COMPLAINTS AND COMPLIANCE COMMITTEE[1]

Dates of the hearings: 18 and 19 April 2012 **Case number: 59/2011**

Neotel **Applicant**

and

Telkom **Respondent**

Complaints and Compliance Committee

JW Tutani Chairperson

N Batyi

N Ntanjana

Z Ntukwana

J Tlokana

T Ramuedzisi

For the Applicant: Mr H Msimang from Maluleke Msimang and Associates, Attorneys, Pretoria.

For the Respondent: Mr J Wilson, assisted by Ms S Pudfin-Jones, instructed by Mr A Roets from Nortons Attorneys, Johannesburg.

[1] Established in terms of section 17A of the ICASA Act, No 13 of 2000

JUDGMENT

[1] This was an application for the postponement of the main case by Telkom due to its senior counsel, Mr Maleka's non-availability. The main case was to have been heard on the 18th and 19th of April 2012 respectively. Neotel opposed Telkom's application. It must be stated up-front that the said dates had been agreed to by both parties herein.

[2] In his submission, Mr Msimang indicated that on 12 April 2012, immediately after his senior counsel informed him of his non-availability on the said dates, he wrote a letter to ICASA, explaining his predicament. He said he copied his "opponents".

BACKGROUND

[3] Before dealing with Telkom's application for a postponement, it is useful to give a brief background of what the dispute is about. Neotel had approached Telkom with a request for a formal facilities lease in respect of the last copper mile at two specified geographic points in terms of chapter 8 of the Electronic Communications Act[2] (the "Act") and the Electronic Communications Facilities Leasing Regulations[3] (the "Regulations").

[4] Briefly stated, Telkom turned down Neotel's request, saying that it was premature whereupon Neotel notified the Independent Communications Authority of South Africa (the "Authority") in terms of section 43(5) of the Act. The Authority decided to refer the dispute to the Complaints and Communications Committee (the "CCC") for resolution in terms of section 43(5)(c) of the Act.

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[2] Act No 36 of 2005

[3] Published under Government Notice R468 in Government Gazette 33252 of 31 May 2010

[5] Mr Msimang stated that Telkom had engaged Mr Maleka SC, as early as a year ago as they anticipated that "this matter would eventually end up before the CCC or other tribunals. " He said Mr Maleka SC, had been on a brief all along and was ready to argue the case on 18 and 19 April 2012 when he informed him on 12 April 2012 that he was unable to appear on the said dates because his other trial he was busy with, was running over. He said in these circumstances, he and his client, Telkom, felt it would be difficult to get another counsel obviously in a short space of time. He said it would not have been reasonable at that late stage to rope in another counsel and take him through all "the intricate and sophisticated" documents.

[6] He did concede, however, that all along, senior counsel was assisted by junior counsel who Telkom did not want to argue the merits of the case. Telkom wanted him to appear before the CCC to apply for a postponement but he refused as he wanted to argue the main case. His mandate was thereupon terminated.

[7] Mr Wilson opposed the application. He said it is very well established that a postponement is an indulgence which is granted by a Court and, in this instance, by the CCC. He said it is an indulgence which is requested of the decision-maker and it is granted on the basis of particular principles.

[8] He argued that Telkom had suffered prejudice occasioned by, *inter alia,* preparing for the hearing, as well as for hiring attorneys and counsel who had been briefed to appear at the hearing. He said the relief sought was urgent and Neotel would suffer prejudice if the hearing was postponed. He also asked for punitive costs against Telkom.

THE DECISION AND THE REASONS THEREFOR

[9] The CCC is indebted to both Mr Msimang and Mr Wilson for their arguments which assisted the CCC in coming to a decision.

[10] For the record, the application for the postponement was granted on 18 April 2012 for the reasons that appear hereunder but, the matter was adjourned until the following day to enable Mr Msimang to consult with senior counsel as well as provide the CCC with the name of alternative senior counsel who would step into Mr Maleka's shoes, should he become unavailable again. Mr Wilson was also afforded the opportunity to prepare his argument regarding the CCC's competency to award costs. In addition, he was ordered to address the CCC on why the CCC should award punitive costs against Telkom, should it determine that it had the requisite powers to award costs.

[11] On resumption of the proceedings the following day, Mr Wilson abandoned his application for the awarding of punitive costs against Telkom with the result that the CCC decided not to pursue this issue any further. However he insisted on an order for costs.

[12] Regarding Mr Msimang's application for a postponement, the CCC was satisfied that Mr Msimang, contrary to Mr Wilson's argument that Mr Msimang had failed to provide a full and satisfactory explanation for wanting a postponement, had sufficiently and clearly spelt out the reasons for applying for a postponement.

[13] He was advised on the 12th of April 2012 of Mr Maleka's unavailability when the hearing was due to commence from the 18th April. He submitted that this was a complex matter in which they involved Mr Maleka SC, for a period of a year. He further submitted that this was an intricate and sophisticated matter and we agree. This is a matter of huge interest to the industry, the government, the public and ICASA. The outcome of the hearing will have far-reaching consequences, not only for Telkom, but also for the industry, the public and the regulatory environment.

[14] Mr Wilson referred to Msimang's letter of 12 April 2012 as being "relatively high-handed" as he simply stated that their senior counsel's case would run over to 18 and 19 April 2012 and that he would therefore not be available for the hearing. Mr Msimang did not ask for Neotel's consent nor did he tender costs.

[15] We disagree with Mr Wilson's submission herein. If we may quote from the said letter, Mr Msimang says:

> *"We shall be pleased if you could communicate with the Chairperson and the other side in order to determine whether they will be available to accommodate us in this matter as our instructions are that we should have Advocate Maleka SC, when this matter is argued before the CCC. Anticipating your favourable response and our apologies for any inconvenience."*

[16] From the above quotation, it can be seen that Mr Msimang is making a plea to the CCC. He uses words like "we shall be pleased" as well as "accommodate". He is really asking, and not demanding. His plea to ICASA (to whom the letter was addressed) was to ask them to find out from the Chairperson and the "other side" if we would be available to accommodate them. He is not presumptuous about a favourable response to his request but "anticipates a favourable reply". He also apologises for any inconvenience he may have caused. What more could we have expected from Mr Msimang? Perhaps from Mr Wilson's point of view, Mr Msimang's failure to ask for Neotel's "consent" and tender costs was a serious flaw.

[17] The CCC disagrees.

[18] In his request for an indulgence, Mr Msimang asked ICASA to also communicate with the other side, meaning Neotel's attorneys. Mr Msimang

did not tender costs because obviously he did not believe that the CCC is endowed with such power.

[19] In the words of Mr Wilson, ".....the question of local loop unbundling is one which is of very considerable interest to Neotel and very important for purposes of its business operations in the market and, obviously, from a consumer perspective is one which we submit would have very significant benefits for the public". It is exactly for these reasons that both parties must be given time to prepare adequately for an important matter as this.

[20] In light of the foregoing, it was incumbent upon the CCC to ensure that both parties were afforded enough opportunity to state their cases, adequately and without any inhibitions of any kind. The CCC has an obligation to create a climate that is conducive to a fair hearing and that is what the tenets of justice demand of the CCC. That includes granting a party applying for a postponement the desired relief if circumstances justify the granting of such relief. We must do so fearlessly and without flinching.

[21] To expect senior counsel to be prepared and ready to argue within a period of five days, a complex and intricate matter whose papers had been drawn up by another senior counsel would have been grossly unfair and unreasonable. It took Mr Maleka SC, a year to go through the paces to be sufficiently seized with the complexities of the case. Telkom would have been substantially prejudiced had they been compelled to bring in new senior counsel to argue their case in these circumstances.

[22] Telkom believes that junior counsel had not gone through the paces nor does he have the skill and expertise of senior counsel. Junior counsel does not equate to senior counsel, especially for a matter of considerable interest like this one.

[23] Mr Wilson is wrong to suggest that junior counsel was ideal to argue the case on behalf of Telkom simply because, in his words, Neotel had taken the view that this was a matter which could be argued by him, being junior counsel. A party to litigation is entitled to decide who will adequately represent his/her interests and whether that person should be senior or junior counsel. It is definitely not for Mr Wilson to decide who should represent Telkom.

[24] A postponement is an indulgence which is granted by Court after assessing the merits of a particular application and the same principle guided the CCC in deciding to grant Telkom's application. Mr Msimang learnt of senior counsel's unavailability on 12 April and on the same day, liaised with ICASA and Neotel's attorneys, and explained the difficulty that confronted him. In our view, he reacted timeously and as quickly as he could.

[25] At this stage it necessary to deal with three issues which were canvassed during the application.

[26] Firstly, it is common for a trial to spill over to the next day or week, thereby clashing with other matters which are on the Court roll. Neither counsel nor the instructing attorney is to blame for this. Matters that have been crowded out are usually postponed sine die.

[27] Secondly, when counsel informs the instructing attorney that a matter he was busy with in Court was running over to clash with another matter for which he had been instructed, it is not practice for the instructing attorney to interrogate him. He/she believes him/her as there is generally trust and a good working relationship between them, spanning a long time. So when counsel says his matter is running over, the instructing attorney does not doubt counsel's *bona fides*. This is normal practice in the legal fraternity. If, however, the instructing attorney discovers that counsel was in fact double-

booked, the instructing attorney may report him/her to the Bar Council as this is unethical behaviour.

[28] Another interesting point that generated a lot of interest pertained to urgency. Questions were raised as to whether a matter that must be dealt with expeditiously means it must be treated on an urgent basis. The relevant section of the Act that will assist the CCC in understanding the intention of the legislature in this regard is section 43(5)(c) of the Act. For ease of reference, this section is reproduced below:

> *In the case of unwillingness or inability of an electronic communications network service licensee to negotiate or agree on the terms and conditions of an electronic communications facilities leasing agreement, either party may notify the Authority in writing and the Authority may-*
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> > *Refer the dispute to the Complaints and Compliance Committee for resolution on an expedited basis in accordance with the procedures prescribed in terms of Section 46.*

[29] The point at issue was the interpretation to be given to the word "expedite". The Paperback Oxford English Dictionary defines expedite as follows: "**cause to happen sooner or be done more quickly**". Quick in turn is defined as "**moving fast or taking a short time**". Urgent, on the other hand is defined as "**requiring immediate action or attention**".

[30] As can be seen from the definitions from the Oxford Dictionary, these words don't mean the same thing. In our view, expedite means creating space for something to happen soon rather than immediately as

contemplated by urgently. According the above definition, expedite includes the word "quickly" which means one must move fast or take a short time. Again this definition excludes urgent since expedite is not synonymous with urgent.

[31] It is also germane to also seek redress from section 17C (5) of the ICASA Act in order to try and understand that expedite is not synonymous with urgent and that the legislature intended them as such. Section 17C (5) reads as follows:

> *Notwithstanding this section, the Authority may prescribe procedures for handling urgent complaints and non-compliance matters.*

[32] In this sub-section, the legislature has made provision for hearing **urgent** matters for which the Authority is empowered to prescribe procedures, if it deems it necessary. By making provision for hearing matters on an urgent basis means that the legislature was alive to the fact that not all cases are the same. There are some that must be handled expeditiously and others urgently.

[33] We have taken a leaf from our Courts and see how they deal with matters that are said to be urgent. When a matter is before Court on an urgent basis, the Court deals with it on the spot. If the Court is satisfied that an applicant has made out a case on the papers, it grants the relief sought immediately. If we adopt the Courts' approach, the CCC must dispose of urgent matters on an urgent basis and the ICASA Act makes provision for that.

[34] In our view, the legislature used the word, expeditiously deliberately with the full knowledge that certain matters which are being referred to the CCC cannot be dealt with urgently because of their complexity. On the other

hand, it took cognisance of the fact that there are matters which must be dealt with on an urgent basis, hence the enactment of section 17C(5).

[35] In light of the above exposition, it seems to us that expeditiously does not mean the same thing as urgently. The legislature acknowledges that there are two classes of matters that can be referred to the CCC – those that must be dealt with expeditiously and those that must be dealt with on an urgent basis.

[36] Mr Msimang regrettably equated the CCC to traditional courts and made references to palm tree justice. These utterances seem to suggest that Mr Msimang demeans the status and role of the CCC and we find this troubling indeed. When arguing against the awarding of costs against Telkom, he issued a warning to the CCC not to do so. Mr Msimang is definitely out of order. His role as an attorney is to argue his client's case and make submissions to the best of his ability, and not to warn the CCC. If he feels that the CCC is misdirecting itself, one way or the other, he knows which remedies are available to him.

[37] Mr Wilson asked the CCC to make a recommendation to ICASA to award costs against Telkom to which Mr Msimang objected. Mr Wilson argued that there were no limitations to the kinds of recommendations which the CCC could make under section 17B (i) and (ii) of the ICASA Act. Whilst we accept that the CCC has the power to make any recommendation to the Authority that is necessary for the performance of its functions, and to achieve the objects of the ICASA Act and the underlying statutes, the CCC is not persuaded that this power extends to making a recommendation for costs.

[38] The CCC is governed by statute and derives its powers from it and is therefore loath to make a recommendation regarding costs since it is not

vested with such powers. There is a general outcry about high legal fees which deny Mr John Citizen access to our Courts. If then we start making a recommendation on costs, we will suddenly find ourselves in a situation where a community radio station, from poor rural areas, is asking for a postponement in circumstances which are similar to Telkom's. Is the CCC going to make a recommendation on costs in these circumstances? Yes it will, if the CCC makes a precedent by making a recommendation about costs.

[39] Our Constitution entitles everyone to access to Courts and the government is troubled by inaccessibility of the Courts by ordinary people due high legal fees. We have no doubt therefore that when the legislature remained silent on costs in the relevant statutes, it did so in order not to deny ordinary people and entities like community radio stations access to justice. If a community radio station is saddled with costs, it may have to close down due to inability to pay. The awarding of costs will also deter poor would-be litigants from poor community radio stations from challenging the likes of Telkom and Neotel which do have resources.

[40] The CCC has therefore come to the conclusion that it will not make a recommendation for costs to the Authority.

JW Tutani **Date 26 July 2012**

Chairperson