

SOUTH AFRICA / JUDGMENT

Multimedia and Satelite Solutions (Pty) Ltd and Another v Multichoice Support Services (Pty) Ltd

(D8232/2023) [2023] ZAKZDHC 52 (8 August 2023)

[2023] ZAKZDHC 52

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Sanders AJ

CASE / FILE NUMBER

D8232/2023

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IN THE HIGH COURT OF
SOUTH AFRICA
KWAZULU-NATAL
LOCAL DIVISION, DURBAN
Case No: D8232/2023

In the matter between:

MULTIMEDIA
AND SATELITE SOLUTIONS (PTY) LTD

First Applicant

RAJESH

MALTHOO

Second

Applicant

and

MUTICHOICE

SUPPORT SERVICES (PTY) LTD

Respondent

This

judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII.

The

date for hand down is deemed to be on 8th August 2023 at

13:00

ORDER

The following order

shall issue:

1. The application is dismissed with costs which shall include the costs of counsel.

JUDGMENT

Sanders AJ

Relief sought

[1] This is an opposed application in which the applicants seek inter alia the following relief:

‘1. That the matter be heard as one of urgency.

2. The Applicant’s non-compliance with Rule 6 relating to service and notice periods be condoned in terms of Rule 6 (12) (a).

3.1 That pending finalization of this application or the conciliation / arbitration proceedings to be instituted by the Applicant:

3.1.1 The Respondent be and is hereby interdicted and restrained from terminating the Accredited Installers Agreement existing between itself and the Applicants under accreditation number 00031117MC;

3.1.2 the Respondent be and is hereby interdicted and restrained from restricting the Applicants’ access to the facilities currently utilised by the Applicants in order to perform and / receive performance in terms of the Accredited Installers Agreement, specifically, the Respondent’s online portal and electronic invoicing system.

3.1.3 That the Respondent’s notice of termination dated 30 June 2023 and addressed to the Applicants be and is hereby declared unlawful.

3.1.4 the Respondent be and is hereby directed to forthwith withdraw its notice of termination dated 30 June 2023 addressed to the applicants.

3. The Respondent by and is hereby directed to comply with clause 5.4. of the Accredited Installers Agreement and to furnish the Applicants with written reasons for the intended termination of the Accredited Installers Agreement.

5. The relief sought in paragraph 3.1 shall operate as an interim order pending the finalisation of this application or the arbitration proceedings to be instituted by the Applicant.

6. Costs of this application to be paid by the Respondent on the scale as between attorney and client.’

The question of urgency

[2] The applicants invoke Uniform rule 6(12)(a) as the basis for the contention that I should condone the applicants non-compliance with the provisions of rule 6; in relation to both service and the period of notice given to the respondent. The subrule on which the applicants rely reads as follows:

‘6(12)(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.’

The application in relation to urgency

[3] This application first came before me as one of the urgent matters on the Motion Court Roll on the 28th of July 2023. I adjourned the matter to be argued before me on the 2nd of August 2023 in order to give counsel for the respondent time to take full instructions and to prepare his argument. The matter was argued before me on the 2nd of August.

[4] The second applicant has deposed to the founding affidavit and in addressing the question of urgency in paragraph 11 thereof he essentially contends that:

‘11.3 When the notice of termination was received, the applicants were informed that the agreement would terminate in 30 days (31 July 2023). This is not enough time to launch an application and have it finalized in this division while strictly observing the Uniform Rules of Court, while also making every attempt to avoid litigation as the applicants have done.

11.4 I therefore submit that the matter is sufficiently urgent and deserves to be entertained as such given the prejudice that will ensue if it is not.’

[5] The respondent deals with the question of urgency in paragraphs 4 to 7 of its answering affidavit as follows:

‘4

The crux of the Applicants’ argument for urgency is that the contract will be terminated on 31 July 2023.

5

Notwithstanding this, the Applicants have known from as far back as 30 June 2023 of the termination and failed to take any action until the proverbial 12th hour.

6

Accordingly, the urgency in the matter, if any, is self-created.

7

Furthermore, the basis upon which the matter must be dealt with urgently relates to the Applicants' alleged financial position, which has not been dealt with by them in any useful amount of detail.'

The legal position in relation to urgency

[6] In *Square Root Logistics (Pty) Ltd v The Commissioner for the South African Revenue Services and Others* Lopes J delivered judgment on 28 February 2022 in which he stated:[1]

'[9] It is necessary for me to comment on the manner in which this application was brought. I agree with the submission of Ms Ngqanda that the matter is not of the type of application which warrants the urgency claimed. Matters of urgency are able to be set down on several days' or a weeks' notice, (and this demonstrates very clearly why a notice in terms of s 96 is required). A certificate of urgency, issued by an officer of the court, who will be able to argue the urgency, cuts through the normal waiting period for applications. The period of waiting, however, must be thoughtfully and appropriately calculated by the person issuing the certificate. An unfortunate practice has arisen in this division of matters being brought for reasons not as urgent as their certificates suggest. This application is a very good example of what I have referred to above.

[10] Even though this matter is of a vindicatory nature, which may almost always be classified as urgent, this matter did not warrant the sort of urgency relied upon by the applicant. In my view it was an abuse of legal process. Life and death, or extreme prejudice warrants such urgency that a matter cannot wait for the next day or for a few days'. The cases in this regard are clear, and it would serve no purpose for me to repeat them. Divisions of the High Court would simply be unable to function efficiently if work is continually interrupted by unnecessarily urgent applications being brought. Our rules and practice directives anticipate and include urgent applications as part and parcel of the daily functioning of the High Court. They do not envisage applications such as this one being heard on such short notice...'

Matters which are common cause or at least not in dispute

[7] Needless to say I associate myself fully with the views expressed by Lopes J above. In applying what was said above, to the facts of the present matter, I find that the following facts are either common cause or not in dispute:

- (a) the applicants' rights in terms of the Installers Agreement (the agreement) were suspended on suspicions of fraud on 21 April 2023;[2]
- (b) the applicants were given 30 days' notice of the termination of the agreement on 30 June 2023;[3] and
- (c) this application was served on the respondent on the 27th of July 2023, and set down on the following day being the 28th of July 2023.

- [8] I have already stated that I associate myself fully with the views espoused by Lopes J, quoted above. By parity of reasoning, I find that the degree of the abuse of this court's process in the present matter, is greater. The applicants herein do not even have the luxury of hiding behind a smokescreen of their application being vindictory in nature.

The interdict sought is not permissible

- [9] The interdict sought is framed in such a way that it purports to have a lifespan which is directly linked to the finalisation of the arbitration proceedings. The applicants have argued that based on a business-like interpretation of clauses 22.2 and 22.2.5 of the agreement in particular, the respondent was not entitled to terminate the agreement in the manner in which it did. The applicants further contend that the respondent's reliance on clause 5.4 of the agreement in cancelling the agreement in the manner in which they did is misplaced.
- [10] The matters mentioned in the above paragraph are not for determination in these proceedings. There only relevance to these proceedings is that in my view they expose a fatal flaw in the interdict that the applicants seek.
- [11] Clearly, the respondent has no existing dispute with the applicants. In fact, the opposite is true. That being the case, I would have expected the applicants to make haste to launch their dispute with the arbitrator as quickly as possible. Yet that is not the case here. After a month of splendid inertia, the applicants have not even launched the arbitration proceedings which will allegedly limit the lifespan of the interdict sought in these proceedings. When I pertinently pointed out to counsel for the applicants that his clients were essentially seeking an order to perpetuate the agreement for life, because only the applicants could initiate the arbitration proceedings his rather lame response was that the court could impose timelines for the commencement of the arbitration proceedings. Once again, the established pattern continues, the applicants do nothing, yet this court must do something.
- [12] In my mind the pattern of the applicants conduct raises the question of the applicants bona fides. As matters presently stand, it seems to me that the second applicant is far more interested in locking the respondent into the agreement for life, rather than any serious attempt to resolve whatever disputes exist between them.
- [13] I find myself in agreement with the respondent's contentions in the following respects:
- (a) the respondent cannot initiate and / or further the arbitration "proceedings" which do not exist;
 - (b) accordingly, the interdict which the applicants seek effectively amounts to a final interdict; and
 - (c) it is unconscionable that an interdict could be granted which essentially changes the contractual obligations of the parties, by effectively cancelling the respondent's right to ever cancel the agreement.

[14] I also accept that it is trite and well settled law that:[4]

‘An interdict is not a remedy for past invasion of rights but is concerned with present or future infringements. It is appropriate

only when future injury is feared. Where a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated.’ (Footnote omitted.)

No right shown

[15] It is common cause that the respondent relies on clause 5.4 of the agreement as a basis for the cancellation of the agreement. In my view the

applicants’ interpretation of clause 5.4 of the agreement flies directly in the face of the parole evidence rule.

Grounds for termination of the agreement

[16] I cannot turn a blind eye to the fact that in the answering the respondent levels some very serious allegations of fraud against the applicants and supplies details thereof. Tellingly, the fraud allegations are not denied. Instead, the second applicant asserts that all the blame for the fraud should be directed at a former employee of the applicants. Nowhere, is it denied that the money gleaned from the devious transactions was as a matter of fact paid into the account of the applicants.

[17] The bottom line is that the respondent has placed very strong reasons before me why it is perfectly understandable why the respondent to have anything further to do with the applicants, and certainly the reasons why the respondent does not want the applicants to have anything to do with the respondent’s brand

are glaringly obvious.

Findings of the court

[18] In light of all the above I find as follows:

- (a) The applicants have failed to make out a case for urgency in any shape or form.
- (b) Whatever urgency exists, if indeed it exists at all, is entirely self-created.
- (c) Likewise, any prejudice which may accrue to the applicants is entirely self-created.
- (d) The interdict that the applicants seek in bad in law and therefore it is not permissible.
- (e) I find that the respondent has placed good grounds before me justifying the cancellation of the agreement.

Order

[19] In the light of the findings which I have made above the order below is both apposite and in accordance with the interests of justice.

1. The application is dismissed with costs which shall include the costs of counsel.

APPEARENCES

For the Applicants: S. E. Miya Instructed by: Mbele and Ngcobo Attorneys Inc Suite 306, 3rd Floor 379 Anton Lembede Steet Doone House Durban For the Respondent: D. Bond Instructed by: Cliffe Dekker, Hofmeyer Inc 12th Floor 11 Buitengracht Street Cape Town Date of Hearing: 2 August 2023 Date of Judgment: 8 August 2023

- [1] Square Root Logistics (Pty) Ltd v The Commissioner for the South African Revenue Services and Others 2022 JDR 0441 (KZD).
- [2] Founding affidavit para 10.2.1, page 12.
- [3] Founding affidavit para 10.3, page 13.
- [4] National Council of Societies for the Prevention of Cruelty to Animals v Openshaw [2008] ZASCA 78; 2008
- (5) SA 339 (SCA) para 20.

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