IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

REPORTABLE

CASE NUMBER: 2994/2013

WILBERRY (PTY) LTD t/a ECOWASH	**APPLICANT**
And	
SPRINGFOREST TRADING 599 CC	**1ST RESPONDENT**
COMBINED MOTOR HOLDINGS	**2ND RESPONDENT**
LIMITED t/a THE GREEN MACHINE	

JUDGEMENT

MADONDO J:

INTRODUCTION

[1] In this matter the applicant seeks an order interdicting and restraining the first respondent or any associated company or entity acting though the first respondent from promoting or selling any equipment or product which competes with the applicant's equipment (its mobile dispensing units) and the product being manufactured or marketed by or on behalf of the applicant. Secondly, interdicting the first respondent from using and thereby promoting any mobile dispensing units or

cleaning products manufactured , distributed or sold by the second respondent or anyone else , save for the applicant, and from using the name or brand " Spring Forest Enviro Wash"

[2] The application has been brought as one for an interim relief pending the final determination of the legal proceedings to be instituted within 30 days of this order. However, the envisaged legal proceedings are not specified. Mr Stewart for the applicant has stated from the bar that an interim order is sought pending the applicant's claim for the recovery of rentals and for damages arising from the first respondent's breach of the agreement. Mr Smithers for the first respondent has argued that the relief sought is the declaratory that the agreement between the parities has been cancelled and the order preventing the first respondent from breaching clause 1.1 of the contract. In his submission the relief sought is final, in substance and effect. Nevertheless, the appropriate approach in ascertaining whether an order for interim or final relief is sought is to look at the substance rather than at the form. *See Stellenbosch Farmers Winery Ltd v Stellenvalle Winery (Pty) Ltd 1957 (4) SA 234(C) at 235; BHT Water Treatment (Pty) Ltd v Leslie and another 1993 (1) SA 47 (WLD) at 55E.*

[3] The substance of the relief sought in this application appears to be interim pending the claim for the recovery of rentals and damages for breach of contract. It, accordingly, follows that if the aforementioned proceedings are not instituted within 30 days of the order, the order sought shall lapse. In the premises, I do not agree with Mr Smithers that the relief sought is final, in substance and effect. The relief

sought is, in my view, interim in nature, substance and effect. The respondent resists the application on the basis that the agreement in question has been consensually cancelled by the parties.

PARTIES

[4] The applicant is Wilberry (Pty) Ltd t/a Ecowash, a private company duly registered and incorporated in terms of the Company Laws of the Republic of South Africa with its registered address at 8th Floor, 135 Musgrave Road, Durban and its principal place of business at Unit G9, StrijdomCommercialPark, Tungsten Road, Randburg, Gauteng.

[5] The first respondent is Spring Forest Trading 599CC, a close corporation duly registered and incorporated in terms of the Close Corporations Act, no.69 of 1984 with its registered address at 1 Fairways Avenue, FairwaysPark, Mount Edgecombe, KwaZulu-Natal (KZN).

[6] The second respondent is Combined Motor Holdings Limited t/a The Green Machine; a public company duly registered and incorporated in terms of the Company Laws of the Republic of South Africa with its registered address at 1 Wilton Crescent, Umhlanga Ridge, KZN. The second respondent is cited herein merely as an interested party, from whom no relief is sought.

FACTUAL BACKGROUND

[7] The applicant is the developer and manufacturer of an innovative and efficient car wash technology which reduces the water usage per car wash from approximately 250 litres down to about 1 litre (the Eco Wash system). The applicant supplies its EcoWash system comprising, inter alia, waterless car washing equipment, products and training to entities and persons who are running their own car wash operations in various venues around South Africa including KZN. The Eco Wash system is operated from a mobile dispensing Unit (MDU), which does need to be connected to a water or electricity supply, and from which a specially formulated wash product is sprayed on. Eco Wash system and equipment is used in over 500 locations around South Africa, including car dealerships, office parks, shopping malls, golf clubs, panel beaters, and auto fitment centres.

[8] On 28 April 2012 the applicant and the first respondent concluded a written agreement, annexure “B” to the founding affidavit. When concluding such agreement both parties were represented by their duly authorised representatives and in terms of which the applicant appointed the first respondent as its executive operating agent for the province of KZN for an initial period of 48 months. The applicant granted the first respondent the exclusive right to promote rent out and operate itself or through its agents, for its own account MDU’s in KZN. The applicant would in terms of such agreement supply the MDU’s to the first respondent on its standard terms and conditions.

[9] The first respondent undertook to rent the MDU’s directly from the applicant and itself or through its agents, to conduct car washes at office parks, shopping

centres, hospitals, hotels and the likes for its own account at its own risk and for its own reward .It was also the material terms of the contract between the parties that the first respondent would not itself or through any associated company or entity, promote or sell any equipment or product which competes with the equipment and the product being manufactured or marketed by or on behalf of the applicant. The parties also, concluded 4 rental agreements (annexure "C1 to C4"): The rentals payable by the first respondent to the applicant for the MDU's were in terms of the rental agreement due and payable on the 1st of each month. According to the applicant the first respondent failed to pay the rentals due on the 1st of February 2013. As a result of the breach by the first respondent a meeting was held between Nigel Keirby-Smith, the material business development director of the applicant, and Gregory Stuart Hamilton, the sole member of the first respondent, to discuss the matter. The matter came to a head on 25 February 2013 when Keirby-Smith and Walter Burger, a representative of the first respondent met, and the applicant made proposals as to how it intended to resolve the first respondent's breach. Mr Hamilton undertook to consider such proposals and revert to Keirby-Smith. It was also an essential term of the agreement that any variation or cancellation of the rental agreements (and the exclusive operating agent agreement) would be ineffective unless reduced to writing and signed by each party. The first respondent operated its first car washing business from five sites under the agreements – Gauteng, Entabeni, Richardsbay, Inchanga and Mt. Edgecome Golf club. The first respondent attributes its failure to pay rentals to the applicant's onerous pricing structure and protracted spring and summer rains which detrimentally affected the profitability of the first respondent's car washing business. The purpose of this meeting was to discuss the way forward and according to first respondent also whether the first

respondent could continue to operate under the applicant's existing pricing structure. At the meeting Keirby-Smith explained to the respondent that it had, *inter alia*, an option to;

1) to pay a cash amount of R 1600000,00;

2) cancel agreement and walk away;

3) pay R 1000,00 per month for five years with 15 % escalation.

[10] The meeting of 25 February 2013 was followed by emails between the parties as follows: At 11h44; Hamilton wrote Keirby-Smith seeking clarity on the options set out above: once again at 11h56 Hamilton wrote Keirby-Smith and asked him to clarify option 2; "cancel agreement and walk away", he sought confirmation that should the first respondent elect option 2, there would be no further claim or legal action from either side. In the third e-mail exchange Keirby-Smith confirmed that should the first respondent choose option 2, "cancel and walk away", there would be no further legal recourse (no further claim or legal action from either side) but subject to his last reply to the agreement. In the last reply, the applicant told the first respondent that it was free to cancel the contract if it had paid all the area rentals. It is common cause between the parties that the area rental was only paid in full in March 2013. At 16h02 Hamilton notified the applicant that the first respondent had chosen to cancel the agreement and walk away.

[11] Thereafter, the first respondent entered into an agreement with CMH Auto Gas (Pty) Ltd in terms of which the first respondent hired mobile cleaning devices

from (C.M.H). The applicant avers that by so doing the first respondent acted in breach of the Exclusive Operating Agent Agreement existing between the parties. The first respondent alleges that such an agreement between the parties was consensually cancelled by means of e-mail exchanges on 25 Feb 2013. In the contention of the applicant the exchange of e-mail correspondences could not, and did not constitute a: "Cancellation agreement entered into between the parties, reduced to writing and signed by each party or their duly authorised representatives" as it is required by clause 11.1 of the agreement. In the alternative, the first respondent submitted that the applicant is estopped from denying the validity of the consensual cancellation on 25 Feb 2013. The first respondent avers that the e-mail of Keirby-Smith and Wilkinson of 25 Feb 2013 constitutes a representation by the applicant to the first respondent that the first respondent was entitled to elect to cancel the agreement, whereupon either party would have any further claim against the other, save that Feb 2013 rentals would remain due and payable by the first respondent to the applicant. The first respondent avers that it relied on that representation and, that it reasonably acted on its strength to its prejudice. Keirby-Smith knew at the time he communicated that information to the first respondent that it was material to the first respondent's rights and obligations, and on which the fist respondent would rely.

Issues

[12] Issues raised by the facts of this matter are whether or not:

1. the exchange of e-mails between the parties, if accepted as true, could constitute an agreement "reduced to writing and signed by the parties";

2. the applicant made a representation to the first respondent which could entitled to it to an estoppel, as a defence; and,
3. the first respondent itself or through any associated company or entity promotes or sells any equipment or product which competes with the equipment and products manufactured or marketed by or on behalf of the applicant, in violation of clause 11.1 of the agreement.

[13] Clause 14.4 of the agreement provides:

> "… no variation… or consensual cancellation… shall be of any force or effect unless reduced to writing and signed by the parties…"

The first respondent contends that the non-variation clause that a consensual cancellation is required to be in writing is not a requirement of law but a requirement of this contract. Such requirement was met by e-mail exchange of 25 Feb 2013.

[14] In *SA SentraleKo-op GraanmaatskappyBpk v Shifren en Andere 1964 T (4) SA 760 (A)*, it was stated that a stipulation or condition in a written contract which provides that "any variation in the terms of this agreement as may be agreed upon between the parties shall be in writing otherwise the same shall be of no force or effect", could not be altered verbally.

[15] In *Brisley v Drotsky 2002 (4) SA (SCA)* the Supreme Court of Appeal held that the principle laid down in SA *SentraleKo-op GraanmaatskappyBpk. c*ase, that a term (entrenchment clause) in a written contract providing that all amendments to the

contract have to comply with specific formalities is binding and still remains in force. In this regard at p 11 D – E the court stated the following:

> "Daar is ook 'n algemeenheersende mite dathierdietipebepalingslegstenbate van die ekonomiesmagtigebestaan en datdittotongelykheid in kontraksverbandaanleiding gee. Dit is waarskynlikwaaromdaar 'n beroep op die grondwetlikegelykheidsbeginselgemaak word. Hierdie pealing dienterbeskerming van beidepartye."

[16] It is common cause between the parties that an agreement between them contained a stipulation to the effect that a cancellation agreement would be reduced to writing and signed by the parties, for it to have force and effect. The first respondent avers that such a stipulation was complied with prior to the cancellation of the agreement, which the applicant vehemently denied. The first respondent based its contention, in this regard, on the e-mail exchanges of 25 February 2013 between the parties as constituting a written cancellation agreement signed by both parties or their duly appointed representatives.

[17] Section 12 of Electronic Communications Act no. 22 of 2002 (ECTA) provides:

> "… a requirement in law that a document or information must be in writing is met if the document or information is –
>
> (a) in the form of a data message; and
> (b) accessible in a manner useable for subsequent reference."

[18] In the contention of the first respondent e-mails in terms of section 12 of ECTA meet any requirement that information must be recorded. This, in the

argument of the first respondent, means that the e-mail communications of 25 February 2013 met the requirement that a cancellation agreement between the parties should be "reduced to writing". Be that as it may, in my view, for the 25 February 2013 e-mail communications to be said to have met the requirement of clause 14.4 of the agreement, the minds of the parties must have been ad idem (met) to that the e-mail communications in question were intended to constitute the written cancellation agreement in compliance with clause 14.4. In casu, there is nothing to show that the e-mail communications of 25 February 2013 between the parties intended to achieve that purpose, other than enquiry and clarification.

[19] The first respondent enquired from the applicant if its election of option 2 would have any legal consequences and the applicant responded stating that there would be no legal consequences provided all area rentals were paid. Whereupon the first respondent chose option 2, without any further consequence. Nor were any attempts made by either of the parties to have the purported agreement to cancel the agreement reduced to writing and signed by the parties, as it was required by clause 11.1 of the agreement.

[20] Section 2 ECTA provides that the objects of this Act are to enable and facilitate electronic communications and transactions in the public interest. In the contention of the first respondent ECTA recognises and seeks to give legal effect to wide spread use of electronic communications in commerce and to this end, ECTA gives legal force and effect to agreements concluded partly or in whole by means of e-mail. The first respondent, therefore, insinuates that the agreement was partly or

wholly concluded between the parties by means of e-mail. Such, insinuation is not supported by evidence. The first respondent opted for option 2 and there was nothing more. Both parties knew pretty well that in order for a cancellation agreement to have any legal force and effect it must be reduced to writing and signed by each party, which did not happen.

[21] With regard to whether the requirement that the agreement should be signed by both parties was met, Christie, The Law of Contracts in South Africa 6Ed at p 110 says the following:

> "Where the signature is required by law and such law does not specify the type of signature, the requirement is met only if an 'advance electronic signature' is used. Where a signature is required by the parties to an electronic transaction and they had not agreed on a type of electronic signature, the requirement is met if a method is used to identify, the person and to indicate the persons approval of the information communicated, and having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purpose for which the information was communicated."

See also section 13 (1) (3) (a) (b) of ECTA.

[22] In the submission of Mr Stewart for the applicant the phrase "where the signature of a person is required by law …" section 13(1) should be interpreted to include not only statute but instances where parties in a written agreement impose their own formalities, as the common law, in such instances requires compliance with the formalities agreed upon and any non-compliance is rendered null en void.

Section 3 of ECTA enjoins the courts not to interpret this Act so to exclude any other statutory law or common law, and this section provides:

> "… This Act must not be interpreted so as to exclude any statutory law or common law from being applied to, recognising or accommodating electronic transactions, data messages or any other matter provided for in this Act."

[23] Under common law parties are obliged to honour the terms and conditions of their contract, as well as the formalities thereto, and to this end the provisions of section 13(1) of ECTA must be interpreted as to include common law.

Section 13(3) of ECTA provides:

> "Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is not in relation to a data message if –
>
> (a) a method is used to identify a person and to indicate a person's approval of the information communicated ; and
> (b) having regard to all the relevant circumstances at the time the method was used the method was as reliable as was appropriate for the purpose for which the information was communicated."

[24] In the argument of the first respondent since the parties have not stipulated the type of electronic signature required, the signature requirement would be met by e-mails in which the sender identified himself/herself and indicates his or her approval of the information communicated. The first respondent has submitted that

such requirement was entirely met by e-mails exchanged between the parties on 25 February 2013.

[25] Section 13(3) does not find application in this case since the parties did not specify in their document an electronic signature as a type of signature required for variation or cancellation of the agreement. Further, the agreement envisaged was a printed document and it, therefore, follows that it does not constitute and electronic transaction, as defined in the Act. In the premises, the e-mail communications of 25 February 2013 between the parties could not and did not constitute the signature envisaged in clause 14.4 of the agreement. However, had the parties been a*d idem* to that the e-mail exchange communications would constitute written cancellation agreement, surely, the signature requirement would have been met by e-mails exchange.

[26] In the contention of the applicant there is no general requirement of law, save in certain specific instances which are not relevant to this case, that an agreement between private contracting parties can only be varied or cancelled by way of writing signed by or on behalf of both parties. This is merely a requirement the parties have imposed interse. Public policy requires that contracts should be enforced, so as the formalities thereto. In *Reddy v Siemens Telecommunications (Pty) Ltd 2007 (2) SA 486 (SCA) at p 500E-F,* it was stated that this is consistent with the constitutional values of dignity and autonomy therefore the respondent is required to honour the agreement he had entered into voluntarily and in the exercise of its own freedom.

ESTOPPEL

[27] The first respondent has argued that if the exchange of e-mails of 25 Feb 2013 did not satisfy the requirements of the law or the agreement for a cancellation of the contract, they give rise to an estoppel by representation because they satisfy all the elements for an estoppel in law:

(a) they relate to matters of fact;
(b) they are precise and unambiguous, and were reasonably understood in the manner in which they were intended;
(c) the first respondent acted on the correctness of the facts as represented;
(d) the first respondent acted to its detriment, in reasonable reliance on the representations made; and
(e) the representations were made intentionally or at least negligently by persons who were entitled to bind the applicant by means of representation. (i.e. Wilkinson and Keirby-Smith).

[28] The question arises whether the applicant made any representation on which the first respondent legitimately relied to its prejudice. In *Universal Stores Ltd v Ok Bazaars (1929) Ltd 1973(4) SA 747(A) at p761B-C, the* Appellate Division said:

> "An essential element of estoppel is that there must have been a 'representation' of some kind consisting of words or conduct, including acts, omissions or silence."

[29] In the contention of the first respondent the e-mails of Keirby-Smith and Wilkinson of 25 February 2013 constituted a representation by the applicant to the

first respondent that the first respondent was entitled to elect to cancel the agreement, whereupon neither party would have any further claim against the other, save that February 2013 rentals would remain due and payable by the first respondent to the applicant. The first respondent relied on that representation and acted on the strength of it,and as a consequence, the first respondent negotiated with CAM Auto Gas (Pty) Ltd (CMH) and entered into an agreement in terms of which the first respondent would hire from CMH mobile cleaning devices.

[30] The person who bases a plea of estoppel on a representation made to him must establish that he believed in the truth thereof and that he acted on it to his prejudice, must show that he was misled by the representation. In addition, he has to show that he acted reasonably in relying on the representation. A person cannot be heard to say that he was misled into relying on a representation when he had knowledge of the true facts and therefore knew that the representation was untrue or in correct. In *Hauptfleisch v Caledon Divisional Council 1963(4) SA 53(C) at p 57C-D* it was stated:

> "If he knows or believes, that the real facts are not as stated in the representation, he cannot be heard to say the he was induced to act to his prejudice on the faith of the representation."

See also *Van Rooyen v Minister Van OpenbareWerke 1978(2) SA 835(A).*

[31] In general, the premise applicable in all circumstances is that the estoppel assertor can only successfully rely on estoppel if the reasonable person in the street in the position of the estoppel assertor would have been misled by the conduct on

which the estoppel is found. He has to prove that his reliance on the representation was reasonable. He will therefore have to show that he did not know that the representation was untrue and incorrect, that he did not have information which put him upon enquiring, or, if he did, that he exercised reasonable care and diligence to learn the truth, and generally, that he was not misled by a lack of reasonable care on his part. *See Paradise Lost Properties v Standard Bank of SA Ltd 1997 (2) SA 815(D) p 820 G – H.*

[32] When the first respondent enquired from the applicant whether its election of option 2, “cancel and walk away”, would not have any legal consequences and the applicant responded stating that there would be no legal consequences provided all the arrear rentals were paid, shows that both parties had the provisions of clause 13 of the Agreement in their contemplation not clause 14.4. Clause 13 provides:

> “13.1 Save where otherwise provided for in this agreement, should either party (the defaulting party)commit a breach of any of the terms of this agreement or fail to make any payment due in terms hereof and fail to remedy such breach or make such payment within fourteen days from the date of receipt by it if written notice calling upon it to remedy such breach or failure, then the party against whom such breach has been committed (the aggrieved party) shall, without prejudice to any other remedies it may have whether under common law or in terms of this agreement, have the right at its option to:
>
> 13.2 sue for due compliance by the defaulting party with all of its obligations as detailed in this agreement; or
>
> 13.3 cancel the agreement by notice to the defaulting party whereupon the aggrieved party will be entitled to proceed against the defaulting party for recovery of such damages as it shall have sustained.”

[33] This clause allowed the applicant in this case to proceed against the first respondent, as the defaulting party, for recovery of any damages which it might have sustained as a result of the first respondent's breach. Apparently, the first respondent intended to protect itself against such an eventuality.

[34] However, the response by the applicant that there would be no legal consequences, did not in any way entitle the parties to cancel the agreement in contravention of clause 14.4 which requires the "variation or consensual cancellation of the agreement to be reduced to writing and signed by each party ".

[35] The applicant did not represent to the first respondent that it was entitled to cancel the agreement in contravention of the provisions of clause 14.4. Both parties knew very well that cancellation of the agreement in violation of clause 14.4 would have the effect of rendering the purported cancellation agreement null and void. The first respondent could not therefore be heard to say that it relied on such alleged representation because, firstly, it has not been shown that the applicant made it, and, secondly, the first respondent knew that in terms of the agreement such a conduct was prohibited. Even if the applicant had said so, the first respondent would have known what the effect that conduct would have on the proposed cancellation agreement if it were to be done in violation of the provisions of clause 14.4. Therefore, it could not be true that the first respondent relied on the strength of the alleged representation to its prejudice. Nor could it be said that by so doing the first respondent acted reasonably. In the result, the first respondent has failed to show that it is entitled to the benefit of estoppel, as a defence.

RELIEF SOUGHT

[36] It is common cause that currently the first respondent is operating a car wash facility, using car washing units manufactured by Green Machine, which is in direct competition with the applicant, and that, obviously, impinges negatively on the applicant's business. In addition, the fact that the first respondent is now in business with the third party presents a serious risk to the applicant's business in that the first respondent would, inevitably, promote the equipment and the product of the third party to the detriment of the applicant. This is the risk the applicant seeks to protect itself against. As a party to the agreement, the applicant has a clear right to demand compliance with the terms of the agreement and the formalities thereto. Likewise, the first respondent is obliged to honour the same. Should the conduct of the first respondent be allowed to go uncurbed, that will ultimately diminish the applicant's business. Therefore the balance of convenience favours the applicant. The applicant has no other legal remedy to prevent the continued damage to its business, than the interim interdictory relief, pending the institution of the intended proceedings against the first respondent. The evidence adduced in this case does not establish any consensual cancellation of the agreement between the parties. The applicant has, in my view, made a case for the relief sought.

ORDER

[37] In the result, the application for the interim relief sought is granted with costs.

It is further ordered that in the event of the contemplated proceedings not being instituted within 30 days of this order, the interim order shall lapse.

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MADONDO J.

JUDGMENT RESRVED: **3 MAY 2013**

JUDGMENT DELIVERED: **31 MAY 2013**

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Instructed by BiccariBollo Mariano Incorporated

COUNSEL FOR FIRST REPONDENT: **ADV. M D C SMITHERS (SC)**

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