

REPUBLIC OF SOUTH AFRICA



GAUTENG LOCAL DIVISION OF THE HIGH COURT, JOHANNESBURG

CASE NO: 2014/14291

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

WIRELESS BUSINESS SOLUTIONS PTY LTD

APPLICANT

And

MOBILE TELEPHONE NETWORKS PTY LTD

RESPONDENT

J U D G M E N T

TWALA AJ

[1] The applicant applies for leave to appeal the judgment and order of this court granted on the 17 June 2014 dismissing the applicant's action with costs.

[2] The grounds for the application for leave to appeal are as follows:

1. The learned Judge erred and misdirected himself in finding and placing emphasis upon such finding that:

1.1 The Judgment of Mundell AJ, delivered in the matter between the Applicant and the Independent Communications Authority of South Africa under Case No 2013/11/814 in the above Honourable Court, correctly found that the applicant is not entitled to engage in the operation of a network as it is not in possession of Radio Frequency Spectrum Licences.

1.2 As such applicant is not entitled to be provided with an Interconnection Service by a person licensed to provide same.

2. The learned Judge erred in fact and in law:-

2.1 In not finding that the Interim Agreement between the applicant and the respondent dated 27 February 2012 was entered into between them out of the provisions of the electronic Communications Act No 36 of 2005, as amended ("the EC Act");

2.2 In not finding that the Interim Agreement is not governed by the EC Act;

2.3 In not finding that , inasmuch as the EC Act does not apply to the interim Agreement, the same is not affected by Section 39(32) thereof which provides that an Interconnection Agreement will become effective and

enforceable upon filing thereof with the authority in the prescribed manner;

- 2.4 In not finding that the Authority, being the author of its own Regulations enjoyed authority to condone non-compliance with such Regulations.
- 2.5 In not finding that the Authority condoned the failure on the part of the parties to submit the interim Agreement to it in terms of the EC Act and its Regulations;
- 2.6 In not finding that the Interim Agreement is valid and enforceable as between the applicant and the respondents.
- 2.7 In not finding that, the applicant and the respondent having honoured and observed the Interim Agreement, the respondent is precluded from denying its validity.

[3] At the hearing of this application, applicant provided proof that the issue between itself and the Independent Communications Authority of South Africa (Icasa) under case no 2013/11814 has been settled. Icasa has on the 4 November 2014 issued the applicant with Radio Frequency Spectrum License. Further applicant's counsel confirmed that the appeal against the judgment of Mundell AJ has been withdrawn as part of the settlement between the applicant and Icasa.

[4] It is apparent that as at the 17 June 2014 the applicant did not have a Radio Frequency Spectrum License and therefore was not entitled to be provided with an interconnection service by a licensed person to provide same in terms of the EC Act. Therefore this court correctly found that applicant did not have a Radio Frequency Spectrum License at the time. The application falls to be dismissed on this ground since there is no merit in it and there are no prospect that another court may come to a different decision.

[5] I now turn to consider the second ground of the application for leave to appeal.

The applicant argues that the interim interconnection agreement of the 27 February 2012 was entered into by and between the parties outside the EC Act and therefore it is binding between the parties even if it does not comply with the Act. Applicant refer to the matters of **Verryne vs Van Zyl & Another 1963 (1) 592 at 593H** and **Tompkins vs Goltz 1978 (1) 90 at 90G**.

[6] In the matter of Tompkins the court stated the following:

“A person may contract out of the provisions of a statute if

(a) Such contracting out is not expressly prohibited, or

(b) It would not be against public policy to allow him to do so”

In the Verryne matter, the full bench of this court (then known as Transvaal Provincial Division) Claassen J said:

“It is clear in my opinion that if two parties wish to contract out of the provisions of a section, there is nothing in law to stop them. If they do, there is no other person, authority or agency that can step in and claim that the contract or term thereof is illegal, void or contra bonos mores,”

[7] I agree with the respondent that the present matter is distinguishable from these two matters. When the parties conducted the interim interconnection agreement, the intention was not to contract out of the legislation governing the airwaves of the country. The intention was to comply with the Electronic Communications Act – hence the interim interconnection agreement was replaced by the agreement concluded on 4 September 2012. The intention of the parties was that the agreement of 4 September 2012 shall replace the agreement of 27 February 2012 and it was submitted to the authority as required by the Act. Applicant’s argument falls to be dismissed

on this point. It is irrelevant that the parties did perform in terms of the interim interconnection agreement.

[8] Applicant argues further that the Icasa has condoned the late submission of the September 2012 agreement between the parties. Applicant refers to the matter of **S A Eagle Insurance Co Ltd vs Bavuma 1985 (3)42**. It is a Supreme Court of Appeal (then Appellate Division) decision wherein Vivier AJA stated as follows:

“It is a well-established principle of our law that a statutory provision enacted from the special benefit of any individual or body, may be waived by that individual or body provided that no public interest are involved.”

[9] Icasa is a creature of statute and is confined to the four corners of the statute that created it. Icasa is empowered to make its own regulations but nothing in those regulations or the Act empowers it to condone non-compliance with the Act. Icasa had an issue with the applicant at the time regarding the Radio Frequency Licence. It is absurd to suggest that Icasa could have condoned non-compliance with the Act by someone who does not even have a Radio Frequency License at the time. The application for leave to appeal falls to be dismissed on this ground.

[10] Therefore, I am of the view that there are no prospects that another court may come to a different conclusion in the present matter. I therefore make the following order:

Application for leave to appeal is dismissed with costs.

TWALA AJ
ACTING JUDGE OF THE
HIGH COURT GAUTENG
DIVISION JOHANNESBURG

DATE OF HEARING:

20 November 2014

DATE OF JUDGMENT:	11 DECEMBER 2014
COUNSEL FOR APPLICANT:	C. ZIMAN
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