COMPLAINTS AND COMPLIANCE COMMITTEE[1]

Date of hearing - 25 June 2012 **Case No 57/2011**

In the matter between:

Screamer Telecommunications (Pty) Ltd **Applicant**

and

ICASA **Respondent**

Complaints and Compliance Committee

JW Tutani – Chairperson

N Batyi

N Ntanjana

Z Ntukwana

J Tlokana

For the Applicant: Advocate Mark Wesley Instructed by Attorneys Norton Rose, Johannesburg

For the Respondent: Mr Michael Motsoeneng from Attorneys Motsoeneng Bill, Johannesburg

[1] Established in terms of Section 17A of the Independent Communications Authority Act, No 13 of 2000.

JUDGMENT

[1] This is an application by Screamer Telecommunications ("Screamer") for an order directing that the provisions of Rule 35(14) of the High Court Rules be made applicable to these proceedings and that ICASA be ordered to provide Screamer with copies of documents mentioned later in the judgment. Screamer also wanted an order awarding it costs of this application and alternative relief.

[2] The applicant (the respondent in the complaint) is Screamer Telecommunications (Pty) Ltd ("Screamer"), a company with limited liability, duly registered and incorporated in accordance with the company laws of the Republic of South Africa and carrying on business as a wireless electronic communications service provider.

[3] The respondent (the applicant in the complaint) is the Independent Communications Authority of South Africa ("ICASA"), a statutory body established in terms of section 3 of the Independent Communications Authority Act, 13 of 2000 (the "ICASA Act") whose functions include monitoring the electronic communications sector to ensure compliance with the ICASA Act and the underlying statutes as well as managing the radio frequency spectrum.

Brief background

[4] On 22 January 2007, Sentech and GWI entered into a written agreement in terms of which Sentech permitted GWI to use a portion of the radio spectrum frequency allocated to Sentech by ICASA for a fee.

[5] In April 2008, Buzz Trading 66 (Pty) Ltd purchased the entire shareholding of GWI and renamed GWI, Screamer.

[6] On 04 October 2007, Sentech purported to cancel the spectrum agreement but Screamer never accepted that Sentech's purported termination was lawful.

[7] On 26 September 2009, Screamer sent a letter to ICASA asking ICASA to assist with the enforcement of the spectrum agreement.

[8] On 17 November 2010, the Chairperson of ICASA wrote a letter to Screamer stating that it had come to the Authority's attention that Screamer was using part of the 2.6 GHz frequency band to provide WiMax service without the appropriate spectrum licence in contravention of the Electronic Communications Act (the "ECA"). In the said letter, the Chairperson of ICASA ordered Screamer to stop its "illegal" activities within fourteen day from the date of the letter failing which legal action

would be taken against it without further notice.

[10] On 02 December 2010, Screamer responded to the Chairperson's letter and denied that its use of the spectrum was unlawful and continued to use the said frequency spectrum.

[11] Because of Screamer's continued allegedly illegal use the frequency spectrum, the Authority referred a complaint the Complaints and Compliance Committee (the "CCC"). The charges as they appear in the charge sheet are that between January 2007 and 04 May 2011, Screamer unlawfully transmitted a signal by radio or used a radio apparatus to receive a signal by radio not under or in accordance with a radio frequency spectrum licence granted by the Authority.

[12] The second charge is that Screamer, during the period mentioned above, unlawfully transmitted a signal by radio or used a radio apparatus to receive a signal by radio without having, in addition to any service licence contemplated in chapter 3, a radio frequency spectrum licence.

[13] The third charge is that during the same period as mentioned above, Screamer unlawfully possessed a radio apparatus without a radio frequency spectrum licence granted by the Authority.

[14] Lastly, Screamer is alleged to have failed to comply with an order from the Authority in that, notwithstanding an order from the Authority on 17 November 2010, directing it to cease and desist from its illegal activities within 14 days, it continued to use part of the 2.5 GHz frequency band to provide WiMax services.

[15] On 01 March 2012, the CCC convened a pre-hearing conference in terms of section 17C (4) of the ECA for the purpose of giving direction to the parties regarding the procedure to be followed at the hearing and it was agreed that where necessary, the High Court Rules would apply. It was also agreed that ICASA would deliver a supplemented complaint, including a supporting affidavit.

[16] At the pre-hearing conference, Screamer identified four documents it required to be able to answer the complaint against it.

[17] ICASA undertook to provide the required additional documents as part of its supplemented complaint and it was agreed that Screamer would hold-off any request for documents until such time that it was furnished with the complaint.

[18] Upon receipt of the supplemented complaint, Screamer discovered that the four documents which it had identified at the pre-hearing

conference were referred to, in the supporting affidavit, but were not attached.

[19] As a result, on 19 March 2012, Screamer wrote to ICASA's attorneys and asked to be provided with the said documents, namely:

- The legal opinion;
- Documents supporting the allegation that GWI threatened non-Value Added Network Service Licensees in 2007, including any complaints by such licensees;
- Any minutes or records of the meetings held between ICASA and Sentech in September 2007; and
- The complaint submitted to ICASA by Sentech in 2010, referred to by Sentech in the pre-hearing conference.

[20] On 28 March 2012, ICASA's attorneys wrote back and advised that:

- No minutes or records were available as such meetings were conducted informally; and
- The documents supporting the allegation that GWI threatened non-Value Added Network Service Licensees were included exclusively for background purposes. They did not form part of the charges, nor did they form the basis for the complaint;
- The legal opinion was an internal document intended exclusively for the employees of ICASA;
- A copy of the letter (which was part of the documents which Screamer required), was attached.

Alleged threats by Screamer to non-Value Added Network Service Licensees

[21] In its Heads of Argument, Screamer stated that "on the strength of the assurances given and concessions" made by ICASA in the answering affidavit, Screamer no longer persisted with the request for the documents supporting the allegation that it was threatening non-Value Added Network Service Licensees.

THE DECISION

The legal opinion

[22] In the supporting affidavit, Mr Meyer, an inspector in the employ of ICASA, stated that a legal opinion was requested from ICASA's Legal Division as to whether the agreement concluded between Sentech and Screamer was lawful in terms of Chapter 8 of the ECA. ICASA also asked whether the agreement was lawfully terminated by Sentech and whether it was lawful for Sentech to allow Screamer (GWI) to enter into similar agreements with other users.

[23] Mr Meyer deposed that there was no valid agreement between the parties, whether by legislation or contract.

[24] ICASA's Legal Division concluded that since there was no lawful agreement between Sentech and Screamer, Screamer was not in a position to offer services to other users.

[25] Mr Wesley argued that since the legal opinion was expressly mentioned in ICASA's supporting affidavit, ICASA had a *prima facie* obligation to provide Screamer Telecommunications with a copy of the opinion under rule 35(12) of the High Court Rules without it having to show anything more.

[26] He submitted that Screamer became entitled to the legal opinion as soon as reference was made to it in the supporting affidavit.

[27] He submitted further that ICASA could only escape its obligation to provide the opinion if it could satisfy the CCC that there were special facts that relieved it of that obligation.

[28] Rule 35 (12) of the Uniform Rules of Court provides as follows:

> *Any party to any proceeding may, at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the Court, use such document or taper recording in such proceeding provided that any other party may use such document or tape recording.*

[29] In resisting Screamer's request, Motsoeneng argued that the obligation to produce the document was subject to limitations, namely:

- Privilege; and

- Relevance

[30] I will deal with the arguments for and against the production of the opinion below.

Privilege

[31] It is an accepted principle of our law that legal advice given by a legal practitioner in his professional capacity to his client is privileged and may not be disclosed to third parties without the client's consent. This principle also applies to in-house legal advisers who are employed by the government, statutory bodies and private corporations.

[32] Mr Wesley submitted that not every document generated by a legal adviser was privileged. In order to be privileged, the document must constitute a communication between a legal adviser and a client, pursuant to a confidential consultation for the purpose of obtaining legal advice.

[33] He argued that the opinion was not made under the right circumstances with the result that it did not fall within the scope of privilege. In support of this argument, he submitted that ICASA did not say it went confidentially to its Legal Division nor did Mr Meyer say ICASA went to the Legal Division in pursuance of pending litigation.

[34] This argument is, with respect, too simplistic. ICASA sought the legal advice to determine the lawfulness or otherwise of the agreement between Screamer and Sentech and, on the strength of that advice, the Chairperson of ICASA wrote a letter to Screamer Telecommunications on 17 November 2010, ordering it to stop using the 2.6 GHz frequency.

[35] The Chairperson of ICASA gave Screamer fourteen days within which to stop its illegal activities. He went on to say failure to stop the illegal activities would result in appropriate legal action being taken without further referring to it.

[36] It is clear from the above that ICASA was contemplating taking legal action against Screamer but had to follow due process before laying charges against it.

[37] ICASA argued that the legal opinion was intended for the respondent's internal purposes and was therefore not for an external party even if such party was the subject of such a legal opinion.

[38] In its Heads of Argument, ICASA mentioned the requirements for the existence of the privilege.

These are:

- Communication that takes place must have been made to a legal adviser acting in a professional capacity;
- Communication must have been made in confidence; and
- It must have been made for the purposes of obtaining legal advice or in pursuance of pending litigation.

[39] Having regard to these requirements, there is little doubt that the opinion is privileged.

[40] What is more, if the opinion was intended for internal purposes as argued by Mr Motsoeneng, it goes without say that the communication was confidential and that it qualifies to be a privileged document.

[41] In *Mohammed v The President of the Republic of South Africa, 2001 (2) SA 1145 (C) at 1154*, the Court said

> *To limit the scope of professional legal privilege to clients and lawyers in private practice is not justified in law. This would considerably dislocate the established practice and would force government, statutory bodies and even private corporations with in-house legal advisers to reorganise at great expense their modus operandi so that all advice required is received from independent legal advisers rather than engaging salaried staff to give legal advice.*

[42] From the papers before the CCC and the arguments made by Mr Motsoeneng, we are satisfied that ICASA's legal adviser was acting in his professional capacity when he gave his legal opinion. The consultation which preceded the production of the written opinion was confidential. It was a consultation between a legal representative and his client.

[43] In our view, therefore, the legal opinion is privileged but the matter does not end there since Mr Wesley argued that even if the opinion was privileged, which he was not admitting, ICASA had waived that privilege.

Waiver of the privilege

[44] Mr Wesley argued that even if the opinion was privileged, ICASA had waived that privilege. He argued that where a person disclosed part of a privileged document in proceedings as ICASA had done, then the principles of fairness and consistency required that the whole opinion be disclosed.

[45] ICASA dismissed Screamer's argument and submitted that reference to the opinion was to highlight the purpose as well as the conclusion, in vague terms and not in specific terms.

[46] ICASA submitted that the supporting affidavit referred to the legal opinion in general terms. The contents of the document had not been disclosed in the supporting affidavit and, as such, an inference could not be drawn that ICASA had, by implication, waived the privilege.

[47] Mr Motsoeneng argued that the privilege could be waived expressly, impliedly or could be imputed. He submitted that the privilege could not be said to have been waived in the current circumstances.

[48] Both parties referred to the case of *The Minister of Justice: in re S v Wagner 1965 (4) SA 507 at 514* where the Court said:

> *There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point, his election must remain final.*

[49] In the supporting affidavit, ICASA said in 2009 it obtained a legal opinion from its Legal Division on the lawfulness of the spectrum agreement. ICASA also explained the instructions it had given to its Legal Division and the implications of the agreement vis-à-vis third parties.

[50] Lastly, ICASA went on to set out the conclusions contained in the legal opinion.

[51] The above paragraphs are intended to show how much ICASA elected to disclose in the supporting affidavit. In our opinion, ICASA had disclosed a lot and, as pointed out in the case of the Minister of Justice cited above, fairness required that its immunity had ceased, whether ICASA had intended that result or not.

Accordingly, we find that ICASA had waived its privilege.

Relevance

[52] The second aspect which was raised by ICASA for refusing to provide Screamer with the opinion was its relevance. Mr Motsoeneng argued that the legal opinion was not relevant to the issue in the proceedings. Screamer, on the other hand contended that it was relevant.

[53] In *Gorfinkel v Cross, Hendler & Frank 1987 (3) SA 766 at 774,* Friedman J stated the legal position as follows:

> *The Rule should, to my mind, be interpreted as follows: prima facie there is an obligation on a party who refers to a document in a pleading or affidavit to produce it for inspection if called upon to do so in terms of Rule 35 (12). That obligation is, however, subject to certain limitations .....*

Similarly a privileged document will not be subject to production. A document which is irrelevant will also not be subject to production. As it would not necessarily be within the knowledge of the person serving the notice whether the document is one which falls within the limitations which I have mentioned, the onus would be on the recipient of the notice to set up facts relieving him of the obligation to produce the document.

[54] ICASA, as the recipient of the Rule 35 (12) notice, bore the onus of showing that the legal opinion was irrelevant

[55] Mr Motsoeneng argued that it was for Screamer to show that the opinion was relevant and to demonstrate its relevance. He relied on *Universal City Studios v Movie Time 1983 (4) SA 736 (D)* (which is quoted in the Gorfinkel case) for this argument. Booysen J, dealt with the question of onus and dismissed the argument that, if relevance were to be a requirement, the onus of justifying non-production was on the recipient of the notice.

[56] The learned judge said:

It being an application, I would say that the onus is to be discharged on the usual basis, i.e. that the applicant bears the overall onus of satisfying the Court that the respondent is obliged to produce the document or portion in question, i.e. that the document has been referred to and that it is relevant to the issues which have arisen....

[57] What this dictum means was that in this application, the onus was on Screamer to satisfy the CCC that ICASA was obliged to produce the opinion.

[58] Judge Friedman disagreed with Judge Booysen's dictum for the reasons enunciated in the Gorfinkel case above.

[59] We reject Mr Motsoeneng's submission that Screamer bore the onus of showing that the legal opinion was relevant. It was for ICASA, the recipient of the notice to show that the legal opinion was irrelevant as correctly spelt out in the Gorfinkel case.

[60] In Screamer's replying affidavit, Mr Macdonald (Screamer's instructing attorney) deposed in the founding affidavit thus:

"I did not contend in the founding affidavit that the opinion was relevant to this issue. I explained that the contents of the opinion were relevant because they would shed light on whether ICASA's allegations in the affidavit were true".

[61] When challenged by Mr Motsoeneng on this paragraph, Mr Wesley's explanation was that they did not say it (presumably the opinion) was "relevant to working out"; it was not relevant to determining whether the

legal propositions advanced by ICASA were correct. He said it was relevant to assessing ICASA's behaviour in this matter and that it was directly relevant to the issue of remedy.

[62] Mr Wesley's response is somewhat troubling as it is at odds with Screamer's Heads of Argument where it is said:

> *"Moreover, the contents of opinion are directly relevant in this complaint because they shed light on whether ICASA's allegations in the affidavit are true and correct. If they are not correct, this casts considerable doubt on the credibility of the allegations in the founding affidavit……"*

[63] Mr Motsoeneng argued that Mr Meyer would, notwithstanding the conclusions of the legal opinion, have been entitled to proceed with the charges as he deemed fit and this demonstrated how irrelevant the opinion was.

[64] Even though Mr Motsoeneng opined that Screamer bore the onus of proving that the document was irrelevant, we are satisfied that his arguments which sought to show that the document was irrelevant, carried the day.

[65] We are of the opinion therefore that the legal opinion is irrelevant and that ICASA is under no obligation to produce it.

Vexatious proceedings

[66] In ICASA's Heads of Argument, it is argued that Screamer delayed the main proceedings by a third of a year for reasons which were "neither sound, nor reasonable nor are they based on good reasons".

[67] As the saying goes, people living in glass houses should not throw stones, but this is exactly what Mr Motsoeneng chose to do. ICASA became aware of the agreement between Sentech and Screamer as far back as 2009. It also became aware that it had been terminated by Sentech in the same year.

[68] In the supporting affidavit, Mr Meyer said, based on the termination, it was apparent that Screamer was using part of the 2.6 GHz frequency band without the appropriate radio frequency licence and was therefore in contravention of section 31 (1), (2) and 32 (1) of the ECA.

[69] It was only in November 2010 that ICASA decided to write to Screamer and order it to stop its "illegal activities". The charge sheet was drafted only in February 2012.

[70] ICASA, in its Heads of Argument said, despite the outcome of the

application, the Applicant had won today for it had succeeded in causing delays in the conclusion of this matter.

[71] We do not agree that Screamer had delayed the conclusion of this matter. If anything, it is the Authority which delayed the conclusion of this matter. If you compare the time that ICASA has taken to charge Screamer, the latter's alleged delay pales into insignificance.

[72] In the result, we do not find this application to be vexatious as argued by ICASA. Screamer was well within its rights to bring this application and ask for the legal opinion since it believed that it was entitled to it.

[73] The question whether the CCC has jurisdiction to award costs will be argued on the conclusion of the complaint.

[74] Mr Wesley argued briefly about penalties and whether the CCC had the power to impose a penalty. Both ICASA and Screamer will be afforded the opportunity to address the CCC in this regard during the hearing of the complaint.

[75] In conclusion, we make the following order:

- Although the legal opinion is privileged, ICASA waived that privilege because of the disclosures it chose to make in the supporting affidavit;
- The legal opinion is irrelevant and Screamer is therefore not entitled to it;
- Screamer must deliver its answering affidavit to the complaint within 15 days from date of receipt of the judgment; and
- The parties' legal representatives to argue during the hearing of the complaint whether the CCC has the jurisdiction to award costs.

JW Tutani **Date.18/09/... 2012**

Chairperson

Members Ntukwana, Tlokana, Batyi, and Ntanjana concurred with the above judgment.