

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

3 October 2018

CASE NUMBER: 280/2018

In the matter between:

**SOUTH AFRICAN POST OFFICE (SOC) LTD** Complainant

and

**POSTNET SOUTHERN AFRICA (PTY) LTD** Respondent

**Referred to the CCC by the Authority<sup>2</sup> in terms of section 17C of the ICASA Act**

COMMITTEE: Prof JCW van Rooyen SC (Chairperson)

Councillor Dimakatso Qocha

Mr Peter Hlapolosa

Dr Jacob Medupe

Prof Kasturi Moodaliyar

Mr Jack Tlokana

For SAPO: I Goodman (with her O Motlhasedi) instructed by Bowman.

For Postnet: S Budlender SC (with him Meghan Finn) instructed by Nortons.

FOR SAEPA: A Cockrell SC (with him Nicole Lewis) instructed by Baker McKenzie

Coordinator: Ms Lindisa Mabulu

---

## JUDGMENT

**JCW van Rooyen**

### INTRODUCTION

[1] The General Manager Compliance at the Independent Communications Authority of South Africa (“ICASA”) referred this matter of alleged non-compliance with the Postal Services Act 1998 to the Complaints and

---

<sup>1</sup> The CCC is an independent administrative Tribunal in terms of section 33 of the Constitution of the Republic of South Africa. It was constituted by ICASA in March 2007 in terms of section 17A of the ICASA Act 2000, as amended in 2005. In a matter such as the present it advises ICASA as to an order, where appropriate, where it has found against a licensee.

<sup>2</sup> The Independent Communications Authority of South Africa constituted in terms of section 192 of the Constitution of the RSA.

Compliance Committee (“CCC”) at ICASA. This resulted from a matter brought before the said Division of ICASA by the South African Post Office (“SAPO”). SAPO alleges, broadly, that Postnet has and is contravening the Postal Services Act 1998 by virtue of its also providing services which may only be undertaken by SAPO (so-called reserved services). SAPO is licensed as a provider of reserved services and is the only institution which may deliver postage which weighs one kilogramme and less. The CCC has jurisdiction in this matter by virtue of section 80(3) of the Postal Services Act 1998, as amended.

- [2] For ease of reference we shall refer to SAPO as the “Complainant” and Postnet as the “Respondent.” We will, however, remain within the four corners of the reference by the Compliance Division at ICASA. We shall thus, hereunder, commence by quoting the contents of the reference to the CCC by the Compliance division. The Compliance division, however, did not take part in the further process before the CCC and, essentially, SAPO is the Complainant and Postnet the Respondent. The order which is sought is a desist order against Postnet – prohibiting it from contravening Schedule 1 read with Schedule 2 of the Postal Services Act in that it is also providing a reserved service which may only be undertaken by SAPO.
- [3] After the first hearing of the matter, it became clear that the matter is of national interest and necessitated wider investigation. A call for written legal and other relevant opinions by financially interested parties, was placed on the ICASA Website and a term was set within which opinions could be filed with the Coordinator of the CCC. Once the written arguments had been received, the CCC would decide which interested parties would be called to take part in the balance of the hearing. All other written argument filed would, however, be considered. Of course, the parties, Postnet and SAPO, would be part of the further hearing which would be held. The said *investigation* by the CCC had, however, according to the Constitutional Court,<sup>3</sup> to be exercised with fairness. Thus, the following was stated by the CCC in *SAPO v Aramax*:<sup>4</sup>

The CCC does have investigative powers, but would only exercise such powers where a complaint with reference to facts and relevant legislation or licence conditions is brought before it. And, such investigation will only be undertaken where the CCC is

---

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

<sup>4</sup> CCC Case 130/2016.

of the view that there is a lacuna in the facts which needs investigation and fairness permits that the CCC must go beyond the documentation before it; for example, require more details from one of the parties. This was, for example, done in *Nowmedia v SAPO*<sup>5</sup> where SAPO was required to file an affidavit as to what alternative steps it took to deliver postage during an unprotected strike.

- [4] Argument on behalf of Postnet and SAPO was presented before the CCC by advocates appearing for SAPO and Postnet. *Cockrell SC*, acting for the South African Express Parcel Association (SAEPA), joined the advocates at the second hearing in July 2019. Representations were also received from FedEx, DHL and Aramex SA. Since the core of these representations accorded with what was argued by Postnet and SAEPA, it was not deemed necessary to hear the said parties. The documents so filed, however, form part of the materials as a whole and were considered by the CCC, as will appear later in this judgment.
- [5] At the second hearing Dr Modimoeng was no longer available to sit on the CCC panel as a result of duties as Acting Chair of ICASA. Council replaced him with Councillor Dimakatso Qocha. Mr *Budlender* stated that his client had no problem with the replacement, since the matter would, in any case, be argued fully again. He, however, argued that since the Council of ICASA is involved in drafting (relevant) new Regulations in terms of the Postal Services Act, the Council was clearly supporting the principles on which the limiting provisions in the Schedules of the Postal Services Act are based. Council would be deemed to be biased when the matter, ultimately, came before it for the issuing of a possible order. This would nullify the hearing of the complaint before the CCC, since whatever the CCC's decision in the present matter would be, the second step in the process – the Council's consideration of a possible order – would legally be biased and invalid. Thus it would be meaningless to continue with this investigation before the CCC. Since the Chairperson of the CCC is entrusted with the legality of the procedure of the CCC in terms of section 17(6) of the ICASA Act, I ruled that there was no legal basis for such an application. The Constitutional Court's criterion for a finding of bias is the following: would a reasonable person have reasonable grounds to believe that the process before the Council is likely to be biased. In *SACCAWU v Irvin & Johnson Ltd (Seafoods Division*

---

<sup>5</sup> CCC case 126/2015.

*Fish Processing*)<sup>6</sup> Cameron AJ (the later Justice of the Constitutional Court) stated as follows in a judgment of the Constitutional Court:

'The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.'

Councillors of ICASA must also, in accordance with section 4 of the ICASA Act, take an Oath of Office before they assume office.<sup>7</sup>

[6] Whilst it is, of course, Council's prerogative to decide whether it or any Councillor is biased,<sup>8</sup> there would have been no sense in continuing with this hearing if, in applying the Constitutional test for bias, it was concluded that the process could lead to a nullity if the CCC were to continue. However, I have no doubt that the mere involvement of Council in its regulatory role does not meet the test for reasonable bias in the present process in the eyes of the reasonable observer. Council as Regulator is regularly involved in the preparation or amendment of regulations. The fact that Council is presently involved in the preparation of new regulations in this field, cannot mean that it would fall foul of its task as objective and independent adjudicator in the present matter. Its role as adjudicator would be to consider whether an order, if so advised by the CCC, is justified.<sup>9</sup> There is, accordingly, no reason why the CCC

---

<sup>6</sup> 2000 (3) SA 705 (CC).

<sup>7</sup>Section 5 (4) A councillor appointed under this section must, before he or she begins to perform his or her functions, take an oath or affirm that he or she -

(a) is committed to fairness, freedom of expression, openness and accountability; and

(b) will uphold and protect the Constitution and the laws of the Republic, including this Act and the underlying statutes.

<sup>8</sup> See section 12 of the ICASA Act.

<sup>9</sup> *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC) inter alia at para [55].

should not hear this matter as a result of an apprehension that Council could be biased in terms of the rule as stated by Cameron AJ in the matter referred to.<sup>10</sup> Further, the Constitutional Court, fully aware of the relationship between the CCC and Council, held the procedure, as set out in the ICASA Act, as valid from a Constitutional perspective. It was clear from the reasoning<sup>11</sup> of the Constitutional Court that it fully appreciated the role which Council also plays as a Judicial Body.

## **REFERENCE BY THE AUTHORITY TO THE CCC**

[7] The formal document filed with the CCC by the Authority reads as follows:

**Allegations:** PostNet SA allegedly contravened Section 15(1) and (2) of the Postal Services Act, 1998 (Act no. 124 of 1998) as amended, by operating a reserved postal service without a valid licence. The relevant sections 15(1) and (2); 16(3) and (4)(a) of the Postal Services Act, 1998, provide as follows:

*“15. (1) Subject to the provisions of this Act, no person may operate a reserved postal service except under and in accordance with a licence issued to that person in terms of this Chapter.*

*(2) A licence confers on the holder the privileges and subjects him or her to the obligations referred to in this Act or specified in the licence.*

### **1. Allegation relating to non-compliance with the provision of the Postal Services Act, 124 of 1998 as amended.**

1.1 PostNet receives letters, small packets and other postal articles within the mass or size limitations set out in Schedule 1(3) of the Postal Services Act, 1998.

1.2 PostNet is registered to operate in the Unreserved Postal Services (UPS) market and it is allegedly operating in the Reserved Postal Services (RPS) market, without a valid licence issued in accordance with Section 16(3) and (4)(a) of the Postal Services Act, No. 128 of 1998, as amended.

---

<sup>10</sup> Also compare *President of the RSA v SARFU* 1999 (4) SA 147 (CC).

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

- 1.3 PostNet allegedly operated in the RPS market that the South African Post Office (SAPO) has been granted the exclusive right to operate in.
2. On 19 January 2017, the Authority received a formal written request from SAPO, to investigate the conduct of PostNet in the reserved postal services market to determine whether PostNet has/is contravening the monopoly rights granted to it by ICASA in terms of its postal licence conditions. The said letter from SAPO indicated that:
  - (a) PostNet receives letters, small packets and other articles for receipt at the ultimate destination;
  - (b) PostNet dispatches letters, small packages and other postal articles for receipt at the ultimate destination; and
  - (c) PostNet provides mail boxes to consumers.
3. **Allegation of non-Compliance with the Licence Terms and Conditions**
  - (a) PostNet also allegedly contravened Section 77 of the Postal Services Act, 1998. Section 77 states that *“Any person who contravenes or fails to comply with any provision of this Act for which no special or other penalty is provided, is guilty of an offence”*.
  - (b) Further, PostNet has also allegedly contravened Section 80(1) of the Postal Services Act, 1998, which states that *“Any person who operates a postal service except in terms of this Act or in terms of licence or registration certificate issued to that person in terms of this Act, is guilty of an offence”*.
  - (c) From the above provision of the Postal Services Act, 1998, PostNet is in breach of its registration certificate issued in terms of the said Act.
4. **RELIEF SOUGHT**

It is recommended that the CCC considers and decides on the following:

- 4.1 Contravention of Section 15(1) and (2); 16(3) and (4)(a) of the Postal Services Act, 1998 as set out herein;
- 4.2 Contravention of Section 77 and 80(1) of the Postal Services Act, 1998 as set out herein;
- 4.3 Interpretation of Sections 15(1) and (2); 16(3) and (4)(a) of the Postal Services Act, 1998; and
- 4.4 Impose a sanction where appropriate, for contravention of Sections 15(1); 77 and 80(1), of the Postal Services Act, 1998 (Act 124 of 1998), or CCC may impose whatever sanction/relief it may deem fit.

## 5. ANNEXURES<sup>12</sup>

- A. PostNet's advert displaying that it sends postal items (0 – 5kg) countrywide for as little as R99.00;
- B. Copy of PostNet Registration Certificate dated 20 April 2015;
- C. Copy of letter to PostNet SA dated 24 March 2017;
- D. Copy of response by Norton on behalf of PostNet to SAPO letter dated 24 March 2017;
  
- E. Copy of reply by Bowmans on behalf of SAPO dated 20 June 2017;
  
- and
  
- F. The final report by ICASA (Postal Monitoring Specialist) dated 31 October 2017.

It should immediately be stated that the CCC does not have the authority to find a respondent guilty of an offence. Only the Courts may do that. Accordingly the complaint in terms of section 16 and 77 falls away. All that remains is the complaint in terms of section 15(1).Section 80(3) grants the CCC jurisdiction to hear the matter in terms of section 15(1) of the Act and, if no contravention is found, dismiss the complaint or, where a contravention is found in terms of section 80(3), advise Council as to an order in terms of section 80(4).

---

<sup>12</sup> The Annexures are not included in this document.

## REFERRING TO SAPO AS THE COMPLAINANT: THE DISPUTE

- [8] This matter concerns the services, argued to be reserved, that Postnet SA (“Postnet”) is providing to the public. SAPO argues that Postnet is, in certain instances, contravening the Postal Services Act 124 of 1998 (“the Act”). That dispute, in turn, arises from the exclusivity, as argued by SAPO, conferred on SAPO by the Act. The Act distinguishes between reserved postal services and unreserved postal services. Reserved postal services are those services referred to in Schedule 1 to the Act, while unreserved postal services are defined in Schedule 2 of the Act. A person must be licensed under section 15(1) of the Act to operate a reserved postal service. Only SAPO holds a license to provide a reserved postal service. Postnet is registered to provide only unreserved postal services, including courier services. It may not lawfully operate a reserved postal service, and is thus precluded from undertaking any of the activities set out in Schedule 1 to the Act where the weight of the object referred to is 1kg or less. This approach is opposed by Postnet and SAEPA (the latter in its July 2019 presentation before the CCC) as well as the three other interested parties, who filed representations. It is common cause, for purposes of this judgment, that Postnet and its franchisees courier postal articles that weigh one kilogram or less and that its franchisees provide mailboxes to some 55 000 customers (referred to collectively as “the impugned services”). SAPO contends that the impugned services are reserved services, which may only be undertaken by SAPO or its agents. That is so, SAPO argues, because the conveyance of *any* postal articles that weigh 1 kilogram or less or fit within the specified dimensions, are reserved services; and the provision of address boxes must necessarily include the provision of mailboxes to end-users, and is also a reserved service.
- [9] Historically, Postnet and its franchisees provided the impugned services in terms of a Master Agreement concluded with SAPO, which appointed Postnet’s franchisees as retail postal agents of SAPO. It permitted them, inter alia, to transport mail from a designated post office to the franchisees’ premises, to handle incoming mail and to sort it into *poste restante* cabinets or private post office boxes at the franchisees’ premises – provided that the franchisee paid over to SAPO the amount that it was entitled to for rental of post boxes. The Master Agreement also authorised Postnet franchisees to provide post office services during



the ordinary SAPO hours, at prices no higher than could be charged by SAPO. This agreement, however, fell away.

- [10] SAPO argued that the impugned services constitute reserved postal services that Postnet provides without being licensed to do so, in breach of section 15(1) of the Postal Services Act. Postnet argued that it is lawfully entitled to provide the impugned services, primarily because Schedule 1 should contain a “*carve out*” to permit postal articles that weigh 1 kilogram or less to be couriered, and because “*address boxes*” are distinct from the mailboxes that it provides. Further argument will be considered later in this judgment. The Authority has referred the complaint to the CCC, to interpret section 15(1) of the Act and to consider whether Postnet’s provision of the impugned services contravenes the Act. Both SAPO and Postnet agree that the question turns on the proper interpretation of the Act and its Schedules.

## **PROCEDURAL**

- [11] Insofar as it is necessary to do so, the CCC has no doubt that the matter is ripe to be heard. The Authority has referred the dispute to the CCC to resolve it. Essentially, the matter boils down to the legal question whether Postnet is contravening the relevant legislation or not. It should, however, be pointed out that any section of the Postal Services Act which relates to a criminal offence does not fall within the jurisdiction of the CCC. However, section 15(1) of the Act does fall within the jurisdiction of the CCC. It provides as follows:

### **15. Prohibition on operating reserved postal service without licence**

- (1) Subject to the provisions of this Act, no person may operate a reserved postal service except under and in accordance with a licence issued to that person in terms of this Chapter.
- (2) A licence confers on the holder the privileges and subjects him or her to the obligations referred to in this Act or specified in the licence.
- (3) The Minister may by notice in the *Gazette* make such amendments as may be necessary from time to time to the Schedules but may not, in so doing, cause any activity falling under unreserved postal services to fall under reserved postal services.

Schedules 1 and 2 of the Act provide as follows:

**Schedule 1**  
**RESERVED POSTAL SERVICES**

1. The reserved postal services include -
  - (a) all letters, postcards, printed matter, small parcels and other postal articles subject to the mass or size limitations set;
  - (b) issuing of postage stamps; and
  - (c) the provision of roadside collection and address boxes.
2. For purposes of this Schedule, a letter means any form of written communication or other document, article or object that is directed to a specific person or persons or specific address and is to be conveyed other than by electronic means and includes a parcel, package or wrapper containing any such communication or article conforming to the mass or size limitations set out in item 3.
3. The reserved postal services include all items described in items 1 (a) and 2 of a mass up to and including one kilogram or size which enables it to fit into a rectangular box with the following dimensions:  
length 458 mm, width 324 mm, thickness 100 mm  
Cylinders having a maximum length of 458 mm and 100 mm thickness or a mass of up to one kilogram are regarded as letters.
4. The following exemptions from letter mail apply and are not subject to licensing in terms of this Act:
  - (a) Delivery by an employee of the sender exclusively for the private affairs of the sender;
  - (b) unaddressed mail;
  - (c) the exchange or service of legal process, proceedings, pleadings, affidavits or depositions;
  - (d) ...
  - (e) occasional letters delivered by an individual not in the business of delivering letters;
  - (f) trade announcements, circulars, printed extracts from newspapers, or advertisements which are not addressed to any person;
  - (g) newspapers and periodicals.

**Schedule 2**  
**UNRESERVED POSTAL SERVICES**

1. Unreserved postal services include -
  - (a) all letters, postcards, printed matter, small parcels and other postal articles that fall outside the ambit of the reserved services set out in Schedule 1 up to and including thirty kilograms;
  - (b) courier services in respect of items mentioned in paragraph (a); and
  - (c) any other postal service that falls outside the ambit of the reserved services as set out in Schedule 1.
2. The following exemptions apply to unreserved postal services and are not subject to registration in terms of the Act:
  - (a) Delivery by an employee of the sender exclusively for the private affairs of the sender;
  - (b) unaddressed mail;
  - (c) the exchange or service of legal process, proceedings, pleadings, affidavits or depositions;
  - (d) occasional letters delivered by an individual not in the business of delivering letters;

- (e) trade announcements, circulars, printed extracts from newspapers, or advertisements which are not addressed to any person;
- (f) newspapers and periodicals.

[12] The CCC does not, for purposes hereof, propose to go into detail as to the jurisdictional points made on behalf of Postnet. The matter has been referred to the CCC by the Authority and the CCC is called upon to make a finding in terms of the ICASA Act read with the Postal Services Act. Postnet's Counsel argued initially that interested parties must be *joined* in this process. Joinder, as applied by the Supreme Court, is not a process for which the ICASA Act or CCC Regulations provides. The CCC has a case before it against Postnet and that is the case which it must decide. Postnet is registered to provide unreserved postal services. SAPO has lodged a complaint against it with the Authority and the Authority has referred the matter to the CCC in terms of the ICASA Act. It is against or in favour of Postnet that the matter has to be decided. There was, thus, no duty on the Authority to have joined other parties. Postnet's objections to the validity of the charge sheet are, thus, not justified. In addition, Postnet is undoubtedly aware of the scope of the case against it. On Postnet's own version SAPO has raised its objections to the impugned conduct before, and its objections are set out in the documents before the CCC. Postnet has submitted a substantial response, demonstrating its clear understanding of the nature and scope of the case. The CCC, consequently, holds that Postnet's *in limine* objections to the charge sheet and the scope of the complaint are unfounded. Hereunder, the Tribunal quotes the core of SAPO and Postnet's Argument by their Counsel. The CCC has, in any case, decided, after the first hearing, to grant interested parties an opportunity to file representations. SAEPA, an organisation representing more than 100 couriers has, indeed, filed, representations and the Tribunal has decided to also hear it. Mr *Cockrell* SC represented the organisation. Three courier companies also filed representations.

### **THE CORE OF SAPO'S ARGUMENT**

[13] It was argued that at its heart, this case turns on the proper interpretation of Schedules 1 and 2 of the Act. They define the scope of reserved and unreserved postal services, respectively. The proper

approach to interpretation of legislation, according to SAPO's Counsel, has been set out by the Supreme Court of Appeal in *Endumeni*:<sup>13</sup>

*"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."* (Emphasis added)

The purpose of the interpretive process is thus to establish the ordinary meaning of the provision in question. Where its meaning is clear, it must be applied.

In the present case, Postnet argues that Schedules 1 and 2 are ambiguous and that their terms must be interpreted in a manner that promotes Postnet's right to provide the impugned services. That is the most constitutionally appropriate reading, it claims, because it gives effect to both the objects of the Act and its constitutional entitlements. According to Postnet, it is also supported by the general rule that criminal provisions must be restrictively interpreted.

It is submitted, on the contrary, that neither the wording of the Act and its schedules nor the purpose underpinning them supports the interpretation that Postnet proposes. Moreover, while it is correct that criminal provisions must be restrictively interpreted, that tenet is irrelevant in this case. The complaint is concerned with the proper delineation of reserved and unreserved services under the Act, which entails the interpretation of the ordinary, civil provisions of the statute. ICASA has not proffered a criminal charge against Postnet and the interpretation of the criminal provisions of the Act (that is, sections 80 and 77) do not arise. To demonstrate why Postnet's interpretation of the Act is flawed, we begin by assessing the legislative scheme. As outlined above, the Act differentiates between reserved and unreserved

---

<sup>13</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18, cited with approval by a majority of the Constitutional Court in *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) at 105.

postal services. In terms of section 15 of the Act, reserved services may only be provided by an entity licensed to do so. It states:

***“15 Prohibition on operating reserved postal service without licence***

- (1) Subject to the provisions of this Act, no person may operate a reserved postal service except under and in accordance with a licence issued to that person in terms of this Chapter.*
- (2) A licence confers on the holder the privileges and subjects him or her to the obligations referred to in this Act or specified in the licence.*
- (3) The Minister may by notice in the Gazette make such amendments as may be necessary from time to time to the Schedules but may not, in so doing, cause any activity falling under unreserved postal services to fall under reserved postal services.”*

The Act afforded SAPO an entitlement to a reserved services licence from its inception. Section 16(3) of the Act provides that SAPO be regarded as having applied for a reserved services licence at the commencement of the Act, and that the Minister is obliged to grant it a 25-year reserved services licence. The Minister did so with effect from 1 April 2005.<sup>14</sup> The Act also limits the ability of any other entity to procure a reserved services licence: Section 16(8) requires that SAPO’s licence stipulates a fixed period for which it would enjoy the exclusive entitlement to provide reserved postal services.<sup>15</sup> SAPO’s original licence afforded it a 3-year exclusivity period.<sup>16</sup> That period has repeatedly been extended, most recently on 30 March 2017 for a further 5 years.<sup>17</sup> Moreover, ICASA may not accept applications for further reserved services licences unless the Minister first issues a policy direction permitting it to do so.<sup>18</sup> In effect, then, SAPO has an ongoing statutory monopoly in respect of the reserved postal services. Postnet cannot lawfully encroach on or frustrate this exclusivity...The purpose of affording SAPO a monopoly is to fund its obligation to roll out universal postal services. That is clear from terms of its original

---

<sup>14</sup> See SAPO licence, RA3 p 138-156, particularly at p 137 clause 2.

<sup>15</sup> Section 16(8) states: *“In the licence to be issued to the postal company in terms of subsection (3), there must be specified in respect of reserved postal services rendered by the postal company a fixed period or from time to time any extended period, during which no person other than the postal company may be licensed to provide a similar service: Provided that nothing contained in this subsection may be regarded as limiting the powers vested in the Minister by subsection (2) and that any such period must be reviewed by the Minister every five years or such shorter period as the Minister may determine.”*

<sup>16</sup> SAPO licence, RA3 p 137 clause 3.

<sup>17</sup> SAPO affidavit p 96 para 20.8.

<sup>18</sup> Section 16(2) states: *“The Regulator may only accept and consider an application for a licence to provide a reserved postal service in accordance with a policy direction issued by the Minister in terms of section 2A.”*

licence, which expressly linked its exclusivity over reserved services to the provision of a universal postal service. Clause 2 of SAPO's original licence states:

*"In order to facilitate the achievement of the universal postal service, the reserved postal services have been established conferring exclusive rights upon the Licensee, so as to ensure compliance with section 2 of the Act."*<sup>19</sup>

Universal postal services refer to the promotion of reliable and equal access to postal and other services for all citizens, regardless of their physical location, at a uniform and affordable price.<sup>20</sup> It includes the extension of basic letter, mail collection and retail service to underserved areas.<sup>21</sup> It is essential to remedy the historic exclusion of the majority of the population from basic services, including postal services. The provision of universal postal services is thus undergirded by the constitutional obligation to promote equality and to advance the needs of people historically disadvantaged by unfair discrimination.<sup>22</sup> It also facilitates postal communication – and thus gives effect to the constitutional right of freedom of expression. Congruent with the importance of those aims, the rollout of universal postal services is a central objective of the Act: The preamble to the Act states that its purpose is, among others, to make provision for *"the operational functions of the postal company, including its universal service obligations"*. Section 2 of the Act includes a number of objects that focus on the need to develop universal postal services. They include:

the promotion of universal and affordable postal services;<sup>23</sup>

making progress toward the universal provision of postal services;<sup>24</sup>

ensuring greater access to basic services through the achievement of universal postal service, by providing an acceptable level of effective and regular postal services to all areas including rural areas and small towns where post offices are not sustainable;<sup>25</sup>

developing greater equity in respect of the distribution of services, particularly within the areas of the historically disadvantaged communities, including rural areas;<sup>26</sup>

ensure that the needs of disabled persons are taken into account in the provision of postal services;<sup>27</sup>

protecting the interests of postal users and consumers;<sup>28</sup>

---

<sup>19</sup> SAPO licence, RA3 p 137 clause 2.

<sup>20</sup> See section 8(1)(f) of the Act.

<sup>21</sup> SAPO licence, RA3 p 137 clause 4.1; amended licence, RA4 pp 157-158 clause 7.4.

<sup>22</sup> Section 9(2) of the Constitution states: *"Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."*

<sup>23</sup> Section 2(a).

<sup>24</sup> Section 2(c).

<sup>25</sup> Section 2(f).

<sup>26</sup> Section 2(g).

<sup>27</sup> Section 2(h).

<sup>28</sup> Section 2(l).

promoting the effective maintenance of an efficient system of collecting, sorting, and delivering mail nationwide, in a manner responsive to the needs of all categories of mail users;<sup>29</sup>

contributing to the community and rural development and education, through actively participating in the development of a citizen's post office, serving as an interface between Government and community and providing a centre for community activities.<sup>30</sup>

Both the Minister<sup>31</sup> and ICASA<sup>32</sup> must exercise the powers conferred on them by the Act, to promote universal access to postal services. In turn, section 16(7) requires that SAPO's licence conditions ensure *"the provision of postal services in areas and to communities which are not served or adequately served by postal services, with a view to achieving universal postal service"*. Its licence imposes substantial obligations on it to extend existing postal services to underserved areas.<sup>33</sup>

SAPO is currently the only entity subject to universal service obligations. It thus bears the monumental task of providing and expanding postal services to underserved people and areas. It is also subject to tariffs and price controls,<sup>34</sup> set by ICASA,<sup>35</sup> which it cannot unilaterally increase. As a result, it has limited resources with which to fulfil its mandate. Its exclusivity over the reserved services is essential to afford it the revenue that it requires properly to meet its obligations. Where Postnet undertakes reserved services, it diverts revenue away from SAPO and undermines its ability to promote universal access to postal services.<sup>36</sup> By way of example, Postnet's provision of post boxes to its customers generates more than R26 million in revenue, of which SAPO receives some R57 000.<sup>37</sup> The impact on SAPO is plain. The Act and its schedules must be interpreted to give effect to this statutory scheme and to promote universal postal services. The objects of the Act on

---

<sup>29</sup> Section 2(m).

<sup>30</sup> Section 2(n).

<sup>31</sup> See section 2A(2)(b) of the Act.

<sup>32</sup> Section 8(1)(f).

<sup>33</sup> See SAPO amended licence, RA4 pp 157-159 clauses 7.4-7.5.

<sup>34</sup> SAPO amended licence, RA4 pp 159-160 clauses 7.6.

<sup>35</sup> In terms of section 30 of the Act, which states: *"30 Fees and charges for postal services(1) Subject to the approval of the Minister, the Regulator, in consultation with the postal company or, where applicable, any other licensee, may determine the fees and charges payable in respect of the provision of a postal service by the postal company or, where applicable, by such other licensee.(2) The manner of determining fees and charges in respect of reserved postal services must be prescribed.(3) In exercising a power under subsection (1) the Regulator may determine different fees and charges in respect of different services, or services rendered in different areas or circumstances or may determine special fees and charges which may be higher or lower than the normal fees and charges, and may exempt particular users or prospective users of services in specific circumstances from any of the prescribed fees and charges.(4) Fees and charges determined in terms of this section must be published in the Gazette by the Regulator and may not come into force until 60 days after such publication.(5) This section does not apply to courier services."*

<sup>36</sup> SAPO complaint, CW1 p 51 para 9; SAPO affidavit p 109 para 28.16.

<sup>37</sup> SAPO affidavit p 112 para 30.3.

which Postnet relies – of promoting competition and variety within the postal services – are of secondary importance.

### ***The wording of the Schedules***

Against that background, it is submitted that the meaning of Schedules 1 and 2 is clear and unambiguous. Schedule 1 defines the scope of reserved postal services. It states:

- “1. The reserved postal services include—
  - (a) all letters, postcards, printed matter, small parcels and other postal articles subject to the mass or size limitations set out in item 3;*
  - (b) issuing of postage stamps; and*
  - (c) the provision of roadside collection and address boxes.**
  
- 2. For purposes of this Schedule, a letter means any form of written communication or other document, article or object that is directed to a specific person or persons or specific address and is to be conveyed other than by electronic means and includes a parcel, package or wrapper containing any such communication or article conforming to the mass or size limitations set out in item 3.*
  
- 3. The reserved postal services include all items described in items 1 (a) and 2 of a mass up to and including one kilogram or size which enables it to fit into a rectangular box with the following dimensions: length 458 mm width 324 mm thickness 100 mm. Cylinders having a maximum length of 458 mm and 100 mm thickness and or a mass of up to one kilogram are regarded as letters.*
  
- 4. The following exemptions from letter mail apply and are not subject to licensing in terms of this Act:
  - (a) delivery by an employee of the sender exclusively for the private affairs of the sender;*
  
  - (b) unaddressed mail;*
  
  - (c) the exchange or service of legal process, proceedings, pleadings, affidavits or depositions;*
  - (d) . . . . .*
  - (e) occasional letters delivered by an individual not in the business of delivering letters;*
  - (f) trade announcements, circulars, printed extracts from newspapers, or advertisements which are not addressed to any person;**



(g) *newspapers and periodicals.*”

Schedule 2 provides for unreserved services. It says:

*Unreserved postal services include—*

- (a) *all letters, postcards, printed matter, small parcels and other postal articles that fall outside the ambit of the reserved services set out in Schedule 1 up to and including thirty kilograms;*
- (b) *courier services in respect of items mentioned in paragraph (a); and*
- (c) *any other postal service that falls outside the ambit of the reserved services as set out in Schedule 1.*”

Clause 2 of Schedule 2 includes the same list of exemptions as those set out in clause 4 of Schedule 1. It means that those services can be performed without either a licence or a registration certificate.

### ***Items less than 1 kilogram***

1. It is submitted that Schedule 1 and 2, read together, are clear. The conveyance of any letter or postal article weighing less than 1 kilogram or fitting within the dimensions specified in clause 3 of Schedule 1 is a reserved service. Only the conveyance and couriating of articles weighing more than that or exceeding the specified dimensions qualifies as an unreserved service.
2. Postnet submits that the Schedule 1(1)(a) should be read as including a “*carve out*” that permits items falling within its ambit to be couriated. It therefore suggests that it should be read as though it provided:

“(a) *All letters, postcards, printed matter, small parcels and other postal articles subject to the mass or size limitations set out in item 3 except where such items are couriated*”<sup>38</sup>

Where the underlined words represent those that Postnet would have read into the provision.

3. But there is no basis for reading those words in. They conflict with the plain meaning of Schedule 1(1), and squarely contradict the wording of Schedule 2(1)(b), which permits unreserved courier services only in respect of those items identified in Schedule 2(1)(a). The meaning proposed by Postnet strains the ordinary meaning and import of the text.
4. Had the legislature wanted to create the carve out postulated by Postnet, it would have done so. It is, with respect, not for the CCC to change the exclusivity the legislature has elected to impose.<sup>39</sup>

---

<sup>38</sup> Postnet affidavit p 32 para 78.5; p 24 para 55.2.

<sup>39</sup> See, by analogy, *Nova Property Group Holdings v Cobbett* 2016 (4) SA 317 (SCA) para 47.

5. Moreover, contrary to Postnet's claim, there is nothing anomalous, unfair or unconstitutional about the reservation adopted. It is entirely consistent with the legislative scheme and the constitutional purpose underpinning it – which, as outlined above, is to afford SAPO a monopoly over certain services, in order for it to enhance universal service obligations.
6. Postnet's claims that it is prejudiced by any preclusion from providing courier services is overstated. It admits that such services are principally not provided by it, but sub-contracted to other service providers – including SAPO – to do.<sup>40</sup> But in any event, its claim of prejudice is self-serving and is not supported by the provisions of the Act. It cannot claim any statutory or constitutional entitlement to continue performing services the performance of which were unlawful from inception.
7. SAPO therefore submits that its complaint should be upheld in respect of the couriership of items weighing less than 1 kilogram and falling outside the specified dimensions, and that the CCC should recommend that it be directed to refrain from providing such services in the future (except under licence from SAPO).

## **THE CORE OF POSTNET'S ARGUMENT**

### **[14] INTERPRETATION OF THE POSTAL SERVICES ACT**

At the heart of the present matter lies a legal question – the proper interpretation of the Postal Services Act. It is therefore essential to identify the proper approach to the interpretative exercise that this Tribunal will have to undertake.

1. There are three key interpretative principles in this regard:
  - 1.1. First, the provisions of the Act must be interpreted contextually, in a manner that gives effect to its purpose and that avoids absurdity.
  - 1.2. Second, because the Act involves the imposition of criminal and administrative sanctions, the provisions must be interpreted restrictively. In other words, any ambivalence in the provisions or uncertainty about their meaning must be resolved against the risk of being penalised.
  - 1.3. Third, the provisions must be interpreted in a manner that best promotes the spirit, purport and objects of the Bill of Rights.
2. We deal with each of these principles in turn.

#### **2.1 The need for contextual interpretation**

---

<sup>40</sup> Postnet affidavit p 30 para 72.

3. The Supreme Court of Appeal has made clear that that our law is now that statutory interpretation always involves a contextual approach to interpretation, which takes account of the purpose of the provisions.

4. As the Court explained in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.<sup>41</sup>

*“The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. ... The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”<sup>42</sup> (Emphasis added by Senior Counsel for Postnet)*

5. The Constitutional Court has since repeatedly quoted the approach set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* with approval.<sup>43</sup>

6. SAPO, however, denies that the relevant provisions of the Postal Services Act are ambiguous and argues that the provisions plainly support its proffered interpretation. It then contends that it is never necessary to resort to a purposive interpretation where the provisions in question are clear.<sup>44</sup> It is wrong on both counts.

---

<sup>41</sup> *Supra*.

<sup>42</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

<sup>43</sup> See, for example, *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, KwaZulu-Natal and Others* [2013] ZACC 10; 2013 (4) SA 262 (CC) para 129; *Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) and Others* [2017] ZACC 43; 2018 (2) BCLR 157 (CC) para 28; *Food and Allied Workers’ Union obo Gaoshubelwe v Pieman’s Pantry (Pty) Limited* [2018] ZACC 7 para 186.

<sup>44</sup> SAPO’s replying affidavit: Record at p120 paras 52-53; p121 para 60. SAPO’s heads of argument at para 42.

7. As the SCA explained in *Endumeni* at para 19:  
*"[F]rom the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate. The path that Schreiner JA pointed to is now received wisdom elsewhere. Thus Sir Anthony Mason CJ said: 'Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.'"*
  
8. It went on at para 25:  
*"Sometimes the language of the provision, when read in its particular context, seems clear and admits of little if any ambiguity. Courts say in such cases that they adhere to the ordinary grammatical meaning of the words used. However that too is a misnomer. It is a product of a time when language was viewed differently and regarded as likely to have a fixed and definite meaning, a view that the experience of lawyers down the years, as well as the study of linguistics, has shown to be mistaken. Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used. At the other extreme, where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity. This is said to involve a departure from the plain meaning of the words used. More accurately it is either a restriction or extension of the language used by the adoption of a narrow or broad meaning of the words, the selection of a less immediately apparent meaning or sometimes the correction of an apparent error in the language in order to avoid the identified absurdity."*
  
9. The Constitutional Court has similarly explained:  
  
*"The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous. Recently, in *Thoroughbred Breeders' Association v Price Waterhouse*,<sup>45</sup> the SCA has reminded us that:*

---

<sup>45</sup> *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at para 12.

'The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the face of it to have a readily discernible meaning.'<sup>46</sup>

10. Accordingly, SAPO cannot succeed in any argument that suggests that this Court should give a meaning to the Act (or certain provisions within it) without considering and relying on the context, right from the outset.

### **1.1 The need for restrictive interpretation when penalties are involved**

11. SAPO's approach requires this Committee to adopt the widest possible reading of the restrictions contained in the Act.
12. But this is untenable in the present context. This is because the Act involves the imposition of criminal and administrative penalties for breaches of its provisions.
  - 12.1. Section 77 of the Postal Services Act provides that any person who contravenes a provision of the Postal Services Act for which no special penalty is provided, is guilty of an offence and is liable on conviction to either, or both, imprisonment for a period not exceeding two years or a fine.
  - 12.2. Section 80 of the Postal Services Act provides that any person who operates a postal service except in compliance with the legislation and in terms of a licence is guilty of an offence, and may be liable on conviction to imprisonment for up to five years, to a fine, or to both. This is in addition to the possibility of the imposition of severe fines.
13. It is well-established that legislative provisions that give rise to criminal and administrative penalties must be restrictively interpreted in cases of doubt or ambiguity.
14. In *Democratic Alliance v African National Congress*,<sup>47</sup> the Constitutional Court interpreted provisions of the Electoral Act 73 of 1998 restrictively because those provisions give rise to both criminal and civil sanctions.<sup>48</sup>

---

<sup>46</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 90, cited with approval in *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (10) BCLR 1027 (CC) ; 2007 (6) SA 199 (CC) at para 52.

<sup>47</sup> *Democratic Alliance v African National Congress* 2015 (2) SA 232 (CC).

<sup>48</sup> "In case of doubt, we are obliged to interpret [these] prohibitions restrictively. This means that we must resolve any ambivalence in them, or uncertainty about their meaning, against the risk of being penalised. The restrictive interpretation of penal provisions is a long-standing principle of our common law. Beneath it lies considerations springing from the rule of law. The subject must know clearly and certainly when he or she is subject to penalty by the state. If there is any uncertainty about the ambit of a penalty provision, it must be resolved in favour of liberty. This Court has endorsed this approach. And indeed the Bill of Rights gives these considerations added force. It posits the rule of law as a founding value of our

15. Very significantly, the Court did so even though the case before it concerned a civil interdict – without any criminal charges.
  - 15.1. Put crisply, the mere risk that criminal or administrative penalties could be imposed in other proceedings necessarily colours the interpretation of the relevant provisions at all times, even where those penalties are not threatened in a particular instance.
  - 15.2. For this reason, it is no answer, as SAPO contends, that the penal provisions are not in effect against PostNet in this case.
16. In any event, this case does involve the very risk that sanctions will be imposed.
  - 16.1. The charge sheet clearly contemplates that the CCC consider and decide not only on whether PostNet has contravened sections 15 and 16 of the Postal Services Act, but also whether a sanction should be imposed as a result.
  - 16.2. While the Committee itself cannot impose a penalty or sanction – it makes a recommendation to the Authority<sup>49</sup> – this does not alter the fact that a finding that PostNet has contravened the Postal Services Act can give rise to both criminal and administrative penalties.<sup>50</sup>
17. Courts have also interpreted legislative provisions restrictively where provisions only impose administrative – and not also criminal – sanctions.
18. Accordingly, in assessing PostNet’s compliance with the Postal Services Act, PostNet must be afforded the benefit of any ambiguity or doubt in the relevant provisions. In particular, this Tribunal should favour a narrow reading of Schedule 1 – as PostNet contends – rather than the broader reading put forward by SAPO, which would effectively criminalise an entire industry.

## **1.2 The need for an interpretation that promotes the spirit, purport and objects of the Bill of Rights**

---

constitutional democracy. It entrenches the common law’s protections against arbitrary deprivation of liberty and imprisonment. The common law presumption in favour of interpreting penalty provisions restrictively therefore applies with added force under the Constitution. And the interpretive injunction in the Bill of Rights itself requires us to interpret section 89(2) and item 9(1)(b) to promote its spirit, purport and objects.”

<sup>49</sup> Section 17D(2) of the ICASA Act.

<sup>50</sup> In *Oilwell (Pty) Ltd v Protec International Ltd 2011 (4) SA 394 (SCA)* the SCA made clear that the principle of restrictive interpretation applies to provisions that give rise to both criminal and administrative penalties, observing that—“any legislation that creates criminal and administrative penalties, as the [Exchange Control] Regulations do, requires restrictive interpretation.” *Hira v Booysen 1992 (4) SA 69 (A)* at 78; *Woodlands Dairy (Pty) Ltd and Another v Competition Commission 2010 (6) SA 108 (SCA)* at para 10.

19. Section 39(2) of the Constitution obliges every court, tribunal and forum, when interpreting any legislation, to “*promote the spirit, purport and objects of the Bill of Rights*”.

20. Our Courts have emphasised the duties of courts and tribunals, imposed by section 39(2) of the Constitution:

“ s 39(2) of the Constitution requires courts when interpreting a statute that is reasonably capable of two interpretations to avoid an interpretation that would render the statute unconstitutional and to adopt the interpretation that would better promote the spirit, purport and objects of the Bill of Rights, even if the interpretation would render the statute unconstitutional.”

21. The Committee is a tribunal, and so is bound by section 39(2) of the Constitution.

22. Section 39(2) requires more than adopting an interpretation that avoids unconstitutionality. It also involves adopting the interpretation that “better” promotes the spirit, purport and objects of the Bill of Rights, where the provision is reasonably capable of such an interpretation.

23. As the Constitutional Court has explained:

*“The objects of the Bill of Rights are promoted by, where the provision is capable of more than one meaning, adopting a meaning that does not limit a right in the Bill of Rights. If the provision is not only capable of a construction that avoids limiting rights in the Bill of Rights but also bears a meaning that promotes those rights, the court is obliged to prefer the latter meaning. For, as this Court observed in Fraser: ‘Section 39(2) requires more from a court than to avoid an interpretation that conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights.’<sup>51</sup>*

24. In this respect, it is well established that juristic persons can be rights-bearers.<sup>52</sup> PostNet bears a number of significant rights under the Constitution, including the right to property in terms of section 25 of the Constitution.

25. The interpretation of section 15 and Schedules 1 and 2 of the Postal Services Act proffered by the SAPO infringe these rights, in that, inter alia:

25.1. It would have the effect of arbitrarily depriving PostNet of its property. It would preclude PostNet and its franchisees from using the business model it has used since 1994 and the goodwill it has built up since then, to generate revenue.

---

<sup>51</sup> *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) at para 89.

<sup>52</sup> Section 8(4) of the Constitution.

- 25.2. SAPO's interpretation of the Postal Services Act would divest PostNet of its proprietary interests, and divert them instead to SAPO. This is not only deprivation that exceeds the bounds of the legislative scheme, but also expropriation without compensation, for SAPO is a state entity.
26. Section 39(2) of the Constitution thus requires this Committee to avoid SAPO's interpretation, if the Act is reasonably capable of an interpretation that would do so.

## [15] SAEPA ARGUMENT

The South African Express Parcel Association ("SAEPA") filed written submissions on 17 January 2019, in which it contended that Schedule 1 to the Postal Services Act 124 of 1998 ("the Act") should be interpreted to mean that the articles listed in item 1(a) form part of reserved postal services only when they are conveyed by means of the post. This means that SAPO's exclusivity extends to conveying articles of the prescribed dimensions when those articles bear a stamp and have been deposited in a roadside collection box, since these are the traditional attributes of the postal service. However, SAPO's exclusivity does not apply in circumstances where those articles are being conveyed by means that do not involve the post. Differently expressed, SAPO's exclusivity does not apply when a person wishes to convey those articles by a method that does not involve affixing a stamp and depositing the article in a roadside collection box – for example, by using courier services.

Item 1(a) of Schedule 1 to the Act provides that reserved postal services include "all letters, postcards, printed matter, small parcels and other postal articles subject to the mass or size limitations set out in item 3" (our underlining). The use of the word "other" makes it plain that item 1(a) applies to "postal articles" – including "letters, postcards, printed matter and small parcels – that are subject to the mass or size limitations. In other words, "letters, postcards, printed matter and small parcels" will only fall within the ambit of item 1(a) if they qualify as "postal articles".

The Act defines a "postal article" as meaning "any letter, postcard, reply postcard, letter card, envelope, book, packet, pattern or sample packet or any parcel or other article when in the course of transmission by post, and includes a telegram when conveyed by post" (our underlining).<sup>53</sup>

The underlined words indicate that the articles listed in item 1(a) of Schedule 1 only fall within SAPO's exclusivity when those articles are "in the course of transmission by post".

---

<sup>53</sup> Section 1.



In circumstances where “letters, postcards, printed matter and small parcels” are being transmitted by means of courier service rather than by means of the post, they do not amount to “postal articles” and SAPO’s exclusivity therefore does not apply.

For this reason as well as all the other reasons to be developed in oral argument, SAEPA continues to ask that SAPO’s complaint be dismissed.

In argument before the CCC *Cockrell SC* expanded substantially on the above. He put forward that in the light of section 39(2) of the Constitution of the Republic of South Africa it was important to take into consideration the following: That-

- (a) The right to freedom of expression does not only protect the right to free speech but also to disseminate by post and that any interpretation of Schedule One of the Act which would unreasonably curb that right should be interpreted by this Tribunal in favour of couriers and, in effect, lead to an interpretation of Schedule One to an exclusion of only post in its traditional sense: posting in a post box and delivering to street side boxes or combined boxes for a group of people in the vicinity. Personal delivery by a courier lies outside such street boxes.
- (b) The limitation of couriers to materials weighing less than 1 kilogram also amounted to a contravention of section 25(1) of the Constitution of the RSA which provides as follows: No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

[16] Generally, the argument of Postnet, SAEPA, FedEx, Aramex SA and DHL International amounts to the following: Couriers are not delivering a postal service but a special service different from that of the Post Office, where members of the public generally place their letters *et cetera* in post boxes to be collected by addressees at what is called street (or “garden”) boxes, which, in certain areas, are *en bloc*, e.g. near shopping centres or areas. Couriers deliver a personal service as clearly held in *Interlink Postal Courier SA (Pty) Ltd v South African Post Office Ltd* 2003 (5) SA 111 (SCA): A critical element of a courier service, as pointed out in the latter judgment, is that the courier service amounts to actual delivery of an item to a named intended recipient or intended recipient's authorised agent to accept delivery, as opposed to depositing it at a street or similar (central) box. Senior Counsel for SAEPA and Postnet argued that Schedules One and Two of the Act have nothing to do with courier services. In other words, it is not “postal”. Also, alternatively,

that section 39(2) of the Constitution of the Republic of South Africa requires the CCC to attach a limited meaning to the categories set out in Schedule One: it must thus exclude courier services from its reserved list.

- [17] Further argument was that freedom of expression as guaranteed by section 16(1)(b) of the Constitution also protects the freedom to receive or impart information or ideas and that section 39(2) of the Constitution should, thus, impact on the interpretation of the Schedules – in fact, lead to the CCC finding that it could never have been the intention of Parliament in the Postal Services Act (or, indirectly, *Constitutionally*) to limit *couriers* by the 1 kg limitation - couriers differing in their functions from postage, as referred to above. A further argument was that the 1 kg limitation amounts to arbitrary expropriation in terms of section 25 of the Constitution.<sup>54</sup> Thus, the argument ran, the Schedules, which include the 1kg and rectangular box size limitation, demonstrated also by its “postage” semantics, must effectively be ignored and, read against the background of the Constitution: thus, that couriers are not subject to the 1 kg limitation.
- [18] Counsel for *Aramax South Africa (Pty) Ltd* argued in similar vein in their written submission to the CCC. What was added, with more detail, is the enormous number of foreign clients they serve as courier to South Africa and, similarly, South African clients using their services for delivery in foreign countries. *DHL* agreed and pointed out that it (which would include other similar companies) substantially contributes to the South African economy, not only as taxpayer but also as an investor, employer and a provider of value-added services that amount to a substantially different service from a postal service. It has invested substantially and benefits consumers and the economy generally. Also, that it presently employs 800 full time staff, has two airport facilities in Johannesburg and Cape Town and provides sorting, transit and customs clearance to customers. *DHL* has invested substantially in its South African operations for at least the last forty years. By way of example, *DHL* operates three aircraft out of Johannesburg, including a Boeing 737 freighter aircraft servicing the South African region. It also has a strong commitment to local staff development and training. Excluding materials of 1kg and less

would “deeply prejudice *DHL Express* and its legitimate interests – goodwill and investment.” It also added:

“In addition to South Africa’s GATS commitments, South Africa also signed a bilateral investment treaty concerning the Reciprocal Encouragement and Protection of Investments with Germany in September 1995, and although it was unilaterally terminated in 2013, under its provisions it continues to be effective with respect to pre-termination investments for a further period of 20 years from the date of termination (i.e. through to 2033). The Treaty provides that each country shall promote investments by nationals or companies of the other country and accord them fair and equitable...”

- [19] *FedEx South Africa* is, according to its submission, a key stakeholder in the express freight, courier and parcel delivery market and has a real and substantial interest in the regulation of unreserved postal services in South Africa. *FedEx* submits that SAPO has misinterpreted the reserved services. In fact, it is submitted, that Schedule 1 and 2 of the Act is *silent* as to the ambit of the courier services. It could not have been the intention of the Legislature to limit the unreserved services to letters which weigh more than one kilogram or larger than the dimensions in regard to packages. Reference was made to the oft quoted *Endumeni*<sup>55</sup> judgment of the Supreme Court of Appeal. *FedEx* thus argued that a “sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.” Reference was also made to a 14 September statement by SAPO’s then Chief Executive that SAPO was confronted with a local mail backlog of approximately 38 million parcels and letters. Following this information, it was submitted that in the event that the consumer’s right to choose is taken away, the consumer will have no option but to utilize the services of one postal provider, SAPO, and risk incurring major delays in the event that the service provider is faced with internal issues such as the backlog currently experienced by SAPO. In any event, it was argued, that depriving consumers from their right of choice for the conveyance of items under one kg could have the consequence of contravening and undermining the primary objectives of the Postal Services Act as set out in section 2 of the Act, which seeks to promote and protect the interests and needs of postal users and consumers. In this regard, it was submitted that the interests of the consumer outweigh SAPO’s interest to monopolize the business/market of conveying letters and parcels that weigh 1 kilogram or less.

---

<sup>55</sup> *Supra*.

Hypothetically, *FedEx* states the following solution to the interpretation: If SAPO is correct in its view of the Act “the conveyancers would not bear an issued postage stamp, would not be delivered to the unreserved postal service operator through a roadside collection box, and could not be addressed for delivery to an “address box” as these are reserved for the exclusive operations of the reserved postal service operator. If this interpretation is accepted, the consumers would retain the option to decide the manner in which they wish to convey their Kilogram and sub 1 kilogram items. It is submitted that “this latter interpretation is more reflective of global practice and market realities and is reflective of the Legislature’s intention.”

*Fedex* also argued that its opinion that the Act is not applicable to couriers is supported by international conventions. By way of example, the US Central Product Classification defines postal services for parcels as “services consisting of pick-up transport and delivery services and packages, whether for domestic or foreign destinations, as rendered by the national postal administrator” and applies a similar definition for letters delivered by national agencies. This accords, argues *Fedex*, with its interpretation of the reserved postal service envisaged by the Postal Services Act, namely that the main difference between reserved postal service and unreserved postal service, in relation to items under the 1 kilogram limit, is to whom the consumer assigns *FedEx* to carry it – the item is ‘post’ when rendered to the postal operator for carriage. The World Trade Organisation Geneva Agreement on Trade in Services (WTO GATS) makes a similar distinction between the postal and courier services.

Ultimately, it is argued that the Legislature, the Minister and ICASA should take steps to provide clarity on the regulatory ambiguity concerning the scope of the reserved and unreserved postal services.

## **CONCLUSION REACHED BY THE CCC**

- [20] Senior Counsel for Postnet and SAEPA argued that the Schedules to the Postal Services Act must be interpreted narrowly and thus in favour of Postnet and other couriers. It was argued that the Schedules *implicitly* excluded couriers from the 1 kg restriction in the Schedules of the Act by virtue of section 39(2) of the Constitution of the Republic of South Africa. Section 39 of the Constitution provides as follows:

## Interpretation of Bill of Rights

- (1) When interpreting the Bill of Rights, a court, tribunal or forum: (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.
- (2) *When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.*
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill. (Emphasis added)

[21] In *Popcru v SACOSWU & Others* 2019(1) SA 77 (CC) Jafta J, writing for the majority of the Constitutional Court, stated as follows in regard to the applicability of section 39(2) of the Constitution insofar as the interpretation of legislation is concerned:

[85] Section 39(2) has received attention in many decisions of this court. For present purposes a reference to one of them would suffice. In *Makate*<sup>56</sup> we said:

*'The objects of the Bill of Rights are promoted by, where the provision is capable of more than one meaning, adopting a meaning that does not limit a right in the Bill of Rights. If the provision is not only capable of a construction that avoids limiting rights in the Bill of Rights but also bears a meaning that promotes those rights, the court is obliged to prefer the latter meaning.'* (Emphasis added)

[86] Implicit in this statement is the fact that at the outset of interpreting a legislative provision a court must determine whether that provision implicates rights in the Bill of Rights. For if it does, then the approach stipulated in s 39(2) must be followed. As mentioned, here the provisions to be interpreted affect guaranteed rights like every worker's right to form or join a trade union and the right to participate in the activities and programmes of the trade union. Section 18 also implicates the right of a trade union to engage in collective bargaining.

It is also of significance to quote what Moseneke DJP said in *Abahlali baseMjondolo Movement SA & another v Premier, Province of KwaZulu-Natal & others* [2009] JOL 24393 (CC) at para [120]:

---

<sup>56</sup> *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC).

Yet, whilst it is important to prefer an interpretation that avoids any constitutional inconsistency, we must be careful not to choose an interpretation which cannot be readily inferred from the text of the provision. In *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs*, Ackermann J warns that:

*"... a construction is not a reasonable one, however, when it can be reached only by distorting the meaning of the expression being considered." (Footnote omitted and emphasis added)*

[22] It would be appropriate to again quote the Schedules to the Act:

**SCHEDULE 1**  
**RESERVED POSTAL SERVICES**

1. The reserved postal services **include** -
  - (a) all letters, postcards, printed matter, small parcels and other postal articles<sup>57</sup> subject to the mass or size limitations set;
  - (b) issuing of postage stamps; and
  - (c) the provision of roadside collection and address boxes.
2. For purposes of this Schedule, a letter means any form of written communication or other document, article or object that is directed to a specific person or persons or specific address and is to be conveyed other than by electronic means and includes a parcel, package or wrapper containing any such communication or article conforming to the mass or size limitations set out in item 3.
3. The reserved postal services include all items described in items 1 (a) and 2 of a mass up to and including one kilogram or size which enables it to fit into a rectangular box with the following dimensions:

length 458 mm, width 324 mm, thickness 100 mm  
Cylinders having a maximum length of 458 mm and 100 mm thickness or a mass of up to one kilogram are regarded as letters.
4. The following exemptions from letter mail apply and are not subject to licensing in terms of this Act:
  - (a) Delivery by an employee of the sender exclusively for the private affairs of the sender;
  - (b) unaddressed mail;
  - (c) the exchange or service of legal process, proceedings, pleadings, affidavits or depositions;

---

<sup>57</sup> "postal article" according to section 1 of the Act means any letter, postcard, reply postcard, letter card, envelope, book, packet, pattern or sample packet or any parcel or other article when in the course of transmission by post, and includes a telegram when conveyed by post;

- (d) .....
- (e) occasional letters delivered by an individual not in the business of delivering letters;
- (f) trade announcements, circulars, printed extracts from newspapers, or advertisements which are not addressed to any person;
- (g) newspapers and periodicals.

**SCHEDULE 2**  
**UNRESERVED POSTAL SERVICES**

1. Unreserved postal services **include** -
  - (a) all letters, postcards, printed matter, small parcels and other postal articles<sup>58</sup> that fall outside the ambit of the reserved services set out in Schedule 1 up to and including thirty kilograms;
  - (b) courier services in respect of items mentioned in paragraph (a); and
  - (c) any other postal service that falls outside the ambit of the reserved services as set out in Schedule 1.
2. The following exemptions apply to unreserved postal services and are not subject to registration in terms of the Act:
  - (a) Delivery by an employee of the sender exclusively for the private affairs of the sender;
  - (b) unaddressed mail;
  - (c) the exchange or service of legal process, proceedings, pleadings, affidavits or depositions;
  - (d) occasional letters delivered by an individual not in the business of delivering letters;
  - (e) trade announcements, circulars, printed extracts from newspapers, or advertisements which are not addressed to any person;
  - (f) newspapers and periodicals.

[23] The word “include” is, within the context of Schedule 1, understood by the CCC to limit the items to what is stated in in Schedule 1(a) in light of the principles set out by the Constitutional Court in in *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others*.<sup>59</sup>

[24] There is no doubt that the Postal Services Act 1998 has created a monopoly in favour of SAPO. The monopoly is clearly intended to place SAPO in a financial position to widen the availability of postal services *throughout* the country; a country, the large majority of the people of

---

<sup>58</sup> “postal article” according to section 1 of the Act means any letter, postcard, reply postcard, letter card, envelope, book, packet, pattern or sample packet or any parcel or other article when in the course of transmission by post, and includes a telegram when conveyed by post;

<sup>59</sup> 2004(1) SA 406 (CC).

which has been wracked<sup>60</sup> by and is still, inter alia, suffering economically from the pre-1994 apartheid past.<sup>61</sup> This position was recognised by the Supreme Court of Appeal in *Chief Executive Officer, SA Social Security Agency v Cash Paymaster Services (Pty) Ltd* 2012 (1) SA 216 (SCA) where Tshiqi JA (the present President of the Supreme Court of Appeal) stated as follows on behalf of the Court:

[6] SAPO is, pursuant to a 1991 amendment to the Post Office Act 44 of 1958, a public company incorporated in terms of the Companies Act 61 of 1973, and is owned by the State. Section 51 of the Postal Services Act 124 of 1998 regulates the operation and control of Postbank. Postbank is a division of SAPO. It is not registered under the Banks Act of 1990 but undertakes 'such activities as are customary for a financial institution carrying on the business of accepting bank deposits' (s 51(2) of the Postal Services Act). *It offers simple, affordable banking services, specifically to the low-income groups, through the SAPO network throughout the country. Its services extend into isolated rural areas where other financial institutions do not maintain a viable commercial presence. (Emphasis added).*

The above statement accords with some of the aims of the Postal Services Act as set out in section 2 of the Act:

The primary object of this Act is to provide for the regulation and control of postal services in the public interest and for that purpose to –

- (a) promote the **universal** and affordable provision of postal services;
- (c) make progress towards the **universal** provision of postal services;
- (e) promote the **development** of postal services that are responsive to the needs of users and consumers;
- (f) ensure greater access to basic services through the achievement of **universal** postal service, by providing an acceptable level of effective and regular postal services **to all areas including rural areas and small towns where post offices are not sustainable**;

---

<sup>60</sup> Abraham Lincoln in his Gettysburg Address on Thursday 19 November 1863, commemorating the sacrifice of those from both sides who died at the Battle of Gettysburg during the American Civil War. See Shapiro *The Yale Book of Quotations* (Yale University Press 2006) at 463. Also see Wallis AJ in *Kham v EC* 2016 (2) SA 338 (CC). Since the Address was not written, some versions do not include the word “wrack.” Nevertheless, the word “wracked” is in the CCC’s view the most fitting word.

<sup>61</sup> *Afriforum & Another v University of the Free State* 2018(2) SA 185(CC) at para [53] per Mogoeng CJ; *Rustenburg Platinum Mine (OBO Bester) & Others* 2018(5) SA 78(CC) at [62] per Theron J; *Doctors for Life International v Speaker of the National Assembly & Others* 2006(6) SA 416 (CC) at [244] per Van der Westhuizen J.



- (g) **develop greater equity in respect of the distribution of services, particularly within the areas of the historically disadvantaged communities, including rural areas;**
- (i) **encourage the development of human resources and capacity building within the postal industry, especially amongst historically disadvantaged groups;**
- (n) **contribute to the community and rural development and education, through actively participating in the development of a citizen’s post office, serving as an interface between Government and community and providing a centre for community activities;**
- (q) promote small, medium and macro **enterprises** within the postal industry;  
(Emphasis added)

The accent is clearly placed on certain duties of the South African Post Office as a State Institution to provide services throughout the country, also where costs are higher than income. This would at least be one of the factors – indeed, in this Tribunal’s view, the most important - which supports the monopoly which is granted by the Act to SAPO.

[25] The CCC has no doubt that in applying the realistic approach to interpretation, as held in *Endumeni*,<sup>62</sup> it is impossible to ignore the limitations which are, in the considered opinion of the CCC, set for weight and size in the Schedules. In the ordinary course couriers ultimately also deliver what is otherwise, within the Post Office context, the same materials that are delivered – or could be delivered – by SAPO. The style of delivery differs but, even if Schedules 1 and 2 give rise to a debate about the word “post” the underlying intention of Parliament is

---

<sup>62</sup> *Supra* : Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. **The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.** Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the [legislation].

clear: what is understood as postal, as defined in the Act, qualifies as postal and if it weighs one kilogram or less it falls, by licence, within the monopoly of the SAPO.

[26] The CCC has also considered, in the light of *Endumeni*, whether the interpretation which SAPO's legal representatives has put forward is not "unbusinesslike" and thus amounts to an incorrect interpretation of the Schedules. However, most, if not all, monopolies are unbusinesslike in the ordinary course. After having considered the Schedules from what the CCC believes to be all angles, the CCC has not been able to come to a different conclusion than that put forward by SAPO's Counsel. Within the guideline of *Endumeni* it would undermine the clear purpose of the Schedules: to exclude anyone else from doing what Parliament earmarked exclusively for SAPO.

[27] In coming to this conclusion the CCC considered the relevant sections of the Constitution and argument of Counsel representing couriers. The CCC also noted that it has to do with provisions which could lead to the imposition of a fine by ICASA.<sup>63</sup> It is true that the prescribed fine could not be found in related Regulations, but that does not change the nature of the sanction, which foresees a fine as prescribed. Of course, the fine alone does not make a contravention a *crime*, but the CCC will, in any case, accept that the Act provides for the imposition of a prescribed fine, which could have a limiting effect on the ambit of the Schedules when interpreted. The list of postal articles which is set out, including even postcards, clearly has one aim: to keep couriers (and anyone else) out of the kilogramme and less postal (as defined and set out in the Schedules) carriage and delivery. And, of course, the CCC is most aware, in reaching this decision, that a courier service, confirmed by the Supreme Court of Appeal, amounts to personal delivery. But the accent clearly does not lie in the mode of delivery, but in the weight of the "postal" articles carried. Fortunately when laws, on the face of it, create absurdities such as the literal implementation to the delivery of fish and chips and the like (as mentioned, presumably "tongue-in-the cheek", by Mr *Budlender*) for dinner at one's home, no judicial officer will regard it as "postage" –

---

<sup>63</sup> See section 80(4)(b) of the Postal Services Act.

even if delivered by a courier service and weighs one kilogramme or less. If that is not the conclusion, the Law would indeed then be an “ass”, as Lord Griffiths observed in *Attorney General v Guardian Newspapers Ltd and Others (No 2)* [1988] 3 All ER 545 (Ch, CA & HL) (the *Spycatcher* case).<sup>64</sup> And where foreign law governs a contract by a legally permissible<sup>65</sup> choice, the Act will also not apply. In addition to a legally permissible choice it is, in any case, an established rule of our law that where the place of delivery is in a foreign country, the law of that country governs the legality of the contract.<sup>66</sup> Probably Courts will, when the opportunity arises, in the absence of choice, in any case apply the law of the closest connection (*lex causae*).<sup>67</sup> I should add that “legally permissible” e.g. means that a contract for courier delivery from Cape Town to Johannesburg which elects e.g. Italian Law to govern the contract, would amount to a legally impermissible choice. There are also other limits: the procedure of the Court where the action is brought is also governed by the procedure of that Court, whatever the choice of law was. Maritime law also has its own limits as to choice.<sup>68</sup>

## LIMITATION: CONSTITUTIONALLY UNFAIR

[28] Counsel representing the Couriers inter alia argued that the exclusion of the carrying of postal articles of 1 kg and less, for example, limits the rights of couriers unfairly in the light the Constitutional right to freedom of expression which includes the right to convey that which is published and also amounts to unfair and arbitrary deprivation of property – the latter being the courier business – without compensation in terms of section 25 of the Constitution.

---

<sup>64</sup> And also quoted by South African Courts – see, for example, Ponnar JA in *Maharaj and Others v Mandag Centre of Investigative Journalism NPC and Others* 2018 (1) SA 471 (SCA).

<sup>65</sup> *Fraus legis* cases.

<sup>66</sup> See *Standard Bank of South Africa Ltd v Efroiken and Newman* 1924 AD 171 at 185; and also the judgment of Van Zyl J in *Soc of Lloyd's v Romahn & Two Other Cases* 2006 (4) SA 23 (C) where the principle of the law of closest connection (*lex causae*) in the English law is referred to as a guidance for future development of Private International Law in South Africa. Also compare *Soc of Lloyd's v Price; Soc of Lloyd's v Lee* 2006 (5) SA 393 (SCA) where the law with the closest connection (*lex causae*) is foreseen to be a workable approach for the future.

<sup>67</sup> See the SCA judgment in the previous footnote.

<sup>68</sup> See e.g. *Representative of Lloyds v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA).

The question arises whether section 39(2) of the Constitution leads to placing more weight on the said rights of couriers than on the rights of the poorly served countryside. Areas grossly neglected under apartheid and which are specifically identified for better service by SAPO in the section 2 aims of the SAPO Act. We have already quoted what Jafta J, said in *South African Police Service v Solidarity obo Barnard (Popcru as Amicus Curiae)* 2014 (6) SA 123 (CC). See paragraph [21] above. Added to that, Moseneke J (the later DP) said the following in *President of the RSA and Another v Hugo* 1997(4) SA 1 (CC) at para [27]:

This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persists. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but situation sensitive approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society.'

[29] Then there is also section 9 of the Constitution of the Republic of South Africa:

#### 9. Equality

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. **To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.** (Emphasis added)
- (3) ...

[30] We quoted section 2 of the Postal Services Act 1998 earlier in paragraph 2 of this judgment. We need only to repeat two aims here:

- (g) develop greater equity in respect of the distribution of services, **particularly within the areas of the historically disadvantaged communities, including rural areas;**

- (i) encourage the development of human resources and capacity building within the postal industry, **especially amongst historically disadvantaged groups;** (Emphasis added)

Many would say – and support Postnet, SAEPA and the three other presenting companies - that the South African Post Office is simply not up to this task, given the massive 2014 strike and the concession by its Managing Director (having recently stepped down) quoted in the hearing that the backlog of SAPO is enormous. But this cannot, in law, be the test. Parliament decided to make it possible for SAPO to have a monopoly in the interest of a previously forsaken People. And that is the predominant test in the present matter.

## FINDING

### [31] The CCC finding is as follows:

- (1) The intention of Parliament was to protect SAPO against competition within the kilogram and less postage, which is stated in detail in the Schedules of the Act and would also exclude couriers and other similar concerns from transporting such materials, even in their particular manner, which includes personal delivery, according to the Supreme Court of Appeal.<sup>69</sup> In this connection the following words of the Supreme Court of Appeal in *Endumeni*<sup>70</sup> are particularly relevant for this case:

A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or **undermines the apparent purpose** of the document. **Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.** To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. **The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”** (Emphasis added)

The words of Moseneke J<sup>71</sup> in *Hugo*<sup>72</sup> are also in point:

---

<sup>69</sup> *Interlink Postal Courier SA (Pty) Ltd v South African Post Office Ltd* 2003 (5) SA 111 (SCA).

<sup>70</sup> *Supra*.

<sup>71</sup> The later Deputy President of the Constitutional Court.

<sup>72</sup> *Supra*.

'This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persists. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage.

- (2) The CCC thus finds that the one kilogram and less limitation is constitutionally justifiable and that the intention of Parliament is clear: no one is permitted to transport or deliver reserved postage as set out in the Schedules to the Act, unless licensed to do so in terms of the Act. Presently only the South African Post Office is licensed to do so.
- (3) The South African Post Office is, however, permitted by section 16(3)(b) of the Postal Services Act 1998 to do the following:
  - (b) Any service of the postal company contemplated in this section[16] may be provided on an agency or franchise basis without such agent or franchisee being required to hold a licence in terms of this Act if –
    - (i) such agent or franchisee complies with the terms and conditions of the licence held by the postal company; and
    - (ii) such agent or franchisee is registered by the postal company with the Regulator.
- (4) Postnet has contravened section 15(1) of the Postal Services Act in that it has operated a reserved postal service without a licence.

#### **ORDER ADVISED TO COUNCIL**

The CCC has resolved to advise the Council of ICASA to issue the following order:

1. That Postnet be ordered by the Council of ICASA to desist from contravening section 15(1) of the Postal Services Act 1998 as amended, which subsection provides as follows:

- (1) Subject to the provisions of this Act, no person may operate a reserved postal service except under and in accordance with a licence issued to that person in terms of this Chapter.
2. That the desist order will apply as from ninety working days from the date on which this judgment is issued by ICASA.

*J. C. W. van Rooyen*

**JCW VAN ROOYEN SC**  
**CHAIRPERSON**  
**The Members agreed**

**26 September 2019**





