

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No.: A301/2007

In the appeal between:

NVM BELEGGINGS & VERSEKERINGS

Appellant

and

ACT COMPUTERS

Respondent

CORAM:

BECKLEY, J *et* RAMPAL, J

JUDGEMENT:

RAMPAL, J

HEARD ON:

28 JULY 2008

DELIVERED ON:

14 AUGUST 2008

[1] This appeal originated from the Kroonstad District Magistrate Court. The appellant as the plaintiff sued the respondent as the defendant. The claim of the appellant was based on two causes of action.

[2] As regards the first claim the appellant alleged in the particulars of claim that the parties concluded an agreement during August 2003. The respondent supplied and installed certain equipment at the request of the

appellant. Among others, the equipment consisted of an antenna, called WiFi, and connective cables which linked the antenna to the appellant's computers. The WiFi system replaced the appellant's existing internet access system. The WiFi connection was supposed to give the appellant access to internet round the clock. The appellant paid to the respondent an amount of R3 687,90 for the provision and installation of the antenna.

[3] The appellant further alleged that notwithstanding the WiFi, it never had reliable internet access because the said equipment was either improperly installed or assembled. The malfunctioning of the equipment led to a dispute between the parties. Because of such dispute, the respondent unilaterally removed the antenna from the appellant's business premises.

[4] On account of the respondent's breach, the appellant repudiated the agreement and demanded the refund of the amount of R3 689,90 and other ancillary relief. This completes the appellant's pleading in respect of the first claim.

[5] In its plea the respondent admitted the agreement but denied that the costs of supplying and installing the equipment amounted to R3 687,90. Respondent specifically averred that the equipment supplied and installed remained the property of the respondent. The respondent admitted that it removed the antenna and took it back but averred that it was entitled to cancel the agreement and to take the equipment back seeing that the appellant had failed to make payments in terms of the agreement. The respondent denied the appellant's allegation to the effect that the equipment did not properly function. It was the respondent's case that it cancelled the agreement on account of the appellant's breach. Therefore the respondent pleaded that the appellant was not entitled to a refund of any amount. Accordingly the respondent prayed that the appellant's first claim be dismissed with costs. This completes the respondent's pleading in respect of the first claim.

[6] As regards the second claim the appellant alleged that during August 2003 the respondent wrongfully removed

certain computer programmes and equipment from the premises of the appellant.

[7] As a result of the respondent's actions, the appellant alleged that it suffered damages in the amount of R8 725,00 which represented a reasonable and equitable costs of replacing the computer discs and programmes. Before the proceedings were instituted the appellant received an amount of R4 350,00 from its comprehensive insurers. In the circumstances the appellant demanded payment of the balance of R4 375,00 plus ancillary relief from the respondent.

[8] In its plea the respondent denied all the allegations relating to the appellant's second claim as if each allegation had been specifically traversed. This in brief completes a summary of the pleadings. I now proceed to summarise the evidence.

[9] The matter served before Mr. I Redelinghuys, District Court Magistrate on the 24th March 2006. On behalf of the

appellant appeared Mr. Grimbeek and on behalf of the respondent Mr. R C van Rooyen.

[10] The version of the appellant was narrated by Christoffel Petrus Booysen. He testified that the WiFi equipment was in actual fact an antenna which had been mounted against the wall in the appellant's building. After the respondent had installed the antenna it also installed certain programmes on the appellant's computers. The appellant was obliged to pay a certain monthly fee to the respondent in respect of the computer programmes. These programmes together with the antenna were supposed to give the appellant access to the internet. However, the equipment did not function properly. On several occasions the computers and programmes were removed from the appellant's premises to the respondent's premises for repairs.

[11] For months the appellant could not access any internet services. The appellant withheld payment of the monthly fee because there was simply no internet access available. Notwithstanding its failure to provide internet services the

respondent continued to debit the appellant's account with the monthly fee. With the passage of time, the continued debiting of the appellant's account by the respondent and the continued withholding of the payment by the appellant led to a dispute. The dispute was about payment of the monthly fee relating to the computer programmes and not payment relating to the purchase price of the WiFi. The appellant queried a number of debits on its account. Such queries were by agreement reduced to writing as set out in annexure "C".

- [12] Booyesen testified further that the WiFi installation meant that an antenna was mounted against the wall of the appellant's building and that he purchased such an antenna from the defendant for R3 687,90. The internet access fee was R570,00 per month. The appellant had to pay this fee for the use of the internet services which the appellant was supposed to receive regularly from the respondent. He confirmed that there were no problems relating to the antenna and that the installation of the software in the computers created all sort of problems. In addition to the payment of the purchase price in respect of

the antenna the appellant also paid the monthly fee for the first month in respect of the internet access services rendered from November 2003 to March 2004 both inclusive.

[13] The respondent frequently removed appellant's computers in an attempt to properly install the programmes in the computers. The dispute which arose concerned the accounts which the respondent delivered to the appellant in respect of the internet access services which services the respondent had failed to make available to the appellant. He also testified that the parties discussed the problem, resolved it and agreed as to what the correct account for the internet access services should be. Such an agreement was reached on the 19th of March 2004 and reduced to writing.

[14] Still on the 19th March 2004 the appellant sent an e-mail to the respondent in which the terms of the agreement were spelled out. After doing so Booysen went home for lunch. After lunch he returned to his office and discovered that all the appellant's computers were dead and the screens

blank. Booyesen heard from his secretary what happened to the computers and why. After the discussion with his secretary Booyesen went outside and inspected the building. He discovered that the antenna, which had been mounted against the wall, had physically been ripped off and removed. He immediately telephoned Harry Knepscheld, a representative of the respondent. In a rather rude and hostile manner Knepscheld informed him that the equipment had been removed because the appellant did not pay for the services rendered.

- [15] Booyesen told his secretary that, contrary to what she was told, he did not send any request to the respondent to remove anything. He realised that the respondent had made false and fraudulent representations to his secretary in order to remove the programmes from the computers, to wipe off such programmes and also to remove the antenna from the wall in the absence of Booyesen. From his workplace Booyesen went to his place of residence. There he discovered that the computer discs had been removed and the programmes wiped off from the computer. From his domestic worker he heard a similar story as the one he

had heard from his secretary. Everything had been removed by false pretences. His impression was that the respondent removed the equipment from the appellant's office and from Booysen's home because he was probably unaware that the appellant had paid the amount as agreed on the 19th March 2003.

- [16] During cross-examination it was put to Booysen that the appellant did not purchase the antenna that the appellant only paid for the installation of the equipment and the connection of the internet access services. Booysen denied the suggestions. He answered that the unit referred to was the antenna and that he had purchased it from the respondent. He added that subsequent to the removal of the antenna by the respondent, the appellant purchased a similar antenna from another supplier for precisely the same amount. Booysen repeatedly stated that he gave no one the right to remove the goods for which he had paid or to suspend the internet access services for which he had also paid.

[17] He denied that he ever received any email which Spidey, on behalf of the respondent, had sent to the appellant on the 19th March 2004. He doubted whether the alleged email was ever sent since it did not have any details of its source and destination. Booysen denied the suggestion that the email which the appellant sent to the respondent on the 19 March 2003 could, by any stretch of the imagination, be regarded as an invitation which authorised the removal of the discs from the computers and the antenna from the wall. Booysen confirmed in conclusion that he, on behalf of the appellant, bought a replacement antenna from Johan Geldenhuys who carried on business under the name E3. He repeated that he paid the same price for the replacement antenna as he had paid for the original antenna supplied by the respondent. In both instances he became the owner of the antenna.

[18] The version of the respondent was narrated by two witnesses, of whom Hermanus Johannes Knepscheld was the first. He confirmed that he was also known as Spidey. He testified that the “*mounting and the unit installation*” was indeed an antenna as described by Booysen. Such an

antenna was physically attached to the roof of the building at the request of the appellant. He testified that when the services were described as “*mounting an unit installation*” such services represented items which the respondent was entitled to remove. The respondent remained the owner of the antenna. The appellant paid only for the services and not for the antenna. He referred to clause 8 of the quotation, “exhibit a”, and said that the WiFi 100 MB equipment in that clause referred to a radio antenna which the respondent had provided to the appellant. It was the hardware component of the system which provided internet link. The hardware was never sold to the appellant.

- [19] Contrary to the testimony of the appellant’s witness he testified that the software data stored on the computers of the appellant was not erased but merely rolled back and that it was still stored on the computers. The respondent’s agents never removed the data from the appellant’s computers, he said. He confirmed that the so-called “*mounting and unit installation*” was in reality the physical equipment, namely the equipment which was installed at the roof of the customer’s building. The cost of the

antenna, the box and the cables that linked the antenna to the computers was R7 000,00.

[20] During cross-examination Knepscheld denied that the respondent removed the antenna under false pretext. He could not explain why another supplier who sold and supplied the appellant with an antenna as the respondent had done did not remove such an antenna when the contract expired. He supposed that E3, the respondent's competitor, did not remove the antenna as the respondent had done because the way it did business was different from the way the respondent did. He conceded that if they acted as the appellant said they did, then they acted in a completely wrong manner.

[21] It was suggested to him that the respondent could not have sent an email to the appellant on account of the private cassettes that were removed from the computers early that morning. He admitted that there was no proof that the email was indeed sent to the appellant and received. He confirmed that he was present on the premises of the appellant when the things were removed. He was assisted

by two technicians to remove the equipment. Although they removed the antenna and the box they did not remove the connective cables.

- [22] He volunteered to say that he told Booysen at the time they made the oral agreement that Booysen should remember that the equipment belonged to the respondent. He added that Booysen even acknowledged that the equipment did not belong to him. Although it was earlier suggested to the appellant's witness that the respondent was invited to go and remove the equipments from the appellant's premises, Knepscheld admitted that he and his companions went to the appellant's business premises on their own, took the law into their own hands and removed things. He also admitted that they did not do so in terms of the contract. They did so on their own, but again he repeated that he told Booysen that the equipments did not become the property of the appellant, the contract notwithstanding. He answered that the timing of the removals both at Booysen's office and home was unfortunate. But he immediately changed the tune and denied that he and his companions were ever at the home of Booysen.

[23] Johan Geldenhuys also testified as the respondent's second witness. He testified that he was an internet service provider in 2004. The appellant was one of his customers. As time went on he received a number of complaints from the appellant. Booysen, on behalf of the appellant, often complained about the services which Geldenhuys's company was rendering. Sometimes the appellant's complaints related to his account. Business relationship between him and Booysen broke down. He paid an amount of R1 000,00 to the appellant in order to avoid a legal action which the appellant was threatening to take against his business enterprise.

[24] During cross-examination Geldenhuys conceded that some of the complaints of the appellant were valid. The complaints related to the computer software. Usually his business enterprise rented out radio antennas but, in this instance, they sold the antennas to the appellant. On behalf of the appellant, Booysen purchased the antennas and the appellant became the owner thereof because his business enterprise, E3, no longer required such antennas.

The appellant bought two antennas from E3 and paid R4 000,00 for each. By paying for the antennas the antennas became the property of the appellant. The appellant's complaint was that the internet with a new WiFi system off-loaded data slower than it did while it was using the old system he had replaced with the new system.

[25] He answered that like the respondent, his business enterprise was internet service provider but that when the contract between his business enterprise and the appellant terminated the appellant became the owner of the antennas. His business enterprise had its own network and did not share the same reception tower with the respondent. Responding to the question by the court he stated that the amount of R4 000,00 was all inclusive of the cost of supplying the antenna, the cables, the box as well as the installation. He told the court that the cost price of the WiFi antenna varied between R2 500,00 and R3 000,00. However, the service providers resold it for more in order to make profit. This completes the evidence of the defence.

[26] On the 24th May 2001 the Magistrate delivered judgment. He granted absolution from the instance with cost against the appellant in respect of each of the two claims. It is against this order that the appellant now comes on appeal before us. Mr. Claasen, counsel for the appellant, conceded that the magistrate was correct in granting absolution in respect of the second claim of the appellant. Therefore the appellant abandoned its appeal in respect of the second claim. The judgment, therefore, concerns the order of absolution with costs in respect of the first claim only.

[27] As regards the version of the appellant the magistrate found:

“Verder is dit duidelik dat die eiser bedoel het, en op daardie wyse kontrakteer het dat hy die antenna gekoop het – dat hy eienaar van die toerusting geword nie.”

It follows from this passage that the magistrate accepted the appellant's version to the effect that he bought the antenna from the respondent, paid for it and thereby became the owner thereof.

[28] As regards the version of the respondent the magistrate found:

“Die hof is ook van oordeel dat hy seker nie, hoe laakbaar sy optrede ook mag blyk, as hy die toerusting verkoop het, dit sou gaan verwyder nie – hy sou dan sekerlik net die internet-aansluiting (die diens) gestop het.”

It is also obvious from this passage that the magistrate accepted the evidence of the respondent to the effect that the respondent leased the antenna to the appellant and that the respondent remained the owner of the antenna notwithstanding delivery thereof to the appellant and that the respondent was therefore entitled to reclaim such property upon the termination of the lease contract.

[29] The magistrate reasoned the matter as follows:

“Dit wil dus blyk dat ten opsigte van die verkoop al dan nie en die gepaardgaande eiendomsreg ten opsigte van die toerusting daar nie wils ooreenstemming tussen die partye (aldus die getuienis op rekord) was nie.

Dit blyk dus dat nie 'n kontrak tot stand gekom het nie – vanweë die gebrek aan wils ooreenstemming.

Die eis van die eiser teen die verweerder is egter nie baseer op restitusie as gevolg van 'n onderlinge kontrak as gevolg van gebrek aan wils ooreenstemming nie.

Dit is 'n eis baseer op kontrakbreuk (volgens ie besonderhede van vordering) deur die verweerder en dat toerusting, die eiendom van die eiser wederregtelik deur die verweerder verwyder is.

Ten opsigte van die eise van die eiser teen die verweerder, soos dit ingeklee is, dra die eiser die bewyslas om te bewys dat die kontrak tot stand gekom het op die termes en voorwaardes soos deur die eiser beweet.

In die omstandighede kan die hof op die getuienis voor hom nie 'n bevinding maak op hierdie aspek nie.”

- [30] The cardinal finding of the court below was that no valid agreement came into existence following the negotiations the parties had at Kroonstad on about the 25th August 2003. This was so because the court found on the one hand that the evidence of the appellant was credible. It will be recalled that the evidence of the appellant was that at the time of the negotiations the appellant honestly believed that the deal was about the sale of the radio antenna. That

the appellant purchased the antenna from the respondent, that the appellant paid the purchased price to the respondent and that the appellant accordingly became the rightful owner of the antenna on delivery thereof.

[31] The foregoing was not the only finding the court below made. On the other hand the finding of the court was that at the time of the negotiations the respondent genuinely believed: that the transaction was about the hiring out of the radio antenna; that the appellant rented the antenna from the respondent; that the appellant paid for the rental and not for the purchase of the antenna and that the respondent remained the owner of the antenna despite delivery thereof to the appellant.

[32] In the theory of error an error is regarded as material in the case where it pertains to a person, viz error *in persona*, where it pertains to a thing, viz error in *corpore* or where it pertains to a transaction, viz error in *negotio*. In this instance, the mistake in issue is an error in *negotio* because it is a mistake about the legal nature of the transaction concerned. According to the law of contracts

no agreement whatsoever comes into existence in such circumstances. In a case where each party acts under the mistaken impression of the other party's real intention and one is unaware of the mistake under which the other is labouring, we have a case of mutual mistake. **DIAMOND v KERNICK** 1974 (3) SA 69 AD.

[33] It was argued on behalf of the appellant that in view of the finding of the court below that the parties were not *ad idem* as to the true nature of the transaction they were concluding, the court erred in granting an absolution from the instance instead of ordering restitution. On behalf of the respondent it was submitted that the evidence was overwhelming and clear that the appellant had not pleaded restitution but rather contractual breach and that it had failed to establish the alleged breach. That being the case Mr. De Wet counsel for the respondent submitted that the court below was correct in granting absolution from the instance in respect of the first claim as well.

[34] It was incumbent upon the appellant as the plaintiff to prove the agreement as well as the terms thereof. The finding by

the court below that there was no agreement between the parties and the order it gave suggested that seeing that the appellant on whom the onus rested, had failed to prove the agreement there could have been no contractual breach as averred in the particulars of claim. Indeed the appellant's case was not elegantly pleaded. However it remains the duty of the court to ensure that justice is done.

- [35] Where the evidence is not in complete harmony with a party's case as pleaded, the important duty of the court was articulated as follows by Erasmus: **Superior Court Practice**, page 129:

“However, since pleadings are made for the court, not the court for pleadings, **it is the duty of the court to determine what are the real issues between the parties and**, provided no possible prejudice can be caused to either party, **to decide the case on these issues**. The court must look at the substantial issue between the parties and not blindly follow the *ipsissima verba* of the pleadings.”

See **ROBINSON v RANDFONTEIN ESTATE GOLD MINING CO LTD** 1925 AD 173 on 198 and **E C CHENIA &**

SONS CC v LAMÉ & VAN BLERK 2006 (4) 574 (SCA) at 479f – 580g.

[36] The real issues which emerged from the evidence was, the appellant claim that it was the rightful owner of the antenna in dispute and the respondent's converse claim that it was the legitimate owner of the same thing. These were the substantive and defining issues between the parties. In these circumstances the appellant's evidence should not have been underplayed because it did not plead mutual mistake and flowing from that, pray for restitution.

[37] The finding of the court that the respondent did not intend selling the antenna to the applicant was to a large extent based on exhibit "C". This was the quotation which provided that the goods installed remained the property of the respondent. However, at the bottom of the same quotation the following appeared:

"These prices are valid for 7 days only. Goods remain the property of Act Computers until fully paid."

The antenna was the major item of the goods supplied by the respondent to the appellant. Whereas the first part of the quotation tends to support the version of the respondent the second part as encapsulated in the quotation strongly favours the version of the appellant. According to the respondent's version no goods ever became the property of the appellant. This allegation is in direct conflict with the quotation. The quotation fortifies the appellant's averment that he purchased the goods paid for them and acquired ownership thereof. The court below did not comment on the aforesaid aspect of the quotation.

[38] I deem it unnecessary to evaluate and to analyse the evidence in order to determine whether or not the appellant as the plaintiff had established the breach of the agreement as averred in its particulars of claim. The crux of the matter is that the court below found that the parties were not *ad idem* and that they performed under the mutual mistaken believe as to the true nature of the transaction they were concluding. Where the one party reckons he buys whereas the other reckons he leases no agreement comes into

existence. **WEINERLEIN v GOCH BUILDINGS LTD** 1925
AD 292 on 291.

[39] The following quotation is apposite:

“If a purported acceptance does not correspond with the offer there is no contract because the parties are not ad idem. When this non-correspondence of offer and acceptance is plain for all to see the question of mistake does not arise, but when it is not apparent at the time the contract is entered into but only becomes apparent later we are in a field of mutual mistake.”

CHRISTIE: THE LAW OF CONTRACT IN SOUTH AFRICA (5TH Edition) p. 322.

[40] If we accept, and I think we should, the magistrate’s finding that there was mutual mistake as to the legal nature of the transaction the parties were concluding, then considerations of fairness and equity demand that there should be mutual restoration of performances wherever possible so that the parties are restored to the positions in which they were immediately prior to the mutual mistake. According to our law each party to such an abortive

transaction is entitled to claim back the performance he/she or it has rendered provided that such a party also tenders to return the performance he/she or it has received by virtue of a transaction that was adversely affected by mutual mistake. In this case there was nothing the appellant could tender to return seeing that the respondent was keeping both performances, viz the money and the thing.

[41] In the instant case the appellant has mistakenly paid the money to the respondent for the antenna which was duly delivered to the appellant by the respondent. Subsequently, however, the respondent wrongfully removed the antenna from the appellant. This was done under false pretences. The respondent took the law into its own hands to reclaim its performance. It is inequitable that the respondent should be allowed to retain both performances, namely the appellant's money and the respondent's own antenna. This is precisely the effect of the absolution granted in the court below. It is unjust and inequitable, if there was no contract as the court below found. The salient principle of our law of contracts, in the

case of mutual mistake, demands that both parties should restore the respective performances they received on the strength of the abortive transaction.

- [42] It was argued on behalf of the respondent that the amount of R3 689,90 did not exclusively represent the purchase price but that it included, among others, the costs of labour. Since there was no evidence as regards the breakdown of the costs of labour, the antenna and the cables the repayment of the global amount of R3 689,90 would unfairly benefit the appellant at the expense of the respondent. I am not persuaded by this argument. The main item on the quotation was the antenna. The respondent drew up the quotation and chose not to specify its various components. In any event, it would appear that labour and cables were not important features thereof. According to Geldenhuys, he sold the same type of antenna to the appellant for more or less the same amount the appellant paid to the respondent. The amount was exclusively a selling price.

[43] It was also contended on behalf of the respondent that the appellant still has the respondent's cables in his possession and that it would not be equitable to order the respondent to repay the full amount to the appellant since such amount included the costs of the cables. The fact that there was no evidence as to the exclusive costs of the cables, it was argued, militated against the argument that the respondent be ordered to repay the full amount. This argument has no substance. The appellant did not return the antennas to the respondent but chose to retain the cables. The evidence is that the respondent went behind the appellant's back, removed the antenna under false pretences in the absence of Booysen but chose to leave the cables behind. It is not unreasonable to assume from Knepscheld's conduct that the respondent chose to abandon the cables probably because such cables were worthless to the respondent.

[44] In the circumstances I have come to the conclusion that the court below erred in granting an absolution from the instance in respect of the first claim in this matter. The order of absolution was unfair, unjust and inequitable to the

appellant. It was not in keeping with the salient principle of our law. As regards the first claim I am inclined to uphold the appeal. As always the cost must follow success.

[45] Accordingly I make the following order:

45.1 The appeal succeeds with costs.

45.2 The order of the court below in respect of the second claim is upheld.

45.3 The order of the court below as regards the first claim is hereby set aside and it is substituted therefore, the order specified below.

45.4 Judgment is granted in favour of the plaintiff in the amount of R3 687,90. The defendant is directed to pay interest on the capital amount of R3 687,90 at the rate of 15,5% per annum, calculated from the date of service of the summons until the date of final payment. The defendant is directed to pay the cost of the action.

M. H. RAMPAL, J

I concur.

A. P. BECKLEY, J

On behalf of the Appellant:

Adv. J. Y. Claasen
Instructed by:
Naudes
BLOEMFONTEIN

On behalf of the Respondent:

Adv. P. J. T. de Wet
Instructed by:
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