



COMPLAINTS AND COMPLIANCE COMMITTEE

DATE OF HEARING: 12 NOVEMBER 2021

CASE NO: 412/2021

TELKOM SA SOC LTD

COMPLAINANT

V

METRO FIBRE NETWORKX (PTY) LTD

RESPONDENT

CCC MEMBERS:

Judge Thokozile Masipa - Chairperson
Councillor Dimakatso Qocha - Member
Mr. Paris Mashile - Member
Mr. Peter Hlapolosa - Member
Mr. Thato Mahapa - Member
Ms. Ngwako Molewa - Member

FROM THE OFFICE OF THE CCC:

Lindisa Mabulu - CCC Coordinator
Meera Lalla - CCC Assessor
Xola Mantshintshi - CCC Assessor
Thamsanqa Mtolo - CCC Assessor
Amukelani Vukeya - CCC Administrator

LEGAL REPRESENTATION FOR PARTIES

Complainant - BL Makola SC
Instructed by Maphanga Maseko and
Fahima Rahim (from TGR Attorneys)
Respondent - Adrian Botha SC
Instructed by Anton Kotze
(Makda Cull Kotze Inc.)

JUDGMENT

Judge Thokozile Masipa

INTRODUCTION

[1] The Complainant is Telkom SA SOC Limited ("Telkom"). The Respondent is Metro Fibre Networx (Pty) Limited ("MFN"). Both Telkom and MFN are electronic communications services ("ECS") and electronic communications network services ("ECNS") licensees. The parties, therefore, fall within the jurisdiction of the CCC.

THE COMPLAINT

[2] The complaint concerns the Respondent's alleged failure to comply with section 43 (1) of the Electronic Communications Act 36 of 2005 ("ECA") read with Regulation 3 of the Electronic Communications Facilities Leasing Regulations ("Leasing Regulations").

[3] The basis of the complaint is that the *Respondent "unlawfully accessed Telkom's electronic communications facilities at Cottage Creek and Stone Forest Housing Complexes in Mooikloof Ridge Estate in Pretoria"* ("the estates").

THE RELIEF SOUGHT

[4] Telkom seeks the following relief:

1. A finding that the Respondent has failed to comply with section 43(1) of the ECA read with Regulations 3 of the Regulations;
2. The Respondent is directed to remove its fibre optic cables installed in Telkom's manholes, covers, ducts and/or pipes and in any of Telkom's electronic communications facilities in the Estates;
3. The removal should be done within 10 (ten) calendar days of the order sought above;

4. The CCC shall make recommendations to ICASA to impose an appropriate administrative penalty on the Respondent for its unlawful conduct; and
5. Any other relief which the CCC thinks appropriate.

HISTORICAL BACKGROUND

- [5] Circumstances which led to the present complaint, in the words of the complainant, are the following:
- [6] Telkom constructed, among others, ducts, manholes and related electronic communications network infrastructure (“Telkom infrastructure”) in the Cottage Creek and Stone Forrest housing complexes in Mooikloof Ridge Estate, Pretoria (the “Estates”).
- [7] The Telkom infrastructure falls within the definition of “electronic communications facilities” as defined in section 1 of the Electronic Communications Act of 2005 (ECA).
- [8] In or about September and October 2020, Telkom conducted inspections in the Estates during which it found that the Respondent had installed its fibre optic cabling in the Telkom infrastructure at the Housing Complexes without following the prescribed regulatory process as set out in section 43 of the ECA read with regulation 3 of the Facilities Leasing Regulations.
- [9] Through its Openserve division, and in an attempt to resolve the matter, Telkom addressed a letter to MFN, stating among others, that MFN has unlawfully accessed the Telkom’s infrastructure and requesting it to remove its fibre optic cables from such infrastructure within a period of 7 days from the date of the letter. A flurry of correspondence between the parties followed but failed to produce the desired results. Consequently, Telkom lodged the present complaint.

THE DEFENCE

- [10] In its papers, MFN admits that it accessed the underground infrastructure at the Estates without following the prescribed procedure set out in the ECA. It, however, denies any wrongdoing on its part. In its defence, MFN avers

that the infrastructure it accessed does not belong to Telkom but to the HOAs of the Estates.

[11] According to MFN, it sought and obtained the necessary permission from the HOAs and it was on this basis that it accessed the said infrastructure. It was submitted on behalf of MFN that MFN did not need to enter into a leasing agreement with Telkom as it had entered into agreements with the HOAs of the Estates.

[12] In addition to this defence MFN raised two points *in limine*, namely:-
lack of jurisdiction on the part of the CCC to entertain the complaint and non-joinder. It was submitted on behalf of MFN that the HOAs had an interest in the proceedings and should have been joined as parties. However, since the CCC did not have jurisdiction over the HOAs, it lacked jurisdiction to adjudicate the present complaint.

THE PROCEEDINGS

[13] Because of the jurisdictional point which the Respondent raised at the outset, it became necessary for the CCC to first hear argument on jurisdiction only. For that reason, this judgment shall deal with the merits only insofar as it is necessary to reach a decision on jurisdiction.

JURISDICTION

[14] **Jurisdiction** has been defined as "*the power or competence of a court to hear and determine an issue between the parties*". (See **Spendiff v Kolektor (Pty) Ltd 1992(2) SA 537 (A) at 551**).

The above definition equally applies to a tribunal such as the CCC.

[15] MFN challenged the jurisdiction of the CCC to hear the complaint on the ground that Telkom did not own the electronic communications facilities in the Estates. Instead, ownership of the facilities concerned vested in the HOAs in the respective estates. In support of its contention that the electronic communications facilities belonged to the HOAs, MFN annexed a document

titled "Grants of Rights Agreement" from the HOAs which allegedly gave the MFN permission to access the facilities in the Estates.

[16] MFN further contended that because the HOAs has an interest in the matter they should have been joined as interested parties. However, since the CCC does not have jurisdiction over the HOAs, its jurisdiction to hear the present complaint was ousted.

[17] On behalf of Telkom it was submitted that the HOAs had no interest in the matter before the CCC as the only issue to be determined was whether MFN had failed to comply with Section 43 of the ECA. Telkom's stance was that the CCC has jurisdiction to hear and adjudicate on the matter. The basis of this contention was that the complaint against MFN was that it had failed to adhere to the statutorily prescribed regime for accessing the underground electronic communications facilities of another licensee as set out in section 43 of the ECA, read with the Regulations. That was the one and only issue to be determined.

Case Law

[18] The question of jurisdiction came under scrutiny in numerous cases. Both counsel kindly furnished the CCC with authorities, a long line of cases where the question of jurisdiction was dealt with. The CCC is grateful to both Mr Makola SC and Mr Brand SC for their assistance. In most of these matters the courts dealt with labour law related matters but the principles in those cases are applicable in the present case.

[19] **In Baloyi v Public Protector and Others 2021 (2) BCLR 101 (CC) at para [33]** it was reiterated that an assessment of jurisdiction must be based on an applicant's pleadings, as opposed to the substantive merits of the case. In answering the question whether the CCC has jurisdiction to hear this matter, the nature of the proceedings and/or the nature of the relief claimed must be taken into account. (See **Estate Agents Board v Lek 1979 (3) SA 1048 (A) at 1063 F-H**).

[20] The role played by the applicant's pleadings in determining whether a court has jurisdiction to hear a matter was confirmed in **Gcaba v Minister of Safety 2010(1) SA 238(CC)**. There the Constitutional Court held:

"In the event of the court's jurisdiction being challenged... the applicant's pleadings are a determining factor. They contain the legal basis of the claim under which the applicant seeks to invoke the court's competence.

"...it is not for the court to say that the facts asserted by the applicant would also sustain another claim cognizable in another court. If, however, the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court lacks jurisdiction."

ANALYSIS OF THE COMPLAINT

[21] At this stage, it is necessary to scrutinize the nature of the complaint. The present complaint concerns a matter between two licensees, that is Telkom and MFN. The relationship between the two is governed by ECA and the Regulations. In addition, the relief sought is in terms of the ECA.

[22] **In Chiwra v Transnet Limited and Others 2008(3) BCLR (CC)** 251 para [124] the Court stated:

"Where an employee alleges non-compliance with the provisions of the LRA, the employee must seek the remedy in the LRA."

Similarly, in the present matter, Telkom's allegations of non-compliance with section 43 of the ECA, is accompanied by a prayer for relief in terms of the same Act. In view of the above, the complaint, clearly falls within the jurisdiction of ICASA and no other forum.

[23] Complaints such as the present are dealt with by ICASA through the Complaints and Compliance Committee ("the CCC") which was specifically established in terms of section 17A of the Independent Communications Authority of South Africa Act ("ICASA Act") for such a purpose. As a creature of statute, the CCC has limited powers to adjudicate disputes as stipulated

in the said Act. Hence the necessity to examine the provisions of the Act to see whether the matter before the CCC falls within or outside its jurisdiction.

[24] Functions of the CCC are clearly set out in section 17B which states that the CCC "*must investigate, hear if appropriate and make a finding*" in matters that come before it. This however, applies only to matters where **licensees** are parties. The parties, Telkom and MFN, are both electronic communications service and electronic communications network service licensees as defined in the ECA which is an underlying statute. So, they fall under the jurisdiction of the CCC.

[25] Counsel for MFN submitted, correctly in my view, that the CCC has no jurisdiction over the HOAs. This is because HOAs are not licensees as defined in the ECA and would have no basis to invoke the powers of the CCC to grant a remedy.

[26] A further submission was that Telkom's complaint could only have merit "if it can show that the ducts and manholes at the Estates are its facilities". MFN avers that the Estates are the owners of the infrastructure based on the accession thereof to immovable property owned by such Estates. Accordingly, before the provisions of the ECA or the Facilities Leasing Regulations come into play, the question of ownership and possession must first be decided and that issue can only be decided by the High Court, it was submitted.

I am unable to agree with this submission.

[27] The submission that because the CCC has no jurisdiction over the HOAs, it has no jurisdiction to hear the present complaint, cannot be correct. I say this because the issue between the parties, which issue has been brought before the CCC, is not about who owns the infrastructure. Rather it is about whether or not MFN has failed to comply with the provisions of section 43 of the ECA read with regulation 3 of the Regulations. In other words, properly interpreted, Telkom's complaint establishes that it, Telkom, is asserting a claim under the ECA. It is the ECA and no other legislation that was specifically created to resolve issues of this nature.

[28] The problem with the submission by counsel for MFN is that it conflates the issue of jurisdiction with the merits when they are in fact separate. It is so, that the question before the CCC cannot be resolved without a finding on the merits that Telkom has some kind of entitlement over the infrastructure. However, that entitlement does not have to be ownership. This is clear from the provisions of section 43 of the ECA. Certainly, the regulations, as counsel for MFN, correctly pointed out, refer to "**its**" *electronic communications facilities...*" (which may denote or seems to suggest ownership). However, this interpretation is not in alignment with section 43 of the ECA.

[29] Lending support to the above conclusion regarding the question of ownership is the decision of ICASA dated 13 April 2018, which was the subject of a review and ultimately upheld by the High Court in **Telkom v Vodacom and Others, case no: 38332/18**. There it stated:

"It is important to note that the obligation to lease electronic communications facilities in terms of section 43 of the ECA is not limited to an owner of such facilities, but is imposed on any electronic communications network service licensee. This view is mainly informed by the fact that section 43 makes no specific reference to ownership, thus the obligation to lease is not limited to owners of electronic communications facilities".

[30] Counsel for MFN argued that it was a prerequisite in these proceedings to determine whether Telkom is the owner of the facilities or whether it had some kind of entitlement over those facilities. And because one of the parties to the ownership dispute was a non licensee the issue ought to be determined by the High Court.

[31] The basis of this submission was that in its complaint, Telkom asserts that it is the owner of the facilities. A further submission was that the CCC could not determine the present complaint until such time as a court of competent jurisdiction has decided whether or not Telkom is in fact the owner or is in possession of the facilities.

[32] On behalf of Telkom it was submitted that in cases such as the present, where there seems to be a dispute between Telkom and the HOAs over the

ownership of the facilities, the correct approach would be for a party such as MFN to make an application to stay the proceedings before the CCC, while the matter of ownership was being resolved. That application could be entertained and granted on merit, but it had nothing to do with whether or not the CCC has jurisdiction to hear the present complaint. I agree with counsel for Telkom for several reasons.

[33] One crucial factor is that when one considers the parties cited in the present matter, the issue to be determined, the forum to adjudicate on the matter as well as the empowering legislation, there is no doubt that the CCC has jurisdiction to entertain the complaint before it. That jurisdiction cannot be ousted by an allegation that a third party may be an owner of the underground electronic communications facilities.

[34] Furthermore, there is no dispute concerning ownership of the facilities in the complaint before the CCC. There is also no indication that there is such a dispute pending elsewhere. The fact that there is a debate as to whether third parties may be owners, simply because they gave MFN permission to access the infrastructure, cannot oust the jurisdiction of the CCC to hear the present complaint.

[35] The curtailment of the powers of the court of law will not be presumed in the absence of an express provision or necessary implication to the contrary. (See inter alia **Richards Bay Bulk Storage (Pty) Ltd v Minister of Public Enterprises 1996 (4) SA 490 (A) at 494 G-I**).

Applied to the present case, it is interesting to note that nothing in the ICASA Act or in the ECA, which is the underlying statute, justifies the limitation in the CCC's jurisdiction as contended for on behalf of MFN. There are, of course, factors which can restrict the jurisdiction of the court such as the subject matter, the territory over which the court may preside etc. However, these are not applicable to the CCC.

[36] In any event, it seems to me that the question of ownership or some form of entitlement by Telkom over the facilities is an issue on the merits that cannot be entertained at this stage of the proceedings when the question is whether or not the CCC has jurisdiction to determine the issue before it.

[37] Telkom's complaint is that MFN has failed to comply with section 43 of the ECA. In other words, the complaint against MFN is that the latter failed to adhere to the statutorily prescribed regime for accessing the underground electronic communications facilities of another licensee as set out in section 43 of the ECA read with the Regulations. This is the legal basis of the claim under which Telkom, the complainant, seeks to invoke the competence of the CCC to hear the matter.

[38] Section 43 is titled '**Obligations to lease electronic communications facilities**' and the relevant subsection reads as follows:

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

[39] In terms of section 43 the ECA facilitates a compulsory leasing system unless the request to lease is unreasonable. Telkom's complaint is couched in clear terms in that the language used fits neatly into the above section. There is no confusion as to the basis of the complaint. Equally there is no confusion regarding the identity of the party cited as the respondent against whom the complaint is brought. The issue to be determined is between Telkom and MFN and no one else.

[40] It is not denied that MFN accessed the infrastructure referred to in Telkom's complaint. Also not disputed is that MFN failed to follow the prescribed procedures as set out in section 43. The crisp and only question then is whether this was non-compliance with the section as alleged.

CONCLUSION

[41] As can be seen from the discussion above, there seems to be conflation of the issues of jurisdiction and the merits. Of importance, therefore, to determine whether the CCC has jurisdiction to hear the complaint before it, it is necessary to go back to the question 'what is the definition of jurisdiction?'

[42] Jurisdiction has been defined as "*the power or competence of a court to hear and determine an issue between the parties*".

(See **Spendriff NO v Kolektor (Pty) Ltd 1992 (2) SA 537 (A); Graaff-Reinet Municipality vs Van Ryneveld's Pass Irrigation Board 1950(2) SA 420 (A) at 424**).

[43] The obvious question, therefore, is ***What are the issues between the parties and who are the parties?***

Parties agree that MFN accessed the infrastructure referred to above without a request to enter into a lease agreement with Telkom. However, MFN denies any wrongdoing and asserts that the HOAs "owns the infrastructure", and so gave it permission to access the infrastructure. It is on that basis that MFN claims that the CCC has no jurisdiction to hear the matter. However, the submission cannot be correct for a number of reasons as already stated above.

For emphasis, a summary is provided hereunder.

[44] The complaint is that MFN failed to comply with section 43 of the ECA read with the Leasing Regulations. Properly interpreted, the complaint has nothing to do with a dispute that 'may' have arisen or 'may' arise in the future between Telkom and the HOAs over the ownership of the infrastructure. I say 'may' because there is nothing before the CCC apart from mere allegations that the HOAs own the facilities. The paucity of evidence in this regard can be seen in a document titled "Grants of Rights Agreement" which, in any event, cannot be relevant at this stage of the proceedings.

[45] Although MFN, both in its papers and during submissions stated that central to the dispute is "Telkom's alleged ownership or possession" of the electronic communications facilities at the Estates, a proper interpretation of the complaint shows that this is not so.

[46] The complaint is that MFN failed to comply with section 43(1) of ECA read with regulation 3 of the Leasing Regulations. It is this alleged non-compliance that the CCC has to determine. That is the issue between the parties. As can be seen, the complaint is rooted in the ECA and not in any other legislation. Furthermore, the remedy sought by Telkom is provided for in the ECA. The fact that Telkom referred to the facilities as "*its facilities*" does not create a dispute between it and the HOAs or even other parties who may claim some entitlement over the facilities. It must be borne in mind that it is not for the CCC to say that the facts asserted by the Complainant would also sustain a claim of ownership cognizable in the High Court, for instance.

[47] Both parties, that is, Telkom and MFN are electronic communications network service licensees as defined in the ECA. The relationship between them is regulated by the ECA. In terms of the current legislation, therefore, these parties would have no alternative forum which can lawfully adjudicate the dispute which has arisen between them.

[48] The CCC is a creature of statute established in terms of section 17A of the ICASA Act. Its functions are set out in section 17B of the Act. In terms of section 17B (a) (iii) the CCC is empowered to "*investigate, and hear if appropriate, and make findings on allegations of non-compliance with the*" ECA or the underlying statutes received by it.

[49] All the above reasons militate against the conclusion that the CCC has no jurisdiction to hear the complaint before it. On the contrary, the reasons confirm that the CCC does have jurisdiction. That jurisdiction cannot be ousted simply because, at some future date, there might arise a dispute over ownership of the infrastructure between Telkom and the HOAs. In the event of such an eventuality, however, the parties in that dispute will be free then to take the dispute to an appropriate forum.

[50] In the result, it seems to me that the dispute in the present matter, which is whether or not there has been non-compliance as alleged, must be

adjudicated through the mechanism provided by the ECA by a body specifically established for that purpose, which is the CCC.

[51] Accordingly, the point *in limine* that the CCC has no jurisdiction to hear the matter has no merit and is dismissed.

TMMasipa

Judge Thokozile Masipa
CCC Chairperson