

IN THE HIGH COURT OF SOUTH AFRICA  
NORTH GAUTENG DIVISION PRETORIA

REPORTABLE

Case Number: 24088/09

In the matter between:

FLOYD MUZIMUHLE MAKHANYA

And

VODACOM SERVICE PROVIDER COMPANY  
(PTY) LTD

|                                          |                                         |
|------------------------------------------|-----------------------------------------|
| DELETE WHICHEVER IS NOT APPLICABLE       |                                         |
| (1) REPORTABLE: YES/NO.                  | <input checked="" type="checkbox"/> YES |
| (2) OF INTEREST TO OTHER JUDGES: YES/NO. | <input checked="" type="checkbox"/> YES |
| (3) REVISED                              | <input checked="" type="checkbox"/>     |
| DATE                                     | SIGNATURE                               |
| 12/10/09                                 | [Signature]                             |

Applicant

Respondent

JUDGMENT

1. The applicant, Floyd Muzimuhle Makhanya, is a candidate attorney employed by a well-known Pretoria firm of attorneys, residing in Mucklenuk, Pretoria.
2. The respondent is Vodacom Service Provider Company (Pty) Ltd, a company duly registered and incorporated in accordance with the company laws of South Africa, with its registered office situated at Vodacom Commercial Park, 082 Vodacom Boulevard, Vodavally, Midrand, 1685.
3. The respondent is a provider of cell phone services.
4. The applicant is an account holder of the respondent, having entered into a service contract with the respondent.
5. The applicant has suffered from a telephone pest's unsolicited calls for a number of months. The said calls are made from one or more

undisclosed telephone numbers that are indicated on the cell phone screen of the applicant's phone either as "private" or "unknown".

6. The calls follow a pattern and are made during the small hours of the morning. Once the call is answered, the caller hangs up, sometimes immediately, sometimes after his or her breathing has been heard for a few moments. This conduct has taken place since the end of 2008.
7. The applicant has no idea who the telephone pest or pests might be. Enquiries among his family and friends have confirmed, according to his hearsay evidence that nobody in his circle of acquaintances or relatives is responsible for the harassment that he suffers.
8. The applicant has requested the respondent to identify the telephone number or numbers of the unwelcome caller or callers, but was informed that the respondent was prevented by law from providing the information.
9. He was advised to take the matter to the police, but the relevant official responsible "...for cell phone fraud..." could not be reached, in spite of the fact that the applicant made several telephonic attempts to contact him.
10. While harassment by way of telephone calls of the nature the applicant was subjected to may constitute a criminal offence – it might i.a. be regarded as a *species* of assault, but it is not necessary to investigate this question any further – there can be little doubt that the applicant's privacy is invaded by this conduct.
11. The right to privacy against the government was defined by Justice Brandeis in *Olmstead v United States* 277 US 438 (1928) at 478 as "... the right to be let alone – the most comprehensive of rights and the right most valued by civilized men."
12. The right to be let alone, to be free from unwanted and unwarranted intrusions upon one's time, peace of mind and sleep can be asserted in at least the same measure, and is as enforceable against individuals and corporate entities in the private sphere.

13. In principle, the applicant is therefore entitled to protect his privacy against the telephone pest by way of an interdict in the same fashion as unwarranted noise intrusion may be prohibited: *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) and authorities there cited.
14. The obvious challenge confronting the applicant is the fact that he cannot identify the perpetrator without tracing her or his identity through the telephone number or numbers of the phones that the telephone pest uses to harass the applicant.
15. It is not in dispute on the papers that the respondent has the information stored in its records.
16. It is clear that the applicant requires this information to protect his right to privacy as intended in section 50 (1) of the Promotion of Access to Information Act 2 of 2000 ("the Act"), as demonstrated by Combrinck AJA in *Cleese v Information Officer, South African Airways (Pty) Ltd* 2007 (5) SA 469 (SCA) at 472 E-G and the authorities referred to there.
17. The respondent does not oppose the application but has not tendered the information, presumably because it regards itself bound, whether by contract or otherwise, not to disclose the relevant telephone numbers unless ordered to do so by a competent court.
18. In the light of the foregoing, an order to supply the relevant information was made in the terms as requested by the applicant. No costs order was made.

Signed in Pretoria on this 12<sup>th</sup> October 2009.

  
E Bertelsmann

Judge of the High Court

~~For App: R Grobler.~~

~~Instr by: Solomon Nicolson Attorneys 012 343 2271.~~

ADV. CORINA ENSUN (012) 3037782

INSTRUCTED BY: FLOYD M MAKHANYO