



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1709/2012

In the matter between:

MTN SWAZILAND LIMITED

1st Applicant

MTN INTERNATIONAL (PTY) LTD

2nd Applicant

**MOBILE TELEPHONE NETWORKS HOLINGS
(PTY) LTD**

3rd Applicant

And

**SWAZILAND POST AND TELECOMMUNICATION
CORPORATION**

1st Respondent

PETROS DLAMINI

2nd Respondent

Neutral citation: *MTN Swaziland Limited & 2 Others v Swaziland Post and Telecommunication Corporation & Another (1709/2012) [2013] SZHC 204 (18th September 2013)*

Coram: **M. Dlamini J.**

Heard: **28th August 2013**

Delivered: **19th September 2013**

interpretation of contract – intention of parties to be gathered from language of their record of the agreement read with the context of the nature of their transaction – technical matters best addressed by lay tribunals and lay appeal – contempt of court proceedings – respondent bears onus to rebut inferred willfulness or mala fides on balance of probability –

Summary: Serving before me is an application at the instance of applicants for an interdict and an order for contempt of court against the respondents. The applicants contend that the respondents have breached a material term of a joint venture agreement by launching a product which has “*mobile component of telephony network and service*” thereby failing to comply with an arbitration award which was subsequently made an order of this court.

The parties

[1] The applicants and 1st respondent are companies although 1st respondent is a creature of statute, incorporated and registered in terms of the legislative enactment of Swaziland except for 2nd and 3rd applicants whose registration is in accordance with the laws of South Africa. The 2nd respondent is the Acting Managing Director of the 1st Respondent.

[2] The parties are all engaged in the business of telecommunication. Applicants run a mobile cellular telecommunication while 1st respondent is dealing with immobile or fixed telecommunication. The 1st respondent is also a regulator of the industry.

Point in limine

[3] The respondents raised a *point in limine* on urgency. In such matters the litigants are normally guided by the *dictum* of his Lordship **Coetzee J.** in **Luna Meubel Bervaardigers v Makin and Another 1977 (4) S.A. 135** at 137:

“Practitioners should carefully analyse the facts of each case to determine for purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must commensurate therewith. Mere lip service to the requirements ... will not do and an applicant must make out a case from the founding affidavit to justify the particular extent to the departure from the norm...”

[4] They contend that the urgency is self created and therefore the court should not entertain the matter. The applicants’ in counter submit that in the spirit of maintaining a good working relationship, they could not come to court without first engaging the respondent.

[5] The applicants have attached a considerable number of correspondences exchanging hands between the parties. In some instances, as reflected in some of the correspondences, the respondents’ attorneys would seek for time to take instructions. This on its own was time consuming. Not only were correspondences exchanged but meetings were held.

[6] I pose here to mention that as evident in our Rules of court, one of the cardinal rules is that a court of law should dispense justice in a much less

expensive and expedient manner. In other words, negotiations by parties especially in a matter as *in casu* where litigation costs could be insurmountable, the court should encourage parties to reach a *consensus* rather than rush to court. This is of course subject to limitation of the time frame in negotiations which is determined by the complexity of the matter. It is my considered view *in casu* that the period of six weeks was reasonable in the circumstances.

[7] The court notes that applicants lodged their application on 25th July 2013. The parties by consensus set the 28th August 2013 as the hearing date. This on its own demonstrates that the exigencies of urgency were no so stringent.

[8] I note further as contended in the replying affidavit that the parties had fixed dates among themselves as to when to file their given set of pleadings. However, respondent chose to file out of time, rendering the applicant to file a reply within a very short space of time. The end result of the respondents' action has rendered the matter extremely urgent as against the applicants. It is now not clear how respondents could complain of urgency when they were at leisure in filing their answers. I am compelled to refer to the poetic words in **Jajbhay v Cassin 1939 AD 537 at 551:**

“All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice.”

[9] In the above, there is no basis for respondents' objection on urgency and therefore the *point in limine* stands to be dismissed.

The Catalogue of events

- [10] The series of events leading to the present application deduced from the pleadings is as follows:
- [11] It appears that the 1st respondent having exclusive rights to be in the telecommunication industry, was desirous to venture into mobile cellular telecommunication. It approached the 2nd and 3rd applicants. This resulted in a joint venture agreement (JVA). 4th applicant was introduced into the (JVA) as an empowerment partner. One of the terms of the joint venture agreement was that the parties would form a company. On compliance thereof, 1st applicant was established wherein 1st respondent holds 51% in terms of clause 5.1.2 of the JVA.
- [12] It was further a term of the JVA that none of the share holders of 1st applicant would associate “*directly or indirectly*” with any business which such “*association will or might result in a conflict of interest arising.*”
- [13] In the course of its trade, 1st respondent launched a product referred to as “*one*”. The applicants instituted proceedings seeking to interdict and restrain respondents from rolling out this product. Before the application could be argued, 1st respondent conceded that such product was in violation of the JVA terms. This resulted in a compromise which was made an order of court by consent of the parties on 5th July 2010 pending arbitration on the same issues.
- [14] In 2011 the 2nd respondent launched a product called “*fixedfone*”. The applicant lodged an application seeking to compel 1st respondent to comply with the order taken by consent on 5th July 2010. Honourable **M.C.B.**

Maphalala J. dismissed this application. An appeal was noted against the dismissal. Before the appeal could be argued, the 1st respondent continued with marketing and supplying the *fixedfones*. Applicant was compelled to move yet another application interdicting 1st respondent. This was successful. Eventually the appeal was heard and upheld. This meant that the parties had to proceed to appear before arbitration in terms of the *transactio*.

[15] When the matter was before arbitration, the parties decided to draw out an agreement on the merits which was made a partial award. The partial award reflected that 2nd respondent was ordered to terminate forthwith all activities relating to “*mobile component of any telephony network and service operated by it*”.

[16] The question on the *quantum* of damages was postponed. On the return date, a final award which incorporated the partial award was issued by the **Honourable Justice P. M. Nienaber J.**

[17] By consent of the parties, the final award was entered as an order of court on 12th October 2012.

[18] In January 2013, 1st respondent introduced and offered the public a product referred to by applicants as *mifi*, and on 14th June 2013 the product was launched together with other products which are *Wi-Max* and *fixed terminal*. This has culminated to the present application.

Parties’ contention

Applicants’

[19] The applicants contend that the *mifi* product consist of “*mobile components of telephony service and operations*”. In proof of its averments that the *mifi* product is mobile, the applicants have referred this court to the affidavit of **Mr. Sandile Dhlomo** who identified himself as the Chief Executive Officer of SAMO Consultancy (Pty) Ltd. **Mr. Dhlomo** confirmed that the product provided by respondent is “*part of the mobile component of the 1st respondent’s CDMA Network*”.

[20] For this reason, the respondents are in violation of the final arbitration award which was made an order of court in October 2012, so proceeded the submissions.

[21] The applicants further informed the court that respondents have failed to completely terminate the rolling out of the ‘*one*’ and ‘*fixedfone*’ products in that its employees and on a limited bases, the public have been offered the services of these products. In support hereof, the applicants attached a printout indicating that respondents’ employees were still utilizing the services of ‘*one*’ and ‘*fixedfone*’ products.

Respondents’

[22] *Au contraire*, the respondents aver that as respondents they are statutory obligated to improve telecommunication services in the Kingdom.

[23] The respondents ferociously dispute that the products (*mifi*, *Wi-Max* and *fixed terminal*) are of “*mobile components of telephony network service and operations*”. They expatiate this point by submitting that the said products were never part of the products which led to the final award and subsequently the order of court.

- [24] To demonstrate that the *mifi* product is not mobile, respondents contend that it “*requires power to connect*”. It has no power sources of its own. It derives power from an AC source. **Mr. Dhlomo’s** contention is nothing but proof that the product can be manipulated and abused, a situation never contemplated by respondent. They contend further that to manipulate the device one has to be an expert in the field as **Mr. Dhlomo** was.
- [25] Further to say that the product is mobile because it could be used in a motion motor vehicle is incorrect as it is the motor vehicle that is mobile and not the product. They conclude that the *mifi* referred to by **Mr. Dhlomo** was an old version. They give a further description of the product under issue and annex diagrams of the same.
- [26] They contend that in a meeting with applicant they configured the access layer and re-provisioned the product further in order to render it difficult to manipulate. **Mr. Dhlomo** tested the one without improvements.
- [27] They submit that these are completely new products giving rise to a new dispute. In the result, this new dispute ought to have been referred for arbitration in terms of clause 27 of the JVA. Respondent then urge this court to decline to entertain the application.
- [28] The respondents further challenge applicants view on the reason for the JVA. They contend that the JVA was not concluded “*for purposes of providing mobile telephony and data services*” but its operation was confirmed to a GSM Network. They refer the court to clause 3.1 of the JVA.

- [29] They submit that competition between the two entities is inevitable as they are both in the telecommunication industry.
- [30] They dispute that the honourable **Nienabar J.** found that respondents had breached the JVA for reasons that the award was entered by consent. In other words, no findings were made on whether the “one” and “fixedfone” were of mobile components so went the contention.
- [31] Respondents submit that applicants endorsed its *Wifi* products. They conclude by saying that there is no mobile component on the product i.e. N.G.N. Any removal would require a removal of the CDMA Access Layer infrastructure which will shut down its telephony system. This will also negatively impact on applicants themselves as they will not be able to provide telecommunication services in Swaziland.

Applicants’ case

- [32] The applicants’ case is articulated with much precision at paragraphs 18 to 21 of their replying affidavit as follows:

“18. *The fact of the matter is that the products which the first respondent has launched through its CDMA network are part of the mobile component of the first respondent’s NGN network.*

19. *The first respondent states that it re-provisioned the products and reconfigured the access layer. This is an admission by the first respondent that it has tried to tamper with the mobility of products which are otherwise mobile products. The products are supported by the mobile network and whatever the first respondent does, the product will remain mobile products. The key factor is the access network. The mobile network operates through radio access and communication is through base stations.*

20. *As long as the products are part of the mobile component, they will always remain mobile however one tempers with the actual product. The fact that the device uses AC power or an external antenna or is fitted with an anti-tampering device does not define mobility. Mobility depends on the access network. Any product which is part of the mobile component will be mobile despite the modification and adaptations intended to make it look like it is not a mobile product.*
21. *The dispute between the applicants and the first respondent is whether the first respondent is entitled to operate a rival telephony network to that of the first applicant. The interdict exhaustively settled this dispute finally. The interdict deals with the network as opposed to individual products. The first respondent has to terminate the mobile component of its telephony network to comply with the interdict.”*

[33] It is clear that the attack on respondents’ product is not whether the product can or cannot be moved around as one would ordinarily impute to the word “mobile”. The applicants’ bone of contention is that the product competes in the network and therefore it is in violation of the JVA.

[34] I say it is in violation of the JVA because applicants have not averred that the final award which was eventually made an order of this court consists of a new agreement between the parties. In other words, any interpretation given to the final award must be consistent with the terms of the JVA.

Issues

[35] The above assertion by applicants calls for this court to take a two fold approach to the application.

[36] Firstly, is the assertion as appears in paragraph 32 *supra* envisaged by the terms of the JVA? In other words, did the parties herein contract according

to applicants' assertion? The answer lies in the JVA. I reiterate that whatever imputation is given to the final award which was then made an order of court must correspond to the JVA. In other words, the final award or court order, cannot find its meaning outside the ambit of the JVA.

Legal Principles

[37] It is apposite to highlight the principles of law operating at the backdrop of my mind as I interrogate the interpretation to be imputed to the joint venture agreement.

[38] Basic to the interpretation of a contract is the principle found in the **South African Railways and Harbours v National Bank of South Africa Ltd 1924 AD 704** at pages 715-716 where **His Lordship Wessels J. A.** stated:

“The law does not concern itself with the working of the minds of the parties to a contract, but with the external manifestation of their minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, yet if by their acts their minds seem to have met, the law will, ... look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which courts of law can determine the terms of a contract.”

[39] In 1478 his **Lordship Brian C. J.** articulating the *raison d’etre* for the above proposition proclaimed:

“...the intent of a man cannot be tried, for the devil himself knows not the intent of a man.” (**Saambou – Nationale Bouverening v Friedman 1979 (3) S. A. 994**).

[40] **Lord Eldon** on the other hand:

“protested that his task was not to see that both parties really meant the same thing, but that both gave their assent to that proposition which, be it what it may, de facto arises out of the terms of their correspondence” (See **Saambou supra**)

[41] **Solomon J.** in **Pletsen v Henning 1913 A.D. 82** at **99** hit the nail on the head on this principle as he stated:-

“The intention of the parties must be gathered from their language, not from what either of them has in mind.”

[42] In ascertaining the intention of the parties, I am very cautious of the approach which was adopted by the learned Judge **Olivier J. A.** in **Nedperm Bank Ltd v Lavarack and Others 1996 (4) S. A. 30** at **43 D** as follows:

“It follows that interpretation of a contract should not proceed from a consideration of the words and terms of the contract in abstracto, but always having regard to the broad context, nature and purpose of the contract.” (words underlined, my emphasis)

[43] On the same principle **Marais J. A.** in **First National Bank of S. A. Ltd v Rosenblum and Another 2001 (4) S. A. 189**, citing **South African Railways and Harbour v Lyle Shipping Co. Ltd 1958 (3) S. A. 416** at **419 D-E** had this to say:

“It is perhaps necessary to emphasise that the task is one of interpretation of the particular clause and that caveats regarding the approach to the task are only points of departure. In the end the answer must be found in the language of the clause read in the context of the agreement as a whole in its commercial setting and against the background of the common law and, now, with due regard to any possible constitutional (statutory) implication.” (words in brackets and underlined my own addition and emphasis respectively)

[44] To sum up the principle:

“The parties must be regarded as having meant a business transaction; and it is the duty of the Court to construe their language in keeping with the purpose and object which they had in view, and so render that language effectual. Such is the clear principle of our law. ...In agreement we should examine what is the common intention of the contracting parties, rather than the grammatical sense of the terms. Moreover, we must construe the words in that sense which is most agreeable to the nature of the agreement.” See **Cape Provincial Administration v Clifford Harris (Pty) Ltd 1997 (1) S. A. 439 at 466 C)**

[45] The above *dicta* however does not depart from the words of his Lordship **Steyn C. J.** in **Capuorizas v Webber Road Mansions (Pty) Ltd 1967 (2) S. A. 425 (A) at 434 A-B** that:

“must give effect to the grammatical and ordinary meaning of the words, and that cogent reasons would be required for doing violence to plain words, it is likewise settled law that a departure from such a meaning is justified where it clearly appears from the contract that the parties, intended a different meaning.”

[46] Lastly, I also bear in mind the words of our greatest jurist his Lordship **de Villiers, J.P.** in **Provident Land Trust, Ltd. V Union Government (Minister of Mines) 1911 A.D. 615** at page 627 as follows:

“Courts of law do not hesitate to strip transaction of disguise and reveal their true nature.”

Adjudication

[47] Having demonstrated that the bone of contention is on the interpretation of the JVA, and that the final award must find its meaning and purpose within the JVA, I now seek to scrutinize the terms of the JVA with a view to ascertaining its purpose in accordance with the *dicta supra*.

[48] The Applicants have cited clauses 21.1 and 21.2 of the JVA as the *grund norm* behind the final award.

[49] The clauses read:

“21.2 Without derogating from the foregoing or clause 12.5 no Shareholder shall either directly or indirectly be associated with any business or concern if such association will or might result in conflict of interest arising.”

[50] In brief, clause 21.2 prevents any shareholder of 1st applicant referring also to 1st to respondent *inter alia* from engaging either directly or indirectly with the “*business*” or “*concern*” of 1st applicant.

[51] This leads one to the question therefore, what is the “*business or concern*” of 1st applicant which should be protected according to this clause?

[52] The “*business or concern*” of 1st applicant which is envisaged by clause 21.2 can be deduced from the preamble of the JVA titled “*Introduction*” in clause 3.1 which is as follows:

“3.1 Pursuant to MTNH having been successful in its proposal to be appointed as a joint venture partner of the SPTC to operate a network in the territory, the Shareholders have formed the Company which is a public company, and which will be granted a licence to operate a network in the territory.”

[53] From the above, the business of 1st applicant is to “*operate a network*” in Swaziland. To demonstrate the intention of both parties, the licence granted to 1st applicant was to “*operate a network*” as per this clause.

[54] In order for the court to understand fully the words “*operate a network*” it is imperative that one resorts to the memorandum of articles for 1st applicant and view its objective.

[55] Although this document was not part of the pleadings, I requested for it in order to inform myself fully on the issue. I was guided in so doing by the *dictum* of his Lordship Centlivies J. A. in **Collen v Pietfontein Engineering Works 1948 (1) S. A. 413 at 433** which is to the effect that it is desirable that a court should have all the evidence at its disposal in order to decide on a matter and **Teachers Association of South Africa v Pillay, 1993 (1) S.A 111** at 119 where it was held that judges had very large powers to order for such evidence.

[56] Article 3. (a) (1) of 1st applicant’s Memorandum of Association reads:

“3. (a) (1) *To operate telecommunication services in Swaziland and for that purpose to import, export, wholesale, retail, manufacture, maintain repair and in any other manner deal with all forms of equipment and technology.*”

[57] Nothing further was disclosed as the business of the 1st applicant from the Memorandum.

[58] If these broad terms (*operate a network / telecommunication services*) define the business of 1st applicant, then the next question to follow is similar. What then is the business of 1st respondent? I ask this question in order to enquire on the demarcation between the operations of the 1st applicant and 1st respondent. Again this question demands that I turn to 1st respondent’s mandate. It is highlighted in the legislation that establishes it viz., section 7(1) of the Swaziland Post and Telecommunications Act No.11 of 1983:

Section 7 (1) (a) and (b) stipulates:

“7 (1) *It shall be the duty of the Board, by means of the undertaking of the Corporation*
–

(a) *to provide postal services and telecommunications services within Swaziland and from Swaziland to foreign countries; and*

(b) *to regulate and control radio communications operated from or received in Swaziland.*”

[59] From the above it is clear that both parties are engaged in the business of “*telecommunication services*”.

[60] However, could it be said that it was the intention of the parties to provide the same services to the public and thereby compete with each other? This calls for a close scrutiny of the JVA.

[61] It is apposite to cite again the provision of Clauses 21.2 *op. cit.* as follows:

“21.2 Without derogating from the foregoing or clause 12.5 no Shareholder shall either directly or indirectly be associated with any business or concern if such association will or might result in conflict of interest arising.”

[62] These words connotes that members of 1st applicant as shareholders were prohibited from venturing into the business of 1st applicant. Put differently, the intention of the parties was that there should be no duplicity of services among themselves.

[63] What then is the specific area of business of 1st applicant or 1st respondent in terms of the instruments that establish them?

[64] I have already referred to clause 3.1 of the JVA that the business of 1st applicant is “*to operate a network*” with 1st respondent exercising its regulatory powers.

[65] The term “*network*” is described under clause 2.15 of the JVA as:

“2.15 “*network*” means the telecommunications network consisting of the GSM network.”

[66] There is no definition of the word “*telecommunication*” in the JVA.

[67] Under 1st respondent Act telecommunication has been defined under Section 2 (1) as:

“telecommunication services” means radio communication services, telegraph services and telephone services.”

[68] This leads us also to interrogate the term “*network*”. Under clause 18.2 of the JVA we learn the following:

“18.2 Each of the parties and MTNH reciprocally agrees and undertakes to the other parties that for as long as it is a direct or indirect shareholder in the Company, or directly or indirectly controls a shareholder of the company, and during the restraint period, it will not;

18.2.1 directly or indirectly, either on its own account or as a partner with or as an agent, employee, associate, adviser, consultant, financier, administrator, shareholder or member of any other person or persons, firm, company or close corporation or in any other capacity whatsoever, carry on or be engaged, interested or concerned in any business or activity which operates a GSM network or GSM service provider, dealer or agent in the territory.”

[69] The restraint period is found in clause 18.3.5 as follows:

“18.3.5 the restraint set forth in 18.2 above shall cease to apply in the event that the Company is finally liquidated.”

[70] It appears from the plain language of clause 18.2.1 that 1st applicant’s business was to operate a GSM network and provide GSM services, at the exclusion of all others. The 1st applicant was to monopolise the GSM network in terms of its operation and services. This is gathered from the words “*in any other capacity whatsoever*”. Now that the 1st respondent is a regulator of the telecommunication industry, it was restrained from, for instance, issuing licences to third parties and worse if 1st respondent intended itself as a shareholder of 1st applicant to operate the GSM network or provide GSM services. It is totally prohibited by this clause unless it

ceases to be a shareholder of 1st respondent. Even then, it has to wait for a period of twelve months as per clause 18.1 with the exception that 1st applicant ceases by reason of liquidation in terms of clause 8.3.5 *supra*.

[71] In summary, the exclusive business of 1st applicant as can be deduced from the JVA is to operate the GSM network and provide GSM services to the territory, being the Kingdom of Swaziland. In other words, should the 1st respondent venture either directly or indirectly or assist any person, juristic or natural, in any manner, to compete with 1st applicant's business in the said arena, 1st respondent would be held to be in breach of the JVA simultaneously with the final award or court order.

[72] I need not deal with the question of mobility or immobility as both parties from the totality of the pleadings seem to appreciate that 1st applicant deals with mobile components while 1st respondent immobile. This is because in engaging their various experts to examine the product under issue, both experts were concerned with the physical mobility of the product.

[73] In other words, the product should not be tested for its mobility characteristics only but its GSM network services and operations as well.

[74] The findings above lead me to the second approach. Is the 1st applicant's product under issue (*MiFi*) one which could be said to operate in the GSM network or of GSM services and is it mobile as well? I pose this question in this manner because the words in the final award or court order which read, "*terminate forthwith the mobile component of any telephony network and service operated by it*" should be understood in terms of the interpretation of the JVA as imputed above in the absence by either party contending that the

final award or court order constituted a new agreement falling outside the purview of the JVA.

[75] At its paragraphs 42, 49, 51, 53 applicants aver:

“42. Without notice to the applicants, at the time the final award was being made (and this by consent), the first respondent had introduced or were introducing into the market its MiFi product. This product is part of the mobile component of the first respondent’s network and therefore in flagrant violation of the award of the International Court of Arbitration which is an order of the High Court. The first respondent had committed itself to not operating any product that would violate the terms of the award. Despite this, the first applicant discovered in January 2013 that the first respondent was offering to the public its MiFi product. It is highly significant that the respondents withheld any disclosure of their intentions and activities regarding the MiFi product, either in the run-up to the final arbitration session in September 2012 or the settlement discussions which ensued. Had the respondents been in good faith they would have disclosed the launch of MiFi (which quite obviously was either taking place or had been decided upon, by October 2012), and have sought to ensure that the ambit of the agreed award and court order excluded the operation of MiFi.

49. The first respondent’s refusal to forthwith terminate the mobile component of its telephony network and continuing to offer products which are part of the network that the first respondent is obliged to terminate is a blatant violation of the terms of the interdict.

51. Not only has the first respondent continued the operation of its One and Fixedfone products, despite the three court orders, partial and final arbitration awards and its own consent to the awards and first and third court orders. It has, as already indicated, compounded its unlawful conduct by also rolling out a mobile wireless internet hotspot service, branded as MiFi is also a part of the mobile component of the first respondent’s NGN network. It operates using wireless routers connected to the mobile component of the first respondent’s network and is fully mobile except that it requires power to connect. It can also connect from a car. MiFi is accordingly, operated in violation of the interdict. It is part of the mobile component of the first respondent’s telephony network

which the first respondent was expressly required to terminate in terms of the interdict.

53. *The first respondent does not deny using the products in question, but denies that it is violating the interdict by continuing to operate the mobile component of its telephony network. The first respondent's justification is that the products are not in competition with the services offered by the first applicant nor are these products mobile as they are fixed to terminals.*

[76] In *au contraire*, respondents assert:

- “13. *In this regard, in paragraph 42 of the Founding Affidavit, the Applicants allege that they “discovered” in January 2013 that the First Respondent was offering to the public its MiFi product and that this product is in violation of the court order. In fact, in a technical meeting held between the First Applicant and the First Respondent on 21 January 2013, and which was attended by Francis Dlamini (whose confirmatory affidavit is filed evenly herewith), the First Respondent disclosed to the First Applicant that it intended to introduce certain “fixed wireless products” into the market. One of the wireless products is the MiFi product complained of. MiFi is a name used for a wireless router. This router has been re-engineered by the First Respondent to remove the mobility ability of the router by ensuring that it cannot work without AC power and by ensuring that the router is physically fixed to its intended location and that it is not possible under normal circumstances for an individual to move the product. The MiFi router also does not have a battery pack of its own to enable it to operate under its own power. A copy of the minutes of that meeting, which Francis Dlamini confirms to be accurate, is annexed hereto marked “PD1”*
14. *Paragraph 1.1(iii) and paragraph 1.4 of annexure “PD1” in essence deal with the MiFi product and the WiFi hotspot. This product was endorsed by First Applicant's technical team. The Applicants now allege that this product is part of the mobile component of the First Respondent's network and is in violation of the Court Order. In support of its contention, they have retained the services of an expert, Sandile Dhlomo, to carry out a mobility test. Significantly, in order to determine the mobility of the MiFi product, Dhlomo had to provide a vehicle to provide mobility. Furthermore, he had to modify the MiFi gadget to enable it*

to obtain power from the vehicle. Quite clearly, without these steps having been taken, the product was not mobile.

15. *The Applicants similarly contend, without proof, that the Wi-Max and Fixed Terminal products are part of the mobile component of the First Respondent's telephony network. This is simply not so.*

17. *Not only have the First Respondent and I at all times held the genuine and bona fide belief that the new products referred to above are fixed and not mobile, but, in the case of the MiFi product, additional steps have been taken at the instance of the First Applicant to render them incapable of being converted by unscrupulous persons so as to become mobile (a conversion which Mr. Dhlomo performed). This is confirmed in the affidavit of Francis Dlamini filed herewith."*

[77] **Mr. Jeff Penberton** duly attested to having examined the product and his findings were that the product was immobile.

[78] I must pose here to point out that during the hearing, Counsel for applicants urged the court not to admit the expert evidence of **Mr. J. Penberton**. It was said that his evidence was not supported by any qualifications in the field or if any, such were not of required standard.

[79] From the foregoing assertion of both parties, it is apparent that the product under issue is highly contested in terms of its mobility and its network operations and services.

[80] It is my considered view that the questions on the mobility, network operations and services and on admissibility or otherwise of **Mr. J. Penberton** are technical.

[81] Faced with a similar case, the Honourable **Lord Justice Schutz J.A.** in **Powernet Services (1988) (Pty) Ltd, v Government of the Republic of South Africa 1998 (2) S. A.** at pages **18-19** held as *ratio decidendi*:

“Also, it needs to be emphasized again that cases concerned with technical subjects are tried by lay tribunals and go on appeal to a lay appeal court. Technical matter is not always easy to make clear. But it must be done, otherwise a litigant may find a modern court responding much like the Glossators of old – who had Latin but not Greek – Græca non loquuntur.”

[82] In *casu*, the parties contentions are more compounded by their differing view on the nature and characteristics of the product under issue.

[83] Applicants submit that the product (*Mifi*) has features depicted in annexure AD22. Respondents counter this by submitting that the product in AD22 was the subject matter in the first case that led to the arbitration award and the subsequent court order. The product under issue bears characteristics shown in annexures TM2, TM3 and TM4, according to respondents. Further, applicants are demanding respondents to switch off the radio while respondents are lamenting applicants’ demand on the basis that should they switch off the radio, the whole system will shut down and not only shall it adversely affect 1st respondent’s operations but 1st applicant as well.

[84] It is on the basis of the above highly contentious and material issues that I am inclined to refer the question of mobility, network operations and services of the products in issue together with the admissibility of the expert’s evidence and any other pertinent matter to arbitration to be deliberated upon in line with the interpretation canvassed in this judgment.

[85] To sum up, the court is not in a position to ascertain whether the respondents are in contempt in view of the outstanding question of whether the *MiFi* or *WiMax* or *fixed terminal* are of “*mobile component of any telephony network and services*” by reason of its highly technical nature.

[86] It would be remiss of this court not to address another point pertinent herein *viz.*, whether the final award subsequently made an order of court is to be interpreted *structu* as applying to the “*fixedfone*” product or any other product which has “*mobile component of telephony network and services*”

[87] The final award reads:

“By agreement between the parties, the following award is made:

1. *It is further recorded that the rights of the claimants to enforce the terms of the partial award of 4 August 2012, incorporated and reiterated herein, in respect of any continued or new breach of the terms of the joint venture agreement between them are specifically reserved.”*

[88] The partial award reads that 1st respondent:

“is ordered to terminate forthwith the mobile component of any telephony network and service operated by it (be it mobile data services or functions in competition with the 1st Claimant (first applicant), voice or any text message services), to cease advertising or in any other way promoting same and to desist from canvassing subscribers and other potential users in respect thereof for so long as the [first] Respondent is a shareholder of the joint venture or the joint venture agreement subsists between the parties”.

[89] The term “*any*” to me suggests that the award or court order should not be confined to “*fixedfone*” only. It refers to future products of “*mobile*

component of any telephony network and services” but consistent with the JVA terms as alluded above.

[90] This transaction in my view is in all fours with the wise words of his Lordship **Zulman A. J.** in **M. M. Fernandez (Pty) Ltd v Mohamed 1986 (4) 383** at **386** when discussing a tacit term:

“... contract to my mind makes perfectly good sense, both in a commercial and ordinary sense, without the implication of the term in question.”

[91] In other words imputing the word “*any*” in this fashion accords well with commercial dictates of the industry as it affords the aggrieved party to invoke the *transactio* whenever the other party is said to have engaged in products which violates the agreement.

[92] However, that as it may, it does not mean that the parties may not refer the matter to arbitration where the component of the product is disputed.

[93] The applicants have submitted a list of numbers in proof of their assertion that the respondents failed to terminate the *fixedfones* in terms of the award or court order thereby are in contempt of court.

[94] **Van Copenhagen J.** in **Holtz v Douglas and Associates (O. F. S.) cc En Andere 1991 (2) S.A. 797** at **798** defined contempt of court emanating from civil proceedings as follows:

“...as an intentional refusal or failure to comply with the order of a competent court.”

[95] On “*intention*” his Lordship Goldin J. in **Haddow v Haddow 1974 (2) S.A. 181** held:

“Where an applicant in proceedings to commit the respondent for contempt of court, in that he has disobeyed an order of court of a nature justifying such punishment, has proved that the respondent has disobeyed the order of court which was brought to his notice, then both willfulness and mala fides will be inferred. The onus is then on the respondent to rebut the inference of mala fides or willfulness on a balance of probabilities.”

[96] In *casu*, my task is to ascertain whether the respondents have rebutted the inference of willfulness or *mala fides* on their part.

[97] The respondents have deposed in rebuttal under the hand of **Mr. Petros Dlamini**:

“7. *In compliance with the Arbitration Award and the Court Order, the First Respondent removed the above mentioned products from the market.*

8. *I pose to mention that, after withdrawal of the products as aforesaid, the First Respondent’s employees were allowed to utilize the small cellphone-like handsets, which were enabled for internal communication purposes only. Such limited use was not in any way in completion with the First Applicant’s business. On 17 July 2013, these handsets were removed from all employees after it was found that certain employees had tampered with them to enable them to make calls to Swazi MTN customers. The SPTC telephone numbers referred to in annexure “AD8” of the Applicants’ Founding Affidavit are all calls made from these handsets and not from the bigger wireless desk top phone handsets referred to above.*

9. *Both the First Respondent and I were unaware of the aforementioned state of affairs and acted promptly when it was brought to our attention. In any event, I*

respectfully submit that the conduct of few unscrupulous employees cannot be imputed to me or to the First Respondent.

10. *The “Fixedfone” product referred to in paragraphs 48 and 50 of the Applicants’ Founding Affidavit is not “the bigger wireless desktop phone mobile handset” referred to in paragraph 23 of the Applicants’ Founding Affidavit. It will be evident from the Affidavit of Amon Dlamini filed evenly herewith that the fixed phone product referred to by the Applicants is not a mobile device and neither are the other devices referred to in paragraph 65 of the Applicants’ Founding Affidavit.”*

[98] At Paragraph 30 of **Mr. Amon Dlamini**’s affidavit, it is deposed:

- “30. *The Respondents deny that they have failed to comply with the Court Order as alleged or at all. In fact, as stated by Petros Dlamini, the Respondents complied with the Court Order by removing the cellphone-like handsets as well as the bigger wireless desk top hone handsets from the market. Furthermore, the Respondents dispute the interpretation of the terms of the interdict given by the Applicants in paragraph 45.*

[99] He continues at page 54:

- “54. *There is no need for the relief sought in paragraph 3 and 4 of the Notice of Motion. In any event the Respondents have demonstrated that they have complied with the Order of 12 October 2012. If it should be held that they have not done so, their conduct has not been intentional or mala fide. They have conducted themselves in a manner which they bona fide considered was in compliance with the Court Order, in compliance with the duties of the First Respondent in terms of its founding statute in the best interest of their citizens of Swaziland.”*

[100] In their *viva voce* hearing, the respondents drew the court’s attention to the list of *fixedfone* numbers submitted by applicant and contended that they were merely few. They were made by 1st respondent’s employees without

their sanction. They were retained for internal calls within 1st respondent. As soon as they were alerted, they withdrew them completely. In essence, the 1st respondent submitted that they complied with the Order of this court.

[101] In their replying affidavit applicants did not dispute the above contentions, but insisted that the 1st respondent should switch off the radio which is the power base station referred to as per the court order, “*telephony network*”. However, the evidence as adduced by 1st respondent that it terminated the product which led to the court order by removing the products on the market; only few gadgets were left for internal calls within 1st respondent offices; that they did not anticipate that employees would abuse the same and that as soon as they were informed of the employees’ misconduct, they removed the product, remained unchallenged. At any rate once the products were removed from the market, there was no competition or financial loss against applicant.

[102] For the principle of our law that unchallenged averments must be held to be admitted, I find that the respondent lacked the necessary *animus* to be found to be guilty of contempt with regard to the *fixedfones* that were left in the hands of their employees. The scales of justice must tilt in respondent’s favour in this regard.

[103] Lastly, the respondents have suspended any rolling out of the products which are the subject of this application upon being challenged by the applicants. They were well advised. The status *quo ante* should remain pending arbitration findings.

[104] I am not inclined to grant any party costs as the matter has not been dealt with on merits. This matter is left to the able hands of the Honouable arbitrator.

[105] For the foregoing, I enter the following orders:

1. Question of whether the products in issue violate the court order and other pertinent issues therein are referred to arbitration;
2. Status *quo ante* remains pending arbitration orders.
3. No order as to costs.

M. DLAMINI
JUDGE

For Applicants: J. J. Gauntlut SC assisted by Mr. Poser Jr instructed by Magagula & Hlophe Attorneys

For Respondents: R. J. Salmon SC assisted by Mr. Bedderson Jr instructed by Howe Masuku Nsibande Attorneys