IPSP078 - Legal Aspects of Electronic Commerce

Assignment 2: 724205

Nyameko Lisa

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NOTE

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[1] This is a footnote.

1 Question 1 [25]

The following discussions pertain to *Spring Forest Trading v Wilberry (Pty) Ltd t/a Ecowash Combined Motor Holdings Limited (725/13) [2014] ZASCA 178* [1],

1.1 Briefly state the facts of the case. (5)

This case is an appeal from a decision of the high court, KwaZulu-Natal, Durban (Judge Madondo) granting interim *'pendente lite relief'* following an urgent application by Wilberry (Pty) Ltd t/a as Ecowash **the respondent**, against Spring Forest Trading 599 CC **the appellant**, and Combined Motor Holdings Limited t/a The Green Machine (CMH)[2].

The appeal concerns a series of emails purporting consensual written cancellation of several agreements in which the applicant leased MDU's[3] from the respondent, which the applicant required for use in its mobile car wash business. The agreement included a non-variation clause stipulating that changes to or cancellation of the agreement would only be effective if recorded in writing and signed by both parties, and it also afforded the appellant the right to promote, operate and lease out the respondent's MDU's to third parties.

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The appellant subsequently reneged on its rental obligations in terms of the agreement and after negotiations the parties had reached a verbal understanding to cancel the standing agreements. The terms of the cancellation of the agreements, were recorded in a series of email correspondences between the respective representative(s) for the respondent Mr Nigel Keirby-Smith and those for the appellant, Mr Gregory Stuart Hamilton and Mr Walter Burger. These included the settlement of the rental payment in arrears owed by the appellant and the return of the MDU's to the respondent.

1.2 Identify and discuss the principle of law in the case. (5)

The appeal concerned a series of emails purporting to the consensual cancellation of the written agreements. Stipulated within these written agreements was that 'consensual cancellation' to be effected **in writing and signed by both parties**. As per the provisions of [sections 11, 12 and 13][2], statutory regulations of the Republic afford legal recognition to transactions concluded electronically via email. The SCA[4] was required to consider whether the dispute arising from the exchange of emails between the parties, did indeed satisfy the **writing** [section 12][2] and **signature** [section 13][2] requirements, thereby constituting legal consensual cancellation.

The appellant settled the rental fees which were, but continued its car washing operations at the locations of the rental agreements, arguing that it was entitled to do so as the agreements between itself and the respondent had been effectively canceled. The appellant then entered into subsequent agreements with another entity to conduct the same operations. To which the respondent denied the validity of the cancellations to the agreements, and sought interdictory relief preventing the appellant from conducting said operations, protecting its proprietary rights in it's MDU's pending the institution of breach of agreement actions.

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In the original action the HC[5] found that the email communication constituted inconclusive negotiations between the parties and did not evince and intention to cancel the agreements, adding that the

[2]Cited here as it has an interest in the relief claimed, but is not party to the present appeal.
[3]Mobile Dispensing Units.
[4]Supreme Court of Appeals.
[5](Durban) High Court.

parties had not explicitly specified that their agreements could be canceled via email.

The respondents argued that the emails did not comply with the requirements of [section 13(1)][2], lacking an endorsement of an 'advanced electronic signature'. Moreover, the respondent also argued that the appellant cannot bring the emails into the ambit of the law as per the provisions of [section 13(3)][2], contending that the emails pertain to oral negotiations about the agreement and hence cannot constitute separate electronic transactions, nor were there any controls implemented to identify the parties and indicate their approval.

1.3 What was the court's decision regarding the issues raised? (5)

On appeal the SCA upheld that it was not in dispute whether the emails satisfied the requirement that the cancellation need be 'in writing', as per [section 12(a)][2], of which statutory requirements are satisfied if said correspondence is in the form of a 'data message'. Instead the SCA held that the real issue was whether the names of the parties at the foot of their respective emails, indeed constituted signatures as per the provisions of [section 13(1) and 13(3)][2].

The SCA held that the stipulations for the requirement of an 'advanced electronic signature' [section 13(1)][2] did not apply to the circumstances of this case, whereas however the less restrictive requirements of an 'electronic signature' [section 13(3)][2] do indeed apply. Wherein it need only be demonstrated that the requirement is indeed met if a method of electronic signature used to identify a party and indicate their approval of the contained information [section 13(3)(a)][2], and that the method was indeed 'appropriately reliable' for the intended purposes of the information communicated [section 13(3)(b)][2]. In the SCA's analysis of [section 13(3)][2], Justice Cachali argued [paragraph 19][1]:

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> *'The respondent submits that the phrase: "Where the signature of a person is required by law" (emphasis added) in s 13(1) it should be interpreted not only to include formalities required by statute but must also incorporate instances where parties to an agreement impose their own formalities on a contract, as in this case. And, so the contention goes, because the parties required their signatures for the contracts to be cancelled the requirement could only be satisfied by the use of an advanced electronic signature as contemplated in s 13(1), which did not occur in this case.'*

The SCA ordered that the appeal be upheld with costs, and that the order of the HC be set aside and dismissed with costs [paragraph 32][1].

1.4 What is the impact of the case on the law? (5)

The SCA held that courts seek to determine whether the method of signature used fulfills the function of a signature which is to authenticate the identity of a signatory and to appropriately validate it's authenticity, rather than insisting on the form a signature may assume. The judgment held that the approach of courts has in general been pragmatic and not overly formal, citing a case [paragraph 148F-G][3] where the courts have accepted any mark made by a person attesting to a document [paragraph 25][1]:

> *'In the days before electronic communication, the courts were willing to accept any mark made by a person for the purpose of attesting a document, or identifying it as his act, to be a valid signature. They went even further and accepted a mark made by a magistrate for a witness, whose participation went only as far as symbolically touching the magistrate's pen.'*

The SCA held that the typed written names of the respective parties appearing at the foot of the emails in question, were indeed intended to identify the parties, amounted to data that was logically associated with data in the body of the emails, and thus constituting legal electronic signatures, [paragraph 29][1]:

'There is no dispute regarding the reliability of the emails, the accuracy of the information communicated or the identities of the persons who appended their names to the emails. On the contrary, as I have found earlier, the emails clearly and unambiguously evinced an intention by the parties to cancel their agreements. It ill-behoves the respondent, which responded to clear questions by email itself, to now rely on the non-variation clauses to escape the consequences of its commitments made at the meeting on 25 February 2013 which were later confirmed by email.'

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Given that the SCA upheld the appeal, finding that the email cancellation of the agreements in question was indeed valid, raises the important and difficult question of whether courts of the Republic would hold a similar view in terms of an agreement canceled via other electronic instant text messaging platforms and social media, such as SMS[6], WhatsApp, FaceBook status updates, Twitter, etc...

1.5 What are the opinions of other authors regarding the principle discussed in the case? (5)

With reference to [section 13][2] Shumani L. Gereda [4], argued that where contracting parties failed or neglected to agree on the electronic signature to be used, the presumption is that the requirement of a signature is met if a method is used to identify the person (who has purportedly 'signed' the electronic communication) and to indicate said person's approval of the data message. Such intent can be made by any means from which said person's intent can be inferred.

In the newsletter for Sonnenberg Property & Legal Advice [5], Fritz Sonnenberg advises how the precedent established by the findings of the SCA would be applicable to most contracts (including residential and commercial leases), where electronic communications are used to effect changes. However electronic signatures cannot be used for long-term[7] lease of land, the signing of a will, agreements for the sale of immovable property and bills of exchange. Adding that it would be beneficial to include a clause in an agreement stipulating the nature of electronic communications that will constitute acceptable means of written communications. Lastly he advises that one should ensure email communications should be signed if one requires them to be binding, and one should explicitly declare that they are not binding should one not want them to be bound.

Simone Dickson, a director at the firm Cliffe Dekker Hofmeyer provides similar advise [6], advising contracting parties to be cognizant of the SCA's judgment and to carefully consider any electronic communications between themselves. Moreover she advises that parties include express provisions in the contract which clearly regulate how electronic communications will apply in order to avoid disputes and ambiguity.

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Ryan Tucker of RM Tucker Attorneys, also provides similar advise [7], clarifying and reiterating that contract negotiators making amendments to, or canceling agreements via email, or other electronic means, with a simple signature at the foot of the message will be sufficient to effect such amendments/cancellations, unless one explicitly imposes more stringent requirements in their agreements.

In additional to the above considerations, attorneys from Abrahams & Gross explicitly enumerate [8] the laws/transactions to which [section 12 and 13][2] are not applicable, where variations and/or cancellations must be effected in the traditional manner written on paper and signed by hand:

- Wills Act 7 of 1953 (Wills);

[6]Short Message Services.
[7]Exceeding 20 years.

- Alienation of Land Act 68 of of 1981 (An agreement for alienation/sale of immovable property and an agreement for the long terms lease of immovable property in excess of 20 years as provided for in the aforesaid act);
- Bills of Exchange Act 34 of 1964 (bills of exchange); and
- Stamp Duties Act 77 of 1968 (stamp duties).

References

[1] *Spring Forest Trading v Wilberry (Pty) Ltd t/a Ecowash Combined Motor Holdings Limited (725/13) [2014] ZASCA 178*, KwaZulu-Natal Local Divsion, 2015 2 SA 118 (SCA).

[2] Electronic Communications and Transactions Act No. 25, 2002.

[3] *Putter v Provincial Insurance Co Ltd & another*, 1963 (3) SA 145 (W).

[4] S. L. Gereda, "The Electronic and Communications Transactions Act," in *Telecommunications Law in South Africa*, Thornton, Ed., 2006, 262–295.

[5] F. Sonnenberg. (2015). SONNENBERG & ASSOCIATES PROPERTY AND LEGAL ADVICE NEWSLETTER #28, [Online]. Available: `http://sonnenberg.co.za/PDF/Newsletter28.pdf`.

[6] S. Dickson. (2015). Validly cancelling or amending an agreement via email in spite of a non-variation clause, [Online]. Available: `https://www.cliffedekkerhofmeyr.com/en/news/publications/2015/tmt/tmt-alert-18-february-validly-cancelling-or-amending-an-agreement-via-email-in-spite-of-a-non-variation-clause.html`.

[7] R. M. Tucker. (2015). Contract law: Non-variation clauses – meeting modern business practices, [Online]. Available: `https://www.rmtucker.co.za/contract-law-non-variation-clauses-meeting-modern-business-practices/`.

[8] Abrahams & Gross. (2017). Written agreements – can they be amended or cancelled via email? [Online]. Available: `http://www.abgross.co.za/written-agreements-cancelled-email/`.

RESULTS

Total = 23 / 25 (92%)