IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 51877/11

DATE:24/04/2012

In the matter between:

RTT GROUP (PTY) LTD APPLICANT

V

THE SURGICAL WAREHOUSE (PTY) LTD RESPONDENT

JUDGMENT

WEBSTER J

1.This is an opposed application. The applicant seeks an order that the respondent pay R497 664.76, interest thereon at 15.5% per annum as from 8 April 2011 to date of payment plus the costs of the application. After the parties had filed their affidavits the applicant sought leave to file a supplementary answering affidavit justifiably so as the applicant had introduced new facts that ought to have been set out in its founding affidavit. The applicant (in the main application) was fair enough not to pursue its original intention to oppose the filing of such affidavit as opposing it could conceivably have resulted in dilatoriness in resolving the issues.

2. The applicant's claim is based on a simple written acknowledgement of debt in which the business relationship between the parties was terminated, the amount allegedly owing by the respondent was acknowledged and admitted and the payment by the respondent in monthly instalments set out. The applicant avers that the respondent failed to comply with the terms

and conditions set out in the acknowledgement of debt and seeks payment of what is allegedly owing by the respondent.

3. The respondent has resisted the application. The first impression formed from a "hasty" perusal of the papers is that the applicant is entitled to the order it seeks. Given the decision I have reached in this matter and hopefully in order to avert any misconception, the court will be most frugal with its views on the interpretation of the issues and particularly its views on what is set out in the almost illegible fine print in some of the documents filed by the applicant.

4. It is trite that where disputes of fact have arisen in motion proceedings a final order may only be granted if those facts averred to by the applicant's affidavit that have been admitted by the respondent, together with the facts alleged by the respondent justify such an order. It is only where the dispute of fact is such that the court cannot with any accuracy conclude that the probabilities in the founding affidavit of the applicant's case should be accorded any more weight than an assertion under oath to the contrary, then it is incumbent upon the applicant to ask for the hearing of evidence so as to enable him to establish that the evidence and the resultant probabilities should be acted upon (Decro Paint and Hardware (PTY) LTD v Plascon Evans Paints (PTY) LTD 1982(4) SA 213 (0) at 223 C - F).

5. The document relied upon by the applicant reads as follows:
" We herewith give notice of termination of the agreement with PHD with effect from 20 October 2010, As agreed in our meeting yesterday morning the foiiowing wili apply; 1. The balance of the PHD account at the end of September of R913 265.76 will be paid to PHD as follows, by way of post
dated cheques to be delivered to PHD offices on Friday, 8 October 2010:

08 Oct'10 - R37 500

15 Oct '10 - R37 500

22 Oct '10 - R37 500

29 Oct '10 - R37 500

30 Nov '10 - R150 000

31 Dec '10 - R50 000 31 Jan '11 - R50 000 28 Feb '11-R513 265

Together with the cheques a letter from Unicore Trading (Pty) Ltd confirming that these payments will be honoured on the basis agreed above needs to be supplied on Friday, 8 October 2010.

2. AH the stock at PHD not sold and distributed as yet needs to be collected by Wednesday, 20 October 2010, in this regard you can make the necessary arrangements with Arno Haigh on our side.

3. Current services will continue until 20 October 2010 and the pro rate service fee for October needs to be paid as a current invoice by end November 2010.

4. The rental agreement regarding the offices occupied by Surgical Warehouse will continue until 31 January 2011, with the monthly rental invoices being settled within 7 days of date of invoice.

Amounts recovered by PHD from future collections of Surgical Warehouse debtors will be offset against the final cheque payment on 28 February 2011, with such an amount being paid back by PHD to Surgical Warehouse upon clearance of the last post dated cheque."

6. The respondent's defence is a denial that it intended that contents of the document be an admission of liability. It denied that it had contracted with the applicant but had done so with an entity PHD and further averred that it had various counterclaims against the applicant. For purposes of this judgment only two of those counterclaims need be mentioned. Among these

counterclaims is one in respect of the delivery of a consignment of female condoms to the Gauteng Health Services at Chris Hani Baragwanath Hospital, the second relates to a loss of income resulting from the applicant's failure to deliver promotional products to various pharmacies during October and November, 2010. These two are mentioned solely for the purpose of determining whether the test referred to above favours the applicant or the respondent.

7. It is common cause that the applicant was supposed to have delivered condoms to the Baragwanath Hospital. On its own documentation such delivery was supposed to have taken place on 1 November 2010. According to the applicant it attempted to deliver this consignment but the recipient * ...didnot accept delivery ... because its warehousing facilities were overflowing". It however, managed to deliver the said goods on 1 December, 2010. The issue regarding this is that the respondent claims never to have been paid as no proof of delivery was forthcoming. The documents purporting to provide proof of such delivery are RA1, RA2 and RA3.

8. RA1 which is relied upon by the applicant as proof of delivery and has what purports to be a rubber stamp of Baragwanath Hospital bears a number CSD88385110 and bears the date 2010-12-01. RA2 describes the consignment as n23 pallets" weighing 5 000kg. RA3, the "TRIP CHECKLIST (DETAILED)' bears i.a. the following information: "Trip date; 11/1/2010; Print date: 11/1/2010', "Reference 88385110'. When this information is compared with the topmost information, viz. "01.12.2010 12:53 (8?) from - Div Transport 2711733....." there is no certainty with regards to the information contained in the document.

9. Assuming that the court were to accept that the applicant duly attempted to deliver the

consignment of condoms on 1 November, 2010, that was clearly after 20 October, 2010, the date by which "all the stock at PHD not sold and distributed had to be collected'. The applicant has not deemed it necessary to explain the terms that were reached by the parties regarding the further storage of the 23 pallets. Further, the applicant fails to explain what agreement was reached with the hospital regarding storage of the condoms from 1 November 2010 until 1 December 2010 and who would be liable for such storage.

10. With regard to the "distribution of various promotional products to various pharmacies" the applicant's response is that it "...can find no record that any such requests were made for services to be rendered'. The applicant further contends that it is highly unlikely that such "request" was made, and, in any event, the applicant "...was fully entitled to so refuse given the termination of the agreement. The last statement flies in the face of the applicant's generosity given its decision to store the condoms for a month without any remuneration therefore and further whether the costs of such delivery had already been included in the acknowledgement of debt when such delivery had not been effected through no fault of the respondent.

11. From the issues raised above the question to be answered is whether this court can find that the applicant has satisfied the requirements set out above. My considered view is that there are far too many imponderables and unanswered questions in the applicant's case to justify a finding that the test set out in the case of Plascon Evans Paints LTD v van Riebeeck Paints (PTY) LTD 1984(3) SA 623 (A) has been met.

12. It was submitted by the respondent's counsel that the appropriate order in the event of the application being refused would be an order in terms of draft order "X" annexed hereto. It is the court's considered view that the proposed order is appropriate in the circumstances.

13. An order is accordingly made in terms of draft order marked "X" annexed hereto.

G. WEBSTER JUDGE IN THE HIGH COURT

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

HELD AT PRETORIA ON THIS THE 18th DAY OF APRIL 2012 AT COURT

BEFORE THE HONOURABLE JUSTICE WEBSTER J

CASE NO: 51877/11

In the matter between;

RTT GROUP (PTY) LTD PLAINTIFF

and

THE SURGICAL WAREHOUSE (PTY) LTD DEFENDANT

DRAFT ORDER OF COURT

HAVING HEARD COUNSEL for the parties, and having read the papers filed of record, it is herewith ordered as follows:

1. The application is referred to trial;
2. The applicant's notice of motion shall stand as a simple summons;
3. The respondent's notice of intention to oppose shall stand as a notice of intention to defend;
4. The applicants shall deliver their declaration within twenty days of this order, after which the normal rules relating to action shall apply;
5. The costs of the application shall constitute costs in the action.

BY THE COURT REGISTRAR