Legal update

No. 1 of 2019 • January 2019

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Case law update

This update discusses several recent interesting determinations / judgements.

A. Summary

1. **MM o.b.o AM v Kgopano (2018) ZALMPPHC 29 – Promise made in a WhatsApp message is valid and binding**

   An undertaking or promise made in a WhatsApp message is valid and binding if it was entered into and formulated with the intention that it would be final, binding and legally enforceable.

2. **Ocean Echo Properties 327 CC and Another v Old Mutual Life Assurance Company (South Africa) Limited (2018) ZASCA 9 – Written contract cancelled by oral agreement**

   A written contract that has a non-variation clause can be cancelled by oral agreement if the oral agreement does not vary or amend the contract but cancels it.

3. **Mashishi v Mdladla and Others (2018) ZALCJHB 116 – Attorneys should not pursue hopeless cases**

   Attorneys as well as any person who has the right to appear before court, such as trade union officials and employers' organisations, should not pursue hopeless cases. Those that have the right to appear before court should respect the courts and the purpose of resolving disputes quickly. This is especially important given the court's limited resources and the backlogs that have built up.

B. Case law

1. **MM o.b.o AM v Kgopano (2018) ZALMPPHC 29 – Promise made on WhatsApp is valid and binding**

   Ms MM is AM's mother and she sued Mr Kgopano, AM's father, to enforce an undertaking he had made to pay her R1 000 000 for AM's maintenance. In 2003 Mr Kgopano was ordered by the Magistrates Court to pay R1 000 a month for the maintenance of AM. In July 2015 Mr Kgopano contacted Ms MM and told her that his health had worsened and he could no longer continue working. He indicated that he would leave employment and he would pay her R100 000 from the R600 000 pension fund benefit he would receive. They had this agreement made an order of court and Mr Kgopano paid the R100 000.

   Shortly after this, Mr Kgopano received R20 814 582.20 in lotto winnings. He sent a WhatsApp message to Ms MM, saying "if I get R20m I can give my children R1m and remain with R13m. I will just stay at home and not driving up and down looking for tenders". Despite this message, Mr Kgopano did not pay

anything to Ms MM. In October 2016 Ms MM approached the High Court for an order that Mr Kgopano was bound by the promise he made in the WhatsApp message and must pay her R900 000 (less the R100 000 she had already received).

Mr Kgopano claimed that he never intended the message to be enforceable and that he had sent it to get rid of Ms MM. He said that the R100 000 he had already paid was in full and final settlement of his maintenance obligations and that he had left his employment due to ill-health. When he was asked what type of illness he suffered from, he could not give a direct or sensible explanation.

The Court said that the issue it had to decide was whether Mr Kgopano had the necessary intention to enter into the contract (*animus contrahendi*) when he made the statement. The contract needed to have been entered into and formulated with the intention that it would be final, binding and legally enforceable.

The Court found that the WhatsApp message was clear. Mr Kgopano had already won the lottery when he sent the message to Ms MM. His message stated that he was going to pay R1m to all of his children and he would be left with R13 million and not worry about doing other work to earn a living.

The Court held that the offer in the WhatsApp message was dependent on Mr Kgopano winning the lotto. By the time he made the offer, he had already won the lotto. This made the promise enforceable. Also, Mr Kgopano claimed that he had retired early due to hill-health around the same time that he won the lottery. It could be assumed that he left his employment because he was an instant millionaire. This made Mr Kgopano's credibility and reliability questionable.

The Court ordered Mr Kgopano to pay the R900 000 claimed by Ms MM to her.

Lesson to be learnt: As with all other social media interaction, be careful about what you communicate.

2. Ocean Echo Properties 327 CC and Another v Old Mutual Life Assurance Company (South Africa) Limited (2018) ZASCA 9 – Written contract cancelled by oral agreement

Ocean Echo Properties 327 CC ("Ocean Echo") leased a commercial property from Old Mutual. The lease contained a non-variation clause, a clause stating that nothing in the lease could be changed without the written consent of all the parties to the agreement, as well as a clause which required Old Mutual's written consent if Ocean Echo wanted to vacate the property before the end of the lease period. Ocean Echo vacated the premises during the term of the lease without Old Mutual's written consent and a Mr. Solomon occupied the premises for the rest of the lease period. Mr. Solomon proceeded to pay all the rent and costs and Old Mutual sent the monthly rental statements to Mr. Solomon. When Mr. Solomon fell behind with his payments, Old Mutual issued summons to claim the outstanding amount of R457,816.07 from Ocean Echo.

Ocean Echo argued that the lease between itself and Old Mutual had been tacitly cancelled when it vacated the premises and Mr. Solomon moved in. Old Mutual argued that Ocean Echo was not allowed to vacate the premises without Old Mutual's written consent and claimed that the alleged tacit cancellation amounted to a variation or amendment of the contract, which was not allowed by the non-variation clause in the agreement.

The High Court agreed with Old Mutual. Echo Ocean appealed to the full bench of the High Court, and eventually to the SCA. In its judgment, the SCA referred to the earlier case of *Ferreira & Another v SAPDC (Trading) Ltd [1983] 3 All SA 346 (A)* ("Ferreira") which said that "while an oral agreement varying … the terms of a contract … is not permissible, there is no objection to allowing proof of an oral agreement relating to the cancellation of the contract by which its terms as such are not placed in issue". The SCA had to decide whether the tacit agreement alleged by Ocean Echo was a variation of the lease, or a cancellation. If it was a variation, it was not valid because of the non-variation clause. If a cancellation was not a variation, a tacit cancellation was valid.

The court distinguished between the two concepts on the basis that a cancellation terminated the operation of the contract with all its terms for the future, while leaving intact all terms of the contract and its operation in the past. Cancellation does not involve a variation of the terms of the contract and does not go against the non-variation clause in the contract.

The SCA decided that the parties tacitly terminated the contract and that the termination was valid. Old Mutual's claim was dismissed.

3. Mashishi v Mdladla and Others (2018) ZALCJHB 116 – Attorneys should not pursue hopeless cases

Mr Mashishi was dismissed by his employer because of misconduct relating to unauthorised payments he made to suppliers. He referred his dismissal to the bargaining council after which the matter was referred to arbitration. On 26 July 2006 the arbitrator found that Mr Mashishi's dismissal was fair. Mr Mashishi had until mid-September 2006 to apply for review of the arbitration award. The review application was eventually filed five years later, on 10 November 2011 together with an application to condone or excuse the delay in filing the review application.

For the application to condone the delay to be successful, Mr Mashishi had to show that there was a reasonable explanation for the delay in filing the review application and that the review application had a reasonable chance of success.

Mr Mashishi gave several reasons for the delay in filing the review application. These included his initial attorney not taking any steps to pursue the application, him consulting four different attorneys who refused to take on his case, his ill-health, his dismissal from another job and his employment with his current employer which he said he needed to devote his full time and attention to.

The Court rejected his reasons for the delay in filing the review application. While Mr Mashishi's first attorney did not take any steps to file the review application, Mr Mashishi still had to follow up with the attorney and ensure that the instructions he gave were being acted on. Mr Mashishi could not show that the delay was not his fault to some degree. The Court further found that the delay was excessive and there were significant periods of delay that Mr Mashishi did not explain or the explanation was weak. For those reasons the Court refused to grant the application to condone the delay.

The Court also pointed out that attorneys as well as any person who has the right to appear before court, such as trade union officials and employers' organisations, should not pursue hopeless cases. Those that have the right to appear before court should respect the courts and the purpose of resolving disputes quickly. This is especially important given the court's limited resources and the backlogs that have built up.

The present case was a hopeless one and the attorney should have never filed the review application or the application for condonation. He should have advised Mr Mashishi not to proceed with the application. The fact that Mr Mashishi had consulted four other attorneys who all refused to assist him spoke volumes. The attorney should have looked carefully at the merits of the matter, especially since the application would have been filed years out of time.

The Court dismissed the application.

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