REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Delete whichever is not applicable
(1) Reportable Yes / No
(2) Of interest to other Judges Yes / No
(3) Revised.

Date: 05 / 5 / 2016

Signature……..

CASE NO: 2012/24131

In the matter between:

NATASHA RODRIGUES Applicant

And

BOABABSKY (PTY) LTD t/a URBAN TREE Respondent

J U D G M E N T

MAIER-FRAWLEY AJ:

1. This is an application for the recovery of monies paid by the applicant to the respondent in anticipation of the conclusion of a written Venue Hire Agreement, which the applicant alleged had not come into being. I will refer to the Venue Hire Agreement as “the agreement” in this judgment.

2. The respondent opposed the application on the basis that a binding agreement had come into being, which was repudiated by the applicant, thereby disentitling her to the relief sought.

3. What follows, are the primary facts relating to the matter.

4. The respondent is an Events Organising Venue Provider which, amongst other things, provides venues for weddings as well as services related thereto. One Claire Van Halderen, whom I will refer to as" Claire", is the respondent's Client Service Manager, whilst one Bruce Van Halderen, whom I will refer to as "Bruce", is the Managing Director of the respondent. Both Bruce and Claire represented the respondent in its dealings with the applicant.

5. The applicant contemplated hiring the respondent's venue situated at 8 & 10 Commerce Crescent, corner Dartfield Road, Eastgate ext 13, Sandton ("the venue") at which to host her wedding.. A provisional date for the hosting of the applicant's wedding was agreed between the applicant and Claire for the 20th June 2015.

6. On 23 March 2015, Claire sent an email to the applicant enclosing the respondent's *pro forma* agreement, which included annexure "A" thereto that contained further terms and conditions, as well an invoice that reflected the hire charges and 'damages deposit' that were payable in terms of the proposed agreement. In her covering email, Claire stated *inter alia,* the following:

"

Herewith the Venue Hire CONTRACT and INVOICE…

A. Please could you read, sign and return the contract…see attached

contract.

1. Please sign page 7 of 23 in full

2. And initial each of the other pages

3. And send back to me soonest, so that Bruce can countersign

B. Please also at the same time make payment in full for the Venue Hire plus damages deposit…see attached invoice.

4. Please send proof of payment once completed, also a requirement to secure the booking.

The booking remains provisional until such time as the hire charge and damages deposit is paid in full and the Venue Hire Contract is signed and returned countersigned by Urban TREE…"

7. Clause 2.2 of the *pro forma* agreement provided that:

> **"***The Client shall be required to pay the hire charge to Urban TREE in full (together with the Damages Deposit referred to in the Event Information Schedule) and sign this agreement in order to confirm its provisional booking of the Venue for the Event date. The Client's booking shall remain provisional until such time as the hire charge is paid in full in freely available funds into Urban Tree's bank account and this agreement is signed in full and returned to Urban Tree and the same is countersigned and returned to the Client.""*

8. Clause 31 of the terms and conditions, reflected in Annexure "A" to the agreement, provided the following:

> " *31.1 The agreement constitutes the sole record of the agreement between the parties in relation to the subject matter thereof.*
>
> *31.2 Neither party shall be bound by any express, tacit or implied term, representation, warranty, promise or the like not recorded herein.*

31.3 The agreement supersedes and replaces all prior commitments, undertakings or representations, whether oral or written, between the parties in respect of the subject matter hereof.

31.4 The agreement shall in all respects be governed by, and construed in accordance with the laws of the RSA.

31.5 No addition to, variation or consensual cancellation of the agreement shall be of any force or effect unless reduced to writing and signed by or on behalf of the parties.

31.6 ….

31.7 …. *"*

9. On 25 March 2015, the applicant paid the venue hire costs and damages deposit specified in the respondent's invoice, in the amount of R74 204.80.

10. On 26 March 2015, the applicant sent an email to the respondent in which she enquired as follows ; "…*so is the venue confirmed without signed contract*? *Technician is coming today or Monday to fix scanner so I can send you signed and initialled contract"*.

11. On 11 April 2015, Claire replied thereto and advised the applicant, among others, that: "…*I urgently need a signed copy of the venue hire agreement…"*

12. On 15 April 2015, the applicant signed the last page, namely, page 7 of the agreement in full and initialled the other pages but did not return the signed agreement to the respondent for counter-signature, due to ongoing technical problems being experienced with her scanner. The applicant consequently photographed page 7 of the agreement that was signed by her and emailed a copy thereof to the respondent.

13. On 21 April 2015, Claire sent an email the applicant in which she proposed

a meeting between the parties. In the said email, Claire recorded the following: "…*You can bring the agreement with you and I can get Bruce to sign and give you a copy while you are here...*" [1]

14. In reply thereto, later the same day, the applicant's attorney sent a letter to the respondent in which he recorded, among others, that as at 21 April 2015, the agreement had not been countersigned on behalf of the respondent and that the applicant consequently withdrew her offer with immediate effect. Repayment of the amount of R74 204.80 was requested from the respondent.

15. On 22 April 2015, Bruce sent an email to the applicant in which he conveyed, among others, that the respondent regarded the booking as confirmed.

16. Later the same day, the applicant's attorney demanded a refund of monies paid by the applicant to the respondent by close of business on 24 April 2015, failing which an application would be launched to court.

17. The applicant alleged in the founding affidavit that she was entitled to a refund of the monies paid on the basis that no binding agreement had ever came into being between the parties, it being her contention that her offer to contract with the respondent had been withdrawn by her prior to the respondent having signed the agreement.

18. The respondent alleged in its answering affidavit that Bruce had countersigned the last page of the agreement on 17 April 2015 on its behalf. The respondent contended that a valid and binding agreement had therefore come into being on a date that preceded the withdrawal of the

[1] at p43

offer by the applicant. The respondent also alleged in the answering affidavit that it was the respondent who had made the initial offer to the applicant to contract with it.

19. The applicant disputed that Bruce had countersigned the agreement on behalf of the respondent on 17 June 2015. In this regard, reliance was placed on the contents of Claire's email of 15 April 2015 in which Claire had stated "…*You can bring the agreement with you and I can get Bruce to sign and give you a copy while you are here ...*" *(own emphasis)*

20. Both parties were represented by counsel at the hearing of the matter. The respondent's counsel conceded in argument that since the applicant had signed the agreement first, she came to be the *offeror,* thereby constituting the respondent, the *offeree*.

21. The respondent's counsel submitted that it could be inferred from the contents of the email sent by Bruce to the applicant on 22 April 2015 that the agreement had been signed on behalf of the respondent before that day. I am inclined to agree with the respondent's counsel in this regard.

22. In the email that was addressed by Bruce on behalf of the respondent to the applicant on 22 April 2016, the respondent maintained that it regarded the applicant's booking of the venue, as confirmed. In terms of clause 2.2 of the agreement, the booking could only be confirmed in the event that the hire charges were paid in full and the agreement was signed by both parties. It can be inferred from the contents of that email that the agreement had been signed on behalf of the respondent sometime prior to prior to the 22 April 2015. It can further be inferred from the contents of that email that the respondent communicated its acceptance of the applicant's offer to the applicant on 22 April 2015.

23. At the outset of their respective arguments, I requested counsel appearing for each party to address the court in regard to whether or not the respondent had communicated its acceptance of the offer to the applicant, and if so, the date on which such communication had been conveyed to the applicant. The applicant's counsel initially submitted that the communication by the offeree of its acceptance of the offeror's offer was not a requirement of law, but thereafter retracted such submission in his replying argument.

24. The applicant's counsel submitted that the acceptance of the applicant's offer was communicated to her after she had withdrawn her offer.

25. The respondent's counsel submitted that the applicant had failed to 'plead' in her founding papers that the respondent's acceptance of the offer had not been communicated to her prior to her withdrawal of her offer, and that accordingly, the applicant was precluded from relying thereon in the proceedings. The argument is not sustainable for reasons that follow.

26. It is trite that a contract is created by offer and acceptance. Furthermore, acceptance of an offer by the offeree must be clear, unequivocal and unambiguous.[2] Not only must the offer be accepted by the offeree, the acceptance itself must be communicated by the offeree to the offeror. Until that happens, no contract can validly come into existence.[3]

27. It is further trite that a party, who alleges that a binding agreement has come into being, bears the onus of alleging and proving its constituent

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[2] See: ***Boerne v Harris 1949 (1) SA 793 (A) at 799-800, Collen v Rietfontein Engineering Works*** *1948 (1) SA 413 (A) at 421-1*

[3] See: '*Wille's Principles of South African Law'* 9th Edition at page 742*; See too:****Tactical Reaction Services CC v Beverley Estate II Homeowners Association*** *ZAGPJHC/2010/102*

parts.[4] Since the applicant alleged that no binding agreement had ever come into being, it was therefore not necessary for the applicant to formulate a specific allegation in the founding affidavit to the effect that the respondent had failed to communicate its acceptance of the applicant's offer to her prior to the date on which she withdrew such offer.

28. By virtue of the conclusion reached in paragraph 22 above, I find that the acceptance by the respondent of the offer was only communicated to the applicant on 22 April 2015, that is, the day after the applicant had withdrawn her offer. This carried the consequence that no valid and binding agreement came into being between the parties.

29. The fact that both counsel who appeared for the parties initially failed to identify the pivotal point in question, namely, the fact that acceptance of the offer by the offeree had to be communicated to the offeror before the offer was withdrawn by the offeror, is of no consequence in the light of the fact that the primary facts were before the court by way of emails annexed to the affidavits, which were not in dispute, and the said facts were fully ventilated in argument by both counsel appearing for the parties.

30. Both counsel referred in their respective arguments in court to the case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd.*[5] This judgment dealt with how a court should approach disputes that arise in relation to the primary facts of a matter. The present matter however lent itself to a determination, by means of inferences drawn from primary facts which were *not* in dispute, of the date on which the respondent countersigned the agreement and the date on which the respondent communicated its acceptance of the offer to the applicant. Accordingly, in my view, reliance

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[4] See: ***Kriegler v Minitzer*** *1949 (4) SA 821 (A**)***

[5] 1984 (3) SA 623

on the Plascon-Evans case was entirely misplaced within the context of the present matter.

31. Finally, mention should be made of a point raised in argument by the respondent's counsel, namely, that the applicant failed to identify or disclose a cause of action in the founding affidavit. The label appended to the applicant's claim by her counsel in argument, namely, that it was a restitutionary claim, was criticised by the respondent's counsel as being inappropriate and inapplicable to the present matter. The fact that the applicant's counsel sought to label the applicant's claim as one for restitution, is in my view insignificant. A reference to the word 'restitution' or a 'restitutionary claim' is unnecessary as it clearly appears from the evidence put before the court that monies were paid in anticipation of a contract to be concluded, but which never came into being.

32. I am accordingly of the view that the relief sought, namely, the repayment of the amount paid by the applicant to the respondent, is to be granted.

33. As regards the question of costs, it was submitted by the respondent's counsel that since the amount of the applicant's claim fell within the jurisdiction of the magistrate's court, proceedings ought not to have been instituted in the High court. I am inclined to agree therewith. The general rule is that costs follow the result. I find no reason to depart from that rule, save in regard to the scale on which costs should be awarded to the successful party in the present matter.

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34. I accordingly make the following order:

34.1 The respondent is ordered to pay the applicant the sum of R R74 204.80;

34.2 The respondent is to pay interest on the aforesaid sum at the rate of 9% from date of judgment to date of final payment;

34.3 The respondent is ordered to pay the applicant's costs on the appropriate magistrate's court scale, as determined by the taxing master upon taxation.

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A MAIER-FRAWLEY

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing: 26 April 2016
Date of judgment: 5 May 2016

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