

BEFORE THE COMPLAINTS AND COMPLIANCE COMMITTEE

In the matter between

MTN (PTY) LTD

Complainant

And

CELL (PLY) LTD

Respondent

PANEL:

JW Tutani

Chairperson

N Ndhlovu

ICASA Councilor

M Ramokgopa

Member

T Ramuedzisi

Member

K Moodaliyar

Member

Pre-hearing:

12 May 2014

Heard on:

23 June 2014 and 18 July 2014

JUDGMENT

THE PARTIES

- [1] The *Complainant* is MTN (Pty) Ltd, ("MTN") a company with limited liability registered in accordance with the company law of the Republic of South Africa. Advocate Friedman represented the complainant.
- [2] The *Respondent* is Cell C (Pty) Ltd, ("Cell C") also a company with limited liability registered in terms of the company law of the Republic of South Africa. On 23 June 2014, the first day of the hearings, Advocate Sisilana represented the Respondent and on 18 July 2014, the second day of the hearings, the Respondent changed Counsel and was represented by Advocate Berger.
- [3] Both the Complainant and the Respondent in this matter are holders of electronic communications service licenses, which were granted by the Independent Communications Authority of South Africa (ICASA) for the provision of electronic communications services in South Africa.

THE COMPLAINT

- [4] On 31 October 2013, MTN lodged a complaint with the Complaints and Compliance Committee (the "CCC") against Cell C for allegedly contravening Regulation 7(1) of Mobile Number Portability Regulations (the "MNP Regulations") on a number of occasions and requested the CCC to deal urgently with the alleged contraventions.

- [5] In particular, MTN alleged that:

- [5.1] Cell C is engaged in a practice whereby persons representing Cell C approach people on the street or in their homes and, having established that they are MTN customers, offer them a Cell C starter pack as a

“present” or “gift”.¹

[5.2] A request is then made of the customer that he/she make available his/her MTN cell phone number and identity number. After obtaining relevant information from the customer, and without his/her knowledge or consent, a porting request is "manufactured" and sent to MTN for action. As a result, the MTN's customer's number is deactivated and the customer no longer has access to the MTN network and its services.

[5.3] MTN also alleged that it had received many complaints from its customers alleging that they had received an SMS from Cell C, thanking them for their request to port to Cell C whereas they had not requested the port nor had any knowledge thereof.

[6] MTN submitted that even after it had complained to Cell C and the CCC on the alleged conduct, it continued to receive complaints from its customers and thus Cell C's alleged conduct was ongoing.²

[7] In particular, MTN submitted that when the conduct was first brought to Cell C's attention³, four (4) affidavits from customers who had allegedly fallen victim to the alleged unlawful practice were shown to Cell C. When the formal complaint was made to the CCC, a further twelve (12) affidavits were brought to Cell's attention.⁴

[8] MTN in its replying submission on 20 January 2014, brought a further eleven (11) affidavits as evidence of ongoing conduct. Finally, in May 2014 MTN brought another forty-five (45) affidavits of customers allegedly complaining of the same conduct.

¹ See bundle page 142 para 15.1. Affidavit by Ms Ntokozi Seshibedi, customer and employee of MTN.

² Letter from MTN to Cell C dated 20 May 2013.

⁴ The parties referred to eleven cases in some instances and twelve cases in other instances. The CCC has settled on the number of twelve instances as per the letter of complaint from MTN to the Office of the CCC dated 31 October 2013.

Adv. Friedman submitted that none of these ports had been reversed.

[9] Therefore in total there are seventy-two (72) alleged cases of illegal porting brought by MTN.

PRE-HEARING

[10] On 12 May 2014, the parties attended a pre-hearing meeting in terms of section 17C (4) of the ICASA Act. At that stage, Adv. Sisilana represented Cell C and Adv. Friedman represented MTN.

[11] The following was agreed upon between the parties:

[11.1] MTN could lead its evidence in the form of submissions without the need to call the deponents of the affidavits to confirm their evidence orally or be subjected to cross-examination. However, Cell C required additional time to respond to the twelve (12) additional affidavits, which MTN had annexed to its replying submission to the CCC.

[11.2] Both parties agreed that it would not be necessary to call witnesses. However, Adv. Friedman placed on record that, that position was subject to the qualification that MTN reserved the right to call witnesses to deal with anything arising from Cell C's further submission.

BACKGROUND: MOBILE NUMBER PORTABILITY

[12] Before we deal with issues dealt with in the complaint, we find it prudent to provide background on the concept of mobile number portability.

[13] Mobile number portability allows mobile users to change their mobile operator whilst keeping their mobile number. It can occur in various forms, e.g. direct requests to the mobile operator, SMS based port requests etc.

[14] ICASA published the MNP Regulations in 2005, which are self-explanatory.⁵ The mobile number portability Marketing, Sales Code of Practice and Communication with Subscribers ("the Code"), which arise from the MNP regulations, provides amongst other

⁵ Mobile Number Regulations, published on 30 September 2005 in Government Gazette 28091.

aspects, the porting process to be followed in Clause 3 and also a Dispute Resolution Mechanism between licensees in Clause 11.

[15] It is also acknowledged that porting errors are inevitable by all networks in the industry. Errors during the porting process may occur during to what is termed “finger errors” (i.e. entering the wrong number into the system), system limitations or subscriber “ignorance”. Therefore the regulations do provide for those subscribers who are erroneously ported with the recourse of requesting a port reversal.

ALLEGEDLY DEFECTIVE COMPLAINT

[16] In its heads of argument and during the hearing, Cell C contended that MTN's complaint suffers from many defects; that are, jurisdictional, procedural and substantive. We deal with these below.

The CCC allegedly has no jurisdiction to hear the matter

[17] When this matter came before the CCC to be heard for the first time, Cell C initially raised two jurisdiction points, which it argued, should be disposed of. The first was based on the Number Portability Ordering System Specification ("the OSS") and the second was MTN's alleged failure to comply with the Code to which Regulation 7 refers.

[18] The OSS and the Code require competitors to use the dispute resolution mechanism provided for. The jurisdiction point which was based on the OSS was abandoned on the day of the first hearing (23 June 2014), however the Respondent decided to proceed with the alleged non-compliance with the Code.

[19] Cell C submitted that because MTN had not exhausted the dispute resolution mechanism provided for in Clause 11 of the Code before lodging the complaint, the CCC should not entertain the complaint. Clause 11 provides as follows:

Should a dispute arise between the parties in connection with any matter contained in this code of practice, shall be dealt with in accordance with provisions of the chapter.

[20] Cell C further argued that Regulation 7 recognises that porting errors are inevitable and for that reason, it includes a detailed dispute resolution mechanism that involves

the development and enforcement of binding Codes.

- [21] Cell C reiterated that Regulation 7 is intended to enable operators to resolve any disputes between themselves and that those disputes, if they can be resolved in a non-litigious manner, are to be addressed in such a manner.
- [22] Cell C argued that Regulation 3(1) of the CCC Regulations empowers the CCC to reject a purported complaint that falls outside its jurisdiction. It was submitted that by failing to comply with the dispute resolution mechanism as required by the Code, the complaint falls outside of the CCC's jurisdiction and should, therefore, be rejected.
- [23] It was argued that the CCC has a discretion under Regulation 3(2) of the CCC Regulations to reject the purported complaint or dispute if it is vexatious or frivolous or, if insufficient attempts have been made to settle it.
- [24] Cell C submitted that MTN has not complied with Regulation 3(2) of the CCC Regulations as MTN had not done enough to try and settle the dispute with Cell C within the structures of the MNP Code and Regulations and asked the CCC to exercise its discretion and reject the complaint.
- [25] MTN in reply submitted that there is no internal remedy provision in Sections 17B and 17C of the ICASA Act, which requires parties to resolve disputes first internally before complaining to the CCC. It was further submitted that, there is no reference in any of the two provisions to any internal dispute resolution procedure that the underlying statute should consider.
- [26] MTN maintained that the underlying statute empowers the Authority (ICASA) and the CCC on their jurisdiction. It was argued that the statute gives the parties an unconditional right to approach the CCC and refer a matter to it and the only constraint to that right is that it must be the type of dispute that the CCC can consider. It was submitted that MTN has that unconditional right to approach the CCC.
- [27] The CCC is inclined to agree with MTN that it does have jurisdiction to hear this matter. Section 17B (a)(ii) of the ICASA Act empowers the CCC to investigate and hear if appropriate, and make a finding on complaints received by it. MTN decided to directly approach the CCC with its complaint and the CCC was correct to accept and entertain it.

[28] The CCC views the Code as being intended to deal with matters contained in the Code itself, however this does not constrain a party's right to complain directly to the CCC. The CCC is a creature of statute and its powers are given by the statute. Its jurisdiction can only be interfered with if the statute provides for that, in deserving cases.

[29] The CCC's powers to hear a matter as well as its jurisdiction cannot be ousted by the Code.

Late submission of the Complaint

[30] Cell C submitted that MTN filed its complaint out of time as stipulated in the Act. It was argued by Cell C that, in terms of section 17C (1)(a) of the ICASA Act, MTN should have filed its complaint within 60 days of becoming aware of the alleged non-compliance by Cell C with the relevant regulations. It was pointed out that in any event, MTN has not applied for condonation.

[31] Before dealing with section 17C (1)(a), we find it prudent to comment on the provisions of section 17B (a)(i) and (ii).

[31.1] Section 17B (a)(i) makes provision for the CCC to investigate and hear, if appropriate, and make a finding on all matters referred to it by the Authority.

[31.2] Section 17B (a)(ii) on the other hand, empowers the CCC to investigate and hear, if appropriate, complaints that are referred directly to it.

[32] Section 17B accordingly provides a complainant with two options and draws a distinction between the Authority and the CCC.

[33] Section 17C (1)(a) further provides as follows:

"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 this Act or the underlying statutes may lodge a complaint with the Authority within 60 days of becoming aware of the alleged non-compliance.

[34] Section 17C (1)(a) speaks to a complaint that is lodged with the Authority and prescribes the time within which the complaint must be lodged. It is noteworthy that this section of the Act is silent on the time constraints in relation to the complaints lodged directly with

the CCC.

[35] Therefore, for purposes of sections 17(B) and 17(C), the Authority and the CCC are two separate entities, hence a complainant may choose to go either to the Authority or the CCC and if it were not so, the legislature would not have drawn this distinction through the enactment of section 17B(a)(ii).

[36] If a complainant elects to complain to the Authority, he or she must do so within 60 days, but there is no stipulated time within which a complainant may complain to the CCC.

[37] In short, the 60-day rule does not, in our view, apply to complaints lodged directly with the office of the CCC and MTN was correct in not applying for condonation. Our view is discernibly subject to the rules of prescription.

The alleged insubstantial nature of the complaint

[38] In the heads of argument, Cell C argued that MTN's complaint is insubstantial and referred to the trivial nature of the complaint.⁶ It is contended that, in the initial complaint, MTN identified sixteen (16) cases of alleged unlawful port, and a further eleven (11) in the second complaint, in total twenty-seven (27) ports.

[39] Cell C argued that if we consider the twenty-seven (27) alleged instances of ports in the universe of ports, the conduct is trivial. It was submitted by Cell C, that between January 2006 and 31 March 2014, there were over two million ports between mobile network operators and that between 1 January 2014 and 31 March 2014, there were:⁷

[39.1] 168 106 attempted ports between mobile network operators; and

[39.2] 149 107 successful ports between mobile network operators.

[40] Cell C submitted that between 1 January and 31 December 2013, there were 335 109 to Cell C alone.

[41] The panel was further provided with a letter by Cell C that indicated that in 2013 the number of successful ports from MTN to Cell C were 211 209 and the number of ports from Cell C to MTN were 19 545. Between January 2014-May 2014 the

⁶ Page 4 para 3, Cell C's heads of argument.

⁷ Page 110 of the Bundle, Cell C's supplementary submission.

number of ports from MTN to Cell C was 76 379 and from Cell C to MTN there were 11 301 ports.⁸

[42] In this context of numerous ports, Cell C argued that the conduct is insubstantial and should be dismissed.

[43] MTN submitted that the complaint is not insubstantial because Cell C is in breach of Regulation 7(1) of the MNP Regulations. MTN argued that this complaint is based on an ongoing practice, and is therefore sleight of hand to say that the relevant number is the 26 alleged ports.⁹

[44] The panel disagrees with Cell C's submission that MTN's complaint is trivial and insubstantial. As the CCC, we have a duty to investigate any complaint that has been properly submitted. Section 17(B) of the ICASA Act provides:

The CCC is required to investigate, and hear if appropriate, and make a finding on:

- *All matters referred to it by ICASA;*
- *Complaints received by the Committee; and*
- *Allegations of non-compliance with the ICASA Act or underlying statutes.*

[45] In addition, the object of the Electronic Communications Act ("the ECA"), is to promote the interests of consumers with regard to the price, quality and the variety of electronic communications services. (*Our emphasis*).

[46] It is in this context that the CCC believes that where there is a complaint involving consumers, we are legally bound to investigate and hear it, if appropriate.

[47] The CCC is of the firm view that, even if a complaint about the alleged porting involves one or two consumers, it is still mandated by law to consider the complaint.

[48] It is further important to emphasize that, by its nature, porting is a very technical and sophisticated concept, which can be confusing to some consumers.

[49] Council for Cell C itself during the hearing, did state as follows:

"I'm not making a point that the fifteen complaints are unimportant, and certainly

⁸ Page 9 para 21, Respondent's Oral Submissions.

⁹ Pg 15 of MTN's replying affidavit.

to the subscribers who were ported, whether as a result of an error, for whatever basis”¹⁰

[50] Ultimately, the CCC should not be seen to only adjudicate on disputes and/or complaints between the licensees who are better informed on the technical aspects of porting. The CCC’s interventions should not be perceived to be only in the context of how many illegal ports occurred within the millions of ports between the licensees, but importantly, it is also our duty to protect consumers as envisioned by the ECA. If the CCC does not look deep into the allegations, whether one or two, there is a real possibility that consumers may be inconvenienced and prejudiced. The implications of the alleged conduct could be wide-reaching on consumers if found to be true.

Allegation that the case is moot

[51] Cell C submitted that there was nothing MTN could achieve by the relief it sought which Cell C had not already done or put in place. It was submitted that Cell C had taken certain steps to remedy the alleged conduct, but hastened to say that by taking the steps it had taken, it did not admit liability.

[52] Cell C submitted that where MTN has requested reversal, Cell C has reversed the alleged illegal ports, and has taken and continues to take steps to minimise the incidence of unrequested ports.¹¹

[53] Cell C pointed out that, sixteen (16) of the twenty-seven (27) ports "*properly*" forming part of the complaint were reversed except one.¹² Then out of the second set of the additional eleven (11) alleged ports, eight (8) have been reversed. Cell C further submitted that steps have been taken to try and secure the consent of the subscribers to reverse the three (3) remaining ports. It was submitted that MTN did not deny that. Cell C also indicated that, there were six SMS-based ports that Cell C dealt with.

[54] Cell C submitted that, it has not reversed the forty-five (45) new ports, which MTN

¹⁰ Page 55, Transcript, 22 July 2014. Extract from Adv. Berger’s submission.

¹¹ Page 2, Cell C Replying Affidavit.

¹² Page 70 of the Transcript, 22 July 2014 and confirmed in the affidavit of Mr Harrish Kasseepursad at page 256 of the bundle. Mr Kasseepursad reported in paras 5-6 of his affidavit that the reason for not reversing the one port whose number belonged to a Mr Simphiwe Mpanza was because he had ported from MTN to Cells into a post-paid Straight Up 100 Contract and the number was permanently deactivated when the customer repeatedly failed to pay his account with Cell C. The deactivated number returns to MTN in terms of procedures of the OSS.

alleged, as these are new matters.

[55] MTN submitted that Cell C has not reversed all the ports which are the subject of the complaint and some of which Cell C continues to refuse to reverse. Adv. Friedman argued that the illegal porting which is the subject matter of the complaint is ongoing and the evidence suggests that Cell C is not doing enough to prevent and/or is condoning the ongoing conduct of its agents.

[56] The CCC does not agree with Cell C's contention that the matter is moot. We do agree that, based on the evidence before us, some of the alleged illegal ports were reversed. However, the reversal of the alleged ports and further action taken therein to minimise the conduct, does not suggest that illegal conduct in contravention based on the MNP Regulations could have taken place.

[57] It is generally accepted in the legal doctrine on moot points that a matter cannot be seen as moot, so long as the complainant continues to have an injury for which the court can award relief, even if entitlement to the primary relief has been mooted and what remains is small. As MTN has submitted, it does not agree that all the alleged ports have been resolved and continues to allege that the conduct is ongoing.

[58] There is ample case law and legal authority in this regard. For example in the matter involving *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, Ackermann J said:

*"A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law."*¹³

[59] Perhaps relevant to this matter, is the Constitutional Court approach in *Pheko and others v Ekurhuleni Metropolitan Municipality*.¹⁴ In this case the applicants, who had been evicted from their homes without a court order, sought leave to appeal against an unfavourable decision by the court. The respondent opposed the application on the ground, *inter alia*, that the matter had become moot as the applicant had already been moved.

¹³ (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1At footnote 8. Also confirmed by *Independent Electoral Commission v Langeberg Municipality* 2001(3) SA 925 (CC)

¹⁴ (CCT 19/11) [2011]ZACC 34; 2012 (2) SA 598 (CC);

[60] The Court disagreed, stating that not only were the rights of the applicants allegedly infringed, but there was a threat of further infringement. The Court further stated that the matter still presented live controversy and the applicants would benefit from the order it might make if the matter was heard.

[61] We therefore adopt the same approach that the fact that Cell C has reversed the alleged illegal ports, does not suggest that MTN and its alleged affected subscribers, whom we are legally bound to protect, would not benefit if the matter is fully heard. MTN insists that despite the reversal of some of the ports, the conduct continues.

[62] We therefore find that the complaint is not moot.

THE MERITS

[63] On 29 April 2013, MTN addressed an email to Cell C complaining about its alleged unlawful porting of MTN's customers. In the email, MTN furnished Cell C with twelve (12) examples and requested Cell C to provide it with copies of the requests to port forms as well as an incident report. When no response was forthcoming, MTN wrote to Cell C again on 14 May 2013 requesting the same documents as in the previous email, and also pointed out that they continued to receive reports of "*slamming*" (the industry term which is used to describe unlawful porting).¹⁵

[64] MTN subsequently wrote another letter to Cell C on 20 May 2013¹⁶ wherein it made reference to the previous communications with Cell C and its dissatisfaction with the responses from Cell C. MTN also then alleged that Cell C was engaged in the practice as described in paragraph 5 of this judgment.

[65] Cell C replied on 24 May 2013¹⁷ and denied engaging in a practice as alleged by MTN but said, to the extent that any unlawful practice had taken place by any person purporting to act on its behalf, it undertook, to the extent that was within its control, to ensure that it is stopped immediately and that the lawful port process is followed.

[66] MTN maintained that this response, whilst couched in co-operative terms, "*amounts to little more than a bare denial*" and that there has been no further communication from

¹⁵ Contained in the letter from MTN to Cell C dated 20 May 2013 on page 4 of the hearing bundle

¹⁶ Page 4 of the hearing bundle

¹⁷ Page 12 of the hearing bundle

Cell C relating to the conclusion of this matter.

[67] Cell C also confirmed that it had issued an urgent letter to its channel distribution partners and reminded them of their obligation to adhere to proper process in signing up customers. It confirmed further that it had advised them that failure to do so is unlawful and is also a breach of their distribution agreements.¹⁸

[68] MTN was not satisfied with Cell C's efforts and undertakings as it contends that the practice is ongoing and widespread. It is allegedly as a result of this stalemate and receipt of alleged further evidence of contraventions by Cell C, that MTN decided to complain to the CCC for an intervention in terms of section 17B (a)(ii) of the ICASA Act.¹⁹

[69] In the complaint to the CCC, MTN alleged that Cell is in contravention of regulation 7(1) of the MNP Regulations. In this letter to the CCC, MTN then attached a further twelve (12) affidavits²⁰, over and above the initial four (4) affidavits it had made Cell C aware of in the letter dated 20 May 2013.

[70] Regulation 7(1) reads as follows:

“A recipient operator shall not order number portability for any subscriber unless it has received a request from that subscriber and shall ensure that the recipient service provider does not order number portability for any subscriber unless it has received a request from that subscriber.”

[71] The CCC addressed an email to Cell on 11 November 2013 informing it of the complaint brought against it by MTN. Cell C then responded on 6 December 2013, after which MTN replied to the CCC on 20 January 2014. In the said response, MTN then annexed a further eleven (11) affidavits that it said were evidence of the behaviour that is the subject of the complaint.²¹

[72] The hearing was set down for 23 June 2014, prior to this, the parties were requested to submit their affidavits. In its replying affidavit, MTN then included a further forty-five (45) examples of what it refers to as Cell C's unlawful conduct. This brought the total cases of alleged unlawful porting to seventy-two (72).

[73] Counsel for MTN submitted that the reason for the addition of the forty-five (45) cases

¹⁸ Page 120 of the Bundle, Letter from Cell C to Channel Partner, 23 May 2014.

¹⁹ Letter from MTN to the CCC dated 31 October 2013 on page 1 of the hearing bundle

²⁰ Total at that stage was 16.

²¹ Total affidavits at 20 January 2014 was 27.

was to demonstrate that the conduct is on-going and further motivate the relevance of the complaint. He also submitted that there are likely to be more examples of this conduct which have thus far gone unreported and undetected.²²

[74] In rebuttal, Counsel for Cell C submitted that there were two problems with the characterization of the complaint and these are:

[75] Firstly, the complaint differs from the complaint MTN lodged with the CCC on 31 October 2013. Adv. Berger summarized the differences as follows:

“the case started out in October 2013 with fifteen instances of alleged unauthorized porting, to which was added – in the January 2014 reply – eleven new instances. Thereafter, in late May 2014, MTN added forty-five requests for reversals which had allegedly been refused by Cell C, seemingly as evidence of alleged unauthorized porting.”

[76] He argued that a complainant must make its case in its founding papers – in this matter, MTN’s letter to the CCC dated 31 October 2013. In support of his submission, Adv Berger referred the CCC to the case of *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at page 636. He submitted that it was improper for MTN to advance the eleven allegations in reply.

[77] He contended that the forty-five (45) new instances cannot be admitted as evidence of the alleged ongoing practice. He argued that in large part, this was because they were introduced ostensibly to rebut the statement by Cell C that it had reversed all the ports whose reversal had been requested. The reversed ports were the twenty-seven (27) alleged instances of unauthorized porting that had been brought to Cell C’s attention. In answer to this statement, MTN referred to forty-five (45) new instances.

[78] He argued that the dispute between the parties excludes the forty-five (45) allegations as well as the eleven (11) allegations made in reply. He submitted that the dispute is confined to the sixteen (16) allegations made in the letter to the CCC dated 31 October 2013.

[79] Adv. Friedman pointed out that from the beginning, MTN’s complaint was about an ongoing, widespread practice. He said the complaints only came to the attention of MTN

²² Page 21 of the Transcript.

when customers experienced the port and could no longer access the MTN network. He pointed out that it was in this context that MTN referred, in its reply, to the fact that it had received a further eleven (11) affidavits in support of the complaint which demonstrate, among other things, that the conduct complained of, is ongoing. He denied that MTN had raised a new case in its replying submission. He argued that it rather adduced further evidence of an ongoing practice.

[80] In the matter between the *Director of Hospital Services and Mistry* referred to above, Diemont JA said the following:

*“.....an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon to either affirm or deny.”*²³

[81] If new allegations are introduced in the reply, a respondent does not have the opportunity to either confirm or deny the new allegations. However, in this case, Cell C chose to deal with the eleven (11) new allegations, before appearing before the CCC, just to protect itself and it said it had answers to the allegations which it wanted to bring to the attention of the CCC. It protested that it was improper for MTN to advance the eleven (11) new allegations in reply. MTN should have stated its case fully in its 31 October 2013 letter to the CCC and it is impermissible that it should, in its reply, introduce new matters. It must stand or fall by what it alleged in the said letter.

The evidence that is properly before the CCC

[82] Summarising the evidence, Adv. Berger submitted that only three (3) allegations that deal with the substance of MTN's general complaint, were placed before the CCC by 31 October 2013. One was from the Western Cape and two were from Gauteng. He submitted that these three (3) instances cannot be seen to constitute an ongoing and widespread practice.

[83] He denied that the Sixteen (16) allegations deal with the substance of MTN's general complaint. He said they are so thinly spread across time and space that no such practice can be found. He submitted that the forty-five allegations are not part of the complaint

²³ 1979 (1) SA 626 (A) at 635 H.

and do not provide evidence of a widespread practice. He argued that what they show is that, from time to time, an MTN subscriber is ported to Cell C without his or her consent.

[84] In its complaint to the CCC, MTN mentioned four (4) supporting affidavits from affected subscribers who were illegally ported by persons allegedly representing Cell C. When the formal complaint was made to the CCC, twelve (12) affidavits were annexed.

[85] Cell C has pointed out that there has been an “immense” growth in the number of ports over the eight-year period between 1 January 2006 and 31 March 2014. As mentioned in para 39 above it says between 1 January 2013 and 31 December 2013, there were 335 109 ports in its favour. Cell C then argues that in these circumstances, it would be strange that it would, as part of its expansion strategy, which it denies, engage in only twenty-seven illegal ports.

[86] Having heard the arguments, we are inclined to agree with this submission in this context. It would not make sense for Cell C to risk incurring the wrath of the law by engaging in an illegal exercise for a mere twenty-seven ports when it appears to be a net gainer of porting. Moreover, there is a reputational risk in that if consumers become aware of its illegal activities, they will turn their backs on it and thereby result in it losing a lot of business

[87] In paragraph 8 of Cell C’s Heads of Argument, Cell C writes *“At paragraph 8 of that letter, MTN referred to 4 instances of “examples” of the alleged practice. Just four days later, and after all ports had been reversed, Cell C replied.”* Cell C’s admission of reversing all the ports does not necessarily point to guilt with respect to all four cases. In paragraph 9 of Cell C’s letter of 06 December 2013 and addressed to the CCC Coordinator, Cell C admits porting but explains the circumstances, for example “finger errors” under which it occurred.

THE CCC DECISION

[88] The CCC does not accept the eleven (11) cases submitted by MTN in its replying submission on 20 January 2014 as evidence that is relevant for this matter. The CCC further does not accept the forty-five (45) cases that MTN introduced in its replying affidavit as evidence that is relevant for this matter. This brings the total of the cases accepted as evidence for MTN’s allegations to sixteen (16).

[89] The CCC therefore accepts the total of sixteen (16), i.e. the initial four (4) and additional

twelve (12), as being the evidence that is properly before it.

[90] Of these cases accepted as evidence, an example of Cell C's alleged unlawful porting is in paragraph 23 of Cell C's oral submissions where Cell C talks about Felicity Mathebula (Mathebula), one of the four people included by MTN in its complaint. Cell C says Mathebula alleges that she met Cell C people in the street who offered her a starter pack as a Mother's Day present and her MTN number was requested and RICA documentation completed. Cell C states that in this encounter, Mathebula did not know that her number was to be ported. This instance clearly indicates that a request and consent were not made for the port as required by the Code. Cell C avers that Mathebula's port was reversed.

[91] The CCC accepts, as per Cell C's representations, that there was a transgression in this case and thus, upholds MTN's complaint in this instance. Out of the sixteen complaints, there is clear evidence that there has been unlawful porting in only one instance.

[92] As a Complainant, MTN bears the onus of proof and, is required to prove on a balance of probabilities that Cell C has contravened regulation 7(1) of the MNP Regulations. MTN has failed to produce sufficient evidence to convince the CCC that, on a balance of probabilities Cell C is guilty of contravening regulation 7(1) in the remaining fifteen cases.

[93] Violating the MNP Regulations is a serious matter even if it affects one person. Porting is a sophisticated and complex process, and can therefore be quite confusing to consumers. The regulations related thereto are also not easily understood by people who are not *au fait* with the telecommunications industry, which may be most consumers.

[94] Therefore the CCC cannot take transgressions of this nature lightly or else they will take root and kill the industry. It is also an enormous inconvenience to consumers who have to go through a lengthy process and sometimes incur costs (making calls and travelling to outlets) in order to address the unauthorised port.

[95] As demonstrated in paragraph 39 above, in the first quarter of 2014 (January to March) there were 168 106 attempted ports between mobile network operators, of which 149 107 were successful. That equates to almost 19 000 unsuccessful ports. This demonstrates that unwanted ports, whether by finger error or illegal ports, are an industry-wide and fairly common problem. One cannot just limit it to one or two networks, and it thus needs to be addressed at an industry level.

[96] Regarding the additional fifty-six (56) (eleven and forty-five) cases that we have rejected, MTN is at liberty to direct a complaint to the CCC, if it so wishes.

RECOMMENDATIONS

[97] Hereunder are the remedies, which we recommend to the Authority in terms of section 17D of the ICASA Act:

[97.1] We recommend that the Authority ratify the CCC's finding that Cell C breached the MNP Regulations in only one case;

[97.2] The Authority should direct Cell C to desist from any further contravention of Regulation 7(1); and

[97.3] Directing Cell C to indicate and demonstrate what remedial action it has taken to desist from contravening Regulation 7(1) and to prevent recurrence of such contravention.

[97.4] The Authority should direct all mobile network operators to carry-out campaigns directed at their agents and consumers to make them aware of the porting rules and regulations, and also to make consumers aware of their rights in the case of erroneous or illegal porting.

[97.5] The Authority should review the MNP Regulations and consider including fines or other punitive measures for transgressions.

Dated on 21 November 2014.



Signed by Tumeka Ramuedzisi on behalf of the members

N Ndhlovu, Councilor; M Ramokgopa, Member; T Ramuedzisi, Member; K Moodaliyar, Member; and J W Tutani, Chairperson concurring.