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JUDGMENTIN THE HIGH COURT OF SOUTH AFRICA  
(TRANSCAAL PROVINCIAL DIVISION)PRETORIA

CASE NUMBER: 27624/99

DATE: 1999-10-28

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE <del>YES</del> /NO.	
(2) OF INTEREST TO OTHER JUDGES: <del>YES</del> /NO.	
(3) REVISED.	
DATE <u>16-11-1999</u>	SIGNATURE <u>[Signature]</u>

(10)

In the matter between:

AT & T GLOBAL NETWORK SERVICES SA (PTY) LTD

1st Applicant

BGS-NET (PTY) LTD

2nd Applicant

FIRSTNET (PTY) LTD

3rd Applicant

OMNILINK (PTY) LTD

4th Applicant

PIN-POINT HOLDINGS (PTY) LTD

5th Applicant

TRANSNET LIMITED

6th Applicant

and

TELKOM SA LTD

1 Respondent (20)

THE SOUTH AFRICAN TELECOMMUNICATIONSREGULATORY AUTHORITY

2nd Respondent

J U D G M E N T

COETZEE, AJ: The applicants are members of the South African VANS Association ("SAVA"), a voluntary association established to represent the united interests of value-added network services suppliers and users. They are allegedly licenced to provide such services in terms of section 40 of the Telecommunication/...

(30)

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Telecommunication Act no 103 of 1996 ("the Act".)

The applicants applied for an order interdicting the first respondent ("Telkom"), pending the final determination of an action to be instituted by the applicants for similar relief, from refusing or threatening to refuse to provide to the applicants existing and new telecommunication facilities. During the course of his argument, Mr Soggot who, with Mr Kennedy, appears for the applicants, applied for an amendment of the notice of motion. The relief that the applicants now seek is a temporary interdict restraining Telkom, pending the (10) adjudication by the second respondent ("SATRA") of an alleged contravention by Telkom as referred to in SATRA's notice of 10 September 1999, from refusing or threatening to refuse to provide to the applicants existing and new telecommunication facilities unless the applicants furnish Telkom with written confirmation that they accept the terms set out in Telkom's letter sent to the applicants on or about 10 July 1999. The application for the amendment of the notice of motion is opposed. In my view no prejudice will result should the application be granted that cannot be cured by an appropriate (20) cost order. In the circumstances the application for the amendment of the notice of motion is granted.

In summary, the facts giving rise to this application are the following. Telkom is the holder of a number of licences issued to it or deemed to have been issued to it in terms of the Act. Amongst others, it is licenced to provide Public Switched Telecommunication Services (PSTS) and Value-Added Network Services (VANS). The first mentioned licence, a section 36 licence, entitles Telkom to provide PSTS on an exclusive basis until May 2002. These services include (30) national/...

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national long distance, international, local access and public pay-telephone telecommunication services as well as any telecommunication facilities to be used by any person for the provision of VANS and of any Private Telecommunication Network (PTN), other than an PTN which is maintained by TRANSNET or ESCOM or which is situated on a single piece of land or on contiguous pieces of land owned by the same person. The award of exclusivity carries a burden. Telkom is obliged to reach certain telecommunication services development targets within the period of exclusivity. Should it fail to do so it is(10) liable to substantial monetary penalties and it may lose its licences. For that reason it is important for Telkom to operate its business activities without illegal interference by persons who do not have the requisite licence to compete with it in the provision of PSTS. Telkom is required to undertake major costly infrastructural outlay to achieve its licence obligations and therefore needs to protect its income from PSTS to finance such outlay.

Telkom's VANS licence, a section 40 licence, does not grant it exclusive right to provide VANS. Other persons and(20) entities also hold VANS licences. A holder of a VANS licence is not permitted by the Act to carry voice in the provision of such services or to assign or cede its rights to use such facilities or to sublet, part with, control or otherwise dispose of such facilities until a date to be determined by the minister. Furthermore, a VANS supplier who has a PTN is obliged to make use of Telkom's telecommunication facilities. The Act subjects a PTN supplier to certain restrictions. Such a supplier may not resell spare capacity on telecommunication facilities comprising the PTN where the PTN is interconnected(30) to/..

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to Telkom's telecommunications system. The PTN provider may not permit any telecommunication which originate in Telkom's system and which is intended to be received in Telkom's system to bypass that system by being transmitted via the PTN. A PTN may not be interconnected to any telecommunication system other than that of Telkom.

On request, Telkom is obliged, in terms of section 43 and 44 of the Act, to provide interconnection to its telecommunication system to the systems of any other person providing a telecommunication service and to make available (10) telecommunication facilities to such person, unless such request is unreasonable. For that purpose Telkom and such person are required by the act to enter into an agreement. In terms of Telkom's PSTS licence it is entitled to contractually bind such other person, in the case of a VANS supplier, not to obtain any telecommunication facility for that purpose from any other person during the period of exclusivity and not to resell capacity on any telecommunication facilities obtained by such person in order to provide VANS, or to cede, or assign its rights to use such telecommunication facility, or to sublet or (20) part with control of such facilities until a date to be fixed by the Minister. Telkom may refuse to provide such facilities should a VANS licensee fail or refuse to enter into a contract with it for the purpose of enabling the VANS licensee to acquire telecommunication facilities, or if the licensee uses, or permits the use of, telecommunication facilities supplied to him or her or it for an illegal purpose.

Since November 1997 Telkom lodged written complaints with SATRA against various VANS suppliers. Telkom alleged that these suppliers were acting contrary to the Act and the (30) provisions/...

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provisions of their licences in supplying VANS and thus causing financial loss to it. These complaints concerned some of the members of SAVA. SATRA was asked to investigate the complaints and to take appropriate steps against the alleged culprits. SATRA allegedly failed to do so.

On 27 August 1999 Telkom received a written notification from SATRA that SAVA had lodged a complaint against it in terms of section 53 of the Act. The complaint was that Telkom was intimidating customers and potential customers of its members, and refusing, or threatening to refuse, to provide(10) telecommunication facilities to its members unless they confirm or agree to confirm in writing that they will not use facilities provided to them by Telkom for illegal purposes. Telkom addressed letters to various VANS suppliers in this regard which the applicants alleged was uncalled for. For instance, on 15 July 1999, Telkom wrote to the third applicant a letter which reads as follows:

"With reference to our discussion held on 15 July 1999 to re-iterate Telkom's exclusivity rights. The Government granted Telkom certain rights and privileges for a(20) limited period in order for Telkom to achieve goals and objectives as defined by the government. This limited period is known as Telkom's "Exclusivity period". During Telkom's exclusivity period:-

1. no person may provide any telecommunication facility for conveyance of signals for itself or any other person except if the telecommunication facilities are for the exclusive use of the provider of the facilities on a single property.
2. all facilities must be obtained from Telkom. (30)

3./...

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3. facilities obtained from Telkom are to be for exclusive use of the legal person who obtains those facilities.

4. no person may resell, sublet or share facilities during the period of exclusivity.

Please confirm that you are not using existing facilities and will not use those facilities on order for any of the following purposes:

- a) to provide a private network or private network facilities to any of your customers, whether to a(10) single customer or in shared mode to more than one customer;
- (b) to resell spare capacity thereon, or sublet the facilities to any of your customer in any manner or form;
- (c) as part of a telecommunication network on which switched services are provided to your customers;
- (d) to carry voice on behalf of any customer;
- (e) for the conveyance of data signals between different premises of any single customer or to connect(20) different customers to each other, other than through Telkom's public switched telecommunication network (PSTN);
- (f) to bypass Telkom's PSTN i.e. to receive a data signal from a customer and allow that signal to break out of your private network at any place or point other than at the first point of entry to your private network.

We would appreciate your confirmation response within a period of two weeks of receipt of this letter." (30)

Letters/...

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Letters with similar content were written to other VANS suppliers including the applicants. The third applicant's response to this letter was to dispute Telkom's interpretation of its exclusive rights stating that Telkom has no authority in terms of the Act or otherwise to require the third applicant to respond to the various statements made in the letter and furthermore stating that it is operating in terms of the provisions of the Act and its licence including the provisions relating to Telkom's exclusive rights. Telkom's answer to that was a threat to stop providing any new services to the third(10) applicant. SAVA alleged that Telkom's action was anti-competitive and that it had no right to refuse its members telecommunication facilities. The applicants submit that Telkom is misinterpreting the Act.

On 9 September 1999 a committee appointed by the board of SATRA dealt with SAVA's complaint. On 10 September 1999 SATRA made a determination regarding the complaint. It directed Telkom to immediately cease and refrain from making statements to VANS provider's customers regarding the legal status of VANS operators, implying that VANS operators are under investigation(20) and that their services will be terminated and issuing threats to terminate existing facilities and services of VANS operators. SATRA also on the same date issued two section 100 notices. The first notice states that it appeared from the proceedings held on 9 September that Telkom was involved in uncompetitive actions that had led to an undue preference of Telkom as a VANS supplier and that it will investigate and adjudicate the alleged failure by Telkom to comply with certain provisions of its PSTS and VANS licences. The second notice, also dated 10 September 1999, states that it emanates from the (30) proceedings/..

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proceedings of 9 September where it appeared that Telkom had elected to discontinue with the provision of outstanding services or new service to the fourth applicant. The notice states that it intends to investigate and adjudicate on Telkom's alleged failure to comply with the provisions of section 44(2) of the act.

On 13 September 1999 SAVA's attorneys wrote to SATRA request it to make a further determination on the following or similar terms:

"The authority directs Telkom to cease and refrain from(10) refusing or threatening to refuse to provide telecommunication facilities to VANS licensees unless VANS licensees confirm or agree with certain of Telkom's interpretations of the act regarding the extent of its exclusive right to provide certain services and facilities."

On 16 September 1999 SATRA responded by stating that it has given an appropriate determination, that it cannot exceed to the request for additional relief and that investigations into Telkom's refusal to provide services are being conducted.(20)

This application was then launched on 22 September 1999 as an urgent application. Telkom also brought an urgent application for the review and setting aside of SATRA's determination and the two section 100 notices issued by it as well as for an order directing SATRA to investigate and adjudicate its complaints lodged against various VANS providers. Both applications were postponed on 5 October 1999 with directions to the various parties involved to deliver supplementary answering and replying affidavits. The two applications came before me on 28 October 1999. The review application was (30) postponed/..



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postponed give die on that date to enable the parties to deliver further affidavits.

The applicants state that Telkom has recently refused to negotiate and enter into agreements with them for the provision of telecommunication facilities unless they bind themselves to Telkom's interpretation of the act and that Telkom refuses to provide telecommunication facilities where agreements have already been interred into or where requests for such facilities have already been made unless they comply with Telkom's demand. They rely for that statement on the contents(10) of the letter of 15 July 1999 addressed to the third applicant and its response to third applicant's answering letter. Telkom's responding letter, dated 2 September 1999, states, in paragraph 3 thereof, that Telkom intends to cease with the provisions of any new services and that it will, in addition, examine its options in line with its licence rights with respect to the provision of telecommunication services to the third applicant.

17/11 It is clear from the papers that Telkom has not terminated any existing facilities and services to VANS operators. It(20) refuses to provide any outstanding or new services. The applicants have not been put out of business. However, the applicants say that they are unable, due to Telkom's attitude, to expand their networks to provide additional services or to provide existing VANS to additional customers. Telkom abides SATRA's ruling, will continue supplying existing facilities and services, and will desist from issuing threats to terminate such services. Telkom's stance in this regard was reported in statements to the press which came to the applicants notice. Telkom still maintains that a number of VANS operators are (30) contravening/...

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contravening the provisions of the Act but pending the investigation and adjudication of its complaints by SATRA it will comply with its directives.

Telkom is providing new services to those VANS operators who subscribed to its request set out in the letters to operators of July 1999 and so contractually bound themselves to refrain from conducting their operations as requested by Telkom. However, Telkom contends that it is acting within its rights to refuse to supply new services to those VANS suppliers who refuse or fail to contractually bind themselves not to act (10) as requested. Telkom contends that these operators who are using facilities provided to them by it for the purposes enumerated in paragraphs (a) to (f) of the letters, are contravening the act and the provisions of its licences.

Mr Badenhorst and Mr Maleka who appear for Telkom submit, in limine, that this court does not have jurisdiction to hear this application. An adjudication of the relief sought calls for expert knowledge of telecommunication engineering. Telkom's attitude is that it is not obliged to supply new services because it would be unlawful to do so and that the (20) requests for new services are therefore unreasonable within the meaning of that word in section 43 of the act. They argue that SATRA's board comprises persons who have expert knowledge of the telecommunications industry and that they are eminently suited to decide whether the applicant's claims are reasonable or not. In this regard I was referred, amongst others, to the judgments in the matters of Independent Municipal and Allied Trade Union v Northern Pretoria Metropolitan Substructure 1999 (2) SA 234 (T) and Onshelf Trading Nine (Pty) Ltd v De Klerk NO and Others 1997 (3) SA 103 (W). Telkom's counsel contend (30)

that/...

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Does an  
interdict  
require  
exhaustion  
of internal  
remedies?

that a court will not interfere on SATRA's domain by considering and ruling on the issue of reasonableness (illegality/legality) unless and until SATRA has expressed its view on that question. Section 100 of the act empowers and obliges SATRA to investigate and adjudicate upon this issues and this court has no power to intervene by anticipating and adjudicating upon a matter which the legislature has deemed it necessary to be dealt with by experts in this field. They argue that the applicants would not have been precluded from bringing the determination of SATRA on review. However, this(10) is not the nature of the relief that the applicants seek. They are asking the court to rule on the reasonableness of Telkom's refusal to supply new services on the ground that to do so would constitute a contravention of the Act, that it would be in breach of the provisions of its licences and that this court, not being learned in the field of telecommunications engineering, should not do so.

The applicant's counsels' response to this submission is that the granting of the order sought by the applicants would merely normalize the way in which Telkom receives, considers(20) and then grants or refuses applications for new services. They contend that Telkom has no right to insist that the applicants agree to Telkom's interpretation of the Act which is clearly wrong. The applicants, so they argue, are not requiring the court to rule on the question of reasonableness of applications for services but to restrain Telkom from, in considering such applications, applying an incorrect interpretation of the act.

I do not agree with this submission. The reason why Telkom required VANS operators to confirm that they are not conducting their businesses in contravention of the Act and the(30) provisions/..

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provisions of its licences is because it believes, and has been expertly so advised, that certain VANS providers are in fact doing so. For that reason it states that it is acting reasonably in refusing applications for new services. In order to decide whether Telkom's action is reasonable or not does not only call for what a court is able to do namely interpret the Act and the provisions of Telkom's licences. It also requires a proper understanding of and the ability to determine whether the conduct complained of is in fact what Telkom claims it to be. To do that a court must either be well versed in the(10) specialised fields of electrical and telecommunications engineering or have had the benefit of hearing experts in these fields. It is for that reason that the legislature has thought it fit to establish a board with specialised knowledge in these fields and to direct that this board shall hear disputes of this nature as a tribunal of first instance. A court is in my view not qualified to fulfil the functions of the board. Once the board has heard and recorded expert and other evidence and when it has made a determination any party aggrieved by its decision may take that determination on review and appeal as(20) provided for in section 100(4) of the act. Moreover, it is not possible to decide that dispute on affidavit. I agree with Telkom's submissions that this court does not have jurisdiction to entertain this application.

A second point in limine raised is the defence of res judicata. Telkom contends that the issues before me has been decided by SATRA when it refused to grant the additional relief sought from it by SAVA. SATRA states, in response to SAVA's attorneys letter of 13 September 1999 in which SAVA required SATRA to make a further determination, that it has (30) comprehensively/..

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comprehensively dealt with SAVA's complaints and has give an appropriate determination. It was not prepared to accede to SAVA's request for additional relief. As I have indicated, that relief is substantially the same as the relief now sought. In support of this contention Mr Badenhorst referred me to the judgment in the matter of Sparks v Sparks 1998 (4) SA 714W. Mr Kennedy argues that that relief was sought pending the relief that was granted by SATRA on 10 September 1999 and that thereafter, in SAVA's attorneys follow-up letters, mere clarification of the determination was requested. (10)

N.Y. In my view this issue has not been determined. The issue is the reasonableness of Telkom's refusal to supply new services or, put in other words, the legality of the conduct of VANS' operators. SATRA declined to decide this issue and said that they will do so after having investigated the issue. The matter has not been rendered res judicata and in my view the second point in limine must be dismissed.

A third point in limine is a plea of lis pendens. Telkom's counsel submit that SATRA is seized with the issue of the reasonableness or unreasonableness of Telkom's actions and (20) that I should not allow the matter to be determined in this court whilst the same issue is pending in another forum. It is clear that SATRA is investigating the issue and that it will determine it in future. In my view this point must be upheld.

If I should grant the order prayed for I would be compelling Telkom to accede to applications for new services whether such applications are reasonable or not and to favourably consider all applications until such time that SATRA has made a determination in its favour. The July letters in affect state that Telkom will not and cannot supply new services/... (30)

Taking law into your own hands

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services if those service will be used for illegal purposes or in breach of the provisions of its licences. If it should be found by SATRA, and possibly, ultimately by a court, that those applications were granted for illegal purposes then it means that Telkom acted illegally in doing so. If it should be found that the services were provided contrary to the provisions of its licences Telkom submits that it will suffer loss for which those VANS suppliers to whom services were provided, will be liable. For that reason it demanded a guarantee from the applicants to ensure payment of damages that will be suffered. (10)

In respect of that demand the applicants did not respond. It appears that they refuse to give such a guarantee. In my view it would be unjust under the circumstances to grant the order sought. Also for that reason the application falls to be dismissed.

In the light of the findings that I have made I do not consider it necessary to deal with the further submissions made by counsel for the parties. In the result I make the following order.

1. The application is dismissed with costs. (20)
2. The applicants are ordered to pay the first respondents costs jointly and severally. The costs include the costs of two counsel.

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