

SOUTH AFRICA / JUDGMENT

Zevoli 158 (Pty) Ltd t/a Cancom and Others v The Road Traffic Infringement Agency and Others (82085/2015) [2015] ZAGPPHC 837 (11 December 2015)

[2015] ZAGPPHC 837

COURT

North Gauteng High Court, Pretoria

BEFORE

P.M. Mabuse

CASE / FILE NUMBER

82085/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NUMBER: 82085/2015

DATE:

11 December 2015

ZEVOLI

158 (PTY) LTD t/a

CANCOM First

Applicant

AVIS

RENT A CAR A DECISION OF BARLOWORLD

SOUTH

AFRICA (PTY)

LTD Second

Applicant

IMPERIAL

CAR RENTAL (PTY) LTD t/a

EUROPCAR Third

Applicant

BIDVEST

CAR RENTAL (PTY) LTD t/a BUDGET CAR

AND

VAN

RENTAL Fourth

Applicant
CMH
CAR HIRE (PTY) LTD t/a FIRST CAR
RENTAL Fifth
Applicant
ER24
EMS (PTY)
LTD Sixth
Applicant
V
THE
ROAD TRAFFIC INFRINGEMENT
AGENCY First
Respondent
MINISTER
OF
TRANSPORT Second
Respondent
TSHWANE
METROPOLITAN
MUNICIPALITY Third
Respondent
CITY
OF JOHANNESBURG METROPOLITAN MUNICIPALITY Fourth
Respondent

JUDGMENT

MABUSE J:

- [1] This matter came before me as an urgent application. Urgency in the matter was disputed by the Respondents who opposed the application but after the parties had argued that stage of the application the Court ruled that the matter was urgent.
- [2] The relief that the Applicants seek in this matter is contained in Part B of the notice of motion. Part A was dealt with on 20 May 2015 when Louw J granted interim relief. In Part B the Applicants seek the following order:
1. that the First Respondent be interdicted from issuing infringement orders in respect of any vehicle in the name of the applicants, in circumstances where there has been a redirection or an election to be tried in Court in terms of s 17(1)(f)(iv) or (v) of the Administrative Adjudication of Road Offence Act 56 of 1998 (“the Act”).
- [3] The First Applicant is a company with Limited liability duly registered as such in terms of the company statutes of this country.

Its principal place of business is located at Gantry, Unit B, corner Witkoppen and The Straight, Pinelopes, Fourways. It represents all the other applicants that it calls its clients. The application is founded on the affidavit of one Laura Olinsky, the sole director of the First Applicant.

- [4] This application is opposed by the First Respondent who has for that purpose delivered an answering affidavit which was later followed by its counsel's heads of argument. There are no appearances for the Second, Third and Fourth Respondents, despite the fact that the copies of the proceedings in this matter were duly served on them. There is also no explanation why the said Respondents have chosen not to oppose the application. As a result the tussle in this matter involves only the Applicants on one side and the First Respondent on the other side.
- [5] The First Respondent is a statutory body with legal personality and constituted as such in terms of s 3 of the Act. It has its principal place of business at Waterfall Edge B, Howick Close, Waterfall Office Park, Becker Street, Midrand. The First Respondent is, and remains responsible for, among others, enforcement of penalties imposed against persons who contravene the road traffic laws, who are more fully identified in terms of the Act. The First Respondent is also responsible for issuing enforcement orders and more importantly for placing blocks on the registration of such offenders' motor vehicles. The First Respondent exercises those powers in terms of s 17 of the Act. Section 17 provides that:

"17(1) If a person is alleged to have committed an infringement, an authorised officer or a person duly authorised by an issuing

authority, must instead of a notice contemplated in s 56 or 341 of the Criminal Procedure Act, 1977 (Act 51 of 1977), and subject to the s 23, serve or cause to be served on that person an infringement notice which must-

- (a) specify the name and residential and postal address of the infringer, if known, at the time when the infringement was committed;
- (b) state the prescribed particulars of the infringement;
- (c) specify the amount of the prescribed penalty payable in respect of the infringement, the issuing authority to which the penalty is payable and the place where the penalty may be paid;
- (d) specify the prescribed discount which may be obtained if the penalty is paid not later than 32 days after the date of service of the infringement notice;
- (e) inform the infringer that the demerit points position may be ascertained from the national contraventions register at the office of any issuing authority, registering authority or driving licence testing centre;
- (f) inform the infringer that, not later than 32 days after the date of service of the infringement notice, the infringer may –

- (i) pay the penalty, as reduced by the discount contemplated in paragraph (d), or make representations to the agency, in the case of a minor infringement;
- (ii) pay the penalty, as so reduced, in the case of a major infringement;
- (iii) make arrangements with the agency to pay the penalty in instalments in the prescribed manner;
- (iv) elect in the prescribed manner to be tried in court on a charge of having committed the allege offence; or
- (v) provide information, in the prescribed manner, to the satisfaction of the issuing authority that he or she was not the driver of the motor vehicle at the time of the alleged infringement, coupled with the name, acceptable identification and residential and postal address of the alleged driver or person in control of the motor vehicle, failing which the matter will be referred to the agency and a courtesy letter will be issued in terms of s 19, whereafter the infringer becomes liable to pay both the penalty and the prescribed fee of the courtesy letter.”

[6] Section 20 of the Act deals with an enforcement order. It provides as follows in s 20(5):

“Subject to subsection (6), no –

- (a) driving licence;
- (b) professional driving permit; or
- (c) licence disc,

may be issued to an infringer or in respect of a motor vehicle registered in the name of an infringer, if an enforcement order has been issued in respect of such infringer, until such enforcement order has been complied with or has been revoked.”

[7] Now the provisions of s 20(5) must be understood against the following backdrop. The core business of each of the Applicants

and their clients consists in renting motor vehicles to members of the public at large. In principle it is not the Applicants but the drivers of such rented motor vehicles who are infringers. The infringement notices are directed to the Applicants and their clients simply because the relevant motor vehicles are registered in the names of the Applicants or their clients and the particulars that appear in the First Respondent’s records are those of the Applicants and their clients.

[8] Each of the Applicants maintains a fleet of motor vehicles. In order to serve the demands of members of the public, each of the applicants is required continuously to purchase new motor vehicles and to register such motor vehicles with the local motor vehicle licencing authorities. Over and above each of the Applicants are obliged by law to renew annually existing licences. These motor vehicles must be licenced by the relevant licencing authorities because the use of any unlicenced motor vehicle in the public road of this

country constitutes a violation of the law. The use in a public road by a motor vehicle whose licence disc has not been renewed is unlawful.

[9] As indicated in s 20(5) of the Act, the issuing of an unlawful enforcement order has far reaching consequences in terms of the Act. What it means in effect is that once an unlawful infringement has been issued, the Applicants who, for all intents and purposes, are considered infringers may not obtain licence discs in respect of new motor vehicles and cannot renew the licence discs of existing motor vehicles. The Applicants complain that the issuing of an unlawful enforcement order can bring their business to a halt.

[10] It is now contended by the applicants that the first respondent issues enforcement orders against the First Applicant and its clients unlawfully. Olinsky's testimony is that there are hundreds of thousands of infringement notices and hundreds of enforcement orders which the First Applicant has dealt with but in respect of which still enforcement orders have been issued.

[11] Olinsky states that on 15 September 2015 the First Respondent undertook to refrain from:

11.1 imposing any block on new motor vehicles belonging to the First Applicant's clients;

11.2 imposing any block on any fleet of motor vehicles belonging to the First Applicant's clients; and

11.3 issuing any enforcement orders against the First Applicant's clients without affording them 30 days' notice.

In this respect the First Applicant contends that on 15 September 2015 the Applicant's Attorney, one Rudi Pottas ("Pottas") and the First Respondent's attorney, one Bonisile Majavu ("Majavu") concluded an agreement in which they, on behalf of their respective clients or parties, agreed as set out in paragraph 11 above. Attached to the founding affidavit is Annexure 'FA6', a letter dated 15 September 2015 from Pottas to Majavu. The said letter reads as follows. The subject of the said matter is:

"BIDVEST/RTIA

Dear Boni

I refer to the above matter.

After our numerous discussions this evening, my understanding of the proposal is as follows:

1. no blocks were placed on any new vehicles;
2. no blocks were placed on the complete used vehicle fleet;
3. should a block be placed, same will only affect that specific vehicle and the remaining used vehicles will still be in operation; and
4. no enforcement orders will be issued until otherwise advised.

Should this become the case, we will be notified via the association of the intention to do so and provided with 30 days' notice.

I await confirmation of the above.

Kind regards

Rudi Pottas"

Majavu's response to the said email, it is annexed to the papers as Annexure 'FA7'. It reads as follows. Firstly, the subject of the said letter is:

Dear Rudi

I confirm that your proposal is in line with my instructions.

I believe you will attend to withdrawing/removing the matter from the roll with costs being reserved.

Regards

Majavu Incorporated"

[12] The First Applicant contends that notwithstanding the conclusion of the said agreement, the First Respondent has breached it by continuing to do what it undertook not to do. The First Applicant contends furthermore that the First Respondent has,

notwithstanding the terms of the said agreement, continued issuing unlawful enforcement orders and has furthermore continued imposing

blocks against the First Applicant's clients' motor vehicles and has thereby prevented the Applicants' clients from obtaining registrations of new licences and existing licence discs. This of course is denied by the First Respondent.

[13] The First Respondent admits that an agreement was concluded by and between the First Applicant on one side and the First Respondent on the other side as set out in Annexures 'FA6' and 'FA7'. The First Respondent contends, however, that the agreement reached between the parties and whose terms were set out in 'FA6' and 'FA7' were only in respect of Bidvest Car Rental (Pty) Ltd t/a Budget Car and Van Rental ("Bidvest"); and that the said agreement was reached pursuant to an urgent application in case no. 71259/15 which had been launched by Bidvest alone against the First Respondent. In support of its contention the First Respondent referred this Court to the heading of its email and pointed out that it reflected the parties involved therein as BIDVEST/RTIA. This subject appears also in the email dated 15 September 2015.

[14] There is in the papers a letter from the Applicants' attorneys to the First Respondent. It is marked annexure 'FA8' and it is dated 17 September 2015. The heading of the said letter is:

*“RE: ZEVOLI 158 (PTY) LTD t/a CANCOM / ROAD TRAFFIC INFRINGEMENT AGENCY BOARD
AND ANOTHER – BUDGET CAR AND VAN RENTAL”*

[15] It is only proper if I quote the whole letter. It states as follows:

“1. We refer to the above matter and to the agreement concluded under case no. 71259/2015;

2. For sake of clarity, we confirm that the agreement reached will be in respect of each and every client of Zevoli 158 (Pty) Ltd as more fully described in Annexure ‘KLO6’ attached to the main application. We trust that you find the above in order.”

Olinsky’s evidence around this letter is that Pottas and Majavu had been in constant communication with each other continually and that Pottas and Majavu expressly agreed with each other that the settlement reached applied to each and every applicant and the First Applicant’s clients. She contends furthermore that Pottas and Majavu resolved the impasse between the parties in regard to the First Respondent’s unlawful conduct in relation, not only to the litigation under case no. 71259/2015 but also in regard to the First Applicant’s clients under case no. 35698/2014 and generally also with regard to how the parties would in future resolve their programs.

[16] In the answering affidavit the First Respondent disputes the agreement of the parties as one including what ‘FA8’

contains. Mr. Japh Chuwe (“Chuwe”) who deposed to the said affidavit, states that it is simply inconceivable that any other interpretation could be given to the settlement agreement. He contends that the Applicants belated attempt on 17 September 2015 as reflected in ‘FA8’ to the founding affidavit to the settlement agreement to include also the First Applicant and all its remaining clients was never agreed to and that the said letter was never confirmed by the First Respondent.

[17] In the meantime there is a loose affidavit in the court file by Majavu in which he denies that he received ‘FA8’.

He states that he only became aware of it when the Applicants launched their application. He states furthermore that if he

had received it, he would immediately have acknowledged receipt thereof and sought instructions from the First Applicant. He states further that that is normally what he and Pottas did with their communication. He confirms further in his affidavit that he did receive ‘FA6 and FA7’ and that even then the two emails only concerned two clients, RTIA/SILVER SMOKE/ZEVOLI.

[18] Majavu continues with his evidence and states that he telephonically spoke to Pottas about this matter. Pottas has promised to send him a copy of that letter but never did until 30 September 2015 when he received a letter of an even date annexed to the application as ‘FA15’.

[19] In terms of our law, a party alleging a contract must prove the terms of the agreement which he seeks to enforce. See in this regard *Mac Williams v First Consolidated Holdings* 1982(2) SA 180. Majavu denies that 'FA8' reached him. The duty is on the First Applicant to prove that Majavu received it. There are problems at both sides about this annexure 'FA8'. The First Applicant has referred to the said annexure in its founding affidavit. It attached a copy of the relevant 'FA8' to the founding affidavit and contended that it served to confirm that the settlement was in fact one in regard to each of the applicant's identified therein together with their clients. On the other hand, despite the fact that a copy of 'FA8' was annexed to the founding affidavit, the First Respondent did not, in its answering affidavit, specifically deny that it received 'FA8'. It refers to the affidavit of Majavu attached to the answering affidavit as 'TT1' and contends that it confirms the limited extent of the agreement. In this affidavit, Majavu only confirmed the contents of the affidavit of Chuwe. In this affidavit the said Majavu does not deny having received the said letter. The denial instead is only contained in another affidavit commissioned on 22 October 2015. This affidavit contains no explanation as to why the denial of the receipt of 'FA8' was not contained in the answering affidavit nor does it explain why it was only contained in another affidavit.

The impression that one gets is that this second affidavit came as an afterthought when the First Respondent realised its impact after Majavu had realised that he failed to respond to it. There is no indication that he was not available to depose to the affidavit in which he would have denied having received 'FA8' at the material time that the answering affidavit was crafted. With the admission of the subsequent affidavits the Applicants were not afforded any opportunity to challenge the contents of Majavu's said affidavit. Counsel for the First Respondent did not raise the fact that Majavu did not receive 'FA8' in his heads of argument.

[20] On the other hand it is clear that Pottas and Majavu had been communicating by email. Such emails have contained or should I say copies thereof, in the papers as annexures. All of a sudden Pottas decided to communicate, this time by way of an ordinary letter which, as he states at the bottom thereof, was sent electronically. He does not state whether it was sent electronically by telefax or was scanned and sent as such. I am prepared to accept that if it was sent by telefax or scanned after he had typed it, it would have been signed by Pottas before sending it away. As it stands there is no proof that the letter was sent and, if it was, that it went to the email address of Majavu. There is no explanation why the contents of the 'FA8' were not sent to Majavu in the same fashion as 'FA6'.

[21] There is therefore a dispute as to whether Majavu received 'FA8'. In the absence of proof that he received it one cannot, without much ado, conclude that he failed to respond to it and that an inference of the conclusion of an agreement on that basis should be made. Absent proof that he received it, there cannot be any agreement.

[22] In *Pillay v Krishna and Another* 1946 AD 946 at page 951 the Court laid the two basic principles relating to the fundamental rules governing the incidents of burden of proof. The first of these principles was that “semper necissitas probandi incubit illi qui agit”, which means in plain English is that if one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it. There is another rule which was mentioned by Voet. It provides that:

“He who asserts, proves, and not he who denies, since a denial of a fact cannot naturally be proved, provided that it is a fact that is denied and that the denial is absolute.” See in this regard p. 952. This means that in order to succeed on either the facts of the matter or the probabilities if the facts cannot assist them, the Applicants must produce evidence that satisfies the Court that they are entitled to the relief that they seek. The Applicants will have failed to discharge that onus if at the end of the evidence the Court is left in doubt whether or not to grant the relief that they seek.

[23] Coupled with the duty to prove its case beyond reasonable doubt, there is a duty cast upon a litigant who relies on a contract to prove not only the existence of the contract but also its terms. The Applicants must produce evidence to demonstrate that the First Respondent received ‘FA8’ which forms the basis of their view that the contract was concluded. It is enough if they produce such evidence. It is not relevant whether or not the First Respondent read ‘FA8’ after receiving it or responded to it. If the First Respondent has received it and failed to respond to it the Court is entitled to find that a contract has been concluded. The Applicants must produce evidence, however, of the party’s conduct that satisfies** a reasonable inference that the parties intended and did indeed contract on the terms alleged in annexure ‘FA8’.

[24] In this matter the First Applicant has, in his answering affidavit, raised a dispute with regards to the Applicants’ contention that annexure ‘FA8’ was part of the contract that the parties concluded following annexures ‘FA6 and FA7’. In the first point the First Respondent stated that to show that no agreement was concluded after 15 September 2015 ‘FA8’ was dated 17 September 2015, two days after the settlement agreement was reached on 15 September 2015 and one day after the application that the parties at the time had was removed from the roll by agreement. It is highly unlikely, in my view, that after concluding the settlement agreement whose terms were set out in annexures ‘FA6 and FA7’, the First Respondent would subsequently be reluctant to conclude another settlement agreement in terms of annexure ‘FA8’.

There is also no reason placed before the Court why the terms contained in annexure ‘FA8’ were not included in ‘FA6’.

Secondly, the First Respondent relies on the fact that annexure 'FA8' was never confirmed by Majavu. It will be recalled that Majavu has deposed to an affidavit in which he denied ever having received 'FA8' and in which he furthermore gave reasons why he did not receive it. Thirdly and lastly, the First Respondent contends that annexure 'FA8' is nothing more than a simple attempt by the Applicants to extend the terms of the settlement agreement reached in respect of the case involving Bidvest and them.

[25] In that manner, the First Respondent has raised a factual dispute as set out in *Room Hire (Pty) Ltd v Jeppe Street Mansion (Pty) Ltd* 1949(3) SA 1155 T at page 1165 where Murray AJ, as he then was, stated as follows:

"It may be desirable to indicate the principal ways in which a dispute of fact arises. The clearest instance is, of course

- (a) when the Respondent denies all the material allegations made by the various deponents on the Applicant's behalf and produces or will produce positive evidence by the deponents or witnesses to the contrary."

[26] The factual disputes in our law are resolved by adopting the approach set out in *Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957(4) SA 234 (C) at page 235 E-G where the Court stated 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."

The approach set out in the above authority was clarified by the Court as per Corbett J, as he then was, in *Plascon Evans Paints v Van Riebeeck Paints* 1984(3) 623 AD at page 634 F-H. After pointing out that the approach as set out in *Stellenbosch Farmers Winery Ltd v Stellenvale Winery Ltd* was adopted in many cases he then set out to explain the second sentence thereof and he stated as follows:

"It seems to me, however, that this formulation of a 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 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 a Respondent of a fact alleged by the Applicant may not be such as to raise a real, genuine or bona fide dispute of facts."

- [27] On the basis of the abovementioned authority, according to the First Respondent's answering affidavit the First Respondent denied having received 'FA8' and therefore having concluded any agreement with the Applicants on the terms contained in annexure 'FA8'. This is a fact that the First Respondent has stated. The applicants do not admit this fact.
- [28] Accordingly, as there is a dispute of facts, the only finding that this Court can make is that the Applicants have not discharged the onus that rests on them to prove the existence of an agreement and its terms and the application can therefore not succeed.
- [29] This matter was, in my view, not a complex matter and did not deserve the attention of two counsel. In the premises I am disinclined to grant an order of costs which includes costs consequent upon the employment of two counsel. However, costs may be granted for the appearance of a senior counsel.
- [30] Because of the results I have arrived at, I do not deem it necessary to be detained by other issues raised in the application.
- [31] In the result I make the following order:

The application is dismissed with costs which costs shall include the costs consequent upon the employment of a senior counsel.

P.M. MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicants: Adv. M Seagal

Instructed by: Lee and McAdam Attorneys

Counsel for the first respondent: Adv. A Bester

Adv. A Ayayeer

Instructed by: Majavu Inc.

Date Heard: 22 October 2015

Date of Judgment: 11 December 2015

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