

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)

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

19/02/2021

.....
SIGNATURE

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DATE

CASE NO: 303/2021

In the matter between:

**MPUMALANGA MEC FOR PUBLIC WORKS, ROADS &
TRANSPORT**

First applicant

**MPUMALANGA DEPARTMENT OF PUBLIC WORKS,
ROADS & TRANSPORT**

Second applicant

and

KWA-MAHLABA CONNECT CC

First respondent

UNIWISP (PTY) LTD

Second respondent

ICT GLOBE MANAGEMENT (PTY) LTD

Third respondent

ABT TELECOMS (PTY) LTD

Fourth respondent

CHEAPCALLS

Fifth respondent

ICASA

Sixth respondent

J U D G M E N T

MASHILE J:

[1] In consequence of the respondents being a few, I deem it necessary to refer to them by their actual names to avoid confusion. Where appropriate and depending on the context, the Respondents will mean the First to Third Respondents. That said and for similar reasons, albeit slightly different, I will refer to the Applicants simply as the Applicant. This matter first served before this Court as an urgent matter on 9 February 2021. The Applicant sought the following relief:

“1.

2. That the first, second and third respondents be ordered and compelled to port forthwith telephone numbers [013 766 0000 to 013 766 9999] to the fifth respondent;
3. That the first second and third respondents be ordered and compelled to relinquish and transfer to the first and second applicants and fourth respondent management and control of telephone numbers [013 766 0000 to 013 766 9999];
4. That the first second and third respondents, jointly and severally with any other respondent opposing this application be ordered to pay the costs of this application on the scale as between attorney and client;”

[2] During argument on urgency on 9 February 2021, Kwa-Mahlaba Connect CC (“Kwa-Mahlaba”), Uniwisp Management (Pty) Ltd (“Uniwisp”) and ICT Globe (Pty) LTD (“ICT Globe”) registered a grave complaint. The complaint concerned the truncated period within which they had to prepare, serve and file their answering papers. The Applicant, they argued, had approximately 14 days within which to launch the application whereas they were afforded only 1 day to do the same. As a result of this, they alleged that the quality of their arguments in the papers could not fairly match the case mounted against them by the Applicant. I suggested to the parties that the matter be stood down to the following Tuesday,

the 16th of February 2021 to enable the affected parties to file supplementary papers. The costs of that day were reserved at the instance of the Respondents.

- [3] When the parties returned to court on 16 February 2021, Counsel for the Applicant advised the court that the Applicant would not be pursuing the relief initially sought against ICT Globe and that it would be withdrawing the application against it. For that reason, Mr De Villiers who had appeared on behalf of ICT Globe previously was not present in court. The court stood down the matter for approximately 30 minutes to allow the Applicant to deliver a notice of withdrawal of the application against ICT Globe. Subsequently, the notice of withdrawal, as promised, was filed with the court. The withdrawal of the application against ICT Globe was prompted by the latter agreeing to comply with Prayer 2 of the notice of motion, which I have described in Paragraph 1 *supra*.
- [4] The understanding between the Applicant and ICT Globe left Kwa-Mahlaba and Uniwisp to oppose the application alone. However, because the two's refusal to port the numbers as prayed was contingent upon ICT Globe's co-operation, it dawned upon Kwa-Mahlaba and Uniwisp that they could not continue to oppose the matter without ICT Globe being part of their team. ABT Telecoms (Pty) Ltd ("ABT" supported the withdrawal of the application against ICT Globe. Simply put, this presaged effective collapse of the matter as no issues other than costs were left for the court to decide.
- [5] The Applicant was resolute that costs must follow result – the party that lost must be liable for the costs of the triumphant and it believed that it was in this case. It contended that the Respondents never had a case. Of the three respondents, ICT Globe was the only one that acknowledged that it was unsustainable to persist with its opposition. It was That grasp of the facts and law that fortified its stance to settle the matter with the Applicant.
- [6] In opposition, Kwa Mahlaba and Uniwisp asserted that the fallacy in the Applicant's argument is that they were brought to court because the Applicant believed they had a substantial and direct interest in the matter. If that was not

the case, continued the argument, the Applicant would not have dragged them to court. If the Applicant is correct in its argument, then it should be liable for the costs otherwise the court should allow them to supplement their papers to articulate their position on the settlement of the matter between the Applicant and ICT Globe.

- [7] It is trite that ordinarily costs follow results. As such, a determination of who was successful in these proceedings is the overwhelming issue. To do this, it is important to assess the circumstances that led to the collapse of the application.
- [8] Kwa-Mahlaba and Uniwisp had a direct and substantial interest in the matter of porting of the numbers. Their interest is unmistakable from their response to the request to port the numbers to ABT by the Applicant. It appears that the Applicant, until the day before the hearing of this application (15 February 2021) had firmly believed that it could not get ICT Globe to consent to the porting of the numbers without the permission of Kwa-Mahlaba and Uniwisp. It is apparent that both the Applicant and ICT Globe came to the realisation that they could conclude a settlement agreement without Kwa-Mahlaba and Uniwisp between the 9th of February 2021 and 15 February 2021. The Applicant was conscious that the case of Kwa-Mahlaba and Uniwisp would be stillborn without ICT Globe.
- [9] Equally, Kwa-Mahlaba and Uniwisp were mindful that their case leaned heavily on the support and co-operation of ICT Globe. If not, they would have elected to proceed defending the matter against the Applicant alone. Their acknowledgment of the fall of the matter on 16 February 2021 is reminiscent of a party that would have reassessed its position as soon as it had been apprised of the likely settlement between the Applicant and ICT Globe. I cannot blame Kwa-Mahlaba and Uniwisp for sticking it out to the last minute as they were not aware that the matter had taken a different turn that could put them in a precarious position.
- [10] Settlement of the matter with ICT Globe must therefore be one that necessarily involve Kwa-Mahlaba and Uniwisp because all parties, until the arrangement between the Applicant and ICT Globe had laboured under the impression that the

Respondents were in the matter as a unit. They did not put themselves into this unenviable situation. The victory realised by the Applicant was only possible because ICT Globe broke ranks with the other two parties. The Applicant ought to be reminded that the settlement that it reached with ICT Globe is the product of negotiations and not a judgment of this Court. Had the matter continued to be opposed, the court would be forced to make a cost order one way or the other.

- [11] All that said, the point is that the parties have settled the matter in a manner that favours the Applicant insofar as it has accomplished what it had set out to. The settlement, although welcomed, is unpalatable insofar as its success, for now, rests on negotiations that were conducted in bad faith with one of the Respondents, ICT Globe. Acknowledging that the Applicant has been successful and that it might well have succeeded in the end, I cannot grant costs in its favour for reasons described above. Similarly, all the Respondents have failed in their opposition of the matter but I cannot single out two of them to bear the costs of the 16th of February 2021. A fair and just cost order in these circumstances is one that should recognise that the parties came to an arrangement. As such, all of them should pay their own costs.
- [12] Turning then to the reserved costs of the 9th of February 2021. The Applicant argued that the only party which could claim that it has had only one day to prepare for the urgent matter on 9 February 2021 is ICT Globe. Kwa-Mahlaba and Uniwisp had more than a day because they were served with unsigned papers the previous week. Thus, they knew that the application was imminent and should have taken the trouble of preparing their opposing papers timeously. In any event, it is not evident from the contents of the supplementary papers of Kwa-Mahlaba and Uniwisp that their case has changed complexion as a result. For those reasons, the Applicant asked that they be directed to pay for the reserved costs of the 9th of February 2021.
- [13] Conversely, Kwa-Mahlaba and Uniwisp contend that while it is true that they received the papers the previous week, as alleged by the Applicant, those papers

were still to be issued. Parties, continued the argument, have no obligation to respond to papers that are yet to be issued. As such, they only gave attention to them as soon as they realised that the papers had been through the court. Regarding the contents of the supplementary affidavits, they strongly argued that the contents of Marius Botha who deposed to the supplementary affidavit of Uniwisp was more detailed as it gave an exposition of the porting procedure as contemplated in the Electronic Communications Act, 36 of 2005 and other matters. Kwa-Mahlaba and Uniwisp asked that their costs be paid by the Applicant.

[15] The postponement of the application on the 9th of February 2021 was an acknowledgment that the time afforded to the Respondents to respond to the Applicant's papers was 'cut too thin' to expect well-articulated papers in response. It is of no moment that the Respondents had been warned of the impending urgent application as anything could have intervened between the preparation of the papers and the issuing. Had the Respondents commenced with their preparation immediately after the threat, would the Applicant be happy to compensate them for their costs? The probable answer is no.

[16] The contents of the supplementary affidavit of Uniwisp shed nothing new but they do provide detail explanation, which the previous papers lacked. It would be disingenuous to suggest that one derived no benefit from the comprehensive discussion of the procedure. This part of the argument aside, the point is that the court postponed the matter due to the Respondents having been given insufficient time within which to oppose the application.

[17] In the circumstances, I am constrained to make the following order:

1. The Applicant is liable for the costs of Kwa-Mahlaba and Uniwisp for the 9th of February 2021;
2. Each party is to pay its own costs for the 16th of February 2021.

B A MASHILE

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA**

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 19 February 2021 at 10:00.

APPEARANCES:

Counsel for the Applicants:	Adv TP Kruger SC
Instructed by:	State Attorney
Counsel for the First & Second Respondent:	Adv C Erasmus SC
Instructed by:	Swanepoel & Partners Inc
Counsel for the Third Respondent:	Adv R de Villiers
Instructed by:	Van Zyl Inc
Counsel for the Forth Respondent:	J Berger
Instructed by:	ENS Africa
Date of Hearing:	16 February 2020
Date of Judgment:	21 February 2021