sanna, and Defendant, duly represented by D S Van Der Westhuizen, entered into a written agreement.

[4] The essential terms of the agreement were that:-

4.1 Plaintiff would install and rent to defendant, Telematics Control Units, that is, satellite and fleet management equipment for 37 (thirty seven) of defendant's vehicles.

4.2 Plaintiff would in addition, provide to defendant the following services:

4.2.1 General package radio service for cellphone alerting for alarms, panic button and over rev sensors;

4.2.2 Driver behaviour, harsh braking and harsh acceleration monitoring;

4.2.3 Immobilisation including relay cutting;

4.2.4 Receiving of free SMS messages for the purpose of health checks or tracking and fleet management.

[5] On the 3rd October 2007, Plaintiff issued and served summonses against the Defendant on the grounds that Defendant breached the agreement by failing to pay the rental due from January 2007 to March 2007. The summons is for payment of the amount of R72 760.50, being arrear rental as well as the amount of R698 179.41 for damages due to Defendant's breach.

[6] Plaintiff's case is that the written agreement consists of:-

6.1 The Principal Document titled, Telematics Solutions Agreement incorporating the terms and conditions;

6.2 A Proposal Form;

6.3 An Order Form; and

6.4 An Order Confirmation document.

These documents form part of the summons.

Defendant's plea:

[7] Defendant denies that a valid agreement was concluded between the parties, in that on its reading of the contract, no rental is stipulated in the alleged agreement.

[8] Defendant's alternative plea is that in terms of the provisions of clause 1.2.1 of the standard terms and conditions of the Telematics Solutions agreement, the agreement consists only of documents signed by both parties and that the proposal form and order form is not signed by both parties and therefore does not form part of the agreement.

The issues before court:

[9] At the start of the hearing counsel for both parties brought to my attention that the parties had agreed to the separation of merits and *quantum* and that the only issue before me on the merits was the determination of whether the parties had concluded a valid agreement. This preliminary issue was argued on the papers and no evidence was led or witnesses heard.

The four documents:

[10] The documents relevant to the enquiry are the following:

10.1 The principal agreement, titled "Telematics Solutions Agreement" is a standard pro forma contract. It is the type of in-house standard agreement large businesses utilise for purposes of recording the service or product based agreements they enter into with the public.

The definition section of the Terms and Conditions Agreement contains two clauses on which the defendant relies for the assertion that no agreement exists on which Plaintiff can found a claim based on breach of contract. These clauses are:-

1.2.1 'agreement' means this agreement including the front page and installation report(s) as well as any other annexure signed by both parties from time to time incorporated by reference into this agreement;

1.2.2 'annexure' means collectively all documents incorporated into this agreement irrespective of whether they have been attached to or incorporated by reference in this agreement on or after the date of signature including invoices.

10.2 The "order confirmation" document has evidently been generated by Plaintiff and bears the Plaintiff's company name and address at the top. The document was prepared according to its date on the 30 March 2006, a day before signature of the main agreement

and was presumably intended by Plaintiff to form part of the main agreement that was to be concluded and signed on the 31 March 2006.

10.2.1 The price per TCU (vehicle satellite tracking and fleet management equipment) is reflected in particular in the one page document headed "order confirmation" as R575.00 (five hundred and seventy five rands) rental per month for each vehicle. The number of required units is set out as 37 (thirty seven). There is on the bottom right hand corner of the document an entry marked Installation date—31 March 2006.

10.2.2 In the top and middle part of the left hand column are signatures of both the Plaintiff and Defendant appended next to two deletions/corrections. At the left bottom side of the document immediately below an entry 'contact customer care on: 0861505505' is a signature said to be that of Defendant's authorised representative. There is no signature on the right hand side for the Plaintiff.

10.3 The "Order Form", unlike the "order confirmation" document referred to above, appears to have been generated by the Defendant and not by the Plaintiff. It is in the form of an invoice, on Defendant's own letterhead—Sutherland Transport—and is signed by the Defendant's authorised signatory. Of interest is the fact that the price on

Defendant's 'order form' is the price set out in Plaintiff's "Order Confirmation" document aforesaid.

10.4 The document referred to as "Proposal Document" is a 38 (thirty eight) page profile of the broad and comprehensive services provided by the Plaintiff and outlines all the technical products and services provided by Plaintiff. It is what I would regard in commercial parlance as a marketing document modified in certain respects to address itself to Defendant's possible requirements and solutions.

Analysis of the evidence:

[11] What appears to me to be of importance is the following:-

11.1 Plaintiff and Defendant must have entered into discussions regarding the possibility of the Defendant renting the satellite tracking and fleet management equipment sometime before the agreements were signed on the 31 March 2006. This is evident, among others, from the Proposal Document which on the face of it reflects a preparation date of 23 February 2006, a full month before signature date of the main agreement. For these discussions to have led to the signing of an agreement, it must be that the parties were serious and committed to what each wanted out of the agreement;

11.2 Prior to the 31 March 2006, documents were exchanged between the parties and this must have been with a view to each familiarising themselves with the detail therein in so far as these impacted on their respective future rights and obligations;

11.3 The most important document, the Principal Agreement referred to above was signed on the 31 March 2006. This document reflects a description of the products rented; the duration; the nature of contract; reservation of ownership as well as other ancillary terms save for the rental amount.

11.4 As regard pricing at the top of page 3 of the Principal Agreement it is said "This contract serves as a master open-ended agreement and all refer to the terms and conditions and pricing stipulated on any relevant documentation and annexures hereto, now and in the future." In addition to this, sections 1.2.1 and 1.2.2 of the terms and condition (restated above) anticipates the possible inclusion in recording the agreement in writing of 'any other annexure signed by both parties from time to time incorporated by reference into this agreement.' The 'order confirmation' document is precisely such an anticipated possible 'annexure';

11.5 The 'order confirmation' is a document generated by Plaintiff as owner of the goods rented. This document reflects the price per month per vehicle to be paid by Defendant. The document is signed by

Defendant in all material respects, that is at two places in the mid-body of the agreement as well as at the bottom. The Plaintiff signed at two places in the mid-body of the agreement. The parties signed the 'order confirmation' simultaneously with the main agreement intending it to form part of the agreement;

11.6 I have already stated that the Proposal Document appears to be no more than Plaintiff's Commercial Marketing document or Product Profile suitably adjusted to invite Defendant to do business. This is borne out by both the language and content of the product articulation on the one hand and the fact that the document was prepared for Defendant in February 2006, some one month prior to conclusion and recordal of the agreement. It is not a document that is essential in enquiring whether or not a valid agreement was concluded by the parties;

11.7 Similar considerations apply to the 'order form' prepared by Defendant on the same date and place of signature of the main agreement. At best it provides us with some evidence that Defendant had indeed applied its mind to the issue of price and at worst that Defendant was clearly anxious to be bound. To the extent that the document does not introduce anything new in regard to the essentialia of the rental agreement, it does not take the matter any further and it is possible to come to a finding without taking it into account.

[12] It appears to me that the parties met to conclude an agreement which to all intents and purposes was intended to create a binding legal agreement. Defendant expressed its intention to be bound by signing the Principal Agreement and the Order Confirmation at the same sitting.

It is also clear from the conduct of the Defendant subsequent to the conclusion of this agreement on 31 March 2006 that he viewed it as binding. Not only did the Defendant gladly receive the goods and continue to use them, he in fact paid the required rental for some 9 (nine) months until he defaulted in January 2007. Defendant does not deny that following signature in March 2006, Plaintiff installed the TCU's as had been agreed, and that the Defendant was quite happy to utilise these until the alleged breach of January to March 2007.

[13] In my view, bar the Plaintiff's failure to sign at the bottom right hand corner of the order confirmation, the Principal Agreement and the order confirmation document set out the essentialia for a valid rental agreement. Does this omission then by the Plaintiff to sign at the bottom of the order confirmation lead to invalidity? The answer must be no.

[14] Where no statutory obligation to reduce to writing exists, the parties may elect to reduce a verbal agreement into writing merely for purposes of facilitating proof of its terms.

[15] In these foregoing instances, unlike the position where reduction to writing is statutorily required, the courts have always sought to ascertain the intention of the parties as a matter of substance rather than of form.

[16] In this regard it is important to bear in mind that whilst courts will not readily create a contract for the parties where there is none, courts are also disinclined to stifle commercial enterprise by readily finding agreements undertaken in good faith unenforceable.

[17] In *Murray and Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 (1) SA 508 (A) at 514D-E, the learned Judge stated:-

"It must be allowed at once that PCI is composed in a somewhat staccato fashion, and that its terse language is often clumsy and not ideally clear. For example, it does not appear from clause 1 by what means and according to what criteria MRC and the Board are to achieve the 'finalisation' of the price for even. PCI is, however, 'a commercial document executed by the parties with a clear intention that it should have commercial operation' (see the remarks of Colman J in *Burroughs Machines Ltd v Chenille Corporations of SA (Pty) Ltd* 1964 (1) SA 669 (W) at 670F-H); and a Court should therefore not lightly hold its terms to be ineffective."

[18] In Law of Contract, 5th Edition by R H Christie at 154:-

"The court should not be astute to find that there is no enforceable contract simply because there is some doubt about its terms, but should brush the doubt aside if the terms can be ascertained with reasonable accuracy or reasonable certainty. The approach to be adopted was well expressed by

Colman J in *Burroughs Machines Ltd v Chenille Coprn of SA (Pty) Ltd* 1964 1 SA 669 (W) 670G.

"it is my task therefore to examine exh. 'A' in order to see whether or not it fixes a price, or provides for the fixing of a price with the requisite degree of certainty. In so doing I must, I think, have regard to the fact that exh. 'A' is a commercial document executed by the parties with a clear intention that it should have commercial operation. I must therefore not lightly hold the document to be ineffective. I need not require of it such precision of language as one might expect in a more formal instrument, such as a pleading drafted by counsel. Inelegance, clumsy draftsmanship or the loose use of language in a commercial document purporting to be a contract will not impair its validity as long as one can find therein, with reasonable certainty, the terms necessary to constitute a valid contract."

[19] The cases relied on by Counsel for the Defendant for the proposition that written contracts must peremptorily be attended at all times by signature on the designated space provided for in the document are decisions wherein writing is required by statute as opposed to those where parties elect to reduce their agreement as a matter of choice in order to facilitate proof.

[20] For example, in *Brack v City State Townhouses (Pty)Ltd* 1982 (3) SA 364 (W), the sale of land agreement was governed by section (1) (1) of Act 71 of 1969 and in *Dairy v Blackburn, Jeffreys & Thorpe Estate Agency* 1985 (2) SA 178 (E) the sale of land was subject to the provisions of Act 68 of 1986.

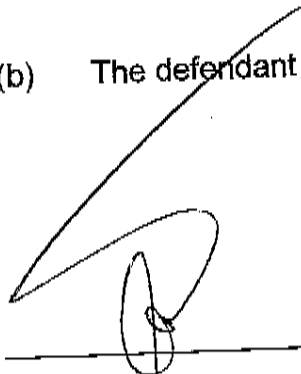
[21] There is in law a marked difference between the first and latter instance. This was put by Innes AJ in *Goldblatt v Freemantle* 1920 AD 123 at 128 as follows:

"Subject to certain exceptions, mostly statutory, any contract may be verbally entered into; writing is not essential to contractual validity. And if during negotiations mention is made of a written document, the Court will assume that the object was merely to afford facility of proof of the verbal agreement unless it is clear that the parties intended that the writing should embody the contract. (Grotius 3.14.26 etc). At the same time it is always open to parties to agree that their contract shall be a written one (see Voet 5.1.73; V Leeuwen. 4.2, sec. 2, Decker's note); and in that case there will be no binding obligation until the terms have been reduced to writing and signed. The question is in each case one of construction."

[22] In the result, I am satisfied that both parties intended to enter into an agreement in the terms set out in the written agreement and annexures to the summons.

I therefore make the following order:

- (a) That the principal agreement and "order confirmation" annexure to the plaintiff's summons is a valid/binding agreement between the parties;
- (b) The defendant is ordered to pay the plaintiff's costs.



P T MAGEZA
ACTING JUDGE OF THE HIGH COURT

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