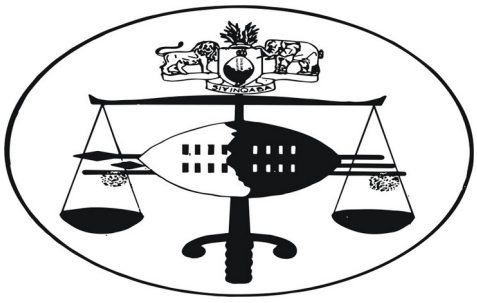

# IN THE HIGH COURT OF SWAZILAND

**HELD AT MBABANE**

**CIVIL CASE No. 1896/2010**

In the matter between

**SWAZI MTN LIMITED** **FIRST APPLICANT**

**MTN INTERNATIONAL (PTY) LTD** **SECOND APPLICANT**

**MOBILE TELEPHONE NETWORKS HOLDINGS (PTY) LTD** **THIRD APPLICANT**

**SWAZI EMPOWERMENT LIMITED** **FOURTH APPLICANT**

**AND**

**SWAZILAND POSTS AND TELECOMMUNICATION CORPORATION** **FIRST RESPONDENT**

**ELIJAH ZWANE** **SECOND RESPONDENT**

CORAM : RAMODIBEDI, CJ

HEARD : 6 MAY 2011

DELIVERED : 19 MAY 2011

*SUMMARY*

*Notice of motion – Application for interdict pending final determination of an appeal under case No. 19/2011 of the Supreme Court – Such application in effect in the nature of stay of execution pending appeal – Application granted with costs.*

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## JUDGMENT

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**RAMODIBEDI, CJ**

[1] This is an application brought by the applicants on notice of motion for relief, *inter alia*, interdicting and restraining the respondents from (1) marketing and advertising the first respondent's Fixed Wireless Component of its NGN Network and (2) connecting new customers to the Fixed Wireless Component of the NGN Network "pending the final determination of the appeal under case No. 19/2011" of the Supreme Court.

[2] After hearing submissions in the matter on 6 May 2011, I granted the interdict as prayed with costs pending the finalisation of the appeal in question. I intimated that reasons would follow. These are the reasons.

[3] The parties are seemingly engaged in cut-throat litigation over the first respondent's roll out of its Fixed Network Wireless Network which is a Mobile Telephone

Service. The first applicant is admittedly also a Mobile Telephone Operator.

[4] It is not disputed that by "Agreement of Settlement" between the parties dated 4 June 2010, the first respondent undertook that, pending finalisation of certain arbitration proceedings, it "shall":-

(1) cease marketing and advertising the Fixed Wireless component of its NGN Network;

(2) refrain from connecting new customers to its Fixed Wireless component of its NGN Network.

It is common cause that the "Agreement of Settlement" in question was made an order of court on 5 July 2010.

[5] On 20 April 2011, MCB Maphalala J dismissed the applicants' "main and interlocutory applications" for an interdict against the respondents.

[6] On 21 April 2011, the applicants filed a notice of appeal to the Supreme Court challenging the whole judgment of MCB Maphalala J.

[7] On 3 May 2011, the applicants filed the present application for relief as fully set out in paragraph [1] above. I should emphasise that the relief sought was specifically "pending the final determination of the appeal under case No. 19/2011" of the Supreme Court. Evidently, the relief was merely interlocutory and not final.

[8] **Mr. Manzini** for the respondents put in the forefront of his submissions the point that a single Judge cannot reverse a judgment of a High Court colleague. He submitted that MCB Maphalala J having dismissed the applicants' application for an interdict, another High Court Judge cannot reverse that order. This submission, in my view, misses the point. It shall suffice to mention two reasons only, namely:-

(1) The present application was based on fresh allegations made after MCB Maphalala J's judgment of 20 April 2011, as will be seen shortly.

(2) The present application was in effect in the nature of a stay of execution pending the finalisation of the appeal to the Supreme Court, albeit labelled as an interdict.

## **Fresh allegations**

[9] I was mainly persuaded by the following fresh allegations made after MCB Maphalala J's judgment, namely, paragraphs 64, 67, 70, 76, 80, 82 and 83 of the founding affidavit of Ambrose Dlamini who is the first applicant's Chief Executive Officer. He deposed to the affidavit on 3 May 2011. It proves convenient to reproduce these paragraphs:-

> *"64. I submit that the Respondents are clearly violating the Court Order and the Joint Venture Agreement by connecting new customers and advertising its Mobile Network. They undoubtedly undertook not to do so pending determination of the dispute by Arbitration. The fact that the parties agreed to hold in abeyance arbitration pending attempts to settle the dispute through negotiation did not discharge the 1st Respondent of its obligation to strictly adhere to the undertakings. I beg leave to attach a copy of a letter from the 1st Respondent to the 1st Applicant dated 5 July, 2010, marked "MTN 10", in which the 1st Respondent confirmed that arbitration was by agreement put in abeyance by the parties.*
>
> *.*
> *.*
> *.*
>
> *67. The Applicants [stand] to suffer irreparable harm if the Respondents continue to roll out its Mobile Network and to advertise same. At stake is not only the prejudice suffered by the Applicants but also the Rule of Law. The Respondents have with impunity set out on a course to break the Law on the pretext that it is engaging in competition.*
>
> *.*
> *.*
> *.*

70. *Furthermore, the Applicants' business is adversely affected each day that the 1st Respondent operates its Fixed Wireless Service in competition to the 1st Applicant. The 1st Applicant loses revenue and market share. The 1st Respondent on the other hand gains revenue and market share.*

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76. *The 1st Respondent's roll out of its Mobile Network violates Clause 21 of the Joint Venture Agreement which prohibits the 1st Respondent as shareholder of the 1st Applicant from being directly or indirectly associating itself with any business or concern, if such association would result in a conflict of interest arising.*

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80. *The Applicants suffer financial prejudice each day that the 1st Respondent continues with violating the Court Order and its contractual obligations. The transgressions aforesaid, per se, [tilt] the balance in favour of the Applicants.*

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82. *I respectfully submit that the Applicants will continue to suffer harm from the 1st Respondent's unlawful actions, which can only be stopped by this Court granting the Interdict.*

83. *The Respondent is rolling out its Fixed Wireless Service with the added advantage of:*

83.1 *As a Controlling Shareholder of the 1st Respondent, having full knowledge of the manner in which the 1st Applicant conducts its business, a position which enables it to compete unfairly with the 1st Applicant using the knowledge that it obtains as a controlling shareholder of the 1st Applicant. In particular, the 1st Respondent's position as Controlling Shareholder gives it access to crucial competitive information*

> *such as business plans, strategies, spending plans, and cash flow usage. In addition, by virtue of the fact that the 1st Respondent is also able to approve or veto these plans, the 1st Respondent has the power to determine the manner in which the 1st Applicant conduct its business, and not being required in terms of a licence to adhere to any prescribed terms and conditions. This means that the 1st Respondent can itself set its terms and conditions of operating. Furthermore, notwithstanding that the 1st Respondent has placed itself in competition with the 1st Applicant, it has had the exclusive privilege of setting the 1st Applicant's terms and conditions of operating, even to its advantage and to the detriment of the 1st Applicant. Again, a position that places the Respondent in a considerably more favourable position."*

[10] Most of the material averments in these paragraphs were not controverted in the second respondent's answering affidavit. Crucially, the allegation that the respondents continue to roll out its Mobile Network and to advertise same after Maphalala J's judgment of 20 April 2011 was not denied. Indeed, the deponent appeared to admit this allegation in paragraph 56.6 of his answering affidavit where he said the following:-

> *"56.6 It is in the public interest that the 1st Respondent should continue to offer its products as the call rates are cheaper and this will lead to more choice for the consumer."*

**The present application was in effect in the nature of a stay of execution, albeit labelled as an interdict**

[11] It is undoubtedly so that the present application sought to maintain the status *quo ante* pending the finalisation of the appeal in case No. 19/2011 of the Supreme Court. In my view, the application was in effect in the nature of a stay of execution, albeit labelled as an interdict.

[12] Now, there is no statutory provision in this jurisdiction dealing with stay of execution. In some jurisdictions an appeal does not operate as an automatic stay of execution. In the absence of a statutory provision in this country it follows that resort must be had to the common law. At common law the noting of an appeal operates as an automatic stay of execution. This is so in order to prevent potential injustice or irreparable damage and to ensure that parties are not prejudiced should the appeal be successful. One has a similar situation here. See, for example, the well-known case of **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A)**. I am mainly attracted by the following apposite remarks of Corbett JA (as he then was) at pp. 544H-545B:-

> *"Whatever the true position may have been in the Dutch Courts, and more particularly the Court of Holland (as to*

> *which see Ruby's Cash Store (Pty.) Ltd v. Estate Marks and Another, 1961 (2) S.A. 118 (T) at pp.120-3), it is today the accepted common law rule of practice in our Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the Court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make special application. (See generally Olifants Tin "B" Syndicate v De Jager, 1912 A.D. 377 at p. 481; Reid and Another v Godart and Another, 1938 A.D. 511 at p. 513; Gentiruco A.G. v. Firestone S.A. (Pty.) Ltd., 1972 (1) S.A. 589 (A.D.) at p. 667; Standard Bank of S.A. Ltd. v. Stama (Pty.) Ltd., 1975 (1) S.A. 730 (A.D.) at p.746.) The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from."*

[13] On these principles I consider that, even if one approaches the matter purely on the basis of an interdict untainted by considerations of a stay of execution pending the finalisation of the appeal in question, the applicants' application clearly passes muster in my view. The noting of an appeal gives the applicants a clear right for an interdict pending the finalisation of the appeal. The facts set out in paragraph [9] above show an injury actually committed as well as irreparable harm. See, for example, the leading case of **Setlogelo v Setlogelo 1914 AD 221**.

[14] It made practical sense in these circumstances to grant the relief sought pending the finalisation of the appeal in case No. 19/2011 in the Supreme Court. See **Santam Ltd v Norman And Another 1996 (3) SA 502 (C)** at 505.

**M.M. RAMOBIDEDI**
**CHIEF JUSTICE**

For Applicants : Mr. M.B. Magagula
For Respondents : Mr. M.J. Manzini