

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO: J1476/07

In the matter between

VODACOM (PTY) LTD

APPLICANT

AND

COMMUNICATION WORKERS UNION

1ST RESPONDENT

AND THE INDIVIDUAL RESPONDENTS

2ND RESPONDENT

REFERRED TO IN ANNEXURE “A”

JUDGEMENT

PARTIES

- 1) The applicant in this matter is Vodacom (Pty) Ltd (hereinafter referred to as ("Vodacom"). Vodacom is involved in the communications industry and provides cellular communications and broadband via its network. The first respondent is the Communication Workers' Union a registered union that represents a number of employees (hereinafter referred to as "the union"). It is in dispute how many employees are represented by the union. It is Vodacom's contention that the union represents about 8% (432 members) of the workforce whereas it is the union's contention that it has 1078 members.

NATURE OF THE APPLICATION

- 2) This is the return date of an urgent application heard by Pillay J. The learned judge granted an order in terms of which the strikers are interdicted from entering the premises of Vodacom, interfering and or obstructing, intimidating, assaulting and/or threatening any employee or client. The order operated with immediate effect as an interim order pending the return date of the rule *nisi*.
- 3) This application concerns the alleged unlawful conduct of the individual respondents who are all members of the union (hereinafter referred to as

“the strikers”) and their alleged unlawful and unprotected conduct. More in particular it is alleged that the strikers are in breach of picketing rules that are binding on them (see hereunder).

- 4) For purposes of this application it is accepted that the strike action was protected. I will return to this point hereinbelow.

BRIEF HISTORY

- 5) From the papers it appears that Vodacom and the union have been embroiled in a dispute regarding organizational rights as far back as November 1999. More recently in November 2006, the union referred another organizational rights dispute to the CCMA. On 8 February 2007 a conciliation meeting was held. The dispute could not be settled and a certificate was issued in terms of which it is stated that the dispute was one of mutual interest and that the dispute could accordingly be the subject of strike action. An interim interdict was granted on 12 March 2007 interdicting the strike action. However, on the return date Rampai AJ was of the view that the strike action engaged in by the union and its members constituted a lawful strike and therefore discharged the rule *nisi* issued on 12 March 2007. Although Vodacom has applied for leave to appeal against the decision, it is apparent that the decision of Rampai,

AJ is determinative at this stage as to the lawfulness and protected nature of the present strike.

- 6) On 1 June 2007 the union advised Vodacom of its intention to engage in lawful and protected industrial action due to commence on 6 June 2007 in support of its demands relating to the organizational rights dispute referred to the CCMA and temporarily interdicted by the Labour Court prior to the discharge of that order.
- 7) Immediately upon receipt of the strike notice, Vodacom issued the union with a 48 hours statutory notice in terms of section 64(1)(c) of the Labour Relations Act of the imposition of a lawful and protected lock-out. This defensive lock-out was only in respect of employees who participated in strike action on Wednesday 6 June 2007. On 6 June 2007 none of the members of the union participated in the intended strike action and the lock-out was accordingly not implemented. Although various discussions took place between Vodacom and the union in respect of the dispute, the dispute could not be resolved.
- 8) On 29 June 2007 Vodacom received a further letter in terms of which Vodacom was advised of the upliftment of the strike suspension and its intention to embark on strike action on 2 and 3 July 2007. Again Vodacom advised the union on 29 June 2007 of its intention to impose a

lawful and protected lockout in respect of those members who participate in the strike.

- 9) On 29 June 2007 Vodacom forwarded a letter to the union expressing concern with the notice received from the union in terms of which it is expressly stated that the members of the union intended marching “in” the premises of Vodacom. In this letter it was expressly pointed out that Vodacom would not tolerate a march in or upon any of its premises as that was contrary to the rules on picketing and access dated 12 March 2007 and imposed by the CCMA. The union was further advised that the union should clarify whether it intended that a march take place in the company’s premises and that should this happen, Vodacom intended to approach the Labour Court for an order interdicting such action. No response was received from the union.
- 10) At this juncture it should be pointed out that on 12 March 2007, the CCMA imposed rules on picketing and access. Although it was initially the case for the Respondents that the picketing rules did not apply the moment Vodacom instituted the lock-out, it was, however, conceded in argument that the picketing rules applied both during the strike as well as during the lock-out.

THE EVENTS OF MONDAY 2 JULY 2007

- 11) On Monday 2 July 2007 a large number of employees gathered outside of the premises of Vodacom. It was the case for Vodacom that the strikers were striking on the premises at the entrance of Vodacom in the street in contravention of Rule 21.6 of the picketing agreement in terms of which it is stated that –

“A picket will take place on the first row of the parking area in front of Commercial Park. No more than 20 picketers are allowed to be here at any given point in time. 10 picketers are allowed on either side of the pedestrian bridge. If there is a breach of this ruling, the employer will in consultation with the union, withdraw the permission to picket inside the parking area.... The entrance to the campus will not be obstructed in any way.”

- 12) The founding affidavit sets out in great detail the nature of the unlawful acts committed by the individual strikers on 2 June 2007. According to Vodacom the individual strikers blocked access to and egress from the premises to other employees and third parties, hammered on the windcreens of motor vehicles of third parties seeking to enter and gain access and egress. In broad terms it was the case for Vodacom that the strikers irate and frightened employees and customers and created a volatile and unpredictable situation as a consequence of their belligerent

attitude. Although the strikers were requested to move away from the entrance to allow cars to access and egress the premises, they refused. These acts were witnessed and confirmed by two employees of Vodacom.

- 13) The assistance of the South African Police Services was also sought. However, when the police informed the strikers that they were not permitted to interfere with the public access to and egress from the premises, a certain union official Mr. Mike Gwamanda (hereinafter referred to as “Gwamanda”) argued with the police and informed them that they had permission to block the road and that, because the strikers were on a protected strike, they were permitted to block the road. When Mr Berriman (an employee of Vodacom – hereinafter referred to as “Berriman”) tried to distribute lock-out notices to the strikers, Gwamanda told employees not to accept the notices and physically pushed Berriman out of the way. The lock-out notices were also thrown on the ground. Mr Lapham (the Group Executive: Employee Relations- hereinafter referred to “Lapham”) also addressed the strikers and informed them that they (the strikers) were breaching the CCMA picketing and access rules.
- 14) In light of the breach of the picketing rules, Vodacom referred the dispute to the CCMA. In response to this referral, the CCMA informed Vodacom that the CCMA would conciliate the dispute on an urgent basis on 3 July

2007. Vodacom unsuccessfully tried to contact the union to inform them of the conciliation meeting. Vodacom also sent a letter to the union on 2 July 2007 advising them of the fact that strikers were blocking the entrance to and from the Midrand camps and that the strikers were behaving in an angry manner, obstructing traffic and intimidating pedestrians and drivers of cars. The union was also specifically advised of the fact that the strikers were breaching the picketing rules. Again the union was advised that, unless the strikers abide by the picketing rules and unless the situation was brought under control, Vodacom will bring an application to the Labour Court on an urgent basis for an order compelling the strikers to comply with the picket rules and to conduct themselves in a peaceful and lawful manner. Again no response was received from the union.

- 15) It is clear from the supplementary affidavit that, despite the fact that an order interdicting the unlawful acts perpetrated by the strikers was obtained on 3 July 2007, the strikers continued with their unlawful conduct: The strikers continued to gather in front of the entrance of Vodacom despite the fact that the Metro Police cordoned off the road with barricade tape to ensure access to the premises of Vodacom. Gwamanda simply removed the barricaded tape. Other members attempted to force their way out to the Vodacom Campus and swore and intimidated security personnel. The police had difficulty in controlling the

situation. Some strikers also sat down in the middle of the entrance gate, blocking all traffic and refused to move when requested to do so.

- 16) On 6 July 2007 Vodacom addressed a letter to the South African Police in which the Provincial Commissioner of the SAPS was informed of the order obtained from the Labour Court. This letter further informed the police of Vodacom's intention to approach the Labour Court for an extension of the court order and requested a response from the police. In a letter dated 9 July 2007 the police responded to this letter. The following two paragraphs are relevant in that it is consistent with Vodacom's version that there was a situation at its premises which warranted police intervention:

- "1. We are informed that the situation regarding access as well as egress to Vodacom's premises appears to be under control and that a meeting was held between Vodacom and the SAPS this morning to further assess such.*
- 2. In light thereof we feel that an application for additional relief may be somewhat unnecessary. Should you however wish to do so, the imposition of an exclusion zone of about 50 – 100 meters from the gates will be beneficial to the SAPS in enforcing of the order."*

- 17) It is denied by the Respondents in very bold terms that the strikers ever participated in unlawful action. It was briefly the case for the union that the strikers had conducted themselves in terms of the CCMA picketing rules in a peaceful and orderly manner. It was also alleged that Vodacom is hostile to union membership.

BRIEF SUMMARY OF THE LEGAL ARGUMENT

- 18) It was submitted on behalf of the Respondents that there exists a dispute of fact on the papers as to whether the strikers did indeed participate in the unlawful acts as alleged by Vodacom in the founding; supplementary and replying affidavits. It further contended that Vodacom should have foreseen this dispute of fact.
- 19) On behalf of Vodacom it was argued firstly, that there is no real dispute of fact on the papers and that, in light of the fact that the Respondents' papers contain no more than a mere denial of the facts, there exists no reason why the version presented by Vodacom should not be accepted. Secondly, in light of the fact that the union never responded to any of the correspondence sent to it in which the union was explicitly advised of the unlawful actions perpetrated by its members and of the intention of

Vodacom to approach the Labour Court, Vodacom could, in any event, not have foreseen a dispute of fact.

20) I have carefully perused the founding; supplementary as well as the replying affidavit. All three sets of papers contain a detailed account of the various unlawful acts perpetrated by the strikers during the strike and is supported by various confirmatory affidavits deposed to by witnesses who witnessed the unlawful acts. The correspondence attached to Vodacom's papers (which was not responded to by the union) and especially the letter addressed to Vodacom by the Provincial Commissioner of the SAPS (see paragraph (16) supra) is also consistent with the facts set out in Vodacom's affidavits. In stark contrast stands the answering affidavit of the Respondents in which the accusations of unlawful conduct are merely denied without any particularity. Put differently, other than a bare denial of the alleged unlawful conduct the Respondents fail to deal with the allegations. More in particular, the answering affidavit does not deal with any of the correspondence attached to the founding and supplementary affidavits.

21) In my view, this bold and unsubstantiated denial of any unlawful conduct is insufficient to raise a real, genuine and bona fide dispute of fact and I am of the view that no reliance can be placed on the Respondents' bold denials. See in this regard ***Room Hire Co (Pty) Ltd v Jeppe Street***

Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1165. In this case the court set out the principles in respect of factual disputes raised in motion proceedings as follows:

“The crucial question is always whether there is a real dispute of fact. That being so, and the applicant being entitled in the absence of such dispute to secure relief by means of affidavit evidence, it does not appear that a respondent is entitled to defeat the applicant merely by bare denials such as he might employ in the pleadings of a trial action, for the sole purpose of forcing his opponent in the witness box to undergo cross-examination. Nor is the respondent's mere allegation of the existence of the dispute of fact conclusive of such existence.

“In every case the Court must examine the alleged dispute of fact and see whether in truth there is a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence. . . .”

(Per Watermeyer CJ in Peterson v Cuthberth & Co Ltd (supra at 428).)’

At 1165 the court went on to state:

“ . . . (A) bare denial of applicant's material averments cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondent to enable the Court (as required in Peterson's case (supra)) to conduct a preliminary examination of the position and ascertain whether the denials are not fictitious, intended merely to delay the hearing. The respondent's affidavits must at least disclose that there are material issues in which there is a bona fide dispute of fact capable of being decided only after viva voce evidence has been heard.”

- 22) See also ***Van Aswegen and Another v Drotskie and Another*** 1964 (2) SA 391 (O) at 395:

"It does not of course follow that because a dispute of fact is reasonably foreseeable an application on notice of motion will always be dismissed with costs. There may still be circumstances present which will persuade a Court not to dismiss an application....."

- 23) The approach of the court in motion proceedings when a factual dispute is raised has also been restated in ***Plascon-Evans Paints Ltd v Van***

Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634 and 635 in the following terms:

"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 (see in this regard Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163 - 5; Da Mata v Otto NO 1972 (3) SA 858 (A) at 882D - H). 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 (cf Petersen v Cuthbert & Co Ltd 1945 AD 420 at 428; Room Hire case supra at 1164) 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

(see eg Rikhoto v East Rand Administration Board and Another 1983 (4) SA 278 (W) at 283E - H). 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 (see the remarks of BOTHA AJA in the Associated South Africa Bakeries case supra at 924A)."

- 24) See also the case of **Da Mata v Otto NO** 1972 (3) SA 858 (A) at 882G where Wessels JA stated as follows:

"In the preliminary enquiry, ie as to the question whether or not a real dispute of fact has arisen, it is important to bear in mind that, if a respondent intends disputing a material fact deposed to on oath by the applicant in his founding affidavit or deposed to in any other affidavit filed by him, it is not sufficient for a respondent to resort to bare denials of the applicant's material averments, as if he were filing a plea to a plaintiff's particulars of claim in a trial action. The respondent's affidavits must at least disclose that there are material issues in which there is a bona fide dispute of fact capable of being properly decided only after viva voce evidence has been heard."

- 25) In light of the foregoing I am of the view that Vodacom has made out a proper case on the papers for final relief in terms of the notice of motion.
- 26) On behalf of Vodacom it was submitted that I should also include an order in terms of which the second and further respondents are interdicted and restrained from being within a distance of 500 meters from the perimeter of the Applicant's Vodacom Campus premises in Midrand situated at Vodacom Boulevard, 14th Road and 13th Road.). Although I am, in light of the facts presented to this court and more in particular in light of the fact that the strikers have flaunted the picketing rules, of the view that the strikers should be restrained from being near Vodacom's premises, I am of the view that a 500 meter perimeter is too stringent. I am accordingly of the view that a 200 meter perimeter is reasonable.
- 27) The question of costs remains. It was submitted on behalf of Vodacom that I should order the Respondents to pay the costs of the application. I have already indicated above that the Respondents' bold and unsubstantiated denials of any unlawful conduct are rejected on the papers. I am further of the view that the Respondents' conduct in opposing this application, particularly in light of the unions non-responsive attitude in respect of the attempts made by Vodacom to avoid litigation calls for a costs order: The union was repeatedly warned that

Vodacom will approach this court for an order should the strikers persist with their unlawful actions.

ORDER

28) Accordingly a final order is granted in the following terms-

1. The second and further respondents are interdicted and restrained from entering or being upon the applicant's premises located at 082 Vodacom Boulevard, Voda Valley, Midrand.
2. The second and further respondents are interdicted and restrained from in any way interfering with or obstructing access to and egress from the applicants' premises.
3. The second and further respondents are interdicted and restrained from intimidating, assaulting or threatening any employee of the Applicant or any supplier to the applicant.
4. The second and further respondents are ejected from the applicant's aforesaid premises subject to the agreed picketing rules or subject to any other rules as determined by the CCMA.

5. The South African Police Services are authorized to take such action as they may in law be permitted to take in the event that any of the second or further respondents refuses to comply with the instructions of the Sheriff or the obstruction of the Sheriff in the execution of his duties, save that this order shall not preclude or limit the South African Police Services from exercising any power which they may have in terms of any law.
 6. The second and further respondents are interdicted and restrained from being within a distance of 200 meters from the perimeter of the Applicant's Vodacom Campus premises in Midrand (situated at Vodacom Boulevard, 14th Road and 13th Road).
 7. The second and further respondents are ordered to comply with the provisions of the picketing rules issued on 10 March 2007 by the CCMA pending the ruling of the dispute referred to the CCMA on 2 July 2007.
 8. The costs of this application is to be paid by the Respondents jointly and severally, the one paying the other to be absolved.
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AC BASSON, J

19 July 2007

DATE OF HEARING: 18 JULY 2007

DATE OF JUDGMENT: 20 JULY 2007