



## COMPLAINTS AND COMPLIANCE COMMITTEE<sup>1</sup>

Date heard: 26 November 2020

CASE NR: 363/2019

**NOMBEU**

**COMPLAINANT**

**TELKOM SA SOC LTD**

**RESPONDENT**

**MOBILE TELEPHONE NETWORKS (Pty) Ltd**

**AS WITNESS**

COMMITTEE: Prof JCW van Rooyen SC (Chairperson)  
Councillor Yolisa Kedama  
Mr Peter Hlapolosa  
Mr Mzimkulu Malunga  
Dr Jacob Medupe  
Prof Kasturi Moodaliyar  
Mr Jack Tlokana

The Complainant in person: Ms M Nombeu; Adv H Rajah for the Respondent; Representatives of MTN: Ms Dinkelman and with her expert witness Mr Brijlal  
Coordinator of the CCC: Ms Lindisa Mabulu and with her Ms Xola Manshintshi

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### JUDGMENT

JCW VAN ROOYEN [1] The Complainant is a mobile phone client of Telkom SA SOC Ltd (hereinafter called "Telkom"). She lodged a complaint on 2 October

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<sup>1</sup> The Complaints and Compliance Committee ("CCC") is an Independent Administrative Tribunal set up in terms of the Independent Communications Authority Act 13 of 2000. Its constitutionality as an independent Administrative Tribunal in terms of section 33 of the Constitution has been confirmed by the Constitutional Court. It, inter alia, decides disputes referred to it in terms of the Electronic Communications Act 2005. Such judgments are referred to Council for noting and are, on application, subject to review by a Court of Law. The Tribunal also decides whether complaints (or internal references from the Compliance and Consumer Affairs Division at ICASA) which it receives against licensees in terms of the ICASA Act 2000, the Broadcast Act 1999, 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 and confirmed by Council the matter is final and only subject to review by a Court of Law. Where a complaint or reference concerning non-compliance is upheld, the matter is referred to the Council of ICASA with a recommendation as to an order against the licensee. A fine is a possibility only when it is prescribed. If not prescribed, it may not be imposed. A desist order may be imposed where a licensee has been found to have contravened a regulation or other relevant legislation.

2019, which was amended on 1 November 2019 and then amended again on 12 November 2019. The essence of her complaint is that several port out requests were initiated to port her Telkom number out to MTN, which porting she did not initiate. Ultimately, after her stopping on her phone the porting as required within 40 minutes several times, her number was indeed ported to MTN when she, not being aware of the further porting notice on her phone, did not stop it as prescribed by Regulation. She argued that Telkom should have stopped the said porting. Telkom has, as per regulation, one hour to stop the porting. Telkom's internal approach to porting is that, if notified within forty minutes by its client that the client did not initiate or no longer wished to port, Telkom would stop the porting. If no response is received from the client, Telkom is bound by law to port the client to the other operator as indicated on the phone.

[2] On 18 November 2019 the CCC Coordinator requested Telkom to respond to the complaint in writing. Telkom submitted its response on 9 December 2019 noting that it had not received a notice in terms of the ICASA Act setting out the nature of the alleged non-compliance. However, it, nonetheless, responded to the complaint. Amongst other reasons given in response to Ms Nombeu's complaint, Telkom stated that it was not responsible for what happened, since MTN had somehow or other achieved this result without the Complainant having requested the porting.

[3]As a result of Telkom's response, the CCC Coordinator's Office at ICASA addressed correspondence to MTN on 13 December 2019 requesting MTN to reply to Telkom's response and, in particular, where Telkom states that the onus is on MTN to prove compliance with regulation 7(1) of the Number Portability Regulations of 2005.

[4]On 22 January 2020 MTN responded to the CCC and admitted that the repeated port-out requests (to port the Complainant's number from Telkom to MTN, which were sent by MTN to Telkom) were initiated by MTN's agents via its wireless interface. MTN was in the process of addressing the defects by blocking the ability to initiate a port-in via the wireless interface. MTN thus took full responsibility for initiating the port-out requests. As a result of COVID restrictions and availability of the Complainant, the matter could only be heard at the end of November 2020.

[5]On 3 September 2020, Telkom's attorneys of record addressed correspondence to the CCC to seek clarity in relation to MTN's joinder to the proceedings and to request whether consequential relief may be obtained against MTN.

[6]On 11 September 2020 the undersigned issued a Procedural Ruling.<sup>2</sup> The Ruling stated (at that stage) that both licensees deny responsibility in the matter. The Ruling directed that “*MTN also sets out its role, if any, before the CCC so as to place the CCC in a position to decide the matter.*” MTN was not joined as a Respondent, which it could not become at that stage of the inquiry, since the CCC is not permitted in law to add a Respondent. However, any person may be required by the CCC Chair to provide information which relates to a matter before the CCC.<sup>3</sup> The inquiry may, however, never degenerate into an inquisition, according to the Constitutional Court.<sup>4</sup>

## **PORTING**

[7]The porting of numbers from one network to another is currently regulated by the 2005 Number Portability Regulations (“NPR”).<sup>5</sup> Regulation 7(1) provides that:

“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.”

In terms of Regulation 4(16) of the Functional Specifications (“FSS”) for Mobile Number Portability under the NPR, “the donor side shall respond to a request from a recipient side, and effect any actions requested, *as soon as possible and within one hour where the responses or actions are required as soon as possible.*” (Emphasis added)

Regulation 4(9) under the FSS provides as follows:

“A donor side may reject a request to port only on the following grounds:

(a) *the MSISDN number is not a valid number on the donor operator’s network,*

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<sup>2</sup> See section 17(6) read with section 17C (6) of the ICASA Act. 2000.

<sup>3</sup> See section 6(4) read with section 17B of the ICASA Act 2000.

<sup>4</sup> *Islamic Unity Convention v Minister of Telecommunications 2008 (3) SA 383 (CC) at para [48].*

<sup>5</sup> GNR 963 of 30 September 2005.

*(b)the MSISDN number is excluded from number portability under sub-regulation 2(2),*

*(c )the account number in the request is not the account number used by the donor side for the MSISDN for which porting is requested (post-pay only);*

*(d)the classification of the account does not match, for example a request is made under the pre-pay procedure for a post-pay account;*

*(e)the subscriber is already subject to suspension of outgoing or incoming calls because of failure to pay a bill;*

*(f) the number is already subject to a porting process;*

*(g)the number has already been ported in the last two months;*

*(h)any other reason agreed to by the Authority and notified to the operators in writing.”*

This means that other than on above grounds, Telkom was obliged to effect the request sent through by MTN to port the Complainant's number from Telkom to MTN. Practically, under normal circumstances a client would approach the recipient operator (MTN in this case) with a request for his or her number to be ported out. The recipient operator would then forward a request to the donor operator (Telkom in this case) to initiate the port-out request of the customer's existing number (in this case the Complainant's existing number). The 2005 NPR requires that the donor operator (in this case Telkom) effect the port-out request *within an hour* of receiving the request from the recipient operator.

[8]Licensees have implemented additional measures, not required by legislation, to confirm that the customer indeed requested the port-out. In this regard, before the port-out is effected, Telkom would send a text message to the customer informing the customer that he or she has 40 minutes within which to reply with “STOP” if the customer did not request the port. The forty minutes was set in order to ensure that a port-out request can still be effected within one hour as required in terms of the 2005 NPR.

[9]Regulations 4(1) and (2) to Schedule A to the 2018 NPR – the Functional System Specification for Number Portability - amended the legal position, introducing a new validation process by the donor operator on receipt of a port request. In terms hereof the customer has to “opt-in” to porting out his or her number, failing which the port will be cancelled. Furthermore: it provides that the subscriber has *four* hours to respond with an "opt-in" message. The 2018 NPR is not yet in force as a result of litigation against the amendment, which is presently pending.

[10]Although the 2018 NPR, even if it were in force, would allow for cancellation of the port if the Complainant did not respond within the longer period of 4 hours, it would not do anything to address the main issue in regard to unauthorised port-out requests as sent from MTN to Telkom in the present matter.

[11]Despite repeated port-out requests received by Telkom from MTN, after investigation of the issue by MTN, it transpired that MTN in fact was *not* in possession of a request by the Complainant that her number be ported out from Telkom to MTN. Notwithstanding, and as set out in MTN’s letter, numerous and repeated requests to port-out the Complainant’s number were sent from MTN to Telkom. Although Telkom in each instance sent a message enabling the Complainant to reply “STOP” and halt the port-out request, the Complainant did not reply “STOP” to every message within the 40 minute time limit and some port-outs were therefore effected. In terms of the 2005 NPR, Telkom is not permitted to and could not stop the requests to port-out the Complainant’s number, because the requests did not fall within the exclusions allowing Telkom to reject a port-out request as set out in regulation 4(9) above. Repeated port-out requests is not a stated reason in terms of the 2005 NPR for refusal to port-out a number.

#### ADMISSION BY MTN

[12] At the hearing of this matter Mr Niran Brijlal, an electronic expert in the service of MTN - who is also Senior Manager (Billing and CRM) - provided a full report under oath as to what had taken place. His affidavit reads as follows:

1 I am the Senior Manager, Billing and CRM at Mobile Telephone Networks

Proprietary Limited ("MTN").

2 I am authorised to depose to this affidavit on behalf of MTN.

3 The facts contained in this affidavit are within my own personal knowledge unless otherwise stated or the contrary appears from the context and are both true and correct.

#### PURPOSE OF THIS AFFIDAVIT

4 The purpose of this affidavit is for me to give an account of the facts which gave rise to the Complainants mobile number being ported to MTN.

5 I hold a qualification of a Bachelor of Business Science in Information Systems and Computer Science from the University of South Africa.

6 I have approximately 20 years' experience in the electronic communications industry, 15 years of which was at management level.

7 I have been employed at MTN since August 2009 and have been in my current position as Senior Manager for Billing and CRM from September 2017.

8 In terms of my current role, I am responsible for IT delivery in billing and customer relationship management systems. As part of my role I oversee the management of the Mobile Number Portability ("MNP") process from an IT perspective. My functions include being the Technical Single Point of Contact for the Industry for any escalations, the Application Owner for MNP which includes owning the design and architecture for MNP at MTN and supporting the MTN Operations team if assistance is needed on MNP Operational issues.

#### NUMBER PORTABILITY COMPLAINT

9 On 13 December 2019 MTN received a letter from the CCC regarding a complaint by the Complainant against the Respondent marked "MTN 1".

10 I was requested by MTN's Regulatory Affairs team to investigate the matter so that MTN could respond to the CCC.

11 I investigated the matter and concluded the following:

11.1 MTN received six port-in requests for the Complainants MSISDN (Mobile Number), 082...<sup>6</sup> between 10 July 2019 and 12 September 2019.

2 The port-in requests were initiated through a wireless interface (WIG), which enables RICA agents appointed by MTN to RICA customers.

3 The WIG interface enabled the RICA agents to initiate port-in requests and then

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<sup>6</sup> Full number removed from this CCC Report so as to protect the privacy of the Complainant.

to RICA new customers who wish to port to MTN. Before an agent can initiate a port they are required to perform a Caller Line Identification validation process. The CLI validation process requires the RICA Agent to make a call to the port requestor (subscriber) to ensure the subscriber answers the call in their presence. This will ensure that the customer owns the cell phone number and is not requesting a port of a number that does not belong to him. The interface then allows the agent to capture the port request and then to RICA the customer. In this case, the Caller Line Identification process was not followed.

12 Below are all port requests that were initiated:

- 12.1 Request 1: 10 July 2019 – Port request initiated, and port out was not approved by Telkom. The process was stopped;
- 12.2 Request 2: 02 August 2019 - Port request initiated, and port out was approved by Telkom. Port-in to MTN completed during Network Synchronisation;
- 12.3 9 August 2019-Port reversal requested by Telkom and MTN reversed the port back to Telkom; .4 Request 3: - 13 August 2019- Port request initiated, and port out was not approved by Telkom;
- 12.5 Request 4:- 13 August 2019-Port request initiated, and port out was not approved by Telkom;
- 12.6 Request 5:- 15 August 2019-Port request initiated, and port out was approved by Telkom. MTN cancelled the port in request; and
- 12.7 Request 6:- 12 September 2019-Port request initiated, and port out was not approved by Telkom.

13 Our investigation revealed a flaw in the wireless interface (WIG) porting process in that it is possible to bypass the caller Line Identification verification process.

14 MTN immediately took a decision to disable mobile number portability function on the wireless interface. In order to do this certain development was required on our IT system. The functionality was disabled on 7 February 2020.

15 Regulatory Affairs responded to the CCC's letter "MTN 1" on 22 January indicating my findings and the remedial action taken by MTN. I attach the letter marked "MTN 2".

## CONCLUSION

16 MTN has taken the necessary steps to rectify the complaint.

Signed by the Deponent on 24 November 2020.

[13] Upon questioning, Mr Brijlal stated that MTN had taken the necessary steps to have the person(s) involved in this irregular porting removed from his/their position as a RICA agent. The possibility for this irregularity which, of course, at least, amounts to fraud, has thus been removed. On a question from a CCC Member whether Criminal Charges have been laid against the person(s) involved, the response was in the negative. It does not lie within the ambit of this inquiry to have required the expert witness to explain why this had not been done – that is an internal issue for MTN to decide on and would, in any case, not have contributed to this inquiry.

### **FINDING BY THE CCC**

[14] In the light of the above finding, the first complaint against Telkom is thus not upheld. There was nothing which Telkom could have done to prevent such fraud.

### **COMPLAINT AS TO POOR SERVICE BY TELKOM**

[15] The Complainant accused Telkom of not having prevented the porting of her number. Summarised, the following is placed in issue:

*(a) Telkom should not have permitted her number to have been ported.*

The answer to this is that Telkom was under a legal duty to port. To ensure that this would not take place unintentionally, it introduced a forty minute notice period. In several instances this system was successful in the present matter, but in the instance where the Complainant did not stop the procedure, Telkom was under a legal duty to port within a maximum period of one hour, at the minimum within 20 minutes. Telkom cannot be blamed for abiding by the 2005 Regulations. In fact, it had introduced the forty minute rule to protect clients. The problem, of course, lies in the one-hour Regulation, which ICASA has, per Regulation amended to four hours. However, this amendment is presently under Review in the High Court and is, accordingly, suspended pending the outcome of the Court case.

(b) Although Telkom is under a duty to refer a complaint which is not solved to ICASA, the Complainant addressed her complaint directly to ICASA. There was, accordingly, no sense for Telkom in referring the Complaint to ICASA. The Complainant's complaint that Telkom did not respond to ICASA within the time frame required is understandable, but did not affect the fairness of the process



substantially.

(c) At the hearing of this matter the Complainant also complained about the poor service which she received at the Telkom outlet or Agency where she complained about the porting. The attendant had, according to her, no understanding of her problem and could not advise her as to how to address it and what possibly could have happened. This complaint was not included in the *written* complaint to the CCC, but added during the hearing by the Complainant. *Adv Rajah*, appearing on behalf of Telkom, in fact pointed this out in her closing address to the CCC and argued, correctly, that it was not part of the matter before the CCC. A Respondent must be informed of the charges before the hearing.<sup>7</sup> It is, indeed, important that our Courts and thus also the CCC, as an Administrative Tribunal, do not show any resemblance to the dictatorial rule of, for example, the English *Star Chamber* of the 16<sup>th</sup> to 17<sup>th</sup> Century.<sup>8</sup> This Court was known to dictatorially add to the charge sheet as a matter of procedure.<sup>9</sup> Adding to charges is also not permitted by the Constitution of the RSA<sup>10</sup> and not included in the inquisitorial powers of the CCC.<sup>11</sup>

### **The Complaint is, accordingly, not upheld.**

It should be pointed out that all licensees have, in terms of the End-User and Subscriber Regulations, the following duty as per Regulation 4(2):

*A licensee must conduct random checks on points of sale and service outlets to monitor compliance with the requirements to provide information to end-users as contained in sub-regulation (1)*

Thus it will, it is advised, be prudent for Telkom to ensure that all its outlets and agencies would have an explanation available – even if it is only available in a guide to outlets. Probably, it is already so available and it was simply the attendant's *alleged* incompetence. An attendant who could not, in any case,

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<sup>7</sup> See *SAPO v Aramax and Others* Case 130/2016 where this principle was applied by not investigating the matter, where SAPO had not made out a prima facie case.

<sup>8</sup> See inter alia *S v Thebus* 2003 (6) SA 505 (CC) where Justice Moseneke J (the later DCJ) refers to aspects of the unacceptable procedures of the Star Chamber. Thus, to initiate a matter itself, could place the CCC in a position which might be reminiscent of such a (Star Chamber) regime, which is foreign to our Constitutional judicial system. Also see Levy *Emergence of a Free Press* (Oxford University Press 1985) inter alia at 162 and Levy *A Legacy of Suppression* (Oxford University Press 1985).

<sup>9</sup> Also see the judgment of the Broadcasting Complaints Commission in *Chetty v Mnet* [2016] Judgments Online (Butterworths) 35435 para [13] or BCCSA Website Case 41/2012.

<sup>10</sup> See section 35(3)(a) of the 1996 Constitution of the RSA.

<sup>11</sup> *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC).

defend him-or herself before the CCC, since his or her alleged incompetence had not been included in the written complaint.

*J. C. W. van Rooyen*

JCW van Rooyen SC  
The Members agreed

23 January 2021