IN THE SOUTH GAUTENG HIGH COURT (JOHANNESBURG)

Case Number: 2009/48153

In the matter between:

POOOSH CELLULAR (PTY) LTD	Applicant
And	
ITALK CELLULAR (PTY) LTD	First Respondent
MTN HOLDINGS (PTY) LTD	Second Respondent
MOBILE TELEPHONE NETWORKS (PTY) LTD	Third Respondent
MTN SERVICE PROVIDER (PTY) LTD	Fourth Respondent

JUDGMENT

C. J. CLAASSEN J:

[1] This is an application pursuant to the provisions of Rule 49(11) of the Uniform Rules of Court. The applicant seeks the leave of this court to execute upon a judgment in its favour pending the outcome of an appeal lodged by the respondents to the Full Court of this Division. This sub-rule states:

> "Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary any order of court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave the order, on the application of a party, otherwise directs."

INTRODUCTION

[2] On 31 October 2008 the applicant and first respondent concluded a "Corporate Network Service Subscription Agreement" (the "Agreement"). [1] In terms of this agreement, the first respondent was required to supply to the applicant certain telephony products described as "value added telephony products" as well as certain telephony services such as "Push to Talk", e-mail, chat rooms, faxing and discounted calls. The network which was required for these telephony goods and services was operated by the third respondent in terms of a sub-licence granted to the first respondent. The duration of this contract was to last for a minimum of two years subject to termination by either party upon notice being given.

[3] Approximately ten and a half months into the contract and on 17 September 2009 the applicant issued its first purchase order for 301 "HO1 MTN Anytime 50 TopUp" items from the first respondent. [2] Although the order was intended for the first respondent, for some reason it was sent to the fourth respondent instead, who promptly rejected the order. [3] Subsequent hereto a litany of correspondence between the respective parties' attorneys of record ensued culminating in the applicant's attorneys threatening legal action in the form of urgent interim relief.

[4] On 21 October 2009 the sub-licence agreement which entitled the first respondent to supply the products and services to the applicant, was cancelled.

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[1] See annexure "DT2" to the founding affidavit in the main application at p 68.
[2] See annexure 2 on p 107 of this application.
[3] See paragraph 21 of the judgment of Farber AJ on pp 22 – 23 of this application.

[5] On 13 November 2009 the applicant issued an urgent application, which I will refer to as "the main application", for an order (i) declaring the Corporate Network Services Subscription Agreement valid and enforceable; and (ii) declaring that the first respondent is obliged to honour the order for 301 units dated 17 September 2009. This application was argued before Farber AJ on 1 and 2 December 2009 where after he handed down a written judgment [4] on 24 December 2009. In his judgment the declaratory orders asked for were granted together with an order for costs against the respondents jointly and severally.

[6] On 18 January 2010 the respondents issued an application for leave to appeal the aforesaid judgment. This application was argued on 16 February 2010 and leave was granted by Farber AJ to appeal his judgment to the Full Court of this Division.

[7] Approximately three weeks thereafter and on 5 March 2010, the applicant issued the present application against the respondents. Paragraph 1 in the notice of motion was incorrectly worded resulting in an objection thereto being raised by the respondents. The applicant was obliged to amend prayer 1 by the deletion of the words "…application for leave to…" in order for the prayer to be effective. The applicant filed a notice of amendment on 25 March 2010 which amendment was duly granted. The notice of motion in this application now reads as follows:

> "1. Directing that the judgment granted by his Lordship Mr. Justice Farber on 24 December 2009 shall continue in force until the outcome of the respondents' appeal.
>
> 2. Directing that the applicant shall not be required to furnish security.
>
> 3. Costs.
>
> 4. Further and alternative relief."

[4] See annexure A pp 14 – 39 of this application.

[8] A further skirmish ensued between the parties in regard to the time period within which the respondents were to file their answering affidavits. [5] Ultimately, the answering affidavits were filed on 13 April 2010 and the applicant's replying affidavit on 16 April 2010.

THE APPLICABLE LAW

[9] It is trite that Rule 49(11) constitutes a codification of the common law regarding the effect on judgments when an appeal is lodged. [6] The accepted common law rule of practice in our courts is that, generally speaking, the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, a judgment cannot be carried out and no affect can be given thereto, except with the leave of the court which granted the judgment. The purpose of this rule as to the suspension of a judgment on the noting of an appeal, is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from.

[10] To obtain such leave, the party in whose favour the judgment was given must make a special application. The court, to which application for leave to execute is made, has a wide and general discretion to grant or refuse such leave. It is common cause that the *locus classicus* in regard to applications for leave to execute pending an appeal, is the judgment of Corbett JA in **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd** 1977 (3) SA 534 (AD) at 545 where the learned Judge of Appeal stated the following:

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[5] See the letters in the document headed "INDEX IN RESPECT OF CORRESPONDENCE ON APPLICATION FOR LEAVE TO EXECUTE".

[6] See **United Reflective Converters (Pty) Ltd v Levine** 1988 4 SA 460 (W) at 463F.

> "In exercising this discretion the Court should, in my view, determine what is **just and equitable** in all the circumstances, and, in doing so, would normally have regard, ***inter alia***, to the following factors:
>
> (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
>
> (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;
>
> (3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, e.g., to gain time or harass the other party; and
>
> (4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, **the balance of hardship or convenience**, as the case may be." (Emphasis added)

[11] Previously the question of who bears the onus of satisfying the court that the application should succeed or be refused was a vexed one. However, this has now been settled by Corbett JA in the **South Cape Corporation** case *supra* at 546D – F, where the learned Judge of Appeal said the following:

> "Approaching the matter on principle, one starts with the basic rule that the due noting of an appeal suspends the operation of the judgment and that, if the party in whose favour it has been given wishes it to be put into execution, he must make special application for leave to do so. He, being the claimant for relief, must satisfy the Court that there are good grounds for the exercise by the Court of **its general discretion** in his favour. This means that the overall *onus* of establishing a proper case for the grant of leave to execute would rest upon the applicant and**, if at the end of the hearing the Court were left in doubt as to the essential facts or as to whether it was an appropriate case of the grant of leave, then the application should be refused**." (Emphasis added)

THE MERITS OF THE APPLICATION

[12] Upon a perusal of the papers and after hearing argument, I have come to the conclusion that this is indeed a case where both parties may

potentially suffer some prejudice or harm whichever way the decision goes. I came to this conclusion for the following reasons.

[13] It is common cause that the contract concluded between the parties will terminate on 31 October 2010. This is so because the contract expressly provides that it will last for two years and because the respondents contend that it had already terminated alternatively, without prejudice to its allegations in this regard, gave notice of such termination in their answering affidavits.[7] Currently, the applicant is left with the remaining six months of a twenty four month contract during which it would be able to reap the benefits therefrom. If leave to execute is refused and the appeal is only heard and possibly completed towards September 2010, then, if the applicant is successful in the appeal, it would be left with only a month or so to exercise any of its contractual rights. Such prejudice suffered by the applicant can only be remedied by a claim for damages against the respondents, which the applicant contends will be difficult to quantify.

[14] The applicant would be further prejudiced if leave to execute is not granted in that it may forego the beneficial contractual provisions which it had negotiated for itself in the agreement. It is not in dispute that the applicant is entitled to a discount of between 22% and 24% from the first respondent on orders for products placed by the applicant. If leave to execute is refused, the applicant would obviously be unable to enforce these beneficial contractual rights within the curtailed contract period.

[15] On the other hand, if leave to execute is granted, the respondents, and in particular the first respondent, would also suffer harm and prejudice. In particular, the answering affidavits in some detail indicate that the first respondent has been divested of its personnel and assets which will

[7] See paragraph 24.2 of the answering affidavit at pp 54 – 55.

render it unable to provide any products and services to the applicant pursuant to the provisions of the agreement. It is alleged that this process of stripping the first respondent commenced well before the application was issued and pursuant to the respondents' *bona fide* view that the agreement had already been cancelled. Should leave to execute be granted, the first respondent would have to reassemble its staff and product to comply with its contractual obligations, a costly exercise which according to the respondents would be exorbitant.

[16] Furthermore, even if it was able to reassemble its personnel, it would not be able to provide the contractually required products and services since the sub-licence which enabled it to do so, has been terminated. Although this of course is not the fault of the applicant, it is a circumstance which a court must take into account when weighing up the just and equitable circumstances for purposes of exercising its wide discretion. Thus, should leave to execute be granted, the first respondent would immediately be rendered in breach of the provisions of the agreement with all the prejudicial consequences attached thereto.

[17] To a certain extent, the potential prejudice sufferable by the applicant, should leave to execute be refused, may be ascribed to its own fault. It wasted almost half of the contractual period before placing the first order with the first respondent. In addition, such order was not for a substantial amount of items but only for 301 units which was 1 more than the minimum per order permitted by the contract. This conflicts with the applicant's purported intentions to order thousands of units of product as alleged by the applicant in the main application. Furthermore, it is common cause that the applicant was able to obtain similar products for resale by it in the open market and admitted to spending 2.5 million rand in advertising such similar products. In so doing, it acquired fifty thousand clients using such similar products. This is not a case where

the applicant will be crippled by being denied all access to such product in the event of leave to execute being refused.

[18] The respondents, in its answering affidavits, make out a substantial case that the computation is not that difficult to quantify any potential damages suffered by the applicant in the event of the appeal going its way. Of course, in an application such as this, the Plascon Evans-rule applies and the allegations of the respondents in regard to this kind of dispute of fact have to be accepted. In the present case the applicant's real loss would be in foregoing the beneficial terms in regard to the discount which the agreement affords it. However, the respondents have indicated that discounts, although of a lesser amount, are in fact available in the industry should the applicant have to forego the beneficial discounts in the present agreement, thus minimising any potential loss to the applicant.

[19] Based upon the aforesaid considerations it would seem to me that the balance of hardship or convenience is in favour of an order refusing leave to execute.

[20] I have not yet considered the prospects of success on appeal. In doing so Let me say immediately that I cannot find the respondents' noting of the appeal to have been frivolous or vexatious. In my experience, when it concerns interpretation of contracts, an appeal is often allowed unless the interpretation is so clear and unambiguous that no other conclusion can be arrived at. In my view, reading the contract in the present case, it cannot be said that the contract is so explicitly clear and unambiguous that the appeal as wholly unfounded. For that reason alone I am of the view that it cannot be said that the appeal was noted for an ulterior purpose i.e. to gain time in order to prejudice the applicant in the exercise of its contractual rights. The fact that Farber J granted leave to

appeal is further confirmation of this conclusion. In this regard it must also be noted that the delays in bringing this matter to finality are attributable to both the applicant and the respondents. The applicant substantially delayed in activating the contract by ordering the product to which it was entitled. It also delayed the matter by making procedural mistakes in the drafting of its notice of motion in this application. Similarly, the respondents are also at fault in taking points unnecessarily and elevating procedural issues to substantive issues when reasonable conduct could have avoided the resulting delays.

[21] Finally, it would seem to me that the scales of justice weigh heavily in favour of the respondents by virtue of their undertaking to hold available an amount of "R10 million rand in cash within the first respondent pending the outcome of the appeal". Should the applicant ultimately be successful in the appeal, any claim for damages and costs which it may have will in fact be secured by the aforesaid amount. Of course, the applicant cannot be assured that such amount will be retained for its benefit in the event of the appeal being decided in the applicant's favour. However, if such offer had been made earlier and prior to the issue of this application, the applicant may very well have been persuaded to accept it. Such acceptance may have averted this application. By the time it was made in the respondents' answering affidavits, the battle lines had been drawn and attitudes had hardened. It would therefore seem just and equitable to issue an order under the prayer "further and/or alternative relief" in the notice of motion, to secure such amount for the potential benefit of the applicant pending the unfolding of further events. Thus, if leave to execute is refused, justice would prevail by protecting the respondents from unnecessary harm and so too would the applicant's interests be protected if the amount of R10 million remains available to it, subject to appropriate conditions. In my

view the amount of R10 million is more than adequate for these purposes considering the applicant's own projections of revenue. [8]

COSTS

[22] In view of my finding that all the parties share the blame for the delays in this matter and the order I propose to make, it would seem to me to be an equitable exercise of my discretion in regard to costs, to order each party to bear its own costs.

CONCLUSION

[23] Based on the aforesaid reasons, I am of the view that a just and equitable order in these circumstances would be as follows:

1. The application is refused.

2. The respondents are ordered to retain an amount of R10 000 000.00 (ten million rand) in cash set aside within the first respondent pursuant to the undertaking contained in paragraph 37.2 of the respondents' answering affidavit as security for any judgment for damages and costs or other relief awarded to the applicant arising out of the current litigation pending between the parties.

3. The order in 2 above will operate with immediate effect pending the final outcome of the appeal lodged by the respondents.

4. In the event of the applicant failing to institute an action for damages and costs and/or any other relief it may be advised to

[8] See annexure 3 p 108 of this application.

seek, within 30 days after the final outcome of the aforesaid appeal, the order in 2 and 3 above will lapse.

5. Each party is to pay its own costs of this application.

SIGNED AND DATED THE 24th DAY OF MAY 2010 AT JOHANNESBURG.

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C. J. CLAASSEN
JUDGE OF THE HIGH COURT

Counsel for the Applicant:	Counsel for the Respondents:
Adv T. Beckerling SC	Adv A. R. Bhana SC
Adv J. Heher	Adv T. Massyn
Attorney for the Applicant:	Attorney for the Respondents:
Fluxmans Incorporated	Mashiane, Moodley & Monama Inc

Argument was heard on 22 April 2010.