

REPUBLIC OF SOUTH AFRICA

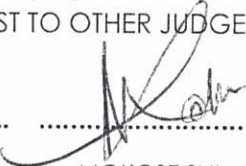


IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 2018/38332

- (1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED.

4/6/2019  
DATE

  
MOKOSE SNI

In the matter between:

TELKOM SA SOC LIMITED

Applicant

and

CHAIRPERSON, INDEPENDENT COMMUNICATIONS

AUTHORITY OF SOUTH AFRICA

1<sup>st</sup> Respondent

INDEPENDENT COMMUNICATIONS AUTHORITY

OF SOUTH AFRICA ("ICASA")

2<sup>nd</sup> Respondent

VODACOM (PTY) LIMITED

3<sup>rd</sup> Respondent

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JUDGMENT

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MOKOSE J

## **Introduction**

- [1] This is an application to interdict and thereafter review and set aside the decision of the second respondent dated 13 August 2018 in which it was resolved that it is technically and economically feasible for the applicant to grant access and accommodate the fibre optic cables of the third respondent in the applicant's ducts located at various residential estates in the Western Cape.
- [2] At this point, the applicant is seeking an order suspending the operation of the decision by the second respondent with immediate effect and interdicting the second and third respondents pending the outcome of the review in Part B of this application. The first and second respondents do not oppose Part A of the application but the third respondent opposes the relief sought by the applicant.

## **Material background facts**

- [3] On 23 December 2015 the third respondent initiated its request to the second respondent for access to ducts laid within and around several residential estates in the Western Cape Province after the applicant had refused access to its ducts. The second respondent invited the applicant to respond without determining the reasonableness of the request.
- [4] On 8 March 2016 the applicant responded to the invitation highlighting, *inter alia*, that:
- (i) it did not own all of the ducts referred to in the request;

- (ii) the identified ducts formed part of its electronic communications network and that it was not technically feasible to accommodate the third respondent's fibre optic cables in the ducts as requested.

- [5] In response, on the 18 April 2016, the third respondent suggested that an inspection *in loco* be conducted so as to determine the availability of space in the ducts which inspection was duly conducted.
- [6] On 7 June 2016 the second respondent requested further information from the applicant regarding its assertion that a minimum of thirty per cent (30%) space should remain unoccupied for maintenance and related activities and for the applicant's business plans.
- [7] The applicant responded on 23 June 2016 by providing documents relating to its business strategies and furnished a technical expert report by Detecon Consulting setting out the observations and findings of an inspection *in loco* of the applicant's ducts, indicating also that the third respondent had unlawfully gained access to some of its ducts. The applicant averred that it was desirous of resolving the alleged illegal conduct prior to dealing with the request.
- [8] During August 2016 the second respondent notified the applicant of its intention to conduct an inspection *in loco* and appointed a company, Africa Analysis, to assist. This inspection was held on 21 November 2016. However, at this time the applicant launched an application interdicting the first respondent and the Home Owners' Association of Dennegeur Estate in the Western Cape which interdict was granted.

[9] The second respondent's report was completed in March 2018 which report the applicant seeks to interdict the operation thereof pending the review of it.

[10] The third respondent's position is that the current legislation obliges the applicant to acquiesce to its request and that the applicant cannot prefer itself over a prior request made by it. The third respondent avers that the applicant does not have "the first entitlement" to roll out its FTTH (Fibre To The Home) infrastructure. Furthermore, it avers that it has undertaken to confine its access to three residential estates only and has no immediate intention to roll out FTTH in the other estates.

### **Issue**

[11] The issue to be determined by this court in the application for interim relief is whether the requirements for granting of interim relief have been met by the applicant.

### **Applicable law**

[12] The requirements for the grant of an interim interdict are as set out in the matter of *Setlogelo v Setlogelo*<sup>1</sup> which principles were refined in the matter of *National Treasury v Outa*<sup>2</sup> by Moseneke DCJ where it was held that the court must find on the evidence presented that:

- (i) the applicant has established a *prima facie* right;
- (ii) a reasonable apprehension of irreparable and imminent harm if the interdict is not granted;
- (iii) the balance of convenience must favour the grant of the interdict;

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<sup>1</sup> 1914 AD 221

<sup>2</sup> 2012 (6) SA 223 (CC)



- (iv) there must be an absence of a similar protection by any other remedy.

[13] The principles by which an application for a temporary interdict are judged are also set out in the matter of **Webster v Mitchell**<sup>3</sup> in which it was held that:

*"In the grant of a temporary interdict apart from prejudice involved, the first question for the court in my view is whether, if interim protection is given, the applicant could ever obtain the rights he seeks to protect. Prima facie that needs to be shown."*

[14] Section 43 of the Electronic Communications Act 36 of 2005 ("ECA") provides as follows:

*"(1)....(a) an electronic communications network services licence must on request, lease electronic communications facilities to any other person licenced in terms of this Act....in accordance with the terms and conditions of an electronic communications facilities leasing agreement entered into between the parties, unless such request is unreasonable.*

*(2) Where the reasonableness of any request to lease electronic communications facilities is disputed, the party requesting to lease such electronic communications facilities may notify the Authority in accordance with the regulations prescribed in terms of Section 44*

*(3) The authority must within 14 days of receiving the request or such longer period as is reasonably necessary in the circumstances determine the reasonableness of the request.*

*(4) For purposes of subsection (1), a request is reasonable where the Authority determines that the requested lease of electronic communications facilities –*

*(a) is technical and economically feasible; and....."*

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<sup>3</sup> 1948 (1) SA 1186 (W) at 1189

- [15] The court has a discretion whether or not to grant an interdict. No rules have been laid for the granting or refusal of interdicts but the court may decide each case on its own facts. The court must exercise this discretion judicially upon a consideration of all the facts.

### **Prima facie right**

- [16] The applicant submitted that it had set out sufficient facts to justify a *prima facie case* for interim relief pending the outcome of the main review for the following reasons, *inter alia*:

- (i) the procedural process had been materially unfair in that despite repeated requests by the applicant to convene a formal enquiry to deal with the multiple factual disputes and disputes of expert witnesses, the second respondent had failed and/or refused such requests;
- (ii) the second respondent had made the decision in the face of crucial material disputes and conflicting expert opinions without resolving them. Accordingly, the applicant had shown a *prima facie case* for review of the second respondent's decision;
- (iii) the second respondent had relied on information which was not disclosed to the applicant in order to arrive at the decision;
- (iv) an incorrect interpretation of Section 43(4)(a) of the ECA where the second respondent was required to inquire into and make a determination on the technical feasibility of the third respondent's request for access;
- (v) the second respondent's failure to comply with the mandatory provisions as provided in the ECA;

- (vi) the second respondent had acted irrationally and unlawfully *prima facie* when making the decision to grant the third respondent access to the applicant's ducts and as such, the decision is tainted and therefore reviewable.

[17] The applicant brought to the court's attention the recommendations of the second respondent being the following:

"1) *Inform the parties of its findings and instruct Telkom to grant access to the complainant at a reasonable cost and under non-discriminatory terms.....*

*Failure of the parties reaching an agreement, the Authority should apply any of the three positions prescribed by section 43 of the ECA in order to resolve the dispute; whereby it can....."*

[18] The procedure is such that should the parties fail to agree such terms and conditions, the second respondent should apply any one of three positions prescribed in Section 43 of the ECA in order to resolve the matter. It may impose terms and conditions consistent with Chapter 8 of the ECA, propose terms and conditions consistent with Chapter 8 which must be agreed by the parties within such specified period or it may refer the dispute to the Complaints and Compliance Committee ("CCC") for resolution in accordance with Section 46 of the Act.

[19] The applicant accordingly argued that such a decision can therefore not be implemented immediately. Accordingly, an interdict must be granted.

- [20] The third respondent avers that the applicant seeks only to protect its right to review the second respondent's decision through an interim interdict. The third respondent is of the view that as set out in the National Treasury matter (*supra*) the *prima facie* right that the claimant must establish is not merely the right to approach a court in order to review an administrative decision.<sup>4</sup> Given that the right of review is the only right relied upon by the applicant and that the Constitutional Court has rejected such argument as a basis to justify interim relief, the applicant's application should fail.
- [21] The third respondent was also of the view that the grounds for the review are not *prima facie* right and as such, the applicant must show that its rights are being infringed upon in the interim.
- [22] Having heard the arguments by the parties, I am of the view that the applicant has set out sufficient facts to justify a *prima facie* case for interim relief pending the outcome of the main review. It is evident that the second respondent failed to comply with the mandatory provisions of the ECA in that none of the three positions as prescribed in the ECA have been complied with to resolve the matter.

### **Irreparable Harm**

- [23] The second requirement for an interim interdict is a well-grounded apprehension of irreparable harm if the interim interdict is not granted. The loss may consist of an irredeemable breach of the applicant's rights.

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<sup>4</sup> Setlogelo v Setlogelo 1914 AD 22 at 227



[24] The applicant is of the view that it will suffer irreparable harm as the implementation of access is likely to bring about irreversible consequences unless it is interdicted. The harm foreseen by the applicant includes:

- (i) the loss of an opportunity to have its submissions considered in accordance with a fair and legal process as contemplated in the ECA as well as the loss of an opportunity to profit from the use its own ducts;
- (ii) should the third respondent be allowed to proceed in the interim, it will become difficult for the applicant to reverse the consequences.

[25] The third respondent, on the other hand, is of the view that the only harm that the applicant would suffer is the harm that would flow from "implementation of access" and not that flowing from the implementation of the second respondent's decision. Accordingly, the application must fail because the relief claimed is so broad that it seeks to interdict conduct which would give rise to no harm.

[26] In reviewing the decision by the second respondent, the review court will have to consider whether it is just and equitable to reverse the actions flowing from the said decision. Some of the decisions will have irreversible consequences and as such, irreparable harm may befall the applicant. Furthermore, the third respondent in its answering affidavit confirmed that there is 'a significant advantage to being the first mover in the FTTH market'. In the premises, I am of the view that a case has been made out by the applicant for irreparable harm which needs to be avoided by means of an interim interdict.

## Balance of convenience

- [27] The third requisite for an interim interdict is a balance of convenience in favour of the granting of the interim relief. The court must weigh up the prejudice to the applicant if the interim interdict is refused against the prejudice to the respondent if it is granted.<sup>5</sup>
- [28] The applicant was of the view that what weighs heavily in its favour is that the second respondent has failed to comply with the statutory pre-conditions for the lawful exercise of its powers. In reply, the applicant also brought to the court's attention that it had plans to rollout fibre optics in the affected residential estate as part of its strategic plan. Accordingly, it is not convenient and does not conduce to orderly administration to allow the third respondent to proceed with the implementation of the decision by the first respondent which will bring about difficulties where a prima facie case of review has been shown.<sup>6</sup>
- [29] The third respondent was of the view that the applicant seeks to resist its entry and commencement of competition for clients with the relevant estates. The applicant will, whilst the proposed interdict is in effect, sign up the clients and set prices as an exclusive supplier without competition as to price or service levels. Permitting its entry will benefit the residents of the estate with competitive pricing, so too will they enjoy the benefit of choice. Accordingly, it will suffer the greater prejudice should the interim interdict be granted.

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<sup>5</sup> Tshwane City v Afriforum 2016 (6) SA 279 (CC) at 302B - C

<sup>66</sup> Esorfranki Pipelines (Pty) Ltd and another v Mopani District Municipality and others [2014] 2 All SA 493 (SCA) para 20

[30] In assessing the balance of convenience the court is required to consider various interests including the prejudice to the applicant if the interim interdict is refused against the prejudice to the respondent if it is granted. Having considered the interests of both parties, I am of the view that the prejudice to the applicant in this matter, far outweighs the prejudice to the third respondent. As such, a case has been made out by the applicant in respect of the balance of convenience.

#### **No other satisfactory remedy**

[31] The fourth requisite for the granting of an interim interdict is the absence of another adequate ordinary remedy.

[32] The third respondent had provided the applicant with undertakings to pay for any damage that may be sustained in the process of removing cables, in the unlikely event that the third respondent is required to do so. Accordingly, should the applicant take over the installed FTTH cables the likelihood of damage would be minimal as they would not be removed.

[33] The applicant's complaint is that the arrival of the third respondent may reduce its ability to make profits from clients in the affected estates and as such is without a remedy. This has not been denied by the third respondents.

[34] In view of a lack of a challenge to the applicant's contentions in this regard, I am of the view that the applicant has no alternative remedy available to it.

[35] Accordingly, the following order is granted:

- (i) the applicant's non-compliance with the rules relating to time periods, service and forms and that Part A be disposed of as urgent in terms of Rule 6(12) of the Uniform Rules of Court is condoned;
- (ii) pending the final determination of the relief sought in Part B as set out in this notice of motion, it is ordered that:
  - (a) the decision of the second respondent, the INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA (ICASA) communicated to the applicant by letter of 13 April 2018 and purported to be explained in the report accompanying that letter attached to the founding affidavit marked annexures "FA1" and "FA2" to authorise the third respondent to gain access to the applicant's ducts located at various residential estates in the Western Cape is suspended with immediate effect;
  - (b) ICASA and the third respondent are interdicted and restrained from taking any steps to implement the decision in any form or shape.
- (iii) the respondents who oppose Part A of this application jointly and severally, are liable for costs occasioned by such opposition, including the cost of two counsel.

A handwritten signature in black ink, consisting of a large, stylized 'M' followed by a cursive 'J' and a horizontal line.

MOKOSE J

Judge of the High Court of South Africa

Gauteng Division, Pretoria



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For the Third Respondent:

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Cliffe Dekker Hofmeyr Inc

Date of Hearing: 1 March 2019

Date of Judgement: 4 June 2019