REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 32648/2014

4/9/2015

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

04/09/2015 ....
DATE

SIGNATURE

In the matter between:

VAN DE VENTER MOJAPELO (PTY) LIMITED Applicant

and

AUTOMAN AUTO TRADING (PTY) LIMITED Respondent

J U D G M E N T

TEFFO, J:

[1] The applicant seeks judgment against the respondent for payment of an amount of R541 000,46 which amount it alleges is due and payable to it by the respondent for services rendered at the respondent's special instance and request.

[2] It further alleges that the respondent admitted liability in respect of the aforesaid debt.

BACKGROUND FACTS

[3] In November 2012 the parties concluded an agreement in terms whereof the applicant would send data messages in the form of short message services ('*SMS*') on behalf of the respondent to various members of the public.

[4] The services were rendered by the applicant in November and December 2012 and further in January 2013 in the total sum of R741 000,46.

[5] Subsequent to the rendering of the services thereof, the applicant issued invoices to the respondent and various e-mail messages were exchanged between the parties. All the e-mail messages allegedly received by the respondent from the applicant were directed to a Mr Andre van Zyl ("Mr Van Zyl") who from 15 January 2013 communicated with the applicant regarding the matter. In the email dated 15 January 2013 Mr Van Zyl stated the following:

> *"… Your email below refers. We are truly apologetic about the outstanding payment. We had a systematic error and accordingly our billing went out very late. We are waiting on money to come in and as it comes in, we will start paying you within the next two weeks.*
>
> *True apologies …"*

[6] On 19 March 2013 the respondent made an electronic payment of R200 000,00 from its banking account to the applicant in part payment of the debt.

[7] The outstanding sum of R541 000,46 remains unpaid and the applicant launched an application for the winding up of the respondent under case number 31786/13 on 21 May 2013 which application was dismissed.

[8] An amount claimed by the applicant was paid into the respondent's attorneys' trust account two days before the date of the hearing of the application. To date the debt remains unpaid.

[9] The application is opposed.

CONTENTIONS BY THE RESPONDENT

[10] The applicant has instituted the application against the incorrect respondent, Data Solutions (Pty) Ltd ("*Data Solutions*") and not the respondent is the applicant's debtor.

[11] It conducts business of purchase and sale of second-hand motor vehicles and no other business. Data Solutions conducts business by providing telemarketing services to its clients and transmitting short message service (SMS) to its targeted consumers whose details are stored on its database.

[12] Mr Frans Lodewyk Munnik Basson ("*Mr Basson*"), represented Data Solutions in November 2012 when the agreement that the applicant would provide the SMS service to Data Solutions ("*the SMS agreement*") was concluded.

[13] The applicant provided the service to Data Solutions by transmitting the SMSes to the consumers.

[14] It disputes that the SMS agreement was entered into between the applicant and the respondent.

[15] It also disputes that the applicant rendered any services to it and that it is indebted to the applicant in the amount claimed or for any other amount.

[16] The invoices rendered to the respondent which remain unsettled, were incorrectly rendered to it. The invoices were responded to by Mr Van Zyl who is the Chief Executive Officer of Data Solutions.

[17] It has on 19 March 2013 by means of an inter-company loan and for and on behalf of Data Solutions paid the sum of R200 000,00 in part settlement of Data Solutions's debt to the applicant.

[18] In terms of the emails exchanged between the parties, it was not the respondent but Data Solutions that acknowledged its indebtedness to the applicant.

[19] It disputes that it made several undertakings to pay the outstanding amount to the applicant.

[20] Although the amount of the debt was not disputed, it was at all times disputed that the respondent is liable for the payment of the debt.

[21] There is a material dispute of fact as to who the correct debtor is and such dispute of fact was foreseeable when the applicant launched the application. It was raised in the applicant's prior winding up application against the respondent.

[22] The issue for determination is whether there are disputes of fact incapable of resolution on the papers before me or not. Should I find that they are there, I further have to determine whether such disputes of fact are real, *bona fide* and genuine disputes of fact. Should the answer be in the affirmative, that will be the end of the matter but should the answer be in the negative I will then deal with the application before me.

[23] In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 the general principle that was laid down by Van Wyk J with whom De Villiers JP and Rosenow J concurred in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at p 235E-G was referred to. It was articulated as follows:

"… where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order … Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."

[24] Further to the above the following was said:

"It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order whether it can be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however not confined to such a situation. In certain instances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 T at pp 1163-5, Da Mata Otto NO 1972 (3) SA 858 at 882D-H. If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (Rikhoto v East Rand Administration Board 1983 (4) SA 278 (W) at p 283E-H). Moreover, there may be exceptions to this general rule, as for example, where the allegations or denials of the respondent are so far fetched or clearly untenable that the court is justified in rejecting them merely on the papers."

[25] It is common cause between the parties that an agreement to render the service of short messages to members of the public was concluded in November 2012 and that in terms of that agreement the applicant rendered the service. It is also common cause that after rendering the service, invoices

were issued and sent to the respondent. The amount claimed was not disputed. What is in dispute is who is the party that concluded the agreement with the applicant in November 2012 and on whose behalf was the service rendered. Further to the above were the invoices sent to the correct party that concluded the contract with the applicant.

[26] I have to look at the facts placed before me in order to be able to determine if the disputes of fact raised by the respondent are real, genuine and *bona fide*. While the applicant alleges that it contracted with the respondent, it rendered the service on behalf of the respondent and then sent the invoices to it, the respondent contends that Mr Basson represented Data Solutions when he concluded the contract with the applicant during November 2012. Mr Basson deposed to an answering affidavit on behalf of the respondent in opposition of this application. He states in the answering affidavit that he is a director of the respondent and also that of Data Solutions. It is common cause between the parties that both the respondent and Data Solutions carry and use the name "*Automan*". The invoice issued by the applicant was issued to Automan Auto Trading (Pty) Ltd, the respondent in this matter. It is common cause between the parties that on 19 March 2013 the amount of R200 000,00 in part payment of the amount due and payable to the applicant, was paid by the respondent to the applicant.

[27] All the emails from the different representatives of the applicant, namely Deon Joubert, Tabetha Henwood, Karin van de Venter, etc, to name but a few, in respect of outstanding invoices, were sent to the different

representatives of '*automan*', *viz*, Gary, Pierre, Andre's emails '@ *automan*' and also to frans@bassonia.com. On annexure FA 14 Mr Basson replied to an email from Tabetha Henwood of the applicant and said:

> "*I have send it to Andre, Pierre and Amit must check the invoice, then we bill our client and then Andre pays that's the process.*"

On annexure FA 13 an email from Pierre@automan.co.za to Tabetha Henwood, Frans Basson and others Pierre states:

> "*Hi Tabetha,*
>
> *I received a message an hour ago ... As communicated before, Andre our CEO is responsible for commercials. He is copied on this email and his number is 0848006664.*"

[28] Taking into account that the respondent and Data Solutions use the name "*Automan*" to do business, it appears that the two companies have people like Mr Basson as a director of both companies and that the people the applicant communicated with via email seem, e.g Mr Van Zyl, to be carrying double-roles at Data Solutions and at the respondent, it was prudent for all those who dealt with the matter and who received the invoices from the applicant to inform it that "*sorry you are dealing with the wrong person*".

[29] The applicant sent its invoices and emails to the respondent. At no stage was it ever told that it was sending the invoices to the wrong company and/or that it did not render the service to the respondent but to Data Solutions. Mr Basson, in particular also responded to some of the emails

received from the applicant. He never raised the issues that are now being raised in the papers. He is the person who now states in the answering affidavit that he represented Data Solutions when the contract was entered into. The contract was orally concluded. The fact that the applicant's emails were responded to by representatives of Automan Data Solutions is neither here or there. What I also find strange is the fact that the respondent made a part payment of R200 000,00 from its own account to the applicant without even questioning the amount claimed and not telling the applicant that its debtor is Data Solutions. The respondent paid the amount and kept quiet. It was only now in the papers that it contends that it made an inter loan payment to the applicant on behalf of Data Solutions.

[30] It is not for me to deal with what came before the court at the winding up application. The fact of the matter is that indeed the issue as to who is the debtor of the applicant was raised as a point *in limine* but it was dismissed.

[31] It is alleged by the applicant that the amount that is due and payable to it was paid by the respondent in the attorney's trust account two days prior to the winding up application. The respondent just disputed the allegations.

[32] From the facts dealt with *supra* as to the conduct of the respondent prior to winding up application I am satisfied that the disputes of fact raised by the respondent are not real, genuine and *bona fide* disputes of fact. I am persuaded to reject them as not being credible and probable as it is my

considered view that are just a recent fabrication. This will therefore enable me to deal with the applicant's application.

[33] I am satisfied from the facts that the applicant concluded an oral agreement with the respondent as alleged and also rendered the service on behalf of the respondent at its special instance and request. I also find that the invoices were correctly sent to the respondent and that is the reason why the respondent made a part payment of its debt towards the applicant.

[34] Marais AJ said the following in *Cape Town Municipality v Allie NO* 1981 (2) SA CPD at 11H to 12C:

> *"As was recognised in Lubbers and Canisius v Lazarus (supra) part payment of a debt will ordinarily give rise to a tacit acknowledgement of liability for the balance. If the debtor expressly states, when making payment, that it is payment on account, or a part payment, the inference that he is acknowledging liability for the unpaid balance is irresistible. And even if the debtor does not state, when making a payment which is in fact less than the full amount which is due, that it is a payment on account, or in part payment, the inference that liability for the unpaid balance is being tacitly acknowledged would, I think ordinarily be justified.*
>
> *But it is conceivable that there may be circumstances in which it would not be correct to infer an acknowledgement of liability for a balance from the making of a payment simply because, objectively regarded, it is a part payment. There may be something in the prior dealings between the parties, or the prior or contemporaneous conduct of the debtor, which would negate such an inference. It has been said that this does not matter."*

[35] The respondent has never disputed the amount claimed as per the invoices sent to it by the applicant. Instead in its emails to the applicant it

sought an extension of time to make payment. There has always been an intention to pay and that is the reason why when it was reminded of the due date of 15 March 2013, it immediately paid without hesitation.

[36] It is my considered view on the papers that indeed the respondent admitted liability by its conduct and also making a part payment to the amount that was due and payable to the applicant. The contention by the respondent that it was Data Solutions which corresponded and admitted liability to the applicant is without merit taking into account my reasoning with regard to how I found the respondent's conduct in dealing with the applicant *supra.*

[37] It can also not be said under the circumstances that the amount claimed is not liquid in that it was not disputed and already a part payment of it, has been effected.

[38] I am satisfied under the circumstances that the applicant has made out a case for the relief sought and that it is therefore entitled to judgment as prayed for.

[39] In the result I make the following order:

39.1 Judgment is granted in favour of the applicant against the respondent for payment of the amount of R541 000,46 with costs.

M J TEFFO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

HEARD ON	2 DECEMBER 2014
FOR THE APPLICANT	K D RAMOLEFE
INSTRUCTED BY	V V M ATTORNEYS (REF Jorica Hamman/TF)
FOR THE RESPONDENT	G D WICKINS
INSTRUCTED BY	BROOKS & BRAND INC (REF MR A Brooks/1743) C/O EDELSTEIN BOSMAN INC (REF MR Scrooby/Rosemary/1BOO2094)
HANDED DOWN ON	4 SEPTEMBER 2015