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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 13770/2018

Date:

19/3/18

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED
19/3/2018
DATE SIGNATURE

In the matter between:

IDH WEBB CC

APPLICANT

And

ARC INTERNATIONAL TELECOMS (PTY) LTD

FIRST RESPONDENT

PHILSWA PROJECTS (PTY) LTD

SECOND RESPONDENT

UBUNTU BUSINESS ADVISORY CONSULTING
(PTY) LTD

THIRD RESPONDENT

JUDGMENT

PRETORIUS J.

- (1) This is an urgent application in which the applicant seeks relief only against the first respondent, directing the first respondent to switch on the servers, allegedly the property of the applicant, that are in the possession of the first respondent. Furthermore to interdict and restrain the first respondent from directly or indirectly interfering or tampering with the servers and to direct the first respondent to provide the applicant with unhindered access to the servers. It is common cause that the relief sought is for a final interdict.

- (2) An application to strike out certain paragraphs in the applicant's replying affidavit was issued by the first respondent and failing this application to strike out, an application for a rejoinder was argued. I have dealt with both in a short judgment. The point *in limine* by the applicant was also disposed of. I will now deal with the merits of the main application.

THE PARTIES:

- (3) The applicant is an internet-based company that specializes in the provision of full internet access, web design, e-mail, hosting and data base solutions, domains, sub-domains and dynamic DNS. The applicant has forty five full time clients who depend on the applicant to provide these services.

- (4) The second respondent is a company specializing in providing PBX and SIP-based IP-PBX systems for all centres and other service providers and businesses.
- (5) The third respondent is an internal auditing, forensics and advisory service. The third respondent is a customer of the second respondent.

BACKGROUND:

- (6) The first respondent rented a rack at a 24-hour data centre, namely Teraco Data Environments. This rack can be divided and shared with other entities.
- (7) According to the applicant, the applicant and the first respondent had entered into "an informal oral agreement". The terms of the agreement were that the applicant would share the rack space with the first respondent, the applicant would bear the costs for sharing the rack-space with the first respondent; the applicant was to be responsible for the technical support, maintenance and cost to keep the server operational and that the applicant would have access to the server 24-hours a day and the first respondent would ensure that the server is on 24-hours a day.

- (8) According to the applicant the first and third respondents entered into an agreement of which the applicant does not know the terms. A dispute arose between the first and third respondents apparently as the third respondent alleged that the work done by the first respondent was substandard. On 26 February 2018 the second respondent received a notice claiming that the second respondent was in arrears with payment. The applicant avers that there is no dispute between the applicant and the first respondent. As a result of the dispute between the first, second and third respondents, the first respondent turned the applicant's servers off on 23 February 2018, but the servers were switched on again shortly afterwards. The servers were switched off again on 26 February 2018. The result is that the applicant is unable to provide a service to its 45 customers and has already lost 17 customers due to not being able to provide the service.
- (9) A letter of demand was sent on 26 February 2018 to the first respondent, which *inter alia* demanded that the applicant's servers be switched on before or on 27 February 2018, failing which an urgent application would be launched.
- (10) The only response from the first respondent was that the letter of demand was sent to their attorneys.

LEGAL FRAMEWORK:

- (11) In order to succeed in obtaining a final interdict the applicant has to prove a clear right, that is a right clearly established; an injury committed or reasonably apprehended and the absence of any other satisfactory remedy available to the applicant.
- (12) The clear right the applicant relies on is the informal oral agreement entered into in August 2017 that provided that it would share rack space with the first respondent at the latter's cabinet in Teraco's Isando Campus. The further terms were that it would bear all the necessary costs for technical support and maintenance costs to keep the server operational, which would cause it to have access to the server 24 hours a day. The first respondent denied the existence of the agreement in the answering affidavit and set out that it had at all material times only contracted with the second respondent.
- (13) The applicant's evidence is that most of the applicant's clients are businesses and professional people, who have since the servers have been switched off, no access to their e-mails, internet or data stored on the servers. The applicant derives approximately R30 000 per month from its clients for the services provided. Due to the loss of income the applicant will no longer be able to employ the two employees. Therefor injury has been caused and stands to be caused to the applicant through the actions of the first respondent. Despite communicating with the first respondent, the first respondent refuses to

switch on the server until such time that the second respondent has paid the unpaid invoices.

(14) It is clear from the founding affidavit that the applicant does not set out who represented it once entering into the agreement. It is only alleged in the replying affidavit that it was Mr Swart on behalf of the applicant. In the replying affidavit the applicant alleged that the first respondent represented by Mr Smorthit offered to let the applicant share the shelves and Mr Swart had accepted the offer on behalf of the applicant.

(15) I have perused the e-mails referred to by the applicant in the replying affidavit and find that they were sent to and from Openserve, Teraco and Philip Swart, with his email address that of the second respondent and not that of IDH Web CC. The emails between Mrs Bester, on behalf of IDH Web CC, to Mr Smorthit in May 2017 contained enquiries regarding the first respondent's assistance and service in connection with the storage of applicant's server. Once more it is only set out in the replying affidavit that Mr Smorthit had been at all times fully aware that the first respondent were providing storage services to the applicant. The first time it is set out that it is just one server belonging to the applicant, is once more in the replying affidavit.

(16) It is trite that a party has to make out its case in the founding affidavit

and cannot supplement it in the replying affidavit to augment its case. The question the court has to deal with is whether the agreement can be inferred from the proved facts and circumstances.

(17) Rule 18(6) of the **Uniform Rules of Court** provides:

“A party who in his pleading relies upon a contract shall state whether the contract is written or oral, and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.”

In **Roberts Construction Ltd v Dominion Earthworks Ltd**¹ the court found:

“Another aspect of the latter must now be mentioned. Rule 18(6) does not in terms refer to the case where the contract relied upon in is implied. It seems, however, a necessary corollary that a pleader could hardly avoid disclosure of the fact that he is relying upon an implied contract. Failure to state whether a contract is written or oral would naturally lead to disclosure of the reason, and describing “when, where and by whom it was concluded” would in many instances entail the setting out of the conduct relied upon.”

¹ 1968(3) SA 255 (AD) at p 262 A-B

- (18) According to **Christie's The Law of Contract in South Africa**² the court has to undertake a three stage enquiry. The first stage is where the court has to decide, on the preponderance of probabilities which facts have been established. The applicant, in the founding papers, alleged that it was a term of the contract that it would bear all the necessary costs to share the rack space with the first respondent. There is no indication as to what the amount would be per month and which services would be paid for. In the replying affidavit Mr Swart contended that the applicant, at all times, were willing to pay for the cross connect, but had not done so as the first respondent never furnished the applicant with an invoice.
- (19) It is thus clear that in the founding affidavit the applicant had not made the averment as to who represented the applicant and who represented the first respondent when they entered into the agreement. Furthermore, it is not clear in the founding affidavit as to what the costs would be for the service rendered. There was no indication as to which date would be the relevant date when the service would be supplied. **Christie**³ reiterates that the law of contract is based on true agreement "*and a party whose state of mind is 'on balance I think we are probably in agreement' does not have a contract*".

² 6th Edition, page 88

³ *Supra* page 88

(20) In **Boerne v Harris**⁴ it was held that if the conduct of the parties and the circumstances surrounding the parties were not so clear, so unequivocal, so unambiguous that the parties were in agreement, then no contract exists.

(21) In **Landmark Real Estate (Pty) Ltd v Brand**⁵ it was held by Lazarus J:

"To return to the question whether plaintiff acquired the mandate by purchase or cession from Maximum. In summing up the test for a tacit contract, Christie The Law of Contract in South Africa 2nd ed at 99 says:

'In order to establish a tacit contract, it is necessary to prove, by the preponderance of probabilities, conduct and circumstances which are so unequivocal that the parties must have been satisfied beyond reasonable doubt that they were in agreement. If the court is satisfied on the preponderance of probabilities that the parties reached agreement in that manner, it may find the tacit contract established.'"

(22) In **Triomf Kunsmis (Edms) Bpk v AE & CI Bpk en Andere**⁶ Coetzee J found:

"In die huidige geval word 'n finale bevel aangevra by kennisgewing van mosie-prosedure. Hier is nie sprake van

⁴ 1949(1) SA 793 (A)

⁵ 1992(3) SA 983 (W) at 985 I-J

⁶ 1984(2) 261 (WPA) at p269 B

slegs 'n tydelike bevel pendente lite nie en dit is by uitnemendheid ook die soort geval waar die volgende stelling wat NESTADT R in Shephard v Tuckers Land and Development Corporation (Pty) Ltd (1) 1978 (1) SA 173 (W) op 177 aanhaal, van toepassing is:

"It is founded on the trite principle of our law of civil procedure that all the essential averments must appear in the founding affidavits or the Courts will not allow an applicant to make or supplement his case in his replying affidavits and will order any matter appearing therein which should have been in the founding affidavits to be struck out."

Verder aan:

"This is not however an absolute rule. It is not the law of Medes and Persians. The Court has a discretion to allow new matter to remain in a replying affidavit, giving the respondent the opportunity to deal with it in a second set of answering affidavits. This indulgence, however, will only be allowed in special or exceptional circumstances."

- (23) There can be no doubt and it is not in issue that the first and second respondents had entered into a written agreement. At all material times Mr Swart represented the second respondent during the conclusion of the agreement. It was Mr Swart who on 23 February 2018 undertook to make payment of the outstanding amount on behalf of the second respondent to the first respondent after receiving the

suspension notice from the first respondent.

(24) The emails annexed to the replying affidavit do not conclusively prove that these emails related to the applicant. There was no form completed, similar to that completed on behalf of the second respondent, on behalf of the applicant which one would have expected if there indeed existed an agreement between the applicant and the first respondent.

(25) It is equally strange that, according to the applicant, it never received an invoice since using the services from October 2017 until the server was switched off in February 2018. The applicant never made an attempt to enquire as to what it owed for the service supplied by the first respondent. One would expect a party to an agreement, where payment for a monthly service is involved, to ascertain what the amount would be. Furthermore, if no invoice was forthcoming, the applicant could have made enquiries. Here the applicant seemingly accepted the service for months, without knowing what amount to pay or to enquire about it and not paying for the service provided.

(26) In **Amler's Precedents of Pleadings**⁷ it is said by the learned author:

"An implied term arises by operation of law, whilst a tacit term is an unexpressed provision of the contract, derived from the

⁷ LTC Harms, 7th Edition at page 112

common intention of the parties which is inferred from the express terms of the contract and from the surrounding circumstances."

(27) I have considered all the facts, lengthy arguments by counsel, as well as the decisions as mentioned above. In the present application I cannot find that the applicant has proved on a balance of probabilities that the applicant and the first respondent had a common intention that the applicant would rent the server from the first respondent if I apply the principles as set out in the authorities discussed above.

(28) I have considered the first respondent's counsel's submissions regarding costs on a punitive scale, but cannot find that it is justified in these circumstances.

(29) In the result the application is dismissed with costs.

A handwritten signature in black ink, appearing to read 'Pretorius', is written over a horizontal line.

Judge C Pretorius

Case number : 13770/2018

Matter heard on : 13 and 14 March 2018

For the Applicant : Adv Breytenbach

Instructed by : FJ Jordaan Inc

For the Respondent : Adv MW Verster

Instructed by : BMV Attorneys

Date of Judgment : 19 March 2018