

IPSP078 - Legal Aspects of Electronic Commerce

Assignment 2: 724205

Nyameko Lisa

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NOTE

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1 Question 1 [25]

[2]–[15]

The following discussions pertain to *Spring Forest Trading v Wilberry (Pty) Ltd t/a Ecowash Combined Motor Holdings Limited (725/13) [2014] ZASCA 178* [16],

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 relief pendente lite 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's³ 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 reduced to writing and signed by both parties, and afforded the appellant the right to promote, operate and lease out the respondent's MDU's to third parties.

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][15], statutory regulations of the Republic afford legal recognition to transactions concluded electronically via email. The SCA⁴ was required to consider whether the dispute arising from the exchange of emails between the parties, indeed satisfy the **writing** [section 12][15] and **signature** [section 13][15] requirements, thereby constituting legal consensual cancellation.

The appellant settled the rental in arrears, 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 its MDU's pending the institution of breach of agreement actions.

In the original action the HC⁵ found that the email communication constituted inconclusive negotiations between the parties and did not evince an intention to cancel the agreements, adding that the

²Cited here as it has an interest in the relief claimed, but is not party to the present appeal.

³Mobile Dispensing Units.

⁴Supreme 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)][15], 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)][15], 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)][15], 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)][15].

The SCA held that the stipulations for the requirement of an ‘advanced electronic signature’ [section 13(1)][15] did not apply to the circumstances of this case, whereas however the less restrictive requirements of an ‘electronic signature’ [section 13(3)][15] 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)][15], and that the method was indeed ‘appropriately reliable’ for the intended purposes of the information communicated. In the SCA’s analysis of [section 13(3)][15], Justice Cachali argued [16]:

‘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.’

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

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

References

- [1] Trade Marks Act No. 194, 1993.
- [2] Papadopoulos, “An introduction to cyberlaw,” in *Cyberlaw @ SA III: The law of the Internet*, Papadopoulos and Snail, Eds., Third, 2012, 1–8.
- [3] Buys, “Towards an electronics commerce policy for south africa,” in *Cyberlaw: The Law of the Internet @ SA*, First, 2000, 97–112.
- [4] B. Hamann and S. Papadopoulos, “Direct marketing and spam via electronic communications: An analysis of the regulatory framework in south africa,” *De Jure*, vol. 47 (1), 42–62, 2014.
- [5] Eiselen, “E-Commerce,” in *Information and Communications Technology Law*, D. van der Merwe, Ed., Second, 2016, 149-181 and 195-220.

- [6] S. L. Gereda, “The Electronic and Communications Transactions Act,” in *Telecommunications Law in South Africa*, Thornton, Ed., 2006, 262–295.
- [7] Pistorius, “Copyright Law and IT,” in *Information and Communications Technology Law*, D. van der Merwe, Ed., Second, 2016, 267-270 and 292-362.
- [8] —, “Domain Names and Infringement of Trade Marks on the Internet,” in *Information and Communications Technology Law*, D. van der Merwe, Ed., Second, 2016, 221–265.
- [9] Model Law on Electronic Commerce with Guide to Enactment, United Nations Commission on International Trade Law, 1996.
- [10] Model law on electronic transactions and guide to enactment, Common Market for Eastern and Southern Africa, 2010.
- [11] A green paper on electronic commerce for south africa, Department of Communcations, 2000.
- [12] Electronic Transactions and Electronic Commerce: SADC Model Law, Harmonization of ICT Policies in Sub-Saharan Africa, 2013.
- [13] Electronic Communications and Transactions Amendment Bill, 2012.
- [14] Electronic Communications and Transactions Act No. 25: Alternative Dispute Resolution Regulations, 2006.
- [15] Electronic Communications and Transactions Act No. 25, 2002.
- [16] *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).