

SOUTH AFRICA / JUDGMENT

Mobile Telephone Network(Pty) Ltd v Vodacom (Pty) Limited and Anothers (A5074/2018, 25771/2018) [2019] ZAGPJHC 102 (26 March 2019) [2019] ZAGPJHC 102

COURT

South Gauteng High Court, Johannesburg

BEFORE

R M Keightley, CG Lamont, TP Mudau

CASE / FILE NUMBER

A5074/2018

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE

(2) OF INTEREST TO OTHER JUDGES

(3) REVISED.

CASE NO: A5074/2018

COURT A QUO CASE NO. 25771/2018

26/3/2019

In the matter between:

MOBILE TELEPHONE NETWORKS (PTY) LTD

Appellant

And

VODACOM (PTY) LIMITED First respondent

TRANSNET SOC LIMITED

Second respondent

J U D G M E N T

KEIGHTLEY, J:

INTRODUCTION

1. On 24 August 2018, Van der Linde J granted urgent relief in favour of the two respondents (Vodacom and Transnet) in what has been referred to by the parties as the principal application. He granted leave to Vodacom to intervene in the principal application, which had been brought by Transnet. He further directed the appellant before us (MTN) to comply with an order of the Independent

Communications Authority of South Africa to port Transnet's cellphone numbers from the MTN network to the Vodacom network.

2. Unhappy with the judgment and order in the principal application, MTN applied for leave to appeal. This had the effect of automatically suspending the operation of the order. In response, on 19 September 2018 Vodacom instituted an application in terms of section 18(1) of the Superior Courts Act[1] (the Act). It sought an order directing the immediate implementation of the judgment and order in the principal application,

notwithstanding the pending application for leave to appeal. Van der Linde J granted the section 18(1) application in a judgment

and order dated 26 November 2018.

3. What lies before this court is an appeal by MTN (under section 18(4) of the Act) of the judgment and order of Van der Linde J in Vodacom's section 18(1) application.
4. This is by no means the full history of the litigation between the parties. The litigation has its origins in a bitterly contested

award of a tender by Transnet to Vodacom of mobile services. MTN was the incumbent service provider at the time. It did not take the award of the tender to Vodacom (and hence the ousting of its services to Transnet) lightly. In his judgment

in the principal application, Van der Linde J summarises the litigation history between the parties. For purposes of the

issues this court must decide, it is not necessary to do so again. I will refer to current and pending litigation between the parties only where this is relevant. It is relevant to record that MTN sought to review and set aside the tender award to Vodacom. As recorded in the judgment of the court a quo, Sutherland J dismissed the application, as well as the application for leave to appeal. MTN has also instituted a review against the direction by ICASA that MTN port the numbers to Vodacom.

5. As far as the material facts of the matter are concerned, it is not necessary to set these out in any detail. The critical

facts

are that after the award of the tender to Vodacom, Transnet gave notice to MTN that it was terminating the contract between them. The agreement requires a “calendar month’s notice” to be given. MTN avers that Transnet did not comply with this requirement in that it terminated the contract on 8 March 2018, with effect from 9 April 2018, rather than giving a named calendar month’s notice. Consequently, MTN does not accept that the contract has been validly terminated; it continues to render monthly services to Transnet under the contract in respect of the unported numbers; and it has declined all requests and directions to port the mobile numbers to Vodacom until the dispute is finalised.

6. Until MTN ports the numbers to Vodacom, it cannot render services to Transnet in relation to those numbers and thus cannot earn the full revenue that ought to flow to it under its contract with Transnet. The Vodacom/Transnet contract is a fixed term contract for three years, and as things currently stand, Vodacom says that it has lost more than a year’s worth of revenue in respect of the affected mobile numbers as a consequence of MTN’s stance.
7. These facts were central to Vodacom’s application to the court a quo for an order under section 18(1).
8. Despite the protracted litigation history between the parties, the issues before us are relatively narrow. The fundamental question is whether or not the court a quo erred in finding that Vodacom had satisfied the requirements for the grant of relief under section 18(3) of the Act. MTN contends that it did so err.
9. I should add that Transnet was cited as a respondent in the appeal and, at the invitation of the Deputy Judge President, it filed written submissions. In the written submissions, Transnet aligned itself with Vodacom. However, Transnet’s counsel advised the court at the hearing that it’s stance was neutral, and it did not seek to make any oral submissions to the court.

Effectively, Transnet played no active part in the appeal. To the extent that it incurred any costs, it should pay for these

itself.

THE TEST UNDER SECTION 18

10. The parties are agreed that the test to be applied in determining whether relief under section 18(3) may be granted is that laid down in *Incubata Holdings (Pty) Ltd & Another v Ellis & Another*,^[2] which was confirmed by a Full Court of this Division in *Mogale City Municipality & Others v Fidelity Security Services*^[3] (hereafter, *Fidelity*). The onus lies on the applicant under s18(3) to satisfy each of the following requirements, viz., that:

10.1. the applicant stands to suffer irreparable harm if the order is not implemented pending finalisation of the appeal proceedings;

10.2. conversely, the respondent will not suffer irreparable harm if the order is so implemented; and

10.3. the existence of exceptional circumstances.[4]

11. All three of these requirements must be met by the applicant. The court must be satisfied not only of the absence of irreparable harm on the part of the respondent, but also of the existence of irreparable harm on the part of the applicant.[5] This involves findings of fact by the court,[6] on a balance of probabilities.[7] Unlike the test applied prior to the introduction of section 18, the new test does not involve the court in an exercise of a discretion, based on a balance of convenience or harm as between the applicant and the respondent.[8] Instead, as the court noted in *Incubata*:

“Two distinct findings of fact must now be made, rather than a weighing-up to discern a preponderance of equities. The discretion is absent, in the sense articulated in South Cape.”[9]

DID THE COURT A QUO APPLY THE INCORRECT TEST?

12. In its grounds of appeal MTN contended that the court a quo had erred in applying a preponderance of equities test, rather than the test laid down in *Incubata* and *Fidelity*. MTN says that the court a quo failed to make a factual finding of the existence of irreparable harm on the part of Vodacom. Mr Motau SC, for MTN advanced the same argument before us at the hearing of the matter. MTN’s complaint is premised on paragraph 33 of the court a quo’s judgment, where it was held that:

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

13. MTN submitted that in the subsequent paragraphs of the judgment the court a quo proceeded to delve into the relative strengths of the respective potential claims for damages. Ultimately, in this regard, the court found that:

“The delictual cause of action by Vodacom against MTN for delictual loss represented by pure economic loss is an alternative which is far more esoteric and difficult to show than is the contractual alternative available to MTN against Transnet. I agree therefore that, on a balance of probabilities, Vodacom has shown that the requirements of s18(3) have been met.”[10] (Emphasis by MTN)

14. MTN submits that this shows that the court adopted a balance of equities approach, rather than reaching its decision on the requisite factual finding of irreparable harm on the part of Vodacom.

15. It is so that the court a quo considered and compared MTN's position, as being a party with a clear contractual claim against MTN, with that of Vodacom, as being a party with no contractual claim, and only a potential delictual action against MTN for pure economic loss. However, in my view, this does not mean that it applied the wrong test.
16. The court accepted, as a matter of fact, that MTN would have a contractual claim for damages against Transnet for any damages it

might suffer if it was required by the court to port its numbers to Vodacom immediately pending the appeal (and thus to forgo the monthly revenue it was earning in respect of those numbers in the interim). The court also accepted that as a matter of fact, Vodacom would have no such claim: it could not claim contractual damages against either Transnet or MTN for the losses in revenue it continued to suffer while MTN appealed the porting order. The court accepted, as a fact, that Vodacom's alternative relief, lay in a potential delictual claim against MTN for pure economic loss, which it found was a far more difficult "row to hoe" than a contractual claim for repudiation and damages.

17. If one reads the court a quo's judgment on this issue as a whole, it is clear that whatever reasoning process it undertook to get there, at the end of the day, it made a factual finding that on the probabilities MTN would not suffer irreparable harm: it had a clear contractual damages alternative at hand. It also made a factual finding that Vodacom would suffer irreparable harm, based on the probabilities

that in reality its claim was unlikely to ever see the light of day. It seems to me, then, that it cannot be said that the court a quo erred in applying the wrong test. It made the factual findings required under section 18, and there is no merit in this ground of appeal.

18. Of course, this does not deal with the further, and more central issue that arises in this appeal, viz. whether the court a quo was correct in its factual finding, viz. that Vodacom would suffer irreparable harm unless MTN was ordered to port to Vodacom pending

the appeal in the principal application.

WAS THE COURT A QUO CORRECT IN FINDING THAT VODACOM WOULD SUFFER IRREPARABLE HARM?

19. Mr Motau described this question as being the central issue in the appeal. He submitted that not only was it relevant to the

irreparable harm aspect of the test, but also to that of exceptional circumstances. This is because if the court erred in finding that Vodacom would not suffer irreparable harm if the order in the case continued to be stayed pending the appeal, then it followed axiomatically that there could be no exceptional circumstances warranting the grant of the section 18 order.

20. MTN made two main submissions on this issue:

20.1. First, that Vodacom must be held to its averment made in its founding affidavit in the intervention application that it was entitled to delictual and restitutionary damages from MTN. Vodacom could not later say, in the section 18 application, that these remedies were not likely to be effective, and thus that it stood to suffer irreparable harm unless MTN was ordered to port pending the appeal. In the circumstances, the court a quo had erred in ignoring the fact that Vodacom itself had not expressed any difficulties with the likelihood of its success in a future delictual action.

20.2. Second, even if this was not so, it was not open to the court a quo, in exercising its powers under section 18, to inquire into the likelihood of Vodacom's success in pursuing its potential relief. The court could go no further than to determine whether Vodacom has an alternative cause of action to recover damages for the revenues it is losing by the porting delay. If such an alternative remedy exists then, as a matter of fact (and regardless of the likelihood of success), the court was bound to find that Vodacom would not suffer irreparable harm. Accordingly, it erred in investigating Vodacom's likelihood of success.

21. As to the first argument, MTN relied on the following passage from Vodacom's founding affidavit in the intervention application:

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

22. The gist of MTN's case in this regard is that this averment should be the beginning and the end of Vodacom's subsequent assertion that it stands to suffer irreparable harm: it has asserted a case for damages and it must be held to that assertion.

It has asserted that MTN has acted unlawfully and mala fides in pursuing its appeals, and has reserved its right to continue to rely on that assertion should it institute trial proceedings against MTN for damages in the future. Therefore, on Vodacom's own version that MTN has acted mala fides, Vodacom will not have difficulty proving its delictual claim for damages in the future, and it cannot seriously contend that it will suffer irreparable harm unless the order to port is implemented. MTN submitted that the court a quo ought not to have given any credence to what Mr Motau described as Vodacom's volte face in the section 18 application when it belatedly contended that it would have little prospect of succeeding in a delictual action for pure economic loss.

23. Whatever assertions Vodacom has made about the unlawfulness and alleged mala fides of MTN's conduct, in my view they cannot be determinative of the issue of irreparable harm in these proceedings. The stance adopted by Vodacom from the commencement of the section 18 application was that if MTN denies that it has acted mala fides, the section 18 application must proceed on that basis, and Vodacom cannot persist in those proceedings on a reliance

on mala fides. There was no volte face on the part of Vodacom. Its position was very clearly, and in my view, correctly spelled out in the founding affidavit in the section 18 application.

24. MTN has indeed denied any mala fides on its part. MTN has also refused to tender to Vodacom to make good on Vodacom's revenue losses in the event that MTN's

defences to its porting obligations ultimately are dismissed. Had MTN been willing to make the tender sought by Vodacom, there would have been no question of irreparable harm. However, as things stood when the section 18 application came before the court a quo, the prospect of Vodacom being able to recover its losses by way of a delictual action against MTN remained highly contested. In these circumstances, the court a quo did not err in accepting Vodacom's contention that it would face difficulties in succeeding in a delictual claim for damages for pure economic loss against MTN.

25. I turn to the second leg of MTN's submissions on the question of Vodacom's irreparable harm. Did the court err in proceeding to examine Vodacom's likelihood of success in a delictual action against MTN to recover its revenue losses?

MTN's argument is that if there is a prospect of a remedy, regardless of the likely success or failure of that prospect, there can be no irreparable harm. It is not for the court to embark on an evaluation of the prospects of success.

26. In dismissing this contention, the court a quo held as follows:

"That is to my mind taking far too impractical a view of the matter. If an alternative damages cause of action is one in form only but not in substance, then the party in whose favour the judgment was given will be denied the vindication of its rights if the order is permitted to remain suspended." [11]

27. In my view, the court a quo was correct in its finding. The factual question of irreparable harm, as noted by the court a quo, is to be determined on a balance of probabilities.[12] The court is required to make a determination on the probabilities of the alleged irreparable harm occurring. This is consistent with the purpose of section 18, which is to prevent a party from suffering irreparable harm while appeal proceedings are pending. Its purpose is rooted in the realities and practicalities of the parties' situations. It follows that the determination of irreparable harm must also address these realities and practicalities. In other words, the court must determine whether, in reality, it is more probable than not that the applicant (or respondent as the case may be) will suffer irreparable harm. As the court noted in *Incubata*, this inevitably requires the court to make a qualitative assessment of the existence of irreparable harm:

"What remains intriguing, however, is the extent to which even a finding of fact as to irreparable harm is a qualitative decision admitting some scope for reasonable people to disagree about the presence of the so-called 'fact' of 'irreparability'."[13] (my emphasis)

28. MTN's argument means that provided there is some possibility of an alternative remedy in damages, no matter how remote the prospects of that remedy succeeding may be, the court must find, as a matter of fact that there is no irreparable harm. This cannot be. It ignores the express requirement that the finding must be made by examining the probabilities; it ignores the qualitative element of this process; and it ignores the practical underpinnings and purpose of section 18(1) relief. In my view, the court a quo correctly rejected MTN's submissions in this regard.
29. The difficulties presented to Vodacom in pursuing a claim for delictual damages for pure economic loss are discussed in some detail in the court a quo's judgment.[14] As Mr Chaskalson SC for Vodacom also pointed out, it will be very difficult for Vodacom to establish that MTN acted negligently when it acted on the advice of its legal team. In my view, the court a quo cannot be faulted for expressing grave reservations as to whether Vodacom could ever prove the necessary state of mind on the part of MTN in order to recover damages.
30. I conclude that there is no basis for overturning the court a quo's finding that Vodacom stood to suffer irreparable harm unless the court ordered relief under section 18(1).

THE REMAINING ISSUES: MTN'S HARM AND EXCEPTIONAL CIRCUMSTANCES

31. As I have already indicated, Mr Motau accepted in his oral submissions to the court that the main thrust of the appeal was directed at the issue of Vodacom's irreparable harm. However, he did address the court on the remaining issues of MTN's irreparable harm and exceptional circumstances.
32. As to MTN's irreparable harm, this hinges on its contention that Transnet's purported termination of the contract between them was unlawful. MTN does not dispute that if this is so it is entitled to accept Transnet's repudiation of the contract and to claim contractual damages. The court a quo's assessment was that this would present no major obstacles for MTN. I agree with that assessment, and MTN does not raise any substantive reasons as to why the assessment was wrong.
33. In the interim, MTN has elected to adopt the stance that it is entitled to hold Transnet to the contract and, in effect, to exert specific performance, rather than to accept the repudiation and claim damages. It also sought to review the decision to award the tender to Vodacom, which precipitated the termination of the contract. Does the section 18(1) order give rise to irreparable

harm to MTN in this respect?

34. On a balance of probabilities, I do not believe so. MTN's contention that the contract was unlawfully terminated was rejected by the court a quo both in the principal application, and in the section 18(1) application. Van der Linde J refused leave to appeal against

this finding in the principal application. We were advised at the hearing that the Supreme Court of Appeal recently dismissed an application to it to grant leave to appeal. We were further advised that MTN had filed an application with the President of the SCA under section 17(2)(f) of the Act for the reconsideration of the petition refusals. In addition, MTN have instructed their attorneys ultimately to prepare a petition to the Constitutional Court for leave to appeal in the event that this is necessary. As to the review application, this has suffered a similar fate. Sutherland J on 3 May 2018 dismissed the review application, and he subsequently dismissed an application for leave to appeal. The SCA similarly refused an application for leave to appeal.

35. Mr Motau reminded us that it can never be said that an appeal is hopeless until the last court has ruled. Of course this is so. However, this does not mean that in assessing the probabilities of MTN's defences succeeding this court must ignore the realities as they are currently presented. In addition, even if, contrary to the way things look at present, MTN were ultimately to succeed not only in obtaining leaves to appeal, but also in those appeals, it would still have the fallback of contractual damages against Transnet.
36. In my view, for these reasons, the court a quo's decision cannot be faulted.
37. On the issue of exceptional circumstances, MTN's primary contention on appeal was that the non-existence of irreparable harm

on the part of Vodacom inevitably extinguished the existence of exceptional circumstances. In view of my finding as regards

Vodacom's irreparable harm, this contention has no merit.

38. The court a quo took into account the nature of Vodacom's right that was vindicated in the principal application, viz. the right to obtain the as yet unported numbers from MTN, to render the services required of it in respect of those numbers under the tender awarded by Transnet, and to receive revenue from Transnet in return. The court a quo noted that, as in Incubata, the right has a use-by date. The tender was for a period of 3 years. To date, more than a year has elapsed of that period. In addition, MTN had failed in its principal application and in its application for leave to appeal, and it had failed in its review application and its application for leave to appeal in respect thereof. The court a quo considered it a relevant factor as regards the existence of exceptional circumstances that MTN's prospects of ultimately

succeeding were weak.

39. In my view, the court a quo did not err in finding that these were facts which constituted exceptional circumstances warranting an order under section 18(1).

The only change that has occurred subsequent to the court a quo's finding is that the Supreme Court of Appeal has refused the applications for leave to appeal. As I indicated earlier, this is further indicative of MTN's weak prospects of appeal. I agree with the conclusion reached by the court a quo that in the circumstances of the case, it would have been legally perverse to permit the process of MTN's weak appeals to destroy, through the effluxion of time, the rights that Vodacom had succeeded in vindicating in the principal application.[15]

CONCLUSION

40. It follows from the above that I find there to be no merit in MTN's appeal against the order of the court a quo.

41. I propose the following order:

"The appeal is dismissed with costs including the costs of both senior and junior counsel."

R M KEIGHTLEY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

It is so ordered

CG LAMONT

I agree

TP MUDAU

DATE OF HEARING : 19 MARCH 2019

DATE OF JUDGMENT : 26 MARCH 2019

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[1] Act 10 of 2013

[2] 2014 (3) SA 189 (GJ)

[3] 2017 (4) SA 207 (GJ) at para 26

[4] Subsections 18(1) and (3) read as follows: “(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal. ... (3) A court may only order otherwise as contemplated in subsections (1) and (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.”

[4] Subsections 18(1) and (3) read as follows:

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

...

(3) A court may only order otherwise as contemplated in subsections (1) and (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.”

[5] Incubata, at para 24; Fidelity, at para 22

[6] Fidelity, at para 22

[7] Section 18(3). The judgment of the court a quo at paras 31-33 points out that this is novel in motion proceedings.

[8] See paras 11, 12 & 24 of Incubata, discussing the test laid down in South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A)

- [9] At para 24. Under the Supreme Court Act 59 of 1959, the test for directing an order to be executable pending its appeal was laid down in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A). The test involved a court adopting an even-handed balance of convenience or hardship approach, and the exercise of a discretion.
- [10] Judgment at para 40
- [11] Judgment at para 41
- [12] Judgment at para 33
- [13] At para 24
- [14] At paras 39 & 40
- [15] Judgment at para 43
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