



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 648/08

No precedential significance

ACT COMPUTERS

Appellant

and

NVM BELEGGINGS & VERSEKERINGS ADVISEURS

Respondent

Neutral citation: *Act Computers v NVM Beleggings* (648/2008) 94 [2009]
ZASCA (17 September 2009)

Coram: **Mpati P, Lewis, Ponnan and Snyders JJA and Wallis AJA**

Heard: 3 September 2009

Delivered: 17 September 2009

Summary: Appeal against order to repay moneys where contract found to have been vitiated by material mistake: no mistake in fact – contract embodied in written documents accepted orally. Appeal upheld.

ORDER

On appeal from: High Court, Free State (Beckley and Rampai JJ sitting as a full bench).

(a) The appeal is upheld with costs.

(b) The order of the court below is set aside and is replaced with:

‘The appeal is dismissed with costs.’

JUDGMENT

LEWIS JA (Mpati P, Ponnann and Snyders JJA and Wallis AJA concurring)

[1] This appeal turns on whether a contract between the parties, who claimed to have different understandings as to its nature, was proved on the terms alleged by the respondent. The appellant, ACT Computers (ACT), contends that it rendered services to the respondent, NVM Beleggings & Versekerings (NVM), and installed equipment necessary for the services at ACT’s premises, but that the equipment remained its property. NVM, on the other hand, maintains that it bought the equipment – a radio antenna used for electronic communication.

[2] NVM is an investment agent and insurance broker in Kroonstad in the Free State. ACT, also based in Kroonstad, supplies computer equipment and services. The dispute between the parties arose because the sole proprietor of NVM, Mr C P Booyesen, complained, over several months, that the equipment installed by ACT was not functioning adequately and that he and

his employees were unable to gain access to the internet and electronic databases for its business. Booyesen accordingly refused to pay ACT a monthly subscription for internet connectivity. Mr H J Knepscheld of ACT instructed employees of ACT to remove the antenna from NVM's premises several months after it had been installed. There was an ancillary dispute about the alleged removal of computer programmes from NVM computers, in respect of which damages were claimed, but that is not before us on appeal.

[3] After the antenna was removed from NVM's premises NVM claimed, in the magistrates' court, Kroonstad, the repayment of what it alleged was the purchase price of the antenna – the princely sum of R3 687.90. The court granted absolution from the instance on the basis that the contract between the parties was not proved. A full bench of the Free State High Court (Beckley and Rampai JJ) upheld an appeal against the order, finding that there had been an error as to the nature of the contract (error in negotio) which was accordingly void, and that NVM was entitled to restitution of the R3 687.90 paid to ACT. ACT appeals against the order with the leave of the full bench.

[4] I shall deal first with the documents forming the basis of the contract as pleaded by the parties. NVM itself alleged that the contract was partly written and partly oral, attaching the written portions to the particulars of claim, and ACT admitted that these documents were the written portions of the contract. In my view, the documents are determinative of the dispute. They comprised a letter attaching two quotations.

[5] On 25 August 2003 Knepscheld, on behalf of ACT, wrote to Booyesen proposing the installation of a cordless network 'WiFi' system for NVM. He explained the various installation permutations and stated that because the equipment was highly specialised, and was designed specifically for ACT, it was not offered for sale.¹

[6] The first quotation was for one 'WiFi 100Mb Internet Link', 'Mounting & Unit Installation', 'Panning & Fine Tune', 'Firewall & Routing' and 'Security & Voice over IP Config'. The 'Unit Price' was R3 235, plus VAT of R452.90, the total being R3 687.90. At the foot of the quotation were the words:

'These prices are valid for 7 days only. Goods remain the property of ACT Computers until fully paid. All goods carry a ONE YEAR carry-in warranty.'

[7] The second quotation was for internet connectivity at a monthly rate of R570 including VAT. This quotation also carried the words stating that goods remained the property of ACT unless fully paid for, a statement plainly inappropriate for the monthly provision of internet connectivity. Equally plainly, the words were printed routinely on all ACT's quotations, irrespective of whether they were for sales or services.

[8] Knepscheld's evidence was that the written quotations were accepted orally by Booyesen, and the antenna was in fact installed. A tax invoice dated 8 October 2003 was sent to NVM for 'Labour – WI-FI 100MN Internet link' for R3 687.90 (including VAT) and for 'WiFi CONNECTION 08/10/03-31/10/03'

¹ 'Aangesien die toerusting hoogs gespesialiseerd is en spesifiek vir ACT opgestel word, word dit nie te koop aangebied nie.'

for R379.68 (being for two-thirds of October). Payment by NVM of R4 515 was made by cheque to ACT on 18 November 2003. That, it appears, was in respect of the invoice of 8 October and the monthly payment for internet connectivity for November. NVM made no further payments to ACT.

[9] ACT workmen removed the antenna from NVM's premises on 19 March 2004, following numerous complaints about the equipment and lack of internet connectivity by Booyesen, and constant attempts by ACT to resolve the problems. An email sent by Booyesen on the same day, 19 March, listed the many problems that required attention and set out a suggested readjustment of amounts claimed by ACT. Knepscheld responded, also on the same day, questioning Booyesen's claims and stating that the only solution was for ACT to remove the equipment (which it promptly did) and for NVM to find another service provider in Kroonstad.

[10] NVM duly claimed the amount that it alleged it had paid for the antenna removed by ACT. ACT's defence to the claim was that the antenna was its property which it was entitled to remove when it cancelled the contract with NVM. Both Booyesen and Knepscheld testified in the trial. Their versions of what had been agreed differed as I have indicated. The trial court concluded, because of that, that there was no contract, and therefore no breach of contract. The court could thus, it reasoned, make no finding and granted absolution from the instance.

[11] The high court, on appeal, came to a different conclusion, one not advanced by ACT at all either in the trial or on appeal: that there was no consensus and therefore no contract. It decided that because there were different intentions as to the nature of the contract and its terms, the contract was vitiated by error and that NVM was entitled to restitution of its payment of R3 687.90.

[12] On appeal to this court NVM confirmed that the letter and quotations set out the terms of the contract and were accepted orally by it. The only argument advanced in support of its case was that the statement at the foot of the quotation for the equipment and installation – that goods remained the property of ACT until fully paid for – and that payment in full had been made, meant that the antenna had been sold to it. But NVM also conceded that these words, routinely used on ACT quotations, did not change the nature of the contract, if it were for services, to one for sale. The reservation of rights in the event of a sale clearly cannot mean that there was in fact a sale.

[13] NVM conceded also that the statement in the letter accompanying the quotations that the equipment was not for sale clearly meant just what it said: the equipment would be installed at the premises of NVM but would remain ACT's property. In my view, ACT proved that the contract was not one for the sale of the antenna or anything else, but was rather one for the installation of its own equipment and rendering of services. Accordingly, the trial court should have dismissed NVM's claim and not granted absolution from the instance.

[14] It follows also that the decision of the court below – that there was dissensus rendering the contract invalid, and that ACT should repay R3 687.90 to NVM – must be reversed.

[15] (a) The appeal is upheld with costs.

(b) The order of the court below is set aside and is replaced with:

‘The appeal is dismissed with costs.’

C H Lewis
Judge of Appeal

Appearances:

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