COMPLAINTS AND COMPLIANCE COMMITTEE[1]

Dates: 16, 17 and 18 May 2012. **Case number: 59/2011**

Neotel **Complainant**

and

Telkom **Respondent**

Complaints and Compliance Committee

JW Tutani Chairperson

N Batyi

N Ntanjana

Z Ntukwana

J Tlokana

T Ramuedzisi

K Moodaliyar

For the Complainant: Adv J. Wilson instructed by Nortons Attorneys

For the Respondent : Adv I. Maleka SC together with Adv T. Motau SC on 16 May 2012 instructed by Maluleke Msimang & Associates

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[1] Established in terms of section 17A of the ICASA Act, No 13 of 2000.

JUDGMENT

JW TUTANI, Chairperson

[1] The complainant in this matter is Neotel (Pty) Ltd (Neotel), a company with limited liability, duly registered and incorporated in accordance with the company laws of the Republic of South Africa. The respondent is Telkom SA Limited, (Telkom), also a company with limited liability, duly registered and incorporated in accordance with the company laws of the Republic of South Africa.

[2] On 23 November 2010, Neotel approached Telkom with a request that they conclude a formal lease agreement in respect of the copper last mile at two specified geographic points in terms of chapter 8 of the Electronic Communications Act (the "ECA")[2]. In its response of 06 December 2010, Telkom turned down Neotel's request on the grounds that the said request was premature.

[3] Telkom said that local loop unbundling was currently being attended to by ICASA but that the process was still "some way from being finalised." Telkom said in the circumstances, Neotel's request was "somewhat premature" and that it was therefore unable to accede to Neotel's request.

[4] On 23 March 2011 and after Neotel failed to persuade Telkom to agree to its request, Neotel referred the dispute to Dr Mncube, the Chairperson of ICASA in terms of section 43 (5) the ECA. On 11 August 2011, Dr Mncube advised Dr Cohen, the Managing Executive: Regulatory for Neotel that the Authority had decided to refer the dispute to the

[2] Act No 36 of 2005.

Complaints and Compliance Committee (the CCC) for resolution in terms of section 43 (5)(c) of the ECA. The aforesaid section provides as follows:

> *In the case of unwillingness or inability of an electronic communications network service licensee to negotiate or agree on the terms and conditions of an electronic communications facilities leasing agreement, either party may notify the Authority in writing and the Authority may -*
>
> *refer the dispute to the Complaints and Compliance Committee for resolution on an expedited basis in accordance with the procedures prescribed in terms of section 46.*

[5] Section 43 (6) of the ECA stipulates that for the purposes of subsection (5), unless otherwise agreed in writing by the parties, a party is considered unwilling to negotiate or unable to agree if a facilities leasing agreement is not concluded within the prescribed time-frames.

[6] It is common cause that in this matter no agreement has been reached by the parties, hence the referral of the dispute to the Authority and ultimately to the CCC.

[7] The legal question to be decided by the CCC is whether Neotel's request for a formal lease in respect of the last copper mile is covered by chapter 8 of the ECA and the Electronic Communications Facilities Leasing Regulations[3] (the Regulations).

[3] Published under Government Notice R468 in Government Gazette 33252 of 31 May 2010.

[8] In its Founding Affidavit, Neotel, through Dr Tracey argues that its request falls squarely within the ambit of the Regulations and that, as a result, Telkom was obliged to reply to the request within seven days, stating its minimum requirements for entering into the electronic communications facilities leasing agreement.[4]

[9] In its Heads of Argument, Telkom argues that it cannot be compelled to provide the local loop to Neotel due to what it calls "admitted practical hurdles" by ICASA.

[10] Section 43 of the ECA places an obligation on an electronic communications network service licensee to lease electronic communications facilities to any other person licensed in terms of the ECA. Section 43 (1) reads as follows:

> *Subject to section 44 (5) and (6), an electronic communications network service licensee must, on request, lease electronic communications facilities to any other person licensed in terms of this Act and persons providing services pursuant to a licence exemption in accordance with the terms and conditions of an electronic communications facilities leasing agreement entered into between the parties, unless such request is unreasonable.*

[11] Regulation 3 deals with requests for electronic communications facilities and provides as follows:

[4] In terms of Regulation 3(2).

11.1 A request for electronic communications facilities must be in writing and must, amongst others include:

(a) the date for the request;

(b) the electronic communications facilities seeker's technical requirements and physical parameters; and

(c) the type of electronic communications facilities that are requested.

11.2 An electronic communications facilities provider must respond to a request to lease facilities within 7 days of receipt of the request, stating its minimum requirements for entering into the electronic communications facilities leasing agreement.

11.3 The parties must finalise the electronic communications facilities leasing agreement within 45 days from the date of the request provided that the parties may agree on a longer period, which period must not exceed 60 days.[5]

[12] Neotel relies on the provisions of section 43 (1) of the ECA and the Regulations in seeking to have Telkom compelled to provide it with local loop facilities.

[13] Mr Maleka SC, acting for Telkom, dismisses Neotel's representative, Mr Wilson's argument and points out in paragraph 1 of Telkom's Heads of Argument that the real issue is not "an abstract and context-free interpretation of section 43(1) of the ECA and the Regulations." He argues that the CCC can hardly be expected to make an order which is incapable of implementation.

[5] Regulation 3(3).

[14] Section 43(1) of the ECA and the Regulations are clear and unambiguous and Telkom was obliged to respond adequately and in accordance with the requirements of regulation 3(2) to Neotel's request.

[15] Neotel satisfied all the requirements of the Regulations in that its request was in writing and included:

15.1 the date of the request;

15.2 its technical requirements and physical parameters; and

15.3 the type of electronic communications facilities that it was requesting.

[16] In light of the above, I have come to the conclusion that Telkom's response to Neotel's request was not adequate and was not in accordance with the Regulations.

[17] On 20 June 2011, ICASA issued a Discussion Paper which was published in the Government Gazette on 22 June 2011.[6] The purpose of the Discussion Paper was to outline the Authority's initial views on the process to be followed to unbundle the local loop.

[18] In its Executive Summary of the Discussion Paper, ICASA states as follows:

> *The Independent Communications Authority of South Africa (ICASA) seeks stakeholders' inputs on the manner in which to ensure access to the local loop.*
>
> *ICASA's view is that access to the local loop is mandated in terms of the obligation to lease facilities (section 43(1) of*

[6] Published in General Notice 409 in Government Gazette No 34382 of 22 June 2011.

the Electronic Communications Act, no 36 of 2005) (the ''ECA''), and any facilities leasing agreement is governed by the Electronic Communications Facilities Leasing Regulations as stipulated in Government Gazette 33252 of 31st May 2010.

[19] ICASA's views are clear. Access to local loop is mandated in terms of the obligation to lease facilities and reference is made to the ECA in this regard. Secondly, any leasing agreement is governed by the Regulations.

[20] On 29 November 2011, the Authority issued a Findings Note which was published in the Government Gazette on 06 December 2011.[7] The Findings Note contained the Authority's findings and determinations following the publication of the Discussion Paper.

[21] The purpose of the Findings Note was to outline the Authority's determinations on the process to be followed to unbundle the fixed line "local loop".

[22] In the background in the Findings Note, ICASA says

In the Discussion Paper, the Authority expressed its views that the unbundling of the local loop in the South African electronic communications market represented a step forward in introducing the open-access approach to regulation of the electronic communications sector as espoused in the Electronic Communications Act, no 36 of 2005 (the ECA).

[7] Published in General Notice 889 in Government Gazette No 34823 of 06 December 2011.

The Authority outlined its views on the legal requirements supporting the unbundling of the local loop; expressing its views that access to the local loop at a non-discriminatory price is mandated within the obligation to lease electronic communications facilities as prescribed in Chapter 8 of the ECA (See Section 3.3 of Government Gazette No 34382, page 10).

Recognising that the introduction of an obligation to provide access to the local loop may cause disruptions to existing business models, the Authority requested respondents to provide answers to a number of questions.

[23] The Authority re-emphasises its position that access to local loop at a non-discriminatory price is mandated by the ECA. The fact that the Authority decided to seek inputs from stakeholders on a number of questions it had, does not, in my view, take away the right of entities like Neotel to apply for access to local loop.

[24] Neotel already has these rights under section 43(1) of the ECA read with the Regulations and section 3.3.1 of the Discussion Paper is concerned with facilitating access to these rights. The Authority does not, through the Discussion paper and Findings note seek to frustrate the rights which Neotel already has.

[25] In the Discussion Paper, ICASA makes the following pertinent observations:

The open-access approach to regulating electronic communications services may be summarised as follows:

- *a technology neutral framework that encourages innovative, low-cost delivery to users;*
- *competition at all layers in the network, allowing a wide variety of physical networks and applications to interact in an open architecture;*
- *transparency to ensure fair trading within and between layers that allows clear, comparative information on market prices and services;*
- *the circumstances where everyone can connect to everyone else at the layer interface so that any size organisation can enter the market and no one takes a position of dominant market power (my emphasis); and*
- *devolved local solutions rather than centralised ones encouraging services that are closer to the user.*

[26] Among other things, the ECA aims to promote competition in the sector, not only through infrastructure competition (i.e. licensing a new vertically integrated participant), but through the introduction of service-based competition at different levels within the network where licensees are able to access components of existing network assets of another licensee to provide services.

[27] The Discussion Paper further states that the open-access approach is espoused in section 2 of the ECA. The Objects (in section 2) listed below have particular reference to unbundling the local loop:

> *"(b) promote and facilitate the development of interoperable and interconnected electronic networks; the provision of the service contemplated in the Act and to create a technologically neutral licensing framework;*

(f) promote competition within the ICT sector;

(g) promote an environment of open, fair and non-discriminatory access to broadcasting services, electronic communication networks and to electronic communications services;

(m) ensure the provision of a variety of quality electronic communications services at reasonable prices; and

(n) promote the interests of consumers with regard to the price, quality and the variety of electronic communications services."

[28] Summarising the open-access approach to regulating electronic communications services, ICASA makes the point that "the circumstances where everyone can connect to everyone else at the layer interface so that any size organisation can enter the market and no one takes a position of dominant market power."

[29] In its Answering Affidavit, Telkom says "in so far as was previously a legal issue between the parties, ICASA has made its decision known on that issue. Telkom then refers to the determination made by ICASA in paragraph 4.1 of the Findings Note.

[30] Paragraph 4.1 of the Findings Note provides as follows:

The Authority determines that access to the local loop is mandated by Chapter 8 of the ECA, subject to the provision of such access being financially and technically feasible. However, LLU regulations would need to be made in terms of section

44(3)(m) in "the manner in which unbundling electronic communication facilities are to be made available" and a market review on pricing such facilities would have to be undertaken before fixed line full line, shared or sub-loop unbundling could be implemented in practice.

[31] Telkom submits that the issue which arises from Neotel's complaint is whether its request for access to Telkom's local loop in an unbundled state can be given effect to at this stage and whether the Regulations are the appropriate instrument to rely upon in determining the practical implementation of local loop unbundling.

[32] Telkom argues that for the reasons set out in the Findings Note and in its Answering Affidavit, access cannot be implemented at this stage.

[33] In terms of section 17B of the ICASA Act, the CCC must investigate and hear if appropriate and make a finding on

- all matters that have been referred to it by the Authority
- complaints received by it; and
- allegations of non-compliance with the ICASA Act or the underlying statutes received by it.

[34] The Electronic Communication Act is an underlying statute.

[35] The CCC has a legal duty to investigate, hear and make a finding in respect of Telkom's alleged non-compliance with the ECA and the Regulations. If the CCC were to accept Telkom's contention that the issue has already been decided by ICASA that would mean that the CCC must

ignore the complaint that has been referred to it by ICASA in terms of the ECA and by doing so, the CCC would be failing in its statutory duties.

[36] In short, the CCC is not bound by the Authority's determinations and findings. The CCC has a duty to discharge its legal obligations placed on it by the ECA. In any event, the Authority referred this matter to the CCC so that the CCC can hear it, apply its mind and make findings.

[37] Mr Maleka submits that the CCC must find it impossible to implement the local loop unbundling until the completion of the ICASA process. The reason for that is that there are factual allegations about the impossibility of implementation which, according to Mr Maleka are not denied by Neotel.

[38] In the Administrator, Cape And Another v Ntshwaqela And Others 1990 (1) SA705 (A) at 720, it was argued on behalf of the second and third respondents that there was nothing they could do to comply with an order for restoration of the possession of the sites concerned because they have neither *dominium* nor a right of control. It was the owners who were in possession and the second and third respondents had no means, legal or otherwise, to compel the owners to give possession to the applicants. The order is therefore a *brutum fulmen.*

[39] The court stated the legal position thus :

> *"It is trite that a Court will not engage in the futile exercise of making an order which cannot be carried out. So, an order for specific performance of a contract will be refused where performance is impossible……"*

[40] The learned judge went on to say that the principle is embodied in the maxim, *lex non cogit ad impossibilia* which is discussed in Broome's Legal Maxim 10th ed at 162:

> *"This maxim, or, as it is also expressed, impotentia excusat legem, must be understood in this qualified sense, that impotentia excuses where there is a necessary or invincible disability to perform the mandatory part of the law, or to forbear the prohibitory".*

[41] Neotel requests Telkom to set out its minimum requirements for entering into the electronic communications facilities and, in my view, this request is legally valid.

[42] The response that Telkom provided was not adequate and was therefore not in accordance with the prescribed legal provisions.

[43] In terms of the existing regulations, it was not impossible for Telkom to perform as requested and its defence of impossibility must therefore fail. M r Maleka has failed to persuade the CCC that there is invincible or a necessary disability to comply with Neotel's request.

[44] Telkom contravened Regulation 3(2) of the Electronics Facilities Leasing Regulation of 2010.

[45] In terms of the Ministerial Policy Directive of 2007[8], ICASA was given until 30 November 2011 to publish Local Loop Unbundling Regulations. These regulations are still outstanding. To reach a practical solution herein, it is necessary for these regulations to be developed as envisaged by section 44 (3)(m) of the ECA.

[46] In the Ministerial Policy Directive, the then Minister, Dr Ivy Matsepe-Casaburri acknowledged the complexity of the local loop unbundling process and "the urgency for South Africa to enable all operators appropriately licensed to have access to the local loop". She said the unbundling process should be urgently implemented and completed by November 2011.

[47] Granting all licensed operators access to the local loop is urgent and the unbundling process must be implemented urgently. In view of the time that has already lapsed as well as the importance of the unbundling process, ICASA can no longer afford to delay. Any further delays will frustrate competition envisaged by the legislature as well as prejudice consumers.

[48] In light of the above and ICASA's silence on the progress on the finalisation of the Local Loop Unbundling Regulations and the steps undertaken to resolve the dispute when it was initially referred to it by Neotel, the CCC has come to the conclusion that ICASA must develop terms and conditions that are consistent with the provisions of Chapter 8 of the ECA.

[8] Published in Notice No 876 in Government Gazette No 30308 of 17 September 2007.

[49] ICASA is required to develop the said terms and conditions within a period of three months from the date of the interim order, i.e. 18 May 2012. The interim order has since been delivered to ICASA.

[50] Telkom argues that there is something problematic with the regulations and they are inadequate. Telkom submits that Neotel must wait until the process of developing new and adequate regulations is completed.

[51] The existing regulations cannot be ignored and if Telkom has issues with them, it can apply to Court to have them set aside, and they have not done that.

[52] Neotel also sought relief in the form of a penalty against Telkom for non-compliance with the Facilities Leasing Regulations. Neotel says Telkom failed to respond to its request within seven days as mandated by Regulation 3(2).

[53] Regulation 20(1)(b) of the Facilities Leasing Regulations which deals with contraventions and penalties states:

> Upon a determination of non-compliance by the Complaints and Compliance Committee in terms of the ICASA Act, the Authority may impose a fine not exceeding:
>
> (a) Five hundred thousand rand (R500 000 00) for contravention of regulations 9,10(3) and 19;
> (b) Fifty thousand rand (50 000 00) for contravention of all regulations not specified in regulations 20(1)(a) of these regulations.

[54] From the reading of the above Regulation, it is the Authority, and not the CCC that has jurisdiction to impose a penalty, in the event of non-compliance.

[55] However, in terms of section 17E of the ICASA Act, the CCC may make a recommendation to the Authority to issue an order directing Telkom to pay as a fine, an amount prescribed by it for non-compliance.

[56] Regulation 20(1)(b) allows ICASA to impose a fine of R50 000 for a contravention of all regulations not specified in regulation 20(1)(a) once the CCC determines that there has been non-compliance.

[57] The CCC has determined that Telkom has failed to comply fully with regulation 3(2) in that it did not respond adequately to Neotel's request as required by the Regulations. However, this does not mean that the CCC, must, *ipso facto* recommend to ICASA that ICASA should consider imposing the said sum of R50 000 on Telkom.

[58] The CCC has a discretion whether to make such a recommendation in terms of the ICASA Act. In view of the fact that ICASA must still develop Local Loop Unbundling Regulations, also taking into account that Telkom is the first offender in a case of this nature, the CCC recommends that no fine be imposed on Telkom. However, Telkom must be warned to follow the rules and pay attention to legal requirements as stipulated in the ECA and the Regulations otherwise the CCC will not hesitate to recommend a harsh penalty allowable under the regulations in future.

JW Tutani **Date: 29 August 2012**

Chairperson

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