

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 725/13

In the matter between:

SPRING FOREST TRADING 599 CC

APPELLANT

and

WILBERRY (PTY) LTD t/a ECOWASH

FIRST RESPONDENT

COMBINED MOTOR HOLDINGS LIMITED

SECOND RESPONDENT

t/a THE GREEN MACHINE

Neutral citation: *Spring Forest Trading v Wilberry (725/13)* [2014] ZASCA 178 (21 November 2014)

Coram: Lewis, Cachalia, Bosielo and Swain JJA and Mocumie AJA

Heard: 10 November 2014

Delivered: 21 November 2014

Summary: Contract – non-variation clause providing for cancellation to be in writing and signed by the parties – whether cancellation by email valid – Whether ss 13(1) and (3) of the Electronic Communications and

Transactions Act 25 of 2002 applies – Whether interim interdict pendente lite appealable.

ORDER

On appeal from: KwaZulu-Natal Local Division, Durban (Madondo J sitting as court of first instance):

The appeal is upheld with costs. The order of the high court is set aside and in its place the following is substituted:

‘The application is dismissed with costs.’

JUDGMENT

Cachalia JA (Lewis, Bosielo and Swain JJA and Mocumie AJA concurring)

[1] This is an appeal from a decision of the high court, KwaZulu-Natal, Durban (Madondo J) granting interim relief pendente lite. The order was granted following an urgent application by Wilberry (Pty) Ltd t/a as Ecowash against Spring Forest Trading 599 CC and Combined Motor Holdings Limited t/a The Green Machine (CMH). CMH is cited because it has an interest in the relief claimed, but is not party to this appeal. So the protagonists in this appeal are Spring Forest Trading 599 CC and Wilberry (Pty) Ltd t/a Ecowash. They shall be referred to as the appellant and respondent respectively.

[2] The appeal concerns a series of emails purporting to consensually cancel written agreements between the parties. The agreements required any 'consensual cancellation' to be in writing and signed by them. The Electronic Communications and Transactions Act 25 of 2002 (the Act) gives legal recognition to transactions concluded electronically by email. The dispute between the parties requires us to consider whether their exchange of emails met the writing and signature requirements of the Act thereby constituting a consensual cancellation.

[3] The learned judge found that the e-mail communications as a fact did not evince an intention to cancel the agreements, but merely recorded the inconclusive negotiations between the parties to that end. And, that in any event, the parties had not specified that their agreements could be cancelled by the exchange of emails. He thus held that the Act did not apply to the emails and that the appellant's purported cancellation of the agreements was in conflict with the terms of their written agreements, and therefore invalid. This appeal is with his leave.

[4] The facts are uncomplicated. The respondent is the proprietor of an 'Eco-Wash System' operated from one of its 'Mobile Dispensing Units' (MDU's). The business involves washing cars in the parking lots of shopping malls, office parks, hotels and hospitals. The parties concluded a written agreement (the master agreement) on 28 April 2012 in terms of which the respondent appointed the appellant as its operating agent. This gave the appellant the right to promote, operate and rent out the respondent's MDU's to third parties. The agreement contained a non-variation clause providing that no variation or consensual cancellation would be effective unless reduced to writing and signed by both parties.

[5] On 20 June and 23 July 2012 the parties concluded four subsidiary rental agreements all of which were subject to the respondent's standard terms of business as set out in the master agreement. The rental agreements permitted the appellants to lease the respondent's MDU's at four locations. They also contained non-variation

clauses providing that 'no variation . . . or agreement to cancel shall be of any force and effect unless in writing and signed by both you and us'.

[6] The appellant was not able to meet its rental commitments under the rental agreements on 1 February 2013. The parties then met in Durban on the morning of 25 February 2013 to discuss how they should proceed in light of the appellant's failure to meet its rental obligations. The respondent was represented at the meeting by Mr Nigel Keirby-Smith and the appellant by Mr Gregory Stuart Hamilton and Mr Walter Burger. Keirby-Smith put four proposals to the appellant's representatives. They undertook to consider these and respond after the meeting.

[7] Hamilton dispatched an email to Keirby-Smith later that morning at 11h44 am confirming the proposals. It read:

'Hi Nigel,

Thanks for meeting with Walter and I today. I would like to clarify the options that you mentioned to us today.

- 1/ Pay a cash amount of R1 600 000.00 for the balance of 2 years.
- 2/ Cancel agreement and walk away.
- 3/ Carry on operating but we would end up in court.
- 4/ Pay R1 000.00 per month for 5 years with 15 % escalation.

Please confirm the above then we will advise tomorrow.

Kind Regards

Greg.'

At 11h56 am, Hamilton sent a further email to Keirby-Smith:

'Hi Nigel,

[Fu]rther to my previous mail, to clarify point 2. Please confirm that should we elect this option to walk away, there [wi]ll be no further claim or legal action from either side.

Kind Regards

Greg.'

At 12h18 pm, Keirby-Smith replied:

'Hi Greg,

That is correct subject to my last reply.

Nigel.'

The 'last reply' referred to in the email above was sent from Keirby-Smith's address (...) at 12h05 pm. It read:

'All arrear rentals due at the date of handover will be due.

Henry Wilkinson

Chief Executive Officer.'

At 04h02 pm, Hamilton sent the final email in this exchange:

'Dear Henry and Nigel,

[A]s per our discussion this morning and follow up emails, we thank you for the 4 options offered to us. We confirm that we accept your second offer whereby we will return all equipment leased to us and that there shall be no further legal recourse from either party. We would like all equipment picked up on or before 28 February 2013 so that we do not incur further lease costs for the following month.

Kind Regards

Greg.'

[8] On 13 March 2013, the appellant paid the arrear rentals. However, it continued operating its car washing business at the locations covered by the rental agreements. It says it was entitled to do this as both the master and rental agreements between it and the respondent had been cancelled. And following the cancellation it entered into an agreement with another entity – CMH – to use its mobile cleaning devices at the locations from which it had been operating.

[9] The respondent denies that the agreements were validly cancelled. It therefore sought and was granted interdictory relief to protect its proprietary rights in its MDU's pending the institution of an action for breach of the agreements.

[10] The appellant's case is this. The respondent offered four options to the appellant at the meeting on 25 February 2013. The appellant accepted the second option – that it could cancel the agreements and walk away – in writing by email. The parties agreed further in the series of emails that once the appellant had paid the arrear rental, which it did on 13 March 2013, and the respondent's equipment had been returned, which was also done, there had been a consensual cancellation of the agreement. The cancellation meets with the requirements for the information to be recorded in writing and signed by the parties in terms of s 13(3) of the Act.

[11] The respondent disputes the appellant's argument. It contends that the email exchange was merely a negotiation between the parties regarding the appellant's breaches and did not amount to a consensual cancellation of the agreements, a contention that the high court upheld. At best for the appellant, says the respondent, the emails refer only to the rental agreements, not the master agreement. However, if they do evince a cancellation of both the master and the rental agreements, the emails did not comply with s 13(1) of the Act. This is because the section requires an 'advanced electronic signature' to be used on an email when a signature is required by law – as specified by the non-variation clause in this case – and no such signature appears on the emails. In addition, s 13(3), relied upon by the appellant to bring the emails within the ambit of the Act, does not apply for reasons given later in this judgment.¹

[12] The respondent's contention that the emails merely record a negotiation and do not amount to an agreement to cancel is utterly without merit. The emails say emphatically and unambiguously that once the appellant settles the arrear rental and returns the respondent's equipment it may 'walk away' without any further legal

¹Sections 13(1) and (3) are set out below para [17].

obligation. This can only mean – and did mean – that the parties considered that all agreements between them (the master and subsidiary rental agreements) would be cancelled once the appellant had satisfied two obligations: payment of the arrear rental and return of equipment. The obligations were met and the agreements therefore do evince a consensual cancellation. Whether this cancellation by email fulfilled the requirements of the non-variation clauses to be in writing and signed by both parties requires a consideration of the relevant provisions of the Act.

[13] Before I consider these it is necessary to remind ourselves that when parties impose restrictions on their own power to vary or cancel a contract – as they did in this case – they do so to achieve certainty and avoid later disputes. The obligation to reduce the cancellation agreement to writing and have it signed was aimed at preventing disputes regarding the terms of the cancellation and the identity of the parties authorised to effect it. Our courts have confirmed the efficacy of such clauses.²

[14] It is apparent from the parties' opposing contentions that the proper interpretation of ss 13(1) and (3) lies at the heart of this dispute. But these provisions have to be analysed in their context. This requires us to consider other sections that also have a bearing on this analysis.

[15] The Act's main objective is to 'enable and facilitate electronic communications and transactions in the public interest'.³ 'Electronic communications' is defined as 'communication by means of data messages'. 'Transaction' is defined to include 'a transaction of either a commercial or non-commercial nature . . .'. An email means 'electronic mail, a data message used or intended to be used as a mail message

²SA *Sentrale Ko-op Graanmaatskappy Bpk v Shifren & andere* 1964 (4) SA 760 (A); *Brisley v Drotsky* 2002 (4) SA 1 (SCA). See generally R H Christie & G B Bradfield *Christie's The Law of Contract in South Africa* 6 ed at 464-466.

³ Section 2(1) of the Act.

between the originator and addressee in an electronic communication'.⁴ It is thus common ground that the email-exchange between the parties is governed by the Act.

[16] One of the Act's aims is to promote legal certainty and confidence in respect of electronic communications and transactions.⁵ So, when interpreting the Act, the courts are enjoined to recognise and accommodate electronic transactions and data messages in the application of any statutory law or the common law.⁶ Thus when there are formal requirements of writing and signature imposed by statute or the parties to a transaction, these can generally be satisfied through electronic transactions.⁷ There are, however, exceptions where agreements may not be generated electronically. These are the agreements for the sale of immovable property, wills, bills of exchange and stamp duties.⁸

[17] A legal requirement for an agreement to be in writing, subject to the exceptions mentioned above, is satisfied if it is in the form of a data message.⁹ There is no dispute in this case that the emails met this requirement. The real dispute is about whether or not the names of the parties at the foot of their emails constituted signatures as contemplated in ss 13(1) and (3). Section 13 reads as follows:

'(1) Where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used.

(2) . . .

(3) Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if-

(a) a method is used to identify the person and to indicate the person's approval of the information communicated; and

⁴ Section 1 of the Electronic Communications and Transactions Act 25 of 2002.

⁵ Section 2(1)(e).

⁶ Section 3 of the Act.

⁷ Section 4(1) provides that the Act applies to any electronic transaction or data message: *Christie's The Law of Contract in South Africa* op cit at 109.

⁸ These are specifically provided for in ss 4(3) and 4(4) of the Act read with the applicable schedules.

⁹ Section 12(a).

(b) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.'

[18] It is apparent that the Act distinguishes between instances where the law requires a signature and those in which the parties to a transaction impose this obligation upon themselves. Where a signature is required by law and the law does not specify the type of signature to be used, s 13(1) says that this requirement is met only if an 'advanced electronic signature' is used. Where, however, the parties to an electronic transaction require this but they have not specified the type of electronic signature to be used, the requirement is met if a method is used to identify the person and to indicate the person's approval of the information communicated (s 13(3)(a)); and having regard to the circumstances when the method was used, it was appropriately reliable for the purpose for which the information was communicated (s 13(3)(b)).¹⁰

[19] The respondent submits that the phrase: 'Where the signature of a person is *required by law*' (emphasis added) in s 13(1) it should be interpreted not only to include formalities required by statute but must also incorporate instances where parties to an agreement impose their own formalities on a contract, as in this case. And, so the contention goes, because the parties required their signatures for the contracts to be cancelled the requirement could only be satisfied by the use of an *advanced electronic signature* as contemplated in s 13(1), which did not occur in this case.

[20] In my view the respondent's reliance on s 13(1) is misplaced for two reasons. First, the non-variation clauses were agreed upon by the parties: they were not imposed upon the parties by any law.¹¹ Secondly, when one has regard to the purpose for which an advanced electronic signature is required it is apparent that it does not apply to the private agreements between these parties.

¹⁰Christie's *The Law of Contract in South Africa* op cit p 110.

¹¹ See for example s 6(12) of the Companies Act 71 of 2008.

[21] An 'advanced electronic signature' is a signature which results from a process accredited by an Accreditation Authority.¹² It is used for accredited 'authentication products and services' which are designed to identify the holder of the electronic signature to other persons. An application for accreditation must be made in a prescribed manner supported by prescribed information and accompanied by a non-refundable fee. Furthermore, elaborate and strict criteria are applicable for the accreditation of authentication products and services to which the electronic signature relates.

[22] There is no suggestion that either of the parties' businesses deal in products and services to which contracts that require advanced electronic signatures as envisaged in the Act relate. And to impose the onerous requirements and criteria for accreditation upon the parties in this case would have a detrimental effect on electronic transactions, and the obligation of the courts, when interpreting the Act, to recognise and accommodate electronic transactions and data messages in the application of any statutory law or the common law. In addition, it would render s 13(3) – which provides for private agreements between parties – superfluous. In my view s 13(1) does not apply in the circumstances of this case, and on the face of it, s 13(3) does.

[23] The respondent, however, says that even if s 13(3) does apply to private agreements between parties the section does not assist the appellant. It advances three grounds to support this submission: First, it contends that the emails do not and cannot constitute a separate electronic transaction because they pertain to the oral negotiations about the written agreements. Secondly, even if they do constitute a separate electronic transaction, the parties did not require an *electronic signature* as envisaged in the section; and finally, there was no reliable method used whereby the parties were identified and indicated their approval of the information communicated in the emails.

¹² Sections 1 and 37 of the Act.

[24] Regarding the first ground – that the emails do not constitute a separate transaction – the simple answer is that they do. The oral negotiations between the parties were reduced to writing in the form of emails and constituted an agreement to cancel their written agreements. And s 22(1) of the Act says emphatically that '[A]n agreement is not without legal force and effect merely because it was concluded partly or in whole by means of data messages'.

[25] As to the second ground – the requirement for an 'electronic signature' – a brief discussion on how the courts generally approach signature requirements is necessary. Commonly understood a signature is 'a person's name written in a distinctive way as a form of identification . . .'.¹³ But this is not the only way the law requires a document to be signed. In the days before electronic communication, the courts were willing to accept any mark made by a person for the purpose of attesting a document, or identifying it as his act, to be a valid signature. They went even further and accepted a mark made by a magistrate for a witness, whose participation went only as far as symbolically touching the magistrate's pen.¹⁴

[26] The approach of the courts to signatures has therefore been pragmatic, not formalistic. They look to whether the method of the signature used fulfils the function of a signature – to authenticate the identity of the signatory – rather than insist on the form of the signature used.

[27] The Act describes an electronic signature – which is not to be confused with an advanced electronic signature – as 'data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature'.¹⁵ Put simply, so long as the 'data' in an email is intended by the user to serve as a signature and is logically connected with other data in the email the

¹³ Concise Oxford Dictionary 12 ed.

¹⁴ *Putter v Provincial Insurance Co Ltd & another* 1963 (3) SA 145 (W) at 148F-G.

¹⁵ Section 1.

requirement for an electronic signature is satisfied. This description accords with the practical and non-formalistic way the courts have treated the signature requirement at common law.

[28] The argument that s 13(3) does not apply because the parties did not require an electronic signature as contemplated in the section, is based, in my view, on a misreading of the section. It envisages a situation where a signature is required by the parties but the parties have not specified the type of electronic signature that is required.¹⁶ Here the parties did require a signature to cancel the agreement, but when they cancelled the agreement by email they did not specify the type of electronic signature that was required. So, the section does apply in the circumstances of this case. The typewritten names of the parties at the foot of the emails, which were used to identify the users, constitute 'data' that is logically associated with the data in the body of the emails, as envisaged in the definition of an 'electronic signature'. They therefore satisfy the requirement of a signature and had the effect of authenticating the information contained in the emails.

[29] The third ground for which the respondent contends – that there was no reliable method used in the emails whereby the parties were identified and indicated their approval of the information communicated – is also without merit. There is no dispute regarding the reliability of the emails, the accuracy of the information communicated or the identities of the persons who appended their names to the emails. On the contrary, as I have found earlier, the emails clearly and unambiguously evinced an intention by the parties to cancel their agreements. It ill-behoves the respondent, which responded to clear questions by email itself, to now rely on the non-variation clauses to escape the consequences of its commitments made at the meeting on 25 February 2013 which were later confirmed by email.

[30] I turn to the final issue in this appeal. At the outset the parties were asked to address the question as to whether the order of the high court, being an interim order

¹⁶*Christie's The Law of Contract in South Africa op cit* p 110.

pending an action for damages to be instituted by the respondent against the appellant for breach of contract, was appealable.

[31] In granting the relief sought the court found that the appellant had established that, on a proper interpretation of the emails, the written agreements and the relevant provisions of the Act, the respondent had established a 'clear right' to the relief claimed. The order thus disposes of the main issue between the parties concerning the cancellation of the agreements. This means that the respondent's right to claim damages for breach of contract is no longer an issue open for consideration by the trial court. All that remains, once the respondent commences its action for breach of contract, is to prove and quantify its contractual damages. The interdict restraining the appellant from conducting its business in competition with the respondent is therefore final in effect, and appealable. On this the parties agree.

[32] The following order is made:

The appeal is upheld with costs. The order of the high court is set aside and in its place the following order is substituted:

'The application is dismissed with costs.'

A CACHALIA
JUDGE OF APPEAL

APPEARANCES

For Appellant:

C T Vetter

Instructed by:

Shepstone & Wylie Attorneys, Durban

Webbers, Bloemfontein

For First Respondent:

M E Stewart

Instructed by:

Biccari Bollo Mariano Inc, Durban

E G Cooper Majiedt Inc, Bloemfontein