REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE: 10/4/2018

CASE NO: 66075/2017

DELETE WHICHEVER IS NOT APPLICABLE

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

10/4/2018 ..... (C.J. Haupt) .....

DATE SIGNATURE

10/4/18

In the matter between:

ROAD TRAFFIC MANAGEMENT CORPORATION Applicant

and

TELKOM SA SOC LTD Respondent

JUDGMENT

1. The applicant is the Road Traffic Management Corporation ("*RTMC*"), a juristic person established in terms of the **Road Traffic Management Corporation Act**, 20 of 1999. The respondent is Telkom SA, a state owned corporation. The applicant seeks a final interdict directing the respondent to restore all suspended telecommunication services relating to a number of the applicant's accounts.

2. The termination of services by the respondent resulted in the applicant approaching the urgent court on two occasions during October 2017. An *ex parte* order was granted by Moosa AJ on 3 October 2017, with a return date of 18 October 2017. The matter was not enrolled for reasons which are not relevant at this stage, resulting in the lapse of the rule nisi. This eventually led to the respondent again suspending services at 08h25 on the 25th of October 2017.

3. An interim interdict in the form of a rule nisi was granted on an urgent basis on 25 October 2017 by Molopo J.

4. In terms of the 25 October 2017 order the return date was 19 February 2018. As more fully dealt with hereunder, the return date was extended on 19 February 2018 to 19 March 2018.

5. The requirements for a final interdict are well established. Firstly the applicant should indicate it has clear right. Secondly, that an injury is

actually being committed or reasonably apprehended and thirdly that the applicant has no adequate alternative remedy available.

6. The authorities indicate that the discretion of the court to refuse a final interdict, provided that the three requisites are present, is very limited and depends on adequacy of the alternative remedy. [1] The court has no discretion to grant an interdict for the protection of an alleged right it has found does not exist.

7. Before dealing with the facts of the present application, I shortly deal with the 3 requirements the applicant has to meet. The first requirement is a matter of substantive law and evidence. The authorities indicate that an applicant has to prove on a balance of probability facts which in terms of the substantive law established the right relied upon

8. Pertaining to the second requirement, it is trite law that the term "*injury*" is interpreted to mean the infringement of the right which has been established by the applicant which results in prejudice. The test is an objective one and the applicant need not establish on a balance of probabilities that the injury will follow.

9. The third requirement entails that an applicant will not obtain an interdict if he can obtain adequate redress through an award of damages. As a general rule the applicant must first exhaust other remedies at his disposal.

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[1] Harms, Civil Procedure in the Superior Court (LexisNexis) at A-39 and the references in footnote 6 thereto

10. On the papers it is not in dispute that the RTMC is a creature of statute which is entrusted with the management and operation of the eNaTIS system. The eNaTIS system is a national keypoint due to its significance to the national economy and security. The eNaTIS system links up the RTMC with all motor vehicle licensing institutions in South Africa, the manufactures of vehicles and various institutions including banks and the South African Police Service. This systems not only enables the RTMC to regulate and administrate the licensing of all vehicles in South Africa, learner drivers and driver's licenses, road vehicle roadworthiness tests but also the general implementation of the road traffic legislation. In order to render these services the applicant (RTMC) requires the services of the respondent (Telkom). Without the services of Telkom the eNaTIS system cannot be utilised to render crucial services and functions which include:

10.1 finding personal information of persons involved in accidents, to identify vehicles that were used to commit crimes, to indicate vehicles as stolen as per the SAPS requirements and to prevent illegal exportation of stolen or high-jacked vehicles;

10.2 to verify the authenticity of vehicles and driver's licenses during road blocks and other law enforcement exercises;

10.3 for the renewal of driver's licenses and car licenses;

10.4 for appointments of driving licenses.

11. The papers in this matter are voluminous and are close to 700 pages. Given the magnitude of the issues involved the estimate duration of 3 hours for argument in the practice notice was unrealistic. The argument took up most of the day on the 19th of March 2018 despite the Court starting earlier and taking a short lunch adjournment. In terms of the Practice Directive this matter should have been allocated to the third motion court.[2] However, due to the fact that this dispute needs to be resolved in the interests of the public, a further delay in the finalisation of the disputes is not in the interests of justice. However, this aspect will be taken into account when a costs order is made.

DISPUTE:

12. The main dispute centres around the first requirement of a clear right that the applicant needs to meet. The dispute regarding the existence or non-existence of the applicant's clear right boils down to the question whether or not the applicant and respondent entered into an agreement.

13. In short the applicant's argument is that since it has been in operation at the beginning of April 2017, it has entered into an agreement with the respondent for the rendering of essential services. The applicant alleges that the parties have reached an interim agreement, relying on the surrounding

[2] Gauteng: Pretoria Practice Manual: Chapter 13.13

circumstances, the conduct of the parties which include the negotiations that took place, the correspondence exchanged and the fact that the respondent has billed/invoiced the applicant separately and the applicant has paid all the invoices from its own funds/budget. According to the applicant, although the parties were awaiting the signing of the master agreement, this does not mean that the parties have not in principal agreed on the terms of the contract.

14. The respondent opposes the application on the basis that there is no agreement between the applicant and the respondent. According to the respondent the applicant simply stepped into the shoes of Tasima. Tasima acted as an agent on behalf of the Department of Transport ("*DoT*"). According to the respondent, the agreement between the respondent and the DoT is the basis for the rendering of services initially to Tasima and thereafter the applicant. The DoT has outstanding debt, pre-dating April 2017 in the amount of approximately R15 million owing to Telkom. Therefore in terms of the main service agreement, the respondent is entitled to withhold services due to non-payment.

15. The respondent contends that at best for the applicant there was an intention to reach an agreement but no final agreement was reached. It is contended that the outstanding debt owed by the DoT, pre-dates the takeover by the applicant of the services previously rendered by Tasima. As there is no agreement with the applicant, it is not obliged to render it any services. Tasima previously paid the accounts on behalf of the DoT and the applicant

is doing the same since taking over the services previously rendered by Tasima. As there was no contractual relationship between Telkom and Tasima, there is also no contractual relationship between the applicant (who is according to the respondent Tasima's successor in title) and Telkom.

16. The second dispute is the aspect of costs. Both parties seek a punitive cost order against the other, such order to include the costs of two counsel.

17. The dispute between the parties directly affects the public interests as the eNaTIS system is located in a national key point located in Midrand, Gauteng. Reference was also made to the disaster recovery centre which is a division of the eNaTIS system which is located in Erasmuskloof, Pretoria, Gauteng. It is against this backdrop that the context of the dispute is addressed and the factual matrix as set out on the papers before me regarding the surrounding circumstances.

MATERIAL DISPUTE OF FACT:

18. Retired Judge BR Southwood is the author of *Essential Judicial Reasoning in Practice and Procedure and the Assessment of Evidence*[3] . He comments that litigants frequently use Motion Court Proceedings to resolve their disputes as they consider such proceedings as more expeditious and less expensive. However, they should do so only when the material facts are not in dispute.[4] Therefore motion proceedings for final relief are appropriate only

[3] LexisNexis 2015

[4] At 22 with reference to Damata v Otto NO 1972 (3) SA 858 (A) at 865 G-H

where it is not foreseeable that there will be a material dispute of facts in the affidavits.[5] The problem arises that the determination of facts in motion proceedings are not made on the probabilities disclosed in the affidavits unless this is done to enable the Court to decide whether or not to reject either party's version.

19. The applicable principles to the determination of the relevant facts when final relief is sought on motion proceedings, was set out in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634 E to 635D. The adoption of a "*robust and common sense approach*" to disputes of facts was further outlined in Soffiantini v Mould 1956 (4) SA 150 E at 154 E-H.

20. The Court raised the concern whether the factual dispute on the papers pertaining to the existence of an agreement between the applicant and the respondent can be determined on the papers. To determine whether the dispute can be decided on the affidavits, a careful perusal of the affidavits filed on behalf of the applicant and the respondent is necessary in light of the common cause and undisputed facts.[6] During argument on behalf of the respondent I was also referred to Wightman t/a JW Construction v Headfour (Pty) Ltd and another 2008 (3) SA 371 (SCA) at 375 to 376, paragraph 13.

21. In the present application the applicant is seeking final relief by requesting that the rule nisi is made a final order. When a party seeks final relief in motion proceedings, it is necessary to examine the admitted facts of the

[5] Southwood Essential Judicial Reasoning at 23-26, paragraph 4.2 to 4.4
[6] Southwood, Essential Judicial Reading at 26 to 27, paragraph 4.5 and the reference to Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO 1978 (4) SA 281 (A) at 293 H to 294 E

applicant, the facts of the respondent and those facts that cannot be denied which have not been admitted, to justify the granting of the order sought. In essence a determination is made on the respondent's version and if the respondent's version is farfetched and unattainable then it should be rejected in its entirety. I am guided by the principles set out in the Plascon-Evans-matter as referred.

22. Having regard to the arguments on behalf of both parties, I am satisfied with the papers before the Court, the Court is in a position to decide on the disputes raised by applying a robust common sense approach.

23. In resolving the conflicting versions of the parties pertaining to whether or not a contract was concluded, I look at the respondent's conduct as it appears from the papers. In addition, looking at the sequence of events as set out by the applicant as well as the respondent, and the involvement of the respondent's managing executive of operations, Mr Albertus Venter, the views expressed in the Constitutional Court judgment as well as in the judgment of Tuchten J in this division, the version of events advanced by the applicants in my view is more probable than that of the respondent.

ROLE AND FUNCTION OF THE RTMC AND THE PREVIOUS SERVICE PROVIDER (TASIMA (PTY) LTD):

24. The judgment of the Constitutional Court under case number CCT5/16 pertaining to the tender between the DoT and the previous service provider responsible for the eNaTIS system, Tasima, is attached to the papers before

me. The judgment was delivered during November 2016. From the reading of the judgment it is evident that the DoT contract with Tasima resulted from the awarding of a tender pertaining to the provisions of services relating to the eNaTIS system. The awarding of the tender to Tasima resulted in the Department and Tasima concluding a turnkey agreement in terms of which Tasima was, for a period of 5 years, responsible for the provision of service relating to the eNaTIS system and these services were rendered to the Department at a considerable fee. In essense the Constitutional Court confirmed that the extension of the contract between the Department and Tasima was unlawful and that it can only be in the best interest of the public that the handover of the services and the eNaTIS system to the RTMC should happen as expeditiously as possible.[7]

25. As Telkom, who was not being paid by the DoT, threatened to cut off services during March 2017, RTMC had to launch urgent proceedings to gain control of the eNaTIS system as some eighty eNaTIS sites countrywide were already experiencing operational issues or had already collapsed, putting a serious strain on service delivery countrywide. The applicant, the DoT and the Minister of Transport approached the urgent court under case number 18849/2017. Relief was sought against, *inter alia*, Tasima and 9 other respondents in order to provide clarity pertaining to whether the Constitutional Court required Tasima to handover the eNaTIS system to the applicant by a specific date (22 December 2016) or to a later undeterminable

[7] Paragraph 206 of the Constitutional Court judgment as it appears on paginated page 85 of the papers

date in the future. The application was argued before my brother Tuchten J and his judgment is attached to the papers before me.

26. The **Road Traffic Management Corporation Act**, 20 of 1999 and the Regulations thereto provide valuable insight into the important and distinctive role of the RTMC. This assists in considering the probabilities regarding the surrounding circumstances pertaining to the existence or not, of an agreement between the parties. I am mindful of the technique set out in SFW Group Ltd and another v Martell et cie and others 2003 (1) SA 11 (SCA) at 14 to 15, paragraph 5.

27. The objectives of the Act and the Regulations confirm that it is in the public interest, *inter alia*, to establish the RTMC as a partnership between National, Provincial and Local spheres of Government by *inter alia* strengthening National and Provincial Governments collective capacity to govern road traffic through partnerships with local government bodies in the private sector, to introduce commercial management principles to inform and guide road traffic governance and decision-making in the interest of enhanced service provision.

28. Section 4 of the Act clearly provides that the corporation must perform its functions in an independent and impartial manner without undue influence from any person. Section 14 of the Act provides for the corporations' business and financial planning. Section 24 stipulates the basis on which

the corporation is funded which includes checks and balances in place for reporting to *inter alia* the Minister of Finance.

29. The principal function of the corporation is set out in Section 27 from which it is clear that the corporation and its organs must jointly and individually act in public interest and within the confines of the approved business and financial plan and certain governance agreements and performance contracts concluded between the CEO and the respective managers of the functional units referred to in Section 15(4) and 19(4).

30. Section 42 requires that the CEO must monitor compliance with the provisions of every contract concluded or purported to have been concluded under the Act. It is clear from the reading of the Act that the argument of the respondents that the applicant is merely stepping into the shoes of the previous service provider, Tasima, is not supported by the provisions of the **Road Traffic Management Corporation Act.** From the reading of the Constitutional Court judgment it is clear that Tasima's main object was not to perform its services in the public's interest but rather for its own financial gain. This is not the objective of the applicant.

31. The Constitutional Court judgment confirms that Tasima was appointed as an agent of the DoT and that the initial 5 year contract was unlawfully extended from 2010 to 2015, costing the DoT hundreds of millions of rands. Tasima at all material times acted as the agent for the Department.

However, the same cannot be said of the applicant, who is a separate creature of statute.

FACTUAL BACKGROUND:

32. It is clear from the papers that as soon as the order was granted by Tuchten J on 3 April 2017, the applicant engaged in continued negotiations with the respondent. The applicant's conduct is in line with its responsibilities, duties and functions as provided for in Act. 20 of 1999. As the South African Police has declared the applicant as a key point owner, the applicant was obliged to act in terms of the Act regarding its key appointment. As an owner of a key point the applicant acts to ensure that there is continued services. Those are provided by the respondent.

33. The major role players on behalf of the parties are Mr Kevin Kara-Vala the Division Head Road Traffic Information Systems and Adv Morne Gerber Legal Advisor of the applicant and Mr Albertus Venter, the Managing Executive of the respondent.

34. An email dated 7 April 2017 by Mr Kara-Vala, two days after takeover, was addressed to Mr. Albertus Venter. It refers to the new agreement between the applicant and the respondent to ensure the continuing of services. The letter clearly states the applicant's intention to conclude a new agreement between the applicant and the respondent to ensure critical services continued. The respondent never disputed the need for a new agreement by replying to the letter. The only plausible inference to be drawn is that the

respondent accepted that there was a need for an agreement with the "*new kid on the block*".

35. The 7 April email led to a meeting on 18 April 2017. During this meeting Telkom and RTMC agreed, subject to compliance with applicable procurement processes, that they will enter into a new master service agreement. Telkom requested a letter of intent. A letter of intent dated 18 April 2017 from Mr. Kara-Vala addressed to Mr. Venter is particularly insightful in answering the dispute regarding the existence of an interim agreement. The letter refers to the order granted by Tuchten J pertaining to the management and control of eNaTIS and its services that has been taken over by the applicant as from the 3rd of April 2017.

36. Paragraph 3 and 4 of the 18 April 2017 letter is advanced by the applicant as confirmation that the parties reached an agreement with an effective date. The wording of the letter, the circumstances under which it was sent and the subsequent conduct of the parties support the argument that the parties intended to enter into a new and binding agreement. The letter of intent confirms a continued service due to the importance of the service rendered. I quote the relevant paragraphs as follows:

> "*3. The eNaTIS is also a registered national key point due to its importance to the state and the citizens. It is imperative that the operations of a NKP are not interrupted. <u>The services provided by Telkom to eNaTIS are integral to the operation and it is against this backdrop that the corporation thanks Telkom for continuing to provide the services necessary for the operation of eNaTIS</u>.*

4. *Pursuant to a meeting on the even date, the corporation hereby confirms its intention to conclude an agreement with Telkom after the finalisation of all internal procurement processes, effective from the takeover date as per the order granted by Tuchten J.*

5. *We believe in trust that you will find our request appropriate and reasonable."* (own emphasis added)

37. If the applicant was merely an agent of the DoT one would have expected that the respondent would have replied to the letter of intent and to clearly state that there was no need for a new agreement due to the existing master agreement with the department and would not have changed the invoices in order to invoice the applicant directly. It is common cause that from April 2018 the respondent started billing the applicant with its own consumer reference, and invoice numbering. The probabilities supports the argument that this conduct is indicative that the respondent's services were rendered to the applicant in terms of an interim agreement pending the finalisation of a main service agreement.

38. Although it is so that the respondent contended that account numbers on the separate billing merely confirmed the existing account number and that the request to change the accounting details does not in effect mean that the account was ceded from the DoT to the applicant, this does not slant the probabilities in the respondent's favour. Why change the existing billing details if it is not aimed at confirming who is being billed and who is liable.

39. The applicant argues that the respondent has shown a shameful indifference to the interest of the public and is holding the applicant ransom for debts of

the DoT pre-dating April 2017. The letter from Telkom to the DoT in which the applicant was CC'd, dated 24 July 2017 of which I quote the following relevant portion, is insightful :

> *"In light of the several engagements between Telkom and the DoT, with particular reference to the letter of demand issued on the 31 May 2017 as well as the meeting that was scheduled and took place on the 3 July 2017, to which the Department was invited, accepted, but did not attend. We are here to find a viable solution. Please note we have also engaged RTMC to try and resolve, however, they advised that a mandate/approval is required from DOT for the older debt, their responsibility as the court order is only effective April 2017, assosiate accounts of which they have duly settled. Please note that the outstanding balance has to date accumulated interest to the tune of R896,793.27. You will appreciate that Telkom has explored all avenues to find an amicable solution to this inpas to no avail, this leaves us no option but to proceed with the action of suspending your services in lieu of the outstanding amounts."* (own emphasis added)

The letter is signed by the Managing Executive : Operations, Albertus Venter.

40. The wording of the 24 July 2017 letter supports the argument that the respondent was aware at all times that the applicant is not a representative or agent of the DoT as it is a separate legal entity and has a different role and function than Tasima. In amplification, the applicant's separate legal status as a new contractor was confirmed by the applicant's legal advisor Adv Gerber in an email to the respondent dated 6 September 2017.

41. The negotiations between the respective representatives, the surrounding circumstances and subsequent conduct the probable inference is that an

partly oral and/or tacit agreement was reached for the uninterrupted providing of services by the respondent for which the respondent would directly bill the applicant. It is not in dispute on the papers that the applicant is up to date with the payment of all the invoices received from the respondent since April 2017.

42. Furthermore the applicant followed up on the finalisation of the master agreement which is evident from the trail of correspondence between the parties. For example an email by Mr. Kara-Vala on 24 August 2017 was addressed to Mr Venter enquiring whether the Master agreement for the "*RTMC agreement*" has already been prepared. As managing executive of the respondent, Mr Venter responded on the same date indicating that he is checking with the sales colleagues who would advise them to confirm. This all point to the probability that the applicant was a new client and that a new master service agreement was in the process of being finalised. If Mr Venter was of the view that there should not have been such a master agreement between the parties, logic dictates that he would have indicated same.

CONDUCT OF THE PARTIES AND THE EXISTENCE OF AN AGREEMENT:

43. According to Christie's Law of Contract in South Africa[8] it is not uncommon for parties in complicated or protractive negotiation to record the progress they have made in a provisional agreement, thus clearing the points on which they agreed out of the way and facilitating the discussion on the

[8] (7th edition) (LexisNexis) at 43-45

remaining outstanding points. Reference is made to the manner in which to approach this incomplete or provisional agreements. In such cases the offer is isolated and it is ascertained whether the evidence shows that the offeree knew, or ought to have known, that it was intended to be accepted on a provisional basis only, and that the completion of a binding contract was dependent on agreement on further points. In Pitout v North Cape Livestock Co-op Ltd, Corbett JA expressed the following view:

"*Was the undertaking an offer made, animo contrahendi, which upon acceptance would give rise to the enforceable contract, or was it merely a proposal made ...while the parties were in the process of negotiating and were feeling their way towards a more precise and comprehensive agreement? This is essentially a question to be decided upon the facts of the particular case.*"[9]

44. The authorities therefore confirm that there is no reason why parties should not enter into a fully binding contract while expressly or by implication agree to discuss their addition of further terms, after the commencement of the contract.[10]

45. In this regard I refer to the following comments in Christie's Law of Contract:[11]

> "*...In accepting the statement of the law in CGEE Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd, Corbett JA added: 'Whether in a particular case the initial agreement acquires contractual force or not depends upon the intention of the parties, which is to be gathered from their conduct, the terms of the agreement and the surrounding circumstances.'*

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[9] 1977 (4) SA 842 (A) at 850D and the authorities cited in Christie's, Law of Contract, at 44 footnote 130.
[10] Christie's, Law of Contract, at 45 and the authorities cited in footnote 140 and 141
[11] At 45

The initial agreement cannot acquire contractual force if it is incapable of standing on its own ....

The question whether an agreement reached as in the course of negotiations is intended to be enforceable or merely provisional may sometimes, as in MV Navigator (No.1): Wellness International Network Ltd v MV Navigator, be answered by recourse to the doctrine of quasi-mutual assent: Was the one party reasonable in thinking that the other party's proposal or reply was made with the intention of making a binding contract?"[12]

46. The factual matrix, in particular the correspondence between the parties, their conduct following the correspondence and the sequence of events as addressed herein favours the applicant's version pertaining to an interim agreement being reached and that was to be reduced to writing. This is supported by the correspondence exchanged and the subsequent conduct of the parties.

47. Furthermore the argument of the respondent that although the applicant is a separate creature of statute it is still part of the government and therefore is in a similar position as Tasima and that they merely took over Tasima's role, is not supported by the relevant legislation and judgments.

48. The respondent's argument that the correspondence of 3 July 2017 does not indicate an agreement as the applicant had to obtain permission to conclude an agreement as is evident from the National Treasury's letter dated 25 July 2017 is not supported within the factual matrix and surrounding circumstances of the present application. The internal memo to the applicant's board dated 30 May 2017 is indicative that the applicant had

[12] MV Navigator (No.1): Wellness International Network Ltd v MV Navigator 2004(5) SA 10 (C)

entered into new contracts to ensure the uninterrupted operation of the eNaTIS system.

49. The memo further dealt with the constitutional court judgment. As the applicant was to receive the system from Tasima and to proceed as the legal custodian to manage, operate and maintain the eNaTIS system, it necessitated a deviation from the normal procurement processes to ensure an uninterrupted provision of services. Therefore the applicant had to enter into a new contract with, *inter alia*, services providers such as Telkom, as referred to in the memo.

50. National Treasury's letter, dated 25 July 2017 states in paragraph 2 thereof that for the continuing of services, the applicant had to enter into individual contracts with different service providers that were rendering the services and that the applicant had to enter into individual contracts with different service providers that were rendering the services under Tasima.

51. The surrounding circumstances include the sudden eviction and handover of the system after a tedious legal battle in the constitutional court and in this division, placing the applicant in a situation that forced it to urgently enter into contracts with various service providers in order for eNaTIS to remain operational and functional. The applicant's operations depend fully on the goods and services provided by third party service providers of which the respondent forms part. It is therefore understandable that the letter of

National Treasury noted the memo and confirmed that the reasons provided for the deviation in the appointment of various service providers was justifiable.

52. According to the respondent there was no offer and acceptance and no consensus. It is not supported by the facts before this court, especially in light of the fact that the respondent continued to provide services to the applicant and billed the applicant for such services from April 2017 until the suspension of services which led to the first urgent application in October 2017.

53. When interpreting the documents the court exercises its judicial function in such a manner to give business efficiency. Of particular significance is the letter of intent dated 18 April 2017. This letter of intent follows pursuant to the meetings that took place between the parties. It stands to reason that something must have precipitated the request for such a letter. The only plausible inference is a new agreement. Adding hereto, is the applicant's request for direct billing in its own name and the respondent acceding to this request without the indication on the papers that these invoices were ever CC'd to the DoT.

54. Why would the respondent continue with services and start billing the applicant directly every month and the applicant paying on receipt of such invoice from their allocated budget if it was not for the existence of an agreement in principle. Furthermore the email correspondence from the

respondent on 5 May 2017 to the applicant can only be interpreted as correspondence that would be addressed to a new customer, when regard is had to the following content:

54.1 The applicant is particularly thanked for using the services of Telkom;

54.2 There is reference to the enclosed Telkom business contract solution invoice and a request that as part of Telkom's ongoing commitment to improving the experience of their business customers, they strive to get regular feedback on Telkom business contract solution invoicing and in order to do this they conduct short surveys with randomly selected customers.

54.3 It is also indicated to the applicant that they may be asked to take part in the survey in the coming days and that the applicant's support would be highly appreciated to ensure that Telkom can continue to improve the service to the applicant.

55. If the applicant had any involvement in the service agreement between Telkom and the DoT dated February 2014, the contents of this email makes no sense. The respondent's conduct is consistent with the applicant's version that the parties reached an interim agreement. The 5 May email forms part of the footprints in the sand that indicate that an agreement was in place. The fact that the main service agreement has not been signed or not

been provided, does not detract from the fact that an agreement was reached. Although the parties were still negotiating on the terms of the master agreement, the terms of the interim agreement were simple, i.e the respondent would continue with its services to the applicant pending the signing of a master agreement, the applicant would be directly billed and consequently pay directly for the services. Therefore the agreement is binding and enforceable. [13]

56. From the 30 May 2017 memorandum to the applicant's board it is evident that the applicant had the necessary authority to enter into a new agreement with the respondent. The board approved the agreement and National Treasury was subsequently informed of the board's approval and the reasons for the deviation. National Treasury acknowledged that the deviation was justifiable.

57. In examining the merits in the present application the court needs to have regard to the public interest, as it is of paramount importance in this matter. The services in dispute directly affect the public at large and impact on the economy and vital security concerns. Furthermore, by holding the applicant (and the public at large) ransom to enforce payment under a different contract falls short of the requirement of good faith when contracts are negotiated.

CLEAR RIGHT:

[13] CGEE Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd 1987 (1) SA 81 (A) at 91 J to 92E; Gihwala and others v Grancy Property Ltd and others 2017 (2) SA 337 (SCA) at 363, paragraph 54

58. In my view the applicant has met the requirement of a clear right.

INJURY:

59. The applicant has also shown an injury. It is clear from the documents in particular the complaints received from the different service centres as well as the public that the withholding of services by the respondent has caused injury prejudicing not only the members of the public but also the applicant as it cannot comply with its obligations in terms of the Act if it does not have the support of Telkom's services.

60. According to the applicant the suspension of the respondent's services had a disruptive effect on the functioning and operations of the eNaTIS system. According to the respondent the suspension of the services merely slowed down the system and the Midrand facility was still operational. The respondent contends that only a portion of the services was suspended and that the eNaTIS system was not shut down. The Midrand station remained operational and the effect of the suspensions of services was merely that it slowed down the system.

61. With reference to the complaints received from the public as well as the different call centres, in particular on the morning of the 25th of October 2017 when the respondent again suspended its services to the applicant, it is clear that the respondent's contention that the eNaTIS system was merely slowed

down and that there was no real harm done, is not supported by the factual evidence.

NO ALTERNATIVE REMEDY:

62. There is no adequate alternative remedy for the applicant but to approach the court for the relief sought in light of the interruptions of essential services which jeopardize the eNaTIS system. The applicant is being held ransom for the payment of the debt due by the DoT which existed prior to the applicant taking over the eNaTIS system from April 2017.

63. It would not be lawful for the applicant to pay a debt owed by the Department. The National Treasury Practice Note, Accounting General Practice Note 4 of 2006 and in particular paragraph 5 provides that public entities may not fund the operations of a national department. The applicant also states in the replying affidavit that this would amount to an irregular expense.

64. On the other hand Telkom has remedies available to it. Telkom can enforce its rights in terms of the agreement with the department should it choose to do so. Instead, the present situation amounts to the interest of the public and the functioning of the RTMC is being caught in the cross-fire between the DoT and the respondent.

65. The debt that the respondent is relying on, pre-dates April 2017. It is a separate dispute in terms of an agreement that does not involve the applicant.

COSTS:

66. Both parties are seeking special costs order, including the costs of two counsel against one another. I was provided with a timeline by the respondent indicating how the matter has progressed since the 4th of October 2017, when a rule *nisi* was granted by Moosa AJ *ex parte*.

67. From the correspondence addressed to the applicant's attorney of record it is evident that the respondent experienced great frustration due to the lack of the applicant's attorney of record to timeously reply to correspondence and/or emails and/or telephone calls. The dilatory attitude of the applicant's attorney of record is further illustrated by the fact that a supplementary affidavit was filed on 15 March 2018. The respondent's supplementary affidavit was served on 1 March 2017. No attempt is made on behalf of the applicant to request condonation or to provide the Court with a proper explanation for the delay.

68. It is also evident from the correspondence placed before me that, despite the fact that the applicant is *dominus litis*, it was the respondent who proactively pursued the finalisation of this matter. This included writing to the Office of the DJP requesting directives with regards to the filing of heads and the replying affidavit of the applicant that was late. The applicant's attorney also

failed to paginate and index the Court file resulting in the matter not being enrolled during February 2018.

69. Despite being notified of a pre-trial hearing with the DJP to be held on 19 February 2018, none of the applicant's legal representatives attended the pre-trial and a directive was issued pertaining to the setting down of the matter for hearing on 19 March 2018. It is the respondent's attorney of record who attended to the indexing and pagination of the Court file.

70. It is trite law that it is the duty of every legal practitioner to acquaint him/herself with the Rules of Court.[14] By implication this also places a duty on legal practitioners to be acquainted with the relevant practice directives relating to the Rules. However, both parties failed to consider the practice directives pertaining to the third motion court.

71. Even if the applicant has been successful in obtaining the relief sought, it does not automatically follow that the applicant is entitled to all its costs as costs remains the discretion of the Court. I am not satisfied that the applicant's attorney has provided a satisfactory explanation for the delay in the proper enrolment of the matter on two occasions (18 October 2017 and 19 February 2018).

72. On the other hand I am also not impressed by the respondent's aggressive approach to the litigation process which includes the termination of services on the morning on the 25th of October 2017 resulting in the urgent

[14] Kgobane v Minister of Justice 1969 (3) SA 365 (A) at 369; Waar v Louw 1977 (3) SA 297 (O)

application which was heard by my sister Molopa J. The respondent's bullish approach affected the lives of thousands of innocent members of the public and had the potential of seriously effecting the economic and security interests of the country. As already stated and more fully dealt with above, the applicant cannot be held hostage for the debts of another government department.

ORDER:

73. In the result, the following order is granted:

1. The application is granted and the Rule *nisi* granted on 25 October 2017 is hereby confirmed and the respondent is directed to restore all suspended telecommunication services to the applicant's account number as set out in prayer 3 of the order granted by Molopa J on 25 October 2017.

2. The applicant is ordered to pay the following costs of the respondent, including the costs of 2 counsel were applicable:

    2.1 The wasted costs of 18 October 2017;

    2.2 The costs occasioned by addressing correspondence to the Office of the DJP from October 2017 to February 2018.

2.3 The wasted costs of 19 February 2018, including the pre-rail with the DJP and appearance in court;

2.4 The costs occasioned by the preparation and filing of the respondent's supplementary affidavit field on 1 March 2018;

2.5 The costs relating to the indexing, pagination and preparation of the court file in order to prepare the matter for hearing on the opposed roll of 19 March 2018;

3. The respondent is ordered to pay the applicant's costs, including the costs of 2 counsel were applicable, pertaining to:

3.1 the urgent application on 25 October 2017;

3.2 the argument of the matter on the opposed roll of 19 March 2018.

HAUPT L.C

ACTING MADAM JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

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