COMPLAINTS AND COMPLIANCE COMMITTEE

Date Heard: 7 April 2021 **Case No: 398/2020**

IPROP (PTY) LTD **COMPLAINANT**

TELKOM (SOC) LTD **RESPONDENT**

CCC MEMBERS:
Judge Thokozile Masipa – Chairperson
Ms. Dimakatso Qocha - Councillor
Mr. Paris Mashile - Member
Mr. Peter Hlapolosa - Member
Mr. Thato Mahapa - Member
Ms. Ngwako Molewa - Member

FROM THE OFFICE OF THE CCC:

Lindisa Mabulu - CCC: Coordinator
Meera Lalla – CCC Assessor

LEGAL REPRESENTATIVES:

Counsel for the Complainant: Adv. JH Wildenboer
Instructed by: Mr. Shaun Pelser (DDP Attorneys)

Counsel for the Respondent: Adv. Sesi Baloyi SC
Instructed by: Ms. Candice Hunter-Linde (DM5 Incorporated)

JUDGMENT

Judge Thokozile Masipa

1. INTRODUCTION

1.1 The Complainant is IPROP (Pty) Ltd, a private company registered in accordance with the laws of the Republic of South Africa. At the time the matter first came before the Complaints Compliance Committee ("CCC"), IPROP was the registered owner of an immovable property situated at Baragwanath Extension 5, on Portion 130 of the Farm Diepkloof 319 IQ and remainder of Portion 5 of the Farm Vierfontein 321 IQ, ("the property").

1.2 The Respondent is TELKOM SA (SC) LTD, a licensed telecommunications provider, a company registered in accordance with the relevant laws of the Republic of South Africa.

1.3 In this judgment, the Complainant is referred to as IPROP and the Respondent as TELKOM.

2. THE COMPLAINT OR DISPUTE

2.1 The complaint falls within the ambit of section 25(4), read with section 25(7) of the Electronic Communications Act, 36 of 2005 ("the ECA").

2.2 Section 25(4) of the ECA reads thus:

> "If any deviation or alteration of an Electronic Communications Network Facility, pipe, tunnel, or tube constructed and passing over any private property is desired on any ground..., the owner must give the Electronic Communications Network Service Licensee written notice of 28 days, of such deviation or alteration".

2.3 Section 25(7) of the ECA provides as follows:

> "If, in the opinion of the electronic communications network service licensee the deviation or alteration is justified, the licensee may bear the whole or any part of the said costs".

3. HISTORICAL BACKGROUND

3.1 The history of the matter can be gleaned from the facts set out in the papers before

us and submissions from Counsel in the matter.

3.2 Facts giving rise to the dispute and circumstances leading up to the hearing before the CCC, in the current proceedings, are summarized succinctly in paragraph 8 of IPROP's AFFIDAVIT IN SUPPORT OF REFERRAL OF A DISPUTE which reads:

"8. During or about December 2014, an unprotected Telkom manhole was discovered on the property. Subsequent to an inspection by the Licensee, it was discovered that the manhole is the "hub" of an Electronic Communications Network facility that was installed by the Licensee during approximately 1991".

IPROP alleged that at all material times, it was the owner of the property, and attached an extract of the records of the Registrar of Deeds marked Annexure "JPM1", as proof of ownership.

3.3 Aggrieved at the manner in which the ECN facility was installed, as it made it impossible to develop the property "in an economically viable fashion", IPROP requested TELKOM to deviate the facility by relocating it.

3.4 TELKOM's response was that IPROP should bear the costs of the relocation which amounted to R936 790.35. This amount was to be paid to TELKOM in advance before any work on relocation could begin.

3.5 IPROP disputed this suggestion, and, when the parties could not resolve the issue, the matter was referred to the CCC.

3.6 In due course, IPROP filed a complaint against TELKOM.

3.7 The crux of the dispute between the parties was whether TELKOM was, in part or in whole, liable for the relocation costs of an ECN facility, installed by it on the property.

3.8 This was the issue which was eventually referred to the CCC for adjudication. For ease of reference, it shall be referred to as the First Complaint.

4. THE FIRST COMPLAINT - Case No. 331/2018 (Heard August 2019)

4.1 At the hearing, the parties were afforded an opportunity to make submissions on the facts and the law. Section 25(4) and 25(7) of the ECA were identified as applicable in the dispute and the CCC heard argument from both parties in this regard.

Section 25(4) of the ECA reads thus:

"*If any deviation or alteration of an electronic communications network - facility,*

pipe, tunnel or tube constructed and passing over any private property is desired on any ground...the owner of the property must give the electronic communications network service licensee written notice of 28 days, of such deviation or alteration".

Section 25(7) of the ECA states:

"*If, in the opinion of the electronic communications network service licensee the deviation or alteration is justified, the licensee may bear the whole or any part of the said costs*".

4.2 The proceedings turned on the interpretation of the provisions of section 25(7). As a result, the CCC diligently examined the relevant case law to assist in the interpretation of the word "may" in the section as opposed to the word "must".

4.3 After careful analysis, the CCC came to the view that, in this instance, the word "may" in s25(7) had the ordinary meaning which granted TELKOM a choice whether to pay or not to pay costs of relocation.

4.4 Accordingly, the CCC made a finding in favour of TELKOM. The finding is quoted *verbatim* here under:

"*CONCLUSION*

[10] The finding of the CCC is that in principle TELKOM has no duty to pay the costs. On the facts before the CCC there was, accordingly, no contravention.

It should, however, be pointed out that in each such case a licensee has a duty to exercise its discretion in terms of section 25(7) and come to a reasonable conclusion. No reasons were placed before the CCC for not contributing to the costs and an advice will be made to Council in this regard."

"*ORDER*
[11] Since the complaint was not upheld on the facts before the CCC, no order is advised to Council."

5. RECOMMENDATION TO COUNCIL AS TO ITS FUNCTIONS IN TERMS OF SECTION 17B(b) OF THE ICASA ACT.

5.1 "The CCC's advice to Council in terms of section 17B(b) of the ICASA Act is to inquire, in due course, from Telkom (through the relevant Division of ICASA) whether Telkom has reconsidered the matter as to payment of costs or part thereof in terms of section 25(7) of the ECA and what the reasons for the decision was. It would be appreciated if the Coordinator of the CCC is copied with the

correspondence in this regard ".

5.2 The judgment of the CCC, on the first complaint was signed by the chairperson on 3 October 2019. Subsequently, the CCC submitted its judgment, together with its finding and recommendations to ICASA.

5.3 Pursuant to this submission, ICASA addressed a letter to the parties informing them of the finding of the CCC as well as the decision of the Council in that regard.

5.4 Paragraph 2.5 of the letter reads:

"*The finding of the CCC is that in principle Telkom has no duty to pay the costs. On the facts before the CCC there was, accordingly, no contravention and the CCC did not uphold the complaint.*

This is to advise the parties that on Tuesday, 22 October 2019, the Council of the Independent Communications Authority of South Africa ("ICASA") approved the recommendation of the CCC in accordance with s 17E of the ICASA Act and the judgment of the Authority is attached and marked Annexure "A".

5.5 This letter was signed on 7 November 2019.

5.6 The above communication to the parties appears to have triggered what is referred to as the second complaint.

5.7 On 6 February 2020, the attorneys for IPROP addressed a letter to TELKOM which, in essence, resuscitated the dispute between the parties.

5.8 Paragraph 2 of the letter states:

"*2. As you are no doubt aware, the dispute between the parties culminated in a ruling by the Complaints and Compliance Committee of ICASA which, inter alia, ordered that:*

"[12] CCC's advice to Council in terms of section 17B(b) of the ICASA Act is to inquire, in due course, from Telkom (through the relevant division of ICASA) whether Telkom has reconsidered the matter as to payment of cost or part thereof in terms of section 25(7) of the ECA and what the reasons for the decision were. It would be appreciated if the coordinator of the CCC is copied with the correspondence in this regard".

5.8 The letter then continued:

"*You are therefore required to exercise a discretion in relation to the relocation cost of the Electronic Communications Network Facility which passes our client's property situated at Baragwanath Extension 5*".

IPROP then set out a number of reasons why TELKOM should be liable for the costs of relocation.

A flurry of correspondence between the parties followed. When this did not produce the desired results, the Complainant once more approached the CCC with a complaint.

This is referred to as the Second Complaint.

THE SECOND COMPLAINT - 398/2020

(Set down for hearing for 7 April 2021)

6. THE ISSUE

6.1 The issue in the Second Complaint was whether TELKOM should be liable, in full or in part, for the relocation costs of the ECN facility. This is the same issue that the CCC had to adjudicate on 26 April 2019.

6.2 IPROP, however, saw the matter differently and described the current proceedings as constituting "a continuation of proceedings" that it had launched previously. According to IPROP, the recommendations that the CCC made in terms of section 17B(b), were a clear indication that the previous proceedings were not final. (This aspect shall be discussed later in the judgment).

6.3 Telkom raised two *points in limine* both of which would determine whether the hearing on the merits was warranted.

The points raised by TELKOM were:

1. That the matter had been finalized and, therefore, the principle of *res judicata* applied.
2. That IPROP had no *locus standi* as complainant in the current proceedings as it had, during the period between the first complaint and the second complaint, transferred its ownership of the property to a third party.

7. RES JUDICATA

7.1 What is *res judicata* and when is it applicable?

The principle of *res judicata* means that a matter has already been finally decided on the merits by a competent court or a decision-making body or person with jurisdiction, on the same cause of action, and for the same relief between the same parties.

7.2 It is applicable when one of the parties involved in the matter on a previous occasion, subsequently attempts to litigate again against the same opponent, the same matter, in which case such re-litigation shall not be allowed.

7.3 The rationale for this principle is to ensure that there is certainty on matters that

have already been decided, promote finality and prevent or discourage the abuse of judicial processes. (See in this regard ASCENDIS ANIMAL HEALTH (PTY) LTD v MERCK HARP DOHME CORPORATION AND OTHERS 2020 (1) SA 327 (CC).

7.4 A successful plea of *res judicata*, therefore, must meet the following requirements:

1. There must be a previous final judgment by a competent court or some other decision maker with jurisdiction.
2. The dispute must be between the same parties.
3. Based on the same cause of action.
4. For the same relief.

8. COMMON CAUSE FACTS

8.1 It is common cause that the parties in the Second Complaint are the same parties that were before the CCC in April 2019 when the First Complaint was heard.

8.2 Also, common cause is that the cause of action and the relief sought are the same.

8.3 The dispute arose from and still concerns the relocation of the same ECN facility from the same property. More importantly, the relief sought then and now is that TELKOM ought to be liable in full or in part for the relocation costs of the ECN facility.

8.4 The only difference is that in the Second Complaint, IPROP sought to introduce what, it termed, a new ground, that is, that TELKOM failed to exercise its discretion properly, and that the amount quoted as the costs of relocation was unreasonable.

8.5 Counsel for IPROP could not explain why this ground surfaced only now when IPROP knew about it all along.

8.6 That this was nothing new, was borne out by correspondence between the parties. TELKOM sent the quote for the relocation costs to IPROP before the First Complaint was brought before the CCC.

IPROP's case then was not that the quote was unreasonable. It was also not that TELKOM had failed to exercise its discretion in terms of the Act. That seems to have been an afterthought triggered by the letter from ICASA. I say this because before then, IPROP's case was clearly that TELKOM ought to contribute to the costs of the relocation, in full or in part.

8.7 In any event, as Counsel for TELKOM correctly submitted, in my view, the submission on behalf of IPROP that the quote was unreasonable had no basis as

the only quote before the CCC was the one prepared on behalf of TELKOM. IPROP had made no attempt to counter TELKOM's quote by bringing another quote which might prove that the costs of relocation could be less.

8.8 We have dealt with common cause facts. The only remaining question is whether there was a final judgment concerning the First Complaint.

In this regard, I proceed to deal with submissions by Counsel.

9. SUBMISSIONS BY COUNSEL

9.1 As alluded to earlier, it was submitted on behalf of IPROP that the matter had not been finalized, and accordingly, the current proceedings were merely a continuation of the previous proceedings.

9.2 TELKOM resisted any attempt by IPROP to resurrect the dispute on the basis that the issue was adjudicated and finalized on the previous occasion.

On behalf of TELKOM, it was argued that this was the same matter which was previously before the CCC. It had been finally decided and the CCC could not re adjudicate the issues. The only avenue available for IPROP was to take the decision on review, it was argued.

9.3 There is merit in this submission for reasons which shall become clearer later in this judgment.

9.4 In its attempt to persuade the CCC that the present proceedings were a continuation of the previous proceedings, IPROP submitted, *inter alia*, that the fact that the CCC, in the First Complaint, made a recommendation to Council of ICASA in terms of section 17B(b) requesting the Authority to engage TELKOM on whether it had reconsidered its decision not to contribute to any costs of relocation of the ECN facility, was a clear indication that the previous proceedings were not final.

9.5 This submission loses sight of the fact that the recommendations to Council of ICASA in terms of section 17B(b) are not mandatory. The word "may" is used specifically in the section to give the CCC a choice whether or not to make the recommendation. If IPROP's submissions were correct, in this regard, it would mean each time the CCC elects not to make any recommendation, the proceedings would be said to be incomplete. Such a result could not have been the intention of the Legislature.

9.6 It is also important to bear in mind that the findings and the recommendations in terms of 17B(b) are separate and each serves a different purpose. The findings are conclusions drawn by the CCC after the hearing of the dispute or complaint. They

are made specifically to let the parties know what the outcome of the proceedings were. On the other hand, the recommendations in terms of section 17B(b) of the Act are for the benefit of Council of ICASA and only Council can act on them.

9.7 Accordingly, it is the findings and not the recommendations which determine whether the proceedings were final.

In the present case, the finding was final. The reasons are the following:

1. From the wording of the 'Finding' in the First Complaint, there is nothing to suggest that the finding was pending or conditional on the happening of a certain event. The finding was simple and straightforward. It merely conveyed that in principle Telkom had no obligation to pay the costs.
2. If the finding was not final, Council would have brought this to the attention of the CCC.
3. Council has a discretion to accept or to reject the findings of CCC. In this case Council exercised its discretion by accepting both the finding of the CCC and the recommendation in terms of section 17B(b) and then conveyed its decision to the parties. This step took the matter out of the hands of the CCC and it became *functus officio*.
4. It is the view of the CCC that had the previous proceedings been incomplete, Council would not have taken the step that it did. Instead, it would have waited until a final judgment of the CCC was submitted, before it wrote and published its own judgment.

9.8 Once Council accepted the findings of the CCC, as it did in this instance, the matter was taken out of the hands of the CCC and the decision became that of ICASA. The CCC, therefore, has no power to revisit the decision made re the hearing of 26 April 2019.

9.9 More importantly, in this matter, is that the issue seems to have been the interpretation of the applicable provisions, i.e. section 25(7) of the ECA, and the CCC diligently addressed that issue in its judgment. It analyzed the meaning of "may" in section 25(7) as opposed to "must" in 25(4) of the ECA Act and came to the conclusion that the word "may", in this instance, bears its ordinary meaning. This meant that TELKOM had a choice whether or not to pay the relocation costs. Hence CCC's conclusion that, in principle, TELKOM has no legal obligation to pay

the costs.

9.10 The word "in principle", that appears in the CCC's findings, was another point of concern on the part of IPROP.

9.11 Counsel for IPROP sought to argue that the phrase "in principle" was another indication that the decision was not final. There is no merit in this submission. The phrase "in principle" is similar to "in general" and does not mean contingency. It is also not synonymous with the word "pending".

More importantly, as said earlier, once the finding had been submitted to Council which is entitled to accept or reject such finding, the CCC became *functus officio* and is precluded from adjudicating the matter. Should any party be aggrieved by the decision of the CCC, it should take the matter on review.

9.12 Having considered all the above, it seems to me that the plea of *res judicata* should succeed and the Complaint should be dismissed.

10. CONCLUSION

Accordingly, the plea of *res judicata* by TELKOM is upheld.

The Complaint by IPROP is, therefore, dismissed on this point alone.

By virtue of the conclusion above, it shall serve no purpose to determine the second issue, that is, the point of the *locus standi* of IPROP as the Complainant.

Digitally Signed

_____ **Date: 11 May 2021**

Judge Thokozile Masipa
Chairperson of the CCC

The CCC Members agreed with the finding and the order advised to the Council of ICASA.