REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number: 593/04

In the matter between:

CELL C (PTY) LIMITED Appellant

and

GERVAS MPANDLANA BHEKISISA ZULU Respondent

CORAM: **MPATI DP, ZULMAN, NUGENT, JAFTA JJA and MAYA AJA**

HEARD: **11 NOVEMBER 2005**

DELIVERED: **29 NOVEMBER 2005**

Summary: Contract – interim agreement – parties performing obligations before written document intended to regulate their relationship fully executed – cancellation of – reasonable notice to be given in absence of agreement as to how to be effected.

JUDGMENT

MPATI DP:

[1] On 14 January 2004 and pursuant to a written application and subsequent payment by the respondent of an agreed sum, the appellant, a cellular phone service provider, delivered to the respondent a community service container (the container) with telephones and other equipment. The appellant provided a cellular phone signal (the signal) to the container, which enabled the respondent to make available to the public a telecommunication service at a fee. Delivery of the container and the provision of the signal took place before signature, by an authorised representative of the appellant, of a written document which was to regulate the contract between the parties. For reasons that will become apparent later in this judgment, the appellant deactivated the telephones in the container on 3 February 2004 by terminating the signal. This appeal concerns the questions (as formulated by counsel in their heads of argument):

(1) whether an enforceable agreement was concluded between the parties and, if so, whether the appellant had lawfully cancelled it; and (2) whether termination of the cellular phone signal to the container constituted an act of spoliation.

[2] On 5 February 2004 the respondent applied for, and obtained, from

the Natal Provincial Division, a *rule nisi* in terms of which the appellant was ordered, *inter alia*, 'to restore the telecommunication line' to the container. In addition, the appellant was interdicted from 'unlawfully terminating and/or suspending' such service. The appellant, in turn, 'instituted' motion proceedings against the respondent, seeking an order discharging the *rule* and, *inter alia*, directing the respondent 'forthwith to return to the [appellant], against repayment of the amounts paid by the [respondent] (reduced to the extent of the use of airtime), the container, telephones and all other equipment supplied to the [respondent] by the [appellant]'. On 7 May 2004 the matter was adjourned for the hearing of oral evidence and determination of certain specific issues.

[3] Subsequently, however, the parties agreed that the issues between them be determined on the following set of agreed facts:

'. . .

10. On the 19th of September 2003 the Applicant made application to the Respondent for a community service facility.

11. The application was received by Jabu Mary Sekete.

12. At the relevant time Sekete was employed by the Respondent as a regional sales and training coordinator.

13. The application was signed respectively by the Applicant and Sekete and

consisted of annexure “H” to the application papers.

14. At the time when annexure “H” was delivered to Sekete, the Applicant also delivered to her a site consent form in terms of annexure “I” to the application papers, which bears the signatures of Sekete, the Applicant and Counsellor Ndlovu.

15. Sekete was not authorised to conclude the agreement (in terms of annexure “B”) or any other agreement and could only provisionally approve any application, subject to it being approved or rejected by Allen Maphumulo and reduced to writing and signed in terms of the agreement (annexure “B”).

16. Only Jose da Santos and Allen Maphumulo were authorised to represent the Respondent in the conclusion of any agreement concluded in respect to a community service facility rendered by the Applicant prior to the suspension of those services.

17. The Respondent does not conclude agreements in terms of which such services are rendered by Service Providers such as those in casu, except in the terms contained in the agreement (annexure “B”).

18. Pursuant to receipt of the application and the site consent (annexures “H” and “I”), the Applicant paid the following amounts to the Respondent:

    (a) On the 28th October 2003, R28 400-00;

    (b) On the 5th November 2004, R100-00;

19. On the 13th of January 2004 Sekete provided the Applicant with a copy of the agreement and invited him to sign the agreement and to return it to the Respondent.

20. The Applicant undertook to consider the contents following consultation with his attorney and, thereafter, to sign the agreement and return it to the Respondent, if he was satisfied with the contents and the advice given by his attorney.

21. The agreement was thereafter signed by the Applicant but not returned to the Respondent, but tendered in the Applicant's Founding Affidavit, which tender was refused (In the circumstances neither Maphumulo or Dos Santos signed the agreement).

22. On the 14th of January 2004 a container with telephones and equipment arrived for delivery to the Applicant.

23. On that day there was a dispute between the parties as to the site identified by the Applicant and provisionally approved by Sekete, on the basis that:

    (a) The Applicant claimed that he was entitled to have the container delivered to 2526 Sinkwazi Road, Imbali;

    (b) Sekete claimed that the container had to be delivered at or near Zizamele Tuckshop (about 2km away).

24. By way of compromise the parties agreed for the container, in the interim, to be delivered to the Applicant's place of residence (at another location, altogether).

    (After delivery the respondent activated the telephone lines and the applicant commenced trading.)

25. On the 26th of January 2004, the Applicant gave notice to the Respondent of his intention to move the container to 2526 Sinkwazi Road, Imbali, in terms of annexure "C" to "D" to the application papers.

26. The Respondent did not respond thereto.

27. On the 3rd of February 2004 the Applicant moved the container to 2526 Sinkwazi Road, Imbali.

28. On the 3rd of February 2004 the Respondent, without notice to the Applicant, deactivated the Applicant's cellular lines, by a computer instruction implemented at the Respondent's head office in Johannesburg, which resulted in the Applicant and his customers becoming unable to receive or make any calls from the cellular phones installed in the container delivered to him.

. . .

38. The Respondent concedes, in the event of this Honourable Court finding that the agreement (in terms of annexure "B") had been concluded, or if the Applicant acquired rights to operate the telephone services, that it was not entitled, on the 3rd of February 2004, to deactivate the cellular telephone lines.

. . . .'

Part 'C' of the application (annexure "H") is headed: PROPOSED SITE INFORMATION, and the site address where the telecommunication service was to be conducted is reflected as 2526 Sinkwazi Road, suburb of Imbali in Pietermaritzburg. Annexure "I" is a consent form on which is appended the signature of the ward councillor for the area where the proposed site is situated, which signifies that the respondent had obtained permission to

operate the service from the proposed site. The address of the site reflected on annexure "I" is the same as that in part 'C' of annexure "H". The ward councillor's official stamp also appears next to his signature.

[4] With this factual background the parties invited the court *a quo* (Msimang J) to determine the following issues:

'(a) Whether the parties concluded a written agreement in terms of annexure "B" to the applicant's founding affidavit, referred to herein as "the agreement";

(b) whether the suspension/termination of the telephone services provided to the applicant, on the 3rd of February 2004, amounted to:

(i) an act of spoliation;

(ii) a breach of the Respondent's obligations in terms of the agreement;

(c) Whether, if the agreement had been concluded, such agreement had been duly cancelled by the Respondent in terms of the notification contained in paragraph 96 of the affidavit by Sekete;

(d) Whether, in any event, apart from the written agreement the Applicant acquired from the Respondent any rights to operate a Cell C community service facility from 2526 Sinkwazi Road, Imbali and, if so, the nature of such rights.'

[5] Msimang J answered (a) in the negative and (b)(i) and (d) in the affirmative. In view of those findings, the learned judge held that 'the issues under (b)(ii) and (c) would fall away'. As to (d) he found that the

respondent's right to operate a Cell C community service facility 'flowed from the subsequent contract which was binding between the parties'.

[6] The learned Judge accordingly confirmed the *rule* and dismissed the appellant's counter-application with costs. This appeal is with his leave.

[7] Although it was common cause in this court that when the container was delivered to the respondent an interim agreement was entered into between the parties, counsel for the appellant submitted that such agreement was lawfully cancelled, ie the appellant was entitled to terminate the signal. Counsel's submission is inconsistent with the concession made by the appellant in paragraph 38 of the stated case, but due to the stance he took in this court, it is now necessary to consider the question. Counsel, however, disavowed any reliance on paragraph 96 of the affidavit of Sekete, in which it is stated that to the extent that the respondent's application for a site had been approved in circumstances which might constitute an agreement, the appellant 'has elected to cancel that agreement'.

[8] One of the contentions advanced by counsel was that having found that an agreement outside of the written document had been concluded,

Msimang J should then have defined the terms of such agreement. That he did not do.

[9] That an interim agreement was concluded between the parties is established by an inference to be drawn from the conduct of the parties (*Golden Fried Chicken (Pty) Ltd v Sirad Fast Foods CC* 2002 (1) SA 822 (SCA) 825 para 4), viz payment by the respondent of the contract price, the subsequent delivery of the container and equipment, the provision of the cellular phone signal which enabled the respondent to commence business, and the compromise reached with regard to the location of the container, all before the written agreement came into effect. As to the compromise referred to, clearly the agreement was that the respondent would operate his business from his place of residence until the dispute pertaining to the site had been settled. In this regard, counsel for the appellant contended that once the respondent moved the container from the place agreed to by compromise, the appellant was entitled to terminate or cancel the contract and to cut off the signal. This, counsel argued, was because the respondent had no right to receive a signal at any place other than the one agreed to by compromise, namely at his place of residence.

[10] There is in my view no sound basis for counsel's submission. There

is no indication whatsoever in the stated case that it was a condition of the interim agreement that the respondent was not to move the container from his place of residence. Nor can such a condition be inferred from any other facts or from the conduct of the parties that preceded the conclusion of the interim agreement. The question then is: how was cancellation of the contract to be effected?

[11] Counsel accepted that there is no evidence as to how the interim agreement could be cancelled by either party. In the absence of such a term a reasonable notice of cancellation has to be given (cf *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A) 827I-828B; *Golden Fried Chicken*, supra, at 825 para 5). It is not necessary to consider what period would have constituted reasonable notice in this case. Counsel conceded that no notice was in any event given. It follows that the appellant was not entitled to terminate the signal at the time that it did.

[12] Counsel agreed that a finding against the appellant on the first issue renders consideration of the second issue (of spoliation) unnecessary.

[13] The appeal is dismissed with costs.

L MPATI DP

Concur:

ZULMAN JA
NUGENT JA
JAFTA JA
MAYA AJA