

SOUTH AFRICA / JUDGMENT

Datawallet (Pty) Ltd and Another v Thamani
Mobile (Pty) Ltd and Others (2024/090086)
[2024] ZAGPPHC 1215 (25 November 2024)
[2024] ZAGPPHC 1215

COURT

North Gauteng High Court, Pretoria

BEFORE

Labuschagne AJ

CASE / FILE NUMBER

2024/090086

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

CASE NO:

2024/090086
In

the application of:

DATAWALLET
(PTY)
LTD
First Applicant
SULIWARE
(PTY)
LTD
Second Applicant
and
THAMANI
MOBILE (PTY) LTD
First Respondent
GEZANI
FREDDY
MASHELE
Second Respondent
F
CASEY AND ASSOCIATES (PTY)
LTD
Third Respondent
SEFAKO
MAKGATHO HEALTH SCIENCES

UNIVERSITY
(MEDUNSA)
Fourth Respondent

JUDGMENT

LABUSCHAGNE AJ

[1] During August 2024 the applicants launched an urgent interdict application against the respondents seeking an interim interdict pending finalisation of an action to be instituted. The matter was heard by Teffo J on 28 August 2024. On 25 October 2024 judgment was handed down and an interim order in favour of the applicants was granted as requested. On 28 October 2024 the first and second respondents applied for leave to appeal against the judgment, which application has not yet been heard. As Teffo J is on long leave, the application is scheduled for hearing during January 2025. The applicants contend that the effect of the leave to appeal needs to be determined urgently as it is facing financial ruin if the order is not effective. It is argued by the respondents that the risk of ruin applies not only to the applicants. I am satisfied that the application is urgent.

[2] The order granted by Teffo J found the application to be urgent and reads as follows from Prayer 2:

“2. That this order hereby serves as an interim order with immediate effect pending the finalisation of an action to be instituted within 30 days from the date of granting this order.

3. That the first and second respondents hereby, jointly and severally,
be prohibited from interfering with the applicants’ business activities in any manner whatsoever, including but not limited to:

3.1 Be prohibited from giving any instructions to the third or fourth respondents or any other client of the applicants to change, vary or amend the applicants’ banking particulars;

3.2 Be prohibited from diverting and/or misappropriating any funds payable to the applicants from the following clients:

3.2.1 Ekurhuleni Municipality;

3.2.2 Tshwane Municipality;

3.2.3 Mogale City Municipality;

3.2.4 City of Johannesburg Core – SAMWU;

3.2.5 Johannesburg Water – SAMWU;

3.2.6 Emfuleni Municipality;

3.2.7 Rand West Municipality – RWC; and

3.2.8 Sefako Makgatho Health Sciences University.

3.3 Be prohibited from holding out or representing that the first and/or second respondents are the applicants or the applicants' duly authorised representatives;

3.4 Be prohibited from representing to the applicants' clients, including but not limited to those mentioned in this order, that the applicants' business is that of the first and second respondents;

3.5 Be prohibited to induce, procure or solicit payments from the applicants' clients, including but not limited to those listed in this order, to make payment payable to the applicants to the first and/or second respondents.

4. That the third respondent is hereby prohibited from making any payments to the first and/or second respondents or their nominees for payments received from the applicants' clients listed in this

order.

5. ... (deleted).

6. That the third respondent be hereby prohibited from taking, accepting

or implementing any instruction received from the first and/or second respondents or their nominees relating to the collection of the funds due and payable to the applicants in respect of the clients listed in this order.

7. The first, second and third respondents are hereby ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved, including the costs of two counsel where so employed on Scale C."

[3] For purposes of clarity, I will refer to the parties either by name or as they are defined in this application. Thamani Mobile and Mr Mashele (the "respondents") are of the view that the filing of their application for leave to appeal has suspended the order of Teffo J and they have therefore not complied with it.

[4] The applicants contend that, in terms of section 18(2), the interim order granted is not suspended by the leave to appeal. They seek a declarator to that effect, with an alternative, if I find that it is not a section 18(2) scenario, for the interim implementation of the order in terms of section 18(3).

[5] As there is an interplay between section 18(2) and section 18(3) of the Superior Courts Act, 10 of 2013 ("the Act"), the subsections are quoted in full:

"(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.”

[6] Suliware, Datawallet and another entity called Mastercare Mobile Coastal (Pty) Ltd conduct business and trade under the name and style of Numobile. The basis on which the court a quo granted the relief against Thamani and Mashele can be summarised as follows:

6.1 Data Wallet and Suliware, the applicants, have a business relationship with service providers, Vodacom, MTN and other suppliers of mobile phones and tablets and laptops. After acquiring the business of Thamani (an acquisition that is disputed before me), Numobile’s end-user clients also included the public sector.

6.2 Without acquiring smart phone devices and airtime and data bundles from Numobile, the end-users are bound to prepaid rates to other service providers and end-users cannot otherwise afford devices, airtime and data packages on a postpaid contract basis.

6.3 The end-users’ liability towards Numobile is deducted by the end-user employers, who act as collecting agents and facilitate a payroll deduction every month and then make the payments to Numobile via Casey (the third respondent). Casey is a collection agency which collects the payments from the end-user employers and who is then supposed to pay to Numobile, who in turn makes payment to the service providers such as Vodacom, MTN and other suppliers.

6.4 The applicants lay claim to the clients who were listed in the order of Teffo J.

6.5 Monthly collections by Casey amount to approximately R1,3 million

which, since the Teffo order was granted, have not been paid.

6.6 This was in large part due to the fact that the first and second

respondents contend that the order was suspended by the application for leave to appeal filed on 28 October 2024.

[7] The applicants have utilised other sources to absorb the loss of R1,3 million a month, but contend that this cannot be sustained. The South African Municipal Workers Union: Greater Tshwane Region is the Union to which the bulk of the endd users belong. That Union recognises the dispute between the parties and also directed Casey not to make payment to any party and to deposit the amounts into a trust account. This was conveyed to Casey in a letter of 1 November 2024.

[8] The applicants’ have made payments (including short payments) since July, totalling just over R5 million. This related to the period July 2024 to October 2024. Thereafter, approximately R1,3 million per month needs to be paid. The applicants therefore contend that their irreparable harm lies in their inability to sustain these expenses without access to the payments distributed by Casey. The applicants contend that they face termination of

their business relationship with end-users and service providers. They contend that a damages claim against Thamani and Mashele is not an option, as they have pleaded poverty and a damages award will not make a meaningful contribution against the actual damages suffered by the applicants.

AN INTERLOCUTORY ORDER NOT HAVING THE EFFECT OF A FINAL JUDGMENT

[9] The effect of the interlocutory order needs to be assessed.

There are a number of ways of determining the finality of an interim order. Finality would typically require a comparison of the interim relief with the final relief to be sought in the proceedings to be instituted or pending which the interlocutory order would find application. In this instance, the action had not yet been instituted when this application was launched. The time within which that action falls to be instituted was 30 days from 25 October 2024. It was disclosed during argument that the action had been instituted and was being uploaded to Case Lines. The parties were afforded an opportunity to make further submissions by filing further heads of argument, which they then filed.

[10] Having regard to the action instituted the relief sought includes an order confirming the interim order. As the interim relief will be revisited, the interim order is interlocutory. The mere fact of revisiting the interim order in the action points to it not intended to be final in effect. But whether it is final or not requires an assessment of its effect.

[11] Where the interim order will not be in existence when the action is finalised, it is treated as final in effect. This premise is based on *BHT Water Treatment (Pty) Ltd v Leslie and Another* 1993

(1) SA 47 (W), which was considered by the SCA in *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation and Others* 2018 (6) SA 440 (SCA) where Rodgers AJA extracted from such case the principle that, if a court granted an interim interdict in circumstances where

it should, on the basis of the BHT case have treated the application as one for final relief, the interdict, though interim in form, was final for purposes of appealability (see *Cipla Agrimed* case *supra* at paragraph [23]).

[12] The SCA limited the application of the BHT test to cases where it was clear, at the time the court granted the interdict, that the matter would not be able to be finally determined before the interdict expires (*Ibid*, paragraph [24]). At paragraph [23] Rodgers AJA states the following:

“[23] BHT and the cases which followed it were concerned with the test to be applied in the granting of an interdict rather than the issue of appealability, but I can see force in the argument that, if a court grants an interim interdict in circumstances where it should on the basis of BHT, have treated the application as one for final relief, the interdict, though interim in form, is final for purposes of appealability. This is particularly so where, as here, Cipla pertinently alleged in the court a quo, and subsequently argued, that the matter should, in accordance with BHT, be adjudicated as a claim for a final interdict where the court a quo’s failure to do so is one of the grounds of appeal.”

- [13] I have scrutinised the application for leave to appeal but do not find an express reference to a failure by the court to apply the test for final relief. In the application for leave to appeal, much is made of the fact that the respondents had put up incontrovertible facts which were destructive of the applicants' case and presented disputes of fact which could not be resolved in the papers.
- [14] On the contrary, the application for leave to appeal assumes that only the test for interim relief is applicable. At paragraph 3.1.1 thereof the applicants for leave to appeal state: "It is also unclear why the court was wading into the issues of a clear right since the application before it was for an interim order."
- [15] Insofar as the court a quo was venturing into the field of a clear right, the application for leave to appeal does squarely engage specific contentions. So, for example, in paragraph 1.1 of the application for leave to appeal the following is stated:
- "In paragraph 74 of the judgment, the court already made a finding that the agreement on which the application was founded was in dispute. Based on that therefore, it could not be said that the applicants have established a clear right."*
- [16] While the principle in BHT Water Treatment is not applicable in this instance, a similar consideration arises where the respondent is unlikely to survive the interim order.
- [17] Thamani Mobile and Mr Mashele stress that they had challenged the applicants about the ownership of Thamani Mobile (Pty) Ltd and the clients brought into the business of the first applicant. It is contended that there was no basis on which the court could allocate or award the clients in the court order to the applicants, in light of this dispute. From the perspective of the applicants for leave to appeal, the court thereby disturbed the status quo rather than restored it. The effect is final.
- [18] The respondents contend that the applicants have no contract with Casey, obliging Casey to make payment to them. Further, they contend that there was no acquisition of the business of Thamani by the applicants. Rather, payments were transferred to the applicants by merely changing the banking details to those of Data Wallet, to whom Casey would thereafter make payments on behalf of Thamani. The respondents contend that the applicants, when Mr Mashele left with his former clients, soft blocked the end-users. The respondents replaced the sim-cards of the end-users. This does point to the applicants not having direct contracts with all the role players, like Casey and the end-users. The respondents contend that they get access to the workforce of three core clients via SAMWU. The three contested clients are City of Tshwane, Ekurhuleni Metro and Sefako Makgatho Health Sciences University.
- [19] It is further apparent from the application for leave to appeal that the relationships between the parties had reached rock bottom. The tone of head of argument and of the address during the court proceedings reflected deep differences on almost everything material.

- [20] The allegations are made that Mr Mashele's (the second respondent's) benevolence in changing payment instructions to bank details of the first applicant without an obligation to do so, was not reciprocated but abused. The court order had the effect of defining the rights between the parties (so it is alleged in paragraph 7.3 of the leave to appeal) regarding the contract depicted in Annexure FA8 and determining to whom the clients listed in paragraphs 3.2.1 to 3.2.8 belong. This is alleged to constitute final relief on seriously contested issues in which irreconcilable disputes of fact were raised (Leave to Appeal, paragraph 7.4).
- [21] In *Cash Crusaders Franchising (Pty) Ltd v Cash Crusaders Franchisees* 2024 (4) SA 141 (WCC) a similar scenario unfolded. In that matter the applicant was a franchisor and the respondents, its franchisees in terms of a franchise agreement that was cancelled by the respondents, who represented 40% of the applicant's business and who had proceeded to set up a rival business in defiance of an interim interdict granted in favour of the applicant. That interim interdict restrained the respondents from cancelling the franchise agreement and directed them to comply with it pending final determination of the dispute by an arbitrator or a court. The court that granted the order in question also ruled that the applicant did not breach the franchise agreement and that its cancellation by the respondents was therefore invalid. The applicant brought an application to declare the order in question interim in nature and hence not suspended by an application for leave to appeal. Alternatively, it brought a section 18(3) application for interim implementation.
- [22] The court held that, although the order in question was cast as an interlocutory one, it had a final effect on the parties. By seeking to restore the status quo ante, it was determinative of the lis between the parties and therefore appealable. Given the breakdown of trust and confidence between the parties, it was also in the interests of justice to treat the order as a final decision (*Ibid* at paragraphs [43] and [51]).
- [23] Both sides contend that they face financial ruin. For the applicants ruin would ensue if the Teffo J order were not operative. And for the respondents, if it were operative.
- [24] In this matter, at least as far as directing that the three core clients referred to are treated as the applicants' clients is concerned, the Teffo J order does decide the lis between the parties.

Although the order is crafted as an interim order, the respondents contend that their business will not survive until the action is finalised. It would be an order that is final in its effect on the respondents.

- [25] In light of the breakdown in the relationships, the interests of justice also require that the interim order be treated as final in effect. I intend following a similar approach to this matter as

in *Cash Crusaders* (*supra*) and therefore find that the order, though interlocutory in form, is final in effect. The application for leave to appeal has therefore suspended the operation of the order of Teffo J.

THE ONUS IN RESPECT OF INTERIM IMPLEMENTATION

[26] There are three requirements for an interim implementation order in terms of sec 18(3). The first is the presence of exceptional circumstances, The second is that the applicant will suffer irreparable harm if the order is not implemented. And the third is that the respondents will not suffer irreparable harm.

[27] As far as the application for interim implementation in terms of section 18(3) is concerned, the onus is on the applicants to establish on a balance of probability that all three requirements are present.

[28] In what follows , I assume the existence of exceptional circumstances and that the applicants will suffer irreparable harm if the order is not implemented.

[29] Data Wallet and Suliware contend that Thamani and Mashele will not suffer damages if the order is implemented pending leave to appeal or an appeal. At paragraph 16.10 the following is stated:

“Insofar as they may claim the possibility of potentially suffering any prejudice/harm, the prejudice the applicants will suffer if the relief is not granted, far outweighs any potential prejudice/harm they will suffer if it is granted.”

[30] This proposition by Data Wallet clearly postulates a weighing up of the respective prejudice and harm of the parties with the balance tilting in favour of the applicants. That was the test under

the repealed rule 49(11). But this is not the test in terms of section 18(3). The applicants need to establish that they will suffer irreparable harm and that the respondents will not.

IRREPARABLE HARM

[31] In referring to the merits of the dispute I am mindful thereof that this application is not an appeal. I refer to the contentions advanced to assess the irreparable harm requirement in sec 18(3) proceedings. The facts do support the contention of the applicants that there was not merely a change of address for payment from Thamani to Data Wallet but a sale of business. The dispute lies in whether there was an effective transfer of the business or not. In what follows the narrative of the respondents is expressed.

[32] Thamani Mobile and Mr Mashele (second respondent) have been conducting the business since 2020 together with Mr Cleopas Sanangura, who held 51% of the shares of the business. When Mr Sanangura expressed interest to sell his 51% share to the second respondent, that held the prospect of him being the sole shareholder of Thamani Mobile. Mr Sanangura wanted R4 million for his shares, split as follows:

32.1 R2 million in cash paid to Mr Sanangura; and

32.2 R2 million to release Mr Sanangura from the suretyship/guarantee issued in favour of Vodacom and MTN.

[33] Because the second respondent did not have the funds, he approached Mr Johan Marais and Mr Nelius Greyling, being the CEO and Director of the Suliware (second applicant) respectively for assistance.

Suliware, which owns the first applicant, is in the same business as Thamani. The discussions resulted in the conclusion of a loan agreement in terms of which the Suliware agreed to advance R4 million to the second respondent to buy out Mr Sanangura and to release him from the guarantees in favour of Vodacom and MTN.

[34] It was a term of the agreement that the second applicant would conduct a due diligence on the first respondent to determine its value. Upon completion of the due diligence, the second applicant would issue shares to the second respondent in the first applicant. The upshot of the aforesaid agreement was that the first applicant's loan of R4 million would enable the second respondent to purchase Mr Sanangura's 51% shareholding in Thamani Mobile.

[35] As an act of goodwill, the second respondent decided to transfer the business of Thamani Mobile to the applicants at a time when the applicants have not paid any money either to Mr Sanangura or for the release of Mr Sanangura from the guarantees.

[36] On 26 April 2022 the second respondent was presented with a copy of an agreement of sale signed by Mr Greyling, but he refused to sign it. In the main application the second respondent contends that a contract was placed before court which bears a signature which is not his. He contends that he had refused to sign.

[37] The applicants therefore failed to pay the R4 million on behalf of the second respondent. An amount of R2 million was paid by the first respondent from the revenue generated from the business.

[38] On 26 August 2021 Suliware purported to purchase shares in Thamani Mobile by concluding the loan and sale of shares agreements. However, the applicants have not complied with any of those agreements.

[39] The second respondent contends that he was misled in transferring the business by assurances that the applicants would comply with their agreements. In short, the applicants:

39.1 Failed to pay the R2 million to Mr Sanangura.

39.2 Failed to release Mr Sanangura from a bank guarantee;

39.3 Failed to conduct the due diligence that the parties had agreed to; and

39.4 Failed to allocate shares to the second respondent in the first applicant.

[40] The second respondent contends that he had to pay Mr Sanangura from the revenue generated from contracts that he had procured.

[41] The second respondent therefore contends that the applicants did not invest a cent in attempting to acquire the business of Thamani Mobile.

[42] The first and second respondents contend that Ekurhuleni Metropolitan Municipality, the City of Tshwane Metropolitan Municipality and Sefako Makgatho Health Sciences University were signed up to Thamani

Mobile and that the applicants have no entitlement to those clients.

[43] The second respondent contends that he was misled into enabling Thamani Mobile clients to be serviced by the first applicant, believing that the applicants would honour their side of the agreement concluded in respect of the loan and the purchase of shares.

[44] It was then, when it became apparent that they were not living up to their terms of the agreement, that the second respondent advised the applicants that he was reversing the arrangement and was resuming

service to Thamani Mobile's clients. It is this action which was interdicted by Teffo J.

[45] The first and second respondents therefore allege that the applicants have essentially hijacked their business without paying for it.

[46] At paragraph 34.2 of the answering affidavit the deponent, Mr Mashele, states the following:

"34.2 It is of no moment that the time for the institution of the action has not lapsed. The fact of the matter is that the judgment and order literally have the effect of shutting down the business of the respondents. The respondents have been conducting their business even before they met the applicants. Their business cannot be subsumed into the applicants' business by an interim order without more."

34.3 As already mentioned the order practically and literally lists three clients of the first respondent and awards them to the applicants with the effect that the third respondent is directed to make payments to the applicants without any legal basis."

[47] Mr Mashele also contends that the management accounts of the first applicant demonstrated the business generated revenue of over R34 million for the 12 months between March 2022 and February 2023. He contends that the applicants used the revenue that he generated to fund other operations and salaries of employees and other companies that they own (Answering Affidavit ("AA"), paragraph 36.3).

[48] The second respondent contends that the prejudice that the first respondent will suffer with the implementation of Teffo J's order was the reason for the application for leave to appeal (AA, paragraph 40.6).

[49] The second respondent contends that when the applicants attempted to take over the business of the first respondent by transferring the contracts to the first applicant, the applicants left Thamani with liability of approximately R2,6 million as a result of the breach of a material term of the agreement. This, he says, is a consequence engineered by the applicants and is a liability the first respondent now faces.

[50] The second respondent contends that the applicants are not entitled to payment of money from the third respondent from the three clients listed to whom the first respondent lays claim. He contends

that as at 8 April 2022 the first applicant was a shelf-company with neither clients nor assets. After the transfer of the business the second respondent signed ten clients with the first applicant, which clients he has left with the first applicant. The applicants are receiving monthly payments from those clients. However, because neither the sale of shares nor the sale of business agreement was complied with, the second respondent decided to take back the clients that he had brought into the first applicant. Those that were signed after April 2022 remain with the applicants.

[51] The respondents further contend that the applicants did not secure the release of Mr Sanangura from his guarantees, as a result of which he was sued. The respondents contend that the income stream generated

by the respondents for the applicants is being used by the second applicant to finance expenses of its other businesses and subsidiaries. That will continue if the interim implementation order were granted.

[52] It is apparent from the aforesaid that the second respondent contends

that the first applicant will retain an income stream from the ten or so clients that remain with the applicant if the order is not implemented. By contrast, the respondents' will go under.

[53] The counter arguments do not dispel these contentions. Rather, the adverse consequences are said to flow from the correctness of the Teffo J order. That approach does not address the issue of irreparable harm in the context of sec 18(3). It is an issue for a court of appeal. Irreparable harm is assessed with regard to the implementation of the order, and not on an assessment of the prospects of success on appeal.

[54] As the applicants bear an onus to prove that the respondents will not

suffer irreparable harm, and as this onus has not been discharged, I cannot come to the assistance of the applicants. The applicants have not established a basis for the implementation of the court order in terms of section 18(3).

[55] In the premises the following order is made:

1. The application for leave to appeal filed by the first and second respondents has suspended the order of Teffo J, which is an order of an interlocutory nature but with final effect.

2. The application in terms of section 18(3) is dismissed with costs.

ACTING JUDGE OF THE HIGH COURT

25/11/2024

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