COMPLAINTS AND COMPLIANCE COMMITTEE[1]

21 August 2019 CASE NUMBER: 331/2019

In the matter between:

IPROP (PTY) Ltd **COMPLAINANT**

And

TELKOM SA (SOC) LTD **RESPONDENT**

COMMITTEE: Prof JCW van Rooyen SC (Chairperson)
Councillor Dimakatso Qocha
Mr Peter Hlapolosa
Mr Mzimkulu Malunga
Dr Jacob Medupe
Prof Kasturi Moodaliyar
Mr Jack Tlokana

For the Complainant: Adv JH Wildenboer instructed by Attorney S Pelser and from his firm Mrs Pelser.

For the Respondent: Adv Sesi Baloyi instructed by Ms Candice Hunter-Linde and from Telkom Dr Aniel De Beer (Executive),Ms Tsholofelo Letsike (Executive),Mr Gert Postma – Senior Legal Adviser, Ms Charlene Naidoo – Senior Specialist.

Coordinator of the CCC: Ms Lindisa Mabulu and with her Ms Meera Lalla

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JUDGMENT

JCW van Rooyen

THE COMPLAINT

[1] The Complainant in this matter is iProp (Pty) Ltd and the Respondent Telkom SA (SOC) Ltd, a licensee in terms of the ICASA Act 2000, which resorts under the jurisdiction of the Complaints and Compliance Committee ("CCC") at ICASA in regard to its duties under its licence and the related legislation, which includes

[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.

the Electronic Communications Act 2005 as amended. The Complaint, which was lodged by way of an Affidavit deposed to by Ms Jean Marie Pelser, who is the Operations Director of the Complainant, states that a dispute has arisen between the two companies pertaining to an electronic communications network facility which passes over the Complainant's property – which would amount to a restriction on the development of the property. The Complainant has required from Telkom to relocate the said facility (hereinafter referred to as a "Cable"). The Respondent agreed but required that the Complainant undertakes to stand in for all costs occasioned by the relocation, indicated as R936 790 – if accepted within 30 days. Since the Complainant is of the view that the Respondent is legally responsible for such costs and the dispute could not be resolved amicably, it lodged a complaint with the CCC requesting an order that the cable be removed at the cost of Telkom. The CCC has jurisdiction in this matter in terms of section 25(8) of the ECA.

[2] The defence of Telkom is that it is not by law responsible for such costs. The Complainant had purchased the property from a third party and should, after having discovered the cable, have taken action against the seller. It was pointed out that since the cable was what can be described as a latent defect to the property, the seller should have been responsible for such costs. Why such action was not taken was not disclosed to the CCC and, in any case, that was not the legal point which had to be decided by the CCC.

[3] A further aspect which was raised by the Complainant was that the cable should have been constructed in the road reserve area which borders on the Complainant's property. Telkom denied that such a road reserve had existed when the facility was inserted. Telkom averred that the facilities were constructed in June 1992. In any case, Telkom denied that it was under a legal duty to have obtained the consent of the owner at the time. According to the Complainant's documentation iProp had acquired the property in August 1997. The complainant's case was, however, simply based on the fact that Telkom presently has a statutory duty to remove the cable at its expense.

SECTION 25 OF THE ECA

[4] Section 25 of the Electronic Communications Act provides as follows:

Removal of electronic communications network facilities
25. (1) If an electronic communications network service licensee finds it necessary to move any electronic communications facility, pipe, tunnel or tube

constructed upon, in, over, along, across or under any land, railway, street, road, footpath or waterway, owing to any alteration of alignment or level or any other work on the part of any public authority or person, **the cost of the alteration or removal must be borne by that local authority or person.**

(2) Where any electronic communications network facility passes over any private property or interferes with any building about to be erected on that property, the licensee **must**, on receiving satisfactory proof that a building is actually to be erected, deviate or alter the positioning of the electronic communications facility in such manner as to remove all obstacles to building operations.

(3) The owner of the property **must**, in writing, give notice that any such deviation or alteration is required to the electronic communications network service licensee, not less than 28 days before the alteration or deviation is to be effected.

(4) 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 other than those contemplated in subsection (2), the owner of the property **must** give the electronic communications network service licensee written notice of 28 days, of such deviation or alteration.

(5) The electronic communications network service licensee **must** decide whether or not the deviation or alteration is possible, necessary or expedient.

(6) If the electronic communications network service licensee agrees to make the deviation or alteration as provided for in subsection (3), **the cost of such deviation or alteration must be borne by the person at whose request the deviation or alteration is effected.** (Emphasis added)

(7) 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 cost. (Emphasis added**)**

(8) Where a dispute arises between any owner of private property and an electronic communications network service licensee in respect of any decision made by an electronic communications network services licensee in terms of subsection (4), such dispute must be referred to the Complaints and Compliance Committee in accordance with section 17C of the ICASA Act. (Emphasis added)

ARGUMENT BY COUNSEL

[5] Ms *Baloyi* argued for the Respondent that the matter falls within subsections (6) and (7), which ultimately grants Telkom a discretion whether to remove the cable or not. If it agrees, the costs must be paid by the person who requested the deviation or alteration. However, "**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 cost."

The word "may" is the operational word. The unsigned Afrikaans text reads "kan", which also designates a *choice* for Telkom. Mr Wildenboer argued on behalf of the Complainant that once it appears that the work was justified, the costs must be borne by Telkom. In fact, there was no way in which Telkom could, in such a case, not pay. This was so, Mr Wildenboer argued, despite the wording of section 25(7) which, on the face of it, grants Telkom a discretion to pay or not to pay.

AUTHORITIES

[6] Our Courts, including the Constitutional Court, have held that "may", depending on the context, may be construed as mandatory. Thus, Nkabinde J, writing for the Constitutional Court in *Botha & Another v Rich NO & Others* 2014(4) SA 124 (CC), which dealt with different legislation, states as follows:

[35] Section 27(1) should not be read in isolation. An examination of s 27(3) reveals that it provides a further protection to a purchaser. The word 'may' in s 27(3) is used to give a purchaser power. This view is fortified by the words 'shall' and 'may', the use of which in the same section is not insignificant. It needs to be stressed, however, that courts may, in appropriate circumstances, construe the word 'may' as mandatory even though it is permissive on the face of the section.

Wade *Administrative Law* (1994) at 94 states as follows;

The hallmark of discretionary power is permissive language using words such as ''may'' or ''it shall be lawful'', as opposed to obligatory language such as ''shall''. But this simple distinction is not always a sure guide, for there have been many decisions in which permissive language has been construed as obligatory. This is not so much that one form of words is interpreted to mean its opposite as because the power conferred is, in the circumstances prescribed by the Act, coupled with a duty to exercise it in a proper case. Cotton LJ once said:

''I think that great misconception is caused by saying that in some cases 'may' means 'must'. It never can mean 'must', so long as the English language retains its meaning; but it gives a power, and then it may be a question in what cases, where a Judge has a power given him by the word 'may', it becomes his duty to exercise it.''

This view is repeated by Wade & Forsyth *Administrative Law* 8th ed (Oxford University Press, Cape Town 2000) at 239.

In *Schwartz v Schwartz* 1984 (4) SA 467 (A) Corbett JA (the later Chief Justice) said the following at 473I – 474E:

'A statutory enactment conferring a power in permissive language may nevertheless have to be construed as making it the duty of the person or authority in whom the power is reposed to exercise that power when the conditions prescribed as justifying its exercise have been satisfied. Whether an enactment should be so construed depends on, inter alia, the language

in which it is couched, the context in which it appears, the general scope and object of the legislation, the nature of the thing empowered to be done and the person or persons for whose benefit the power is to be exercised. (See generally *Noble & Barbour v South African Railways and Harbours* 1922 AD 527 at pp 539 – 40, citing *Julius v The Bishop of Oxford* (1880) 5 AC 214; *South African Railways v New Silverton Estate Ltd* 1946 AD 830, at p 842; *CIR v King* 1947 (2) SA 196 (A) at pp 209 – 10; *South African Railways and Harbours v Transvaal Consolidated Land and Exploration Co Ltd* 1961 (2) SA 467 (A) at pp 478 – 80, 502 – 4.) As was pointed out in the *Noble & Barbour* case supra, this does not involve reading the word **''may''** as meaning must. As long as the English language retains its meaning ''may'' can never be equivalent to ''must". It is a question whether the grant of the permissive power also imports an obligation in certain circumstances to use the power.'

In *Saidi and Others v Minister of Home Affairs and Others* 2018 (4) SA 333 (CC) Madlanga J, writing for the majority of the Constitutional Court, stated as follows:

[17] In some instances this court has adopted this approach in interpreting 'may'. At issue in *Van Rooyen* was the meaning of 'may' in s 13(3)(aA) of the Magistrates Act. The question was whether — since the section provided that the Minister of Justice 'may' confirm a recommendation by the Magistrates Commission that a magistrate be suspended — the Minister could exercise a discretion not to suspend the magistrate. Answering the question in the negative, Chaskalson CJ held: 'As far as the Act is concerned, if may in s 13(3)(aA) is read as conferring a power on the Minister coupled with a duty to use it, this would require the Minister to refer the Commission's recommendation to Parliament, and deny him any discretion not to do so. . . In my view this is the constitutional construction to be given to s 13(3)(aA). On this construction, the procedure prescribed by s 13(3) of the Act for the removal of a magistrate from office is not inconsistent with judicial independence.'

[18] Based on this, I agree with the parties' interpretation. This interpretation better affords an asylum seeker constitutional protection whilst awaiting the outcome of her or his application. She or he is not exposed to the possibility of undue disruption of a life of human dignity. That is, a life of: enjoyment of employment opportunities; having access to health, educational and other facilities; being protected from deportation and thus from a possible violation of her or his right to freedom and security of the person; and communing in ordinary human intercourse without undue state interference. (Footnotes omitted)

CONCLUSION

[7] After having considered the above judgments and authors that require that the context of a word such as "may" must be taken into consideration so as to determine whether it does not, on closer construction, effectively mean "must", the CCC has come to the following conclusion: the contrast between the word "must" and "may" in section 25, considered as a whole, is so pronounced that the word "may" (unsigned Afrikaans text of the Act: "kan", which means "may") has its ordinary effect, which grants a discretion to Telkom. The judgment of the Constitutional Court in *Saidi v Minister of Home Affairs* 2018 (4) SA 333 (CC) is distinguishable. There the word "may" was interpreted to mean that the officer involved had the right *and* duty to extend the permit of the person involved until

the outcome of the judicial review of her decision. “May” was thus not interpreted to mean “must”, but pertained to the implied ambit of the authority of the officer involved to extend a permit to stay in the country until the outcome of the judicial review. In any case, as pointed out by Corbett JA, the word “may” cannot simply be amended to “must”. However, the word may be interpreted to mean more than what the officer involved had believed it to be. This accords with what Corbett JA said in *Schwartz*, cited above: As long as the English language retains its meaning ''may'' can never be equivalent to ''must”. *It is a question whether the grant of the permissive power also imports an obligation in certain circumstances to use the power.*' (Emphasis added)

[8] Ms *Baloyi*, in her argument before the CCC, argued that what is important to her client is that subsection (6) provides that the Complainant must pay the costs of the alteration or deviation. Subsection (7) grants Telkom a discretion to pay all or any part of the costs if the deviation or alteration is justified. The word “may” clearly grants that discretion in subsection (7) and, as held above, there is no reason to find otherwise, given the compulsory language (“must”) in earlier subsections of section 25.
[9] In a letter dated 11 June 2018 Telkom has already informed the Complainant what the cost will be and has added certain conditions. There is no indication that Telkom would be prepared to pay the costs or any part of the costs.

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.

ADVICE TO COUNCIL AS TO ITS FUNCTIONS IN TERMS OF SECTION 17B(b)[2] OF THE ICASA ACT

[2] The Complaints and Compliance Committee may
(a)….
(b) make any recommendation to the Authority necessary or incidental to -

[12] 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.

JCW VAN ROOYEN SC

The Members agreed

3 October 2019

(i) the performance of the functions of the Authority in terms of this Act or the underlying statutes; or
(ii) achieving the objects of this Act and the underlying statutes.