IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number: 2021/53620
Date of hearing: 18 November 2022
Date delivered: 23 November 2022

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

23/11/22 .....
DATE SIGNATURE

In the appeal of:

DARRYL ACKERMAN ATTORNEYS **Applicant**

and

BHAWAN, MITESH **First Respondent**
DAMON, IRVIN CLINTON CLIVE **Second Respondent**

JUDGMENT

SWANEPOEL AJ:

[1] Applicant applies for an order for payment by respondents jointly and severally of the sum of R 982 254-66. On 11 March 2020 second respondent, acting on behalf of Eldo Telecommunications (Pty) Ltd ("Eldo"), instructed applicant to represent Eldo in a number of disputes. It is undisputed that applicant has rendered extensive services on behalf of Eldo, and that it is indebted to applicant in the sum of R 982 254.66. The only question in this application is whether the parties reached agreement that respondents would be personally liable for Eldo's debt.

[2] Applicant's case is based on a series of emails which the parties exchanged, and which, applicant says, resulted in an agreement that respondents are personally liable to applicant. The correspondence commenced on 16 February 2021 when the deponent to the founding affidavit, Grant Hugo ("Hugo") wrote to respondents saying:

"As per our conversation, the compromise (replacing all previous agreements) under consideration is-

1. Darryl Ackerman Attorneys will continue to represent you in the appeal matters provided that the R 200 000 is paid in by tomorrow and between you and Irvan you guarantee (as co-plaintiffs therein) payment against account going forward of no less than R 50 000.00 per month, on or before the last day of each month, February 2021 included....."

[3] The email then goes on to set out other proposed terms that are not relevant to this application. On 24 February 2021 Hugo wrote to respondents referring to certain discussions, and proposing amendments

to the original proposal. Nothing turns of the contents of this email. On 3 March 2021 respondents made a proposal to applicant to settle the outstanding account in instalments. On 4 March 2021 Hugo again wrote to respondents. In this email Hugo set out a comprehensive counter proposal to respondents' proposal of 3 March 2021. The material passages in the email are the following:

"1. The full account as reflected in our February statement of over R 1 million, is agreed to be due, owing and to be paid by Eldo Telecommunications (Proprietary) Limited ("ET") as and when it can, subject thereto that any portions thereof paid by Irvan and/or Mitesh (jointly herein after "you") will be credited by us against ET and may only be reimbursed to you by ET after our account, historical and going forward, have been settled in full;

2. You guarantee that we will receive payment, to be made by you personally to the extent that such payments are not made by ET as follows:

   a. R 200 000 by close of business today; and

   b. R 70 000 by close of business on 30 March 2021; and

   c. R 50 000 each month from April 2021 to August 2021 (both months included) also to be allocated as against the historical account; and.....

We can unfortunately not accept anything less than the above. Unless we receive written confirmation from both of you (each providing the same separately in response to this email) that you agree to the above (without reservation, exception or equivocation) together with proof of payment of the R

200 000 by close of business today, this offer will be construed to have **not** been accepted and we will proceed with all withdrawals." (emphasis added)

[4] Respondents did not accept this offer, nor did they effect payment of the R 200 000. Respondents were evidently the victims of a phishing scam, which resulted in a further email by Hugo on 8 March 202, which reads:

"Further to the emails below and the unfortunate events relating to the phishing scam perpetrated against you, Darryl and Gill agree that the deadline for payment of the R 200 000 can be extended to Friday 19 March 2021. This off course means that, again, we will be rendering services prior to funds being received. This indulgence must in no way be construed as any kind of waiver and the terms of our counter proposal below remain the same. In order to accept our counter proposal we require, as stated below, clear confirmation from each of you that you agree to such terms, as amended by the extension for payment of the R 200 000.

If we do not receive such confirmation via email by close of business tomorrow, 9 March 2021, same will be deemed to constitute a rejection of our counter proposal." (emphasis added)

[5] First respondent prevaricated, causing Hugo to write the following on 10 March 2021:

"What you have provided is not an unequivocal not an unconditional acceptance. Indeed it is the opposite. We have also not received any acceptance from Irvan.

.....

We are not going to engage further. Our proposal was clear as to our requirements and it is either accepted unequivocally, without conditions, or not.

We must know from both you and Irvan within the next 30 minutes."

[6] Both respondents replied that they accept the counter proposal. On 16 March 2021 Hugo wrote:

"I want to confirm that as a result of the recent phishing scam, the R 200k will now be paid to us by no later than 19 March 2020 and the further R 70k by no later than 31 March 2020. Thereafter payments will be made as discussed and agreed."

[7] No payment was forthcoming and on 23 March 2021 Hugo wrote:

"Darryl advises that the R 200 000 was not paid into our account as agreed. In the circumstances the full account has been accelerated and is due owing and payable by ET and you personally.

Notwithstanding the above, and strictly without prejudice to our rights, Darryl is prepared to hold over on withdrawing formally until 12;00 on Friday 26 March 2021 for you to make payment of the R 200 000. It must be stressed though that this is the last extension of any nature that we will provide and we are not going to be working on the matter until the R 200 000 is actually received, and any prejudice to your case as a result arises out of your continuous failure to adhere to the arrangements made in an endeavour to assist you.

If the R 200 000 is received before 12:00 on Friday the arrangement as agreed below will apply. If not, we will withdraw and the acceleration will remain in place."

[8] Although attempts were made to effect payment, it is common cause that the R 200 000 was never paid. Respondents contend that the agreement required two steps by which respondents had to indicate their acceptance of the counter-proposal, firstly by written acceptance of the terms of the counter proposal, and secondly, by payment of R 200 000. This contention seems quite evident if one were to consider the applicant's counter proposal of 4 March 2021. Mr. Van der Merwe, applicant's counsel, conceded this much.

[9] However, says applicant, the 4 March proposal fell away, and was replaced by the agreement reached in the emails of 8 and 10 March 2021. The proposal made in the applicant's email of 8 March 2021 was accepted in writing, save that the time for payment was extended, first to 19 March 2021 and then to 26 March 2021.

[10] That there is no merit to this submission is evident from a simple reading of the email of 8 March 2021. It specifically records that the indulgence granted must not be considered to be a waiver, and that the terms of the counter proposal remained the same, save that the period for payment of the R 200 000 was extended to 19 March 2021. Furthermore, in Hugo's email of 10 March 2021 he says that respondents are aware of applicant's requirements (plural) that have to be met in order to accept the counter proposal.

[11] Far from the emails of 8 and 10 March 2021 suggesting that a new agreement was reached, and that the counterproposal of 4 March 2021 had fallen by the wayside, the 8 and 10 March emails repeatedly refer back to the counter proposal, making it clear that applicant required respondents to comply fully with the proposals made therein.

[12] It is trite that if an offeror indicates the method and the time by which the offeree must signify its acceptance of the terms of an agreement, then the offeree must comply[1] with both the time and method. Respondents signified their unequivocal acceptance of the terms of the counter proposal by their emails of 10 March 2021. However, the payment of the R 200 000 never ensued, and as Hugo said in his own words on 4 March 2021, in the absence of payment of this amount "....this offer will be construed to have not been accepted...."

[13] In both of Hugo's emails of 16 and 23 March 2021 he refers to an agreement that had been concluded. Neither of these emails received any response and so, applicant says, I must draw the inference that respondents also held the view that the parties had concluded an agreement. I cannot draw such an inference. Although respondents acknowledge receipt of both emails, I cannot say that they understood from the emails that applicant believed that the counter proposal was a binding agreement, and that they had accepted personal liability, especially when applicant's proposal was unequivocally clear that only

[1] Laws v Rutherford 1924 AD 261 at 262; Withok Small Farms (Pty) Ltd v Amber Sunrise Prop 5 (Pty) Ltd 2009 (2) SA 504 (SCA)

upon payment of the monies would the proposal be regarded as having been accepted.

[14] Applicant also argues that the fact that respondents did make some payments to applicant on 25 March, 29 March and 31 March 2021 respectively indicates that it intended to abide by the agreement. It must be borne in mind that Eldo still had an outstanding account that had to be settled. Respondents were obviously keen to retain applicant's services, and there were clearly a number of discussions held and email correspondence exchanged in order to resolve the impasse. Can I draw the inference that by effecting the payments respondents signified their acceptance of the terms of the counter proposal? I do not believe so.

[15] In my view applicant clearly established the manner in which acceptance was to be conveyed, firstly by acceptance of the terms of the agreement in writing, and secondly by payment of the R 200 000. In the absence of payment, no agreement was concluded.

[16] Respondent contended that a second possibility was that the payment requirement was a suspensive or resolutive condition. That presupposes a binding agreement, which I have already found did not come to fruition. Nothing more needs to be said on that issue.

[17] In the premises, the application must fail, and I make the following order:

[17.1] The application is dismissed with costs.

SWANEPOEL AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION OF THE HIGH COURT,
JOHANNESBURG

COUNSEL FOR APPLICANT:	**Adv. C van der Merwe**
ATTORNEY FOR APPLICANT:	**Darryl Ackerman Attorneys**
COUNSEL FOR FIRST RESPONDENT:	**Adv. L Hollander**
ATTORNEYS FOR RESPONDENT:	**EFG Inc.**
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