



IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

JUDGMENT

Civil Appeal Case No. 58/2013

In the matter between

**SWAZI MTN LIMITED
MTN INTERNATIONAL (PTY) LTD
MOBILE TELEPHONE NETWORKS
HOLDINGS (PTY) LTD
SWAZI EMPOWERMENT LIMITED**

**First Appellant
Second Appellant

Third Appellant
Fourth Appellant**

And

**SWAZILAND POSTS AND
TELECOMMUNICATIONS
CORPORATION**

First Respondent

PETROS DLAMINI

Second Respondent

Neutral citation:

*SWAZI MTN Limited and Others v Swaziland
Posts and Telecommunications Corporation*

and Another (58/2013) [2013] SZSC 46 (29 November 2013)

Coram: RAMODIBEDI CJ, OTA JA, and
LEVINSOHN JA

Heard: 20 NOVEMBER 2013

Delivered: 29 NOVEMBER 2013

Summary: **Contempt of court – The order of the High Court dated 12 October 2012 directing the first respondent to terminate the mobile component of any telephony network and service operated by it in competition with the first appellant not complied with – The High Court responding to the contempt proceedings brought by the appellants by referring to arbitration the question whether the products in issue violated the court order – Appeal upheld with costs on attorney and client scale.**

JUDGMENT

RAMODIBEDI CJ

[1] These contempt proceedings represent yet another chapter in the long drawn-out litigation between the parties in this matter as will become apparent shortly.

- [2] In order to appreciate the full nature and extent of the contest raised in these proceedings it is necessary to spell out in the forefront of this judgment the special relationship between the parties.
- [3] The first appellant (“MTN”) is the holder of a mobile cellular telecommunication licence issued by the first respondent (“SPTC”) in terms of s 59 (1) (ii) of the Swaziland Posts and Telecommunications Corporation Act 11 of 1983 as amended (“the Act”). It is duly registered and incorporated in accordance with the company laws of the Kingdom of Swaziland.
- [4] The second appellant is a company registered in accordance with the company laws of the Republic of South Africa. It is the holder of 30% of the shares in the first appellant company. It is the empowerment partner.
- [5] The third appellant is a company registered in accordance with the laws of the Republic of South Africa.

- [6] The fourth appellant is a company registered in accordance with the laws of the Kingdom of Swaziland. It holds shares in the MTN company.
- [7] SPTC, the first respondent, is in turn a corporation duly incorporated in terms of s 3 of the Act. It is common cause that it is the current regulator of the posts and telecommunications industry in the Kingdom of Swaziland. It is responsible to the Minister of Information, Communications and Technology. Admittedly, it holds 41% of the issued shares in the MTN.
- [8] The second respondent is the Acting Managing Director of SPTC.
- [9] It is common cause that all the parties in these proceedings, with the exception of the second respondent, were also parties in certain arbitration proceedings which culminated in a final award in favour of the appellants. Crucially, that award was admittedly

made an order of court on 12 October 2012. I shall return to this order in more detail shortly.

[10] The background facts to this dispute may be briefly stated insofar as is relevant to a proper consideration of this appeal.

[11] The appellants are parties to a Joint Venture Agreement (“the JVA”) with SPTC. The JVA was concluded on 31 July 1998 by the second to fourth appellants with SPTC for the specific formation of “a Joint Venture Company”, namely, MTN. It is the appellants’ case that the specific purpose of forming MTN was to provide mobile telephony and data services in Swaziland. The respondents contest this proposition. They contend that the JVA was limited to the operation of a GSM Network.

[12] Subject to what is contained in the next paragraph it is, however, in my view strictly unnecessary in these proceedings to determine these competing claims. This is so because on 12 October 2012, the High Court made an order which is the

subject matter of this appeal. That order was made regardless of these competing claims. The real question is whether the respondents complied with that order? A proper starting point is obviously the order itself. But before doing so it is necessary to refer briefly to additional background facts which have a direct bearing on the matter.

- [13] Clause 3.1. of the JVA undoubtedly provides a legal framework within which the parties relate to each other. It spells out the very objective of forming MTN in these terms:-

“3.1 Pursuant to MTNH having been successful in its proposal to be appointed as a joint venture partner of the SPTC to operate a network in the territory, the Shareholders have formed the Company (MTN), which is a public company, and which will be granted a licence to operate a network in the territory.”

[14] It is of fundamental importance to note that the word “network” is defined in clause 2.15 to mean “the telecommunications network consisting of the GSM network”. The term “GSM network” is in turn defined in clause 2.7 to mean “a digital cellular mobile telecommunications system using the GSM standard as defined by the European Technical Standards Institute Structure of Specifications”.

[15] Notwithstanding these clear provisions of the JVA in favour of MTN as a mobile telephony provider, Amon Dlamini, who filed an affidavit as SPTC’s General Manager, surprisingly deposed as follows in paragraph 16:-

“(a) The respondents deny that the Joint Venture Agreement was concluded ‘for purposes of providing mobile telephony and data services’ in Swaziland. The Joint Venture was limited to the operation of a GSM Network, as appears from clause 3.1. of the Agreement.”

[16] In my view, Amon Dlamini tried too hard to deny the obvious fact that the JVA, and by extension the MTN, was concluded specifically for purposes of providing mobile telephony and data services as contended by the appellants.

[17] Clause 21 of the JVA on which the appellants specifically rely in the whole litigation provides as follows:-

“21.1 The Shareholders [including SPTC] shall at all times during the subsistence of this agreement and their relationship to the company [MTN], bear to each other the utmost good faith as is required by law to be borne by partners, the one to the other.

21.2 Without derogating from the foregoing or clause 12.5 [on technical support services] no shareholder [including SPTC] shall either directly or indirectly be associated with any business or concern if such

association will or might result in a conflict of interest arising.”

[18] The record shows that sometime in 2010, and notwithstanding the clear provisions of clause 21 of the JVA, SPTC launched and started advertising and operating a rival telephony network to that of MTN. This triggered the whole protracted litigation leading up to the present appeal. MTN has contended throughout that SPTC is prohibited by clause 21 from launching or re-provisioning any products as long as they are supported by the mobile network which admittedly operates through radio access. As Ambrose Dlamini, MTN’s Chief Executive Officer, avers in his replying affidavit, communication is through base stations.

[19] In the course of the protracted litigation between the parties, MTN obtained the following orders/decisions in its favour:-

(1) On 5 July 2010 the High Court issued a consent order in terms of which SPTC undertook that pending finalisation of

arbitration proceedings which were to be submitted in terms of the JVA it shall:-

“3.1.1 Cease marketing and advertising the Fixed Wireless component of its NGN Network;

3.1.2 refrain from connecting new customers to its Fixed Wireless component of its NGN Network.”

(2) On 31 May 2011, and in Civil Appeal Case No. 19/2011, this Court upheld the order at (1) above.

(3) On 14 September 2012, the International Court of Arbitration finally made the following award against SPTC and in favour of MTN:-

“1. The respondent is ordered to terminate forthwith the mobile component of any telephony network and service operated by it (be it mobile data services or functions in

competition with the first claimant [MTN], voice or any text messaging services), to cease advertising or in any other way promoting same and to desist from canvassing subscribers and other potential users in respect thereof for so long as the respondent is a shareholder of the joint venture or the joint venture agreement subsists between the parties.”

- (4) It is common cause that this award was subsequently made an order of court on 12 October 2012 as alluded to in paragraph [9] above.

[20] In a series of correspondence between the parties commencing on 7 January 2013, MTN complained that SPTC had violated the court order in question in the following respects:-

- (1) By making available to its customers a product called MIFI which operated using wireless routers connected to the mobile component of SPTC’s network.

- (2) By making available to its staff members fully functional “One Fixed phones and mobile data gadgets which are currently in use.”
- (3) By failing to terminate the mobile component of its network.

[21] It is noteworthy that in their reply to a letter from the appellants’ attorneys dated 17 April 2013 in particular, the SPTC’s attorneys did not dispute the material allegation that the SPTC’s products were indeed mobile and that they competed with MTN’s network as well as violating the court order. On the contrary, by letter dated 2 May 2013, SPTC made an unqualified undertaking that it would not act in contravention of the final arbitration award which was subsequently made an order of court as stated above.

[22] By letter dated 7 June 2013 from SPTC’s attorneys addressed to MTN’s attorneys, SPTC was surprisingly defiant. It now contended that the JVA was illegal as being contrary to the

enabling statute. This line of defence has, however, not been persisted in, and properly so in my view as it is plainly untenable in the circumstances.

[23] Against this background the appellants launched motion proceedings in the High Court for the following order, *inter alia*:-

- (1) Directing the 1st Respondent [SPTC] to comply forthwith with the terms of the order of this Honourable Court dated 12 October, annexure “AD1” to the founding affidavit.
- (2) Interdicting and restraining the 1st Respondent [SPTC] from continuing to act in breach of the aforesaid court order.
- (3) Holding the 1st [SPTC] and 2nd Respondents to be in contempt of the aforesaid court order.

[24] As is evident from the appellants’ prayers, they sought to achieve full compliance with the court order set out in paragraph [19] (3)

and (4) above. That order is in turn plainly wide in terms. It is not confined to termination of one particular “product” only as the respondents contend. Yet notwithstanding this clear feature of the court order and the all-embracing issues raised in the appellants’ prayers, the High Court erroneously confined itself to the Mifi “product” as being the real issue. In this regard, in paragraph [82] of its judgment, the court said this:-

“[82] In casu, the parties contentions are more compounded by their differing view on the nature and characteristics of the product under issue.” Emphasis supplied.)

[25] Indeed, in paragraphs [84] and [85] of its judgment the High Court expressed itself as follows:-

“[84] It is on the basis of the above highly contentious and material issues that I am inclined to refer the question of mobility, network operations and services of the products

in issue together with the admissibility of the expert's evidence and any other pertinent matter to arbitration to be deliberated upon in line with the interpretation canvassed in this judgment.

[85] To sum up, the court is not in a position to ascertain whether the respondents are in contempt in view of the outstanding question of whether the MiFi or WiMax or fixed terminal are of 'mobile component of any telephony network and services' by reason of its highly technical nature."

[26] In the result, the *court a quo* made the following order as appears in paragraph [105] of its judgment:-

"[105] For the foregoing, I enter the following orders:

1. *Question of whether the products in issue violate the court order and other pertinent issues therein are (sic) referred to arbitration.*
2. *Status quo ante remains pending arbitration orders.*
3. *No order as to costs.”*

[27] The appellants have appealed to this Court primarily on the ground that the *court a quo* failed to interpret the court order of 12 October 2012 properly and that, therefore, there was no need to refer the matter for arbitration.

[28] In my view, it is regrettable that the *court a quo* shied away from dealing with the prayers raised in the notice of motion. In a clear case of passing the buck, the court opted to transfer the matter for arbitration. In so doing, I consider that it misdirected itself in the circumstances of the case, thus entitling this Court to consider the matter afresh. I need only cite four reasons for this view:-

(1) The question of contempt of court, which is *sui generis* for that matter, is inherently a matter for the court itself and not the arbitrator. The court, and not the arbitrator, is entitled, and indeed enjoined to jealously act in self-protection insofar as its orders are concerned. The court will ordinarily not delegate such an exercise to non-judicial bodies.

(2) What served before the *court a quo* was whether its order had been complied with or not, namely, whether the respondents had “terminated” forthwith the mobile telephony network and service as fully set out in paragraph [19] (3) and (4) above. A determination of this issue did not require referral for arbitration as the *court a quo* erroneously held. The court had the full facts before it to enable it to determine the issue which effectively involved interpreting its order of 12 October 2012.

(3) In interpreting its order of 12 October 2012, the *court a quo* was not bound by the parties’ “differing views on the nature and characteristics of the product under issue” as the court held in paragraph [82] of its judgment.

(4) SPTC conceded in effect that it had not complied with the court order in question as fully set out in the next paragraph.

[29] It is of fundamental importance in determining whether SPTC “terminated” the mobile component of its telephony network as ordered to note the following crucial concession made by the respondents in paragraph 53 of the affidavit of SPTC’s General Manager, Amon Dlamini:-

“The Respondents deny that an interdict in the terms sought is capable of being enforced. It is simply not possible to ‘terminate’ the alleged ‘mobile component’ of the Respondents’ telephony network. There is no such thing as the ‘module on the

mobile component of the network.’ No such thing can be removed. This will be confirmed in the affidavit of Jeff Penberton filed herewith. The Respondents accordingly dispute the efficacy of the order sought.”

[30] It is as plain as it can be, as it seems to me, that in this paragraph the respondents are conceding that they have not terminated the mobile component of SPTC’s telephony network. Instead, they claim that the court order in question is impossible of enforcement. It is common cause, however, that they have never applied for variation of the order in question which, in any event, was granted by consent. As a matter of inescapable inference, I accept that SPTC agreed to do whatever it took to “terminate” the mobile component of its network. It cannot now be heard to argue otherwise. The record shows that the “termination” ordered by the court is doable. This is so because the record shows that the mobile component in question is controlled by a soft switch which is no more than a computer that is programmed to allow or restrict certain subscribers on SPTC’s telephony network. In my view the affidavit of Thembi

Mkhonto (“Thembi”), who is MTN’s Senior Manager Network Operations, is decisive. Incidentally, she was previously employed by SPTC as a Senior Engineer Mobile Network. She was well acquainted with its functions and operations. She demonstrated full well that there are two ways in which the SPTC’s mobile component can be terminated. In paragraph 3.2 she averred as follows:-

“3.2 The 1st Respondent’s [SPTC’s] network consists of the mobile and fixed components which operate independently of each other. The mobile component can be terminated either by removing the module on the core network which controls the mobile component of the network. The second and much simpler way of terminating the mobile component is by switching off the radio access control which controls the base stations. If you switch off the radio access controller the mobile network would stop to function and would not affect the rest of the network.”

This disposes of SPTC’s claim that switching off its mobile component would amount to shutting down the whole of its

telephony system in Swaziland. Nothing can be further from the truth. Crucially, Thembi's version was supported by SPTC's own expert, Jeff Penberton, who addressed an email to SPTC's attorneys dated 16 August 2013 and included the following "conclusion" at p 320 of the record of proceedings:-

"Re-defining and de-activating the roaming capability between service zones – SPTC's CDMA infrastructure will no longer have the capability to provide the mobile service that is in contention.

Re-defining and de-activating the roaming capability between service zones will not interfere with SPTC's ability to provide other telecommunication services."

Curiously, when SPTC's lawyers prepared Jeff Penberton's affidavit, they omitted that vital conclusion which supports Thembi's version, whilst including everything else contained in the email in question. This Court can only hope that the lawyers in question were not acting dishonestly in so doing.

[31] In its seemingly endless armoury of “defences”, SPTC claims that the new MIFI service is not a mobile component because (1) it does not have a built-in antenna and (2) it has no built-in power source. Reliance is placed on the affidavit of Amon Dlamini to the effect that the MIFI is fixed. The appellants contend in their replying affidavit, however, that the products, whatever they may be, are supported by SPTC’s mobile network. This version, in my view, is supported by SPTC’s own device called “the SPTC NGN”, annexure “AD 22”, which appears on page 336 of the record of proceedings. Under the heading, “Different Access Networks” the following words appear:-

“Voice (Fixed Access, Wireless, Mobile)” (Emphasis added.)

Indeed, it is of fundamental importance to observe that in paragraph 5 of his affidavit SPTC’s own expert, Jeff Penberton, categorically stated that the SPTC NGN “supports generalized

mobility which will allow consistent and ubiquitous provision of services to users.”

It is plainly evident, therefore, that SPTC’s network includes mobile component as contended by the appellants. Regrettably, the *court a quo* did not seem to understand this concept. In paragraph [31] of its judgment it said the following:-

“They (the respondents) conclude by saying that there is no mobile component on the product i.e N.G.N.”. The correct position is that NGN is a network and not a product as the court erroneously held.

[32] I attach due weight to the fact that on the respondents’ own version, as late as 17 July 2013, a period spanning more than 9 months after the court order of 12 October 2012, SPTC had still not complied with the order.

[33] It is hardly surprising in these circumstances, in my view, that the appellants' allegation in paragraph 49 of the founding affidavit of Ambrose Dlamini that SPTC's refusal to forthwith terminate the mobile component of its telephony network is a blatant violation of the court order drew no more than a bare denial in paragraph 34 of the affidavit of Amon Dlamini. I consider, therefore, that this is a fit case where the appellants' version should have been accepted as correct on the well-known authority of **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)** which has been followed in several decisions in this jurisdiction. That case is authority for the proposition, as was laid down by Corbett JA (as he then was) at p 634, that "in certain instances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact." This is undoubtedly such a case.

[34] In light of the foregoing considerations, I have come to the inescapable conclusion that the appellants succeeded in establishing that SPTC failed to comply with the High Court's order of 12 October 2012.

[35] Insofar as the law of contempt of court is concerned it is trite that where the order of the court has been brought to the knowledge of the respondent, as here, and the respondent fails to comply with it, again as here, wilfulness and *mala fides* will be inferred on the part of the respondent and the onus burdens such respondent to rebut this inference on a balance of probabilities. See, for example, **Bahle Sibandze v Petrus Jacobus Van Vuuren, Civil Appeal Case No. 22/2006; Putco Ltd v TV and Radio Guarantee Company (Pty) Ltd 1985 (4) SA 809 (A).**

[36] I discern the need to stress at this juncture that the respondents' belated attempt to try and justify the contempt on the basis that SPTC's products were fixed and not mobile is laughable to say the least. This is so having regard to the foregoing

considerations, more especially the fact that the SPTC's telephony network specifically includes "mobile" component as contended by the appellants. In any event, a correct interpretation of the court order in question will show that the order was made in very wide and far-reaching terms which virtually include all SPTC's mobile telephony products and service as fully set out in paragraph [19] (3) and (4) above as long as they are connected to its device namely, "The SPTC NGN". As will be recalled from paragraph [31] above, this device includes "mobile" in its component. Therein lies the test.

[37] Both in his heads of argument and oral submissions in this Court, the respondents' counsel spent considerable time and energy arguing in effect that the "mobile" appearing both in the court order in question as well as in the SPTC's telephony network system is not the same thing as the term "mobile component." In his own words, counsel submitted as follows in paragraph 5.4 of his heads of argument:-

“5.4 The order does not require the termination of the telephony network and service of which the ‘mobile component’ forms a part. It only requires the termination of the ‘mobile component’ of the network and service.”

Construing the order in this way, counsel then argued that the order was aimed at the “products.” In my view this argument is untenable. It is a complete misreading of the court order in question. Furthermore, it contradicts the very concessions which the respondents had consistently made all along that they had not complied with the order in question by terminating “the mobile component of any telephony network and service” operated by SPTC in competition with MTN.

[38] In interpreting the court order in question I am mainly attracted by the following principles as laid down in **Firestone South Africa (Pty) Ltd v Genticuro A.G 1977 (4) SA 298 (A)** at 304:-

“The basic principles applicable to construing documents also apply to the construction of a court’s judgment or order: the court’s intention is to be ascertained primarily from the

language of the judgment or order as construed according to the usual, well-known rules. See Garlick v. Smartt and Another, 1928 A.D. 82 at p.87; West Rand Estates Ltd, v. New Zealand Insurance Co. Ltd., 1926 A.D. 173 at p. 188. Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it."

[39] As alluded to above, the respondents' counsel sought to juggle with the words "mobile" and "mobile component" in the matter. The ordinary meaning of the word "mobile" as defined in the Concise Oxford Dictionary: Ninth Edition at p 874 is "movable", "not fixed." The ordinary meaning of the word "component" is in turn defined at p 272 as "a part of a larger whole." Construed in this way, I conclude that the term "mobile component" in this case simply means that part of the SPTC's telephony network which is mobile or which is not fixed. Since the impugned order was granted by consent, there cannot, in my view, be any question of misunderstanding of the term "mobile

component” by any of the parties. SPTC knew exactly what it was that it was obliged to terminate but failed to do so.

[40] It requires to be stressed at this stage that there was never any serious dispute about the fact that SPTC’s telephony network included a mobile component. Hence MTN’s complaint that this amounted to competition against it contrary to clause 21 of the JVA. Purely as an example, the following correspondence bears reference:-

(1) By letter dated 18 January 2013, SPTC wrote to MTN raising the following issues, *inter alia*:-

“3.1 We do not agree with your comments that SPTC has not fully complied with the Arbitration award and in particular the provision relating to the disconnection of the mobile component of any telephony network and service in competition with Swazi MTN limited.

3.2 *It is our understanding that nothing in the award prohibits the operation or continued deployment of the Corporation's fixed wireless network but rather the termination of the mobile components thereof. To suggest that the award requires the Corporation to terminate in its entirety the fixed wireless service or fixed services offered on the wireless platform is to give a broader interpretation to the award.*

:

5.1 *It is again our understanding that the MI-FI gadget you make reference to is a fixed terminal and in our opinion can't pass the mobility test and neither can it conceivably be in competition with mobile data services offered by Swazi MTN."*

(2) The minutes of the Regulator's meeting with SPTC and MTN Management held on 17 July 2013, annexure "FD2" show that the SPTC's Managing Director informed the meeting that SPTC had on the previous day resolved to "terminate the ONE Mobile which they were using for their staff."

(3) The same minutes show that the Minister concerned confirmed SPTC's commitment to discontinue the "ONE Mobile" as directed by the Ministry.

[41] Pressed by this Court on whether "mobile" telephony was a constituent part of SPTC's telephony network as highlighted above, the respondents' counsel finally conceded the point. The concession was properly made in the circumstances, albeit belatedly. Crucially, counsel conceded that the *court a quo's* order cannot stand. Once this concession was made, properly so for that matter, it is incomprehensible to me how the respondents could still have the moral courage to urge that the appeal be dismissed as they did. In my view, it is despicable conduct on the part of the respondents that they made no attempt to abandon the erroneous order in question when it was always open for them to do so.

[42] To sum up, as alluded to in paragraph [35] above, the court order in question was brought to the knowledge of the respondents. It is common cause that they have consistently failed to comply with it by terminating the mobile component of the SPTC's telephony network. It follows in my view, therefore, that this is a fit case where willfulness and *mala fides* should be inferred against the respondents at least on a *prima facie* basis. And I so find. I should stress that the court has a duty to vindicate its authority by ensuring that its orders are complied with at all times. Hence the order proposed below.

[43] This brings me to the question of costs. The appellants have asked for costs on a punitive scale, namely, attorney and client scale in relation to the appeal and attorney and own client scale in relation to the application for a rule *nisi*. I approach the matter on the basis of the apposite remarks of this Court in **Jomas Construction (Proprietary) Limited v Kukhanya (Proprietary) Limited, Case No. 48/2011** at paragraphs [16] and [17], namely:-

“[16] Now, the law on attorney and client costs as well as costs de bonis propriis is well settled in this jurisdiction. In the first place an award of costs lies within the inherent discretion of the Court. Such a discretion must not, however, be exercised arbitrarily, capriciously, mala fide or upon a consideration of irrelevant factors or upon any wrong principle. It is a judicial discretion. Generally speaking, an award of costs on attorney and client scale will not be granted lightly. The authors Cilliers, Loots and Nel: Costs 5th Edition state the principle succinctly at p971 in the following apposite terms:-

‘An award of attorney – and – client costs will not be granted lightly, as the court looks upon such orders with disfavour and is loath to penalise a person who has exercised a right to obtain a judicial decision on any complaint such party may have.’

We agree with this statement. We wish to caution, however, that everything has its own limits. It is not inconceivable that even a person who exercises his right to obtain a judicial decision may abuse such right. In such a situation the Court would be entitled within its discretion to award costs on attorney and client costs against such person in order, for example, to mark the Court’s displeasure.

[17] *There are several grounds upon which the Court may grant an award of costs on attorney and client scale. The list is certainly not exhaustive. It includes dishonest[y], fraud, conduct which is vexatious, reckless and malicious, abuse of court process, trifling with the court, dilatory conduct, grave misconduct, such as conduct which is insulting to the court or to counsel and the other parties. As to authorities see the leading case of Nel v Waterberg Landbouwers Kooperatieve Vereeniging 1946 AD 597 at 607.”*

[44] Counsel for the appellants submitted that the respondents’ conduct in the matter was both disgraceful and appalling. I agree. Through sheer twisting and turning, the respondents have consistently failed to comply with the court order in question by terminating “forthwith” the mobile component of SPTC’s telephony network and service operated by it. In the process, they have advanced absurd and dishonest defences such as that the order, which was by consent for that matter, was impossible to comply with.

[45] Furthermore, counsel for the appellants submitted that it was the respondents themselves who misled the *court a quo* into granting the wrong orders in the matter. It is clear from the respondents' heads of argument in the court below, which were handed in by consent in this Court, that it was indeed the respondents who urged the *judge a quo* in that regard. In paragraphs 8.2, 10.2 and 11.2.1 the respondents made the submission that the *court a quo* had no jurisdiction and that the matter should be referred for the hearing of oral evidence "arguably by way of arbitration."

[46] In these circumstances, I accept the submission by counsel for the appellants that it would be unreasonable for the appellants to be out of pocket after pursuing an appeal necessitated by SPTC's dishonest defences in the matter.

[47] (1) In the result, the appeal is allowed with costs including the certified costs of two counsel on the scale as between attorney and client.

(2) The order of the *court a quo* is set aside and in its place the following order is made:

(a) The respondents are hereby interdicted and restrained from breaching the order of this court dated 12 October 2012.

(b) A rule *nisi* shall hereby issue calling upon the respondents to show cause before the High Court of Swaziland on 16 December 2013 or on such extended return date as the Court may determine:-

(i) why the respondents should not be declared to be in contempt of the said order of court;

(ii) why the respondents should not be sentenced, in the case of the 2nd respondent to such a term of imprisonment as the court may determine and in the case of the 1st respondent to a fine or such other penalty as the court deems appropriate;

(iii) why the respondents should not pay the costs of these proceedings on a scale applicable to attorney and client including the certified costs of counsel.

(c) The respondents to pay the costs of this application on attorney and own client scale, such costs to include the certified costs of two counsel and the reasonable qualifying and witness fees of the applicants' expert witnesses.

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree

E.A.OTA
JUSTICE OF APPEAL

I agree

**P. LEVINSOHN
JUSTICE OF APPEAL**

For Appellants

**: Adv J.J. Gauntlett S.C.
(with him Adv F.B. Pelsler)**

For Respondents

**: Adv R.J. Salmon S.C.
(with him Adv B.S. Bedderson)**