



COMPLAINTS AND COMPLIANCE COMMITTEE¹

Dates heard: 4/12/2020 & 11/1/2021

CASE NR: 396/2019

JHAVARY

COMPLAINANT

TELKOM SA SOC LTD

RESPONDENT

COMMITTEE:

Prof JCW van Rooyen SC (Chairperson)

Councillor Yolisa Kedama

Mr Peter Hlapolosa

Mr Mzimkulu Malunga

Dr Jacob Medupe

Prof Kasturi Moodaliyar

Mr Jack Tlokana

The Complainant: Mrs. FH Jhavary, represented by her son Mr SM Jhavary

From the Respondent: Dr Siyabonga Mahlangu

Coordinator of the CCC: Ms L Mabulu and with her Mr T Mtolo

JUDGMENT

JCW van Rooyen[1] Although the ICASA Act requires that a Complainant must present her or his case personally or be represented by a duly admitted

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 ICASA Act 2000, the Broadcast Act 1999, 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 and confirmed by Council 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. Fines may only be imposed where they are prescribed. A desist order may only be imposed where a contravention has taken place; a contravention thereof amounts to an offence in terms of section 17H of the ICASA Act.

attorney or advocate, the Complainant's son was permitted to present his Mother's case as a result of special personal circumstances. Hereinafter we will refer to the son as the Complainant.

[2] The dispute was that Telkom should be held to what Mr Jhavary understood as being an amendment of his mother's mobile phone contract, which would cost his mother nothing more, but provide her with a new Modem. She would also remain entitled to a monthly contract, which could be cancelled by her with a month's notice. The Complainant was adamant in his pursuance of what he regards as justice. His lengthy complaint, which followed upon a meeting with an ICASA employee and, according to him, a "hundred" telephone calls, was that Telkom should be held to the contract, as perceived by him, which was put to him telephonically by an employee of Telkom.

[3]After the complaint was lodged with the Coordinator of the CCC, Mr Jhavary applied to the undersigned that a recording of his meeting with an ICASA official be ordered to be made available and, thus, also form part of the documentation before the CCC. Undersigned ruled against this application. Although the Chair of the CCC is authorised by section 17(C)(6) read with section 6 of the ICASA Act, to issue an order that information/evidence be provided to the CCC, that authority only relates to persons *outside* the ICASA structure. That is so since the *Authority* may, by virtue of its employment of an employee, require relevant information in regard to ICASA matters from such employee. However, the CCC is not the employer and does not have the authority to do that. In any case, even if the CCC Chair had the authority to do so, the question before the CCC is not what transpired in a meeting which the Complainant had with an employee of ICASA, but what transpired between the Complainant and Telkom.

[4]The following Ruling should also be made: after the hearing the Complainant filed a document in which he, *inter alia*, severely criticised the manner in which the hearing before the CCC had been conducted. The documentation before the CCC is limited to the Complaint, the Response by the Respondent and the Reply by the Complainant. *During* the hearing each party has an opportunity to address the CCC within the confines of the documentation filed. The Complainant also has the opportunity to reply to what was argued by the Respondent. Thereafter, no further documentation may be filed, unless requested by the CCC. The document filed by the Complainant after the hearing is, accordingly, held to be irregular and struck from the documentation before the Tribunal. A repetition of an offer to settle the dispute was, however, allowed since it amounted to a last attempt to bring the matter to a close amicably.

[5] Returning to the facts before the CCC. The transcript of the call on 11 October 2019 to Mr Jhavary was provided by Telkom and reads as follows:

Mr Jhavary	Hallo...hallo...
Azola	Hallo, hallo Sir, you are speaking to Azola I am calling from Telkom. May I please speak to Ms F.H. Jhavary? (coughs) So
Mr Jhavary	She is not [inaudible] at the moment Mam.
Azola	Ok when can I call her back Sir?
Mr Jhavary	One second..one sec...
Azola	Hallo? Hallo sir?
Ms Jhavary	Hallo..who is [inaudible] speaking?
Azola	You are speaking to Azola I am calling from Telkom
Ms Jhavary	Is it about [inaudible] You can speak to my son because he handles all my
Azola	No problem Mam.
Mr Jhavary	Hi mam.
Azola	Sir, am I speaking to Ms Jhavary's son?
Mr Jhavary	Yes.
Azola	All right Sir. I'm calling from Telkom, right? Telkom is calling all their Customers just to notify them of the change that is happening at the moment. Ok so what is happening at the moment is that Telkom is moving all of their customers away
Mr Jhavary	Ok.
Azola	The reason for that is due to copper theft, copper damage as well as the slow
Mr Jhavary	Ya.
Azola	Okay. So what's going to happen is that Telkom will be providing you with a wireless router which is an LTE router which will be delivered for free at your door step Sir.
Mr Jhavary	Thank you.
Azola	Ok. So nothing much is going to change ok. You're still going to stay on your unlimited ADSL 4meg line okay, but the only thing that's going to change is the amount.
Jhavary	What is the amount that's going to change?
Azola	Ok. The amount for the ADSL line only, ok, is going to be an amount of R560 per month. Ok, and then with the landline she's just going to add an additional amount of R40 which now the bill will be R599 per month which is going to be less than
Mr Jhavary	Ok, ok ok.
Azola	Sorry?
Jhavary	I'm saying so we were initially paying R605 am I correct?
Azola	Yes.
Mr Jhavary	And so now it drops R6?
Azola	Yes Sir.
Mr Jhavary	And everything else will remain the same.
Azola	Yes Sir your number remains the same, ok?
Mr Jhavary	The number remains the same, the unlimited calls remain the
Azola	Yes Sir, its going be unlimited anytime 3000 calls to make to Telkom landlines

Mr Jhavary	Ok. Unlimited...OK. Is that the same thing that I have at the moment or is this
Azola	Yes, anytime, 3 000 minutes (coughs).
Mr Jhavary	Ok. Is it the same thing that I have at the moment?
Azola	Yes, it's the same thing as what you have at the moment its just that the price is going down, and you're getting a wireless device now so you're no longer
Mr Jhavary	Ok ok ok. All right, so when are you going to send through the
Azola	Ok. We going to send through the device within the next 3 to 4 weeks. Ok. I first need to put through an order for you and then within the next 3 to 4 weeks you will receive your device
Mr Jhavary	Ok. And will the speed increase with the wireless?
Azola	It's going to be on...still going to be on your 4megs like I said we're not changing anything but then the speed is going to be
Mr Jhavary	Yes yes, okay, okay perfect mam, lovely. When will we hear from you guys
Azola	Sorry Sir?
Mr Jhavary	I'm saying we will hear from you guys when you're coming to
Azola	Okay, before anything else we need to confirm okay, if the details that we
Mr Jhavary	Sure.
Azola	Ok. Can you just confirm your mother's ID number? Or you can confirm the
Mr Jhavary	ID read out (reads entire ID number, some numbers inaudible)
Azola	Ok. Can you please confirm the delivery address?
Mr Jhavary	Its flat(address left out to protect privacy of Complainant)
Azola	Okay, alright then Sir. And then by the time of delivery when the courier people come they are going call you on this 083 number (not verbalised) okay, just to confirm they will be coming to deliver a device fromTelkom, ok? All you need to have is a copy of your ID as well as proof of residence, in fact
Mr Jhavary	Right, right a copy of ID.
Azola	Yes. Copy of ID as well as proof of residence.
Mr Jhavary	Ok.
Azola	That's going to happen in the next 3-4 weeks, ok?
Mr Jhavary	Ok, alright then.
Azola	Ok, thank you very much for your time Sir, please do enjoy the rest of your day and as a Telkom team we would like to congratulate you on your upgrade and would like to tell you
Mr Jhavary	Thank you Mam.
Azola	All right then thank you very much and enjoy your day.
Mr Jhavary	Bye.
Azola	Bye.

[6] Several attempts to settle the matter were made by Telkom via the office of the Coordinator.

RE: SETTLEMENT OFFER: SM Jhavary on behalf of JM Jhavary

- 1 We refer to your e-mail dated 28 January 2021 requiring more details with regard to Telkom's settlement offer dated 21 January 2021.
- 2 We confirm that the settlement offer made by Telkom in an effort to avoid a protracted hearing was rejected by the Complainant. The Complainant proceeded with his complaint and the hearing before the CCC was concluded. Accordingly there is factually no longer any settlement offer on the table.
- 3 However, notwithstanding the above and over and above the credit of R1300.00 which Telkom has passed in favour of the Complainant, we further undertake to provide her with:
 - 3.1 A free LTE router with no conditions attached to it should she opt to migrate from her copper service to any wireless product that Telkom may offer her.
 - 3.2 An LTE service which will continue on a month-to-month basis once migrated from ADSL to LTE. This service can be cancelled with one month's notice.
We trust you find the above in order.
Yours faithfully,

Dr. Siyabonga Mahlangu
Group Executive: Regulatory Affairs and Government

The Complainant refused to accept this offer.

[7] In the light of the approach of the Complainant in regard to the offer by Telkom, it remains the task of the CCC to establish whether the ICASA *End-User and Subscriber Service Charter 2016* was indeed contravened by Telkom, alternatively whether Telkom has not, by way of its offer of settlement, addressed the complaint in terms of the Regulations.

[8] The Office of the Coordinator of the Complaints and Compliance Committee formulated the complaint (in the light of the wording of the complaint) as follows:

(a) That Telkom contravened regulations 2(b) and (c) as well as Regulation 4(1)(a)(i) to-(xi)

2. Purpose of the regulations

The purpose of these Regulations is to:

(a) Prescribe minimum standards for electronic communications services to an end-user by:

(i) an individual or class ECNS licensee; and

(ii) an individual or class ECS licensee

(b) Ensure that the quality of service offered to an end-user is in accordance with the prescribed service parameters; and

(c) Protect the rights of end-users in the electronic communications sector by:

(i) providing an end-user with sufficient information to enable informed decisions;

(ii) ensuring the efficient and effective resolution of complaints; and

(iii) *facilitating redress to an end-user where appropriate. (emphasis added)*

4. Provision of information to end-users

At the point of contracting

(1) A licensee and its agents must inform an end-user at the point of sale, or prior to contracting of the following where applicable:

(a) contract terms and conditions;

(i) deposit; (ii) connection fee; (iii) administrative fees;

(iv) insurance costs; (v) in and out-of- bundle rates;

(vi) hardware costs; (vii) the possibility of tariff changes during the contract term; (viii) rules for early termination of a contract prior to expiry of the contract term; (ix) rules for the carryover of voice minutes and data; (x) fair usage policies; (xi) date and period of invoicing;

[9] A further effort to settle the matter was made: “Without admitting that a contravention had occurred and as a gesture of goodwill and in an effort to settle this matter amicably,” Telkom made the following Offer:

- (a) Telkom will provide Ms Jhavary with a free LTE modem which is not tied to a 24-month contract;
- (b) Ms Jhavary's LTE service will continue on a month-month basis once migrated from ADSL to LTE (the migration is at no extra [cost]); and
- (c) The Complaint will be withdrawn by the Complainant or Mrs Jhavary within 3 days of acceptance of this offer.

The offer had to be accepted within three days as spelt out in the offer.

[10] In answer to this offer Mr Jhavary set out a wide range of problems and costs of "hundred" phone calls; and also questioned the intention of the offer. *Mr Jhavary, however, stated that had it not been for the range of problems created, as well the costs of "a hundred telephone calls" the offer would have been accepted.* The word "hundred" must, of course, be understood in an idiomatic sense. In any case, we will accept in his favour, without deciding it, that there were more than 100 calls.

[11] Ultimately, Telkom, after the hearing, without conceding² any contravention on its side, repeated a settlement offer. Once again, this was rejected by the Complainant. He stated as follows upon inquiry of the Coordinator's Office on 16 February 2021:

*With regard to the offer it's an insult and I don't accept
What a waste of more precious time. Thank you.*

Regard

Salih NB: I wish that these people are brought to book for their incompetence and lies and incompetence again.

CONCLUSION

[12] In the charge sheet prepared by the Coordinator's Office, reference is made to the following Regulation in the End-User Regulations.

4. Provision of information to end-users

At the point of contracting

- (1) A licensee and its agents must inform an end-user *at the point of sale, or prior to contracting* of the following where applicable: (emphasis added)
 - (a) contract terms and conditions;
 - (i) deposit;(ii) connection fee;(iii) administrative fees;

² A typical feature of settlement offers.

- (iv) insurance costs;(v) in and out-of- bundle rates;
- (vi) hardware costs;(vii) the possibility of tariff changes during the contract term;(viii) rules for early termination of a contract prior to expiry of the contract term;(ix) rules for the carryover of voice minutes and data;(x) fair usage policies;
- (xi) date and period of invoicing;(b)complaints handling procedure.

It is clear that the contract under discussion amounted to an amendment of the initial contract. The above regulation is directed at provision of information to end-users “at the point of contracting”. The Regulation which is applicable to the present matter is Regulation 4(1)(c), which is discussed in paragraph [13] hereunder.

[13] It is necessary to repeat the following regulation as quoted above:

The purpose of these Regulations is to:

- (c) Protect the rights of end-users in the electronic communications sector by:
 - (i) providing an end-user with sufficient information to enable informed decisions;
 - (ii) ensuring the efficient and effective resolution of complaints; and
 - (iii) *facilitating redress to an end-user where appropriate.*

It is clear from the documentation that the Complainant would have accepted the settlement offer from Telkom had he not been put to what he, broadly, described as endless (“hundred”) phone-calls and a frustrating meeting at ICASA. In fact a part of his complaint, referred to above, demonstrates his frustration and, at times, what could be described as anger. This frustration also came to the fore at the hearing of this matter and in his note to the CCC after the hearing - which note was struck from the material before the CCC, since additional argument is not procedurally permitted unless requested by the CCC.

The Complainant ultimately states as follows:

“ If this offer had happened last year September without me breaking my head with your incompetent staff- it would be fine - by offering it to me now after a year - and after a hundred phone calls - then to ICASA and then to higher management at ICASA after ICASA themselves realised their own person who was in charge of chairing the meeting did an extremely poor job - I lost out on so many months of my seeing my uncapped balances- making me be extremely

cautious how I use the network so I do not get throttled etc. then I'm paying 675 roughly a month whereas I would have paid 599 per month from last year..."

The document continues in similar style. A derogatory style which was repeated after the hearing when a final offer was made to him. In fact, a question which arises is whether this conduct did not amount to a vexatious approach, which is not countenanced by the Courts³ and this Tribunal.⁴ However, since this aspect was not put to the Complainant, we will not delve into that question.

[14] It is clear, in the CCC's considered view, that Telkom in its initial and ultimate offers to the Complainant was in terms of the above quoted regulation "facilitating redress to an end-user where appropriate" although it, as is customary in settlement offers, did not concede an error. The CCC is satisfied that Telkom was, by its offer, "facilitating" redress to its client. It also satisfactorily explained the usual increase in the annual fee, which would, as per the initial contract, have taken place in any case. The Complainant also indicated that he would have accepted this offer, had it not been for his frustration caused by the "hundred" phone calls and other events in his attempt to seek what he termed "justice."

[15] The frustrations of the Complainant are understandable, but should not play a role in determining whether Telkom has "facilitated redress" in terms of the Regulations. The CCC is of the considered view that Telkom, by way of its offers, has "facilitated redress" in terms of the Regulations. "Facilitating redress" need not necessarily amount to perfect redress or satisfaction. The *legal* question is whether it *facilitated* redress. The fact that Telkom did not concede a contravention, is a typical feature of settlement offers. It is, of course, noted, that the offer of a settlement was not accepted – more than once. However reasons for this rejection are not relevant: the question is whether the CCC is satisfied that Telkom has offered to *facilitate* redress.

*The CCC finds that Telkom, on the facts, indeed **facilitated redress** in terms of the Regulations. Whether the facilitation was accepted is irrelevant.*

³ According to *Nicholas J in Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others* 1979 (3) SA 1331 (W) at 1339E – F: 'In its legal sense vexatious means frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant ...

⁴ See *the Regulations Pertaining to the Procedures of the Complaints and Compliance Committee* Published under Government Notice R886 in *Government Gazette* 33609 of 6 October 2010.

A note of concern: from Telkom's side it would ensure certainty if staff training is rolled out that would ensure that clarity is obtained as to what a particular offer entails and a determination can be made whether there is an agreement in place or not.

ADVICE TO COUNCIL

We, accordingly, advise Council of ICASA to direct Telkom to maintain the above facilitation. Thus:

That Telkom

- (a) Provides or continues to provide Mrs Jhavary with a free LTE modem which is not tied to a 24-month contract;
- (b) Continues Mrs Jhavary's LTE service on a month-month basis once migrated from ADSL to LTE (the migration is at no extra cost).

If these conditions are met, the complaint is dismissed.

- (c) Telkom is required to provide within 21 working days after this judgment is issued the Secretary of the ICASA Council, as copied to the Coordinator of the CCC, with an affidavit that it has so provided or has already provided the Complainant with what is stated in (a) and (b) above.
- (d) Telkom must also confirm that the requirement in the proposed settlement that the complaint be withdrawn was not repeated as a condition.

NOTE

[16] As a postscript to this matter – during the CCC's discussion of the matter - the question was raised by the undersigned whether this kind of private contractual dispute, which turns on error, is a matter which should have been referred to the CCC by the undersigned. If this approach is followed in future, *private law contractual* disputes, which resort with the Courts could, unjustifiably, find their way to the Complaints and Compliance Committee - which essentially has the task to ensure compliance with legislation which places *public law* duties on licensees.

[2] The *Jhavary* case was, in fact, a typical case where a dispute arose as to the content of a contract – thus *private law*. There are several judgments of our Courts which deal with cases where one party to a contract misunderstands the terms of the contract but, through his behaviour, leads the other party to believe that she or he agrees. The headnote in *SONAP PETROLEUM (SA) (PTY) LTD v PAPADOGIANIS* 1992 (3) SA 234 (A) reads as follows:

*“The decisive question in a case where unilateral mistake is in issue is whether the party whose actual intention did not conform with the common intention expressed (the offeror) led the other party (the offeree), as a reasonable man, to believe that his declared intention represented his actual intention. To answer that question a three-fold enquiry is necessary: firstly, was there a misrepresentation as to the offeror's intention; secondly, who made the misrepresentation; and, thirdly, was the offeree misled thereby? The last question postulates two possibilities: Was the offeree actually misled, and would a reasonable man have been misled? The introduction of the fault principle to the enquiry is unnecessary. (Its origin appears to lie in the use of the word 'blame' in the dictum by Fagan CJ in *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 417B-D. The word 'blame' in that dictum was not, however, equated with negligence; it referred, instead, to 'blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe . . .'.)*

If the offeree realises (or should, as a reasonable person, realise) that there is a real possibility of a mistake, he has a duty to speak and to enquire whether the intention expressed was the actual intention. Whether or not there is a duty to speak would, obviously, depend upon the facts of the case. The snapping up of a bargain, however, in the knowledge of the possibility that the declared intention did not represent actual intention, would not be *bona fide*. *Where an offeree is alive to the real possibility of a mistake and, failing in his duty to speak and enquire, decides instead to snatch a bargain, there is no consensus and, thus, no binding agreement.”*

[17] Of course, there may be exceptions where an issue is so important for ICASA that the Chair may decide to, in any case, refer it to the Complaints and Compliance Committee. In the exercise of her or his discretion to hear a complaint, the Chair of the CCC is bound by the following statement by Malan J (The later Judge of Appeal) when the Court dealt with the exercise of the authority to hear or not to hear a matter, which at the time, was entrusted to the Chairperson of the BMCC (now, the Chair of the CCC):

[30] An exercise of a power would not be lawful if the functionary misconstrues the purpose of a statute and as a result errs on the jurisdictional facts to be taken into account when exercising a discretionary power....Clause 1.16 required the first respondent [the Acting Chairperson of the BMCC] to determine whether the complaint merited a formal hearing. The purpose of the power is to determine whether the seriousness of the allegations and the complexity of the issues that arise and, in particular, the dictates of procedural fairness, require a formal hearing to be convened. While the substance of the complaint is not irrelevant it is not the only factor to consider when the power conferred by clause 1.16 is exercised. Where the complaint is not frivolous or vexatious as envisaged by para 1.6 a request for a formal hearing may not be refused simply on the basis that the complaint has *no substance*. Additional factors, such as the *seriousness* of the complaint, the nature of the

issues raised and *complexity* of the legal and factual issues, the question whether the parties are willing and able to present evidence and whether the complainant requested a formal hearing, should be considered in the exercise of this power. The first respondent did not have regard to any of these factors. Instead, he first decided that there was no 'merit' in the complaint, on an incorrect understanding of the Constitutional Court's judgment, and then concluded that there was no sound reason for holding a formal hearing. (Emphasis added)

As mentioned above, the CCC Chair is bound by this statement of the law since it deals with exactly the same question: when to hear or not to hear a complainant. One should, accordingly, look wider than whether a *prima facie* case has been made out. Of course, as held by the CCC in *SAPO v Aramex*,⁵ that does not mean that an unsubstantiated complaint should be heard or that a fishing expedition should be undertaken. In the light of this approach, it could be argued that the present problematic matter was justifiably referred to the CCC. Given the fact that it **was** referred, it is unnecessary to address the matter further

What should be said is:

Contractual disputes lie within the jurisdiction of the Courts and should not, in the ordinary course, be referred to the CCC by the Chairperson. The Complainant would, in any case, not be awarded damages by a Court for his alleged frustration, calls and other costs in pursuance of this matter.



JCW VAN ROOYEN SC
The Members of the CCC agreed
8 March 2021

⁵ Case 130/2016.

