IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE **DATE: 29/1/2008**

CASE NO: 6460/06

In the matter between:

NILSEN, NADIA APPLICANT

AND

VODACOM SERVICES PROVIDER 1ST RESPONDENT

COMPANY (PTY) LTD

STERILING DEBT RECOVERIES (PT) LTD. 2ND RESPONDENT

JUDGMENT

MAVUNDLA, J.,

[1] The applicant approached this Court by way of motion proceedings, the relevant notice of motion having since been amended, seeking an order

in terms of which the first and second respondents are ordered to remove the adverse publication against the applicant 's name at ITC, with a costs order against the first respondent. The application is being opposed by the first respondent. There is also an application to have certain paragraphs of the applicant's replying affidavit struck out, which application is also resisted.

Background Facts

Applicants' case in main affidavit

[2] The applicant and the first respondent concluded an agreement on the 26 May 2001 in terms of which, the first respondent sold to the applicant a cellular phone, which the first respondent would connect to the communication system and invoice the applicant on monthly basis in relation to the connection charges and monthly access charge and call charges. The relevant agreement is attached to the applicant's founding affidavit as annexure A.

[3] Clause 10.6 of this agreement provides that:

"10.6 The customer acknowledges Vodacom SP's right to inform third parties of any breach by the customer of its obligations in terms of this agreement and the customer indemnifies Vodacom SP in respect of any claim whatsoever arising from Vodacom SP in respect of this right."

[4] In accordance with the aforesaid agreement the applicant had two accounts for air-time contracts with the first respondent as well as a contract for the upgrading of her cellular phone, which contract is attached to the founding affidavit as annexure B.

[5] The applicant has been blacklisted by the respondents due to her failure to honour her two air-time contracts for her cellular phones with numbers 082-4466756 (the first air-time contract) and 0829206025 (the second air-time contract).

[6] According to the applicant, she qualified for the upgrade of her handset (cellular phone) on the 2 March 2005. She says that during the first three weeks of the use of the handset it had to be repaired twice without success. On the second occasion she took the handset to the first respondent and left it at Vodaworld Vodacom Customer Care Repairs. The first respondent suspended her services without due notice which step was an administrative blunder on the side of the first respondent. This blunder caused the applicant much aggravation and damages in both personal and business life as she is reliant upon her phone.

[7] The applicant then wrote a letter on the 21 April 2005 (annexure E)[1] in

[1]

terms of which she states that In terms of the original agreement between Vodacom and herself the former has an obligation to provide her with basic cellular service . On this day the first respondent has suspended this service without notice due to an administration blunder on its side which caused her aggravation and loss of income. She further stated that she finds the first applicant to be in breach of contract and that she is subsequently terminating the agreement. In her affidavit she states, inter alia, that she cancelled the agreement with the respondent because she considered their action as repudiation of the agreement which repudiation she accepted. She says that notwithstanding this cancellation of the contract the first respondent persisted in sending her accounts for the month May in respect of the contract relating to cellular phone number 0824466756, after the contract had been cancelled.

[8] The applicant further admits that she had received a letter of final demand from the first respondent on the 17 August 2005. She received a further letter on the 28 October 2005, advising her that she had not made payment on her account for a significant period of time, which she admits to be true, and that her name has been blacklisted.

[9] She says that the action of the first respondent is unacceptable. She says that she has been advised that the first respondent should have first issued summons and obtained judgment before they could validly place

her name on the ITC.

[10] She says further that she is struggling to get credit as the result of the fact that her name has been placed on ITC and that this is defamatory as she is a credit worthy person. She also says that she has been caused harm in her business life as well as in her personal life. She is reliant on credit grants from time to time and have recently had trouble to aid her younger sister in obtaining a study loan since her credit name has been tainted.

First Respondent's case

[11] The first respondent states in its affidavit, inter alia, as follows:
"
4

Prior to dealing with the affidavit of the applicant, the above Honourable Court should adjudge the applicant's affidavit in the light of the following factors:

(a) What must be borne in mind is that the first respondent is entitled to inform third parties of any breach by the customer (the in the present scenario) of her obligations in terms of the agreement. (vide paragraph 10.6 of annexure "A" of the applicant's founding affidavit)

(b) The first respondent has listed the applicant with Transunion Information Trust Corporation ("ITC") due to the breach by her of the terms of the agreement she entered into with the first respondent in respect of cellular

telephone numbers:

(i) 082-44 6756

(ii) 082-920-6028

5

In order for the application to succeed with the interdict that she seeks in terms of her Notice of Motion, she bears the onus of proving that she has a clear right to cancel the aforementioned agreements she entered into with the first repsondent, it is respectfully submitted, she clearly fails to do so.

6.

(a) In annexure "A" there is no clause entitling the applicant to cancel the agreement in the event of non-performance by the respondent of any of the terms of the agreements.

(b) Nor has the applicant placed the respondent in mora by giving the respondent a notice of rescission.

(c) What the applicant has done is merely cancelled both agreements in terms of annexure "E" and "G" annexed to her founding affidavit and I quote:

"In terms of the original contract between Vodacom and me you have the obligation to provide a basic cellular service. Today my service was suspended without notice due to an administrative blunder on your side. It has caused me much aggravation and loss of income,

I find you to be in breach of contract and subsequently terminate this agreement. The cellular handset supplied to me during upgrade are currently at Vodaworld Vodacom Customer

Care Repairs. This is the second time since I've received it (3 weeks) that it has been booked in for repairs. In terms of the upgrade agreement you should reasonably supply me working handset. You have failed to do so. You can collect the handset there at your leisure and the rest of the equipment at the address where it was delivered to".

Annexure "E" was despatched in respect of cellular telephone number 082-446 6756.

Annexure "G" was despatched by the applicant to the first respondent in respect of cellular telephone number 082-920-6028 and I quote as follows:

"I also warned that if the problems with 0824466756 caused disruption of service to 08299206028 you will be in breach of this contract and I will terminate it. This is that termination letter".

7.

The issue before the Honourable Court is that despite the fact that there is no clause in annexure "A" entitling the applicant to cancel the contract, as well as the fact that there was no notice of rescission, is the "alleged breach" by the first respondent so serious that one cannot reasonably expect the applicant to abide by the contract alternatively does the breach go to the root of the contract.

8

It shall be submitted at the hearing hereof that there has clearly not been a substantial failure on the first respondent's part to perform the terms of annexure "A" and, in the circumstances, the applicant has failed to discharge, on a balance of probabilities, the onus that she bears that she was entitled to cancel the contract.

9

The applicant's ground for cancelling the contract are:

a) the handset went twice for repairs;

b) the cellphone was disconnected for a day

As set out hereinbelow in pragarphs 19,20 and 22, the difficulties that the applicant experienced with the handset lie with the manufacturer of the cellphone and not with the actual contract, annexure "A" to the applicant's Notice of Motion, which is the contract entered into between the applicant and the first respondent. As regards ground (b), the fact that the cell phone was disconnected for one day would nit entitle the applicant to cancel the contract.

….19

AD PARAGRAPH 8[2]

I draw the Honourable Court's attention to the following in regard to the new handset acquired by the applicant:

(a) As appears on annexure "B" annexed to the applicant's founding affidavit, the manufacturer supplies the warranty for the first year of use. The first respondent provides the additional warranty for the second year.

(b) One must draw a distinction between a contract for airtime and the

2 " Soon after I duly received the upgraded "handset" my troubles with the first respondent began. In the first three weeks of use of the handset it had to be repaired twice without any success. On the second occasion I took the handset back to the first respondent and left it at Vodaworld Vodacom Customer Care Repaires. The Honourable Court is referred to annexure '"C" and "D" in this regard.

upgrading of a handset.

(c) They are two completely different things. The one has nothing to do with the other. The airtime contract enables one to receive and make cellular calls as well as a hoist of other functions, such as sending SMS's
(d) The handset is the product of a manufacturer, who in this case was Ericsson. It could have been Nokia, Siemens, etc.

20

The applicant was obliged in terms of annexure "B" to take the handset back to the *manufacturer's* warranty honoured. If one has regard to the terms of annexure "A" , the first respondent does not indemnify a customer against a faulty handset. This is the reason why the manufacturer provides the warranty.

…22

In terms of paragraph 10 on annexure "d", the following appears:

"Vodacare shall under no circumstances whatsoever be held liable for any damages, loss and/ or expenses arising out of or connected with manufacturer product liability, faulty design and/ or latent faulty workmanship or materials in the products and/or spare parts and for any consequential and/or unforeseen losses of whatever nature and howsoever arising".

…25

AD PARAGRAPH 11[3]:

3 Notwithstanding the cancellation of the contact pertaining to cellular number 082 446 6756 the first

As appears on annexure “F” , although the applicant purports to cancel the contract, she still utilises the handset. In this regard, I point out that she paid R9,47 in respect of the May account and merely declined to pay the contract charges. It is respectfully submitted that on her own version and accepting that she was entitled to cancel the contact, which the first respondent denies, by utilising the cellular phone she kept the contract alive. One is not entitled to approbate and reprobate.

…27

AD PARAGRAPH 13[4]

The contents of paragraph 25 are repeated, viz. even if on the applicant’s version she entitled to cancel the contract, which the first respondent denies, the applicant kept the contract alive by utilising the phone. One is not entitled to approbate and reprobate.

28

It is denied that the applicant paid all that was validly due and payable. As set out in annexure “I”, the sum of R2688,56 was outstanding and the applicant was warned that should it not be paid, the whole amount then outstanding in terms of annexure “A” would become due and owing.

…32.

---

respondent persisted sending me accounts for the month of May which is the month after I have cancelled the contract. The Honourable Court is respectfully referred to annexure “F”

4 Quite remarkably the first respondent also ignore me on this occasion and once again sent me an account for a phone that has been cancelled and a month prior to the account received namely for payment in the month of June 2005! The Honourable Court is referred to annexure “H” in this regard.

AD PARAGARPH 18[5]**;**

Legal argument will be presented to the above Honourable Court at the hearing hereof in this regard that the first respondent is not obliged to issue summons or obtain a judgment against the applicant before being entitled to blacklist her

[13] The applicant in her replying affidavit states inter alia that:

"4

Ad paragraph 4(a) (b):

It is respectfully contended that the first respondent's entitlement only arises in the event of breach by the customer. I was never in breach, quite the contrary.

5

Ad paragraph 5:

I respectfully contend that my application is not based on a clear right to cancel the agreement with the first respondent, but rather my clear rights in terms of natural laws of justice and my right to credible name. In this regard I contend that I do have a "clear right".

6

Ad paragraph 5(a):

5 The first and second respondents' actions are unacceptable. I was advised which advice I accept, that the first respondent should have issued summons and obtained judgment in the event that they think that they have a claim against me before they could validly place my name on ITC. None of these procedures have been followed.

I contend that my right to cancel by virtue of the first respondent's non-performance is trite law. I further contend that any other interpretation would be contra bones mores and would not be simple justice between man and man.

7

Ad paragraph 5(b) (c):

As stated in the founding affidavit I considered the suspension of the service without notice as breach of the agreement by the first respondent.

I accepted the breach by cancelling the agreement on the 21st of April 2005 as is clear from annexure "E".

…. 26

The Honourable Court is respectfully referred to clause 3.1.3 of annexure "A". Subscription was cancelled on the 21st April 2005. The call charges were paid as I felt liable to pay for the services up until the time I utilised same. The call charges paid were for the month of April before the cancellation of the contract.

27

Ad paragraph 26:

Despite the fact that the second contract was fully paid up, the first respondent because of the dispute concerning the first contract

***mero muto* cancelled this contract and not I. This cancellation was consequently accepted by me as per annexure "G".**

…32

Ad paragraph 32:

It is respectfully contended that only information that is accurate, relevant and unbiased may be recorded. **A credit bureau may record information only if it has been assured by the contracted subscriber (in casu the first respondent) that there is no bona fide dispute involved**.

[14] I have selectively referred to the above mentioned paragraphs in the applicant's replying affidavit, because some of these paragraphs become relevant in the first salvo taken by the first respondent against the applicant, who contends that some of these paragraphs constitutes new matter and should have been in the applicant's founding affidavit, and that the applicant should not be allowed to broaden the basis upon which she mounted her case, through her replying affidavit. What is sought to be struck out from the applicant's replying affidavits are the words which I have highlighted in paragraphs "5, 6, 27 and 32", under paragraph [13] hereof. I will refer to these paragraphs in due cause.

[15] The relief sought by the applicant is a final order. Where a party seeks a

final relief, the Court has limited discretion to refuse such an application, the Court has a judicial discretion which it must exercise judicially[6]. For the Court to grant a final relief, it must be satisfied that:

(a) there is a clear right on the party asserting it or requesting such a final relief,
(b) there is an injury actually committed or reasonable apprehended;
(c) there is no clear and satisfactory remedy that may be available to the applicant.[7] The *onus* rest on the applicant, to be proven on a balance of probability.[8] There is no onus resting on the respondent to prove any fact or facts or to disprove the applicant's right to a final interdict[9].

[16] In deciding whether the applicant has acquitted herself of the onus resting upon her, I must also bear in mind that it is trite that in motion proceedings:

(i) the affidavits form the pleadings and evidence of the litigants[10];

(ii) the applicant must make her case in her founding affidavit and not

---

6 Grundling v Beyers and Others 1967(2) SA 131 at 155C
7 Minister of Health v Drums and Pails Reconditioning CC 1997 (3) SA 867 at 872C
8 Lubbe v Die Administrateur, Oranje-Vrystaat 1968 (1) SA 111 (OPD) at 113E-H
9 Free State Gold Areas Ltd v Merriespruit (OFS) G.M. Co. Ltd and Another, 1961 (2) SA 505 (W)at 518 and 524.
10 Kleynhans v Van Der Westhuizen, NO 1970 (1) SA 565 (0) a 568E-F:
"It is trite law that an applicant should set out in his petition or notice of motion and supporting affidavits a cause of action and since in application procedings the affidavits constitute not only the pleadings but also the evidence, such facts as would entitle him to the relief sought. (Cf. Rule 6 (1)). Normally the Court will not allow an applicant to insert facts in a replying affidavit which should have been in the petition or notice of motion (cf. Mauerberger v Mauerberger, 1948 (3) SA 731 (C) ; de Villiers v de Villiers, 1943 T.P.D. 60; John Roderick's Motors Ltd v Viljoen, 1958 (3) SA 575 (O) ; Berg v Gossyn (1), 1965 (3) SA 702 (O) ; van Aswegen v Pienaar, 1967 (1) SA 571 (O)), but may do so in the exercise of its discretion in special G circumstances (cf. Bayat and Others v Hansa and Another, 1955 (3) SA 547 (N) ; Schreuder v Viljoen, 1965 (2) SA 88 (O))."

in the replying affidavit[11]. In this regard in the matter of Shephard v Tuckers Land and Development Corporation (Pty)Ltd (1)[12] Nestadt J (as he then was) said:

"The second part of the application to strike out, that relating to Auret's affidavit, is based on the contention that the allegations therein contained should have formed part of the applicant's founding affidavit and annexures, or, alternatively, constitute new matter. It is founded on the trite principle of our law of civil procedure that all the essential averments must appear in the founding affidavits for the Courts will not allow an applicant to make or supplement his case in his replying affidavits and will order any matter appearing therein which should have been in the founding affidavits to be struck out. (See Herbstein and Van H Winsen, p. 75.) In Titty's Bar and Bottle Store (Pty.) Ltd. v A.B.C. Garage (Pty.) Ltd. and Others, 1974 (4) SA 362 (T) , VILJOEN, J., at p. 368 stated:

"It has always been the practice of the Courts in South Africa to strike out matter in replying affidavits which should have appeared in petitions or founding affidavits, including facts to establish locus standi or the jurisdiction of the Court. See Herbstein and Van Winsen, Civil Practice of the Superior Courts in South Africa, 2nd ed., pp. 75, 94. In my view this practice still prevails."

This is not however an absolute rule. It is not a law of the Medes and Persians. The Court has a discretion to allow new matter to remain in a replying affidavit, giving the respondent the opportunity to deal with it in a second set of answering affidavits. This indulgence, however, will only be allowed in special or exceptional circumstances. Bayat and Others v Hansa and Another, 1955 (3) SA 547 (N) at p. 553; Kleynhans v Van der Westhuizen, N.O., 1970 (1) SA 565 (O) at p.

11 Kleynhans v Van Der Westhuizen, N.O. (supra)
12 1978 (1) SA 173 (W) AT 1777G-178A.

568."

[18] With regard to the contention that the applicant is introducing new matters in her replying affidavit, I am of the view that there is merit in this contention. The relevant new matters are the following:

(a) "It is submitted on behalf of the applicant that because the applicant is seeking a final order, the following factors need to be considered, namely a "clear right", factual or probable prejudice and no other remedy. It is contended on behalf of the applicant that the respondent is raising fictitious issues of fact purely to delay the applicant's relief claimed."

(b) **Ad paragraph 5(a):**

"**I contend that my right to cancel by virtue of the first respondent's non-performance is trite law. I further contend that any other interpretation would be contra bones mores and would not be simple justice between man and man**.""

(c) **27**

Ad paragraph 26:

"**Despite the fact that the second contract was fully paid up, the first respondent because of the dispute concerning the first contract *mero muto* cancelled this contract and not I. This**

cancellation was consequently accepted by me as per annexure "G"."

(d) …32

Ad paragraph 32:

..." **A credit bureau may record information only if it has been assured by the contracted subscriber (in casu the first respondent) that there is no bona fide dispute involved**."

[19] The above mentioned paragraphs contain evidence or issues which the applicant ought to have been aware of at the formulation of her founding affidavit[13]. She did not include these in her founding affidavit. It needs to bear that in her founding affidavit It cannot be said that these are issues that arise from the evidence of the respondent. For instance, the applicant's contention in the replying affidavit that her application is not based on a clear right to cancel the agreement with the first respondent, but rather her clear right in terms if the natural laws of justice and her right to credible name. Besides the fact that she must have been alive to her right to credible name, the right in terms of natural laws, nothing precluded her in making these allegations in her founding affidavit, nor is there any explanation why she did not saddle her horse on these alleged

13 Supreme Court Practice B1-46 it is said: "The court will, however, not allow the introduction of new matter if the new matter sought to be introduced amounts to an abandonment of the existing claim and the substitution therefor of a fresh and completely different claim based on a different cause of action."

rights from the onset.

[20] It needs to bear that in her founding affidavit the applicant maintain that the respondent should have first issued summons and obtained judgment against her in the event that they thought that they have a claim against her before they could have validly placed her name on ITC, and that none of these procedures were done. To allow the paragraphs that are under attack to stand would, in my view, be permitting her to ride on two different horses at the same time, to the prejudice of the respondent.

[21] A litigant when invited by the other party to fence at court, surely he or she or it is entitled to know in advance what case it is expected to meet. For that reason, the inviter (as in the case of the applicant) cannot be allowed to shift ground when the dual is on and or horns have been locked, for that would prejudice the other party. Consequently, I am of the view that the application to strike out must therefore succeed with costs.

[22] It is common cause that the relationship between the applicant and the first respondent is regulated by the provisions of the contract attached as annexure A in the applicant's founding affidavit, which contract provides, inter alia that:

22.1 "10.6 The customer acknowledges Vodacom SP's right to inform third parties of

any breach by the customer of its obligations in terms of this agreement and the customer indemnifies Vodacom SP in respect of any claim whatsoever arising from Vodacom SP in respect of this right."

22.2 "clause 12 SUSPENSION

12.1 Vodacom SP may from time to time without notice suspend the services (and at Vodacom SP's discretion disconnect the subscriber apparatus from the system) in any of the following circumstances:

12.1.1 during any technical failure, modification or maintenance of the system provided that Vodacom SP will use its reasonable endeavours to procure the resumption of the services as soon as its reasonably practicable ;

12.1.2 If the customer fails to comply with any of the terms and conditions of this agreement (including failure to pay any charges due) until the breach (if capable of remedy) is remedied, or does, or allow to be done, anything which in Vodacom SP's opinion may have negatively affected the operation of the services,

12.2 Notwithstanding any suspension of the services under this clause 12, the customer shall remain liable for all charges due hereunder throughout the period of suspension unless Vodacom SP at its sole discretion determines otherwise in writing.

22.3: 13 TERMINATION

13.1 In the event that the customer breaches any of the terms of this agreement or any warranty given by it hereunder or fails to fulfil any obligation resting upon it, then without prejudice to Vodacom SP's other rights in terms of this agreement or common law, Vodacom SP may forthwith and after 3 days written notice to the customer, either terminate this agreement or call for specific performance all customer's obligations and immediate payment of all sums owing by the customer, whether or not then due, in either event without prejudice to Vodacom SP's right to recover such damages as it may have suffered by reason of breach or failure.

Notwithstanding the aforegoing and pending Vodacom SP's election in terms of this agreement and the customer shall remain liable for the payment of all amounts owing by the customer in terms of this agreement whether or not such amount are then due.

13.2 Vodacom SP may without notice, terminate is agreement immediately in any of the following circumstances:

13.2.1 if the customer fails to pay any amount owing to Vodacom SP on due date;

[23] There is no precondition in regard to clause 10.6 which the respondent must comply with before exercising this right.

[24] According to the applicant, the suspension of her services was as a result of a blunder on the part of the first respondent. This suspension, according to the first respondent was only for one day, and this is not disputed by the applicant. The applicant bears the onus to show that the breach on the part of the first respondent was such that it entitled her to cancel the contract. Christie in the Law of Contract in South Africa 5th edition at page 514 cites Potgieter JA in Oatorian Properties (Pty) Ltd v Maron 1973 (3) SA 779 (A) at 784 as saying:

"According to the well-known principles there enunciated rescission of a contract is only permissible if a breach occurred of a term which goes to the root of the contract and materiality of the breach is according to

those authorities also relevant factor in determining whether rescission should be ordered or not (cf Spies v Lombard 1950 (30 SA 469 (AD) at 488)". The learned author at page 515-516 further refers to the matter of Singh v McCarthy Retail Ltd[14] where Olivier JA, said:

> "I perceive the correct approach to be as follows: The test, whether the innocent party is entitled to cancel the contract because of the malperformance by the other, in absence of *lex commissoria,* entails a value judgment by the Court. It is, essential, a balancing of competing interest-that of the innocent party claiming rescission and that of the party who committed breach. The ultimate criterion must be one of treating both parties, under the circumstances, fairly bearing in mind that rescission, rather than specific performance or damages, is the more radical remedy. Is the breach so serious that it is fair to allow the innocent party to cancel and undo all its consequences?"

[25] The suspension of the services for one day, must be separated from the difficulties the applicant had with the upgraded handset. The malfunctioning of the handset is something falling under the Manufacturer's Warranty as reflected in annexure B, and not under the main contract (Annexure A), as contained in clause 2.[15] I am of the view

14 2000 (4) SA 795 (A) at 803 para [15].

15 "2. CONNECTION TO THE SYSTEM AND PROVISIONS OF THE SERVICES
Subject to the terms and conditions of this agreement, Vodacom SP shall connect and maintain the

that the fact breach of the contract on the part of the first respondent for one day, does not entitle the applicant to cancel the contract[16] as it purportedly did per its letter of the 21 April 2005. (termination of contract 082 4466 756). The duration of the breach was rather too short to justify a cancellation, in my view.

[26] The applicant proceeded to remitted to the first respondent a letter on the 24 May 2005 (annexure G[17]) informing it of the cancellation of contract pertaining to cell phone 0829206025. The applicant has failed to set out in what manner the problems with 0824466756 caused disruption of services to 0829206025, resulting in her taking a decision to terminate this second contract. In other words the applicant has, in my view, failed to show that it was entitled to terminate the contract relating to the second airtime contract relating to cell phone 0829206025.

[27] With regard to the termination of the contract relating cell phone no. 0824466756, the applicant has attached tax invoice dated 3 May 2005

---

connection of the subscriber apparatus to the system and Vodacom SP shall use its reasonable endeavours to make the services available to the customer throughout the duration of the agreement, save and except for circumstances beyond the control of Vodacom SP."

16 Vide The Law of Contract in South Africa, by Christie, 5th edition., at page 495-515.

17 'Regardless of numerous communications to you regarding the problems surrounding the contract for 082 4466 756 and the termination of the contract I have had NO response from Vodacom. I will not reiterate those problems that led to the termination here since you are clearly not interested in them
I also warned that if the problems with 082 4466 756 cause disruption of services to 082 9206 028 you will be in breach of this contract and I will terminate it. This is that termination letter. I will pay all outstanding amounts on this account to date. Any additional monthly fees you want to charge will be ignored like you ignored me."

showing amounts due on 31 May 2005. This invoice reflects that she was billed with an amount of R3.03 for an international call category 2, and with an amount of R 5,28 for a domestic SMS service. The respondent contends that notwithstanding the alleged termination, the applicant was still using the services and that therefore the applicant kept the contract alive. In her replying affidavit the applicant avers that these charges were for services effected in April and that she felt obliged to pay for these charges. This admission contradicts her contention that she had paid all outstanding amounts on the invoices which were validly billed and due and payable in respect of both cell phones and that she had no more any obligation towards the first respondent. This contradiction is also borne out when the first respondent states that an amount of R2 688,56 as reflected in annexure I of the applicant's founding affidavit was outstanding. She does not dispute this fact although she contends that these are contract fees that escalated after cancellation and before the first respondent eventually respondent to her numerous phone calls.

[28] A final interdict is only granted in notice motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavit justify such an order Du Preez v NWK Ltd[18]. Where there is a dispute of facts the final interdict is granted on the version of the

18 2005 (3) ALL SA 551C

respondent, vide Townsend Production (Pty) Ltd v Leech[19].

[29] The applicant has admitted that she had not made payment for a significant period, (para [8] supra). In terms of clause 12.2 of the agreement the applicant remained liable for all charges that remained due. The first respondent under such circumstances had the right to resort to clause 10.6. In my view, the applicant has not demonstrated that the first respondent should first have issued summons before it can be entitled to resort to clause 10.6. In other words the applicant has not shown any right of entitlement to the issuing of summons before clause 10.6 can be resorted to. In terms of clause 12.1 the first applicant has a right to suspend the services of a customer if the customer fails to comply with any of the terms and conditions of the agreement, including failure to pay any due charges, (12.1.2).

[30] In the premises, I am of the view that the applicant has failed to acquit herself of the onus resting upon her so as to persuade me to exercise my discretion and grant a final order as sought in the notice of motion. I am of the view that the application must fail and that the applicant must bear the costs of the application, including the costs attendant to the striking out application.

19 [2001] 2 ALL SA 255, 2001 (4) SA 33c

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

1. That the application by the first respondent to strike out is granted with costs

2. That the main application is dismissed with costs.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

HEARD ON THE: 20 / 06/2007
DATE OF JUDGMENT: 29 /01/ 2008

APPICANT`S ATT: Ms. BERTHA GROND
APPLICANT`S ADV: MR. M OLIVIER
RESPONDENT`S ATT: MR. L COHEN
RESPONDET'S ADV: Mr. A MacMANUS