IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED	
_____	_____
DATE	SIGNATURE

CASE NO: A56/21

COURT *A QUO* CASE NO: 89823/19

DATE: April 2022

In the matter between:-

HUGE NETWORKS (PTY) LTD Appellant

and

TELEMAX (PTY) LTD Respondent

JUDGMENT

KOOVERJIE J (Khumalo J and Noncembu AJ concurring)

[1] This appeal has been instituted against the final order of the court *a quo* granted on 26 June 2020 where the following order was made that:

(i) payment plan concluded by the parties on 25 November 2019 is made an order of court;

(ii) the appellant (the respondent in the court *a quo*) is to pay the costs of the application on an attorney and client scale, including the costs of 20 November 2019.

[2] It is the appellant's case that the issue that had to be adjudicated by the court *a quo* (the court) was the return day of a rule nisi for an interim interdict which was granted on 30 November 2019 and not the final relief.

[3] For the purposes of this judgment Huge Networks (Pty) Ltd will be referred to as "the appellant" and Telemax (Pty) Ltd will be referred to as "the respondent".

[4] The basis of the appeal is twofold: firstly, it was submitted that the court acted ultra vires in granting the respondent a final relief, and secondly, it was argued that a case for interim relief was not made, hence the court should have discharged the rule nisi.

[5] The appellant specifically seeks the following relief, namely that:

5.1 the appeal be upheld with costs; and

5.2 the order of 26 June 2020 be replaced therewith-

5.2.1 the rule nisi and interim interdict granted on 30 November 2019 are discharged;

5.2.2 the applicant is ordered to pay the costs of the application.

THE COURT *A QUO* HEARING

[6] It is necessary to set the background in order to appreciate what transpired in the court *a* quo that led to the aforesaid order.

[7] On Friday, 29 November 2019, the respondent launched an urgent application. The respondent sought an interim interdict to restore the respondent's telecommunication services and other ancillary relief in a form of a rule nisi, returnable on a date to be determined.

[8] The order was intended to serve *"as an interim order with immediate effect pending the finalization of the application to have the payment plan settlement agreement made an order of court".*

[9] The matter stood down until Saturday 30 November 2019. On the said date the court granted the rule nisi and ordered the return date to be Thursday 5 December 2019.

[10] The error however came about on 5 December 2019 when the court was required to adjudicate on whether the rule nisi should be confirmed or discharged. Instead the court postponed the decision and on 26 June 2020 made a final order as set out above.

[11] On appeal, during argument, the respondent eventually conceded that the court *a quo* was not requested to make a final order.

[12] However, it must be mentioned that this was not their attitude in their answering papers, on appeal. The respondent opposed the appeal, *inter alia*, on the basis that the court has a wide discretionary power and could have made the final order.

[13] It was further submitted that in granting the order the court effectively disposed of all the possible issues and dealt with the entire application. The court therefore effectively ordered the existence of a contract and protected both parties by making the payment plan an order of court. The respondent further persisted with the argument that the appellant made out a *prima facie* case in order to obtain the final order.

[14] During argument on appeal, we have noted the appellant's submissions as to why the court could not have granted such an order. In our consideration of the appeal record, the appellant's contention has merit. The relief sought was the following:

"2. That this order serves as an interim interdict with immediate effect and a rule nisi be issued calling upon the respondent to show cause why on the ___ day of _____ 2020 at 10:00 or as soon thereafter as the matter may be heard why an order in the following terms should not be made final:

2.1 that the respondent and/or directors of the respondent and/or employees of the respondent and/or agent and/or those appointed by the respondent and/or any other person who associates themselves with the respondent and/or those acting through and under the respondent, be ordered, compelled and directed to restore, turn on the applicant's internet, voice hosting, 3cx, and mega cloud services and connectivity and related services within one hour from the time of obtaining this order;

2.3 …

3. The respondent is ordered to pay the costs of the application on a scale between attorney and own client, only in the event of opposition;

3.1 the costs of the application be reserved for final determination of the return date.

4. <u>That this order serves as an interim order with immediate effect pending the finalization of the application to have the payment plan settlement agreement made an order of court</u>.

5. That the applicant be granted leave to supplement its papers, should the need arise; …." (Our emphasis)

[15] The court *a quo*, aware of the issues before it as well as the nature of the relief sought, had erred. In its judgment, at paragraph [17], the court was mindful of the appellant's contention that the notice of motion was defective in that the applicant sought an interim interdict pending the bringing of an application or action to have the alleged agreement of 25 November 2019 made an order of court without specifying the period within which an application or action would be brought.

[16] However, the court went on and stated at paragraph [18]:

> *"[18] In view of the rule nisi being anticipated I am of the view that this point is no longer pertinent to the issues to be determined and it is not necessary anymore to deal with this point.*
>
> *[19] The main issue to be determined is whether the agreement was concluded between the applicant and the respondent of 25 November 2019 …."*

[17] It was specifically emphasized that the relief sought made provision for a pending application which still had to be finalized. It was only thereafter that a final order could be made.

[18] The appellant further submitted that in order to obtain a final order the respondent had to demonstrate that it had a clear right. At that stage of the

application, the respondent was only required to establish a *prima facie* right and could have only been entitled to an interim order.

[19] The defectiveness of the relief sought was further pointed out. The respondent failed to specify a period in which the rule nisi would serve as an interim order pending an application to have the payment plan settlement agreement made an order of court (the rule nisi had a return date which was 5 December 2019. The subsequent application regarding the payment plan settlement agreement made an order of court had no specific time-period). The effect thereof would be that the interim interdict would be perpetual.

[20] The appellant further proceeded to make out a case as to why the rule should have been discharged. The following reasons were proffered:

(i) it was common cause that the respondent fell in arrears with the payments to the appellant and that it had been in arrears for some time;

(ii) in terms of the agreement between the parties the appellant was entitled to suspend the telecommunication services to the respondent due to the fact that the respondent was in arrears;

(iii) there was clearly a dispute of fact regarding the payment plan settlement agreement which was to be determined in the envisaged application/action proceedings in the future.

[21] The respondent, on the other hand, in its papers submitted that it made out a *prima* facie case and that a payment plan was in place between the parties.

The existence of the agreement between the parties was thus sufficient to establish a *prima facie* right. There could never have been any doubt. The *prima facie* right existed as a result of the admission that the agreement was signed between the parties and duly responded to in the opposing affidavit.

[22] It was further argued that the respondent particularly agreed to the payment plan on the alleged arrear amount in order to prevent and avoid suspension of the services by the appellant.

[23] In our view, this was however not the case. On the respondent's own version, it was alleged that the payment plan settlement agreement was subject to it signing an acknowledgement of debt

[24] The appellant's case in relation to the error committed by the court in not finalizing the adjudication of the interim order but making a final decision on the merits of an Application that was not yet before it, has merit and consequently, the court *a quo*'s decision stands to be set aside. At that point in time, the court *a quo* was not in the position to have made a final order but merely an interim order.

[25] Even if the order of the court *a quo* is set aside we are posed with a further aspect for consideration. The respondent submitted that the relief the appellant seeks would have no practical effect. In fact, it was argued that the parties have gone past the issue of the internet services and other services

being restored. Hence this court should not be considering as to whether a case for interim relief has been made or not.

[26] It is not in dispute that presently action proceedings have been instituted in the magistrate's court and such litigation is ongoing between the parties on the same issues. The restoration of services is no longer an issue.

[27] It was also not disputed that before the court had furnished the order on 26 June 2020, the parties had already parted ways and litigation in the said lower court was initiated, which remains pending. There was no probable payment plan in place even at the time.

[28] The respondent specifically submitted that the appellant was aware already at the leave to appeal stage, that the interim application would have no consequence, hence no practical effect. In other words, a decision from this court on the interim interdict issue had become moot due to the aforesaid supervening circumstances.

[29] The appellant, on the other hand, argued from a different perspective. The appellant's view was that it is necessary to proceed with the appeal and eventually have the court order set aside, that is, "final" judgment. Such judgment stands unless overturned. As it stands, the court order reflects that a payment plan was concluded. It was argued that such conclusion could not

have been reached as there were existing disputes concerning this issue on the papers.

[30] Counsel for the appellants, although conceding that the issue of the rule nisi had become moot, persisted that the order confirming the existence of a payment settlement plan between the parties remained a valid and binding court order be set aside as it would have consequences on the pending litigation in the lower court between the parties. On that basis therefore, the appeal could not be moot.

[31] The respondent relied on Section 16(2)(a) of the Superior Courts Act which reads:

"(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone;

(ii) unless under exceptional circumstances, the question whether the decision would have practical effect or result is to determine without reference to any consideration of costs."

[32] In our consideration, we find that the order, as it now stands, confined that a payment plan agreement is in existence. We have however noted that the appellant, in its papers, persisted in having the rule nisi order discharged. As alluded to above, the granting of such order would have no practical effect.

[34] It is trite that a case will be moot if the controversy is hypothetical, or if the judgment of the court for some other reason cannot operate to grant any actual relief, and the court is without power to grant a decision[1].

COSTS

[35] On the issue of costs, the respondents submitted that no "exceptional circumstances" exists that would justify an order which had no consequence to costs.

[36] The approach followed by our courts, more particularly in the John Walker Pools[2] matter, was that where an appeal has become moot by the time leave to appeal is sought, it will generally be appropriate to order the appellant to pay the costs, since the appeal was stillborn from the outset. However, different considerations apply where an appeal becomes moot at a later time. We have found that this appeal is partially moot in respect of the rule nisi. The appellant has however been substantially successful in respect of having the court *a* quo's order set aside.

[37] We agree with the appellant that it was necessary to nullify the order of the court due to its effect in the pending litigation between the parties.

[1] National Coalition for Gay and Lesbian Equality & Others v the Minister of Home Affairs 2000 (2) SA 1 EC at par. 18
[2] John Walker Pools v Consolidated Aone Trade and Invest 6 (Pty) Ltd (in liquidation) and Another (245/2017) [2018] ZASCA 012 (8 March 2018)

[38] We deem it necessary to remind the parties that as a general rule, that litigants and their legal representatives have a responsibility in circumstances where an appeal becomes moot during the pending appeal proceedings, to be alive to the efficient use of judicial resources, and are required making sensible proposals so that an appellate court's intervention is not needed. The parties were required to do in this instance.

[39] Both parties were mindful that supervening events occurred before the decision of the court *a quo* was handed down on 26 June 2020. Despite there being no longer a contractual relationship between the parties, they persisted with their respective submissions on the papers and proceeded to argue as to whether or not a case for final relief was made.

[40] We further note the respondent's submission that it raised the issue of mootness in its heads of argument which was already filed in April 2021. However, it is our view that since the court order was granted erroneously the respondent could have at least abandoned the incorrect order and headed to the aforesaid approach. Its failure to do so prompted the appellant to proceed with the appeal. In our view, we therefore find the appellant is partially successful. We deem it appropriate that it be entitled to 5-% of the costs occasioned by the appeal.

[41] In the premises we find the following order to be appropriate:

(1) the judgment of the court *a quo* of 26 June 2020 is set aside;

(2) the respondent to pay 50% of the appellants costs occasioned by the appeal.

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NV KHUMALO

JUDGE OF THE HIGH COURT

_____

H KOOVERJIE

JUDGE OF THE HIGH COURT

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V NONCEMBU

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:	*Adv GVR Fouche*
Instructed by:	*Makda Cull Kotze Inc*
	Care of: Jacobson & Levy Inc

Counsel for the First Respondent:	*Adv J Prinsloo*
Instructed by:	*Hills Inc*
Date heard:	*16 March 2022*
Date of Judgment:	*April 2022*