THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 325/09
No precedential value

COMBINED DISTRIBUTION SOLUTIONS CC Appellant

and

THE COURIER & FREIGHT GROUP (PTY) LTD
t/a XPS Respondent

Neutral citation: Combined Distribution Solutions v Courier & Freight Group (325/09) [2010] ZASCA 93 (19 July 2010)

Coram: NUGENT, HEHER, MLAMBO and MALAN JJA and MAJIEDT AJA

Heard: **12 MAY 2010**

Delivered: **19 JULY 2010**

Summary: **Oral agreement – whether established – whether damages sustained in consequence of breach**

ORDER

On appeal from: North Gauteng High Court (Botha J sitting as court of first instance).

The appeal is dismissed with costs.

JUDGMENT

NUGENT JA (HEHER, MLAMBO and MALAN JJA and MAJIEDT AJA concurring).

[1] This is an appeal against an order of the High Court at Pretoria (Botha J) dismissing a claim for damages for breach of contract. The appeal is before us with the leave of that court.

[2] The appellant is a close corporation of which Ms Oosthuizen is the sole member. It conducts business as a broker in the courier industry. In the ordinary course the appellant will negotiate tariffs for the provision of courier services by a service provider. It will then contract with persons who make use of those services. It will place its customer's business with the service provider, making its profit from the mark-up that it charges its customer. At the end of each month the service provider will invoice the appellant and provide it with a detailed report for the services that it has provided.

[3] This case arises from an attempt by the appellant to secure the business of a company referred to in the evidence as Elster Kent Metering. Elster Kent manufactured water meters and used the services of a courier to deliver the meters to its customers. Such was the volume of its business that it needed to have a person permanently on its premises to complete the relevant documentation and to arrange for its goods to be despatched daily.

[4] Ms Oosthuizen was introduced to one of the directors of Elster Kent with a view to securing its business. At that time Elster Kent was being served by a company that was referred to as RTT but Elster Kent was willing to allow the appellant the opportunity to take over its business. The respondent was Ms Oosthuizen's preferred service provider and was at that time being used by her to provide services to other customers. As will appear later in this judgment the state of the appellant's account with the respondent became an important element in the dispute that arose between them.

[5] In view of the volume of the business the appellant would need to install at the premises of Elster Kent what was called an 'in-house' computer system – also referred to at times as a 'full-house' system. This was a computer system, linked to the system of the respondent, which would record all parcels despatched, and would enable their whereabouts to be tracked. The components of the system comprise a computer, a modem, a telephony line, appropriate software, and a specialised litho printer (also referred to as a Zebra printer).

[6] It is not necessary to relate all the negotiations that took place with a view to securing the business of Elster Kent. It is sufficient to say that at

the outset Ms Oosthuizen visited the premises of Elster Kent in the company of the operations manager of the respondent, Mr Permal, to enable him to evaluate what would be involved in providing the service. Mr Permal was impressed with the volume of business that would be generated and apparently reported back to the respondent that an 'in-house' system should be installed as soon as possible so that the business could be secured. That is corroborated by a letter written to Ms Oosthuizen after that visit, by Ms Venter, a sales representative of the respondent, in which she recorded the following:

'Desmond [Permal] seems to think that we must get the in-house going as quickly as possible, because we will pick up the business once they see we can handle the volumes … Let me have the client's details so that I can start organizing the software with the [information technology] department …'

[7] At that stage the appellant was already providing Elster Kent with a service for its smaller parcels. The idea was that it would install the in-house system on the premises and demonstrate to Elster Kent that it could deal with the volume of its entire business. If Elster Kent was satisfied that the appellant could fulfil its requirements then it would terminate the services of its existing provider and appoint the appellant to handle all its business.

[8] Meanwhile a meeting took place on Wednesday 11 February 2004 between Ms Oosthuizen, Ms Venter, and Mr Hendricks, the managing director of the respondent, to discuss the proposed business. At the meeting Ms Oosthuizen told Mr Hendricks that Elster Kent required an in-house system to be installed by 20 February 2004. Elster Kent had agreed that it would provide the computer, the modem and the telephony line. What the appellant required from the respondent was that it should

supply the necessary software and the litho printer. Ms Oosthuizen said that Mr Hendricks agreed to do so.

[9] Ms Oosthuizen's account of what occurred at the meeting was denied by Mr Hendricks and Ms Venter. According to their evidence the respondent would consider installing an in-house system only after evaluating the volume of work that would be generated.

[10] There is some support for Ms Oosthuizen's version of events in the correspondence that followed the meeting. On the evening of 11 February 2004 Ms Oosthuizen wrote to Ms Venter, with copies to Mr Permal and Mr Hendricks, in which she asked Ms Venter to 'please give me a date and time for next week when the in-house will be implemented.' In reply Ms Venter wrote on 13 February 2004 that 'this will take 7 days. They have to get the software set up for the in-house, please give me the client's details, address, contact numbers, contact person, what type of line they have for us to use'. On the evening of Sunday 15 February 2004 Ms Oosthuizen wrote to Ms Venter asking her 'wanneer kan ek sê sal [die respondent] by Elster opdaag vir installasie?' The following morning Ms Venter replied to Ms Oosthuizen in the following terms: 'You and I must get together as you must sign a form for the in-house installation, then I have to give it to Kenny from [information technology] department who will then process the instruction.' That afternoon they met and the relevant document was signed.

[11] But things took a different turn on Wednesday 18 February 2004 when Ms Venter wrote to Ms Oosthuizen as follows:

'I do not have good news regarding Elster in-house. I have just spoken to Victor [Hendricks], he says sorry, but we can not supply a new Zebra printer at the moment.

If one becomes available soon from an in-house closing, we will advise you and get the request for an in-house at Elster in motion.
A new printer is going to cost us R20 000.00 and we can not be sure the client's spend at this moment in time will justify us spending this amount of money.'

[12] Meanwhile, another difficulty had developed for the appellant. In order to conduct business the appellant required credit to be extended by the respondent. By agreement between them credit had been granted to the appellant up to a limit of R50 000. The written agreement between the parties regulating the terms on which they would do business recorded that

'credit facilities granted by [the respondent] … shall be in the sole discretion of [the respondent] which may at any time terminate or vary such facilities'.

[13] On 9 February 2004 the credit manager of the respondent, Mr Sotyato, wrote to the appellant advising that the sum of R137 312 was outstanding on her account, and that if the amount was not paid the appellant would have 'no option but to suspend your account'. Ms Oosthuizen replied on 15 February 2004 advising that she had reviewed the account and had come across numerous discrepancies that needed to be resolved. Again on 17 February 2004 she wrote a long letter to Mr Sotyato raising numerous concerns about the account. But Mr Sotyato was unrelenting and he advised Ms Oosthuizen that payment of the full amount claimed was required by 20 February 2004, and that in the absence of a response by 19 February 2004 the account would be 'put on hold' until payment had been made.

[14] There is no dispute that at that time the appellant owed the respondent the sum of at least R90 524. On 20 February the appellant's attorney wrote to Mr Sotyato as follows:

'We have been informed by our client that you have frozen her account with [the respondent] and that she is currently in no position to conduct her day to day business. We confirm that our client has [on] numerous occasions requested you to provide her with the correct statements of her account reflecting the outstanding amount due and owing to yourselves.

Furthermore we would like to bring to your attention that our client indicated that she is trying to reach an agreement with yourselves today, the 20th February 2004, in order to try and resolve this matter. Our client indicated that she is an amount of R90 524,22 indebted to yourselves.

We confirm that our client has paid this amount into our trust account with instructions to pay this amount to yourselves as soon as you give attention to her requests …'

[15] By 23 February 2004 it seems that the respondent was contending that the amount outstanding was far more than the amount originally claimed. On that day Mr Sotyato wrote to Ms Oosthuizen, with reference to the letter from her attorney, disputing that the relevant statements had not been provided, and saying the following:

'I have lifted the suspension on your account and thereby request compliance to the following conditions:

> I will accept payment of no less than R100 000 two days from receipt of this faxed copy of this letter.
>
> An additional payment of R100 000 is expected in two weeks from receipt fax copy of this letter
>
> The account will then have to be paid in 30 days and you will also be required to comply with the approved credit limits.
>
> Full compliance with our terms and conditions of trade should be maintained from today onwards.

Failure to comply with any of the above conditions will result in the immediate suspension of the account.'

[16] It is common cause that no moneys were paid to the respondent. The account was duly suspended and no further business was capable of being done by the appellant with the respondent.

[17] Relying upon the alleged oral agreement by the respondent to provide a printer for the in-house system that was to be installed at the premises of Elster Kent, and its failure to do so, the appellant sued the respondent. The appellant alleged that had the respondent not breached the agreement the appellant would have secured the business of Elster Kent, which would have earned it a profit of R696 428 during the period March 2004 to October 2005, and damages were claimed in that amount. Apart from denying the claim the respondent counterclaimed for payment of the sum of R281 466,11 that was alleged to be owing by the appellant for services that had been provided.

[18] By agreement between the parties the court below ordered that the respondent's 'liability' for the claim would be determined initially, and that the 'quantum' of the claim, and the counterclaim, would stand over for later determination. Once again, as is so often the case when issues are separated, counsel for the respective parties differed on the meaning of that order.

[19] Counsel for the appellant submitted that the effect of the order was that the court was called upon to decide only whether there was an oral agreement and whether it was breached. Counsel for the respondent, on the other hand, submitted that, in addition, the court was called upon to decide whether the appellant had sustained damages in consequence of the alleged breach.

[20] In its ordinary meaning the ‘quantum’ of a claim refers to the monetary amount of a claim. That being the only issue that was left over for later determination I think the court below must be taken to have meant by its order that the enquiry would extend to the question whether the appellant sustained damages in consequence of the alleged breach. Indeed, I think it is apparent from the findings that were made by the court below that that is what it intended its order to mean. I might add that the facts in that regard were fully canvassed in the evidence.

[21] The court below found that the parties indeed concluded the oral agreement alleged by the appellant and that the respondent breached the agreement by failing to supply the printer but it dismissed the claim on other grounds. The respondent has purported to conditionally ‘cross appeal’ against that finding but I think that that was misconceived. It is trite that an appeal lies against the order that is made by a court rather than against the reasons for the order. The order in this case was made in favour of the respondent and it was open to the respondent to support that order on whatever grounds were appropriate without noting a ‘cross appeal’.

[22] In view of the conclusion to which I have come it is not necessary to consider whether the finding of the court below that I have referred to was correct. I will assume for present purposes that an oral agreement was indeed concluded, and breached, as alleged by the appellant. I will also assume – though in my view it is by no means clear – that had the agreement been fulfilled the appellant would have secured the business of Elster Kent.

[23] The court below went on to find that it had not been established that the appellant would have earned the moneys that it claimed to have lost. On the contrary, it found that had the business of Elster Kent been secured, the appellant would not have been able to execute the work, because the respondent had suspended its account and would thus not have provided the necessary services.

[24] Whether loss has been sustained in consequence of a breach of contract is a factual enquiry. The proper enquiry in such a case is what would have occurred had the contract been fulfilled. I think it is abundantly clear that if the in-house system had been installed the appellant would not have been capable of executing any resultant contract with Elster King because the respondent had refused to provide further services until the appellant paid the moneys that were claimed to be owing. Counsel for the appellant submitted that although the account was at first suspended the suspension was lifted on 23 February 2004. While that is indeed so, the suspension was lifted only conditionally. It is common cause that the conditions were not met and that the suspension took effect once more on 25 February 2004.

[25] In heads of argument that were submitted on behalf of the appellant after the hearing of the appeal it was submitted that the appellant was entitled at least to damages for loss sustained over a period of four working days from the time the agreement was allegedly repudiated on 18 February 2004 until the account was finally suspended on 25 February 2004. (Of course the respondent's obligation was to install the printer by no later than 20 February 2004 – leaving only two working days before the account was finally suspended.) I do not think the submission can be sustained. This claim was not about the recovery of loss sustained over

two (or four) days. Indeed, the claim in the pleadings was for loss alleged to have been sustained only from 1 March 2004 and it is not open to the appellant to claim damages for an earlier period. But that apart, the evidence does not establish that if the printer had been installed the appellant would immediately have commenced to do business and there is no reason simply to assume that that would have occurred.

[26] It was also submitted on behalf of the appellant that the respondent had not established that money was indeed owing by the appellant and that it was entitled to impose the suspension. I referred earlier to the written agreement between the parties, which entitled the respondent to terminate the appellant's credit at any time. Whether or not money was owing by the appellant seems to me in the circumstances to be immaterial. But that notwithstanding, it is common cause that at least R90 524 was owing by the appellant. It is true, as pointed out by the appellant's counsel, that the appellant paid that sum into her attorney's trust account, to be paid to the respondent if certain conditions were met. It is trite that that did not constitute payment of what was owing, nor even a tender of payment. On any basis, then, the respondent was entitled to suspend the account, as it did, and the appellant would not have been capable of doing business. In those circumstances the finding of the court below cannot be faulted and the appeal ought to be dismissed. While the respondent might have been justified in employing two counsel I do not think that the appeal was such that the cost thereof should be borne by the appellant.

[27] The appeal is dismissed with costs.

R W NUGENT
JUDGE OF APPEAL

APPEARANCES:

For appellant: F W Botes

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