REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 39840/2013

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

25-2-2014 ....
DATE

....
SIGNATURE

In the matter between:

SOUTH AFRICAN BROADCASTING CORPORATION SOC LIMITED	Applicant
And	
PLATCO DIGITAL (Pty) Ltd	First Respondent
E-TV (Pty) Ltd	Second Respondent

J U D G M E N T

TSOKA, J:

[1] *"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers...".* These are the words of Harms DP in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 77 at p20 restating the settled approach to be adopted by courts in resolving disputes of fact where a litigant seeks final relief.

[2] In the present matter, the applicant, South African Broadcasting Corporation SOC ("SABC"), seeks final relief against the first respondent, Platco Digital (Pty) Ltd ("Platco") and the second respondent, e-tv (Pty) Ltd ("e-tv"). The relief sought is that Platco should be interdicted from carrying and broadcasting the SABC Channels 1, 2 and 3 and from using SABC's copyright material, trademarks or logos for marketing or promotional purposes on its recently launched Open View HD Channel operated by e-tv, Platco's television station unless and until a duly executed agreement is entered into between SABC and Platco.

[3] In terms of its amended notice of motion dated 1 August 2014, SABC now seeks a declarator to the effect that there is no agreement between it and Platco in terms whereof the latter has been authorized to carry and broadcast the former's channels on its Open View HD platform. SABC further seeks a final interdict, similar to the one sought in the original notice of motion, in terms whereof, Platco should be prohibited from carrying and broadcasting the former's channels on the latter's Open View HD platform until an agreement has been entered into between the parties of the three channels.

[4] In the alternative, SABC seeks interim relief pending an action to be instituted by it against Platco within 14 days as foreshadowed in para (3) above. Pending the institution of such action, Platco is to be interdicted from carrying and broadcasting SABC's channels on its platform and reproducing, distributing or in any other manner using any of SABC's copyright material, trademarks or logos for marketing or promotional purposes.

[5] The application is hotly contested by Platco and e-tv. The thrust of their opposition is that the application is as dead as a dodo in that it is premised on disputed facts which are irresoluble on the papers, and that it was ill-advised and impermissible for SABC to seek a final interdict in motion proceedings. Furthermore, it is Platco's contention that whether SABC seeks final or interim relief, it has failed to establish such relief on the papers.

[6] I proceed to examine whether SABC, on the common cause facts, is entitled to the relief it seeks. If the common cause facts do not justify the granting of the final relief, whether there are special circumstances present in this matter entitling it to the relief it seeks.

[7] SABC avers that there is no agreement between the parties entitling e-tv to carry and broadcast its channels on the latter's Open View HD platform and lawfully use its copyrights material, trademarks or logos for either marketing or promotional purposes.

[8] Platco, on the other hand, alleges an oral agreement authorizing it to do the opposite, that is to say, to carry and broadcast the channels.

[9] Briefly, the facts according to Platco and e-tv, are the following. On 9 April 2013, Marcel Jonathan Golding ("Mr Golding"), on behalf of Platco and e-tv sent an email to Ms Lulama Patricia Mokhobo("Ms Mokhobo"), SABC's Group Chief Executive Officer("GCEO") requesting a meeting to discuss issues of mutual concern between the parties in particular a multi-channel strategy which would counter the increasing encroachment of DSTV in their market. The e-mail was accompanied by a presentation entitled "Digital Migration – What is at stake?" Its purpose was to consider the input of DSTV's growth of the Free to Air ("FTA") market in the country and in particular to identify the need for an urgent market launch of multi-channel free television in 2013.

[10] Pursuant to the said e-mail, Ms Mokhobo requested to meet with Mr Golding, the Chief Executive Officer ("CEO") of e-tv and Sabido Investments (Pty) Ltd ("Sabido"), the holding company of both e-tv and Platco. The two met. Following the meeting, on 14 May 2014, Mr Golding made a formal presentation to Ms Mokhobo and her colleagues at SABC. At the time of the presentation, Mr Golding was representing both Platco and e-tv. At that meeting, Mr Golding made slide presentations with regard to free-to-view satellite and Platco's business model. The proposition underpinning free-to-view satellite and technical issues were also discussed. Of importance was the discussion around the benefits SABC would derive from free-to-view satellite in advancing its strategic goals of universal access of its channels and to strengthen free-to-air television to compete with pay-TV. The presentation included Platco's offer to SABC to carry its channels on Open View HD.

[11] On 10 June 2013, Ms Mokhobo requested one of her junior officials to speak to Ms Lara Kantor ("Ms Kantor") of e-tv, to obtain the details of Platco's offer regarding the carriage of SABC's channels as per the presentation of 14 May 2013. Ms Kantor duly obliged. She sent an e-mail to Mr Philly Moilwa ("Mr Moilwa") wherein she stated the fee

to be paid by Platco to SABC in carrying out the channels and pointing out to him that Platco, in its marketing material, would promote the channels. Platco also gave SABC certain guarantees in carrying the channels.

[12] On June 2013, pursuant to a telephone discussion between Ms Kantor and Mr Moilwa and at the latter's suggestion, the former met with Mr Zwelibanzi Emmanuel Mthembu ("Mr Mthembu") to discuss Open View HD. Mr Mthembu was taken through the slide presentations of the 14 May 2013. During this meeting, Mr Mthembu alerted Ms Kantor of Sentech's intention to launch its own free-to-air view satellite platform to be known as Freevision. Following the discussion between the two, on 23 June 2013, Mr Golding met with Ms Mokhobo at the former's house. After discussing the importance of Open View HD and the importance of Sentech's Freevision supporting and complementing each other, it was agreed that SABC's channels would be made available on both Sentech's Freevision and Platco's free-to-view satellite platforms. It was further agreed that the carriage fees to be charged in respect of the channels would be equitable, reasonable and market related.

[13] In preparation to implement the agreement, and presumably to reduce the oral agreement to writing, on 25 June 2013 Mr Mthembu met with Ms Kantor at her offices whereat the parties confirmed what was agreed on 23 June 2013. Of importance, it was confirmed that –

'The main analogue free-to-air channels (SABC 1, 2, 3 and e-tv) will be carried on both the Sentech Universal access DTH (Direct to Home) platform and the Platco Digital DTH platform in South Africa. The main analogue free-to-air channels will be available on the launch date of each platform…'

[14] On 23 July 2013 Sentech made a presentation to e-tv regarding DTT tariffs. Sentech pointed out that it will carry any DTT channels for free on its Freevision as the Government, the sole shareholder in SABC, would subsidize the DTT tariffs for a period of approximately 18 months. On this basis, Platco agreed to carry and broadcast

SABC's channels on its Open View HD platform for a period of 18 months for free whereafter SABC would be charged equitable, reasonable and market related rates.

[15] According to SABC, Platco and e-tv's version is contrived in order to create disputes of fact where none exist. Ms Mokhobo states that although she met with e-tv sometimes in May 2013 in Rosebank, such meeting was informal with no agenda and minutes. At that meeting, Platco and e-tv were not authorized and permitted to carry and broadcast SABC's channels on Open View HD. At a subsequent meeting in June 2013, the date which she does not recall, only e-tv attended. Again such meeting was informal with no agenda and minutes being taken. According to Ms Mokhobo, the meeting was for the purposes of sharing ideas with regard to free-to-air channels. Although Mr Golding suggested that SABC's channels should be carried and be broadcast on its Open View HD, she shot down the suggestion as premature because proper governance processes were first to be followed and formal agreements be put in place, the process which Mr Golding was well aware of as a similar agreement was entered into in 2012.

[16] Although Mr Mthembu and Ms Kantor confirmed that an agreement was reached between SABC and Platco with regard to the carrying and broadcasting of SABC's channels, Ms Mokhobo states that she was unaware of such agreement and that had she been aware earlier, she would not have processed such agreement without it first going through SABC's governance protocols. She emphatically denies that an agreement as alleged by Platco and e-tv was entered into at any of the meetings she attended.

[17] That there are disputes of fact on the papers, admits no doubt. The said disputes of fact are irresoluble on the papers and it was, in my view, impermissible and ill-advised for SABC to proceed by way of application instead of action.

[18] The respondents' allegations that there was an agreement cannot by any stretch of imagination said to be '*bald or uncreditworthy denials, raises fictitious disputes of fact, is*

palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'

[19] SABC's argument that there in terms of Sections 24 of the Copyright Act 98 of 1978 ("the Act") there is an actionable infringement of a copyright by, amongst other things, interdict, and therefore in terms of Section 26 there is a rebuttable presumption of ownership of copyright which cast an onus on Platco and e-tv to prove that its version is true, and their failure to discharge such onus entitles it to the relief sought, is unsustainable.

[20] What the sections of the Act envisage is that a party may proceed by way of action or interdict and the rule applicable in resolving disputes of fact in an action for damages is on a well-established standard of proof on a balance of probabilities. Should a litigant such as SABC elect to proceed by way of motion proceedings wherein disputes of fact arise or were foreseen, the resolution of such disputes is, in my view, as stated previously in para [1] above. The onus referred to in Section 26 of the Act relates to rebuttable ownership of copyright. The section does not by any stretch of imagination create a different standard of proof with regard to copyright infringement. The superficial reading of Section 26 of the Act reveals that the onus referred to therein relates to proof of ownership of such disputed copyright. Nothing more.

[21] In any event, if the legislature wished to create a different standard of proof of infringement of copyright it should have done so. But it did not. A party such as SABC who approaches court for infringement of its copyright by way of interdict, such as is the position in the present case, and disputes arise or were foreseen, such disputes are, contrary to the argument of SABC, to be resolved on the common cause facts. A litigant such as SABC would only be entitled to final relief, on the trite *Plascon-Evans* rule, only if the facts averred by SABC's affidavits, which have been admitted by both Platco and e-tv together with the facts alleged by the latter justify such final relief. The version of SABC being disputed by Platco and e-tv that there was indeed oral agreement concluded by the parties in June of 2013 and the facts alleged by them do not justify the

granting of the order sought by SABC. The facts alleged by Platco and e-tv are not '*palpably implausible, far-fetched or so clearly untenable*' that this court is entitled to reject them on the papers. There are also no special circumstances entitling SABC to final relief. On this basis alone, SABC's application must fail.

[22] Reliance on Memorandum of Agreement entered into between SABC and e-tv attached to the papers to prove that any agreement, alleged by Platco and e-tv, must be in writing, is misplaced and unhelpful. The Memorandum of Agreement was entered into between SABC and e-tv and not with Platco and e-tv. The purpose of the Memorandum of Agreement, according to SABC, is to merely to demonstrate '*the level of formality required by the applicant (SABC) for the conclusion of agreements*'. Nothing else.

[23] In any event, the attempt of SABC to try to rely on the Memorandum of Agreement for any other purpose other than as stated in para [22] above, is impermissible and contrary to the principle stated in *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (TPD) wherein this court stated the approach to be adopted by a litigant in motion proceedings in referring to a document attached to the papers. In that Court, Joffe J, at 324 F-G said the following –

'*Regard being had to the functions of affidavits, it is not open to an applicant or respondent to merely annex to its affidavit documentation and to request the court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know what case must be met…*'

[24] In the present matter SABC cannot therefore annex a document without identifying the portion it seeks to rely on and without indicating what case it seeks to make to enable Platco and e-tv to know well in-advance what the case is to be met. In the result, SABC cannot rely on the Memorandum of Agreement entered into between it and e-tv in 2002 for any other purpose other than what is stated in its founding papers. Its

belated attempt, in argument, to rely on such document would place Platco and e-tv at a disadvantage. They will not know in-advance what case is to be met.

[25] SABC's difficulties are further compounded by its failure to prove the requirements for either final or interim relief.

[26] Regarding the issue of the balance of convenience it is worth restating what the Constitutional Court recently said in *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 CC at para [22]. The learned Deputy Chief Justice Moseneke said the following –

'[55] A court must be satisfied that the balance of convenience favours the granting of a temporary interdict. It must first weigh the harm to be endured by an applicant, if the interim relief is not granted, against the harm a respondent will bear, if the interdict is granted. Thus a court must asses all relevant factors carefully in order to decide where the balance of convenience rests'

[27] In balancing the prejudice to be suffered by SABC, if interdict is not granted, as against the prejudice to be endured by Platco and e-tv, if interdict is granted, the available evidence reveals that SABC will not, for a period of 18 months, suffer any prejudice if the interdict is refused while substantial prejudice will be suffered by Platco and e-tv, if interdict is granted.

[28] The balance of convenience in the present matter favours Platco and e-tv for the refusal of the interdict. They have, since the launch of the Open View HD, spent considerable resources in promoting its platform which carries and broadcasts SABC's channel 1, 2, 3. Open View HD has since its launch, attracted more viewers which were unable to view SABC's channels in spite of the fact that they own a television set and by operation of the law are expected to pay SABC television licence. The granting of an interdict would harm Platco and e-tv's reputation amongst these viewers. Furthermore, an interdict would result in them losing these viewers and would harm their reputation to attract new viewers.

[29] Platco and e-tv's reputation amongst decoder manufacturers, decoder retailers, distributors and providers of other channels would be irreparably harmed. Their ability to make inroads into the broadcasting market and compete with pay-TV would also be irreparably be harmed. The granting of interim interdict would, in the circumstances of this matter, also cause harm to the broader public interest in that television owners who are unable to access SABC's 1, 2 and 3 would not be able to access these channels for free via free-to-air satellite provided by Open View HD.

[30] Not only has SABC failed to prove a clear right or a *prima facie* right, but it has failed to prove that it has no alternative relief other than interdict.

[31] Regarding the absence of alternative remedy, in good faith and in compliance with SABC's requirements for a written agreement between the parties, Platco and e-tv have prepared a detailed written agreement addressing SABC's concerns with regard to its statutory requirements and formalities for perusal and suggestions. To date SABC has failed to react to the said agreement.

[32] With regard to damages, SABC's affidavits are silent as to why damages are not suitable as alternative remedy to interdict. To argue and submit, as it does, that the carrying and broadcasting of its channels on Platco and e-tv's Open View HD platform would expose it to breach of contract to third parties is without basis and factually incorrect. In terms of Section 24(1A) of the Act, *in lieu* of damages as a remedy, SABC '*may be awarded an amount calculated on the basis of a reasonable royalty which would have been payable by a licensee (Platco and e-tv) in respect of the work or type of work concerned.*'

[33] SABC's application for interdict, whether interim or final, on the aforesaid stated grounds, must also fail.

[34] With regard to costs, Platco and e-tv seek an order for costs consequent upon employment of three counsel. The employment of two counsel is not an issue as SABC

has also employed the services of two counsel. The issue is the employment of a third counsel by Platco and e-tv.

[35] The present matter is not only voluminous but technical in nature. It was allocated two days for argument. SABC raises various defences to defeat Platco and e-tv's bargain to carry and broadcast SABC's channels 1, 2 and 3 on the Open View HD. Although in its papers SABC does not raise a constitutional issue, its Heads of Argument do, which required Platco and e-tv to engage the services of a third counsel to address this issue. In the circumstances, the employment of a third counsel, in my view, is not only justifiable but reasonable.

[36] In the result the application is dismissed with costs including costs consequent upon engagement of three counsel.

M P TSOKA

JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

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DATE OF HEARING: 4 August 2014

DATE OF JUDGMENT: