REPUBLIC OF SOUTH AFRICA

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

CASE NO: 20428/17

(1) REPORTABLE: NO
(2) OF INTEREST TO ~~OTHER~~ JUDGES: YES
(3) REVISED

20 JUNE 2018 **FHD VAN OOSTEN**

In the matter between

T.O.M.S. SOUND AND MUSIC (PTY) LTD **APPLICANT**

and

NGL LOGISTIC SOLUTIONS (PTY) LTD **RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

Introduction

[1] The crisp issue for determination in this application concerns the term of duration of a previous contractual relationship between the parties. The applicant conducts business as an importer, distributor and supplier of sound equipment, musical instruments and accessories. In terms of the contractual relationship (the agreement) the respondent provided services consisting of warehousing solutions and the transportation of specified consignments to customers of the applicant. The

applicant's case is that an informal agreement was concluded, which it was entitled to cancel with reasonable notice, which was given, resulting in the termination thereof on 31 May 2017. The respondent on the other hand, contends for an oral agreement which incorporated the terms of a written Joint Operations Agreement and the rates and costs reflected in Warehousing proposals. The Joint Operations Agreement was not signed by either the applicant or the respondent nor were any of the blank spaces filled in. Based on these documents the respondent further contends that the agreement would have endured for three years, from 1 January 2016 to 31 December 2018. In the alternative the respondent relies upon the doctrine of quasi mutual assent alleging that the applicant's conduct, to which I shall revert, led it to believe that the applicant considered itself bound by the three-year agreement.

[2] The respondent further alleges that the applicant's purported cancellation of the agreement, by letter dated 25 April 2017, constituted an act of repudiation which was accepted and the respondent accordingly cancelled the agreement. In the meanwhile the respondent has, on 25 May 2018, issued summons against the applicant claiming payment of the amounts reflected in two of its invoices and damages in the form of loss of profits by virtue of the applicant's alleged repudiation of the agreement.

[3] The applicant launched this application by way of urgency and in terms of part A thereof, sought and at the hearing by consent obtained an order for the release by the respondent of its stock, all of which was removed by the applicant from the respondent's warehouse by 1 November 2017. In part B of the application, which now serves before me, the applicant seeks a declarator that the parties have not concluded a three year agreement, and, that the agreement concluded between them (as contended for by the applicant) terminated on 31 May 2017, together with an order for costs.

[4] The applicant contends that the application, notwithstanding factual disputes which it concedes do exist, can be determined on the papers as they stand while the respondent submits that the matter should be referred to trial in view of material disputes of fact having arisen, which it is submitted are incapable of resolution without the hearing of oral evidence.

Dispute of fact

[5] A long line of correspondence between the parties exists. That has not been placed in dispute. In addition, much of the background facts are likewise either common cause or not disputed. The disputes that have arisen relate to peripheral matters which in my view are not directly relevant to the real dispute that I am required to determine. Counsel for the respondent was seemingly unable to point to any factual disputes concerning the real true issue and diverted the arguments to an examination of and reliance on certain probabilities which counsel argued are supportive of quasi mutual assent. In addition, counsel advanced as a ground in support of a referral to trial, that it would enable the court after the hearing of oral evidence in particular arising from cross-examination, to determine what the real intent of the parties was.

[6] The fundamental premise from which counsel departed, as correctly pointed out by counsel for the applicant, is misconceived: the court is required in matters of this nature and in accordance with the well-established *Plascon-Evans*-rule, to consider the common cause facts together with the respondent's version in adjudicating the matter. This is the approach I propose to adopt.

[7] I am satisfied that the issue before me can and should be decided on the papers before me and such factual disputes as there may be, are irrelevant to my determination. I do not think that further oral evidence by the parties will add anything substantial to what has already been stated not only by the parties in correspondence between them, but also their attorneys in correspondence after having come on board and lastly, and perhaps decisively, by the *dramatis personae* (Rudiger Moser, the managing director of the applicant and Mark Bryan Scott, a director and shareholder of the respondent) themselves in the negotiations between the parties right from the outset, in an application running into more than 400 pages. It is my impression that everything that needed to be mentioned has been fully dealt with. A fishing expedition by way of a trial in an attempt to derive some unknown benefit is obviously uncalled for and the interest of justice, in my view, demands that finality must now be reached on this issue in this matter. I am alive to the fact that the outcome of this application if against the respondent, will in effect decide the fate

of the action recently instituted by the respondent. But, that in itself, I hold, should not deter me for determining the issue on well-established principles and rules.

[8] The respondent's request that the matter be referred for trial is accordingly refused.

Factual matrix: the correspondence between the parties

[9] The negotiations between the parties commenced in June 2015 when the applicant, having decided to outsource its warehousing and logistical functions and requirements, by way of an email, requested a quotation from the respondent. Subsequent to that, a meeting was held for the purpose of showing the respondent exactly what was required by the applicant. Following upon that, several written proposals as well as draft agreements were sent to the applicant. The applicant at all times expressed its dissatisfaction with the terms proposed by the respondent in particular to accept the respondent's standard terms and conditions. As much was expressed in several email exchanges and meetings held between the parties.

[10] Counsel for the applicant has painstakingly scrutinised and analysed the correspondence and from the extracts he has referred me to, he submitted that Scott's version at times became somewhat ambivalent and indeed not supported by the facts of the matter. I agree. More importantly though, as rightly pointed out by counsel for the applicant, the correspondence, far from showing that a written agreement was concluded, conclusively proves just the opposite, which is that no written agreement was concluded. That accords with the common cause reality of this matter that no written agreement was concluded. Counsel for the respondent did not take issue with the submission. I therefore do not consider it necessary to deal any further with the correspondence. The only issue remaining is whether the applicant is deemed to be bound to a three year duration period on the application of the doctrine of quasi mutual assent, which I now turn to deal with.

Quasi mutual assent

[11] In support of quasi mutual assent, counsel for the respondent has placed reliance on the fact that the applicant has carried on business in all its facets, as if a contact was in place. While it must be accepted that some form of contract did exist between the parties, there is nothing in the applicant's conduct to show that the

applicant considered itself bound to a three year duration term. The contrary is readily apparent from the applicant's conduct: the correspondence as I have alluded to is replete with utterances and conduct of dissatisfaction with the proposed terms. In order for the doctrine of quasi mutual assent to apply, something more than the applicant carrying on with the business needs to be shown. Nothing in that regard was advanced nor am I able to find any indication in the applicant's conduct that a term of three years was assented to. On the contrary, the applicant in no uncertain terms, denied the term of three years in response to Scott's email dated 10 June 2016, in which this term was 'confirmed'. The unsigned Joint Operations Agreement, on which the respondent heavily relies, although making provision (with many blank spaces) for a three year term in clause 5 thereof, does not assist the respondent: the 3 year period in terms of the clause commences on the date of signature of the agreement, which never occurred. The term of three years was clearly unilaterally put forward and maintained by Scott but as I have dealt with, hotly disputed by the applicant. Significantly, in the letter of demand by the respondent's attorneys, dated 16 May 2017, an oral agreement is alleged to have been concluded 'during or about January 2016' and that such agreement 'was to endure for a period of three years'. There are seemingly no facts in support of these allegations.

[12] For all the above reasons I conclude that the doctrine of quasi mutual assent does not find application on the facts of this matter.

[13] The application must accordingly succeed.

Order

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

1. It is declared that the applicant and the respondent have not entered into:

1.1 a 3-year agreement (from 1 January 2016 to 31 December 2018) in terms of which the respondent provides warehousing (general warehouse and online warehouse and office space) to the applicant; and

1.2 a 3-year agreement (from 1 January 2016 to 31 December 2018) in terms of which the respondent is appointed by the applicant as an operator for the transportation of specified consignments of the applicant's stock to the

address of the applicant and/or the customers of the applicant within the borders of the Republic of South Africa.

2. It is declared that any agreement which the applicant and the respondent entered into in terms of which the respondent provided the services referred to in paragraph 1.1 above and/or was appointed as an operator for the services referred to in paragraph 1.2 above, terminated on 31 May 2017.

2.1 The respondent shall pay the costs of this application, such costs to include the costs consequent upon the employment of two counsel as well as the costs reserved on 13 June 2017 and 30 June 2017.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

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DATE OF HEARING	***18 JUNE 2018***
DATE OF JUDGMENT	***20 JUNE 2018***