IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

12/05/2016

CASE NUMBER: 33647 / 2012

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

12 / 05 / 2016
DATE

SIGNATURE

In the matter between:

TELFREE COMMUNICATIONS PROPRIETARY LIMITED — APPLICANT

And

MOBILE TELEPHONE NETWORKS PROPRIETARY LIMITED — RESPONDENT

JUDGMENT

MAVUNDLA J;

[1] On the 6 November 2015 this Court dismissed with costs the applicant's urgent application without advancing the reasons for such order. The reasons are herein below set out.

[2] The applicant approached this Court on urgent basis seeking an order directing the respondent to restore full short message services (SMS) sending and receiving capabilities ("services") to it as a matter of urgency. In addition to the restoration, the applicant sought an order confirming that the respondent is interdicted from restricting the applicant's access to the respondent's network "until the time as this application is resolved in full".

[3] In its papers the applicant contended that the purposes of the application was to interdict the respondent to restore the normal short message service (SMS) network access and functioning granted to the applicant by virtue of an Interconnection Agreement for voice and message (SMS) entered into as long ago as during 2006, together with subsequent fee arrangement relating to SM traffic of 2 October 2008.

[4] It was not the first time that the parties locked horns over the issue of the connectivity on the respondent's network. The parties had locked horns on no less than four occasions, namely on the 14 June 2012, 6 September 2012, 8 March 2013 and 1 November 2013. All four orders were in the nature of an interim interdict against the respondent ordering it not to suspend the applicant's SMS traffic transmitted over the respondent's network. There is also a main application pending in the South Gauteng High Court.

[5] The dispute between the parties is raging on without any quarter asked or given by any of the parties. At the centre of the dispute, is whether the applicant is entitled to be connected over the respondent's network. The respondent contends that the applicant is not entitled to connectivity without payment. There is a dispute between the parties as to which agreement prevails, or whether there was any cancellation of any of the agreements. There is a further dispute between the parties as to the terms and the tariff upon which the applicant should be billed, and also a dispute over some of the invoices issued to the applicant by the respondent. Because of the disputes between the parties, this Court was not satisfied that the applicant has established a right to be provided with connectivity in particular without payment.

[6] It would seem that the services over which the parties have locked horns, translate for either party in substantial financial interest, running into millions. Either way there is potential substantial financial loss to the applicant as a result of non-connectivity, equally too for the applicant as a result of "free services" to the applicant. In my view, the scale of convenience in respect of both parties, being at equilibrium, this Court was not inclined to tilt the scale in favour of the applicant. In my better judgment, the best cause to follow is to decline to grant the applicant the relief it sought. In this regard, I take guidance from what Chetty J held in the matter of *Bandle Investments (Pty) Ltd v Registrar of Deeds and Others*[1] that an applicant seeking a temporary interdict, must satisfy the Court:

"(i) that the right which is the subject-matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established though open to some doubt;

(ii) that, if the right is only prima facie established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;

(iii) that the balance of convenience favours the granting of interim relief; and

(iv) that the applicant has no other satisfactory remedy.

See L F Boshoff Investments (Pty) Ltd v Cape Town Municipality; Cape Town Municipality v L F Boshoff Investments (Pty) Ltd1969 (2) SA 256 (C) at 267.....

In considering the balance of convenience it behoves me to take cognisance of the fact that the refusal of the relief sought will cause the loss of the right, whilst granting the relief will cause the respondents no loss whatsoever. In fact if the right lapses, it reverts to the third respondent who thereby acquires an extremely valuable right. What should be avoided is the possibility of doing an injustice. It is apposite in this context to refer to the remarks of Hoffman J in the English case of Films Rover International Ltd and Others v Cannon Film Sales Ltd [1986] 3 All ER 772 (Ch) at 780 - 1, where he stated:

'The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the "wrong" decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong" in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle.'

[1] 2001 (2) SA 203 (SECLD) at 214 I-p215B, H215H-216A-B.

[7] In so far as the applicant's application, it is seemingly one of *mandament van spolie*, this Court was not satisfied that indeed resorts under spoliation. It is trite that in spoliation proceedings, the applicant must prove that he was in undisturbed possession and has been unlawfully or wrongfully deprived. The despoiled is entitled to restoration, without the court having to interrogate any dispute regarding the items forming subject of spoliation; *Zulu v Minister of Works, KwaZulu, and Others*[2].

[8] In the matter of *Nienaber v Stuckey*[3] the Appellate Court held that:

"Where the applicant asks for a spoliation order he must make out not only a *prima facie* case but must satisfy the Court on the admitted or undisputed facts, by the same balance of probabilities as is required in every civil suit, of the facts necessary for his success in the application."

[9] In the matter of *ATM Solutions (Pty) Ltd v Olkru Handelaars CC*[4] the Supreme Court of Appeal held that:

"[9] The cases where quasi-possession has been protected by a spoliation order have almost invariably dealt with rights to use property (for example, servitudes or the purported exercise of servitudes—'gebruiksregte') or an incident of possession or control of the property. The law in this regard was recently succinctly stated in *FirstRand Ltd v Scholtz NO*[5] where Malan AJA pointed out that spoliation order—

'does not have a "catch-all function" to protect the quasi-possession of all kinds of rights irrespective of their nature. In cases... where a purported servitude is concerned the *mandament* is obviously the appropriate remedy, but not where contractual rights are in dispute or specific performance of contractual obligations is claimed: its purpose is the protection of quasi- possession of certain rights. It follows that the nature of the professed right, even if it need not be proved, must be determined or the right characterized to establish whether its *quasi possessio* is deserving of protection by the *mandament.*[6]'

[10] In the matter of *Telkom SA (Pty) Ltd v Xsinet (Pty) Ltd* [7] the Supreme Court held that:

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[2] 1992 (1) SA 181 (D) at 187.
[3] 1946 AD 1049 at 1053-4.
[4] 2009 (4) SA 337 (SCA) at 340 I-341C.187I.
[5] 2008(2) SA 503 (SCA) at510 B-C.
[6] See also *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 (5) SA 309 (SCA) at para 14; *cf Impala Water Users Association v Lourens NO and Others* 2008 (2) SA 495 (SCA), reported first in [2004] 2 ALL SA 476, where the court considered that rights to water in issue were not purely contractual in origin and that they were protected by *mandament*.
[7] 2003 (5) SA 309 (SCA).

"[13]...in these circumstances it is in my opinion both artificial and illogical to conclude on the facts before the Court that *Xsinet's* use of the telephones, lines, modems or electrical impulses gave it 'possession' of connection of its corporeal property to Telkom's system. [14] In the alternative counsel argued that the quasip0ssession of the right to receive Telkom's telecommunication services consisting of the actual use (daadwerklike gebruik') of those services must be restored by possessory remedy. This is, however, a mere personal right and the order sought is essentially to compel specific performance of contractual rights in order to resolve a contractual dispute. This has never been allowed under *mandament van spolie* and there is no authority for such an extension of the remedy..."

[11] It is apposite to cite the matter of *Microsure (Pty) Ltd and Others v Net1 Applied Technologies SA Ltd* 2008 ZAKHC 111 where the Court held that:

"The mere disconnection of communication along physical telephone lines in an exchange would however not in my view amount to spoliation. That is a matter for the law of contract. If the lines were not physical telephone lines, buy cell phone connections through sim cards and the like, then I respectfully differ from the conclusion of the learned Judge, as the mere disconnection or rendering inoperative of the sim cards by performance of some act in the cell phone provider's computer centre, would not in my view constitute spoliation."

[12] The applicant did not satisfy this Court that it was in possession of the respondent's network from which the applicant seeks connectivity, nor of the facility itself which triggers connectivity. The applicant did not satisfy this Court that the relationship between the parties does not arise from a contract. From the authorities cited herein above spoliation does not apply in this case and the matter simply had to be dismissed for the said reason as well.

[13] The respondent engaged the services of three counsel. The matter was brought on urgent basis, issued on the 3 November 2015, inviting the respondent to inform the applicant's attorneys on or before 16h00 on Tuesday 3 November 20015 of its intention to oppose and file answering affidavit on or before 12h00 on Wednesday 4 November 2015. The respondent was invited to Court to lock horns at 1400 on Thursday 5 November 2015. The applicant's papers ran into one hundred and four (104), pages which were quite voluminous.

[14] The respondent was hardly given any time to make any informed decision. It had to hit the ground running. The respondent managed to prepare an answering affidavit inclusive of annexure running into about four hundred and fifty eight (458) pages in

less than two days. The papers were filed at court on the 5 November 2015. The applicant had truncated the time limits to a bear minimal. The importance of the matter to both parties is demonstrated by the fierce litigation and the number of times the parties had been to court. The respondent in the circumstances was justified and entitled to engage the services of three counsel to meet the dead lines.

[15] The Courts have repeatedly warned that a party, who approaches the Court on urgent basis, must truncate the time frames wisely, afford its opponent sufficient time to prepare its opposing papers, and also allocate enough time for its replying affidavit. *In casu* the applicant hardly provided itself with time to file its replying affidavit. It could hardly cry foul that it was not afforded time to file its replying affidavit because that was the desert it created for itself; *vide Gallagher v Norman's Transport Lines (Pty) Ltd.*[8]

[16] In the result for the aforesaid reasons the following order was granted:

That the application is dismissed with costs inclusive costs of the employment of three counsel.

N.M.MAVUNDLA

Date of Hearing	:	06 / 11 / 2015;
Date of Judgment	:	12 / 05 / 2016
APPLICANTS' ADVOCATE	:	ADV JC KLOPPERS
INSTRUCTED BY	:	MASHIANE MOODLEY & MONAMA INC.
RESPONDENT'S ADVOCATE	:	ADV. LEE MORISON SC with ADV. TEBOHO MANCHU
INSTRUCTED BY	:	MARITZ SMITH VAN EEDEN INC.

[8] 1992 (3) SA 500 at 502E-503 D.