

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of hearing: 26 October 2007

Case number: 10/2007

P. Galbraith

Complainant

vs

TELKOM SA LTD.

Respondent

Complaints and Compliance Committee Panel

I.W.B. de Villiers ² Acting Chairperson

N. Ntanjana CCC Member

D. Moalosi CCC Member

J.C.W. Van Rooyen SC CCC Member³

Complainant

In person

For the Respondent

N.G.D. Maritz SC instructed by attorneys

Kevin Moodley and Associates

¹ In terms of s 17C of the ICASA Act 13 of 2000 as amended

² Judge of the High Court not in active service.

³ By virtue of section 17A(1) of the ICASA Act 2000, as amended.

JUDGMENT

JCW van Rooyen

[1] As from 2005 the Complainant has complained to the Monitoring and Complaints Unit of ICASA that Telkom was debiting clients incorrectly as to the sum owed and the VAT payable. Telkom alleged that the amount owed to the complainant up to this stage is R13,51. However, it was clear that the complainant has approached the matter from a public interest point of view, arguing that all the clients of Telkom were being prejudiced as a result of the manner in which accounting takes place in the above respects.

[2] *Mr. Maritz*, for Telkom, argued that the CCC does not have jurisdiction to deal with this complaint, which was originally lodged in 2005. The CCC was only introduced by the ICASA Act in July 2007 and the complaint had been lodged in 2005.

[3] In terms of the Independent Broadcasting Authority Act 1993, a Broadcasting Monitoring and Complaints Committee (“BMCC”) was appointed by the IBA Council. The committee only dealt with complaints which related to broadcasting and which did not, in terms of section 56(2) of the IBA Act, fall under the jurisdiction of the Broadcasting Complaints Commission of South Africa – an independent adjudicating entity, set up by the National Association of Broadcasters in 1993 and officially recognized by the IBA in 1995. Complaints concerning telecommunications resorted under the Minister of Communications. Later in the nineties a Telecommunications Authority (SATRA) was set up which advised the Minister as to the licensing of telecommunication entities. In 2000 the Independent Communications Authority took over the functions of both the IBA and SATRA. However, complaints concerning broadcasting were dealt with by the BMCC and complaints concerning telecommunications by the Authority in terms of section 100 of the Telecommunications Act.

[4] In July 2006 the Electronic Communications Act 2005 (“ECA”) as well as the ICASA Amendment Act became operative. The BMCC was substituted by the Complaints and Compliance Committee (“CCC”) and the CCC now has jurisdiction to adjudicate complaints against any licensed entity within the sector, including telecom operators.

[5] Neither the ECA nor the ICASA Act, as amended, provides that complaints which were lodged before the ECA and the ICASA Amendment Act became operational in July 2006, would now resort under the CCC. The CCC did not step into the shoes of the Authority in terms of section 100 of the Telecommunications Act nor did it step into the shoes of the BMCC in terms of section 56(1) of the IBA Act. Transitional provisions in the ECA and ICASA Act do not address the issue.⁴ Several pre-July 2006 complaints of the Monitoring and Complaints Unit (“MCU”) of ICASA have been heard by the CCC, but the MCU renewed the complaints which were, in any case, still related to events which were shown to have continued after July 2006. The matter of jurisdiction, accordingly, did not arise in those cases.

[6] Although correspondence from the complainant in the present matter continued after July 2006, it was clear that the complaints were based on what had taken long before July 2006. To have renewed the complaints after July would also not have been effective: the ICASA Act, as amended, provides that complaints must be lodged within sixty days after a complainant has become aware of the alleged contravention.

[7] Mr. Galbraith expressed his frustration: he has been complaining formally since 2005 and then has to hear in 2007 that the CCC does not have jurisdiction to hear the matter. This is, however, the first opportunity which the CCC has had to express its view on the matter and it was not within the discretion of the coordinator of the CCC or the Monitoring Unit to have decided the issue. Matters of jurisdiction resort with the CCC itself. Although Mr. Galbraith’s frustration is perfectly understandable, any decision taken by CCC, under these circumstances, would amount to a nullity. The Rule of Law is a founding value in our Constitution.⁵ All organs of state are bound by it. In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para [17] Chaskalson P (as he then was) states that the exercise of public power is regulated by the Constitution: “One of the constitutional controls referred to is that flowing from the doctrine of

⁴ Compare sections 93(11) and 95 of the ECA and section 22 of the ICASA Act 2000, as amended.

⁵ S 1(c) of the Constitution Act 108 of 1996

legality.”⁶ The Promotion of Administrative Justice Act of 2000 reflects the same values. The importance for an organ of state of acting within the powers granted to it is also emphasised by Navsa JA in *Gerber and Others v Member of the Executive Council of Development and Planning and Local Government, Gauteng and Another*.⁷

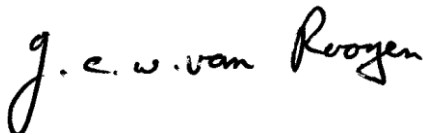
[8] We have no doubt that the CCC, in the light of the above, does not have jurisdiction to hear this matter. The complaint was lodged under a different dispensation and the CCC cannot usurp jurisdiction without proper authorization by the ICASA or ECA Acts.

The point *in limine* is upheld. The CCC does not have jurisdiction to hear this complaint.

De Villiers J, Ms Ntanjana and Mr. Moalosi concurred in the judgment of Councillor van Rooyen SC.

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I.W.B. de Villiers
(Acting Chairperson)



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JCW van Rooyen
For: CHAIRPERSON OF THE CCC

⁶Also see *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) (also reported at 1998 (12) BCLR 1458 (CC) and *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) at para [148] (also reported at 1999 (10) BCLR 1059 (CC)) where it was held that the holder of public power must act in good faith and not misconstrue its powers.

⁷ 2003(2) SA 344(SCA) at para [34] and [35].