

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date heard: 22 August 2019

CASE: 323/2019

In the matter between:

PANGEA COMMUNICATIONS CORPORATION (PTY) LTD

Complainant

and

BUSINESS CONNEXION (PTY) LTD

First Respondent

TELKOM SA (SOC) LTD

Second Respondent

COMMITTEE:

Prof JCW van Rooyen SC (Chairperson)

Ms Nomonde Gongxeka-Seopa

Mr Peter Hlapolosa

Mr Mzimkulu Malunga

Dr Jacob Medupe

Prof Kasturi Moodaliyar

Mr Jack Tlokana

On behalf of the Complainant: Mr. Karl Blom, Mr. Duncan Wild and Mr. Leon Labuschange.

On behalf of Telkom: Adv Sesi Baloyi instructed by Ms Candice Hunter-Lind and from Telkom: Ms Tsholofelo Letsike, Mr. Andries Matthysen, Mbongeni Mapiyeye, Mr. Gert Postma, Ms Charlene Naidoo.

Coordinator of the CCC: Ms Lindisa Mabulu.

JUDGMENT

JCW van Rooyen

[1] The complainant in this matter before the Complaints and Compliance Committee is **PANGEA COMMUNICATIONS CORPORATION PTY LTD**

¹ 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 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. 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. 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.

("Pangea"). The complaint is brought against BUSINESS CONNEXION (PTY) LTD ("BCX") and TELKOM SOUTH AFRICA (SOC) Ltd ("TELKOM").

Facts

[2] Pangea conducts the business of selling facsimile (fax) platforms and various fax services and has been operating its business for over 20 years. As part of its service offering, Pangea offers fax-to-fax and email-to-fax services, which enable customers to attach digital files to email messages in order to be sent via an email programme or web interface to a recipient's fax number. A virtual fax server translates the attached digital file so that the recipient's fax machine may read and print the digital file, though it was a "traditional" fax message.

[3] The sender of the fax is levied a fee ("Service Charge") when sending a fax to a person who has subscribed to a free fax-to-email service. The Service Charge payable by the sender is determined by time required to transmit the fax message, known as the connection speed, or the "baud rate". Consequently, where the length of the transmission is increased (i.e. the connection speed is reduced) this will result in an increase to the Service Charge. Telkom's fixed line tariffs for the period of 1 April 2017 to 1 April 2018 set the Service Charge for fax-to-email transmissions at R1.82 per minute.

[4] During the course of 2016, and continuing as at the date of this complaint, Pangea's customers experienced an increase in the number of incidents of slower connection speeds ranging between 2400 to 4800 baud across 086 numbers, resulting in lengthier transmissions and more costly Service Charges. Where a fax transmission occurs between two different devices, both devices will use the highest baud rate supported by both fax devices, which for fax-to-email machines should be a minimum standard of 9600 baud or 14400 baud. However, where the receiving fax machine is set to receive transmissions at a lower baud, this will result in the transmitting matching the reduced baud specified by the receiving machine. Accordingly, while fax-to-email transmissions to 086 numbers should typically obtain speeds of 9600 or 14400 baud (as experienced in instances where Pangea transmitted faxes to numbers outside the 086 prefix), fax-to-email transmissions using the 086 prefix instead achieve a 2400 to 4800 baud according to tests conducted by Pangea as further described in the paragraphs below.

[5] Pangea argues that the various unidentified Valued Added Services ("VAS") Providers appointed by Telkom were either (i) utilising defective or faulty

infrastructure, or (ii) intentionally or negligently lowering the connection speeds or baud rates. The VAS Providers utilise Telkom's infrastructure in order to facilitate fax-to-email services. The relationship between Telkom and the VAS Providers is contractual, the precise terms of which are unknown to Pangea, save for the fact that the VAS Providers are appointed by Telkom to facilitate fax-to-email services. Pangea is not able to independently determine the terms of the contractual relationship between Telkom and the VAS Providers.

[6] On 28 September 2017 Pangea attended a meeting with BCX, a wholly owned subsidiary of Telkom, to alert BCX to the fact that Pangea had been experiencing reduced connection speeds or baud rates when transmitting to numbers with the 086 prefix. On 1 October 2017 Pangea provided BCX with a report that had been prepared by Pangea containing network traffic statistics obtained from Internet Solutions ("IS") gateways as well as statistics from Pangea's own gateway statistics in accordance with a request for information from BCX. The report records the connection speed at which the fax transmissions were made from various fax numbers, contrasting the connection speed to the 086 prefix associated with fax-to-email services and other prefixes utilised by other fax services. The report shows that baud rates of the fax transmissions to the 086 prefixes across both IS's gateways and Pangea's own gateways were consistently slower than the baud rate of 14400 baud achieved when transmitting to other fax numbers.

[7] Pangea informed BCX that it believed the decreased connection speeds was a consequence of either (i) defective or faulty infrastructure utilised by the VAS Providers, or (ii) deliberate conduct by the VAS Providers. Pangea was unable to identify specific VAS Providers, but provided BCX with the relevant 8 digit prefixes, sourced from Pangea's gateways, which would enable BCX to determine the identity of the VAS Providers with reduced connection speeds to fax numbers with the 086 prefix.

[8] On 25 January 2018, BCX informed Pangea that it had determined that no faults or defects existed in its infrastructure that would result in reduced connection rates to fax numbers with the 086 prefix. In light of the results, BCX requested the full numbers from Pangea as BCX had conducted tests on the prefixes alone. The prefixes only allowed BCX to determine who the service providers were for purposes of investigating the existence of faults or defects on said service providers' lines. Pangea provided the requested number to BCX on 29 January 2018.

[9]BCX was not forthcoming with any updates on the status of the investigations, despite Pangea's follow-up request to BCX on 11 May 2018. Pangea, in an attempt to bring a conclusion to the investigations, sent an email to Tracy Mulwela of BCX on 29 October 2018 requesting the investigations to be conducted and a final report to be provided to Pangea no later than 13 November 2018.

[10]With the assistance of Openserve, a division of Telkom, BCX conducted testing on fax transmission speeds and provided Pangea with the findings of its investigations in an email dated 6 November 2018. Openserve concluded that nothing within the Telkom/Openserve network environment contributed to the low fax connection speeds but rather that the termination fax machine's (in other words, the recipient's fax machine) modulation rate was to blame. This meant that the slower connection speeds or baud rates were not as a result of infrastructure issues, but was rather attributable to the VAS Providers who control the modulation rates of the recipient's fax machine.

[11]It is noted that Openserve tested only three numbers: two with 086 prefixes and one non-premium rated number. The results indicated that both the 086 prefix numbers had a lower connection speed (baud rate) than the non-premium rated number. The two 086 prefix numbers directed to Next Generation Networks Telecommunications (Pty) Ltd ("NGN") and Fax Effects (Pty) Ltd ("FaxFX"), with the NGN fax connection speed (baud rate) being 4800 bytes per second and the FaxFX connection speed (baud rate) being 2400 bytes per second. It should be noted that Pangea's preliminary investigations covered 7000 calls spanning over a period of 6 months. These preliminary test results were provided to both BCX and Openserve, but despite this, Openserve only conducted testing on two numbers with the 086 prefix.

[12]The results of the limited testing conducted by Openserve support Pangea's contention that the VAS Providers are intentionally or negligently lowering the connection speeds or baud rates for fax transmissions to fax numbers with the 086 prefix. As noted above, Pangea's tests have revealed that fax-to-email transmissions to 086 numbers should typically obtain speeds of 9600 or 14400 baud (as experienced in instances where Pangea transmitted faxes to numbers outside the 086 prefix). The 4800 and 2400 baud transmission rates to numbers with the 086 prefix identified by Openserve are well below the typical speeds experienced by Pangea with fax-to-email transmissions.

[13] Pangea's customers continue to be prejudiced by increased Service Charges that have arisen as a consequence of the reduced connection speed associated with transmissions to fax numbers with the 086 prefix. This has led to allegations by Pangea's customers that it is not being honest and/or upfront with its service offering and billing. These allegations not only affect current customers of Pangea but also prospective customers interested in purchasing services from Pangea. Pangea has suffered and continues to suffer reputational damage due to Pangea's customers being dissatisfied with the lengthier transmission times to fax numbers with the 086 prefix, as this result in higher Service Charges payable by the customers.

[14] It is against this backdrop that Pangea has submitted this complaint.

THE COMPLAINT – WHAT IS BEING PROPOSED?

[15] As stated above, Pangea has been able to determine that various unidentified VAS Providers appear to be decreasing the connection speed (or baud rate) when transmitting faxes to persons who subscribe to "free" fax-to-email services using fax numbers with the 086 prefix. As a result of this, the VAS Providers are able to inflate the Service Charges payable by fax senders when sending emails to numbers with the 086 prefix (when compared to fax numbers using a different prefix).

[16] Pangea has conducted investigations, in conjunction with BCX to determine whether any technical issues existed which would explain the decreased connection speed (or baud rate). Pangea and BCX have not identified defective or faulty infrastructure utilised by the VAS Providers which would result in decreased connection speeds (or baud rates) to fax numbers with the 086 prefix. Consequently Pangea is of the view that the licenced VAS Providers have intentionally decreased the connection speed (or baud rate) when faxes are sent to fax numbers associated with premium rate numbers, including the fax numbers with the 086 prefix. It is important to note that fax numbers with the 086 prefix are premium rated numbers, for which higher than normal prices are charged.

[17] Despite Pangea providing BCX with the necessary information, BCX has identified only two VAS Providers, through the limited testing carried out by Openserve, which are liable for the slower connection speeds or baud rates when transmitting to a fax number with the 086 prefix.

THE APPLICABLE LICENCING REGIME

[18] The Electronic Communications Act 36 of 2005 (the “**ECA**”), provides that a person who holds an Electronic Communications Network Service (“**ECNS**”) licence and/or an Electronic Communications Service (“**ECS**”) licence must, among other things, adhere to:

The regulations in respect of the Code of Conduct for Electronic Communications and Electronic Communications Network Services Licensees published in Government Gazette number 30533, 7 December 2007, notice number 1740 (the “**Code**”); and (2) the regulations on code of conduct for Premium Rated Services, published in Government Gazette number 40402, 4 November 2016, notice number 1376 (the “**Premium Rated Services Regulations**”). The relevant provisions of the above regulations are set out below.

[19] The Code prescribes the manner in which licensees under the ECA must interact with consumers. Section 3.1 a) of the Code provides that “all licensees must act in a fair, reasonable and responsible manner in all dealings with the consumer”. In addition, Section 3.6 c) of the Code provides that “No tariff plan must be offered, presented, marketed or advertised in a manner that may be misleading”. Finally Section 3.12 a) of the Code provides that “licensees must clearly state, where a product or service is defective, what steps they will take to correct the defect with the interest of consumers in mind”. Accordingly, to the extent that the consumer, as defined in the Code, submits a complaint, a licensee will be required to demonstrate, among other things, that their conduct is fair, reasonable and responsible. The licensee will be required to demonstrate that its tariff plan is not misleading and that it will rectify any defects in its products or services. As noted above the licensed VAS Providers may be deliberately attempting to inflate the service charges payable by fax senders by delaying the baud rate, or connection speed, when faxes are sent to fax numbers associated with a premium rate. In deliberately (or negligently) lowering the connection speed or baud rate, to premium rated numbers only, the conduct of the VAS Providers is not fair, reasonable and responsible in their interaction with consumers and equates to a contravention of Section 3.1 a) of the Code. In addition, the VAS Providers have failed to disclose in their tariff plans that the connection speed, or baud rate, to premium rated fax numbers is routinely slowed, or are generally subject to lengthier transmission times. The VAS

Provider's failure to do so is misleading, and constitutes a contravention of Section 3.6 c) of the Code.

Alternatively, a VAS Provider must identify the defect and propose a resolution to the defect in instances where it receives a complaint from a consumer.

After conducting investigations concerning the underlying infrastructure utilised by the VAS Providers, Telkom as an ECS licensee, determined that no technical issues or faults existed on the infrastructure but failed to determine whether the VAS Providers were intentionally or negligently decreasing the connection speeds or baud rates. Telkom as an ECS licensee failed to correct the defect and furthermore failed to offer to take any steps that it would take to resolve the defect and as a result has contravened provision 3.12 of the Code.

The premium rated services regulations

[20] The Premium Rated Services Regulations set out in the Code of Conduct applicable to the provision of 'Premium Rated Services' is applicable to ECS and ECNS licence holders. Premium Rated Services are defined in the numbering plans regulations in Government Gazette number 39861, 24 March 2016, notice number 370 to mean *"a service provided by means of premium rated numbers of short codes in level three and four, where the charge is higher than standard rate and in some instances, where a portion of the charge is passed to a Premium Rate Service Content licensee, irrespective of the original electronic communications network used"*. A premium rated number in turn, is defined as a *"non-geographic number that is used to provide a premium rate service"*.

[21] While a transmission of the fax message falls within the definition of Premium Rated Service, as set out above, the Premium Rated Services Regulations do not expressly contemplate the regulation of fax messages. In particular, the Premium Rated Services Regulations specifically address SMS/MMS messages, USSD transmissions and voice calls. Neither of these concepts is defined within the Premium Rated Services Regulations or the Electronic Communications Act, however a voice call is similar to a fax transmission, in the sense that a rate payable by an end user is determined on the basis of the length of the call. This is significant as Section 6(12) of the Premium Rated Services Regulations states that "premium rated services

provided by means of a voice call shall not be intentionally prolonged or delayed for the purposes of extracting additional revenue from end users.”

[22] It is important to note that Section 5 of the Premium Rated Services Regulations provides that “a licensee must ensure that third parties providing Premium Rated Services through the use of the licensees’ network comply with the provisions as set out in these regulations and as such shall be the minimum standards for the provision of such services”. Telkom, as the holder of an ECNS licence in respect of the Electronic Communications facility comprising the fax network is obliged to enforce the provisions of Section 6(12) against its ECS licensees, being the VAS Providers.

[23] While this complaint is being submitted to ICASA and its Complaints and Compliance Committee, a brief review of the relevant provisions of the Consumer Protection Act 69 of 2008 (the “CPA”) relating to the complaint was set out. The CPA is, according to the Complainant, a key legislative instrument in South Africa regulating the rights of the consumers and the obligations of suppliers to consumer. Aspects of the Act were quoted. In the light of the conclusion which the CCC has reached, it is not necessary to quote parts of the Act, as quoted.

The complainant submitted that it had complied with the procedures set out in the code and/or the premium rated services regulations in that: the complainant has submitted a complaint to the relevant licensee being BCX; and BCX has failed to resolve the complaint in the manner prescribed by the code as BCX has failed to identify and correct the defect in its services, being the delayed transmission by the VAS providers utilising its infrastructure. As a result, BCX has failed to correct the defect in the manner required by the relevant provisions of the premium rated service regulations.

[24] Telkom and BCX and Openserve were only able to identify two VAS Providers responsible for the lowering of connection speeds and baud rates through the limited testing carried out by Openserve. Pangea’s preliminary testing, conducted over a period of approximately 6 months, revealed that more than 70 000 faxes to 086 prefix numbers were being slowed. It is Pangea’s contention that the testing conducted by Telkom, BCX and Openserve was superficial and that Telkom, BCX and Openserve should conduct a comprehensive investigation with due regard given to the magnitude of the complaint. Telkom, BCX and

Openserve were not able to satisfactorily identify and resolve the system defect resulting in inflated service charges, which amounts to a contravention of the Code. By decreasing the connection speed (or baud rates) to a fax number with the 086 prefix (when compared with transmission to numbers with a different prefix) in order to increase their service charges payable by a fax sender, the VAS Providers are:

Acting in a manner that is not fair, reasonable and responsible in their interaction with customers; amounts to *misleading* behaviour to the extent that the decreased connection speed (or baud rates) to premium numbers is not stated in their tariff plans; or constitutes a *system defect* that the Telkom and the VAS Provider is required to identify and resolve; *purposefully* decreasing the connection speed (or baud rate) to increase the service charges payable to the VAS Providers is in contravention of the Premium Rated Services Regulations, in that the regulations state that “premium rated services provided by means of a voice call shall not be *intentionally* prolonged or delayed for the purposes of extracting additional revenue from the end users.” (accent added by CCC)

RELIEF SOUGHT

[25] Pangea’s customers continue to be prejudiced by *artificially* increased service charges arising from the reduced connection speed to fax numbers with the 086 prefix. In addition, customer dissatisfaction arising from increased service charges associated with the slower connection speeds or baud rates to fax numbers with the 086 prefix has *impugned* Pangea’s reputation. This *reputational* harm continues to jeopardise Pangea’s relationship with its customers as well as its ability to market its services to prospective customers. Thus Pangea claims that:

(1) Telkom deliver up to the CCC its contracts with the VAS Providers that enable the VAS Providers to operate on Telkom’s infrastructure, subject to appropriate confidentiality measures, in order to facilitate and investigation by the CCC into the relationship between Telkom and the VAS Providers;

(2) Telkom and BCX be *ordered* to conduct a comprehensive investigation in order to determine the identity of any additional VAS Providers who are lowering the connection speed or baud rate of their fax to email transmissions;

(3) Where Telkom and/or the VAS Providers are in breach of the Code, that the appropriate penalties as set out in *Section 17H* of the ICASA Act be handed down; and/or

(4) Where Telkom and/or the VAS Providers are in breach of the Premium Rated Services Regulations, that the appropriate penalties under Section 18 of the Premium Rated Services Regulations be handed down.

RESPONSE TO COMPLAINT

Background

[26] ICASA allocates certain 086-numbers to various operators, including Telkom which numbers can be used for, inter alia, receiving inbound calls and for fax-to-mail services. The operators can also assign their ICASA allocated 086 numbers to vendors (Value-Added Services/VAS Providers), who in turn provide the fax-to-mail service to customers. Telkom is allocated some and not all 086 numbers within the 086-number range. It assigns some of those numbers through Business Connexion ("BCX") to Vodacom, New Generation Network ("NGN") and Phone Worx ("VAS") providers.

[27] When a customer dials an 086 number from for example, a landline, in order to transmit a fax, the call traverses the networks of the different network providers involved in the transmission of the fax, until it reaches the server of the receiving party and the fax is delivered by way of an e-mail provider. The transmission speed ("baud rate") of the fax communication can be affected by a number of factors including the networks, the fax machine's data baud rates and the distance over which the fax machines communicate. There are accordingly multiple parties involved in the transmission of a fax-to-email.

[28] The baud rate at which fax machines communicate is always agreed between the fax machines and is influenced by numerous factors. One such factor is the quality of the relevant network, this being the only factor the respondents' can investigate. The respondents' scope of investigation is therefore limited to the network quality of Openserve's network. Where transmission is over another operator's network, only that other operator is able to investigate any faults or defects in its network which may affect the baud rate.

[29] Pangea Communications Corporation (Pty) Ltd's ("Pangea") complaint pertains to an alleged deliberate lowering of the fax-to-email baud rate for the

transmission of faxes to 086-numbers. It alleges that the lower baud rate results in a longer call duration, resulting in the sender of a fax-to-email to an 086 number paying more for transmitting the fax. It should be noted that there is no prescribed minimum baud rate.

[30] Pangea seeks to compel the respondents to conduct an industry-wide investigation into alleged low baud rates. There is no obligation on the respondents or basis to require such an investigation in the light of the fact that there are different operators, their VAS Providers and vendors who provide fax-to-email services. It is unreasonable to require of, and impractical for, the respondents to conduct such an investigation in the circumstances.

[31] The respondents have no means of investigating the quality of other operators' networks to determine their effect on the baud rate. Further, they are not in a position to investigate all the fax machines used by other operators and their vendors, *inter alia*, because they have no knowledge of their location.

[32] Openserve conducted an investigation of the two full 086 numbers provided to it by Pangea. It found no fault or defect on its network and advised Pangea accordingly. In the complaint, Pangea states that lower baud rates are likely a result of VAS Providers manipulating the rates. Pangea must thus investigate and seek its relief from the VAS Providers it identifies as allegedly slowing baud rates. In the circumstances it is unreasonable to require of the respondents to conduct an industry-wide investigation on the baud rate. They are only able to investigate the quality of the Openserve network over which calls are transmitted.

CONCLUSION BY THE CCC

[33] For purposes of this matter, the nature and task of the Complaints and Compliance Committee needs to be re-stated. The Constitutional Court has held that the CCC is an independent administrative tribunal as understood in section 33 of the Constitution.² This means that it must be as independent as a Court and operate at a level where it may even advise the Council of ICASA to set aside administrative decisions, for example that of the SABC and the South African

² The Constitutional Court, in *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC) has held that the CCC is an administrative tribunal in terms of section 33 of the Constitution of the RSA and also that there is nothing in the ICASA Act which impinges upon its independence.

Post Office.³ Of course, it may also advise other orders to the Council as set out in section 17E(2) of the ICASA Act in cases where a finding is made against a licensee. It should, however, be pointed out that the Complainant's reference to section 17H of the ICASA Act is incorrect. The powers in terms of section 17H vest in the Criminal Courts and not the CCC. The CCC's powers are set out in section 17E of the ICASA Act. The ECA also grants the CCC certain powers where it decides matters that, in the ordinary course, are referred to as civil disputes. In such cases Council is not involved in the final order – which is issued by the CCC itself.

[34] Section 17B of the Electronic Communications Act 2005 provides as follows:

17B. Functions of Complaints and Compliance Committee

The Complaints and Compliance Committee -

- (a) must investigate, and hear if appropriate, and make a finding on -
 - (i) all matters referred to it by the Authority;
 - (ii) complaints received by it; and
 - (iii) allegations of non-compliance with this Act or the underlying statutes received by it;

The Constitutional Court⁴ has held that the investigative function of the CCC is constitutionally permissible, as long as it is not exercised *unfairly*. The CCC is thus not bound to the facts placed before it and could inquire, where necessary, as to e.g. the background of facts before it. The CCC has also held that before it investigates a matter, a *prima facie* case must be made out in the Complaint.⁵ Hearsay evidence is impermissible, except in the limited instances allowed by the Courts.⁶ The basic rule of *audi alteram partem*⁷ must consistently be applied. For any decision taken, sound reasons must be provided. The CCC is not

³ Which is also under the jurisdiction of the CCC by virtue of the SA Post Office Act.

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

⁵ Compare *SAPO v Aramax & Others Case 130/2016*.

⁶ *Public Protector v Mail & Guardian Ltd and Others* 2011(4) SA 420(SCA) at para [14] Nugent JA explained: 'Courts will generally not rely upon reported statements by persons who do not give evidence (hearsay) for the truth of their contents. Because that is not acceptable evidence upon which the court will rely for factual findings such statements are not admissible in trial proceedings and are liable to be struck out from affidavits in application proceedings. But there are cases in which the relevance of the statement lies in the fact that it was made, irrespective of the truth of the statement. In those cases the statement is not hearsay and is admissible to prove the fact that it was made. In this case many such reported statements, mainly in documents, have been placed before us. What is relevant to this case is that the document exists or that the statement was made and for that purpose those documents and statements are admissible evidence.'

⁷ "Hearing the other side"

permitted in law to add to the charge sheet⁸ or advise that a new charge should be instituted. Of course, a member of the public or another licensee may also lodge a complaint. Of course, the same complaint based on substantially the same facts may not be filed again – this is based on the *autrefois acquit*, or *res judicata* and issue estoppel rule.⁹

[35]It is clear that the Complainant requires that the CCC undertakes an investigation. Whilst the CCC has understanding for the concerns of the Complainant, it is also clear that the two numbers provided by the Complainant to Telkom led to an investigation by Telkom into this complaint. There is no reason to doubt the outcome of that investigation, which did not support the complaint of Pangea. Although the CCC as investigative tribunal does not function on the principle of evidence on a preponderance of probabilities (the approach which the Courts – in the ordinary course – apply in civil matters), the CCC has found that the complaint of the Complainant suffers from two assumptions: that the CCC should investigate the matter further and that the Respondents must, in effect, prove that they have not acted fraudulently or without negligence. Although the CCC is under a duty to investigate, it is expected from a Complainant to at least establish a *prima facie* case. The Complainant, to be sure, has a substantial suspicion that the speed of transmission is caused by human intervention – whether intentionally or negligently. It then expects the CCC to undertake an inquiry which could readily be perceived to be a “witch hunt.”¹⁰ That is certainly not the task of a Tribunal in South African law.

The Complaint is, accordingly, dismissed.

COUNCIL OF ICASA

The judgment is, in the ordinary course, sent to the Council of ICASA.



JCW VAN ROOYEN SC

The Members agreed

⁸ *Roux v Health Professions Council of SA & Another* [2012] 1 All South Africa Law Reports 49 (SCA).

⁹ See for example *South African Human Rights Commission v Khumalo* 2019 (1) SA 289 (GJ) per Sutherland J.

¹⁰ *S v Kemp* 2019 LexisNexis 44155(ECG).

