HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1)	REPORTABLE: Electronic reporting only
(2)	OF INTEREST TO OTHER JUDGES: No.
(3)	REVISED.

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DATE SIGNATURE

Case No. 36983/14

In the consolidated matters between:

Case No. 11803/14

GETSOFT CC Applicant

and

THE POST PAID COMPANY (PTY) LIMITED Respondent

Case No. 14021/14

NEOSOFT CC Applicant

And

THE POST PAID COMPANY (PTY) LIMITED Respondent

Case No. 4180/14

CONYCARE (PTY) LIMITED Applicant

And

THE POST PAID COMPANY (PTY) LIMITED Respondent

Case Summary: Claims for specific performance in motion proceedings – material disputes of fact have arisen on the affidavits that are real, genuine and bona fide – applicants have failed to satisfy the stringent test for the facts alleged by the respondent and its denials to be rejected without evidence – the relief for specific performance claimed has become moot by the time the matter is heard - a referral of the application to trial or for the hearing of oral evidence will effectively be a *brutum fulmen* – the principle enunciated in *Jenkins v S.A. Boiler Makers, Iron & Steel Workers & Ship Builders Society* 1946 WLD 15, at 17-18, applied in making an award of costs.

JUDGMENT

MEYER, J

[1] These are three applications brought by Getsoft CC (Getsoft), Neosoft CC (Neosoft) and Conycare (Pty) Limited (Conycare) respectively (jointly referred to as the applicants) against the same respondent, The Post Paid Company (Pty) Limited (Post Paid), which have been consolidated for hearing. Essentially identical relief is sought in each application: specific performance of an oral agreement allegedly concluded between each applicant and Post Paid during May 2013 (and in the case of Conycare, also of an earlier oral agreement allegedly concluded during November 2012).

[2] Post Paid's defence (in the main) in each instance is that it never concluded an agreement with any of the applicants and it (for this reason) also denies that it repudiated the alleged agreements. Post Paid further contends that the consolidated application should be dismissed, either because the applicants should have realised when launching their applications that genuine disputes of fact not capable of resolution on the papers would develop or because the alleged oral

agreements on which they rely were of fixed duration, the time fixed in terms of each agreement had come to an end and the applicants are thus no longer entitled to specific performance.

[3] Getsoft alleges that during May 2013 it (represented by Mr Norman le Roux) and Post Paid (represented by Messrs Steven Greenspan, Meyer and Yach) concluded an oral agreement in terms of which Post Paid agreed to supply Gestsoft with 2 000 MTN Top-Up 100 preloaded SIM cards for R21,00 per month per SIM card (i.e. R42 000,00 per month) for two years commencing on 10 May 2013. Getsoft, so it alleges, agreed to make an upfront payment of R84 000,00 (i.e. two months' payments) to Post Paid, which payment was to serve as a guarantee for the monthly payments and if these payments were regularly made it was to be utilised to pay the last two months' charges.

[4] Neosoft relies on an oral agreement with identical terms to those of the Getsoft agreement. It was allegedly concluded during May 2013 between Neosoft (represented by Mr Richard David Baldwin) and Post Paid (represented by Messrs Steven Greenspan, Meyer and Yach). In terms of the alleged agreement Post Paid agreed to supply Neosoft with 500 MTN Top-Up 100 preloaded SIM cards for R21,00 per month per SIM card (i.e. R10 500,00 per month) for two years commencing on 29 May 2013. Neosoft's upfront payment (i.e. two months' payments) in terms of the alleged agreement was the sum of R21 000,00.

[5] Conycare relies on two oral agreements with identical terms to those of the Getsoft and Neosoft agreements. The first one was allegedly concluded between Conycare (represented by Mr Demetre Kotsonis) and Post Paid (represented by Messrs

Richard Meyer and Colin Yach) between 22 and 29 November 2012 and the second one between Conycare (represented by Messrs Demetre Kotsonis and Stefano Valenti) and Post Paid (represented by Messrs Steven Greenspan, Meyer and Yach) during May 2013. It is alleged that Post Paid in terms of the first agreement agreed to supply Conycare with 3 000 MTN Top-Up 100 preloaded SIM cards for R16,00 per month per SIM card (i.e. R48 000,00 per month) for two years commencing on 1 December 2012 and in terms of the second one with 3 000 MTN Top-Up 100 preloaded SIM cards for R21,00 per month per SIM card (i.e. R63 000,00 per month) for two years commencing on 23 May 2013. It is alleged that Conycare's agreed upfront payment (i.e. two months' payments) in terms of the first agreement was the sum of R96 000,00 and in terms of the second one the sum of R126 000,00.

[6] It is alleged that Post Paid delivered the SIM cards to Getsoft, Neosoft and Conycare respectively and that they made the upfront payments and duly paid the monthly fees to Post Paid for the SIM cards as and when they fell due. It is alleged that Post Paid repudiated each oral agreement by de-activating the SIM cards on 13 December 2013 (in Getsoft's case it is alleged that 1030 SIM cards were de-activated on that date and the remaining 970 on 12 March 2014). The de-activation of the SIM cards that form the subject-matter of this application is not disputed.

[7] The specific performance sought by the applicants is for the re-activation of the SIM cards supplied by Post Paid pursuant to the alleged oral agreements. Post Paid contended that specific performance is no longer possible since Post Paid on-sold the airtime on the SIM cards in the applicants' possession. In response the applicants sought to amend the relief claimed by them in their notices of motion to also include

alternative relief directing Post Paid, in the case of Getsoft, to supply it '. . . with 2000 MTN Sim cards, preloaded with airtime equivalent to R100,00 per month from 12 December 2013 to date of this order and thereafter with airtime of R100,00 per month from date of this order until 9 May 2015.' Similar amendments were sought by Neosoft and Conycare. The amendments were authorized by an order that I granted at the commencement of the hearing without objection from Post Paid.

[8] Post Paid's case is that the SIM cards that form the subject-matter of this application were supplied by it to a company named Corporate and Industrial Mobile Solutions (Pty) Ltd (CIMS) pursuant to a written agreement ('the MTN agreement') in terms of which Post Paid was entitled to de-activate the SIM cards. It is alleged that Post Paid concluded two written agreements with CIMS during 2012 (one being the MTN agreement that relates to the supply of MTN SIM cards and the other one to the supply of Vodacom SIM cards) in terms whereof it appointed CIMS as a wholesaler and distributor of SIM cards. On 12 December 2013, Post Paid de-activated or 'soft-locked' the SIM cards it had supplied to CIMS. Post Paid avers that it did so lawfully in terms of the written agreements with CIMS. The SIM cards that form the subject-matter of this application were amongst those that were de-activated by Post Paid. Consequently, CIMS launched an application in this court seeking the re-activation of the SIM cards. The matter was settled between CIMS and Post Paid.

[9] The affidavits disclose material disputes of fact as regards the existence of the alleged oral agreements and the repudiation thereof. The applicants, nevertheless, seek final relief. It is trite that courts approach opposed applications for final relief on

the basis of the rule that was expressed as follows by Corbett JA in *Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635C:

'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact. . . . If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court . . . and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks . . . . Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers . . .'

[10] And, as was stated by Harms JA in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA), para 26-

'[m]otion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities.'

[11] Leach JA, in *National Scrap Metal (Cape Town) (Pty) Ltd and another v Murray & Roberts Ltd and others* 2012 (5) SA 300 (SCA), said the following on the topic:

‘[21] These factors — particularly collectively — do cast a measure of doubt on the appellants' version, which is certainly improbable in a number of respects. However, as the high court was called on to decide the matter without the benefit of oral evidence, it had to accept the facts alleged by the appellants (as respondents below), unless they were 'so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers'. An attempt to evaluate the competing versions of either side is thus both inadvisable and unnecessary as the issue is not which version is the more probable but whether that of the appellants is so far-fetched and improbable that it can be rejected without evidence.

[22] As was recently remarked in this court, the test in that regard is 'a stringent one not easily satisfied'. In considering whether it has been satisfied in this case, it is necessary to bear in mind that, all too often, after evidence has been led and tested by cross-examination, things turn out differently from the way they might have appeared at first blush. As Megarry J observed in a well-known dictum in *John v Rees and Others; Martin and Another v Davis and Others; Rees and Another v John* [1970] 1 Ch 345 ([1969] 2 All ER 274 (Ch)) at 402 (Ch) and 309F (All ER):

'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.'

(Footnotes omitted.)

[12] Despite the protestations of the applicants to the contrary, the disputes of fact that have arisen on the affidavits seem to me to be real, genuine and bona fide. Post Paid’s allegations and denials are neither far-fetched nor untenable. The affidavit evidence put up by Post Paid includes evidence to the effect that: there was a contractual relationship between Post Paid and CIMS governed by the MTN agreement;

the SIM cards that form the subject-matter of this application were ordered by CIMS pursuant to the MTN agreement (that permitted Post Paid to de-activate them); the SIM cards were delivered by Post Paid to CIMS; CIMS requested that the invoices be made out to Getsoft, Neosoft and Conycare individually to which request Post Paid acceded and it did not invoice the applicants individually of its own accord; Post Paid (including its Chief Financial Officer and Chief Sales Officer) have stated under oath that they have never met the deponents to the Getsoft and Neosoft affidavits – let alone concluded agreements with them. The documentary evidence advanced by Post Paid, at least on the face of it, supports its case in several and material respects.

[13] Each applicant asserts a contractual *nexus* with Post Paid inter alia based on the fact that Post Paid invoiced the applicants in their respective company names. Strong reliance is placed on the invoicing in arguing that this court would be justified in rejecting Post Paid's allegations and denials on the papers. But an invoice *per se* does not necessarily evince an agreement or even an offer and is to be construed in context and in the light of all the material facts. See *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 (1) SA 878 (A) at 981 *et seq*.

[14] The applicants have dismally failed to satisfy the stringent test for the facts alleged by Post Paid and its denials to be rejected merely on the papers. The version of Post Paid cannot be said to be 'so far-fetched and improbable that it can be rejected without evidence.' The disputes of fact that have arisen are clearly not capable of resolution on the papers. The evidence of the deponents needs to be tested by cross-examination.

[15] I now turn to Post Paid's argument that the application should be dismissed and not be referred to trial or for the hearing of oral evidence, because the alleged agreements on which the applicants rely had come to an end by the time this application was argued. The alleged agreements provide for their own duration. Each one was expressed to be for a specified duration of two years or 24 months. Post Paid was in terms of each agreement obliged to supply Getsoft, Neosoft or Conycare with a specified number of SIM cards preloaded with airtime equivelant to R100,00 per month for two years commencing in the case of Getsoft on 10 May 2013, Neosoft on 29 May 2013 and Conycare on 1 December 2012 and on 23 May 2013. Post Paid was in terms of each alleged agreement obliged to supply the SIM cards for a two year period and to preload them monthly with airtime equivalent to a specified money amount. Getsoft, Neosoft and Conycare were in terms of the alleged agreements obliged to pay a consideration of R21,00 per SIM card per month to Post Paid (except in the case of the alleged first agreement with Conycare where the agreed monthly consideration was R16,00 per SIM card). Thus, the reciprocal obligations of the parties were qualified by time clauses, which provide for the termination of their obligations at certain future dates. The two year period in each instance had expired by the time the application was heard in this court. The reciprocal obligations of the parties have therefore been terminated on account of the time clauses and each agreement ceases to exist. The applicants are no longer entitled to specific performance and an order referring the application to trial or for the hearing of oral evidence will effectively be a *brutum fulmen* (exercise in futility).

[16] In an attempt to escape the dismissal of the application on this ground and to avoid any adverse costs order, counsel for the applicants at the conclusion of his argument in reply moved a further application to amend the notices of motion by adding alternative prayers for declaratory relief that Getsoft, Neosoft, Conycare and Post Paid concluded the agreements as alleged by the applicants and that Post Paid repudiated each agreement. The issues forming the subject-matter of the declaratory relief, counsel for the applicants argued, are alive between the parties also in claims for damages which the applicants intend to institute against Post Paid in lieu of specific performance. The applicants' argument is thus to the effect that the decision sought in this application will have practical effect or result in a future case. Post Paid opposes the application for the amendments and I have not yet given a ruling thereon.

[17] It is a long-standing principle that 'courts of law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important.' (Per Innes CJ in *Geldenhuys and Neethling v Beuthin* 1918 AD 426 at 441 and see *Coin Security Group v SA National Union for Security Officers* 2001 (2) SA 872 (SCA) para 7.) To permit the belated amendments and to refer the declaratory relief claimed by the applicants to trial would simply result in the piecemeal adjudication of claims for damages which the applicants may institute in lieu of specific performance.

[18] I agree with the submission made by counsel for Post Paid that the principle enunciated in *Jenkins v S.A. Boiler Makers, Iron & Steel Workers & Ship Builders Society* 1946 WLD 15, at 17-18, is of equal application in a matter such as the present

one where the relief claimed has become moot by the time the matter is heard. Therein Price J said the following:

'I cannot imagine a more futile form of procedure than one which would require Courts of law to sit for hours, days, or perhaps even for weeks, trying dead issues to discover who would have won in order to determine questions of costs, where cases have been settled by the main claims being conceded. If the Court were eventually to say, that it awarded costs to a particular party because on the evidence that party would have won on that issue, would the disappointed party then be entitled to appeal in order to upset the decision as to who would have won on the dead issue that has been tried? This must necessarily follow if Mr. *Kuper's* application is entitled to succeed. When a case has been disposed of by an offer which concedes the main claim and the costs of the whole case have still to be decided, I think the Court must do its best with the material at its disposal to make a fair allocation of costs, employing such legal principles as are applicable to the situation. This is much to be preferred to laying down a principle which requires courts to investigate dead issues to see who would have won on such issues. In most such cases the litigants would be required to incur far greater costs than those at stake. In my view the costs must be decided on broad general lines and, not on lines that would necessitate a full hearing on the merits of a case that has already been settled.'

[19] Conycare's application was issued on 10 February 2014, Getsoft's one on 31 March 2014 and that of Neosoft on 16 April 2014. Post Paid's answering affidavit in the Getsoft application was filed on 13 May 2014, in the Neosoft application on 9 June 2014 and in the Conycare application on 26 September 2014. Getsoft, Neosoft and Conycare are represented by the same attorneys and counsel. There is also a close connection between the applicants and CIMS: Mr Demetre Kotsonis (the deponent to Conycare's affidavits) is a director and shareholder of Conycare and a director of CIMS;

Mr Norman le Roux (the deponent to Getsoft's affidavits) is the sole member of Getsoft, and he was until February 2014 also a director of CIMS; and Mr Richard Baldwin (the deponent to the Neosoft affidavits) is a director and the sole shareholder of Neosoft, and he is also a senior developer at CIMS. The applicants ought to have reasonably foreseen the existence of material disputes of fact that are not capable of resolution in the pending motion proceedings by the latest when Post Paid's answering affidavit in the Getsoft application was filed on 13 May 2014. But they doggedly persisted in seeking final relief in motion proceedings and in so doing caused Post Paid to incur unnecessary costs.

[20] In the result the following order is made:

(a) The applicants' application for leave to amend their notices of motion made at the conclusion of the hearing on 4 August 2015 is refused with costs, including those of senior counsel.

(b) The consolidated application is dismissed and the costs of the respondent incurred as from 14 May 2014 are to be borne by the applicants,

P.A. MEYER
JUDGE OF THE HIGH COURT

DATE OF HEARING:	4 August 2015
DATE OF JUDGMENT:	6 November 2015
APPLICANTS' COUNSEL:	EA Limberis SC
INSTRUCTED BY:	Christelis Artemides, Rosebank, Johannesburg
RESPONDENT.S COUNSEL:	A Subel SC (assisted by L Kelly)
INSTRUCTED BY:	Baker & McKenzie, Sandown, Sandton