

**In the South Gauteng High Court  
Johannesburg**

**Case: 2004/20602  
A5014/08**

In the matter between:

**La Consortium & Vending CC t/a LA Enterprises**

Appellant

and

**MTN Service Provider (Pty) Ltd**

Respondent

In re:

**MTN Service Provider (Pty) Ltd**

Plaintiff

and

**La Consortium & Vending CC t/a La Enterprises**

First Defendant

**Lance Henry Froneman**

Second Defendant

**Condoprops 1021 CC**

Third Defendant

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**Judgment**

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**Malan J:**

[1]The appellant appeals against the judgment of Claassen J ordering the appellant to pay to the respondent the amount of R 3 403 903,30 with interest and costs in respect of goods sold and delivered. The appeal is with the leave of the court a quo.

The appeal is based primarily on two grounds; first, that the respondent failed to establish on a balance of probabilities that it had delivered the goods to the appellant; and, secondly, that the computer generated documents relied upon by the respondent amounted to inadmissible hearsay evidence.<sup>1</sup>

[2] The respondent sells cellular telephones and provides cellular telephone services. The appellant conducted business as a distributor of the respondent's cellular telephones and services. Originally, the parties concluded three written agreements (varied by subsequent addenda). Two of them are relevant for the purposes of the respondent's cause of action: the Electronic Distribution Agreement of the 28<sup>th</sup> of January 2002; and the Prepaid Distribution Agreement concluded on the 2<sup>nd</sup> of April 2001.<sup>2</sup> In terms of the agreements, the respondent would sell and the appellant would purchase: cellular handset kits; airtime in the form of physical vouchers as well as 'airtime'. Over a period of time the appellant purchased these goods from the respondent. The parties conducted their commercial relationship for approximately 2 years and 6 months. Thereafter the respondent terminated the agreements in terms of the respective termination provisions, ie by providing the appellant 90 days written notice. During October 2003, and at the time of the

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<sup>1</sup> Record 991-2.

<sup>2</sup> Record 61-83 and 24-6.

notification of the intended cancellation of the agreements, and in terms of the agreements, all amounts outstanding at the date of termination became due, owing and payable by the appellant to the respondent.<sup>3</sup> The terms of the agreements were never placed in dispute by the appellant. After the respondent received the respective letters of termination, the appellant placed no further orders, nor did the respondent deliver any further products to the appellant.

[3]The court a quo found in respect of claim A that the respondent 'had proved on a balance of probabilities that it had delivered the physical stock reflected in the copy tax invoices vis-à-vis purchase orders 1000948 and 1000941 dated 10 October 2003. The acknowledgements of receipt were signed by one Fiona Campbell and similarly bore the appellant's company stamp. The court a quo found that in terms of clause 7.8 of the Pre paid Distribution Agreement, same constituted 'absolute and incontrovertible proof of delivery of the stocks referred to therein'.

[4] In respect of claim B the court a quo found that Lodge's (the respondent's Senior Manager, Operational Finance) evidence stood uncontradicted, and that the respondent had never queried the outstanding amounts on the statements delivered to it. There was no evidence to contradict

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<sup>3</sup> Record 40 (clause 19.2) and Record 73 (clause 16.2).

the evidence of Lodge as confirmed by Mphofu (the respondent's Product Manager) that the status of the purchase orders namely 1000954, 1000947 and 1000900 was in fact activated. In terms of the Electronic Distribution Agreement, 'activation' constituted delivery of network packages.<sup>4</sup>

[5] The relevant parts of clause 6 of the Electronic Distribution Agreement provide:

'6.1 The Distributor shall be entitled to place orders for Pre Paid Network Packages via electronic mail ("e-mail") or any other means acceptable to the Service Provider and stipulated in the Business Specification annexed hereto ... and in the format determined by the Service Provider, from time to time. A pro forma order form is annexed hereto as Annexure "F". Any such e-mail orders shall be sent to a designated e-mail address stipulated by the Service Provider, from time to time. Any e-mail order emanating from an e-mail address nominated by the Distributor from time to time, shall be prima facie proof of such order submitted by the Distributor.

6.3 After acceptance by the Service Provider of any order submitted in accordance with 6.1 above, the Service Provider shall effect delivery of the Pre Paid Network Packages by way of electronic delivery in a format in accordance with the Business Specification. The parties wish to record that this format is considered by the Distributor to be a secure format and that the Distributor shall adhere to any security specifications set out by the Service Provider ... Such order shall be delivered to the Distributor by way of e-mail or any other format stipulated by the Service Provider in the Business Specification from time to time, in an encrypted file in the denominations stipulated by the Distributor in each relevant order. Such Pre Paid Network Packages shall be inactive and shall only be elevated to a status zero i.e. , activated status, once the Distributor has acknowledged receipt of the encrypted file by way of return e-mail to a designated address nominated by the Service Provider, from time to time. In the event of the Distributor failing to acknowledge receipt of such encrypted file, within twenty four (24) hours of such file being sent by the Service Provider to the Distributor, the Service Provider shall be entitled to cancel such order or any part thereof and the Distributor shall be obliged to re-submit an order in accordance with the provisions of 6.1 above.

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<sup>4</sup> Clause 6.4 of the Electronic Distribution Agreement; Record 69.

6.4 Receipt of the Pre Paid Network Packages by the Distributor shall be deemed to have taken place either once acknowledgement of the receipt as referred to in 6.3 above, has been forwarded by the Distributor to the Service Provider or such Pre Paid Network Packages have been activated by the Service Provider for use on the Network or any one of the Pre Paid Network Packages contained in any one file is utilised on the Network, whichever is the sooner. Receipt of the Pre Paid Network Packages by the Distributor shall constitute delivery of such Pre Paid Network Packages to the Distributor.'

The appellant never disputed that delivery took place in respect of the orders referred to, nor did it dispute that it failed to pay the amount outstanding in this regard. No evidence was led by the appellant disputing the correctness of the amounts paid by the appellant as reflected in the summary of transactions.<sup>5</sup>

[6] In terms of claim A, the respondent claimed payment in the amount of R323 701,26 in respect of cellular telephone kits sold and delivered by it to the appellant. The appellant conceded that delivery of the goods referred to in claim A took place. In terms of Claim B, the respondent claimed payment in the amount of R3 080 202,04 consisting of 'airtime' sold and delivered by it to the appellant. The appellant closed its case without leading evidence. On its behalf it was submitted that the since the respondent was claiming the balance owing on a running account the respondent should have proved the opening balance. In addition, it was submitted that the evidence presented on behalf of the respondent and in particular the certificates furnished in terms of s 15(4) of the Electronic Communications and Transactions Act 25 of 2002 constituted hearsay evidence and were consequently inadmissible. Nor was the evidence relied upon the 'best evidence' since no source documentation was presented.

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<sup>5</sup> Exhibit A and documents attached to Exhibit C at Record 5:321-5.

[7] The respondent's main witness was Mr L J Lodge. He testified that his day to day functions included managing teams of people whose function it was to administer the agreements governing the relationship between the respondent and its distributors as well as collecting outstanding monies owed by distributors to the respondent. He was familiar with the appellant.<sup>6</sup> He had a team which managed distributor accounts as well as the day-to-day operations of those accounts. The latter's activities included the physical printing of the documents and their issuing to various distributors.<sup>7</sup> The respondent relied on an accounting software package known as the Oracle Accounting System, which manages stock and debtors. He furthermore testified to the integrity of the system:<sup>8</sup> the system was audited on a regular basis by both the respondent's internal auditors as well as external auditors. He testified<sup>9</sup> that

'there is a separation of duties and certain staff have the ability to create transactions in the system, based on the job that they have, and once the transaction is created in the system there is auditing logs and procedures that track the transaction is not altered in any form ... Each staff member deals with a particular portion of a transaction and therefore is not able to alter the overall transaction and there is controls and

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<sup>6</sup> Record 799.

<sup>7</sup> Record 817.

<sup>8</sup> Record 817-8.

<sup>9</sup> Record 818.

notifications that would go out should certain transactions be amended on the system, and those are sent to various managers to be able to monitor any variances on the system.’

The statements relied upon by the respondent were under his control and stored on the respondent’s computer system.<sup>10</sup> In terms of the respondent’s statement dated 30 November 2003 the appellant was indebted to the respondent in the amount of R3 419 014,95.<sup>11</sup> The customer number appears on the statement, namely 5182, which is the appellant’s customer number. Having regard to this statement, Lodge was able to identify and isolate the transactions in terms of which monies were still outstanding by the respondent. The method adopted by him in isolating the outstanding payments on the individual transactions was as follows: As at 17 October 2003, ie the date of the termination notice, there were no outstanding orders which the appellant placed and the respondent similarly did not after that date deliver any stock whether physical or airtime.<sup>12</sup> It was not in dispute, that the respondent on receipt of monies from the appellant, would allocate same to the oldest unpaid transactions.<sup>13</sup> On the basis of that practice a

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<sup>10</sup> Record 820.

<sup>11</sup> Record 5:254.

<sup>12</sup> Record 3.1:815-6.

<sup>13</sup> Record 3.1:805, 815.

consolidated summary of the transactions was prepared for the purposes of the trial.<sup>14</sup> It indicated that the following purchase orders together with their respective invoice numbers identified by Lodge remained unpaid namely: PO100900 (Electronic Distribution Agreement) dated 18 September 2003; PO100948 (Prepaid Distribution Agreement) dated 10 October 2003; PO100941 (Prepaid Distribution Agreement) dated 10 October 2003; PO100947 (Electronic Distribution Agreement) dated 13 October 2003; and PO100954 (Electronic Distribution Agreement) dated 15 October 2003.

[8]Once the transactions had been isolated by Lodge, the relevant POD copy tax invoices were identified evidencing delivery of the product to the appellant. The POD copy tax invoices were signed by one Fiona and bore the respondent's company stamp thereon. In terms of clauses 7.7 and 7.8 of the Pre Paid Distribution Agreement such returned delivery note duly signed and stamped served as absolute and incontrovertible proof of delivery. The appellant has, in any event, conceded that delivery of the goods relating to claim A has been proved. Clauses 7.7 and 7.8 provide:<sup>15</sup>

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<sup>14</sup> Record 5:321 ff.

<sup>15</sup> Record 33.



Clause 7.7: 'Forthwith upon the delivery of any Pre paid Kits and/or Pre paid Debit Cards, the Distributor will return to the Service Provider or the nominated Distributor, an acknowledgement of receipt in the form of the Service Provider's official despatch or Delivery Note signed, dated and stamped (with the Distributor's official company stamp) by a nominated and authorised representative of the Distributor. It is compulsory for the Distributor or an authorised representative of the Distributor, for the purposes of this clause 7.7, to sign the Delivery Note aforementioned by writing out its name in full and not just initialling the said Delivery Note.'

Clause 7.8: 'Upon receipt by the Service Provider of a duly returned despatch or Delivery Note referred to in clause 7.7 above and whether the contents of the delivery have been checked by the Distributor or not, such despatch or Delivery Note shall serve as absolute and incontrovertible proof of delivery ...'

[9] Lodge, applying the aforementioned methodology and reconciliation, identified the individual and outstanding transactions in respect of the Electronic Distribution Agreement. Insofar as delivery of the airtime is concerned, that took place by way of an e-mail containing an encrypted file in the denominations stipulated by in this instance, the appellant. According to Lodge, the network services were initially inactive and were only activated once the appellant had acknowledged receipt of the encrypted file by way of a return e-mail to the designated address. Delivery of the airtime (network services) was deemed to have taken place either once the acknowledgement of the receipt of the encrypted file or files had been e-mailed back by the appellant to the respondent, or once those network services had been activated by the respondent for use on the network whichever was the sooner.

[10] Lodge described how orders were placed in terms of

the Electronic Distribution Agreement for Pre Paid Network Packages ie by email in terms of clause 6 to a designated email address stated in the contract.<sup>16</sup> Deliveries were made to a designated email address of the appellant.<sup>17</sup> No specific orders were referred to - only as examples did Lodge refer to some.<sup>18</sup> Neither the original orders placed nor copies were made available. In fact, Lodge testified<sup>19</sup> with reference to the account that '[o]nce the order was received it was captured on the Oracle accounting system and which resulted in the invoice taking place.' Also in relation to payments received on the account Lodge was unable to state whether the payments were made by cheque, cash or transfer.<sup>20</sup> Copies were kept of statements but they were not presented to court:<sup>21</sup> 'These are the documents that would be originating from Oracle, the Oracle documents would obviously be – the invoice would be

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<sup>16</sup> See para 5 above; Record 3.1:808.

<sup>17</sup> Record 3.1:809.

<sup>18</sup> Record 2.4: 685-6 and 690.

<sup>19</sup> Record 5.1:831 and 847.

<sup>20</sup> Record 3.1:834, 838-9.

<sup>21</sup> Record 3.1:840, 842.

captured from a purchase order, the receipt would be captured from a receipt that has gone through our bank account.’ Lodge conceded that that there was documentary proof of orders that were placed by the appellant.<sup>22</sup> Where orders in terms of the electronic agreement which were placed electronically by email were concerned, Lodge conceded that there were records of these transactions.<sup>23</sup> ‘We have gone through our archiving systems and we have not been able to find the actual physical purchase order that was electronically sent to us ... Our computer system from Oracle refers to the purchase order and also two copies of emails requesting the activation of those particular airtime vouchers, we have copies of those emails coming back from Mr Froneman.’ It was put to Lodge:<sup>24</sup> ‘So you have copies of the emails ordering and requesting activation? – We have copies of the emails requesting activation.’ Lodge’s evidence is based on the printout on Excell from Oracle:<sup>25</sup>

‘It is a transaction register that is run and then is placed into Excell. It comes

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<sup>22</sup> Record 3.1:843.

<sup>23</sup> Record 3.1:846-7.

<sup>24</sup> Record 851.

<sup>25</sup> Record 851.

from the accounting system, it is not as though the staff go and capture the information from the statements and capture them into this particular report.'

He further said:<sup>26</sup>

'The order is captured by a department – order management department ... By order control – order administrative staff who work in department at that stage known as order management, and that was managed during this period by Kumaran Vandayar. ... It is captured on Oracle and it is also captured on the electronic system. ... The order goes for approval and validate – it validates to see whether or not the particular account has sufficient credit facility or whether the account is in overdue position. That goes to the credit manager and if there is sufficient credit and the account is within its credit terms then the transaction is automatically approved. If it is not it needs to be approved by that particular manager, by the commercial credit manager, the commercial credit manager reports to myself.'

The commercial credit department was under the control of Lodge and the order management department under that of Mr Vandayar. Lodge conceded that there would have been a large number of people who would have been responsible for the different elements of a transaction.<sup>27</sup> When he was asked who had placed a value on an order he responded:<sup>28</sup>

'The accounting system has various products which have been created, these products have a

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<sup>26</sup> Record 851-2.

<sup>27</sup> Record 854.

<sup>28</sup> Record 853-5.

selling price and there is also from time to time certain discounts that are offered in terms of the commercial agreement, in accordance with annexure C ... the system then picks up the customer from the system and goes and picks up the discount for that particular agreement and determines the selling price of the particular products.'

'And when is the value of the order allocated to it on the system? – The value of the order is allocated to it on capturing of the order. ... The account – the debtors account is debited with amount when an invoice is generated and an invoice is generated at point of shipping the product out of our warehouse.

So the debit takes place before delivery takes place? – That is correct, for – in terms of the prepaid distribution agreement.

And for the electronic agreement? – It is done in retrospect, after activation. ...

Who activates? – Activation is done by – you are talking about in terms of the prepaid electronic distribution agreement? ... It is done by another department and that is run by Shepherd [Mpofu].

Now when he activates does he tell somebody it has been activated you must debit the account or does he debit the account? – He tells the – at that stage he sends notification down to our warehouse to ship the transaction, which generates the invoice. ... And then the account is debited.

How many people work or do things to finally get all this information captured on your oracle accounting system? The exact number I am not sure but there would be a large number of people who would be responsible for different elements of the entire transaction.

And there can be mistakes? - ... It might be possible that mistakes are made but there are checks and balances that are in place to make sure that if mistakes are made they are identified and necessary adjustments are processed to rectify the situation.'

[11] In respect of purchase order 100900 dated 18 September 2003 and purchase order 100947 dated 13 October

2003 and purchase order 100954 dated 15 October 2003, these network packages were activated by the respondent according to Mr Mphofu's evidence. Mphofu is the respondent's product manager ('I look after the electronic distribution of airtime').<sup>29</sup> His evidence was not challenged by the appellant.

A few extracts from his evidence will suffice to describe the process involved:<sup>30</sup>

'- Okay, effectively, the process entails our link between our MTN SP and our customers, how emails are set up, how the encryption files for the secure transfer is also managed and at what point we are advancing stock.

Mr Fischer: Is there a particular process within MTN, you do not receive a request in vacuum. How does it work, how is it linked? – The link effectively is the order entry department from our environment, so basically process an order from our customer, which they capture into the system. It comes through to us and then we encrypt which means we will put it into a secure mode and transmit now to our channels. On confirmation from the channel that they have received their stock and they are happy with all the contents of that particular order they request that we activate. So at that point then we activate. So at that point we activate the stock to be available on the MTN network.

Just put in layman's terms, how do you effect delivery? – Delivery is effected on an email format. We submit the file, or we make an attachment onto the email and send it to the designated email that we basically agree on with our customers and then we send it to that particular email, we wait for a response confirmation to us to say we are happy with the stock can you ...

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<sup>29</sup> Record 3.2:891.

<sup>30</sup> Record 3.2:891 ff.

Mr Fischer: Perhaps just, can one ascribe your function as the electronic warehouse so to speak? – Ja as the electronic warehouse, is because we are not holding physical stock, but it is just the pin definition of the stock that we are holding. So effectively we are managing this stock in sort of systems rather than holding a physical card.

Court: Ja the pin really the key, is it not? – Yes it is the key.

With no pin, no delivery? – No delivery ...

Is that what you talk of when you say, about a pin number? – Ja, the pin number. It is actual inventory. It ... inventory in a way, in a physical environment.

Like an inventory? – Like in a card. You know the scratch card that you hold, it has got a pin behind there. This pin we sell it in an electronic format. ...

Mr Fischer: Once you have “delivered” to a particular customer, is that product active on the system at that point in time already or not” – No it is not active.

What is the next, in order to activate the product, what is the next step that one would have to go through in order to activate this product? – On order to activate we have to get confirmation from the said client or customer to say he is happy with the stock, he has received it and confirm ad request that we activate.

How would he do that? – Through an email process.

Turn to page 326, 327 [Record 2.4: 685-6] ... Do you see that, 326?<sup>31</sup> – Yes I am looking at it. ... This particular document basically is coming from our customer confirming that the stock has been received and they are requesting that we activate the stock. ...

The customer basically initiates that LA 57, because that is his reference number, he raises an order, a physical order from his side and say and submit us LA 57. When it comes through my section, the order entry section they capture that order to say ... customer order number LA 57.

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<sup>31</sup> These two emails are referred to merely as examples.

- Yes for reference purposes we capture that to say this is order that we are processing from this customer.

Mr Fischer: What is the purpose of this email? – The email that is in front of me is basically requesting that we, they have received the order and they would like us to activate it.

That presumes that delivery has taken place, is that right? – Yes it is. ...

He is now waiting to make use? To make use of it which he requires activation.'

[12] The data messages relied upon in this case are not only real evidence but includes hearsay. This is apparent from the cross-examination of Mr Mphofu:<sup>32</sup>

'Mr Mphofu, you say that the electronic, in terms of the electronic agreement there would be an order, is that correct? – Yes that is correct.

Then on the order there would be a delivery, correct? – Yes.

There are documents to substantiate the orders, is that correct? – Yes that is correct.

There are documents to substantiate the deliveries, is that correct? – Yes.

Then after that there is a document requesting activation, is that correct? – Yes.

The activation itself is also documented or not? – The confirmation of the activation, yes comes through.

Yes, but somebody physically must go to a computer and press a button to activate that airtime, is that correct? – That is right, yes.

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<sup>32</sup> Record 903.



It also follows from Mphofu's evidence that there were other documents available showing the activation of all the orders but that they were not presented to the court a quo: 'We could print a longer script of that'.<sup>33</sup> For evidence of the activation of the orders he relied on the document attached to his certificate showing that the orders relied upon had a status '4' meaning that they were activated.<sup>34</sup>

[13] Lodge testified, that the last payment received from the appellant was on 13 October 2003 in the amount of R600 000,00.<sup>35</sup> The appellant did not always give an indication as to which transaction the payment was to be allocated to and generally paid in round amounts. The respondent would then have allocated such payments to the oldest transaction.<sup>36</sup> Lodge's evidence was not challenged by the appellant nor was any version put to him. Lodge testified that stock was taken every single month to investigate any variances as against physical stock. In respect of virtual stock (airtime), reconciliations are done on a monthly basis, and if there were errors and duplications those would have been identified and reconciliations would have been effected. He testified that

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<sup>33</sup> Record 906.

<sup>34</sup> Record 5: 'LA3' at 333.

<sup>35</sup> Record 833.

<sup>36</sup> Record 834.

Froneman (the sole member of the respondent) never queried any particular transaction.<sup>37</sup>

[14] Mr Chongo<sup>38</sup> a commercial credit manager of the respondent was called to testify but he did not deal with the accounts of the appellant at the time the transactions were concluded. He, however, gave evidence of the procedures followed after a customer had placed an order. After the order had been validated it was sent to his department where he would have looked at the availability of credit on the account. If he was satisfied he would have sent the order back to order management to proceed with its implementation. All the customer's information was stored on Oracle under Accounts Receivable, a debtors management system.

[15] Mr Vandayar<sup>39</sup> was in charge of the order management department at the time the orders were placed by the appellant. He gave evidence of the different mediums in which orders could be placed, ie via fax or through email or by electronic data interchange. The checks made were the same whatever medium was used to place the order: the department would have verified the existence of the customer in their books and that the order emanated from a legitimate source such as the email address mentioned in the agreement, that

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<sup>37</sup> Record 3.1:858-9.

<sup>38</sup> Record 3.2:906 ff.

<sup>39</sup> Record 3.2: 878ff.

the value of the order fell within the agreed amount and that the goods ordered were within the agreed bouquet of products.<sup>40</sup>

'Now just to give you a bit of a background why we do these checks is because when an agreement is signed with any customer all the information of that agreement, the customer's name, the registration details, delivery address and the pricing structure is captured on a system so that my department does not have any influence of changing any of the information, all we do is we call up the customer who insert the product and the relevant pricing actually automatically comes up, we cannot change the price at that stage. Once we have checked all this information we actually capture the physical order to our commercial credit department who verifies the relative credit amounts or proof of payment amount.'

The credit department would then have returned a copy of the physical order with some kind of stamp indicating their approval.

'With some kind of stamp of approval or what? – Yes we stamp it basically just to write, the original purchase order comes from the customer, the stamp that we put on it, we actually write down our system order number on that copy, on that stamp and we also write this person that is processing the order. When we get it back it is either signed or it is not signed. There are two streams to this process. The one is an electronic stream and the one is physical. ... Yes so the physical copy of the order, we use that to capture it on the system. ... We send that copy of the order, after we have captured it on the system we write our system order on that piece of paper with a stamp and we send it down to commercial credit. ... When they get that piece of paper they call up that order number that we have captured. So they can call it up on their system to verify that the order was for these products to those values and what was captured on the system is also the same. ...

This purchase order 100948, who allocates this purchase order number to this particular purchase? Who does that? – We do, by capturing that order, yes.

So in the process of receiving the fax you then do the capturing and then you allocate this purchase order number to that particular order? – Well it is a system generated purchase

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<sup>40</sup> Record 879, 886.

order. ... So when we capture it the system gives us an invoice number or order number. ... Okay so after the commercial credit department has checked their funding and they approve it they send the piece of paper back to us, indicating that on the system they have actually went into the order and the order that we have captured and they have approved it. So when I call that order up the next time I call it up I will actually see that the status has changed from being captured to being approved. ... Okay on approval my next step would be to release this order to the warehouse for the physical picking of the stock. Once they have picked the stock to match the order they ship that stock and when they ship that stock, the shipping function generates ... They ship it. It is a function, it is a status on the system. After approval it is released to the warehouse and they ship the stock. When they ship it the system generates an invoice number ... Now obviously the only next step after that is the warehouse hands it over to our courier company who goes out and deliver it and obtains the signatures.'

You say it is a system generated function. Is it not? – A manual function. You cannot do it manually.

Ja but is there not a manual element in somebody in the warehouse typing with their fingers? – From the order perspective yes, someone has to manually capture it.'

[16] As far as orders placed in terms of the Electronic Distribution Agreement were concerned, Vandayar testified that the only difference from the placing of orders by fax<sup>41</sup>

'is that for electronic orders it had to be via an email facility and not fax and would be different verifications. The email would have an order attachment. ... So it is usually in a Microsoft Excell file and once you open the Excell file you would have the customer's logo with his company details and all the relevant order information as in the physical order. That is the product's name, the quantity, the pricing, the details of the customer and so forth. ... The verification from an order perspective is exactly the same as physical. We have to verify that the customer is in existence on our books..we have to verify that we have received the order from a legitimate source which is either the email address mentioned in his agreement and he is ordering products to the price value as agreed in the agreement. Those are the verification steps from an order perspective

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<sup>41</sup> Record 886-8.

and then the same process flows from an order perspective. ... Delivery, well no there would not be a delivery address in the electronic distribution agreement, because the ultimate goods that he is ordering will actually be emailed through to him, it would not be delivered. ...

Court: Who does the actual verification of the email and identity, the machine or somebody sitting in front of the machine, looking at the email that came in? – The email would be set up our system as part of the agreement. So once the agreement is signed off they would put those, that information in and upon processing, after my, or the processor, I am sure one of the next witnesses are going to talk about that, their process would be to ensure that they are sending the file of goods to the same email address as captured in the system. ... The verification is to look at the screen. ... Yes, but the sending of the file, they actually have to physically type it to send it to that email address. The system does not do that automatically.

It is possible to ascertain from the computer records 'who processed [an order] at each stage. So it will tell you that someone in my department processed the physical capturing of the order. Someone in the commercial credit department released the credit hold which basically approves the order. It would said that someone else in my department pick release the order and it will tell you who shipped it in the warehouse. So it is full order trail by function.'<sup>42</sup>

[15] Lodge and Mphofu provided certificates in terms of s 15 of Act 25 of 2002.<sup>43</sup> Mphofu's certificate certifies the order activation record stored on the respondent's computer and Lodge's the running account

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<sup>42</sup> Record 889-890.

<sup>43</sup> Record 5: 331 and 334. See *Trend Finance (Pty) Ltd and Another v Commissioner for SARS and Another* [2005] 4 All SA 657 (C) para 49.

statements so stored. Section 2(1) of the Act provides:

‘The objects of this Act are to enable and facilitate electronic communications and transactions in the public interest and for that purpose to promote legal certainty and confidence in respect of electronic communications and transactions.’

Section 4 provides:

‘Subject to any contrary provision in this section, this Act applies in respect of any electronic transaction or data message.’

Section 1 defines ‘data’ as ‘electronic representations of information in any form’.

A ‘data message’ ‘means data generated, sent, received or stored by electronic means and includes ... (b) a stored record’. Section 15 provides for the admissibility and evidential weight of data messages:

‘(1) In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message in evidence –

(a) on the mere grounds that it is constituted by a data message; or

(b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

(2) Information in the form of a data message must be given due evidential weight.

(3) In assessing the evidential weight of a data message, regard must be had to –

(a) the reliability of the manner in which the data message was generated, stored or communicated;

(b) the reliability of the manner in which the integrity of the data message was maintained;

(c) the manner in which its originator was identified; and

(d) any other relevant factor.

(4) A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organisation or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, a copy printout or extract.'

[12] Section 15(4) is controversial.<sup>44</sup> Schwikkard and Van der Merwe<sup>45</sup> submit:

'The definition of "data message" is sufficiently broad to include hearsay evidence and accordingly

<sup>44</sup> For the history of the Act and the *Uncitral Model Law on Electronic Commerce with Guide to Enactment* (1996) on which it was based, see Andrew Rens 'Approach with Caution' June 2003 *De Rebus* 23; Tana Pistorius "'Nobody Knows You're a Dog": The Attribution of Data Messages' 2002 (14) *SA Merc LJ* 737; José Angelo Estrella Faria 'e-Commerce and International Legal Harmonization: Time to Go beyond Functional Equivalence' 2004 (16) *SA Merc LJ* 529 as well as the discussion in *Ndlovu v Minister of Correctional Services and Another* [2006] 4 All SA 165 (W) 171 ff.

<sup>45</sup> PJ Schwikkard and SE van der Merwe in collaboration with DW Coller, WL de Vos, A St Q Skeen and E van der Berg *Principles of Evidence* (2002) para 21.4 at 385. This conclusion no doubt ties in with the idea of 'functional equivalence' which Tana Pistorius "'Nobody Knows You're a Dog": The Attribution of Data Messages' 2002 (14) *SA Merc LJ* 737 at 746 says 'dictates this – it will be wrong to adopt rules that create disparity between paper-based and electronic-based transactions.' (See also para 16 of the *Guide*). Cf CWH Schmidt and H Rademeyer *Law of Evidence* (2003) who remark that '[t]hese provisions make it clear that information given in electronic form is in principle to be treated, with only some adaptation, as the equivalent of other forms of evidence, particularly documentary evidence.'

the section subjugates the hearsay rule in so far as the admissibility of computer printouts are concerned. The courts appear to have no discretion in respect of the admissibility of a data message but rather they are required to exercise their discretion when they assess the weight to be attached to the evidence.'

The authors state that the provisions of s 15(4) are a great improvement 'on the prior, muddled, state of affairs and it is anticipated that the provisions will allow for a more equitable approach to computer generated evidence ...' This approach has not been followed and a more careful view of the section is called for. Zeffertt et al<sup>46</sup> suggest that a 'data message' 'is clearly hearsay within the meaning of s 3(4) whenever it is tendered in evidence in circumstances where the probative value of the evidence depends, in this sense, on the credibility of such a person.' The sense referred to concerns the case where the probative value of the evidence depends on the credibility of the person who enables the computer system accurately to register and process information contained in the print-out. This raises the question of the effect of s 15. Zeffertt et al conclude:<sup>47</sup>

'The thinking behind the new section 15 seems to be expansive and the purpose of the legislature was probably to free as much computer-generated evidence from the hearsay trap as

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<sup>46</sup> DT Zeffertt, AP Paizes and A St Q Skeen *The South African Law of Evidence* (2003) 394. See *Ndlovu v Minister of Correctional Services and Another* [2006] 4 All SA 165 (W) 172: 'Subsection (1)(a) appears, on a quick reading, to render a data message admissible without further ado. However, it would be anomalous if that were the case, since the ECT Act would then elevate a data message evidentially above an ordinary document. Rather, on a proper reading, section 15(1)(a) prohibits the exclusion from evidence of a data message on the mere grounds that it was generated by a computer and not by a natural person, and section 15(1)(b) on the mere grounds that it is not in its original form.'

<sup>47</sup> At 394.



could be justified without doing violence to the important values served by the exclusionary rule. To that end it provided that the rules of evidence must not be applied so as to deny the admissibility of a “data message” in evidence “on the mere grounds that it is constituted by a data message”. What does this mean, and does it achieve the desired purpose? Consider, for instance, the situation where a party tenders in evidence, via the computer, information that has been processed and generated by that computer (where, that is, the computer has not been used merely to *store* information). If it is accepted – as we submit it must be – that this evidence is on the face of it – before, that is, we consider the effect of the new Act – hearsay, can section 15 be used to admit it? It can, it seems, if the only impediment to its reception is the fact that it is “constituted by a data message”. Would it be admissible, then, if it were *not* so constituted? To answer this question, one has to ask what it *would* be if it were not constituted by a data message. If it were to be regarded as direct oral evidence furnished by a person upon whose credibility the probative value of the evidence depends, it would clearly not be hearsay and would be admissible. But if it were to be regarded as evidence tendered by a witness other than the person upon whose credibility the probative value of the evidence depends, it would still be hearsay and would, to be admissible, have to satisfy the requirements of section 3 of the 1988 Act or some other exception to the hearsay rule (such as section 221 or section 222 of the Criminal Procedure Act).’

The learned authors advocate an approach that<sup>48</sup>

‘would leave all the work – as far as hearsay is concerned – to the other exceptions, a conclusion that is not indefensible in view of the wide sweep of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 which allows for the reception of hearsay if the court is of the view, after considering the stipulated factors, that its admission would be in the interests of justice.’

[13] The definition of ‘data message’ in s 1 is sufficiently wide to include not only real but also hearsay evidence.<sup>49</sup> This follows from the wide description of ‘data’ as the ‘electronic

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<sup>48</sup> At 395. “Hearsay evidence” is evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence’ (s 3(4) of Act 45 of 1988).

<sup>49</sup> *S v Ndiki and Others* [2007] 2 All SA 185 (Ck) para 8.

representations of information in any form' but also from the definition of 'data message' as 'data generated, sent, received or stored by electronic means' including '(a) voice, where the voice is used in an automated transaction; and (b) a stored record'. This, however, does not mean that hearsay is admissible just because it is contained in a data message. The principle of 'functional equivalence' does not free data messages from the normal strictures of the law of evidence but only from those referred to in s 15(1).<sup>50</sup> It follows that, despite

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<sup>50</sup> On the 'best evidence rule' see Zefferdt et al 357 ff and 685 ff. Section 15(1) allows for the admission of a data message when either subs (a) or (b) is complied with. Article 9 of the Model Law provides for the admissibility and evidential weight of data messages: '(1) In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of a data message in evidence: (a) on the sole ground that it is a data message; or, (b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form. (2) Information in the form of a data message shall be given due evidential weight. In assessing the evidential weight of a data message, regard shall be had to the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified, and to any other relevant factor.' The *Guide* dealing with article 9 states: '70. The purpose of article 9 is to establish both the admissibility of data messages as evidence in legal proceedings and their evidential value. With respect to admissibility, paragraph (1), establishing that data messages should not be denied admissibility as evidence in legal proceedings on the sole ground that they are in electronic form, puts emphasis on the general principle stated in article 4 and is needed to make it expressly applicable to admissibility of evidence, an area in which particularly complex issues might arise in certain jurisdictions. The term "best evidence" is a term understood in, and necessary for, certain common law jurisdictions. However, the notion of "best evidence" could raise a great deal of uncertainty in legal systems in which such a rule is unknown. States in which the term would be regarded as meaningless and potentially misleading may wish to enact the Model Law without the reference to the "best evidence" rule contained in paragraph (1). '71. As regards the assessment of the evidential weight of a data message, paragraph (2) provides

the very wide words of s 15(4), any hearsay contained in a data message must pass the criteria set out in s 3 of the Law of Evidence Amendment Act 45 of 1988.

[14] Section 3 of the Law of Evidence Amendment Act 45 of 1988 provides:

‘(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person on whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to –

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given the person upon whose credibility

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useful guidance as to how the evidential value of data messages should be assessed (e.g., depending on whether they were generated, stored or communicated in a reliable manner).’

the probative value of such evidence depends;

- (vi) any prejudice to a party which the admission of such evidence might entail;  
and
- (vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.’

[15] The appellant submitted that since the data produced by the Oracle Computer System is the product of human intervention of at least ten persons it is not the computer that generated the data.<sup>51</sup> Since the computer did not generate the data, s 3 of the Law of Evidence Amendment Act 45 of 1988 renders the printouts used by the respondent inadmissible. In particular, it was argued on behalf of the appellant that the orders in regard to both claims A and B allegedly placed by the appellant were not proved. Adopting this approach, the factors listed in s 3(1)(c) must all be considered. Since they overlap their combined effect must also be given appropriate weight.<sup>52</sup> Moreover, the alleged hearsay is contained in ‘data messages’. This entails an enquiry into the reliability of the manner in

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<sup>51</sup> The appellant relies on *Ndlovu v The Minister of Correctional Services and Another* 2006 (4) All SA 165 (W) and *State v Ndiki and Others* 2008 (2) SACR 252 (CK).

<sup>52</sup> Zeffertt et al 372 ff.

which the data message was generated, stored or communicated and in which its integrity was maintained and the manner in which its originator was identified (s 15(3) of the Act). These questions also overlap to some extent with the issues posed by s 3 of Act 45 of 1988. It is to the provisions of the Law of Evidence Amendment Act 1988 to which I now turn to determine whether the 'data messages' relied upon should be admitted despite their containing hearsay evidence.

[16] The nature of the proceedings (s 3(1)(c)(i)) and the evidence tendered (eg evidence of the orders placed, of the running account and deliveries made etc) speak for themselves. The admission of the evidence was sought in a civil trial. The evidence presented was presented for the truth of its contents (s 3(1)(c)(iii)) and consists in what may be characterised as 'data messages' (or their copies or printouts (see s 15(4)) reflecting purchase orders, invoices, requests to activate airtime, evidence of payments and receipts and also evidence (not necessarily documentary) of employees capturing information onto the system. The probative value of the evidence presented is high (s 3(1)(c)(iv)): The Oracle software system, manages a particular customer (in this instance the appellant) at every step of the process. The respondent led evidence concerning the reliability of the

manner in which the data messages was generated, stored or communicated; the reliability of the manner in which the integrity of the data messages was maintained; the manner in which its originator was identified. These aspects were not challenged by the appellant under cross-examination, and no evidence was led by the respondent in this regard. The Oracle computer software system is, in addition, not merely utilised for storing information. It also creates additional information such as calculations as to what the appellant owes the respondent. This is real evidence the probative value of which depends on the reliability and accuracy of the computer and its operating systems. Nor does there appear to be any cogent reason to suppose that any of the computer entries relating to, for example, the orders placed, were incorrect.

[17] The appellant, however, sought to cast doubt as to the correctness of the amounts claimed and reflected in the account relied upon. In particular, it was submitted that there was no indication as to how the opening balance of R 1 612 448,87 on 2 July 2003 was arrived at. Lodge has indeed explained how he identified the outstanding and unpaid transactions.<sup>53</sup> It was further submitted that an order for R 258 000 had been repeated on various occasions with different

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<sup>53</sup> See para 7 above and also the Record 3.1:815, 819, 822,834, 839 and 855.

order numbers. Lodge, to my mind explained this satisfactorily:<sup>54</sup>

‘[I]t is not uncommon that orders would be placed for a bulk amount and that due to the file size that we are sending over the – by email, that that file would be broken up into a size that could be transmitted and it might be that a similar amount or quantity would be processed in that particular file. ...

So delivery would have been too big to do in one batch, you would split it up? – Potentially.

Yes but then you would have the same order number? – Yes that is the same order number.

No, no? – For all the transactions on that particular invoice there is the same order number.

No, if we look at 9 July, the order number for the first R 258 000 is 100686 and the order number for the second of R 258 000 is 100693, it is not the same order number? – Which indicates that when we captured it there were two orders for that particular – they were received on that particular day.

Isn’t that peculiar, Mr Froneman says it is highly unlikely that one would place the exact same order in two batches, I mean if you order on one day you order all in one go? – The date that is reflected on there is the date on which invoice was generated. And as I have said, invoices generated after activation so that it is possible that activation took place on one day, two days, and then both were invoiced on the same day.’

Moreover, an amount of R 1 290 000 was entered on 23 July 2003 but allegedly duplicated under different orders, PO 100737 and PO 100751. Other amounts were also referred to in Lodge’s cross-examination. Again Lodge explained this satisfactorily; he said that it was not uncommon that their distributors would order

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<sup>54</sup> Record 3.1:856-7.

the same quantity on a regular basis.<sup>55</sup>

'Is it not possible that there could have been a duplication of the transaction? – If there was a duplication of the transaction our stock control procedures – because the stock would then have credited our stockholding in our system, we take stock every single month, and investigate any variances as part of our control, that is for physical stock. For logical stock reconciliations are done on a monthly basis to check the reconciliation between the various systems, so if there were errors and duplications those would have been or should have been identified in those reconciliations. I am not aware of any issues that came up in those reconciliations at that time. And Mr Froneman has never queried these particular transactions before.

I am saying to you is there a possibility that there could have been a duplication? – It is possible but highly unlikely given the controls that are in place to have identified it.'

[18] In considering the admissibility of hearsay a court is also obliged to consider the reason why the evidence is not given by the person on whose credibility the probative value of the evidence depends (s 3(1)(c)(v)). A number of people would have had to have testified to prove, for example, the entry of the particulars of the orders placed. No reason was given why they were not called to testify. This, however, is not conclusive of the matter. The margin for error in making the entries is minimal and some or other conspiracy can be discounted. In addition, the agreements envisaged the placing of some orders and their performance (delivery) by electronic means. Indeed the greater part of the respondent's business, certainly in so far as the relevant orders were concerned, was conducted

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<sup>55</sup> Record 3.1: 857 ff.



primarily within the 'electronic stream' as opposed to the 'physical stream'. In these circumstances the evidence was correctly admitted by the court a quo. The appellant suffered no prejudice by the admission of this evidence nor can a procedural disadvantage, if any, be regarded as 'prejudice' (s 3(1)(c)(vi)). If the interests of justice require the admission of the evidence a judgment based upon the evidence admitted cannot constitute 'prejudice'.<sup>56</sup> As I have said, the appellant could have placed any specific order or delivery in dispute. Nothing of the kind was done. Given the above considerations the evidence relied upon by the respondent was correctly admitted.

[19] A data message must according to s 15(2) be given 'due evidential weight'. In assessing the evidential weight of a data message s 15(3) requires that regard must be had to the manner in which it was generated, stored or communicated; the reliability of the manner in which its integrity was maintained; the manner in which its originator was identified and any other relevant factor. What I have said above relating to the probative value of the evidence tendered is also applicable to these considerations particularly those relating to the manner in which the data messages was generated, stored

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<sup>56</sup> Cf *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA) para 50.

and communicated and the reliability of the manner in which their integrity was maintained. The 'originator', ie the person who captured the data on the computer, of the data messages was not one but several persons in the employ of the respondent. They were not identified and did not give evidence. I am nevertheless satisfied that they entered the information on the computer duly and within the scope of the employment and under the supervision of Lodge, Vandayar and other supervisors. The data messages contain information of both credits and debits on the appellant's account. The fact that more than one person contributed to their existence does not constitute a valid objection to the admission of the data messages into evidence and the court affording them 'due evidential weight'. It follows that the appeal should be dismissed.

The appeal is dismissed with costs.

Malan J

Judge of the High Court

I agree

Van Oosten J

Judge of the High Court

I agree

Mokgoatlheng J

Judge of the High Court

Counsel for appellant: DH Den Hartogh

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Respondent's attorneys: Bowman Gilfillan Inc

Date of appeal: 1 June 2009

Date of judgment: 17 August 2009