

REPUBLIC OF SOUTH AFRICA


 IN THE HIGH COURT OF SOUTH AFRICA
 (GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: <i>no</i>	
(2) OF INTEREST TO OTHER JUDGES: <i>no</i>	
(3) REVISED: <i>yes</i>	
<i>15 September 2023</i>	
DATE	SIGNATURE

CASE NUMBER: 57882/2019

In the matter between:

VODACOM (PTY) LTD

APPLICANT

and

NKOSANA KENNETH MAKATE

1st

RESPONDENT

SHAMEEL JOOSUB N.O.

2nd

RESPONDENT

 JUDGMENT

LEDWABA DJP

[1] The applicant (Vodacom (Pty) Ltd) filed a conditional notice of application for leave to appeal in terms of section 17(1) read with section 17(6) of the Superior Courts

Act¹ and Rule 49(1)(b) of the Uniform Rules of Court. The applicant further filed an application in terms of common law alternatively Rule 42 (1)(b) of the Uniform Rules of Court to vary the order of Kollapen J. Kollapen J was not available to hear these applications. The parties stated that they have no objection if I adjudicate on the applications.

[2] Brief relevant background information which gave rise to the applications is that, initially Mr Makate filed an interlocutory application in which it sought an order against Shameel Joosub N.O. and Vodacom for an order that Shameel Joosub N.O. and Vodacom should supplement the record in the rule 53 proceedings and further that both should file various documents mentioned in his Notice of Motion. On 29 June 2020, Kollapen J granted the order in favour of Mr Makate.

[3] In July 2020, Vodacom launched a conditional Notice of application for leave to appeal and an application to seeking an order in terms of common law, alternatively Rule 42(1) of the Uniform Rules of Court to vary the order of Kollapen J in the following respects:

"By the addition of the words in paragraph 1 following the word "ordered" only to the extend to which it has in its possession".

[4] When the applications were heard, in the opening remarks, counsel for Vodacom and Mr Makate agreed and submitted that both applications, the application for leave to appeal and the variation application should be heard together. Importantly, counsel representing Vodacom submitted that if the variation order is granted, it will not be necessary for me to entertain or rule on Vodacom's application for leave to appeal. He further submitted that if the order of Kollapen J is not varied and/or corrected, I should make a ruling on the application for leave to appeal.

[5] Vodacom's counsel further submitted that if the abovementioned applications were not filed, Mr Makate could file an application for contempt against Vodacom for not complying with the order of Kollapen J.

¹ Act 10 of 2013.

[6] The court in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture Corruption and Fraud in the Public Sector including Organs of State v Zuma*² held that “If the impression were to be created that court orders are not binding, or can be flouted with impunity, the future of the judiciary, and the rule of law, would indeed be bleak.”

[7] Ngcobo J in *Zondi v MEC, Traditional and Local Government Affairs, and others*³ elucidated on the common law position in respect of variation of interlocutory orders as follows:⁴

“Simple interlocutory orders stand on a different footing. These are open to reconsideration, variation or rescission on good cause shown.¹¹ Courts have exercised the power to vary simple interlocutory orders when the facts on which the orders were based have changed¹² or where the orders were based on an incorrect interpretation of a statute which only became apparent later.¹³ The rationale for holding interlocutory orders to be subject to variation seems to be their very nature. They do not dispose of any issue or any portion of the issue in the main action.”

[8] The Constitutional Court in *Municipal Manager O.R. Tambo District Municipality and Another v Ndabeni* held

“Trite, but necessary it is to emphasise this Court’s repeated exhortation that constitutional rights and court orders must be respected. An appeal or review — the latter being an option in the case of an order from the Magistrates’ Court — would be the proper process to contest an order. A court would not compel compliance with an order if that would be “patently at odds with the rule of law”. Notwithstanding, no one should be left with the impression that court orders — including flawed court orders — are not binding, or that they can be flouted with impunity.”

² [2021] ZACC 18; 2021 (5) SA 327 (CC); 2021 (9) BCLR 992 (CC) (State Capture) at para 87.

³ (CCT73/03) [2005] ZACC 18; 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC) (29 November 2005).

⁴ *Ibid* at para 29.

[9] The court in *Proxi Smart Services (Pty) Ltd v Law Society of South Africa*⁵ ruled that an order must be set out in clear terms and the purpose must also be readily ascertainable from the language used:

"The Constitutional Court has emphasised that court orders must be framed in unambiguous terms and must be practical and enforceable. They must leave no doubt as to what the order requires to be done. In Eke v Parsons the Constitutional Court stated the following:

"The rule of law requires not only that a court order is couched in clear terms but also that its purpose is readily ascertainable from the language of the order. This is because disobedience of a court order constitutes a violation of the Constitution. Furthermore, in appropriate circumstances, non-compliance may amount to a criminal offence with serious consequences like incarceration."

[10] In my view, the order of Kollapen J is clear and not ambiguous. It does not need any correction or verification. The order deals with and rules on the issue that was before Kollapen J.

[11] I am of the view that the application by Vodacom to vary the order is to frustrate the implementation of the court order. The judgment and the order are clear and concise. The interpretation of the order is ascertainable from the wording thereof, to wit, paragraph 1.2 of the Order reads as follows:

"All the available underlying data and financial information which were provided by the second respondent to the first respondent for the entire period of 2001 – 2018.

[12] The court in *Mabotwane Security Services CC v Pikitup Soc (Pty) Ltd and Others*⁶ held the following in respect of leave to appeal matters:

"Section 16(2)(a) of the Act provides as follows:

'(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

⁵ 2018 (5) SA 644 (GP) at para 54.

⁶ (1027/2018) [2019] ZASCA 164 (29 November 2019).

(ii) *Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.*’ In *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC) para 21 footnote 18, it was stated that:

‘A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.’”

[13] In *Transasia 444 (Pty) Ltd v Minister of Mineral Resources and Others: In re: Umsombovu (Pty) Ltd v Minister of Mineral Resources and Others*⁷, Millar J discussed the appealability of a judgment or an order as follows;

“In deciding whether a judgment is appealable or not, in Zweni v Minister of Law and Order, it was stated:

‘A ‘judgment or order’ is a decision which, as a general principle has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.’

It is apparent from the attributes set out in Zweni that a court’s mere ruling or an interlocutory order is not appealable. However, these three attributes are not immutable and exhaustive as pointed out in Moch v Nedtravel (Pty) Ltd.

...

In Nova Property Group Holdings v Cobbett the court was of the view that ultimately in deciding whether a decision is appealable, the interest of justice is of paramount importance:

⁷ (10531/2022) [2023] ZAGPPHC 51 (3 February 2023) at paras 22, 23, 25 and 26.

'It is well established that in deciding what is in the interests of justice, each case has to be considered in light of its own facts. The considerations that serve the interests of justice, such as that the appeal will traverse matters of significant importance which pit the rights of privacy and dignity on the one hand, against those of access to information and freedom of expression on the other hand, certainly loom large before us.'

The approach that has been taken by the courts recently has been flexible and pragmatic. The courts have directed more to doing what is appropriate in the circumstances than to elevating the distinction between orders that are appealable and those that are not to one of the principles, as was the case in Phillips v National Director of Public Prosecutions."

[14] Mr Makate's counsel stated that after the conditional notice of application for leave to appeal was filed on 20 July 2020, a letter dated 29 July 2020 (annexure FA7 of the bundle) was addressed to Vodacom's attorneys, stating, *inter alia*, that the application is said to be "conditional" but the "condition" is not set out clearly. However it is conditional on the rule 42(1)(b) application, such application has not yet been filed. Vodacom was further requested to file an affidavit if it did not have some of the documents in its possession or under its control, failing which, submission would be made to the Court that the application for leave to appeal is a delaying tactic and is filed in bad faith.

[15] The variation application was filed on 31 July 2020. In paragraph 15 and 16 of the affidavit to support the application, the deponent states the following:

*"The second respondent contends that paragraphs 1.1 and 1.2 of the order require clarification and variation in the manner set out below.
I have been advised, which advice I accept, that paragraphs 1.1 and 1.2 of the order contained in annexure FA1 ("the order"), may not be appealable because the orders of this nature may be interlocutory in form and substance."*

[16] The deponent states further in the affidavit that the documents, which it does not have in its possession and it was directed to produce in terms of paragraph 1.1 of the order of the judgment of Kollapen J.

[17] It is incomprehensible that the variation application was filed instead of merely filing an affidavit as it was requested by Mr Makate's attorneys.

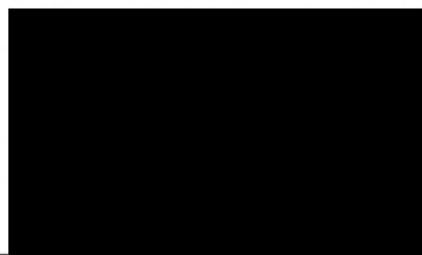
[18] The deponent further states that if the Court does not grant the variation sought, Vodacom is applying for leave to appeal to avoid an order of contempt of Court for non-compliance in all respects with paragraph 1.1 of the Order.

[19] On careful analyses of the applications before me, I am of the view that there is no merit in the application for variation and it was not necessary to file such an application.

[20] In so far as the applicant's conditional notice of application for leave to appeal is concerned, there are no reasonable prospects of success.

[21] I make the following order:

1. Both applications are dismissed with costs, the costs shall include the costs of employing two counsel.



A.P LEDWABA
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

HEARD ON: 16 September 2022

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DATE OF JUDGEMENT: 15 SEPTEMBER 2023