THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 1209/11

In the matter between:

RAVENSCOE TRADING 145 cc t/a TNW DATA 1st Applicant

versus

E-INFRASTRUCTURE SOLUTIONS (PTY) LTD 1st Respondent

JUDGEMENT: 16 MARCH 2012

BOZALEK J:

[1] On 15 June 2011 the applicant, Ravenscoe Trading 145 cc trading as TNW Data, launched an urgent application against respondent, E-Infrastructure Solutions (Pty) Ltd, seeking an order directing respondent to comply with certain of its obligations pursuant to a distribution agreement allegedly concluded between the parties in Cape Town on 10 March 2011.

[2] The application was opposed and on 24 June 2011 it was postponed to 15 September 2011 by which date answering and replying affidavits had been filed. In its answering affidavit the respondent disputed that a distribution agreement had been concluded between the parties and in reply the applicant gave notice of its intention to apply for this issue to be referred for the hearing of oral evidence. By agreement the matter was postponed to 29 February 2012 for the hearing of oral evidence *"to determine the issue whether a distribution agreement was concluded between the parties in Cape Town on 10 March 2011 and the terms thereof."*

[3] Evidence was heard over two days with Mr Schalk Bothma (Jnr) ("Bothma") the applicants managing director being its sole witness and Mr Richard Stansfield ("Stansfield"), one of the respondent's directors, being its sole witness.

BACKGROUND

[4] The applicant is a Cape Town based IT firm selling all the equipment needed for a professional data reticulation installation whilst the respondent is a Johannesburg-based provider of networking infrastructure hardware used in setting up and operating computer systems. The respondent supplies the networking hardware brands Panduit, RiT and Global Six. The respondent previously had had a business relationship with another Cape Town company, DN Technologies, which distributed and installed the respondent's products to customers. In 2008 DN Technologies

was purchased by the applicant and in essence applicant stepped into its shoes as the sole distributor for the respondent's products although this arrangement was not formalized.

[5] During 2010, however, the applicant encountered cash flow problems caused by the failure of certain of its customers to pay their accounts. This in turn resulted in the applicant being unable to meet its payment commitments to the respondent. In January 2011 the respondent put a hold on the applicant's account with the result that the latter was only able to purchase products from respondent on a cash basis ie its credit facility was suspended. This in turn led Bothma to seek a solution to this problem which was that in return for bringing applicant's account up to date he would obtain an undertaking from respondent that they would negotiate a distribution agreement with the applicant. In order to bring applicant's account up to date, Bothma had to recapitalise the business by taking a loan from his father, Schalk Bothma (Snr).

[6] One of the primary means of communication between the parties was email and a series of emails fully documents the negotiations between the parties which led to the solution being arrived at. Bothma Snr also contributed to the emails, the general content and tone thereof being that he did not wish to risk any of his money without an assurance that a distribution agreement would be negotiated and he wanted clear answers and undertakings in this regard. The respondent's initial stance, as expressed in an email, was that they had long been accommodating

towards the applicant but had now hardened their stance and would not enter into negotiations until such time as the applicant brought its account up to date.

[7] In this phase there were at least two key emails, the first being from Bothma Snr to the respondent in which he posed two questions; firstly; whether respondent was going to negotiate a reasonable and fair sole distribution agreement with the applicant, to which the respondent answered yes and, secondly, was the respondent negotiating with anybody else to distribute their products to areas historically served by applicant up to now to which respondent's answer was no. Prior to this on 24 February 2011 respondent Stansfield emailed Bothma Jnr giving details of the amounts outstanding on the applicant's account and giving as the total due on 28 February 2011 as R772 413.99. Following receipt of the answers referred to earlier, the applicant paid the outstanding balance to the respondent on 3 March 2011 producing a joyful response from the respondent's finance or accounts manager, Marina Van Vuren.

[8] On the same day as the payment was made Bothma emailed the respondent for the attention of Stansfield and his co-director, a Mr Calvin Thompson ("Thompson"), asking if the distribution agreement could be resolved within the next two weeks. This led directly to the meeting in Cape Town on 10 March 2011 when negotiations took place between the respondent, represented by Stansfield, and the applicant, represented by Bothma. Also present was Bothma's father in law, Mr R Hendra. Discussions

took place over the course of several hours on the terms of a distribution agreement as well as an agreement whereby the respondent would acquire space in the applicant's premises in Cape Town where it would place stock and, through one its employees, market its products directly to customers.

[9] The dispute referred for oral evidence turns largely around this meeting, applicant's case being that the terms of the distribution agreement were agreed at that very meeting. The respondent's case, however, is that what took place was no more than preliminary discussions.

[10] The format of the meeting was that Stansfield prepared an agenda for the meeting on his laptop under two headings: firstly *"Distribution agreement"* and secondly, *"EIS (respondent) Cape Town stores"*. Under the first heading there were eight sub-headings *viz* pricing, targets, exclusivity, products, terms, period, joint marketing plan and training. Under the stores heading there were ten sub-headings which are not necessary to detail. As the meeting and negotiations proceeded, Stansfield added content under the sub-headings on his laptop. At 11:35am he put the contents of the agenda and all the information which he had added during the course of the meeting into an email which he sent to his fellow director Mr Thompson, Bothma, Van Vuren and to his operations manager, Mr J Marais, with the following introductory sentence:

"Hi all, these are the minutes from my discussion with Schalk this morning and a guideline to moving forward. Please pre-empt actions where possible, we will meet on Monday to finalise."

It was common cause that the meeting on Monday was to have been between Stansfield and his staff or fellow director and that Bothma would not be party thereto, nor was any further input required from him at that stage. It is this email which the applicant contends forms the completed distribution agreement.

THE LAW

[11] Clearly the onus of proving that an agreement was concluded on 10 March 2011 and the terms thereof rests with the applicant. See *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A 893): In order to prove the contract the applicant must also prove that the parties had the requisite intention (*animus contrahendi*) to conclude the contract. Similarly, the duty also rests with the applicant to prove that the respondent agreed to the contract in its final form. *Da Silva v Janowski* 1982 (3) SA 205 (A). As was submitted by respondent's counsel, Ms Lundström, other than the issue referred for the hearing of oral evidence the issues fall to be decided on the papers and therefore in accordance with the rule in *Plascon Evans Paints Ltd v Van Riebeeck Paints* (Pty) Ltd[1].

[1] 1984 (3) SA 623 (A)

BOTHMA'S EVIDENCE

[12] Bothma' gave evidence in accordance with the common cause facts set out in the background section set out above. He conceded that the payment by applicant of the R772 000 odd was a precondition to the negotiation of a distribution agreement. As far as the meeting of 10 March 2011 was concerned he testified that the understanding was that the parties had reached agreement on the content of each of the sub-points thereby constituting an agreement which was binding on the parties and enforceable. In regard to the commencement date of the agreement he testified that he understood it to commence immediately notwithstanding that under the sub-heading *"period"* the following was noted *"one year from July 2011, to be renewed automatically if agreement criteria are met."* In support of this he referred to the agreement under the sub-heading *"target"*, which, provided that the annual target for the applicant's sales was to be R6mil to be measured over the respondent's financial year viz July to June but that any sales made by respondent in the three months or so leading up to that date would be included in the target ie would be used to *"ramp up"*, to use the wording of the parties.

[13] In regard to the same issue *viz* the commencement date of the agreement, Bothma also relied on the agreement which the parties reached regarding the setting up of a store or selling space for the respondent in the applicant's Cape Town premises in respect of which it

was recorded that the formal commencement date would be 1 April 2011.

[14] Bothma testified that at the end of the meeting he thanked Stansfield and that, as far as he was concerned, there was nothing further to be negotiated and the distribution agreement was complete and he understood this to be a mutual understanding. He then outlined the *"post agreement"* period which was one characterised by the lack of any substantive response or activity on the part of the respondent contrary to what he had envisaged. This led him to send a series of emails to the respondent over the ensuing weeks and months including three headed *"Concerned"* sent on 14 April 2011, *"Concerned letter no 2"* sent on 4 May 2011 and *"Concerned letter no 3"* sent on 20 May 2011. In each of these, in tones of increasing concern, Bothma complained that he was not getting any feedback or plans from the respondent and his calls were not being answered or returned. In the second email he asks *"when will we receive clarity on all issues"* and lists as the first such issue *"Agreement between (applicant) and (respondent)"*. In the third he asks what is happening with *"distribution agreement as discussed in our offices and attached with this email"* and adds *"we created the distribution agreement in our offices and that agreement is not being followed at the moment"*. To none of these emails did the applicant receive a substantive response setting out what, if any, problems that respondent was wrestling

with and certainly nothing to suggest that there was no distribution agreement in existence.

[15] Matters deteriorated further when on, 27 May 2011, making further reference to the distribution agreement which had been concluded with Stansfield, Bothma complained that the applicant was being precluded from quoting competitively to customers for the respondent's products and was thus not able to enjoy its rebates. Stansfield's immediate response was noteworthy. He emailed *"as usual we are caught in between pressure from you guys and trying to keep TCM happy"* and *"the rebates have been blocked from TCM's side"*. TCM, it is common cause, became respondent's major shareholder in late 2010 and increasingly began to make its presence felt in the running of respondent's affairs.

[16] Bothma responded to Stansfield's reply almost immediately making further reference to the agreement he believed had been reached and indicating that in view of the fact that the applicant was being side-lined in the Western Cape he would be seeking legal opinion. As mentioned, in the second half of June this application was launched and it is worth recording that it was only in its answering affidavit that the respondent first recorded its denial that any distribution agreement had been reached on 10 March 2011.

[17] Bothma was an impressive witness who answered questions directly and did not prevaricate. He was able to support virtually everything he

stated by reference to the emails which he drafted and sent to the respondent. He fared well in cross-examination and, indeed, Ms Lundström on behalf of the applicant, fairly conceded that she could not really dispute that Mr Bothma believed that, on behalf of the applicant, he had concluded the distribution agreement on 10 March 2011 with the respondent. The focus of Ms Lundström's argument was that whilst the applicant may have believed that a final agreement was reached this was certainly not the respondent's stance or intention, as represented by Stansfield who, as he indicated in his answering affidavit saw the meeting on 10 March 2011 as no more than *"preliminary discussions"*.

STANSFIELD EVIDENCE

[18] Much therefore rests on the evidence of Stansfield. He testified that no agreement was reached between the respondent and applicant on 10 March 2011 and was adamant in this regard. He indicated that the respondent was committed to reaching an agreement but only once all outstanding debts of the applicant to the respondent had been settled. As far as he was concerned, since the applicant still owed the respondent monies on 10 March 2011 no agreement could have been reached on that day. Late in his evidence he testified that the respondent required agreement that the applicant sell certain of the respondent's products exclusively before any written distribution agreement could be completed. He also relied particularly on the agenda item relating to the period indicating that any agreement would only commence with effect from 1 July 2011. He stated that the fact that training by one of the

respondent's suppliers took place at the applicant's premises in Cape Town some four days after the 10 March 2011 meeting was merely a coincidence; the training cycle in question had been established well in advance.

[19] Stansfield's explanation for the prior commencement of the agreement setting up a selling space for the respondent on applicant's premises was that the respondent wished to facilitate access to products for sale and installation, presumably in the expectation of a distribution agreement being reached. As far as his critical email of 10 March 2011 was concerned, Stansfield testified that it was primarily addressed to respondent's internal staff but stated that it was only intended as a guideline to moving forward *inter alia* in relation to the on-going negotiations with applicant towards a distribution agreement. Stansfield relied on the wording of certain of Bothma's post 10 March 2011 emails for example the reference to clarity being sought regarding the agreement, as an indication that no such agreement had been reached.

[20] Stansfield was taxed with the failure by the respondent and/or himself to respond to Bothma's emails after 10 March 2011 complaining of the lack of any progress or movement from respondent's side. His answer to this charge was twofold. Firstly, he stated the respondent had made it clear to the applicant in February that it had to make payment in full of its obligations to the respondent before the distribution agreement could be

concluded and that the payment of R772 000 had not met this pre-condition because monies were still owing by the applicant. Secondly, he stated that as a result of work pressure and an *"oversight"* on his part he had not responded in terms to Bothma's frequent email complaints about a lack of progress and his assertions that an agreement had been created but was not being met.

THE RESPONDENT'S CONTENTIONS

[21] In argument Ms Lundström made several arguments, the principal one being that, relying on the evidence of Stansfield, no agreement had in fact been reached inasmuch he had never had the intention to conclude a binding and final agreement on 10 March 2011. She also argued that the content of the minutes do not contain sufficient clarity to create valid obligations and, furthermore, to the extent that any distribution agreement was negotiated, the minutes reflect that it would only commence on 1 July 2011. The application was therefore, counsel argued, brought prematurely.

EVALUATION OF STANSFIELD'S EVIDENCE AND ANALYSIS

[22] Stansfield's evidence was challenged by the applicant's counsel in cross-examination and extensively criticised in argument. As a witness Stansfield was simply not of the same quality as Bothma. His evidence on crucial points shifted and he was evasive at times in his evidence with a result that he had to be requested on several occasions to answer questions directly. Much of Stansfield's evidence was not, as one would

have expected, substantiated by any contemporaneous documents, most notably emails, and there were key aspects which were improbable.

[23] To mention some of these aspects, Stansfield relied upon applicant's alleged failure to bring its account up to date as reason for not driving the negotiation process any further forward. But he was only able to point to an email from Van Vuren around 11 April 2011 as indicating any concern on the part of respondent on this score. Given the negotiations which preceded the meeting on 10 March 2011, as set out in the emails, and the applicant's dramatic payment of three quarters of a million rand on 3 March 2011 it is highly improbable that the negotiations would stall over this point without the respondent conveying in express terms to the applicant that nothing would happen until any outstanding debt was extinguished. By doing so it would, in one fell swoop, obtain payment of the monies owing to it and re-open the distributorship negotiations. Furthermore, Stansfield's explanation flies in the face of the fact that Stansfield met with Bothma on 10 March 2011 and reached agreement on a wide range of terms at a time when, according to him the applicant had not settled its account. It was common cause furthermore that at this stage the applicant's credit facility had been restored and it was obliged to settle its debt on a 30 day basis. In any event, as Bothma testified, as soon as he was advised in April that the applicant's account had been put on hold again he communicated with Van Vuren and ascertained that at worst there was a sum of some R33 000 owing by the applicant.

Although he did not agree that this was then due he immediately paid the sum of money. Therefore, with effect from 11 April 2011 any such impediment was removed and there is no convincing indication from Stansfield that this was not the case.

[24] Another key aspect unsatisfactorily dealt with by Stansfield was that in his answering affidavit he stated that while he admitted *"that the parties had had discussions about potentially establishing a distributing agreement, the parties merely engaged in preliminary discussions in this regard."* This statement was at best disingenuous if not misleading. Stansfield prepared the agenda for the meeting to discuss the distributorship agreement and under each of the eight items which he listed a positive detailed sub-agreement was reached. On his agenda nothing was left uncertain or in dispute. Nor is there any indication on his agenda there were any items left undiscussed or which were still to be the subject of negotiations.

[25] Late in his evidence Stansfield suggested that one item yet to be concluded was the matter of the applicant having to undertake not to sell any competing products ie exclusivity, but seen from the point of view of the respondent. In this regard he referred to an earlier email from Thompson relating to this matter and pointed out that the latter; had the technical expertise. However, one looks in vain in any of the documentation or indeed any indication whatsoever that Thompson was going to engage in any discussion with the applicant regarding this aspect

or that it formed a necessary part of the distribution agreement. Furthermore, as is recorded in the emails, Thompson came down to Cape Town over the period 11 – 13 May 2011 and at Bothma's request a meeting was held since he was anxious to ascertain from respondent why it was dragging its feet regarding the implementation of the distribution agreement and the issue of sales in Cape Town. According to Bothma, Thompson was generally evasive in the meeting and could not or would not provide direct answers to the question he posed. This account by Bothma is not contradicted in Stansfield's opposing affidavit and nor was Thompson called to give evidence. In my view, this puts paid to any suggestion that there were outstanding technical issues relating to the distribution agreement which required Thompson's input and which were holding up the conclusion of the distribution agreement.

[26] Yet a further factor which militates against the probability that the 10 March 2011 meeting was but a preliminary discussion is the lack of any indication at all of respondent taking any further steps to pursue what it claimed were preliminary discussions or negotiations. One looks in vain in the correspondence for any indication of a follow-up meeting, any outstanding issue or any queries to the applicant regarding aspects of the distribution agreement. Stansfield stated in evidence that any distribution agreement would have to be drawn up by respondent's attorney as was customarily done. In these circumstances one would expect, at the least, some indication that an instruction was given to respondent's attorneys to

commence such an agreement. No such evidence was forthcoming notwithstanding that by the time the applicant launched its application there were only some ten days left before, according to the respondent, any distribution agreement would commence. Stansfield concedes, furthermore, that he had not even told Bothma about respondent's alleged to have that any distribution agreement formalised through attorneys.

[27] There is, furthermore, the unexplained matter of the respondent's virtual total failure to respond to the regular and ever-growing number of emails which Bothma sent articulating his concern that there was nothing happening pursuant to the distribution agreement. The excuses raised by Stansfield in my view simply do not wash. His claim that he was under work pressure was unsubstantiated and, even if this was the case, hardly explains why he was unable to compose and send an email, the work of five minutes. Later Stansfield was driven to stating that his failure to respond virtually any shape or form was *"an oversight"*, whatever that may mean in the circumstances. On this very issue Stansfield's credibility is dealt a heavy blow by the fact that in his answering affidavit he denied that Bothma's emails were not answered or ignored and in evidence he had to admit that this was not the case. He also made the concession that the existence of the distribution agreement had not been placed in dispute in any correspondence and was first brought to the attention of

Bothma when he read the contents of Stansfield's answering affidavit dated 29 July 2011.

[28] There was only one occasion where the respondent replied to the applicant's emails expressing growing concern at the lack of progress with the arrangements made and that was in late May 2011 when Stansfield responded with the telling first sentence *"as usual we are caught in between pressure from you guys and trying to keep TCM happy"*. He continued by stating that the rebates which were an integral part of the distribution agreement and which Bothma was claiming had *"been blocked from TCM's side"*. In all probability this communication provides the key to why, shortly after the meeting of 10 March 2011, virtually everything went cold from the respondent's side. TCM had become a majority shareholder in the respondent in late 2010 and were responsible for the respondent's tougher attitude on the extension of credit to the applicant. Stansfield admitted in evidence that TCM had not been aware, prior to 10 March 2011, of his meeting with Bothma in Cape Town regarding the distribution agreement. Whereas Stansfield and Thompson had previous taken the executive decisions for respondent it would appear that from late 2010 this was no longer the position. In my view, it is probable that when TCM learnt of the distribution agreement and the rebates to the applicant, they took a different view to the desirability thereof, hence Stansfield's reference to *"pressure from you guys and trying to keep TCM happy"* and TCM blocking the rebates.

[29] The probabilities are further that this internal disagreement which caused the respondent, in effect, repudiate the arrangements or, if this is indeed what it was, the agreement concluded on 10 March 2011. That respondent did not do so in terms is, to my mind, a further indication that an agreement was reached. Were this not the case, although perhaps embarrassing, it would have been quite open to the respondent to state that, having consulted their majority shareholders, they had decided not to take the preliminary discussions any further and conclude a distribution agreement.

[30] A further indication pointing to the conclusion of an agreement on 10 March 2011 was the virtually immediate execution of the parallel agreement reached that day relating to the making available to the respondent of space on the applicant's floor in its Cape Town premises. The evidence was that these arrangements were put into effect almost immediately with the applicant constructing the cage and debiting the respondent for the costs thereof and for rental. Had a distribution agreement not been reached on 10 March 2011 it is improbable that either Bothma or Stansfield would have proceeded with these arrangements since they would have been completely inappropriate and wasted costs in the event that the distribution agreement was ultimately not concluded.

[31] Stansfield was not an impressive or reliable witness. He had no qualms in giving a different version to the court from that to which he had

testified on oath in his answering affidavit. His testimony was at times evasive and often improbable. An adjective which springs to mind in describing his demeanour in giving evidence and many of his answers is "*cagey*", as befits a witness who is manoeuvring a version through a sea of hostile facts and emails which do not support his version.

[32] In order for there to be an agreement both Bothma and Stansfield must have concluded the meeting on 10 March 2011 with the belief that they had reached agreement. I am satisfied that this was Bothma's state of mind judging from his evidence as supported by the surrounding documentation. Stansfield denies that this was his state of mind and of course it is impossible to gaze into the mind of any witness. However, the background to the meeting on 10 March 2011, the respondent's behaviour afterwards, the surrounding documentation and the lack of any credible reason as to why what the respondent suggested were merely preliminary discussions or negotiations suddenly lost all impetus, when taken together, in my view point ineluctably, on the probabilities, to an agreement having been reached between the parties on 10 March 2011. Thereafter, for reasons which are not entirely clear but on the probabilities relate to the contrary stance taken by TCM, the new majority shareholder, the respondent decided that it would not honour the agreement but rather hope that it would wither away.

[33] I am satisfied, also, that a consensus was reached on 10 March 2011 on the term of the distribution agreement and, in particular, that the points

in the minute created by Stansfield contains sufficient clarity to create valid obligations. The only real point of contention in this regard was the commencement date of the agreement. In this regard I am satisfied that the agreement commenced with immediate effect but that it would be evaluated, save for the first year, with regard to targets reached in the respondent's financial year of 1 July to 30 June. The sub-agreement that all respondent's products sold between the date of conclusion of the agreement and 1 July would be included in the first year's target, as well as the fact that there was a *de facto* distribution agreement already in existence, provides strong support for Bothma's view that consensus was reached that the agreement would commence immediately.

[34] I consider then that the applicant has established a right to the benefits and rights accruing to it in terms of the agreement, including the right to a rebate where the respondent sold those products which were the subject of the agreement directly to customers in the Western and Eastern Cape.

[35] At the conclusion of argument Mr Elliott indicated that the applicant sought relief in terms of prayer 3 of the notice of motion, namely, an order that pending an action for a final interdict and/or damages the respondent is obliged to comply with its obligation to pay the rebates to which the applicant is entitled. This amounts to a temporary interdict. However, after argument was concluded I directed a query to both counsel in this regard asking why permanent relief was not being sought

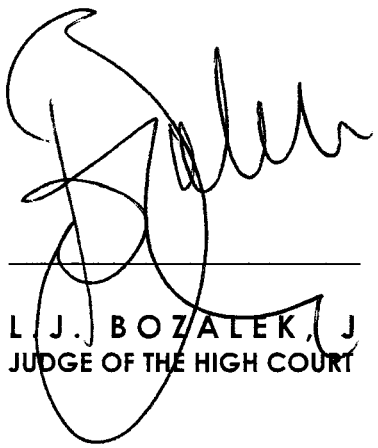
by the applicant in terms of prayer 2 of the Notice of Motion given that the court had been asked to deal with the critical dispute of fact viz the existence and terms of any agreement, through the hearing of evidence. Applicant's counsel responded that he had now been instructed to seek final relief whilst respondent's counsel noted that such relief would have only prospective effect.

[36] The requirements for final relief are a clear right, an injury committed or reasonably apprehended and the absence of similar protection by any other remedy. The first two requirements have, in the light of the Court's findings, been met. The only other remedy which could afford the applicant's some protection is an action for damages. However, the nature and terms of the agreement are such that I do not consider that a damages action will afford the applicant similar protection. Although reviewable annually, the agreement is potentially of indeterminate duration. If the applicant is not afforded the final relief he now seeks, instead of a business agreement which will assure it of a stream of income, possibly for years to come, it will be left with the cold comfort of an action for damages. Apart from losing what is presumably a valuable distributorship, pursuing a damages action will require the applicant to gaze into the future and speculate how long the business agreement would have endured for an inherently imprecise measure of its damages. In these circumstances I consider that the applicant has succeeded in establishing the third requirement for final relief.

[37] In the result the following order is made:

- **Respondent is ordered, to comply with its obligation in the distribution agreement concluded between Applicant and Respondent in Cape Town on 10 March 2011 to pay the rebates to which applicant is entitled and which are calculated as the difference between the standard price payable by an installer and the distributor's price for day to day sales of respondent's products, details of which products appear in paragraph 43.7 of the founding affidavit of Schalk Willem Daniel Bothma.**

- **Respondent is directed to pay applicant's costs in the matter including those that stood over on 24 June 2011 and 15 September 2011.**



L J. BOZALEK, J
JUDGE OF THE HIGH COURT