REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 25771/2018

[1] REPORTABLE: ~~YES~~ / NO
[2] OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
[3] REVISED.

26.11.18
Date:

WHG VAN DER LINDE

In the matter between:

Vodacom (Pty) Limited	Applicant
and	
Mobile Telecommunications Network (Pty) Limited	First Respondent
Transnet (SOC) Ltd	Second Respondent

JUDGMENT ON SECTION 18(1) APPLICATION

Van der Linde, J:

Introduction and background

[1] In the last week of July 2018, in the urgent court, Transnet SOC Limited (*"Transnet"*) brought an application against Mobile Telecommunications Network (Pty) Limited (*"MTN"*), in which Vodacom (Pty) Limited (*"Vodacom"*) successfully applied for leave to intervene. I gave a judgment on 24 August 2018 in favour of Transnet. The effect of the order, which was in terms

of prayer 2 of the Notice of Motion, was to direct MTN to comply with an order by the Independent Communications Authority of South Africa's Council ("*ICASA*"), that MTN must comply with the award by Transnet of the tender to Vodacom, and must port all Transnet's cell phone numbers on its network to Vodacom's network.

[2] As will appear from that judgment, there was a materially relevant earlier judgment delivered on the 18th June 2018 between MTN, Transnet and Vodacom under Case Number 33335/2017, by Sutherland, J. In that judgment, my colleague dismissed an application by MTN to review and to set aside Transnet's disqualification of MTN in a tender process that led ultimately to Transnet awarding a contract to Vodacom for the provision of mobile telecommunication services to Transnet employees. My colleague has subsequently in an *ex tempore* judgment dismissed an application by MTN for leave to appeal his judgment.

[3] Subsequently, on 9 October 2018 I dismissed an application by MTN for leave to appeal the judgment that I gave on 24 August 2018. There are therefore three judgments which set out the background and the pertinent facts that give rise to the current dispute between MTN and Vodacom; and Transnet. But in a nutshell, what had happened was the following.

[4] In September 2014 Transnet and MTN concluded a written agreement whereby MTN would provide voice and data services to Transnet until 9 October 2015. Transnet had an option to extend the agreement for 12 months, to 9 October 2016. It exercised that option and thereafter extended the contract for another three times, ultimately until 9 March 2018.

[5] As is set out in my judgment on the merits of this matter, Transnet had in the meantime set about inviting proposals to enable it to award a fresh tender for the provision of those services upon the expiration of the MTN contract. Tenderers were MTN, Cell C and Vodacom. The tenders by MTN and Cell C were unsuccessful (MTN was disqualified) and they were so advised on 22 August 2017. Vodacom was chosen to be the preferred bidder.

[6] MTN was not satisfied with this outcome and complained to Transnet's Procurement Ombudsman on 29 August 2017 and also applied urgently on 4 September 2017 for urgent interdictory relief. On 11 October 2017 the Ombudsman reported that MTN had been correctly disqualified and recommended that Transnet proceed with the tender process, and award the tender to Vodacom. This happened and consequently on 2 February 2018 Transnet and Vodacom concluded a written agreement, called a Master Services Agreement ("*MSA*"), for the provision by Vodacom to Transnet of voice and data services.

[7] Shortly after the conclusion of this agreement, MTN on 8 February 2018 reinstated its urgent application. Transnet in turn referred a complaint against MTN to ICASA's Complaints and Compliance Commission ("*CCC*") and on 19 March 2018 a hearing before that body took place. Both parties were heard but its conclusion and recommendation were reserved.

[8] When on 22 March 2018 MTN's application came before the Gauteng Division, Johannesburg, it was struck from the roll for lack of urgency. Later that very day, the CCC issued an interim ruling (which was dated 21 March 2018) in which it said that it would hold over its decision on the merits until the High Court had dealt with MTN's urgent application. MTN thereupon set down its urgent application for an interdict on the ordinary opposed roll for 14 May 2018. It was removed from that roll by Wepener, J on 24 April 2018 for lack of compliance with the Practice Manual.

[9] On 26 April 2018 the CCC recommenced to ICASA's council that MTN be ordered to port all Transnet's cell phone numbers onto Vodacom's network. ICASA's council approved that recommendation and on 3 May 2018 issued an order to that effect.

[10] In the meantime MTN's application to challenge the award of the tender and the subsequent contract to Vodacom came before Sutherland, J and it is that application which his Lordship dismissed on 18 June 2018. He dismissed MTN's application, declared the award of the tender

to Vodacom free of any irregularities, and declared that the contract between Transnet and Vodacom pursuant to the award of the tender was validly concluded.

[11] In my judgment on the merits I pointed out that the reasoning of the CCC, which was accepted by the ICASA council, was that the porting regulations published in Government Gazette No 28091 of 30 September 2005 compelled MTN to port, irrespective of the validity of the underlying agreement, since the regulations list in regulation 4(9) the exhaustive grounds upon which MTN might reject a porting request. These exhaustive grounds do not include the existence of a valid and binding agreement between Transnet and MTN.

[12] This reference to the existence of a valid and binding agreement between Transnet and MTN formed a major part of the debate on the merits in the matter before me. MTN resisted an order directing it to port, because – so it argued - Transnet had not succeeded in validly terminating the prior agreement that had been in existence between MTN and Transnet. On this argument, Transnet therefore had no power to enter into a valid agreement with Vodacom; and this court could not enforce against MTN the Transnet decision to award the contract to Vodacom, because MTN itself still had a binding contract with Transnet.

[13] The simple point that MTN took in support of its proposition that its contract with Transnet was still extant, was that when Transnet purported to terminate the contract, its notice of termination was defective, because the contract required of Transnet to give a written notice of cancellation of "*... not less than 1 (one) calendar month*". MTN argued that that reference meant not simply one calendar month, but actually one named calendar month. On the facts, Transnet had given a notice on 8 March 2018, purporting to terminate the contract with effect from 9 April 2018. MTN argued that the notice ought to have terminated the contract with effect from 30 April 2018 and not 9 April 2018.

[14] In my judgment I concluded that MTN's submission was incorrect and, relying on LAWSA Volume 27, "*Time*", by E Cameron (Revised by M Dendy), the correct legal position was that unless there were contrary indications, a reference to "*calendar month*", even in a civil contract, meant a period which commences on a specific date in one month and terminates on the same date in the next month.

[15] MTN also took a second point before me, which was that it was entitled to challenge collaterally the validity of the administrative action upon which Transnet relied in its application before me to compel MTN to port, the administrative action being the order of the ICASA council.

[16] In my judgment I acknowledged that a defensive challenge to the legal validity of the action relied upon by the administration for the coercive action was, in principle, available to MTN. But I held also that the substantive underpinning of MTN's collateral challenge to the validity of the ICASA council order was destroyed by the combined effect of my finding that the Transnet/MTN agreement had been validly terminated, and by the dismissal by Sutherland, J of MTN's challenge to the validity of the tender award to Vodacom, coupled with his declaration that the contract between Transnet and Vodacom had been validly concluded.

[17] In my judgment on the application for leave to appeal I held that no reasonable prospect of success had been shown and on that basis I dismissed that application. MTN has subsequently applied to the Supreme Court of Appeal for leave to appeal against the order I made against it in favour of Transnet in the main application, and that application is currently pending.

[18] In consequence of that step, section 18 of the Superior Courts Act 10 of 2013 applies. S.18(1) to s.18(3) provide as follows:

"*18.Suspension of decision pending appeal*

(1) *Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.*

(2) *Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.*

(3) *A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders."*

Vodacom's submissions

(20) Vodacom thus applies for an order that my order not be suspended. In moving its application, Vodacom submitted that MTN was conducting the appeal process in bad faith. It submitted that under section 173 of the Constitution, this court has the inherent power to protect and to regulate its own process and, also within that power, to prevent any possible abuse of process. It relied in this regard on *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) at para [90]. Based on that proposition, it submitted that its application for an order that my decision not be suspended pending MTN's application to the SCA for leave to appeal, should be granted.

(21) Mr Chaskalson, SC who appeared for Vodacom, submitted too that Vodacom will suffer irreparable harm if this court does not order that its decision is not suspended, and that MTN will not suffer irreparable harm if this court issues such an order. Fundamentally, the submission was that whereas MTN would always be able to sue Transnet for contractual damages should it transpire that MTN's contract remained valid and Transnet

acted in breach of it, Vodacom did not have a similarly enforceable cause of action against MTN should it turn out that all along Vodacom was correct and MTN not.

(22) He pointed out that the contract between Vodacom and MTN is a three years fixed term contract that has commenced running, and that accordingly for so long as Vodacom is being kept out of the contract, its potential damages are escalating exponentially and commensurately. Mr Chaskalson submitted that Vodacom did not have an effective alternative cause of action against MTN for two reasons.

(23) First, the cause of action would be for pure economic loss and our courts are slow to recognise such a cause of action. But second, he submitted that it would be difficult to prove negligence if MTN responds by asserting it was acting upon legal advice in adopting the stance that it did. Accordingly, so submitted Mr Chaskalson, if the order sought is not granted, the balance of irreparable harm favours MTN and not Vodacom, and thus Vodacom clears the threshold referred to in section 18(3) of the Act.

(24) So far as concerns "*exceptional circumstances*", Mr Chaskalson submitted that these are established by the following facts. First, contrary to the usual scenario, in this matter there was an earlier decision by the ICASA council in favour of the position supported by Vodacom before this court in the matter before me. This cements, in a way, the correctness of this court's judgment.

(25) Second, Mr Chaskalson submitted that the conduct of MTN is inconsistent with procurement legislation and he referred in this regard to Annexure "TS23" page 123 of the main application. He submitted that MNT has by now extorted more than R100 million in conflict with procurement legislation. Third, he submitted that this application was brought by way of urgency; and fourth, he submitted that the merits were strongly in favour of Vodacom.

MTN's submissions

(26) In response Mr Kutumela on behalf of MTN, submitted that what Vodacom seeks is an extraordinary deviation from the usual common law position as well as from what is now the section 18(1) position, namely an "*exceptional*" remedy. He submitted that exceptionality is not constituted by mere loss of revenue, nor by a simple difference of opinion between parties as to who is right and who is wrong in law.

(27) Further, Mr Kutumela submitted that despite the contention by Mr Chaskalson, his own client had on affidavit asserted that it has a damages claim in delict against MTN, and Vodacom should be kept by that assertion. The relevant passage quoted by Mr Kutumela from the affidavit of Vodacom in the main application reads:

> "*Vodacom maintains that it is entitled to delictual and restitutionary damages from MTN for the losses that it is suffering at the expense of MTN as a result of MTN's refusal to port the remaining Transnet members to it ...*".

This comes from the founding affidavit of Vodacom in its intervention application, paragraph 17.4.5. Mr Kutumela submitted that it is not a requirement that MTN should show that Vodacom has a clear cut alternative case; all that MTN need show is that Vodacom has an alternative cause of action.

(28) Mr Kutumela submitted that fundamental to the hierarchy of the courts and the judicial process is that finality in litigation must await the decision of the last and final court. That would be the Constitutional Court, and not the Gauteng Division, Johannesburg. He submitted that MTN has a right to apply for leave to appeal and if Vodacom's application were granted, that right would be stultified.

(29) In response to the submission that MTN was not prepared to give an undertaking to pay damages should it turn out that Vodacom was right all along, Mr Kutumela submitted that

there was no obligation to give such an undertaking. He stressed the submission that MTN has a right to raise a collateral challenge, and to raise it on appeal. As to prospects of success, he submitted that the review record in the main review application was not available when I gave my judgment and therefore it was not my province to pronounce on the prospects of success of that review. On his submission, the prospects of success on appeal favoured MTN.

(30) In reply, Mr Chaskalson submitted that Vodacom accepted that it was difficult to find *mala fides* on the part of MTN on these application papers. That being so, if MTN acted in good faith, then there is no alternative cause of action available to Vodacom against MTN.

Discussion

(31) There are principally three issues that weigh with this court in arriving at a conclusion on the submissions of the parties. The *first issue* is that the approach of a court to an application under section 18 of the Superior Courts Act is novel in the context of motion proceedings. Although it is accepted that relief under section 18 would at least ordinarily be granted upon application, still the court is required to reach a decision "*on a balance of probabilities*" so far as concerns the respective irreparable harm that the parties will suffer. This is an unusual measure to be applying in motion proceedings.

(32) Usually motion proceedings are not designed for the determination of factual disputes on a balance of probabilities: *National Director of Public Prosecutions v Zuma (573/08) [2009] ZASCA 1 (12 Jan 2009) at [26]*:

"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It

may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version."

(33) It is for this very reason that judgments such as *Plascon-Evans Paints (Tvl) Ltd v Van Riebeeck Paints (Pty) Ltd. (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 (21 May 1984)* and the many judgments that are annotated on it, came to see the light. There are firm rules that apply when final relief is sought on affidavit, and equally when interim relief only is sought in motion proceedings. But the legislature has now swept aside those rules of practice by exacting of a court, as I have said, to determine the issue of irreparable harm on a balance of probabilities. That is the approach that I proceed to adopt.

(34) The *second overarching issue* flows from the one just mentioned. That is to determine who between MTN and Vodacom, on a balance of probabilities and not constrained by *Plascon-Evans*, stands to suffer irreparable harm more than the other if the Vodacom application before me were granted or conversely refused. In this context the parties compared their respective positions (as I have indicated above) relative to the availability of damages claims to make good any loss that each may suffer if the suspension judgment went against them.

(35) In other words, Vodacom argued that if my order was suspended, so that MTN could carry on providing the mobile telephony services pending its appeal, Vodacom's ultimate residual damages claim against MTN would be far less effective than MTN's damages claim against Transnet if my order was not suspended, and MTN was thus directed to port. MTN argued the mirror position. The irreparable harm debate was therefore decked on this table, and that is what I am required to call.

(36) Now litigation in the High Court to recover pure financial loss, be it delictual or contractual, is always a drawn out process. It is also very costly. However in this matter

the two protagonists are mega-corporations and the damages are, at least potentially, very sizeable. They are not put off by the prospect of High Court litigation, as the proceedings before me have illustrated. And so it seems to me that the mere fact that MTN could sue Transnet for contractual damages in due course, or conversely that Vodacom could sue MTN for delictual damages in due course, is evenly balanced.

(37) But what is not evenly balanced is that, in my view, a cause of action by MTN against Transnet for breach of contract is a much easier row to hoe, than is a delictual cause of action by Vodacom against MTN. I say that for the following reasons.

(38) A contractual damages claim does not require proof of a state of mind as does a delictual claim; nor does it require assessing the conduct of the guilty party against a notional standard. All that MTN would have to show, was that the termination by Transnet of the contract with MTN was – objectively - bad in law. The quantification of the damages would then follow as a matter of arithmetic. It may be that there is a case to be made that the damages, being in the nature of special damages (loss of profit), would have to be shown to fall within the contemplation of the parties when the contract was entered into. But I suggest that, given the nature of the contract, this would not be insurmountable at all.

(39) Against that Vodacom, to succeed ultimately in its delictual action against MTN, would have to show that public policy demanded the existence of a duty in law on the part of MTN owed to Vodacom – in effect - to concede that Vodacom's position regarding the termination of the contract between Transnet and MTN, was correct all along; and Vodacom would additionally have to show that MTN negligently breached that duty by adopting a contrary position. In doing so Vodacom would find itself in the invidious position of having to argue that the opposing position held by MTN was so bad in law that no reasonable person would have adopted that position.

(40) I have grave reservations as to whether this could ever be shown. It seems to me that Mr Chaskalson is correct when he submits that the delictual cause of action by Vodacom against MTN for delictual loss represented by pure economic loss is an alternative which is far more esoteric and difficult to show than is the contractual alternative available to MTN against Transnet. I agree therefore that, on a balance of probabilities, Vodacom has shown that the requirements of section 18(3) have been met.

(41) It follows that I disagree with Mr Kutumela's submission that it is not for this court to analyse whether the alternative case that avails is good or bad in law. All that is necessary, according to his submission, is to identify whether such a case (available to Vodacom) exists; if it does, then that weighs against directing that the order not be suspended pending the appeal. That is to my mind taking far too impractical a view of the matter. If an alternative damages cause of action is one in form only but not in substance, then the party in whose favour the judgment was given will be denied the vindication of its rights if the order is permitted to remain suspended.

(42) That brings me to the *third issue*, being the existence of *"exceptional circumstances"*. As occurred in *Incubeta Holdings (Pty) Ltd v Ellis, 2014(3) SA 189 (GJ)*, the right which was vindicated in favour of Vodacom is one which has a use-by date. If the process of appeals, perhaps not stopping at the Supreme Court of Appeal but even going on to the Constitutional Court (given MTN's financial muscle), has the effect of wiping out any practical effect which a favourable judgment in favour of Vodacom will have, then it seems to me that that would be destructive of the rule of law. It implies that the very process of appeals would be permitted, of itself, to destroy the advantage of the vindication of rights.

(43) No doubt different considerations might apply if the prospects of success on appeal are held to be good. But in this matter the prospects of success on appeal have been held to be poor. Therefore this court, if MTN were to be correct in the present application, is

being asked to ignore the fact that it has decided that MTN do not have good prospects of success on appeal; and yet the same court is being asked to allow the process of two potentially weak appeals to destroy through the effluxion of time the vindication by Vodacom of its rights. That seems to me to be a legal perversity which qualifies as exceptional circumstances for the purposes of section 18(1) of the Superior Courts Act.

(44) In these circumstances I am persuaded that Vodacom's application must be granted and I make an order in terms of prayers 1 and 2 of the Notice of Motion dated 19 September 2018, except that the costs of the application are on the party and party scale.

WHG van der Linde
Judge, High Court
Johannesburg

For the applicant: Adv M Chaskalson, SC

Instructed by:
Edward Nathan Sonnenbergs Inc
Applicant's Attorneys
The Marc
128 Rivonia Street
Sandton 2196
Tel: (011) 269 7600
Email: mrossouw@ensafrica.com
smbatha@ensafrica.com
Ref: SMbatha/MRossouw/0426427

For the 1st respondent: Adv L Kutumela

Instructed by:
Werksmans Attorneys
1st Respondent's Attorneys
155 – 5th Street
Sandton
Johannesburg
Tel: (011) 535 8145
Email: cmanaka@werksmans.com
Ref: CManaka/MOB18149.57

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