

**BEFORE THE COMPLAINTS AND COMPLIANCE COMMITTEE**

Date of the hearing: **08 March 2013**

Case No: **64/2012**

In the matter between:

THE INDEPENDENT COMMUNICATIONS AUTHORITY Complainant  
OF SOUTH AFRICA

And

LEXMARK INTERNATIONAL SA

Respondent

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**Committee members**

JW Tutani – Chairperson

Z Ntukwana

K Moodaliyar

J Tlokana

Councillor W Currie

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**For the Complainant: T Lekganyane**

**For the Respondent: P Grealy and J Mwilo**

## JUDGMENT

- [1] The Complainant is the Independent Communications Authority of South Africa (“ICASA”/the “Authority”), a juristic person established in terms of section 3 of the Independent Communications Authority of South Africa Act, No 13 of 2000 (the “ICASA Act”).
- [2] The Respondent is Lexmark International SA (Pty) Ltd, a company with limited liability, registered according to the company laws of the Republic of South Africa (Lexmark).
- [3] The Complainant alleged that the Respondent had contravened the Electronic Communications Act No 36 of 2005 (the “ECA”) read with the Regulations In Respect of Labelling of Telecommunications Equipment (the “Regulations”)<sup>1</sup> and, as a consequence, brought the following charges against the Respondent:

3.1 Respondent was supplying, selling or offering for sale electronic communications equipment, using radio frequency spectrum at Mass Discounting Group trading as Makro on 23 December 2008 without the necessary labels being attached to the electronic communications equipment or the containers in which the equipment was supplied, offered for sale or sold. The charge sheet alleges that this constituted a contravention of section 35(1) of the ECA.

Section 35(1) states that no person may use, supply, sell, offer for sale or lease or hire any type of electronic communications equipment or electronic communications facility, including radio apparatus, used or to be used in connection with the provision of electronic communications, unless such equipment, electronic communications facility or radio apparatus has, subject to subsection (2) been approved by the Authority.

3.2 According to the charge sheet, this also constitutes a contravention of regulations 3(1), 3(2), 4 and 7.

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<sup>1</sup> As published in Government Gazette 23212, Notice No. R289 dated 06 March 2002

3.3 Regulation 3(1) which Respondent allegedly contravened provides as follows:

All type-approved telecommunication equipment, facility or radio apparatus shall have a legible label permanently affixed to the outside of such equipment, facility or radio apparatus, bearing –

- (a) The ICASA logo and
- (b) The ICASA-issued licence number.

3.4 Regulation 3(2) says the label must be affixed before the product is made available for sale or lease or is supplied in any other manner.

3.5 In terms of regulation 4, the container in which the equipment, facility, or radio apparatus referred to in regulation 3 is supplied, shall bear a similar label.

3.6 Regulation 7 stipulates that in the event of a supplier wanting to produce his own label, a sample of the proposed label shall accompany the application for the type-approval of the telecommunication equipment, facility or radio apparatus. This label may only be used if approved by the Authority in writing.

[4] Failure to affix labels on the containers before supplying, offering for sale or selling them and failure to affix labels on the electronic communications equipment before supplying, offering for sale or selling it, led to the seizure of the following equipment:

4.1 Lexmark X5600 – facsimile machine

4.2 Lexmark X50XN –facsimile machine.

[5] Mr Grealey conceded that the Respondent did not comply with regulations 3 and 4 and, in mitigation, explained the circumstances in which the said non-compliance took place.

[6] Regarding the alleged contravention of section 35(1) of the ECA, Mr Grealey referred the CCC to copies of licences marked Annexures “C” and “D” respectively, contained in the paginated bundle of documents.

[7] The said licences were issued by the Complainant in favour of the Respondent and Mr Lekganyane admitted the licences were for the

equipment that had been seized. At the time of the seizure, (23 December 2008), the licences were still valid as their expiry date was 31 March 2009. As a matter of fact, Mr Lekganyane went on to say that on 23 December 2008, the licences were “appropriate”.

[8] It is worth noting that as early 14 November 2012, Respondent played open cards with Mr Lekganyane by making a written submission in which it made concessions where it was on the wrong side of the law and, at the same time, explained why it believed it was not in breach of section 35(1) of the ECA.

[9] It looks like Mr Lekganyane elected to ignore MR Grealey’s written submission and pieces of evidence (e.g. licences) to prove Respondent’s claims and chose, instead, to meet Respondent headlong, in a hearing.

[10] Regarding the alleged violation of regulation 7, Mr Lekganyane testified in his evidence-in-chief that “....Lexmark has been putting their own labels, it’s one of those things that we never pursued at the same time, but it’s one of those aspects.” With respect, this does not make sense and has no value to enhance Complainant’s case. When the Chairperson asked for evidence, Mr Lekganyane’s reply was “.....we can go back to the store and bring it up.”

[11] When Mr Grealey put to him that Respondent was using ICASA’s label, Mr Lekganyane said “Presently I can’t dispute that because I don’t have evidence that they are really putting only ICASA stickers on it.”

[12] In his closing argument, Mr Grealey submitted that the cause for the complaint arose on 23 December 2008. He said 60 days would have expired around 23 February 2009.

[13] He said the charge sheet was drafted on 23 July 2012. It is common cause that this date was incorrect and was amended by Mr Lekganyane in his e-mail to Mr Jooste to 23 December 2008.

[14] Lastly, Mr Grealey submitted that it was iniquitous to seek to bring the complaint 3 years and 7 months later and more than that, it was not competent by virtue of the provisions of section 17C which speak for themselves.

- [15] The relevant section on which Mr Grealey relied says a person who has reason to believe that a licensee is guilty of non-compliance with the terms and conditions of its licence or with the ICASA Act or the underlying statutes, may lodge a complaint with the Authority within 60 days of becoming aware of the alleged non-compliance.<sup>2</sup>
- [16] It is significant that Mr Lekganyane did not respond to Mr Grealey's argument which had the potential to strike a lethal blow to the Authority's case. At the very least, he should have asked for a postponement to consult the Legal Division for guidance.
- [17] The question before the CCC is whether the provisions of section 17C(1)(a) as quoted above relating to the period within which a complaint must be lodged with the Authority, also apply to an inspector who acts in terms of section 17F(5)(c), (d) or (e) of the ICASA Act.
- [18] In section 17F(5)(c), there is no mention of any time period within which an inspector must investigate or evaluate any alleged or suspected non-compliance by a licensee with its licence terms and conditions, the provision of the ICASA Act or the underlying statutes, breach of an agreement or failure to provide a communications service.
- [19] In section 17F(5)(d), there is also no mention of any time period within which an inspector must refer all non-compliance matters to the CCC for consideration, where an inspector determines that a licensee has not complied with the terms and conditions of its licence, the provisions of the ICASA Act or the underlying statutes or failed to provide broadcasting or communications services.
- [20] There is also no mention in section 17F(5)(e) of any time period within which an inspector must refer all complaints to the CCC for consideration after an investigation has been carried out, nor is there in section 17F(5)(c), (d) or (e) any indication that any complaint should have been directed to the CCC by the Authority.
- [21] The legislation is presumed to be consistent with itself.....where there are two sections in an Act which seem to clash but which can be interpreted so as to give full force and effect to each, then such interpretation is to be

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<sup>2</sup> Section 17C(1)(a) of the ICASA Act

adopted rather than the one which will partly destroy the effect of one of them.<sup>3</sup>

[22] It is a well-recognised principle in the construction of statutes to construe them as to avoid, if possible, a conflict between different parts of an Act.<sup>4</sup>

[23] In our view, the abovementioned two sections of the ICASA Act which seem to clash can be interpreted to give full force and effect to each. That interpretation is to be adopted rather than the one which will partly destroy the effect of one of them.

[24] It is also our view that the legislature never intended that the provisions of section 17C(1)(a) would be applicable to a case where an inspector has, in terms of section 17F(5)(c) investigated and evaluated any alleged or suspected non-compliance by a licensee with its licence terms and conditions, the provisions of the ICASA Act or the underlying statutes, breach by a licensee of an agreement between it and its subscribers or failure to provide a communications service.

[25] This is supported, in our view, by section 17F(5)(d) which provides that an inspector must refer all non-compliance matters to the CCC for consideration where he determines that a licensee has not complied with the terms and conditions of its licence, the provisions of the Act or the underlying statutes or failed to provide broadcasting or telecommunications service.

[26] The procedure envisaged in section 17C(1)(a) is quite different from that of section 17F(5)(c), (d) and (e). Firstly, section 17C(1)(a) does not refer to an inspector at all. It speaks about a person who has reason to believe that a licensee is guilty of any non-compliance with the terms and conditions of its licence or with the ICASA Act or the underlying statutes who may lodge a complaint with the Authority within 60 days of becoming aware of the alleged non-compliance.

[27] Secondly, it is clear from section 17F(5)(c) and (d) that an inspector is not required to lodge a complaint with the Authority within 60 days of becoming aware of an alleged non-compliance, or at all. In terms of section 17F(5)(c), he must investigate and evaluate any alleged or suspected non-

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<sup>3</sup> Principal Immigration Officer v Bhula AD 345

<sup>4</sup> Minister of the Interior v Estate Roos 1956(2) SA 266(A) at 271B

compliance. In terms of section 17F(5)(d), he must refer all non-compliance matters to the CCC for consideration where he determines that a licensee has not complied with the terms and conditions of its licence, the provisions of the ICASA Act or the underlying statutes or failed to provide broadcasting or communications services.

[28] The legislature did not deem it fit to impose any time restraints on an inspector possibly because it was not considered to be in the interests of proper administration of the ICASA Act to require him to conclude his investigation and evaluation of any alleged or suspected non-compliance by a licensee within any particular time or that he should refer all non-compliance matters to the CCC within any such time. No doubt, the legislature envisaged that an inspector would do so within a reasonable time, but certainly not, as in the case of a complaint in terms of section 17C(1)(a), within 60 days of the inspector becoming aware of an alleged non-compliance.

[29] The legislature probably considered to be in the public interest and in the interests of fairness to a licensee that a complainant should lodge his complaint with the Authority within 60 days of becoming aware of the alleged non-compliance.

[30] An inspector has a duty not only to investigate any alleged or suspected non-compliance, but also to determine whether a licensee has complied with the terms and conditions of its licence, the provisions of the ICASA Act or the underlying statutes or has failed to provide broadcasting or communications services. It seems that the legislature considered that it would not be fair to require an inspector to be bound by any particular time constraints in performing his duties. However, an inspector is required to perform his aforesaid duties within a reasonable time.

[31] Having said this, Mr Lekganyane took a long time in investigating and evaluating the complaint against Respondent which finally landed with the CCC. The CCC urges the inspectorate to ensure that they finalise all their investigations within a reasonable time. A reasonable time will depend on the complexity of a particular matter and the CCC cannot prescribe what a reasonable time is.

[32] Having regard to the legal position as explained above, Mr Grealey's argument regarding 60 days is dismissed. Mr Lekganyane is not affected

by 60 days stipulated in section 17C(1)(a) of the ICASA Act as this section does not apply to an inspector.

- [33] Mr Lekganyane gave evidence on behalf of Respondent. When he gave evidence, he spoke in general terms, making reference to other retailers who had allegedly contravened the Regulations rather than restricting his evidence against Respondent. Interestingly, those retailers had not been indicted and were not before the CCC. In addition, the Respondent was not even one of those retailers.
- [34] He gave detailed evidence regarding past contraventions by other licensees which had nothing to do with the Respondent. For example, he said “A couple of years back we had one consumer in our Cape Town region whereby this consumer went and bought equipment outside and brought it into the country, a facsimile also which has capabilities of also being used as a phone.”
- [35] He said when the equipment developed problems; they launched an investigation and confiscated it. The consumer was offered another type of equipment.
- [36] Mr Lekganyane did not know how to package the evidence he had against Respondent thereby putting in jeopardy any prospects of success in his prosecution.
- [37] Mr Grealey pointed out that Mr Lekganyane’s evidence was not supported by the charge sheet, was anecdotal and was not relevant to the Respondent.
- [38] Mr Lekganyane’s response was “I was just trying to appraise the Committee of the whole matter, and also for your own aspects. But if you think that it’s irrelevant, you don’t want it, it’s fine, we can confine it to the particular aspects, but the whole thing is we do have your equipment which is not labelled which we can bring in.”
- [39] Mr Grealey pointed out that as early as March 2009, they had already engaged the Authority regarding labels which had not been affixed to the equipment and had, at the same time indicated what remedial action Respondent had taken.
- [40] Mr Lekganyane’s response was “In terms of that particular aspects, we do agree, but it was not referred basically in terms of our own evidence that



Lexmark never co-operated with us, it was just said in terms of just explaining that to the Committee that certain suppliers never co-operated with us, but Lexmark did co-operate with us, because that's why this particular letter came into being."

[41] If then Lexmark had co-operated, why did Mr Lekganyane bring up the question of non-co-operation by other suppliers who were not charged? This and his responses quoted above demonstrate Mr Lekganyane's lack of understanding which issues are relevant and should be brought up in a hearing.

[42] By quoting extensively from Mr Lekganyane's responses, we are trying to show that Mr Lekganyane should be assisted by the legal team in preparing for hearings otherwise the Authority will never be successful in its prosecution of brazen law-breakers. Simply stated, Mr Lekganyane does not have the skill and expertise to prosecute wayward licensees and this is understandable because he is not a trained lawyer.

[43] After listening to the submissions of Mr Lekganyane and Mr Grealey, we have come to the conclusion that Mr Lekganyane has been unable to prove that Respondent contravened section 35(1) of the ECA as well as Regulation 7 for the following reasons:

43.1 Mr Lekganyane agreed under cross-examination that Respondent had valid licences which he said were "appropriate." Section 35(1) was therefore not contravened.

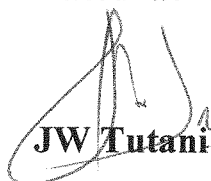
43.2 Mr Lekganyane could not produce proof that Respondent was using its own labels on its equipment which had not been approved by the Authority. He was in possession of the equipment he had confiscated and had ample opportunity to bring it to the hearing to prove the alleged contravention of Regulation 7.

[44] Mr Grealey conceded that Respondent had indeed breached Regulations 3 and 4 and we accept that. They took remedial action immediately they were confronted by Mr Lekganyane about non-compliance. Mr Lekganyane kept the Respondent's goods for a long time and by now, they have no value and this is a loss to the Respondent. The goods were still with Mr Lekganyane during the hearing. Lastly, the Respondent cooperated with Mr Lekganyane.

## **RECOMMENDATIONS**

- [45] Respondent cooperated with Mr Lekganyane and conceded that it had contravened Regulations 3 and 4 and did not waste the CCC's time. In addition, Respondent suffered a loss as its goods had become obsolete by being kept by Mr Lekganyane for a long time. Accordingly, we recommend that no sanction be imposed on the Respondent.
- [46] In our judgment in the matter between ICASA v Massmart, we made certain comments and recommendations regarding the role that should be played by ICASA's Legal Division in matters of this nature. Kindly refer to the said judgement.
- [47] We have once again found the quality of the transcript to be poor and in the same matter of ICASA v Massmart, we made certain comments and recommendations on this aspect. We respectfully refer the Council to the said judgment.
- [48] We also recommend that Council seek an amendment to the ICASA Act that will empower the CCC to condone non-compliance with the ICASA Act or the underlying statutes.

**Dated at Bryanston on this 22nd day of June 2013.**



**JW Tutani**

**Chairperson**

**Z Ntukwana, K Moodaliyar, J Tlokana and Councillor Currie  
concurred with the above judgment.**