

SOUTH AFRICA / JUDGMENT

Lendtech Investment Holdings Private Limited v IMS Tech Corp Limited and Others (2023-025384) [2023] ZAGPJHC 633 (6 June 2023) [2023] ZAGPJHC 633

COURT

South Gauteng High Court, Johannesburg

BEFORE

GC Wright

CASE / FILE NUMBER

2023-025384

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE

NO: 2023-025384

NOT REPORTABLE

NOT OF INTEREST TO

OTHER JUDGES

REVISED

06.06.23

In the matter between:

LENDTECH

INVESTMENT HOLDINGS PRIVATE LIMITED

APPLICANT

And

IMS

TECH CORP LIMITED

FIRST

RESPONDENT

IMS

VENTURES (PTY) LTD

SECOND

RESPONDENT

IMS

VENTURES DIGITAL (PTY) LTD

THIRD

RESPONDENT

MOBI
SYSTEMS SOLUTIONS (PTY) LTD
FOURTH
RESPONDENT
TELKOM
SA SOC LIMITED
FIFTH
RESPONDENT
MTN
GROUP LIMITED
SIXTH
RESPONDENT
MOBILE
TELEPHONE NETWORKS (PTY) LTD
SEVENTH
RESPONDENT

Neutral Citation: Lendtech Investment Holdings Private Limited v
Ims Tech Corp Limited & 6 Others (Case
No: 025384/2023) [2023] ZAGPJHC 633 (6 June 2023)

JUDGMENT

WRIGHT J

1. The applicant, Lendtech is a company registered in Singapore.
2. The first respondent, Ims Tech is a company registered in Mauritius.
3. The second respondent, Ims Ventures is a South African company, as are the third respondent, Ims Ventures Digital, the fourth respondent, Mobi, the fifth respondent, Telkom, the sixth respondent, MTN Group and the seventh respondent, Mobile Telephone Networks, a cellphone service provider in South Africa well-known as MTN.
4. Lendtech sought and obtained ex parte an order against the seven respondents. The order was granted on 24 April 2023 by Wanless AJ.
5. On 9 May 2023, a variation order was sought by Lendtech and granted by Wanless AJ, again ex parte. There seems to have been some difficulty in executing the first order on 8 May 2023. The orders effectively cover the same subject matter, the second order apparently having been sought to tighten up certain aspects of the first order. I shall refer below simply to the order, in the singular.
6. The order was in the form of a rule nisi, returnable on 30 May 2023.

7. On 29 May 2023, Lendtech launched an application for the extension of the rule nisi. The complaint was raised by the applicant's attorney that Lendtech needed time to prepare replying affidavits. She blamed the respondents for dragging their feet in filing the answering affidavits and generally obstructing the execution of the order. The respondents were understandably anxious that the order be discharged as soon as possible.
8. On 30 May 2023, the hearing was postponed to 6 June 2023 and I extended the rule nisi to the same date after I had heard counsel for all parties. The applicant wanted three weeks in which to do a replying affidavit. The respondents' counsel said that the matter could wait a week and that the order and attachments could remain intact until then. With hindsight, the concession by the respondents to the extension of the rule nisi by a week was generous.
9. The order does not make for easy reading. It provides, among other things for attachment to confirm or found jurisdiction against Ims Tech pending the outcome of dispute resolution proceedings which have commenced in London between Lendtech and Ims Tech. It also operates as an anti-dissipation order so that Lendtech may enforce any award that it may obtain in due course.
10. The affidavits and the order are lengthy, complex and contain much technical jargon. I shall try to simplify.
11. The order permits attachment of:
 - 11.1 Lendtech's own software held or controlled by Ims Tech directly or through its subsidiaries, agents or customers.
 - 11.2 The same software in the hands of the second to seventh respondents.
 - 11.3 Ims Tech's right, title and interest in Ims Ventures and in Ims Ventures Digital.
 - 11.4 Funds in the South African bank accounts of Ims Tech.
 - 11.5 Funds in bank accounts of the second to seventh respondents which funds are due to Ims Tech.
12. The order provides further that:
 - 12.1 The relevant software may not be used in the meantime.
 - 12.2 The respondents are to restore and maintain the access of Lendtech to the software and to grant Lendtech "line of sight", that is visibility to the software, including to "transactional data".
 - 12.3 The respondents are to return to Lendtech the software so that Lendtech can deliver certain services to cellphone service providers.
 - 12.4 The respondents are forthwith to cease all business with cellphone service providers.

13 In my view, to allow the attachment of a creditor's own property to confirm or found jurisdiction over a debtor would render ineffective the doctrine of effectiveness which is a cornerstone of the law on jurisdiction.

14 The attachments on the bank accounts are limited to the amount of USD 1 439 433. The order does not state the amount to be attached in respect of each respondent. There is no provision in the order for how the sheriff is to determine what amount of money each of the second to seventh respondents owes to Ims Tech. The founding affidavit is quite intricate on the amount or amounts allegedly owing by Ims Tech to Lendtech but it does not set out clearly the final amount allegedly owing. There is no allegation that any of the second to seventh respondents owe a sum of money, certain or calculable, to Ims Tech...

15 Sheriffs execute orders which need to be precise so that the sheriff does not need to interpret them. The limit of USD 1 439 433 is cold comfort for any of the respondents.

16 The founding affidavit and the order seem to assume that the accounts are in credit with the banks. Any account in debit would constitute a debt owed by the account holder to its bank and could not be attached pursuant to the order.

17 Lendtech owns a software tool. Lendtech licensed the software to Ims Tech in a written contract. Ultimately, cellphone service providers like Telkom and MTN use the software to facilitate the provision of airtime to cellphone users, particularly in the form of advance airtime credit services. It would appear that the software helps businesses like Telkom and MTN, who have many customers who use cellphones, to assess the creditworthiness of customers or potential customers. At least for the purposes of this case, Telkom and MTN seem to be referred to sometimes as "Contracting Mobile Network Operators".

18 The deponent to the founding affidavit says that:

18.1 Lendtech cancelled the contract as Ims Tech failed to pay invoices.

18.2 Ims Tech has failed to return the software,

18.3 Ims Tech has stolen the software,

18.4 Ims Tech has blocked Lendtech from accessing the software, thereby denying Lendtech "line of sight" visibility to the software.

18.5 The respondents may dissipate Lendtech's right to the software.

18.6 Ims Tech is carrying on its own business while using the software unlawfully and it continues to receive money from its customers while Lendtechech suffers a cash shortage with concomitant risk to its business.

18.7 After attachment establishing jurisdiction, the primary objectives of the order are to preserve its intellectual property in the form of its software and preserve the money owed by Ims Tech to Lendtech.

19 In my view, the founding affidavit contains allegations amounting to conclusions. The factual basis for the conclusions is as narrow as the order obtained is broad. Lendtech's case is quite bald, namely that because Ims Tech owes it money and has blocked Lendtech's access to the software, Lendtech fears reasonably that dissipation will follow. No detail is provided to support the fear other than the alleged breaches of contract and the alleged blocking of access.

20 Annexed to the founding affidavit is a letter dated 15 December 2022 sent by Ims Tech's attorneys to Lendtech's attorneys and referring to a number of named disputes between them. Ims Tech demands in the letter that Lendtech refrain from harming Ims Tech's business reputation and from contacting Ims Tech's clients including cellphone network operators.

21 Correspondence between the opposing attorneys and which is attached to the founding affidavit shows that there has been considerable dispute for some time between Lendtech and Ims Tech.

22 Lendtech goes further than merely saying that it has cancelled the contract. It says that because Ims Tech does not consider itself bound by the agreement, Lendtech is not bound by certain exit clauses in the agreement designed to effect an orderly separation, ultimately so that the service to cellphone users is not disrupted.

23 The answering affidavits of the respondents are detailed and reveal huge disputes of fact. To a large extent, the respondents make common cause with each other. I shall highlight parts of these affidavits.

24 The deponent to the answering affidavit of Ims Tech says that:

24.1 The attachment of the software by Lendtech, of its own property, is bad in law to confirm or found jurisdiction.

24.2 Ims Tech has no right, title or interest in Ims Ventures or Ims Ventures Digital.

24.3 Ims Tech has no bank accounts in South Africa.

24.4 Accordingly, the order can't be executed against Ims Tech, a foreign company.

24.5 Ims Tech has no direct contract with Telkom or MTN. Ims Tech deals with certain entities which in turn contract with Telkom and MTN.

24.6 Lendtech is obliged under the written agreement to render support services relating to the software.

24.7 Mobi renders services to MTN. An uncited entity, Ims Solutions, renders services to Telkom. Mobi and Ims Solutions render their services under licence from Lendtech and Lendtech is obliged contractually to follow a process before terminating the access of Mobi and Ims Solutions to the software.

24.8 The order prevents Ims Tech, Mobi, Telkom and MTN from utilizing the software and is prejudicial to them and millions of customers.

24.9 There was never a prospect that Ims Tech, Mobi, Telkom or MTN would dissipate the software. The software is integrated into the networks of Telkom and MTN.

24.10 Ims Tech has not and will not licence the software to anyone else.

24.11 Ims Tech does not have the source code so it could not steal the software.

24.12 The order was designed to harm Ims Tech, in particular its indirect business with Telkom and MTN.

24.13 Ims Tech was anxious to disengage from Lendtech and find replacement software. Ims Tech needs the co-operation of Lendtech to remove the software. Lendtech refused, effectively holding as hostage Ims Tech, Mobi, Ims Solutions, Telkom and MTN.

24.14 Ims Tech may not lawfully provide “line of sight “ or visibility to the “transactional data” as this includes protected information in the form of the records of each customer of a network operator. At a minimum, the network operator’s consent would be needed.

24.15 In any event, Lendtech never had the access that the order contemplates. All that Lendtech had were no more than performance reports, generated through open-source software called Grafana.

24.16 Ims Tech undertakes to pay any award which may be made against it in the coming arbitration.

24.17 Ims Tech gave valid notice of six months to Lendtech that the agreement will end on 15 June 2023.

25 The deponent to the answering affidavit for Ims Ventures and Ims Ventures Digital says that:

25.1 Ims Ventures has no contract with Lendtech.

25.2 Ims Ventures is not a subsidiary of Ims Tech, let alone a wholly owned subsidiary as alleged by Lendtech.

25.3 Ims Ventures Digital was registered in April 2022. It operates as an independent vendor under contract with Ims Tech to provide digital services.

25.4 The allegation by Lendtech, that the first to fourth respondents share common directors is false.

25.5 Ims Tech has no ownership in or control over Ims Ventures or Ims Ventures Digital.

25.6 Ims Tech does not receive payments made into the bank accounts of Ims Ventures or Ims Ventures Digital, nor does it have entitlement or access to such funds. Funds which flow into the bank accounts of Ims Ventures or Ims Ventures Digital have nothing to do with the commercial relationship between Lendtech and Ims Tech.

25.7 Ims Ventures and Ims Ventures Digital have never made payment of invoices issued by Lendtech to Ims Tech. Ims Tech has never made payment to Lendtech from Ims Ventures' or Ims Ventures Digital's bank accounts. It could not have done so, as it has no control over these bank accounts. Ims Tech has never paid Lendtech with funds derived from Ims Ventures or Ims Ventures Digital.

25.8 Ims Ventures and Ims Ventures Digital are not the agents, representatives and wholly owned subsidiaries of Ims Tech in South Africa as alleged by Lendtech.

26 The deponent to the answering affidavit for Mobi says that:

26.1 Ims Tech, through Mobi and Ims Solutions has only ever used a part of the software, namely the "lending platform" rather than this platform and the "data services", "business intelligence", "operations" and " nano platforms " as alleged by Lendtech.

26.2 Lendtech never had "line of sight" visibility to the "transactional data". Lendtech only received certain reports via the open source platform, Grafana.

26.3 Ims Tech, as required by its agreement with Lendtech, sought to obtain the consent of the Contracting Mobile Network Operators (like Telkom and MTN who in turn have the end user customers) for Lendtech to access the "transactional data" held by the operators. These operators had certain requirements before they would consent. Lendtech failed to meet the operators' requirements with the consequence that Lendtech could not access the "transactional data". Had Ims Tech allowed Lendtech to see the transactional data, Ims Tech would have violated data protection laws. Accordingly, Lendtech never had "line of sight" access to the transactional data.

26.4 Ims Tech invited Lendtech to disengage so that substitute software could be installed. Lendtech has failed to agree. Mobi and thus also MTN are now compelled to use the software of Lendtech. Ims Tech can't replace the software without the co-operation of Lendtech.

26.5 The order is highly prejudicial to Mobi. Its bank accounts are attached and Mobi's rights and ability to render services to MTN are impeded. MTN at present can't deliver advance airtime credit services to its millions of customers. MTN won't pay Mobi until the court order is lifted. Mobi needs the money.

27 The deponent to Telkom's answering affidavit says that:

27.1 The order is vague and difficult to implement.

27.2 The sheriff attempted to attach Telkom's entire bank account.

27.3 Telkom does not owe any money to the first to fourth respondents.

27.4 Telkom has no access to the Grafana platform and accordingly cannot comply with the order.

28 The deponent to the answering affidavit for MTN Group and MTN says that:

28.1 The allegation by Lendtech that MTN will dissipate funds is unfounded and defamatory.

28.2 The sheriff wanted to attach the entire bank accounts of MTN Group and MTN.

28.3 On 8 May 2023, MTN undertook in writing to Lendtech's attorneys that MTN would not pay to Mobi any money which MTN owed to Mobi. In fact, it was discovered after that date that Mobi owes MTN money and not the other way round. For that reason alone, there should be no attachment of MTN's bank account.

28.4 MTN has a contract with Mobi relating to airtime credit services only and not generally to the software as described by Lendtech.

28.5 MTN has terminated its contract with Mobi as from 30 May 2023 and will cease using Mobi's airtime credit services and other services, as from 30 June 2023 at the latest.

28.6 MTN has only viewing access to the Grafana platform and is unable to restore or grant complete access to this platform to Lendtech.

28.7 The order is extremely prejudicial to MTN and its customers.

28.8 Lendtech was never entitled to MTN's transactional data as Lendtech failed to satisfy MTN's data protection requirements.

29 The replying affidavit of Lendtech is long and it is detailed on many different topics. It serves to widen the substantial area of dispute of fact and makes any possible understanding of the order even more difficult. The deponent:

29.1 Admits that his allegation in the founding affidavit that Ims Ventures and Ims Ventures Digital are subsidiaries of Ims Tech was wrong.

29.2 Admits that the allegation in the founding affidavit that ImsTech has common directors with the second to fourth respondents is wrong.

29.3 Says, in paragraph 9.2.1 that it is now apparent that Ims Tech owes Lendtech over USD 2,2 million. Curiously, the deponent does not say how this sum is calculated or how it could have been calculated, given that on Lendtech's own version it has been denied "line of sight" to data necessary to work out how much Ims Tech owes Lendtech.

30 There is a supplementary answering affidavit by MTN Group and MTN. The deponent sets out the practical difficulties experienced by the sheriff and Lendtech's attorney in attempting to attach against these respondents on 8 May 2023. The affidavit confirms that MTN does not owe money to Mobi.

31 In a short reply thereto, Lendtech's attorney underlines the alleged need for confirmation of the rule nisi.

32 Lendtech served a notice on 3 June 2023 under Rule 35(12) demanding certain documentation from some of the respondents. The respondents did not reply. Counsel for Lendtech did not press for the documents in argument.

33 The respondents claim prejudice in the operation of their businesses as a consequence of the order and in my view, this claim is understandable. The operation of the respondents' businesses is substantially impeded by their not being able to use the software, directly or indirectly, on a daily basis, at least until the greater dispute is finalized one way or the other. Attachments of bank accounts or parts of them compound the prejudice. Many cell-phone customers are prejudiced.

34 To entitle Lendtech to its interdict, it needs to show:

34.1 a prima facie right, even though open to some doubt, to the main relief sought against Ims Tech

34.2 harm reasonably apprehended

34.3 no other satisfactory remedy and

34.4 that the balance of convenience favours it.

35 Regarding the prima facie right, to put it differently, a respondent need only cast serious doubt on the alleged right of Lendtech. The answering affidavit of Ims Tech raises serious doubt as to Lendtech's alleged prima facie right. It may be, that at the end of the day Ims Tech owes a net amount to Lendtech. It may be the other way round. I make no finding thereon. The problem now for Lendtech is that it is difficult to see what sum is presently said by Lendtech to be owing to it by Ims Tech, given the way the subject is dealt with in both the founding and replying affidavits. It would be bold of me to attempt to calculate even a minimum figure, either way.

36 On the remaining requirements for an interdict, the harm apprehended by Lendtech is not supported by the evidence and the balance of convenience strongly favours the respondents.

37 These findings make it unnecessary for me to deal with the allegation by Lendtech that it has no other satisfactory remedy. Nor do I need to deal with a range of other defences raised by the respondents.

38 The learned acting judge who granted the order did so without the benefit of the respondents' side of the story. I have had the advantage of considering what the respondents say and the picture I view is wholly different to that which Wanless AJ viewed. Lendtech should not have sought the order without notice. The order is overbroad by a long way, difficult if not impossible to execute accurately and is prejudicial to the respondents. The notice of motion contained no limit on the amounts to be attached. At the hearing on 6 June 2023, counsel for Lendtech informed me, quite candidly that the limit of USD 1 439 433 was inserted into the order at the insistence of Wanless AJ. Punitive costs follow.

ORDER

1. The orders of 24 April 2023 and 9 May 2023 are set aside.
2. All attachments made pursuant to either order are set aside.

3. The applicant is to pay the costs of the respondents on the attorney and client scale, including those of two counsel.

GC Wright

Judge of the High Court

Gauteng Division, Johannesburg

HEARD : 30 May and 6 June 2023

DELIVERED : 6 June 2023

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