

IN THE HIGH COURT OF LESOTHO

In the matter between:

**Vodacom Lesotho (Proprietary)  
Limited t/a D L. Communications**

**Applicant**

and

**Lesotho Telecommunications Corporation**

**Respondent**

JUDGMENT

**Delivered by the Honourable Chief Justice Mr Justice  
J.L. Kheola on the 4<sup>th</sup> day of May, 1998**

This is an application for an order in the following terms:

1. Dispensing with the normal rules as to service due to the urgency of this application;
2. Calling upon the Respondent to show cause, if any on or before the 1<sup>st</sup> of September 1997 as to why:
  - 2.1 Respondent should not be ordered on and maintain a regular and consistent power supply to the Mobile Switching Centre ("the M.S.C.") being the nerve centre of the Cellular Network positioned and located within the premises of Respondent within one hour of service upon Respondent of this order and to ensure that such power supply is not disrupted, disturbed or impeded until Respondent is

lawfully entitled to do so.

- 2.2 Respondent should not be ordered to re-connect the two (2) fixed telephone lines to VCL Communication being telephone numbers 315101/212000 within one hour of service upon the Respondent of this order and to ensure that such fixed telecommunication lines are not disconnected, disrupted, disturbed, or impeded until such times as Respondent is lawfully entitled to do so.
- 2.3 The Sheriff of Maseru or his Deputy should not be authorised, upon the failure by Respondent to so switch on such power supply and re-connect such fixed telecommunication lines, to take all such necessary steps so as to not only ensure that such power supply is switched on and that the two (2) fixed telecommunications lines are re-connected but further more to ensure that such power supply and fixed telecommunications lines are not disconnected, disrupted, disturbed, or impeded until such time as Respondent is lawfully entitled to do so, and to this end, if and where necessary to change and secure the lock of all doors leading to the M.S.C., alternatively the re-connection point of the telecommunication lines and if necessary to place security personnel where necessary so as to ensure the uninterrupted continuation of such services.
3. Ordering Respondent to pay the costs hereof.
4. Ordering and directing that prayers 1 and 2 above operative with immediate effect and operate as an interim interdict until such time

as the Court orders otherwise.

5. Further an/or alternative relief.

On the 14<sup>th</sup> August, 1997 a **rule nisi** was issued as prayed for by Guni, J. After several extensions the arguments were heard by me on the 24<sup>th</sup> April, 1998 and the rule was discharged on the 4<sup>th</sup> May, 1998. What follows are the reasons for that discharge.

It must be pointed out that when this matter was heard on the 24<sup>th</sup> April, 1998 normal services had been restored to the applicant by the respondent. **Mr Mpobole**, attorney for the applicant, submitted that the arguments were nothing but an academic exercise and a waste of the Court's time. He had suggested to **Mr. Makeka**, counsel for the respondent, that the rule be discharged and that each party should bear its own costs. This suggestion was turned down.

I do not agree with **Mr. Mpobole**, that this is an academic exercise. The question of costs is involved. It is important to decide whether the bringing of this application was justified; if not the applicant must pay the costs; if there was justification the respondent must pay the costs. For that reason it is necessary to consider the merits of the case.

It is common cause that the applicant is the holder of a licence to operate a cellular telephone network in the Kingdom of Lesotho being a National Cellular and Mobile Telecommunications Licence issued to it by the respondent. In terms of the said licence, the respondent is authorised to construct, maintain and use a nation Public Land Mobile Network in the geographical area of the Kingdom of Lesotho and to provide a Global System for Mobile Communications (GSM) as contemplated in the said licence.

By arrangement between the applicant and the respondent, the Mobile Switching Centre (the MSC), being the nerve centre of the cellular network, has been positioned and located in a room on the ground floor of the respondent's Headquarters Building and is dependent upon a power supply provided in the premises of the respondent. The power switch is located in the generator room situated in respondent's Headquarters Building and accessed through a door or doors on the outside of the building.

The applicant alleges that in terms of this agreement the technical staff of the applicant have been given unrestricted access to the room where the MSC is located to carry out routine maintenance work from time to time.

In its opposing affidavit the respondent denies that the technical staff of the applicant had unrestricted access inasmuch as they required a written permit to enter the respondent's premises. The permit form is annexed to the opposing affidavit as Annexure "1". The heading of the permit reads as follows: "VCL STAFF ENTRY PERMIT TO LTC PREMISES". It requires that the name of the staff member who seeks entry must be shown and the reason for entry be stated. It requires that the name of the LTC Divisional Manager who grants the permission must be shown and he must sign the document.

I do not agree that it was a mere procedural issue. It clearly restricted the entry of the applicant's staff into the premises of the respondent. Its Divisional Manager could refuse to issue such a permit for any justifiable reason. It is therefore not correct that applicant's employees had unrestricted entry into the premises of the respondent. The requirement of a permit indicates a restriction.

I have come to the conclusion that it is not correct that the staff of the applicant had unrestricted entry into the premises of the respondent.

The applicant alleges that at various times during the period from or about Monday 11<sup>th</sup> August, 1997 up to and including Thursday 14<sup>th</sup> August, 1997 and

at the time this application was instituted, the power supply to the MSC had been switched off and the respondent had failed not only to maintain a regular and consistent supply of power to ensure that the MSC could function without interruption, but furthermore to allow the applicant access to the power switch located as aforementioned.

In answer to this allegation the respondent alleges that contrary to its instructions some members of its staff went on an unlawful strike as from the 11<sup>th</sup> August, 1997 and tampered with the power supply to telephone exchanges and deliberately misplaced keys to the power room. It alleges that it did its level best to restore services to all its customers, including the applicant, and as an example had to break down the door to the power room to restore power to exchanges.

In its replying affidavit the applicant alleges that it was the Deputy Sheriff, Mr. Lemena, who broke down the door leading to the exchanges in an execution of the order of Court and it refers to the return of service filed by the Deputy Sheriff. In his return of service he states that "on the 15<sup>th</sup> I caused the opening of the door leading to the MSC."

There is a dispute of fact as to what actually happened regarding the door.

The Deputy Sheriff says that he caused it to be opened. On the other hand the respondent alleges that it had to break down the door. The law is that a return of service by the deputy-sheriff is **prima facie** evidence of service and of the matters therein stated. From this it is clear that, the return not being conclusive evidence but merely **prima facie** evidence of service, proof that there has been no or insufficient service will be allowed, although the maxim **omnia praesumuntur rite esse acta** applies to a return of service, and the clearest and most satisfactory evidence will be required to rebut this presumption and to impeach the return (The Civil Practice of the Supreme Court of South Africa, 4<sup>th</sup> edition, 1997 page 303).

In the present case the respondent has challenged the accuracy of the deputy-sheriff's return of service by pointing out that it broke down the door and not the deputy-sheriff. This fact is stated in an affidavit which is better evidence than a return of service which is mere **prima facie** evidence which can be rebutted.

I have come to the conclusion that the respondent has successfully rebutted the contents of the deputy-sheriff's return of service. In my view it was the duty of the applicant as soon as it noticed that there was a dispute of fact on this point to apply that the deputy-sheriff should give oral evidence.

The above issue is of vital importance because the applicant has accused the respondent of failing to take appropriate action to ensure that the fixed telecommunication line, as well as the supply of power to the MSC, were not disrupted, disturbed or impeded. If the respondent went to the extent of breaking down a door in order to have access to the exchange room, then the accusation has no basis.

The applicant alleges that the failure of the respondent to ensure the smooth functioning of the MSC by a constant supply of power has resulted in the whole of applicant's cellular network becoming inoperative, giving rise to damages in the form of loss of income, potential further damages in the form of potential loss of information and facilities within the MSC, and serious inconvenience to all subscribers of VCL Communications.

The applicant alleges that the failure of the respondent is unlawful and it is within the power and control of the respondent to switch on the power supply to the MSC and to ensure the security of both power supply and the MSC.

In answer to these allegations the respondent alleges that its employees went on an unlawful strike as from the 11<sup>th</sup> August, 1997 contrary to their terms of



employment and they engaged in unlawful acts of disrupting normal services to the customers of the respondent, including the communications services to the respondent's Acting Managing Director and the applicant amongst others.

The respondent alleges further that it did everything within its power right from the 11<sup>th</sup> August onwards, when the unlawful strike started and its attendant unlawful strike started. The Acting Managing Director addressed the workforce and implored them to desist from their unlawful acts and to disperse from their unlawful acts and to disperse and proceed to their respective work places and work stations as their grievances were being attended to. The staff had insisted to be addressed by the Board of Directors and this was not possible at such short notice, and so they said they would not work until the Board addressed them. Realising that the unlawful acts were persisting the Acting Managing Director saw to it that the Board held a special meeting on the 12<sup>th</sup> August and it decided that a High Court Order be obtained to restrain the striking employees and restore services to normalcy. The application was lodged immediately and a Court Order was obtained. (See Annexure "3" to the opposing affidavit).

There were many prayers but prayers (c) (e) are the most relevant. Prayer (c) reads"

“That the respondents shall not be restrained and or interdicted from entering the said premises without lawful authority or permission and from destroying and or vandalising applicant’s property and from shutting down cellular communications exchange, internal, national and international communication links.”

- (e) “That the strikers should desist from their unlawful strike and report to work on 15<sup>th</sup> August, 1997, failing which they render themselves liable to dismissal.”


In its replying affidavit the applicant does not deny that the respondent took the steps it alleges to have taken. Amongst the steps it took I think that the obtaining of a Court Order was the most important one. The employees of the respondent were ordered and interdicted from committing unlawful acts, especially from shutting down the applicant’s cellular communications, exchange and vandalising respondents’ property. If the employees continued to commit the unlawful acts they would face criminal charge if found and identified.

It is therefore not correct to say that the respondent did not take sufficient and effective steps to remedy the situation. In the view I take proper and effective steps were taken within a very short time after the start of the strike. A Court interdict is a very effective remedy against striking employees because it restrains them from maliciously damaging the employer’s property. It seems that in the present case the interdict had the desired effect because the facilities about which the applicant was complaining were soon restored.

The respondent alleges that the matter was reported to the police concerning the unlawful acts of the strikers and that police investigations were going on. In his return of service the deputy-sheriff confirms that when he went to the premises of the respondent the police were all over the place.

I have come to the conclusion that the steps taken by the respondent were adequate and reasonable under the circumstances. The institution of these proceedings was altogether unjustified especially because the applicant was aware of what the respondent was doing. In paragraph H of its opposing affidavit the respondent alleges that on the 14<sup>th</sup> August, 1997 a meeting of shareholders was held and the Acting Managing Director of the respondent briefed the shareholder's meeting in the presence of Mr. Moqhali, who is the Chief Executive Officer of the applicant, of the numerous steps that the respondent had taken to bring things back to normalcy at respondent's premises, prominent being the emergency meeting of the Board of Directors of the respondent on the 12<sup>th</sup> August, 1997 and the legal action taken per CIV/APN/283/97 and the stationing of police to protect the respondent's property.

In the result the rule was discharged with costs on the 4<sup>th</sup> May, 1998 and the above are the reasons for that order.

  
**J.L. KHEOLA**  
**CHIEF JUSTICE**

**10<sup>th</sup> SEPTEMBER, 1998**

**For Applicant - Mr. Mpobole**  
**For Respondent - Mr. Makeka**