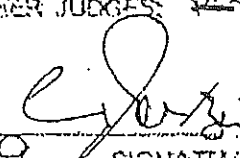


IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA

CASE NUMBER: 26876/99

1999-09-27

DELETE WHICHEVER IS NOT APPL	
(1) REPORTABLE:	<input checked="" type="checkbox"/> NO
(2) OF INTEREST TO OTHER JUDGES:	<input checked="" type="checkbox"/> NO
(3) REVISED.	
DATE 04-10-1999	SIGNATURE 

(10)

In the matter between:

DIGITAL EXPRESS NETWORK (PTY) LTD

Applicant

and

TELKOM SA LIMITED

Respondent

J U D G M E N T

COETZEE, AJ: The applicant applies for a order directing the respondent to restore the telecommunication services provided(20) by it to the applicant and interdicting the respondent from interrupting or discontinuing its telecommunication services to the applicant save for lawful cause and in compliance with a fair and proper procedure. Mr Kennedy who appears for the applicant informed me that the applicant does not proceed with the alternative relief claimed in paragraph e of the notice of motion and that the applicant now applies for a final interdict.

The applicant's business is primarily that of providing electronic data transfer services from clients in the United (30) States/...

States of America for distribution in South Africa. In the telecommunication industry it is referred to as a Value-Added Network Service ("VANS"). Various forms of electronic data, in particular telefax transmissions, computer transmissions on the internet and E-mail, are transferred by it by means of electronic data networks. This service the applicant provides to a United States network provider, IBSA Inc. This company has a number of clients, mainly corporate clients with their own clients or subsidiaries, in South Africa. When IBSA's clients wish to transmit data to South Africa they do so via (10) IBSA's facility in Florida, USA. This facility then transmits the data via an international private line between the United States and South Africa. That line is leased for that purpose partly from a United States telephone service provider and partly, on the South African side, from the respondent. The data is channelled in digital form through a facility known as a "roter" operated by the applicant at Four Ways to the South African clients via lines provided by the respondent. The applicant provides this service in terms of a VANS licence issued to it by the South African Telecommunications Regulatory (20) Authority ("SATRA") in terms of section 40(2) of the Telecommunication Act, no 103 of 1996. This licence is presently in force. The applicant holds no other telecommunication licence. The licence it holds expressly provides that it is issued subject to the provisions of the act including section 40(3) thereof.

By law the applicant, in conducting its VANS operation, is dependent upon telecommunication facilities provided by the respondent. Section 40(2) of the act reads as follows:

"A licence to provide any value-added network service, (34)
including/...

including, but not limited to, electronic data interchange, E-mail, protocol conversion, access to a database or a managed data network service, shall contain a condition that the service in question shall be provided by means of telecommunication facilities provided by Telkom or made available to Telkom as contemplated in section 44 until a date to be fixed by the Minister by notice in the Gazette, and a different date may be so fixed in respect of national long-distance facilities."

Section 40(3) of the act reads as follows:

"No person who provides a value-added network service shall permit that service to be used for carrying voice until a date to be fixed by the Minister by notice in the Gazette."

The minister has not yet fixed the dates referred to in subsections 40(2) and 40(3).

The respondent is the exclusive holder of a licence to provide, for a period of five years calculated from 7 May 1994, public switched telecommunications services. No person other than the respondent is permitted to provide national long distance telecommunication services, international telecommunication services, and local and access telecommunication services.

Section 32(1) of the act prohibits any person to provide a telecommunication service except under and in accordance with a telecommunication service licence issued to that person in terms of chapter v of the act. In terms of section 101 of the act a person who contravenes the provision of section 32(1) is guilty of an offence and is on conviction liable to a fine not exceeding

exceeding R500 000,00 or imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

In terms of section 44(2) read with section 44(4) and 44(5) the respondent is obliged to make available to the applicant telecommunication facilities. The subsections read as follows:

"44(2) Telkom and any other provider of a public fixed telecommunications service shall, when requested by any other person providing a telecommunication service, including a private(10) telecommunication network, lease or otherwise make available telecommunication facilities to such other person pursuant to an agreement to be entered into between the parties, unless such request is unreasonable.

44(4) Every agreement for the leasing or otherwise making available of telecommunication facilities, including any agreement contemplated in subsections (1) and (2), shall, unless exempted by the regulations, be lodged by the parties(20) with the Authority to enable it to determine whether the agreement is consistent with the guidelines contemplated in subsection (5)."

44(5) The Authority shall prescribe guidelines relating to the form and content of agreements for the leasing or other manner in which telecommunication facilities are made available as contemplated in section 43(3), with the necessary changes."

During 1997 the applicant entered into agreements with the(3)
respondent/...

respondent in terms of section 44 of the act. In terms thereof the applicant rented from the respondent two primary rate telecommunication lines each of which comprises 30 communication lines allowing for simultaneous operation which provides a local link between South African clients via the respondent's public switch telecommunication services and the applicant's Johannesburg router. A second service which the respondent provides to the applicant by agreement is an international private line which is operated by satellite or undersea cable linking the South African router operation to the United States based operation of IBSA which then in turn provides links with the United States based clients. The applicant pays the respondent approximately R300 000,00 per month for its use of the international line and approximately R200 000,00 per month for the use of the local lines. The applicant has been conducting its VANS operation since approximately February 1998 and has been paying the rental for the two services in accordance with the provisions of the agreements.

On 10 September 1999 the local lines were disconnected by the respondent. The reason for doing so appears from Annexure AK10 to the respondent's answering affidavit. [The applicant competed with the respondent in providing public switched telecommunication services. The applicant, according to the respondent's documentation, was providing voice telephony services from foreign destinations to South Africa. I bypassed respondents international telephone gateway by bringing international voice traffic into South Africa via the international line and the local lines leased to it by the respondent. That conduct, so the respondent alleges, contravenes section 40(3) of the Telecommunications Act and breached/..

breached the agreements entered into with the respondent.

In terms of the act no one but the respondent may presently convey international telephone calls to and from South Africa. The respondent earns revenue from such calls and the act safeguards the respondent's financial interest in this regard. When a user of the applicant's system makes a telephone call on its system it pays for such a call on a tariff for local calls. It makes an international call at the cost of a local call. International calls are of course substantially more expensive than local calls. When the (10) applicant's system is so used the respondent obviously suffers loss. The respondent states that, during the first six months of this year, it suffered a significant decline in its international call income. Investigations revealed that this was brought about primarily by network service providers, such as the applicant, permitting its customers to make international calls to South Africa at the cost of local calls. The loss suffered by the respondent runs into millions of rand.

A Mr Ross, an employee of the respondent, was tasked by the respondent, assisted by a Mr Herbert, to investigate the (20) matter. Mr Ross travelled to the United States of America. From 5 to 8 September he made telephone calls to South Africa from the United States by using telephone cards purchased in America. He and Mr Herbert had created a Johannesburg telephone number and he called Mr Herbert from the United States at pre-arranged times. He phoned Mr Herbert from Westport Connecticut and New York and whilst calls were in progress Mr Herbert traced the origin of the calls. It was then found that the telephone calls were all registered on the respondent's computerised billing system as having been (3)

made/...

made from the applicant's router in South Africa. The established that the use of the telephone cards enable American customers to make direct person-to-person international calls to South Africa at the cost of a local call. After further investigation it was established that the applicant is operating an international telecommunication service and enabling person-to-person voice telecommunication between the United States of America and South Africa without these calls passing through the respondent's international telecommunication service and its international gateway exchange. Mr Ross opines that it is highly improbable that the applicant is conducting business as a VANS provider or that the applicant is conducting business as an internet service provider to its customers in South Africa.

The applicant's response to Mr Ross's evidence is that the applicant's service may well have been used for voice telephone calls but that the applicant was unaware of this at all times. The applicant states that the service it provides to IBSA in America was specifically to convey facsimile transmissions to its United States clients. The applicant states that IBSA does not offer a service for the transmission of voice calls. The service it offers for clients wishing to communicate with South African clients is that of transmitting data for the purpose of communication by facsimiles. The applicant admits that although unknown to it, some of the clients may have been using the data service provided by IBSA and the applicant to make voice calls rather than facsimile transmissions. The allegation made by Mr Ross that telephone cards are sold, or through IBSA in the United States to enable voice calls to be transmitted using the network, is said to be untrue.

applicant/

applicant says that IBSA does not sell such telephone cards.

However, the applicant did not annex an affidavit by IBSA to support this denial of what Mr Ross alleges.

In my view there can be no doubt that the applicant's system is being used, amongst others, to make voice calls. The applicant presently knows that by operating its system it contravenes section 32(1) and section 40(3) of the act and also acts in breach of its licence and of its agreements with the respondent. It presently permits its service to be used for the carrying of voice. (10)

In order to succeed with its application the applicant must firstly establish that it has a right. A right implies a lawful right. The right upon which the applicant relies is unlawful. It not only contravenes section 40(3) of the act but it is involved in a criminal activity considering the provisions of section 32(1) read with section 101 of the act. The applicant has therefore not proved that it has a right and for that reason this application must fail.

A court does not grant an order which will result in an illegality and particularly a criminal activity being countenanced. It is clear that, should the order sought by the applicant be granted, the continuation of the service provided by the applicant will result in a contravention of section 32(1) and section ^{OK}4(3) of the act. Also for that reason the application falls to be dismissed.

In my view the respondent was obliged, on establishing that the applicant was breaking the law, to disconnect the service. If it had not done so it would have been guilty of aiding and abetting the applicant in committing an offence.

Mr Kennedy argues that the respondent, in terminating the service/..

service without affording the applicant a hearing, denied it its constitutional right in terms of section 33 of the Constitution and failed to comply with the principles of natural justice. Furthermore, he submits that the dispute should have been referred to SATRA and he relies for this contention on section 34 of the Constitution and section 100 of the act.

I do not agree with these submissions. There is no dispute between the parties. The applicant well knows that its service is being used in contravention of the law and so does (10) the respondent. Section 33 of the Constitution and the principles of natural justice serve three purposes. Firstly they facilitate accurate and informed decision making on the part of an administrative authority. Secondly they ensure that decisions are made in the public interest and thirdly they cater for certain important process values. None of these purposes could and would have been served by a hearing. A hearing would not have changed the fact that the applicant's system is being used in such a way that the law is contravened. A hearing of whatever nature in this case could not have (20) resulted in the service not being terminated. The law prohibits the respondent from providing a service which constitutes a transgression of the law. There is therefor in my view no reason why the applicant should have been afforded an opportunity to state its case before the service was disconnected.

V. broad dicta
Section 100 does not compel the respondent to report a contravention of the act to SATRA. It was not bound to do so.

I do not understand section 100(1)(b) to mean that the respondent had no choice but to seek SATRA's intervention and (30)

to/...

to await its decision before acting against the applicant in terms of their contract. Section 100 does not afford SATRA the position of a final arbiter. It only acts when an offence comes to its notice. It is then that it is directed by the section to investigate and adjudicate. Moreover, subsection (b) in my view connotes blameworthiness on the part of the respondent particularly when the fact that the section refers to "offences by licensees" is considered. The respondent is not to blame for the disconnection of the service. That was due to the applicant's failure to comply with the law and the (10) provisions of its license. In my view section 100 is not applicable.

Section 34 of the Constitution envisages an adjudicable dispute between an administrative authority and a subject of the state. There being no dispute, that section in my view is not applicable.

In the result the application is dismissed with costs.

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