THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 1081/2018

In the matter between:

NTSIENI MORRIS KGOPANA **APPELLANT**

and

MOHLAKI ROSINA MATLALA **RESPONDENT**

Neutral citation: *Kgopana v Matlala* (1081/2018) [2019] ZASCA 174 (2 December 2019)

Coram: Petse DP and Leach, Wallis, Van der Merwe and Mocumie JJA

Heard: 20 November 2019

Delivered: 2 December 2019

Summary: Contract – when concluded – whether WhatsApp message contained an offer *animo contrahendi* – in both context and content the message did not convey an offer to contract – doctrine of quasi-mutual assent not applicable.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Makgoba JP sitting as court of first instance):

1 The appeal is upheld.

2 The order of the court a quo is set aside and replaced with the following:

'The plaintiff's claim is dismissed. There is no order as to costs.'

JUDGMENT

Van der Merwe JA (Petse DP and Leach, Wallis and Mocumie JJA concurring)

[1] During July 2015, the appellant, Mr Ntsieni Morris Kgopana, enjoyed a handsome windfall. He won a prize in the National Lottery[1] that amounted to R20 814 582,20. This amount was paid into his bank account on 29 July 2015. Some six months later, the appellant sent the following WhatsApp message (the message) to the respondent, Ms Mohlaki Rosina Matlala, who is the mother of one of his seven children:

'if I get 20m I can give all my children 1 m and remain with 13m .I will just stay at home and not driving up and down looking for tenders'

[2] The issue in the appeal is whether the message constituted an offer *animo contrahendi*, that is, an offer which upon acceptance could give rise to an enforceable contract. After proceeding to trial, the court a quo (Makgoba JP in the Limpopo Division of the High Court, Polokwane) held that it did. He accordingly gave judgment for the respondent but granted leave to the appellant to appeal to this court.

[3] The romantic relationship between the parties came to an end during March or April 2003. On 21 August 2003, however, a child was born to the respondent of whom

[1] Established in terms of the Lotteries Act 57 of 1997.

the appellant was the father. It can be accepted that over the years the appellant had little or no contact with the child. He did, however, pay maintenance for the child in the amount of R1 000 per month, in terms of a consent order granted by the Mokopane maintenance court under case number 121/2003.

[4] The appellant was employed by the South African Revenue Service. Shortly after he received his bonanza, he made contact with the respondent. He conveyed to her that his health had deteriorated and that he could no longer be employed. He said that he expected that the pension benefits payable upon the termination of his employment would amount to approximately R600 000. He proposed to pay an amount of R100 000 to the respondent from this source of funds, in full and final settlement of his duty to maintain the minor child.

[5] The respondent was agreeable to the proposal. In order to give effect to their arrangement, the parties arranged a meeting with the maintenance officer at the maintenance court. At this meeting the respondent said she had heard that the appellant had won R20 million in the Lotto. The appellant denied this and said that he had only received payment of his pension benefits. The maintenance officer indicated, quite correctly, that the parties could not finally determine the rights of the minor child to receive maintenance from his father. The meeting ended on this note. Nevertheless the appellant paid the amount of R100 000 to the respondent for the benefit of the minor child on 5 January 2016 and did not thereafter make any further payments in terms of the maintenance order.

[6] On 20 January 2016 the respondent again visited the maintenance officer. According to the respondent, he told her that the appellant had indeed won approximately R20,8 million and exhibited bank statements of the appellant that reflected the payment.[2] This caused the respondent to send a WhatsApp message to the appellant in which she said that she now knew that he had won R20 million. On 21 January 2016 the appellant responded with the message I have mentioned at the outset.

[2] It was not explained how the maintenance officer came to be in possession of the bank statements of the appellant.

[7] About seven months later, on 7 September 2016, the respondent issued summons against the appellant. Relying on the message, she claimed payment of R900 000, that is, R1 million less the amount of R100 000 that had been paid on 5 January 2016. Her particulars of claim could not be described as a model of clarity. The appellant accepted, however, that it encapsulated the case that the respondent advanced at the trial. This was that an agreement, in terms of which the appellant was obliged to pay the amount of R1 million to her for the benefit of the minor child, had been concluded when she accepted an offer contained in the message. The particulars of claim did not state when and how the offer was accepted. In response to a leading question, the respondent said in evidence that she had accepted the offer by issuing the summons.

[8] In his plea, the appellant denied that he had won the prize in the National Lottery and denied that he had sent the message. However, he formally admitted these facts shortly before the commencement of the trial. It should be mentioned that the appellant specifically pleaded in the alternative that he had no *animus contrahendi*. The appellant testified that the only reason he had sent the message was to get rid of the respondent[3] and that he had no intention to make an offer to contract.

[9] The trial court concluded that the content of the message was clear and unequivocal and contained an offer that was 'certain and definite in its terms'. It held that an offer had been made 'with the necessary *animus contrahendi*' and that the respondent had 'readily accepted the offer'. The court a quo also held that the appellant was contractually liable in accordance with the message, even if he might not have intended to make an offer to contract. This was so, it reasoned with reference to cases such as *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd*[4] and *Steyn v LSA SA Motors Ltd*[5], because the respondent reasonably regarded the message as an offer that was open to acceptance. For the reasons that follow, I am unable to agree with any of these findings.

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[3] '. . . to get her away from me.'
[4] *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 (1) SA 978 (A); [1983] 1 All SA 375 (A).
[5] *Steyn v LSA SA Motors Ltd* 1994 (1) SA 49 (A); [1994] 1 All SA 483 (A).

[10] The primary basis of contractual liability in our law is true agreement or *consensus ad idem*, in accordance with the will theory. In cases of dissensus contractual liability may nevertheless be founded on the doctrine of quasi-mutual assent, which is based on the reliance theory. In these cases the first party is contractually bound because he or she led the second party, as a reasonable person, to believe that the first party intended to contract on particular terms.[6]

[11] Importantly, true agreement or consensus can generally only be determined by an examination of the external manifestations of the intention of the respective parties. As it is put in *Christie's Law of Contract of South Africa*[7] at 31:

'In the result, it is correct to say that in order to decide whether a contract exists one looks first for the true agreement of two or more parties, and because such agreement can only be revealed by external manifestations one's approach must of necessity be generally objective.'

The author also aptly explains the application of these principles to the concept of *animus contrahendi* in these terms:

'In this context, the phrase "lack of *animus contrahendi*" is appropriate to describe those cases in which, from the circumstances or manner in which the "offer" was made, or both, it is clear to the court and was, or ought to have been, clear to the offeree that the offer was not intended to be taken seriously.'[8]

[12] It follows that the question in this case is whether in the context thereof, the message conveyed an offer *animo contrahendi*. The admissible context was that the appellant consistently denied having won a prize in the National Lottery. The message was sent in response to a statement that she knew that he had won the prize. It therefore constituted a denial that he had done so. The context thus strongly suggested that the appellant never intended to agree to part with a portion of his winnings. And in its terms, the message related what the appellant could possibly do in the hypothetical future event of him receiving R20 million. It set out what the appellant

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[6] *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A); [1979] 2 All SA 71 (A) at 995-996; *Mondorp Eiendomsagentskap (EDMS) Bpk v Kemp en De Beer* 1979 (4) SA 74 (AD) at 78E-G; *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* (fn 4 above) at 984D-G; *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A); [1992] 2 All SA 114 (A) at 238I-240I; *Steyn v LSA Motors Ltd* (fn 5 above) at 60J-61J; Hutchinson et al *The Law of Contract in South Africa* 2 ed (2016) at 18-20.

[7] G B Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016).

[8] Ibid at 38.

might do if he received R20 million. In respect of the manifestation of the intention of the respondent it is significant that she never responded to the message, and did not immediately claim payment.

[13] In my view the message clearly did not contain an offer that could on acceptance thereof be converted into an enforceable agreement. Therefore this is also not a case where the offeror's true intention differed from his expressed intention. The appellant subjectively had no intention to contract and the message did not suggest otherwise. Thus there was no room for the application of the doctrine of quasi-mutual assent.

[14] It follows that the court a quo should have dismissed the respondent's claim and the appeal should succeed. In the result this court must determine the incidence of costs in the court a quo and in this court. The facts show that the morally reprehensible conduct of the appellant contributed to the institution of the action in the interests of the minor child. And it was not unreasonable of the respondent to defend the judgment in favour of the minor child on appeal. A costs order against the respondent would be detrimental to the best interests of the child. In the exercise of this court's discretion in respect of costs in the particular circumstances of this case, I consider it fair and just to make no order as to costs in the court a quo and in this court.

[15] The following order is issued:

1 The appeal is upheld.

2 The order of the court a quo is set aside and replaced with the following:

'The plaintiff's claim is dismissed. There is no order as to costs.'

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C H G van der Merwe

Judge of Appeal

APPEARANCES

For Appellant:	A C Diamond Instructed by: Hamman-Moosa Inc, Louis Trichardt Eugene Attorneys, Bloemfontein
For Respondent:	J Hershensohn, with him C M Rip (Heads prepared by D M Leathern SC) Instructed by: De Beer Attorneys, Mokopane Bezuidenhout Inc, Bloemfontein