# COMPLAINTS AND COMPLIANCE COMMITTEE

Date of Final Hearing: 26 October 2015 CASE NUMBER GAU3586/11

LAPA LAKA cc COMPLAINANT

MOBILE TELEPHONE NETWORKS (Pty) Ltd RESPONDENT

CONSUMER DIVISION (ICASA) INTERVENING

## EXECUTIVE SUMMARY BY CHAIRPERSON

[1] The core of the complaint by the Complainant, Mr Pieterse from Lapa Laka cc, was that he was not informed by MTN, when he made an arrangement for roaming, as to roaming costs for his mobile phone when visiting the United States.
[2] From the facts it emerged that when making the arrangement for roaming, he had not asked details from the attendant.
[3] On his return to South Africa he refused to pay the account.
[4] After attempts at settling the matter via the MTN Ombudsman had failed, the Complainant filed a complaint with the CCC.
[5] The CCC held that it was not necessary to deal with preliminary points made by MTN, since the matter could be resolved in favour of MTN by applying regulation 3.6 of the Code of Conduct for Electronic Communications and Electronic Communications Network Licences, 2007:

3.6 Tariffs

a) Licensees must publish information on applicable tariffs, fees and terms and conditions for provision of the relevant service.

b) Licensees must not provide any service for a charge, fee or other compensation, unless the prices for the service and other terms and conditions of the provision of such service have been made known to the public and the Authority by:

i. making such information available for inspection at its offices during business hours;

ii. **providing such details to anyone who requests at no charge;**

iii. providing such details on its website;

iv. providing such pricing details within thirty (30) days of commencing a service.

[6] It was common cause that Mr Pieterse had not requested details when he made the arrangements. A pre-condition was, accordingly, not met by Mr Pieterse.
[7] Sub-clauses i, iii and iv were also complied with by MTN.

The Complaint was, accordingly, not upheld.

22 November 2015

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MOBILE TELEPHONE NETWORKS (Pty) Ltd RESPONDENT

CONSUMER DIVISION (ICASA) INTERVENING

PANEL: Prof. JCW Van Rooyen SC
Councillor Nomvuyiso Batyi
Mr Jack Tlokana
Ms Mapato Ramokgopa

Mr H Pieterse, Managing Member of Complainant

Adv Adrian Friedman for MTN instructed by Mr Robby Coelho from Webber Wentzel, Johannesburg

Mr Ehiremen Enabor from Mkhabela Huntley Adekeye for the intervening ICASA Consumer Division

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**JUDGMENT**

JCW van Rooyen SC



[1] An Independent Administrative Tribunal set up in terms of the Independent Communications Authority Act 13 of 2000.The CCC was recognised as an independent tribunal by the Constitutional Court in 2008. It, inter alia, decides disputes referred to it in terms of the Electronic Communications Act 2005. Such a decision is, on application, subject to review by a Court of Law. The Tribunal also decides whether complaints (or internal references from the compliance division or inspectors 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. The decision is then referred to Council for noting. Where a complaint or reference concerning non-compliance is upheld, the matter is referred to the Council of ICASA with a recommendation as to sanction 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. A licensee, which is affected by the sanction imposed, has a right to be afforded reasons for the Council's imposition of a sanction. In the normal course, where Council is satisfied with the reasons put forward to it by the Complaints and Compliance Committee, further reasons are not issued. The final judgment is, on application, subject to review by a Court of Law.

[1] The complainant, Lapa Laka cc ("Lapa Laka"), concluded a mobile telecommunications contract with a subsidiary of MTN in 1994. On 17 July 2011, Mr Pieterse, a member of Lapa Laka, attended at the MTN Sandton branch in order to set up international roaming to be used on a trip that he was about to take to the United States. He stated that, when he visited the branch to activate roaming, he was at no stage informed about the costs and/or charges attendant upon the use of international roaming. When Mr Pieterse returned from the United States, he queried Lapa Laka's invoice for roaming charges. His complaint focused on the quantum of his invoice (which, including roaming charges, was approximately R50 000). Thereafter, there was engagement between Mr Pieterse and MTN during the period between August and December 2011 in which MTN attempted to resolve the dispute. This included a referral by MTN to the independent ombudsman established by MTN to address customer complaints. During this period, Mr Pieterse's approach was that Lapa Laka would not pay MTN any of the amounts due by Lapa Laka in respect of its cell-phone contract with MTN, also those (for instance, the fixed monthly contract payment) that were not the subject of the roaming dispute. Meetings were conducted, in the first half of 2012, in an attempt to resolve the dispute. These were, however, fruitless. By August 2012, Lapa Laka's account was in arrears in an amount of approximately R26 000 in respect of non-disputed amounts, unrelated to roaming. As a result, Lapa Laka's account was suspended.

[2] During the process of engagement, MTN agreed to waive 82% of the roaming charges. It did not consider it fair for it to be expected to waive any more, because the charges had been validly incurred and MTN had paid for the data in terms of its agreements with its international roaming partners. In due course, and in a gesture of goodwill, MTN waived the balance of the charges so that Lapa Laka was required to pay nothing for the roaming service that it used while in the United States. At the hearing Mr Pieterse mentioned that Lapa Laka did, however, pay R10 000 of its debt. Ultimately, the dispute was not resolved to Mr Pieterse's approval.

[3] On 8 July 2013, MTN was issued with a notice that informed it that a complaint against it had been referred by the Consumer Division of ICASA

to the CCC. The complaint against MTN was that it failed to comply with regulations 3.1(e) and 3.5(a) of the Code of Conduct for Electronic Communications and Electronic Communications Network Licences, 2007 ("the Code").

[4] The Complaints and Compliance Committee, during 2014, heard this matter and certain preliminary matters were decided. The points decided upon were:

1. That MTN could not argue that roaming was dealt with by a subsidiary, MTN SP, since it had actively participated in the negotiations in regard to the arrangement which was made by Lapa Laka's Mr Pieterse.[2]

2. That although the Regulations excluded juristic persons, like Lapa Laka cc, from protection in terms of the Regulations, juristic persons also deserved protection, in the light of interests referred to in other parts of the Regulations.[3]

3. That the 60 days which are prescribed for a complaint to be filed with ICASA did not run during the period when settlement attempts were made with MTN. The Committee stated as follows: "The Complainant could not, whilst busy negotiating with MTN, lodge a complaint to ICASA. By doing that, Complainant would be negotiating in bad faith. What is more, Complainant…could not have known that he had to observe the 60-day period. He was not involved in the electronics business and had no reason



[2] As part of the motivation in reaching this result, the Committee states as follows in para [25]: "Throughout, (MTN) it gave the Complainant the impression that it was on the correct path by consulting and negotiating with it, thereby misleading it.. MTN's lawyers who were directly involved in this matter knew or ought to have known that MTN and MTN SP were separate entities, but instead, participated in making Complainant to believe that it was correct in dealing with MTN. MTN cannot eat its cake and have it." And in para [30]: "In our view MTN was dishonest throughout the negotiations and consultations with the Complainant. Its behaviour (sic) suggested that it was not genuine in its dealings with the Complainant." And in para [31] in regard to piercing the corporate veil, which was argued by counsel for MTN not to be applicable to the present facts: "In our view, MTN acted dishonestly and improperly by not disclosing the identity of the relevant entity."

[3] The learned Chairperson states as follows in para [41]: "In terms of these obligations (in the Code), licensees are required to: 1. Act in a fair, reasonable and responsible manner in all dealings with the consumer; 2. ensure that all services and products meet the specifications as contained in their licence conditions; and 3. provide consumers with information regarding services and pricing." In para [42] the following is stated: "Indeed there are some obligations which are applicable exclusively to natural persons but, as can be seen from the above examples, natural and juristic persons are catered for. The Code excludes juristic persons but in the same breath, includes end-users which recognise juristic persons and, in the result, we conclude that the Code applies to Lapa Laka."

to familiarize himself with the labyrinth of the law and regulations governing this industry. His relationship with this industry is as a result of being MTN's client, and that is all."

[5] The CCC, as presently constituted, took this case over in 2015.[4] The approach was that the matter could validly be divided[5] and this was accepted by the Complainant, the Consumer Division of ICASA and MTN. The CCC, as constituted previously, had limited its judgment to points which amounted to *preliminary* matters. It had decided that MTN was the respondent, the Code was applicable to it in spite of the fact that Lapa Laka is a juristic person and the complaint was lodged after the prescribed sixty day period. For purposes of the resolving of the merits of the matter before us, it was agreed that it would be resolved by way of affidavits. Although MTN still argued, persuasively, that the CCC did not have jurisdiction since Lapa Laka is a juristic person and that the Code was, accordingly, not applicable to it, the crux of the matter turned on another principle which was overwhelmingly sufficient to bring the matter to a close. That principle, which related to the merits of the matter, was not dealt with in the first judgment and we could, accordingly, decide this point without reverting to the first judgment.

[6] A matter which should be mentioned and which, once again, was not necessary to bring the matter to a close on the papers before us, is the question of dishonesty or improper use of legal personality as a subterfuge. We do not believe that it was necessary to have found dishonesty on the side of MTN to have held it to be responsible in this matter. MTN could very well have been found to have been responsible based on its use of MTN SP as an agent or estoppel.[6] There are, in our view, sufficient other approaches to holding MTN responsible in terms of the Code. On the other hand, it should also be taken into consideration that the law permits a person to



[4] The term of the chair and two members had come to an end at the end of November 2014.

[5] The alternative, that the first committee was seized with the matter was, accordingly, not regarded as applicable.

[6] Estoppel is defined as follows in *Bester NO v Schmidt Bou Ontwikkelings CC* 2013 (1) SA 125 (SCA) at para: [17]: "Broadly stated, the concept of estoppel, borrowed from English law as applied by our courts, amounts to this: when a person (the representor) has by words or conduct made a representation to another (the representee) and the latter acted upon the representation to his or her detriment, the representor is estopped, that is precluded, from denying the truth of the representation…"

organise her or his duties in a variety of manners which are quite legal, although they might appear to be evasive.[7] In any case, it is not necessary to pursue this matter, since MTN has, for purposes of the dispute on the papers before us, accepted, without indicating the basis thereof - that it is the responsible party.[8] The argument based on MTN SP was not repeated, although it was not, according to Mr *Friedman*, abandoned.

[7] Let me, thus, return to the matter before us. As mentioned, the complaint was that MTN had failed to comply with regulations 3.1(e) and 3.5(a) of the Code. The relevant provisions provide as follows:

> 3. General standards to be adhered to by electronic communications services and electronic communications network services licensees
>
> 3.1 Key commitments
> All Licensees must:
> e) provide consumers with information regarding services and pricing;
>
> 3.5 Provision of information
> a) Licensees must inform / provide consumers with information regarding the broad range of services / products on offer, tariff rates applicable to each service offered, terms and conditions, payment policies, billing, complaints handling procedures and relevant contact details.

Since Regulation 3.6 is also relevant for purposes of this judgment, it is also quoted here:

> 3.6 Tariffs



[7] Cf. Centlivres CJ in *Commissioner for Inland Revenue v Estate Kohler and Others 1953 (2) SA 584 (A) at 591-2* , where the following approach of Lord Tomlin in *Inland Revenue Commissioners v The Duke of Westminster* [1936] AC 1 at 19 and 20 was applied and approved:'. . . [i]t is said that in revenue cases there is a doctrine that the Court may ignore the legal position and regard what is called "the substance of the matter", and that here the substance of the matter is that the annuitant was serving the Duke for something equal to his former salary or wages, and that therefore, while he is so serving, the annuity must be treated as salary or wages. This supposed doctrine (upon which the Commissioners apparently acted) seems to rest for its support upon a misunderstanding of language used in some earlier cases. The sooner this misunderstanding is dispelled, and the supposed doctrine given its quietus, the better it will be for all concerned, for the doctrine seems to involve substituting "the uncertain and crooked cord of discretion" for "the golden and straight metwand of the law". Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioner of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax. This so-called doctrine of "the substance" seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable.' Recently also quoted with approval by Heher JA in *Commissioner, South African Revenue Service v LG Electronics SA (Pty) Ltd* 2012 (5) SA 439 (SCA) footnote 10.

[8] Which, we accept, as not being based on dishonesty.

a) Licensees must publish information on applicable tariffs, fees and terms and conditions for provision of the relevant service.
b) Licensees must not provide any service for a charge, fee or other compensation, unless the prices for the service and other terms and conditions of the provision of such service have been made known to the public and the Authority by:
   i. making such information available for inspection at its offices during business hours;
   ii. providing such details to anyone who requests at no charge;
   iii. providing such details on its website;
   iv. providing such pricing details within thirty (30) days of commencing a service.
c) No tariff plan must be offered, presented, marketed or advertised in a manner that may be misleading.

[8] Although the defence to the complaint was much wider, we believe that there is one defence which will bring this matter to a close. Mr *Friedman* argued that Regulation 3.6 is the provision of the Code that describes the substantive content of the duty of licensees such as MTN to provide information to customers on pricing and, in particular, tariffs applicable to particular services. Consumer Affairs has not disputed MTN's detailed explanation in its answering affidavit of its compliance with section 3.6. This effectively amounted to the fact that the Code requires a customer to *request* information. There had been no such request by Mr Pieterse when arranging the roaming.

[9] The Complaint against MTN is that it contravened regulations 3.1(e) and 3.5(a) of the Code. Regulation 3.1(e) imposes an obligation on licensees to "provide ***consumers*** with information regarding services and pricing" (emphasis added). Regulation 3.5(a) imposes an obligation on licensees to "inform/provide ***consumers*** with information regarding the broad range of services/products on offer, tariff rates applicable to each service offered, terms and conditions, payment policies, billing, complaints handling procedures and relevant contact details" (emphasis added). The preamble to the Code describes its main objectives as being to (1) prescribe guidelines that will set acceptable standards of conduct by licensees in respect of ***consumers*** and (2) protect the rights of ***consumers*** in the electronic communications sector. There can be no doubt, from these

definitions and provisions reproduced above, that the duties of relevance to these proceedings, are owed to "consumers".

[10] As argued by Mr *Friedman*, it is not correct to speak of a licensee contravening regulation 3.1(e), read with 3.5(a), of the Code. There is an essential element missing in such an allegation. Regulation 3.1 of the Code is entitled "key commitments". It is analogous to a preamble or to a provision in an Act, such as section 2 of the ECA, which lists the objectives of the Act. It lists several general statements of commitments that licensees must make. One of these is to provide consumers with information regarding services and prices.[9] MTN argued that regulation 3.1 lists a series of key commitments that a licensee must make. These commitments are clearly very important and mentioning them in 3.1 as part of the key commitments is understandable. But, importantly, the *content* of the commitments relevant to this case are spelled out later in the Code. It is for this reason that Mr *Friedman* persuasively argued that a complaint that a licensee has breached regulation 3.1 is meaningless without a reference to the substantive provision of the Code (for instance, regulation 3.6) that determines the *content* of the obligation.

[11] Regulation 3.5(a) imposes a wide-reaching and comprehensive duty on licensees to "inform/provide consumers with information regarding the broad range of services/products on offer, tariff rates applicable to each service offered, terms and conditions, payment policies, billing, complaints handling procedures and relevant contact details". Regulation 3.5 imposes varied obligations when it comes to the providing of information. The Code proceeds to flesh out those of these obligations that require elaboration: regulation 3.6 deals with the provision of information regarding tariffs (one of the topics listed in regulation 3.5(a)); regulation 3.7 deals with contract terms and conditions (another of the topics listed in section 3.5(a));regulation 3.9 deals with charging, billing, collection and credit practices (which are all examples of payment policies and billing, both of which are topics listed in regulation 3.5(a)); and regulation 3.10 deals with



[9] Regulation 3.1(e).

complaints-handling procedures (which is also one of the topics listed in section 3.5(a)).

[12] Accordingly, a complaint that alleges a breach of regulations 3.1(e) and 3.5(a) omits an essential averment. The allegation is meaningless without reference to regulation 3.6, because *that* is the provision that addresses the substantive content of the duty of licensees to provide tariff rates applicable to each service that is offered (as envisaged by regulation 3.5(a)).

[13] Mr Pieterse states that when he visited the MTN store in Sandton before his trip to the United States, he was not told what the charges for roaming would be. This is not disputed by MTN. It is, however, common cause that Mr Pieterse did not ask for the roaming pricing. Mr *Engabor*, for Consumer Affairs, argued that regulations 3.1(e) and 3.5(a) impose an independent obligation on licensees such as MTN, divorced from the requirements of regulation 3.6, to provide consumers with pricing information - even when they do not ask for it. However, the problem with this interpretation is, with respect, that it means that regulations 3.1(e) and 3.5(a), on the one hand, and regulation 3.6 on the other, impose obligations on the same topic which are inconsistent. On that construction regulations 3.1(e) and 3.5(a) impose a duty on MTN to provide all customers with pricing information even when they do not ask for it. Regulation 3.6, on the other hand, provides that tariff information must be made known to the public by, amongst other things, providing such details to anyone who requests it, at no charge.[10] The answer to this seeming conflict lies in reading these regulations together – in fact, in harmony with each other. The express reference in regulation 3.6 to a request for pricing information would be meaningless in a context in which there was already an obligation (as contended for by Consumer Affairs) to provide information to all consumers (including those who have not asked for it).Wallis JA has also,



[10] Section 3.6(b)(ii).

more recently, placed accent on *context* in the process of interpretation of statutes.[11]

[14] The question that now arises is whether MTN, as a matter of fact, violated regulations 3.1(e), 3.5(a) and 3.6, read together, of the Code. Regulation 3.6 of the Code, to the extent relevant here, reads as follows:

> "a) Licensees must publish information on applicable tariffs, fees and terms and conditions for provision of the relevant service.
>
> b) Licensees must not provide any service for a charge, fee or other compensation, unless the prices for the service and other terms and conditions of the provision of such service have been made known to the public and the Authority by: i. making such information available for inspection at its offices during business hours; ii. providing such details to anyone who requests at no charge; iii. providing such details on its website; iv. providing such pricing details within thirty (30) days of commencing a service."

The duties envisaged by regulations 3.6(b)(i), (iii) and (iv) arise automatically. The duty envisaged by regulation 3.6(b)(ii) is triggered by a request from any person for that information. In other words, regulation 3.6(b)(ii) only arises when someone asks a licensee for the tariff information applicable to any service that the licensee offers (eg roaming).The papers reveal that the following facts are common cause:Mr Pieterse did not ask for the tariff information, so the obligation envisaged by regulation 3.6(b)(ii) of the Code does not arise in this case. MTN complied with all of the other requirements of regulation 3.6.The prices and terms and conditions of roaming services (and any other MTN products



[11] Thus the learned Judge of Appeal said the following in *Natal Joint Municipality Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18] : "The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the **context** provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. …The 'inevitable point of departure is the language of the provision itself', read in **context** and having regard to the purpose of the provision and the background to the preparation and production of the document."(footnotes omitted and emphasis added)

and services) are made available to customers at MTN's premises and stores across South Africa and were available in July 2011, the time relevant to this complaint. A customer could, at that time, approach any MTN branch to request the pricing and would then be given it in hardcopy.[12]All pricing and terms and conditions are (and were in July 2011) uploaded and made available (primarily on the website) on the launch date of products and services.[13] Therefore, MTN complied with the obligation to publish all relevant tariffs, including the tariffs in relation to international roaming, on its website.[14]Crucially, ICASA issued a report, covering the time in which Lapa Laka's complaint arose, in which ICASA confirmed that MTN was in compliance with regulation 3.6 of the Code.[15]

[15] In our view all the requirements of regulation 3.6 of the Code were complied with by MTN in 2011. As a result, there was no contravention of regulations 3.1(e) and 3.5(a) of the Code because, by complying with regulation 3.6, MTN complied with the duty to provide consumers with information regarding tariff rates applicable to roaming. And, as pointed out, no request for details was made by Mr Pieterse. Accordingly, no duty arose to provide details.

[16] In the result the complaint against MTN is dismissed. This finding on the merits is communicated to the Council of ICASA for noting.

[17] Given the finding on the merits, the matter of sanction, accordingly, does not arise and no recommendation is made to Council.

J. e. s. van Rooyen

22 November 2015



12 Answering Affidavit at para 18.1, pg 163 and para 18.4, pg 166; See Replying Affidavit at paras 21 to 23, pgs 280-281 in which these allegations are not disputed.

13 Answering Affidavit at para 18.1, pg 163. See Replying Affidavit at paras 21 to 23, pgs 280-281 in which this allegation is not denied.

14 Answering Affidavit at para 18.2, pgs 163-166 and para 18.4, pg 166. See Replying Affidavit at paras 21 to 23, pgs 280-281 in which this allegation is not denied.

15 Answering Affidavit at para 18.3, pg 166. See Replying Affidavit at paras 21 to 23, pgs 280-281 in which this allegation is not denied.

Councillor Batyi and Members Tlokana and Ramokgopa agreed.