IN THE COURT OF APPEAL OF SWAZILAND

CIVIL APPEAL CASE NO.32/2006

In the matter between:

SWAZI M.T.N. LIMITED **APPELLANT**

AND

MV TEL COMMUNICATIONS (PTY) LTD **1st RESPONDENT**

E TOP UP (PTY) LIMITED **2nd RESPONDENT**

CORAM: **STEYN JA**
TEBBUTT JA
BANDA JA

FOR THE APPELLANT: **MR. N. HLOPHE**

FOR THE RESPONDENTS: **MR. L.R. MAMBA**

JUDGMENT

Tebbutt JA

(1) The distribution of so-called "airtime" products, which include the facilities for the use of cellular telephones throughout the Kingdom of Swaziland, is the underlying basis of a number of litigious steps that have culminated in this

application for leave to appeal to this Court.

(2) The applicant, Swazi MTN Limited, to which I shall refer, for convenience, as "Swazi MTN" is a licensee entitled to distribute airtime for cellphones within Swaziland. It is the sole cellphone operator in Swaziland. In 1999 it established a distribution network to empower Swazis, as its distributors, to distribute airtime products under its auspices. To this end a memorandum of understanding (MOU) was entered into on 23rd July 2003 between the applicant and the first respondent, MV Telecommunications (Pty) Ltd (to which I shall, for convenience, refer as "MV Tel") whereby the latter was appointed as a supplier of a so-called "virtual voucher solution" to distribute Swazi MTN airtime products using the said solution and so sell airtime to its customers in electronic format.

The vehicle through which MV Tel would effect its distribution was the second respondent, E Top Up (Pty) Ltd, to which, again for convenience, I shall refer as "E Top Up". The latter and Swazi MTN on 1st August 2004 entered into a Distribution Agreement in terms whereof E Top Up was appointed by Swazi MTN to distribute its prepaid products to its customers. It would do so at a fixed commission rate, such commission to be paid to E Top Up by Swazi MTN. The agreement was to be for a period of 12 months.

Relationships between the parties soured during the latter part of 2005. It would appear that no letter for the renewal of the agreement was signed by E Top Up and Swazi MTN thereupon treated the agreement as having expired on 1st August 2005. It stopped supplying E Top Up with its airtime products.

During September 2005 both respondents brought an application by way of notice of motion in the High Court for a number of orders. It is unnecessary to set them out herein in detail. Suffice to say that the gravamen of them was that MV Tel and E Top Up asked, as "final relief," that one or other of them be appointed "in perpetuity", or alternatively for a period of 5 years, as distributors of Swazi MTN's prepaid airtime products. There were also a

number of prayers for consequent ancillary relief.

The application, which was opposed, came before Ebersohn J, who was requested by the two respondents to grant them only interim relief pending the institution of an action by them for the relief claimed by them in the notice of motion. Ebersohn J, who intimated that he could not grant the orders sought on the material before him, stated that the respondents, if they wished to claim the relief sought, should institute their mooted action, but he felt that the respondents would be seriously prejudiced if interim relief was not to be granted to them pending this happening. He therefore on 30th November 2005 made the following interim order, referred to in the papers before this Court as "the first interim order". It reads:

> (The applicants, of course, were MV Tel and E Top Up and the respondent was Swazi MTN)
>
> **"Pending the institution and conclusion of an action by the applicants against the respondent for final relief for declarators and/or rectification and/or damages, which action must be instituted within 30 court days as from 30th November 2005, interim interdicts are granted as follows:**
>
> **1.1. the respondent is ordered to supply to the applicants its pre-paid electronic tokens including ETMS and SMS to sell as distributors thereof and where applicable through the applicants' SMS based system of distributing pre-paid (virtual) electronic tokens, at the ordinary fixed commission rate paid by the respondent and the respondent is not entitled to unilaterally reduce the commission rate;**
>
> **1.2. that the respondent be ordered to allow, facilitate and implement the operation by applicants of ETMS solution as supplied by first applicant to respondent directly on the GSM (alternatively ERPS) platform of the respondent's cellphone network;**
>
> **1.3. that the respondent promptly distribute electronic (virtual) token airtime to applicants, alternatively to the first and/or second applicant as against the terms of payment in**

the past adhered to by the parties;

1.4. that the respondent be interdicted from interfering with the existing contractual rights and duties in existence as between applicants and the respondent and the applicants and their distributors and clients."

The respondents duly instituted an action within the 30 court days stipulated in the above order viz on 9 th January 2006. The applicant, Swazi MTN, however, failed timeously to file and serve a notice of intention to defend, as it had to do on or before 23rd January 2006, and on 6th February 2006 the respondents applied for, and were granted, default judgment for the relief claimed by them in the summons.

This included a declaratory order that Swazi MTN was obliged to appoint E Top Up (alternatively MV Tel) as a distributor in perpetuity or for the duration of Swazi MTN's licence. Swazi MTN was further interdicted from distributing its products through its own so-called "VTU system" directly to its customers but was ordered to so only through an authorized distributor. It was also interdicted from withholding stock or its products to E Top Up but was ordered promptly to deliver stock to the latter. It was also declared that Swazi MTN was not entitled unilaterally to reduce the agreed commission payable to E Top Up but was bound to do so at a rate of 15%. Costs were to be paid by Swazi MTN on the attorney and own client scale.

Swazi MTN thereupon filed an application to rescind the default judgment. It also sought an order suspending or staying the operation of the default judgment pending the determination of the rescission application. The application for the suspension of the default judgment came before Mamba AJ who, on 21st January 2006, allowed the application. He held ***inter alia*** that, and I quote:

"The plaintiff (respondent) would suffer no substantial prejudice if the execution is stayed. The parties shall retain their respective positions they had through a court order

before the judgment sought to be rescinded was granted, regard being had to the fact that plaintiff coped without such execution for some time."

He felt that Swazi MTN would suffer real substantial prejudice if the default judgment was not stayed or suspended. He therefore made the following order:

"Pending determination or finalization of the application for rescission of the judgment granted by this Court on 6th February 2006 herein, the operation and execution of the said judgment is stayed or suspended."

He ordered Swazi MTN to pay the costs of the application.

Swazi MTN, though it averred that it wished to do so, had not sought leave to appeal against the judgment of Ebersohn J granting the respondents the first interim order. On the 17th March 2006 it sought condonation in this Court for the late filing of an application for leave to appeal. The matter came before Ramodibedi JA, Banda JA and Magid AJA. Unfortunately, for some unaccountable reason the court was not furnished with either the judgment or order of Mamba AJ on the terms on which the default judgment was suspended. Giving the judgment of the court, Magid AJ said :-

"As I see the position, if the application for rescission is granted, then the question of condonation of the late filing of the application for leave to appeal against the order may have to be considered by the court. On the other hand, if the application for rescission is refused, then the order will have been superseded by the default judgment. In these circumstances I do not think that it would be proper for this court to consider the application for condonation unless and until the High Court rescinds the default judgment."

It follows, therefore, that in my view, the application must be struck off the roll."

The Court accordingly ordered that the application be struck off the roll and that Swazi MTN pay the wasted costs attendant on the enrolment and hearing

thereof.

Serious disputes, however, arose between the parties, as to what the effects were of the various orders, particularly that of Mamba AJ. To re-capitulate : the first interim order by Ebersohn J was that pending the conclusion of an action by MV Tel and E Top Up,

Swazi MTN was ordered to supply to the former its pre-paid electronic tokens, including ETMS and SMS, to sell as distributors and, through their SMS based system of distributing, to sell prepaid (virtual) electronic tokens, at the fixed commission rate paid by Swazi MTN, which it was not entitled to unilaterally reduce. It was ordered promptly to distribute electronic token airtime to MV Tel and E Top UP and was further interdicted from interfering with the existing contractual rights between the parties. That order fell away when the default judgment on the action brought by MV Tel and E Top Up was granted. The operation, effect and execution of the default judgment was, however, stayed or suspended by the order of Mamba AJ granting such stay or suspension. Was the effect of this to revive the interim order of Ebersohn J? MV Tel and E Top Up said it was; Swazi MTN said it was not and it has refused to comply with it.

It did not supply E Top Up with stock. It, however, maintained that it did not have to do so as there was no contractual relationship between it and the two respondents, such having lapsed on 1st August 2005. The interim order of Ebersohn J, it said, did not compel it to do so as that lapsed when the default judgment was granted and was not revived when the operation of the default judgment was stayed.

Because of these disputes MV Tel and E top UP on 15th June 2006 applied, as a matter of urgency, for an order.

> **"declaring pending the outcome of (Swazi MTN's) application for rescission of the default judgment ... that the interim order**

> **issued by Mr. Justice Ebersohn ... on the 30th November 2005 and in particular the orders contained... in the judgment is and will be of full force and effect and that the applicants are entitled to demand compliance by (Swazi MTN) with same."**

The application came, once more, before Mamba AJ who held that his order for a stay or suspension of the default judgment removed its effects and revived the first interim order issued by Ebersohn J. He said:-

> **"It returned the parties to their respective positions immediately prior to the default judgment."**

That position, he held was regulated or governed by the first interim order. He then made the following order on 3rd July 2006.:-

> **"Pending the determination and subject to the outcome of the application for the rescission of the default judgment granted by this Honourable Court on the 6th February 2006, the first interim order issued by this Court under case number 3406/06 on the 30th November 2005 is and will be of full force and effect."**

Each party was ordered to bear its own costs.

It is against that judgment that Swazi MTN now seeks, by way of notice of motion, leave to appeal.

The first issue raised before this Court was whether it was necessary for Swazi MTN to obtain leave from the Court of Appeal to it. Mr. Daniels, who appeared for Swazi MITN, submitted that it was not necessary because, so he argued, the judgment of Mamba A J of 3rd July 2006 was final and definitive in effect, permitting of an appeal as of right to this Court. Ms. Van der Walt, for the respondents, submitted that the judgment was of an interlocutory nature, necessitating an application for leave to appeal. In the light of what follows hereinafter it is unnecessary for the Court to come to a decision on this issue.

This appeal is concerned with one issue and one issue only viz was it correct for Mamba AJ to have held that pending the determination and outcome of the application for recession of the default judgment, the first interim order of Ebersohn J was of full force and effect.

Mr. Daniels attacked that judgment on three fronts. He said, firstly, that in the application before him resulting in his judgment of 3rd July 2006, Mamba AJ was called upon to interpret the order of Ebersohn J but that as Mamba AJ had not done so, his judgment was flawed and should be set aside by this Court.

That submission is incorrect and has apparently resulted from a misreading of the application before Mamba AJ.

That application, as set out above, was for an order -

> **"declaring pending the outcome of Swazi MTN's application for recision of the default judgment... that the interim order issued by Mr. Justice Ebersohn ... will be of full force and effect and that the applicants are entitled to demand compliance by Swazi MTN with same."**

It is inclear and unambiguous terms and required Mamba AJ to state whether the result of his having stayed the effect of the default judgment, was to revive the order of Ebersohn J and render it once more of full force and effect. That was all he was called upon to do and nothing else and that was exactly what he did do as well. The application said nothing about the contents of Ebersohn J's order and what they embraced or whether Mamba A J was called upon to interpret them. Nor could he have done so. An application for leave to appeal against the order of Ebersohn J had been noted. This, as pointed out by Ms. Van der Walt, rendered the High Court ***functus officio*** in so far as that order was concerned. The application for leave to appeal against the judgment of Ebersohn J was, as set out above, struck off the roll by this Court. It has not been reinstated. Lengthy heads of argument were put before this

Court attacking the judgment and order, Swazi MTN particularly complaining that it is unable to carry out certain terms of the order.

This Court is not presently concerned with that. There is no appeal against Ebersohn J's order before it and in the light of what the present appeal is concerned with, those heads are entirely inappropriate.

The second prong of the attack by Mr. Daniels on the judgment of Mamba AJ is that, in relation to his judgment of 21st January 2006, suspending or staying the operation and execution of the default judgment, Mamba AJ was ***functus officio*** and thus precluded from making the order he did on 3rd July 2006.

It will be recalled that in his judgment of 21st January 2006, Mamba AJ said, in relation to a stay of execution, that -

> **"The parties shall retain their respective positions they had through a court order before the judgment sought to be rescinded was granted..."**

It was this that gave rise to the uncertainty between the parties as to what the learned Judge meant by the sentence quoted. As I have set out above, did it revive the order of Ebersohn J or was that order "dead" to use a term appearing in the papers? The application resulting in his judgment of 3rd July 2006 was to ask Mamba AJ to explain what he did, in fact, mean. He says that in terms viz:

> **"The parties differed or could not agree on what their rights and obligations were following my judgment for the stay. It is this difference of opinion that prompted the applicants to bring this application to court."**

Although a court is generally ***functus officio*** when it has finalized its judgment or order in a case, there are certain exceptions to this general proposition. One of these is that the court may clarify its judgment or order if on a proper interpretation the meaning thereof is uncertain, so as to give

effect to its true intention, provided it does not thereby alter the "sense and substance" of the judgment (see per **TROLLIP JA** in **FIRESTONE SA (PTY) LTD V GENTICURO AG 177(4) SA 298 (A)** at 307 A.

In **S V WELLS 1990(1) SA 816(A)** at 820 C-G Joubert JA, referring to the Roman Dutch law authorities and in particular a statement by Voet 42.1.27 that a Judge may explain what has been obscurely stated in his judgment, said this reflected the common law in South Africa. It also accorded with English practice (see **BROMLEY V BROMLEY 1964(3) ALL ER 226 CA** at 228F.) The approach of the South African and English courts applies equally in Swaziland.

Mamba AJ on 3rd July 2006 was not altering the "sense and substance" of his earlier judgment of 21st January 2006 but giving an explanation to the parties of what had caused the uncertainty between them. There was nothing wrong in that.

Mr. Daniels finally submitted that in making the order of 3rd July 2006, Mamba AJ was wrong. The order of Ebersohn J had, because of the default judgment "died" and could not be revived. If Mr. Daniels is correct, it would mean that until the application to rescind is finally determined, the parties would be in limbo and MV Tel and E Top Up deprived of the rights granted to them by Ebersohn J. Moreover, if Mr. Daniels is correct it would mean that if rescission of the default judgment is granted, MV Tel and E Top Up would similarly be deprived of those rights. It must be remembered that those rights were accorded to them pending the conclusion of their action against Swazi MTN. The effect of a rescission of the default judgment will be that that action would then continue to its conclusion and therefore the rights given to them by Ebersohn J would prevail until that occurred. Those rights could therefore not possibly be taken away by the suspension of default judgment. It could also result in the absurd outcome that, in order to defeat the rights of MV Tel and E Top Up, Swazi MTN would merely have to fail to enter appearance in their action against it and then apply for a stay of execution of any resultant

default judgment pending an application to have it rescinded that, this Court, could not possibly countenance. In the view of this Court Mamba A J in his order of 3rd July 2006 was perfectly correct.

It follows that the presently appeal fails and must be dismissed.

The parties have so far expended considerable time and resources in preliminary legal skirmishing without getting down to a resolution of the real dispute between them. That state of affairs is likely to continue if the pursuit of these preliminary legal technicalities continues to block the path to a resolution of the real issues involved in this case, issues which, it would seem, are, with the exercise of insight and sound common sense, possible of mutual settlement. The Court would urge the parties to consider embarking on an investigation of this possibility or, if an amicable settlement cannot be achieved, to have the real dispute, shorn of technical objections and defences, brought expeditiously before court.

The following order is therefore made:

1. The appeal is dismissed with costs, including the certified costs of counsel.
2. The order of Mamba AJ of 3rd July 2006 is confirmed.

P.H. TEBBUTT

Judge of Appeal

I AGREE

J.H. STEYN

Judge of Appeal

I AGREE

R.A. BANDA

Judge of Appeal

Delivered in open court on this 16th day of November 2006