COMPLAINTS AND COMPLIANCE COMMITTEE[1]

Date of hearing: 4 March 2019 **CASE NO: 310/2019**

IN RE: MOBILE TELEPHONE NETWORKS (PTY) LTD

Tribunal JCW van Rooyen SC
Dr Keabetswe Modimoeng (ICASA Councillor)
Mr Peter Hlapolosa
Mr Mzimkulu Malunga
Mr Jacob Medupe
Prof Kasturi Moodaliyar
Mr Jack Tlokana

For MTN Gilbert Marcus SC and with him adv Nick Ferreira and adv Moroka Phalane instructed by Webber Wentzel
For the CCA adv H Zondo-Pilani instructed by Fasken
Coordinator of the CCC: Ms L Mabulu

JUDGMENT

JCW van Rooyen

INTRODUCTION

[1] The Compliance and Consumer Affairs Division at the Independent Communications Authority of South Africa ("ICASA") referred, in terms of

[1] The Complaints and Compliance Committee ("CCC") is an Independent Administrative Tribunal set up in terms of the Independent Communications Authority Act 13 of 2000. Its constitutionality as an independent Administrative Tribunal in terms of section 33 of the Constitution has been confirmed by the Constitutional Court. It, inter alia, decides disputes referred to it in terms of the Electronic Communications Act 2005. Such judgments: are referred to Council for noting and are, on application, subject to review by a Court of Law. The Tribunal also decides whether complaints (or internal references from the Compliance and Consumer Affairs Division at ICASA) which it receives against licensees in terms of the Electronic Communications Act 2005 or the Postal Services Act 1998 (where registered postal services are included) are justified. Where a complaint or reference is dismissed the matter is final and only subject to review by a Court of Law. Where a complaint or reference concerning non-compliance is upheld, the matter is referred to the Council of ICASA with a recommendation as to an order against the licensee. Council then considers a sanction in the light of the recommendation by the CCC. Once Council has decided, the final judgment is issued by the Complaints and Compliance Committee's Coordinator.

section 17B (a)(1) of the ICASA Act 2000, the following alleged contravention of regulation 9(1)(b) of the *Regulations Regarding Standard Terms and Conditions for Individual Licences* 2010 as amended in 2014 to the Complaints and Compliance Committee ("CCC") at ICASA for a decision on the merits of an alleged contravention by Mobile Telephone Networks (Pty) Ltd ("MTN"). Thus: if a contravention is found by the CCC, the task of the CCC is to advise the Council of ICASA as to an order against MTN in terms of section 17E(2) read with section 17E(3) of the ICASA Act 2000.Section 17E(3),referring back to section 17E(2), requires the CCC to also consider the following in its advice to Council if it has found against the licensee: the nature and gravity of the non-compliance; the consequences of the non-compliance; the circumstances under which the non-compliance occurred; the steps taken by the licensee to remedy the complaint; and the steps taken by the licensee to ensure that similar complaints will not be lodged in the future.

[2] MTN is a licensee in terms of the Electronic Communications Act 2005. At the core of the present matter lies the question whether MTN had, by not waiting seven working days after its notice to ICASA of a price increase, contravened **R**egulation 9(1)(b) of the *Standard Terms and Conditions for Individual Electronic Communications Services 2010 as amended.*

Regulation 9 provides as follows:

Publication of tariffs and fees

(1) *A Licensee may not provide any service for a charge, fee or other compensation, unless the price(s) for the service and other terms and conditions of the provision of such service:*
   (a) have been made known to the end-user by:
      (i) making such prices and terms and conditions available for inspection at its offices during business hours; and
      (ii) providing such details to anyone who requests same at no charge;
   (b) *have been filed with the Authority at least seven days prior to the provision of the said service. In making such a filing, a Licensee must utilise a format approved by the Authority in writing.*

(2) A Licensee must submit to the Authority, on a bi-annual basis, a record of the actual services provided and the actual tariffs charged therefore during the previous six months. (Emphasis added)

Regulation 12 provides as follows:

Contraventions and penalties

(1) Any person that contravenes regulations 7, 8, 9 and 10 is liable to a fine not less than R100 000 (One hundred thousand Rand) but not exceeding R5 000 000 (Five million Rand) or 10% of the Licensee's annual turnover - whichever is the greater - for every day or part thereof during which the offence is continued.

(2) Any person that contravenes any other regulation not specified in sub-regulation (1) is liable to a fine not less than R10 000, 00 (Ten thousand Rand) but not exceeding R100 000, 00 (One hundred thousand Rand).

(3) A person found guilty of a contravention in terms of sub-regulations (1) and (2) is liable for an additional fine of R100 000, 00 for every repeated contravention of a regulation in these Regulations.

(4) …

CLOSED DOORS

[3] MTN applied to the Chairperson of the CCC, in terms of section 4C (5) read with section 17C (6) of the ICASA Act that the hearing be held behind closed doors. That would mean that only the parties, their legal representatives, the CCC, the Coordinator, employees of the Authority, Councillors of the Authority and the lithographer may be present throughout the hearing. The relevant subsection provides as follows:

(5) The person presiding at an inquiry may, after hearing representations from any person present at and connected to the inquiry and having regard to -

(a) any reasonable apprehension of prejudice or harm to the person to be questioned;

(b) the rights of reply and rebuttal of any person whose rights may be adversely affected; and

(c) whether it is in the interest of the achievement of the objects of the inquiry, determine that any part of the inquiry be held behind closed doors and direct that the public or any class thereof may not be present.

This subsection must, however, be read with section 4D (4) of the ICASA Act, which provides as follows:

4D. Confidential information

(1) (a) When a person submits information to the Authority, such person may request that specific information be treated as confidential information.

(b) The request for confidentiality must be accompanied by a written statement explaining why the specific information should be treated as confidential.

…….

(4) When considering a request contemplated in subsection (1), the Authority (the CCC)[2] must treat the following information, as confidential information, namely -
 (a) trade secrets of such person;
 (b) financial, commercial, scientific or technical information, other than trade secrets, the disclosure of which is likely to cause harm to the commercial or financial interests of such person;
 (c) information of which the disclosure could reasonably be expected -
  (i) to put the person at a disadvantage in contractual or other negotiations; or
  (ii) to prejudice the person in commercial competition;
 (d) the names of prospective employees; and
 (e) business plans of a licensee.

(5) A determination of confidentiality may not be made in respect of a document or information that is in the public domain or is required to be disclosed by operation of law or a court order.

[4] In light of the above it was not found necessary to "close the doors" of the hearing. Section 4(d)(4), in any case, protects secret information, as defined, which would be made available during the hearing. *Mr Marcus*, Senior Counsel for MTN, indicated that he would combine the subsection (4) information and, at the appropriate stage, request that the Chair direct any person who is not in the service of MTN, ICASA or involved in the matter to leave the Court Room. This was, accordingly, only necessary when the two expert witnesses were called. Such evidence will indeed be part of the record, but will not be available to the public in terms of section 17C (7) of the ICASA Act.

All the evidence which was given, orally and in writing, by the two experts is declared to be protected by section 4(d)(4) and to be marked as such in a sealed file and not be made available to the public.

THE ALLEGED CONTRAVENTION AND THE ADVICE TO THE ICASA COUNCIL

[2] See section 17C (6).

[5] The Compliance and Consumer Affairs Division of ICASA ("CCA") avers that the Respondent, MTN, has breached regulation 9(1)(b) of the *Standard Terms and Conditions for Individual Electronic Communications Services,* 2010 as amended ("the Regulations") as quoted above. The CCC must thus inquire into the matter and reach a decision, firstly, as to whether there was a contravention of the regulation and, if so, what order should be advised to Council in terms of section 17E (2) read with section 17E (3) of the ICASA Act. The Constitutional Court has held that the CCC inquiry may never go beyond what is fair. An inquiry may, accordingly, not develop into an inquisition.[3] Once again: Regulation 9(1)(b) provides as follows:

"A licensee may not provide any service for a charge, fee or other compensation, unless the price(s) for the service and other terms and conditions of the provision of such service have been filed with the Authority at least seven days *prior* to the provision of the said service."

Section 1 of the ECA provides that "Days" means "working days" unless otherwise specified.

The CCA contends, and this is not denied by MTN, that MTN amended its tariff for certain social media bundles on Monday 16 July 2018, after notice had been given to ICASA on Thursday 12 July 2018. Although MTN satisfied its duty to notify ICASA, it failed, for reasons set out before the CCC, to do so at least seven working days ***prior*** to activating the amendment. In fact, the price was increased with only two working days' notice. MTN's defences are that:

1.1 ICASA tacitly consented to MTN's price increase.

1.2 MTN substantially complied with the regulation.

1.3 MTN's conduct was justified by necessity.

TACIT CONSENT DEFENCE

[6] On 22 November 2017, MTN filed a tariff notification with ICASA which included a 1 gigabyte monthly WhatsApp bundle priced at R10.On 18 June 2018 MTN filed a tariff notification with ICASA to amend the tariff of the WhatsApp monthly 1 gigabyte bundle to R20. On Thursday 12 July 2018 MTN filed a tariff notification with ICASA to further update the price of the WhatsApp monthly 1

[3] *Islamic Unity Convention V Minister of Telecommunications* 2008 (3) SA 383 (CC) at paras [48] and [49].

gigabyte package to R30. The following day, Friday 13 July 2018, MTN emailed a letter to ICASA requesting ICASA to permit by way of a waiver MTN to implement its price adjustment to the WhatsApp monthly 1 gigabyte bundle earlier than the seven working days provided for in regulation 9 of the Standard Terms and Conditions. MTN requested permission to implement the price adjustment on Monday, 16 July 2018. In the letter MTN stated that it was necessary to increase the price due to a significant increase in traffic attributed to the R10 and R20 bundles. The traffic had increased by 300% over the previous two months resulting in capacity constraints on the networks and a detrimental customer experience, including voice services. MTN informed ICASA that if it were to wait until Saturday 21 July 2018 (which was when the seven working day notice period lapsed) to implement the price increase, it would not be able to manage the impact on the network's capacity. MTN's quality of service standards would have been negatively impacted.

"*Because time is of the essence, we sincerely request that we receive the necessary waiver from ICASA as soon as possible so that we can make the necessary changes on Monday 16 July 2018"*.

MTN also proposed an urgent meeting with ICASA to discuss its request in more detail. ICASA acknowledged receipt of this letter but, according to MTN, did not respond to the contents thereof.[4] MTN proceeded to implement the service before the expiry of the seven-day period on Monday 16 July 2018. It thus only waited two working days: Thursday and the Friday. The next Friday was the seventh day and that would mean that MTN may only, according to the Regulations, have implemented the new price on the Saturday 21 July 2018.

[7] It was submitted that these facts provided a sufficient basis for the CCC to be able to adjudicate the question whether ICASA impliedly consented to MTN's implementation of the increased tariff. MTN has argued before the CCC that, in the absence of a response from ICASA to its urgent letter of Friday 13 July 2018, it was entitled to assume that ICASA had, by its conduct, acceded to its request. It was also argued that it is well-established that there are certain circumstances

4 MTN's response to charge sheet p 17 para 5.5; ICASA's response to MTN pp 23-24 para 5.

in which silence or a failure to take a decision may be construed as granting implied, constructive or tacit consent.

First, a failure to respond to a letter may amount to an admission of the truth of its contents.[5] The Courts have held:

"I accept that 'quiescence is not necessarily acquiescence' … and that a party's failure to reply to a letter asserting the existence of an obligation owed by such party to the writer does not always justify an inference that the assertion was accepted as the truth. But in general, when according to ordinary commercial practice and human expectation, firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute."[6]

Similarly, here, ordinary practice and reasonable human expectation would have required, it was argued, an urgent response from ICASA to MTN's urgent letter of Friday 13 July 2018.

Second, where a right holder has been given notice of litigation that may affect his right but does not respond, it may be regarded as having given its consent:

"[T]he holder of a right who has been given notice of an application which, if granted, will effect such right, but who does not oppose the relief sought can be regarded as having given constructive consent."[7]

It was also argued that the same doctrine has been applied in the context of occupation of land: The Constitutional Court has held that the fact that the applicant had lived on a farm continuously with the knowledge of the farmer and in circumstances where the farmer raised no objection to the applicant residing on the farm, implied that the farmer consented to her occupancy tacitly.[8] The Constitutional Court has held that:

5 *Benefit Cycle Works v Atmore* 1927 TPD 524.

6 *McWilliams v First Consolidated Holdings (Pty) Ltd 1982 (2) SA 1 (A) at 10E – H; see also Unit Inspection Co of SA (Pty) Ltd v Hall Longmore & Co (Pty) Ltd 1995 (2) SA 795 (A) at 801; and Hamilton v Van Zyl 1983 (4) SA 379 (E) at 389E-G.*

7 *Ex parte Saiga Properties (Pty) Ltd* 1997 (4) SA 716 (E) at 719 A-B.

8 *Klaase and Ano v Van der Merwe NO 2016 (6) SA 131 (CC) at para 60.*

"The definition of 'consent' is broad. It encompasses both 'express' and 'tacit' consent. The word 'tacit' means 'understood or implied without being stated'."[9] It went on to hold that "consent is no less 'actual' because it is given tacitly."[10]

[8] It was argued that the position in this matter is similar to that in the *New Clicks* matter where the Supreme Court of Appeal held that an unreasonable delay in urgent circumstances by the High Court in deciding an application for leave to appeal, gave rise to the ineluctable inference that the application for leave to appeal had been refused.[11] The Constitutional Court upheld this finding on appeal.[12]Similarly here, it was contended, MTN approached ICASA on an urgent basis. ICASA did not respond to MTN's urgent approach, although receipt of the notice was acknowledged. In the circumstances and given the severe consequences that would have resulted had MTN not increased the price, it was argued that ICASA's non-response amounted to tacit, implied or constructive consent. At the very least, MTN was reasonably entitled, it was argued, to assume that ICASA's non-response constituted consent.

[9] The common cause facts, it was argued, permit no other inference than that ICASA impliedly or tacitly consented to MTN's conduct: MTN pertinently wrote to ICASA raising the reasons why it wished to implement the price increase without waiting for the seven-day period to lapse; MTN also pertinently drew the urgency of the matter to ICASA's attention and asked for an urgent response. MTN explained the reasons motivating the urgency of the matter and thus, MTN had been entitled to expect that ICASA would respond timeously to the letter of Friday 13 July 2018. ICASA's failure to respond in circumstances in which it does not deny that it received the letter, it was argued, gives rise to no other inference than that ICASA consented.

[10] The CCA does not say that ICASA did not receive the letter, or that it was not aware of its existence. MTN addressed its correspondence to the same ICASA representative as it would ordinarily have addressed correspondence to, and ICASA in fact received this correspondence. MTN therefore did alert ICASA

[9] *Klaase and Ano v Van der Merwe NO 2016 (6) SA 131 (CC) at para 53. supreme Court of Appeal*

[10] *Klaase and Ano v Van der Merwe NO 2016 (6) SA 131 (CC) at para 53.*

[11] *Pharmaceutical Society v Tshabalala-Msimang and Ano NNO; New Clicks South Africa (Pty) Ltd v Minister of Health 2005 (3) SA 238 (SCA) ("New Clicks SCA") at para 3.*

[12] *Minister of Health and Ano NO v New Clicks South Africa (Pty) Ltd 2006 (2) SA 311 (CC) at paras 68-71.*

of the urgency of the matter: it raised the issue of urgency in its letter of Friday 13 July 2018. ICASA's failure to respond timeously to MTN's letter is also, it was argued, inconsistent with the following provisions of the Constitution of the Republic of South Africa: Section 195 of the Constitution, which obliges ICASA to conduct itself responsively and efficiently; to be accountable, and to respond to people's needs. Section 237 of the Constitution, which provides that "All constitutional obligations must be performed diligently and without delay." ICASA's duty as a Regulator is to respond to urgent communications from a major entity in its sphere of regulation emanates from the Rule of Law, the ICASA Act, and the Electronic Communications Act 2005. The duty is, it was argued, plainly constitutional in nature. *At the very least, it was contended, that it was reasonable for MTN to assume that ICASA's non-response to its letter constituted tacit consent.*

FINDING ON THE FIRST GROUND OF DEFENSE

[11] Adv *Zondo-Pilani*, representing the CCA, correctly argued that neither the relevant Regulations, the ECA or the ICASA Act grants the CEO of ICASA or the Council of ICASA the authority to grant an exemption to the Regulations applicable.

[12] That the exercise of authority by organs of State must, indeed, remain within the limits of the powers granted, was authoritatively stated by Navsa JA in *Gauteng Gambling Board v MEC for Economic Dev, Gauteng* 2013(5) SA 24 (SCA) at [1]:

"Our country is a democratic state founded on the supremacy of the Constitution and the rule of law. *It is central to the conception of our constitutional order that the legislature, the executive and judiciary,* in every *sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law. This is the principle of legality, an incident of the rule of law.* Public administration must be accountable and transparent. All public office bearers, judges included, must at all times be aware that principally they serve the populace and the national interest. This appeal is a story of provincial government not acting in accordance with these principles." (emphasis added, footnote omitted).[13]

[13] Also see Navsa JA's judgment in *Gerber and Others V Member of Executive Council for Development Planning and Local Government, Gauteng, and Another* 2003 (2) SA 344 (SCA).

[13] There is no manner in which the CCC may read an authority to grant an exemption into the Regulations. The ECA does contain an example where the Authority's not reacting to an application for the renewal of a community radio license amounts to having approved the re-licensing of the radio station.[14] But there is no provision in the applicable Regulations or the ECA, for that matter, which authorises the CEO or the Council to grant an extension in a matter such as the present; also no provision which provides that no reaction – as is the case with sections 16 and 17 of the ECA - must be regarded as approval. Also the ICASA Act does not provide for such an eventuality.

[14] Applying the definition of "day" (working day) in the ECA, which would include the Thursday the 12th July, the implementation of the new price on Monday 16 July would mean that a two days' notice was given (the Saturday and Sunday being excluded as non-working days). The new price was, accordingly, made effective *after* two working days instead of after seven days. The Regulations provide that notice must be given seven days *prior* to the introduction of the new fee. Therefore, the seventh day was the second Friday and the Saturday would have been the operational day.

The conclusion is, accordingly, that neither ICASA nor its CEO was authorised to grant an exemption or waiver – whether explicitly, by conduct or by implication.

SECOND DEFENSE: SUBSTANTIAL COMPLIANCE

[15] It was argued that MTN had substantially complied with the Regulations. In *Nokeng* the following was stated by the Supreme Court of Appeal:

"The mere failure to comply with one or other administrative provision does not mean that the whole procedure is necessarily void. It depends in the first instance on whether the Act contemplated that the relevant failure should be visited with nullity and in the second instance on its materiality. To nullify the revenue stream of a local authority merely because of an administrative hiccup appears to me to

[14] Section 16 and 17 of the ECA.

be so drastic a result that it is unlikely that the Legislature could have intended it."[15]

It was also argued that in determining whether there had been substantial compliance, the Court will have regard to whether, in spite of the defects, the objects of the provision had been achieved.[16] The Constitutional Court in the *Steenkamp* case made the principle of substantial compliance even clearer, when Cameron J said the following in delivering the minority judgment*:*

*"*Since *Schierhout*, the rigidity of both propositions has been substantially tempered. First, our courts accept that whether violating a statutory prohibition has the consequence of nullity depends on a broad understanding of the statute's purpose and meaning. That consequence depends on the subject-matter of the prohibition, its purpose in the context of the legislation, the remedies provided for disregard of it, the mischief it was designed to remedy and any untoward consequences that invalidity may wreak. "[17]

Zondo J, delivering the majority judgment in the same matter, agreed with Cameron J on what will inform the Court's decision on whether or not substantial compliance results in nullity or not.[18] This approach has been adopted in several judgments, more particularly in the leading case of *Standard Bank v Estate van Rhyn* 1925 AD 266 at 274, where Solomon JA also referred to a statement by the 17th Century Common Law authority, Johannes Voet, that an important consideration is whether "greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law."[19]

[16] It was also argued that MTN's conduct was responsive to the objects of the ECA. Though it did not wait the specified seven-day period, once it had submitted the notice before implementing the new tariff, its early implementation of the tariff was in furtherance of the broader purposes of the ECA. The circumstances and reasons MTN advanced in its letter of 13 July 2018

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15 *Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association and Others [2011] 2 All SA 46 (SCA)* at para 14, cited with approval by the Constitutional Court in *Liebenberg NO and Others v Bergrivier Municipality* 2013 (5) SA 246 (CC) at paras 22-26.

16 *Liebenberg NO and Others v Bergrivier Municipality 2013 (5) SA 246 (CC) at para 23, citing Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at para 22.

17 *Steenkamp and Others v Edcon Limited* [2016] ZACC 1 at para 74.

18 At para 99.

19 *Oilwell v Protec* (295/10) [2011] ZASCA 29 (18 March 2011) at para 19.

all, it was submitted, clearly demonstrate that MTN was committed to upholding its legislative obligations, especially when regard is had to the following objects of the ECA:[20]

to ensure efficient use of radio frequency spectrum; to ensure the provision of a variety of quality electronic communications services at reasonable prices; to promote the interests of consumers with regard to the price, quality and the variety of electronic communication services; to ensure information security and network reliability.

[17] Failure to respond to the network constraints as it did would, it was argued, have resulted in MTN falling foul of all of the legislative objects listed above. Therefore, MTN's conduct must be seen within the correct context as conduct that was in fact aimed at *complying* with legislative obligations – not flouting regulatory obligations. Similarly, ICASA's functions, it was submitted, include ensuring compliance with the ECA and furthering its objects. Regulation 9(1)(b) does not require MTN to obtain ICASA's *consent*. It was submitted that MTN's conduct did not materially undermine the purpose of the provision: the seven-day notice period does not require MTN to consult with ICASA, or to obtain its approval before implementing a tariff change. There is no indication in the regulations that a licensee must first obtain ICASA's approval, or even consider its views, before proceeding with implementation of its planned price increase – simply that it must notify ICASA. As a result, the implementation of the tariff change 5 working days early, in the extraordinary and exceptional circumstances in which MTN found itself, did not, it was submitted on behalf of MTN, prevent the purpose of the Regulation from being achieved. MTN's conduct was, it was argued, accordingly not a material contravention of the Regulations in the circumstances. Regulation 9(1)(b) clearly does not require MTN to consult with ICASA or obtain its consent before implementing a price increase. It is well established that: "[W]here the law requires a functionary to act in consultation with another functionary, this too means that there must be concurrence between the functionaries, unlike the situation where a statute requires a functionary to act after consultation with another functionary, where this requires no more than that the ultimate decision must be taken in good faith,

[20] Sections 2(e), (m), (n), and (q).

after consulting with and giving serious consideration to the views of the other functionary."[21]

[18] It was submitted that the purpose of the duty imposed by Regulation 9(1)(b) is not to elicit ICASA's inputs for consideration, but rather to inform ICASA of the content of the proposed amendment.[22] The regulation's deliberate creation of an obligation to *notify*, rather than to *consult* ICASA demonstrates that MTN had substantially complied with the duty to notify ICASA. On the test for materiality set out in *Allpay 1*,[23] the purpose of Regulation 9(1)(b) has not been undermined, because ICASA *was* informed of the intended price increase. This interpretation is supported by the amendments to the Regulations. In the past, the applicable license terms and conditions gave the Authority the power to *approve* any intended change in tariffs before implementation. That position was changed to the current situation. Under the current regime, a licensee does not require ICASA's consent to change a tariff, but may implement a change after giving ICASA notice. This is a clear indication, it was argued, that Regulation 9(1)(b) in its present form creates only a duty to inform ICASA, not to elicit its views or obtain its approval.[24] In circumstances such as in this case, where MTN has substantially complied with the regulation, and its overall conduct was in furtherance of the broader objects of the ECA and its licensing conditions, the non-compliance with the seven-day notice period requirement should, it was argued, thus, not attract censure.

FINDING ON THE SUBSTANTIAL COMPLIANCE ARGUMENT

[19] The question is whether MTN contravened regulation 9(b). The regulation makes it clear that seven working days' notice must be given *before* the new rate is implemented. However, only two working days' notice was given by MTN: The Thursday, the 12th and the Friday, the 13th - Saturday and Sunday

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[21] *President of the Republic of South Africa and Others v Reinecker* 2014 (3) SA 205 (SCA), at para 9, quoting *McDonald and Others v Minister of Minerals and Energy and Others* 2007 (5) SA 642 (C).

[22] See for example, *National Police Service Union and Others v Minister of Safety and Security* 2000 (3) SA 371 (SCA) at para 17.

[23] *Allay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) ("Allpay 1") para 22.

[24] It is accepted that this argument is an *alternative* to the first argument that ICASA's consent was necessary.

not being working days. The new rate was implemented on the Monday - the third day. That means that the new rate was implemented 5 days early. However, ICASA had, per regulation, as argued by Counsel for the CCA, determined that seven days' notice *must* be given *prior* to implementation. Substantial fines are prescribed, which demonstrate the importance of compliance.

[20] Although the ideal would consistently be that the legislation and licence conditions must be complied with to the letter, Acting Chief Justice Moseneke stated as follows in *Ferris v FirstRand Bank Ltd* 2014 (3) SA 39 (CC):

"While our law recognises that *substantial compliance* with statutory requirements may be sufficient in certain circumstances, Mr and Mrs Ferris have not given compelling reasons why a substantial-compliance standard would be useful or appropriate in determining compliance with a debt-restructuring order. On the contrary, there is no indication in the wording of the Act or the debt-restructuring order that anything less than actual compliance is required. Further, it was raised for the first time at the hearing before this court, and this court has held that it should be wary of deciding issues raised for the first time on appeal. Finally, even if substantial compliance were appropriate in this case, I am not convinced that Mr and Mrs Ferris had substantially complied by the time summons was issued — at that stage they had only paid R1000 of the almost R9000 owing under the order." (accent added)

[21] It was common cause that the crisis was essentially caused by the special offer from MTN. It should, given its access to experts, reasonably have foreseen what could happen, but realised too late that the plan had failed. The following statement of Scott JA in *Snow Crystal, MV: Transnet Ltd t/a National Ports Authority V Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) is of particular relevance to the present matter:

This brings me to the appellant's defence of supervening impossibility of performance. As a general rule impossibility of performance brought about by *vis major* or *casus fortuitus* will excuse performance of a contract. But it will not always do so. In each case it is necessary to 'look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied'. *The rule will not avail a defendant if the impossibility is self-created; nor will it avail the defendant if the impossibility is due to his or her fault.* (footnotes omitted and emphasis added)

The legal principle of impossibility, which is self-created, being no defense, also has relevance in this matter. The substantial risk to the system in the present

matter was due to MTN's not having foreseen the consequences of the lower rates. The crisis was, from an objective perspective, self-created. This was explained by the two MTN experts, who gave evidence during the hearing of this matter. They both, however, confirmed the necessity for the shorter notice.

[22] The defence of substantial compliance is, in any case, not accepted on the facts. Two working days (the Thursday and the Friday before the Monday) fall substantially short of seven working days before making the new rate operational. As Acting Chief Justice Moseneke said in the *Ferris* matter, referred to above:

"Finally, even if substantial compliance were appropriate in this case, I am not convinced that Mr and Mrs Ferris had substantially complied by the time summons was issued — at that stage they had only paid R1000 of the almost R9000 owing under the order."

THIRD DEFENCE: NECESSITY

[23] The urgency and necessity to act without any further and undue delay was brought about by a significant increase in traffic (300% over 2 months) that was attributed to the 1GB monthly bundle service at the rates of R10 and then R20. The legal question, it was argued, is whether necessity is a defence in the present matter. Our Courts have considered the defence of necessity on a number of occasions, both in the context of criminal prosecutions and in the context of actions for damages in delict. The present proceedings before the CCC do not comfortably equate to either a criminal prosecution or an action or application based in delict. Though the proceedings are regulatory in nature, they do involve a punitive aspect regarding the imposition of a potential penalty. If anything, therefore, the proceedings before the Committee are, it was argued, more akin to criminal proceedings - in the present matter. However, it was rightly submitted by *Mr Marcus SC,* representing MTN, that not a great deal turns on the proper classification of the nature of the proceedings before the CCC. It is the legal principles applicable to the common law defence of necessity that the CCC must consider and apply in this matter. In *Maimela*, the Court dealt with liability based on delict for the killing of an innocent victim in circumstances of necessity. It was held that where a defendant is able to show that his conduct in causing the death of an innocent person was objectively reasonable in the

particular circumstances, the person would be exonerated. The Court observed that:

"Professor Jonathan Burchell suggests that for an act to be justified on the ground of necessity the following requirements must be satisfied: '(a) A legal interest of the defendant must have been endangered; (b) by a threat which had commenced or was imminent but which was (c) not caused by the defendant's fault, and, in addition, it must have been (d) necessary for the defendant to avert the danger, and (e) the means used for this purpose must have been reasonable in the circumstances'."[25]

[24] It was argued that the means used by MTN were reasonable in the circumstances. MTN was faced with a choice: it could either breach its legal obligations to provide services in accordance with the objects of the ECA, or it could contravene its obligation to observe a seven-day notice period before implementing the new tariff. It was argued that MTN chose to ensure that it met its obligation to continue to provide services in accordance with the objects of the ECA.[26] The SCA in *Maimela* observed further that – "…in determining whether the conduct of the defendant was reasonable a court will consider questions of proportionality. As was said in *Crown Chickens*, 'the greater the harm that was threatened and the fewer the options available to prevent it, the greater the risk that a reasonable person would be justified in taking, and vice versa'."[27]

[25] The case referred to above is *Crown Chickens (Pty) Limited t/a Rocklands Poultry v Rieck* 2007 (2) SA 118 (SCA). That case concerned an action in delict in which the respondent had claimed damages for bodily injuries arising out of an incident in which she sustained a gunshot wound after having been taken hostage by robbers. Shots were fired at the fleeing vehicle by employees of the appellant, apparently in an attempt to stop the vehicle. In the course of judgment, the Court set out the relevant principles thus:

"[10] But our law also recognises that there are circumstances in which even positive conduct that causes bodily harm will not attract liability. That is so where the harm is caused in circumstances of necessity, which have been described as occurring when the conduct is 'directed against an innocent person for the purpose of protecting an interest of the actor or a third party (including the innocent person) against a dangerous situation'. It is well-

25 *Maimela and another v Makhado Municipality and another* 2011 (6) SA 533 (SCA) para [17].

26 MTN Response to Charge Sheet, page 12 of paginated bundle, para 2.

27 *Maimela and another v Makhado Municipality and another* 2011 (6) SA 533 (SCA) para [20].

established that where a particular conduct falls within that category is to be determined objectively. That the actor believed that he was justified in acting as he did is not sufficient. The question in each case is whether the conduct that caused the harm was a reasonable response to the situation that presented itself. [11] But, while it is clear that there is no liability for harmful conduct that occurs in circumstances of necessity, and that the standard for assessing the conduct is objective, it has yet to be authoritatively determined where necessity fits in the jurisprudential scheme of delictual liability. The weight of academic opinion is that necessity operates to justify conduct that would otherwise be wrongful, thus taking it outside the class of conduct that is susceptible to an action for damages, a view that seems largely to draw upon analogous principles that have been developed in criminal law. On the other hand, it also seems at times to have been suggested that it might operate instead to avoid a finding of negligence. [12] It is not necessary in the present case to question the correct jurisprudential niche that is occupied by necessity in the scheme of delictual liability. Whether it operates to justify conduct that would otherwise be wrongful, or to avoid a finding or negligence, the test for whether it operates at all calls for an objective evaluation. For the classic test for negligence, as it was articulated by Holmes JA in Kruger v Coetzee, itself requires not only that the harm was foreseeable, but also that a reasonable person would have guarded against it occurring. [13] Thus, whatever the correct jurisprudential approach, a person who causes bodily injury by a positive act will avoid liability for the harm that he caused, on either approach, only if a reasonable person in the position in which he found himself would have acted in the same way. Considerations that are to be brought to account in determining whether the conduct was reasonable are described by Van Der Walt and Midgley as follows: 'A person may inflict harm in a situation of necessity only if the danger existed, or was imminent. … The means used and measures taken to avert the danger of harm must not have been excessive, having regard to all the circumstances of the case. The nature of the threat, the extent of harm, the likelihood of serious injury to persons, and the value of the interests threatened must, for example, be taken into consideration. It must have been the only reasonably possible means of averting the danger. Similarly, although any interest may be protected, the interest infringed or the harm inflicted should not be greater than the interest protected or the harm prevented.' [14] Essentially, what is called for is a weighing against one another of the gravity of the risk that was created by the defendant, and the utility of his conduct. As it is expressed by Boberg: Proportionality, in the sense of a preponderance of avoided over inflicted harm, is traditional postulate of necessity. …'In short, the greater the harm that was threatened, and the fewer the options available to prevent it, the greater the risk that a reasonable person would be justified in taking, and vice versa."

FINDING ON THE DEFENCE OF NECESSITY

[26] Whilst it is clear from a business and service perspective that MTN had only one choice and legal argument and expert evidence was placed before the CCC that the law supported by the circumstances permitted MTN's decision, the

fundamental question is whether MTN should not, reasonably, have foreseen this risk. Of course, the CCC must, in considering this question, constantly take into consideration that hindsight is the perfect sight - an approach that should not, in law, be applied.[28]

[27] Although the following passage (as quoted earlier) deals with impossibility of performance, it is also, from a *legal* perspective, relevant for the present requirement of necessity. In *Snow Crystal, MV: Transnet Ltd t/a National Ports Authority V Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) at [28] Scott JA stated:

This brings me to the appellant's defence of supervening impossibility of performance. As a general rule impossibility of performance brought about by *vis major* or *casus fortuitus* will excuse performance of a contract. But it will not always do so. In each case it is necessary to 'look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied'. ***The rule will not avail a defendant if the impossibility is self-created; nor will it avail the defendant if the impossibility is due to his or her fault***. Save possibly in circumstances where a plaintiff seeks specific performance, the onus of proving the impossibility will lie upon the defendant. (footnotes omitted and emphasis added)

[28] It is true that the Highest Court in the RSA, at the time, has held that in principle a person may kill another to save his own life - see *S v Goliath 1972(3) SA 1(A)* where Chief Justice Rumpff stated (as summed up in English by the author, Prof CR Snyman) as follows:

"A person acts in necessity and his act is therefore lawful, if he acts in protection of his or somebody else's life, bodily integrity, property or other or other legally recognised interest which is endangered by a threat of harm which has commenced or is imminent and which cannot be averted in another way, provided that the person is not legally compelled to endure the danger and the interest protected by the protective act is not out of proportion to the

[28] Thus Daffue J stated as follows in *Oosthuizen v Castro and Another* 2018 (2) SA 529 (FB):

"[1] The following warning of Schutz JA in *Durr v Absa Bank Ltd and Another* 1997 (3) SA 448 (SCA) ([1997] 3 All SA 1) at 453D applies *in casu* as well. The learned judge of appeal said: 'Hindsight is not vouchsafed the common man as he picks his course through life.' This must be kept constantly in mind in a case like this, one where all is so obvious now. "

interest infringed by the act, and the act is not out of proportion to the interest infringed by the act, and the act is not out of proportion to the interest infringed by the act."[29]

[29] The present situation, however, does not meet the high standard set in the *Goliath* matter. Full and uninterrupted electronic service to the public is, of course, a high value from an economic and electronic perspective. There is also an element of public service in it. However, the special offer by MTN, as it were, collapsed. Thus, MTN increased its fees so as to protect the quality of its service by reducing its potential customers with a price increase. MTN must, however take responsibility for its initial grave error. The MTN technical expert, who testified before the CCC, supported the steps taken and there is no evidence before the CCC to disagree with him as to what, from an electronic perspective, had to be implemented. MTN's financial expert also confirmed that the steps had to be taken from his perspective. *However*, the situation was brought about by MTN's own miscalculation as to the rush for and effect of its price-friendly product. The special circumstances of the *Goliath* approach to choices between one's life and killing a person simply do not weigh up to the service crisis which MTN underwent. The *Snow Crystal* judgment is also based on a situation where an attempt was made to stop fleeing criminals – a situation which could, as the

[29] Snyman *Criminal Law* (3rd ed) 107-115. The full passage by Rumpff CJ states as follows: Wanneer die mening uitgespreek word dat in ons reg dwang as verweer erken word teen alle misdade behalwe moord, en daardie erkenninggeskied op grond van die aanvaarding dat strafopheffing plaasvind omdat die bedreigde geen wilsvryheid meer het nie, skyn dit my, as gevolg van die ontwikkeling wat sedert die dae van die ou skrywers van Nederland en Engeland plaasgevind het en die beslissing in die Hercules saak dit irrasioneel sou wees om dwang as volkome verweer teen moord uit te sluit indien die bedreigde onder so 'n sterk dwang verkeer het dat 'n redelike persoon onder daardie dwang nie anders sou gehandel het nie. Die enigste grond vir so 'n uitsluiting sou dan wees dat nieteenstaande die bedreigde geen voldoende wilsvryheid meer het nie, die daad nogtans aan hom toegereken moet word omdat hy nie aan wat as die hoogste etiese vereiste beskryf word, voldoen het nie. By die toepassing van ons strafreg, in die gevalle wanneer die handeling van 'n beskuldigde volgens objektiewe standaarde beoordeel word, geld die beginsel dat aan die beskuldigde nie hoër eise gestel word nie as wat Redelikerwys van die gewone deursnee-mens in die besondere omstandighede verwag kan word. Dit word algemeen aanvaar, oak dear die etic, data vie die genome men's in die aldermen see eye lee belangriker is as die lewe van 'n ander. Alleen hy wat met 'n kwaliteit van heroisme bedeeld is, sal doelbewus sy lewe vir 'n ander offer. Indien die strafreg dus sou bepaal dat dwang nooit as verweer teen 'n aanklag van moord kan geld nie, sou hy vereis dat 'n persoon wat 'n ander onder dwang dood, afgesien van die omstandighede, moes voldoen het aan 'n hoër vereiste as die wat aan die deursnee-mens gestel word. So 'n uitsondering op die algemene beginsel wat in die strafreg toegepas word, skyn my nie geregverdig te wees nie. Vir sover dit dwang in ons reg betref, sou die volgende uittreksel uit die artikel van Prof. Hazewinkel-Suringa, op cit. bl. 195, na aanleiding van D. 4.2.6. nie onvanpas wees nie:'Gaat het om lyf of leven, om eerbaarheid en vrijheid, dan behoeft een gewoon, behoorlijk mens geen weerstand meer te bieden. Heroïsme mag niet verlangd worden. En heldenmoed is niet het beheersen der hevige gemoedsaandoeningen, maar het welbewust op die achtergrond plaatsen van eigen bestaan ten gerieve van dat van een ander. Dit moge eis der zedelijkheid zijn, niet van het recht.'

Court held, be a defence in the particular circumstances of that case, where a person held captive by the fleeing criminals was accidentally wounded by a gunshot from a person who was attempting to stop the runaway car in which the criminals were. The self-created crisis of MTN does not, as argued by *adv Zondo-Pilani,* for the CCA, weigh up to the circumstances of these cases.

FINDING ON THE MERITS

[30] The CCC has come to the following conclusion:

(a)The cause of the crisis lay in the resolution by MTN to introduce the R10 offer which led to sales which MTN could not technically cater for. The second offer of R20 was not effective in stemming the tide. The MTN expert evidence was that the crisis was substantially stemmed by the R30 offer. However, it is clear in the CCC's opinion, that the crisis was caused by the R10 and even the R20 offers. The question is whether this exonerated MTN legally from its duty in terms of the Regulations to wait seven working days from the day of the notice to the Authority on 12 July 2018, before increasing its price for the bundle to R30.The evidence was that it was effective: sales fell and the quality of the service was no longer under threat. *However*, the true cause lay in the erroneous decision taken by MTN when it introduced the R10 offer – a conclusion which was supported by MTN's own expert evidence at the hearing of this matter. This was, indeed, the main cause - *causa causans* - of what followed.[30]

(b) MTN was, as argued, taking steps which MTN believed would save its service from disruption. The experts confirmed this. It is not necessary for the CCC to inquire into the question whether MTN could have waited another five days. Experts may differ on this. However, the experts before the CCC confirmed that the steps taken were necessary. There is no evidence before the CCC to controvert this. However, ultimately it is a question of law whether there was a justified defence. The core of the problem lay in the original offer, given the

[30] *Webranchek v LK Jacobs & Co, Ltd* 1948 (4) SA 671 (A) at 678, where Van den Heever JA said:'(A) judge who has to try the issue must needs decide the matter by applying the common sense standards and not according to the notions in regard to the operation of causation which might satisfy the metaphysician . . . . The distinction between the concepts *causa sine qua non* and *causa causans* is not as crisp and clear as the frequent use of these phrases would suggest; they are relative concepts. . . . It stands to reason, therefore, that the cumulative importance of a number of causes attributable to one agent may be such that, although each in itself might have been described as a *causa sine qua non*, the sum of efforts of that agent may be said to have been the effective cause of the sale.'

effect which, according to the expert evidence, it had. The CCC has no doubt that the *causa causans*, in terms described by Judge of Appeal Van den Heever[31] lay in the initial offer of R10 which was not stemmed by the R20 offer.

(c)It is true that the Highest Court in the RSA at the time, held that in principle a person may kill another to save his own life - see *S v Goliath* 1972(3) SA 1(A). However, the present situation does not meet the high standard set in the *Goliath* matter. Full service to the public is, of course, of high value from an economic and service perspective. However, the special offer by MTN amounted to the *causa causans* of the crisis. Thus MTN increased its fees, without abiding by the seven-day rule, so as to protect the quality of its service. However, MTN has to take responsibility for the initial grave error which led to this crisis. The MTN technical experts supported the steps taken by raising the price to R30. The situation was, however, brought about by MTN's own miscalculation – confirmed by its own expert evidence at the hearing of this matter - as to what led to what may be termed a stampede for its R10 product. The special circumstances of the *Goliath* approach to choices between one's life and killing an innocent person simply do not support the decision taken in the service crisis which MTN underwent. Self-created impossibility is not a legal defence, as stated by Scott JA and quoted above. And that legal principle also applies to the facts before the CCC: MTN was the cause of its own crisis.

[d] The conclusion which the CCC has reached is that Regulation 9(1)(b) was knowingly contravened. MTN's initial grave error led to the situation where it, according to its own evidence, could not comply with Regulation 9(1)(b). The, decision not to wait a further five days was, in the opinion of the CCC, a decision which was knowingly taken. MTN clearly knew that the Regulation required 7 working days' notice and, accordingly, the regulation was contravened with knowledge of unlawfulness. The main cause, for which MTN must take responsibility, lay in the initial erroneous decision to make the product available

[31] Van den Heever JA in *Webranchek v LK Jacobs & Co, Ltd* 1948 (4) SA 671 (A) at 678, said: (A) judge who has to try the issue must needs decide the matter by applying the common sense standards and not according to the notions in regard to the operation of causation which might satisfy the metaphysician . . . . The distinction between the concepts *causa sine qua non* and *causa causans* is not as crisp and clear as the frequent use of these phrases would suggest; they are relative concepts. . . . It stands to reason, therefore, that the cumulative importance of a number of causes attributable to one agent may be such that, although each in itself might have been described as a *causa sine qua non*, the sum of efforts of that agent may be said to have been the effective cause of the sale.' Quoted with approval by Lewis JA in Wakefields Real Estate (Pty) Ltd v Attree and Others 2011(6) SA 557 (SCA) at 560.

at R10. The R20 increase did not, according to the evidence of MTN, address the crisis.

The finding, accordingly, goes against MTN based on its breach of Regulation 9(1)(b) of the *Standard Terms and Conditions for Individual Electronic Communications Services,* 2010 as amended, well-knowing that it was in breach of the Regulation. The crisis was self-created and cannot, in the circumstances, be a defence.

ORDER ADVISED TO COUNCIL

INTRODUCTION

[31] Section 17D of the ICASA Act provides as follows:

17D. Findings by Complaints and Compliance Committee

(1) The Complaints and Compliance Committee must make a *finding* within 90 days from the date of conclusion of a hearing contemplated in section 17B.

(2) *The Complaints and Compliance Committee must recommend to the Authority what action by the Authority should be taken against a licensee, if any.*

(3) The Complaints and Compliance Committee must submit its *finding and recommendations* contemplated in subsections (1) and (2) and a record of such proceedings to the Authority for a decision regarding the action to be taken by the Authority.

From the above section it is clear that **firstly** the CCC must make a *finding* and **then**, if a contravention has been found, *recommend* to the Council of ICASA *what action by the Authority should be taken against a licensee, if any.*

17E. Decision by Authority

(1) When making a decision contemplated in section 17D, the **Authority** must take all relevant matters into account, including -

(a) the recommendations of the Complaints and Compliance Committee;

(b) the nature and gravity of the non-compliance;

(c) the consequences of the non-compliance;

(d) the circumstances under which the non-compliance occurred;

(e) the steps taken by the licensee to remedy the complaint; and

(f) the steps taken by the licensee to ensure that similar complaints will not be lodged in the future.

(2) The **Complaints and Compliance Committee** may recommend that one or more of the following orders be issued by the Authority, namely -

(a) direct the licensee to desist from any further contravention;

(b) direct the licensee to pay as a fine the amount prescribed by the Authority in respect of such non-compliance or non-adherence;

(c) direct the licensee to take such remedial or other steps [not] in conflict with this Act or the underlying statutes as may be recommended by the Complaints and Compliance Committee;

…….

(3) The Complaints and Compliance Committee must submit its finding and recommendations contemplated in ***subsections (1) and (2)*** and a record of its proceedings to the Authority for a decision regarding the action to be taken by the Authority within 60 days.

(4) The Authority must make a decision permitted by this Act or the underlying statutes and provide persons affected by such decision with written reasons therefor. (Emphasis added)

[32] The CCC requested the parties to provide it with written argument as to what order(s) the CCC may recommend to Council in terms of section 17E (2) of the ICASA Act, if a finding against MTN is made. It is of relevance that section 17E (2) of the Act provides that the CCC "may" recommend one or more of the following orders. Deputy President of the Supreme Court of Appeal Harms states as follows in *Woodlands Dairy (Pty) Ltd v Competition Commission* 2010 (6) SA 108 (SCA):

[18] It is conceivable that the commissioner, by virtue of facts submitted informally or from facts obtained by the commission in the course of another investigation, may wish to initiate a complaint and to dispense with a subsequent investigation. It would accordingly appear reasonable to assume that in this case one could read 'must' as 'may'. The problem is that Parliament chose to deal with the two cases in an identical manner. ***The same word cannot***

bear different meanings in the same sentence depending on the circumstances. Even recourse to purposive construction superimposed on benevolent construction does not help. Furthermore, Parliament was quite particular in its use of 'may' and 'must' in this Act. In the preceding two subsections and the subsequent one the word 'may' is used. Why then the use of 'must' in this subsection if 'may' was intended? (emphasis added)

[33] In accordance with section 17E (3) of the ICASA Act the Complaints and Compliance Committee must submit its *finding* and *recommendations contemplated in subsections 17E (1) and 17E (2)* and a record of its proceedings to the Authority for a decision regarding the action.

The **CCC** must, thus, advise **Council** as to

(1) the finding; and

(2) if the finding is against the licensee; then

(3) in accordance with section 17E (3) the following must be considered by the CCC before the order is advised:

(a) …

(b) the nature and gravity of the non-compliance;

(c) the consequences of the non-compliance;

(d) the circumstances under which the non-compliance occurred;

(e) the steps taken by the licensee to remedy the complaint; and

(f) the steps taken by the licensee to ensure that similar complaints will not be lodged in the future.

Thus:

(a) The finding is that MTN has knowingly contravened Regulation 9(1)(b) of the *Standard Terms and Conditions for Individual Electronic Communications Services,* 2010 as amended.

(b) As to the nature, gravity and consequences of the non-compliance: MTN has contravened the Regulation, well knowing that it was contravening the Regulation by filing the notice of the price increase after two working days instead of the prescribed seven working days. It was a serious contravention since the right of the Authority to be informed of fees charged to the public was limited to two working days instead of seven working days. Substantial non-compliance was accordingly found. The following argument of the CCA is also a consideration.

A sanction hardly ever negates the act of contravention. The complainant has already argued how among other things, non-compliance with the Regulations challenges and undermines

the Authority's role at the regulator. This may inadvertently have far-reaching consequences to the community's perceptions in relation to the Authority's ability to perform in terms of its mandate. A sanction is aimed at punishing the contravention, thus acting as a deterrent for the party sanctioned and other licensees from future contraventions.

On the other hand, MTN argued that a desist order would address the matter sufficiently. This would mean that if MTN is in future found by the Authority, on the advice of the CCC, to have contravened regulation 9(1)(b), MTN would be subject to prosecution before a Criminal Court in terms of section 17H(1)(f) of the ICASA Act as having failed to desist.

(c) The circumstances under which the non-compliance occurred is, indeed, the main theme of the defence as set out in this judgment: in short, the experts explained that the price of R10 per Gigabyte attracted a huge market which created a risk for the quality of its system; the increase to R20 did not remove the risk and MTN then resolved to obtain permission from ICASA to shorten the period to two instead of seven working days. As pointed out in this judgment, the Authority is and was not authorised by the governing legislation to grant such an application. It was argued at the hearing that ICASA must in law be regarded as having assented. This view as to the law was not accepted by the CCC. The defences based on substantial compliance and necessity were also not accepted. MTN's price policy was the sole cause of its problems and the crisis was thus of its own making – which, in the circumstances, is no defence.

[34] The finding, as appears from the first part of this judgment, is that sub-regulation 9(1)(b) was contravened. The next question is whether MTN had acted with intention, which includes knowledge of unlawfulness (*dolus directus*); or with intention, which of necessity included the contravention of the Regulation (*dolus indirectus*); or which would include the foresight of the possibility of unlawfulness and nevertheless acted (*dolus eventualis*).[32] Since the

32 See Director of Public Prosecutions v Pistorius; DPP, Gauteng v Pistorius 2016 (2) SA 317 (SCA) 336 where Leach JA said the following as to *dolus eventualis*: [51] In these circumstances I have no doubt that in firing the fatal shots the accused must have foreseen, and therefore did foresee, that whoever was behind the toilet door might die, but reconciled himself to that event. Also see *S v Bradshaw* 1977(1) PH H60 (A):
"...the court should guard against proceeding too readily from 'ought to have foreseen' to 'must have foreseen' and hence to 'by necessary inference in fact foresaw, the possible consequences of the conduct inquired into. The several thought processes attributed to an accused must be established beyond any reasonable doubt, having due regard to the particular circumstances which attended the conduct being enquired into."

Respondent clearly knew that it had to notify ICASA of the new price and knew of the seven working days' rule, it apparently found itself on the horns of a dilemma. Either contravene the regulation or not contravene the regulation and, in its view, supported by its experts, suffer substantial loss of connectivity if seven work days' notice is given and the amendment to R30 commences 5 days later on the Saturday.

[35] The only reasonable inference is that MTN ultimately knew that it would be contravening the Regulation. The situation was, however, caused by its own price policy, the introduction of which was the main cause (*causa causans*) of the crisis it found itself in on 12 July 2018. It was confronted with a dilemma which led to its resolution to not comply with the 7-day regulation. The notice sent on 12 July 2018 is indicative of the fact that MTN knew of the seven-day Regulatory rule. The letter of 13 July requests that ICASA approve the 16th July as the operational date. As found above, MTN knew it was breaching the Regulations and nevertheless, acting on its experts' advice to protect its services, increased its rate to R30 with two instead of seven working days' notice. The CCA did not dispute the evidence of the experts, but argued that there had, in any case, been an intentional contravention of the Regulation and that there were no legal defences to the contravention. It argued that a fine of R500 000 would be fitting in the circumstances. It is clear from the Regulations that a price amendment may only be made *after* seven working days' *notice.* The seventh day was Friday 20 July 2018. The first day to make the new price operational was, accordingly, Saturday 21 July. However, it was common cause that MTN already made the new price operational on Monday 16 July: five days early. However, the main cause (*causa causans*) lay in the first erroneous resolution to sell its product at R10.

ESSENCE OF WRITTEN ARGUMENT ON SANCTION

[36] The CCA and MTN were requested to file written argument. MTN replied to the view of the CCA, which proposed a desist order plus a fine of R500 000. It was argued that a *desist* order would, in the circumstances, suffice.

***The Full written argument will be included in the Record of the proceedings* since it was requested after the close of the proceedings and thus not argued before the CCC and recorded.**

THE CCA'S ARGUMENT ON SANCTION

INTRODUCTION

1. The Complaints and Compliance Committee ("CCC") was established in terms of section 17 of the Independent Communications Authority of South Africa Act, 2000 ("the Act").

2. The functions of the CCC set out in the Act include to investigate, hear if appropriate and make a finding on, *inter alia*, allegations of non-compliance with the Act. The Act further provides that the CCC must make recommendations to the Independent Communications Authority of South Africa ("the Authority") on what action the Authority should take against a licensee, if any.

3. Section 17E (1) of the Act, provides as follows:

   "When making a decision contemplated in section 17D, the Authority must take all relevant matters into account, including-

   (a) the recommendations of the Complaints and Compliance Committee;
   (b) the nature and gravity of the non-compliance;
   (c) the consequences of the non-compliance;
   (d) the circumstances under which the non-compliance occurred…".

   (own emphasis)

4. Finally, the Act sets out the sanctions which the CCC may make to the Authority, namely:

   (a) direct the licensee to desist from any further contravention;

   (b) direct the licensee to pay as a fine the amount prescribed by the Authority in respect of such non-compliance or non-adherence;

   (c) direct the licensee to take such remedial or other steps in conflict with this Act or the underlying statutes as may be recommended by the Complaints and Compliance Committee;

   (d) where the licensee has repeatedly been found guilty of material violations-

   (i) prohibit the licensee from providing the licensed service for such period as may be recommended by the Complaints and Compliance Committee, subject to the proviso that a broadcasting or communications service, as applicable, must not be suspended in terms of this subsection for a period in excess of 30 days; or

   (ii) amend or revoke his or her licence; and

   (e) direct the licensee to comply with any settlement.

5. There is a fine prescribed by the Authority for a breach of the Standard Terms of Conditions for Individual Electronic Communications Services Regulations, 2010 ("the **Regulations**"). Regulation 12 states that upon determination of non-compliance by the CCC, the Authority may impose a fine not less than R100 000, 00 (one hundred thousand Rand) but not exceeding R5 000 000. 00 (five million Rand) or 10% (ten per cent) of the

licensee's annual turnover – whichever is the greater – for every day or part thereof during which the offence is continued.

APPROPRIATE SANCTION

6. A sanction hardly ever negates the act of contravention. The complainant has already argued how among other things, non-compliance with the Regulations challenges and undermines the Authority's role at the regulator. This may inadvertently have far-reaching consequences to the community's perceptions in relation to the Authority's ability to perform in terms of its mandate. A sanction is aimed at punishing the contravention, thus acting as a deterrent for the party sanctioned and other licensees from future contraventions.

7. The Respondent raised three main arguments regarding its non-compliance, being tacit consent, substantial compliance and necessity. The Compliance and Consumer Affairs ("CCA") has, in its closing heads of argument, shown why each of these defenses should fail.

8. These defenses are raised again in mitigation of sanction. The nature of the defenses is to deny that a contravention took place to begin with. It is the view of the CCA that the Respondent does not demonstrate an understanding that it has contravened the Regulations and that contravention of the Regulations is a serious matter. Its insistence that it has substantially complied with the Regulations demonstrates a lack of appreciation for the role of the Authority as a regulator in the industry.

9. It is therefore the view of the CCA that the appropriate sanction in the current matter would be the imposition of a fine in terms of the Regulations. A fine of R 500 000 (five hundred thousand Rand) would be deemed appropriate. This figure represents R 100 000 (one hundred thousand Rand) per day of the notice which was outstanding at the time the tariff increase was implemented. This fine represents five (5) days during which MTN was in breach. It is therefore our view that the appropriate order would be a desist order and a fine of R500 000.

[37] Respondent's Heads on Sanction (shortened but added as a whole to the Record of the Proceedings)

1. MTN submits that the facts of this matter do not justify any sanction beyond an order in terms of section 17E(2)(a) of the ICASA Act, namely, an order directing MTN "*to desist from any further contravention*". At the outset, we note two significant aspects of the CCA's closing argument on sanction: The CCA's closing heads say nothing at all about ***prejudice*** suffered, either by ICASA or anyone else. As a result, this Committee must decide the question of sanction on the assumption that no prejudice was suffered as a result of MTN's early implementation of the price increase. Second, the CCA fairly

concedes that all of MTN's evidence setting out its defence on the merits should be considered to be ***mitigating*** circumstances for the purposes of sanction.[33]

2. We submit that both these factors weigh in favour of a desist order and nothing more. MTN proposes to present its argument as follows: The imposition of an administrative sanction in terms of the ICASA Act constitutes administrative action as defined in the PAJA Act 3 of 2000. It is accordingly governed by the following well-established principles of administrative law. First, the sanction must be **proportionate** to the transgression: The Constitutional Court has held that a reasonable administrative decision is one that strikes a reasonable equilibrium between the competing interests at stake.[34] The notion of reasonable equilibrium between competing interests requires proportionality.[35] Prof Hoexter explains the concept as follows: "Proportionality may be defined as the notion that one ought not to use a sledgehammer to crack a nut. Its purpose is 'to avoid an imbalance between the adverse and beneficial effects…of an action and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end.'"[36]Second, the decision to impose the sanction must be based on the **correct facts**. Third, the sanction must be **rational and reasonable** in the circumstances. Fourth, the provisions of the Regulations which empower the CCC to recommend sanctions are penal provisions. They must thus be subject to a **restrictive interpretation** in all contexts: an approach that resolves ambiguity in the provisions against the risk of being penalised.[37] The SCA has applied this principle of restrictive interpretation to provisions that give rise to both criminal and administrative penalties. It held that "*any legislation that creates criminal and administrative penalties, as the [Exchange Control] Regulations do] requires restrictive interpretation*."[38] The same principle applies where, as in this matter, the relevant statute imposes purely administrative penalties. Senior Counsel submitted that, based on the uncontested evidence before this Committee, any

[33] CCA's closing heads of argument.

[34] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at paras 49-54

[35] *Ehrlich v Minister of Correctional Services* 2009 (2) SA 373 (E) at paras 42-43

[36] Hoexter, *Administrative Law in South Africa*, 2nd edition, p344, references omitted.

[37] In *DA v ANC*,[37] the Constitutional Court held that: "In case of doubt, we are obliged to interpret [penal provisions] restrictively. This means that we must resolve any ambivalence in them, or uncertainty about their meaning, against the risk of being penalised. The restrictive interpretation of penal provisions is a long-standing principle of our common law. Beneath it lies considerations springing from the rule of law. The subject must know clearly and certainly when he or she is subject to penalty by the state. If there is any uncertainty about the ambit of a penalty provision, it must be resolved in favour of liberty.

[38] *Oilwell (Pty) Ltd v Protec International Ltd* 2011 (4) SA 394 (SCA) at para 11.

significantly punitive sanction would be disproportionate, unrelated to the facts before this Committee, irrational and unreasonable, and based on an expansive, as opposed to restrictive, interpretation of the relevant penal provisions.

The CCC's powers

The CCC's guideline for sanction recommendations to the Authority is set out in section 17E (2) of the ICASA Act ("the Act") [It is unnecessary to repeat them here] MTN submits that the effect of this Regulation is as follows (if this Committee recommends a fine):

First, the minimum fine which is permitted is R100 000.

Second, the maximum fine which is permitted is the greater of R5m or 10% of MTN's annual turnover for every day during which the offence is continued.

Third, in the circumstances of this matter, MTN stands accused of breaching Regulation 9(1)(b) in that it implemented a tariff increase without giving advance notice to ICASA of 7 days. This is not a matter in which MTN failed to give notice of the increase. MTN gave notice of the increase, but did not wait the required 7 days before implementing it. The period for which MTN breached Regulation 9(1)(b) was therefore 5 days. The maximum fine which could be recommended is therefore 10% of MTN's annual turnover, for each of the 5 days during which MTN was in breach.

Section 4(3)(p) of the Act provides that:

"Without derogating from the generality of subsections (1) and (2), the Authority-

except where section 74(1) of the Electronic Communications Act applies, must determine a penalty or remedy that may be appropriate for any offence of contravening any regulation or licence condition, as the case may be, contemplated in this Act or the underlying statutes, taking into account section 17H." (Emphasis added)

It is clear from section 17E (2) of the ICASA Act that at a minimum, the CCC can recommend an order directing the licensee to desist from any future non-compliance. The extent of any permissible fine ranges from a minimum of R100 000 to a maximum of 10% of MTN's annual turnover for each day during which the offence was continued.

Suspended sentences

The Regulations are silent on whether the CCC can recommend a suspended sanction. However, the CCC has the implied power to make such a recommendation. This is made clear by the examples of a variety of sanctions the CCC has ordered in the past. The CCC has suspended sanctions in cases where it found a gross violation of the applicable legislation and a constitutional right. In *in re: South African Broadcasting Corporation SOC Limited* (case number 203/2016),[39] the CCC found that the South African Broadcasting Corporation SOC Limited had contravened section 56 and 58 of the ECA. The CCC held that the contravention "*was particularly serious*" and affected citizens' rights to a free and fair election. The CCC reasoned that this was because "*the main purpose of sections 56, 57, 58 and 59 of the ECA is to ensure that political parties have an equal opportunity in broadcasting their political advertisements. The equality principle was not upheld by the SABC by not ensuring that no political advertisements would be broadcast within the 48 hours before the polling commenced...*"[40]The CCC having found the contravention particularly serious and that SABC had been grossly negligent, nevertheless ordered that the SABC should pay a fine of R50 000 to ICASA, R35000 of which was suspended for three years. The CCC also imposed a (wholly) suspended sanction in *Now Media (Pty) Limited v South African Post Office Limited* case number 126/2015.[41] …. This recommendation by the CCC was given in circumstances where the South African Post Office had failed to deliver mail during an unprotected strike. The reasoning of the CCC for recommending a wholly suspended penalty is relevant: "...From the above judgment on the merits it is also clear that SAPO had considered outsourcing and that it bona fide came to the conclusion that it would not solve the problem. The CCC, however, found that without evidence as to genuine attempts made by SAPO to engage outside carriers, SAPO was also not in a position to decide whether this would have been a viable option. The finding was that SAPO should have engaged with outside carriers so as to reach a rational and reasonable decision in this regard. This is, according to the CCC's finding, where the omission lay. The maximum fine which the ICASA Council may impose for this omission is R250 000. The fact of the unprotected strike, the violence, the approach to the Court and

39 *In re: South African Broadcasting Corporation SOC Limited* (case number 203/2016) handed down on 10 September 2016

40 At para 3

41 *Now Media (Pty) Limited v South African Post Office Limited* case number 126/2015 handed down on 29 February 2016

Police are extenuating circumstances in advising what the fine should be. The maximum fine would, accordingly, not be fitting." [42]

It is thus evident that the CCC has the authority to recommend suspended sanctions, and that in the event of the CCC finding that the most lenient sanction (desist order) would be inappropriate, a wholly suspended penalty could be the next appropriate sanction.

Orders to desist have often been imposed. One of the sanctions available to the CCC is a direction that the licensee desists from any further contravention.[43] Several examples are then given of cases where it was applied.

THE EVIDENCE IN MITIGATION

MTN relies on all of its evidence that was led on its behalf at the hearing of 4 March 2019 as evidence in mitigation. In Counsel's heads of argument of 18 March 2019 at paragraphs 4 to 8, it was explained why the consequence of the CCA's failure to lead any evidence or to put any aspect of MTN's evidence in issue in cross-examination is that this Committee is bound to accept that the evidence led by both MTN witnesses is in all respects true and correct. As we explain in greater detail below, MTN's evidence established that:

1. As a result of the unexpected and unprecedented demand for the WhatsApp bundle, MTN faced a severe risk to the stability of its network. MTN considered and implemented all alternative options, including the expansion of its network capacity and moving network resources to the nodes that were under the most pressure. These alternatives failed to ameliorate the risk. MTN did not benefit from the early implementation of the tariff increase. In fact, it suffered a decline in revenue as a result of declining traffic volumes. It was impossible for MTN to predict with any certainty what would happen if it did not act swiftly to reduce that demand. The extent of MTN's non-compliance with the Regulations was minimal. As we explain at paragraphs 27-30 of MTN's heads of argument of 18 March 2019, MTN did not undermine the purpose of the provision. Instead its conduct was necessary to prevent more severe and prejudicial breaches of MTN's statutory duties.

The evidence of Experts Miklos and Mr Joshi

This evidence, which was positive for MTN, is not repeated since it is classified in terms of section 4 of the ICASA ACT. It will be made available under separate cover. It is sufficient to say that Mr Miklos supported the steps taken to resolve the matter from a technical perspective and Mr Joshi from a financial perspective. There was no suggestion by the CCA or any member of the committee that this evidence was not true and it must accordingly be accepted as correct for the purposes of deciding this complaint.

We submit that this undisputed evidence constitutes compelling mitigating circumstances which weigh in favour of a lenient sanction.

[42] Paragraph 45 of the ruling

[43] Section 17E (2) of the ICASA Act.

Ultimately *Mr Marcus SC* argued as follows:

Having regard to the detailed explanation provided by MTN regarding the circumstances that led to it implementing the price increase earlier than the prescribed 7 days, we submit that there are sufficient grounds to impose the most lenient of the sanctions available to the Authority.

In the remainder of this section, we address the factors set out in paragraph 17E(2)(b) – (f) of the ICASA Act, which must be taken into account by ICASA when making a decision on sanction.

Nature and gravity of non-compliance

We submit that the nature and gravity of MTN's non-compliance was not serious. As we explained in our heads of argument of 1 March 2019 at paragraphs 19 to 25, MTN substantially complied with Regulation 9(1)(b). This was not a situation in which MTN filed no notice at all. MTN filed a notice, but only implemented it 5 days early. For the reasons set out in our 1 March 2019 heads of argument: this was done in order to comply with MTN's statutory obligations; and because MTN does not require ICASA's consent for any tariff change, but is only required to give ICASA notice, the purpose of the regulation was not undermined. A notice filed in compliance with the Regulations in fact preceded MTN's non-adherence to the 7day notice period. MTN had therefore substantially complied with the regulatory requirement of filing its intended price increase. MTN implemented the notified price increase a few days before the expiry of the notice period. The fact that MTN had filed a complaint notice of its intended price increase on 12 July 2018, demonstrates that the purpose of the regulation (filing of notices in respect of tariff increases) was not undermined. MTN's fault was in not adhering to the notice period.

The consequence of the non-compliance

The CCA has not suggested, despite being invited to do so by this Committee, that MTN's conduct caused any prejudice. The CCA also does not argue that MTN's conduct was prejudicial to its customers. MTN in fact took great care not to negatively affect its low-income customers. It did so by implementing the price increase only in respect of a certain segment of its customers.[44]The implementation of the price increase earlier than the notice period requires was shown to have alleviated the risks to MTN's network. MTN experienced a reduction in revenue as a result of the price increase. Therefore, any suggestion that MTN took steps to effect the price increase earlier than the notice period requires for commercial

[44] Miklos Affidavit at paras 34-35

benefit is untrue. On the contrary, MTN would have generated more revenue had it waited for the remainder of the notice period before effecting the price increase.

The circumstances of the non-compliance

The earlier implementation of the price increase was forced by technical risks whose eventual occurrence could have been catastrophic. The volume of traffic on the WhatsApp bundle was unprecedented, and thus it presented novel challenges to MTN. Miklos, an expert of more than 20 years in the telecommunications industry had seen from his previous experiences what a network failure can result in, and it was clear to him that MTN needed to do all it can to avoid such catastrophic consequences.[45]

Steps taken by MTN to remedy the complaint and ensure similar complaint will not be lodged in future

The circumstances leading to the non-adherence were unusual, unprecedented and unlikely to ever repeat. MTN did bring to the attention of the Authority its intention to effect the price increase before expiry of the notice period.

We submit that regard being had to how the CCC has previously ruled, the appropriate sanction for the non-adherence by MTN in this instance is nothing more than a desist order because: MTN substantially complied with the regulation and therefore its conduct was not grave. Neither the Authority, nor MTN customers were prejudiced by MTN's non-adherence to the notice period. MTN acted in order to avert a genuine and unprecedented emergency. MTN's conduct aimed to further the key objects of the ECA, not to flout regulatory requirements.

THE CCA'S SANCTION ARGUMENT: The CCA has made submissions on sanction in its closing argument.[46] This Committee nonetheless invited the CCA to make additional submissions on sanction, which are required to be filed simultaneously with these submissions.[47] [Note: MTN filed a reply to the suggestion of a fine of R500 000 by the CCA. See end of these heads.] We note that the CCA fairly accepts that MTN's defences on the merits may be taken into account in the mitigation of sanction.[48] For the reasons set out above, that evidence overwhelmingly favours a lenient sentence. Indeed, we submit that, based on the uncontested evidence before this Committee, any significantly punitive sanction would be disproportionate, unrelated to the facts before this Committee, and irrational and unreasonable. The CCA argues that MTN "*failed woefully to take the CCC into its confidence and did not explain the*

[45] Miklos Affidavit at para 19

[46] CCA's closing heads of argument at para 5

[47] CCC's letter of 10 April 2019

[48] CCA's closing heads of argument para 5.5

impact of what would have transpired had [it] not acted swiftly on 16 July 2018". This is incorrect. We have set out above the uncontested evidence of Mr Miklos on this issue, which demonstrated the unprecedented emergency MTN was facing. In a ruling of the CCC in the matter of In re: ORBCOMM South Africa (Pty) Ltd, it was observed that:

"A detailed affidavit filed by Orbcomm's chief operating officer, explaining the circumstances in detail, demonstrates the positive approach of Orbcomm towards ICASA and its licences. It also demonstrates the bona fides of Orbcomm well.... In the light of the fact that Orbcomm was bona fide in its omission to file the 2011-2012 financial statement and pay USAF fees for the year 2011-2012 and has now filed the statement and paid the fees, it is not necessary to issue more than a desist order..."[49]Similarly here, the evidence of Miklos was a clear demonstration of bona fides and transparency, and gave a detailed explanation of the possible impact of the system collapse. Miklos explained that the significantly high traffic on the network mean the elements worked significantly harder, thus risking a collapse of the entire network. Had a network collapse occurred, this would have affected emergency services, machine to machine customers and other critical services that rely on data.[50]

The CCA also argues that Miklos' testimony did not offer a cogent explanation, nor did it shed any light on the reasons justifying the early price increase. This is incorrect. On the contrary, Miklos provided the CCC with a very detailed and cogent explanation, including details of remedial solutions that MTN implemented to try and reduce congestion on its network. Despite all the reasonable interventions MTN implemented, the network continued to be exposed to a possible collapse.[51]

CONCLUSION OF ARGUMENT FOR THE RESPONDENT

We submit that:

This Committee's recommendation is required to be proportional, reasonable and rational, and based on correct findings of fact.

This Committee is empowered to recommend a range of sanctions, from an order that MTN desist from future contravention, to severe financially punitive fines.

Based on the uncontested evidence before the Committee, the only appropriate sanction would be an order to desist in terms of section 17E(2)(a) of the ICASA Act.

[49] Case No. 224/2016, handed down on 16 March 2017 at paras 7 and 9

[50] Miklos Affidavit at paras 26-28

[51] Miklos Affidavit, paras 29-41

DECISION OF THE CCC: ADVISING AN ORDER TO THE COUNCIL OF ICASA

[38] Section 17E (1), 17E (2) and 17(3) of the ICASA Act set out the orders that the CCC may advise to Council as well as mitigating and aggravating circumstances which must be considered by the CCC and the Council of ICASA as to an order. These subsections provide as follows (accent added)

> 17E (1) When making a decision contemplated in section 17D, the Authority ***must*** take all relevant matters into account, including -
> (a) the recommendations of the Complaints and Compliance Committee;
> (b) the nature and gravity of the non-compliance;
> (c) the consequences of the non-compliance;
> (d) the circumstances under which the non-compliance occurred;
> (e) the steps taken by the licensee to remedy the complaint; and
> (f) the steps taken by the licensee to ensure that similar complaints will not be lodged in the future.
>
> 17E (2) The Complaints and Compliance Committee ***may*** recommend that one or more of the following orders be issued by the Authority, namely -
> (a) direct the licensee to desist from any further contravention;
> (b) direct the licensee to pay as a fine the amount prescribed by the Authority in respect of such non-compliance or non-adherence;
> ……

[39] The crisis which arose was caused by an erroneous decision taken by MTN as to the capacity of its network and the contravention of the seven-day notice Regulation was, as concluded by the CCC in the first part of this judgment, with knowledge that it was contravening the Regulations. It had, however, found itself in a crisis which had been caused by its own earlier decision as to the R10 price. It then, ultimately, took the steps which it believed, as supported by internal expert advice, were the only solution to the problem. The expert evidence before the CCC was that the increase to R30 had the desired effect. The conclusion reached in the first part of this judgment is, however, that MTN knew that it was contravening the seven work day regulation. In the circumstances, which were perceived to be dire, as advised by its experts, it waited two working days (the Saturday and Sunday not being working days)

before introducing the R20 increase to R30 on the 16th July 2018. In the process it had also written to ICASA, requesting permission to activate the new price with two working days' notice instead of seven working days. MTN also requested an urgent meeting with ICASA. As held earlier in this judgment, ICASA did not and does not (as per the governing legislation) have the authority to grant an exemption to the Regulation.

[40] The consequence of the non-compliance is that the relevant seven working day regulation was not complied with. Instead of the seven working day notice *before* the price increase, only two working days' notice was given to ICASA. This clearly did not amount to substantial compliance.[52]

[41] The question is not one of prejudice in the ordinary sense. The intention of the Regulations which are applicable to this matter is clearly to ensure that ICASA is kept informed of prices charged in the market of which it is the Regulator. In this approach the Authority is supported by its right to monitor the market. Compare section 4(3)(d) of the ICASA Act 2000 as amended in 2014, which deals with the monitoring functions of ICASA.

It "must develop, monitor and enforce compliance with licence conditions and regulations consistent with the objects of this Act and the underlying statutes for different categories of licences."

Of necessity ICASA would be entitled to require certain information from licensees in regard to pricing and afford itself a reasonable opportunity to study them.

[42] Section 17E (1) of the ICASA Act provides for relevant matters which must be taken into consideration by the Authority insofar as an order is concerned. Thus, the following is stated in the said subsection:

> (1) When making a decision contemplated in section 17D, the Authority *must* take all relevant matters into account, including –
>
> (a) the recommendations of the Complaints and Compliance Committee;
>
> (b) the nature and gravity of the non-compliance;

[52] Compare the judgment of Acting Chief Justice Moseneke in *Ferris v FirstRand Bank Ltd* 2014 (3) SA 39 (CC) at para. [21] as quoted above.

(c) the consequences of the non-compliance;

(d) the circumstances under which the non-compliance occurred;

(e) the steps taken by the licensee to remedy the complaint; and

(f) the steps taken by the licensee to ensure that similar complaints will not be lodged in the future. (accent added)

The clear implication of the above mentioned "relevant matters" is that differentiation must take place according to the different circumstances which apply to each case – this is so, in spite of the wording of the relevant regulation, which lays down one sanction for all cases, depending on the number of days. It is, accordingly, clear from the ICASA Act itself (which, of course, has priority over Regulations) that an identical order for all cases may not be made. Differentiation must take place according to the extenuating and aggravating circumstances, which Council and the CCC, must take into consideration in terms of section 17E (1) and (3) of the ICASA Act. An alleviating factor is that, at least, MTN attempted to obtain permission from ICASA which, had MTN obtained legal advice, would have shown that ICASA was not empowered to grant an exemption. MTN has also indicated that it has taken steps to ensure that there would be no recurrence of what has happened. MTN had also requested an urgent meeting with ICASA – which, at least, demonstrated a willingness to consult.

[43] The Constitutional Court has held that a reasonable administrative decision is one that strikes a reasonable equilibrium between the competing interests at stake.[53] The notion of a reasonable equilibrium between competing interests requires proportionality.[54] Prof Hoexter explains the concept as follows: *"Proportionality may be defined as the notion that one ought not to use a sledgehammer to crack a nut. Its purpose is 'to avoid an imbalance between the adverse and beneficial effects…of an action and to encourage the administrator*

[53] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at paras 49-54.

[54] *Ehrlich v Minister of Correctional Services* 2009 (2) SA 373 (E) at paras 42-43.

to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end."[55]
Second, the decision to impose the order must be based on the correct facts. Third, the sanction must be rational and reasonable in the circumstances. Fourth, the provisions of the Regulations which empower the CCC to recommend sanctions are penalty provisions. They should thus be subject to a restrictive interpretation in all contexts.[56] The Supreme Court of Appeal has applied this principle of restrictive interpretation to provisions that give rise to both criminal and administrative penalties. It held that "any legislation that creates criminal and administrative penalties, as the [Exchange Control Regulations do] requires restrictive interpretation."[57]

CONCLUSION

[44] The conclusion which the CCC has reached is that the circumstances justify a fine. Regulation 9(1)(b) was knowingly contravened. It is clear from the Regulations that the Authority regards the duty to inform ICASA of price amendments, which are to be introduced after seven working days, as of crucial importance. This is also clear from the substantial fine which is prescribed. The finding of the CCC is that MTN was in grave error by introducing the R10 deal. This was, as indicated above, the main cause of the problems which arose for MTN. The error cannot, as found earlier in this judgment, be invoked as a defence: neither as a ground for a finding that there was not a substantial contravention or on grounds of necessity.

[45] The ICASA Act requires that the Authority [section 17E (1)] and the CCC [section 17E (3)] has regard to extenuating and aggravating circumstances. There are extenuating circumstances present. Although MTN acted with intention well knowing that it was contravening the Regulation, the finding of

[55] Hoexter, *Administrative Law in South Africa*, 2nd edition, p344, references omitted.

[56] In *DA v ANC*,[56] the Constitutional Court held that: "In case of doubt, we are obliged to interpret [penal provisions] restrictively. This means that we must resolve any ambivalence in them, or uncertainty about their meaning, against the risk of being penalised. The restrictive interpretation of penal provisions is a long-standing principle of our common law. Beneath it lies considerations springing from the rule of law. The subject must know clearly and certainly when he or she is subject to penalty by the state. If there is any uncertainty about the ambit of a penalty provision, it must be resolved in favour of liberty.

[57] *Oilwell (Pty) Ltd v Protec International Ltd* 2011 (4) SA 394 (SCA) at para 11.

the CCC in its advice to Council is that it did not act with malice. The short notice was believed to be the only solution – a position supported by the MTN Experts. It also attempted to obtain permission from ICASA – which, as held above, was based on an incorrect perception of the Authority's powers. Although the crisis was of MTN's own making – in fact as a result of its initial error as the main cause (*causa causans*) - the action which followed was not simply a blunt disregard for the law – the experts confirmed that the action had to be taken. But, as the CCC has held above, necessity and substantial compliance are not, in these circumstances, a defence. There was, in any case, not substantial compliance. It will also be taken into consideration that MTN has stated that it has learnt from this experience and would not venture into the same predicament again. On the other hand, the relevant regulation is in the public interest and requires, with a substantial fine supporting it, that ICASA remains informed of price changes within the Market that it regulates and monitors in accordance with governing legislation.[58] The CCC's conclusion is, indeed, that the regulation was contravened by MTN, well-knowing that it was being contravened and that the crisis was self-created and not a defence to the charge.

[46] It was argued by MTN that a desist order would address the omission, in the particular circumstances. A desist order is in the nature of an interdict to discontinue an activity which is prohibited.

[47] It has, accordingly, been decided to advise Council to impose a fine. The fine, it is advised, should be of such a nature that MTN and other licensees would realise that ICASA takes a particular interest in what is charged for services and that it has a right to information within this sphere. Although the particular circumstances in which MTN found itself is an alleviating factor to an extent, the

[58] See section 2 of the ECA, which, inter alia provides as follows: The primary object of this Act is to provide for the regulation of electronic communications in the Republic in the public interest and for that purpose to -

(m) ensure the provision of a variety of quality electronic communications services at reasonable prices;

(n) promote the interests of consumers with regard to the price, quality and the variety of electronic communications services;

importance of ICASA's right to information[59] and its duty to regulate in the public interest, should not be underestimated by giving short notice - in this case *two* working days. ICASA is granted *seven* working days to study amendments to price. Two days fall substantially short of the requirement.

The contravention, even considered within its background was, accordingly, a serious contravention. There were, however, sufficient extenuating circumstances, as sketched above, not to impose the maximum fine which is provided for by the Regulations which is based on turnover. The CCA argued that a fine of R500 000 would fit the contravention. MTN, however, argued that a desist order would suffice.

ICASA obviously, by Regulation, places a high premium on compliance with the seven working days' notice. Only two working days' notice was given. When having regard to the Regulation which states the fines – which could be enormous – it was decided that there were sufficient extenuating circumstances not to impose the maximum fine. However, it is also important that the importance of these Regulations not be down-graded to what is proverbially called a "mere slap on the wrist".[60] Since it should be made clear that ICASA places a high premium on its right to be informed on price adjustments and that the fine must clearly demonstrate the gravity of the offence, the following order is advised to Council:

[59]Section 8(2)(m) of the ECA, for example, provides as follows:

(1) The Authority must prescribe standard terms and conditions to be applied to individual licences and class licences. The terms and conditions may vary according to the different types of individual licences and according to different types of class licenses.

(2) Such standard terms and conditions may include, but are not limited to-

(m) the public interest in facilitating and maintaining a competitive electronic communications environment and in regulating and controlling anti-competitive practices;

[60] SA Human Rights v Nasuku and Another 2018(3) SA 291(GJ) at [62] per Moshidi J; Recycling & Economic Development Initiative of SA NPC v Minister of Environmental Affairs 2019(3) SA 251 (SCA) at [257]

1, A fine of R5 million Rand of which R2million is suspended for three years as from the date of issue of the Council's Order in this matter. The condition of the suspension is that MTN is not found to have contravened the same regulation again within three years of the issue of this judgment – such date running from the day on which Council's order is issued.

2. The above fine of R3 million must be paid to ICASA within ninety working days after the issue of this order.

3. A desist order, which means that if found to have contravened the same Regulation within a term of three years after issue of this judgment, the matter would resort under section 17H of the ICASA Act.

JCW van Rooyen SC 3 September 2019

The Members agreed