LOM Business Solutions t/a Set LK Transcribers/rm

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT,PRETORIA)

CASE NO: 26557/09

DATE: 2009-05-17

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO
(3) REVISED ✓

DATE 21/5/09 SIGNATURE

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In the matter between

CONGRESS OF SOUTH AFRICAN TRADE UNIONS Plaintiff

and

TELKOM S.A. LTD AND OTHERS Defendant

JUDGMENT

Ex tempore judgment handed down in the urgent court Sunday 17 May 2009.

20 MURPHY, J: This, as I have said during the course of today, is a matter of considerable national importance.

As I indicated when I adjourned the proceedings earlier today, I am not in a position to hand down a fully reasoned judgment. The papers, which I received only this morning, extend to some 800 pages or more and

I have in addition had the benefit of the submissions of no less than seven senior counsel.

I have nonetheless been able to reach a decision.

As I have also said, the public interest in this matter may require me to give a fully reasoned judgment in the full course of time. Accordingly, in view of the difficulties, I propose only to set out brief reasons now, to make an order and to reserve the right to hand down fuller reasons at a later stage, should that be required.

The application brought by COSATU and ICASA is for an urgent interim interdict seeking to restrain the second, fourth, fifth, sixth and seventh respondents, to whom I shall refer as "the commercial respondents", from taking any further steps in the implementation of the Vodacom share transaction. These respondents are the commercial entities involved, namely Telkom, Vodafone and Vodacom. The third respondent is the Minister of Communications. They all oppose the application.

The seventh respondent, Vodacom (Pty) Limited, is the holder of a telecommunications licence. The shares in it are held by Telkom, the second respondent, and Vodafone PLC, the fourth respondent, as to 50% each.

Through the Vodacom share transaction it is intended that Telkom will sell 15% of the issued share capital of Vodacom Group (Pty) Limited, the sixth respondent, to the fourth respondent, that is, Vodafone Group PLC. Vodacom will then be listed on the Johannesburg Stock Exchange

and the remaining 35% of the shares held by Telkom in Vodacom will be transferred by way of a dividend in specie to the Telkom shareholders.

On 5 May 2009 the COSATU filed an application to review a decision taken on 16 April 2009 by ICASA, who is the first respondent in that application. In terms of that decision ICASA accepted a notification it had received from Vodacom and elected not to require Vodacom to seek ICASA's approval in respect of the transaction. The respondents are *ad idem* in their view that no approval was required for the transaction and accordingly proceeded with the transaction on that basis. The listing is set to go ahead on the Johannesburg Stock Exchange tomorrow morning.

COSATU maintains that after the transaction Vodafone PLC, through its subsidiaries, will hold 65% of the voting shares in the Vodacom Group which will then hold 93,7% of the shares in the licensee. COSATU contends that this is a contravention of paragraph 19 of the relevant licence conditions which were preserved in terms of Decision 15 in a so-called section 93 notice issued by ICASA on 16 January 2009. Paragraph 19.1 of the licence requires the prior written approval of ICASA for any transfer of shares which will result in the direct or indirect ownership of 25% of the issued voting share capital of the licensee changing hands.

On 5 February 2009, Vodacom wrote to ICASA notifying it that it had concluded certain agreements, effectively those making up what I have referred to as the Vodacom share transaction. It informed Vodacom of the contents of the transaction and stated that it was merely notifying it of the transaction.

ICASA replied to the letter on the 15th of April. In its letter it referred

to several correspondences and engagements between the parties and stated that it was of the view, in the light of the documentation place before it, that Vodacom did not need the approval of the authority to effect the transaction. It also informed Vodacom that it would inform the public of the nature of the transaction and the reasons for not proceeding with an approval process.

This letter, as I have said, was written after various engagements which took place between the commercial respondents and ICASA after ICASA had taken legal advice. In keeping with the undertaking expressed in the letter, ICASA then went ahead and issued a public media statement on 16 April 2009 announcing that it agreed with Vodacom that no approval was required in respect of the transaction. This announcement prompted the main application which was filed by COSATU three weeks later on 5 May 2009.

After considering COSATU's application, ICASA then changed its mind on 14 May and on Friday last, 15 May, it issued a notice described as "an urgent public notice to all stakeholders" in which it declared that it was no longer of the opinion that approval was not required. Making reference to the court proceedings, that is the main application, it stated that it believed that a transaction of this nature should take place in an environment conducive to regulatory certainty and that it now preferred to proceed in the interests of transparency with an approval process that would include public participation in the form of public hearings which would take place some time in June this year.

As a consequence of this public announcement, COSATU brought the present urgent application. It did so on the basis that its hope of participation had now concretised into a right, in that it was now clear that ICASA believed that there should be a public participation process and on behalf of its members and stakeholders COSATU had the right to make a contribution in that process. Consequently, it considered that urgent relief was required preventing and restraining the respondents from proceeding with the listing process on the Johannesburg Stock Exchange tomorrow morning.

There is some difference of opinion on the papers about the extent to which the transaction has proceeded. The respondents allege, and their version must be accepted in accordance with the principles governing disputes of fact in motion proceedings, that the shares have already been transferred and paid for, that the in species dividends have already been declared in favour of the Telkom shareholders, vesting in them vested rights, and the Johannesburg Stock Exchange listing, as I have already said, is scheduled for tomorrow morning.

While ICASA is the first respondent in the main application, it has joined COSATU as the second applicant in the urgent application. Its position is that the question of whether or not approval is required falls to be decided by a court of law and that there are conflicting opinions on the question. It does not, however, unequivocally state that approval is required. It is of the view that if a court considers approval necessary, the process would benefit from a process of public participation.

The respondents in the urgent application stick to their guns that no approval is required.

The respondents have addressed to me the preliminary argument that the matter is not urgent, because of self created urgency on the part of COSATU who should have sought urgent relief shortly after the media announcement on 16 April or in the form of ancillary relief when it filed its main application on 5 May 2009. I tend to agree, but that does not exclude the second applicant, ICASA, for whom the matter became urgent only once it changed its mind on 14 May 2009. That is on Thursday last. The predictable answer to that finding is that ICASA was *functus officio* and should be non suited on that ground.

There is also a challenge to the *locus standi* of COSATU.

I am prepared to assume for present purposes, and if need be I shall canvass the matters more fully at a later stage, that both applicants do indeed have *locus standi* and the matter is in fact urgent in that – or at least I am prepared to assume this for the purposes of argument - ICASA was not *functus officio;* and it is therefore in the interests of justice to consider whether the requirements of an interdict have been met.

Mr Tuchten and Mr Freund, who appeared for COSATU, argued strenuously on two bases that a clear right exists in the form of the requirement for approval in the licence conditions and the regulations, and COSATU's right to seek to influence that approval in the contemplated public hearings.

Mr Beckerling, on behalf of Vodacom, disputed whether non-compliance with the regulatory requirements necessarily resulted in void

transfers, and also whether the right to participate in possible future public hearings, for the purpose of considering and determining the grant of approval, was sufficiently clear to sustain or justify the grant of a final interdict. Added to that, of course, is the contested view about whether or not approval is required in the first place, as well as the submissions made by Mr Celliers, on behalf of the Minister, that the relevant licence conditions may in fact not have been renewed when they were re-enacted resulting in the approval requirement of paragraph 19 not being reinstated in the final version of the licence.

I agree that it is at least debatable whether or not a transfer contrary to the provisions of a licence condition, albeit tainted perhaps by illegality, will necessarily have the consequence of voidness. It is also doubtful whether approval under the regulations is required, because the transfer to Vodafone might not in fact have resulted in the transfer of a control interest in the licensee from Telkom to Vodafone.

In the result, therefore, I am not persuaded that the applicants have established a clear right entitling them to a final interdict.

I do though accept that the licence conditions and the ownership and control regulations may be such that the applicants at least have a *prima facie* right, albeit open to some doubt. Regulation 8 of GNR 105 of 16 January 2003 provides for voidness in certain circumstances which may or may not be applicable. That being so the inquiry before me then resolves into a consideration of the prospects of success and the balance of convenience.

The prospects of success of the applicants in the main application in view of what I have just said are by no means overwhelming. I need therefore to weigh the prejudice facing the applicants if the interdict is refused against the prejudice facing the respondents if it is granted.

The respondents have proceeded on the premise that Government fully supports the transaction and that regulatory approval was not required. They nevertheless have been fully transparent in their dealings, have engaged appropriately with the regulator, and were led to believe that no approval was required.

More importantly, the following considerations should be kept in mind.

The respondents have incurred expenditure of more than R10 million in establishing the infrastructure for the listing and anticipate that they will lose more than R6 million per day for each day the listing is delayed.

The listing is one of the last phases in a series of commercial transactions which has already run its course and which the respondents maintain cannot now be unscrambled without severely injuring the financial standing and reputations of the respondents and the Government. They have proceeded in good faith on the basis of a clear representation by ICASA, the regulator, that they could do as they are doing.

Neither applicant has offered, nor for that matter is able to offer, any indemnity against damages that the respondents may suffer if the allegation of illegality is found to be wrong or inconsequential.

Telkom's shareholders, as I have mentioned, have already acquired vested rights to the dividends in species.

The anticipation of the listing has also resulted in a significant upsurge in the trading of Telkom shares on the Johannesburg Stock Exchange in recent days to nine times the average trade. An interdict will therefore have adverse implications for share values and presumably there is the risk of contagion running through to other areas in the market.

Since the price of the shares, more than R20 billion, was financed by the import of foreign currency, the imposition of any restraint at this late stage most probably will have an unwelcome impact on the exchange rate as well.

Moreover, Government is legitimately concerned, as are the other respondents, about the impact of an order on the regulatory environment and the country's reputation as an investment destination.

The inconvenience facing COSATU is that it may be denied the right to participate in a pre-approval hearing and the opportunity to influence the outcome of any change of ownership. It also warns of the possible commercial dislocation should it be found at a later stage that the transactions and the transfers are in fact unlawful.

These are indeed real concerns. But after anxious deliberation I am persuaded that regulatory mechanisms are in place that can be effectively deployed in the future to ensure commercial coherence and the resolution of any regulatory illegality in a manner less prejudicial than interdicting the listing at this late stage.

Given the nature of the judicial discretion I am bound to exercise, equitable and social factors such as these can appropriately be taken into account as legitimate considerations in determining the balance of convenience.

In the result then, I find that the balance of convenience favours the respondents, and for that reason I am not prepared to issue the interdict.

Accordingly the application is dismissed with costs; such costs to include the costs of two counsel, and where applicable the costs of two senior counsel.
