

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Not reportable

Case no: DA18/18

In the matter between:

E-MD TECHNOLOGIES (PTY) LTD

Appellant

and

MINAL VASATHRAI SONI

First Respondent

DUSENTHA GOVENDER

Second Respondent

USIZO ADVISORY SOLUTIONS (PTY) LTD

Third Respondent

MOTION CAPITAL (PTY) LTD

Fourth Respondent

Heard: 11 March 2020

Delivered: 18 May 2020

Coram: Waglay JP, Davis JA and Murphy AJA

JUDGMENT

DAVIS JA

Introduction

- [1] Appellant sought a final interdict on motion proceedings, which application was based on an alleged restraint clause contained in a Memorandum of

Understanding (MoU). In its application, appellant sought to enforce, as a matter of urgency, certain restraint and confidentiality undertakings provided by the first respondent in favour of the appellant which the latter alleged was contained in the MoU.

- [2] It was common cause on the papers that first respondent had not actually signed the MoU. The MoU, dated 15 March 2018, is attached to the founding affidavit. It reveals that the first respondent initialled all the pages of the document and filled in his name in capital letters. However, he did not sign the document. This is made clear in that there is a space for a signature under which there appears first respondent's name, "Minal Soni". By contrast, Dr Demetrio Tzitzivacos signed the MoU on behalf of the appellant and, in addition, filled in his name in capital letters.
- [3] Sitting in the court *a quo*, Coetzee AJ found that the onus rested upon the appellant to prove that the MoU was signed by the first respondent. As the question of the signature had been placed in dispute by first respondent, the learned judge found that appellant had not discharged the onus to show that an agreement had been entered into which would justify the relief sought. It is against this order that the appellant, with leave of this Court, has appealed.

The significance of an application brought on motion proceedings

- [4] The law dealing with the problem of disputed facts in motion proceedings is clear. As stated in the well-known decision of *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (a) at 634H – 635 C Corbett JA (as he then was) set out the position in his typically luminous style as follows:

'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which 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 respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact in this regard *Room Hire Co.* 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. 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 on rejecting them merely on the papers.'

- [5] Regrettably far too little attention was paid to this critical *dictum* in the argument presented by appellant's counsel. First respondent had deposed to a comprehensive answering affidavit to which I shall refer presently. The crisp question for determination was whether the denial set out in this affidavit of critical facts alleged by appellant was not one which raised a real genuine or *bona fide* dispute of fact or was so farfetched or clearly untenable that a court was justified in rejecting it solely on the papers.

The answering affidavit of first respondent

- [6] First respondent referred in his affidavit to a meeting which took place at approximately 16h00 on 15 March 2018 at Oliver Tambo airport. He recorded that he was startled 'that I was not advised that the applicant's attorney would be present at the meeting. I was very uncomfortable with the situation'. He then continues, 'I then called my attorney Arsheyah Kadwa (Kadwa) on 15 March 2018 and advised her that I was present at a meeting at the Johannesburg airport with Dr Demetiro Tzitzivacos and the applicant's attorney and that I had been presented with the MoU to sign. I requested her assistance as I was not aware that the applicant would have its attorney present at the meeting.'
- [7] When the MoU was emailed to Ms Kadwa, she telephoned first respondent and advised him not to sign the document, providing a series of reasons in relation to

her difficulties with certain clauses contained therein. A discussion then took place between Kadwa and appellant's attorney, Ms Moni. According to first respondent, after this discussion, 'Kadwa telephoned me once again and advised the problems with the agreement were too extensive to comment and agree on, given the short period of time. She advised that I should not sign the Agreement but that I should request sufficient time, at the least until the following day, to obtain legal advice and for her to comment on the contents of the Agreement before it is concluded.'

[8] Nether Dr Tzitzivacos nor appellant's attorney was willing to grant such an extension. According to first respondent, before Ms Kadwa left her office on the evening of 15 March 2008 she sent a detailed email with comments about the MoU to appellant's attorney. This email generated at 18:58, contained a page of objections and comments concerning various clauses in the MoU.

[9] A number of amendments were then made in handwriting at the meeting at the airport. According to first respondent, he was then asked by appellant's attorney to initial each page as well as the hand written amendments. At approximately 20:00, Dr Tzitzivacos left the meeting following which first respondent said that he telephoned Ms Kadwa, who advised him to let her have the amended MoU before he appended his final signature thereto. A confirmatory affidavit was provided by Ms Kadwa confirming her involvement in the negotiations.

[10] Appellant's counsel contended that by initialling the pages and inserting his name in capitals, first respondent had assented to the entire MoU notwithstanding that he had not signed his name in the designated place on the MoU. To suggest that the MoU was concluded and that the act of inserting his name in capitals, while leaving open the space provided for the signature, sufficed to confirm first respondent's agreement is to ignore the detailed version which he has set out in his answering affidavit.

[11] To return to the *Plascon Evan* rule: The appellant elected to seek relief on motion proceedings. It was, therefore, subject to the *Plascon Evans* rule. That meant

that the court *a quo* was obliged to work with a particular factual matrix which included the agreed facts between the parties and, where there was no agreement, the further facts alleged by the first respondent. It followed that the first respondent's proffered reason for not signing the MoU could only stand to be rejected if his denial did not raise a real and genuine or *bona fide* dispute of fact or was so farfetched or clearly untenable that a Court was justified in rejecting this version.

[12] Neither of these exceptions to the Plascon Evans rule apply in this case. The account provided by the first respondent in his answering affidavit raises a most important dispute of fact, namely that he did not assent to the MoU and thus did not conclude an agreement with appellant at the meeting on 15 March 2018. The explanation that he sought legal advice which counselled him not to sign the document until his attorney could examine the amended MoU is neither farfetched nor untenable. This version was supported by the email generated by his attorney at 18:58pm on 15 March 2018, together with her confirmatory affidavit. First respondent's version is thus one which a court is obliged to take into account in the formulation of the factual matrix upon which the dispute between the parties must be resolved.

[13] It follows that, as first respondent's version has to be accepted for the purposes of the resolution of this dispute brought on motion, there is no basis by which to conclude that the MoU was signed by both parties, which, in turn, would have justified the relief sought by appellant.

[14] In the result, the appeal is dismissed with costs.

Davis JA

Waglay JP and Murphy AJA concur.

APPEARANCES:

FOR THE APPELLANT:

FOR THE FIRST RESPONDENT:

LABOUR APPEAL COURT